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FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	LON/00AM/LSC/2013/0592
Property	:	30 Burtonwood House, Woodberry Down Estate, London N4 2RX
Applicant	:	The Mayor and Burgesses of the London Borough of Hackney
Representative	:	Mr Jack Parker, instructed by Hackney Legal Services
Respondent	:	Openlink Limited
Representative	:	Mr James Butler, Landmark Residential
Type of Application	:	Determination of the reasonableness of and the liability to pay a service charge
Tribunal Members	:	Mr Robert Latham Mr Mel Cairns, MCIEH Mrs Rosemary Turner JP
Date and venue of Hearing	:	17 and 18 February 2014
Date of Decision	:	27 March 2014

DECISION

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(1) The Tribunal is satisfied that the Applicant has complied with the consultation requirements imposed by Section 20 of the Landlord and Tenant Act 1985, save for one matter for which dispensation is granted.

(2) The Tribunal determines that the sum of £13,570.42 is payable by the Applicant in respect of the service charges for major works which became due on 28 September 2011.

(3) The Tribunal makes an order under section 20C of the Landlord and Tenant Act 1985 so that none of the landlord's costs of the tribunal proceedings may be passed to the lessee through any service charge.

(4) The Tribunal determines that the Respondent shall pay the Applicant £190 within 28 days of this Decision, in respect of the reimbursement of the tribunal fees paid by the Applicant.

(5) Since the Tribunal has no jurisdiction over county court costs, fees and interest, this matter should now be referred back to the Clerkenwell and Shoreditch County Court.

The Application

1. The Applicant seeks a determination pursuant to s.27A of the Landlord and Tenant Act 1985 ("the Act") as to the amount of service charges payable by the Applicant in respect of major works carried out at Burtonwood House, N4 2RX ("the block"). The Respondent is the lessee of Flat 30 ("the flat"). The flat is on the Woodberry Down Estate ("the Estate").

2. Proceedings were originally issued in the Northampton County Court under claim no.3YJ29133. The claim was transferred to the Clerkenwell and Shoreditch County Court and then in turn to this Tribunal, by order of District Judge Manners on 15 August 2013 (see C9).

3. As this is a County Court referral, our jurisdiction is limited to the issues referred to us by the County Court (see *John Lennon v Ground Rents (Regisport) Ltd* [2011] UKUT 330 (LC)). It is therefore important to remind ourselves of the scope of the dispute which has been referred to us:

(i) By their Particulars of Claim dated 20 January 2013 (at C35), the Applicant claim £13,570.42 in respect of major works. They contend that this sum became payable on 28 September 2011.

(ii) The Respondent's Defence, dated 4 March 2013, is at C41. First, the Respondent asserts that the major works are "unfair, unreasonable and unnecessary" because the block is included in the Woodberry Down Regeneration programme and is shortly due to be demolished. Secondly it is asserted that £3,617.19 (+ an administration fee of 10%) related to windows and balconies and were the responsibility of the tenant, rather than the landlord. Thirdly, issue is taken with the Section 20 Consultation Requirements. It is asserted that the Notice, dated 13

January 2010, is flawed as it is (a) misleading; (b) does not provide adequate quotes; (c) it not addressed to the lessee; and (d) does not adequately identify what is currently wrong with the flat and the building.

4. Up to this point, the Respondent Company had been acting through a director. It now decided to instruct Landmark Leasehold Advisory Services Limited ("Landmark") to act on its behalf. On 4 June 2013 (at C108), Landmark wrote to the Applicant stating that they were now acting for the Respondent "to apply our Major Works Investigative Services in respect of her Leasehold ownership at this property". It added "for the avoidance of doubt, it is our intention to eventually cover the full Major Works programme undertaken to all leasehold properties across this estate". From this point, the scope of the dispute expanded.

5. On 17 September, 2013 (at B11), the Tribunal gave directions. No one from Landmark attended the hearing. However, it had written to the Tribunal with proposed Directions on 15 September (at E171). The Tribunal identified the following issues to be determined:

(i) whether the costs of the major works invoiced in 2011 are reasonable, in particular in relation to the nature of the works, the contract price and the supervision and management fees.

(ii) whether the cost of the major works is reasonable having regard to the planned works of demolition of the subject building.

6. What had not been apparent at the Directions Hearing, was the real focus of the case that Landmark now sought to advance on behalf of the Respondent, namely a trial of Hackney's whole procurement procedures. The Respondent's primary case has been that the Applicant misdirected themselves in law and consulted under the wrong provisions of the Consultation Regulations consulting under Schedule 3 ("Consultation Requirements for Qualifying Works under Long Term Agreements and Agreements to which Regulation 7(3) Applies") rather than Schedule 2 ("Consultation Requirements for Qualifying Long Term Agreements for which Public Notice is Required"). The issue has been whether Regulation 7(3)(b) applies.

7. It is to be noted that whilst the Respondent had raised a number of issues relating to the consultation procedures in its Defence, this was not a point which was raised. Mr Parker, on behalf of the Applicant, was content that this was an issue which we should determine.

Disclosure

8. The Procedural Judge gave the following Direction:

"On or before the 8th October 2013, the parties shall arrange a mutually convenient date for the respondent tenant's representative to inspect all relevant documents held by the applicant landlord in relation to the planning and execution of the major works in dispute".

