FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**MAN/16UC/LSC/2019/0004**
Property	**:**	**97 Ocean Road, Walney, Barrow in Furness, Cumbria LA14 3HN and others**
Applicants	**:**	**Mr M. Mackenzie, Ms A. Hampson, Ms C. Campbell, Mr R. Pugh, Mr and Mrs W. Collard, Mr and Mrs D. Devlin and Mr B. Carter**
Respondent	**:**	**Barrow Borough Council**
Type of Application	**:**	**Landlord and Tenant Act 1985 – s 27A** **Landlord and Tenant Act 1985 – s 20C**
Tribunal Members	**:**	**Judge JM Going** **J Faulkner FRICS**
Determination Date	**:**	**17th of June 2019**
Date of Decision	**:**	**25th of July 2019**

DECISION

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THE DECISION

The Tribunal found that:-

(1) the on account demand for £9,370 from each of the Applicants, contained in the estimated service charge demands for the period 1 April 2019 to 31 March 2020 under the heading Major Works, is unreasonable (and nor do all of the individual leases authorise the Respondent to make an on account demand for such works).

(2) the necessary information to make a determination of what lesser sum is reasonable has not been made available to the Tribunal, and it is not reasonable to expect it to devote its limited resources to the task of calculating that sum without further information.

(3) as a consequence, it has been decided that the proper course is for the Respondent to recalculate the appropriate sum for each stand-alone Building of 4 flats separately, having regard to the detailed findings of this decision, and having allowed each of the Applicants and other owners of the privately owned flats a further period of at least 30 days from receipt of a formal notice to that effect to propose the name of the person from whom the Respondent should try and obtain estimates for the carrying out of the proposed works to the individual Buildings (or for a flat owner to obtain their own estimate) and thereafter to have proper regard to such estimates (and the terms of the individual leases) before attempting to reach agreement with the private flat owners, on a Building by Building basis, as to what works are appropriate for each individual Building and their reasonable contribution to the relevant costs.

(4) each party shall have the right to apply to the Tribunal if agreement cannot be reached.

(5) the Respondent be precluded from including the costs of the present proceedings within the Applicants' service charges or those of Mr and Mrs Marwood,

(6) there be no further order for costs, and

(7) because this case gives rise to various common or related issues applicable to all of the privately owned flats the Respondent must within 14 days of its receipt of this Decision send a full copy of it to each of the owners of such flats (other than the Applicants who will each receive a copy direct from the Tribunal)

Preliminary

1. The Lead Applicant Mr M. Mackenzie applied on 14th January 2019 to the First-Tier Tribunal Property Chamber (Residential Property) “the Tribunal” under section 27A of the Landlord and Tenant Act 1985 (“the 1985 Act”) for a determination as to whether service charges in respect of the Property are payable and/or reasonable. The application concerns the sums demanded and estimated by the Respondent for the 2019-2020 service charge year, being from 1 April 2019 to 31 March 2020.

2. The application also included a request and separate application under section 20C of the 1985 Act for an order preventing the costs incurred in connection with these proceedings from being recovered as part of the service charge. The section 20C application named and specified each of the remaining Applicants and Mr and Mrs Marwood as being within that application.

3. The Tribunal issued Directions on 20th March 2019.

4. The parties provided written submissions with their statements of case which were copied to the other. None of the parties requested a hearing.

Facts

5. Each Applicant is the owner of a one bedroomed flat within a stand-alone block of four. The Lease for each flat was granted under the Right to Buy legislation introduced by the Housing Acts of the 1980s with an original term of 125 years and a nominal annual ground rent of £10. For the most part, each Applicant’s Lease (“each Lease”) contains comparable terms, except as referred to below.

The relevant terms of each Lease

6. Each flat is described as being part of a Building (the Building) belonging to the Landlord and containing other flats and each Lease contains (inter-alia) covenants by the tenant: –
   “to keep the interior of the Flat including ..... the windows window frames and door frames and the glass thereof and the doors thereof in good and substantial repair and condition... ”

7. Each Lease includes various covenants for the Landlord including: –
   “that (subject to contribution payment as herein provided) the Landlord will maintain and keep in good and substantial repair and condition (a) the main structure of the Building including the foundations and the roof thereof and its gutters and rain water pipes. (b) all such gas and water pipes drains and electric cables and wires in under and upon the Building as are enjoyed or used by the Tenant in common with the owners or lessees of the other flats...”

