11753

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	:	**LON/00BH/LSC/2015/0150; LON/00BH/LSC/2015/0247; LON/00BH/LDC/2015/0078; LON/00BH/LSC/2016/0148; and LON/00BH/LDC/2016/0061**
Property	:	**Ground & First Floor Flats, 276A & B, High Road, Leytonstone, London E11 3HS**
Applicant	:	**Arora Estates Ltd (freeholder)**
Representative	:	**Mr Ajay Arora, in-house solicitor**
Respondents	:	**1. Stephen Bakare & Abimbola Carew; 2. Chelliah Christie Manoharan; 3. Rajinder Kaur Gill; and 4. David Gbadego Ojo**
Representatives	:	**In person, at the hearing**
Type of application	:	**Reasonableness and payability of service charges**
Tribunal members	:	**Judge Timothy Powell Mr Duncan Jagger MRICS Mr Owen Miller**
Date and venue of hearing	:	**17 August 2016 at 10 Alfred Place, London WC1E 7LR**
Date for further submissions	:	**30 September 2016**
Date of decision	:	**7 November 2016**

DECISION

NB: the references in square brackets are to pages in the hearing bundle.

Summary of the tribunal's determinations

(1) This tribunal makes the following determinations:

(a) In tribunal case LON/00BH/LSC/2015/0150, the full advance sum of £8,236.89, specified in the particulars of claim in county court proceedings under claim number A4QZ28C2, is payable by the defendants, Mr Stephen's Olunkunle Bakare and Mr Abimbola Oladimeji Carew, the former leaseholders of the ground floor flat (who are the first respondents to these tribunal proceedings), together with such interest and costs as the county court may determine;

(b) In tribunal case LON/00BH/LSC/2015/0247, the full advance sum of £12,712.88, specified in the particulars of claim in county court proceedings under claim number A6QZ157X, is payable by the defendant, Mr Chelliah Christie Manoharan, the former leaseholder of the first floor flat (who is the second respondent to these tribunal proceedings), together with such interest and costs as the county court may determine, but subject to any payments made by Mr Manoharan to the applicant/claimant in the interim;

(c) Further and/or in the alternative, in tribunal case LON/00BH/LSC/2016/0148, if the applicant freeholder were to incur costs in the sums referred to above, in respect of future services, repairs, maintenance, improvements, insurance or management, a service charge would be payable for such costs, as follows:

(i) in respect of the £8,236.89, by Messrs Bakare and Carew (the former lessees) and, if the applicant were unable to recover such costs from them, by Ms Rajinder Kaur Gill (the current lessee of the ground floor flat and third respondent to these proceedings), and

(ii) in respect of the £12,712.88, by Mr Manoharan (the former lessee) and, if the applicant were unable to recover such costs from him, then by Mr David Gbadego Ojo (the current lessee of the first floor flat and fourth respondent to these proceedings);

(d) Insofar as may be necessary, in tribunal cases LON/00BH/LSC/2015/0078 and LON/00BH/LDC/2016/0061, the tribunal grants dispensation from any of the statutory consultation procedures, which might be found lacking in any respect, insofar as those procedures touch upon the proposed major works at 276 High Road Leytonstone, the cost of which were included in the two county court actions referred to above; and

(e) The tribunal declines to make an order under section 20C of the Landlord and Tenant Act 1985.

(2) The tribunal makes the following orders for the refund of the tribunal fees:

(i) In respect of the £190 tribunal hearing fee paid for the combined cases LON/00BH/LSC/2015/0150 and 0247, Messrs Bakare and Carew (on the one hand) and Mr Manoharan (on the other) must each refund £95 to the applicant within 14 days of this decision;

(ii) In respect of the £190 tribunal hearing fee paid for the first dispensation application LON/00BH/LSC/2015/0078, Messrs Bakare and Carew (on the one hand) and Mr Manoharan (on the other) must each refund £95 to the applicant within 14 days of this decision; and

(iii) In respect of the £190 tribunal hearing fee paid for the dispensation application LON/00BH/LDC/2016/0061, Ms Gill and Mr Ojo must each refund £95 to the applicant within 14 days of the date of this decision.

(3) The two matters transferred from the county court should now be returned to the county court, to deal with issues relating to interest, costs and court fees. The tribunal notes that in each case the lease makes provision in clause 4 for any arrears in service charge, unpaid after 14 days, to become liable to interest rate at 4% above Barclays Bank plc base rate from time to time in force.

Background

1. The applicant company is the freehold owner of two adjoining properties, 276 and 278 High Road Leytonstone, London E11 3HS. Each of the two properties contains two residential flats; and there is a commercial unit, which spans them both. This case is concerned with the ground floor flat ("Flat A") and the first floor flat ("Flat B") at 276 High Road Leytonstone.

2. The two flats at no.276 are subject to long leases on identical terms. The lease to Flat A was granted on 18 December 2006 and that to Flat B on 8 June 2006. Each lease is for a term of 99 years from 25 March 2006. An issue arose relating to the demise of Flat A, which encroached upon part of the neighbouring property, no.278. However, this issue was resolved by the grant of a further lease and by a deed of rectification, both in 2007, and it is not material to this decision. The provisions of the leases will be referred to, where relevant, later in this decision.

