9797

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/OOAK/LSC/2013/0358**
Property	:	**Blocks being part of the Cuckoo Lane Estate, being in Charlton Road, Mottingham Road, and St Mary's and Nightingale Road**
Applicants	:	**Miss Rayna Kutner** **Mr Gary Reeves** **Ms Maxine Wade** **Ms Kerry Patterson** **Mr Steven Veeramotoo** **Mr Patrick Twum-Barimah** **Mr D Heaney** **Mr R Radani**
Representative	:	**None notified**
Respondent	:	**London Borough of Enfield**
Representative	:	**DMH Stallard LLP, Solicitors**
Type of Application	:	**For the determination of the reasonableness of and the liability to pay a service charge and/or administration charge**
Tribunal Members	:	**Judge Goulden** **Mrs S Redmond BSc MRICS** **Mr O N Miller BSc**
Date and venue of Hearing	:	**16 September 2013 and 9, 10 and 11 December 2013** **10 Alfred Place, London WC1E 7LR**

Date of Decision : **10 January 2014**

DECISION

Determinations of the Tribunal

(1) The Tribunal makes the determinations as set out under the various headings in this Decision

(2) The Tribunal makes an order under Section 20C of the Landlord and Tenant Act 1985 so that none of the landlord's costs of the Tribunal proceedings may be passed to the lessees through any service charge.

The application

1. The Applicant seeks a determination pursuant to s.27A of the Landlord and Tenant Act 1985 ("the 1985 Act") as to the amount of service charges payable by the Applicants in respect of service charge years

2. The relevant legal provisions are set out in the Appendix to this decision.

3. Directions of the Tribunal had been issued on 13 June 2013 following an oral Pre Trial Review held on the same date. The Tribunal heard representations for or on behalf of both sides, decided that mediation was not appropriate in view of the possible number of Applicants and listed the matter for hearing of Monday 16 September 2013, going over to Tuesday 17 September if necessary. Miss Rayna Kutner, who had lodged the application, agreed to be the Lead Applicant.

The background

4. The properties which are the subject of this application were three (of four) blocks on the Cuckoo Hill Lane Estate, being 18 to 56 Mottingham Road (20 units of which 9 were lessees) , 16 to 26A Charlton Road (12 units of which 3 were lessees) and St Marys and Nightingale Road (12 units all of which were lessees) The fourth block, 1 to 15A Mottingham Road was not part of this application. The Applicants were 8 long lessees out of a total of 24 long lessees. In the body of this Determination, the properties at 18 to 56 Mottingham Road will be referred to as "Mottingham", the properties at 16 to 26A Charlton Road will be referred to as "Charlton", the properties at St Marys and Nightingale Road will be referred to as "Nightingale".

5. Photographs of the building were provided in the hearing bundles. Neither side requested an inspection and, since the issues related to major works carried out some 4 years ago, the Tribunal did not consider that one was necessary, nor would it have been proportionate to the issues in dispute. The works had been delayed because the lessees of 12 flats in Nightingale Road had been given an opportunity to buy the freehold which, in the event, did not take place.

6. The Applicants hold long leases of the property which require the landlord to provide services and the tenant to contribute towards their costs by way of a variable service charge.

7. The substantive hearing took four days. Miss Rayna Kutner, the Lead Applicant and Mr Ranjit Bhose QC, Counsel for the Respondent appeared on each day. There were also appearances for or on behalf of Applicant and the Respondent on various days during the hearing. The Tribunal sets out the names of those parties below, but does not set out the dates on which they did or did not appear (unless relevant) since this would be time consuming and unproductive.

8. Appearances for the Applicants: Miss R Kutner, Mrs K Patterson, Ms M Wade, Mr P Twum-Barimah, Mr R Radani, Mr G Reeves.

9. Appearances for the Respondent: Mr R Bhose of Counsel, Mrs E Buckland, Solicitor and Ms R Gubbins, Trainee, both of DMH Stallard LLP, Mr E Addo, Mr T Manson, Ms V Gardener, Ms J Stokes, Mr A Headland, Ms E Andreou, Ms K Birianzi, Ms Z Ndereyimana, all of Enfield Homes, Mr P Madigan, Capital Property & Construction Consultants Ltd., and Mr C Tipple and Mr C Chan, Pupils.

The hearing on 16 September 2013

10. The Applicants were unrepresented. As stated above, Miss Rayna Kutner was the Lead Applicant. The Respondent was represented by Mr R Bhose QC of Counsel, instructed by DMH Stallard LLP, Solicitors.

11. Immediately prior to the hearing the Tribunal was handed a very large lever arch file containing a supplementary bundle on behalf of the Respondent, which had been dated stamped as having been received by the Tribunal on 13 September 2013.

