11278

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/00/AY/LSC/2015/0347**
Property	:	**1 St Cloud Road & 18 Hubbard Road London SE27 9PN**
Applicant	:	**Primeview Developments Limited**
Representative	:	**Mr Steven Newman (in-house solicitor)**
Respondents	:	**Mr Z R Ahmed and Dr M Javaid (1)** **Ms N P Jumbo (2)** **Mr L Frade (3)** **Ms J F Kelly (4)**
Representative	:	**Ms Amanda Gourlay, Counsel**
Type of Application	:	**(1) For the determination of the reasonableness of and the liability to pay a service charge and** **(2) dispensation from compliance with the consultation requirements under the Landlord and Tenant Act 1985 ("the Act")**
Tribunal Members	:	**Mr C Norman FRICS (Valuer Chairman)** **Mr I Thompson FRICS** **Mrs J Hawkins MSc**
Date and venue of Hearing	:	**10 Alfred Place, London WC1E 7LR** **15 October 2015**
Date of Decision	:	**30 November 2015**

DECISION

Decisions of the Tribunal

(1) The Tribunal records its oral decision given at the hearing that the written agreement entered into by the applicant and the predecessor in title of the first respondent (London and Capital Limited) was void by virtue of section 27A(6) of the Act. Consequently, the Tribunal retained jurisdiction to consider the on account amounts in the case.

(2) The Tribunal determines that the first respondents are liable to pay £5098.50 payment on account for roof works. This sum was payable from 18 May 2015.

(3) The Tribunal determines that an on account management fee of 10% of this sum being £509.85 was also payable by the first respondents from the 18 May 2015.

(4) The application under section 20ZA of the Act (dispensation) is postponed and Further Directions are appended.

(5) The Tribunal has no jurisdiction to make determinations in respect of the second third and fourth respondents.

(6) The Tribunal invites submissions in relation to the application for orders under section 20C of the Act (see below).

Reasons

The applications

1. The applicant seeks a determination pursuant to s.27A of the Landlord and Tenant Act 1985 ("the 1985 Act") as to the amount of on account service charges payable by the applicant in respect of the current service charge year.

2. The applicant also made a contemporaneous application for dispensation from the consultation requirements under section 20ZA of the Act.

3. The relevant legal provisions are set out in the Appendix to this decision.

4. The application was made only against the first respondent. Subsequently, the remaining respondents were joined as parties by the Tribunal. However, as there were no cross-applications by the second third and fourth respondents before the Tribunal, the Tribunal is unable in these proceedings, to make formal determinations in respect

of those respondents. Further, related County Court proceedings have been instigated against the second and third respondents.

5. Of the disputed on account demands, only two items remain in dispute: the amount for roof works and the amount for management fees.

6. The Tribunal received a poorly paginated and bound trial bundle exceeding 1220 pages one week before the hearing so that the members received this just three days before the hearing date. This did not assist the Tribunal which needed to sit late to finish hearing the case.

The hearing

7. The applicant was represented by Mr Steven Newman, in-house Solicitor. Ms Amanda Gourlay, Counsel appeared on behalf of the Respondents.

8. At the start of the hearing the Tribunal explored the scope of the hearing with the advocates. The Tribunal explained that as the matter concerned an on account payment prior to major works, it could not deal conveniently with questions relating to consultation or allegations of prejudice suffered by the lessees. These matters would require expert evidence, which was not available. In addition, the Tribunal was later told that the works (although substantially carried out) were unfinished and final accounts had not been rendered.

9. The Tribunal therefore explained that it would consider only the amounts payable on account. Matters relating to consultation and or prejudice would need to be considered in future proceedings. The Tribunal however, allowed the parties to refer to factual matters revealed in the consultation process to the extent that these were relevant to the on account demands.

10. One central aspect of the case is whether a standard form of agreement entered into by the first respondent (and fourth respondent) at the behest of the landlord had the effect of excluding the jurisdiction of the Tribunal. The agreements are formal legal documents. They required the respondents to agree that the tenant will not raise objections to the consultation process, accept that specified scheduled works with prices appended are agreed, with a named contractor. They also required agreement to a specified management fee.

