

Northern Rent Assessment Panel

MAN/35UB/LSC/2005/0022

## LEASEHOLD VALUATION TRIBUNAL

SECTIONS 27A, 27ZA AND 20C OF THE LANDLORD AND TENANT ACT 1985  
(AS AMENDED)

**PROPERTY :** 49A, 49B, 49C, Bondgate Within  
Alnwick  
Northumberland  
NE66 2HZ  
(‘the Properties’)

**APPLICANTS:** Michael and Janet Armitage (49A)  
Jaqueline Sanderson (49B)  
Ross Davidson (49C)

**RESPONDENT:** Gilesgate Properties Limited

## DECISION OF THE TRIBUNAL

## Preliminary

- A. By Applications dated 23<sup>rd</sup> August 2005 the Applicants applied pursuant to Section 27A of the Landlord and Tenant Act 1985 as amended (‘the Act’) for a determination as to whether service charges in respect of the Properties for certain years were reasonable and payable and for an order pursuant to Section 20C of the Act.
- B. By an Application dated 20<sup>th</sup> December 2005 the Respondents applied pursuant to Section 20ZA of the Act for an order that consultation about qualifying works should be dispensed with.
- C. It was directed that the Application under Section 27ZA of the Act be dealt with contemporaneously with the other Applications.
- D. At a hearing on 14<sup>th</sup> December 2005 the matter was adjourned and directions given as to the adjourned hearing which took place on 1<sup>st</sup> February 2006. The matter was then further adjourned at their request for Counsel’s closing speeches, both Counsel undertaking to inform the Tribunal as to their availability.
- E. In default of satisfactory information being received it was directed on 7<sup>th</sup> March 2006 that final submissions were to be made in writing not later than 7<sup>th</sup> April 2006. Only the Respondent complied with that direction. No final submission was made on behalf of the Applicants.
- F. At the hearing on 1<sup>st</sup> February 2006 Counsel for the Applicants stated, and it was accepted, that the only matter still in issue was that relating to the service charges for the years 2004 and 2005 resulting from works carried out by the Respondent to the external fabric and the roof of the building of which the Properties form part (‘the Works’).

G. The Tribunal made an unaccompanied inspection of the Properties on 14<sup>th</sup> December 2005. They lie on the second and third floors of the building known as 49/51 Bondgate ('the Building'). The ground and first floors comprise commercial premises. Scaffolding was in place round both frontages of the Building

### The Leases

1. The leases to the Applicants ('the Leases') were accepted to be in common form in all material respects. There was no dispute that at all material times the Respondent was the owner of the freehold of the Properties and that the leasehold interest was vested in the respective Applicants
2. The Leases are each for a term of 99 years from 1<sup>st</sup> February 1990
3. The accounting period for service charge purposes is defined as being 1<sup>st</sup> April to the following 31<sup>st</sup> March. The Common Parts are defined at Clause 1(11) a copy of which comprises Appendix 1. The landlord's maintenance, repair and insurance obligations are at Clause 5(4) a copy of which comprises Appendix 2. The general service charge provisions are in the 5<sup>th</sup> Schedule a copy of which comprises Appendix 3. The tenant covenants to pay the service charge at Clause 4(4)

### Representation

4. The Applicants were represented by Mr G Knowles of Counsel instructed by Hindmarsh Guy Solicitors of 17 Bondgate Without, Alnwick. He called as witnesses Mr Ross Davidson one of the Applicants, Mr Kevin Dobson (by written statement only) and Mr R A Sayer.
5. The Respondents were represented by Miss M Temple of Counsel instructed by Dickinson Dees, Solicitors, of 1 Trinity Gardens, Broad Chare, Newcastle upon Tyne. She called as witnesses Mr Paul Spensley and Mr Stephen Smith
6. The written witness statements of all witnesses except Mr Davidson were, by agreement, taken as their evidence in chief.

### The Law

7. The relevant law is to be found in the Act. Section 18 of the Act defines 'service charge' and 'relevant costs'
8. Section 19 of the Act provides:

***"Limitation of service charges: reasonableness***

*Relevant costs shall be taken into account in determining the amount of a service charge payable for a period -*

*only to the extent that they are reasonably incurred; and*

*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."*

9. Section 20 of the Act with effect from 31st October 2003 reads as follows:

***“Limitation of service charges: consultation requirements***

- (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) a leasehold valuation 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 applied 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.”*

10. “The appropriate amount” is defined by Reg. 6 of The Service Charges (Consultation Requirements) (England) Regulations 2003 as  
*... an amount which results in the relevant contribution of any tenant being more than £250.*