9. Mr Long states that all the documentation relating to the procurement process and works would fill three box rooms (see [5] at G257). A meeting was therefore arranged at the Applicant's offices on 7 October 2013 for the Landmark to inspect relevant documents. Mr Butler and Mr Austin were present. The inspection lasted some 4.5 hours. Copies were provided of some 3,500 pages of documentation which were sent to Landmark on 22 August 2013 (see G393). The Respondent requested copies of a further 29 separate qualifying long term agreements (as confirmed in the letter dated 7 October 2013 at E180). Mr Austin explained how only 13 of these were relevant. He copied these and put them in his manager's office. It would seem that they were not sent out at the time.

10. On 18 October 2013 (at I494), Landmark applied to strike out the Applicant's case on grounds of their failure to comply with their disclosure obligations. This led to extensive correspondence between the parties. The cost expended by the parties in addressing this issue of disclosure would not have arisen had there been greater clarity of the nature of the issues in dispute and the documents which were required to fairly resolve the same in a proportionate manner. Both parties must accept responsibility for the unsatisfactory manner in which this case has been litigated. It should not have been necessary for the Tribunal to have to grapple with not only two lever files of documents totalling over 800 pages.

11. The Tribunal are satisfied that we had sufficient documentation before us to fairly determine this application. We are also satisfied that both parties had adequate opportunity to deal with the extensive documentation, much of which was not material to our determination.

Statements of Case

12. The Applicant's Statement of Case (1.11.13) is at C18-28). A short additional Statement of Case (18.11.13) is at C112-113. The Respondent's Statement of Case (9.12.13) is at C114-128. The Applicants have filed a Reply to the Respondent's Case (6.1.14) at CC1-11).

Witness Statements

13. The Applicant relies upon witness statements from the following: (i) Mr Martin Long, Head of Programme Management at Hackney Homes (18.11.13) at G257 and (20.1.14) at G258; (ii) Mr Leslie Austin, Major Works Officer, Hackney Homes (21.1.14) at G373; (iii) Mr Gareth

Perkins, Major Works Officer, Hackney Homes (18.11.13) at G392; (iv) Mr David Lange, Project Manager, Hackney Homes (20.1.14) at G 394; (v) Mr Jonathan Oxlade, Head of Asset Management, Hackney Homes (18.11.13) at G477; and (vi) Ms Sema Yohannes, Senior Telephonist, Courier Systems (18.11.13) at G479.

14. The Respondent did not file any evidence. Neither party has applied to call expert evidence.

Other Applications

15. On 8 October 2013 (at I494), the Respondent applied to strike out the Applicant's Case because of their failure to comply with their disclosure obligations. On 8 November 2013 (at I497), the Applicant applied to strike out the Respondent's Case because of their failure to provide their Statement of Case. It was agreed that both applications have been superseded by events.

16. On 19 November, a Procedural Judge refused an application by the Respondent to join other tenants to this application.

17. On 20 January 2014 (at I499), the Respondent applied for an order under section 20C of the Act. We address this under Issue 7.

18. On 21 January 2014, the Respondent applied for an order requiring the author of the Stock Condition Survey report produced by Frost Associates to attend the hearing. On 6 February, a Procedural Judge made an Order to this effect. Mr Clifford Moore, a Chartered Quantity Surveyor, was author of the report and attended to give evidence.

19. On 31 January 2014 (at I505), the Applicant made an application under section 20ZA of the Act for dispensation of the consultation requirements. On 6 February 2014, a Procedural Judge directed that the application be determined after the current hearing. A particular concern was the issue of the impact of such an application on other tenants on the Estate.

Applications made after the Hearing

20. On 28 February 2014, the Applicant applied to adduce additional evidence. They are concerned about the wider impact of our decision on other lessees on the Estate. This application was opposed by the Respondent. On 10 March, the Tribunal notified the parties that we were refusing this application. We were satisfied that we had sufficient evidence before us to determine the application fairly, albeit that the evidence adduced by the Applicant at the hearing was not entirely satisfactory.

21. On 5 March 2014, the Respondent made an application for costs under Rule 13(4) of the Tribunal Procedure (First-Tier Tribunal) (Property Chamber) Rules 2013 ("the Procedural Rules") in the sum of £11,730.12 (inc VAT). The Respondent enclosed a Schedule of Costs in which Mr Butler bills his time at £250ph. The Respondent contends that the Applicant has acted unreasonably in their conduct of these proceedings. Particular complaint is made of the Applicant's failure to comply with the direction in respect of disclosure. On 10 March, the Tribunal notified the parties that we would consider this application. Were we to be satisfied that there are grounds for making such an order, we would give the Applicant the opportunity to make written representations before making our determination. We address this under Issue 9.

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

The Hearing

23. The Applicant was represented by Counsel, Mr Jack Parker. He produced a Skeleton Argument at the beginning of the hearing which he updated for his final submissions. We commend him for his skill in grappling with the complexities of the Consultation Regulations, particularly in the context of the unsatisfactory evidence that Hackney had adduced to support their claim. He adduced evidence from Mr Moore who attended pursuant to the Order of the Tribunal and for whom there was no witness statement, Mr Long, Mr Lange, and Mr Austin. All these witnesses were cross-examined by Mr Butler.

