



**FIRST-TIER TRIBUNAL  
PROPERTY CHAMBER  
(RESIDENTIAL PROPERTY)**

**Case Reference** : **LON/00AE/LSC/2014/0176**

**Property** : **Danes Court and Empire Court,  
North End Road, Wembley,  
Middlesex HA9 0AJ**

**Applicant** : **LKB Investments Limited**

**Representative** : **Mr Carl Fain (Counsel)  
The Beavis Partnership LLP  
(Solicitors)**

**Respondent** : **The lessees of Danes Court and  
Empire Court**

**Representative** : **Mr A Shah, Miss S Shah and Mr R  
Davis in person**

**Type of Application** : **For the determination of the  
reasonableness of and the liability  
to pay a service charge**

**Tribunal Members** : **Mr J P Donegan (Tribunal Judge)  
Mr K M Cartwright JP FRICS  
(Professional Member)  
Mr O N Miller (Lay Member)**

**Date and venue of  
Hearing** : **23 June 2014  
10 Alfred Place, London WC1E 7LR**

**Date of Decision** : **13 August 2014**

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**DECISION**

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## **Decisions of the tribunal**

- (1) The tribunal makes the determination set out at paragraph 51 of this decision.
- (2) The tribunal does not make an order under section 20C of the Landlord and Tenant Act 1985 (“the 1985 Act”).

## **The application**

1. The Applicant seeks a determination pursuant to s.27A of the 1985 Act, as to the amount of service charges payable by the Respondents in relation to the proposed replacement of pavements and roadways (“the Works”) at Danes Court and Empire Court, North End Road, Wembley. The Applicant plans to undertake the Works during the current year, ending 31 December 2014.
2. The application was received by the tribunal on 31 March 2014. Directions were given at an oral case management hearing on 22 April 2014. These included provision for the Respondents to appoint a maximum of two lead Respondents, to be responsible for all issues on behalf of the Respondents. The directions also provided that the parties should complete a schedule, identifying the service charges in dispute and setting out their respective arguments on the disputed charges.
3. Following the case management hearing, Mr Davis, the leaseholder of 45 Danes Court submitted a request to the tribunal to represent himself. Further directions were issued on 30 May 2014, which included provision for Mr Davis to represent himself.
4. The full hearing of the application took place on Monday 23 June 2014
5. The relevant legal provisions are set out in the Appendix to this decision.

## **The hearing**

6. The Applicant was represented by Mr Fain at the hearing. Mr Shah and Miss Shah, who had been appointed as lead Respondents in accordance with the original directions, appeared in person. They represented all Respondents, with the exception of Mr Davis. Mr Davis represented himself.

7. The tribunal was supplied with two hearing bundles; one prepared by the Applicant's solicitors and a separate bundle prepared by the lead Respondents. The bundles contained copies of the relevant documents.
8. Shortly before the hearing the tribunal were supplied with copies of a helpful skeleton argument from Mr Fain and a supplementary report from the Applicant's expert, Mr Walker, dated 20 June 2014. These documents had been submitted to the tribunal office, by fax, on Friday 20 June 2014. The tribunal were also supplied with various copy letters that Mr Davis had sent to the tribunal office; the most recent of which were dated 20 and 21 June 2014.
9. The hearing was scheduled to start at 10.00am. In his letter of 20 June 2014 Mr Davis stated that he would be arriving late for the hearing, as he had to travel from another part of the country. However the letter did not state when he would arrive. The start of the hearing was delayed by 15 minutes, to accommodate Mr Davis. However he had not arrived by 10.15am and the tribunal decided to commence the hearing without him. Mr Davis joined the hearing at approximately 11am. He informed the tribunal that he did not have his set of hearing bundles but was willing to proceed without them. The bundles had been delivered to his home address, which is local to the tribunal premises and Mr Davis collected these during the lunch break.

### **The background**

10. Danes Court and Empire Court form a substantial estate at North End Road, Wembey, Middlesex ("the Estate"). There are 4 blocks of flats at Danes Court and 8 blocks at Empire Court. In total there are approximately 320 flats at the Estate.
11. The Applicant is the freeholder of the Estate. The Respondents are leaseholders of various flats at the Estate.
12. The Applicant wishes to undertake the Works this year. In accordance with section 20 of the 1985 Act and Part 2 of the Service Charges (Consultation etc) (England) Regulations 2003, a Notice of Intention was sent to the leaseholders on 09 January 2013. The paragraph (b) statement was sent to the leaseholders leaseholders on 07 August 2013.
13. Only those leaseholders that responded to the section 20 consultation have been named as Respondents to the application. A schedule, listing the leaseholders of 16 of the flats as Respondents, was attached to the application.
14. Various photographs of the Estate were provided in the hearing bundles. Neither party requested an inspection and the tribunal did not consider that one was necessary.