8. Each Lease specifies that the Tenant shall pay such yearly sum as is payable under the provisions of the 3rd schedule

9. In each of the Applicants' leases (apart from those relating to 17 Biggar Garth and 97 Ocean Road) the 3rd schedule headed "Service Charge" states: –

   "1. The Service charge … to be paid by the Tenant….be….25% per annum of the aggregate cost and expenses and outgoings incurred by the Landlord in respect of or for the purpose of painting, repairing maintaining, servicing, lighting, cleansing and managing the Flat and the Building including without prejudice to the generality of the foregoing costs and expenses incurred in: –
   (1) keeping the Flat and the Building (including drains gutters and external pipes and cables) in good and substantial repair…
   2.The Service Charge is subject to the following terms and conditions: -
   (1) the Service Charge shall be ascertained on the basis of and become payable in respect of each of the Landlord's financial years which shall mean the period from and including the first day of April in each year to and including the thirty first day of March in the following year;
   (2) so soon after the end of the Landlord's financial year as may be practicable the Landlord shall supply to the Tenant with an invoice in respect of the Service Charge (including value added tax) payable by the Tenant for the then immediately preceding Landlord's financial year and the invoice shall contain a fair summary of the Landlord's said costs expenses and outgoings incurred during the financial year to which it relates. The Tenant shall make payment to the Landlord on 1st April in each year a sum to be determined by the Landlord, such sum representing the Landlord's estimated costs of the current year's service charge. This "on account" sum will be deducted from the final charge when actual costs are invoiced after the end of the financial year in accordance with paragraph 2 (2)
   (3) the expression "the Landlord's said costs expenses and outgoings incurred" as hereinbefore used shall be deemed to include not only those costs expenses outgoings and other expenditure hereinbefore described which have actually been disbursed incurred or made by the Landlord during the year but also such reasonable part of all such costs expenses or outgoings hereinbefore described which are of a periodically recurring nature (whether recurring by regular or irregular periods) whenever disbursed incurred or to be dispersed or incurred as the Landlord may allocate to the year in question as being fair and reasonable in the circumstances."

10. The leases relating to 17 Biggar Garth and 97 Ocean Road (granted in 1989 and 1990 respectively) do not include the final 2 sentences of clause 2 (2) of the 3rd Schedule beginning with the words "The Tenant shall make payment to the Landlord…", whereas the other leases (granted from March 1993 onwards) all do.

The factual background

11. Cumbria and North Lancashire were badly affected by the winter storms in 2015, particularly Storm Desmond, and other seemingly now more regular extreme weather events.

12. At the beginning of 2017 senior managers and technical officers in the Respondent's Housing Department met to consider the ongoing penetrating damp problems affecting properties on the Tummerhill estate. The options appraisal document that followed, under Mr Davies' name as the Respondent's Maintenance and Asset Manager, said it would be limited to "the condition of the walls to the worst affected flats on Biggar Garth, Ocean Road, Darent Avenue and Ribble Gardens and excludes the dwelling houses on the estate." It was noted that "of the 36 flats referenced above, 22 are presently managed by the Council, 14 are leasehold" and that "since 2015 several flats on the Tummerhill estate have experienced major problems of penetrating damp. It is now clear that the cause…is saturation of the outer leaf of the external cavity walls in conjuntion with the absorption of that water by the cavity insulating material and its subsequent transfer to the inner leaf brickwork" "to summarise, when faced with the need to carry out damp repairs on the estate, the Council has increasingly to take into account the following underlying problems when specifying the remedial works: –
    - The flats are situated in a severely exposed location.
    - The external brickwork is porous.
    - The external cavity walls are blocked with debris.
    - The cavity wall installation material absorbs and transfers moisture."

    3 solution options were considered. The 1st, being to carry out minor damp and replastering repairs on a property by property basis, and the 2nd, being to remove the debris and insulating material from the cavities and treat the external facade with silicone based water repellent, were both rejected as not providing a permanent cost effective solution. The 3rd option being to re-render the external facade with a new waterproof render system was adopted as being the most viable and on the basis that it would provide a permanent cost effective solution. It was also said that if the works were undertaken as a single contract it was likely to provide cost savings due to associated economies of scale. Mr Davies' provisional estimate "to carry out the work using traditional procurement options such as "lowest price" is estimated to be in the region £325,000." But he went on to say "having reviewed alternative procurement options I believe that it will be possible to manage and deliver the work via the Cumbria Housing partners framework for approximately £247,000. These potential savings are delivered from economies of scale and increased savings with regard to material purchasing costs"

13. Section 20 of the 1985 Act and the Service Charges (Consultation requirements) (England) Regulations 2003 (SI 2003/1987) ("the Regulations") specify detailed consultation requirements ("the consultation requirements") which if not complied with by a landlord, or dispensed with by the Tribunal, mean that the landlord cannot recover more than £250 from an individual tenant in respect of a set of qualifying works.