11 Part 2 of Schedule 4 of those Regulations sets out the Consultation Requirements

12 Section 20C of the 1985 Act provides

- (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 connections with proceedings before a court, residential property tribunal or leasehold valuation tribunal ... are not to regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant ...*
- (2) [omitted]

(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.*

13 Section 20ZA of the Act provides:

(1) *Where an application is made to a leasehold valuation tribunal for a determination to dispense with all or any of the consultation requirements in relation to any qualifying works or qualifying long term agreement, the tribunal may make the determination if satisfied it is reasonable to dispense with the requirements*

(2) *In section 20 and this section-*

*“qualifying works” means works on a building or any other premises, and*

*“qualifying long term agreement” means (subject to subsection (3)) an agreement entered into, by or on behalf of a landlord or superior landlord, for a term of more than twelve months.*

### **Evidence for the Applicants**

14 Mr Ross Davidson, the leaseholder of No.49C, said that

- a) the first he heard of any intention to have the Works carried out was an account of Howarth Litchfield Partnership ('HLP') dated 10<sup>th</sup> January 2005 in the sum of £2232 50 for carrying out a condition survey and preparing a schedule of works for the Building sent to him by Ashley Smith ('AS'), the Respondent's agents. On the same day he had a letter from AS dated 11<sup>th</sup> January 2005, telling him that it was intended to carry out the Works within the next two weeks and that scaffolding would be erected. He responded on 7<sup>th</sup> February to say that there had been no consultation about the Works and drawing Ashley Smith's attention to legal consultation requirements.
- b) He had correspondence and telephone calls with Mr Smith of AS over a period of time about the need for and cost of the Works but did not think Mr. Smith was taking any notice.
- c) He was not aware of any problem with the roof. When provided with the last page of the schedule of works he thought reference to the roof was to the copper dome at the apex of the Building.
- d) The scaffolding was put up in February 2005 but no further work was done until June 2005.
- e) He discovered that a firm called Fleetwoods, tenants of premises on the ground floor had asked two firms of roofers to check the roof. He himself spoke to one of them, Mr Dobson of Parkside Roofing and asked him to take photographs of the roof. Mr Dobson gained access to the roof via the scaffolding and a ladder. Mr Dobson told him the roof was 'OK' except for a need for minor repairs. Mr Dobson expressly stated it did not need replacing and later gave a quote of £396 + vat for the necessary work. He did not send that quote to Mr Smith before June 2005 because it had been given to solicitors who had been instructed by the Applicants.
- f) He (Mr Davidson) thought the Work to the roof constituted an improvement rather than a repair.
- g) A different material than specified by HLP was used to cover the flat area of the roof.
- h) He accepted that a letter to him from AS of 1<sup>st</sup> March 2005 indicated on the face of it that no contract for the Works had been awarded and that a letter from them to him dated 14<sup>th</sup> March dealt with points raised by him in a letter of 2<sup>nd</sup> March.
- i) He further accepted that it was reasonable, given the lack of quotations for the Works and the prices given by those who did quote, to get a further quotation.
- j) He, himself, had not been able to get quotations because someone other than him would be liable to pay for the work to be quoted for. He did not give names of potential roofing contractors to

Mr Smith because he believed he had already made up his mind to use a firm called Newton Moor Construction ('NMC')

- k) A quantity surveyor from whom he had sought advice did not inspect the roof and took the view that it was 'a rolls-royce job' from the figures obtained by HLP.
- l) He accepted that in the event there had been a much longer period for consultation than required by the Act but pointed out that the letter of 11<sup>th</sup> January 2005 had said the Works would start two weeks after that letter.
- m) He first knew of the report of Mr Sayer dated in May 2004 when Miss Sanderson got it from Mr Armitage. It was not sent to Mr Smith but given to the Applicants' solicitors and in any case he thought from the wording of it that it was privy to Mr Armitage.
- n) He accepted that a flat roof needed replacing from time to time but only when there were signs it was likely to fail overall. Otherwise patching would be adequate for a while. Certainly wholesale renewal was not justified simply because of the elapse of 10 years since the last renewal. He had never told Mr Smith that he accepted the roof work was necessary.