11. The Tribunal considered that such a document potentially made reference to specific evidence upon which the agreement from the tenant was sought. If so, it would be void by virtue of section 27A(6) of the Act. This provides:

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

(a) in a particular manner, or

(b) on particular evidence,

of any question which may be the subject of an application under subsection (1) or (3)"

12. Neither party had made reference to this issue in their statements of case nor the recently decided cases on this point. Although both parties were represented at the hearing and bearing in mind the remarks of HHJ Gerald in *Birmingham City Council v Keddie and Hill* [2012]UKUT 323 (LC) the Tribunal nonetheless considered that interests of justice made it essential for the Tribunal to raise the point. The Tribunal referred the parties to the recent decision of the Upper Tribunal of *Jeanna Gater and Others v Wellington Real Estate Limited and LCP Commercial Limited* [2014] UKUT 0561(LC). This in turn cited *Windermere Marina Village v Wild* [2014] UKUT 163(LC). The salient points are at Para 68 of *Gater*:

"40. The prohibition in section 27A(4) on re-opening matters which have been agreed must, however, be considered in the light of section 27A(6). This renders void any agreement by the tenant in so far as it "purports" to provide for the determination of any question which could be the subject of an application under sub-section (1) or (3) "in a particular manner" or "on particular evidence". The purpose of the provision is clearly to avoid agreements excluding the jurisdiction of the first-tier Tribunal on questions which could otherwise be referred to it for determination.

41. In a statutory anti-avoidance provision such as section 27A(6) an agreement will "purport to" provide for an outcome if it has the effect of providing for that outcome. In *Joseph v Joseph* [1967] Ch 78 the Court of Appeal held that in section 38(1), Landlord and Tenant Act 1954 the expression "purports to preclude the tenant from making an application or request" for a new tenancy means "has the effect of precluding the tenant" so that an agreement for the tenant to surrender their tenancy at a future date was void. The same broad approach is appropriate in the case of section 27A(6) so that the question in the case of any particular agreement by a tenant is whether it has the effect of providing for the determination of any question which could be the subject of an application under sub-section (1) or (3) "in a particular manner" or "on particular evidence".

13. The Tribunal invited submissions and adjourned for thirty minutes. Mr Newman submitted that the agreement was not part of the lease; it was also not to be determined by a surveyor, contrary to Windermere. He also relied on *Cain v London Borough of Islington* [2015] UKUT 0117 (LC).

14. Ms Gourlay submitted that the form of agreement was void because it sought to determine the matter by reference to particular evidence as set out at the schedule to the agreement.

15. The Tribunal preferred the submission of Ms Gourlay. The Tribunal found that the agreement did provide for determination on particular evidence and for that reason was void. It did not consider that the agreement need be confined to that within a lease, nor did it consider *Cain* to be relevant. The question in *Cain* was whether the Tribunal retained jurisdiction to deal with apportionment once an agreement on quantum had been reached. There was no suggestion in that case that the tenant's agreement (reached at a hearing) had been based on particular evidence. Section 27A(6) was not in issue.

16. The agreement is therefore unenforceable and the Tribunal retains jurisdiction to hear applications in respect of Mr Ahmed and Dr Javaid.

17. The Tribunal did not consider that an inspection was necessary or proportionate in view of the nature of the application nor did any party request an inspection.

The background

18. From photographs provided the property which is the subject of this application is a converted end of terrace house dating from the 19th century. The property has a return frontage to Hubbard Road. The building has been converted into flats. In about 2004, a single storey rear extension was built which now forms Flat 1B. There are four flats. These are all sold on long leases each having about 89 years unexpired. All the leaseholders have sublet their flats.

19. It is significant that the roof area although modest in size (some 80 sq. m estimated by Mr Newman and 75 sq. m as submitted by Ms Gourlay) the roof area is complex, a point made by the Tribunal. The roof is formed by several different adjacent types of roof structure. Immediately behind the flat roof over the bay front (not in issue in the case) lies a hipped pitched section; next is a gabled section of roof, then a single pitched roof and lastly a shallow single pitched roof over the rear extension.

20. The history of the matter was given by Mr Rajesh Tankaria who had provided a witness statement and gave oral evidence. Mr Tankaria is director and sole shareholder of the applicant.

21. The applicant has appointed D&S Property Management as managing agents. Mr Newman is the in house solicitor of that company and also gave evidence (see below). Day to day management is performed by Jaimin Property Management LLP.

