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FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**CAM/33UF/LSC/2014/0111**
Property	:	Trafalgar Court, 42 Cromer Road, Mundesley, Norfolk NR11 8DB
Applicants	:	Bruce Roderick Maunder Taylor & Michael Harrison Maunder Taylor, as appointed Receivers & Managers
Representative	:	Bruce Maunder Taylor
Respondents	:	London Land Securities Ltd and others listed on the application form, all of the same address
Representative	:	Mark Baumohl (counsel – public access) Ravinder Sharma & Sonal Sharma (& Mrs N Sharma)
Type of Application	:	For determination of liability to pay service charges for the years 2012/13, 2013/14, and 2014/15 [LTA 1985, s.27A]
Tribunal	:	G K Sinclair, R Thomas MRICS & C Gowman BSc MCIEH MCMI
Date and venue of Hearing	:	Wednesday 25th & Thursday 26th March 2015 at the Keswick Hotel, Walcot Road, Bacton, Norfolk
Date of Decision	:	18th May 2015

DECISION

Cases cited or mentioned in this decision

Daejan Investments Ltd v Benson & ors [2013] UKSC 14; [2013] 1 WLR 854
Martin v Maryland Estates Ltd [1999] L&TR 541; (2000) 32 HLR 116
Phillips v Francis [2014] EWCA Civ 1395; [2015] 1 WLR 741; [2015] L&TR 4
Regent Management Ltd v Jones [2010] UKUT 369 (LC)
Schilling v Canary Riverside Development PTD Ltd LRX/26/2005
Southwark LBC v Oyeyinka [2014] UKUT258 (LC)

Summary

1. Yet again a dispute has arisen between the landlord and its nominee tenants of a majority of the flats in a former seaside hotel converted into flats (on the one side) and the managers and, to some extent, the other tenants who bought their flats (on the other). This has proved a particularly challenging and long-running dispute, with numerous tribunal applications being made from 2001 until now.

2. The respondents on this occasion are the landlord and its nominee tenants, and the subject yet again is their failure to pay what is demanded of them by way of service charge contributions. There has not been a total failure to pay, but it is frustrating that various amounts seemingly of Mr Sharma's choosing are paid on random dates but the reaction to demands for payment of regular service charges demanded in accordance with the lease, both in advance against a budget and as a final payment upon preparation of accounts, is a steadfast refusal coupled with obfuscatory correspondence or simply silence.

3. For the reasons given below the tribunal determines that the final service charge accounts for the first two years in question and the advance sum budgeted for the year 2014/15 are payable in full, without deduction, in the proportions and sums calculated by the tribunal-appointed managers.

Background

4. The landlord and some of the current tenants have been involved in proceedings concerning this property before the Leasehold Valuation Tribunal and latterly this tribunal since 2001. Apart from short interludes when the landlord has been able to resume control the property has been the subject of management orders in favour of now three separate managers throughout; the current applicants having been appointed for a 3-year term in 2012. An application to renew that most recent management order is pending.

5. Throughout this last 14 years there have been many and various applications by the various parties under what is now section 27A of the 1985 Act, section 20ZA, for revocation of the management order under section 24 of the 1987 Act, for a declaration under the 2002 Act that an RTM Company whose shareholders comprised the landlord's nominee tenants of a majority of the flats should have the right to manage, and various applications concerning the reasonableness of

actual or proposed major works contracts.

6. During the most recent period when the landlord was managing the property it obtained reports and a specification of works from a building surveyor and a firm of architects for the completion of major works that had previously ground to a halt due to the departure of the main contractor and failures in supervision. At the stage when it was about to sign contracts for the execution of these works the current managers were appointed and they took over.

7. The works are largely complete and the property finally watertight (or as close to that as is possible with a cliff-top building of solid brick construction) but the landlord and its nominee tenants have failed or refused to pay all of the service charges demanded by the applicant managers, leaving them seriously short of funds.

8. After a 2-day inspection and hearing at which the landlord was represented on a public access basis by Mr Mark Baumohl of counsel the tribunal was surprised to receive by e-mail on 27th March 2015 some further submissions, raising new points, from Mr Ravinder Sharma directly. The tribunal declines to take them into account as it makes this decision solely on the basis of the evidence and submissions put before it at the hearing; and the respondent cannot now seek to introduce additional matters.

