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HM Courts & Tribunals Service

Leasehold Valuation Tribunal
Case no. CAM/00KA/LSC/2012/0025

Premises:	5 Kingsley House, Kingsley Road, Luton, Beds LU3 2LS
Hearing:	11 June (preliminary) and 3 August 2012
Applicants:	Mrs M F Clapp (landlord)
Managing agent:	Trust Property Management Ltd
Respondent:	Mr Mark James Weedon (leaseholder)
Members of Tribunal:	Mr G M Jones - Chairman Mr R Brown FRICS Mr P A Tunley

ORDER

1. As regards the 2010 consultation in relation to internal decorative works, the Tribunal grants dispensation pursuant to section 20ZA of the Landlord & Tenant Act 1985 on terms that only £500.00 + VAT is to be included in the service charge account in respect of the fees of Benjamin Mire Chartered Surveyors.

2. It is declared that the fees of Benjamin Mire Chartered Surveyors in respect of the said 2010 works in excess of £500.00 + VAT were not reasonably incurred and no contribution to the same is payable by the Respondent.

3. It is declared that the sums of £1,804.32 and £913.29 demanded of the Respondent in respect of 2006 major building works additional works were not payable by the Respondent at the commencement of claim number 1QT71303 in the Northampton County Court and are not now payable by the Respondent.

4. It is declared that the sum of £250.00 in respect of boiler repairs to Flat 2 deducted from the Respondent's service charge account was not owed to the Applicant or to Trust Property Management Limited and is not payable by the Respondent pursuant to his service charge liability or at all.

5. It is declared that the arrears administration fee of £58.75 and the management arrears fees totaling £130.20 added to the Respondent's service charge account were not reasonably incurred and are not payable by the Respondent.

6. It is declared that brickwork repair costs in 2010 in the sum of £399.00 were reasonably incurred but that the balance of the invoices dated 21 October and 29 November 2010 over and above £399.00 was not reasonably incurred and is not payable by the Respondent who is liable to contribute £57.00 only in respect of such repairs.

7. The Applicant shall not be entitled to add to any service charge account in respect of Kingsley House any costs incurred in relation to this Application the Tribunal considering it just so to order.

8. The parties have permission to apply for a determination of the true balance of the Respondent's service charge account in accordance with and on the date of this Order provided such application is made within 6 weeks after service of this Order.

9. This case is hereby returned to the Luton County Court under case reference 1QT71303. The Tribunal Clerk shall forthwith send to the Luton County Court a copy of this Order and Reasons in order that the County Court can determine the issues before it.

G M Jones
Chairman
30 August 2012

1. THE DISPUTE

1.1 In April 2006 Mr & Mrs Weedon moved house from 4 Gatehill Gardens, Luton to 40 Barton Road, Luton. They told the Tribunal that they notified all those with whom they had dealings of the move and had mail forwarded for 3-6 months,. On 1 November 2007 Mr Weedon wrote to TPM from 40 Barton Road to pass on a claim he had received from Paul Johnson the owner of Flat 2, of which more later. Mr Weedon hoped that the claim would be covered by insurance. However, TPM continued to send correspondence to Gatehill Gardens until 4 January 2008 when Mr Weedon telephoned TPM to find out what had become of Mr Johnson's claim. TPM were, as will be seen, pursuing Mr Weedon in respect of unpaid ground rent and service charges; but he had not received their correspondence. No doubt the TPM representative to whom Mr Weedon spoke on 4 January 2008 (a lady named Harshika, we were told) mentioned the unpaid sums, which led to the realisation that correspondence had been sent to the wrong address.

1.2 It appears that invoices for ground rent from 1 July 2005 onwards and service charges from 1 January 2006 onwards were demanded from Mr Weedon by a series of invoices sent to 4 Gatehill Gardens on 8 October 2007. The sums claimed totalled £2,989.32. Mr Lawson told the Tribunal that, had Mr Weedon notified his change of address, TPM's records would have been updated; he concluded that no such notification had been received, in which case service of notices at 4 Gatehill Gardens would have been sufficient service as a matter of law. The legal argument appears sound; but the factual issue of notification of change of address is an issue for the Tribunal. At some stage prior to 15 November 2007 Mr Weedon appears to have paid £152.50, as appears from a subsequent demand of that date. When he made that payment and how he came to make it if he did not receive any demand is unclear. The issue was not canvassed and therefore was not clarified at the hearing.

