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FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**CAM/33UG/LSC/2013/0086**
Property	:	Earlham House, Earlham Road, Norwich NR2 3PE
Applicant	:	Bellgold Properties Ltd
Representatives	:	Timothy Concannon (counsel), instructed by Marcus Cover (solicitor); Chris Goddard (managing director) & David Morton (finance manager for both Bellgold Properties Ltd & Earlham House Management Ltd)
Respondents	:	The various long leaseholders of flats 13, 17, 27, 28, 30, 33, 38, 40, 44, 48, 58, 66, 71, 73, 76, 79 & 82 Earlham House, whose names and addresses appear on a list annexed to each application form
Representatives	:	Mr Bennett & Mrs Blake
Type of Application	:	For determination of payability of service charges for the years 2011–2013 [LTA 1985, s. 27A]
Tribunal Members	:	G K Sinclair, G F Smith MRICS FAAV REV, and D S Reeve MVO MBE
Date and venue of Hearing	:	Thursday 10th & Friday 11th October 2013 at The Old Bakery, 115 Queens Road, Norwich
Date of Decision	:	18th November 2013

DECISION

Summary

1. The applicant company is the freehold owner of a purpose-built block comprising 21 commercial units on the ground floor and 85 residential units on the first and second floors. It acquired the freehold reversion and, soon after, the head lease in early 2012. The previous freeholder, Relayarch Ltd, had gone into liquidation and for years had neglected the building, to the annoyance of the leaseholders. It had left very little paperwork, save for a number of improvement notices from the local authority (Norwich City Council) concerning a Category 1 hazard, viz extreme cold.

2. The residential leaseholders are in a minority, as 61 of the 85 flats are held directly by the applicant. Consequently it was directly concerned as landlord to comply with the improvement notices served on it and its predecessor. It has therefore carried out substantial work to improve the heating system within the building and to replace the windows, as well as long-overdue remedial work to restore the premises to "good and substantial repair and condition", as required by its landlord's covenant in the leases. Significant expenditure was incurred in 2012 and the applicant asks the tribunal to determine the reasonableness and payability of historic service charge arrears for 2011 (pre-acquisition), service charge costs incurred in 2012, and the estimate of costs to be incurred in 2013.

3. Of the leaseholders of 16 flats joined as respondents 4 did not file any response, seek to participate in the proceedings, or appear at the hearing. The rest were represented by Mr Bennett (leaseholder of flats 58 & 76), assisted by Mrs Blake (resident leaseholder of flat 82).

4. As the adequacy of the freeholder's compliance with the statutory consultation process under section 20 of the Landlord and Tenant Act 1985 and the Service Charges (Consultation Requirements) (England) Regulations 2003[1] was in issue the tribunal, to avoid the need for any further hearing, invited the applicant to avail itself of the opportunity provided by section 20ZA to seek dispensation from some or all of the consultation requirements. This decision proceeds on that basis.

5. For the reasons set out later in this decision document the tribunal finds that :
   a. 2011 – the pre-acquisition "arrears" are unproven and not payable
   b. 2012 – the budget is acceptable, save that the cost of the replacement windows (particularly in Mr Bennett's case) is not a proper service charge cost
   c. 2013 – the amount sought, while perhaps on the high side, is reasonable. However, no sufficient evidence has been adduced to justify any alteration in the established method of apportionment of cost by internal floor area, especially when the leaseholders oppose it. The traditional method should

[1] SI 2003/1987

continue

d. Dispensation from the strictures of the section 20 consultation procedure is granted to the applicant on terms that it pays its own costs of this application

e. In the alternative to d above, the tribunal determines under section 20C that none of the costs of this application may be included as relevant costs when calculating any service charge payable by the respondents.

Material lease provisions

6. A copy of a specimen lease, for flat 58, appeared rather unhelpfully at the very back of the hearing bundle. Dated 21st January 2008, it was granted by Relayarch Ltd (the previous freeholder) to Charles Bentsir Ebenezer Addison for a term of 125 years from 1st January 2007, at an initial (and current) annual rent of £200 plus insurance rent and service rent.

7. The service rent is defined in Schedule 1 as meaning a fair and proper proportion as determined by the landlord's surveyor of the service costs, which in turn comprise the total sum computed under paragraph 1 of part 2 of schedule 6.

8. The demised premises are defined in Schedule 2, and by reference to the part shown edged red on the lease plan. The definition includes :

1.1 the finishes facings coverings and plasterwork of the internal walls bordering and lying within the demised premises and the doors and door frames and window frames and fittings in such walls (other than in the external surfaces of such door doorframes and window frames) and the glass fitted in such door and window frames and the front door to the demised premises;

1.2 the whole of the walls and the partitions lying within the demised premises save where such walls and partitions form part of the main structure of the building;

1.3 the plastered coverings and plasterwork of the ceilings and the surfaces of the floors including the whole of the floorboards (but not any timbers or joists forming part of the main structure of the building);... etc.