The Lease

22. The counterpart lease of Flat 1B was provided. By clause 3(1) the tenant

> "covenants to pay 25% of all costs charges and expenses estimated to be incurred by the Landlord in providing the facilities and services set out in the Fifth Schedule such payments to be treated as rent due under this lease and such payments to be made on demand and in advance of any payments being made by the landlord with regard to the services set out in the Fifth Schedule"
>
> By clause 3(3) the tenant covenants to pay such percentage as the Landlord shall reasonably determine
>
> (a) of the costs charges and expenses of employing a Managing Agent and any accountant solicitor or other professional person in relation to the preparation auditing or certification of any accounts of the costs expenses outgoings and every other matter relating to the administration of the services and facilities provided by the landlord and the collection of the contributions and payments due from all occupiers and owners of the Properties in the Building ...and in the event that the landlord does not employ a managing agent (but not otherwise) a sum equal to fifteen per cent of all contributions and payments due from all occupiers and owners of properties in the building ..."

23. Para 2 of the Fifth Schedule states:

> "At all times during the term to maintain clean light decorate and repair or (if necessary) renew (or procure the same):-
>
> (ii) Any external balcony and the foundations roof and main walls and any main structural parts of the building and the timbers girders stanchions joists or floor slabs of the building and any walls or partitions of the same..."

The Landlord's Case

24. At the hearing Mr Newman produced a short skeleton argument the gist of which in relation to the reasonableness of the on account demand was as follows: the fourth respondents confirmed that the roof leaked; the applicant decided that the best means of complying with the landlord's covenants was by means of the proposed work; it is for the landlord to decide how to comply with its covenants; the on account demand was a reasonable provision having gone to the market and obtained two quotes and selecting the lower one. The applicant had also undertaken a BCIS analysis which supported the sums demanded; further there was no obligation to proceed with the lowest quote.

25. Very late in the day of the hearing Mr Newman submitted that following *Keddie*, the issue of patch repairing was not before the Tribunal as it had not been canvassed in the respondents' statement of case (see below).

26. Mr Newman himself gave evidence following service of a witness statement. He explained that the landlord had originally been considering a Long Term Qualifying Agreement ("LTQA") for works and started and progressed that procedure. The Tribunal is not concerned with that issue, nor compliance with the consultation regulations. However as part of that process, he was made aware that the pre-predecessor in title of Flat 1B was concerned about the state of the roofs and had obtained a quote (undated) from Keith Compton Roofing Limited which was sent to Mr Newman. There were no responses from the then leaseholders so Mr Tankaria decided that estimates should be obtained from Bali Homes Limited and Synergy Contracts (Leeds) Limited. Keith Compton was not approached because that quote did not include fascia board replacement. The works needed to the lower roof [over Flat 1B] did not include complete restriping but only limited repair above the door. Mr Newman had inspected the property externally.

27. Subsequently it was decided to place the LTQA procedure on hold and proceed with a separate major works section 20 consultation instead. Notices of intention were served. Bali was asked to confirm their previous quote (in respect of the LTQA) which they did. As Synergy had previously been the higher quote, an alternative quote was sought from Kim Contracting Limited. Section 20 notices were served and the only observation received was from the then lessee Flat D. [This was a letter from a Mr Raja stating that the costs proposed were too high.] Mr Newman then commented on the chronology of correspondence with Ms Kelly and Mr Ahmed / Dr Javaid.

28. Mr Newman set out his calculations of possible cost taken from the BCIS data. The Tribunal allowed him to give factual evidence about this

but as we made clear Mr Newman was not an expert witness. The Tribunal places no weight on this (see below).

29. During cross-examination, Mr Newman said that he was not sure whether there were any inspection notes. He did not go back to Keith Compton because that company's quote was only valid for two months and because they required part payment in advance. Mr Newman agreed that the property had not been viewed by a surveyor before the works had been carried out but said that this was a matter for the owner. Mr Newman agreed that the owner was not a building surveyor but referred to an email from Mr Hitchens [husband of Ms Kelly] stating that the roof was leaking. Mr Newman agreed that he did not know the source of leaks into Flat D but explained that the source of the leak did not necessarily correlate with the position and location of internal staining. His company acted for 15 or so properties where there were specific problems. He agreed that based on his interpretation of the Compton quote the tile repairs to the lower roof would not match. Mr Newman was then asked about his use of the BCIS data. Mr Newman said that the works are not fully finished or signed off. In answer to a question from the Tribunal Mr Newman confirmed that the wording from the Compton quote (but not the amount) had been provided to Bali. The work required needed scaffolding. The landlord decided not to instruct a surveyor because this would have itself required scaffolding and thereby incur double scaffolding costs. A "cherry picker" would not have sufficed as a patch repair might not resolve the problem. The landlord did not wish to inspect internally because that would not enable the source of water to be traced.