1.3 The sums demanded included £1,804.32 by way of contribution to major works of repair and redecoration in respect of which a consultation process was begun on 22 June 2006. Of course, Mr Weedon says he was unaware of the process because correspondence was all sent to Gatehill Gardens. The lowest tender was submitted by David Hewitt Ltd in the sum of £13,144.20. It is common ground that, regardless of the issue of due service, the consultation process was flawed because the initial letter stated that nominations of alternative contractors from tenants would not be accepted unless they came from a nominee of all tenants, whereas the statutory requirement is to invite a tender from any contractor nominated by any tenant.

1.3 The second consultation letter dated 27 September 2006 explained that BMCS would be supervising the works and that their fee would be based on 12.5% of the contract price plus disbursements and VAT. Two or three tenants did not pay the sums demanded (which varied depending on each tenant's prior contribution to reserves), as a result of which no works were then carried out. However, in October 2007 BMCS contacted David Hewitt Ltd asking whether the company would stand by its "April 2006" price. This suggests that the company had

already quoted for the work before the start of the statutory consultation period. The response was that there would be a 10% increase. The decision was taken (not unreasonably in the circumstances) not to repeat the tendering exercise but to accept the new price offered. This would, of course, mean an increased contribution from leaseholders. TPM wanted to collect these monies in advance for obvious reasons.

1.4 The initial demand had covered only the tender price net of VAT, which meant a contribution of £1,877.74 per flat. The decision was taken to use up reserves which, in the case of Flat 5, amounted to only £73.42 (all other tenants had contributed over £750.00 towards reserves). In November 2007, TPM decided to follow up the completion of the works. On 15 November 2007 a letter was sent to tenants explaining that TPM had decided not to re-tender the works because that was likely to prove the more expensive option. Included in the letter, which was sent to 4 Gatehill Gardens, was a demand for a further £913.29. This included the 10% increase over and above the tender price, VAT on the revised contract sum and the professional fees of BMCS at 15% + VAT. There is no explanation as to why the fees of BMCS had increased from 12.5% to 15%.

1.5 Once again, Mr Weedon (who says he did not receive the demand) and one or more other tenants did not pay the sum demanded. The works did not progress. The next development was on 30 June 2009 when, in response to complaints from tenants about the state of the entrance door and surrounding glazed panels, TPM served a further section 20 consultation notice. This time the notice was served on Mr Weedon at 40 Barton Road. It indicated an intention to replace the entrance door and surrounding panels at a cost of around £450 per tenant ((£3,150 in total).

1.6 In the letter TPM pointed out that they could not use the monies collected pursuant to the earlier section 20 notice for entirely different works; accordingly, they suggested that the tenants might like to consider indicating in writing their willingness to cancel the earlier section 20 notice; a refund could be made; and the necessary sums would then be available for the door replacement. It appears that this suggestion was not taken up by the tenants; certainly, there is no suggestion that any refund was in fact made.

1.7 On this occasion the first consultation notice was in due form. It appears that there were no significant responses. Accordingly, the work was put out to tender on a like-for-like basis. Two quotations for just over £4,000 were received and one was selected as the most suitable. A second consultation letter in due form elicited (rather late in the day) a suggestion from a tenant that it would be cheaper to replace the door etc with a UPVC unit. TPM took up this suggestion and the door was replaced at a cost of £2,420.00 including VAT. Mr Weedon did not respond to either letter. However, he now says that it was unnecessary to replace the door; repair and refurbishment would have sufficed and would have been much cheaper.

1.8 A letter of 18 February 2010 reported that the door replacement was underway and concluded as follows: -

"Unfortunately, as the original works were started a while ago we now need to re-tender on the price of the works and will then pick the most essential works to be completed with the funds available."

"Together we can now restore Kingsley House to the pleasant home environment we all crave but this is only possible providing everyone starts to pay all their service charge demands in full and when demanded."

1.9 Following a site meeting on 28 August 2010 letters of 10 September and 13 October 2010 report an urgent need for internal decoration and a need for repairs to the front and flank walls. In addition, it was proposed to install as a temporary measure, a locking bollard to prevent non-residents from using the car park. In the long term the installation of electronic gates was being considered. A specification had been prepared by Jason Tilbury and by 13 October 2010 tenders were being sought. Meanwhile, repairs were carried out by Harrington's Building Maintenance to the front and flank walls at a cost (labour only) of £1,950. This was divided into two invoices dated 21 October and 29 November 2010. It is difficult to escape the conclusion that the work was divided into two invoices to avoid consultation requirements. However, Mr Weedon does not complain of lack of consultation; his only objection to these invoices is that the costs were unreasonably high for the work actually done.

