12374

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**LON/00AW/LSC/2017/0076** **LON/00AW/LDC/2017/39**
Property	**Flat 2, 101 Ledbury Road, London W11 2AQ**
Applicant	**Ms Jasmine Arora**
Representative	**Ms A. Halker (Counsel)**
Respondent	**Mr Ali Morad Yazdi Nodouchani**
Representative	**Mr J. Hardman (Counsel)** **Ms Danish Ahmad** **(David Adams Surveyors)**
Types of Application	**Liability to pay service and administration charges under Section 27A of the Landlord & Tenant Act 1985 and an application for a Dispensation Order under Section 20ZA of the Act, and a Section 20C Costs Application under the same Act.**
Tribunal Members	**Judge Shaw** **Ms S. Coughlin MCIEH** **Mr P Clabburn**
Date and venue of Hearing	**10 Alfred Place, London WC1E 7LR**
Date of Directions	**30th March 2017.** **Amended on 4th April 2017**
Date of Hearing	**17th and 18th August 2017**
Date of Decision	**14th September 2017**

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DECISION

Introduction

1. This case involves three separate applications in respect of the property situate and known as Flat 2, 101 Ledbury Road, London W11 2AQ ("the Property"). The Applicant in the first application in time is Ms Jasmine Aurora ("the Applicant"). The Applicant is the leasehold owner of the property.

2. The property forms part of the building at 101 Ledbury Road which is divided up into four residential flats. The owner of the building and of the basement flat is the Respondent in the Applicant's application, namely Mr Ali Morad Yazdi Nodouchani ("the Respondent"). The Applicant's application is made pursuant to Section 27A of the Landlord & Tenant Act 1985 ("the Act"). It was made on 23rd February 2017. The application was originally supported by the other two leaseholders in the building, but their cases were settled with the Respondent in mediation. The matter before the Tribunal therefore is the Applicant's application for a determination of the reasonableness and payability of service charges and administration charges for the service charge years referred to in the Directions, that is to say 2012/13 – 2017/18. The service charge year runs from March of one year to March of the following year.

3. There is a second application dated the 4th April 2017 made by the Respondent. That application is for an order for dispensation of the consultation requirements of Section 20 of the Act. Finally, there is a Section 20C application made by the Applicant, for an order by the Tribunal to the effect that no costs incurred in dealing with these applications should be charged to the service charge account.

4. The building comprises five storeys (including a mansard roof and basement level) and contains a basement, ground, first, second, and third floors. There are four residential flats within the building and flats 3 and 4 are combined and spread over two floors. The Applicant owns the top floor and the Respondent owns the basement flat, together with the freehold of the building.

The Hearing

5. The parties, together with their representatives, appeared before the Tribunal on 17th August 2017 and the hearing proceeded over that day and the following day, 18th August 2017. The Applicant appeared in person represented by her Counsel Ms A. Halker. The Respondent also appeared in person represented by Counsel, namely Mr J. Hardman. Ms D Ahmad MRICS of David Adams Surveyors also attended and assisted the Tribunal by giving some oral evidence, as did the Respondent himself. The parties had prepared between them four very full ring pull files running to some 4,000 pages approximately, three of the files having been prepared by the Applicant and a further file on behalf of the Respondent. At the hearing the Tribunal was very much assisted by a Skeleton Argument prepared by Mr Hardman on behalf of

the Respondent which helpfully isolated the disputed matters in respect of each service charge year. Ms Halker on behalf of the Applicant confirmed that the relevant issues had indeed been isolated in that Skeleton Argument, and all parties were content for the Tribunal to work its way through the listed matters within that Skeleton, hearing the evidence and submissions in respect of each such matter during the course of the hearing. In the event the hearing did indeed proceed in that manner. There were some ancillary items which were dealt with separately and which did not appear in the Skeleton, but those will be covered in the context of this decision.

6. The parties further confirmed that since the service charge accounts may have to be adjusted in a manner not easily achieved during the course of the hearing (involving accounting recalculations) that they would be content if the Tribunal would make its findings on the specific disputed matters raised in the Skeleton referred to, and thereafter the parties would make such adjustments to the service charge account for each year in the light of those findings. It is proposed accordingly to take that course in the context of this decision, and to make findings in respect of each such disputed matter.

7. The matters are referable to each service charge year in dispute, and the Tribunal will deal with the issues on an annual basis.

Service Charge Year 2012/13

8. The Applicant put the Respondent to proof of the sum claimed in respect of insurance for that year in the sum of £2,300. The Respondent conceded that the incorrect sum had been demanded and that this figure should be reduced to £1,194.91. The premium document was produced to the Tribunal and the lesser sum agreed by the Applicant. The Tribunal determines that the sum due is indeed £1,194.91. There was also a claim for a sum of £570 in respect of work asserted to have been carried out by the previous managing agent, Andy Isaac – which was challenged. The Respondent was unable identify the nature of this work, and no invoice was produced. The sum is disallowed.

9. A payment of £358 was challenged by the Applicant, as understood by the Tribunal to have related to payment of a surveyor's fee. The Respondent took the Tribunal to the accounting document in this respect (Bundle 4/A24b) and the Tribunal is satisfied that due credit has already been given to the Applicant in respect of this sum.