14. The Respondent appears to have taken the first steps specified in the consultation requirements when issuing a notice of intention to carry out works on 7th February 2017. In May 2017 a subsequent notice under the heading "Tummerhill estate rendering works" referred to 2 estimates obtained by the Respondent, one for £309,141.32 and the other for £316,546.58.

15. In January 2018 Mr Davies wrote to the privately owned flat owners referring to the earlier notices stating "having recently commenced work on a "pilot block" it has become clear that there are a number of potential additional areas of work required and these elements were not included in the initial cost estimate we provided. As a result, we are unable to carry out the work as planned and required to provide you with a new section 20 notice so that you have the opportunity to comment on the revised cost information..."

16. On 2nd of February 2018 a new notice of intention to carry out qualifying works was issued stating that "the Respondent proposes to undertake re-rendering of the external walls of the existing structure and remove debris in the low-level cavity construction". The notice referred to the rights of the leaseholders under the 1985 Act to make written observations to the Respondent about the proposed works and to propose a person from whom the Respondent may try to obtain an estimate in respect of the works. "Observations must be received no later than 30 days after the date of this notice. Any observations received after that date will not be considered. The consultation period will end on **2nd of March 2018**"

17. On 14th of May 2018 the Respondent issued a new notice of the estimates for its proposed works provided by 9 contractors where the figures ranged from £445,882.59 to £694,483.01. There was nothing in the notice to explain the number of properties involved or what fraction of the overall figure might be claimed from an individual flat owner.

18. A number of the flat owners reacted to this notice. Letters and emails passed between the Lead Applicant and the Respondent. The Lead Applicant asked for copies of the estimates, tender documents and schedules of works. The Respondent said that any copies would have to be redacted because the contractors rates/prices were "commercially sensitive". Initially it said that full copies (including the contractors rates and prices) could nonetheless be inspected at the Town Hall, but that offer was then withdrawn. The Lead Applicant received a copy of the schedule of quantities/works, relating to 40 flats, with the prices for individual component parts having been removed.

19. On 27th July 2018 the Respondent issued a further notice confirming (inter-alia): –

"2. We have now entered into a contract for carrying out the works first described in the notice of intention dated 2 February 2018…
3. Our reasons for doing so are: this contractor provided the lowest estimate…
4. The written observations in relation to the estimates received during the consultation period may be summarised as follows.
(a) can you please confirm that the lowest estimate of £445,882.59 as the total cost of the proposed work, including provisional sums, preliminaries and VAT?
(b) can you please provide individual costs/prices that make up the estimate of £445,882.59?
(c) what will be the cost from each flat?
(d) has there been any consideration how leaseholders will fund this work?
Our response to the observations is
(a) the lowest estimate of £445,882.59 is the anticipated cost of the proposed work, including provisional sums and preliminaries. This cost excludes VAT. The estimate provided acts as a "target cost" for the delivery of the works specified and may increase or decrease dependent upon any changes agreed between the Respondent and DLP Services (Northern) Ltd
(b) the individual costs/prices (ie contractors rates) that make up the estimate of £445,882.59 are commercially sensitive and cannot be provided to leaseholders.
(c) the estimated cost payable by each leaseholder is £9,370 plus VAT.
(d) leaseholders can discuss payment plans with the Respondent on an individual basis…"

20. On 15th April 2019 the Respondent issued each of the Applicants with a payment request headed 'Ground rent and estimated service charges for the period 1 April 2019 to 31 March 2020" which included the sum of £9,370 under the item referred to as "Major Repairs – Estimated" stating that the amount was due for payment within 30 days.

The Applicants' and the Respondent's submissions

21. The Lead Applicant, Mr McKenzie, made various submissions as to why the figure of £9,370 was disputed. He contended that the Respondent had not complied with the section 20 consultation procedure "by their refusal to provide a copy of the successful contractors fully priced schedule of works to its leaseholders and also the refusal to allow them to be copied by the leaseholders... (who) would be unable to check if they have been charged for work that was not carried out to their own property or whether the costs are reasonable good value or even necessary" and also "by not having regard to my observations and by not including my observations in their summary of the observations which they sent to the other leaseholders". He also argued that in allowing the installation of retrospective cavity wall insulation ("CWI") the Respondent had been negligent and that it had failed to properly assess the properties "situated in a severe wind driven location" to see if they were suitable for such installation. He contended that the Respondent's failure to regularly maintain the external structure of the properties had resulted in insulation in some of the properties becoming saturated. He stated that the Respondent had failed to carry out a survey to each individual property to establish if every property was affected by damp ingress and rather than providing "a permanent solution" the specification of works had been altered to reduce the guarantee period to 10 years for the polymer cement render system.