1.10 Meanwhile, three tenders were obtained for the other works included in Mr Tilbury's specification. After deducting the cost of works TPM decided to omit, these ranged from £5,828.00 + VAT to £6,816.60 + VAT. The lowest tender was from Architectural Decorators Ltd; this was the only tender that allowed for the contingency sum of £750.00 proposed in the specification. These tenders were received early in November 2010. Only on 2 December 2010 was a first section 20 consultation notice sent to tenants. The second stage of the statutory consultation i.e. the second notice was omitted. On 7 February 2011 tenants were informed that Architectural Decorators Ltd had been instructed to proceed with the works. No indication was given of the scale of the fees BMCS intended to charge for preparation of the specification, tender analysis and supervision of the works.

1.11 Mr Weedon does not complain about the sum paid to Architectural Decorators Ltd for these works, which he considers to have been reasonably incurred. He does, however, complain about the fees paid to BMCS. BMCS charged their "minimum fee" of £1,500 + VAT. By this time, it appears that they were charging TPM 15% of the contract price, with a minimum fee of £1,500 + VAT. There was, of course, no arm's length negotiation of these fees. The final contract price certified by BMCS turned out to be £5,388.40 + VAT. BMCS were paid a total of £1,825.75 inc. VAT. 15% of the contract sum sum would have been £808.26 + VAT, a total of £949.70 (if invoiced before 1 January 2011). To put it another way, the BMCS fee was nearly 28% of the contract price.

2. THE ISSUES

2.1 The matter came to a head on 7 July 2011 when the Applicant issued a claim in the Northampton County Court claiming the following: -

	£
Ground rent in advance	12.50
Service charge	45.00
Service charge in advance	106.12
Additional building works	913.29
Repair and redecorations	1,804.32
Arrears administration fee	58.75
Management fees/ arrears	64.40
	65.80
Management fee/court summons	468.00
Civil Court fee	100.00
Interest	1,003.59

2.2 The Respondent says he paid the ground rent up to date before issue of the claim and this appears to be accepted. As regards the arrears administration fee and the management fees/arrears, the Respondent says the sums claimed from him were wrong and those charges were neither justified nor reasonably incurred. The Tribunal notes that the county court claim is proceeding on the small claims track.

2.3 There is, however, one further item of dispute. Mr Johnson's complaint was that water overflowing from Mr Weedon's boiler overflow entered the vent of his boiler below, necessitating repair by a plumber, who reported that he had seen copious amounts of water from the overflow of Flat 5 entering the boiler vent of Flat 2. He was able to gain access to Flat 5, where he found that a pressure control valve had been accidentally left open, causing a continuous overflow from the boiler of Flat 5. TPM passed on the claim to the communal insurer; the insurer met the claim less £250.00 excess, which TPM then charged to Mr Weedon through is service charge account. Mr Weedon disputes liability on factual grounds and on the legal ground that it is solely a matter between him and Mr Johnson.

3. THE EVIDENCE

3.1 There is no need to set out in detail all the oral evidence at the hearing. As is so often the case, much of the evidence is in documentary form and there is little factual dispute between the parties. These Reasons will, however, set out the evidence on both sides to the extent necessary to show how disputed issues of fact have been resolved.

4. THE LAW

Service and Administrative Charges

4.1 Under section 18 of the Landlord & Tenant Act 1985 (as amended) service charges are amounts payable by the tenant of a dwelling, directly or indirectly, for services, repairs, maintenance, improvement, insurance or the landlord's costs of management.

4.2 Under section 19 relevant costs are to be taken into account 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. Where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable.

4.3 Under section 27A the Tribunal has jurisdiction to determine whether a service charge is payable and, if so, the amount which is payable; also whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for those costs and, if so, the amount which would be payable.

4.4 In deciding whether costs were reasonably incurred the LVT should consider whether the landlord's actions were appropriate and properly effected in accordance with the requirements of the lease and the 1985 Act, bearing in mind RICS Codes. If work is unnecessarily extensive or extravagant, the excess costs cannot be recovered. Recovery may in any event be restricted where the works fell below a reasonable standard.

4.5 Under Commonhold & Leasehold Reform Act 2002 section 158 and Schedule 11 a variable administration charge is payable by a tenant only to the extent that the amount is reasonable. An application may be made to the LVT to determine whether an administration charge is payable and, if so, how much, by whom and to whom, when and in what manner it is payable. The LVT may vary any unreasonable administration charge specified in a lease or any unreasonable formula in the lease by which an administration charge is calculated.

