10838

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**CAM/33UG/LSC/2014/0085**
Property	:	Earlham House, Earlham Road, Norwich NR2 3PE
Applicants (A)	:	Mr Richard Bennett and others, being the various long leaseholders of flats 13, 17, 28, 32, 38, 40, 44, 48, 58, 66, 71, 73, 76, 79 & 82 Earlham House, whose names and addresses appear on a list annexed to the application form
Respondent (A)	:	Bellgold Properties Ltd
and		
Applicant (B)	:	Bellgold Properties Ltd
Respondents (B)	:	Adefunki Oluwatomi Adewumi and others, being the various long leaseholders of flats 13, 17, 28, 32, 38, 40, 44, 48, 58, 66, 71, 73, 76, 79 & 82 Earlham House, whose names and addresses appear on a list annexed to the application form
Type of Application	**A**	For determination of payability of service charges for the years 2012–2013 [LTA 1985, s. 27A]
		For an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with these proceedings before the tribunal 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 [LTA 1985, s.20C]
	B	For dispensation with all or any of the consultation requirements provided for by s.20 [LTA 1985, s.20ZA]

DECISION

Tribunal Members	:	G K Sinclair, G F Smith MRICS FAAV REV, and D S Reeve MVO MBE
Representation		*Landlord* – Mr Marcus Cover, in-house solicitor
		Residential tenants – Mr Bennett
Date and venue of Hearing	:	Monday 30th & Tuesday 31st March 2015 at Norwich Magistrates Court
Date of Decision	:	Thursday 7th May 2015

Summary

1. The respondent company in the first application and applicant in the second ("the company") is the freehold owner of a purpose-built 1960s building 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 tenants. 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 tenants are in a minority, as 61 of the 85 flats are held directly by the company. 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 (including the electrical supply 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 company asked the tribunal in 2013[1] 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. In paragraph 5 of its 2013 decision the tribunal summarised its findings thus :

> 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

[1] See the decision in Case Ref CAM/33UG/LSC/2013/0086 dated 18th November 2013

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 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.

4. Findings b & c are relevant to the present applications, as Mr Bennett on behalf of the residential tenants sought to argue that although the earlier tribunal had found the budget acceptable (save for the windows) it did not say that it was payable (as advance payments of service charge). In the current application the company adduced evidence which, it said, justified an alteration in the method of apportionment of cost from one based on internal floor area to one of equality between residential tenants.

5. For the reasons which follow this tribunal determines :

a. That the amounts appearing in the Schedule annexed are reasonable and, on service of valid demands for the appropriate proportions, are payable by the residential tenants

b. That the company has demonstrated by evidence that apportionment of the service charge amongst the residents in this building on an equal basis is within the range of reasonable management decisions that a landlord or manager could take in the interests of good estate management, and it is therefore entitled to do so

c. That the statutory consultation requirements in respect of the two aspects of the work sought by the company are dispensed with

d. That, as the Co-operative Supermarket site is freehold land and there is an issue about the enforceability of its liability to contribute a fair share of the service charge expenditure for maintenance of the car park, etc. under a rent charge, the tribunal cannot assume that 50% of certain costs should be apportioned to that third party – as argued for by Mr Bennett

e. However, the company's acquiescence in the erection of signs in the car park by its contracted parking operator to the effect that parking is for shoppers only, and limited to 2 hours, is contrary to the easement granted by a number of the residential leases and a derogation from their grant. Without implementation of such rights it would be unreasonable for the flat tenants to have to contribute to service charge costs for a facility from which they were wrongfully excluded. (The interests of the company's commercial tenants on the ground floor are not within this tribunal's jurisdiction). Concerted 24-hour use of such easement, on the other hand, might apply pressure upon the supermarket to reconsider its outright refusal to make any contribution whatever to the costs of upkeep of the car park, the use of which one suspects contributes in large part to the

continued profitability of its business

f. That although the outcome overall is favourable to the landlord, and the tenants failed to demonstrate (in relation to the section 20ZA application) that they had suffered any real prejudice, it is correct that it was only when the tenants instructed solicitors for a time that the existence of a trust fund for their benefit was finally proved. A fair balance can, the tribunal considers, be struck by requiring each party to pay their own costs, and an order is made under section 20C (which application was not really resisted by Mr Cover) that none of the landlord's costs of these applications and hearing shall be regarded as relevant costs for the purposes of calculating any service charge payable by any of the applicant tenants.