15. The evidence of Richard A Sayer, a director in the firm of Rook Matthews Sayer and a Fellow of the Royal Institute of Chartered Surveyors, may be summarised as follows:

- a) In response to instructions from Mr Armitage to investigate possible penetrating damp and or condensation at 49a Bondgate he had inspected that flat and, so far as it was possible from windows of the dome, the flat roof above it. He had also seen the roof from his office window and had looked at it from ground level with binoculars. He had produced a report dated 5<sup>th</sup> May 2004 which concluded there was no water penetrating from the roof.
- b) His office was opposite the Building and in about 1996 or 1997 or early 1998 he had inspected the roof with particular reference to the dome and its surrounding area. He was not sure what work had been done at that time but thought it might have just been to the dome itself.
- c) His findings in 2004 did not support the need for work to the roof recommended by HLP.
- d) The scaffolding had been there for about six months before any other work was done.
- e) As a professional surveyor, faced with a situation where two reputable roofing firms had inspected a roof and found only minor repairs needed whilst surveyors who had not inspected recommended full replacement, he would have investigated the situation fully before using his professional expertise to decide what should be done.
- f) He agreed that quotes by Hillerby and Parkside Roofing clearly did not include for the cost of the necessary scaffolding.
- g) It was difficult to judge the condition of a flat roof. Sometimes there was no visible evidence of need to repair or renew but that was still needed. There was always a risk of brittleness. He agreed the normal life was 10/15 years but some would leak earlier and some later.
- h) By paragraph 4 of his witness statement referring to his personal knowledge that the roof had been overhauled in the last ten years he meant that whatever work was then necessary had been done, not that it had been renewed. He agreed 'substantial overhaul' was inaccurate. He thought Mr Armitage must have told him the roof had been overhauled within the last ten years.
- i) The flat roof covering previously used would not be as good as Sarnafil or (if it was similar to Sarnafil) Icopal.
- j) He accepted that the main cost of scaffolding was in the erection and dismantling and also that a lack of firms willing to tender meant one had to take what was offered.
- k) Contractors will not put up scaffolding if there is no contract for the work for which it is intended. Normally there is a weekly charge.

16. Mr Kevin Dobson, a partner in Parkside Roofing Contractors said that Mr Readman, a commercial occupier of part of the Building asked him to inspect the roof of the Building, make recommendations for any necessary remedial work and quote for any cost involved. He thought the flat roof was generally in good condition, with no tear or splitting. There were two small areas where the flashing had lifted. He appended his quotation and photographs to his statement.

### **Evidence for the Respondent**

17. Mr Stephen Smith, the proprietor of AS gave evidence which may be summarised as follows:

- a) The reports of HLP were commissioned having given the lower of two quotations and AS having worked with them previously. The proportion of their charges payable by each of the Applicants was below the threshold requiring consultation and in any case consultation was not required under the 2003 amendments to the Act because the work was done prior to their coming into force. The Applicants did not have to agree to the preparation of the reports which were an essential preliminary to the Works.
- b) Proper consultation was carried out in relation to the Works - Mr Smith made reference to the relevant correspondence and telephone calls set out below under the heading 'Undisputed facts chronologically set out'
- c) The cost of the work was the cheapest of five quotations based on a professional survey and schedule of works. The Applicants could not get any other quotations.
- d) There was an error in the Schedule sent out with letter to the Applicants dated 12<sup>th</sup> August 2005 (wrongly dated 21<sup>st</sup> June). The architects fees should have been shown as £550.00
- e) If the Tribunal considered that the consultation about the actual works had been deficient a dispensation should be given under Section 20ZA because the consultation was very extensive and despite asking he had not been told on behalf of the Applicants what were the problems with the consultation. Further, the Applicants had not been disadvantaged.
- f) The leases required external decorations to be carried out every three years and this was overdue. The last external decoration had been carried out in 1998
- g) It was true that in their letter of 19<sup>th</sup> February 2003 HLP raised the question of expensive equipment to access the roof for inspection. It was later decided it would be too expensive to do so.
- h) Until Mr Davidson raised the point on 7<sup>th</sup> February 2005 he was not aware of the need for consultation about the works to the building but at that time he had not instructed NMC to proceed. There was no contract in place. He agreed there was nothing in the documents before the Tribunal to show when the contract had been entered into. NMC were instructed to proceed in June 2005.
- i) He knew scaffolding was in place or partly in place by February 2005 and assumed that HLP had told the contractor to stop doing anything further because the contract had not been awarded.
- j) He thought that about 40% of the overall work related to the roof.

18. Mr Paul Spensley, a chartered building surveyor, a member of the Royal Institution of Chartered Surveyors and a director of HLP gave evidence which can be summarised as follows:

- a) Flat roofs of bitumen felt (the nature of the flat roof of the Building) have a life span of up to 15 years. After 10 years, defect free effectiveness should be regarded as a bonus. Once a roof has exceeded 10 years of life a building surveyor has to take a view as to the optimum time for

renewal. Since other work was needed to the Building involving scaffolding he considered this was the right time for replacement.