4.6 The Service Charges (Summary of Rights and Obligations) Regulations 2007, made under section 21B of the 1985 Act and taking effect from October 2007, require a landlord serving a demand for service charges to accompany that demand with a statutory notice informing the tenant of his rights. If this is not done, the tenant is entitled to withhold the service charge payments so demanded. The LVT standard forms of directions may include reference to these Regulations.

Consultation

4.7 Under section 20 of the 1985 Act (as substituted by section 151 of the Commonhold & Leasehold Reform Act 2002 with effect from 31 October 2003) and the Service Charges (Consultation Requirements) (England) Regulations 2003 landlords must carry out due consultation with tenants before undertaking works likely to result in a charge of more than £250.00 to any tenant ("qualifying works") or entering into long term agreements costing any tenant more than £100.00 p.a. This process is designed to ensure that tenants are kept informed and have a fair opportunity to express their views on proposals for substantial works or on substantial long term contracts.

4.8 In cases where the same contractor is employed to carry out items of work on a regular basis, the Tribunal must first consider whether there was a 'long term agreement' within the meaning of the section. There will be many cases in which a single contractor carries out numerous items of work, perhaps over a long period, under a series of individual contracts. In each case, it will be a question of fact whether there is a qualifying long term agreement.

4.9 The consultation requirements vary depending upon the circumstances of the case and, in particular, whether the landlord is a designated public body for the purposes of statutory regulations dealing with public works, services and supplies and, in such case, whether the value of the contract exceeds the relevant threshold set under the Public Contracts Regulations 2006. These regulations are designed to provide a level playing field for contractors from EU member states bidding for large public sector contracts in such states. The threshold is, for obvious reasons, set at a fairly high level.

4.10 In this case the relevant requirements are those set out in Part 2 of Schedule 4 to the 2003 Regulations. The landlord must first provide to the tenants (and, if applicable, to the tenants' association) prescribed information about the proposed works and invite them to put forward a contractor. The consultation period is 30 days. The landlord must have regard to the tenants' observations, which might result in a change in the specification of works. After that, the landlord may be obliged to seek an estimate from a contractor or contractors nominated by the tenants. That is likely to occupy a further period of at least 14 days. The landlord must then inform each tenant of the amounts of at least two estimates and the effect of any observations received and the landlord's responses and invite observations on the estimates. All estimates must be made available for inspection. The second consultation period is also 30 days. The landlord must have regard to any observations made. There are other requirements to provide information; but these should not delay the works.

4.11 Landlords who ignore these requirements do so at their peril. Unless the requirements of the regulations are met the landlord is restricted in his right to recover costs from tenants; he can recover only £250.00 or £100.00 p.a. per tenant (as the case may be) in respect of qualifying works. However, it is recognised that there may be cases in which it would be fair and reasonable to dispense with strict compliance.

4.12 Accordingly, under section 20ZA (inserted by section 151 of the Commonhold & Leasehold Reform Act 2002) the Leasehold Valuation Tribunal may dispense with all or any of the consultation requirements if satisfied that it is reasonable to do so. This may be done prospectively or retrospectively. Typically, prospective dispensation will be sought in case of urgency or, perhaps where a tenant is refusing to co-operate in the consultation process. Retrospective dispensation will be sought where there has been an oversight or a technical breach or where the works have been too urgent to wait even for prospective dispensation. These examples are not meant to be exhaustive; there may be other circumstances in which section 20ZA might be invoked.

Notification within 18 months

4.13 Furthermore, under section 20B(1), if any relevant costs taken into account in determining the amount of any service charge were incurred more than 18 months before a demand for payment is served on the tenant then, in general, the tenant shall not be liable to contribute to those costs. But section 20B(1) does not apply if within that period of 18 months, the tenant was notified in writing that those costs had been incurred and that he would subsequently be required to contribute to them through the service charge.

Information for tenants

4.14 Under section 21 of the Landlord & Tenant Act 1985 a tenant liable to pay service charges may in writing require the landlord, directly or through his agent, to supply him with a written summary of the costs incurred in the last accounting period which are relevant costs in relation to the service charges payable or demanded. Amongst the information the landlord must provide is the aggregate of any amounts received by the landlord on account of the service charge in respect of relevant dwellings and still standing to the credit of the tenants at the end of the relevant accounting period. The landlord must supply the summary within one month of the request or within 6 months of the end of the accounting period, whichever is the later.