9. By clause 3.1 the tenant covenants with the landlord to pay the annual rent by half yearly payments in advance on the 1st January and 1st July in each year of the term... and the insurance rent and the service rent at the times and in the manner provided without any deduction or set-off whether equitable or otherwise.

10. By clause 4.4 the tenant also covenants with the landlord and flat owners to pay the service rent at the times and in the manner provided in schedule 6; such service rent to be recoverable in default as rent in arrear.

11. The landlord's covenants appear in clause 5. At 5.5.1 the landlord covenants to use its best endeavours throughout the term to provide and carry out or procure the provision or carrying out as economically as is practicable of the several services and other matters specified in part 1 of schedule 6.

12. Although not directly relevant to this determination the tribunal notes with some surprise that clause 5.5.2.1 makes the landlord's obligation to insure the building and keep it insured conditional upon the tenant having paid the insurance rent.

Does the landlord not have its own interest in keeping the building fully insured, irrespective of the tenant's failure or not?

13. Schedule 6 provides in detail for the provision (part 1) and variation (part 2) of services and for the calculation and payment of service costs (part 3). By paragraph 1.1.1 of part 1 the landlord covenants to use its best endeavours :

> to repair, rebuild, renew, reinstate, decorate, cleanse and maintain in good and substantial repair and condition the foundations roofs outside walls and structural parts of the building (but not the inside plaster surfaces of the walls and ceilings of the demised premises and of any other premises in the building let or intended to be let by the landlord) and the common parts

and by paragraph 1.1.2.3 to provide cleaning of the outside glass surfaces of the building once in every month;...

14. Detailed provisions for payment of the service costs appear in paragraph 2 of part 3, subject to certain provisos in paragraph 3. Mr Bennett lays particular stress on paragraphs 2.1 and 2.2, which provide :

> 2.1 not later than one month before the beginning of an accounting year the landlord shall serve on the tenant an estimate prepared by the landlord's surveyor of the amount of the service rent payable by the tenant during that accounting year and the tenant shall pay on account of the service rent the sum so estimated by four equal quarterly payments in advance on the usual quarter days;
>
> 2.2 as soon as practicable after the end of each accounting year the landlord shall cause his auditors to prepare and account to be certified as true and correct of the amounts under each of the sub-paragraphs 4.1 to 4.5 of this part of this schedule and a calculation of the service rent and thereupon the amount of the service rent for that accounting year so certified shall be final and binding on the tenant;...

15. Paragraph 3.5 of part 3 of schedule 6 is relevant to an issue in dispute for service charge year 2013. It provides :

> In calculating the service rent to be paid by the tenant the landlord and/or the landlord's surveyor may from time to time apply the same proportion to all service costs or different proportions up to 100% to constituent elements of the service costs or may use an alternative basis of calculation if it or they reasonably consider in all the circumstances and in accordance with the principles of good estate management that this would be fair and/or equitable to the tenants of the building provided that in any case the proportion to be applied is applied on the same basis and using the same criteria for each of the tenants in the building who are contributing to the relevant service cost.

Relevant statutory provisions and case law

16. Section 18 of the Landlord and Tenant Act 1985 defines the expression "service charge", for the tribunal's purposes, as :

> 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...

17. The overall amount payable as a service charge continues to be governed by section 19, which limits relevant costs :
    a. only to the extent that they are reasonably incurred, and
    b. where they are incurred on the provision of services or the carrying out of works, only if the services or works are of a reasonable standard.

18. The tribunal's powers to determine whether an amount by way of service charges is payable and, if so, by whom, to whom, how much, when and the manner of payment are set out in section 27A of the Landlord and Tenant Act 1985. The first step in finding answers to these questions is for the tribunal to consider the exact wording of the relevant provisions in the lease. If the lease does not say that the cost of an item may be recovered then usually the tribunal need go no further. The statutory provisions in the 1985 Act, there to ameliorate the full rigour of the lease, need not then come into play.

19. Insofar as major works are concerned, ie those in respect of which the contribution of any tenant liable to pay towards the service charge will exceed £250, then section 20 provides that the relevant contributions of tenants are limited to that amount unless the consultation requirements have been either complied with in relation to the works or dispensed with by (or on appeal from) the appropriate tribunal. The consultation requirements, in the instant case, are those appearing in Part 2 of Schedule 4 to the Service Charges (Consultation Requirements) (England) Regulations 2003 (as amended).

20. The Landlord and Tenant Act 1985, section 20ZA(1) provides :
    > 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.