24. The Respondent was represented by Mr Butler, Director of Landmark. He did not adduce any evidence. He provided the Tribunal with Written Submissions. These focused on the landlord's failure to comply with their disclosure obligations and the correct Schedule of the Consultation Regulations. His position was difficult, given the Respondent's decision not to adduce any evidence. In essence, he was putting the Applicant to proof that they had complied with the Consultation Regulations and that the works were reasonable.

25. We completed the evidence on Day 1. Day 2 was taken up with closing submissions. The five substantive issues which we need to determine are:

(i) Issue 1: Did the Works fall within Regulation 7(3)(b) of the Consultation Regulations?

(ii) Issue 2: Has the Landlord Complied with Schedule 3 of the Regulations?

(iii) Issue 3: Were the works reasonable having regard to the landlord's repairing obligations, the scope of the works and the planned demolition of the block?

(iv) Issue 4: Was it reasonable to execute the works in one phase?

(v) Issue 5: The failure of the landlord to administer a reserve fund.

Issues which were not pursued:

26. The Respondent decided not to pursue three further issues:

(i) The suggestion that the landlord had failed to serve the Notice of Intention on the tenant;

(ii) The Applicant's failure to draw on Decent Home's funding;

(iii) The cost of the works.

27. There are four procedural issues:

(i) Issue 6: The Applicant's application (31.1.14) under section 20ZA to dispense with the consultation requirements;

(ii) Issue 7: The Respondent's application (20.1.14) for an order under section 20C;

(iii) Issue 8: The Applicant's application for reimbursement of tribunal fees of £190;

(iv) Issue 9: The Respondent's application (5.3.14) for an order for costs in the sum of £11,703.12 under Rule 13(4) of the Tribunal Rules.

The Lease

28. The Lease is at C47-83. It is dated 9 August 1989 and is for a term of years expiring on 29 May 2013. The Respondent acquired the leasehold interest on 14 April 2008 (see H491).

29. The terms of the lease are unexceptional. The landlord's repairing covenants are set out at the Ninth Schedule of the Lease (C78). These are the normal requirements to keep in repair the structure and exterior of the premises. These include the windows and balcony doors. Mr Parker referred us to the reference to works of improvement (paragraph 6). This has limited relevance given the limited life of the block.

The Background

30. Burtonwood House was constructed in about 1950. It is on the Woodberry Down Estate. Burtonwood House is a block consisting of 80 flats, 66 of which are occupied by secure tenants. The Block is similar in construction to that at Ashdale House.

31. In 2002, the Applicant carried out a structural evaluation report of the Estate. This concluded that most of the blocks were beyond economic repair due to a number of factors including disrepair to the drainage system, ground movement and subsidence, widespread presence of asbestos, disrepair to the balconies and inadequate thermal insulation.

32. On 8 August 2003, the Applicant went out to tender for its Decent Homes Phase II programme. Five partners were appointed, Mulalley & Company Limited ("Mulalley") receiving the contract for the Shoreditch area. The Framework Agreement between the Applicant and Mulalley is dated 1 October 2006 (at D147) and the PPC 2000 ACA Project Partnership Agreement is dated 1 June 2005.

33. The Woodberry Down regeneration programme is planned to take place over some 20 years. A total of 1981 homes are to be demolished. The current Masterplan, dated March 2007, is at G399. There are 5 phases. Rehousing for Phase 1 started in 2004 (see D170). At that time, Phase 5 was to be completed in 2027. Burtonwood House is included in Phase 3. It was initially planned for rehousing and demolition to be carried out between 2012-18. Mr Lange stated that in 2010, Burtonwood House was scheduled for demolition in 2014-2016. Under the Masterplan, Burtonwood is currently due for demolition between January and September 2015. However, there is inevitably slippage in such programmes. Mr Lange stated that Phase 2 had probably slipped by one year.

34. In February 2007, Mr Moore first became involved when he carried out a Condition Survey of the Blocks at Ashdale and Burtonwood (see CC45). His remit was to carry out a visual condition survey to assess the condition of the Blocks (and some 37 other blocks) and to consider the minimum works necessary to keep them in a reasonable condition for 10 years. He understood that the Block would be demolished between 2012-17.

35. After Mr Moore had carried out the condition survey, Mulalley prepared a detailed schedule of work and priced it. Mr Moore was shown the "Summary of Findings" and which bears the footer "frost ass report" (at G297). He did not recognise the report but thought that parts of it could have been cut and pasted from a report provided by Frost Associates. It would seem that he met Mulalley on 28 July 2009 to discuss the specification for the works.

36. On 11 January 2010, the Applicant held a Residents Meeting. The works and their scope were discussed.

37. On 13 January, the Applicant served the Respondent with the Notice of Intention to do the works (at CC12). On 12 February, Zeev Pollack, on behalf of the Respondent, replied to the Notice. On Monday, 15 February 2010, the works commenced. On 19 March, Nadia Norley, the Applicant's Major Works Estimating Officer responded to the observations. On 23 April, the Respondent wrote a further letter (at CC32). On 14 May, the Applicant replied (at C110).

38. Mr Long stated that the works were completed on 13 January 2011. The handover records are at G365. On 17 August, the Applicant invoiced the Respondent for the sum of £13,570.42 which was payable on 28 September (at C32). It is to be noted that this is somewhat less than the initial estimate for the works. It attached a breakdown of the costs (at C34) which can be compared with the original estimate (at CC14).

