10735

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	:	**LON/00BK/LDC/2014/0149**
Property	:	**47 Shirland Road, London W9 2JD**
Applicant	:	**Danebrook Properties Ltd**
Representative	:	**Mr Mediratta (Director of Danebrook Properties Ltd)**
Respondent	:	**Mr Parris (Flat A)** **Mr Aghamiri (Flat B)** **A2 Dominion Group (Flat C)** **Mr Hunter-Johnson (Flat D)** **Mr Ahmed (commercial premises – interested party)**
Representative	:	**Mr Parris (in person)** **Mr Aghamiri (in person)** **A2 Dominion Group (Miss Matraxia – in house solicitor)** **Mr Hunter-Johnson (in person)** **Mr Ahmed (in person)**
Type of application	:	**For dispensation from consultation requirements and the determination of the reasonableness of and the liability to pay a service charge (application amended with permission of the Tribunal on 2 December 2014)**
Tribunal members	:	**Ms L Smith (Tribunal Judge)** **Mr F Coffey, FRICS** **Ms J Hawkins**
Date and venue of hearing	:	**30 March 2015** **10 Alfred Place, London WC1E 7LR**

Date of decision : 14 April 2015

DECISION

Decisions of the tribunal

(1) The tribunal determines that, subject to its decision in relation to dispensation, the amount payable in respect of the cost of the Works is £4260 as against all Respondents or £3408 against the Respondents other than Mr Hunter-Johnson. In either event, the share per unit (except in relation to the commercial unit in respect of which the Tribunal has no jurisdiction) is £852.

(2) The Tribunal refuses, however, to grant dispensation other than in relation to Mr Hunter-Johnson. Accordingly, the amount which the Applicant can recover from the other Respondents is limited to £250 per unit. Mr Hunter-Johnson has already paid his share of the cost of the Works of £852 by deduction from his original claim in the County Court and that remains payable.

(3) The Tribunal determines that the interest, legal costs and management fee claimed whether by way of administration charges or by way of a service charge are not payable.

(4) 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

(5) The Tribunal refuses to order the Respondents to refund the Applicant the Tribunal fees paid by it in relation to the application/hearing.

(6) The Tribunal refuses to make an order under rule 13 of The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 in favour of the Respondents for their costs of responding to the application

The application

1. The Applicant applies for a dispensation from the consultation requirements in section 20 of the Landlord and Tenant Act 1985 ("the 1985 Act") and the regulations thereunder in respect of works carried out to repair the roof of the property at 47 Shirland Road, London W9 2JD in order to deal with water ingress ("the Works"). It also seeks a determination pursuant to s.27A of the 1985 Act and Schedule 11 to the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act") as to the amount of service charges and (where applicable) administration charges payable by the Respondents in respect of the Works and legal costs and management fees associated with the cost of the Works.

2. The relevant legal provisions are set out in Appendix 1 to this decision.

The hearing

3. At the hearing, the Applicant was represented by Mr Mediratta, Director of the Applicant company. Mr Parris, Mr Aghamiri and Mr Hunter-Johnson appeared in person at the hearing. Mr Aghamiri was accompanied by an interpreter, Mr Hadi. The Tribunal also permitted the tenant of the ground floor and basement premises of the Property (Mr Ahmed) to participate in the proceedings as an interested party even though the Tribunal has no jurisdiction over that commercial lease because it appeared to the Tribunal that he might be affected by the outcome and also because he might have relevant evidence to provide to the Tribunal. Mr Ahmed was accompanied by his business partner, Mr Rashid.

4. Although the Tribunal gave directions for formal witness statements of fact to be produced, the only formal statement was that of Mr Mediratta. Since the facts which needed to be ascertained might not though have been immediately evident to the parties, all of whom were unrepresented, the Tribunal gave those who attended considerable latitude to put forward their case including oral submissions and evidence which was not submitted in writing beforehand to assist the Tribunal to determine what were largely issues of law.

The background

5. The property which is the subject of this application ("the Property") is an old Victorian building which has been extended and converted into 4 residential units at lower ground, first, second and third floor levels and a shop at ground and basement level. Neither party requested an

inspection and the Tribunal did not consider that one was necessary, nor would it have been proportionate to the issues in dispute particularly since the Works had already been carried out.