22. Mr Pugh, in his own words, repeated a number of the submissions made by Mr McKenzie. He stated that the leaseholders believe that the Respondent caused the damp ingress problem in the first place, its lack of maintenance had contributed to the problem, its proposal was not a permanent solution, there was no proof that all the properties have a damp problem, the Respondent had not fulfilled its consultation obligations, and that it had repeatedly refused to give leaseholders any detailed cost breakdown. He also complained that, prior to his purchase in 2015, the Respondent had answered a precontract enquiry as to whether it anticipated any unusually large expenditure within the next 3 years likely to cause an increase in service charge account with the reply "not applicable". He questioned works "being undertaken which were over and above damp proofing", such as wall tie replacement. His main concern was as to how "can the costs be so incredibly high?" stating that local builders had referred to it as "astronomical". He questioned the Respondent's competence referring to a conversation in August 2018 with Mr Clarke when "he stated that the Council had undertaken a complete previous tendering process and cost proposal in 2017 but they had to completely scrap it because the costing proposals were so inaccurate, and that the member of staff responsible for this work had been moved from the Housing Department. Indeed, the costs that were originally proposed were between approximately £2,000 and £4,000 per flat. This raises 2 questions, one of competence; also how a new cost proposal can be so much higher than the original proposal (£5,000-£7,000 higher)".

23. Ms Hampson, the owner of 2 Biggar Garth, exhibited an email from the Seller's solicitors in March 2017, prior to her purchase stating that the Respondent had stated that "they are reviewing the option to render external walls at £8,000 for the block, £2,000 per flat".

24. Mrs Devlin, an owner with her husband of 26 Biggar Garth and 89 Ocean Road, stated that they had had no problems with damp in 26 Biggar Garth since 2015 when the bedroom was tanked, but that there had been nothing but problems with the gable end of 89 Ocean Road and that works undertaken by the Respondent had been "poor, incorrect and inadequate" and asked "how can the new proposed works be trusted? To double the original estimate given to leaseholders is beyond belief".

25. Ms Campbell, the owner of 6 Biggar Garth, also complained of a more than doubling of the figures quoted to her by estate agents prior to her purchase in May 2018, and that due to her personal circumstances, "the whole situation has been very stressful and is making day to day life difficult".

26. The Respondent, through its solicitors denied that it had not complied with the section 20 consultation procedure and described how it had used its Building works procurement framework provider to estimate the total cost of the work using the rates/prices tendered by 9 eligible framework contractors. It emphasised that the £9,370 charged to each leaseholder was simply an estimate and that the Respondent would "on completion of the works remeasure and revalue each block to ensure the amounts paid to the contractor in respect of each element of work is correct, so that leaseholders are only recharged in accordance with the terms of the leases for work actually carried out to their premises". It was stated that Mr McKenzie's observations did receive due consideration, but his request for additional information was deemed to be beyond the legal obligations of the Respondents, and hence not included in the 4 observed responses referred to in the notice issued on 27th of July 2018.

27. The Respondent denied responsibility for the decision as to the suitability of the properties for the installation retrospective CWI, stating that that lay with the installing contractor. It was pointed out that Mr McKenzie had allowed his own flat to have retrospective CWI installed, although Mr McKenzie later stated that such works had been sanctioned by his tenant without his knowledge or consent. The Respondent stood by its view that the flats should be completely rendered. The Respondent accepted that it did not inspect every flat before beginning the consultation process, that some properties have greater damp problems than others and that some properties indeed only appear to be suffering from condensation. Nevertheless, it stated its belief that "the underlying problems on the estate indicates that the pointing is generally in poor condition, the render is hollow, cracked and loose on many exposed elevations, the bricks themselves are

porous and the CWI allows moisture to pass from the outer to the inner leaf of the cavity. On this basis, the Council has concluded that there exists the need to undertake significant actions to improve the weather tightness of the external walls to prevent further water ingress. The Council has undertaken a comprehensive options appraisal… and considers the best solution to be re-rendering the external envelope. Anything short of this will not be as lasting and will ultimately involve both the Council and leaseholders in further expenditure along the line". The Respondent also justified the installation of remedial wall ties following works on a pilot block where the existing galvanised wire butterfly ties on exposed elevations were found to have isolated rusting.