30. Mr Tankaria gave evidence in chief. He has worked in the property industry for the last 20 years. He said that the roof required replacement and if he owned the building he would have replaced the roof. He decided to erect scaffolding as a result of complaints from leaseholders. Leaks were getting worse. D&S were appointed. The roof was in bad condition. It had not been previously patched. He received a letter from the leaseholders letting agent of Flat A [dated 14 February 2014] advising of concerns regarding the roof. Mr Tankaria then visited the property himself and formed the view that as the roof had not been replaced for at least fifteen years the best means of complying with the landlord's covenant was to replace the roof. Mr Tankaria did not consider it necessary to incur the additional expense of instructing a surveyor to confirm his opinion that replacement was required. Following inspection he considered that the specification provided by Keith Compton was sufficient save that it did not include fascia boards. The work needed did not include complete replacement of the lower roof. From his experience he considered the Bali price to be reasonable.

31. During cross-examination Mr Tankaria stated that he was not a legally minded person when ask to interpret repairing covenants under the lease. He also agreed that he was not a surveyor but was very experienced in these matters. He did not accept the proposition that a

formal specification (the document postulated related to a building extension) was needed in this case. He also said that the building extension was a larger piece of work than the roof works. He has not used formal specifications elsewhere. In answer to a question whether the Keith Compton quote was a factor that led him to decide that replacement was needed he said that leaseholders will not ask for work or a quote if not needed. In relation to his inspection he accepted that he had not taken binoculars or made notes. He said that photographs were on file. He used his eyes only but roof was old. The Keith Compton quote was sufficient detail although there were no quantities as it is a small roof. Mr Tankaria rejected suggestions that Bali was unsuitable because they were recently established.

The Respondents' Case

Statement of Case

32. A statement of case was prepared by the respondents in person and approved by each of them. However, as there was no application for determination of service charges by the second third and fourth respondents, the statement of case does not confer jurisdiction on the Tribunal to make determinations in respect of those parties. The salient points in the lessees' statement of case were as follows.

    (i) Requests for payment were sent on 23 March 2015 (in respect of the second third and fourth respondents) and 14 April 2015 in respect of the first respondent. These requests were not described as on account payments until Mr Newman stated that by letter on 7 September 2015. As the demands are ambiguous the respondents cannot be expected to pay them.

    (ii) The first respondents wished to know why the invoice for them was dated the same date as the auction, 14 April 2015.

    (iii) The first respondents purchased their interest at auction on 14 April 2015 with completion on 11 May 2015.

    (iv) The fourth respondent had purchased the lease of flat 1D at auction on 20 March 2015.

    (v) The respondents referred and relied on the Compton quote. They also produced lower quotes from M A Roberts and Astute Property Services. These were obtained well after April 2015.

    (vi) Reference is made to the consultation which the Tribunal is not considering directly in this application.

(vii) The demand in respect of Flat 1B was served on London & Capital Housing Ltd and was therefore never sent to the first respondents; they are not liable as no demand has been made of them. Nevertheless the first respondents offered to contribute to the cost of the roof works.

(viii) Ms Jumbo was out of the country during the consultation process but has paid approximately £4000 to the cost of the works.

(ix) Ms Kelly had been notified about the demand in the legal pack prior to auction. Ms Kelly had not encouraged the applicant to carry out the work.

(x) The applicants did not obtain quotes against a professionally prepared specification but used the Compton quote. If this had been prepared it would have been clear that replacement of fascia boards was part of the Compton quote, no contingency was necessary; replacement of the lower roof [over flat 1D] was a component of the roof works as confirmed in a meeting of 5 September 2015 between Mr Compton and first and fourth respondents. In addition the extent of the scaffolding would have been known.

(xi) The comparative estimates from the contractors was Compton £11,542 plus VAT; Bali £16,995 plus VAT and Kim £21,384 plus VAT.

(xii) Neither Kim nor Bali were suitable contractors to undertake the work. Bali was unsuitable because it is not affiliated to a regulatory body, is not a specialist roofer, scaffold hire for four weeks was £4500 plus VAT. Public liability insurance was not included. There were no warranties. Bali did not require a deposit. The quote by Kim was not serious. The quote was very high compared to Compton; there was no company information indicating that a director was serving nor any employees. Companies House decided to strike off the company. There were irregularities as regards the registered office address and VAT registration address.

(xiii) Whilst it is admitted that there is no obligation to consult prior to collecting monies, there is an obligation to consult under the Act before spending monies.