- b) He had not been actually on the roof to inspect it but NMC's contracts manager had said it was brittle and at the end of its useful life. There was no written evidence of this. He accepted that he had been asked by AS to inspect the roof in their letter of 5<sup>th</sup> July 2005.
- c) He had not seen the quotation of Parkside Roofing Contractors dated 17<sup>th</sup> June 2005 until July 2005 and had not given advice on it or the quote from Hillerby. Nor had he spoken to either. He did not know what they had been asked to do but accepted that they had been on the roof itself.
- d) He accepted that he had originally been asked by AS to go onto the roof but it had later been agreed by AS that that would be too expensive.
- e) He thought that the work to the roof specified by him represented about 40% of the Works.
- f) He agreed that in his letter of 15<sup>th</sup> July 2005 he accepted Parkside's statement that the roof was generally good. His reservations in that letter were based on what NMC's manager had told him.
- g) The quotations from the roofing contractors did not allow for scaffolding needed to get to the roof.

#### 19. Undisputed facts chronologically set out

19<sup>th</sup> February 2003 - Following a request from AS, HLP put forward a proposed programme for essential repair and decoration of the Building and quotes their fee for each element. That proposal and fee quotation is accepted, AS having previously obtained a quotation from another firm of building surveyors.

17<sup>th</sup> June 2003 - HLP produce a survey report including 'budget' costings.

Dec. 2003 - HLP produce a lengthy specification and schedule of works including a reference to the form of contract to be used (JCT, minor works, 1988) and photographs.

2<sup>nd</sup> July 2004 - letter from HLP to AS stating that two out of the four contractors asked to tender had withdrawn and that tenders were still awaited from the others.

24<sup>th</sup> August 2004 - letter from HLP to AS stating that only one of the four had tendered (at £53,610) and that NMC (not one of the original four) had been asked to tender.

7<sup>th</sup> Dec. 2004 - NMC tender in the sum of £34,750.70.

11<sup>th</sup> Jan. 2005 - AS write to Mr Davidson telling him that works of repair and redecoration were expected to start within the next two weeks and would involve the erection of scaffolding. The letter gives the names and telephone numbers of the contractor and the project supervisor.

7<sup>th</sup> Feb. 2005 - Mr Davidson writes to AS complaining he had not had full details of what was proposed and drawing attention to and sending a copy of the consultation requirements in the Commonhold and Leasehold Reform Act 2002. He makes the alternative suggestions that he simply pay £250 toward the cost of the proposed works or that the work is put on hold pending the proper consultation process being carried out. He confirms Ms Sanderson agreed with what he had said.

17<sup>th</sup> Feb. 2005 - AS write to each of the Applicants telling them:

- that the landlord proposed to carry out works summarised on an enclosed schedule
- that full details could be inspected at their offices and copied at a given charge
- that the works were needed to protect and repair the fabric of the Building
- which firms were originally asked to tender
- that their views were invited within 30 days