28. The Respondent described the tendering process, stating that it had "utilised this type of procurement framework for the purchase of labour and materials over the past 10 years and demonstrated significant savings against traditional procurement solutions such as competitive tendering". It had accepted the lowest tender and stated that "the views of contractors expressed verbally to Mr Pugh in relation to the cost are entirely subjective and unsubstantiated by proper analytical estimates based on the Council's quantified schedule of work and cannot be given any serious consideration." The Respondent confirmed that Mr Pugh's precontract enquiries had been answered before both Storm Desmond and its options appraisal contemplating major works.

29. The Respondent also as a preliminary point, in its statement of case dated 8th May 2019, asked the Tribunal to make a ruling on the question of exactly which Applicants are before it, stating that to be of significance for 2 reasons. Firstly, it was argued that because the 2nd, 3rd, 5th, 6th and 7th Applicants had not filed separate signed witness statements of fact and had failed formally to join the proceedings, they had not complied with the Tribunal's directions, the Respondent could not fairly be expected to deal with Applicants who had not filed a statement of case (or formally adopted the statement of case of another Applicant) and that their claims be struck out. Secondly it was stated that if the Tribunal found in favour of the Respondent it would seek its costs and oppose any relief sought under the section 20C application. It was submitted that if the Tribunal were to grant the section 20C application, in whole or in part, relief could only be extended to those Applicants properly before it, and not to any other leaseholders. The Respondent's solicitors cited the Upper Tribunal decision in SCMLLA (Freehold) Ltd re Cleveland Mansions and Southwold Mansions (2014) UKUT 58 (LC) ("Cleveland Mansions") in support of its contention.

The Inspection

30. Walney is a low-lying island accessed from the rest of Barrow in Furness by the Jubilee Bridge. The properties are on the Tummerhill estate on the westerly side of the island, located approximately 250 yards from the coastline and the Irish Sea. Locals would not dispute that it is often wet and often windy on Walney. The roadside trees and vegetation clearly show that the prevailing winds are from the sea and the west.

31. The Tribunal made its inspection on 17th June 2019. It had previously intimated by way of further directions that it would not be necessary to inspect all of the flats internally. Present throughout the inspection (and where appropriate at the invitation of the relevant occupiers) were Mr Clarke, the Respondent's Senior Projects Surveyor and Mr Davies. The Tribunal made an external inspection of all of the different Applicants' flats. It also inspected the inside of 97 Ocean Road, where Mr Mackenzie's son was in attendance, the inside of 6 Biggar Garth with Ms Campbell and the inside of 4 Biggar with Mr Carter.

32. The Respondent built the properties in the early 1960s using a traditional cavity wall construction and pitched slate roofs. Each set of 4 flats was built to a common modest design, with the front and rear walls finished with bricks on the ground floor and a dash render on the first floor. Photographs of the individual Buildings are attached in the Appendix to this decision.

33. Mr and Mrs Devlin are the owners of 89 Ocean Road a first floor flat and, according to the Respondents schedule of works, 1 of 2 privately owned flats in what for ease of reference is referred to as "House 1". Mr and Mrs Marwood are the owners of 91 Ocean Road, 1 of 2 privately owned flats in "House 2". Mr Pugh is the owner of 15 Biggar Garth and Mr and Mrs Collard the owner of number 17, the 2 privately owned flats in "House 5". All 4 flats in "House 8" are privately owned – Ms Hampson owns 2 Biggar Garth, Mr Carter number 4, Ms Campbell number 6 and Mr Mackenzie, whose front door opens on to the A road, owns number 97 Ocean Road.

34. As evidenced by the photographs, the works to Houses 5 and 7 are close to completion, but the main works specified for Houses 1, 2 and 8 have hardly started. The photographs are helpful in showing the sequencing of the works. Little, if anything, appears to have been done at House 1, whilst some bricks have been removed and replaced at House 2 presumably to remove debris and/or the CWI from the bottom of the cavity walls. It appeared that internal trays with vents have been inserted in the flank cavity wall above the porch at House 8. Damp problems had clearly been encountered in both porch areas of House 8 and Mr Carter referred to various privately undertaken works to ameliorate penetrating damp in the bedroom of 4 Biggar Garth.

35. Mr Clarke and Mr Davies gave various helpful explanations during the inspection. They confirmed that the 9 estimates referred to in the notice were all produced by a desktop exercise in response to the Respondent's detailed specification of works and without the contractors inspecting the properties.