21. What criteria should the tribunal apply when determining whether it is satisfied that it is reasonable to dispense with the requirements? A definitive answer has been provided by the Supreme Court in its recent decision in *Daejan Investments Ltd v Benson & others*[2]. The following, taken from the Supreme Court's official press summary, are the principal points to bear in mind. Numbers in square brackets refer to paragraph numbers in the full judgment :
    a. The purpose of the Requirements is to ensure that tenants are protected from paying for inappropriate works, or paying more than would be appropriate. In considering dispensation requests, the LVT should focus on whether the tenants were prejudiced in either respect by the failure of the landlord to comply with the Requirements [44]
    b. As regards compliance with the Requirements, it is neither convenient nor sensible to distinguish between a serious failing, and a minor oversight, save in relation to the prejudice it causes. Such a distinction could lead to uncertainty, and to inappropriate and unpredictable outcomes [47]-[49].
    c. The LVT has power to grant dispensation on appropriate terms [54], and

2 [2013] UKSC 14

can impose conditions on the grant of dispensation [58], including a condition as to costs that the landlord pays the tenants' reasonable costs incurred in connection with the dispensation application [59]-[61].

d. Where a landlord has failed to comply with the Requirements, there may often be a dispute as to whether the tenants would relevantly suffer if an unconditional dispensation was granted [65].

e. While the legal burden is on the landlord throughout, the factual burden of identifying some relevant prejudice is on the tenants [67]. They have an obligation to identify what they would have said, given that their complaint is that they have been deprived of the opportunity to say it [69].

f. Once the tenants have shown a credible case for prejudice, the LVT should look to the landlord to rebut it and should be sympathetic to the tenants' case [68].

g. Insofar as the tenants will suffer relevant prejudice, the LVT should, in the absence of some good reason to the contrary, effectively require the landlord to reduce the amount claimed to compensate the tenants fully for that prejudice. This is a fair outcome, as the tenants will be in the same position as if the Requirements have been satisfied [71].

22. An important consideration in this case is the action which has been taken by the local housing authority, Norwich City Council, in exercise of its powers under Part 1 of the Housing Act 2004. Sections 1 and 2 introduce a new system for assessing housing conditions and enforcing housing standards, and explain what is meant by category 1 and 2 hazards. The old concepts of fitness for habitation are replaced by a new Housing Health & Safety Rating System. This is a system founded on the analysis of 29 specified hazards, 51 types of potential harm (grouped in 4 classes ranging from extreme to moderate, by severity of outcome), the likelihood of an occurrence that could result in harm to a member of a vulnerable group within the next 12 months, and the spread of possible outcomes resulting from it, expressed as a percentage for each of the classes of harm – to which representative scale points are assigned. Essentially mathematical, the result of these calculations for each identified hazard produces a numerical score placing the hazard within one of a number of bands, ranging from A to C (collectively Category 1) and D to J (collectively Category 2).[3]

23. Section 11, upon which the authority in this case acted, provides for the first of those measures and states :

> (1) If –
>
> (a) the local housing authority are satisfied that a category 1 hazard exists on any residential premises, and
>
> (b) no management order is in force in relation to the premises under Chapter 1 or 2 of Part 4,
>
> serving an improvement notice under this section in respect of the hazard is a course of action available to the authority in relation to the hazard for the purposes of section 5 (category 1 hazards: general duty to take enforcement action).
>
> (2) An improvement notice under this section is a notice requiring the person on whom it is served to take such remedial action in respect of the hazard concerned as is specified in the notice in accordance with subsections (3)

[3] Housing Health and Safety Rating System (England) Regulations 2005 [SI 2005/3208]

to (5) and section 13.

(3) The notice may require remedial action to be taken in relation to the following premises –

(a) if the residential premises on which the hazard exists are a dwelling or HMO which is not a flat, it may require such action to be taken in relation to the dwelling or HMO;

(b) if those premises are one or more flats, it may require such action to be taken in relation to the building containing the flat or flats (or any part of the building) or any external common parts;

(c) if those premises are the common parts of a building containing one or more flats, it may require such action to be taken in relation to the building (or any part of the building) or any external common parts.

Paragraphs (b) and (c) are subject to subsection (4).

(4) The notice may not, by virtue of subsection (3)(b) or (c), require any remedial action to be taken in relation to any part of the building or its external common parts that is not included in any residential premises on which the hazard exists, unless the authority are satisfied-

(a) that the deficiency from which the hazard arises is situated there, and

(b) that it is necessary for the action to be so taken in order to protect the health or safety of any actual or potential occupiers of one or more of the flats.

(5) The remedial action required to be taken by the notice –

(a) must, as a minimum, be such as to ensure that the hazard ceases to be a category 1 hazard; but

(b) may extend beyond such action.

(6) An improvement notice under this section may relate to more than one category 1 hazard on the same premises or in the same building containing one or more flats.

(7) The operation of an improvement notice under this section may be suspended in accordance with section 14.

(8) In this Part "remedial action", in relation to a hazard, means action (whether in the form of carrying out works or otherwise) which, in the opinion of the local housing authority, will remove or reduce the hazard.

24. Section 19 provides that where an improvement notice has been served on any person ("the original recipient") in respect of any premises, and at a later date ("the changeover date") that person ceases to be a person of the relevant category in respect of the premises then, as from the changeover date, the liable person in respect of the premises is to be in the same position as if the improvement notice had originally been served on him and he had taken all relevant steps which the original recipient had taken.

25. Most importantly, section 30 provides that where an improvement notice has become operative the person on whom the notice was served commits an offence if he fails to comply with it.