- that the professional firm of HLP had carried out the survey identifying the works.
- 23<sup>rd</sup> Feb 2005 - AS writes to each of the Applicants sending a full copy of the specification and schedule of works
- 1<sup>st</sup> March 2005 - AS writes to Ms Sanderson seeking comments in advance of the 30 day period and hoping that agreement can be reached so as to get updated cost estimates
- 2<sup>nd</sup> March 2005 - Mr Davidson writes to AS asking why NMC was not one of the four contractors originally asked to tender, asking what the other tenders had quoted and as to payment by him of his share.
- 4<sup>th</sup> March 2005 - Ms Sanderson write to AS requesting details of quotations received, how NMC came to be chosen and whether payment could be made by instalments.
- 14<sup>th</sup> March 2005 - AS's reply to Mr Davidson's letter of 2<sup>nd</sup> March detailing the history of the matter, referring to the landlord's obligations under the lease and seeking confirmation that the contractors, NMC, could proceed.
- 11<sup>th</sup> April 2005 - Ms Sanderson writes to AS saying that the NMC price seemed expensive and seeking a breakdown and also saying she would like to nominate a list of local contractors
- 22<sup>nd</sup> April - AS writes to Mr Davidson referring to a telephone conversation in which the latter had said the NMC quote as expensive, enclosing a breakdown of the tender sum and seeking information as to any tenders Mr Davidson had obtained or similar information [The breakdown showed a total tender sum of £38 730.70 in contrast to the sum of £34,730.70 in the actual tender]
- 12<sup>th</sup> May 2005 - Note by AS of a telephone conversation with Mr Davidson indicating that he would shortly have information from a quantity surveyor.
- 27<sup>th</sup> May 2005 - Note by AS of a telephone conversation with Mr Davidson in which the latter said (amongst other things ) that some of the works were improvements and also that a quantity surveyor from Robert Burn Partnership had said the works were worth only £25,000.
- 6<sup>th</sup> June 2005 - AS write to Mr Davidson noting that the quantity surveyor had not inspected the Building notwithstanding the availability of scaffolding They also note that no alternative proposal has been received from Mr Davidson and state their intention to proceed with the works by appointing NMC.
- 21<sup>st</sup> June 2005 - AS write to Ms Sanderson and (in broadly the same terms) to Mr & Mrs Armitage saying that they have not had confirmation of their agreement to the works being carried out by NMC but they assumed that they agreed and had finalised the contract with NMC. He enclosed a summary of the consultation process
- 21<sup>st</sup> June 2005 - AS writes to Mr Davidson referring to the telephone conversation in which Mr Davidson had suggested (a) that a quantity surveyor he had spoken to suggested that the Works were too expensive but that they (AS) did not agree and (b) that some of the works were improvements rather than repair but that their legal advice was that that was not so. They said they had instructed NMC to proceed and enclosed the same summary sent to the other Applicants.
- 13<sup>th</sup> June 2005 - A letter addressed to Mr Davidson by W.H Hillerby & Sons Ltd quotes £254.00 + vat for replacing the two sections of missing welted drips to the flat roof adjacent to the tower
- 17<sup>th</sup> June 2005 - Parkside Roofing Contractors quote to Mr Readman (a commercial tenant of part of the Building) £116.00 + vat for work to the flat roof and £280.00 + vat for work to the slate roof
- 5<sup>th</sup> July 2005 - AS refer those quotations to HLP



15<sup>th</sup> July 2005 - HLP reply that the roof has not been inspected using the scaffolding, assessing the quotations and suggesting a discussion with the landlords about whether there should be a full replacement or patch repair to the flat roof.

### The Issues

20. The main issue related to the Works and whether the consultation requirements had been met. There was a possibility that the agreement for HLP to carry out the survey and tender specification might have needed to be consulted upon and that the charge made for that work was not reasonable and the Tribunal gave consideration to those points also.

### Findings of Fact

21. The Tribunal was satisfied that the relevant provisions of Leases did constitute a services charge within the meaning of Section 18 of the Act.
22. The Tribunal was also satisfied that the agreement between the Respondent (acting through AS) and HLP to provide a survey report and tender specification was not a *long term qualifying agreement* within the meaning of Section 20ZA (2) of the Act because it was not of more than 12 month's duration. Nor did it constitute *qualifying works* within the meaning of that subsection because it did not constitute works on a building or any other premises. There was therefore no requirement for consultation about it under Section 20.
23. The Tribunal found that the agreement with HLP was entered into after seeking quotations from both HLP and another firm of building surveyors and that what was quoted by HLP was charged. The Tribunal further found that the charge was reasonable for the work agreed to be undertaken and that the agreement was authorised by Clause 5 (4) (g) of the Leases.
24. The Tribunal found on a balance of probabilities that a contract with NMC for the work to the Building was in force prior to 17<sup>th</sup> February 2005, the date on which AS started the consultation process. The Tribunal so found because:
- a) The AS letter of 11<sup>th</sup> January 2005 could only have been written if there was a contract. It told Mr Davidson 'The contractor is (*emphasis supplied*) NMC ... The project supervisor is (*emphasis supplied*) Mr Paul Spensley'. It is extremely unlikely that the statement that the work was expected to start within (not after) two weeks could have been made without a contract being in place. Under that wording the work could have started on 12<sup>th</sup> January.
  - b) Such a contract does not need to be in writing.
  - c) Scaffolding round the Building was probably largely if not completely in place before 17<sup>th</sup> February 2005. Mr Davidson's evidence was that it was erected in February and the AS letter of 11<sup>th</sup> January showed that work was expected to start within two weeks of that date.
  - d) NMC was responsible for the erection of the scaffolding under the terms of their tender.
  - e) Mr Sayer's professional view that scaffolding would not be erected in the absence of a contract for relevant works.
  - f) Had the contract been let only after the consultation process started by AS letter of 17<sup>th</sup> February, it would have been easy for the Respondent to have produced evidence of that by way of a formal contract document (as contemplated by the tender invitation), a letter from the Respondent or AS.

to NMC or even a statement from some responsible person at NMC. That was not done. Mr Smith was not able to assist in that regard. Despite being pressed he was not even able to give a firm date for when the contract was put in place