Material provisions of the Management Order

9. By paragraph 1 c) of the tribunal's Order dated 6th August 2012 appointing the applicants as managers of the property :

> "the Leases" shall mean the long leases and/or underleases of flats in the Property and "Lease" shall be construed accordingly. For clarification, the eight intended flats, the development of which has not yet been completed, are to be treated on the assumptions that they have already been built and that the Landlord shall pay a share of the service charge in respect of each such flat, until such time as it has been demised on a lease imposing an obligation to pay a proportionate share of the maintenance charge, as if the Landlord were a leasehold owner of that flat on the same terms and conditions as all the other leases.

10. Paragraph 2 c) goes on to provide that the managers shall manage the property in accordance with :

i. the Directions and Schedule of Rights, Functions and Services attached to this Management Order;
ii. the respective obligations of the Landlord under the Leases by which the flats at the Property are demised by the Landlord and in particular with regard to repair, maintenance, decoration, renewal and provision of services to and insurance of the Property; and
iii. the duties of managers set out in the Service Charge Residential Management Code (2009) ("the Code") [or any approved Code replacing it]

11. The Schedule of Rights, Functions and Services annexed to the Order provides *inter alia* that :

1.2 The Managers shall have the right to demand and receive from the

Tenants, as the proprietors of any flats in the Property, and their successors in title to any flats in the Property, service charge contributions in such reasonable and proper proportions to be determined by the Managers. For clarification, the Managers are to treat the Property as being 32 flats, each contributing to the service charge account.

1.3 The Managers shall have the right to demand and receive from the Tenants half-yearly payments of service charges in advance on account of actual expenditure to be incurred by the Managers on the first date of this Order in such sum as the Managers shall reasonably determine having regard to the likely costs to be incurred and in respect of which service charges are payable during the relevant financial year and for avoidance of doubt shall have the same right in respect of each subsequent service charge financial year. Insofar as the planned major works are concerned the Managers may collect contributions forthwith after the expiry of the present s.20 consultation process; such contributions being payable within one month of demand being made.

1.4 The Managers shall have the right to establish and maintain a reserve fund ("the Reserve Fund") to make provision for any maintenance, repair and renewal of the Property which shall not be carried out in the service charge financial year during which any contribution towards the Reserve Fund is demanded.

1.5 The Managers shall, in their discretion and having regard to any reasonably necessary anticipated repair, maintenance and renewal works required at the Property, be entitled to demand from the Tenants a reasonable contribution towards the Reserve Fund as part of the service charges for works of maintenance, repair and renewal of the Property which will not be carried out within the service charge financial year during which the demand for payment is made and for avoidance of doubt all references to "service charge" or "service charge" within this Management Order shall include such contribution to the Reserve Fund.

Relevant statutory provisions and case law

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

> an amount payable by a tenant of a dwelling as part of or in addition to the rent... (a) which is payable, directly or indirectly, for services, repairs, maintenance, improvements or insurance or the landlord's costs of management...

13. The overall amount payable as a service charge continues to be governed by section 19, which limits relevant costs :

a. only to the extent that they are reasonably incurred, and
b. where they are incurred on the provision of services or the carrying out of works, only if the services or works are of a reasonable standard.

14. The tribunal's powers to determine whether an amount by way of service charges is payable and, if so, by whom, to whom, how much, when and the manner of payment are set out in section 27A of the Landlord and Tenant Act 1985. The

first step in finding answers to these questions is for the tribunal to consider the exact wording of the relevant provisions in the lease. If the lease does not say that the cost of an item may be recovered then usually the tribunal need go no further. The statutory provisions in the 1985 Act, there to ameliorate the full rigour of the lease, need not then come into play.

15. Please also note sub-sections (5) & (6), which provide that a tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment, and that an agreement by the tenant of a dwelling (other than a post-dispute arbitration agreement)[1] is void in so far as it purports to provide for a determination in a particular manner or on particular evidence of any question which may be the subject of an application to the Tribunal under section 27A.