12. Mr Bhose made two applications on behalf of the Respondent, namely (a) a request that late statements from Mr P Madigan and Mr T Manson should be allowed in as evidence (not resisted by Miss Kutner on behalf of the Appliants) and (b) a request for an adjournment since he accepted that neither the Tribunal nor the unrepresented Applicants could have the time to consider the Respondent's supplementary bundle. The application for an adjournment was resisted by Miss Kutner on behalf of the Applicants. She said that those Applicants appearing before the Tribunal had taken time off work and wished to proceed.

13. The Tribunal considered the arguments on both sides and had also taken account of the size of the bundle just presented to the Tribunal and to the Applicants and also noted that certain documents which the Tribunal considered necessary for proper consideration of the issues

before the Tribunal, and which had been listed as included in the original hearing bundle, had not appeared either in the original bundle or the bundle handed in on 16 September 2013.

14. It was the view of the Tribunal that the Applicants would be disadvantaged and it would not be in the interests of justice to proceed.

15. Accordingly, an adjournment was granted to the parties, and Further Directions of the Tribunal were issued on 16 December 2013. The Further Directions provided for the Respondent to reimburse to the Applicants travel costs and/or lost wages (if applicable).

16. The case was, as requested by the parties, re-listed for hearing on Monday 9 December 2013, going over to 10 and 11 December 2013 if necessary.

The issues

17. At the start of the hearing on 9 December 2013, Mr Bhose for the Respondent, and in relation to the Applicants' S20C application, confirmed that the leases did not permit costs of the matters before the Tribunal to be placed on the service charge account. Miss Kutner, for all the Applicants, confirmed that the Applicants were not seeking reimbursement of either the application or hearing fees from the Respondent.

18. Although the Applicants were willing to have a further discussion with the Respondent's representatives, Mr Bhose said that he did not consider that it would be fruitful. The hearing therefore continued.

19. The Applicants identified the relevant issues as follows:

    (i) The payability and/or reasonableness of service charges for the service charge year 2012/2013 relating to major works which were started on 1 September 2008 with practical completion in September 2009. The major works related to window replacement and external and internal repairs and decoration, following commission of a feasibility report in November 2005 which had been completed in September 2006.

    (ii) Original challenges by the Applicants in respect of construction of the lease and errors in cost calculation were withdrawn. With regard to the former challenge, the Applicants confirmed the leases covered the cost of major works, and with regard to the latter, it was agreed that any errors in calculation of costs would be resolved between the parties via Leasehold Services, if not already resolved.

(iii) The heads which were challenged by the Applicants are set out below. The Applicants were seeking a deduction of 40% from the total sums claimed.

20. As a general point, and whilst the Tribunal fully understands and appreciates the Applicants' distress in receiving large bills for the major works and the strain of preparation for the hearing before the Tribunal, as was explained on several occasions throughout the hearing, the Tribunal's jurisdiction is narrow in that it can deal only with reasonableness of costs incurred by the landlord which have been placed on the service charge account and/or standard of the works carried out for those costs. The Tribunal is only able to have regard to the evidence placed before the Tribunal, both oral and written.

21. Having heard evidence and submissions from the parties and considered all of the documents provided, the Tribunal has made determinations on the various issues as follows.

Consultation

22. Although the Applicants accepted that statutory S20 consultation had been entered into, they did not feel that it had gone far enough and/or they had not been genuinely consulted and/or that the Respondent had not taken proper account of their concerns. Examples were provided to the Tribunal in support. Miss Kutner said that the Respondent had failed to carry out a reasonable feasibility study and should have consulted the tenants on the specific increases. She said that if a more thorough investigation had taken place prior to the work being carried out, the Applicants would have had more faith in the figures provided. Miss Kutner said that the Respondent had been *"calculating and divisive"* and had made things as difficult for the Applicants as possible. In the Response to the Respondent's statement of case, it was stated *"the Respondent seem* (sic) *not to appreciate the depth of mistrust resulting from their innumerable errors in their calculations, followed by their defensive posturing and denials"*. With regard to the Respondent's offer to spread the service charge payments over 36 months, Miss Kutner said *"I would suggest that 48 or even 60 months would be more reasonable and a gesture of goodwill"*.

23. The Respondent said that the costs were within budget in respect of Charlton and Nightingale, but accepted that in the case of Mottingham the costs had increased as further works had to be carried out within the same contract as and when they had been identified by the contractors when work had started and the *"nature and extent were greater than anticipated"*. Tenants of Mottingham had been sent letters dated 24 August 2009 to notify them of additional costs to be incurred in respect of panels, coping stones to balcony walls and internal staircase balustrades, and the reasons for the increase. Mr Bhose said that the residents had been informed as time went by,

although, apart from Mottingham, the letters sent to each block to which he had referred had been sent after completion of the works. Mr Bhose was of the view that criticism of the consultation was *"unfair and unwarranted"*.