- g) When asked who had arranged for work to be suspended following the erection of the scaffolding and Mr Davidson's letter of 2<sup>nd</sup> February to him, Mr Smith was somewhat equivocal, saying that he believed or assumed that Mr Spensley might have done so. The Tribunal did not find that evidence convincing.
- h) Mr Smith admitted that, until Mr Davidson mentioned them in his letter of 2<sup>nd</sup> February, he did not know about the consultation requirements. Given that lack of knowledge there would be no reason why the contract with NMC should not have been put in place in early January closely following on receipt of NMC's tender which was dated 7<sup>th</sup> December 2004, particularly given the delay in persuading contractors to tender and that NMC was asked after three out of four of the original prospective tenderers had not submitted a tender.
- i) Although there were letters sent by AS in June implying the contract with NMC had yet to be entered into, the Tribunal did not consider that these outweighed what was in its view very strong evidence that the contract was in force prior to 17<sup>th</sup> February 2005 especially in the light of Mr Smith's failure to supply documentary evidence of the date of the contract or any correspondence with NMC after 17<sup>th</sup> February 2005 advising that they had not been awarded a contract and requesting they cease work on the site.

25. That finding meant that, however compliant the Respondent may have been subsequently with Part 2 of Schedule 4 to The Service Charges (Consultation Requirements) (England) Regulations 2003, its efforts were unavailing. The basic requirement of Section 20 had not been fulfilled and the liability of the Applicants was limited to £250.00 each as specified by Regulation 6.

26. Section 20ZA (1) of the Act provides that a leasehold valuation tribunal may determine that all or any of the consultation requirements may be dispensed with if it thinks it reasonable to do so. In the present case the Tribunal did not consider it reasonable to make such a determination for the following reasons:

- a) There was no longer, if there ever had been, any urgency for the relevant work to be done.
- b) Mr Smith is shown on the AS letterhead as being a Member of the Royal Institution of Chartered Surveyors and being engaged in the management of retail properties should be expected to have read and to comply with the service charge residential management code issued by that Institution in February 1997 and formally approved by the relevant Secretary of State. That code sets out the then requirements for consultation at paragraphs 14-18ff which are referred to again under the heading 'Consultation' at paragraph 19. The requirements mentioned are those prevailing prior to 31<sup>st</sup> October 2003 but it appeared that Mr Smith could not have read or that he ignored the relevant parts and was therefore unaware of *any* consultation requirements.
- c) AS were the authors of their own and the Respondent's misfortune because Mr Smith, who had undertaken the management of the Properties did not know of the consultation requirements and had to be told of them by one of the tenants of the properties he was managing.
- d) The Tribunal felt that Mr Smith had been less than helpful to it in relation to the date of the contract with NMC.

27. Section 20C of the Act allows a leasehold valuation tribunal, if it considers it to be just and equitable in the circumstances, to make an order that costs incurred or to be incurred by the

landlord in connection with the 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. The Tribunal decided it was just and equitable to make such an order in the present case for the same reasons as are given at (b), (c) and (d) of the immediately preceding paragraph.

### The Decisions

#### 28 As to the Section 27A Application

- a) The Tribunal finds that the liability of each Applicant for the cost of the Works as charged by NMC is limited to £250.00 and the relevant service charge account(s) must reflect this. The resultant sum is payable to the Respondent or its agent within fourteen days of receipt of the service charge statement revised accordingly.
- b) The Tribunal finds that that the costs of the survey report and tender specification to be reasonable and payable as part of the service charge in the appropriate proportions.

29 As to the Section 20ZA Application the Tribunal refuses to make the determination sought by the Respondent.

30 As to the Section 20C Application The Tribunal orders that order that any costs incurred or to be incurred by the Respondent in connection with the present proceedings are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by any of the Applicants



Chairman of the Leasehold Valuation Tribunal

3rd May 2006

## **APPENDIX**

### **I**

(11) "the Common Parts" means all main entrances passages landings and internal staircases and the roof void/attic space shown hatched purple on the attached plans marked A B and C Together with the bin store and electricity meter area shown hatched brown on the attached plan marked B and other areas included in the Building provided by the Lessor for the common use of residents in the Building and their visitors and not subject to any lease or tenancy of which the Lessor is entitled to the reversion

## APPENDIX

### 2

(4) Subject and conditional upon payment being made by the Tenant of the Tenant of the Interim Charge and the Service Charge at the times and in the manner hereinbefore provided:-