15. The Respondents each hold a long lease of their flats, which require the landlord to provide services and the tenant to contribute towards their costs by way of a variable service charge. The specific provisions of the lease and will be referred to below, where appropriate.

### The leases

16. In its statement of case, the Applicant advised that the leases at Dane Court and Empire Court are materially the same. The Applicant's bundle contained two sample leases, namely:
- a) An underlease of Flat 187 Empire Court, dated 10 July 1987 and made between the Applicant and Martin Kieran Quaid and Caroline Mary McHugh ("a Type A Lease); and
  - b) A lease of 4 Empire Court, dated 19 January 2012 and made between the Applicant and Peter Brammer ("a Type B Lease").
17. The definitions in the Type A and B leases are the same and are to be found at clause 1. They include:
- (vi) *"The Building" means the land shown edged with a black line on the site plan annexed hereto together with all buildings and Landlords fixtures from time to time erected thereon or attached thereto which said buildings are known as Danes Court and Empire Court*
  - (vi) *"The Gardens" means the gardens from time to time forming part of the Building and falling within the black line drawn on the site plan*
  - (xi) *"The Maintenance Contribution" means a sum equal to the percentage proportion appropriate to the Flat (as specified in Part I of the Fifth Schedule subject to the provisions of that Schedule) of the Aggregate Maintenance Provisions for each Maintenance Year (as computed in accordance with the provisions of Part III of the Fifth Schedule) such Maintenance Contribution having been calculated having regard to the location of the Flat the accommodation contained therein and the services the Flat is entitled to receive in relation to the other flats in the Building which contribute towards the Aggregate Maintenance Provision*
18. The site plan shows the entire Estate as falling within the black line. It follows that the definition of the Building in the leases covers all of the Estate, including the roadways and pavements that form the subject of this application.

19. In both leases the Maintenance Year runs from 01 January to 31 December and Maintenance Contribution is to be paid by two equal instalments, on 01 January and 01 July.
20. Paragraph 2 of part III of the fifth schedule to the leases sets out the detailed provisions for computing the Aggregate Maintenance Provision, which is to include:
  - (a) *The expenditure estimated as likely to be incurred in the Maintenance Year by the Lessor for the purposes mentioned in the Sixth Schedule together with*
  - (b) *an appropriate amount as reserve for or towards those of the matter mentioned in the Sixth Schedule as are likely to give rise to expenditure after such Maintenance Year being matters which are likely to arise either only once during the then unexpired term of this Lease or at intervals of more than one year during such unexpired term including (without prejudice to the generality of the foregoing) such matters as the painting of the common parts and the exterior of Building the repair of the structure thereof the repair of drains and the overhaul renewal and modernisation of any plant or machinery (the said amount to be computed in such manner as to ensure as far as is reasonably foreseeable that the Aggregate Maintenance Provision shall not unduly fluctuate from year)*
21. By clause 6 of the Type A Lease and clause 7 of the Type B Lease, the Applicant is obliged to observe and perform the obligations set out the seventh schedule. Those obligations include:
  2. *As often as may in the opinion of the Surveyor be necessary to wash and paint in appropriate colours and in a workmanlike manner or otherwise treat in an appropriate manner all the outside wood iron cement and stucco work of the Building usually painted or treated as the case may be AND ALSO at all times during the said term to keep the interior and exterior walls and ceilings and floors of the Building (but excluding such parts thereof as are included in the Flat by virtue of the definition contained in the First Schedule and also the corresponding parts of all other flats in the Building) and the whole of the structure roof balconies foundations and main drains of the Building in good repair and condition AND ALSO properly to cultivate and preserve in good order and condition the Garden and Grounds (if any) of the Building and the window boxes on the common balconies (if any) and to keep the entrance drive forecourt and paths thereof properly weeded and surfaced*

22. The sixth schedule also includes the following obligation, at paragraph 20 of the Type A Lease and paragraph 19 of the Type B Lease:

*To carry out all repairs to any other part of the Building for which the Lessor may be liable and to provide and supply such other services for the benefit of the Tenant and the other tenants of flats in the Building and to carry out such other repairs and such improvements works and additions and to defray such other costs (including without limitation the installation of new facilities and/or the modernisation or replacement of plant and machinery) as may from time to time be required by any local or public authority and/or as the Lessor shall consider necessary to maintain the Building as a block of first class residential flats or otherwise desirable in the general interests of the Tenants and in connection therewith to make such reserves as shall be necessary to meet or defray the cost of the future maintenance of such work or services as well as the cost of any services or supplies thereby required to be provided at the Building or in the Common Parts thereof including without prejudice to the generality of the foregoing all electrical gas or other supplies*

### **The issues**

23. The sole issue to be determined by the tribunal is whether the cost of the Works will be reasonably incurred. The Applicant is holding a substantial sum in the reserve fund, which will cover the bulk (if not all) of the cost of the Works.
24. The Applicant wish to instruct MBS Contracting Services I("MBS"), who provided the cheapest tender, to undertake the Works. The total anticipated cost is £547,347.03, which is broken down as follows:

MBS charges	£407,253.00
Surveyor's fees @ 9%	£36,652.77
CDM fees @ 1%	£4,072.53
Managing agent's fees @ 2%	£8,145.06
VAT	£91,224.67.

The Applicant seeks a determination that the sum of £547,347.03 will be reasonably incurred and payable as a service charge.

25. Having heard evidence and submissions from the parties and considered all of the documents provided, the tribunal has made determinations on the various issues as follows.

### **The Works - £547,347.03**

#### **The Applicant's case**

26. Mr Fain's starting point is that the Works fall within the Applicant's obligations in the leases. These obligations extend to repairs and improvements and there is a contractual requirement to "*maintain the Building as a block of first class residential flats*".
27. The Applicant relies upon an expert report from Mr Andrew Walker MRICS dated 19 May 2014 and a supplementary report dated 20 June 2014. The tribunal gave permission for Mr Walker to give expert evidence at the hearing, in a letter to the Applicant's solicitors dated 10 June 2014.
28. Mr Walker gave oral evidence at the hearing and verified the contents of his two reports. The supplementary report commented upon issues raised in a letter and accompanying sketch plans and photographs from a Mr Clive Morley of Anderson Wilde & Harris Chartered Surveyors, dated 14 January 2014, which was relied upon by the Respondents. Copies of this letter and the accompanying documents were first served on the Applicant's solicitors on 17 June 2014. Given the late service of these documents, it was entirely appropriate that Mr Walker be given an opportunity to respond to Mr Morley's evidence.
29. It is unnecessary for the tribunal to recite the contents of Mr Walker's reports in great detail, as the reports are there for the parties to see. His evidence can be summarised as follows:
- a) Mr Walker is a director of EBW Consultancy Ltd ("EBW") and is a Chartered Building Surveyor. EBW were instructed by the Applicant's managing agents, Rendall & Rittner Limited ("RRL") to prepare a survey on the condition of the pavements and roadways at the Estate, with a view to bringing these areas up to a reasonable standard.
  - b) Mr Walker approached this brief with an open mind. His survey revealed that the overall condition of the tarmacadam was poor, with evidence of numerous patch repairs. In several areas, the wearing course, binder course and sub-bases have broken down. Many of the kerbs are uneven or broken as are, to a lesser degree, the edgings to paths. In some cases the road gullies and drainage channels are uneven or damaged and some of the manhole covers

are similarly defective. There are also some areas where the falls or gradients are insufficient, resulting in ponding of rain water.

- c) Having regard to the various defects identified in his survey, Mr Walker concluded that renewing the pavements and roadways on the entire Estate was the best long term solution and was preferable to patch repairs. The Works cover the resurfacing of the entire estate and various ancillary works to the kerbs, edgings, gullies, drainage channels and manhole covers. The Works also include the creation of new parking spaces and the erection of parking posts and a crash barrier.
- d) Mr Walker produced a specification for the Works in December 2012 and subsequently obtained tenders and then produced a tender analysis report in August 2013.
- e) Mr Walker has not obtained costings for patch repairs to the roadways and pavements but considers that resurfacing the entire estate will result in economies of scale. As a comparison he points out the cost of patch repairs consisting of new wearing and binder courses, for an area 10m<sup>2</sup>, would be £75/m<sup>2</sup> against the rate obtained for the entire Estate of £52/m<sup>2</sup>. Mr Walker had based the higher figure from the cost of previous patch repairs at the Estate. The lower figure was taken from his tender analysis report.
- f) Mr Walker also considers that resurfacing the entire estate has the benefit of removing the need for more expensive and disruptive patch repairs in the future and provides more cost certainty when setting future maintenance budgets.
- g) Mr Walker acknowledges that there are areas of tarmacadam on the Estate that have some serviceable life. However these areas are beginning to show signs of failure, which will result in the need for patch repairs or resurfacing in time. Further the need to address uneven or damaged kerbs and edgings, the condition of the gullies, drainage channels and manhole covers and the provision of dropped kerbs at crossings are significant. Works to these areas will involve breaking-out the surrounding surfaces, which would necessitate further patch repairs. This can be avoided if the entire Estate is resurfaces. Further this can also address the problem of incorrect falls and gradients.
- h) Mr Walker considers that the Works will enhance the visual appearance of the Estate. It will also result in a uniform condition of the pavements and roadways.
- i) In cross-examination, Mr Walker accepted that there was the possibility of utility companies digging up the roadways in future