10. The Applicant contended that she was entitled to a credit of £810. She argued that she was informed by the Respondent's previous managing agent that dry rot appeared to be "coming from Jasmine's flat". In the light of this concern raised in August 2011, she pressed the Respondent to have the matter investigated and he in turn referred the matter to his insurers. However, no progress appeared to be made by the end of 2011, and accordingly the Applicant, having served notice to this effect on the Respondent, engaged her own expert to investigate the matter. In the

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event he found no such dry rot or at any rate no conclusive evidence of such infestation. His fee was £600 plus VAT and the Applicant, as indicated contends that this should be credited to her service charge account. The Respondent's position is that this is really in the nature of a cross claim but agrees that in the interests of finality, the Tribunal should deal with the matter. The Respondent's main contention is that there is no cause of action in respect of this sum. It may or may not have been sensible for the Applicant to have this enquiry made, but her proper course, if the Respondent was dragging his feet, would have been to bring a proper claim either for specific performance or some other application before the Tribunal. The Applicant contends that the Respondent was in breach of his repairing obligation by not maintaining the property properly, thereby requiring her to incur this expense.

11. The Tribunal agrees with the Respondent that there is no cause of action on this item, and no basis upon which this sum can be deducted from the service charge account. The Tribunal does not consider that the failure to investigate was causative in a proper way of the loss, because even had the matter been investigated (in the way carried by the Applicant's expert) no course of action would have been recommended and no dry rot discovered. It is unfortunate that the Respondent did not act more quickly to investigate the concern that he himself or his agents have raised, but the Tribunal does not consider in this case that his failure to do so sounds in any reduction of the service charge account. This challenge on behalf of the Applicant is therefore rejected by the Tribunal.

Accounting Year 2013/14

12. The Applicant challenged the Respondent's management costs for this year of £1,400. The fee was thus £350 per unit, given that there are four flats in the building. The Applicant produced lower quotations from alternative managing agents ranging from £200 plus VAT to £250 plus VAT.

13. The obligation upon the Respondent is not necessarily to obtain the cheapest possible management. The previous managers were charging £420 plus VAT per unit and the managing agents concerned were in fact the Applicant's own recommendation. The fee of £350 per unit is, within the Tribunal's experience, and on the evidence, not outside the appropriate range and this management fee is approved by the Tribunal.

14. The next item challenged by the Applicant, and having been charged to her, is the sum £5,839.47, being a cancellation fee required to have been paid by the Respondent to his managing agents David Adam Surveyors Limited. The manner in which this charge comes about occupied the Tribunal in both evidence and submissions for some time, however it is proposed to summarise the position as far as is possible. The Applicant's case is that her flat was suffering from damp ingress caused by a defective hopper pipe at the roof area of the building. The Applicant's flat is the top flat and was the property affected by this defect. There are photographs in the bundle demonstrating the extent of the damp in her flat, which appears to have been considerable. She took the matter up with the Respondent but nothing appeared to be happening and the

Respondent's position was that insofar as works were required, they could and should be incorporated in major works which he was proposing, those works apparently would have been quite considerable, since the cost was £87,592 inclusive of VAT. The Applicant argued that the damp in her flat was urgent and there was very considerable to-ing and fro-ing between the parties, including the other leaseholders about the cost and extent of these other major works. Ultimately, the Applicant was given an ultimatum either to agree to the major works, in the context of which the damp problem would be cured, or alternatively to have the works done herself, but if this latter course was taken then the Respondent would not be contributing the 20% referable under the terms of his lease. There was some argument before the Tribunal as to whether or not it was necessary for the Respondent to abandon the major works or whether he should, despite the opposition to the cost and contractors concerned, have proceeded in any event. This was because, as understood by the Tribunal, the Applicant had not, within the specified period, put forward her own alternative quotations or, alternatively, was still arguing, about the extent of the works or other terms. Whatever the position, the Respondent elected not to proceed with the major works in the light of the unhappiness on the part of the Applicant and possibly the other leaseholders too. The result of this was that the Respondent became liable, under the terms of its management agreement with David Adam Surveyors Limited to pay a fee for the preparation of the specification in relation to the abandoned works. This fee was charged pursuant to, as understood by the Tribunal, the terms of the management agreement and in particular, clause 2.1.1 of the

agreement (page 8 of the agreement). The agreement was produced by Ms Danish Ahmad, the proprietor of David Adam Surveyors Limited. The Applicant's case is that there was no obligation on the part of the Respondent to abandon these works. Either he could have proceeded in their entirety or he could have proceeded in respect of the works which were admitted and indeed being pressed to be done in relation to the Applicant's flat. If this fee was incurred, so it was said on behalf of the Applicant, it was either his own fault or the result of him having failed to do the works in 2012 or as a result of a precipitate and unwarranted abandonment of the major works. It was further said that whether or not Miss Ahmad is entitled to that sum contractually from the Respondent, there is no reason why the other leaseholders should have to make payment.