4.15 Section 21B(1) provides that a demand for the payment of a service charge must be accompanied by a summary of the rights and obligations of tenants of dwellings in relation to service charges. The summary must be in statutory form, in accordance with the requirements of the Service Charges (Summary of Rights and Obligations and Transitional Provisions) (England) Regulations 2007, which came into force on 1 October 2007. Section 21B(3) provides that a tenant may withhold payment of a service charge which has been demanded from him if subsection (1) is not complied with in relation to the demand. By section 21B(4), where a tenant withholds a service charge under section 21B any provisions of the lease relating to non-payment or late payment of service charges do not have effect in relation to the period for which he so withholds it.

Service of Notices

4.16 Personal service of notices is always effective; but personal service is inconvenient and expensive and may often be difficult or even impossible. The landlord may not be made aware of an assignment of the lease; the lessee may not have notified the landlord of a change of address; or the lessee may be deliberately evading service.

4.17 Section 196 of the Law of Property Act 1025 applies to notices served under the Act and under any instrument affecting property executed or coming into effect after the commencement of the Act unless a contrary intention appears. The effect of this, taken in conjunction with the Recorded Delivery Services Act 1962 section 1, is as follows: -

(a) A notice served on a lessee or mortgagee is sufficiently served if addressed to the lessee or mortgagee by that designation, without his name, or generally to the persons interested, without any name.

(b) A notice is sufficiently served if left at the last-known place of abode or business in the UK of the person to be served or, in the case of a lessee or mortgagor, if affixed or left for him on the land or any house or building comprised in the lease or mortgage.

(c) It is also generally sufficient service to send the notice by registered letter or recorded delivery addressed to the person to be served by name at the last-known place of abode or business in the UK of the person to be served and, if the letter is not returned undelivered, service is deemed to have been made at the time at which the registered letter would in the ordinary course be delivered.

(d) However, where the landlord seeks to forfeit for breach of a repairing covenant, section 18 of the Landlord & Tenant Act 1927 requires that a section 146 notice must be brought to the attention of the lessee; or an underlessee holding under an underlease which reserved a nominal reversion only to the lessee; or the person who last paid rent either on his own behalf or as agent for the lessee or underlessee.

Costs of enforcing covenants

4.18 A landlord is entitled under section 146 of the Law of Property Act 1925 to recover from a tenant in breach of covenant costs (including legal costs and surveyors' fees) reasonably incurred in enforcing the covenants. It is not necessary for the landlord actually to seek forfeiture of the lease in order that such costs may be recoverable. In most cases, the lease will contain an express covenant requiring the defaulting tenant to pay those costs.

4.19 A landlord generally has an obligation to each residential tenant to enforce the covenants against other tenants. That is in the interests of the tenants generally, as it tends to maintain standards in the building and to ensure that tenants generally do not suffer nuisance, annoyance or inconvenience through the unreasonable conduct of any individual tenant. Enforcement of the service charge provisions is, of course, important to ensure that every tenant pays his fair share.

4.20 However, if the costs of enforcing the covenants cannot be recovered from the defaulting tenant, the landlord is generally entitled to recover those costs from the tenants generally through the service charge provisions. If he seeks to do so, the tenants are entitled under section 27A of the 1985 Act to challenge those costs on the ground that they excessive or were not reasonably incurred.

Costs generally

4.21 The Tribunal has no general power to award inter-party costs, though a limited power now exists under Schedule 12 paragraph 10 to the Commonhold & Leasehold Reform Act 2002 to make wasted costs orders. In general, if the terms of the lease so permit, the landlord is able to recover legal and other costs (eg the fees of expert witnesses) associated with an application to the Tribunal from the tenants through the service charge provisions i.e. he is entitled to recover a contribution to such costs not only from the defaulting tenant but from all tenants.

4.22 However, under section 20C of the Act of 1985 the Tribunal has power, if it would be just and equitable so to do in the circumstances of the case, to prevent the landlord from adding to the service charge any costs of the application. In the Lands Tribunal case Tenants of ***Langford Court –v- Doren Ltd*** in 2001 HH Judge Rich QC said that the LVT should use section 20C to avoid injustice. Clearly the manner in which this discretionary power is (or is not) exercised will vary depending upon the facts of each individual case.

4.23 In addition, under regulation 9 of the Leasehold Valuation Tribunal (Fees) (England) Regulations 2003 the Tribunal may order a party to reimburse the Applicant in respect of application and hearing fees. This power is likely to be exercised in cases where the applicant is substantially successful, unless he has been guilty of unreasonable conduct in connection with the application, e.g. where he has unreasonably rejected a proposal for mediation or a fair and proper offer of compromise.