(xiv) The sums demanded are unreasonable. In particular the scaffolding cost should have been £900 plus VAT.

(xv) The respondents calculated Bali's underlying costs as £4,064, but said that these would be significantly lower as works to the lower pitched roofs was not to be carried out. This was further supported by a quote from MA Roberts & Sons another local contractor.

Witnesses

33. Witness statements were tendered by Mr R Hichens [husband of Ms Kelly] Ms J F Kelly, Mr Z R Ahmed, Dr M H Javaid, Ms P Jumbo, Mr L Frade and Mr H P Williams. The witness statements cover a wide variety of matters many of which the Tribunal are not considering in the present proceedings. The Tribunal therefore refers only to matters raised that it considers relevant to these proceedings for "on account" demands prior to the works commencing.

34. For the most part, Mr Newman did not seek to challenge these statements. In the event he called only Ms Jumbo and Mr Ahmed.

35. Mr Ahmed is a Management Consultant and Justice of the Peace. On the central question before the Tribunal he said this at Paras 28 and 29 of his witness statement:

> *"In obtaining a quote for the roof before the works had commenced, on 6 June 2015, Mr McGrady from Astute Property Services advised me that the main roof did not need to be replaced in its entirety, but patch repairs could be carried out to the main roof to make it good.*
>
> *The main roof would not have needed to be fully replaced if repairs had been carried out as and when required by the applicant and in accordance with the Landlord's covenants in the lease..."* (emphasis added by the Tribunal)
>
> He then continued at Para 30:
>
> *"At least two independent roofing contractors ...have confirmed that the roof leak could have been resolved through patch repairs costing £3,250. On 10 June 2015 Mr Newman confirmed to me in email that "the roof has not been replaced for at least thirty years".*

36. He also stated that the major works are an enhancement rather than repairs. He also referred (at para 40) to Flat 1B having a long standing leak dating back at least to 2012/13. The landlord undertook a minor repair

"however this repair is inadequate. The repair hasn't addressed the root cause of the leak. The leak is also precariously close to an electrical fuse box. Further damage has been caused to the carpet and the ceiling ..."

37. During a short cross-examination, Mr Ahmed was asked where in the statement of case it had been suggested that the landlord's decision to renew the roof was wrong; Mr Ahmed was unable to point to a relevant passage.

38. Ms Jumbo explained in her witness statement that she had bought the flat as a buy to let investment in 2007 at auction. Owing to ill health this is her sole income. She was out of the country when the consultation documents were served. Ms Jumbo had felt bullied and harassed by the landlord. In cross examination she agreed that she had not responded to the consultation. She refused to sign an agreement to pay. She did not agree that the landlord had offered to accept instalments.

39. Dr Javaid gave a witness statement, the salient points of were as follows. He is the co-owner of Flat 1B (with Mr Ahmed). The purchasers were not provided with access to the property by the vendor prior to completion. The purchasers were threatened that they would lose their deposit if they did not complete. Owing to Dr Javaid's personal circumstances Mr Ahmed took the lead in relation to this matter. On or around 20 May 2015, after completion, he and Mr Ahmed were forwarded by email a demand from Jaimin Property Management addressed to London & Capital Housing. The demand file was called "Demand 23.03.2015". Mr Javaid referred to the exhibit at R2 of the bundle. The quotes from Bali and Kim were very high. On 24 July [2015] Dr Javaid was made aware by the subtenant (Mr Williams) that the roof was still leaking. A section of internal plasterboard ceiling had been replaced in December 2014 following heavy rain. This was completely rotten. The cause was the freeholder's responsibility. Mr Javaid referred to a leaseholders' meeting with Mr Compton on 5 September [2015] at the property. Mr Compton advised the leaseholders present that the problem with the roof was caused by it being laid incorrectly. It was too shallow in pitch. To remedy the defect a complete strip down of the roof was needed so that a new membrane could be laid. Mr Compton's previous quotation had included this work.

40. Mr Huntley Williams, the occupying subtenant of Flat 1B served a witness statement. Mr Williams stated that every time it rains heavily the roof leaks and it has been getting worse. Two internal repairs have taken place since December 2014. There is no insulation in the roof. The roof is leaking in more than one location and this is causing damp and mould within the flat.

41. Mr Frade served a short witness statement in which he complained that the costs were too high and that the chosen contractors were unsuitable.