6. The Applicant and Respondents are party to long leases of the Property which requires the landlord to provide services and the tenant to contribute towards their costs by way of a variable service charge ("the Lease"). The specific relevant provisions of the Lease are referred to below and set out in Appendix 2. References to the Lease are to the Lease for Flat C but the parties agreed that all the Leases were in the same form (save obviously for the commercial lease in relation to which the Tribunal has no jurisdiction). The relevance of the commercial lease for the purposes of this application is that the service charge provision in the Lease is for each tenant to pay 1/5th of the service charge total and, since there are only 4 residential units, the commercial lease is presumably similarly obliged to pay the remaining 1/5th subject to relevant statutory regulations.

7. The facts of this application are slightly unusual in that the Works were not carried out by the Applicant at all; rather they were carried out by a contractor instructed by one of the tenants (Mr Hunter-Johnson) and the Applicant was obliged to repay the cost of the Works by virtue of an order of the Watford County Court dated 31 October 2013 following a hearing in the St Albans County Court on that date.

8. The factual background to this application is as follows. In early 2010, Mr Hunter-Johnson had complained to the Applicant of water ingress into his flat. At that time, the Applicant instructed MNM Property Services Ltd to inspect Mr Hunter-Johnson's flat. That inspection took place in around October 2010. MNM provided details of works required to Flat D (Mr Hunter-Johnson's flat) which is on the top floor of the Property. MNM stated in their quotation that *"we believe only kitchen is affected by roof leak problem"* but in a covering e mail to Mr Mediratta indicated that *"Although we found it all dry when we attended, it seems there has not been any water ingress for quite a while"*. Prior to that inspection and in response to Mr Hunter-Johnson's complaints, Mr Mediratta had sent a number of photographs to Mr Hunter-Johnson which he stated in an e mail of 17 August 2010 *"confirms what I suspected all along: apart from one or two places where the flashing has slightly lifted, there is no evidence of any extensive damage."* Notwithstanding that, Mr Hunter-Johnson continued to complain of water ingress. He gave oral evidence to the Tribunal that prior to the Works, there was a physical leak at the back of the roof in one corner and another at the front of the roof which was leaking directly into bedroom wardrobes. There was also staining indicating further leaks. However, the physical leaks were of most concern. Those required pans to be put under the relevant places where the leaks occurred every time that it rained and those needed to be regularly emptied. He gave evidence that since the Works, there had been no further leaks.

9. Mr Hunter-Johnson obtained 6 quotes at the time from roofing contractors and selected 3 of those. He sent the quotes to the other tenants in the Property in early 2012 (see County Court Particulars of Claim and a specimen e mail dated 29 January 2012 in which Mr Hunter-Johnson refers to an intention to have the Works carried out and to invoice other tenants for a contribution to the cost of the Works). He received no response from the other tenants nor from Mr Mediratta. Accordingly, he instructed Leonard McCaul who had provided the cheapest quote to carry out the Works. The Works were completed on 25 March 2012.

10. Mr Hunter-Johnson issued proceedings in the County Court in January 2013 against Mr Mediratta and Danebrook Properties Ltd for the sum of £3408 being 80% of the cost of the Works (thereby accepting that he was liable to pay 20%) together with interest at 8% and Court fee of £120. The claim was struck out as against Mr Mediratta personally on 21 August 2013. The Applicant filed a Defence and Counterclaim on 19 February 2013 in which it raised the issue that Mr Hunter-Johnson was in breach of the covenants of the Lease for authorising the carrying out of the Works without the landlord's permission and that he was thereby trespassing on the landlord's property. Although it is not entirely clear from the Defence and Counterclaim, Mr Mediratta informed the Tribunal that it was part of his case before the County Court that the Works were not necessary as the roof was reasonably sound.

11. Following an attempt at mediation which failed, Mr Mediratta wrote to the other tenants in the Property by letters dated 6 August 2013 to say that he was minded to settle with Mr Hunter-Johnson and that if he did so each tenant's liability would be £852 being 1/5th of the cost of the Works and a share of legal costs amounting to £261.50. Mr Mediratta accepted at the hearing that he had made a mistake in relation to legal costs which had been calculated on the basis of each tenant paying ¼ whereas each should only have been liable for 1/5th. He received no response. Accordingly, the matter went forward to a full hearing.

12. In relation to what was found at the hearing by the County Court, there was no transcript or written judgment, the case having apparently been heard in chambers. We were informed however by both Mr Mediratta and Mr Hunter-Johnson that the County Court Judge had made a finding that the Works were necessary, having heard from both parties and also from the roofing contractor who carried out the Works. The Judge found in Mr Hunter-Johnson's favour and ordered the Applicant company to pay the sum of £3816.96 for debt and interest and £638.50 for costs totalling £4455.46.