and that the consequential patch repairs would undermine the uniform appearance of these areas. However he pointed out that modern tarmacadam has better bonding qualities, meaning that if the Works are undertaken then future patch repairs would look less intrusive.

- j) Mr Walker expects the new surfaces of the pavements and roadways to last 25 years. The specification for the Works provides for a 12-month defects liability period. However the proposed contractors, MBS, would not be providing any form guarantee. Mr Walker felt unable to comment upon how long patch repairs might last. However he made the point that the degradation of the pavement and road surfaces will accelerate, as they get older.
- k) In relation to the usage of the roadways, Mr Walker felt that there was no one block that had a higher number of deliveries or removals. The main vehicular entrance to the Estate is via Danes Court and the surface of the car park is particularly poor.
- l) Mr Walker gave details of the tendering process in his reports and oral evidence. The specification was issued to four contractors, Lambourn Contracts, MBS, Ross Paving and SpadeOak. Only two full tenders were received. The final figures, after revisions were:

MBS	£407,253.00
Lambourn Contracts	£411,626.60

Both tender figures were exclusive of VAT and professional fees. Ross Paving did not submit a tender, due to lack of estimating resources. Spadeoak were unable to undertake all the works but gave a tender solely for the tarmacadam resurfacing of the road surfaces and car parks in the sum of £72,306.

- m) The corresponding figures for the tarmacadam works in the two full tenders were:

MBS	£90,592.50
Lambourn Contracts	£56,000.00

In both cases the tarmacadam works will be undertaken by specialist sub-contractors and one of the parties was intending to use Spadeoak as their sub-contractor.

- n) Appended to the tender analysis report was a spreadsheet, comparing the tenders on an item by item basis. Mr Walker made

the point that direct comparison can be difficult, as contractors often spread similar costs between items or include various similar costs together in a single figure.

- o) It was Mr Walker who nominated MBS to provide a tender. Lambourn were nominated by the Applicant, via RRL. Mr Walker recommended that MBS be instructed to undertake the Works, as they had provided the lowest overall tender. Further EBW had worked with them on previous major works at the Estate and had been satisfied with the level of their workmanship and their on-site and off-site management.
- p) Following production of the tender analysis report and completion of the section 20 consultation, Mr Walker received a quotation from Dawkins Construction ("Dawkins"). This was in the form of a single page email dated 09 October 2013, for the sum of £398,457 plus VAT. Dawkins had been asked to supply the quote by one of the Respondents, Mr Ahmed of 35 Danes Court. Mr Walker asked Dawkins for a formal priced tender based on the specification. They subsequently produced a breakdown of their costs but no priced specification or completed form of tender.
- q) Mr Walker added the Dawkins quote and breakdown to the tender analysis spreadsheet for comparison purposes. The breakdown did not include any contingency sum, as required by the specification. Adjusting the quote for this omission resulted in a final figure of £418,457 (plus VAT), which was higher than the revised MBS tender. Mr Walker also made the point that the Dawkins breakdown did not show any allowance for preliminaries, although there may have been a suitable allowance spread throughout their various costs.
- r) In cross-examination Mr Walker was asked why he had not selected Spadeoak for the tarmacadam works and one of the other contractors for the remaining works, as this should result in a lower overall cost. He explained that it was difficult to have an arm's length separate contract for part of the Works, as this would be difficult to manage. A main contractor is needed to comply with CDM Regulations and having two main contractors would be unworkable.
- s) Mr Walker was also cross-examined as to his reasons for selecting MBS. He explained that his decision was cost rather than time driven. The tender from Lambourn gave a shorter duration for the Works (18 weeks) than that from MBS (22 weeks) but Mr Walker did not feel this was significant.
- t) Mr Walker relied solely on the competitive tenders, following revisions, when selecting MBS. He had not looked at cost books to

assess the figures or sought advice from a quantity surveyor but had used his own knowledge and experience to assess the figures. Mr Walker stated that involving a quantity surveyor would have been appropriate, had he decided on patch repairs rather than complete renewal.

