9486

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case References	:	**LON/00AH/LSC/2013/0164** **LON/00AH/LDC/2013/0075 (dispensation)**
Property	:	**179 Selhurst Road South Norwood SE25 6LB**
Applicants (Respondent to the Section 20ZA application)	:	**Daniel Pearson and Emma Ramsay** **Bradley Floyd** **Nancy Imbeah** **Melanie Fisher**
Representative	:	**The Applicants in Person represented by Mr Pearson and Mr Floyd**
Respondents (Applicants for the Section 20ZA application)	:	**Mr Stephen Clacy** **Ms Wendy Nunn**
Representative	:	**Mr Clacy in Person; Ms Nunn did not attend.**
Type of Application	:	**For the determination of the reasonableness of and the liability to pay a service charge; Dispensation from compliance with the consultation requirements; Orders ancillary to the above.**
Tribunal Members	:	**Charles Norman FRICS (Valuer Chairman)** **Chris Gowman BSc MCIEH MCMI** **Mrs Jane Clark JP**
Date and venue of Hearing	:	**10 Alfred Place, London WC1E 7LR** **26 July and 19 August 2013**
Date of Decision	:	**13 November 2013**

DECISION

Background

1. This case concerns an application in respect of disputed service charges for the service charge years 2012 and 2013. The service charge year runs from 1 January to 31 December. The Application in respect of 2013 therefore involves, in part, estimated future service charges. This includes major works the costs of which have been incurred.

2. The application was made under section 27A of the Landlord and Tenant Act 1985, which the Tribunal will refer to as "the Act" in this decision. There was also an application under section 20C of the Act and for reimbursement of application fees. All four long leaseholders made the application. These leaseholders are in the process of forming a Right to Manage Company.

The Issues

3. An oral pre-trial review ("PTR") was held on 4 April 2013 where the Applicants appeared in person and Mr Stephen Clacy appeared in person. Ms Wendy Nunn did not appear and was not represented.

4. At the PTR the Tribunal identified the following issues for determination:

    i. The service charges payable for the year 2012
    ii. The budget for the year 2013
    iii. The major works then currently in progress
    iv. The Applicants' section 20C applications
    v. Reimbursement of the Applicants' fees

5. At the PTR Ms Wendy Nunn was also joined as the Second Respondent. The Applicants, as is usual, were directed to produce hearing bundles. Mr Pearson was directed to be Lead Applicant.

Procedural Matters

6. The case was set down for a one-day hearing on 26 July 2013. When the Tribunal received the bundles a few days before the hearing it became apparent that the appendices to the Respondents statement of case had been omitted. At the hearing the Tribunal directed that these be brought to the Tribunal where it became obvious that these 23 appendices exceeded 100 pages. Consequently the Tribunal had no practical alternative but to adjourn the case, which it did after hearing evidence in relation to matters independent of the missing documents. The full hearing bundle exceeds 819 pages. In this decision, bundle references are shown in square brackets.

7. Also at the hearing of 26 July 2013 the Applicants applied for Miss Tracey Lawrence to be joined as an additional Applicant. The Tribunal refused this application as Miss Lawrence was not a leaseholder.

8. Following adjournment of the hearing of 26 July 2013, the Tribunal issued further directions drawing the parties' attention to the decision of the Lands Tribunal in *Warrior Quay Management Company & another v Joachim & others* (LRX/46/2006). This decision enjoined leasehold valuation tribunals (statutory predecessors to this Tribunal) to inquire of unrepresented landlords whether they wish to apply for dispensation from the consultation requirements. Such an application was subsequently made by the Landlords (Reference LON/00AH/LDC/2013/0075). That matter now forms part of this case and is addressed in this Decision. In its further directions of 26 July 2013 the Tribunal also referred the parties to the recent decision of the Supreme Court in *Daejan Investment Limited* v *Benson et al* [2013] UKSC 14.

9. At the hearing of 19 August the Tribunal referred the parties to *Northway Flats Management Company (Camden) Limited v Wimpey Pension Trustees Limited* [1992] 2 EGLR 42 and to Para 16.046 of *Woodfall: Landlord and Tenant.* The Tribunal issued Further Directions inviting written submissions in respect of these matters (see further below). The Tribunal also put forward in writing its provisional construction of Para 9 of Sch 5 of the lease and invited submissions from the parties (see below).

10. An appendix of relevant legislation is attached to this decision.

The Property

11. The Tribunal inspected the property on the afternoon of 26 July 2013 following adjournment of the hearing. The subject property comprises a late Victorian house converted into four flats in Selhurst, South London. The property is a substantial end of terrace structure on ground and two upper floors. It is of solid brick construction under pitched tiled roofs. A particular feature of the building is that it is fully rendered and this therefore covers a substantial surface area. A further feature is that access to two of the four flats is via exterior doors within the flank wall, to which access must therefore be maintained during repair work. The property has previously been underpinned.

The Lease

12. The Tribunal were supplied with the lease in respect of flat one, dated 12 July 2002. This lease grants a term of 125 years from 31 January 2002 For present purposes the salient provisions are as follows:

13. By Clause 5 "the Lessee HEREBY COVENANTS with the Lessor that the Lessee will...pay to the Lessor by way of additional rent one quarter

...of the expenses and outgoings ...set out in the Fifth schedule ...reasonably and properly incurred by the Lessor"

14. By Clause 7 (3) the Lessor covenants "to maintain in good and substantial repair the structure and exterior of the building ...together with the common areas shown coloured yellow on the plan annexed ...and all sewers drains pipes wires party structures ...and parts of the building ...used...in common..."

15. The Fifth Schedule (which is headed "Costs and Expenses to which the Lessee is to contribute by way of Service Charge") includes the following clauses:

"1(A) All maintenance repair renewal (but only where not viable to maintain or repair) cleaning and redecoration (including in particular decoration of the exterior of the Building so often as the lessor in its absolute discretion may determine but not more than once in every five years) required for the purpose of keeping in good and substantial repair

(a) The structure and exterior of the Building and in particular the roofs foundations walls principal internal timbers ...excluding
[...]
(iii) The windows and other glass of and in the demised premises

(b) The common areas shown yellow on the plan annexed hereto and all other parts of the building ...used...in common...
(c) The boundary walls and fences of and in the common areas of the building
(B) The maintenance in good working order and repair of all ...rainwater pipes

(C) The lighting and carpeting of any internal common parts of the Building

2. The reasonable cost of periodically inspecting examining maintaining and overhauling any part of the Building ...

5. The establishment of a reserve fund to provide for any items of future capital expenditure... including external redecoration

6. The reasonable fees of the Lessor and of the Lessor's agents for the general management of the Building and all other expenses ...incurred by the Lessor in and about the maintenance and convenient management and running of the building

8. All reasonable costs incurred in the provision and supply of such services for the benefit of the lessees of the building as the lessor shall in its absolute discretion think fit and the costs of employing staff as

the lessor shall require in connection with the performance of obligations hereunder

9. When any repairs redecoration or renewals are carried out by the Lessor it shall be entitled to charge as the expenses and costs thereof its normal charges (including profit in respect of such work) at a level agreed in advance by the Lessee" (see further below).

16. Clause 6 of the lease contains provisions concerning the service charge mechanism. Clause 6 (a) permits the Lessor to charge estimated sums on account. Such estimated sums are to be based on the previous costs incurred in the previous year. However, these on account estimates may be modified to include costs reasonably to be foreseen.