Material lease provisions

6. A copy of a specimen lease dated 15th February 2008, for flat 76, was granted by Relayarch Ltd (the previous freeholder) to Lawrence Leby 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. 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;...

13. Detailed provisions for payment of the service costs appear in paragraph 2 of part 3, subject to certain provisos in paragraph 3.

14. Paragraph 3.5 of part 3 of schedule 6 is also relevant to one issue in dispute, viz the means by which each flat's proportion of the service charge expenditure is to be calculated. 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

15. 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...

16. 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.

17. 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.

18. Two further provisions, concerning demands for payment of service charge, have been put in issue or are relevant to this case. First, by section 47 of the Landlord and Tenant Act 1987, where any written demand is given to a tenant of premises for rent or other sums payable under the lease (which expression would include a demand for payment of service charge), the demand must contain the name and address of the landlord.

19. Secondly, since 1st October 2007 section 21B of the 1985 Act provides that 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. The content of that summary is prescribed by the Service Charges (Summary of Rights and Obligations, and Transitional Provision) (England) Regulations 2007.[2] The document must contain the prescribed heading and text and must be legible in a typewritten or printed form of at least 10 point.[3]

20. Insofar as major works are concerned, 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).

21. As amended, section 20ZA(1) of the Landlord and Tenant Act 1985, provides :

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

22. When determining whether it is satisfied that it is reasonable to dispense with the requirements the Supreme Court stated in *Daejan Investments Ltd v Benson & others*[4] that the emphasis should be on any prejudice suffered by the tenants, and that the following points should be borne in mind :

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 tribunal should focus on whether the tenants were prejudiced in either respect by the failure of the landlord to comply with the requirements

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

2 SI 2007/1257

3 *Op cit*, reg 3

4 [2013] UKSC 14; [2013] 2 All ER 375

c. The tribunal has power to grant dispensation on appropriate terms, and can impose conditions on the grant of dispensation, including a condition as to costs that the landlord pays the tenants' reasonable costs incurred in connection with the dispensation application

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

e. While the legal burden is on the landlord throughout, the factual burden of identifying some relevant prejudice is on the tenants. 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

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

g. Insofar as the tenants will suffer relevant prejudice, the tribunal 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.

Burden of proof

23. In *Schilling v Canary Riverside Development PTD Ltd*[5] His Honour Judge Rich 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*[6] case make clear the necessity for the [tribunal] 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.

24. The principal application was brought by the tenants, seeking a determination as to the reasonableness and payability of the sums claimed. Insofar as the claims for payment of service charges are concerned, therefore, the burden lies upon

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

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

them to show that these costs were not incurred or were not reasonably incurred to provide services or works of a reasonable standard.

Inspection and hearing

25. The premises were inspected over the course of 35 minutes on the morning of the first day of the hearing. Also present at the inspection were the parties and their various representatives. 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 light projecting 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 has been completed since the tribunal's last inspection in 2013. This has included replacement of the windows to all the flats with PVCu double glazed units and the resurfacing of both the upper and lower car parks.

26. The tribunal inspected the ground floor entrance and first floor corridors on the main part of the building, exiting by one of the rear doors to check a concrete external landing and staircase and where obvious leaks had affected the ceilings and skirting boards immediately inside the door on the top floor, where there appeared to be a problem with the flashing at the base of the pitched copper roof where it met the concealed guttering. Apart from such issues near the rear exits, when one compares the current decorative condition – with painted wallpaper, smart new fire doors and carpets on the floors – with photographs of the internal corridors before the current landlord's acquisition of the premises the overall impression is that the building is bright, modern and of a much higher standard than the dull, dreary, echoing and unloved municipal hallways of yesteryear.