24. Evidence for the Respondent was given by Mr T Manson, Major Works and Service Charges Manager, Enfield Homes who referred to his witness statement dated 20 August 2013, in which it was stated *"..the Respondent goes over and above the statutory requirements by ensuring that leaseholders are given preliminary warning that major works are being considered and we arranged to meet with them to discuss the proposals"*. He said that additional consultation was usually carried out by the Project Management team. He accepted that errors in the Applicants' invoices had been made, due to incorrect figures being supplied, and understood that mistakes made reduced the Applicants' confidence that figures in subsequent invoices would be correct. He did say that he dealt with errors *"honestly and openly with the Applicants"* when they had been identified. Mr Manson gave examples of errors which had been made and subsequently corrected. The Respondent had offered to allow the Applicants to spread payments over a period of 36 months interest free, which he considered generous in that *"no other landlord would put forward this sort of proposal"*.

25. Evidence under this head was also given for the Respondent by Mrs Elpida Andreou, Senior Project Manager, Enfield Homes, who referred to her witness statement dated 19 July 2013. Ms Andreou said that she had responsibility for overseeing the delivery of the major works programme affecting the blocks and *"..we always ensure that we undertake a thorough consultation exercise with leaseholders before the statutory consultation procedure begins. The Council want to involve leaseholders and tenants in the process by letting them voice their opinion and we try to work with them to achieve an end result which they are happy with. However, we also obtain professional advice on the state of repair of the buildings and the available options to carry out works. We must balance this advice with the views and wishes of the tenants and leaseholders"*. To this end, she said that she attended the first meeting in July 2006, outlined the proposed works and the purpose of the feasibility report and listened to the views of those residents who had attended. A second meeting was held in December 2006, after which leaseholders in Nightingale and St Mary's negotiated a delay in the consultation procedure whilst considering whether they wished to purchase the freehold interest. This was not pursued. A third meeting was held in April 2007 and site meetings for each block took place in May 2007.

26. Mrs Andreou said that a subsequent meeting with the leaseholders after the works had been completed had not taken place, since they had not provided an agenda, as requested. She also set out other specific issues which had been raised. Certain reductions had been made as a gesture

of goodwill, but the Respondent could not agree a 40% reduction in the overall cost.

The Tribunal's Determination

27. The Tribunal accepts the Respondent's contention that the Respondent had consulted over and above the statutory requirements. Landlords must take into account the views of the tenants, and there is no evidence in the present case that it did not do so. Although in some instances, the final sums may have increased, the Tribunal does not consider that they related to a wholly new set of works, but the sums had increased within the same set of works.

28. The final account costs were provided to the Tribunal, from which it appeared that the costs for Charlton and Nightingale came in under budget, although there was an overrun in the costs for Mottingham. The only Applicant who lived at Mottingham, Mr R Radani, had appeared at the hearing on 16 September 2013 (on which date no evidence was given by either side). He had not appeared at the subsequent hearings to give oral evidence and had not provided a formal witness statement.

29. There was no statutory obligation to re-consult. From the documentation supplied, the Respondent had sent letters to the tenants, had held meetings and even met the tenants on site to explain its position. In addition, further works which were to have been carried out were omitted at the request of the tenants. An offer was made to the Applicants to spread payments, interest free over 36 months. These are not the actions of a landlord who has shown a cavalier disregard of the views of the tenants, and the Applicants' arguments fail.

30. The Tribunal determines that the Respondent has consulted within the terms of the statute.

Historic Neglect

31. The Applicants' case was that, since the Respondent had not properly maintained the estate in the past, the costs had been increased. Miss Kutner supplied photographs which she said showed neglect. She contended that the Tribunal should make some discount. No costings were supplied. In certain documents sent by Miss Kutner and other Applicants, it was stated *"having complained that over the 60 years since the buildings were built they have not been maintained effectively The result of this is that due to the requirements of the Better Homes we leaseholders are required to stump up the cash, unsubsidised."*

32. Evidence for the Respondent was given by Mr Patrick Madigan, Director of Capital Property & Construction Consultants Ltd. Mr Madigan had been employed by the Respondent as a consultant surveyor from 2004 to 2009 and now acted as a surveying, architectural and project management consultant. He said that he had been called in to deal with this major work project, and had dealt with 30/40 similar residential projects. His witness statement was dated 22 August 2013.