16. On the question where the burden lies in proving the reasonableness or otherwise of service charges the applicants cite the case of *Regent Management Ltd v Jones*[2], where HHJ Mole states at [32] that he can find nothing in section 19 or section 27A that suggests that there is a presumption either way. In *Schilling v Canary Riverside Development PTD Ltd*[3] (not cited in *Regent Management*) HHJ Rich QC had to consider the same point. At paragraph 15 he stated :

> I have felt more difficulty in regard to the question whether a service charge which would be payable under the terms of the lease is to be limited in accordance with s.19 of the Act of 1985 on the ground either that it was not reasonably incurred or that the service or works were not to a reasonable standard, is to be treated as a matter where the burden is always on the tenant. In a sense the limitation of the contractual liability is an exception in respect of which Lord Wilberforce in *Nimmo v Alexander Cowan & Sons Ltd* [1968] AC107 at p.130 stated "the orthodox principle (common to both the criminal and the civil law) that exceptions etc. are to be set up by those who rely upon them" applies. I have come to the conclusion, however, that there is no need so to treat it. If the landlord is seeking a declaration that a service charge is payable he must show not only that the cost was incurred but also that it was reasonably incurred to provide services or works of a reasonable standard, and if the tenant seeks a declaration to the opposite effect, he must show that either the cost or the standard was unreasonable. In discharging that burden the observations of Wood J in the *Yorkbrook*[4] case make clear the necessity for the LVT to ensure that the parties know the case which each has to meet and for the evidential burden to require the tenant to provide a prima facie case of unreasonable cost or standard.

Inspection and hearing

17. The tribunal inspected the property at 10:00 on the first morning of the hearing. Both applicants, Mr Ravinder Sharma and his son Sonal Sharma for the landlord,

1 Eg. provisions in a lease stating that the landlord's accountant's certificate shall be conclusive, or that any dispute shall be referred to arbitration

2 [2010] UKUT 369 (LC)

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

4 *Yorkbrook Investments Ltd v Batten* [1985] 2 EGLR 100 (which was quoted by HHJ Mole in the *Regent Management* case)

their expert witness Mr Hemming, and the caretaker Mr Marsland were also in attendance. Surprisingly, as a barrister's hearing fee is usually charged by the day, the respondent's counsel had not been instructed to be there. The party noted how the condition of the ground floor lobby was far superior to how it had looked on previous visits. The walls were painted and floor newly carpeted, and the entrance to the unfinished ground floor west wing – previously blocked by a rough sterling board frame secured at the rear by scaffold poles – was now concealed by a painted plaster finish under a shallow arch, with console table and several chairs.

18. Ascending the staircase the tribunal was able to see some damp patches on the main staircase by the rear, sea-facing wall; but overall the condition of the interior common parts was of a similar high standard, with fresh paint and new carpets. Damaged or missing balusters around the octagonal light well in the middle of each landing had all been replaced. On the top floor the tribunal gained access by folding loft ladder to the attic space around the large glazed octagonal dome illuminating the landings or central lobbies on the floors below. Much of the attic floor was now covered in thick insulation, and on either side of the dome but at quite low level two hatches have now been fitted so that access can be gained for maintenance purposes to the two high level sections of flat roof – above the east and west wings.

19. The tribunal inspected the interior of a number of flats. Some were completed and let to tenants, including Mr Pooley's flat in the east wing which had been in a very damaged state before (including smashed toilet pan and broken doors with vandalised locks). Other rooms, especially at the extreme western end by the gable wall, either showed signs of damp or were in the course of being replastered after treating penetrating damp. In one top floor flat in the east wing, facing the sea on one side and with the gable wall on another, parts of an internal timber stud wall had been removed and ceiling joists and some brickwork also exposed to treat dry rot and a significant crack in the wall.

20. The tribunal's attention was drawn to the size, profile and means of attachment of guttering and downpipes, some viewed from a balcony facing the road at the front of the building.

21. Leaving the building via an external door from the main lobby on the seaward side the tribunal was shown how in most places the grass was growing right up to the brick wall, in some cases breaching the damp proof course. In particular, a ramped pathway had been constructed for disabled access (there are only steps at the front door), but on either side of it the ground level had been built up with earth and a grassed surface created. The concrete slab path also ran horizontally along the rear wall for a short distance to an external door in the side wall of the new brick, glazed and flat-roofed structure replacing the former ballroom (and which had closed off the exposed opening to the main part of the west wing and finally made the building weathertight). This too breached the dpc.

22. Other points noted on external inspection were the replacement of some old red bricks with new metric-sized ones, the incomplete replacement of some old decorative bricks from various points around the building, greening of vertical surfaces adjacent to downpipes (some of which was of considerable age), how the

outside swimming pool was still present but unfenced and with some water lying in the bottom of it, and how work had still yet to start on the 8 flats intended to be built by the landlord in the now-secure west wing.