The Consultation Requirements

39. The consultation procedures required by Section 20 of the Act are complex. They apply where any tenant is required to contribute more than £250 in respect of any qualifying works. There are four schedules to the Consultation Regulations setting out five different consultation procedures. The standard consultation procedures are to be found in Part 2 of Schedule 4 ("Consultation Requirements for Qualifying Works for which Public Notice is not Required"). These requirements have been helpfully summarised by Lord Neuberger in *Daejan Investments Ltd v Benson* [2013] UKSC 14; [2013] 1 WLR 854 at [12]:

Stage 1: Notice of intention to do the works

Notice must be given to each tenant and any tenants' association, describing the works, or saying where and when a description may be inspected, stating the reasons for the works, specifying where and when observations and nominations for possible contractors should be sent, allowing at least 30 days. The landlord must have regard to those observations.

Stage 2: Estimates

The landlord must seek estimates for the works, including from any nominee identified by any tenants or the association.

Stage 3: Notices about estimates

The landlord must issue a statement to tenants and the association, with two or more estimates, a summary of the observations, and its responses. Any nominee's estimate must be included. The statement

must say where and when estimates may be inspected, and where and by when observations can be sent, allowing at least 30 days. The landlord must have regard to such observations.

Stage 4: Notification of reasons

Unless the chosen contractor is a nominee or submitted the lowest estimate, the landlord must, within 21 days of contracting, give a statement to each tenant and the association of its reasons, or specifying where and when such a statement may be inspected.

40. However, these have been adapted, largely to deal with landlords who have elected to enter into qualifying long term agreements or who are required to issue public notices under European Union procurement law. These have particular relevance for local housing authorities ("LHAs"). The Respondent's primary case has been that the Applicant misdirected themselves in law and consulted under the wrong provisions of the Consultation Regulations.

41. If the Applicant is correct in its contention that Regulation 7(3)(b) applies, the duty to consult is limited. There are just two stages:

Stage 1: Notice of intention to do the works

Notice must be given to each tenant and any tenants' association, describing the works, or saying where and when a description may be inspected, stating the reasons for the works, specifying where and when observations in relation to the proposed works or the landlord's estimated expenditure should be sent, allowing at least 30 days (Paragraphs 1 and 2 of the Schedule). The landlord must have regard to those observations (Paragraph 3).

Stage 2: Notification of reasons

Where the landlord receives observations, he shall, within 21 days of their receipt, by notice in writing to the person by whom the observations were made, state his response to the observations (Paragraph 4).

42. It had been thought that Section 20 created an invaluable procedural right to be consulted: even if service charges were reasonable in amount, reasonably incurred and were for work and services that were provided to a reasonable standard, they would not be recoverable above the statutory maximum if they related to qualifying works agreement and the consultation process had not been complied with or dispensed with. In *Daejan Investments Ltd v Benson*, the Supreme Court gave clear guidance on how the consultation provisions should be applied:

(i) the purpose of a landlord's obligation to consult tenants in advance of qualifying works is to ensure that tenants are protected from paying

for inappropriate works or from paying more than would be appropriate;

(ii) adherence to those requirements was not an end in itself, nor are the dispensing jurisdiction under section 20ZA(1) a punitive or exemplary exercise;

(iii) on a landlord's application for dispensation, the question for the tribunal is the extent, if any, to which the tenants has been prejudiced in either of those respects by the landlord's failure to comply;

(iv) neither the gravity of the landlord's failure to comply nor the degree of its culpability nor its nature nor the financial consequences for the landlord of failure to obtain dispensation is a relevant consideration;

(v) the tribunal can grant a dispensation on such terms as it thinks fit, provided that they are appropriate in their nature and effect, including terms as to costs;

(vi) the factual burden lies on the tenant to identify any prejudice which she claimed she would not have suffered had the consultation requirements been fully complied with but would suffer if an unconditional dispensation were granted;

(vii) once a credible case for prejudice has been shown the tribunal must look to the landlord to rebut it, failing which it should, in the absence of good reason to the contrary, require the landlord to reduce the amount claimed as service charges to compensate the tenants fully for that prejudice;

(viii) where the extent, quality and cost of the works are unaffected by the landlord's failure to comply with the consultation requirements an unconditional dispensation should normally be granted.

43. Lord Neuberger suggested that it did not seem to be "convenient or sensible" to distinguish between "a serious failing" or "a technical, minor or excusable oversight" (at [47]). The reason for this was that this could lead to "unpredictable outcomes" and "a subjective assessment of the nature of the breach". His approach was rather that where the landlord has failed to comply with the consultation requirements, the tribunal should consider the issue of dispensation and the degree of prejudice suffered by the tenant. It is quite possible that a "minor or excusable oversight" could cause severe prejudice, whilst a gross breach could cause no prejudice (see [49]).

44. This decision raises a practical problem which this Tribunal has been required to address: If a landlord responds to the tenant's observations outside the 21 day time limit, is this a breach of the consultation requirements which requires the landlord to seek dispensation from a Tribunal? If so, does it merely consider the issue of prejudice to the

individual tenant, or must it also have regard to the potential prejudice to other tenants? This is an issue of immense practical importance to LHAs where there is a failure to comply with the strict time sequences specified by the Consultation Regulations.

