9820

FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/OOBE/LSC/2012/0768** **LON/OOBE/LSC/2012/0858**
Property	:	**Various properties on Consort Estate, London SE15 3PW and 35 Scylla Road, London SE15 3NY**
Applicants	:	**Various leaseholders on the Consort Estate as listed in the attached schedule, including Lynn Lucy Selwood**
Representatives	:	**Mrs Deudney, one of the leaseholders who acts as a representative for those leaseholders together with Miss Selwood who also represents herself**
Respondent	:	**London Borough of Southwark**
Representative	:	**Miss E Sorbjan, Litigation Officer with London Borough of Southwark**
Type of Application	:	**27A Landlord and Tenant Act 1985**
Tribunal Members	:	**Mr A A Dutton (Judge)** **Mrs S Redmond BSc MRICS** **Mrs J Hawkins**
Date and venue of Hearing	:	**17th – 19th June and 6th August 2013**
Date of Decision	:	**18th September 2013**

DECISION

DECISON

The Tribunal makes the determination set out in the Findings section of this document.

The Tribunal makes an order pursuant of Section 20C of the Landlord and Tenant Act 1985 considering it just and equitable to do so on the grounds set out below.

The Tribunal declines to refund the fees paid by the Applicants in this matter for the reasons set out below.

The Tribunal determines that Miss Selwood's counter claim should be remitted back to the County Court for determination together with any issues regarding the costs of that action and interest for the reasons set out below.

BACKGROUND

1. On 16th November 2012 a group of leaseholders in the London Borough of Southwark, living on the Consort Estate, brought an application under Section 27A of the Landlord and Tenant Act (the Act) seeking to challenge certain service charge items from the year 2009/10 onwards and future major works charges.

2. On 14th December 2012 the Lambeth County Court, in claim number 2YM28210, transferred the dispute between the London Borough of Southwark (the Council) and Lynn Lucy Selwood to the Leasehold Valuation Tribunal for matters in connection with those proceedings to be determined by us. Those proceedings mirrored, to a large degree, the issues raised by the various leaseholders in their application started in November 2012 under case reference LON/OOBE/LSC/2012/0768. The claim against Miss Selwood was allocated the reference LON/OOBE/LSC/2012/0856 and it was ordered that the two cases should be heard together although would remain separate. The main additional issue in Miss Selwood's case was a counter claim seeking damages in respect of issues arising from a burglary at her flat. The counter claim appeared to have a value in the region of £10,000. We will return to the question of the counter claim in due course but as indicated above it was our view, having considered the matter, that the counter claim/set off should be remitted back to the County Court for the reasons we have set out below. It should be noted that in respect of the claim against Miss Selwood the sum in dispute was £2,771.26 relating to service charge payments which were due for the periods 2010/11 through to December of 2013. Interest was also added and costs which are not within the jurisdiction of this tribunal and will need to be considered by the County Court when it considers the counter claim.

INSPECTION

3. Prior to the hearing we inspected the Consort Estate. It consists of two/three storey units made up of eight buildings, the flats being either maisonettes or one-bed flats. At the time of our inspection there was scaffolding in situ on a number of the blocks. We were taken on a guided tour of the estate by Miss

Selwood and others and in the course of that inspection were able to internally inspect Miss Selwood's flat at 35 Scylla Road. We noted that the windows of her flat appeared to be in reasonable order although we were not able to inspect all of them It did appear that they needed redecorating. We noted that there were floor tiles to her balcony which were loose. On this floor of the building the communal rubbish room had no bins in situ and appeared not to be used and in the common parts there were tiles missing to the floor. We then viewed the interior of Mrs Deudney's flat at 79 Mannerton Close where she showed us the new window that had been installed to the balcony and the difficulties she appeared to have with opening it. Reference was also made to problems with mice infestation.

4. We externally inspected the remainder of the estate. We noted that there appeared to be a lack of planting in the small garden areas and that in many places tree roots had uplifted concrete slabs causing uneven areas. Reference was made to skylights but these appeared to be merely ventilation. We inspected some of the bin rooms which were generally in a less than perfect state. But generally the estate appeared to be in a reasonable order. We noted the new communal lighting in the square adjacent to the community centre.

HEARING

5. Before we deal with the evidence we received we should record the fact that the documentation provided to us was poorly prepared. This is no particular criticism of Mrs Deudney and Miss Selwood but the index in the original bundle was really of very little use giving no breakdown between different items of documentation thus not assisting us in trying to find such documents as may be relevant. There was some confusion on the numbering and it seemed to us that an excessive amount of documentation had been produced. Indeed we made it clear to the parties at the start of the hearing the need for them to refer to and take us to specific documents if they were to rely upon same, given that there were over 1,900 pages of papers before us. Complaint is not confined to the preparation of the bundles. We also noted that for example the annual accounts produced by the Council to support the demands made of the tenants were not wholly clear and it is difficult to tell from the headings shown what certain items might be. For example there appears to be no specific heading for pest control. On the second day of the hearing Miss Selwood and Mrs Deudney prepared a further index but with no disrespect to them this was really no further assistance to us.

6. The hearing commenced on the afternoon of 17th June with Mrs Deudney making a brief statement. She told us that she had lived on the estate for five years and that there were some 36 leaseholders involved in the case. She said that there had been no accurate or fair calculations of service charges; that the demands were questionable; that they could not afford representation; that the windows did not relate to the samples provided; that the heating was inefficient and too hot and that they were seeking compensation from the Council for poor performance.

7. Miss Selwood said that there was a general complaint in the manner in which the intention of the works was conveyed to the residents. In a letter sent on 26th January 2012 it indicates that for the period 2012/13 through to the period 2015/16 no works were listed. It does, however, say that the residents had been advised of works for 2011/12. The initial notice, however, relating to these works was sent out on 29th February 2012 and we were lead to believe that this came as something of a surprise to the residents. There was also a general complaint made that the Council had not sent documentation to the tenants' residents association. In fact it was said that this residents association was not recognised within the terms of the Act but that the Council did deal with the steering group. A general observation was made by Miss Selwood that the Council had not taken into account the observations raised by the tenants following the service of the initial notice. A statement from Mr Buchan, who did not attend the hearing, complained about the lack of notice but centred on the new windows to be installed and the problems that were caused with heat build-up and also made criticism of the design and appearance. It was suggested that the Council had, for example, not taken notice of an email which Miss Selwood had sent on 3rd July 2012 but this had been replied to by the Council is some detail on 13th July 2012. We were told that the consultation period ran from February of 2012 to August 2012 and this therefore meant that the Council would have been able to enter most flats to check the central heating issue which was a major concern of the residents, but had not.

8. The Council had a number of witnesses who provided statements and who were to be called to give evidence during the course of the three days. The Applicants called no witnesses other than relying upon statements made by Mrs Deudney and Miss Selwood which we had noted prior to the hearing and additional statements that were brought to our attention during the course of the hearing. No oral evidence was received on behalf of the Applicants, other than those comments made by Miss Selwood and Mrs Duedney. The matter proceeded on the basis that the Council gave such evidence as they considered appropriate in respect of the various items in dispute and Miss Selwood in the main, but also Mrs Deudney, were then able to ask questions of those Council witnesses.

9. The first witness was Miss Carla Blair who is the Capital Works Manager for the Respondent's Home Ownership Unit and responsible for issues to do with service charges, including the services of notices under the Act. Her witness statement was at page 1724 of the bundle and is common to the parties. There is no need, therefore, for us to go into great detail as to what was contained in this written statement, or indeed the statements of the other Council witnesses.

10. Miss Blair told us that the observation period had been extended considerably and that due regard had been given to the observations. For example, a letter at page 1059 of the bundle dated 23rd April 2012 showed that the apportionment costs had been reapportioned following representations made by residents. She also confirmed that the estate did not have a recognised tenants association and within the meaning of Section 29 of the Act.

11. She was then asked questions by Miss Selwood and confirmed that the works had been grant assisted but not within the meaning of section 20A of the Act. It was suggested that the revised estimated bills still included items which were not within the block costs but this really came back to the re-allocation of the costings which Miss Blair said had been done. The question of the 'skylights' was raised and Miss Blair confirmed that they had been included as 'skylights' as it was not clear what they might be but were now understood to be ventilation grills. They would have been resolved when the final account was completed. Complaint was made about the cost of the windows and certain comparable costs were put forward by Miss Selwood indicating that she believed that windows could be installed on an individual basis at a lower cost than the Council was charging. A minor issue was raised with regard to the specification where it referred to seven maisonettes in the building 17-41 (odds) Scylla Road when it should be eight. It was confirmed that this would be changed. The delays to the contract were we were told as a result of a case before this tribunal and the Upper Tribunal.

12. The next witness for the Council was Abigail Wallington. She was the Project Manager in the Housing and Community Services Department of the local authority. Her key role was the implementation and the overseeing of the delivery of major works to the Nunhead, Peckham Rye and Dulwich areas which included the Consort Estate. Her statement at page 1893 fully sets out the position and as with Mrs Blair we do not propose to go into that in detail. Miss Wallington informed us that the original Consort contract was more extensive and included door entry works and works to tenanted properties. However, with the imposition of the warm dry safe standard (WDS) imposed by the Council much of the works to the tenanted properties were omitted and instead the Council concentrated on key issues to the electrics, roofs, windows, door renewal and repairs and structural defects. She told us that the final account would be unlikely to be issued before October 2014 taking into account the defects period. The works were still continuing on the estate and should finish in October of this year but maybe earlier if there were no problems with access. She told us that the electrical works had been reduced by about 25% which would result in a reduction in the costs from those set out in the estimated demand. There then followed discussions about burglaries and the length of time that the scaffolding was in place and also issues raised about the storing of scaffolding boards, none of which took the matter any further.

13. On 18th June the Applicants prepared the fresh index and also included additional papers which were by and large a duplication of those which we already had. It was suggested by Miss Selwood that the estimated charge was extravagant. Miss Sorbjan referred us to the first demand made in February of 2013. This she said referred to the lease and provided for, in Miss Selwood's case, a total sum of £11,323.82 payable as to £4,448.83 in one payment by 1st April 2013, in the following year by four instalments the sum of £5,246.83 was to be paid and in the final year ending January 2015, again by four instalments, a total sum of £1,628.16 was to paid. There is no reserve fund. The question the Applicants raised was whether the Council were entitled to claim the payment in 2013 as one lump sum bearing in mind the terms of the lease. Miss Sorbjan's argument was the demands were intended

to work in line with the consultation and the lease. The consultation was started in February of 2012 and finished in August 2012 and accordingly the Council could not have issued a demand for payment until the consultation period had concluded. The Council say that the capital expenditure term of the lease is not the appropriate one to be applied and that in any event the Council has no obligation to spread the costs over a three year period.

14. We then heard from Mrs Ann Blackburn, Project Manager in the Housing and Community Services Department. Her witness statement was at page 1885 of the bundle. She told us that she was a qualified building surveyor. Much of the questioning of Mrs Blackburn related to the replacement of the windows. She told us that the Clerk of Works had undertaken a survey of the estate (a stock condition survey) and her understanding was that the softwood timber windows have a life span of some 36 years. Apparently the Clerk undertook a survey of 10% of the properties and the feasibility study, which was apparently completed after the Section 20 procedures had commenced, lists the number of properties that were inspected. It was said that the Clerk of Works found that 80% of those inspected were in poor condition, both relating to the fittings and the condition of the timber. The window manufacturers apparently went out of business come 30 years ago and it is extremely difficult, if not impossible, to now get parts to repair the windows. She confirmed that the windows when installed would have Fensa certificates and apparently a ten year warranty. A complaint was made about the design of the windows and the need for adjustment. Mrs Deudney believed that they were difficult to open and the design of her window was inconsistent with that which had previously been in situ. Apparently a public meeting had voiced discontent with the design but there had been subsequent amendments which apparently did not require planning permission. Mrs Blackburn, however, believed the windows had been installed in accordance with the planning requirement. When asked why a feasibility study had been undertaken she told us that in July of 2011 a property survey had been carried out (an example was included in the bundle) and it was decided then that it would be appropriate to replace the windows. The feasibility study was completed in March of 2012 but was part of the impetus created by the DWS standards which were to be implemented by 2016. Mrs Blackburn told us that a number of the windows were rotten and coming to the end of their lives and replacement had already taken place with regard to individual windows in individual properties on the estate. She told us that by undertaking the replacement of the windows in one go it was hoped that this would reduce installation costs and enable easier future maintenance utilising the one style of windows. Questions were also then put to her concerning asbestos removal and other items such as the lighting of scaffolding, preliminaries, overheads and other matters. We were told that there some 73 leaseholders on the whole estate.

15. The next witness on behalf of the Council was a Mr Paul Skelly, a chartered surveyor working for Potter Raper Partnership. His witness statement was to be found at page 1870 of the bundles. He explained that the definition of preliminaries included health and safety issues. An overhead charge of 1% and a profit of 5% were fixed in accordance with the tender documents. The scaffolding was at a rate as tendered, the percentages being fixed. Apparently

Potter Raper were part of the tender approval process assisting the housing team, although they did not prepare the recommendation report. The tenders were apparently based on the pilot scheme and a schedule of works had been prepared by the in-house team based on a stock condition survey and site visits. He confirmed that the professional fees were 9.12% which would include the Quantity Surveyor, Project Manager, health and safety issues and Clerk of Works. This fee he told us did not go to the contractor. He had seen fees both higher and lower than this and he thought that it was reasonable. He was then referred to the question of the comparable evidence put forward by the Applicants with regard to window replacement. Mrs Deudney had provided an estimate showing a figure of £4,926. There were also comparable quotes from Mr Rizk and by Miss Selwood. Mr Skelly compared these to the actual cost calculations and concluded that even taking into account preliminaries and administration fees, the Council's charges were compatible if not in fact cheaper.

16. Mr Skelly confirmed scaffolding costs were fixed and would have been used for measuring windows and other elements as well as the actual fitting. It was put to him that a Mr Punshon, a resident on the estate, had prepared a statement, although did not attend the hearing, which was critical of the method by which the windows were measured. Mr Skelly confirmed that he would always require windows to be measured from the outside and that every window must be measured. He also told us that the tender upon which these works proceeded was based on prices agreed in 2008 and although there were provisions for increases these had not in fact been incorporated.

17. The next witness we heard from was Mr Roger Rodriguez whose witness statement was to be found at page 1813 of the bundle and did not in truth assist greatly in determining the issues before us. He did, however, confirm that the replacement of lighting was not an improvement as such, as it replaced existing lighting.

18. The next witness we heard from was a Mr Rodney Miller, the Operations Manager for A&E Elkins Limited who are the main contractors for the works at Consort Estate. His statement sets out the works that were done and the properties covered and he was cross examined not so much on those issues but on peripheral matters such as gates being left open and some damage to gates which he says his company repaired. He told us that there were some 60 – 70 employees/sub contractors on site and that they had been present since August 2012 with only one or two complaints. He believed he had a good relationship with the residents' association.

19. The next witness we heard from was a Mr Karl Jansen, a Collections Officer with the Council. His witness statement was on page 1845 of the bundle and dealt in some respects with the problems that had arisen over some errors in gas costs to which we will return in due course. He also addressed the estimated demands sent to the leaseholders in respect of the major works and the arrangements for recovering those costs. He told us that those who were parties to this application had not been pursued for their contributions in respect of the estimated costs. He also told us that if leaseholders contacted him he could arrange for some form of amended repayment programme to be

put in place. He told us that no costs have been capped and that they would be changing the estimated invoices notwithstanding that certain items of work, in particular the electrical lateral main, were no longer being undertaken.

20. On the morning of 19th June 2013 the Applicants indicated that they considered they had dealt with the major works in the previous two days of the hearing and therefore wanted to deal with the annual service charge issues, the first of which was the insurance. In this regard we heard from Georgina Brown, a Pre-assignment Manager with the Respondents' Home Ownership Services. Her witness statement is at page 1877 in the bundle. She told us that the insurance was procured by way of a Section 20 consultation with contributions being made by the leaseholders based on the number of beds in their properties. She told us that the price had now been fixed from April 2013 for a period of three years and that the insurers were Zurich. They had gone out to tender and Zurich gave the lowest quote. Malicious damage was covered under the policy but to enable a claim to be made a crime reference number had to be obtained. The only policy excess appeared to be for subsidence. The insurance apparently covered each block and the Council covers the estate with an excess of £750,000. The Applicants did not challenge the costs of the insurance. Apparently the previous contract up to April 2013 was index-linked thus increasing figures. The premium in the new policy is apparently less than the previous one and includes accidental damage for internal fixtures and fittings. The premium would be subject to an increase if there was an increase in the RICS building index and also insurance tax. We were told that the Council gets no commission but they do receive payment of 15% of the premium from Zurich for dealing with the claims. Apparently the Zurich premium includes this 15% uplift. The insurance position was the same as it always had been. However, up until this last change this uplift figure had been 20%. We were told that the uplift figure of 15% reduces the amount which the insurers would charge for providing cover and in fact the leaseholders had asked the Council to take on responsibility for dealing with insurance claims from 2010 onwards. We were told that the cover provided relates to leaseholders' buildings only and that tenanted properties are insured differently by the Council.

21. The next issue raised related to boiler maintenance. The main complaint by the Applicants was that the annual maintenance charge should cover some of the individual maintenance works which leaseholders were also being charged.

22. In respect of cleaning the Council's complaint was that this was not done on a regular basis, that guttering was not dealt with and also that the upkeep of the garden areas was poor.

23. In this regard the Council relied upon the statement of Mr Kevin Cole who is the Area Manager employed by Southwark Cleaning Services. His witness statement started at page 1850 of the bundle. He told us that the quarterly cleaning of bin stores had been withdrawn some three years ago and that it was no longer the cleaner's job to take rubbish from the bin store at each floor down to the paladin bins at ground floor level. The tenants were expected to

do this. The windows are apparently cleaned two times a year the last time being May 2013 but no cleaning would be undertaken of windows where scaffolding was in situ. In respect of ground maintenance they did not undertake any planting but just trimming and weeding. If there is planting then it is an extra charge. Apparently all work is carried out by Council employed staff and he confirmed he looked after a quarter of the Borough. Miss Deudney did, however, say that she thought that the cleaners carried out their works conscientiously.

24. There was an argument relating to the cost and inefficient distribution of cleaning bags which appeared to have led to a higher charge in one year. However, it could not be concluded that there was mis-spending and the uneven charge could be due to accounting when invoices were paid. Issues that had been raised concerning tree lopping were no longer in dispute.

25. The next matter that we did have to consider was the question of pest control. The Applicants' case was that the costs appeared to be increasing but the problem remained. It was thought that there was a lack of care taken in the public areas and that the drains were not maintained correctly. Mrs Deudney thought that the problems had really exacerbated since the beginning of the major works. The recording of these costs appeared, it seems, under the 'responsive minor repairs' heading in the accounts, an example of the difficulty for a leaseholder fully understanding the accounts. There was also a complaint as to the manner in which the pest control department sought access to properties, which it was said by Miss Selwood was on a somewhat aggressive basis with little warning being given.

26. Mr Lesley Leonard, the Pest Control Manager for the Council had provided a witness statement subsequent to the preparation of the bundle. He told us that the service was segregated into two sections. Firstly if over 10% of the residents informed the Council there was infestation then block treatment would be undertaken. Cards were given to the residents indicating the date that they were going to attend either a morning or an afternoon. If there is a pest issue they would treat and return within two weeks' time. This would then continue every two weeks provided there were no problems with access. It seems that if there had been three visits to the property when access had not been obtained, an order would be sought from the Courts enabling the Council to gain access without the leaseholders' consent. It was the note informing leaseholders of this had caused concern, it being considered aggressive. Costs are on a 'time spent' basis and the works are undertaken by Council employees. The cost to the leaseholders is about £40 per annum irrespective of the number of visits and he was of the view that the treatment does work. He accepted, however, that any building work can increase pest activity but he did not think the heating would have been any cause of the problems.

27. The next matter that we dealt with was estate costs. The particular issues here were the quality of repairs, the costs of repairing the roads and the fact that garages were let by the Council to persons who did not live on the estate and that accordingly the Council should contribute to some of these costs. We were told that none of the roads of the estate are adopted. In an email

written by Mr Anthony Shore in November 2012 he informed the recipient that the Council were unable to stop non-residents from parking on the estate roads. It was the Applicants' view that the Council should contribute up to 25% from Council funds received from the garaging towards the estate's roads, footpaths and lighting.

28. The tenants admitted the charges for the surveyors in the years in dispute in respect of asbestos and accordingly there was no need to consider that further. We then dealt with the question of repairs to the boiler which was a vexed issue. No challenge was made to the electricity to the boiler house but concerns were expressed as to the costs of boiler repairs and the apparent delay in billing some of these works. We were told that there was no history of individual assets, that is to say what tenant had what number of radiators or other heating fixtures for which repairs may have been required, in their flat and in those circumstances it was not possible for the Council to specify a cost to an individual but only to the block.

29. The question of overheads was then raised. It was the Applicants' case that the Council was not entitled to make more than one charge of 10% for management as provided for in the lease. However, the Council has to date been charging an overhead in respect of various matters as well as the administration charge provided for in the lease. However, this matter was not pursued further before us as the Council has undertaken that if they are unsuccessful on their present appeal before the Upper Tribunal and do not decided to take that any further, that they will apply the Upper Tribunal ruling for the years in dispute in respect of the overhead charge and will therefore issue fresh demands with these overhead figures excluded.

30. One other matter that we had to deal with was the question of the heating overcharge in 2011. What had apparently happened was that the local authority had provided a credit for the supply of gas and then subsequently received a further invoice which resulted in increased charges in the next year. We were told the residents had queried the costs of the heating on a regular basis accordingly when they received the credit they assumed it was correcting previous overcharges and although some wanted the leave the monies as a credit with the Council against future costs they were unable to do so. No explanation was given, no warnings were given and monies were refunded which in some cases, for example Mr and Mrs Deudney, were spent on the improvements made to a bathroom. Mr Gulam Dudhia, an accountant with the Council, was called to explain the matter. His witness statement starts at page 1836 of the bundle. The statement in fact dealt with the apportionment methods and did not really address the question of the gas overcharge. It seems, however, the issue came to light as a result of the change in supplier. The provision of gas is dealt with by Kent County Council who act as the purchaser for a number of local authorities on a bulk basis. It appears that until 16th February 2009 the gas was supplied by Eon UK PLC. This was, however, switched to British Gas from 17th February 2009. For some reason which is not wholly clear it seems that Kent County Council did not render a bill in respect of the British Gas supply until 23rd November 2010 when a total charge of £281,516.63 was raised apparently covering the period 17th February to 30th September 2009. It is this sum which suddenly appeared for payment by the Council which resulted in the demand made.

On a schedule produced in the bundle at page 501 we can see that all invoices were paid within a short period of the invoices being received. It was said that the sums due from the leaseholders were correctly charged and billed to them as soon as the Council could after they had themselves received notice of the sum due.

31. The conclusion of the hearing was somewhat scrambled. The parties were invited to make their closing submissions in writing which they have done and we will deal with those in due course. It became apparent that the nature of Miss Selwood's counter claim was such that it would be inappropriate for us to hear evidence relating to same. Neither side wished to come back again and the Applicants confirmed that they had made the points they wished to make in respect of those issues which we were to consider. Mrs Deudney did ask the Council to commission an independent report on the gas system and Mr Craig, who was in attendance and is the gas contracts manager, confirmed that they would instruct an independent expert to report from the gas advisory service. It is understood that, in fact, that inspection may have taken place although that appears to be the subject of some dispute.

32. The closing submissions were received and were considered by us prior to making our decision. On behalf of the Applicants the submission opened with a suggestion that they felt their case was compromised by their inexperience which was taken advantage of by the Council. They also complained that they were told, although the authority for the information they were apparently given is unknown, that the hearing could continue for the rest of the week if necessary. We made it quite clear to them that this was not the case and never had been. The matter was listed for three days and throughout the course of the hearing we had attempted to ensure that the parties moved on and dealt with the issues as were relevant. This was not always possible. It is accepted that Miss Selwood's case relating to the counter claim was not considered. However, the issues that were the subject of the proceedings against her in the County Court which were the annual service charge items, were fully aired and she obviously joined in with the Applicants with their challenge to the major works.

33. The submission by the Applicants was helpful in that it clearly set out the items they wished to consider. The first related to the heating and the need for the notification of costs to be given with 18 months of those having been incurred. We noted all that was said. There was also a challenge in respect of non-boiler repairs charged to leaseholders. We were asked to consider whether there was a breach of the maintenance covenant in the lease with regard to the overheating of their homes and the excessive costs associated therewith. The costs of the repairs for the boilers were thought to be excessively high and the installation of thermostatic radiator valves an improvement. They asked that it was reasonable for us to "rule that the Council commission an independent survey of the communal heating system and its long term viability."

34. Under the heading Repair, complaint is again made about the costs associated with the repair works and the use of contractors and wrongful billing. Under the heading Cleaning, Grounds Maintenance and Drainage, it was said that

the standard was below the cleaning schedule and that charges for multi-level collection should be refunded as there was no such collection from the communal corridors. It was suggested that the failure in the cleaning was a contributor to the on-going pest control problems. Under the heading Pest Control, it was asserted that this was largely ineffective and badly run and that the cost of the service should therefore be limited. Insofar as the insurance was concerned, a suggestion was made that not one single claim had been made for repairs on the estate in the last 12 months and that there were many instances of accidental and malicious damage. We are asked to 'direct the Council to provide the actual costs and that charges be limited to at least the actual costs if not more to reflect the lack of service in this regard'. There then followed complaints about the estimated annual service charges and the overheads which were noted.

35. Insofar as the major works it was suggested that the Council had failed to have regard to observations, that the estimated costs were grossly unreasonable and the design of the double glazed windows did not conform to plans. It was also suggested that "the Council on the contrary were grossly irresponsible and, by ignoring our observations have acted in an unreasonable manner causing extreme prejudice, financial and otherwise to leaseholders." Finally, in respect of the major works, the following was said by Mrs Deudney and Miss Selwood: "Many intimidated leaseholders have already committed to costly schemes to pay these outrageous amounts. Many leaseholders have had to take the "death or sale" option, add the amount to their mortgage when allowed to do so, use credit cards etc and non-resident leaseholders have had to turn to independent finances as they are ineligible for the Council's repayment plans. In Daejan vs Benson 2013UKSC it was determined that leaseholders would be liable for charges because they had not suffered financial prejudice as a result of a failure of the consultation process. In our case, however, we have amply demonstrated that the failure to give due regard through the consultation process, subsequent failure to comply with the terms of our leases and potential actual costs resulting from the unreasonable level of service, have and continue to cause severe prejudice financial and otherwise. We would ask, therefore, the Tribunal exercise the utmost of their power and limit service charges to £250 per leaseholder or what amount the Tribunal determines to be appropriate. We wish the matter to be settled and save burdening the LVT in future."

36. The submission then went on to deal with Section 20C points and then sought to recount the judgment of one of the dissenting judges in the Supreme Court case of Daejan.

37. The Council in its submission dealt with matters under various headings. They addressed the issues relating to major works and the requirements to have regard to observations, the validity of the interim demand, the question of reasonableness in respect of the standard of works and the costs incurred, historic neglect, the repair vs improvement argument, the cost of the windows, the standard of works, all these relating to the major works contract. In respect of service charges they addressed the heating service charges for the years 2009/10 and 2010/11 by reference to provisions of Section 20B of the Act, the administration charge of 10% and the reasonable

standard of remaining service charge items relating to care and upkeep, grounds maintenance, repairs, door entry repairs, and pest control. The submission indicated the Council did not intend to seek to recover the costs of the preparation or the conduct of these proceedings, but opposed the reimbursement of any fees.

THE LAW

38. The law applicable to this application is set out in the appendix.

FINDINGS

39. We will deal firstly with the major works and it is perhaps interesting to note a paragraph in the Applicant's submissions. It says as follows "We pointed out that the estimated costs on the itemised specification were grossly unreasonable with many being unnecessary and illegitimate. If the Council had given due regard and these items and the reduction in works to lateral mains had been removed from the estimate during consultation, leaseholders would be liable for about only half the amount currently demanded and this dispute would possibly not be before the LVT today."

40. That is a problem with this particular element of the case. This contract is not going to finish for some time. No final account is going to be available for more than a year. The estimated demand which we have been shown does appear to be on the high side given that such items as the lateral mains are not going to be the subject of works. Our finding in respect of the interim demand is twofold. The first is the ability of the Council to make a one off charge for the year 2012. Matters are not helped by the fact that the leases are not in common form. Miss Selwood's lease contains, at the Third schedule the provisions for the recovery of service charges. The leases for Manaton Close appear to include a provision for Capital Expenditure Reserve and somewhat surprisingly so do other leases in Scylla Road, (see the lease for 45) Despite what the Council may have said it seems to us that the expenditure falls within the capital expenditure reserve charge in so far as the lease makes provision for this. This is contained in paragraph 9.1 onwards under part 2 of the third schedule to the lease. The items which form the capital expenditure reserve charge are the replacement and renewal of any lift, the replacement and renewal of central heating or hot water supply, plant or equipment, the periodic redecoration of the building and the other major repair or renewal of any part of the building which includes the installation by way of improvement of doubled glazed windows or a door entry phone system. It seems to us, therefore, that it is capital expenditure reserve charge provisions that apply, if the lease contains such provision. Here it states at paragraph 9.2 as follows "The Council may require the lessee to pay a reasonable contribution in advance towards such major expenditure (having regard to the estimated date and amount thereof and to the interest to be quoted to such contribution and other relevant circumstances) in each year and shall notify the lessee of the amount thereof." Paragraph 9.3 "The lessee shall pay such contribution by equal payments in the payment days in each year. The payment days are as set out in Part 1 of the Third Schedule namely 1st April, 1st July, 1st October and 1st January." For Miss Selwood the provisions for annual

service charge are contained in the Third Schedule. It seems us, therefore, that the Council is not entitled to ask for a total payment in one go in April. They could, it seems, have asked to payments in October of 2012 and payments in January, April and July 2013. They did not do so, instead relying on the demand dated 12th February 2013. Doing the best we can given the different terms of the leases and considering those terms we find that the demand should be amended to enable payments to be made during 2013 by the usual quarter days and same should apply for the following years.

41. In respect of the total amount claimed, we find that this should be reduced to reflect the fact that the lateral mains works are not being undertaken. The Council should, therefore, reissue the demands making provision for payments on the quarterly basis during 2013, 2014 and 2015 and reducing the sums to reflect the fact that the laterals works are not being done as shown on the attached sheet prepared by the Council and headed "Capital Works Recharges to Leaseholders" under the column headed 'Total'.

42. The question of lack of consultation was raised by the Applicants. The Service Charge (Consultation Requirements) England (Regulations 2003) provides that in the third schedule paragraph 3 that the landlord has regard to observations made. In addition where observations are received he shall respond to those within 21 days to the person who made those observations. There is no evidence given to us that this did not take place. The fact that the Council may not follow the observations is not an issue. Indeed in certain circumstances they did. We therefore dismiss the Applicants' assertion that there had been some breach of Section 20 by failing to have regard to the observations. In the evidence before us it was clear that the apportionments had been revised, that the reallocation to blocks had been reconsidered and that there were a number of meetings held with leaseholders at dealing with matters raised. The argument that they did not consult with the tenants' association cannot be right as there is no association recognised within the terms of the 1985 Act. It is clear, however, that the Council did liaise with what was known as a steering group.

43. Another major complaint in respect of the major works was the replacement of the windows with double glazed units. The complaint here was as much to do with the problems of the central heating as it was the need for the windows to actually be changed. The Applicants called no expert evidence as to the condition of the windows prior to replacement nor to contradict the Council's view that the lifespan was in the region of 36 years. It is surprising that the feasibility study was produced after the Section 20 notices were issued but we were provided with survey sheets showing that inspections of various properties were carried out in November the year before. The evidence was also given that a number of windows in individual flats were being replaced and that it was proving extremely difficult, if not impossible, to obtain parts for the windows the more so as the manufacturer was no longer in existence. We understand also the Council's view that the replacement of the windows in one go with a standard design would lead to future savings and costs savings on the installation of the windows at this time. We are, therefore, satisfied on the evidence given to us and our inspection of some of the windows on the estate, that there was a need to replace some. Whether that

need was this year or in two years' time is another matter. However, it seems to us that to replace now and on this scale makes sense and will have reduced the costs overall in the long term. The Applicants' attempts to obtain alternative estimates on an individual basis were not compelling. They failed to take into account that there were additional communal windows to be dealt with and when the individual costs were stripped out by the local authority we were satisfied that the costs for the installation of the windows was not excessive. We were able to inspect the new windows in Mrs Deudney's flat which seemed to us to have been of a high standard and installed correctly. It was pointed out that the window bar did not align accurately with the balcony as they had done previously. We accepted this as an aesthetic point, however, the window was functional at the time of inspection and Council referred to an aid to opening where occupiers found opening the windows unwieldy although whether this was available to all leaseholders was not clear.

44. As to the question of the central heating, it does seem to us that this needs to be investigated and we understand that that is in fact taking place. At the time of our inspection it did not seem that the central heating was running although the flats were comfortably warm. Mention was made of the fitting of thermostatic valves although this was not raised in the hearing before us but referred to in the submissions made subsequently. We do not propose to disallow such costs as there may be associated with those works as we have no evidence before us as to what they were nor in any event do we consider that a thermostatic radiator valve is an improvement. However, as this was never raised in evidence it is not a matter we propose to deal with.

45. On the general costs of the major works we should say as follows. These were set at prices fixed in 2008. The qualifying long term agreement is not challenged and it does not seem to us therefore that it is open to the Applicants at this stage to take issue with the actual costs associated with specific items of work. The more so of course as the contract has yet to be concluded. We were told that the final account may not be available until October 2014. It seems to us therefore that insofar as the challenge to the actual cost is concerned, this is somewhat premature and if the Applicants wish to make a challenge when the final costs are known then they are free to do so. At present all we are dealing with are estimated costs and subject to the changes we have required above, they are reasonable and the works to be undertaken are reasonably required.

46. We believe that that deals with the issues in respect of the major works and turn now to the service charge items, beginning with insurance. The Applicants' issues as set out in their submissions appear to be that no insurance claims have been made. There appears to be no particular issue with the premiums being sought now, or in the past and we accepted the evidence from Miss Brown that the premium had now been fixed for three years subject only to any increase in the building index or insurance tax. We find that the 15% charge included for the handling of the insurance claims, if any, is not unreasonable and is separate from the 10% administration charge provided for in the lease. If there are to be claims made in respect of malicious damage then the Applicants now know that a crime reference number must be obtained. Accidental damage would not appear to require

such information and as the Council provides the policy excess of £750,000, presumably a number of items of works which might have been dealt with as insurance claims are dealt with as standard repairs.

47. The next matter that we will endeavour to address is the question of the boiler maintenance. The Applicants' complaint is essentially that the annual maintenance charge should cover some of the individual maintenance works. There is a difference between the costs levied by the Council in respect of the works to the boiler room and individual leaseholders' properties. We accept that the heating system seems poor and expensive but the total cost for repairs and maintenance appears to be around £126 per person per annum which does not seem to us to be excessive. Certainly the Applicants are critical of the system and the lack of attempts to properly resolve the issues and we have some sympathy with them. We understand a survey is being done and it is clear that the system does need attention. No contracts were provided to us in respect of the boiler maintenance and we understand it is dealt with on a somewhat pro-active basis and could be open to abuse, although there is no evidence that it is. However, taking the matter in the round without investigating each and every item of expenditure, it seems to us that the annual cost to the leaseholder is reasonable for the provision of maintenance for central heating and hot water.

48. We then turn to the question of cleaning, care and upkeep. We noted all that was said by Mr Cole on behalf of the Council and the complaints made by the Applicants. The care and upkeep figures in the years 2010 – 2012 for Miss Seaward's property are annually around £155. This is split relatively equally between the estate and the blocks. Given the size of the estate it seems to us that this is not an unreasonable expense. It may be that the quarterly cleaning of the bin stores has been withdrawn and that the cleaners do not remove rubbish from the bin stores at each floor level, which now appeared to be defunct. However, it seems to us that the overall cost is not unreasonable and Mrs Deudney said that the cleaners carry out their works conscientiously. This also includes the removal of rubbish which is left in situ by residents and some grounds maintenance. All in all it seems to us that this cost provides reasonable value for money and we see no reason to reduce it. An issue in respect of the provision of bags to residents was raised by Miss Selwood. However, to be frank we cannot see that there is any mileage in this particular element and in any event it is not possible to tell from the accounts where this item falls, presumably in the care and upkeep heading. It is not a matter that we propose to disturb.

49. The next item relates to pest control. According to the schedule of disputed service charges it appears for the year 2009/10 the cost was £1,518, for 2010/11 £1,205 and in 2011/12 when it was broken down to a block basis £1,490. Mr Leonard told us that this equated to an approximate charge for leaseholders of £40 per annum irrespective of the number of visits. The extent of the problems is uncertain. It is likely that the building works will have caused disturbance. However, in London and indeed any conurbation of size, problems with mice and rats are not uncommon and it seems to us that the Council is doing all it can to address these issues. In those circumstances

we find that the charges made for pest control are reasonable as is the service that is provided.

50. The next matter we wish to address is the question of estate costs. This, to an extent, centred on the use of the garages by non-residents. It seems unfair that the Council should have the benefit of the totality of the rental income from the garages not occupied by residents yet make no contribution to the upkeep of the roadways, footpaths and street lighting. The Applicants suggested that the Council should contribute 25% of the income derived from the garages towards the estate costs. This seems to us to be a reasonable suggestion. We do not know the rental income that is derived from the garages that are let to non-residents but it does seem to us that it would not be difficult for the Council to publish that information and as a gesture of good will to make a contribution of 25% of that rental income towards the running costs of the estate particularly relating to the upkeep of roads, street lighting and footpaths. However, this is not strictly speaking a service charge and is not within our jurisdiction. It is, however, a suggestion that this might be a way forward to resolve this issue.

51. Insofar as the overheads are concerned, we note the Council's undertaking that they will follow the ruling of the Upper Tribunal when it is issued and apply it to this case. The simple issue is whether the Council is entitled to claim overheads as well as the 10% administration charge and it is we understand intended that the Upper Tribunal case will clarify this point which should then be applied.

52. We then turn to the question of the heating costs. This is a vexed question. Although the Council's behaviour in providing reimbursement of over payments in respect of central heating costs does not help, and their reasons for so doing are somewhat uncompelling, we are prepared to accept the arguments put forward by the Council in their written closing submissions under the heading Revenue Service Charges - Statutory pre-conditions - Section 20B, Landlord and Tenant Act 1985 at pages 10 and 11. Certainly it seems that the final invoice rendered by Kent County Council at page 523 in the bundles was demanded of the leaseholders within 18 months of the Council receiving the bill, and according to the schedule produced, which was not challenged, it would appear that other charges were settled and demanded within 18 months.

53. Insofar as the administration costs are concerned, we do think it reasonable to reflect a reduction in the management charges for the year 2011. In this year there was the greatly increased heating cost which we find was partly as a result of the poor management of the gas account, compounded by the Council's refusal to allow leaseholders to leave the credit with the Council for future years. Taking the demand issued to Miss Selwood at 35 Scylla Road the management fee associated with the heating cost would be 10%, namely £154.39, which should be deducted from the overall service charge bill for that year. We propose therefore, to make similar reductions from each Applicants service charge demand for the year ending 31 March 2011. We do not have the service charge breakdown for the other properties but a 10%

figure should be applied to the heating cost and deducted from the service charge so that the overall cost is reduced accordingly.

54. In the course of the proceedings we were provided with a document headed 'Disputed Service Charges for Each Year'. It was numbered page 453 onwards in the bundle and is a schedule of each item of expenditure. A mammoth piece of work. Marked on the schedule were a number of reductions and omissions agreed between the parties prior to the hearing and those items should be reflected in the amended demands which the Council will need to issue for the years in dispute following our findings. In addition, certain matters were agreed at the hearing. The first is on page 456 under the heading 4486705-1 4/5/10 T Brown repair leak detection in Queens Road £5,994 which it was agreed by the Council would be removed from the service charge costs. Another item which was agreed at the hearing was under the heading Un-itemised Repairs Estate on page 463 of the schedule where a figure of £30,995.92 was charged in respect of the sheltered housing unit. It was agreed by the Council at the hearing that this cost should be removed from the service charge. We record also some entries on the schedule marked with a 'Y' and 1st May which we were told have all been agreed. These are on pages 468, 469 and 470 of the schedule.

55. On the question of costs the Council has indicated that it does not propose to seek to recover the costs of these proceedings through the service charge and as a confirmation of that we make an order under Section 20C of the Act, it being just and equitable in the circumstances.

56. We do not propose to order a refund of the fees to the Applicants. They have had limited success only and it seems appropriate that the costs should be borne by the Applicants in respect of the application and hearing fees.

57. Insofar as Miss Selwood's counter claim is concerned, it seems to us this is better dealt with by the County Court given the extent of the claim and the basis upon which it is brought. In addition, the question of interest and County Court costs should be referred back to the County Court to deal with by them.

Andrew Dutton
Tribunal Judge

Appendix of relevant legislation

Landlord and Tenant Act 1985

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 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 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) a leasehold valuation tribunal.

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

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

(4) The Secretary of State may by regulations provide that this section 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 20B

(1) If any of the relevant costs taken into account in determining the amount of any service charge were incurred more than 18 months before a demand for payment of the service charge is served on the tenant, then (subject to subsection (2)), the tenant shall not be liable to pay so much of the service charge as reflects the costs so incurred.

(2) Subsection (1) shall not apply if, within the period of 18 months beginning with the date when the relevant costs in question were incurred, the tenant was notified in writing that those costs had been incurred and that he would subsequently be required under the terms of his lease to contribute to them by the payment of a service charge.

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.

Leasehold Valuation Tribunals (Fees)(England) Regulations 2003

Regulation 9

(1) Subject to paragraph (2), in relation to any proceedings in respect of which a fee is payable under these Regulations a tribunal may require any party to the proceedings to reimburse any other party to the proceedings for the whole or part of any fees paid by him in respect of the proceedings.

(2) A tribunal shall not require a party to make such reimbursement if, at the time the tribunal is considering whether or not to do so, the tribunal is satisfied that the party is in receipt of any of the benefits, the allowance or a certificate mentioned in regulation 8(1).

Schedule of Applicants

Details of Applicants, Leaseholders, Consort Estate	
Name	**Address**
Issam & Katherine Abid	81 Manaton Close
Pedro Agostinho	5 Huguenot Square
Nina Ahmed	45 Scylla Road
Jeremy Akerman	63 Scylla Road
Josephine & Philip Amponsah	23 Scylla Road
Emmanuel Bello	185 Wivenhoe Close
David Browne	99 Wivenhoe Close
Rory Buchan & Sam Hardy	88 Manaton Close
Victoria Cowlin	68 Manaton Close
Guiseppe De Marino & Hye-Jin Park	12 Huguenot Square
Dianne & John Deudney	79 Manaton Close
Corali Dorman	61 Scylla Road
Gareth Evans & Katherine Fox	70 Wivenhoe Close
Patience Enuwe	67 Manaton Close
Nick Grimmer	19 Vivian Square
Rosie Joe	4 Huguenot Square
Bodrul Khalique	46 Wivenhoe
Graham Lepetit	4 Vivian Square
Maureen Lewis	7 Huguenot Square
Sandra Manson	21 Scylla Road
John Martin	71 Manaton Close
Raji Olawale	9 Huguenot Square
Abigail Ozuruigbo	69 Manaton Close
Laura Porter	27 Vivian Close
Sandra Powell	21 Huguenot Square
David & Tracey Punshon	22 Huguenot Square
Colin Renwick	57 Scylla Road
Jody Reynard	87 Manaton Close
Sherif Rizk & Dorota Sysak-Rizk	114 Manaton Close
Lynn Selwood	35 Scylla Road
Halcyon Smith & James Ransom	112 Wivenhoe Close
Ron Spencer	56 Wivenhoe
Claudette Thomas	53 Scylla Road
Beverley Tomlinson	30 Wivenhoe
Matt Ward	20 Huguenot Square
Kate & Nick Wigham	77 Manaton Close
Rafat Yusuff	51 Wivenhoe Close
Bhupesh Shah	75 Manaton Close

[redacted]