5. CONCLUSIONS

Consultation

5.1 In addition to the issues outlined above, an application has been made by the Applicant following the preliminary hearing on 11 June 2012 for dispensation under section 20ZA of the Act of 1985 from consultation requirements, insofar as these were not complied with. We will deal with that application first. We are not concerned with the 2006 consultation, except insofar as it was the justification for demanding money from tenants. The works in respect of which the consultation took place were never carried out, so no dispensation is necessary. We will return to the question of Mr Weedon's liability to meet the demands made pursuant to that fatally flawed consultation process in due course.

5.2 The Tribunal is a little concerned about the repairs to walls. There is a suspicion that the works were divided into two contracts to avoid the need for consultation. As will be seen, we consider that Mr Weedon has just cause for complaint about the cost of these works. However, we are not prepared to find that the works constituted a single project in respect of which consultation was required. The total cost exceeded the consultation threshold by only a narrow margin in any event and the sum we propose to allow is well below that threshold.

5.3 The 2009 consultation in relation to the replacement door was duly carried out and it was successful in that a tenant's proposal for a cheaper solution was taken up by TPM. The question whether the work was necessary or appropriate at all is a separate issue. In our view, it was reasonable for that work to be done and the costs were reasonably incurred.

5.4 That leaves the 2010 consultation in relation to the internal decorative works. This was fundamentally flawed in more than one respect. Firstly, costs were incurred in preparing a specification and carrying out a tendering process before ascertaining the views of all leaseholders as to e.g. whether the works were

necessary; whether they were urgent; whether they should be deferred for a period until the leaseholders were in funds; whether the correct works had been identified; and whether other works would be more beneficial to leaseholders. Secondly, the tendering process was potentially flawed because, if a leaseholder identified a contractor who should be approached, such contractor would not be tendering on equal terms with those who had already done so. Thirdly, there was no second consultation letter. Altogether, it was a shambles and a very disappointing piece of business on the part of a substantial organization run by a chartered surveyor.

5.5 However, fortunately for TPM, it appears that Mr Weedon did not wish to respond to the consultation process and is satisfied with the works and with the contract price. In those circumstances, the Tribunal gives dispensation as regards the contractor's invoices. However, the same cannot be said of the fees of BMCS, in respect of which there was no tendering process and no consultation of any kind.

If a management company intends to instruct another company within the same group to provide professional services (which may be a perfectly reasonable method of proceeding, provided the charges are reasonable), it is in the judgment of this Tribunal incumbent on the management company to conduct that process in an open and transparent manner. In the case of a project requiring consultation, the nature of the relationship between the two companies and the basis upon which those professional fees are to be charged ought to be notified to leaseholders at the earliest possible moment so that these issues can be considered as part of the consultation process.

5.6 As will be seen, the Tribunal considers that Mr Weedon's objection to the scale of the professional fees on this occasion is well founded. The outcome might have been very different had all the leaseholders been aware at the outset of the consultation process of the relationship between TPM and BMCS and the scale of fees TPM proposed to pay to BMCS without (for obvious reasons) there being any negotiation at arm's length. Nevertheless, it was reasonable that some fee should be charged for preparation of the specification, conduct of the tendering process and supervision of the works. Given that there is no complaint about the works, it would be unjust to disallow all professional fees; accordingly, the Tribunal intends simply to review of the fees of BMCS.

Disputed service charge items

5.7 We deal first with the sums demanded in respect of the 2006 proposed works and the 2007 price increase. These works were never carried out. Once it became apparent that the works would not be carried out the sums should have been re-credited to the accounts of all leaseholders. This would not necessarily have involved a refund to those who had paid. They could have been invited to agree to the retention of monies for other necessary purposes, as was eventually done. The crucial fact is that, as the Tribunal finds, those sums were not due or owing at the date of issue of proceedings in the County Court and cannot be recovered by those proceedings or at all. Accordingly the Tribunal concludes that those sums were not payable by Mr Weedon when proceedings were issued or at any time thereafter and are not payable by him now.

5.8 As regards the insurance excess relating to the boiler repair, the Tribunal accepts that the management company is under an obligation to ensure that tenants comply with the terms of their lease as regards their conduct towards neighbours. The Tribunal is satisfied on the evidence that the overflow from Flat 5 caused the problem with the boiler vent in Flat 2. However, it is not established that any legal liability for that event falls on Mr Weedon and it is not for the managing agent to decide that issue. Nor does any legal liability attach to the management company beyond the obligation to make an insurance claim and pass on the proceeds to Mr Johnson. In the judgment of the Tribunal liability is, in the circumstances of the case, a matter between Messrs Weedon and Johnson. TPM ought to have left it to Mr Johnson to decide whether to take the matter further. The sum of £250 (paid under protest by Mr Weedon) was not owed to TPM and is not payable by Mr Weedon pursuant to his service charge liability or at all.