33. In respect of issues under this head, Mr Madigan stated *"during the initial feasibility stage inspection/condition survey of the blocks, it was apparent that reactive maintenance had been carried out to elements such as roofs, windows, rainwater goods, lighting etc. In additional cyclical redecorations had also been undertaken in the past to all previously painted items".*

34. Mr Bhose said that repairs had been carried out in the past, and referred to entries in previous service charge demands. He also criticised the Applicants for not setting out what work should have been done and when. He said that no quantity surveying evidence had been provided on behalf of the Applicants and *"there is no semblance of an argument in respect of historic neglect".*

The Tribunal's Determination

35. It had already been flagged up by the Respondent in documentation that it would expect the Applicants to produce some expert evidence in order to support a contention of historic neglect. This is accepted by the Tribunal. It is insufficient to claim that costs would have increased with no supporting evidence.

36. In view of the paucity of evidence on behalf of the Applicants, the Tribunal does not find their argument in respect of historic neglect to be persuasive.

Redecoration to internal communal areas including replastering

37. This issue was challenged by the Applicants in Charlton only. The works had been estimated at £11,200 the actual cost was £12,450. The Applicants' challenge was in respect of cost and standard.

38. Miss Kutner, for the Applicants, provided a photograph on 9 December 2013 which she said showed *"bubbling"* to the wall of the first floor staircase at Charlton and denting to the plasterwork. She said that this indicated the poor standard of the work carried out. Ms Kutner said that the cost had increased because the Respondent had used anti graffiti paint, even though the block had not been subject to graffiti, and

the plaster used had been more expensive and therefore should have been more hard wearing.

39. Mr Madigan, for the Respondent, said that the *"official line"* was that texture coating was deemed to contain asbestos and with regard to the anti graffiti paint, the cost was proportionately very small to have that finish. There were benefits in that it had a clear finish, was easier to remove graffiti and did not fade so quickly.

40. Mr Bhose said the final cost, at £12,450, had been within an acceptable range. The costs had increased because specialist advice had been taken as to a more durable product to be used on textured surfaces, which would be better at withstanding impact. He explained that it was the council's policy on such surfaces for it to be deemed to have an asbestos element. Mr Bhose contended that it was not unreasonable for the landlord to use anti graffiti paint as a preventative measure and the increase in cost was proportionate.

The Tribunal's Determination

41. The photograph supplied by Miss Kutner was not persuasive, in that the work had been carried out some 4 years earlier and any number of reasons could have caused the "bubbling" effect. There were also a number of reasons why the plasterwork had been dented, and there was no evidence from the Applicants that this was because of a poor product.

42. The Applicants acknowledged that there were problems of an anti social nature in the estate. It was reasonable for the landlord to take preventative measures which included anti graffiti paint and a more durable plaster. Specialist advice had been sought from British Gypsum, on which the Respondent was entitled to rely. That company had recommended "Hardwall", *"a product designed specifically for communal, high impact, and well used areas"* which was stated to have been applied in accordance with the manufacturer's instructions. No alternative quotations were provided on behalf of the Applicants.

43. The Tribunal determines that the amount payable in respect of redecoration of internal common parts including replastering in the sum of £12,450 is relevant and reasonably incurred and properly chargeable to the service charge account.

Upgrade of internal communal lighting

44. The Applicants' challenge was in respect of cost and standard. The cost was £5,495 for Charlton, £6,200 for Nightingale and £11,770 for Mottingham.

45. The Respondent, in its Response, stated that the work related to the renewal and upgrade of all external and internal communal staircase lighting.

46. Miss Kutner said that the light bulbs needed changing more frequently, although the Applicants had been told that there would be saving on the cost of lightbulbs.

47. Mr Bhose said that costs had been as tendered. Mr Madigan said that he had not prepared the electrical specification, but this had been prepared by electrical engineering specialists. He said that the Respondent had looked to change the lighting due to age. The lighting was controlled by a timer to the staircases, and dark areas were dealt with. Where areas of rewiring had been needed, these would have been replaced. He said that the tendered price was the actual price and therefore reasonably incurred..

The Tribunal's Determination

48. The Applicants' challenge is not fully understood. The cost was as tendered. No evidence was provided that the tender had been challenged. There was no increase in the actual cost. No evidence has been produced for or on behalf of the Applicants in support of their contention as to either cost or standard.

49. The Tribunal determines that the costs in respect of the upgrade of the internal communal lighting as set out in paragraph 44 above are relevant and reasonably incurred and properly chargeable to the service charge account.