(a) To maintain and keep in good and substantial repair and condition:-

(i) the main structure of the Building including the principal internal timbers and exterior walls and the foundations and the roof thereof with its main water tanks main drains gutters and rain water pipes (other than those included in this demise or in the demise of any other flat in the Building)

(ii) all such gas and water mains and pipes drains waste water and sewage ducts and electricity cables and wires as may by virtue of the terms of this Lease be enjoyed or used by the Tenant in common with the owner or tenants of the other flats in the Building

(iii) the Common Parts

(iv) the boundary walls and fences of the Building

(v) all other parts of the Building not included in the foregoing sub-paragraphs (i) to (iv) and not included in this demise or the demise of any other flat or part of the Building

(b) (i) in every third year of the term to paint the whole of the outside wood iron and other work of the Building heretofore or usually painted and grain and varnish such external parts as have been heretofore or are usually grained and

varnished

(ii) in every fifth year of the term to paint paper varnish colour grain and whitewash such of the interior parts of the Building as have been or are usually painted papered varnished coloured grained and whitewashed (other than those parts which are included in this demise or in the demise of any other flat in the Building)

(c) Insofar as the same are not insured by the Tenant or the Other Owners under his or their covenants in that behalf hereinbefore contained to insure and keep insured the Building (unless such insurance shall be vitiated by any act or default of the Tenant or any person claiming through the Tenant or his or their servants agents licensees or visitors) against loss or damage by fire explosion storm tempest earthquake aircraft and risk of explosion and damage in connection with the boilers and heating apparatus (if any) and all plant associated therewith (if any) and such other or third party risks (if any) as the Lessor thinks fit in some Insurance Office of repute in the full value thereof including an amount to cover professional fees and other incidental expenses in connection with the demolition rebuilding and reinstating thereof and to insure the fixtures and fittings plant and machinery of the Lessor against such risks as are usually covered by a Flat Owner's or Lessee's Comprehensive Insurance Policy and to insure against third party claims made against the Lessor in respect of the management of the Building and in the event of the Building or any part thereof being damaged or destroyed by fire or other insured risks as soon as reasonably practicable to lay out the insurance monies in the repair rebuilding and reinstatement of the Building or part thereof so damaged or

destroyed subject to the Lessor at all times being able to obtain all necessary licences consents and permissions from all relevant authorities in this respect PROVIDED ALWAYS that if for any reason other than the default of the Lessor the obligation on his part hereinbefore contained to rebuild or otherwise make good such destruction or damage as aforesaid becomes impossible of performance the said obligation shall thereupon be deemed to have been discharged and the Lessor shall stand possessed of all monies paid to him under and by virtue of the Policy or Policies of Insurance hereinbefore required to be maintained upon trust to pay to the Tenant subject to the written consent first being obtained of any mortgagee who has served upon the Lessor notice of its interest in the Demised Premises such proportion (if any) of the said monies as may be agreed in writing between the Lessor and the Tenant or in default of agreement as aforesaid as shall be determined by a Valuer appointed by the President for the time being of the Northumberland and Durham Branch of the Royal Institution of Chartered Surveyors upon the request of the Lessor or the Tenant to be fair and reasonable having regard only to the relative values of the respective interests of the Lessor and the Tenant in the Demised Premises immediately before the occurrence of the said destruction or damage and it is hereby declared that any such determination as aforesaid shall be deemed to be made by the said Valuer as an expert and not as an Arbitrator

- (d) To keep clean and lighted the Common Parts and to keep clean the windows in the Common Parts and to carpet the Common Parts which comprise the hall stairs and landings within the Building and where appropriate to furnish the same in such style and

manner as the Lessor shall from time to time in its absolute discretion think fit

- (e) To pay and discharge any rates (including water rates) taxes duties assessments charges impositions and outgoings assessed charged or imposed on the Building curtilage thereof as distinct from any assessment made in respect of any flat in the Building
- (f) For the purposes of performing the covenants on the part of the Lessor and of enforcing the covenants on the part of the Tenant and the Other owners herein contained at its sole discretion to employ on such terms and conditions as the Lessor shall think fit maintenance staff and cleaners or such other persons as the Lessor may from time to time in its absolute discretion consider necessary
- (g) (i) (a) To employ at the Lessor's discretion a firm of Managing Agents to manage the Building and discharge all proper fees salaries charges and expenses payable to such Agents or such other person who may be managing the Building including the cost of computing and collecting the rents interim charges and service charges in respect of the Building or any part thereof
- (b) To perform any service or exercise any function including the computation or collection of rents interim charges and service charges as aforesaid as might be performed or exercised by a Managing Agent appointed in pursuance of the last preceding sub-paragraph
- (ii) To employ all such surveyors builders architects engineers tradesmen accountants or other professional persons as may be necessary or desirable for the proper maintenance safety and administration of the Building