5.9 In the light of the above, the Tribunal concludes that the arrears administration fee (which seems wholly unreasonable in amount for a few computer generated letters) and the management arrears fees (which do relate to letters from a real person but seem rather high considering the content of those letters) were unreasonably incurred. In any event, the Tribunal cannot find in the lease any power reserved to the management company to make administration charges to individual tenants. Moreover, the fees were incurred in relation to sums which, as the Tribunal has found, Mr Weedon was not liable to pay. The Tribunal accordingly disallows all those charges.

5.10 As regards the fees of BMCS, the Tribunal accepts that it is reasonable to instruct a related company to carry out that kind of work, provided the fees charged are reasonable. A management company instructing a related company on a regular basis could expect to achieve preferential rates. One would not, in those circumstances, expect to find reliance on an unexplained "minimum fee". The works in this case were very simple and did not need to be dealt with by a chartered surveyor (as was not, indeed, the case). The specification for this type of work is largely in standard form taken from a standard precedent. The incorporation of JCT Minor Building Works terms avoids the necessity for legal oversight. BMCS sensibly invoiced only for fees in relation to the works that were actually carried out. Much of the 2006 specification could be and was re-used to avoid duplication of effort.

5.11 Interestingly and helpfully, TPM have supplied the Tribunal with a copy of the 2012 management agreement between TPM (represented by Mr Mire) and the landlady Mrs Clapp. Oddly, the document is not signed by Mrs Clapp herself and the identity of the person who signed on her behalf is unclear. But the agreement specifies hourly rates for partners/directors at £150.00 and for associates at £75.00. The Tribunal considers this an appropriate benchmark for assessing the reasonable fees of BMCS in connection with the works of internal decoration. Jason Tilbury appears to fit the description "associate" and we are content to allow £75.00 per hour + VAT for his work. In the judgment of the Tribunal, the work involved ought to have taken a competent associate around 6-7 hours.

5.12 Doing the best we can on the evidence, we assess a reasonable fee for the work actually invoiced by BMCS at £500.00 + VAT. Any sum over and above that figure was not reasonably incurred and no contribution to the same is payable by Mr Weedon.

5.13 This leaves the issue of the brickwork repairs. On the basis of our inspection, at which the new mortar work could be clearly identified, the Tribunal considers that the charges rendered were unreasonably high and that this should have been apparent to TPM. The specification put out to tender in 2006 referred to removal and replacement of 4 slipped courses of the flank wall to a width of 8 bricks and to raising the existing front wall by 9 courses (which was never done). The successful quotation in 2006 provided for the flank wall at a cost of £475.67 excl. VAT, which the Tribunal considers fairly generous at 2005 rates. All that was ultimately done to the front wall was to repair the top course, for which the 2006 quotation gave no separate price. On inspection, it did not appear that all the top course had been replaced, merely a few detached or damaged bricks.

5.14 Doing the best we can on the evidence, the Tribunal considers that the work would take no more than 1.5 days for a two-man team. On that basis, the Tribunal assesses the reasonable cost of both items of work (ncluding materials) at the relevant time in the sum of £399.00 (no VAT was charged). That is the sum to which due contribution (1/7) is payable by Mr Weedon i.e. £57.00.

5.15 For the avoidance of doubt, the Tribunal considers that no contribution in respect of the 2010 and 2011 building and decorative works and associated professional fees has been lawfully demanded of Mr Weedon. No doubt that omission will soon be remedied. Meanwhile, he is not liable to make any such contribution.

5.16 It is conceded that the ground rent has been paid up to date and that before issue of proceedings Mr Weedon paid £250.00 in relation to the boiler repair under protest. This sum can be set off against other sums due and owing. Thus the items ground rent £12.50 and service charge £45.00 and £106.12 were, on the findings of the Tribunal, neither due nor owing when the County Court claim was issued and are neither due nor owing now. The outcome is that, on the findings of the Tribunal, none of the sums claimed in the County Court are due or owing. However, the issue of ground rent is a matter for the Court.

5.17 As we understand it, the issues dealt with above are the issues ultimately contested by Mr Weedon. The claim in the County Court includes additional items, namely, a management fee in respect of issuing the Court summons £468.00; court fee £100.00; and interest at 8% p.a. on the various items of claim, in each case from the date of the original demand. Interest is not generally being allowed at 8% p.a. at present and, in any event, no interest appears to be payable by Mr Weedon because no sums have been due or owing at any material time. However, that is a matter for the County Court.