27. The tribunal walked around the rear of the building and re-entered by an external staircase at the south east corner in order to inspect the interior of Mrs Blake's flat 82 and some defects with the roof immediately above her new windows (as replaced by the landlord and discussed in the tribunal's previous decision). On entering the flat the tribunal noted that the internal atmosphere was very warm and humid, as explained by the facts that a very young child was present and the washing machine had been on earlier. Some condensation was present on the inside of the windows, but equally the tribunal was able to observe where damp had penetrated the ceiling just inside the windows, indicating a leak through the roof or roof plate above the front wall of the flat.

28. At the front of the building the tribunal noted how the car parking areas had been tidied up, and how bollards had been placed to try and prevent vans or other large vehicles from reversing too far into the pedestrian walkways or (not entirely successfully) into the canopy. Damage to part of the canopy in the upper car park was pointed out. This had apparently happened about two years ago but had neither been repaired nor made the subject of an insurance claim. In the same location the tribunal also noted that a persistent leak from the gutter in front of the canopy was perhaps caused by a rather poor connection between a half-round section of gutter to one side and deeper, U-shaped guttering on the other. Why there should be such a mismatch was unexplained.

29. One of the tenants' complaints concerned costs associated with the larger lower car park, immediately below the Co-operative supermarket. Around the edges

of the car park numerous signs are to be observed stating, inter alia, that it is a free shoppers car park, that it maybe used for a maximum of 2 hours while using the Earlham House Shopping Centre only, that there is to be no return within 2 hours, and that no overnight parking is allowed. Anyone not complying with such terms and conditions is said to agree to pay a parking charge notice of £100 (reduced to £60 if paid within 14 days). This notice is not in compliance with the unlimited right to park in any available space granted by the applicants' leases.

30. The hearing commenced at 11:38. On this occasion the landlord was represented by its in-house solicitor, Mr Marcus Cover, and – although for a time they had engaged the services of Birketts solicitors in the preparation of their case – the tenants were again represented by Mr Bennett, who had Mrs Blake with him.

31. The tribunal had before it a 732 page, 2-lever arch file hearing bundle comprising statements of case, witness statements, the tribunal's previous 2013 decision, directions issued for these cross-applications, demands, budgets and accounts, suppliers' invoices for 2012 and 2013, revised floor area calculations, photos and correspondence - with Norwich City Council, the tenants (including consultation documents), and with the Co-operative Group's lawyers concerning the car park and ostensible liability to contribute to the costs of its maintenance under a rent charge. The bundle also included a consulting engineer's and an asbestos report. Mr Bennett supplemented these on day one with a chronology and on day two with a detailed schedule setting out the sums claimed and the amounts (if any) conceded by the tenants.

32. The tribunal heard from Mr Bennett for the tenants and, on behalf of Bellgold Properties, from Mr Goddard (director), Paul Williams (construction director of Hackwood Homes) and Graham Snowley (contracts manager).

33. Much of day one was spent with Mr Bennett taking the tribunal through his own statement, correcting the page numbering so that it matched the bundles in use. It was unhelpful that some documents bore up to three different numbers. When challenging certain figures claimed by the landlord Mr Bennett would unhelpfully state that he had spoken to X, who had given him a different price for an item. However, such alternative figure was never backed up with a report, statement or even a letter. At the start of day two, prompted by the tribunal, Mr Bennett handed in a schedule of amounts claimed by the landlord and the amounts that tenants were prepared to concede – if any. This was more helpful in narrowing the issues but, as Mr Bennett was seeking to represent all the other applicants without the benefit of legal advice, the tribunal approached some of his overnight concessions with caution.