23. The hearing commenced at 12:10. The tribunal had before it three overloaded bundles comprising 1283 pages. Of this total a modest respondent's statement of case comprising 5 pages and a further one of 2 pages had attached to them an unnecessary 80+ pages of documents including parts of expert and other reports not properly adduced nor complying with the tribunal's directions. These were supplemented by the applicant's skeleton argument, copies of case law handed in on the day, and a detailed 10-page spreadsheet – mostly in extremely small print – produced by the landlord.

24. Mr Bruce Maunder Taylor explained in opening that the case concerned three financial years, in respect of which two had certified service charge accounts and one a budget. He said that, with a few exceptions, the respondents had raised no quantified challenges[5]. There were criticisms of certain aspects of the works, and Mr Hemming's condition survey, but unless or until quantified figures were produced the managers (and the tribunal) could only deal with what was there. He argued, citing *Regent Management Ltd v Jones*[6], that it was not for the applicants to have to justify figures without knowing what the challenge is. The problem, he said, was that the respondents paid the sums demanded for year 2013, but they have withheld some sums for the year to August 2014 and some for the year budgeted to August 2015. Recovery action in the County Court requires a determination whether the works are of reasonable standard and of reasonable cost. It was very much hoped that when the tribunal publishes its determination court action will not be necessary and agreement can be reached.

25. The applicants called Janet Jury, architect, of Reynolds Jury Architecture to give evidence. Her detailed statement set out the background to the major works which were required following an earlier failed contract, how she was initially instructed by London Land Securities Ltd, drew up a specification of works and invitation to tender, organised the tender process and later a second one in May to July 2012. After a first detailed conversation with the applicants on 23rd July 2012 an instruction was issued to appoint ND Willan Building Contractors Ltd. Thereafter there were regular site meetings at which the roofers (Garrett), main contractors (Willan), contract supervisor (RJA) and Sonal Sharma of London Land Securities Ltd were present. She explained how the works were progressed and how, from January to July 2013 RJA was also commissioned by the landlord to prepare proposals for the undeveloped ground floor west wing and basement. Since July 2013 no further instructions had been received.

26. Ms Jury's statement also dealt with the design and installation of the gutters and downpipes, discolouration and staining to the render and brickwork. While not unwilling to accept that there is some damp this was examined by cherry-picker and the team were satisfied that much is caused by condensation on the cold uninsulated walls and with occupation and regular heating of the flats this would cease to be a problem. In addition, Eric Pooley had undertaken a core sample in

5 One concerned expenditure on lift repairs or replacement

6 [2010] UKUT 369 (LC)

his flat which showed the centre and exterior of the core to be dry, suggesting that the problem was condensation.

27. On the subject of bridging the damp course she referred to the fact that as part of the plans for redeveloping the ground floor west wing and ballroom it was proposed to include a covered walkway between rear door and the ballroom.[7] It was not until later that RJA discovered that only certain tenants would have access to the former ballroom entrance, but the paving was laid with the covered link in mind. It was then altered to include a gravel French drain next to the wall.

28. Cross-examined by Mr Baumohl, she rejected Mr Hemming's assertion that there was lichen growth on the external surfaces. This was merely "greening", much of it of long standing. She also rejected the suggestion that the gutters were in some way "failing". Much of the greening was where old downpipes had been located. The gutters were not overloaded, but in high winds rain was in some places being blown up or backwards off the roof, so much of it did not even reach the gutters. Increasing their size would make no difference to the volume of rain captured.

29. On the subject of render and brickwork repairs or replacement she said that the work in the original specification was reviewed when the scaffolding was in place in the autumn of 2012. It became clear that if they were taking off render they should take off all of it. That was not practical, so instead the plan was to make the render watertight. Site meetings, which were lengthy affairs attended by Sonal Sharma until 2013, involved a walk around the scaffold and discussion of the budget – so there would not have been an instruction to remove the render. Meetings were about containing works to within the budget, so the magnitude of the task of taking off all the render was not an option.

30. She was site managing the major works. Her first conversation with Maunder Taylor was about the management instruction concerning N D Willan. They were having site meetings regularly, and into 2013. After then reporting was solely to Maunder Taylor. She said she was unfamiliar with working for the LVT, so was initially issuing docs to London Land Securities Ltd and to Maunder Taylor.

31. The extent of the brick repair had originally been assessed from ground level when preparing the spec. it was only when string course, etc could be examined more closely from the scaffold that the true extent of the work was revealed. Rather than replace all indented brickwork to the string courses it was cheaper in the more severely affected areas simply to apply a dressed lead covering to provide protection from further deterioration.