13. Mr Mediratta wrote to the tenants of the Property on 14 November 2013 informing them of the judgment and seeking to recover £1113.87 being ¼ of the total amount and a ¼ contribution to his legal costs of £261.50. Mr Hunter-Johnson as the successful party to that litigation

was not included in that correspondence for the obvious reason that he had already deducted his part of the costs of the Works when issuing the claim and had been awarded his costs. By this stage, Mr Mediratta was also seeking to recover £175 "*towards management*". The total sought had thereby increased to £1550.37 per flat. Following non payment, Mr Mediratta wrote again, this time also seeking interest at 5% in accordance with the Lease.

14. By a joint letter from the tenants dated 28 November 2013, the Respondents (including Mr Hunter-Johnson) denied liability for contribution to the cost of the Works for reasons which are more fully set out below. Further correspondence ensued culminating in a demand from the Applicant's solicitors dated 17 April 2014 for the sum of £1727.37 including ¼ of the judgment debt (£1113.87 per unit), ¼ of the legal costs (£438.50, the total legal costs being £1754) and £175 per unit management fee. Forfeiture of the Lease was also threatened.

15. The application to the Tribunal was issued on 6 November 2014 solely on the basis of seeking dispensation pursuant to s20ZA of the 1985 Act from s20 of the 1985 Act, this having been the principal objection of the Respondents to the claim threatened against them. However, at the Directions hearing, the Tribunal Judge permitted the Applicant to amend to include an application under s27A of the 1985 Act in relation to reasonableness of service charges and pursuant to Schedule 11 to the 2002 Act in relation to reasonableness of administration charges.

The issues

16. At the start of the hearing the Tribunal identified the relevant issues for determination as follows:

    (i) The payability and/or reasonableness of service charges for the cost of the Works;

    (ii) Whether the Tribunal should dispense with the consultation requirements under s20 of the 1985 Act in relation to the cost of the Works;

    (iii) The payability and/or reasonableness of administration charges.

17. 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.

Payability and Reasonableness of Cost of the Works

18. In relation to whether the cost of the Works is payable and/or reasonable, the Tribunal understands the cost of the Works to amount to £4260. Only £3408 was claimed as part of the judgment debt referred to in paragraph 12 above only because Mr Hunter-Johnson had deducted his 1/5th share from that total cost. The cost of the Works cannot include the County Court interest (which is dealt with in the section dealing with legal costs and management fees).

The Tribunal's decision

19. The Tribunal determines that, subject to its decision in relation to dispensation, the amount payable in respect of the cost of the Works is £4260 as against all Respondents or £3408 against the Respondents other than Mr Hunter-Johnson. In either event, the share per unit (except in relation to the commercial unit in respect of which the Tribunal has no jurisdiction) is £852.

Reasons for the Tribunal's decision

20. The main argument for the Respondents was that they should pay nothing towards the cost of the Works since the Works were not carried out by the landlord and could not be recovered as part of the service charge. They relied in that regard on clause 3(3) of the Lease which required the landlord to carry out works of repair to the roof and which would have enabled it to recover 1/5th of the cost from each tenant under clause 2(3)(b). However, since the landlord had not instructed the Works but these had been instructed by one of the tenants, the landlord was not entitled to recover anything. The County Court proceedings were between the Applicant and Mr Hunter-Johnson and not between Mr Hunter-Johnson and the Applicant and the other tenants. Accordingly, they were not bound by the judgment.

21. The Tribunal found itself in the rather odd position in this regard of the Applicant, through Mr Mediratta, arguing that the Works were not necessary (and would not therefore be reasonable or payable) and the Respondents arguing that they were (in which event subject to other arguments they would be reasonable and payable). The Tribunal was presented with evidence which could have led to a conclusion either way. On the one hand, the Applicant's contractor had reported in 2010 that the leaks appeared to be historic. Photographs also from 2010 appeared to suggest that the roof was in a fair condition (although even Mr Mediratta accepted that the flashings had come away which could have accounted for the leaks). On the other hand, the contractors instructed by Mr Hunter-Johnson concluded that "*the roof has come to the end of its useful life and therefore needs replacing completely*", the roof was about 20 years old and the County Court Judge who had heard evidence from both parties and the roof contractor had held that the Works were necessary (although the Tribunal would not be bound by those findings). In the end, given that the Respondents were not in fact arguing that the Works had been unnecessary and in light of the Court's judgment, the Tribunal concludes that it cannot be said that the Works were not necessary and as such the cost of the Works are payable.