15. The Respondent's case was effectively that he had acted properly, having carried out the appropriate consultation and in the face of the opposition by the leaseholders, could not be criticised for having abandoned the work and was undoubtedly liable for some sort of fee to the managing agents, given the time spent in preparing the specification.

16. The Tribunal takes the view that some recovery is appropriate for such cost as was abortive in the light of the fact that the works did not take place, and nonetheless the specification was prepared.

17. Clearly Miss Ahmad has considered that there needs to be some percentage deduction given that the works never proceeded at all. The

deduction she has made is that of 40% which in all the circumstances the Tribunal considers is reasonable. This sum is allowed.

18. An insurance sum of £1400 was claimed for this year. The invoice when produced was in fact for £1300, and this sum is allowed. A cleaning sum of £523 was claimed. The Applicant argued that for some of the year there was no attendance by cleaners, which though not formally admitted by the Respondent, was not contested for the purposes of these proceedings. The sum of £275 is allowed for the cleaning costs of this year.

19. A sum of £361 for a fire extinguisher was challenged by the Applicant. No alternative quotations were given by the Applicant. The actual cost when the invoice was produced was £359.82 which is the sum allowed by the Tribunal.

20. A fire risk assessment was charged to the account in the sum of £500. This seemed to the Tribunal to be a high sum, given the several alternative quotations produced on behalf of the Applicant and contained within the bundle. An alternative and in the view of the Tribunal, a more reasonable figure in the light of those alternative quotations is £240 inclusive of VAT and this is the sum allowed by the Tribunal.

21. There is included within this year's service charge account a total sum of £23,967 in respect of legal and professional fees. These fees are

challenged on behalf of the Applicant. The disputed items are helpfully set out by Mr Hardman in his schedule at paragraph 35 of the Skeleton Argument. Four of the items in this schedule have been immediately conceded on behalf of the Respondent for reasons the Tribunal need not here elaborate upon. The items are in respect of the invoice dated 3rd January 2014 of Alan Edwards Solicitors in the sum of £3,600. Three other invoices from this firm are also conceded, that is to say the invoice dated 30th July 2013 in the sum of £662.40 and two further invoices both in the sum of £1200 dated 29th November 2013 and 29th July 2013. This leaves a series of further invoices, again emanating from the same firm of solicitors (together with a small sum in the sum of £38.29 levied by the Respondent's managing agents) all relating to the Section 24 appointment of a manager in this case. For the avoidance of doubt, those invoices are dated 15th February 2013, £883.20, 27th March 2013 £3,477.60, 31st May 2013 £4,516.79 and as mentioned, the smaller invoice of DASL dated 29th April 2014.

22. The Applicant's position is that the proceedings to appoint a manager were instituted in 2013 and culminated in a Consent Order which appears at page 491 of bundle 2 of the documents. That agreement provides for the appointment of the agents whom the Applicant had proposed in the first place (and whom the Respondent had opposed) and also provides for a payment of £2,500 from the Applicant to the Respondent in respect of claimed service charges but described as "a gesture of goodwill" in the agreement. Upon the basis of those two

events, the application was withdrawn. There is no other provision in the agreement.

23. The Applicant's position is that the negotiations leading to the hearing which resulted in the compromise agreement on the 29th April 2013 were preceded by a letter from the Respondent's solicitors to the Applicant which contained a proposal that "each party pay their own costs to date in relation to the hearing fixed for the 29th April 2013." The Applicant therefore proceeded in the negotiations on the understanding that each side was to be responsible for its own costs if agreement was reached. Of course, agreement was indeed reached, albeit late in the day. Accordingly, says the Applicant, she was surprised to find a very substantial sum in excess of £10,000 added to the service charge account in respect of the Respondent's costs arising out of this appointment. The Applicant says that the sum should not be payable in the light of what has just been described and in any event, is highly excessive given the fact that the matter was compromised. The Respondent argued that no provision in the Consent Order was made for costs either way, and there was nothing in such an agreement to preclude the addition of recoverable costs under the lease in the service charge account.

24. The Tribunal agrees with the Applicant in this case that the sums charged under this head should be disallowed for three main reasons. First, the approach to the compromise was indeed preceded by an offer on behalf of the Respondent to proceed on the basis of each side paying its own costs. There appears never to have been any departure from that

position prior to the compromise being reached. In the circumstances the Applicant was justified in expecting that that would remain the position. Secondly, a Consent Order was agreed, which it is reasonable to construe as having intended to be in full and final settlement of the dispute between the parties. The whole point of such an agreement is to reach some kind of finality on the issue in dispute. Had it been the intention of the Respondent to claim further costs against the Applicant, one would have expected a provision to that effect to have been included within the consent agreement. It does not seem to the Tribunal appropriate for the Respondent to raise such costs by a different route after the event. This is particularly so, given the circumstances and phrasing of the payment which was in fact made by the Applicant pursuant to that agreement. There is no provision for any further payment by her to have been made. Thirdly and in any event, the sum claimed seems to the Tribunal to be extremely high. On behalf of the Respondent it was argued that these cases often last for a day and that overall the £11,000 claimed in this case would have been reasonable. The Tribunal does not take this view. In the experience of the Tribunal, although each case is different, these cases are very often disposed of within half a day and principally involve examination by the Tribunal of the appropriateness of the submitted proposed manager. Of course if the appointment is itself disputed, this will involve some further evidence but these cases are not, in the experience of the Tribunal, of the most complex kind. Had the Tribunal thought it appropriate to allow these costs, they would have been significantly reduced, but for the reasons already indicated, the Tribunal is of the view that they should not now be

added back into the service charge account and these sums are disallowed.