Issue 1: Regulation 7(3)(b) of the Consultation Regulations

45. The Respondent's Case is that this was not a Schedule 3 case at all, but that Schedule 2 applied. The Respondent embarked upon an extensive fishing expedition to identify grounds for suggesting that the Applicant had misdirected themselves in law. It was common ground that had the Applicant failed to comply with Schedule 2, there were significant breaches to the consultation procedures with the potential to cause substantial prejudice to the 14 lessees at Burtonwood House and elsewhere on the Estate. It was therefore for the Applicant to satisfy us that they had complied with the correct consultation procedures.

46. Regulation 7(3)(b), which came into force on 31 October 2003, provides:

> "(3) This paragraph applies where–
>
> .....
>
> (b) under an agreement for a term of more than twelve months entered into, by or on behalf of the landlord or a superior landlord, qualifying works for which public notice has been given before the date on which these Regulations come into force are carried out at any time on or after the date.

47. There are three issues for us to determine:

(1) Were the works carried out pursuant to "an agreement"?

(2) Was the term of that agreement for "more than twelve months"?

(3) Was public notice for the works pursuant to which the agreement was made, given before the 31 October 2003?

48. The Applicant state that public notice for the works was given on 8 August 2003. This is at J569. The contract is "to maintain the London Borough of Hackney's housing stock in a decent and modern condition for the next three to five years. This relates to works of "repair, maintenance and conversion".

49. The Tribunal are satisfied that the works were carried out pursuant to an agreement arising from this public notice. We are required to consider a hierarchy of agreements. The most direct contract is the PPC2000 Sectional Commencement Agreement (at G304) between the

Applicant and Mulalley & Company Limited ("Mulalley"). This relates to planned improvement works at Burtonwood House. Mr Long ([6] at p.261) states that this contract was signed on 9 September 2010. It is not entirely clear where this date came from and Mr Long accepted that it could not be correct. This date does not appear on the contract. We are satisfied that this agreement must have been signed prior to 15 February 2010, the date on which the major works commenced. The contract specifies the date of possession to be 15 February 2010 and the date of completion as 19 August 2010. We also note the undated letter at C134, which was apparently received in 2009, in which Mulalley introduce themselves to the Respondent as the contractor appointed by the Applicant to carry out the works and to a planned start date of January 2010. Mr Long stated that neither the Applicant nor Mulalley would have commenced the works on 15 February 2010 without there being a contract in place. This must be correct.

50. The next agreement is the PPC 2000 ACA Project Partnering Agreement, dated 1 June 2005, which was provided to the Tribunal and the Landmark on Day 1 of the hearing. This is an agreement between the Applicant and Mulalley. Clause 28.2 refers to the contract period being thirteen months from the date of the agreement. There is no provision in the agreement for renewal. Mr Long gave evidence that it was extended annually for a period of five years. We accept his evidence.

51. The final agreement in the hierarchy is the Framework Agreement Relating to Decent Homes Phase II Programme at D147. This is dated 1 October 2006 and is between the Applicant and Mulalley.

52. The Tribunal are satisfied that the major works which were carried out at Burtonwood House fell within the scope of Regulation 7(3)(b). However, the evidence adduced by the Applicant was not entirely satisfactory as we indicated at the hearing.

Issue 2: Compliance with Schedule 3 of the Consultation Regulations

Stage 1: Notice of intention to do the works

53. The Notice of Intention to do the works, dated 13 January 2010, is at CC12. It is addressed to the Respondent at 30 Burtonwood House. The works are described as "interim external bloc repairs, communal works and works to individual properties". A more detailed description of the Works is attached together with the total estimated cost of the works (£1.044m) and the Respondent's estimated contribution (£14,000). The reason for the works is specified. Observations were invited by 12 February.

54. The Respondent initially sought to argue that the Notice had not been served on the Respondent (see [29] at C119). This argument was

hopeless, given that the Respondent had replied to it. In his Defence in the County Court, the Respondent had complained that the Notice was misleading and was not addressed to the lessees. These complaints were equally ill-founded.

55. Mr Butler rather sought to argue that the Notice did not adequately set out the landlord's reasons for carrying out the works. He relied on *Westminster CC v Lessees of Emanuel House* (LON/00BK/LSC/2010/616) in which the Tribunal found the landlord's reasons for carrying out the works to be "unsatisfactory and unhelpful". However, in that case the Tribunal also found the description of the works to be deficient. That is not the position in this case.

56. The Notice states the reasons for the works as follows:

"The regeneration of Woodberry Down is planned to last until 2027. A number of the housing blocks in the later phases of the redevelopment are not scheduled to be decanted and demolished for at least another 6 to 10 years, and those in the last phases at least 12 to 16 years. Repairs are needed to make sure homes are safe, warm and weatherproof until such time as they are due to be demolished. Planned works include installing double glazed windows, roofing and drainage repairs and repairs to the brick and concrete work".

57. The Tribunal are satisfied that this is sufficient to comply with the statutory requirement. Mr Butler contends that this is "an Estate reason; and not a Block reason". We disagree. The works proposed for Burtonwood House are described. The landlord considers them to be necessary to make the Block safe until it is demolished. Such reasons should be set out briefly.

Stage 2: Notification of reasons

58. Mr Butler argues that the Applicant failed to have regard to the observations made by the Respondent in its letter of 12 February. He suggests that the Applicant's letter of 19 March is no more than "a passing glance".

59. We reject this contention. Ms Norley responded to each of the points raised by the Respondent:

(i) The Respondent notes that Burtonwood House is due to be demolished such that "the necessity of the entire major works are put to question." The Applicant makes a detailed response describing the phasing of the regeneration programme.