34. Despite the findings made in the tribunal's previous decision Mr Bennett sought again to argue about the reasonableness of the canopy replacement and of using copper instead of glass reinforced plastic (GRP) on the main roof. Mr Goddard said that one cannot just repair a landmark building in a conservation area with GRP. Bellgold had sought tenders for repairs to the copper roof. The number of contractors undertaking such work is limited, but he had gone with the cheapest. Replacing the entire roof is not a viable option for service charge paying tenants.

35. Mr Bennett argued that the cost of the internal redecoration was extravagant,

with no need for paper instead of paint on the corridor walls. Mr Goddard, by contrast, said that he had started his career as a City & Guilds qualified painter and decorator, that the walls in the corridors had many hairline cracks, and that applying vinyl paper before painting concealed such defects. The paper was a standard type available in all good builders' merchants and was not expensive. Mr Bennett's suggestion that entire sections of wall would need to be redecorated if just a small area was marked or damaged was wrong. The cost difference was marginal.

36. The charges for upgrading the electrical cabling in the corridors and to each flat, and Bellgold's offer to test and upgrade the wiring in each flat for an additional £1 500 were discussed at length. Upgrading the heating was a requirement of the notices served by Norwich City Council, and the landlord regarded the cabling in the common parts as a legitimate service charge cost. Connection to each flat, which involved electrical safety testing, etc within each flat was priced at £1 500 because Bellgold/Hackwood did not want the work, and it was in any event time limited. Any tenant could engage his or her own electrical contractor and make the connection without charge.

37. The tribunal heard from both parties about the maintenance and repair of the car park, of how the Co-op's legal department refused to concede any liability to contribute under an unregistered rent charge, and therefore how it was wrong for Mr Bennett to seek to persuade the tribunal that 50% of the cost should be attributed to that third party from whom there was no lawful means of obtaining recovery.

38. There was also discussion about how the landlord's parking contractor had put up notices imposing conditions conflicting with the tenants' right to park. At this point Mr Cover interjected that all new leases granted by the landlord did not enjoy such an express easement, and – raising another point entirely – that their contribution to the service charge liability was on the basis of equal shares. The landlord drew the tribunal's attention to the recalculation of floor areas that it had undertaken following the last tribunal, and to correspondence with the tenants announcing its intention, in the interests of good estate management, of apportioning liability for flats which did not differ much in size and maximum occupancy levels on an equal basis. It was unlikely that the use of services and wear and tear on facilities by the occupants of each flat would be appreciably different, so the landlord has no reason to apportion the cost other than equally.

39. On the subject of Mr Bennett's persistent refusal to pay anything towards the service charge, he said that he was yet to receive a valid demand, although he had received a demand (not naming the landlord) with separate covering letter from Bellgold which did.

40. Mr Goddard was satisfied that every supplier's invoice had been settled and that the service charge accounts were based on liabilities of the management company that had been settled by Bellgold – being the only party with the funds to pay. He also confirmed that with the exception of those defects noted on inspection (leaks by the rear doors from the junction of the copper roof with the wall, and in flat 82) he regarded the refurbishment as complete. He anticipated that the service charge liability would in future be much more modest and therefore recalculated

it on the basis of equality. Now that the property had been refurbished and the majority of the flats let on long leases it was his company's intention to sell the freehold, and appropriate first refusal notices had been served on the tenants.

41. Questioned about some of the larger items such as site management, Mr Goddard said that a JCT contract had been signed between Bellgold and Hackwood Homes as main contractor. Although Mr Bennett was exercised by the fact that no such contract had been "registered" it was explained that no such concept applies, and there was no dispute between employer and main contractor. A fee of 13.5% was imposed for site management under the contract; not the 10% that his office may originally have mentioned.