- (h) To maintain (if and when installed by the Lessor) a rented communal television aerial or aerials serving the Building and to pay all expenses in connection with the installation and maintenance thereof
- (i) To maintain any existing rented fire extinguishers and install such further extinguishers as the Lessor may from time to time consider necessary and pay all charges in connection with the installations and maintenance thereof
- (j) To install renew replace repair and maintain as and when necessary an electric entry phone system to serve the main entrance of the Building
- (k) Without prejudice to the foregoing to do or cause to be done all such works installations acts renewals matters and things as in the absolute discretion of the Lessor may be considered necessary or advisable for the proper maintenance safety amenity and administration of the Building
- (l) To set aside (which setting aside shall for the purposes of the Fifth Schedule hereto be deemed an item of expenditure incurred by the Lessor) such sum or sums of money as the Lessor shall reasonably require to meet such future costs as the Lessor shall reasonably expect to incur of renewing replacing repairing and maintaining those items which the Lessor has hereby covenanted to renew replace repair or maintain

6. PROVIDED ALWAYS that this Lease is made upon condition that if the respective rents hereby reserved or any part of the same respectively shall at any time be in arrear and unpaid for twenty eight days after the same shall have become due (whether any formal or legal demand therefore shall have been made or not) or if the Tenant shall at any time fail or neglect to perform or observe any of the covenants conditions or provisions

# APPENDIX

3

## THE FIFTH SCHEDULE

### The Service Charge

1. In this Schedule the following expressions have the following meanings respectively:-

- (1) "Total Expenditure" means the total expenditure incurred by the Lessor in any Accounting Period in carrying out his obligations under clause 5(4) of this Lease and any other costs and expenses reasonably and properly incurred in connection with the Building including without prejudice to the generality of the foregoing (a) the cost of employing Managing Agents and (b) the cost of any Accountant or Surveyor employed to determine the Total Expenditure and the amount payable by the Tenant hereunder
- (2) "the Service Charge" means each proportion of Total Expenditure as is specified in Paragraph 7 of the Particulars or (in respect of the Accounting Period during which this Lease is executed) such proportion of such proportion as is attributable to the period from the date of this Lease to the Thirty first day of March next following
- (3) "the Interim Charge" means such sums to be paid on account of the Service Charge in respect of each Accounting Period as the Lessor to be a fair and reasonable. The Interim Charge in respect of the period from the commencement of this Lease to Thirty first day of March next shall be the amount mentioned in Paragraph 9 of the Particulars

2. In this Schedule any surplus carried forward from previous years shall not include any sums set aside for the purposes of clause 5(4)(1) of this Lease

3. The first payment of the Interim Charge (on account of the Service Charge for the Accounting Period during which this Lease is executed) shall be made on the execution hereof and thereafter the Interim Charge shall be paid to the Lessor by equal payments in advance on the First day of April and the First day of October in each year and in case of default the same shall be recoverable from the Tenant as rent in arrear

4. If the Interim Charge paid by the Tenant in respect of any Accounting Period exceeds the Service Charge for that period the surplus of the Interim Charge so paid over and above the Service Charge shall be carried forward by the Lessor and credited to the account of the Tenant in computing the Service Charge in succeeding Accounting Periods as hereinafter provided

5. If the Service Charge in respect of any Accounting Period exceeds the Interim Charge paid by the Tenant in respect of that Accounting Period together with any surplus from previous years carried forward as aforesaid then the Tenant shall pay the excess to the Lessor within twenty eight days of service upon the Tenant of the Certificate referred to in the following Paragraph and in case of default the same shall be recoverable from the Tenant as rent in arrear

6. As soon as practicable after the expiration of each Accounting Period there shall be served upon the Tenant by the Lessor or his Agents a certificate signed by either the Lessor or such Agents containing the following information:-

- (a) The amount of Total Expenditure for the Accounting Period
- (b) The amount of the Interim Charge paid by the Tenant in respect of that Accounting Period together with any surplus carried forward from the previous Accounting Period
- (c) The amount of the Service Charge in respect of that Accounting Period and of any excess or deficiency of the Service Charge over the Interim Charge

7. The said certificate shall be conclusive and binding on the parties hereto but the Tenant shall be entitled at his own expense and upon prior payment of any costs to be incurred by the Lessor or his Agents at any time within one month after service of such certificate to inspect the receipts and vouchers relating to payment of the Total Expenditure