32. Mr Baumohl began cross-examining Ms Jury about how effective the works had been in weather-sealing the building, referring to certain minor leaks around windows, etc until the tribunal chairman reminded him of the context in which the works were specified, namely a missing ballroom structure and a huge gaping hole in the seaward side of the ground floor west wing exposing the interior to the elements. That had now been cured by the erection of the rear flat-roofed extension.

[7] In cross-examination she said that the plan at page 19 of her statement had been drawn up with Sonal Sharma

33. Asked about the electrical works, she explained that by an anomaly they were working to 1998 Building Regulations, but there were three parties taking their own views on the fire protection works. As a result the main addition to those works that had been foreseen in the tender was the basement and undeveloped area, and a change to the entry system. One of RJA's task was to get the fire order lifted from the building so the flats could be occupied, and this took longer with three parties involved. The demands of Building Control were relatively light but it was the fire officer, whose view is subjective, who was more difficult.

34. Ms Jury was questioned about her non-discovery of extensive dry rot in the roof at the western end of the building, which was now being repaired. She explained that when RJA did the work originally there was Code 5 lead laid to current standards and in good condition. Nowhere else on the building had they replaced good lead (where fixed properly – not nailed through). What transpired is that the lead was laid on new board on top of severely decayed sole board in the gutter. What that was masking was decay from infestation and past infestation. The work done now is what should have been removed in 2006–07. It is some timber corbels that had been painted, and a great deal of flood treatment within a metre of infestation. Every time they strip back the specialist would come and test for the presence of mycelium. It is not a valley gutter but a box gutter. The timber grounds found nourishment for the growth. She said that they have had a very frustrating number of months. In flat 19, the sitting room wall had to be stripped back. Removal had now ceased. They had to lift tiles and replace the feet of some of the rafters.

35. Finally, asked whether these additional works could have been incorporated back in 2012 she said that RJA had not been asked to conduct a survey but to start from someone else's document[8].

36. Michael Maunder Taylor confirmed the content of his witness statement and was cross-examined on behalf of the respondents. He confirmed that the intention was to make the premise weathertight. The managers were taking over a partly completed roofing contract and a new contract. The specification of that contract had been prepared by London Land Securities Ltd. He was questioned at some length about a £67 000 overspend on electrical items, although nothing about this appeared in the respondents' statements of case. Asked to what issue this went Mr Baumohl referred to section 20ZA, but that too did not feature in his clients' statements of case.

37. Asked about works to the passenger lift in the building, he confirmed that he had started a section 20 consultation process about that and passed details to tenants, as there was a dispute with Mr Sharma on this issue. He had not yet started the tender process. If Mr Sharma's preferred company could provide a competitive quote for the existing specification then it would be invited to tender.

38. He was also asked further about the cost of the fire electricals, whether figures to be recharged to individual tenants for work to windows had yet been calculated, about the cost of water testing (Aquatech), and an N D Willan invoice which

[8] A reference to Andrew Morton & Associates, which had reported to LLSL earlier

referred to an architect's certificate.[9]

39. Re-examined, he confirmed that the respondents had been given the opportunity to examine documents, his attention being drawn to an interim certificate at page B/708. The boxes at the foot of the document show to whom this would have been sent. One box says "Sonal Sharma".

40. The respondents' case began with chartered surveyor Martin Hemming being called to give evidence. His report started at page A/374, with his signature on page 404. Having listened to Janet Jury's evidence on the previous day he stood by his evidence.

41. Cross-examined by Bruce Maunder Taylor, he confirmed that he had not seen the tribunal's directions; nor had he been given copies of the lease, the specification of works, or the service charge accounts in question.

42. Asked about his experience of managing building contracts, he said that he was familiar with the roles of contract administrator and building owner. He agreed that a JCT contract usually has an arbitration clause, with access to adjudication. It was put to him, therefore, that the idea that the respondents could withhold substantial sums was not the correct way of going about resolving matters under a JCT contract.

43. When discussing the breach of the damp proof course at the seaward side of the building he said that he was not aware of the intention to build a canopy over that part but it made no difference as the damp problem was rising from the ground upwards, not falling from the sky. It was necessary to remove the earth and reinstate the damage. It would cost perhaps £1 000 to replace the floor around the rear door, the door itself, remove the earth and possibly replace the floor itself. He had no idea whether the dpc was actually there and functional, that there would be no problems, and assumed that there was no pre-existing damage to the building.