Roof works

50. The Applicants' challenge was as to cost of the roof works in the sum of £38,088 for Charlton and £33,482 for Nightingale. In addition, there was a challenge to the sum of £6,497 which related to the brickwork of parapet wall chimney stacks and coping stones at Charlton

51. Evidence in respect of the Nightingale roof was given by Mrs Patterson. She said that after the roof had been replaced in 2009, it had leaked twice, in 2010 and 2011 for which she had been charged within her service charge account. She said that a claim should have been made on the guarantee. She claimed someone had told her that the soil stacks had not been sealed, but were sealed now, although she did not know by whom. She said *"it still looks shabby"* Mrs Patterson produced an alternative quotation from Horncastle & Sons (Roofing) Ltd. which was dated 16 January 2007 in support of their contention that the cost was too high.

52. Miss Kutner raised no specific issue in respect of the roof over Charlton but said that another Applicant, Mr Reeve, would be coming to give evidence on this aspect the following day. In the Applicants' response to the Respondent's statement of case, it was stated *"Mr Reeves is a qualified construction and development professional and it is in his professional opinion that the chimney stack and other pointing work was substandard due to the fact that he had considerable issues of leakage following this work"*. As to the brickwork of parapet wall chimney stacks and coping stones at Charlton she complained that cost had increased from £4,220, the consulted figure, to £6,497, as a result of the Respondent's failure to assess the cost properly in the first instance.

53. Mr Reeve did not appear to give evidence to the Tribunal.

54. Mr Madigan said that the roof stacks themselves had not formed part of the roof works. In his statement he said, inter alia, that once full access was available to the Charlton roof, it was found that the brickwork at high level required much more re-pointing than had originally been thought from the ground level inspection. The pointing to the chimney stacks and parapet walls had perished in a number of locations and repointing was necessary to prevent further deterioration. As to the replacement roof at St Marys Road and Nightingale, Mr Madigan said that it had always been the intention to replace the main flat roof to the block since maintenance records had shown that extensive repairs had been carried out as evidenced by patch repairs and other defects eg cracking, crazing and ponding to asphalt surfaces and upstands had been noted. It was thought to be uneconomical to continue to repair and the only option was to renew the roof including upgrading of the existing poor insulation.

55. Mr Madigan said that Polyglass GB had been called back when complaints of leakage had been made, but it had reported that the waterproofing was in good condition, but the roof had been subsequently vandalised.

56. Mr Bhose said that, in each case, the actual cost of the roof works was below the estimated cost of £41,868 for Charlton and £37,272 for Nightingale. He challenged the Applicants' alternative quotation on the grounds that it was not like for like, did not provide for a 20 year guarantee, the doors to the plant room were wood and not steel, there was no insulation and no allowance had been made for cabling. He said the photographs produced by the Respondent spoke for themselves, since they showed significant areas of patch repairs together with other apparent defects which had been identified in the feasibility inspection. He said that the only complaint appeared to be in respect of the soil stacks which were stated to have caused water ingress at ground and first floor level. In his view any damage to the soil stacks may have been deliberate and would not have caused damage at ground or first floor

level. Works to the soil stacks themselves had not been included in the specification of works in any event. In respect of the increase of costs for the brickwork to the parapet wall, chimney stacks and coping stones at Charlton, he accepted that the cost had increased, but this was because the work had to be re-measured on the stated tender rates.

The Tribunal's Determination

57. The cost for the roof works came in at less than the tendered sum per roof. The cost for the chimney stacks had increased from £4,220 to £6,497. The Tribunal accepts that the increase was all on tendered rates, but the work had to be re-measured. The work needed to be carried out. The Respondent accepted that the provisional sum was too low, but this was a matter of judgment.

58. There was a paucity of evidence provided by the Applicants. The alternative quotation, which had been obtained in 2007, was not on a like for like basis, and confirmed that the works to the roof were necessary at that time, the doors to the tank housing needed replacing and the coping stones to the top of the parapet walls were showing signs of deterioration due to age and weather conditions, which could prove dangerous if not attended to. The Tribunal finds it difficult to believe that damage to the soil stacks could have caused water damage at ground and first floor level.

59. Following complaints by the Applicants, a report had been carried out by the manufacturer of the roof covering, Polyglass GB in July 2013, for the purposes of the Tribunal hearing, which had identified possible vandalism to the stacks. There is no reason to disbelieve the Respondent's case that the soil stacks were correctly finished with the collars fitted under the felt membrane in accordance with the manufacturer's instructions.

60. The Tribunal determines that the cost of the roof works to Charlton and Nightingale and the cost of the chimney stacks to Charlton are relevant and reasonably incurred and properly chargeable to the service charge account.

Perimeter wall

61. The challenge was in respect of Charlton and Nightingale, since Mottingham already had railings in place. The tendered cost for Charlton was £3,825 and the actual cost was £6,900. The tendered cost for Nightingale was £2,520 and the actual cost was £6,340. The challenge was in respect of cost and standard.