25. There is a remaining invoice in the schedule referred to and that is the invoice dated 3rd May 2013 from Delta Services in the sum of £1,788.50 and relating to the inspection of the basement at the property. The Applicant, as understood by the Tribunal, challenged the quantum of this invoice. The Respondent contended that it was a reasonable sum for the work carried out. The view of the Tribunal is that it is indeed high. There is some specific work itemised in the bill, being repair of downpipes and tightening of brackets at £90.40 and the cleaning out of external down pipes and gutters and pulling away vegetation growing within the rainwater hoppers in the sum of £280. The further four hours of work at £70.00 per hour which is a "report" simply saying that the cause of the damp was a crack in the parapet wall does not seem to the Tribunal to be justified, and ought to have been included within the body of the overall work. The hourly rate of £70 for two men to do the work itemised also seems excessive to the Tribunal and the Tribunal overall considers that 12 hours work at £50 per hour is appropriate, amounting to £600 which together with the two other items of work of £280 and £90 amounts to £970. With the addition of VAT, this sum is £1,164 and this is the sum which is allowed under this head.

26. The Applicant challenges an accountancy fee of £900 and has produced for the Tribunal alternative quotations which can be found at pages 211 to 213 of the bundle. These figures range from about £250 to £400 plus

VAT. The sum charged for what are relatively straightforward accounts does seem to the Tribunal to be higher than usual (as conceded on behalf of the Respondent) and the Tribunal considers that the sum of £500 inclusive of VAT is the appropriate sum under this head.

27. The next sum claimed is described as "Cunningham £500" – the Respondent conceded that this figure should be disallowed and the Tribunal so orders.

28. At paragraph 46 of the Skeleton Argument, the Applicant seeks to have deducted from her service charge account a sum of £900 which was incurred by her by way of legal fees in taking advice on a Section 20 Notice which appears in the first bundle at page 219. The Respondent argues that there is no basis upon which she can recover such a sum; there is no such provision in the lease and no independent cause of action entitling her to recoup that cost from the Respondent or the other leaseholders by deduction from the service charge account. The Tribunal agrees with this proposition and the finding is that no such deduction should be made from the service charge account and that this challenge fails.

29. The final matter raised for this year by the Applicant is the cost of carrying out the works to cure the damp in her flat at the top of the building, which came about as a result of problems with the hopper pipe and other associated matters. This issue was touched upon earlier in this decision and in short notwithstanding the fact that the matter was raised with the Respondent in August of the relevant year, nothing had

been done by the end of that year and in January the Applicant had the works carried out herself at a cost of £1,369. She did so after serving notice on the Respondent. The Respondent's position is that he legitimately passed the matter onto his insurers and then in any event was proposing to deal with these matters as part of the overall proposed major works which in the event did not occur. However, it is plain from the photographs that the problem was urgent and getting worse (indeed the Applicant contends that had the matter been dealt with promptly it could have been cured at a cost of less than half the eventual sum). The Respondent argued that if this kind of self help remedy to cure a nuisance were to be relied upon then the remedy should be exercised promptly, but this was not the case on this occasion. The Tribunal is of the view that the Applicant can hardly be criticised when the Respondent himself repeatedly assured the Applicant that either his insurers were dealing with the matter or that in some other way the problem would be resolved. It seems to the Tribunal that the sum stipulated in this regard is reasonable and indeed is authenticated by the evidence. It also seems to the Tribunal that the whole of the sum cannot be credited to the Applicant because in any event, had it been part of the service charge account she would have had to pay 40% of this sum in accordance with her contractual obligations. That 40% would have been £547,60. Accordingly, it seems to the Tribunal that the balance should be restored to her to the extent of one third of this sum by the Respondent. The one third of the £821.40 is his 20% contribution to this balance. That sum is £273.80 and of course the other two leaseholders are due to make a contribution in the same sum. It is for the parties to decide how this

should be reflected in the service charge account but the finding of the Tribunal is that no more than £547.60 should be referable to the Applicant in respect of this expenditure.

Service Charge Year 2014/15

30. The first item challenged for this year is £1264 for insurance. Essentially the Applicant was putting the Respondent to proof. The invoice was produced and this sum is allowed. The cleaning charge of £1200 was challenged. £500 was conceded as being the appropriate cost by the Respondent and this sum is allowed. A further claim for a further £500 for a fire, health and safety check was claimed. It is for the Respondent to demonstrate that the Applicant received value for money under this head. The invoice produced refers to the preparation of a report but no such report was produced to enable the Tribunal to assess the reasonableness of the charge for the work carried out. The Tribunal is not satisfied that this sum was established by the Respondent. In any event, it seems a high sum given that the smoke detectors which had been recommended in a previous report were not installed until 2016. Furthermore, although the same check every year is not necessarily excessive, generally these checks are made at a frequency recommended by the Inspector. No such recommendation was made in the previous report. This sum is accordingly disallowed.