3. According to the leases, the original lessees were Mr and Mrs Patel in Flat A and Mr Carr in Flat B. None of the original parties to the leases are involved in these proceedings. In date order, the present parties became involved in the property, as follows:

Date	Party
1 April 2011	Mr Manoharan purchased Flat B
26 November 2012	The applicant acquired the freehold of no.276
22 July 2014	Messrs Bakare & Carew purchased Flat A at auction
26 March 2015	Mrs Gill purchased Flat A at auction
14 May 2015	Mr Ojo purchased Flat B at auction

4. The applicant company and first respondents are what might be termed "professional" property investors; while the second, third and fourth respondents are what might be termed "amateur" investors. None of the respondents has ever lived in Flats A and B, both of which are let out to short-term occupational tenants.

5. The building at no.276 appears to be in a dilapidated condition and the fabric of the property requires attention. It is for this reason that the applicant, through its managing agents, Synergy Home Management Ltd, engaged B Bailey & Co Ltd, chartered surveyors, to survey the building and prepare a specification of the works, in January 2014. By letter dated 10 March 2014, Synergy commenced the statutory consultation procedures under section 20 of the Landlord and Tenant Act 1985, with a view to the applicant landlord carrying out works of maintenance and repair. That consultation was carried out, in the case of Flat A, with Mr and Mrs Patel, and in the case of Flat B, with Mr Manoharan. Four estimates were obtained by the surveyors. Synergy wrote to the then lessees on 8 July 2014, giving details of the proposed works and the estimates obtained; and asking for any written observations, with the consultation period ending on 12 August 2014.

6. In the event, the landlord selected the cheapest of the four estimates, namely that from B & M Builders, in the sum of £14,466 plus VAT, which sum was increased by the addition of supervisory fees and a contingency, to a total of £17,359.20, or £8,679.60 per flat.

7. On 15 August 2014, Synergy sent demands to the then lessees - now Messrs Bakare and Carew, in Flat A, and Mr Manoharan, in Flat B - for

advance service charges and ground rents, including for the proposed major works. The lessees to both flats disputed their liability to pay the advance service charges, with the result that the applicant issued county court proceedings against Mr Manoharan on 12 December 2014 and against Messrs Bakare and Carew on 29 December 2014.

8. As indicated above, both lessees then sold their respective flats to Ms Gill (Flat A) and Mr Ojo (Flat B), on 26 March and 14 May 2015, respectively. In both cases, the first and second respondents agreed to indemnify the third and fourth respondents, either in respect of a specific sum related to the proposed cost of major works, or in respect of such liability as may arise as a result of the proceedings.

9. The first and second respondents both filed defences in the county court, whereupon the proceedings were transferred to the First-tier Tribunal, by order dated 27 March 2015, in A4QZ28C2, and dated 1 June 2015, in A6QZ157X. The two cases were initially dealt with separately by the tribunal under reference numbers LON/00BH/LSC/2015/0150 and 0247, with directions being issued on 16 April and 16 June 2015, respectively. Eventually, however, the two cases were linked so that they could be dealt with together.

10. Then, on 18 June 2015, the applicant issued a third application against the first and second respondents (dealt with under reference LON/00BH/LDC/2015/0078), seeking an order under section 20ZA of the Landlord and Tenant Act 1985, to dispense with some or all of the statutory consultation requirements under section 20 of the Act. That third application became unnecessary, when both the first and second respondents stated unequivocally, at a subsequent case management hearing held on 10 May 2016, that they did not dispute the section 20 consultation procedures and they agreed that such procedures had been complied with.

11. The applicant then issued a fourth application on 8 July 2015 (dealt with under reference LON/00BH/LSC/2016/0148), naming all four respondents and seeking an order under section 27A(3) of the 1985 Act to say that if the costs envisaged for the proposed major works were to be incurred, a service charge based on those costs would be reasonable. Directions in that case, dated 12 May 2016, stated that the application should be dealt with together with first two applications.

12. Finally, a further application was made against the third and fourth respondents only (under reference LON/00BH/LDC/2016/0061), being "a belt and braces" application for dispensation under section 20ZA of 1985 Act, insofar as there were any doubts about compliance with the statutory consultation directions.

The hearing

13. The hearing took place on 17 and 18 August 2016. The applicant was represented by Mr Ajay Arora, in-house solicitor, who was joined on the second day by Mr Peter Gunby, MRICS of B Bailey & Co Ltd, chartered surveyors in Ilford, Essex, and by Mrs Sonia Lakshminarayan-Menon, the property manager for Synergy.

14. The following respondents all appeared in person: Mr Carew, Mr Manoharan (with his wife and two sons), Ms Gill and Mr Ojo. Although the first and second respondents had previously been represented by solicitors and, at earlier case management hearings, by counsel, they did not instruct legal representatives for the hearing, citing cost as the reason.

15. The tribunal had the benefit of a well-prepared and detailed consolidated bundle of documents, which covered all of the applications before the tribunal. In addition, on the morning of the hearing, Mr Arora produced a skeleton argument together with copies of six legal authorities, upon which he relied. Copies of these documents had been supplied to the respondents on the previous day. Although there were some concerns from the respondents about a lack of time for prior consideration, the skeleton itself merely repeated and drew together information and submissions already in the hearing bundle.

16. So far as the legal authorities were concerned, provision was made at the end of the hearing for the respondents to have three weeks in which to make counter-submissions on the law, with a like period for the applicant to reply to such submissions.

17. The first day of hearing dealt with the issue as to whether or not valid demands for advance payments had been made under the leases, that is to say whether liability had been established. The second day of the hearing was concerned largely with the amounts claimed and whether they were reasonable in amount; and by whom they should be paid, if the demands were found to be valid.

18. Having heard the submissions and evidence from those present and having taken into account further submissions received after the hearing, the tribunal reached the determinations that are set out in the summary at the head of this decision.