44. Turning to the burning issue of the gutters, he was referred to Janet Jury's report at A/262 (under "General installation"). He agreed that, if done properly, this was a reasonable way of approaching the design of the gutters. He accepted that she had carried out calculations (being referred to her plan of the roof area at page 276), and this was a reasonable way of doing it. It was also reasonable for Garrett (the roofing contractor) to do run-off tests before striking the scaffolding, but said that if done on a gusty day one will get one set of results; on a calm day another. He agreed that it was reasonable to request information about the system failing, and to return to the property in heavy rain conditions to observe performance. She had done everything reasonably, but despite that he had been there and found the water was not coming down the pipes. At the same time, he had to concede that he had never seen the gutters overflow. They could not do so because he believed there is a fundamental design fault.

45. He was asked briefly about his comments concerning the glass canopy over the atrium. He agreed that this had been drawn to Janet Jury's attention and she had contacted a structural engineer who had provided a report about it. He agreed

[9] Although not in the hearing bundle this was later produced at the tribunal's request

that it was reasonable to have done this, and for her to accept the structural engineer's findings.

46. On the issue whether damp on the inside of the exterior walls of flats was caused by condensation or by penetrating damp he remained of the latter view, despite learning of Mr Eric Pooley's core sample. Taking a core sample was a recognised method of testing for the causes of damp. He said that a lot of water has come in around the window cills, and he did not need a core sample to determine that.

47. Asked about the service charge accounts for 2013– 2014 he told the tribunal that he had not been asked to make any assessment of how much of the contract price has been reasonably incurred. As for the current year's budget, he agreed that it was reasonable to make provision for external redecoration over five years but he did not know wether the figure of £15 000 suggested was reasonable. He could not support that figure simply because he had not calculated it.

48. Mr Ravinder Sharma then gave evidence. He stated that the respondents had paid what was demanded on account for the period up to August 2013, which was why the final amounts were being challenged now. Asked why he had not paid anything on account for the current year he replied by mentioning some specific sums that had been paid, including Mr Marsland's wages,[10] but he confirmed that the last payments made were in August 2014. It was put to him that they were for the previous year, and that nothing at all had been paid on account for the current year. Despite that, he did not accept that he was in significant arrears. He had no sensible answer to why he had not paid for the buildings insurance or the manager's and managing agent's fees.

49. On the subject of the major works, he agreed that the contract signed was as per the specification devised by Janet Jury at his request but said that the managers appointed by the tribunal had the choice to amend it. He said that he was not competent to comment on the contract. It was put to him that when preparing her specification Janet Jury had not been given access to all the flats. He denied that, saying she had access to the entire building for 8 months, though he agreed that he had personally showed her round only a few flats.

50. On the quantification of the respondents' challenge to the service charges he was asked why he had not produced any rival figures, or a Scott Schedule, but he said that he had been trying to get this information since 2014, and asking for copies of the architect's instructions. It was put to him that until 2013 these had been sent to him (or to his son Sonal) as a matter of course.

51. He continued to dispute the adequacy of the gutters. Asked whether he had raised this in response to the consultation he claimed that as the gutters were being fitted he challenged their size. Ms Jury, however, had gone for the smaller and cheaper profile.

52. Quizzed about his assertion that a deduction of 85% was in order, he demurred but nonetheless said that certain tasks such as pointing or replacing decorative

[10] For reasons alleged to concern the tax treatment of his earnings Mr Marsland as caretaker was still employed and paid by London Land Securities Ltd, although such sums were set off by the manager against the respondents' service charge liability

brickwork had not been done, and so many of the costs had not been incurred. The percentage for the masonry work was 15%; not for all of the contract works.

53. On the figure to be set aside as a reserve fund for external decoration he agreed that the building did need painting every 5 years and that it was last done 2½ years ago, but he argued that it was not reasonable to start building up a reserve fund until after the major works were finished. The managers should concentrate on the current works and only look at the matter afterwards – and only after they provide the accountability. Asked why he had not asked his expert Mr Hemming to provide a figure he responded that the tribunal can appoint him for everyone.

54. On other matters Mr Sharma's approach was to be picky about specific items, claiming that they were unnecessary or a duplication, or that he had written in the past to the managers about some issue.