17. By Clause 6 (d) the Lessor may give an estimate to the Lessee. This then becomes payable by the Lessee after 14 days.

18. The Tribunal was informed that all leases are in similar form.

The Major Works

19. It was common ground between the parties that the building required major works, namely hacking off and replacing the existing rendering [13 and 601].

20. The nature of the consultation requirements was not in dispute and the Tribunal can deal with these briefly. By virtue s.20 of the Act where a lessee' contribution exceeds a prescribed mount (currently £250) recovery is limited to £250 unless the consultation requirements are complied with or dispensed by the Tribunal. The consultation requirements are set out at Part 2 of Schedule 4 of the Service Charges (Consultation Requirements) Regulations 2003.

21. Much of the parties' cases is set out in inter partes' correspondence to which the Tribunal refer. The Tribunal then augment this with reference to additional points made by each party.

Inter Partes' Correspondence

22. A notice of intention dated 28 August 2012 [297] was sent to leaseholders by ordinary post. The proposed works were described as "external repairs, renewals and redecoration to the left-hand and rear walls of the properly where affected by penetrating damp". The notice continued "We consider it necessary to carry out these works because the render is cracked and defective externally and the presence of penetrating damp internally indicates that the brickwork has become wet to full depth." The relevant lease covenant was set out.

23. Lessees were invited to make written observations to the Lessor's surveyor, a Dr B MacEvoy of MBM Building Excellence, by 28 September 2012. The lessees were also invited to propose the name of

a person from whom the Lessor should try to obtain an estimate. Extracts from the Schedule to the Service Charge Consultation Regulations were set out on the reverse of the notice.

24. The specification of works was professionally prepared by Dr MacEvoy and ran to ten pages. The salient features were as follows:

The contractor was to provide all plant and machinery;

All workmanship and materials to comply with British Standard Code of Practice

Provisional sum of £2000 specified

The provision of lit skips and lit scaffolding

Take down defective parapet wall over second floor level at rear rebuild, re-render install new lead flashing; install coping stones

Render left hand and rear walls using a specialist Wethertex 3 coat system or an alternative system [of similar specification]

Removal of cast iron drain pipe

Finishing and decorating including replacing louvre vents, supplying new PVC downpipe, reglaze a window repaint all previously painted timbers making good.

25. A single response was received from Mr Pearson of Flat 3 who asked that the specification be enlarged to include works within his demise. Save for the inclusion of additional work, there was no suggestion of alteration to the existing specification. No contractors were proposed by lessees.

26. Dr MacEvoy responded to Mr Person's request and enlarged the specification to include the interior works to Flat 3 (on the basis that Mr Pearson would be solely liable for that portion of the works). This related to interior damp penetration via the flank wall. The building insurers were also notified.

27. The statement of estimates and accompanying notice were served on 14 January 2013 [541] by the Respondents' agents LMD Management. These were as follows:

J Interiors	£27,660
Surrey Build	£28,745
LMD Developments	£30,797

To each of these a surveyor's fee of 12% was added and a management fee of 5% of the contractors' cost.

28. The Notice accompanying the statement of estimates [542-3] informed the lessees that unless observations were received by 13 February 2013, the Landlord intended to accept the lowest tender. This notice also informed each lessee that their one-quarter share was £7,759.35 (with additional items in respect of the interior of Flat 3 for which that lessee alone would be liable).

29. The Landlord received four responses from lessees. Three of these from Ms Imbeah Mr Floyd and Ms Fisher dated 24 January 2013 were written in identical terms ("the lessees' response") [544-556]. The fourth was a second letter from Ms Imbeach dated 24 January 2013 (in which she stated that she could not afford to pay for the works) [569].

30. The salient points of the lessees' response were as follows:

a. The section 20 works should be frozen until the lessees had taken over management by a Right to Manage company that they were establishing.
b. The cost of items in the specification are over inflated.
c. Various items are outside the scope of the lease covenants.
d. Redecorations and renewals are not within the scope of the lease
e. Complete redecoration using materials that are not like-for-like replacements amount to betterment and such works are outside the lease.
f. The rear parapet wall does not need repair.
g. Replacement of a window to Flat 1 is unnecessary because it is not cracked.
h. The clearing away of debris from guttering and the new PVC downpipe were outside the scope of the lease.
i. These costs claimed to be excluded were quantified at £3465, before fees.
j. The contingency fund of £2000 was described as "exorbitantly high."
k. The painting of external windows and doors was an overcharged item and in any event should form part of the rendering works. Further, the windows and doors were not in disrepair.
l. Two skips were excessive and need not be lit.
m. The scaffolding cost (£2895) was "laughable" for a two week hire.
n. The rear parapet wall hacking is not needed nor the coping stones.
o. The Weathertex rendering system is unnecessarily expensive and a standard render should be used.
p. Cleaning away is part of the job and should not be charged separately.
q. The louvre vents [on flank wall] do not need repair/ replacement.
r. The guttering is in good repair and does not need cleaning.
s. The new PVC downpipe is unnecessary.
t. The windows/ doors are not cracked and should be excluded.
u. The 5% management fee was disputed.
v. The 12% surveyor's fee should be consulted upon.
w. The qualifications of Dr MacEvoy were requested.

31. The Landlord's response dated 15 February 2013 [578-589] pointed out that the tenants' comments on items in the specification were not raised at the appropriate time after the Notices of Intention had been served.

32. Nevertheless, the landlord responded to the major points raised by the lessees. These may be summarised as follows:

    a. the notice of intention complied with the law and indeed went much further by enclosing a draft specification.
    b. The nature of the primary works of re-rendering would necessitate consequential works which are also recoverable.
    c. The landlord was nevertheless prepared to allow the lessees to undertake the consequential works themselves.
    d. The cast iron downpipe will not be re-useable because experience shows that these leak once repositioned.
    e. The parapet works are required because the bricks are aged porous and weak. Coping stones were an amendment rather than repair or renewal but no more expensive than other repair solutions.
    f. The landlord granted permission to the contractor to use the hardstanding at the rear of the property with the result that lights and other protection for skips was no longer required.
    g. The landlord stated that the insurers were now prepared to meet the internal repair costs within Flat 3. However, the insurers required the works to take place no later than 28 days from their decision, 13 February 2013.
    h. The specification allowed for suitable alternatives to the rendering system proposed.
    i. The contingency was good surveying practice to deal with unforeseen works whilst scaffolding was in place to avoid delays by the need to apply for dispensation under s 20ZA of the 1985 Act.
    j. The management fee was additional to day to day management charges because of the additional work required.
    k. Details of the work carried out by the surveyor were set out with particularity.
    l. The lessees had failed to put forward their own contractor. The tender returns were all within 10% of each other. The Lessees were not entitled to "cherry-pick" items from tenders but to compare fully priced tenders.
    m. In view of the insurer's deadline (see above) J Interiors [the lowest tenderer] was instructed to commence work at a revised cost of £16,930 excluding VAT, including a contingency of £2,000 excluding VAT.

33. The lessees then sent a joint reply dated 26 February 2013 [601-12]. The salient points of this were:

    a. Two particular items stand out on the specification rendering sat £7,540 and scaffolding at £2,895.
    b. The lessees had obtained two individual quotes from reputable companies who have a track record and guarantee of ten years or

more. These quotes include scaffolding and skip hire project managers fees surveyors fees and all are less than £10,000. These quotes were from Multi-Finish (£7,900) and Eco Rend £(9,400).

c. The effect of these quotes was to demonstrate that the costs sought by the landlord were unreasonable.
d. Concern was expressed as to reputation of J Interiors.
e. The surveyor's fees of 12% were unreasonable against the quotes received by the Lessees.
f. The Lessees whilst "keen to get the works done" do not have the funds available in 14 days.
g. The lessees offered to pay £250 per flat per month for 10 months which would raise enough within 10 months [against their price of £10,000].
h. The works have started without giving 3 days' notice required under the lease.
i. Decorative renewal and additions to the buildings are not provided for in the terms of the lease and the landlord was trying to improve the property at the leaseholders' expense.
j. The proprietary rendering specified is a betterment.
k. The contingency was questioned because of the lack of information as to Dr MacEvoy's qualifications.

34. Dr MacEvoy replied on 12 March 2013 [210-215] the salient points of which were as follows:

a. Lessees did not nominate contractors during the prescribed time period.
b. Neither alternative tender is in the prescribed form of a marked up tender making comparison difficult and neither includes supporting compliance information.
c. A comparison of the tenders provided anyway supports the landlord's decision.
d. There is no connection whatsoever between J Interiors or Surrey build and the Landlord, MPM or LMD.
e. The landlord is responsible for repairing the property; J Interiors have traded continuously in Croydon since the early 1990s; since 2001 they have carried out around 70 projects under MPMs supervision.
f. The landlord will not undertake expensive works without professional supervision, hence the need for the surveyor's fees.
g. Dr MacEvoy is a professional project manager having completed his Bachelors and Masters degrees at Balliol College Oxford and his PhD at Imperial College London. He has extensive experience. He employs two chartered surveyors, one chartered builder and one chartered engineer.
h. A like-for-like render would not be a satisfactory replacement because the left flank wall is leaning. Hacking off has revealed further high level structural cracks. An engineer will inspect but steel reinforcement bars will probably be needed. Further hard cement render and London stock brickwork bedded in lime mortar are notoriously poor combination.

i. Mr Clacy also put forward a payment proposal.

35. On 7 March 2013 Mr Pearson informed Dr MacEvoy that the Application to the Tribunal was about to be made.

Additional Points made by the Respondents

36. On 20 March 2013 a Mr Stokoe BSc CEng MICE MEStrctE of ADS Consulting Engineers and Surveyors reported to Dr MacEvoy following his inspection of the flank wall [446-457]. The gist was that structural work was required following detachment of a circular plate serving a tie strap at first floor; vertical cracking was noticed to almost the full height of the building and that lintels at the rear required repair. Mr Stokoe set out various recommendations for proprietary steelwork reinforcement ("HeliBars") to be inserted into the affected brickwork, for tie straps to be installed and for the lintels to be rebuilt or repaired with HeliBar reinforcement.

37. As to rendering, the Respondents in their submission [83] state that originally it was envisaged in the specification that a through colour monocouche system would be used. However, on opening up the structure the poor condition of the wall, together with the history of subsidence, meant that cement based rendering could no longer be considered.

38. The Respondents submitted that Dr MacEvoy had been in discussions with the technical departments of Weber and K-Rend whom he described as market leaders in rendering products. The Respondents submitted that the walls were best suited to K Rend and K Lime a traditional mortar based on natural hydraulic lime. This mortar is flexible allowing the building to move without cracking. The Respondents also included an email from a Mr G Mooney of K Rend supporting this [667-69]

39. The Respondents submitted that the disadvantage of this system is that it is not self-coloured. It needs to be painted with a lime based paint approved by K Rend to match the rest of the building. This increased cost. The Respondents explained that K Rend would only give a 10 year warranty on K Lime [695].

40. The final costs of the major works were as follows [813]:

Contractors fee	£19,559.34
VAT on contractors fee	£3911.87
Surveyors fee @12%	£2347.12
VAT on surveyors fee	£469.42
Management charge @ 5% of contractors fee	£977.97
Electricity payments to lessee of Flat 3 , 13 weeks @£60 p.w.	£780.00
Total	**£28,045.72**
Cost to each lessee	**£7,011.43**

Additional points raised by the Applicants

Section 20 Consultation

41. The Applicants case for non-compliance with the regulations was (i) that Mr Pearson and Ms Ramsey were not served with a statement of estimates and (ii) that items of additional work identified when the repairs were underway were outside the scope of the consultation.

That the Costs were unreasonably incurred or outside the scope of the lease

42. Mr Pearson submitted that all the work could be carried out for £10,000 and referred to a proposal he had put to the landlords on the basis of that cost. His proposal was for each lessee to pay £250 for ten months to meet that cost. Mr Pearson referred to a number of estimates that he had obtained and advice from a quantity surveyor. A summary of this evidence is as follows.

43. On 20 January 2013 Mr Pearson obtained a quote from a contractor named Mr Slattery of Multi-Finish. Mr Pearson's evidence was that Mr Slattery visited the property. This quote was not on a like-for-like basis against the specification but was limited to lime rendering and appears to have included scaffolding and a skip. The quote was for £7,900. Mr Pearson said that that quote was based on 180 sq. m of wall requiring rendering which he described as a "best rough guess".

44. On 11 February 2013 Eco Rend provided a quote to Mr Pearson via email. This appeared to cover removal of current rendering, Parex through-coloured mineral render, scaffolding and two skips. The total was £9,400 +VAT. Mr Pearson has added typed comments to this email to the effect that this quote was based on approximate measurements of 180-200 sq. m. However, the quote itself contains no measurements. Mr Pearson has then added an adjustment for his asserted area of 103 sq. m.

45. On 25 March 2013 an email quote was provided by a company named External Rendering to Mr Pearson. This said "Thank you for your email. Based on your email for the 103 sq. m here are the prices: K rend ...this is coloured render - £5000. Standard render – this includes full reinforcement mesh - £4200. Scaffolding for length of time required – required for 2 weeks depending on weather conditions. I am unsure about the second part and what prices to quote you for that. I need to be on site to understand it a bit better... Afrim Reka."

46. Later on 25 March 2013 a further email was sent by Afrim Reka to Mr Pearson. This said: The scaffolding will probably be between £1500 and £2000... then we stopped doing standard sand and cement simply because we have received too many problems with it ...this we will not be able to guarantee".

47. A contractor named Martin Smith of Honeycomb Building Services, based at 12 Hathaway Gardens Sunderland produced an estimate dated 2 April 2013. The estimate is brief, and states "re-render 103.2 [the Tribunal infers that this is sq. m] of wall using rendering sand lime and cement mix. Take down small section wall near the parapet and rebuild up with some coping stones on top... It is not necessary to use K Render as this will not prevent cracking and is expensive" The price was stated as £9,600 ex VAT, £12,000 including VAT. Mr Smith then stated that if K Render was used it would cost approximately £1,600 (ex VAT) more, £2,000 inclusive of VAT. Mr Smith also stated that the [wall] should have been repaired two years previously.

48. A quantity surveyor named Mr Ryan Newberry of Lakehouse contractors produced a report dated 3 April 2013. This was three pages long and hand written. Mr Newberry concluded that certain items in the specification (which he had clearly seen) were excessive. In particular, he assessed the reasonable scaffolding cost at £762, rendering at £5725.77 and stated that it "did not require to be decorative". The document posed questions about asking for quantities and units.

49. Mr Pearson also considered that the works carried out involved betterment. This is dealt with below.

The Type of Render Used

50. The Applicants asserted that a highly specialised render system was used [62] and this was betterment. This was repeated in the lessees' joint response of 26 February 2013 which made specific reference to K Rend [604].

New PVC Downpipe

51. The Applicants asserted that this was unnecessary [112].

Structural supports

52. The Applicants stated that as they had not seen received any information regarding the cause of damage to the external wall beyond cracks. [70].

Dr MacEvoy's Qualifications

53. The Applicants' case was that Dr MacEvoy was unqualified to perform his role as surveyor to the landlord.

Telephone Conversation between Mr Pearson and Dr MacEvoy

54. Mr Pearson asserted that a telephone conversation took place on 29 October 2012 in which Dr MacEvoy stated that the landlords would carry out work to a "gold standard". Mr Pearson implied that this was to penalise the lessees. Mr Pearson supported this by reference to an unsigned undated statement from a Mr Steven Ramsay, the father of Ms Ramsey [249]. This did not contain a statement of truth. In that statement Mr Ramsey states that Daniel (i.e. Mr Pearson) had just received a call from Dr MacEvoy and had been left visibly distressed after reference to the "gold standard" had been made.

Whether the Landlords are required to supply measurements of the work to be carried out or other data to the lessees.

55. The quotes provided by the landlords did not include measurements and this made the costs involved vague and comparisons difficult [60].

The Cost of Electricity

56. The Applicants' complaint was that the compensation paid should not form part of the contract costs. The landlords procured a supply by coming to a private arrangement with Flat 3. That involved compensation being paid to the tenant in addition to the electricity cost.

The Cost of Scaffolding

57. The Applicants' case was that this was too high and that lighting was unnecessary. Mr Pearson stated [567] that the most expensive he could find for a two week hire was £700.

The landlords should have come to an agreement before works started.

58. The Applicants asserted this [59].

Concern regarding J Interiors

59. The Applicants expressed concern that J Interiors were unsuitable to carry out this work and could not honour a ten year guarantee. Information about the VAT status of J Interiors had not been provided. Mr Clacy stated J Interiors had been used successfully on other properties.

Delay in dealing with the works

60. Mr Pearson complained that there had been excessive delay in carrying out the repairs. He referred to an email dated 21 March 2012 to LMD Management referring to fixing leaks and damp in his flat. A reply was sent on 13 June 2012 stating that Dr MacEvoy had reported enclosing a copy of his report and stating that he had been instructed to prepare a draft section 20 consultation.

Surveyors' Fees at 12% of the contract sum (exc VAT)

61. Mr Pearson asserted that these fees should "be included in the major works bill and not itemised separately" [57].

Tribunal Findings

Findings on Consultation

62. Firstly dealing with point (i) in Para 40 above, in answer to a question from the Tribunal, Mr Pearson agreed that he was aware of the landlord's intentions in respect of the building works. He had also had sight of another lessee's copy of the notice of estimates. He also responded to the notice as co-signatory of a letter addressed to the landlord dated 26 February 2013.

63. The Tribunal therefore finds that his claim not to have been consulted is without merit. Although not the subject of a formal claim for dispensation the Tribunal would have granted dispensation in respect of this, for that reason.

64. As to point (ii) in Para 40 (above) the question arises as to whether a separate consultation would be required in the circumstances where upon opening up the building structure unforeseen additional works are found to be necessary (noting that a contingency for unforeseen additional costs of £2000 was included in the specification). The Tribunal consider that the landlord should have informally consulted the Applicants in respect of the additional works found to be necessary on opening up the structure. However, the Tribunal accept that a full statutory consultation would have been wholly impractical and increased costs and delay.

Findings on Dispensation under Section 20ZA

65. As set out in the Further Directions of 28 July 2013, the Tribunal is now enjoined to give dispensation except to the extent that the lessees can demonstrate prejudice. This follows the judgment of the Supreme Court in *Deajan Properties v Benson et al* [2013] UKSC 14 to which the Tribunal referred in those Further Directions. At the resumed hearing of 19 August 2013 Mr Pearson frankly stated that he was not able to make out a case for prejudice. The Tribunal did not itself find that any prejudice had been caused to the lessees as a result of the additional works identified following the opening up of the structure. It was entirely clear to the Tribunal that these structural repairs were essential and would be needed in any event. Furthermore, the insurers had required the repairs to be completed expeditiously as a condition of granting cover.

66. The Tribunal therefore **GRANTS** the Respondent the dispensation sought in respect of structural works costing £2,300 and corical lime paint costing £2,127.84.

The Type of Render Used

67. The Tribunal accepts the landlord's case that the hydraulic lime rendering was the only reasonable choice having regard to the state of the flank wall. The Tribunal rejects the Applicants' case that a cement based rendering would have been satisfactory. The Tribunal also accepts that a corical lime paint was necessary. This is because hydraulic lime rendering is unpigmented and requires painting.

Structural supports

68. The Tribunal is satisfied that the advice provided by Mr Stokoe in his report (see above) correctly states and specifies the remedial structural work required.

Dr MacEvoy's Qualifications

69. A surveyor is not required to hold formal professional qualifications provided he or she is qualified by experience. Mr Clacy said that Dr MacEvoy was a professional project manager; he was very efficient and produced clear and timely reports. In addition, there was evidence that Dr MacEvoy employed two chartered surveyors. The Tribunal was impressed by the clarity and content of Dr MacEvoy's reports and correspondence. It was also impressed that he was able to persuade the building insurers to change their position in relation to the interior damage to Flat 3 [579]. The Tribunal finds that Dr MacEvoy was suitably qualified to perform the services as a surveyor to the landlord in this matter.

Telephone Conversation between Mr Pearson and Dr MacEvoy

70. The Tribunal accepts that conversations between Mr Pearson and Dr MacEvoy were taking place, this telephone conversation included. Experience shows that telephone discussions are apt to lead to misunderstandings. Mr Ramsey was not called to give evidence and the Tribunal cannot place weight on an informal unsigned statement lacking a statement of truth. It is also right to record that Dr MacEvoy did not give evidence. Further, the Tribunal is satisfied that the specification did not include unnecessary work. For those reasons, the Tribunal places no weight on this telephone conversation.

Whether the Landlords are required to supply measurements of the work to be carried out or other data to the lessees.

71. The consultation requirements do not impose upon the landlord a duty to provide to the lessees measurements of work to be carried out. Lessees are expected to seek their own advice about such matters. That may require the appointment of experts, which is not uncommon in disputes of this type. However, the proceedings are adversarial and the landlord is not required to provide data to assist the tenants in making their case, save to the extent required by statute, the lease, the consultation requirements or as ordered by a court or tribunal. In any event, Mr Pearson was seeking this information by email to Dr MacEvoy on 31 May 2013 when the works were already taking place [369].

72. Furthermore Mr Pearson told the Tribunal on 19 August that the Applicants had considered appointing an expert but had decided not to do so, on account of cost.

Whether the landlords should have come to an agreement before works started [59].

73. There is no legal requirement for the lessees to agree in advance to works carried out by the landlord.

The Cost of Electricity

74. It was common ground that the alternative to agreeing to use a flat's supply would have been to hire generators which would have been far more expensive. As stated by the Tribunal at the hearings, the fact that a tenant received compensation in these circumstances does not prevent that cost from being part of the cost of works and the Tribunal so find. This cost was reasonably incurred and is payable.

The Cost of Scaffolding

75. Owing to the structural issues identified during the works, the works were not completed until June 2013. Mr Clacy said that the scaffolding

price was fixed. The tender responses for this were £2,895 (J Interiors) (accepted) £3,850 (Surrey Builders) and £3,300 (LMD Developments).

76. The Tribunal consider that the lighting netting and other safety features were necessary. For the above reasons the Tribunal find that the scaffolding cost was reasonable in amount and reasonably incurred.

Concern regarding J Interiors

77. The Tribunal finds that the choice of contractors is a matter for the landlord, not the lessees. In *Daejan Properties v Benson* Lord Neuberger referred to this at Para 46 of his judgment. His Lordship said "the [Consultation] Requirements leave untouched the fact that it is the landlord who decides what works need to be done, when they are to be done, who they are to be done by, and what amount is to be paid for them".

78. The Applicants were given a proper opportunity to nominate their own contractor within the statutory period following notice of intention, but did not so. Even if they had nominated their own contractor, the choice of contractor remains a decision of the landlord although he must give reasons if he chooses a contractor who is not the least expensive or the lessees' nominee. In this case, there was no lessees' nominee and J Interiors were the least expensive and selected. There is no requirement for a contractor to be a limited company, be registered for VAT or indeed have any particular legal form.

79. The matter of guarantees is also a matter for the landlord not the tenants. Should the works prove defective, and future costs be incurred to rectify them, the landlord's attempts to enforce any guarantee may be taken into account by a future Tribunal considering whether such future costs were reasonably incurred. However, that is not a matter before this Tribunal.

80. The Tribunal accepts the landlord's evidence that they had used J Interiors on many other projects and were satisfied with their work. The Tribunal also accepts Mr Clacy's evidence that J Interiors is entirely unconnected with the Landlords. For the above reasons the Tribunal rejects the Applicants' assertion that J Interiors should not have been selected.

Delay in dealing with the works

81. Mr Pearson's assertion appeared to be advancing a set-off against the landlords. The Tribunal noted at the hearing of 19 August 2013 that this matter had not been listed for determination in the directions following the pre-trial review of 4 April 2013. Nor is it included in the application.

82. Although both parties agreed that the Tribunal could deal with this, the Tribunal decided on balance that this issue should not be dealt with as

part of the current case. It is therefore inappropriate for the Tribunal to comment further.

Need for a Replacement Downpipe

83. The Tribunal agrees with the landlords that it is impractical to make a cast iron downpipe leak free on reinstallation and that a modern replacement PVC downpipe is the appropriate repair.

Whether Redecorations and renewals are within the scope of the lease

84. The lessor covenants under Clause 7 (4) to paint and decorate all parts of the external building usually painted or decorated (but not more often than five years). By Para 1 (a) of the Fifth Schedule, there is a corresponding obligation on the lessee to contribute to this cost. There was no suggestion that exterior redecoration had been carried out more recently than five years before the major works. The Tribunal therefore rejects the Applicants' contention on this point.

Whether Replacement of a window to Flat 1 is unnecessary

85. The Tribunal was provided with photographs of the windows before the works [289-90]. These showed that the windows were in poor condition and on the balance of probabilities the Tribunal finds that this window repair was necessary.

Whether the painting of External Windows and Doors was an Overcharged Item and in any Event Should Form Part of the Rendering Works.

86. The Tribunal agrees with the specification that shows this painting separately from rendering. The Tribunal rejects the suggestion that the painting should be included in the cost of the rendering.

Whether the windows and doors were in repair.

87. The Tribunal rejects this suggestion for the reason given at Para 84 above.

Whether Cleaning Away Should be Charged Separately

88. The Tribunal finds that this is a usual and reasonable component of a specification of this kind and rejects the Applicants case.

Whether the Louvre Vents [on flank wall] needed repair or replacement

89. The Tribunal finds on the balance of probabilities that it was reasonable to replace these items following the major works. However it notes that

these items are now to be replaced by the Applicants according to the Final Project Costs schedule.

Surveyors' Fees at 12% of the contract sum (exc VAT)

90. The Tribunal accepts the landlords' submission on this point, namely that these are to be charged separately from the contract cost. The Tribunal also accept the tasks and responsibilities assumed by such a surveyor as set out in Mr Clacy's letter of 15 February 2013 [582-3]. The Tribunal consider that the rate of 12% is a typical fee level charged by a landlord's surveyor in these circumstances. The Tribunal therefore finds that this cost was reasonably incurred by the landlord and is payable by the lessees.

Findings on the Reasonableness of the cost of J Interiors Tender

91. The landlord has gone out to tender against a professionally drawn specification and has received tender responses. It has then selected the lowest tender. The successful tenderer has carried out extensive previous work for the landlord. The Tribunal considered that the work had been properly carried out when it inspected the property. The Tribunal did note a render crack to the rear roof ridge but considers that the standard of work was at least reasonable.

92. The lessees have put forward a number of quotations. The Tribunal finds that these quotations are insufficiently reliable as a basis upon which the Tribunal should displace the results of the tender process. This is for the following reasons:

    i. The lessees have at no time provided an estimate on a like-for-like basis against the whole specification. The material that the lessees have produced amounts to quotations to carry out part only of the work as specified.

    ii. There is no reliable evidence before the Tribunal as to the actual area of wall requiring re-rendering. The lessees have variously referred to both 103.2 sq. m and 180 sq. m in the evidence they put forward. The Tribunal therefore has no evidence upon which it can evaluate the lessees' quotations.

    iii. Some of the quotes were sought whilst the work was being carried out by J Interiors. There was therefore no contract actually available. This is an artificial situation which the Tribunal considers makes the quotes unreliable. In particular, on 31 May 2013 Dr MacEvoy emailed Mr Pearson in which the former said "we have received telephone complaints from rendering sub-contractors, including the one who ...carried out the job, to the effect that you are ....making frivolous enquiries ...by asking them to price a job that has already been done" [369]. This was followed by an email to

the same effect from Afrim Reka (of the sub-contractors) to Mr Pearson of 19 June 2013 [373].

iv. The Tribunal does not accept the validity of a contractor in Sunderland being approached to quote for carrying out this work in South London. In answer to a question from the Tribunal, the Applicants stated that there was a personal connection between a lessee and Mr Smith. However, they were unable to confirm whether the contractor had carried out other work in the London region.

v. The quotes do not take account of the essential structural repair work which was only found to be necessary on opening up the wall.

93. As to Mr Newberry, his report expressed expert opinion but he was not called as an expert witness to give evidence. Nor did his report comply with Rule 19 of The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, namely that experts' reports shall (amongst other things) be addressed to the Tribunal, state the expert's qualifications and contain a statement of truth. For these reasons the Tribunal cannot place any reliance on his opinions.

Whether the Landlords are entitled to charge a management fee of 5% of the cost of works

94. Para 9 of the Fifth Schedule of the lease is in these terms:

"When any repairs redecoration or renewals are carried out by the Lessor it shall be entitled to charge as the expenses and costs thereof its normal charges (including profit in respect of such work) at a level agreed in advance by the Lessee."

95. The Applicants expressly challenged the 5% management fee charged by the landlord. The Tribunal considered that this was an unusual covenant. It appears to require the lessee to agree to a fee proposal put forward by the landlord, before such amount becomes payable. At the hearing of 19 August, the Tribunal therefore drew attention to and supplied copies to the parties of *Northway Flats Management Company (Camden) Ltd* v *Wimpey Pension Trustees Limited* [1992] 2 EGLR 42. The Tribunal invited written submissions on this and produced Further Directions to that effect. In light of submissions by Mr Clacy on 19 August, to the effect that the burden of this covenant has not passed to the present owners, the Tribunal also supplied copies of and extended the request to Para 16.046 of *Woodfall* which concerns the liability of covenants passing with the freehold.

96. The Respondents' solicitors' response was that the purpose of Para 9 was to enable a landlord who might also have a building or maintenance company to recover normal costs and profits and that in the event that his company is employed, it is these costs and profits which must be agreed in advance with the lessees. This did not apply,

because both the works and their management were carried out by parties unconnected with the landlord.

97. The Applicants' response was that the clause was to protect lessees from a lessor carrying out works on a property if there are valid concerns. The lessor remained responsible even if works were carried out by third parties. The clause should apply to all works carried out without the lessees' agreement.

98. The Tribunal finds that the burden of this covenant passed with the freehold for the reasons set out at Para 16.046 of *Woodfall* and in particular by virtue of s.3 of the Landlord and Tenant (Covenants) Act 1995. The Tribunal also finds that the reference to "normal charges" and "profit" limit the ambit of this clause to the management fee which is sought. The Tribunal do not consider that it has a wider effect than that. The Tribunal have then considered whether this clause is an "agreement to agree" which is therefore void, or whether it is a valid but imperfectly drafted clause the meaning of which would be obvious to an informed bystander. In those circumstances, the Tribunal is entitled to construe it in a way that gives commercial sense to the agreement. The Tribunal consider that as far as possible clauses in formal legal documents should be given effect to. The Tribunal therefore finds that it is entitled to read the clause as follows:

> "When any repairs redecoration or renewals are carried out by the Lessor it shall be entitled to charge as the expenses and costs thereof its normal charges (including profit in respect of such work) at a level agreed in advance by the Lessee *the lessee acting reasonably.*" (Italicised meaning implied by the Tribunal)

99. The Tribunal caused a letter to be sent to the parties putting this construction forward and inviting comments. The Applicants replied stating "we agree with the tribunal that this covenant should only be valid providing lessee's were acting in a reasonable way in order to protect the freeholder from leaseholders objecting to work's taking place with no grounds what so ever". Mr Clacy referred to points previously made in his earlier response. Having considered the written submissions the Tribunal finds for the construction set out above.

100. The next issue is whether the Respondent did in fact take sufficient steps to agree the 5% management fee with the lessees. The Tribunal considers that this is required as result of the *Northway Flats* case (see above). In that case it was held that an obligation by the landlord to supply specifications and estimates to the tenants was a condition precedent to liability to contribute to the cost; the landlord had not complied and could not recover. Here, the 5% management fee was expressly referred to in the Notice Accompanying the Statement of Estimates sent to the lessees on 14 January 2013 [542-3]. That Notice expressly invited written observations to be made by 13 February 2013. The Tribunal consider in the circumstances of a section 20 consultation

that that was a sufficient attempt by the Lessor to seek agreement to the 5% management fee from the lessees.

101. The issue then arises as to whether the 5% management fee was reasonable in amount. Mr Clacy said that a fee range of 5-10% was normally applies within his properties. In the Tribunal's experience, a management fee for work of up to 10% is common.

102. In addition, the Tribunal consider that Para 8 of the Fifth Schedule also permits the Lessor to recover this sum as it is a cost to the Lessor of providing the repair works as a service. Alternatively Para 8 includes the landlord's cost of employing staff in connection with the performance of its obligations under the lease. (this clause is set out above).

103. For the above reasons the Tribunal find that the management fee of 5% on the cost of works was reasonably incurred and is payable.

Whether all the works are Within the Lease Covenants to Repair

104. Mr Pearson asserted that the works included a degree of betterment and that these therefore fell outside the lease covenants concerning repair.

105. *Woodfall* at 13.043 states "As a matter of practice, it is often possible to remedy disrepair in a variety of ways. In general, it will be for the covenantor [i.e. landlord in the present case] to decide upon the appropriate method of repair. Thus where a landlord covenants to keep the structure and exterior of a building in repair, and the tenants covenant to contribute towards the cost of so doing, it is for the landlord to decide how to repair, although his decisions must be reasonable."

106. Therefore the fact that some degree of betterment arises from use of a particular technique does not of itself transform a repair into an improvement. Subject to the qualification below, the Tribunal therefore rejects the Applicants' case on the question of betterment.

107. However, it does appear that the replacement of coping stones above the rear elevation falls outside the repairing covenant. The reason for this that this feature of the property did not exist before the repair work. This is based on Mr Pearson's evidence which the Tribunal accepts on this point. This item is therefore an improvement and outside the repairing covenants. *Woodfall* at 13.035 states "A covenant to repair does not involve a duty to improve the property by the introduction of something different in kind from that which was demised, however beneficial or even necessary that improvement may be by modern standards. So a landlord of old basement premises not constructed with a damp course or with waterproofing for the outside walls was not bound by his repairing covenant to render the place dry

by waterproofing the walls [Pembery v Lamdin [1940] 2 All E.R. 434, CA]".

108. This item is shown in the Final Costs as item 4.4 Coping Stones: £330 and is disallowed.

Conclusion on Reasonableness and Payability in respect of the Major Works and Surveyors' Fees as shown on the Final Costs (dated 17 June 2013) [813]

109. The Tribunal therefore finds that with the exception of 4.4 (coping stones)

i. The work was within the scope of the lease covenants, carried out to a reasonable standard and the costs reasonably incurred by the landlord;
ii. In view of the dispensation granted (see above) and save for the effect of the coping stones, the full cost is payable.
iii. The amounts payable are therefore as follows:

Contractor's fee	£19,229.34
VAT on contractor's fee	£3,845.87
Surveyor's fee @12%	£2,307.52
VAT on surveyors fee	£461.50
Management charge @ 5% of contractor's fee	£961.47
Electricity payments to lessee of Flat 3 , 13 weeks @£60 p.w.	£780.00
Total	**£27,585.70**
Cost to each lessee	**£6,896.43**

Management Fees

110. The amount sought was £1000 in both 2012 and 2013. The Applicants' case was that the management fees had increased from £800 to £1000 per year without justification. The service was poor. There was great difficulty reaching LMD Management. The Applicants had had to complain a number of times in relation to the carrying out of gardening. The Applicants also complained that demands were not sent regularly. The Applicants stated that they would have accepted that £800 is reasonable for an "excellent management service" [101].

111. The Applicants also referred to decisions of leasehold valuation tribunals. However, as a matter of law factual findings in other tribunal decisions are inadmissible as evidence: *Land Securities Plc v Westminster City Council (No.1)* [1993] 4 All E.R. 124. Findings of law are admissible but are not binding on other tribunals.

112. The Applicants put forward a quotation from another company, JP Elliot Chartered Surveyors for £685 per annum plus VAT. Including VAT, this is £822.

113. Mr Clacy's position was that the management fee was justified for reasons he set out in his submission [73]. In summary, a great deal of work had been carried out; two major works consultations; five insurance claims since 2007; extensive litigation against the former owners of flats 1 and 3; the landlord funded works himself; there was correspondence with the local authority regarding dumped rubbish; the payment record at the building was appalling and mortgagees had been approached seven times since 2006 to settle service charge demands.

114. The Tribunal accepts that the property has been very challenging to manage. However, leaving aside the matter of section 20 works (because these incur separate management fees, as the Tribunal have found) the range of services provided to the lessees is limited. It comprises, cleaning and gardening and routine repairs. Insurance is dealt with by the landlord. In addition the Tribunal accept the evidence that LMD Management has been difficult to contact.

115. For these reasons the Tribunal consider that the management fee charged was not reasonable and that the reasonable cost if a satisfactory service had been provided was £800 in 2012 and £822 in 2013 including VAT.

116. However the Tribunal finds that these amounts should be reduced by 20% to reflect deficiencies in the service provided. The effect of this is that for 2012 the amount payable is £640.

117. However, the application in respect of 2013 is for amounts payable on account (because the service charge year has not closed). The Tribunal cannot predict the quality of service for the remainder of 2013, following the hearing of 26 July 2013 when this evidence was considered.

118. Consequently, the Tribunal applies this reduction only to that portion of the year prior to the hearing of 26 July 2013. Arithmetically, that is 0.54 of the year. Accordingly, the Tribunal finds that for that period of the service charge year the amount payable is £822 less 20% multiplied by 0.54, i.e. £355.10. Thereafter, the reasonable amount payable as an on account charge will revert to the rate of £822 per annum. Both parties will have the right to seek a further determination by the Tribunal in respect of this once the service charge year has closed.

Interest on Late Payment of Insurance Costs

119. The Landlords sought £137.16 in 2013 and £130.63 in 2012. The Respondents' case was that absent timely payment from lessees he had to borrow the funds to pay this essential cost. The Lessees objected. At the hearing, in answer to a question from the Tribunal, Mr Clacy was

unable to point to a covenant in the lease permitting this charge and therefore conceded that it was not payable. The Tribunal would have so found.

Gardening and Cleaning

120. The Applicants' complaint was that they had seen little evidence of a cleaner or gardener. When seen, such activity only followed a complaint. There was only a small amount of work needed to upkeep a gravel stoned garden. Various kinds of debris had been allowed to accumulate rendering the area unusable. The contract is a qualifying long term agreement. Photographs were provided. As to cleaning, the internal common parts were only a 1.5 sq. metre carpeted space.

121. Mr Pearson referred to cleaning and gardening specifications set out in the bundle [188-9] and a quotation from Pride Services for £30 per month plus VAT [190]. This equates to £432 per annum inclusive of VAT. These were dated 21 March 2013. The Applicants also referred to an affidavit by Ms Molly Olusanya [195] who was not called as a witness. Ms Olusanya stated that she regularly cleaned the communal hallway. She had not seen any gardeners or cleaners at the property for over two years.

122. The Respondent's initial position was that only the rear garden was his responsibility. The front garden area was demised under one of the flat leases. As the lessees disputed this, the Tribunal directed written submissions on this point in the Further Directions of 26 July. Mr Clacy's response was that he had misunderstood the ownership position and the front garden was in fact within the common parts. The Respondent's evidence was that he employed a company, 1st Choice, to carry out the work and that feedback indicated that the staff are reliable and honest. The managing agent checks the property every three months. The contract is negotiated annually so is not a qualifying long term agreement.

123. The Respondent also provide an affidavit sworn by a Mrs Joy Rayner. Mrs Rayner and her husband owned 1st Choice. Mrs Rayner's affidavit stated that 1st Choice had been appointed in November 2011 to bring the grounds of the property into maintainable condition. Her firm continued to visit the property on a monthly basis then changing to two, shorter visits per month between April and November 2012. In November 2011 Mr Pearson told Mrs Rayner and her husband that he was very pleased with the work. In May 2013 Mrs Rayner and her husband again met Mr Pearson and he asked for a business card because he was taking over management of the property. Mrs Rayner was later shown the Applicants statement lodged in the Tribunal. The photographs shown by him pre-dated the May 2013 meeting. The area to the front of the property had never been maintained by the Respondent. Mrs Rayner was very concerned by the Applicants' statement because of the implications for her company's reputation.

124. The jurisdiction of the Tribunal is limited to the dispute between the parties before it. It cannot adjudicate on a dispute between a lessee and a contractor at the property. It is for each party to decide which witnesses to call; they are expected to give evidence so that they can be cross-examined. As to Ms Olusanya's affidavit, she too did not give evidence. In any event, it is clear that the Respondents were under a misapprehension regarding the responsibility for the front garden maintenance.

125. For these reasons and in the context of the dispute the Tribunal are deciding, the Tribunal do not place weight on either affidavit. The Tribunal have to focus on the reasonableness of the charges. Doing the best it can the Tribunal consider that the cost of £720 per annum is too high for the work required and that a reasonable cost for 2013 is £432 including VAT. For 2012 the Tribunal reduce this by 3% to reflect inflation giving a sum of £419.

Fence Replacement

126. This related to replacement of 12m of garden fence for which the Respondents charged £700. The Applicants' case was that the cost of £700 was unreasonable. This work could have been carried out for £458.40 as per a quotation from DWJ Fencing Contractors [197]. The Applicants also complained that the company carrying out the work LMD Developments was related to the landlord and was a dissolved company. The Applicants also sought to refer to factual findings in another Tribunal decision. However this is inadmissible for the reasons given above.

127. The Respondent's case was that LMD Developments did exist at the time. There was no need for a contractor to be a limited company to carry out work. The cost of works was below the threshold for consultation, but the landlord had nevertheless benchmarked the quote against an alternative tender. This was from Surrey Build at £780 [488].

128. The Tribunal inspected this work. The Tribunal found the fence to be flimsy and poorly installed. For those reasons the Tribunal prefer the Applicants' case and find that the reasonable cost was £458.40.

Fees in Connection with Exploratory Works to the Left Flank Wall

129. This was a charge of £220 from Surrey Groundworks for cutting two 600 sq. mm openings in the rendering of the flank wall on 20 July 2012. There was also a charge of £165 from MPM Building Excellence ("MPM") in respect of Dr MacEvoy's attendance on site that day to oversee the exploratory opening up of the structure and report to the landlord by email. Both charges were supported by invoices. Mr Pearson submitted that the physical work could have been done for £100 but provided no like-for-like quotations to support this. He also said that the attendance of Dr MacEvoy was not very good value. The

Tribunal find that this work was essential prior to the major works being specified and that both disputed charges were reasonable and payable.

Surveyor's Fee for Investigating and Reporting on Damp

130. Dr MacEvoy was instructed by LMD Management to carry out an investigation of possible damp penetration to the left flank wall. This followed a report by Mr Pearson. Dr MacEvoy inspected the property on 24 May 2012 and reported on 8 June 2012. The cost was £485 which was disputed by the Applicants as being too high. Mr Pearson referred to the lower cost of a Homebuyer report. The Tribunal find that this work was essential to investigating the source of damp and the report necessary. The Tribunal reject any comparison with a Homebuyer report which is prepared for an entirely different purpose. The Tribunal find that cost was reasonable and is payable in full.

Conclusions

131. A summary of the findings is set out at Appendix 1, attached. The Tribunal has found that the total amount payable to the Respondent is £31,138.32. Each lessee is liable for one-quarter of this amount, which is £7,784.58.

Section 20C Application

132. The sole guidance as to how such application is to be determined is contained in sub-section (3) as follows:

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

133. In the Tribunal's judgment this is the only principle upon which the discretion should be exercised. This will include the degree of success of the tenants and the conduct of the parties.

134. The bulk of the financial dispute related to the major works. The Applicants have lost that case, save for £460.02. As shown on Appendix 1 the total claim contended for by the Respondent including the other heads of dispute is approximately £33,300. The Applicants' corresponding position was approximately £12,700 with the major works at £10,000. The Tribunal determination equates to approximately £31,100. In addition, the Applicants refused to proceed to mediation having initially agreed to do so at the PTR. No satisfactory reason was given. The Tribunal have also had regard to the Applicants' failure to properly compile the hearing bundles with the result that the Respondent was required to return to the Tribunal for a second day. This situation was not inevitable had the full bundles been before the Tribunal on 26 July. The Tribunal would then have had to inspect on a different day, but the Respondent may have chosen not to attend, as in

fact happened on 26 July. For the above reasons the lessees' application is refused.

135. However, this does not amount to a finding that the Respondents' costs of the Tribunal proceedings are necessarily recoverable under the terms of the lease. That was not a matter before the Tribunal and it heard no argument. Should this become an issue it will have to be considered in future proceedings.

Reimbursement of Fees

136. This application is also refused for the same reasons as those in respect of an order under section 20C.

Right to seek Permission to Appeal

137. The Tribunal is required to set out the right of appeal against its decisions and these matters are addressed in the appended Guidance.

Charles Norman FRICS
Valuer Chairman

179 Selhurst Road SE25 6LB Appendix 1											
LON/00AH/LSC/2013/0164											
LON/00AH/LDC/2013/0075											
Item			**Year**		**Respondents' Case**		**Applicants' Case**		**Tribunal Determination**		**Applicants' Success**
Major works			2013	£	28,045.72	£	10,000.00	£	27,585.70		£ 460.02
Management fees			2013	£	1,000.00	£	640.00	£	733.22	[1]	£ 266.78
			2012	£	1,000.00	£	640.00	£	640.00		£ 360.00
Interest on Insurance			2013	£	137.16	£	-	£	-		£ 137.16
			2012	£	130.63	£	-	£	-		£ 130.63
Cleaning & Gardening			2013	£	720.00	£	432.00	£	432.00		£ 288.00
			2012	£	700.00	£	419.00	£	419.00		£ 281.00
Fence			2012	£	700.00	£	458.00	£	458.40		£ 241.60
Surveyor's report				£	485.00			£	485.00		£ -
Fees re exploratory work			2013	£	385.00	£	100.00	£	385.00		£ -
Totals				**£**	**33,303.51**	**£**	**12,689.00**	**£**	**31,138.32**		**£ 2,165.19**
The amount payable by each lessee is one quarter of the total sum of £31,138.32 that is £7,784.58											

[1]	£ 822.00	0.54	£	443.88	0.8	£	355.10
	£ 822.00	0.46	£	378.12	1	£	378.12
						£	733.22

Appendix of relevant legislation

Landlord and Tenant Act 1985 (as amended)

Section 18

(1) In the following provisions of this Act "service charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent -
   (a) which is payable, directly or indirectly, for services, repairs, maintenance, improvements or insurance or the landlord's costs of management, and
   (b) the whole or part of which varies or may vary according to the relevant costs.

(2) The relevant costs are the costs or estimated costs incurred or to be incurred by or on behalf of the landlord, or a superior landlord, in connection with the matters for which the service charge is payable.

(3) For this purpose -
   (a) "costs" includes overheads, and
   (b) costs are relevant costs in relation to a service charge whether they are incurred, or to be incurred, in the period for which the service charge is payable or in an earlier or later period.

Section 19

(1) Relevant costs shall be taken into account in determining the amount of a service charge payable for a period -
   (a) only to the extent that they are reasonably incurred, and
   (b) where they are incurred on the provisions of services or the carrying out of works, only if the services or works are of a reasonable standard;

   and the amount payable shall be limited accordingly.

(2) Where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable, and after the relevant costs have been incurred any necessary adjustment shall be made by repayment, reduction or subsequent charges or otherwise.

Section 27A

(1) An application may be made to the appropriate Tribunal for a determination whether a service charge is payable and, if it is, as to -
   (a) the person by whom it is payable,
   (b) the person to whom it is payable,
   (c) the amount which is payable,

(d) the date at or by which it is payable, and
(e) the manner in which it is payable.

(2) Subsection (1) applies whether or not any payment has been made.

(3) An application may also be made to the appropriate Tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs and, if it would, as to -
(a) the person by whom it would be payable,
(b) the person to whom it would be payable,
(c) the amount which would be payable,
(d) the date at or by which it would be payable, and
(e) the manner in which it would be payable.

(4) No application under subsection (1) or (3) may be made in respect of a matter which -
(a) has been agreed or admitted by the tenant,
(b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,
(c) has been the subject of determination by a court, or
(d) has been the subject of determination by an arbitral Tribunal pursuant to a post-dispute arbitration agreement.

(5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.

Section 20

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

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

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

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

(a) if relevant costs incurred under the agreement exceed an appropriate amount, or
(b) if relevant costs incurred under the agreement during a period prescribed by the regulations exceed an appropriate amount.

(5) An appropriate amount is an amount set by regulations made by the Secretary of State; and the regulations may make provision for either or both of the following to be an appropriate amount—
(a) an amount prescribed by, or determined in accordance with, the regulations, and
(b) an amount which results in the relevant contribution of any one or more tenants being an amount prescribed by, or determined in accordance with, the regulations.

(6) Where an appropriate amount is set by virtue of paragraph (a) of subsection (5), the amount of the relevant costs incurred on carrying out the works or under the agreement which may be taken into account in determining the relevant contributions of tenants is limited to the appropriate amount.

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

Section 20B

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

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

Section 20C

(1) A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a court, residential property Tribunal or the Upper Tribunal, or in connection with arbitration proceedings, are

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

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

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

Commonhold and Leasehold Reform Act 2002

Schedule 11, paragraph 1

(1) In this Part of this Schedule "administration charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent which is payable, directly or indirectly—
- (a) for or in connection with the grant of approvals under his lease, or applications for such approvals,
- (b) for or in connection with the provision of information or documents by or on behalf of the landlord or a person who is party to his lease otherwise than as landlord or tenant,
- (c) in respect of a failure by the tenant to make a payment by the due date to the landlord or a person who is party to his lease otherwise than as landlord or tenant, or
- (d) in connection with a breach (or alleged breach) of a covenant or condition in his lease.

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

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

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

Schedule 11, paragraph 2

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

Schedule 11, paragraph 5

(1) An application may be made to the appropriate Tribunal for a determination whether an administration charge is payable and, if it is, as to—
(a) the person by whom it is payable,
(b) the person to whom it is payable,
(c) the amount which is payable,
(d) the date at or by which it is payable, and
(e) the manner in which it is payable.

(2) Sub-paragraph (1) applies whether or not any payment has been made.

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

(4) No application under sub-paragraph (1) may be made in respect of a matter which—
(a) has been agreed or admitted by the tenant,
(b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,
(c) has been the subject of determination by a court, or
(d) has been the subject of determination by an arbitral Tribunal pursuant to a post-dispute arbitration agreement.

(5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.

(6) An agreement by the tenant of a dwelling (other than a post-dispute arbitration agreement) is void in so far as it purports to provide for a determination—
(a) in a particular manner, or

(b) on particular evidence,

of any question which may be the subject matter of an application under sub-paragraph (1).