- u) The Works involve the removal of the existing cycle store at the Estate. In cross-examination, Mr Walker explained that the decision to remove the store had been taken in consultation with the managing agents. The store was barely used and the plan is to create a more usable cycle area elsewhere on the Estate.
  - v) Mr Walker was unsure of the total fees paid to EBW to date, in respect of the Works. EBW's total fees will be 10% of the cost of the Works, representing 9% for surveyor's fees and 1% for CDM fees.
  - w) In response to a question from Mr Davis, Mr Walker expressed the view that the 12-month defects liability period was sufficient and the nature of the Works meant that a guarantee would not be available.
  - x) Mr Davis also questioned Mr Walker on the tender analysis. Mr Walker explained that he had not prepared or obtained a budget for the Works, before seeking the tenders. Once the tenders came in he spoke to the contractors about apparent disparities, to check that they were happy with their figures. Mr Walker was satisfied with the revised figures from both contractors. The difference between their total figures was approximately £4,000 plus VAT, which showed consistency.
  - y) Mr Walker rejected Mr Davis' suggestion that he knew that Ross Paving and Spadeoak would not provide tenders. He met with both contractors on site, who said they wanted to tender for the Works. He was at a loss to understand their failure to provide proper tenders.
  - z) Mr Walker accepted that the tenders were now quite old, having been obtained in the summer of last year. He has informed the contractors that a final decision on the Works is pending and will check if their tenders still hold good, if appropriate, once the tribunal issues its decision.
30. The Applicant also relied on oral evidence from Mr Timothy Josh of RRL, who is the property manager for the Estate. He has been involved in the management of the Estate since starting work for RRL, approximately 8 years ago.
31. Mr Josh provided brief details of the major works that had been undertaken at the Estate, during his period of management. Initially

work was undertaken to the exterior of the blocks. This was completed approximately 3 ½ years ago. Works were then undertaken to the interior of the blocks. It has always been the Applicant's intention to upgrade the pavements and roadways, as the final phase of the major works. This has become more pressing, as the condition of the roads has deteriorated due to the bad winters over the last few years.

32. RRL have collected substantial reserve contributions from the leaseholders to fund all the major works. These contributions have reduced as the works progressed. Originally the contributions were £650,000 per annum but that figure has now come down to £100,000 per annum. The original budget for the Works was £450,000 but this figure was agreed before the recent deterioration in the condition of the roads.
33. Mr Josh explained that the instructions given to Mr Walker/EBW were to devise a plan for the pavements and roadways that would be in the long term interests of the Estate. RRL had accepted Mr Walker's recommendations, as this would provide a long term solution unlike patch repairs. There have been a number of patch repairs to the roadways in the past, which have been paid for from the service charge fund. No such repairs have been undertaken during the last 12 months, given the plan to undertake the Works.
34. Mr Josh stated that none of the roadways at the Estate had been dug up by utility companies during the last 8 years. However he cannot say when or if the roads will need to be dug up in the future.
35. In cross-examination, Mr Josh confirmed that the Applicant had asked him to nominate Lambourn as a potential contractor.
36. Mr Davis queried how the reserve fund contribution of £100,000 per annum had been calculated. He suggested that the correct approach was to look at the capital cost of cyclical repairs required at the Estate, allowing for inflation and having regard to the lifespan of the repairs. Mr Josh confirmed that this exercise had been undertaken when calculating the contributions.
37. The Applicant also relied upon letters from leaseholders in favour of the Works. There were also letters from leaseholders opposing the Works, including letters sent in response to the consultation notices. Copies of the various letters were included in the bundles but they were of little evidential value, as the leaseholders concerned did not give oral evidence at the hearing or provide witness statements.