The Law

36. Section 27(a) of the 1985 Act provides that:-

"(1) An application may be made to the Tribunal for a determination whether a service charge is payable and, if it is, as to:-

(a) the person to whom it is payable
(b) the person by whom it is payable
(c) the amount which is payable
(d) the date at or by which it is payable
(e) the manner in which it is payable

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

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

37. Section 19 of the 1985 Act confirms that :-

"(1)Relevant costs shall be taken into account in determining the amount of a service charge ....

(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;

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."

38. Section 20C states that: –

"(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... the First-tier Tribunal... 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."

The Tribunal's Reasons and Conclusions

The preliminary questions raised by the Respondent as to which Applicants are included in the applications, and any section 20C order

39. The Respondent has asked for a preliminary determination as to which Applicants are properly before the Tribunal.

40. The Tribunal finds that all of the Applicants referred to on the head sheet have been properly joined into both applications and for the following reasons: –
   - each such Applicant asked the Tribunal at the outset to be added as an Applicant.
   - each such Applicant, after receipt of the Respondent's statement of case and within the time scale set by the Tribunal's Directions, also confirmed in writing and by signature that they wished to adopt the statements of case of the Lead Applicant and Mr Pugh, and without further adding to the same.
   - the Respondent has thus not been asked to deal with any additional matters or prejudiced by the inclusion of all of the Applicants referred to on the head sheet.

41. Mr and Mrs Marwood of 91 Ocean Road, although not co-Applicants in the application under section 27A of the 1985 Act can if the Tribunal so decides also be included in an order made under section 20C, and on the basis that they were clearly specified by name and address in the original application under section 20C made by the Lead Applicant. The final words of section 20C make it absolutely clear that such an order is not necessarily restricted to the tenant making the application, but can include "the tenant or any other person or persons specified in the application". The Tribunal has carefully considered the case of Cleveland Mansions and does not agree that the Respondent has correctly interpreted it. It is not an authority for limiting the Tribunal's jurisdiction to make an order in favour of those clearly identified to the Respondent at the outset as intended beneficiaries of such an order.

The Section 27A Application

42. Section 19 of the 1985 Act imposes a general requirement of reasonableness in relation to service charge expenditure.

43. Section 19 (2) referring to on account service charge demands states "no greater amount than is reasonable is…payable"

44. The following principles, derived from decided cases, were helpful to the Tribunal in making its decision as to what is reasonable: –
    - the Tribunal must take into account all relevant circumstances as they exist at the date of the decision in a broad, common sense way giving weight as it thinks right to various factors in the situation in order to determine whether a charge is reasonable. London Borough of Havering v MacDonald (2012) 3 E.G.L.R. 49.

- whether costs are reasonably incurred is not simply a question of the landlord's decision-making process. It is also a question of outcome. The requirement that costs be reasonably incurred does not mean that the relevant expenditure must be the cheapest available, although this does not give a landlord a licence to charge a figure that is out of line with the market norm. The fact that the landlord has adopted appropriate procedures in incurring the costs does not mean that such costs are reasonably incurred if they are in excess of the appropriate market rate. Forcelux v Sweetman (2001) 2 E.G.L.R. 173.
- there is a real difference between works which a landlord is obliged to carry out on the one hand, and optional improvements which he is entitled to carry out on the other. Different considerations may therefore apply in relation to the assessment of reasonableness as between the two. The Court of Appeal in Waaler v. Hounslow LBC (2017) EWCA Civ 45 confirmed that no error of law had been committed where a Tribunal held that a landlord, who decided to carry out a scheme of works which went beyond what was required to effect a repair must take particular account of the extent of the interests of the lessees, their views on the proposal, and the financial impact of proceeding. The consultation requirements espouse the same principles.
- the question of reasonableness must be considered by reference to the circumstances when the costs are incurred and not by reference to how the need for such costs arose. Accordingly the fact that repair works may only be necessary because of neglect or breach of a landlord's repairing covenant does not prevent the cost of such works from being reasonably incurred. Continental Property Ventures v. White (2006) 1 E.G.L.R. 85
- the purpose of the consultation requirements is to ensure that tenants are protected from paying for inappropriate works, or paying more than would be appropriate. Daejan Investments Ltd v. Benson and others (2013) UK SC 14 ("Daejan")

45. Having inspected the properties, carefully considered the evidence before it, and using its own knowledge and experience, the Tribunal concluded as follows.