42. Mr Williams was able to provide the tribunal with more detail about the contract works and costs, in particular those for internal redecoration. After breaking them down into individual cost items he produced a global figure of £86 402.53. He was able to explain in some detail about the removal of asbestos from the trunking around service pipes. While the outer surface of such trunking might form part of the demise of each flat access had to be gained from one such flat in order to remove a blockage in a pipe (probably caused by one of the restaurants on the ground floor – not by builders' rubble as Mr Bennett seemed to suggest). When opening the void asbestos was exposed and so it was considered sensible just to remove the lot.

43. During the refurbishment Mr Snowley had lived in one of the flats on site. The short let tenants had to be evicted so that work could be done, and some tried to stop it from happening. He experienced a lot of harassment and other problems, including protesters, pushing and shoving, people banging on his door late at night making threats, plus some residents climbing out of their flats and on to the scaffolding at night. One of the flats was broken into and copper pipe stolen, causing a leak right down into one of the restaurants below. There was therefore a need for increased security, with guards patrolling the site.

44. Contrary to Mr Bennett's belief, the copper removed from the roof was not stolen from site; it had been removed from site by the contractor, which had presumably factored the scrap value of the metal into its contract price.

45. On behalf of the landlord Mr Cover accepted that there were certain items in the service charge accounts (such as legal costs of the previous tribunal and internal management costs) which should not properly be included. He asked for finality, for apportionment on the basis of equality, and for a clear declaration that sums were now payable in view of Mr Bennett's past refusal based on his interpretation of the 2013 decision. He also recognised that the figures had changed once he discovered the existence of a trust fund (obtained somehow from the Receiver selling on behalf of the vendor), of which the benefit was passed on by Bellgold to the tenants. Their liability was therefore reduced by a significant amount.

46. The tribunal asked him about how the cost of scaffolding should be apportioned, as it was partly for the copper roof repairs and partly for the replacement of windows (which the previous decision had determined was not a service charge cost). Asked if this should be split equally he argued that the company was working at the roof perimeters, but also on guttering, downpipes, fascias, soffits,

and gables. This was a live commercial site, so it was necessary to protect the public from danger, especially from a large section of the roof in the corner above the Chinese restaurant. By contrast, Mr Bennett argued that only 10% of the scaffold cost should be included.

47. Mr Bennett challenged many of the alleged costs in his closing remarks, although while he was prepared to accept a site Management charge of 10% (which they had originally been told) and not 13.5% he did not see why EHML should receive a further 10% management fee for doing practically nothing. He maintained that 50% of the car park maintenance, repair and lighting costs should be shared with the supermarket. He also considered that the application for dispensation was rather late in the day, and the tenants should have their costs paid by Bellgold as a condition of obtaining relief.

Findings

48. The tribunal met again on Friday 3rd April 2015 to consider all the evidence and submissions by the parties and make findings on some of the larger items before working through Mr Bennett's schedule produced at the beginning of day two. The tribunal's findings on each item can be seen in the right hand column of the schedule annexed to this decision, but below is the reasoning employed.

49. *Roofing* – The burden is on the tenants to show that repairing the copper roof was an unreasonable course of action, and that a specific alternative would have been better. Mr Bennett has not done so. The cost is allowed in full.

50. *Scaffolding* – Here the tribunal does have greater sympathy for the tenants. This was needed both for the roofing work and the replacement of windows and additional work required to each balcony. The work to the windows, etc which was disallowed by the tribunal previously would require additional waste chutes than needed for the roof, and it is fair to apportion the expense by time and cost of erection. Doing the best it can the tribunal allows 50% of the cost; not the 10% argued for by Mr Bennett.