## **The Respondents' case**

38. The Respondents did not dispute that the Works fell within the repairing obligations and service charge provisions in the leases. Further Mr Shah stated that there was no criticism of the section 20 consultation. Rather the Respondents dispute the scope of the Works. They accept that some repairs to the pavements and roadways are required but argue that the Works go too far.
39. The Respondent's case was set out in their statement of case. Again there is no need to recite this entire document, which is there for the parties to see.
40. The Respondents also rely upon the letter from Mr Morley dated 14 January 2014. Mr Morley is a Chartered Builder and Chartered Building Surveyor. His letter refers to accompanying sketch plans and photographs. On the plans, Mr Morley had coloured the areas where he recommends resurfacing in orange and the areas that do not require wholesale resurfacing in green. Based on these plans, roughly half of the pavements and roadways require resurfacing.
41. The photographs that accompanied Mr Morley's letter show the condition of the roadways, which varies across the Estate. A number of cracks, depressions and potholes are visible along with signs of patch repairs. There are also photographs showing pooling of rainwater in one of the car parks.
42. There was no detailed report from Mr Morley and he did not attend the hearing to give oral evidence. Miss Shah explained that the cost of formally instructing Mr Morley was prohibitive for the Respondents.
43. The Respondents acknowledge that resurfacing all of the pavements and roadways would result in some economies of scale but believe that there will be a greater overall cost to their solution, which is to replace some roadways and patch repair others. They point out that resurfacing the areas coloured green in Mr Morley's plans is unnecessary and will give rise to unnecessary ancillary works and costs, such as kerbs, manhole covers, bollards and road markings etcetera.
44. The Respondents also point out that complete replacement of the road is unnecessary from a health and safety perspective. They refer to a Health and Safety Risk Assessment of the Estate dated 16 April 2014, a copy of which was in the Applicant's bundle, to demonstrate that patch repairs are adequate to address the risk of slips, trips and falls from potholes.
45. The Respondents suggest that achieving a uniform appearance for the pavements and roadways is unsustainable, as it is inevitable that areas

will have to be dug when new utilities are laid. Further the Estate does not have a uniform appearance generally, as there is a mixture of different window types.

46. The Respondents also point out that Mr Walker did not investigate the cost of patch repairs, as an alternative to the Works. Further the Respondents contend that tendering process was inadequate, as Mr Walker did not check the contractors' figures in cost books or obtain advice from a quantity surveyor. Further they suggest that the fact that there were only two complete tenders suggests that there was little "competitive tension". The Respondents consider that further tenders should have been sought from alternative contractors, given that Ross Paving did not respond and SpadeOak only provided a partial tender.
47. The Respondents suggest that cost of the Works will result in very high service charges at the Estate, which may impact on flat values. However this overlooks the fact that the bulk, if not all, of the costs will be met from the reserve fund. This means that any top up payments from the leaseholders should be modest.
48. The Respondent's statement of case included a table setting out various items from the tender analysis report that the Respondents consider to be unreasonable and their grounds of objection. The total cost of these items was £288,353. However the Respondents did not put forward any alternative figures or quotes. Further they did not produce any independent evidence to support their objections.
49. Mr Davis referred the tribunal to the Upper Tribunal's decision in **Garside and Anson v RFYC Limited and Maunder Taylor [2011] UKUT 367 (LC)**. He suggested that the tribunal should take into account the financial impact on the leaseholders when deciding whether the cost of the Works will be reasonably incurred. The service charges at the Estate in recent years have been extremely high due to the major works and the level of the reserve contributions. Sample service charge demands were included in the lead Respondents' bundle, which showed advance charges and reserve fund contributions totalling between £1,000 and 1,800 every six months, for the flats in question.
50. The Respondents also rely upon three petitions signed by various residents at the Estate, opposing the Works. Copies of the petitions were to be found in the lead Respondents' bundle. Within the petitions there was a column headed "Owner (O)/Tenant (T)". A majority of the signatories have inserted the letter "T" in this column, suggesting that they are subtenants rather than long leaseholders. It is the long leaseholders, rather than the subtenants, who will be paying for the Works via their service charges. Further the petitions were of little evidential value, as the signatories did not give oral evidence at the hearing or produce witness statements.

### **The tribunal's decision**

51. The tribunal determines that the anticipated cost of the Works, in the total sum of £547,347.03 including professional fees and VAT will be reasonably incurred and payable as a service charge. This determination is subject to the Works being undertaken in accordance with the specification produced by Mr Walker and to a reasonable standard. The Respondents will each be liable to contribute to the cost of the Works, as a service charge, in accordance with the proportions specified in their respective leases.