31. The Applicant once again challenged the management fees as being excessive, but broadly speaking for the reasons already indicated in previous years, the Tribunal considers that the sum claimed by the

Respondent is reasonable insofar as it corresponds with the allowance set out in the contract which is £1400. This is the sum which is allowed.

32. Accountancy fees of £900 were again challenged and for the reasons already set out above, the sum of £500 seems to the Tribunal to be reasonable and is allowed.

Service Charge Year 2015/16

33. The insurance charge of £1636 was properly demonstrated by the Respondent and is allowed. Cleaning was claimed in the sum of £1200 but conceded at the hearing to be £500 and this lesser sum is allowed. Yet again a claim of £500 is made for a health and safety check, but no report evidencing such check was produced and for similar reason set out above, this sum is disallowed.

34. The management fees were again challenged but this challenge is dismissed and the sum of £1400 allowed, again for the reasons indicated above. Finally for this year, accountancy costs of £1200 were claimed but for the reasons indicated in previous years and particularly by reference to the alternative quotes produced by the Applicant, the sum of £500 is allowed under this head.

Service Charge Year 2016/17

35. The management fees and accountancy fees in the sum of £1480 and £1200 respectively were again challenged this year by the Applicant. Again the findings of the Tribunal are that management fees in the sum

of £1400 and accountancy costs of £500 are allowable, again for the reasons set out in earlier years.

36. The next item listed is a sum of £23,967 for legal and professional fees. The sum is comprised of seven separate items in a schedule set out at paragraph 60 of the Respondent's Skeleton Argument. At the hearing, four of these seven items were abandoned on behalf of the Respondent. The items were the invoice dated 12th March 2017 in the sum of £2,884. The invoice dated 22nd March 2017 in the sum of £2,020, the invoice of £4,800 referable to Arden Chambers and the invoice relating to Saracens Solicitors dated 9th March 2017 (claimed as an administration charge) in the sum £6,460.

37. This left first, the invoice of DASL in the sum of £1,000 dated 10th June 2016. This is an invoice raised by the Respondent's managing agent for the cost of drawing up a damp proof specification. The Tribunal considers this to be an excessive charge for the work provided. The document produced lacks the level of detail which would normally be expected in a specification. The substance of the document comes from a report of specialist damp proofers called "Wings". Ms Ahmad confirmed to the Tribunal that she had no particular expertise in the field of damp proofing and relied heavily, perhaps as might be expected, on the specialist firm. In all the circumstances, the Tribunal considers that the transposition of the material supplied by the specialist firm into a specification should be allowed at a cost of £250. The invoice from Delta Services Limited of £3,338 also seems very high to the Tribunal.

This work is largely duplicative of earlier work done in respect of the damp problem and, as was conceded on behalf of the Respondent, this company is not a specialist firm dealing with such work. Having considered the work carried out and the general nature of the firm concerned, the Tribunal considers that a fee of half the sum charged is appropriate, that is to say £1,669.

38. The final disputed item is an invoice raised by the Respondent's managing agents in the sum of £4,800. This invoice, in keeping with another of a similar kind which was put before the Tribunal, was in the nature of an ex post facto document created by the managing agents in order to recoup what they considered to have been extra time outside the ordinary management agreement spent dealing with this property. There was no particular record keeping or detail to confirm the charge made, and Ms Ahmad told the Tribunal that the nature of her work precluded her making individual notations of work carried out. The Tribunal does not consider that this kind of approximation is reasonable in circumstances such as these. On behalf of the Respondent the charge was conceded to be reduced to a sum of £2,000 and the Tribunal allows this reduced figure to be substituted in place of the invoice sum.

39. A sum of £1500 was charged by the Respondent's managing agents for "Liaising and attending" upon the obtaining of an insurance revaluation at the building. The invoice does not condescend to very much detail as to how such a charge arises and again in evidence, Ms Ahmad was not able to expand in great detail upon it, save to say that she spent some

time at the property giving access and spending time with the insurance personnel. The Tribunal was not persuaded that this was a reasonable charge in all the circumstances, there were other quotations supplied by the Applicant also confirming that the charge made was much higher than other agencies would have charged in all the circumstances. The Tribunal allows, on the basis of the evidence before it, the sum of £450 under this head.

40. The insurance figure of £2,413 claimed by the Respondent for this year is allowed for the same reasons indicated in earlier years.

41. A sum of £1207 has been charged under a heading of "Repairs and Maintenance". £950 of these costs relates to the carrying out of repairs to the communal fuse board and providing a Landlord's Electrical Certificate for the common parts. However Ms Ahmad on behalf of the Respondent, was unable to give any explanation as to exactly what this repair work comprised. There was no Minor Works Certificate and no other information as to precisely what was carried out. The Applicant obtained alternative quotes for the obtaining of the appropriate electrical certificate which were in the order of £325 inclusive of VAT. Erring on the side of generosity, the Tribunal allows £500 for this work. Post Office costs of £7.61 are claimed and allowed and a further claim under this head is made in the sum of £250 for the supply of three smoke alarms. The Applicant produced other quotations to show that even this sum is excessive, but the Tribunal considers that the sum, although at

the top end of the range, is nonetheless within the range and allows this figure.