46. It was reasonable for the Respondent, in pursuance of its obligations under each lease to a "maintain and keep in good and substantial repair and condition the… main structure of the Building" to decide, particularly as a consequence of local weather conditions, the age of the Buildings and increasing multiple complaints of penetrating damp, that individual Buildings should be comprehensively re-rendered. Whether or not there was past neglect and/or the Respondent has some responsibility for the decision to allow retrospective CWI, sometimes over a decade ago, the question to be answered is whether it is reasonable to incur costs now.

47. Because each Building was built at the same time, to a common design and all are close together, it is not unreasonable to suppose that the penetrating damp problems encountered by some may also sooner or later affect the others.

48. The Tribunal carefully reviewed the specification of the proposed works prepared by the Respondent. The Tribunal found that it was reasonable to include in the general specification for each Building provision for: –
1. Cleaning cavities at ground level to remove debris.
2. Installation of remedial wall ties.
3. Replacing cavity trays at porch roof/gable abutments.
4. Removal of existing render and re-rendering.
5. Rendering over existing facing brickwork, and
6. Protecting and, if necessary, moving and re-fixing external gas and other existing pipe work, flues and fixings to facilitate rendering.
Whilst acknowledging that, in particular instances and where appropriate, the following works might be desirable, the Tribunal found that the proposed removal and replacement of soffit boards, replacement of timber facias with UPVC, and replacement of guttering and downspouts were all items which could be better regarded as "discretionary improvements" requiring a greater consideration of the individual lessees views and the financial impact on them. This particularly applies to House 8 where all 4 flats are privately owned.

49. Each lease makes it clear that the service charges payable by individual leaseholders are limited to 25% of the charges authorised under the leases relating to their particular Building. When deciding what works and what service charges are reasonable, each Building is, and must be viewed as, an entirely separate legal entity.

50. The Tribunal understands why, as a social housing provider, the Respondent has obtained estimates in the way that it has. Nevertheless, to package separate Buildings together will not be reasonable if, as a consequence, an individual leaseholder has to pay substantially more than would otherwise have been the case, unless there is some significant compensating advantage.

51. The individual leaseholders should not have to contribute a more expensive specification than is necessary without agreement and, if the Respondent for its own reasons, nonetheless chooses to adopt a more expensive specification, individual leaseholders should not have to pay more than they would have otherwise have had to pay.

52. For the Respondent to admit that not all the flats were surveyed and that the contractors supplying estimates were not required to and did not undertake on-site inspections must call into serious doubt whether individual leaseholders are being asked to pay for inappropriate works or to pay more than would be appropriate. The same conclusion comes from cost estimates published by the Respondent moving from around £2,000-£4,000 per flat to the figure of £9,370 plus VAT referred to in the July 2018 Notice (being £11,244 per leaseholder, which equates to £44,976 for a Building) and which was referred to later in that Notice as acting as a "target cost" "and may increase or decrease dependent on changes agreed between the Council" and its chosen contractor. It is true that the Respondent subsequently confirmed that VAT would not be payable, but the Tribunal has huge sympathy for the individual leaseholders receiving that notice, who must have been truly shocked and horrified. The Tribunal, fully understands why Mr Pugh has referred to trust in the Respondent being undermined and, has concluded that the Respondent has fallen well short in demonstrating that the sums demanded are reasonable.

53. The processes employed by the Respondent seems inevitably to have gone from the general to the specific and have not persuaded the Tribunal that its pricing provides reasonable value to the individual leaseholders. Nor is the Tribunal persuaded by arguments as to economies of scale in respect of what are individually modest Buildings each of which can easily be dealt with separately.

54. The logical starting point, and as dictated by the provisions of each lease, is that each Building requires its own estimate or estimates. Without such estimates a proper decision cannot be made. The Tribunal firmly believes that such estimates will best be provided by reputable local builders with the requisite experience.

55. The difference between the wording of the different Applicants' leases, as previously referred to in paragraph 10 above, is significant because it is the final 2 sentences of clause 2 (2) of the 3rd Schedule which authorise on account payments at the beginning of the Respondent's financial year.

56. Without such words, it is extremely questionable whether the Respondent has the requisite legal authority to charge the owners of 17 Biggar Garth or 97 Ocean Road (or any other leaseholder whose lease does not include the requisite sentences) in advance, unless a valid argument could be made that a particular item comes properly within the provisions for charging periodically recurring payments as referred to in subclause 2 (3) of the 3rd Schedule.

57. As a consequence of the material differences between the different Applicants' leases, the Respondent will need to treat different leaseholders differently. Some can be asked for on account payments, others almost certainly not.