62. In the Applicants' witness statement dated 26 June 2013, it was stated *"the original wall was slightly damaged but we do not believe that it*

was in such disrepair that it needed to be entirely replaced.....there was no consultation when the wall was knocked down and completely rebuilt. The cost of this was increased to £6K" A letter of 3 November 2006 was referred to which indicated that the wall could possibly be replaced with a powder coated low metal railing.

63. The Applicants' case was that they had not been properly consulted, the Respondent had not taken into account the issues relating to anti social behaviour which they had raised and which were exacerbated by a low brick wall. The Applicants were aggrieved that eventually, the Respondent had to erect railings on top of the brick wall at Nightingale, although it was accepted that the Applicants were not charged for the railings.

64. Mr Madigan said that the Respondent had tried to undertake a cost cutting exercise as suggested in the feasibility study, but once works to the low level wall round the perimeter to 16-26A Charlton had started, it was found to be in worse condition than anticipated and, *"in considering extensive repair versus replacement.....it would be far more cost effective for the wall to be replaced than to carry out the extensive repairs"*. The cost was covered by the contingency in the budget.

The Tribunal's Determination

65. Whilst the Tribunal sympathises with the Applicants in respect of this issue, it does not consider that the Respondent's decision to rebuild the wall, which was shown in photographs provided to be in a state of disrepair, was unreasonable, although it did increase costs. With regard to the railings, the Tribunal rejects the Applicants' contention that the Respondent should have re-consulted and notes that, in the event, railings were installed on top of the Nightingale wall and at no cost to the Applicants. The Applicants' contention that railings only would have sufficed is rejected. The Tribunal prefers the evidence given by Mr Madigan.

66. The Tribunal determines that the cost of the perimeter wall to Charlton and Nightingale is relevant and reasonably incurred and properly chargeable to the service charge account.

Scaffolding

67. The challenge was as to cost. At the hearing, the costs were stated to be £10,997 for Charlton, £11,500 for Nightingale and £16,790 for Mottingham, and the notes of the Tribunal members reflect this. However, on perusal of the costs breakdown by the Tribunal after the close of the hearing, it appears that the figures were stated to be

£6,598.20 for Charlton, £4,780.55 for Nightingale and £10,074 for Mottingham.

68. In the Applicants' statement dated 26 June 2013, it was stated *"the scaffolding was erected in December 2008 and was left unused for a number of weeks over the Christmas period which, considering that scaffolding is charged for hire on a weekly basis, seems like a waste of money"*. Miss Kutner also said that wraparound scaffolding was unnecessary and a tower or cherry picker could have been used. The windows could have been replaced from the inside. The re-pointing was localised. No evidence of alternative quotations were produced.

69. In the Respondent's Further Response dated 4 November 2013 it was stated *"full scaffolding was necessary, for the window replacements, work to roofs, cladding (where this was undertaken), redecoration, rainwater goods renewals and brickwork repairs. The scaffolding was not erected simply to facilitate re-pointing to the brickwork"*. Mr Bhose said that the scaffolding had been a fixed price and there had been no increase in cost where it had been unused.

70. Mr Madigan referred to his report and said that full wraparound scaffolding was essential, inter alia, to provide satisfactory access for a number of different works which he set out. He said that with regard to the window replacement, in his opinion, a better finish would be obtained. It would not have been cost effective or practical to use a cherry picker and for both a cherry picker and a tower additional time and therefore additional cost would have to be incurred in view of the various works involved, which required assessment, repair and inspection.

The Tribunal's Determination

71. The Applicants' challenges were without merit and were unsupported by any persuasive evidence. There was no variation from the consulted sum.

72. It may be that the variance in the sums as set out in paragraph 67 above are due to the addition of professional/administration fees. The Tribunal has rejected the Applicants' arguments and determines that the total scaffolding costs are relevant and reasonably incurred and properly chargeable to the service charge account. In making this determination, the Respondent is expect to advise the Applicants of the reason for the variance in the sums as set out in paragraph 67 above.

Windows and doors

73. The challenge was in respect of cost only and related to the blocks at Charlton and Mottingham.

74. Mrs Paterson said that she had opted out of having her windows replaced by the Respondent. She provided an invoice addressed to her from Dennis Windows dated 11 April 2012 for the supply and fitting of seven white casement windows at a cost of £1,700 including VAT which she maintained indicated that the Applicants who had opted in had been overcharged.

75. Miss Kutner had opted to have her windows replaced by the Respondent, but contended that she had been overcharged. In addition, there had been errors in the number of windows replaced. In cross examination, she confirmed that she had not known of the cost before opting in and that the cost of errors in the number of windows had been reimbursed by the Respondent.