(ii) The Respondent complains that it is impossible to scrutinise the necessity of the communal works or their costs without seeing the

documentation. The Applicant responds that the surveys can be viewed by arrangement with the Woodberry Down Project Management team.

(iii) The Respondent complains about the works to be executed to his flat suggesting that these are the lessee's obligation. Mr Butler accepts that the Respondent took a bad point. The works related to the windows and balcony doors which fall within the landlord's obligation to repair.

(iv) The Respondent complains of the 10% administration charge. The Applicant responds setting out the various components of the charge.

(v) The remaining questions raised by the Respondent related to works on the tenanted properties, other leasehold dwellings and the number of long leases at Burtonwood House. These questions were all answered.

60. We also note the Respondent's further letter of 23 April to which the Applicant made a full response on 14 May.

61. Two matters have concerned the Tribunal:

(i) Observations on the proposed works were invited by 17.00 on Friday 12 February. Works commenced on Monday 15 February. The Tribunal pointed out to Mr Parker that this start date afforded the Applicant with no window within which to give due regard to any observations made by lessees. The Applicant's response was that the works were not set in concrete and that under their "partnership agreement" with Mulalley, it was open to them to amend the schedule as they considered appropriate. Mr Long described the more collaborative approach achieved through partnership working. There was greater flexibility to amend the scope of the works that were proposed. There was no formal handover. We accepted this explanation. It is significant that the Respondent did not suggest a more limited schedule of works. His position was rather that none of the works were justified.

(ii) The Applicant's response should have been made within 21 days of receipt of the Respondent's observations, namely by 6 March. It was 13 days out of time. Given that the Tribunal is satisfied that the Applicant did have due regard to the observations which had been made by the Respondent, we are satisfied that no prejudice was caused to the Respondent by this tardy response. However, it is no longer appropriate for this Tribunal to classify this as a mere technical breach of the Consultation Regulations. We are required to find that there was a breach of the consultation requirements and consider whether to dispense with the requirement to respond within 21 days under Section 20ZA(1). We are satisfied that it is appropriate to grant such dispensation. No prejudice has been caused whether to the Respondent

or to any other lessee in the Block. No possible prejudice has been suggested by this particular breach.

Issue 3: Were the works reasonable?

62. Mr Butler argued that the works were unnecessary given the limited life of the Block. The problem that he faces is that the Respondent has not suggested a more limited package of works to that proposed by the landlord. Neither has the Respondent adduced any evidence relating to the condition of the block from either a witness of fact or any expert.

63. We were impressed by the evidence of Mr Moore, the Chartered Quantity Surveyor with Frost Associates. He attended pursuant to a witness summons. He only learnt that he was due to give evidence on 7 February, ten days before the hearing. Mr Butler suggested that his evidence was tainted because of his desire to ensure that his firm remained a client of the Respondent. We reject this suggestion.

64. When questioned by Mr Butler, Mr Moore described how the Block could become unsafe if works were not carried out. There was evidence of water penetration to some blocks. The asphalt roof, which would normally have a 30 year life, could have been original. Mr Butler put to him that if there had been a proper programme of planned maintenance in the past, these works would not have been necessary. Mr Moore did not accept this. He noted that patch repairs were apparent. The Estate had been considered for regeneration for some 8-9 years. This was reflected in a lack of maintenance which needed to be addressed. The windows were original He was concerned that rusty windows might fall out. Spalling concrete could also fall. Significant works were required in 2007. These were the more urgent in 2010.

65. In response to Mr Cairns, Mr Moore described the fuller package of works which he would have recommended were the block not to be demolished. This would have included complete renewal of the roof, improved insulation to the roof and walls and a replacement of the lifts. The works to the roof were "patchwork repairs" rather than a full renewal. Although consideration had been given to window repair, this was not possible given the state of the windows. The replacement windows were of a quality envisaged to have a 10 year life span appropriate to that of the Block.

66. The Tribunal are satisfied that in 2010, the Block was in disrepair and in need of works or repair and maintenance. Provided that the Respondent acted reasonably, it was for the landlord to determine the scope of the works that were required given the limited life of the Block (see *Westminster CC v Fleary* [2010] UKUT 136 (LC).

Issue 4: Phasing

67. Mr Butler suggested that the Applicant should have phased the works. He referred us to *Garside v Maunder Taylor* [2011] UKUT 367 (LC). The Tribunal are satisfied that the Applicant was entitled to conclude that phasing was not appropriate:

(i) Urgent works were required to give the Block a limited life of ten years;

(ii) The Respondent had not suggested that the works should be phased. Neither has it adduced any evidence of financial hardship. In any event, the Applicant offers a range of repayment options (see CC73).

Issue 5: The Reserve Fund

68. Mr Butler argued that the Applicant should have maintained a reserve fund. The failure to administer a reserve fund has caused the Respondent significant loss such as to render the charges levied in respect of the major works to be unreasonable. Mr Butler relies on the RICS Residential Management Code, albeit that the Code does not apply to LHAs.

69. It is common ground that Clause 3A of the lease (at C53) permits the Applicant to operate a reserve fund. It is quite a different proposition to contend that they were bound to do so. Mr Parker points out that in 2007/8, the Applicant carried out a survey of their lessees and a majority were against the idea of a reserve fund (see C76-7).