10. REASONS

0. BACKGROUND

The Property

0.1 This property is a flat in a block built of brick in the mid-1980's and comprising 7 flats with a car park reached up a ramp leading through an archway at the side of the building. Originally, the flats were not fitted with central heating but several leaseholders Including those of Flat 2 (ground floor) and the flat immediately above (Flat 5) have installed gas-fired central heating. There appears to have been something of a history of intrusions by children into the communal stairwell, which was insecure and does not have an entry phone system. In 2010 a new entrance door was fitted, which appears to be more secure.

0.2 Upon inspection the Tribunal noted that the boiler overflow from Flat 5 (on the flank wall) was immediately above the boiler air vent of Flat 2 and that there was staining on the outside wall consistent with a serious overflow from Flat 5. Currently, the overflow from Flat 5 discharges some distance (perhaps 300mm) from the wall; but it appears that previously the pipe ended very close to the external face of the wall.

0.3 The attention of the Tribunal was drawn to a low brick wall (2 or 3 courses, topped by bricks on edge) along the front boundary and a flank wall alongside the ramp leading to the car park. The flank wall showed signs of fairly recent brickwork repairs over a relatively small area. The top of the front boundary wall also showed signs of repair, mainly to the top course of bricks.

The Lease

0.4 The lease of Flat 5 dated 23 September 1986 granted a term of 99 years from 24 June 1986 at an initial ground rent of £25.00 p.a. The management and maintenance of the block was to be carried out by Kingsley House Management Ltd, a company of which the leaseholders were members. However, this arrangement seems to have failed at some time prior to 2006, as a result of which the landlord took responsibility for the duties of the Management Company, which are in practice and were at all material times carried out by the landlord's managing agent Trust Property Management Ltd ("TPM"). The lease requires the lessee to contribute one seventh of service charge costs provided, of course, the same has been duly demanded.

The Managing Agent

0.5 The company website identifies TPM as a property management company forming part of the Trust Property Management Group Plc, of which Mr Benjamin Mire is Chief Executive and Mr Michael Yun is Property Management Director. The Tribunal was told by company representative and Property Manager Derin Lawson that TPM is controlled by Messrs Mire and Yun. TPM manages over 13,000 residential units. Also in the Group is Skylon Ltd, which trades as Benjamin Mire Chartered Surveyors ("BMCS"). The website of BMCS indicates that Mr Mire is a fully qualified chartered surveyor. Jason Tilbury, an employee of Skylon Ltd who features in this case has the qualification FDSc (which appears to be a Foundation degree in science) but is not a chartered surveyor.

5.18 What fees are recoverable in the litigation is a matter for the County Court to consider in the light of our findings and its own. However, this is a small claim, which means that costs recoverable through the courts are limited (especially having regard to the findings of the Tribunal). The lease contains the usual provisions in relation to costs incurred in connection with section 146 notices but no other provision entitling TPM to recover litigation costs as a matter of contract.

5.19 TPM is, of course, entitled to add reasonable fees for its services to the service charge account unless, of course, those services are included in the annual management fees under the management agreement between TPM and the landlord. This right is, however, subject to the power of the Tribunal to make an order under section 20C of the 1985 Act.

Costs – section 20C

5.20 This Tribunal has a wide discretion to exercise its powers under section 20C in order to avoid injustice. In many cases, where the tenant applicant has succeeded, it would be unjust if any tenant were obliged to contribute to the legal costs of the unsuccessful landlord or, irrespective of the outcome, if the tenants were obliged to contribute to costs incurred unnecessarily or wastefully.

5.21 However, in some cases, the landlord's conduct of his defence may be a reasonable exercise of management powers even if he loses. The landlord may have made an offer the tenant ought to have accepted. In such cases, it might be reasonable for the tenants generally to bear those costs. In other cases, for example where the non-party tenants supported the unsuccessful landlord, it might be reasonable for the non-party tenants to contribute to the landlord's costs. A wide variety of circumstances may occur and the section permits the Tribunal to make appropriate orders on the facts of each case.

5.22 Overall, on the information available to date, the Tribunal concludes that it would be just and equitable in the circumstances of the case to order that the landlord should be disentitled from treating his costs of and arising out of the application as relevant costs to be taken into account in determining any service charge relating to the property.

5.23 It will be necessary to re-write the service charge account, which the Tribunal leaves to the good sense of the parties. In case this proves a contentious issue, the parties have permission to apply to the Tribunal for determination of any issues arising out of our Decision provided such application is made with 6 weeks after publication of the Order set out above and these Reasons

Geraint M Jones MA LLM (Cantab)
Chairman
30 August 2012