55. In closing submissions Mr Baumohl sought to address the tribunal on three main issues :
    a. The quality and standard of the works
    b. Completion and specification of what the respondents were being charged for, i.e. transparency issues and lack of specificity of figures sought, and
    c. Non-major work items, including one large invoice from N D Willan and other items such as Aquatech.

56. On the first of those there was a conflict between the evidence given by Ms Jury and that by Mr Hemming. On the second there were questions of overspends and additional items, lack of further consultation (ss.20 & 20ZA), and admitted breach of the dpc by constructing the rear path. He discussed the three cases cited by Mr Maunder Taylor, especially *Phillips*, but then had put to him by the chairman that a coach and horses had been driven through the legislation by the Supreme Court's decision in *Benson*[11], which required proof of prejudice suffered by the tenants due to a failure in compliance with the consultation provisions.

57. In his closing submissions Mr Maunder Taylor referred to the history of this building as being one of the worst management histories he had experienced, with several failed management schemes, a roofing contract already in place and the Willan contract ready for signature. He said it was common ground that the original contracts were reasonable, as were the contract sums. the only major point in the Garrrett contract is gutters and downpipes; with Willan there are more difficulties.

58. The case arose because the respondents are £18–19 000 in arrear with their service charge contributions and the managers cannot take recovery action before coming to the tribunal for a determination of reasonableness. He referred to one case that Mr Baumohl had omitted to deal with, namely *Regent Management.* If they were to succeed it was for the respondents to say what their challenge was to specific items claimed as part of the service charge accounts or budget. They must give reasonable grounds and quantify their challenge.

59. On the argument that the respondents could not do so because they lacked the required information he referred to the document at B/708, dated February

[11] *Daejan Investments Ltd v Benson & ors* [2013] UKSC 14; [2013] 1 WLR 854

2014. This, calculated to the last 50 pence, was agreed by Mr Hemming to have been the outcome of discussions between contract administrator and builder. He had not been instructed to enquire into that, and Mr Sharma was not able to say why not. It was not unfair to submit that the respondents had run this case on a "bluff and bluster" approach, avoiding definition and quantification. There is one small paragraph in Mr Sharma's evidence which speaks about figures, in which he says that only 15% of the contract has been carried out. Under cross-examination he seemed to realise that was totally unsustainable, but was unable to give any clear indication of what quantity he was challenging.

60. He conceded that he was momentarily at a loss to explain the £12 610 payable under an unseen architect's certificate, but that in any case the threshold for consultation purposes was in this case £7 143, and there remained the question of what prejudice the respondents might prove to have suffered. At the tribunal's request he agreed to have Ms Jury's architect's certificate and the missing page 19 from her report sent to the tribunal as soon as possible, to clear up several mysteries.

61. On the Garrett work the dispute concerned the gutters. Here the respondents invited the tribunal to prefer the Hemming report to Ms Jury. That was not the correct test to apply. What the tribunal has to establish is whether her approach was reasonable. One has to establish that no other competent surveyor would do the same. He reminded the tribunal that he had taken Mr Hemming through her method, her calculations of the roof area and water flow, all plotted on a plan and all in accordance with recognised practice and procedure. Mr Hemming accepted that those were reasonable steps to take; he simply had his qualifications about the result. Janet Jury had explained that Garrett tested the water flow before he struck the scaffold. Neither Mr Hemming nor one single witness said the gutters are overflowing. Ms Jury has inspected on a wet Sunday and says water is hitting the back of the gutters.

62. On the rival views of Hemming and Jury, in cross-examination it had come out that he had not seen the contract, his instructions were very limited, and his report was in the nature of a survey as at the date he inspected. To some extent his report was irrelevant and should be ignored.

63. On the N D Willan contract there were a number of variations to things already specified. Insofar as the fire protection works were concerned, Ms Jury was faced with a fire officer with different views from those of his predecessor. That was work not in the contemplation of the original specification, but the respondents must show some prejudice. The tribunal had itself pointed out that there was a prohibition order in place and it had to be lifted. In any case, the issue of fire safety works was not in the respondents' statements of case.

64. The issue of the rear access ramp and path breaching the dpc was acknowledged as a snagging item that had to be dealt with. The ground would be lowered and turf dug out to expose concealed air bricks.

65. On the divergence of the contract price from the original quote, he argued that while the contract price will be tightly drawn there will always be provisional sums and quantities, and certain assumptions made which can only be confirmed

either at height or when the building is opened up for close inspection. Amounts will be agreed between contract administrator and builder, with an arbitration and/or adjudication clause to deal with disputes. Simply withholding money, as the respondents had done, was not the appropriate means of challenging items.