42. Mr Robert Simon Hichens gave a witness statement the salient points of which are as follows. Mr Hichens qualified as a chartered accountant but in 2007 retrained as an estate agent. His wife (Ms J F Kelly) consults him on all matters relating to the flat she owns (Flat 1D). In February 2015 he identified the property on an auction website. He and Ms Kelly visited the flat. It was in a poor state with mildew in the bathroom and front room. In his opinion this was caused by poor air circulation. He formed a view that the roof was "fine", subject to some minor issues and missing tiles. In March he asked a surveyor [unnamed] to visit the property to give an opinion. The surveyor replied "The roof doesn't look too bad, some repair work to ridge tiles and flashings are apparent but the tiles look ok to me". He questioned whether the quotes were open market quotes. The lower pitched roof should be replaced as repair has been ineffective and expensive (and inappropriate for the pitch). He also made references to the meaning of repair which the Tribunal addresses below.

43. Ms Kelly stated that she bought the lease of Flat 1D at auction on 20 March 2015. The sellers pack contained correspondence from Mr Newman. Ms Kelly received the service charge request dated 23 March 2015. Ms Kelly contrary to her initial belief had established that Mr and Mrs Tankaria did not own the other leases. Ms Aylett of Jaimin Property Managers wrote to Ms Kelly explaining the reasons for the roof works.

The Law

44. Mr Newman relied on *Flour Daniel Properties Ltd v Shortlands Investments Ltd* [2001] 2EGLR 104 from which he asserted that it is for the landlord to decide how to discharge its covenants to repair. He also relied on *Postel Properties Ltd v Boots the Chemist* [1996] 2 EGLR 60 in submitting that replacement of a roof covering was still "repair" notwithstanding some parts to be recovered had not yet failed.

45. Ms Gourlay referred to extracts from *Dilapidations the Modern Law and Practice, Dowding and Reynolds* (12-06 *et seq*, 6-01 *et seq.* and 10-08 to 10-12). Counsel emphasised stage four of the five-stage analysis postulated by the learned authors, namely "*What work is required to put the subject-matter of the covenant into the contemplated condition ?* Ms Gourlay referred to para 12-07 which opines that once there is damage the question is whether it is so extensive that replacement is the only feasible option. Counsel referred also to the consequences of service charge payers being responsible as set out 10-08 et seq. The authors state that in those circumstances the method must be reasonable in all the circumstances. They suggest that

factors include the fact that the tenant is contributing to the work and whether the work goes beyond that reasonably necessary over the period of the lease.

46. Ms Gourlay also emphasised that reference to the covenant being a maintainer covenant which the applicant had relied on, was incorrect. Counsel emphasised the test of necessity set out in the lease covenant before renewal should take place. Ms Gourlay also submitted that life cycle costings should have been carried out.

Findings

Jurisdiction

47. The Tribunal rejects Mr Newman's submission that it is precluded from considering repairs other than those proposed by the landlord, because the respondents had not challenged the landlord's approach in their statement of case. The reasons are as follows: this submission was made very late in the day of the hearing and did not feature in his skeleton argument. In *Keddie* the Tribunal raised and considered a point not contemplated by either party and which was not in dispute. The facts and circumstances in *Keddie* were wholly different from those here. The Tribunal agrees with Ms Gourlay that the respondents' case on this point was sufficiently foreshadowed in the respondent's statement of case. It was also referred to in several witness statements which were served before the hearing. It was central to the dispute and the applicant knew that. Mr Newman submitted that this alleged failure had prevented his client from leading evidence on this point. However, Mr Newman did not apply for an adjournment at the start of the hearing on that ground and the Tribunal rejects that submission.

Entitlement to Charge for Major Works

48. On the question of whether the landlord was entitled to demand on account sums reflecting the Bali quotation, the Tribunal finds in favour of the respondent. The reasons are as follows.

    (i) The Tribunal finds that whilst the main roof is of uncertain age it is between fifteen and thirty years old. The lower pitched roof dates from 2004.

    (ii) The Tribunal notes that the relevant leases are all long leasehold interests with approximately 89 years unexpired.