22. The Tribunal considers that the clauses of the Lease relied on by the Respondents do not prevent the Applicant from recovering the cost of the Works. Clause 2(3)(b) allows the landlord to recover *"one fifth of such sums as the Landlord may from time to time expend pursuant to the covenants contained in sub-clause (3) to (5) (inclusive)..."* (our emphasis). The covenants include the obligation to repair and the landlord has expended the money for works of repair to the roof albeit via the intermediary of a contractor instructed by one of the tenants. That does not, in the Tribunal's view, preclude recovery. The Tribunal notes also that the County Court judgment was against the Applicant ie the Company which is the landlord of the Property and that any claim against Mr Mediratta personally was struck out. This tends to reinforce the Tribunal's view that the County Court was ordering that the cost be paid by the Applicant as landlord and it follows from this that the landlord ought to be able to recover as normal under the Lease.

23. The Respondents' second argument related to s20B of the 1985 Act on the basis that the service charge had not been demanded within 18 months from when the cost had been incurred, presumably relying on the formal demands from the Applicant's solicitors. The Works were carried out and completed on 25 March 2012 and Mr Mediratta had written to the Respondents on 6 August 2013. Mr Mediratta therefore relied on s20B(2) of the 1985 Act that the letter of 6 August 2013 was sufficient written notice. That letter clearly referred to the share per unit of the cost of the Works as being £852 which is the amount which the Tribunal considers is all that can be claimed in this regard. Accordingly, the Tribunal agrees with the Applicant that this part of the cost of Works claimed is recoverable (subject to dispensation). In fact, even if the Applicant had not sent the letter of 6 August 2013, the Tribunal would have accepted that the cost of the Works was not irrecoverable on the basis of s20B(1) because, on the facts of this case, the costs were not incurred until payment of the County Court judgment by the Applicant.

24. A further point was raised about whether the Applicant had properly demanded the cost of the Works from the Respondents as the demand was not accompanied by the Summary of Tenant's Rights and Obligations under s21B of the 1985 Act. Mr Mediratta accepted that the first demand had not included the summary but thought that his solicitors had rectified this under cover of the later demand. Even if none had been served, though, the only effect would be that the tenants would be entitled to withhold payment until the defect was rectified. It would remain recoverable. It was also argued that the Applicant had not provided a statement of account in accordance with s21 of the 1985 Act and was therefore committing a criminal offence. This was not pursued at the hearing but in any event would not prevent recoverability of the charge (as opposed to creating a criminal penalty). In any event, this application concerns only one item in relation to which a copy of the invoice has been produced.

25. For the above reasons, and subject to its views on dispensation below, the Tribunal considers that the cost of the Works is reasonable and payable. For the avoidance of doubt, the cost of the Works in this part relates only to the actual amount of the invoice relating to the Works and does not include interest and legal costs which are dealt with separately below.

Dispensation from s20 of the 1985 Act

26. The Respondents (including Mr Hunter-Johnson) argue that dispensation should not be granted as there has been complete failure to comply with the requirements of section 20 and that they have been prejudiced by an inability to comment on the Works prior to them being carried out.

The Tribunal's decision

27. The Tribunal refuses to grant dispensation other than in relation to Mr Hunter-Johnson. Accordingly, the amount which the Applicant can recover from the other Respondents is limited to £250 per unit.

Reasons for the Tribunal's decision

28. Part of the Respondents' arguments in relation to prejudice fell away at the hearing since it was evident from the invoice produced for the Works that they did not include a skylight to the roof which Mr Hunter-Johnson had installed as part of the Works. Furthermore, Mr Hunter-Johnson confirmed that the skylight was within his own flat and accordingly no issue of increased maintenance in that regard arises. Accordingly, they were not prejudiced by any inability to comment on the scope of the Works.

29. Mr Parris and Mr Ahmed pointed out that they were not tenants at the time of the Works. Mr Ahmed as a commercial lessee is not directly affected by this argument since he could not benefit from s20 of the 1985 Act in any event. In the view of the Tribunal, Mr Parris would not have been able to avoid liability to pay if there had been consultation before he bought his flat, even though he was not party to that consultation. The Tribunal also had evidence that Mr Mediratta had informed Mr Parris's solicitors of the ongoing dispute when Mr Parris bought the flat.

30. Mr Parris also indicated at the hearing that he did not submit that the quotation on which the cost of Works was based was unreasonable (although having no evidence either way in that regard) and that he trusted Mr Hunter-Johnson's judgement in this regard.

31. Mr Mediratta pointed out that Mr Hunter-Johnson had sent 3 quotations to each of the other tenants prior to the Works and had received no responses. However, this was not in the form of a formal

consultation and the tenants were not informed of their rights to comment on the quotations (or indeed the necessity for the Works at all) nor their rights to obtain an alternative quotation.

32. The Tribunal accepts that there is limited evidence of actual prejudice to the tenants. Mr Mediratta relied on the case of ***Daejan Investments Ltd v Benson and others [2013] UKSC 14*** therefore in support of the application for dispensation. As that judgment, makes clear, however, the extent of compliance may be relevant to whether there has been prejudice since, to a large extent, this is an exercise in hindsight (see in particular paragraph 50 of the judgment in that case). The Tribunal notes that Mr Mediratta on behalf of the Applicant was arguing at the relevant time that the Works were not necessary and it would have been open to any of the tenants to adopt that argument to resist the Works had proper consultation been carried out. Even though Mr Hunter-Johnson had obtained a reasonable number of quotations and selected the cheapest, therefore, the tenants might still be prejudiced by not being formally consulted about the necessity of the Works.

33. The Tribunal also considers it relevant to the exercise of its discretion to take into account the circumstances of this case where the only reason for the lack of any consultation was because of the failure of the landlord to itself carry out the Works. No doubt if the landlord had complied with its duty to repair or had taken action to resolve the issue of whether it was complying (eg by an application at that time to this Tribunal as to necessity for the Works), it would then have been able to follow the proper consultation procedure. Indeed, the Tribunal observes that it would have been open to the Applicant to seek dispensation at the time that the Works were carried out even if it did not have prior notice of the Works which would have enabled it to consult before they started.

34. The Tribunal considers that the position is different though in relation to Mr Hunter-Johnson. His view was clearly that the Works were necessary and he in fact instructed contractors to inspect, prepare quotations and carry out the Works. He can therefore scarcely now be heard to complain of a failure to consult when it was his own actions which prevented that consultation. The Tribunal notes that Mr Parris appeared in submissions to approve of Mr Hunter-Johnson's actions and the County Court appeared also to support him. However, the proper course where his landlord was failing to carry out repairs was to seek an order requiring it to carry out the repairs and not to have the Works carried out himself, thereby laying the other tenants open to financial claims without being properly consulted. Accordingly, the Applicant can recover the full 1/5th of the cost of the Works from Mr Hunter-Johnson (although Mr Hunter-Johnson has already paid this by deduction from the County Court claim).

Interest, Legal Costs and Management Fee in relation to County Court claim

35. The Applicant seeks to recover interest on the cost of Works as awarded by the County Court (which appears to amount to £408.96 - £3816.96 less £3408 being the cost of Works claimed). It also seeks to recover the legal costs awarded against it by the County Court (£638.50), its own legal costs amounting to £1754 and a management fee in relation to the County Court proceedings of £700.

The Tribunal's decision

36. The Tribunal determines that the interest, legal costs and management fee claimed whether by way of administration charges or by way of a service charge are not payable.

Reasons for the Tribunal's decision

37. The Respondents argue that they are not obliged to pay the Applicant's own solicitor's charge and management fee in relation to the litigation nor the costs awarded by the County Court. They submit that this is because none of the tenants were party to the legal dispute (apart from Mr Hunter-Johnson who of course was the successful party and so should not have to contribute anything - see ***Iperion Investments Corporation v Broadwalk House Residents Ltd [1995] 2 EGLR 47***).

38. The Applicant's case is that the right to claim legal costs and management fee arises from either clause 3(5) of the Lease or as an administration charge under Schedule 11 of the 2002 Act.

39. The Tribunal notes that neither the Lease nor the 2002 Act provide for recovery of the interest awarded by the Court. Insofar as the Applicant submits that this is part of the cost of the Works, the Tribunal disagrees. If the Applicant had carried out the Works when Mr Hunter-Johnson demanded that it do so or had taken steps to resolve the issue itself without finding itself a party to a debt recovery action following the carrying out of the Works, no interest would have been payable. The interest cannot possibly be categorised as part of the cost of the Works and accordingly that is not payable.

40. The same rationale applies to the legal costs awarded to Mr Hunter-Johnson. Those were awarded against the Applicant because it unsuccessfully defended the litigation. That cannot be categorised as a cost of "*carrying out any repairs or maintenance*" or "*generally managing the Building*" which are the purposes for which the landlord may charge a management fee under the Lease. Nor does Schedule 11 of the 2002 Act avail the Applicant in this regard since that section covers specific matters none of which can be construed as including a charge payable to a successful third party in relation to defending litigation.

41. In relation to the Applicant's own legal costs, in order to be payable, those must either fall within clause 2(13) of the Lease or Schedule 11 to the 2002 Act. Clause2(13) of the Lease is the usual, fairly standard sub-clause permitting recovery of legal and other costs incurred by the landlord where forfeiture action is in contemplation. The only sub-paragraph of paragraph 1 of Schedule 11 which might have any bearing is paragraph 1(d) which provides for an amount payable *"in connection with a breach (or alleged breach) of a covenant or condition in his lease"*. It is patently clear from the circumstances of this case and indeed from the solicitor's bill dated 26 February 2014 that the costs incurred here were in relation to defence of the County Court claim which was an action instigated by a tenant for recovery of the cost of repair works. The only basis on which it might be argued that the costs would be recoverable (under the 2002 Act) is in relation to the Counterclaim if that had concerned an allegation of breach of covenant against Mr Hunter-Johnson for having the Works carried out without permission. However, the Tribunal notes that the Counterclaim was not in fact on that basis but was for arrears of ground rent and service charge. Furthermore, the Tribunal assumes that the Counterclaim failed since that is not mentioned in the Court's order. The Tribunal also notes and agrees with the submission of Mr Parris that, if an administration charge could be recovered in relation to legal costs whether under the Lease or under the 2002 Act, that would be recoverable from the tenant concerned in the legal action and not against the other tenants as a service charge (which appears to be the basis on which this is claimed from the other tenants).

42. The same reasoning applies to the management fee of £700 which relates to Mr Mediratta's own time spent in relation to the legal proceedings. This does not fall within Clause 3(5) of the Lease in relation to the permissible management charges for the reasons given at paragraph 39 above and nor can it fall within the definition of an administration charge under Schedule 11 to the 2002 Act (and even if it did, the fee would only have been recoverable against Mr Hunter-Johnson and only if the Applicant had succeeded which it did not).

43. Accordingly, the Tribunal decides that none of the interest, legal costs or management fee are payable. The issue of reasonableness does not therefore arise.

Application under s.20C and refund of fees

44. At the end of the hearing, the Applicant made an application for a refund of the fees that he had paid in respect of the application/ hearing[1]. Having heard the submissions from the parties and taking into account the determinations above, the Tribunal does not order the

[1] The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 SI 2013 No 1169

Respondents to refund any fees paid by the Applicant. The Applicant succeeded only in relation to the recovery of the cost of the Works and failed in relation to dispensation (which was the only basis of the original application).

45. In the statement of case and at the hearing, the Respondents applied for an order under section 20C of the 1985 Act. Having heard the submissions from the parties and taking into account the determinations above, the Tribunal 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 Applicant may not pass any of its costs incurred in connection with the proceedings before the tribunal through the service charge. The Tribunal's reasoning is as set out at paragraph 44 above.

46. The Respondents also made an application under rule 13 of The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 ("the Procedure rules") for their costs of responding to the application as they asserted that it was unreasonable for the Applicant to have brought the application and that the manner in which he conducted the matter was also unreasonable. They rely in this regard on the Applicant's failure to involve Mr Hunter-Johnson in the application until this was rectified by the Judge who made the directions. Otherwise the basis of this application is unclear – the written case seeks "*wasted costs*" simply on the basis that if the tenants succeed, they should be able to recoup their costs. Firstly, this is not a matter of "*wasted costs*" since those are recoverable against legal representatives who have conducted the proceedings unreasonably. Secondly, insofar as the Respondents seek costs against the Applicant on the basis of unreasonable conduct, the fact that a claim has failed either in whole or in part is not a reason to award costs. The Applicant might have been better advised to have brought the application for dispensation much earlier than it did (at the time of the Works). It also would probably have been better advised to have included in the initial form an application in relation to the payability and reasonableness of the service charge and/or administration charge sought. However, failure to do so does not amount to conduct which is unreasonable. Accordingly, the Tribunal declines to make an order under rule 13 of the Procedure Rules.

Name: Lesley Smith **Date:** 14 April 2015

Appendix 1

Relevant legislation

Landlord and Tenant Act 1985 (as amended)

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 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.

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) 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.

(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 20ZA

(1) Where an application is made to a leasehold valuation tribunal for a determination to dispense with all or any of the consultation requirements in relation to any qualifying works or qualifying long term agreement, the tribunal may make the determination if satisfied that it is reasonable to dispense with the requirements.
(2) In section 20 and this section—
"qualifying works" means works on a building or any other premises, and
"qualifying long term agreement" means (subject to subsection (3)) an agreement entered into, by or on behalf of the landlord or a superior landlord, for a term of more than twelve months.
(3) The Secretary of State may by regulations provide that an agreement is not a qualifying long term agreement—
(a) if it is an agreement of a description prescribed by the regulations, or
(b) in any circumstances so prescribed.

(4) In section 20 and this section "the consultation requirements" means requirements prescribed by regulations made by the Secretary of State.

(5) Regulations under subsection (4) may in particular include provision requiring the landlord—

(a) to provide details of proposed works or agreements to tenants or the recognised tenants' association representing them,

(b) to obtain estimates for proposed works or agreements,

(c) to invite tenants or the recognised tenants' association to propose the names of persons from whom the landlord should try to obtain other estimates,

(d) to have regard to observations made by tenants or the recognised tenants' association in relation to proposed works or agreements and estimates, and

(e) to give reasons in prescribed circumstances for carrying out works or entering into agreements.

(6) Regulations under section 20 or this section—

(a) may make provision generally or only in relation to specific cases, and

(b) may make different provision for different purposes.

(7) Regulations under section 20 or this section shall be made by statutory instrument which shall be subject to annulment in pursuance of a resolution of either House of Parliament.

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.

Section 21B

(1) A demand for the payment of a service charge must be accompanied by a summary of the rights and obligations of tenants of dwellings in relation to service charges.

(2) The Secretary of State may make regulations prescribing requirements as to the form and content of such rights and obligations.

(3) A tenant may withhold payment of a service charge which has been demanded from him if subsection (1) is not complied with in relation to the demand.

(4) Where a tenant withholds a service charge under this section, any provisions of the lease relating to non-payment or late payment of service charges do not have effect in relation to the period for which he so withholds it.

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 the appropriate 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 the appropriate 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).

Appendix 2
Relevant clauses of the Lease

Clause 2

THE Tenant hereby covenants with the Landlord as follows:-

....
(3).....
(b) to pay one fifth of such sums as the Landlord may from time to time expend pursuant to the covenants contained in sub-clause (3) to (5) (inclusive) of Clause 3 of this Lease.....

(13) To pay the Landlord all reasonable and proper costs and charges and expenses (including legal costs and surveyors fees) which may be incurred by the Landlord in the preparation and service of a notice or in contemplation of any proceedings under Sections 146 and 147 of the Law of Property Act 1925 or re-enactment or replacement thereof notwithstanding forfeiture may be avoided otherwise than by relief granted by the Court.

Clause 3

THE Landlord hereby covenants with the Tenant as follows:-

.....
(3) Subject to the payment of the contributions (including advance payments) referred to in clause 2(3) hereof to repair and keep in good and substantial repair order and condition:
....
(ii) the main walls and timbers roof and foundations and all parts of the structure of the Building and the installations thereof for which individual flat lessees are not responsible.

.....
PROVIDED that the Landlord may at its discretion obtain from the Tenant and the tenants of the other flats contributions for any necessary works for which the Landlord is responsible under this clause prior to the relevant work being instituted.

(5) To keep an account for each year during the said term of any costs charges and expenses incurred by the Landlord under clauses (3) to (5) inclusive of this Clause and it is hereby agreed and declared that the Landlord may for the purpose of carrying out any repairs or maintenance and for the purpose of generally managing the Building employ such person firm or company as it shall in its reasonable discretion deem expedient and the Landlord shall be entitled to charge by way of management fee such reasonable and proper fee for administration and management as shall be reasonable and proper in the circumstances and to provide to the Tenant within three months after the end of such account year a certified copy of the accounts.