Reasons for the tribunal's determinations

The validity of the service charge demands

(i) The respondents' arguments

19. The respondents disputed that the applicant landlord had followed the correct procedure in the lease for demanding service charges. In the reasons for disputing liability in the first respondent's statement of case (drafted by counsel and served on 28 May 2015), [page **B43** of the bundle], the submission was put like this:

> "16. The service charge is payable on 24 June each year. It is a condition precedent to the Respondents' liability to pay the service charge that the amount of the service charge shall be ascertained and certified by a certificate. There is no obligation to pay the service charge on account.
>
> 17. In the premises, it is denied that the Respondents are liable to pay the amount demanded or any sum at all".

20. By the date of Mr Carew's witness statement of 10 July 2015, the first respondents appeared to accept (para.9) that "expenses incurred can include provision for anticipated expenditure". However, by the post-hearing submissions dated 6 September 2016, they had reverted to a bold assertion that "there is no obligation to pay the service charge on account."

21. The second respondent, in his county court defence [**F7**] and in his statement of issues [**G2**], disputed liability for an advance service charge in these terms (from the defence):

> "5. The Defendant denies the Claimant's claim for an advance service charge contribution towards "proposed" major works to the building as the Lease does not permit this. The Lease only provides (Clause 3(ii)(e) [sic]) for advance payment in respect of expenditure which is of a periodical recurring nature and beyond this only for actual expenditure already incurred."

(ii) The lease provisions

22. Clause 2 of the lease contains the lessees' covenants with the lessor [**A29 & F77**]. Clause 2(3)(i) deals with the lessees' liability and is the covenant:

> "To pay to the Lessor by means of yearly payments payable on the 24th June in each year, a service charge equal to one half of the expenses..."

of matters listed thereafter, including repairing the structural parts of the building (clause 2(3)(i)(a)), repairing and lighting of common passageways, entrance halls and access ways (clause 2(3)(i)(c)), insurance (clause 2(3)(i)(d)), and managing agents and accountants (clause 2(3)(i)(e)). (As will be seen below, these matters reflect many of the landlord's obligations in clause 3 of the lease).

23. The mechanism whereby the service charge is payable is contained in clause 2(3)(ii)(a) to (h). They key provisions (redacted by reason of saving space and with emphasis added) are as follows:

> "(a) The amount of the service charge ... shall be ascertained and certified by a certificate (hereinafter called "The Certificate") signed by the Lessor's auditors or accountants or managing agents (at the discretion of the Lessor) ... annually and so soon after the end of the Lessor's financial year as may be practicable..
>
> "(b) The expression "the Lessor's financial year" shall mean the period from the 1st day in April each year to the 31st day of March of the next year ...
>
> "(c) A copy of The Certificate for each financial year shall supplied by the Lessor to the Lessee on written request and without a charge to the Lessee.
>
> "(d) The Certificate shall contain a summary of the Lessor's said expenses and outgoings incurred by the Lessor during the Lessor's financial year to which it relates ...
>
> "(e) The expression "expenses and outgoings incurred by the Lessor" as hereinbefore used shall be deemed to include not only those expenses outgoings and other expenditure hereinbefore described which have actually been disbursed incurred or made by the Lessor during the year in question but also such reasonable part of all such expenses outgoings and other expenditure herein before described which are of a periodically recurring nature (whether recurring by regular or irregular periods) whenever disbursed incurred or made and whether prior to the commencement of the said term or otherwise including a sum or sums of money by way of reasonable provision for anticipated expenditure in respect thereof as the Lessor or its accountants or managing agents (as the case may be) may in their discretion allocate to the year in question as being fair and reasonable in the circumstances and relates pro rata to the demised premises.
>
> "(f) As soon as practicable after the signature of The Certificate the Lessor shall furnish to the Lessee an account of the service charge payable by the Lessee for the year in question due credit being given therein for all interim payments made by the Lessee in respect of the said year ...

> "(g) It is hereby agreed and declared that the Lessor shall not be entitled to re-enter ... by reason only of non-payment by the Lessee of any such interim payment as aforesaid prior to the signature of The Certificate but nothing in this clause ... shall disable the Lessor from maintaining an action against the Lessee in respect of non-payment of any such interim payment as aforesaid notwithstanding that The Certificate has not been signed at the time of the proceedings subject nevertheless to proof in such proceedings by the Lessor that the interim payment demanded and unpaid is of a fair and reasonable amount having regard the prospective service charge ultimately payable by the Lessee ..."

(iii) Steps taken by the applicant to comply with the lease

24. In accordance with the provisions of the lease referred to above, the applicant's managing agents, Synergy, duly prepared and signed a document headed 'CERTIFICATE', setting out the service charge expenditure to the end of lessor's financial year ending 31 March 2014 [**C52 & H76**]. The Certificate contained details of the lessor's expenses and outgoings during the year. It also gave details of the landlord's future expenditure, in the form of an 'Estimated Service Charge Budget' for the period 1 March 2014 to 31 March 2015 [**C51 & H75**].

25. The Certificate revealed that the lessor's actual expenditure for the year was less than the previously anticipated expenditure, by some £1,381.81, so that each of the then lessees received a credit note from Synergy, dated 15 August 2015, for £609.61 each [**C49 & H74**]. At the same time, Synergy sent an invoice to each of the then lessees, for advance service charges in respect of the lessor's future expenditure [**C43 & H69**].

26. Without waiting for either lessee to make a written request for 'The Certificate', pursuant to clause 2(3)(ii)(c) of the lease, Synergy sent a copy of it to each of the then lessees, attached to the credit note and invoices dated 15 August 2014 (which referred to the "attached statement of expenditure" and "attached budget", respectively).

27. Statements of accounts were then served on the leaseholders: on the first respondents by e-mail dated 24 September 2014 to their solicitors [**C60-5 & C60-6**], and to the second respondent by letter to him dated 25 February 2015 [**H92 & H93**] and, later, by letter to his solicitors on 16 March 2015 [**H91**].

28. It follows, therefore, that the lease requirements for the preparation and signing of "The Certificate" and the furnishing of an account of the service charge payable have all been complied with.

29. Even had this not been the case, a failure would not have suspended the lessees' obligation under clause 2(3)(ii)(e) to pay a service charge. The applicant relied on several authorities that emphasised this point. One of these was in relation to demands for estimated service charges: *Elysian Fields Management Co Ltd v Nixon* [2015] UKUT 0427 (LC), where a failure to prepare annual accounts in accordance with lease provisions was held not to be a condition precedent to liability for estimated charges; nor was time of the essence. Another such case was *Clacy and Nunn v Sanchez and others* [2015] UKUT 0387 (LC), where Judge Edward Cousins came to the same conclusion in relation to certification, where the lease provisions were uncannily similar to those in the present case, holding (in para. 28(3)) that:

> "... the requirement for certification is therefore not an essential pre-requisite to the payment of the service charge by the lessees. There is no contractual requirement or stipulation for certification, and thus no condition precedent. The phraseology set out in clause 2(2)(iii) provides the machinery relating to the primary obligation to pay. It is, in effect, a confirmatory procedure".

30. Accordingly, there is no support for the first respondents' assertion, in Mr Carew's witness statement of 10 July 2015 (para.9) [**B59-B60**] that the service charge was not payable because it was based on a "standalone" demand for payment, which in any event was only payable on 24th June in each year.

(iv) Does the lease permit an advance charge to be made?

31. While the first respondent denied that the lease contained an obligation to pay a service charge on account, at all, the second respondent accepted that an advance charge could be made, in principle, but that the lease provisions did not permit such a charge to be made for the proposed major works.

32. The lease provisions have already been set out above. They clearly refer to the possibility of the lessor charging lessees for "anticipated expenditure", in clause 2(3)(ii)(e), and for the lessees paying the "interim payment", in clause 2(3)(ii)(f) and (g).

33. The purpose of these provisions can be in no doubt, but are perhaps best summarised by Warren J in *Morshead Mansions Limited v Mactra Properties Limited* [2013] EWHC 224 (Ch), who dealt with very similar service charge provisions (in the 4th Schedule of the lease, in that case). Warren J held, at para. 62 that:

> "The structure of the 4th Schedule is such as to ensure that MML [the landlord] need not be out of pocket for any serious length of time. This is reflected in (i) the making of provision, as part of

> Expenses, for anticipated expenditure (whether or not as part of the reserve fund) (ii) the making of interim payments under paragraph 3 and (iii) the option for MML to hold on to excess interim payments by way, in effect, of pre-payment of next year's Service Charge. It is right, in my view, to construe the 4th Schedule, provided that this can be done without undue strain to the wording, so as to ensure that MML does not have to carry large amounts of expenditure which it has actually paid ... and ... so as to ensure that MPL [the lessee] (and other lessees at the Property) do not have to pay out by way of service charge amounts which have not been paid ... by MML unless they are reasonable pre-payments in respect of future expenditure."

34. There is no doubt, therefore, in the tribunal's mind, that the first respondent is wrong: the lease does allow the lessor to charge anticipated expenditure to lessees as an advance service charge.

Are the proposed costs within the ambit of the interim charge?

35. That being the case, the next question is whether the proposed costs for major works to the building fall within the ambit of the interim charge. This comprises two issues: (i) do the proposed works fall within the lessor's repairing covenant in the lease, and, if so, (ii) are they "of a periodically recurring nature"?

(i) Are the proposed works within the lessor's repairing covenant?

36. In paragraph 14 of his witness statement of 10 July 2015 [**B62**], Mr Carew submitted that the applicant is not entitled to recover the cost of a long list of works, mainly on the basis that they fall outside the lessor's repairing covenant, they are improvements or the works are not required.

(ii) The lessor's repairing covenant

37. By clause 3 of the lease, the lessor covenants with the lessee:

> "(1) Subject to the Lessee paying the contribution towards the cost thereof in accordance with clause 2(3) to keep in good and substantial repair order and condition
>
> (a) The roof main walls timbers and main structure of the Building including the foundations of the Building
>
> (b) the common entrance hall staircases landings and passages of the Building

(c) all such chimney stacks gutters drains water pipes and sanitary and water apparatus therein as serve two or more flats in the Building

(d) the gardens the common entrance hall staircases lifts (if any) landings and passages of the Building

(2) Subject as aforesaid to keep the said entrance hall staircases landings and passages clean and tidy and adequately lighted

(3) Subject as aforesaid to keep the Building insured ..."

(iii) The nature of proposed works

38. The proposed works are those contained in the specification of works prepared by B Bailey & Co Ltd [**C21-C24**]. The external works comprise: the erection of scaffolding to the front and back of the building; patch repairs to a cornice, preparation and decoration of the front elevation walls; works to a parapet wall and valley roof; washing-down windows and frames. Internally, the proposed works comprise: a repair to the main front door; fire-proofing works to the ceiling and walls of the hallway, with decorations; a repair to the floor; upgrading communal areas to meet current fire safety requirements, including the installation of a smoke alarm system. At the external rear, more scaffolding was envisaged, to enable clearing out of the well area; some repairs to the flashing of the single-storey back-addition; patch pointing to the main chimney stack; patch repairs to a flat roof; and undertaking a CCTV survey of the drains.

39. In his witness statement, Mr Carew challenged the recoverability of proposed costs relating to the washing down of windows and frames, all of the internal works especially relating to fire-proofing, and most of the external rear works [**B60-B61**].

(iv) Do such works fall within the repairing covenant?

40. In the tribunal's view, none of these items is exceptional in any way. They fall squarely within the heading of general repairs and maintenance of the main structure and common parts of the building, which are the lessor's responsibility under clause 3 of the lease.

41. Insofar as the cleaning of windows is a tenant's obligation under clause 2(21) of the lease, the tribunal would say that the proposed item includes the frames which are not the tenant's responsibility; and a landlord's obligation to repair carries with it, in any event, an obligation to reinstate the property to a reasonable standard after completion of any works. In the present case, this would include cleaning the windows of any dust or grime caused by the external

works; and so the applicant would be entitled to recover the £70 proposed cost for this item.

42. With regard to the internal works, which largely relate to fire-proofing and fire safety, the need for these was clearly established by the clear evidence given by Mr Gunby MRICS, both in his fire risk assessment report [**B11**] and orally to the hearing. In short, Mr Gunby did not believe the lobby area of no.276 was compartmentalised enough: that is to say, if there were to be a fire in the adjoining shop premises, there was a need to protect the hallway as a fire escape for residential occupants, and the current ceiling and walls were insufficient for this purpose. In making his recommendations for upgrading the fire safety elements of the common parts of the building, he relied upon industry-standard guidance when deciding what (modest) works were necessary. He confirmed, and the tribunal accepted, the absolute need to improve fire safety provision in the common parts, for the safety of occupants of the flats.

43. Contrary to Mr Carew's assertions at the hearing, the tribunal has no hesitation in finding that such works fall within the lessor's repairing covenant in clause 3(1) of the lease. The express wording of the repairing covenant is wider than a simple obligation to carry out repairs as and when they are needed, but it is expressed as being a covenant "to keep in good and substantial repair order and condition". This is a continuing obligation on the lessor to keep up the standard of repair in the building throughout the duration of the lease, importing a sense of prevention rather than cure, and of maintaining the building before it falls out of condition. It is a phrase that makes a significant addition to what is conveyed by the word "repair" and it includes an obligation to use reasonable care to keep communal parts safe.

44. The tribunal does not, therefore, need to rely upon any implied terms, as submitted by Mr Arora at the hearing. However, if it did need to do so, it would find that there was an implied obligation on the landlord's part to take reasonable care to maintain the common parts in a state of reasonable repair and efficiency (see *Liverpool CC v Irwin* [1977] AC 239, relied upon by the applicant) and that this extended to making and keeping the common parts reasonably safe by means of the provision of fire-proofing works and the provision of a fire alarm system (in the same way that, in *Miller v Hancock* (1893) 2 QB 177 (referred to in *Liverpool CC v Irwin*), the court held that there was an implied term that the landlord would maintain a staircase, which was essential to the enjoyment of the premises demised, and should keep it reasonably safe for the use of tenants).

45. Insofar as it was argued at the hearing that some of the proposed work items should be considered "improvements", rather than "repairs", the respondents have ignored, first, the wider wording of the repairing covenant, dealt with above, and, secondly, the principle that some

repairs necessarily contain an element of improvement, without affecting their status as "repairs"; and this latter all the more so, when repairs are legitimately carried out to modern building standards and to meet current regulations.

(v) Are the works of a "periodically recurring nature"?

46. In his witness statement of 6 July 2015, the second respondent Mr Manoharan, reflects statements made in his Defence [**F7**] and Statement of Issues [**G4**], when he says [at **G11**]:

> "I do not therefore dispute the Applicant's ability to claim a service charge; however I do dispute that the Applicant is entitled to claim for an advance service charge contribution towards "proposed major works to the Building" as the Lease does not permit this. The only advance payments permitted by the Lease as evidenced by this Clause is in respect of expenditure which is of a periodical recurring nature."

47. The full wording of clause 2(3)(ii)(e) is set out above. To recap, in addition to expenditure actually disbursed, the clause allows the lessor to recover a reasonable part of its expenses "which are of a periodically recurring nature (whether recurring by regular or irregular periods) ... including a sum or sums of money by way of reasonable provision for anticipated expenditure ..."

48. The submissions made on behalf of the second respondent relied exclusively on the words "of a periodically recurring nature" – suggesting that major works were "one-off" matters, that did not recur from time to time - but they omitted the words immediately after, i.e. "(whether recurring by regular or irregular periods)". The omission is crucial, in the tribunal's view, because almost by definition, maintenance and repair works to a property will recur from time to time and will take place at regular or, as in the case of major works, at irregular intervals. It follows that the tribunal is satisfied that the proposed major works, all falling within the lessor's repairing obligation, are of a "periodically recurring nature", because they are expenses that arise from time to time, whether by "regular or irregular periods", as part of the general repair, maintenance and upkeep of the building.

(vi) Summary

49. In the tribunal's judgment, the proposed costs of major works do fall within clause 2(3)(ii)(e) of the lease and the lessor is entitled to demand a reasonable amount for his anticipated expenditure. The lessees are therefore liable to pay a reasonable amount as an advance charge for the proposed works.

How much is a reasonable amount for the advance charge?

50. In paragraph 15 of his witness statement of 10 July 2015 [**B62**], Mr Carew submitted that:

> "If the FTT decides that the service charge has been demanded in accordance with the Lease, the Applicant must show: (i) that it is reasonable to carry out the proposed works; and (ii) that the estimated costs of the proposed works are reasonable."

He then goes on to list in paragraph 16 those works which the first respondents believe are not necessary or reasonable to carry out, stating their belief that no works are required, that proposed costs are excessive or that costs should be shared with the leaseholders of no.278.

51. These challenges are supplemented by those set out in the Scott schedules [**B1-B8** for Flat A; and, **F119-F122** & **G25-G27** for Flat B] and the post-hearing submissions.

(i) Need for the works

52. The tribunal relied upon Mr Gunby's witness statement dated 9 July 2015 [**B36-B38**], his fire assessment report [**B11**], his oral evidence at the hearing and upon photographs of the condition of the building in the bundle [**B9-B16**], to conclude that no.276 was in a dilapidated condition and that works were clearly needed to bring the building into good and substantial repair, order and condition.

53. Where there was uncertainty about the need for works, the specification provided for a provisional sum, which the parties agreed meant that no charge would be made, if it turned out on inspection that such works were not needed.

54. The tribunal went through all of the items disputed by the respondents at the hearing, and was satisfied that the works planned were necessary. However, Mr Gunby took on board several of the lessees' comments, for example about covering the windows to avoid the expense of washing them down after the external works, something that Mr Gunby said could be discussed at the pre-contract meeting.

55. Despite this, many of the lessees' objections were not sustained, for example: the lessees' previous decorations to the entrance lobby had no bearing on the need for fire-proofing works; the proposed pin board in the lobby is an effective and important aid to communication with occupants of the building (especially about fire-safety matters and especially where the flats are let to short-term tenants with whom the lessor would otherwise have no means of contact); the lessees'

provision of their own electricity supplies has no bearing on the need for a fuse board for a separate landlord's supply to the common parts, but this was a provisional sum anyway; some clearance of the well area between nos.276 and 278 has already taken place and was covered by charges to no.278; it is unlikely that the local authority will arrange free rubbish removal for a commercial landlord, as opposed to residential owners; and scaffolding is needed to access the rear extension and the proposed works cannot be carried out easily off a ladder or using angled towers.

(ii) Competing estimates for the proposed works

56. As part of the statutory consultation process, the lessor provided four estimates for the cost of the works proposed in the specification of works. The estimates (excluding the 10% managing fees and 10% contingency) were for the following amounts: £14,466, £15,318, £19,122 and £31,068. The lessor proposed to select the cheapest of the four estimates, that provided by B & M Builders Ltd.

57. An item-by-item comparison of the individual elements of the specification and the amounts estimated by each contractor was prepared by Mr Gunby and sent to Synergy on 1 July 2014 **[C14-C15]**. The Schedule of Estimates contained a number of provisional sums for work that was uncertain in extent. The lessees sought to challenge each and every one of the individual items from the B & M Builders estimate. They did this by particular reference to their own alternative quotes, which had been obtained from two firms proposed by Mr Carew, namely from Martsbuild Ltd and from M G Brown, Builder and Decorator **[D1-D5]**.

58. These alternative quotes had been obtained in May 2015 and had been submitted to Synergy, which had accepted them as part of a late extension to the original statutory consultation process. The lessees' quotes were then passed on to Mr Gunby, who wrote to the two firms concerned in June 2015, asking them to complete a specification of works, so that a like-for-like comparison with other contractors could be made. The alternative firms were also asked to provide a health and safety questionnaire, all within 30 days, namely by 12 July 2015.

59. In the event, M G Brown declined to provide a quotation reflecting the specification of works, because of a current heavy workload; but (after chasing letters were sent) Martsbuild Ltd did provide the completed documentation, on the 17 August 2015. Mr Gunby did a comparison of the Martsbuild quotation, which came in at £10,434, approximately £4,000 less than the lessor's cheapest estimate. By letter dated 7 September 2015 **[D37]**, Mr Gunby advised Mr Arora, the lessor's in-house solicitor, that he would be unable to recommend Martsbuild because the owner (a Mr Martin McEwen) "confirms that he has never undertaken a risk assessment and he is not familiar with how to

complete same, even for a relatively small contract such as this." In short, because Mr McEwen had not demonstrated a necessary understanding of the principles behind health and safety legislation, if Martsbuild were instructed, there was a risk that the lessor "would be held responsible for not taking due diligence and not ensuring that the contractor is suitably qualified".

60. Having heard Mr Gunby's oral evidence and having considered the documentation carefully, the tribunal is also satisfied that Martsbuild is not a suitable contractor to carry out the proposed works, because the firm has not demonstrated sufficient competency in health and safety matters. Where a landlord carries out works to a building, there is an expectation that the landlord will satisfy current health and safety standards and will ensure that all his contractors comply likewise. That is not to say that Martsbuild are not perfectly competent: it is simply that without crucial competency in health and safety matters, the landlord's decision not to instruct the company is a reasonable one.

(iii) Challenges to individual items

61. The respondents' challenges to the individual items in the B & M Builders estimate are summarised in the Respondents' Comments on Proposed Works [**B52-1**]. Some of them have been dealt with above, in relation to the issue of which works fall within the lessor's repairing covenant. However, the most important part of the estimate from B & M Builders is the headline total figure of £14,466, rather than the individual elements of the estimate.

62. This is because, in the tribunal's judgment, it is not appropriate for the lessees to "cherry pick" the cheapest items from across the estimates obtained, and to insist that the eventually successful contractor should charge no more than the cheapest amount for each element of the specification. Different contractors seek to earn their profit on a job by pricing different items in different ways. In the present case, each of the contractors will be bound by the total price that they have quoted, whether the eventual work is more or less than anticipated; and it is matter of judgment for each contractor to decide what to quote for each individual element, according to their assessment of the nature of the work and the risks that some items may be more onerous than others. Again, what is important is the final figure and, in this case, having consulted properly, the lessor selected the cheapest of the four estimates presented to him.

63. Despite some confusion arising from the wording of the service charge accounts for the year ending 31 March 2015 [**C101**], which appeared to suggest that the costs of the major works had already been incurred, the works have not been done, or even started. Consequently, these are only advance charges at this stage. The lessor made it absolutely clear that the eventual costs may be higher or lower than the sums quoted

and, if lower, a credit would be given to the leaseholders for any advance payments not utilised – as happened with very similar major works (at a very similar cost, it may be said) carried out at the neighbouring property, no.278.

64. When looking at advance charges for major works, the tribunal has to take an overall view of the likely expense and it is not constrained by the cost of the individual items. It is not as if the works have been carried out and there can be an inspection as to the standard of that work, which may go to reduce the costs charged. This is an exercise in projecting forward and assessing whether the costs sought in advance are reasonable. Where, as in the present case, the lessor has chosen the cheapest of four estimates following consultation, where the works are needed and clearly fall within the repairing covenant of the lease, the tribunal is satisfied that the sums claimed are reasonable in amount and it sees no reason to reduce the interim charge in any way.

65. Accordingly, the sums claimed in the county court proceedings in respect of major works are all reasonable and payable. Furthermore, insofar as any sums cannot be recovered from the first and second respondents, the tribunal makes an order under section 27A(3) of the 1985 Act that, if these works were carried out at this cost, the sums indicated would be reasonable (assuming a reasonable standard of work) and they would be payable not only by the first and second respondents but, in addition, by the current lessees, the third and fourth respondents.

Consultation requirements

66. The above findings as to the reasonableness of the advance charges is, of course, subject to the statutory consultation procedure having been carried out properly. Prior to the hearing, through their counsel, the first and second respondents made it clear that they raised no dispute with the consultation procedure and they accepted that it had been carried out properly.

67. At the hearing, Mr Manoharan seemed to want to draw back from that position and he raised some questions about the dates that letters had been sent to his former managing agents, Theori Investments Ltd (which used to manage Flat B on his behalf, when it was sublet to his tenants), even though the evidence appeared to show all the letters sent to Theori had been passed on to Mr Manoharan. However, given the unequivocal statement at the case management hearing on 10 May 2016, that the first and second respondents did not dispute the section 20 consultation procedures, and that Mr Manoharan withdrew the suggestion to the contrary to his county court defence, the tribunal was not willing to allow him to question the statutory consultation procedure at the hearing.

68. As indicated at the beginning of this decision, as a "belt and braces" approach, the lessor had made a subsequent section 20ZA application seeking dispensation, as against Ms Gill and Mr Ojo, the third and fourth respondents. At the hearing, Ms Gill and Mr Ojo were asked whether they had any dispute with or comment about the statutory consultation procedure; and neither did: it had taken place long before their time and they knew nothing about it.

69. The tribunal considered the consultation documents and was satisfied that it had been carried out properly. However, given that Mr Manoharan had raised questions at the hearing, and for the avoidance of all doubt, insofar as it is necessary, the tribunal grants the applicant landlord an order dispensing with any of the dispensation requirements, which it may be felt had not complied with regulations.

Other service charges

70. Although Mr Manoharan initially sought to dispute other service charges, including insurance fees, by the last quarter of the hearing the only matter remaining in issue was the level of the management fees, in the sum of £83.71 per flat for the year to 31 March 2013 and £315 per flat for the year to 31 March 2014 [**G25**]. Mr Manoharan's main complaint was that there was a connection between the managing agents, Synergy, and the landlord itself - a search of Companies House having revealed "that the Applicant is a majority shareholder in the managing agent" - and that "this arrangement has not been disclosed" [**G11**]. For these reasons, Mr Manoharan challenged the management fees, disputing "the Lessor's ability under the terms of the Lease to pay itself for managing the Property unless proper receipts for expenses have been produced".

71. Mr Arora, as the in-house solicitor for the landlord, explained the arrangements to the tribunal (which were also covered in the Applicant's statement of case [**F129-F130**]). He said that Synergy, the managing agents, were owned one-third by the applicant, Arora Estates Ltd, one-third by himself and one-third by his sister. However, on a day-to-day level, Synergy was run by Mrs Menon, the property manager, and two others not related to the family business of property development. There was real work carried out and a real cost to the business, not least, salaries and pensions of the staff. The work carried out and what was included in the fee was contained in the management agreement, a copy of which was included in the hearing bundle [**H23-H26**]. The charge for the consultation process worked out at £150 for each of the three stages.

72. The documents in the hearing bundle did indeed demonstrate that substantial work had been carried out by the managing agents. For example: in relation to the proposed major works, a chartered surveyor had been instructed, who then inspected the property, prepared a

specification of works and obtained estimates; the managing agents issued consultation notices and engaged in meaningful consultation with the then lessees; end-of-year accounts and budgets were prepared and sent to lessees; and the managing agents corresponded with lessees over time and dealt with their queries.

73. The tribunal's attention was drawn to the judgement of HHJ Gerald in *Country Trade Limited v Noakes and others* [2011] UKUT 407 (LC), LRX/118/2010, in which he said, at paragraph 6:

> "Unless, which is not the case here, it is asserted that the management arrangements were a mere "sham" i.e. an arrangement which disguised the true relationship or agreement between the parties, there is nothing in principle objectionable to a management company such as the Appellant employing a company it owns or is involved in to provides services: see *Skilleter v Charles* [1991] 24 HLR 421."

74. In the present case, there is no allegation of "sham", as such, but disquiet at a connection that had not been disclosed and a concern that the applicant landlord was paying itself to manage the property. While there is obviously a very close family connection between the various elements of the property development business, i.e. the landlord company, the in-house solicitor and the managing agents, they are all separate legal entities and, overall, having considered the explanation from Mr Arora, the documents and the witness statement of Mrs Menon, **[B30-B34]**, the tribunal is willing to accept that the arrangements are transparent and real; and not a sham.

75. Therefore, the tribunal is satisfied that the management fees charged by Synergy in this case for the work carried out on these matters are reasonable and payable by the lessees.

Were county court proceedings justified?

76. Both Mr Carew and Mr Manoharan said that the applicant should not have issued court proceedings against them, for recovery of unpaid service charges. Mr Carew said that no liability had arisen to pay those charges, that there was no scope for the applicant to seek to forfeit the leases for non-payment of them, and that, consequently, there was no ability to claim costs from the lessees.

77. Having been through the evidence and reached the determinations above, the tribunal considers that the applicant was within its rights to bring proceedings in respect of the service charges, which had been properly demanded according to the lease and which remained unpaid by the lessees, despite legitimate requests for payment.

Claim for interest

78. As part of the claim, the lessor claimed interest as against the first and second respondents. The lease provides in clause 4 that:

> "In the event of any payments due under this lease in respect of ground rent and service charges remaining unpaid for fourteen days after they shall become due, the Lessee shall be liable to pay to the Lessor interest on the amounts remaining unpaid at the rate of 4% above Barclays Bank plc base rate from time to time in force..."

79. The invoices to the lessees had been sent to them on 15 August 2014 and the amounts were unpaid fourteen days later, being 29 August 2014. Therefore, interest at the contractual rate is payable on such arrears from 29 August 2014 until the date of issue of the court proceedings, being 29 December 2014 (first respondents) and 12 December 2014 (second respondent). Thereafter, county court rates of interest may apply.

80. The landlord is to calculate interest on the arrears on this basis and present the figures to the first and second respondents for agreement. Only in the event of non-agreement and non-payment, should the relevant correspondence and calculations be provided to the tribunal for confirmation.

Section 20C

81. The leaseholders applied for an order under section 20C of the Landlord and Tenant Act 1985. Such an order, if made by the tribunal, would prevent the lessor from claiming its costs of the tribunal proceedings through the service charge.

82. The first stage is for the tribunal to ascertain whether such costs could be claimed through the service charge and this requires a consideration of clause 2(3)(i)(a) to (e) of the lease. None of the cost items in that sub-clause appear to permit the lessor to recover its costs of the tribunal proceedings through the service charge. Therefore, an order under section 20C of the 1985 Act is not necessary.

83. However, even if the lease did provide that the landlord might recover its costs through the service charge, the tribunal would not consider it just and equitable to make an order under section 20C, because the lessees have lost on all issues, when they should have taken an early pragmatic view and paid the advance charges in respect of the proposed works, clearly necessary, without putting the lessor to the time, effort and expense of litigation to recover sums due under the lease.

Refund of fees

84. As the lessor had to make the various applications for a determination of the various issues, the tribunal considers it only right that it should recover the application and hearing fees paid to the tribunal, as summarised in the beginning of this decision.

85. Although both the first and second respondents eventually conceded that the statutory consultation procedures had been carried out properly, this was only after the issue by the applicant of the third set of tribunal proceedings, seeking dispensation under section 20ZA of the 1985 Act. Prior to this, both had disputed the adequacy of the consultation procedures before the court. Although the application for dispensation had been withdrawn at the case management hearing on 10 May 2016, the applicant nonetheless applied for a refund of its application fee of £190. Given the circumstances, and for completeness, it is right that the first and second respondents should each refund the applicant half of that fee, as well.

Lessees' application for rule 13 costs

86. The first and second respondents considered that the lessor had acted unreasonably in the conduct of the tribunal proceedings and sought an order for costs under rule 13 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013. However, following a detailed consideration of the correspondence in the hearing bundle, the tribunal can see no evidence of any unreasonable conduct in conducting proceedings on the part of the lessor.

87. On the contrary, the correspondence makes it abundantly clear the legal basis upon which the advance service charges were claimed and it gave lessees every opportunity to pay them, at an early stage, before the dispute became protracted. It follows, therefore, that the tribunal declines to make any award of costs against the landlord.

The next steps

88. Having determined the sums due and payable by the lessees to the lessor, and having indicated the basis on which interest is to be calculated, this matter should now be returned to the county court, where any outstanding matters, such as county court costs, county court fees, statutory interest and enforcement maybe dealt with.

Name: Judge Timothy Powell **Date:** 7 November 2016

Rights of appeal

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any right of appeal they may have.

If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber), then a written application for permission must be made to the First-tier Tribunal at the regional office which has been dealing with the case.

The application for permission to appeal must arrive at the regional office within 28 days after the tribunal sends written reasons for the decision to the person making the application.

If the application is not made within the 28 day time limit, such application must include a request for an extension of time and the reason for not complying with the 28 day time limit; the tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed, despite not being within the time limit.

The application for permission to appeal must identify the decision of the tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal and state the result the party making the application is seeking.