Findings

66. Having read their written evidence and listened to and observed them under cross-examination the tribunal has no hesitation in preferring the evidence of Ms Jury to that of Mr Hemming. It rejects his belief that what he saw was recent lichen growth caused by overflowing of the gutters and wetting of the brick and rendered surfaces. There is what Ms Jury called "greening", and some of it quite historic – following the line of former guttering.

67. It also prefers the evidence of Ms Jury, and her comments based upon Mr Eric Pooley's core sample, that the principal issue affecting the inside of the external walls to these flats is one of condensation rather than penetrating damp, except where there are cracks or imperfect seals around the new windows. However, with solid brick walls on a cliff-top building by the sea it would not be surprising if heavy rain was not blown at times of bad weather against the walls and penetrated to some degree. As nobody has ever witnessed water overflowing or overshooting the gutters, and Ms Jury was acknowledged by Mr Hemming to have assessed the roof area and likely water discharge volumes reasonably the tribunal is also satisfied that her design of the guttering was reasonable and the respondents' challenge to it fails.

68. In the context of a contract designed to make the building wind and weathertight it must not be forgotten that before the contract the condition of Trafalgar Court was that it had a poorly laid roof (from a previous contract) and some emergency work had been undertaken, but more significantly a large section of the seaward side of the west wing ground floor was open to the elements after the old single storey glass and timber ballroom had been demolished but not rebuilt. The roof was now almost complete, the remaining problem being the discovery of dry rot in some timbers concealed by recent leadwork at the far end of the west wing. This was now being attended to. The old ballroom had now been replaced by a brick and double-glazed structure under a flat roof. It was for all intents and purposes weathertight.

69. The tribunal agrees that it was imperative that the contract administrator take all steps necessary to satisfy the new fire officer that the building was safe enough for him to withdraw the prohibition notice affecting the corridors on the east wing, thus enabling those flats to be finished and occupied. The respondents offer no alternative, either in approach or quantum. Nor can they demonstrate any prejudice that might justify the tribunal in refusing dispensation with any consultation requirements and/or imposing conditions under section 20ZA.

70. Yet again, Mr Ravinder Sharma adopts a very picky approach to individual items, challenging and seeking to disrupt management of the contract and the building by endless correspondence, a steadfast refusal to pay what is due either as an advance payment based on a budget or the final amounts as assessed, and without ever seeking proper legal advice or quantifying his challenges. Yet again, at the very last minute, counsel is instructed by London Land Securities Ltd to

fight a battle on ground not of his choosing.

71. It is also troubling that Mr Sharma's attitude appears to be that, although London Land Securities Ltd chose both the surveyor and architect who prepared the specification of works and the contractors to carry it out, about all of whom he now complained, because the tribunal had not trusted his company to manage the property it should not have trusted it in its selection of experts and/or the adequacy of the specification, and so it was unreasonable for the managers to rely upon such specification without exercising their own judgment on this and the choice of contractors, so that the inflation of the contract price is unreasonable.

72. Despite featuring so much in the evidence, attending site meetings and being sent contract documents at least in the early stages until 2013, Mr Sonal Sharma did not give evidence (although he was present throughout the hearing).

73. On the basis that the breach of the dpc at the rear of the building caused by the ramp and path to the back door and surrounding raised earthwork will be dealt with as a snagging item, and no fresh damage to this already damaged building has been proved, the tribunal makes no deduction in respect of that.

74. The tribunal therefore allows the actual sums for 2012/13 and 2013/14 and the budget sum for 2014/15 as claimed and directs that the respondent tenants and the landlord (the latter in respect of the eight unbuilt flats in the west wing) pay their respective shares, allowance being made for any sums already paid and as accounted for by the managers.

75. The question of costs was reserved until after delivery of this decision. Should the applicants wish to make any application for costs then they shall do so by filing and serving an application supported by a schedule of costs incurred and written grounds for such application by Friday 5th June 2015, whereupon the respondents must file and serve any written grounds for opposing the making of such an order by Friday 19th June 2015. The application will be dealt with on paper or, if convenient, at the hearing of the application for re-appointment of a manager.

76. The time for appealing this decision shall not start to run until the date of the tribunal's costs decision or, if no such application is made, until Friday 5th June 2015.

Dated 18th May 2015

Graham Sinclair

Graham K Sinclair
Tribunal Judge