Burden of proof

26. In *Schilling v Canary Riverside Development PTD Ltd*[4] His Honour Judge Rich

[4] LRX/26/2005; LRX/31/2005 & LRX/47/2005 (His Honour Judge Rich QC, 6th December 2005)

QC had to consider upon whom lay the burden of proof. At paragraph 15 he stated :

> I have felt more difficulty in regard to the question whether a service charge which would be payable under the terms of the lease is to be limited in accordance with s.19 of the Act of 1985 on the ground either that it was not reasonably incurred or that the service or works were not to a reasonable standard, is to be treated as a matter where the burden is always on the tenant. In a sense the limitation of the contractual liability is an exception in respect of which Lord Wilberforce in *Nimmo v Alexander Cowan & Sons Ltd* [1968] AC107 at p.130 stated "the orthodox principle (common to both the criminal and the civil law) that exceptions etc. are to be set up by those who rely upon them" applies. I have come to the conclusion, however, that there is no need so to treat it. If the landlord is seeking a declaration that a service charge is payable he must show not only that the cost was incurred but also that it was reasonably incurred to provide services or works of a reasonable standard, and if the tenant seeks a declaration to the opposite effect, he must show that either the cost or the standard was unreasonable. In discharging that burden the observations of Wood J in the *Yorkbrook*[5] case make clear the necessity for the LVT to ensure that the parties know the case which each has to meet and for the evidential burden to require the tenant to provide a prima facie case of unreasonable cost or standard.

27. This application was brought by the freeholder, seeking a determination that the sums claimed are payable. Insofar as the claims for payment of service charges are concerned, therefore, the burden lies upon the freeholder to show not only that these costs were incurred but also that they were reasonably incurred to provide services or works of a reasonable standard.

Inspection and hearing

28. The premises were inspected on the morning of the first day of the hearing of both this and a separate breach of covenant dispute concerning Mr Bennett's flats in the building.[6] Also present at the inspection were the parties and their various representatives, all named on page 1. Although the leases date from early 2008 the building is much older, being constructed in the 1960s. Broadly L-shaped, with retail or restaurant units on the ground floor fronted by a concrete canopy for pedestrians, the building has two upper floors of flats under a copper roof. A substantial programme of works to the building and its surrounding common parts is nearing its conclusion. This has included replacement of the windows to all the flats with PVCu double glazed units.

29. The party assembled in the upper car park, under the new canopy or projecting roof over the pedestrian walkway in front of the ground floor shop units. Work to resurface the lower car park (by the free-standing Co-Operative store) is still ongoing, so it was still secured with heras fencing. Access was obtained through the main doors to the residential part of the building. The entrance lobby is spacious, but with a large spiral staircase with plastered sides in the centre. On both first and second floors the landings and corridors are just as spacious and

5 *Yorkbrook Investments Ltd v Batten* [1985] 2EGLR 100

6 A separate decision has been produced for the latter

recently renovated, with fresh paint and carpeting.

30. The tribunal inspected Mr & Mrs Bennett's two flats, numbers 58 and 76, before moving on to another part of the building, accessed by a side entrance, and Mrs Blake's flat 82. This has one large living/dining room plus a built-in mezzanine sleeping area which is approached by a staircase at one side. Mrs Blake pointed out where the former full-width external balcony had now been incorporated within the body of her flat when new double glazing had been undertaken by the freeholder, and she showed the tribunal where the windows regularly leaked at the top.

31. Flats 58 and 76 are smaller, originally with a single long bed-sitting room, with a kitchen, bathroom/WC, and a small external balcony to one side. The balcony has in each case been enclosed by Mr & Mrs Bennett when they first replaced the original softwood windows with PVCu double glazed units in about 2008, so the open balcony is now enclosed as a small utility/drying room. The freeholder has since replaced the Bennett's windows with new PVCu windows matching those used throughout in its refurbishment.

32. Like flat 82, these two flats are on the top floor, immediately under the sloping copper roof, and the ceiling also slopes so that at its lowest point it is above head height, whereas at the inner end of the main room the height is perhaps double. From flat 82 the tribunal was able to look across to the roof of the other wing of the building, where some patching and staining could be seen on the copper roof.

33. The hearing began at 11:25. The tribunal had before it two bundles – a large one for this case and a smaller one for the other case involving Mr & Mrs Bennett. The latter was resorted to from time to time for a clearer copy of the lease. One persistent cause of irritation was the fact that the parties and the three members of the tribunal were working from bundles which, although allegedly identical in content, had different numbering. One bundle was one page out; the chairman's was out by four. Where possible, page numbers shall therefore be avoided in this decision. Another unhelpful tactic was the attempt by the applicant to introduce further documents or photographs that were not in the bundle (and had not been disclosed) by means of passing a laptop or iPad around the room.

34. However, Mr Concannon helpfully prepared for the tribunal a chronology and summary of disputed points, plus a table showing the 2012 exterior budgets. In dealing with one point raised by the respondents this proved invaluable.