    (iii) The Tribunal finds that the roof was suffering from serious disrepair. This is based on clear evidence of serious and worsening leaks arising in different parts of the building. It also notes that previous attempts at repair had failed. It considers

that the respondent's quote showing repairs needed for this modestly sized roof of £3250 to be telling. That suggests that, even at its highest, the respondents' case is that significant repair was needed. That quote itself was expressed very briefly as "replacement of guttering, new black fascias PVC, replace broken ridges/tiles & re-point in cement, repoint brickwork where necessary, scaffolding". No evidence has been produced that the Astute Property patching repair would in fact cure the defects in the roof. The Tribunal notes that the roof structure although small is complex and considers that this would make identifying the true source of water ingress difficult. The Tribunal rejects Mr Hichens' evidence that the roof was "fine" subject to some qualifications but accepts his evidence that the property had been poorly maintained.

(iv) The lease does not impose an obligation on the landlord to obtain a surveyor's report before carrying out work, using a formal specification or to consider life cycle costings. The Tribunal accepts the evidence of Mr Tankaria that he considered from his long experience that replacement (of parts of the covering) was necessary to avoid the future wasted costs of failed patching repairs.

(v) Mr Ahmed's evidence was contradictory as to whether or not renewal of the roof covering was needed. His statement "*The main roof would not have needed to be fully replaced if repairs had been carried out*" implies that replacement was in fact needed (see Para. 35 above).

(vi) The Tribunal accepts the propositions of law that it is for the landlord to decide how to comply with its covenant to repair. The Tribunal is satisfied that the replacement of the roof covering of this building would be "repair". It would not be an enhancement or an "improvement" in law even if modern methods were used or there was for example some collateral advantage such as new insulation to comply with current building regulations. Many repairs involve some such advantage but that does not stop them being repairs. The Tribunal therefore rejects Mr Hichens' evidence to the contrary.

(vii) The covenant is drawn such that necessity is required before "renewal" of the "roof" can be undertaken by the landlord and this was a point in dispute. In the Tribunal's judgment, the "roof" for this purpose means the whole roof, not just the roof covering. This is consistent with the approach adopted by the Technology and Construction Court in *Scottish Mutual Assurance Plc v Jardine Public Relations Ltd* [1999] as set out at para 12-13 of *Dowding and Reynolds* as handed up at the hearing. In that case the court rejected the tenant's argument that recovering of a roof

amounted to "renewal" such that "necessity" had to be proved by the landlord. The judge said "whilst parts of the roof were renewed the roof taken as a whole was not, and I find that the effect of the works ...was to repair the roof and not to renew it..." Should the Tribunal be wrong about that, it nevertheless finds on the balance of probabilities that the landlord has proved necessity. This is because the Tribunal accepts Mr Tankaria's evidence that replacement was needed to provide a long term solution without the risks inherent in patching repairs which in his experience elsewhere had failed.

The Quotes

(viii) The Tribunal agrees with Mr Newman that the landlord is not obliged to undertake works at the least possible cost.

(ix) The Tribunal does not place weight on conversations between Mr Compton and the respondents because Mr Compton was not called to give evidence. The Tribunal accepts that the disputed phrase taken from the Compton quote *"strip off lower pitched roof above front door & discard. Re-new this area as to match in with new roof styles"* is unclear. However, in the context of on account demands the respondent has based its demand on the lower of two bids with Bali being substantially less expensive than Kim: £16,995 plus VAT against Kim £21,384 plus VAT. There is no evidence that Bali and Kim were tendering on different bases. The Tribunal therefore rejects this point as a ground why the Bali quote should not be used as a basis for the on account demand.

(x) The Tribunal agrees that the landlord was not required to obtain a quote from Keith Compton and was entitled to approach contractors of its choosing. It also agrees that the fact that Keith Compton wanted payment in advance of works was a good reason why they should not be approached as this creates financial risks for the landlord and is not industry practice.

(xi) The Tribunal does not place weight on the BCIS calculations prepared by Mr Newman.

(xii) The Tribunal rejects the suggestions that (a) no contingency is required and (b) that scaffolding should cost £900. This is because contingency when dealing with an old building with a complex roof is a usual allowance. As to scaffolding, the Tribunal agrees with Mr Newman that a contractor asked to quote for work that is in course of being undertaken by another contractor, as here, is unreliable evidence.

(xiii) The Tribunal finds that the Bali quote was a reasonable basis upon which on account demands could properly be based in April 2015. The lower quotes obtained by the respondents (M A Roberts and Astute Property Services) were obtained later in time and were not available when the landlord decided to charge on account amounts.

49. The Tribunal reminds the parties that it is not considering the quality of the work actually carried out or compliance with section 20 consultation in these proceedings or prejudice to the lessees in the event of consultation breaches.