58. For all of these reasons, and because the Tribunal does not presently have either the appropriate evidence before it, or the resources, to make a final determination of what sum is reasonably payable by way of service charge, it has decided to make an order in the terms set out in paragraphs (1) (2) (3) and (4) of the Decision.

59. Whilst compliance with the Regulations and the consultation requirements are not a necessary prerequisite to an estimated on account demand for service charges, compliance is required in respect of qualifying works.

60. Clearly, and as shown in the photographs, substantial qualifying works have already been undertaken to Houses 5 and 7. It thus falls to the Tribunal to make a decision as to whether the consultation requirements have been complied with.

61. The Tribunal finds that they have not, for various reasons: –

- the notice issued on 2nd of February 2018 is on the face of it procedurally incorrect. The notice in bold writing stated that the consultation period would end on **2nd of March 2018**, which was clearly less than 30 days from the date of the notice being the requisite period specified in the Regulations. There were only 28 days in February and 2018 was not a leap year. The same notice was also somewhat disingenuous when stating that "You are also entitled to propose a person from whom the Council *may* try to obtain an estimate". The words in the Regulations refer to a stronger obligation and that "the landlord *should* try to obtain an estimate..."
- The Respondent also failed to comply with the Regulations when redacting parts of the estimates. The Regulations state that "the landlord shall.... make all of the estimates available for inspection" and that the estimates "must be available for inspection, free of charge, (and) if facilities to enable copies to be taken are not made available... the landlord shall provide to any tenant on request and free of charge, a copy....." Nothing in the Regulations authorised the Respondent to only allow parts only of the estimates to be inspected. As Mr McKenzie and others quite rightly argued, redacting the component figures from the estimates made it impossible for individual leaseholders to drill down and understand the personal implications of the global figures. The Respondent by its actions made the figures virtually meaningless, and was thereby wholly defeating the point of the consultation requirements, as confirmed by the Supreme Court in Daejan.
- The Tribunal also found that its reasons for not alluding to a number of Mr McKenzie's very pertinent observations in the Notice inadequate. The Regulations require observations to be properly summarised and published to all those who have to pay. The Tribunal is left with the impression that the Respondent preferred not to have to address uncomfortable questions in public.

- Possibly of most consequence, however, was the Respondent's decision to package the different Buildings together when seeking estimates (which was not justified by the terms of any of the leases) and which thereby precluded the nomination of smaller contractors. The Tribunal finds that this process was too restrictive and anti-competitive, again making the consultation procedure invalid.

62. It follows, from the Tribunal's finding that the consultation requirements were not properly complied with, that the service charge contributions due from each of the leaseholders in Houses 5 and 7 must be limited to the sum of £250 as a consequence of section 20 and the Regulations, unless or until any dispensation is granted.

63. It is not for this Tribunal to prejudge any possible future application by the Respondent for dispensation, save to say that it would have to have full regard to the correct approach to such an application as set out in detail by the Supreme Court in Daejan.

The Section 20C Application

64. The Tribunal went on to consider the Applicants separate application, that the Tribunal make an order under section 20C of the 1985 Act that the Respondent be precluded from including within the service charges the costs incurred by the Respondent in connection with the present proceedings before the Tribunal.

65. The Tribunal having regard to what is just and equitable in all the circumstances, and in the light of its foregoing decision, determined that such an order should be made in respect of any service charge payable by any of the named Applicants (who for the avoidance of any doubt in this context also include Mr and Mrs Marwood).

Paragraph 13 Costs

66. Paragraph 13 of The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 ("the Procedure Rules") provides that a Tribunal may determine that one party to the proceedings pays the costs incurred by the other party in the limited circumstances set out in that rule, if that party has acted unreasonably in bringing defending or conducting those proceedings.

67. In making its decision as to costs the Tribunal has had careful regard to the Upper Tribunal case of Willow Court Management Company (1985) Ltd v Alexander and others (2016) UKUT 0290(LC) containing detailed guidance as to how the discretionary power afforded under Paragraph 13 should be exercised. The case confirms that a finding of "unreasonable conduct" relating to the conduct of the proceedings is an essential precondition to the exercise of the Tribunal's discretion, and that the threshold as to what is "unreasonable conduct" in this particular context is a high one.

68. The Tribunal has decided that, in all the circumstances of this case, it would not be appropriate to make an order under paragraph 13 of the Procedure Rules.

J M Going
17th June 2019

The Appendix

Houses 1 and 2

House 5

House 7

House 8