35. For the applicant Mr Morton had made a 26 paragraph witness statement appearing at section 4 of the main bundle. Exhibits referred to in his statement were to be found at section 5 (rent and insurance rent demands), 6 (section 20 notices), 7 (correspondence re electrical upgrade and window replacement), a second section numbered 7 (insurance policy schedules), 8 (correspondence with tenants of flats 33, 40, 44, 50, 58 & 76, 66, 73 and 82), and 9 (invoices from suppliers and contractors). A copy lease (also exhibited) was at section 10.

36. The respondents had not filed any witness statements, but relied instead upon Mr & Mrs Bennett's 2 page statement of case appearing at section 2, with its various documents attached. This included, as "document 11.1", a written submission by

Mrs Blake to the applicant, referring to a letter which it had sent to her dated 14th February.

37. Although not in his chronology, Mr Concannon was able on the second day of the hearing to produce some documentation from Norwich City Council about the steps it had taken under the Housing Act 2004. Although the tribunal has not seen any actual notices it would appear that on a date or dates unknown, but well before September 2011, approximately 50 section 11 improvement notices were served alleging excess cold due to the lack of a fixed or central heating system, poor thermal efficiency of walls and ceilings and the fact that th exterior of each flat comprised a large single glazed area above uninsulated panelling. Remedial action required by the notices included the provision of heating, increasing thermal efficiency of ceiling and walls, and provision either of secondary glazing or replacement of the single glazing with double glazed units (while avoiding the risk of excess heat through solar gain by using anti-sun glass).

38. The previous freeholder had failed to comply with notices served upon it, and it was rightly made clear to the applicant upon purchasing the freehold interest that the notices were binding on it and, unless action were taken to comply, Norwich would either do the work itself or take enforcement measures. It was this that encouraged the applicant to draw up a programme of works and embark upon a consultation process.

39. The first consultation notice was sent out by Earlham House Management Ltd in March, but that was as freeholder's managing agent to the then head lessee. Having later acquired this interest (which merged with the freehold) notices were served again, but this time to the address of the lessee of each long leasehold flat, on 20th June 2012. The last date for reply was wrongly stated to be 19th July – one day short. The tribunal was informed that work did not commence until October, except on the freeholder's own flats.

40. Also said to have accompanied the 20th June notice was the 2012 service charge budget, and an invoice for residential maintenance and major works, showing equal amounts due on 25th December 2011 and 25th March 2012, with further amounts falling due on 25th June and 25th September. This invoice did not have with it the prescribed summary of tenants' rights.

41. On 28th June 2012 two other letters were sent; the first referring to a planned electrical upgrade in order to increase the power supply to each flat to 80 amps and bring them into line with current standards. Cabling would be laid along each corridor and those wishing to upgrade their flats immediately would be included in the work. Those who did not would be entitled at a later date, upon payment of a reasonable share of the costs – assessed at around £1 500 plus VAT – to connect to the new cabling outside their flats. Further disturbance to the surfaces in the corridors would thus be avoided.

42. The second letter referred to the freeholder's intention, having recently obtained planning permission to do so, to replace all existing windows in the building with new plastic double glazed window screens, which was said to be necessary to comply with the council's enforcement notices in respect of insulation. In the course of refurbishing the corridors the freeholder also intended to replace all

front doors to the flats with ones made of inlayed oak veneer. These doors would be supplied and fitted entirely free of charge.

43. By letter dated 1st February 2013 Earlham House Management Ltd wrote to the leaseholders again, enclosing invoices for insurance and ground rent, and giving notice that insofar as the major works were concerned, as work was continuing, the accounting period was being extended to the end of June 2013. Again, the invoices were not accompanied by the prescribed summary of tenant's rights. Fresh copies were resent under cover of a letter dated 11th April 2013.

44. The principal issues between the parties were these :
    a. Whether there were any arrears from 2011 or earlier
    b. Whether there was inadequate consultation in respect of the major works because of :
        i. The requirement that documents be inspected at Basingstoke and not locally in Norwich
        ii. Demolition of the concrete canopy before the leaseholders had time to engage their own consultant to advise if a less expensive solution was possible
        iii. The awarding of the window contract to a company which was not one of those responding to the invitation to tender at stage one of the consultation process
        iv. Failure to consider the option of a fibreglass main roof instead of a very expensive copper one
    c. Whether the proportion of the cost attributable to the residential tenants was fair, as only customers of the commercial tenants have access to and use of the car parks (and most use of the canopy above the walkway)
    d. Whether the replacement of the windows was a legitimate service charge expense, as the windows are part of each demise and are a leaseholder's responsibility
    e. Whether the 2012 advance service charge was payable, as a budget had not been issued in late 2011 as the lease requires. Should payment not wait until the audited service charge account was available?
    f. Whether it was reasonable for the freeholder's managing agent to adjust the proportions demanded from residential leaseholders for the 2013 service charge year from the traditional calculation by internal area to an equal amount per flat.

45. As to the first issue, concerning the alleged arrears, the freeholder conceded that upon acquiring the property from an insolvent company the paperwork was light, and beyond statements of account for each flat it had no means of proving that the arrears existed. Mr Bennett had to be reminded, from time to time, that this was not an issue he need dwell upon.