70. The Tribunal are satisfied that it was open to the Applicant not to operate a reserve fund. In any event, the Respondent has failed to adduce any evidence that it has suffered significant loss by reason of their failure to do so. Further, the Respondent could defer payment through one of the repayment schemes. Such schemes explain why LHAs are excluded from the RICS Code.

Issue 6: The Applicant's section 20ZA application

71. In the light of the Tribunal's decision on Issue 1, it is no longer necessary for the Applicant to pursue their second application, issued on 31 January 2014 under section 20ZA.

Issue 7: The Respondent's section 20C application

72. The Respondent seeks an order under section 20C of the Act. The Tribunal is satisfied that it is just and equitable in all the circumstances to make such an order so that the Applicant may not pass any of its

costs incurred in connection with the proceedings before the Tribunal through the service charge.

73. This case should be a cautionary tale for LHAs. This application has generated a vast quantity of documentation which is quite disproportionate to the sum in dispute. The reason for this was the inability of the Application to address the question as to why the Schedule 3 Consultation procedures applied, namely why this was a Regulation 7(3)(b) case. Whilst this is a simple question to ask, it is a complex one to answer. The Section 20 Request Form at J519 was not sufficient for this purpose.

74. This is a critical issue when a LHA is conducting major works on an Estate which will affect many lessees. A LHA should ensure that there is a sufficient audit trail confirming that they have directed themselves correctly in law and identifying the documentation relevant to this conclusion. The Applicant failed to do this. They would have faced significant problems in establishing their case, but for the forensic skill of Mr Parker. In these circumstances, we are satisfied that it would not be just and equitable for the Applicant to pass on their costs through the service charge account to their lessees.

Issue 8: Reimbursement of Tribunal Fees

75. The Applicant made an application under Regulation 13 of the Procedure Rules that it be reimbursed in respect of the tribunal fees of £190 which they have paid. The Respondent failed to pay the sum demanded in respect of the service charge for the major works. It was necessary for the Applicant to issue proceedings in the County Court to enforce payment. The issue raised by the Respondent in his Defence were framed quite differently than the manner in which they have been argued before this Tribunal. The Applicant has been successful before this Tribunal. In these circumstances, it is appropriate for the Respondent to reimburse this sum to the Applicant.

Issue 9: The Respondent's Rule 13(4) application

76. The Respondent applies for costs of £11,730.12 pursuant to Rule 13(1)(b) of the Procedural Rules based on the "unreasonable" conduct of the Applicant in these proceedings. The Respondent complains of the Applicant's failure to comply with their disclosure obligations and the need for them to apply to adduce further evidence. The Tribunal have refused the Applicant's request to adduce further evidence.

77. The Procedural Rules have applied since 1 July 2013. They make two significant changes to the those previously to be found in Paragraph 10 of Schedule 12 to the Commonhold and Leasehold Reform Act 2002:

(i) The 2002 Act referred to the conduct of a party who had "acted frivolously, vexatiously, abusively, disruptively or otherwise unreasonably" in connection with the proceedings. We are satisfied that the abbreviated language in the new Rules, now restricted to the single term of "unreasonable", does not make any significant change to the circumstances in which we should make such an order. The four additional terms were merely examples of unreasonable behaviour. This is normally a "no costs" jurisdiction. A party must satisfy a high threshold before a Tribunal should make a costs order based on the unreasonable conduct of a party. The basic principle is that this is a "no costs" jurisdiction.

(ii) The limit of £500 has been removed. This gives effect to the recommendation made in the report "Costs in Tribunals" by the Costs Review Group chaired by Sir Nicholas Warren.

78. We are satisfied that the Respondent has failed to establish a prima facie case of unreasonable conduct as a result of which we should invite written representations from the Applicant on this issue. We are satisfied that both parties bear responsibility for the disproportionate manner in which the disclosure issue has been handled. We have had regard to the extensive correspondence between the parties and the mass of documentation potentially relevant to the Applicant's procurement procedures. It is unfortunate that Landmark did not attend the Directions hearing on 17 September 2013. Had they done so, the issues in dispute could have been identified with greater precision, and the disclosure required to determine those issues in a proportionate manner could have been explored. As already noted, the issues argued before this Tribunal have had a significantly different focus than those pleaded by the Respondent in its County Court Defence. Neither were they apparent to the Procedural Judge at the Directions Hearing.

Further Steps

79. Either party has the right to appeal to the Upper Tribunal (Lands Chamber) (s.175 Commonhold and Leasehold Reform Act 2002). Permission to appeal is required which should initially be sought from this Tribunal.

Robert Latham

Tribunal Judge

27 March 2014

Appendix of relevant legislation

Landlord and Tenant Act 1985

Section 18 – Meaning of "service charge" and "relevant costs"

(1) In the following provisions of this Act "service charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent -

(a) which is payable, directly or indirectly, for services, repairs, maintenance, improvements or insurance or the landlord's costs of management, and

(b) the whole or part of which varies or may vary according to the relevant costs.

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

(3) For this purpose -

(a) "costs" includes overheads, and

(b) costs are relevant costs in relation to a service charge whether they are incurred, or to be incurred, in the period for which the service charge is payable or in an earlier or later period.

Section 19 – Limitation of Service Charges: reasonableness

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

(a) only to the extent that they are reasonably incurred, and

(b) where they are incurred on the provisions of services or the carrying out of works, only if the services or works are of a reasonable standard;

and the amount payable shall be limited accordingly.