The Tribunal's Determination

76. The Applicants' case has no merit. Miss Kutner had opted in without, apparently, even enquiring as to the cost. She may have been incorrectly overcharged for the number of windows replaced but this overcharge had been deducted by the Respondent. The Tribunal is of the view that whether the tenants opted in or out, there was no significant increase in the final cost.

77. The Tribunal determines that the cost of window replacement to Charlton and Nightingale is relevant and reasonably incurred and properly chargeable to the service charge account.

Contingencies

78. The challenge was that no explanation had been given for the size of the sum for contingencies which was £50,000 for the project.

79. Mr Madigan said that the contingency sum was decided on by a quantity surveyor and was normally a percentage of the contract value. In this case the pre tender estimate had been £1.135m and £50,000 would have been 4.4% of the estimate. He said that this was within a reasonable band and if areas of risk were higher the percentage would normally be between 5% and 10%.

The Tribunal's Determination

80. Contingencies, by their nature, are sums within a specification earmarked for the unexpected, and were clearly explained in the specification (as were the provisional sums). The amount of £50,000 is not out of line in a contract of this scope and size. Whilst it is noted that the costs did overrun for Mottingham, they were under for Charlton and Nightingale, and the costs incurred were within the contingency provision for the overall package.

81. During the course of his evidence, Mr Madigan explained in detail the chief areas which required unforeseen work which resulted in withdrawals from the contingency sum. The Tribunal accepts these explanations which were supported by photographic evidence and engineers' drawings, particularly in respect of the cladding panels and balcony surface water gulleys at Mottingham, and expansion joints in parapet walls to all blocks.

Decent Homes Initiative

82. In the Response to the Respondent's statement of case, it was stated "*if grants/funding is for tenants kitchens/bathrooms/heating and electrical then why is it referred to in such a way throughout council correspondence to suggest that all work was covered by the scheme. ....the Respondent either deliberately or just through extreme poor judgement misled leaseholders whereas leaseholders should have been told clearly from the very start that they would receive no benefit from any grants or funding through the Decent Homes Scheme..*". Miss Kutner said "*there was no benefit to lessees only benefit to the Council....council rent doesn't include that amount. We are paying more than we need to*". The Applicants felt that their contribution should be capped.

83. Mrs Andreou said that Enfield Homes had been an ALMO since April 2008 but said that at the various meetings which had taken place between the tenants and the Respondent, the question of subsidies or the Decent Homes Initiative had never been raised

84. Mr Manson confirmed that this particular major works programme had not been carried out under the Decent Homes scheme and were therefore not funded by grants. He said "*regardless of what tenants' contributions are to these works, it does not affect how much a leaseholder would contribute to the works*".

85. Mr Bhose said that no grant had been obtained at that time and the works were funded from the housing budget for capital works. He referred the Tribunal to the Upper Tribunal case of **Craighead and Others v Homes for Islington Ltd [2010] WL 666325** in support of his contention that the case did not fall under the Decent Homes Initiative in any event. He said that the Applicants had purchased their flats either under the Council's Right to Buy Scheme or by an assignment of the lease and therefore had the benefit of a valuable asset. It was cost neutral.

The Tribunal's Determination

86. The Applicants are under a misapprehension as to the effect of the Decent Homes Initiative. It does not mean that leaseholders should not

contribute towards the cost of relevant works. In any event, at the time of this project, Enfield Homes did not qualify for a grant.

87. With regard to the suggestion that the amounts paid should be capped, the Tribunal has considered the consultation paper on protecting local authority leaseholders from unreasonable charges published in October 2013. However, this is still subject to consultation, and therefore irrelevant to these works. In any event, it was stated in the body of the document *"these caps are not intended to affect any funding already confirmed, but would affect any allocations made from the 2013 Spending Round Decent Homes funding"*.

Application under S.20C

88. In the application form and at the hearing, the Applicants applied for an Order under section 20C of the 1985 Act. Although the Respondent indicated that no costs would be passed through the service charge since the leases did not permit this (see paragraph 17 above), for the avoidance of doubt, the Tribunal nonetheless determines that it is just and equitable in the circumstances for an order to be made under section 20C of the 1985 Act, so that the Respondent may not pass any of its costs incurred in connection with the proceedings before the Tribunal through the service charge.

Name: J Goulden **Date:** 10 January 2014

Appendix of relevant legislation

Landlord and Tenant Act 1985

Section 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.

Section 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 provisions 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.

Section 27A

(1) An application may be made to a leasehold valuation 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 a leasehold valuation 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.

Section 20

(1) Where this section applies to any qualifying works or qualifying long term agreement, the relevant contributions of tenants are limited in accordance with subsection (6) or (7) (or both) unless the consultation requirements have been either—
(a) complied with in relation to the works or agreement, or
(b) dispensed with in relation to the works or agreement by (or on appeal from) a leasehold valuation tribunal.