46. As to the consultation exercise, Mr Morton for the managing agent contended that it was a question of practicality of having the paperwork in Norwich, rather than at the company's offices in Basingstoke. As seen during the inspection, the premises that had been used as a caretaker's office by the previous freeholder had been filled with old furniture and other junk from the freeholder's own flats, so there was no "local office" that could be deployed as a place where documents could be inspected. Besides, only two leaseholders had expressed any interest in

seeing them, and they had both made the effort of travelling. Provision was made for them to view the documents and they could copy anything they wanted. They could drill down as much as they wanted and ask for further information. The parties disagreed about whether specifications had been available. Mr Goddard said that he gave written specifications, and insisted that wanted contractors to be from within about a 25 mile radius of the site.

47. Mr Bennett queried why the tenders and invoices were addressed to Hackwood Homes Ltd, an associated company, and not to the managing agent, Earlham House Management Ltd. Mr Goddard said that the latter had no money, and so someone had to fund all this work. Payment was requested from leaseholders but none had been forthcoming. "We had to fund it".

48. When did the work to the walkway and its concrete canopy start? Mr Bennett was sure that the walkway was demolished from 21st July 2012. According to Mr Goddard it was later, as the site diary (which had not been disclosed) refers to a Post Office sign being damaged when the walkway was being demolished. Any workers on site much earlier were starting to tackle the work to the freeholder's own flats as required by the council's improvement notices. Asked by the tribunal why, if there was some urgency in demolishing the canopy, no attempt had been made to apply for dispensation under section 20ZA, Mr Goddard candidly admitted that he had never heard of it.

49. Insofar as the window contract was concerned, Mr Goddard said that they had settled on Zenith, using the Building Regs for advice, and went through several design processes to recreate the original look. "These were the drivers we had and we went out to 5 national contractors to get the best price and spec." Until this point he had received no complaint about the windows being in any way defective, or that they only opened 3 inches. In the course of the evidence it became clear that Zenith had not been one of the companies originally invited to tender, or one mentioned at the next stage of the consultation. Indeed, there was some discussion about whether under the particular Schedule in the Consultation Regulations there was any need to disclose the identities of the bidders, rather than the bids themselves. Zenith was mentioned in a third consultation notice dated 4th October and the contract was signed on 10th October, with work starting five days later. At one point during the hearing it was noted that the windows when fitted were not of uniform colour, and so at a later date the supplier came back and spray painted the surface of those which were not quite so white.

50. Replacement of the main roof with fibreglass, at considerably lower cost than the patch and mend to the existing copper finish, was something that Mr Bennett said that he had raised with Mr Goddard.

51. Mr Bennett had been greatly exercised about the unfairness of the residential leaseholders having to pay a fixed percentage of the total cost of the major works when the cost of replacing the walkway and concrete canopy and resurfacing the car parks was so high. Only the commercial tenants benefited from this work, he argued. In response Mr Concannon produced a schedule showing the budget for major works, and with the tribunal he went through each item, identifying which was for the benefit of commercial tenants, residential ones, or both. Having done so he demonstrated that – if anything – applying the traditional costs split was

slightly more advantageous to the residential tenants. The result was therefore fair, he submitted.

52. Whether the replacement of the windows was a legitimate service charge expense was, Mr Concannon conceded, a matter of construction of the lease. However, the freeholder was responding to notices served upon it (and its predecessor in title) requiring replacement of the windows. A number of private leaseholders had also been in receipt of notices, so something would have had to be done by someone. This did not quite explain why the new double glazed windows to Mr Bennett's flats, installed only in 2008, should also be replaced. They were not the subject of any such notice. The answer seems to have been a desire by the freeholder for uniformity of look, but Mr Bennett said that his windows were FENSA approved and, unlike the new ones, they could open inwards to facilitate cleaning.

53. With the exception of some of the points above Mr Bennett appeared to accept that, as a budget figure for 2012, the amounts were reasonable. However, he fixed on the provision in the lease which required the budget to be presented by the end of the preceding accounting year (ie in late 2011), and that as this had not been done he was under no obligation to pay until an audited service charge account was prepared. (The tribunal was told that audited accounts had now been produced by the accountants, but they were not yet available). Mr Morton made the obvious point that his company had not purchased the property and gained access to the site until May 2012, so had been in no position to issue any budget in 2011. The receivers had still been in control then. Mr Bennett seemed to accept, however, that had demand been made for this sum as a 2013 budget rather than as a 2012 one then he would regard it as payable. The tribunal enquired of Mr Concannon whether time was usually not of the essence where such provisions are concerned.[7] He concurred.

54. Should the service charge percentages payable by each flat be harmonised from 2013 onwards? So far as the freeholder was concerned, while the flats may be of nine different types, once leaseholders stepped out into the corridor they were making much the same use of the carpets and other facilities covered by the service costs. It was therefore reasonable and in the interests of good estate management that an equal charge be imposed. Mr Bennett and Mrs Blake were insistent, however, that the service charge had been calculated by floor area ever since the property was built, and that this was fairest.