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

Section 20 - 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) the appropriate tribunal.

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

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

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

(a) if relevant costs incurred under the agreement exceed an appropriate amount, or

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

(5) An appropriate amount is an amount set by regulations made by the Secretary of State; and the regulations may make provision for either or both of the following to be an appropriate amount—

(a) an amount prescribed by, or determined in accordance with, the regulations, and

(b) an amount which results in the relevant contribution of any one or more tenants being an amount prescribed by, or determined in accordance with, the regulations.

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

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

Section 20ZA – Consultation Requirements: Supplementary

(1) Where an application is made to the appropriate 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 that 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 the landlord or a superior landlord, for a term of more than twelve months.

Section 27A – Liability to Pay Service Charges: Jurisdiction

(1) An application may be made to a leasehold valuation tribunal for a determination whether a service charge is payable and, if it is, as to -
(a) the person by whom it is payable,
(b) the person to whom it is payable,
(c) the amount which is payable,
(d) the date at or by which it is payable, and
(e) the manner in which it is payable.

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

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

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

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

Section 20C – Limitation of Service Charges: cost of proceedings

(1) A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a court, residential property tribunal or leasehold valuation tribunal, or the Upper Tribunal, or in connection with arbitration proceedings, are not to be regarded as relevant costs to be

taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application.

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

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

The Service Charges (Consultation Requirements) (England) Regulations 2003

Regulation 7 — The consultation requirements: qualifying works

(1) Subject to paragraph (5), where qualifying works are the subject (whether alone or with other matters) of a qualifying long term agreement to which section 20 applies, the consultation requirements for the purposes of that section and section 20ZA, as regards those works, are the requirements specified in Schedule 3.

(2) Subject to paragraph (5), in a case to which paragraph (3) applies the consultation requirements for the purposes of sections 20 and 20ZA, as regards qualifying works referred to in that paragraph, are those specified in Schedule 3.

(3) This paragraph applies where–

(a) under an agreement entered into, by or on behalf of the landlord or a superior landlord, before the coming into force of these Regulations, qualifying works are carried out at any time on or after the date that falls two months after the date on which these Regulations come into force; or

(b) under an agreement for a term of more than twelve months entered into, by or on behalf of the landlord or a superior landlord, qualifying

works for which public notice has been given before the date on which these Regulations come into force are carried out at any time on or after the date.

(4) Except in a case to which paragraph (3) applies, and subject to paragraph (5), where qualifying works are not the subject of a qualifying long term agreement to which section 20 applies, the consultation requirements for the purposes of that section and section 20ZA, as regards those works–

(a) in a case where public notice of those works is required to be given, are those specified in Part 1 of Schedule 4;

(b) in any other case, are those specified in Part 2 of that Schedule.

(5) In relation to a RTB tenant and particular qualifying works, nothing in paragraph (1), (2) or (4) requires a landlord to comply with any of the consultation requirements applicable to that agreement that arise before the thirty-first day of the RTB tenancy.

Schedule 3 - Consultation Requirements for Qualifying Works under Qualifying Long Term Agreements and Agreements to which Regulation 7(3) Applies

1. Notice of Intention

(1) The landlord shall give notice in writing of his intention to carry out qualifying works–

(a) to each tenant; and
(b) where a recognised tenants' association represents some or all of the tenants, to the association.

(2) The notice shall–

(a) describe, in general terms, the works proposed to be carried out or specify the place and hours at which a description of the proposed works may be inspected;
(b) state the landlord's reasons for considering it necessary to carry out the proposed works;
(c) contain a statement of the total amount of the expenditure estimated by the landlord as likely to be incurred by him on and in connection with the proposed works;
(d) invite the making, in writing, of observations in relation to the proposed works or the landlord's estimated expenditure;
(e) specify–
(i) the address to which such observations may be sent;
(ii) that they must be delivered within the relevant period; and
(iii) the date on which the relevant period ends.

2. Inspection of description of proposed works

(1) Where a notice under paragraph 1 specifies a place and hours for inspection–

(a) the place and hours so specified must be reasonable; and
(b) a description of the proposed works must be available for inspection, free of charge, at that place and during those hours.

(2) If facilities to enable copies to be taken are not made available at the times at which the description may be inspected, the landlord shall provide to any tenant, on request and free of charge, a copy of the description.

3. Duty to have regard to observations in relation to proposed works and estimated expenditure

Where, within the relevant period, observations are made in relation to the proposed works or the landlord's estimated expenditure by any tenant or the recognised tenants' association, the landlord shall have regard to those observations.

4. Landlord's response to observations

Where the landlord receives observations to which (in accordance with paragraph 3) he is required to have regard, he shall, within 21 days of their receipt, by notice in writing to the person by whom the observations were made, state his response to the observations.

The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013

Rule 13 - Orders for costs, reimbursement of fees

(1) The Tribunal may make an order in respect of costs only—

.....
(a) under section 29(4) of the 2007 Act (wasted costs) and the costs incurred
(b) if a person has acted unreasonably in bringing, defending or conducting proceedings in—
.....
(iii) a leasehold case; or

(c) in a land registration case.

(2) The Tribunal may make an order requiring a party to reimburse to any other party the whole or part of the amount of any fee paid by the other party which has not been remitted by the Lord Chancellor.