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

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

(4) The Secretary of State may by regulations provide that this section applies to a qualifying long term agreement—

(a) if relevant costs incurred under the agreement exceed an appropriate amount, or
(b) if relevant costs incurred under the agreement during a period prescribed by the regulations 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 subsection (5), the amount of the relevant costs incurred on carrying out the works or under the agreement which may be taken into account in determining the relevant contributions of tenants is limited to the appropriate amount.

(7) Where an appropriate amount is set by virtue of paragraph (b) of that subsection, the amount of the relevant contribution of the tenant, or each of the tenants, whose relevant contribution would otherwise exceed the amount prescribed by, or determined in accordance with, the regulations is limited to the amount so prescribed or determined.]

Section 20B

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

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

Section 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 the Upper Tribunal, or in connection with arbitration proceedings, are

not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application.

(2) The application shall be made—
(a) in the case of court proceedings, to the court before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to a county court;
(aa) in the case of proceedings before a residential property tribunal, to that tribunal;
(b) in the case of proceedings before a residential property tribunal, to the tribunal before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to any residential property tribunal;
(c) in the case of proceedings before the Upper Tribunal, to the tribunal;
(d) in the case of arbitration proceedings, to the arbitral tribunal or, if the application is made after the proceedings are concluded, to a county court.

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

Leasehold Valuation Tribunals (Fees)(England) Regulations 2003

Regulation 9

(1) Subject to paragraph (2), in relation to any proceedings in respect of which a fee is payable under these Regulations a tribunal may require any party to the proceedings to reimburse any other party to the proceedings for the whole or part of any fees paid by him in respect of the proceedings.

(2) A tribunal shall not require a party to make such reimbursement if, at the time the tribunal is considering whether or not to do so, the tribunal is satisfied that the party is in receipt of any of the benefits, the allowance or a certificate mentioned in regulation 8(1).

Commonhold and Leasehold Reform Act 2002

Schedule 11, paragraph 1

(1) In this Part of this Schedule "administration charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent which is payable, directly or indirectly—
(a) for or in connection with the grant of approvals under his lease, or applications for such approvals,

(b) for or in connection with the provision of information or documents by or on behalf of the landlord or a person who is party to his lease otherwise than as landlord or tenant,
(c) in respect of a failure by the tenant to make a payment by the due date to the landlord or a person who is party to his lease otherwise than as landlord or tenant, or
(d) in connection with a breach (or alleged breach) of a covenant or condition in his lease.

(2) But an amount payable by the tenant of a dwelling the rent of which is registered under Part 4 of the Rent Act 1977 (c. 42) is not an administration charge, unless the amount registered is entered as a variable amount in pursuance of section 71(4) of that Act.

(3) In this Part of this Schedule "variable administration charge" means an administration charge payable by a tenant which is neither—
(a) specified in his lease, nor
(b) calculated in accordance with a formula specified in his lease.

(4) An order amending sub-paragraph (1) may be made by the appropriate national authority.

Schedule 11, paragraph 2

A variable administration charge is payable only to the extent that the amount of the charge is reasonable.

Schedule 11, paragraph 5

(1) An application may be made to a leasehold valuation tribunal for a determination whether an administration 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) Sub-paragraph (1) applies whether or not any payment has been made.

(3) The jurisdiction conferred on a leasehold valuation tribunal in respect of any matter by virtue of sub-paragraph (1) is in addition to any jurisdiction of a court in respect of the matter.

(4) No application under sub-paragraph (1) 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.

(6) An agreement by the tenant of a dwelling (other than a post-dispute arbitration agreement) is void in so far as it purports to provide for a determination—
(a) in a particular manner, or
(b) on particular evidence,
of any question which may be the subject matter of an application under sub-paragraph (1).

Schedule 12, paragraph 10

(1) A leasehold valuation tribunal may determine that a party to proceedings shall pay the costs incurred by another party in connection with the proceedings in any circumstances falling within sub-paragraph (2).

(2) The circumstances are where—
(a) he has made an application to the leasehold valuation tribunal which is dismissed in accordance with regulations made by virtue of paragraph 7, or
(b) he has, in the opinion of the leasehold valuation tribunal, acted frivolously, vexatiously, abusively, disruptively or otherwise unreasonably in connection with the proceedings.

(3) The amount which a party to proceedings may be ordered to pay in the proceedings by a determination under this paragraph shall not exceed—
(a) £500, or
(b) such other amount as may be specified in procedure regulations.

(4) A person shall not be required to pay costs incurred by another person in connection with proceedings before a leasehold valuation tribunal except by a determination under this paragraph or in accordance with provision made by any enactment other than this paragraph.