51. *Car park repairs and drain repair* – These are service charge items and are recoverable. As perhaps the major user of the lower car park and its exterior lighting it is appropriate that this cost be shared by the supermarket, but whether the rent charge dealing specifically with making a contribution to this expense can be enforced against the Co-op is not within the jurisdiction of this tribunal. What is surprising, however, is Bellgold's lack of enthusiasm for negotiating a payment from the Co-op. If, as was said in evidence, this is the best-performing Co-op store in Norwich (or the region) then one wonders how its profitability might be affected if most of the car parking spaces were occupied full-time by residents entitled under their (or their immediate landlords') leases to do so, thus making them unavailable for use by customers. The signs purporting to restrict parking to customers of the shop units and supermarket and threatening tenants with parking fines are unlawful and should be removed. Attempts to fine tenants using the car park can be ignored. If new residential tenants do not enjoy such rights, and if those that do are issued with parking permits, then access can still be controlled to the benefit of the Co-op and commercial tenants and unwanted use by residents of neighbouring streets can be discouraged. It must not be forgotten that the car park is Bellgold's land, and Co-op customers only have an

easement to use such spaces as may be available.

52. If the landlord can negotiate a deal to share the cost of lighting and maintenance with the Co-op then that is a benefit from which the commercial and residential tenants should all benefit. If no deal can be negotiated then neither the Co-op nor the landlord can complain if tenants combine to make the most of their right to park, leaving few spaces available for Co-op customers – or its ex-customers. In the meantime the entire service charge cost must be borne by the tenants.

53. *Internal decoration* – Mr Bennett's arguments illustrate the difference in view between the residential tenant and the investor. The latter wants to maximise income while minimising outlay. The resident, on the other hand, has bought a home and – while still anxious to keep costs down – wants the premises to look good and be well-maintained. Comparing the photographs of the building's past with what has been seen twice now on inspection the tribunal agrees that the use of carpets will reduce sound transmission and improve the look of the building. The cost of wallpaper and paint is marginally more expensive than filling every hairline crack and then painting the plaster surface. The overall effect is pleasing, and the impression created by the entrance lobby and corridors must surely add value to the flats. By contrast, Mr Bennett's figures were wholly unrealistic and unproven, and the proposed work minimalist. The cost incurred was justified and the amount claimed is recoverable in full.

54. *Electrical work* – As the confusion over the supposed £1 500 connection charge and the precise nature of the work done have been explained the tribunal has no hesitation in allowing this cost as a service charge item, dispensation being granted. The intention was to bring up to standard the electrical provision within the building so that tenants, if they wished to do so, could connect safely to it and upgrade their heating.

55. *Lighting maintenance* – This is a combination of internal common parts lighting plus external perimeter, car park and walkway lighting. In fact some of this could best be described as installation (eg uplighters, ceiling lights, PIR controls) rather than maintenance. Of good quality, it benefits all tenants, commercial and residential, who pay their respective shares. Some of the cost includes lighting to the car parks. The same arguments concerning the Co-op apply here. This is recoverable in full unless or until any contribution is forthcoming from third parties, dispensation being granted.

56. *Landscaping* – If this were only for grass cutting and some weeding then the price would be rather high. However, it was explained that this also included some major work crowning trees along the Recreation Road boundary, which will have involved Norwich City Council and/or highways officers, road restrictions, and working at height. This is allowed in full.

57. *Litter control* – This was not challenged in the tenants' statement of case, witness statement or argument until it appeared for the first time in Mr Bennett's schedule on day two. It is allowed in full.

58. *Pest control* – This is reasonable and is allowed in full

59. *Remove excess signage* – As explained to the tribunal, this refers to the removal from the gable wall of the building facing Earlham Road of signs advertising some of the businesses on the ground floor. If the signs were erected without permission and in breach of the individual tenants' leases then this is a cost that should be charged to them, not to the tenants as a whole through their service charge. It is disallowed in full.

60. *Asbestos removal* – Apart from the issue whether the asbestos panels comprise part of the demise of the various flats, the tribunal is not satisfied that this was strictly necessary. In the bundle at page 363 onwards is an asbestos report obtained by the landlord. Having read it the tribunal notes that apart from two insulation board risers in the corridors which contain chrysotile (white) and amosite (brown) asbestos, described as being in fair condition, the only other noteworthy items in the common parts are non-notifiable. If left undisturbed there is usually no need to remove such items. This item is disallowed.