Findings

55. Little time need be wasted on the alleged arrears from 2011 and/or earlier. This was a period prior to the applicant's acquisition of the property. A computerised ledger entry, the accuracy of which nobody for the applicant could confirm, is of no help. The existence of such arrears was disputed by Mr Bennett and Mrs Blake. The burden of proof being upon the applicant, the tribunal is not satisfied that any such arrears exist. This aspect of the application is dismissed.

56. 2012 throws up a variety of issues. Most obviously, until it acquired an interest in the property the applicant was in no position to prepare and issue a budget for

[7] See *Commercial and Residential Service Charges* : Rosenthal and others (Bloomsbury, 2013), at 16–15

the year 2012. Mr Bennett is being exceptionally pernickety when he insists that unless a budget is issued at precisely the time mentioned in the lease (which he knows was impossible in this case) then the freeholder is not entitled to recover any money by quarterly payments in advance. Time is not of the essence, and the late service of a budget does not deprive the freeholder of the right to advance payment of service charges on an estimated basis.

57. However, Mr Bennett makes a fair point when he says that the 2012 budget was not realistic, because the dates when tenders were being sought and contracts signed made it extremely unlikely that the works would be completed and the whole contract cost incurred (as opposed to some stage payments) during the last few months of that year. Had this budget been presented to him at the end of 2012 as a 2013 budget then Mr Bennett would have regarded it as an acceptable estimate and thus one he would be obliged to pay.

58. This is all now rather academic, as nothing has been paid to date and the tribunal was informed that audited accounts have now been prepared. It is time for the leaseholders to make their rather large balancing payment in respect of costs that have actually been incurred. That is subject to some provisos.

59. The tribunal regards the consultation process undertaken here by the managing agent as less than competent. The final response date quoted in the first notice was short by a day. A simple mistake perhaps, but not very professional. That management of residential leasehold property is not part of the applicant's core business was made obvious by the candid admission of ignorance about section 20ZA. The notice and tender procedures were also chaotic, with consultation on different aspects running separately instead of a single comprehensive process. Bidders might legitimately complain that a late bid had been accepted (if not encouraged), but the outcome was a reduction in overall cost. Mr Bennett might also legitimately complain that he could not see the tender by Zenith because it had not even been received when he called to inspect the documents.

60. Following the Supreme Court's decision in *Daejan* the tribunal must ask itself, when considering dispensation, whether and to what extent the leaseholders may have suffered prejudice. Can they be compensated for such failure to consult properly?

61. The tribunal doesn't regard the applicant's offices in Basingstoke, over 160 miles away from Norwich by road, as being a place that is reasonable for the inspection of details of the proposed works.[8] Had arrangements been made to inspect them at a nearby hotel on a particular day, or in one of the applicant's empty flats, then more leaseholders might have made the effort to become involved.

62. Would better consultation before demolition of the concrete asbestos canopy have resulted in the outcome sought by one leaseholder in a letter actually sent to the company, namely the replacement of the single canopy by such shops as wanted them putting up their own individual awnings? What of Mr Bennett's proposal that a fibreglass replacement would do? The applicant dismissed both of these as producing something less satisfactory than what was there already. The views of the local planning authority were not canvassed at the hearing.

[8] As required by paragraph 9 in Part 2 of Schedule 4 of the Consultation Regulations

63. Similarly, the suggestion that access to inspect the high main roof could have been obtained by cherry picker when a wide canopy was still in place was rightly dismissed by the freeholder as unrealistic. At least one section of the canopy had to come down before scaffolding could be erected and safe access obtained. As to Mr Bennett's other proposal that the copper roof be replaced by fibreglass, a product liable to deteriorate when exposed to sunlight and the weather generally, the short lifespan of such a product would require regular expensive replacement under full scaffolding conditions.

64. The freeholder would have been right to reject such an option, but provided it is a reasonable choice the decision about what measures to take belongs to it. That does not mean that the work to the roof has been perfect. There are leaks, and the detailing at the tops of the windows allows for no lip to throw water away from the new windows which seem flush with the edge of the old open balconies.

65. Is the split between the commercial tenants and the residential ones fair? This can be answered shortly. Having studied Mr Concannon's analysis of the exterior budget for 2012 the balance of costs, including items of joint benefit, is almost the same as the currently imposed split, or (subject to one major item) would justify imposing a higher cost on the residential leaseholders. The current split is generally fair, and given the leaseholders' attitude to the 2013 adjustment, it seems surprising that they should wish to alter a long-trusted formula.

66. The elephant in the room is the cost of the windows. One can understand the desire to maintain a reasonably uniform appearance, and to engineer the new windows so that they maintain the existing appearance as closely as possible. It is also reasonable that windows in a high building do not open too far, for safety reasons (although previously occupiers had ready access to the open balconies). However, in designing the new windows the freeholder may have overlooked the warning in the improvement notice about avoiding overheating.

67. More seriously, the freeholder was entirely within its rights – and under a duty – to carry out such works to its own 60 flats in the building. It was the party responsible for compliance with the improvement notices. It did not occupy that role in respect of the flats held on long leaseholds. Upon its interpretation of the lease the tribunal finds that the original windows and their frames were part of the demise, as were the open balconies. The reference to the demise excluding the outer surface is a peculiar means of ensuring that the landlord retained the right to decorate the exterior of the window frames, but the body of the window frames and the glass in them were and are the leaseholder's responsibility. By what right can the freeholder interfere with the windows, or with the open balconies? On this last point Mrs Blake was particularly aggrieved, as not only had she lost a space where she might enjoy fresh air but the landlord required her to provide her own new wooden floor to match the oak laminate she already had in the main living room. The persistent leaks from the top of the new windows and the inability to open them more than a few inches did not encourage her to acquiesce in what had been done.

68. For most private leaseholders the true position is this. All the flats suffered from a lack of insulation and adequate heating. Improvement notices either had been or, in the absence of reasonable co-operation, would have been served upon them

as well by Norwich City Council; especially perhaps where (like the Bennetts) the flats were sub-let to tenants. Even in the case of owner occupiers, however, some councils are beginning to test the limits of the Housing Act 2004 by requiring improvements to bring premises up to the Decent Homes standard. How would they comply with a requirement to replace the windows and increase insulation? Legally, they would need the consent of the freeholder, and it might impose conditions for example as to appearance. Practically, they would need either to undertake the work from inside the flat or take advantage of the scaffolding already erected by the freeholder in order to carry out refurbishment of its own flats. They might even ask the freeholder if its contractors could do the work for them, using the same type of window. In short, while legally the freeholder might not be justified in carrying out this work (in which everyone acquiesced, even if grudgingly), the individual leaseholders might have been required to incur just the same cost if not more in order to comply with improvement notices served upon them directly.

69. The position of the Bennetts is slightly different. In 2008 they had already taken steps, perhaps after negotiations with Norwich, to insulate, replace windows and incorporate their small open balconies within the body of their two flats. After doing so they were not at risk of any improvement notices, so the decision by the landlord to replace brand new windows with ones which, arguably, are not as good seems perverse. The only excuse might be a desire for uniformity, but then why not do as was done with the new front doors and not charge for the work?

70. This tribunal therefore is driven to the conclusion that the applicant freeholder was not justified in adding the cost of the windows to the service charge, but if most leaseholders would have been obliged to undertake the same or similar works then as a matter of private contract between freeholder and leaseholder it may be proper that – on the basis of estoppel or unjust enrichment – the cost be recoverable. That, however, is strictly outwith the jurisdiction of this tribunal.

71. In the case of the Bennetts' flats, however, no such considerations apply. The cost of the windows is not recoverable by way of service charge or otherwise. The work was allowed only under protest; a position confirmed in writing by Mr Bennett.

72. Finally, so far as the 2013 adjustment to the percentage shares is concerned, the tribunal is not satisfied on the evidence before it that there is any justification in altering the historic basis of charge, namely by floor area. Neither Mr Bennett (representing many leaseholders) nor Mrs Blake supported this. In the Bennetts' case it is a moot point whether this is a productive argument. Just as was the case with Mr Concannon's analysis of the exterior budget schedule, consideration of whether the new sleeping platforms in flats 58 and 76 are "internal floor area" might lead to an upward adjustment in their percentage shares, with consequent very minor adjustments to everyone else.

73. There are some unsatisfactory aspects to the service charge provisions in these leases, but in some aspects the landlord's (or its surveyor's) discretion has been limited by historic precedent. It is a matter for the freeholder and leaseholders to decide whether any mutually beneficial variation to the leases may be agreed, but in the meantime the tribunal must rule on the leases as it finds them.

74. For the avoidance of doubt, although the tribunal has disallowed the estimated cost of the replacement windows it sees no justification in the case of the major works expenditure for altering the historic split in service charge costs between the commercial and residential tenants. It also wishes to emphasise that, apart from the 2011 service charges (which have been disallowed), the tribunal has been dealing with what the freeholder might reasonably recover as service charges payable quarterly in advance against a budget of estimated expenditure. Save where the tribunal has made specific findings this decision does not preclude any leaseholder from seeking to challenge a demand based upon the actual expenditure incurred, on the grounds of poor quality or unreasonable cost, once that is known.

75. Finally, the tribunal wishes to make clear that in granting dispensation from the rigours of the section 20 consultation procedure it imposes a condition that the freeholder be responsible for its own costs of this application. Sound legal advice at an early stage could have avoided a number of the problems encountered. In the alternative, should a higher tribunal consider that the consultation was acceptable and dispensation not required, then the tribunal notes that in respect of each service charge year the respondents have emerged the winners, to some extent at least. In those circumstances the tribunal would determine under section 20C that the freeholder's costs of this application are not recoverable by way of service charge from any of the respondents.

Dated 18th November 2013

Graham Sinclair
Tribunal Judge