42. The cleaning costs were challenged and conceded in the sum of £500 again for this year and again this is the sum allowed by the Tribunal.

43. A claim for £770 was made this year, again for a health & safety check, including an Asbestos Survey. On this occasion a full report has been supplied and in all the circumstances, the Tribunal allows this charge as claimed.

The Section 20ZA Application

44. The final item appearing for this service charge year is a large sum of £37,308 relating to certain damp proof works which were carried out in the basement flat. The background to the matter was explained on behalf of the Respondent on the basis that in or around May 2013 a company called Wings Water Proofing (see reference to this firm above) was instructed because of concerns of damp in the Respondent's basement flat. A report was prepared (see Bundle 2, pages 58 to 60) and part of the report suggested that the damp course had failed. In June 2013 there was discussion about such works being included in the major works plan, to which reference has been made above. In fact those major works did not, as already indicated in this decision, proceed. If they had proceeded and insofar as these damp proofing works would in any event have required consultation under the Act, it was suggested on behalf of the Respondent that he would have endeavoured to deal with

the matter by way of a variation of the existing Section 20 Notice. It seems to the Tribunal that it would have been optimistic to deal with such works by way of a "variation", but in any event this is academic because the works were abandoned and never proceeded. The Respondent boarded up the affected areas so as to ameliorate the position for his tenants.

45. The matter lay in abeyance for several years but in due course the Respondent's tenants became unhappy with the situation and vacated the flat in 2016. The Respondent's agent prepared, drawing largely on the report prepared by Wings, a specification and Wings were engaged to carry out some of the works at a cost of just over £9,000 and an individual called Thomas was engaged to carry out further work at a cost of £19,900. The preparation and stripping out cost a further £8,333.76, these three figures totalling £37,355.96, which the Tribunal was told was in fact the sum claimed under this head. The contractors carrying out the preparatory and finishing works do not appear to have provided prior estimates, but have invoiced their work after completion.

46. The Respondent's contention was that since the decision of the Supreme Court in **Daejan Investments Ltd v. Benson & Others [2013] UKSC 14**, the burden was upon the Applicant to demonstrate prejudice which has come about as a result of the failure to follow the Section 20 consultation process. The Respondent argued that since no specialist report had been obtained by the Applicant to demonstrate such prejudice, her grounds for opposing the application made by the

Respondent for a Dispensation Order was "doomed to fail". It is in respect of this item of cost that the Respondent has made the application for a Dispensation Order pursuant to Section 20Z of the Act.

47. On behalf of the Applicant, the Tribunal was urged not to grant a Dispensation Order in this case. Both parties agreed that the guidance to be taken by the Tribunal was from the **Daejan** case referred to above. Ms Holker, on behalf of the Applicant, emphasised that at paragraph 51 in that decision, the Court makes the point that the fact that the landlord will be prejudiced unless a Dispensation Order is granted (in that there will be a statutory cap of £250 in respect of the works) is not a relevant factor for the Tribunal to take into account. She directed the Tribunal to Lord Neuberger's observations first at paragraph 42 of the Decision where he states that it seems clear from the statutory provisions that they are:

> *"Directed towards ensuring that tenants of flats are not required (i) to pay for unnecessary services or services which are provided to a defective standard and (ii) to pay more than they should for services which are necessary and are provided to an acceptable standard."*

He went onto say at paragraph 44:

> *"Given that the purpose of the requirements is to ensure that the tenants are protected from (i) paying for inappropriate works or (ii) paying more than what would be appropriate, it seems to me that the issue on which the LVT should focus when entertaining an application by a landlord under Section 20ZA (1) must be the extent, if any, to which the tenants were prejudiced in either respect by the failure of the landlord to comply with the requirements."*

48. She further took the Tribunal to paragraphs 67 and 68 of Lord Neuberger's judgment which are to the effect that the bar required to be cleared on behalf of tenants is not set especially high. At paragraph 67 it is said

> *"... Given that the landlord will have failed to comply with the requirements, the landlord can scarcely complain if the LVT views the tenants' arguments sympathetically, for instance by resolving in their favour any doubts as to whether the works would have cost less or, for instance, that some of the works would not have been carried out or would have been carried out in a different way) if the tenants had been given a proper opportunity to make their points ...*
>
> *The LVT should be sympathetic to the tenants, not merely because the landlord is in default of its statutory duty to the tenants and the LVT in deciding whether to grant the landlord a dispensation. Such an approach is also justified because the LVT is having to undertake the exercise of reconstructing what would have happened and it is because of the landlord's failure to comply with this duty to the tenants that it is having to do so ... Once the tenants have shown a credible case for prejudice, the LVT should look to the landlord to rebut it."*

49. Against this background, it was advanced on behalf of the Applicant that these works were not established by the Respondent as having been appropriate for two main reasons:

    (i) The Respondent had failed to demonstrate that there was an existing damp proof course in respect of which these works were justified and entitled under the lease. To put it another way, the Applicant contended that on the evidence there was no existing damp proof course. If that was the case, then the installation of a damp proof course, though no doubt sensible for the Respondent personally since it was his flat, was not a repair at all but an improvement which could and would have been resisted by the

other leaseholders because it was not an entitlement under the terms of the lease. In this case, it was contended, there is no clear evidence of a damp course having existed at all, except for the passing reference in the Wings template report to the effect of a break-down in the course. But that is ambiguous and is not amplified in any way by a proper narrative or in a particularised condition report. There is only one other mention of a damp course and that is in the context of a 2013 email from the Respondent himself but that, given he is no expert in these matters, is of little probative value. The Applicant's contention first therefore, was that had there been consultation, as there should have been, the leaseholders would have raised an objection to this on the basis that it was an improvement but not repair or maintenance work. They were denied that opportunity which has caused manifest prejudice on their part, because it could well have led either to the conclusion that they had no liability to contribute or to the extent that there was any liability, it would have been significantly reduced.

(ii) The second point taken on behalf of the Applicant in respect of prejudice was that if, contrary to the primary contention, there was a damp course, which had been the subject of some work in 2013 (as mentioned in the earlier email from the Respondent) then this type of work is almost invariably carried out under a guarantee. If that was the case, then it was inconceivable, said the Applicant, that such work would not have been under guarantee three years later in 2016. The Applicant had been further prejudiced by having been

given no opportunity to investigate this. There was no witness statement or any other evidence from the Respondent dealing with the guarantee issue and so under this first head there were two clear major areas of prejudice.

50. The second aspect of prejudice mentioned by Lord Neuberger at paragraph 44 as mentioned above is the question of quantum. As was contended for on behalf of the Applicant, and not really disputed on behalf of the Respondent, the Applicant had tried repeatedly to obtain disclosure of documentation from the Respondent in order, amongst other reasons, to obtain an alternative quote. The disclosure was always in effect refused on behalf of the Respondent in that it was made the subject of a condition that the Applicant should pay an hourly rate for the facilities to enable her to see the documents. Of course, her entitlement to have such disclosure is a statutory right which should not have a fee attached to it. The Applicant has every reason to be concerned about the high cost of these works, particularly in the light of the Respondent's record for high charging. The Applicant was only ever made aware of the works having been carried out after the event. This, so it was contended, was a bad case of failure to consult, because it is not a case of the landlord acting in person and ignorant of the statutory provisions. An abortive attempt had already been made on his behalf by his professional representative to go through the Section 20 Notice in respect of other major works in 2013. There is no question but that he must be deemed to have had knowledge of the need to consult in this case. He nonetheless went ahead and did these very expensive works

without the proper consultation – indeed without any consultation. These works have been highly priced and, when the Tribunal asked the Respondent's agent in evidence to explain and justify the costs, her response was she really didn't know whether the costs were reasonable or otherwise because she did not take measurements and in any event is not competent to assess such costs. Her expertise is in management rather than costing works of such kind. She relied entirely on the contractors concerned, did not test them in any way, and did not obtain any quotes, other than the quote from Wings. She did not supervise the work, and although Delta was a contractor known to her, the contractor who carried out the reinstatement work was obtained by the Respondent, and was unknown to her. Unsurprisingly, this did not give either the Applicant or the Tribunal any great comfort.

51. The Tribunal accepts the representations made on behalf of the Applicant. The Tribunal agrees that this is a bad case. The Respondent was asked whether there was any great emergency which compelled these works to be done without consultation. The answer compounded rather than ameliorated his difficulty. The Tribunal was told that the situation indeed was one of emergency in that he was losing rental income unless and until he had these works carried out. It does not seem to the Tribunal that the Respondent's financial loss is a good reason for having completely ignored the statutory requirement to consult, as a result of which the Applicant has directly suffered serious prejudice in the way described on her behalf and adopted by the Tribunal. It seems to the Tribunal, applying the guidance in the case law

referred to, that the Applicant has indeed demonstrated that she has suffered prejudice for the reasons listed above. Insofar as the burden moved to the Respondent to rebut this prejudice, he was quite unable to demonstrate on the evidence that the works were appropriate or to deal with the matters raised on behalf of the Applicant and, so far as quantum was concerned, his managing agent, however candid, was completely unable to demonstrate that the costs incurred were at a reasonable level.

52. The Tribunal has considered whether some form of "half-way house" can be adopted in this case, which stops short of limiting the Respondent to the £250 cap contained in the Act. However, in the absence of alternative evidence which, to some extent, was rendered impossible because the Respondent simply went ahead and carried out these works before anything could be investigated on behalf of the Applicant, such a reduction would be both speculative and somewhat arbitrary. For the reasons indicated above, the Tribunal's conclusion is that the application for a dispensation in this case should be refused, and that the Respondent's claim under this head is indeed limited to the cap of £250 contained in the Act.

The budget for the service charge year 2017/18

53. During this year a right to manage company was to take over the management of the building on the 13th July 2017. The first budgeted item therefore of £1480 for management is inappropriate since there will

only have been management for about the first quarter of this service charge year. Accordingly the sum allowed is 25% of the £1480 listed, that is to say £370.