61. *Security* – the tribunal takes into account that security was provided on site for the duration of the works, which included the locally controversial refurbishment of flats previously let on assured shorthold tenancies but later sold on long leases, plus the replacement of windows and related works to balconies. This took far longer than just the roofing works. This work is one of the aspects for which the landlord seeks dispensation from the consultation requirements. Doing the best it can the tribunal considers that a fair apportionment is to allow one third of the cost. Dispensation is granted.

62. *Site management* – The tribunal accepts that the contractual rate in the JCT contract was 13.5%. Having examined a number of invoices it notes that this rate has been consistently applied. It is clear that proper supervision of the site has taken place and the tribunal allows this percentage in full, rather than the 10% eventually conceded by Mr Bennett, albeit applied to a lower total.

63. *EHML management charge* – This is claimed at the rate of 10% of expenditure, in the sum of £46 568.76 for 2012 and £11 474.63 for 2013. Unlike the charge for site management the tribunal struggles to see where EHML put a foot right. It is prepared to allow a modest sum for arranging the building insurance but very little else. The demands are poor, there was a lack of consultation in respect of some significant expenditure, and what became evident during the inspection was that it had no knowledge – from periodic inspections or otherwise – of the true condition of the premises. The leaks through the roof, especially around the rear exits, came as a complete surprise to those officers attending on the day. The tribunal is prepared to allow £50 per unit in each of these two years.

64. *Light and heat* – Mr Bennett sought to argue that the invoices produced only justified a fraction of the sum claimed. However, while incomplete, the invoices did disclose the previous month's totals for which payment had been received. The tribunal considers, on balance, that the landlord is more likely to be correct and allows the sum claimed in full.

65. A point taken by Mr Bennett was that the demands for advance service charge served upon him were invalid as they did not include the name and address of the landlord on the actual demand. The definition of a "demand" is rather vague. Is

it a single document or can it comprise a number of documents served at the same time and from the totality of which all essential information is provided? The landlord argues that the demands were lawful because the relevant details were included in a covering letter. Section 47 of the 1987 Act provides that the demand "must contain" the relevant information. By contrast, regulation 3 of the 2007 Regulations provides that the prescribed summary "must accompany" the demand. One cannot always read over a term in one statutory provision to one in a different statute or statutory instrument, especially when 20 years apart, but as the subject matter of each is so very similar the tribunal is prepared to accept that if a summary can "accompany" a demand by being included in a separate document, then if the demand "must contain" the landlord's name and address it is reasonable to assume that such information must be in the same document, not in a separate one which accompanies it. The net result is that no interest is payable on the sums purportedly levied in advance, and that it shall only run from the expiry of the payment period specified in the lease after service of a valid demand calculated on the basis of the global service charge expenditure shown in the annexed schedule.

66. Although the outcome overall is favourable to the landlord, and the tenants have failed to demonstrate (in relation to the section 20ZA application) that they had suffered any real prejudice, it is correct to say that it was only when the tenants instructed solicitors for a time that the existence of a trust fund for their benefit was finally proved. A fair balance can therefore be struck by requiring each party to pay their own costs, and an order is hereby made under section 20C (which application was not really resisted by Mr Cover) that none of the landlord's costs of these two applications and the hearing shall be regarded as relevant costs for the purposes of calculating any service charge payable by any of the applicant tenants.