### **Reasons for the tribunal's decision**

52. The tribunal reasons, which largely follow the points made by Mr Fain in his skeleton argument and closing submissions, can be summarised as follows:
- a) The Works fall within the Applicant's repairing obligations in the leases and the cost of the Works is recoverable from the leaseholders, as a service charge;
  - b) The Respondents accept that some repairs are needed to the pavements and roadways and based upon Mr Morley's plans, suggest that 50% of these areas need resurfacing;
  - c) Mr Morley's evidence is of limited value as it was served late, there was no formal report and he did not attend the hearing to give oral evidence or be cross-examined;
  - d) Mr Morley has not expressed any opinion on the respective merits of patch repairs compared with complete resurfacing and had not commented on the specification or tenders;
  - e) The evidence of Mr Walker is preferred to that of Mr Morley, as he produced detailed reports and gave oral evidence at the hearing;
  - f) Mr Walker was questioned at length during the hearing and was clear in this evidence that the Works represented the best long term solution for the pavements and roadways on the Estate and is preferable to patch repairs;
  - g) The Respondents did not produce any expert evidence to try and challenge or undermine Mr Walker's evidence;
  - h) The tribunal found Mr Walker to be an honest and reliable witness and accepted all of his evidence and recommendations;

- i) The Works will provide some economies of scale and remove the need to undertake more expensive and disruptive patch repairs in the future;
- j) The Works will also provide more certainty when setting future maintenance budgets;
- k) The tendering process was reasonable, in that Mr Walker had sought tenders from four different contractors and had taken account of the quote from Dawkins produced after the tendering exercise had been completed;
- l) Although not all of the contractors had given tenders, the figures from Dawkins, Lambourn and MBS were consistent, which shows that the tender from MBS was competitive and would be reasonably incurred;
- m) There was no need for Mr Walker to seek additional tenders and it is notable that the Respondents did not seek to challenge the section 20 consultation;
- n) The Respondents have not produced any quotes or evidence to demonstrate that patch repairs would be cheaper than the Works or that the proposed cost of the Works was unreasonable;
- o) The table of objections in the Respondents' statement of case was not supported by any independent evidence and they have not put forward any alternative figures, as to what sums they consider to be reasonable for the disputed items;
- p) There has been considerable expenditure on major works to the exterior and interior of the blocks of flats in recent years and it is reasonable to replace all of the pavements and roadways to bring the entire Estate up to a reasonable standard; and
- q) The Works will not result in the service charges becoming extremely high, as the majority of the costs will be paid from the reserve fund. Further the decision in *Garside* does not mean that service charges are only payable if they are affordable. At paragraph 20 of her decision, HHJ Robinson stated:

*"It is important to make it clear that liability to pay service charges cannot be avoided simply on the grounds of hardship, even if extreme. If repair work is reasonably required at a particular time, carried out at a reasonable cost and to a reasonable standard and the cost of it is recoverable pursuant to the relevant lease then the lessee cannot escape liability to pay by pleading poverty"*



The Works are reasonably required and the tribunal is satisfied that the proposed costs are reasonable and recoverable under the leases.

53. The Works are yet to be undertaken and this determination does not preclude the Respondents from challenging the actual costs if they are dissatisfied with the quality of the Works, once completed.

#### **Application under s.20C and refund of fees**

54. At the end of the hearing, the Respondents applied for an order under section 20C of the 1985 Act, to prevent the Applicant from seeking to pass its costs of these proceedings through the service charge account for the Estate. Ms Shah pointed out that the Respondents had tried to resolve the dispute with Mr Josh before these proceedings were instituted. She also pointed out that there was no advance warning of the application to the tribunal and suggested that the proceeding were premature. Ms Shah argued that the Applicant should have tried to resolve the issues by informal consultation with the leaseholders, rather than formal proceedings. Mr Davis also argued that the proceedings were unnecessary and suggested that there was no need for the Applicant to seek a determination from the tribunal before undertaking the Works.
55. In response, Mr Fain contended that the Applicant had acted cautiously and sensibly in making a prospective application to the tribunal. He suggested that tribunal proceedings would still have been necessary, had the Applicant simply pressed on with the Works. Inevitably the Respondents would have challenged the use of the reserve fund to meet the cost of the Work, meaning that a tribunal determination would have been required in any event. Mr Fain also pointed out that the Respondents had chosen to contest the application rather than agreeing to it. He argued that the Applicant should not be prevented from passing its costs the service charge account, if the application was successful.
56. Having heard the submissions from the parties and taking into account the determination above, the tribunal determines that it is NOT just and equitable to make an order under section 20C of the 1985 Act. The section 27a application has been wholly successful. Given the level of the anticipated cost of the Works and the opposition from some of the leaseholders, the Applicant was entirely justified in making a prospective application to the tribunal. It follows that the Applicant should not be deprived of the opportunity to recover its costs from the service charge account and therefore the application for a section 20c order is refused.

57. Mr Fain informed the tribunal that the Applicant was not seeking an order for the refund of the fees that it had paid in respect of the application and hearing<sup>1</sup>.