50. As to the management fees to be charged by D&S Management the Tribunal considers these too high for the following reason. The D&S brochure provided in evidence showed these fees as 10%. Mr Newman in evidence said that that applies to larger contracts exceeding £50,000. In answer to a question from the Tribunal as to why 15% was being sought, he replied to the effect that the brochure was for marketing purposes. The Tribunal does not accept that if a brochure states 10% on an unqualified basis, that it is reasonable for the landlord's agents to seek 15%. The Tribunal therefore determines that a reasonable on account amount for these fees is 10%.

Liability of the First Respondents

51. Mr Newman relied on s 3(2) of the Landlord and Tenant Covenants Act 1995 (the "1995 Act") which is as follows:

> "Transmission of benefit and burden of covenants.
>
> (2) Where the assignment is by the tenant under the tenancy, then as from the assignment the assignee—
>
> (a) becomes bound by the tenant covenants of the tenancy except to the extent that—
>
> (i) immediately before the assignment they did not bind the assignor, or
>
> (ii) they fall to be complied with in relation to any demised premises not comprised in the assignment; and
>
> (b) becomes entitled to the benefit of the landlord covenants of the tenancy except to the extent that they fall to be complied with in relation to any such premises.

52. He submitted that the invoice of 14 April 2015 did not fall due until 18 May 2015 and that therefore the first respondents were liable for it.

53. Ms Gourlay relied on section 23 of the Act which is as follows:

> "23 Effects of becoming subject to liability under, or entitled to benefit of, covenant etc.
>
> (1)Where as a result of an assignment a person becomes, by virtue of this Act, bound by or entitled to the benefit of a covenant, he shall not by virtue of this Act have any liability or rights under the covenant in relation to any time falling before the assignment...."

54. The Tribunal commented that the equitable assignment of the interest occurred at the point in time when the auctioneers gavel fell on the successful bid [to the first respondents]. "Assignment" under the 1995 Act includes such an equitable assignment as per s. 28 of the 1995 Act as follows:

> (1) In this Act (unless the context otherwise requires)—
>
> "assignment" includes equitable assignment..."

55. The Tribunal finds that the on account demand of 14 April 2015 related to prospective expenditure and did not represent arrears as of that date. The demand gave until 18 May 2015 to make payment. It was therefore not a sum that related to a breach of covenant to pay service charges by London and Capital Ltd as of 14 April 2015. Section 23(1) was not therefore engaged in relation to that demand. On 14 April 2015 an equitable assignment to the first respondents of the lease took place at auction. Therefore by virtue of s.3(2) the first respondents became bound by the lessee covenants in the lease which includes liability to pay service charges. It therefore finds that the first respondents are liable to pay the on account demand subject to adjustments for quantum made by the Tribunal (see above).

56. Further, the Tribunal also finds that the first respondents are being pursued directly for payment by the respondent, in the Tribunal. They were sent a demand by the applicants on 20 May 2015 being a copy of that sent to London and Capital. The Tribunal rejects the suggestion that the demand was ambiguous. This is supported by Para. 23 of Mr Ahmed's witness statement in which he stated *"I have repeatedly offered payment and not refused to pay. My repeated willingness to make a payment is evidenced in my emails. See transcripts ..."*

57. For the above reasons the Tribunal finds that the first respondents are liable.

Application under s.20C

58. The Tribunal invites written representations on the above application. These are required to be served by 4pm on 11 December with cross-representations (if any) by 4pm on 18 December 2015. For the avoidance of doubt, by virtue of s.20C(1) all respondents are entitled to seek such an order, notwithstanding that the Tribunal did not receive applications to determine service charges payable by the second third and fourth respondents.

Further Directions in connection with the Section 20ZA Application.

59. The section 20ZA application is postponed to enable it to be considered with any future application under sections 19 and 27A once the service charge year has ended.

60. The application will be struck out if no application for further directions is made by 5pm on 29 April 2016.

Name: C Norman FRICS **Date:** 30 November 2015

Appendix of relevant legislation

Landlord and Tenant Act 1985 (as amended)

Section 18

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

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

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

Section 19

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

   and the amount payable shall be limited accordingly.

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

Section 27A

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

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

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

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

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

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

Section 20

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

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

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

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

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

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

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

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

Section 20B

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

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

Section 20C

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

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

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

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

Commonhold and Leasehold Reform Act 2002

Schedule 11, paragraph 1

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

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

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

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

Schedule 11, paragraph 2

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

Schedule 11, paragraph 5

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

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

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

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

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

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

(b) on particular evidence,

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