Dated 7th May 2015

Graham Sinclair

Graham Sinclair
Tribunal Judge

SCHEDULE

Service charge accounts for 2012-13 and 2013 (2nd half) as determined by the tribunal

A. Extended accounting period – 1/1/12–30/6/13 (18 months)

Item	Landlord	Tenants	Comment	Allowed
Demolish walkway	19,800.00	0.00	Allowed	19,800.00
Replace covered walkway	76,000.00	300.00	Allowed	76,000.00
Scaffolding	42,269.62	0.00	Allow 50%	21,134.81
Roof repair	65,235.31	0.00	Allowed	65,235.31
Repaired/replaced rainwater goods	32.01	32.00	Not disputed	32.01
Car park repair/maintenance	6,891.42	3,445.71	Allowed	6,891.42
Car park drain repair	1,594.00	797.00	Allowed	1,594.00
Repair external staircase	5,340.00	0.00	Allowed	5,340.00
Redecorate external staircase	2,081.51	2,081.51	Not disputed	2,081.51
Redecorate #	86,402.53	12,926.00	Allowed	86,402.53
Landscape maintenance	6,700.00	1,500.00	Allowed	6,700.00
Litter control	609.80	0.00	Allowed	609.80
Pest control	4,181.25	2,090.63	Allowed	4,181.25
Remove excessive signage	2,818.77	0.00	Not a s/c cost	0.00
Aerials	16,010.00	16,010.00	Not disputed	16,010.00
Electricity supply/ lighting power supply #	20,731.35	0.00	Allowed	20,731.35
Lighting maintenance #	12,564.52	500.00	Installation	12,564.52
Asbestos removal #	14,475.00	0.00	Disallowed	0.00
Security #	26,560.32	0.00	Allow 33.3%	8,853.44
sub-total	410,297.41	39,682.85		354,161.95
Site management @ 13.5%	55,390.15			47,811.86
EHML management charge @ 10% of above	46,568.76	0.00	£50 per flat pa x 85, 18 mths §	6,375.00

Item	Landlord	Tenants	Comment	Allowed
plus				
Motor & travel	903.71	903.71	Part of fee for management	0.00
Subscriptions	218.75	0.00	Not a s/c cost	0.00
Legal & professional	15,329.56	200.00	Telecom survey cost only	200.00
Sundry expenses	75.00	0.00	Disallowed	0.00
Light & heat	4,842.74	2,421.37	Allowed	4,842.74
Postage, admin & accountancy	4,006.34	1,695.55	Not proved as s/c cost	708.00
Clean communal areas	8,293.00	2,241.75	As supported by invoices	4,483.50
Interest on funding	4,722.00	0.00	Disallowed	0.00
Interest received	(28.00)	(28.00)	incl in above	0.00
Total service charge (18 month period)	550,619.42			**418,583.05**

Notes :

= s.20ZA item

§ = Management fee calculated for residential flats only. Commercial tenants may also contribute, and total service charge is split between commercial and residential tenants in accordance with landlord's formula. This figure may therefore require adjustment.

Turn to next page for 1/7/13–31/12/13 service charge

B. Catch-up accounting period – 1/7/13–31/12/13 (6 months)

Item	Landlord	Tenants	Comment	Allowed
Car park maintenance	69,848.35	19,800.00	Allowed	69,848.35
Walkway maintenance	(2,300.00)	(2,300.00)	Approved	(2,300.00)
Repairs & maintenance	33,592.09	5,148.14	Allowed	33,592.09
Site management @ 13.5%	13,607.31	2,264.81	Allowed	13,607.31
EHML management charge	11,474.63	0.00	£50 per flat pa x 85, for 6 mths §	2,125.00
Plus Administration				
Motor	0.42	0.42	Part of fee for management	0.00
Postage, admin & accountancy	145.20	145.20	As above	0.00
Legal and professional	12,850.00	0.00	Withdrawn	0.00
Accountancy	1,987.00	458.00	No doc proof	0.00
Sundry expenses	152.10	0.00	No doc proof	0.00
Light and heat	1,661.69	133.49	Allowed	1,661.69
Repairs and maintenance	393.75	0.00	Allowed	393.75
Cleaning	4,011.50	2,005.75	Allowed	4,011.50
Interest on funding	5,630.31	0.00	Disallowed	0.00
Interest received	(1.38)	(1.38)	incl in above	0.00
Total service charge (6 month period)	153,052.97			**122,939.69**

Note : § = see note on previous page