54. A sum of £1200 is put in the budget for cleaning and for the reasons already indicated earlier in this Decision, the Tribunal considers, and indeed the Respondent conceded, that £500 is the appropriate sum. Building insurance has been listed at £2450. On the assumption that this is authenticated by an appropriate invoice, this sum is allowed. Again a sum of £500 is claimed in respect of a fire risk assessment. This sum is allowed, as is the £200 for fire extinguishers and smoke alarms. Repairs and maintenance are estimated at £390 which seems modest and reasonable but for some reason a sum of £150 has been included "in readiness to be spent if required" in relation to entry phone costs. Nothing specific has been put forward to support that and there is no suggestion that there is anything wrong with the entry phone. The Tribunal allows for the combined estimate of £390 for repairs and maintenance and entry phone costs of £150, a total sum of £500. There was a sum claimed for handover costs to the RTM which was conceded by the Respondent not to be due and is therefore disallowed. The accounting cost estimate of £1250 again seems too high to the Tribunal and the sum of £500 should be allowed. For the first time over £1000 has been estimated to be put into a contribution for reserves. This has never been requested previously and is disallowed. A sum of £8,480 in respect of various suggested costs has been inserted in the budget, which seems to the Tribunal it would have been difficult for the Respondent to

sustain and in any event at the hearing it was conceded that this should be deleted. This sum is therefore disallowed, as is the £484 "administrative" cost which again was conceded as not being recoverable at the hearing.

Section 20C Costs Application

55. As was mentioned in the introduction to this Decision, the Applicant has made an application for the Tribunal to direct that no costs arising out of these proceedings should be put to the service charge account. The Applicant contended through Miss Halker that no costs should be so chargeable because, as it were, before the Applicant had even started in the making of her contentions, a sum of £33,394 on Miss Halker's calculation had already been conceded during the course of the hearing voluntarily on behalf of the Respondent. Given that her contribution is a 40% sum, it would have been substantial and that alone is a good reason for making a Section 20C Order. The only concessions made by the Applicant have been essentially in relation to the insurance premiums and as far as they are concerned, she would have conceded them earlier had she been given benefit of the sight of the appropriate invoices, which was never the case. Miss Halker argued, it seems to the Tribunal with some force, that given the size of these concessions and the fact that they were only made at the day of the hearing, the Applicant was compelled to bring this application and should not be penalised financially for having been required to do so. She underlined this point by saying that the Applicant's efforts to obtain inspection of the relevant documents was always frustrated by the Respondent, for the reasons

mentioned in this Decision, again compelling the application. Very much as a fall back position, it was argued on behalf of the Applicant that the Tribunal, if it desired not to make a full Section 20C Order, could divide up the issues in this case and if it did so, they would substantially have been found in favour of the Applicant.

56. The Respondent's position was that costs should follow the event and effectively the Tribunal should exercise its discretion using that test as a yardstick.

57. On behalf of the Applicant the Tribunal's attention was drawn to the Decision of the Upper Tribunal in **Church Commissioners v. Derdabi [2011] UKUT 380 (LC)** in which the Tribunal indicated that in very broad terms the usual starting point would be to identify and consider the matter or matters which were in issue and whether the tenant had succeeded in all or some only of them and, whether the tenant had been successful in whole or part etc. Where the tenant is successful in whole or in part in respect of all or some of the matters in issue, it will usually follow that an order should be made under Section 20C preventing the landlord from recovering his costs of dealing with the matters on which the tenant has succeeded. However, it was said that whether and to the extent that such an order should be made will depend on many factors and in some cases proportionately would be material. There is of course a range of options open to the Tribunal in relation to its discretion so far as a Section 20C Order is concerned. In this particular case, having head the evidence and having made the findings

as set out above, the Tribunal takes the view that the Applicant has in substantial terms succeeded in reducing very significantly the sums which were being claimed against her and in large part, those sums were conceded not to have been appropriate on behalf of the Respondent. The Tribunal also takes into account the fact that a significant part of these costs has been in relation to the abortive Section 20ZA application. In all the circumstances, the Tribunal considers that this is the most appropriate case for the making of a Section 20C Order, that it would be inappropriate to endeavour to start picking apart separate issues in this case when the preponderance of financially significant items has been determined in favour of the Applicant. The Tribunal therefore accedes to the Applicant's application and makes an order under Section 20C of the Act that no part of the costs incurred by the landlord in the context of any of these applications should be placed in the service charge account for recovery against the Applicant. An additional application was made for recoupment of the Applicant's fees in bringing this matter to the Tribunal; the Tribunal considers that justice is properly done by the costs order already made in favour of the Applicant, and no further order is made in this regard.

58. The only other matter the Tribunal would comment upon is that in relation to the budget for the final year, the findings of the Tribunal are self-evidently in respect of a budget only. It is open to either party later to revert to the Tribunal in the context of a Section 27A application challenging the reasonableness or seeking to enforce payability as may

be appropriate, if grounds exist. It should be well understood that this clarification is given by way of information rather than invitation.

Judge Shaw

14th September 2017