**Name:** J P Donegan

**Date:** 13 August 2014

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<sup>1</sup> The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 SI 2013 No 1169

## **Appendix of relevant legislation**

### **Landlord and Tenant Act 1985 (as amended)**

#### **Section 18**

- (1) In the following provisions of this Act "service charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent -
  - (a) which is payable, directly or indirectly, for services, repairs, maintenance, improvements or insurance or the landlord's costs of management, and
  - (b) the whole or part of which varies or may vary according to the relevant costs.
- (2) The relevant costs are the costs or estimated costs incurred or to be incurred by or on behalf of the landlord, or a superior landlord, in connection with the matters for which the service charge is payable.
- (3) For this purpose -
  - (a) "costs" includes overheads, and
  - (b) costs are relevant costs in relation to a service charge whether they are incurred, or to be incurred, in the period for which the service charge is payable or in an earlier or later period.

#### **Section 19**

- (1) Relevant costs shall be taken into account in determining the amount of a service charge payable for a period -
  - (a) only to the extent that they are reasonably incurred, and
  - (b) where they are incurred on the provisions of services or the carrying out of works, only if the services or works are of a reasonable standard;and the amount payable shall be limited accordingly.
- (2) Where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable, and after the relevant costs have been incurred any necessary adjustment shall be made by repayment, reduction or subsequent charges or otherwise.

#### **Section 27A**

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

- (d) the date at or by which it is payable, and
  - (e) the manner in which it is payable.
- (2) Subsection (1) applies whether or not any payment has been made.
  - (3) An application may also be made to the appropriate tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs and, if it would, as to -
    - (a) the person by whom it would be payable,
    - (b) the person to whom it would be payable,
    - (c) the amount which would be payable,
    - (d) the date at or by which it would be payable, and
    - (e) the manner in which it would be payable.
  - (4) No application under subsection (1) or (3) may be made in respect of a matter which -
    - (a) has been agreed or admitted by the tenant,
    - (b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,
    - (c) has been the subject of determination by a court, or
    - (d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.
  - (5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.

## **Section 20**

- (1) Where this section applies to any qualifying works or qualifying long term agreement, the relevant contributions of tenants are limited in accordance with subsection (6) or (7) (or both) unless the consultation requirements have been either—
  - (a) complied with in relation to the works or agreement, or
  - (b) dispensed with in relation to the works or agreement by (or on appeal from) the appropriate tribunal .
- (2) In this section “relevant contribution”, in relation to a tenant and any works or agreement, is the amount which he may be required under the terms of his lease to contribute (by the payment of service charges) to relevant costs incurred on carrying out the works or under the agreement.
- (3) This section applies to qualifying works if relevant costs incurred on carrying out the works exceed an appropriate amount.
- (4) The Secretary of State may by regulations provide that this section applies to a qualifying long term agreement—

- (a) if relevant costs incurred under the agreement exceed an appropriate amount, or
  - (b) if relevant costs incurred under the agreement during a period prescribed by the regulations exceed an appropriate amount.
- (5) An appropriate amount is an amount set by regulations made by the Secretary of State; and the regulations may make provision for either or both of the following to be an appropriate amount—
- (a) an amount prescribed by, or determined in accordance with, the regulations, and
  - (b) an amount which results in the relevant contribution of any one or more tenants being an amount prescribed by, or determined in accordance with, the regulations.
- (6) Where an appropriate amount is set by virtue of paragraph (a) of subsection (5), the amount of the relevant costs incurred on carrying out the works or under the agreement which may be taken into account in determining the relevant contributions of tenants is limited to the appropriate amount.
- (7) Where an appropriate amount is set by virtue of paragraph (b) of that subsection, the amount of the relevant contribution of the tenant, or each of the tenants, whose relevant contribution would otherwise exceed the amount prescribed by, or determined in accordance with, the regulations is limited to the amount so prescribed or determined.]

### **Section 20C**

- (1) A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a court, residential property tribunal or the Upper Tribunal, or in connection with arbitration proceedings, are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application.
- (2) The application shall be made—
- (a) in the case of court proceedings, to the court before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to a county court;
  - (aa) in the case of proceedings before a residential property tribunal, to that tribunal;
  - (b) in the case of proceedings before a residential property tribunal, to the tribunal before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to any residential property tribunal;

- (c) in the case of proceedings before the Upper Tribunal, to the tribunal;
  - (d) in the case of arbitration proceedings, to the arbitral tribunal or, if the application is made after the proceedings are concluded, to a county court.
- (3) The court or tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances.