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

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| **Case reference** | : | **BIR/00CN/LIS/2021/0001** |
| **Property** | : | **82 Pensby Close, Birmingham, B13 9QJ** |
| **Applicant** | : | **Mr Thomas Howes** |
| **Representative** | : | **None** |
| **Respondent** | : | **Birmingham City Council** |
| **Representative** | : | **Birmingham City Council Legal Department** |
| **Type of application** | : | **Application for a determination of liability to pay and reasonableness of service charges and for an order under section 20C of the Landlord and Tenant Act 1985 and para 5A of Schedule 11 of the Commonhold and Leasehold Reform Act 2002** |
| **Tribunal members** | : | **Judge C Goodall**<br>**Mr G S Freckelton FRICS** |
| **Date and place of hearing** | : | **Paper determination** |
| **Date of Decision** | : | **2 July 2021** |

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**DECISION**

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## Background

1. Mr Thomas Howes ("the Applicant") is the long leaseholder of flat 82 at Pensby Close. There are 15 flats at the Pensby Close development, which is owned by Birmingham City Council ("the Council"), some of which have been sold to long leaseholders, and some of which the Council retains for their own tenants. The development has two linked blocks, one containing six flats, and the other nine.

2. On 23 June 2020, the Applicant received an invoice from the Council for £6,292.01, this being a service charge invoice for major works ("the Invoice"). It was said that the sum was "now due for payment". The Applicant would have had some inkling this bill was coming, as around 11 months earlier he had received a notice of intention to carry out a Main Service Upgrade at Pensby Close.

3. Nevertheless, the Applicant took the view that the amount he was being charged was excessive, unnecessary, and in breach of the Council's consultation obligations, and on 4 January 2021 he therefore commenced an application for a determination of the reasonableness and payability of the Invoice.

4. Both parties were content with a paper determination of the application. The Tribunal considered the application at a meeting held on 14 May 2021. However, the Tribunal required further evidence and submissions to understand the parties' positions, and further directions were issued on 17 May 2021.

5. This decision is the Tribunals determination of the application taking into account the additional information received following the 17 May 2021 directions. In reaching our decision we have taken into account:

    a. The application form dated 4 January 2021;
    b. The Respondent's initial response dated 26 February;
    c. The lease documents comprising a lease dated 9 March 1981 and a deed of variation dated 7 March 1984;
    d. The Applicant's statement of case, dated 19 March 2021;
    e. The Respondent's statement of case dated 23 April 2021;
    f. The Respondent's further submission regarding a discount on the original bill dated 12 May 2021;
    g. The Respondent's submission dated 1 June 2021 following the issuing of further directions by this Tribunal on 17 May 2021;
    h. The Applicant's further submission dated 15 June 2021;
    i. A bundle of documents comprising 118 pages containing documents provided by the Council during the preparation of the case.

## The issues

6. The Applicant's challenges to the Invoice fall into four areas:

    a. Does the lease require that the Applicant contribute towards the costs charged in the Invoice?

    b. Was the electrical work necessary?

    c. Should the amount charged in the Invoice be reduced or extinguished by what the Applicant alleges to be a failure to properly consult under section 20 of the Landlord and Tenant Act 1985 ("the Act")?

    d. Were the charges reasonably incurred? The Applicant challenges whether he should be responsible for any costs incurred by Western Power as the electricity supplier, and he says the cost of the Works is very expensive; some three times more than in his view it should be, and above a competitive price. He was not satisfied with the level of disclosure of the costs charged by the Council.

## The lease terms

7. A service charge can only be levied if it is payable under the terms of the lease under which the Applicant holds the property.

8. The Applicant's lease is dated 9 March 1981 and is for a term of 125 years from that date. The same parties to that lease entered into a Deed of Variation dated 7 March 1984. It is the Deed of Variation that contains the material terms which govern the payment of a service charge by the Applicant. The Applicant has said that he was not aware of the Deed of Variation, but it is clearly noted on the register of his title, and he must be deemed to be aware of the terms whether they were drawn to his attention by his advisers when he purchased or not.

9. There appear to the Tribunal to be two express covenants on the part of the Council in the Deed of Variation that might oblige the Council to carry out electrical works. They are contained in clause 3 of the Deed of Variation and are:

    "(b) generally maintain the Building except the demised premises
    (c) Maintain the staircase lighting in the Building"

10. The Building is defined in the First Schedule of the lease as the block of flats situate at Pensby Close and edged green on the plan in the lease. We were not supplied with a coloured copy, but the plan that we did see edges both blocks at Pensby Close. The Building is not further defined. There is no express term to say that the Building includes all pipes wires drains etc which service it or are contained within it.

11. The demised premises are defined in the Second Schedule of the lease and include all wires ducts and conduits used solely for the purposes of the demised premises whether or not within the boundaries of the demised premises.

12. The Third Schedule of the lease grants a right for the tenant to the free running of … electricity …. in through and along all … pipes wires and cables in on or under other parts of the Building to and from the demised premises.

13. Clause 2 of the Deed of Variation stipulates that there shall be implied into the lease covenants in the terms set out in the Housing Act 1980, Schedule 2 paragraphs 13(1) and 13(2). Although that section has been repealed, those covenants are now contained in Schedule 6 paragraph 14(2) of the Housing Act 1985 in the same terms. That section provides:

> "(2) There are implied covenants by the landlord—
>
> (a) to keep in repair the structure and exterior of the dwelling-house and of the building in which it is situated (including drains, gutters and external pipes) and to make good any defect affecting that structure;
>
> (b) to keep in repair any other property over or in respect of which the tenant has rights by virtue of this Schedule;
>
> (c) to ensure, so far as practicable, that services which are to be provided by the landlord and to which the tenant is entitled (whether by himself or in common with others) are maintained at a reasonable level and to keep in repair any installation connected with the provision of those services;"

14. The costs of complying with the Council's express and implied covenants set out above can be recovered from the Applicant through a service charge in accordance with the Appendix set out in the Deed of Variation. The contractual mechanism is that the Council may provide a budget for anticipated service charges to be incurred in each year, which runs from 1 April to the following 31 March. They may then charge each service charge payer one half of the proposed expenditure by submitting invoices for that half payable on 24 June and 25 December in that year.

15. If the Council do not make a charge in advance, they are required to produce an account of the service charges for each year (in the form of a certificate) as soon after the end of that year as is practicable. Upon receipt, the service charge payer is obliged to pay the sum shown due, credit being given for any advance payments made.

16. Apportionment of the costs between the individual flats is to be ascertained by such method as shall be reasonable. In practice, the

Council apportions the costs between all fifteen flats at Pensby Close equally.

**Facts**

17. The fifteen flats at Pensby Close are located in two three-storey buildings with an interconnecting two-storey construction containing the entrance door and stairwell. One building contains six flats and the other nine. Confusingly, flats 64, 66, 74, 76, 78, and 80 are in the smaller six flat block. Flats 68, 70, 72, 82, 84, 86, 88, 90 and 92 are in the larger nine flat block. When it has been necessary to distinguish between the blocks, the Council has described the smaller block as "64 to 80 Pensby Close", and the larger block as 68 to 92 Pensby Close". The Applicant's flat (82) is a second floor flat located to the right-hand side of the main entrance and staircase and is in the larger block.

18. The Pensby Close flats were constructed in about 1966 and are thus now around 55 years old.

19. In about April 2019, on the instruction of a Mr Taylor, who is the Council's service co-ordinator from their capital investment team, a Mr Rob Hughes, an employee of the Dodd Group, who the Tribunal understands are electrical contractors, carried out an electrical inspection of 68-92 Pensby Close (though they called it Pensby Drive). Mr Hughes produced an EICR in standard form. The condition of the installation was described as "good". Mr Hughes also asked the Dodd Group to complete a "Communal Testing Checklist". This is a two-page report identifying certain features of the electrical installation. The report is unsigned. It identifies that the cabling for 68-92 Pensby Close is in 6mm² mineral insulated copper clad cable with the main protective device being rated at 60amps. It does not identify which cabling was inspected.

20. Mr Taylor held the view that the life expectancy of MICC cable is approximately 50 years. In their documents, the Council provided support for this view from a technical document produced by the Chartered Institution of Building Service Engineers, being CIBSE Guide M, January 2020 supplement, appendix 12.A1: Indicative economic life expectancy. Page 18 of this document confirms that the reference service life of HV and LV mineral insulated cables is 35 years.

21. Relying on BS7871:2018, Mr Taylor also took the view that the electrical current carrying capacity of 6mm² MICC is 57 amps, before any de-rating factors are taken into account. As the protective fuse device is 60 amps, this means the fuse rating exceeded the electrical carrying capacity of the cable and contravenes the current British Standard.

22. Mr Taylor also noted that the Meter Operator Code of Practice Agreement requires local isolation at the electricity meter so that it can

be changed in a safe manner. Local isolation of meters did not exist at Pensby Close.

23. As a result of these considerations, the Council decided to carry out electrical works ("the Works") at 68-92 Pensby Close. The electrical system at 64-80 Pensby Close was also to be upgraded. Another 12 blocks of flats elsewhere in Birmingham were also to be included in the programme of works.

24. Between 2014 and 2016 the Council had been pursuing a process leading to the appointment of a contractor to carry out its maintenance and capital improvement programme in Birmingham. The selection of a single contractor required that the Council follow EU procurement laws and section 20 consultation requirements contained in section 20 of the Act (and associated regulations). The Tribunal is satisfied that by this process, Wates Construction Ltd ("Wates") had been appointed as the Council's contractor for the Works. The Applicant has no further consultation rights regarding the appointment of Wates as the chosen contractor, though there are more limited consultation rights in connection with the proposed works (as to which see below).

25. Wates were therefore asked to carry out the Works, and decided to sub-contract them. Three quotes from electrical contractors were obtained by Wates. A quote from Barrie Beard Ltd is dated 3 June 2019; the other two are respectively 30 July and 1 August 2019. The lowest quote was from Barrie Beard Ltd. The overall cost for the Pensby Close contract (both blocks) in their quote was £79,078.52, with the total value of all the work for which Barrie Beard quoted being in excess of £600,000.00.

26. As alluded to above, whilst the consultation requirements in section 20 of the Act in connection with the Works are less onerous for the Council (as the consultation is not about the selection of a contractor), there is still a duty to consult when the Council intend to carry out works under a qualifying long term agreement. Accordingly, on 15 July 2019, the Council sent the Applicant a letter headed "Notice of Intention to carry out works under a long-term agreement".

27. The Notice stated:

    1. "It is the intention of Birmingham City Council to carry out works under an existing long-term agreement previously consulted upon with contractors Wates in respect of which we are required to consult leaseholders

    2. Programmed works may include part or all of the following as appropriate per property: **main service upgrade**.

    3. We consider it necessary to carry out the works because: under the terms of your lease Birmingham City Council is

responsible for maintaining and keeping the structure of the property in good repair.

4. Under the terms of your lease you are required to contribute towards the cost of the works. Your estimated costs are calculated as per appendix 1 attached to this letter. The total estimated cost for the block is calculated as per appendix 2 attached to this letter where applicable."

The Applicant was told the costs in the appendices were only an estimate and the costs might be higher or lower. He was invited to make written observations in relation to the proposed works within 30 days.

28. The estimate contained two parts; one for the Applicant's flat alone (Appendix 1), and one for 64-80 Pensby Close (Appendix 2). The Appendix 2 block cost estimate was £35,656.07 plus a 10% management charge, totalling £39,221.68. The Appendix 1 estimate was for £6,536.95, i.e., one sixth of the block estimate. Of course, the Applicant's flat is in block 68-92, which contains nine flats.

29. Email correspondence between the Applicant and the Council after the Notice of Intention had been issued clarified the work intended to a certain extent. The Applicant complained about the vagueness of the Notice, and asked for details of the works to be undertaken and clear justifications for their necessity. Some information was provided to the Applicant explaining the Council's intentions and stating that the Works were necessary because of the age and condition of existing equipment. That was explained more fully by a member of the Council's capital investment team on 30 August 2019, though unfortunately the Applicant was provided with incorrect information about the size of the existing wiring. The Applicant replied to that email asking for further clarification, but did not receive a response.

30. In their initial response following the issue of directions, the Council clarified the extent of the Works in more detail. They were to be:

- Installation of new main power service (installed by Western Power Distribution) inclusive of new mains head/cut out fuse.
- Installation of new mains fuse board.
- Installation of sub-lateral cabling including containment to communal areas and each flat i.e., the installation of new concentric electrical cables to each individual property including the communal electrical supply.
- This was contained within a cable tray system installed within the communal area of the block and was covered in a white powder coated 'top hat' cover to improve aesthetics.
- Providing a new external brick-built enclosure to facilitate the network providers incoming electrical supply and equipment.

- Housed within this enclosure is the new incoming electrical mains supply to the block along with all associated distribution equipment provided by Western Power distribution.
- Formation of a new meter cupboard.
- New connections into each dwelling. Within each property new isolation points were provided both before and after the electric meter to allow safe isolation and working for the metering company's operatives.
- Once the electrical supply was energised to each property, facilitating the isolation and removal of the old main supply to the block with Western Power.
- Final disconnection of old incoming main.

31. The consultation exercise did not result in any material alteration to the Council's plans to carry out the Works. They were commenced on site on 6 January 2020 and completed on 25 March 2020.

32. Western Power Distribution are the distribution network operator (DNO) for the provision of an electrical supply to Pensby Close. The supply runs through the pavement in Pensby Close. Work was required to excavate the connection between the Western Power supply in the pavement and the block of flats. A new cable was laid from the pavement along the pathway to the block of flats to a location on the wall at ground floor level outside flat 84, that cable being of about 13 metres in length. At that point a new brick-built enclosure was constructed to house the distribution equipment. From the new distribution board cables were installed to each individual flat. The cables were laid in containment trays / ducting installed externally from the distribution board to the rear of the blocks and from there into each individual flat. Internally the cables were laid in white pvc ducting. Red Henley meter isolators and new meter tails were supplied and fitted to a new meter for each flat.

33. On 24 June 2020, the Council wrote to the Applicant to inform him that the Works had been completed and he would shortly be receiving an invoice for £6,292.01, representing his contribution to the Works. In fact, the invoice is dated 23 June 2020 and is for that sum. It comprises a sum described as a charge of £5,720.01 for major works, and a management fee of 10% (£572.00). As identified above, the sum was said to be now due and payable.

34. The invoice is based upon the Council having paid Wates £85,800.19. It is not clear how that figure is calculated; it exceeds their quote of £79,078.52. Divided equally between the fifteen flats at Pensby Close, the Council say that the Applicant's share is £5,720.01, plus the Council management charge of £572.00, totalling £6,292.01.

35. In their Statement of Case, the Council have however conceded that the Applicant is due a reduction on the amount invoiced. This arises because:

a. Any work on the cable in the public pavement in Pensby Close is not chargeable as that piece of land cannot be said to be within the Building. The length of cable from the pavement to the new enclosure containing the distribution equipment is said to be 13 metres, and the Council concede that 2 metres of this cable should not be charged as it is in the pavement. They have calculated this cost as £389.10. They still seek a charge for the laying of the cable between the boundary of the land and the new enclosure outside flat 84.

b. It is accepted by the Council that the service charge provisions do not allow recharging of work on the demised premises, i.e., the flat. As that is defined in the lease as including any wires, cables etc which exclusively serve the flat, the cabling from the distribution board (but not the containment system) and the internal work in the flat cannot be charged as a service charge. They have therefore conceded a further £915.75.

36. The sum now sought by the Council is therefore £4,987.25.

**Law**

37. Sections 18 to 30 of the Landlord & Tenant Act 1985 ("the Act") contain important statutory provisions relating to recovery of service charges in residential leases. Normally, payment of these charges is governed by the terms of the lease – i.e., the contract that has been entered into by the parties. The Act contains additional measures which generally give tenants additional protection in this specific landlord/tenant relationship.

38. Under Section 27A of the Act, the Tribunal has jurisdiction to decide whether a service charge is or would be payable and if it is or would be, the Tribunal may also decide:-

i. The person by whom it is or would be payable
ii. The person to whom it is or would be payable
iii. The amount, which is or would be payable
iv. The date at or by which it is or would be payable; and
v. The manner in which it is or would be payable

39. Section 19(1) of the Act provides that:

> "Relevant costs shall be taken into account in determining the amount of the service charge payable for a period –
>
> (a) Only to the extent that they are reasonably incurred, and

(b) Where they are incurred on the provision of services and the carrying out of works, only if the services or works are of a reasonable standard:

and the amount payable shall be limited accordingly."

40. The construction of the lease is a matter of law, whilst the reasonableness of the service charge is a matter of fact. On the question of burden of proof, there is no presumption either way in deciding the reasonableness of a service charge. If the tenant gives evidence establishing a prima facie case for a challenge, then it will be for the landlord to meet those allegations and ultimately the court will reach its decisions on the strength of the arguments. Essentially the Tribunal will decide reasonableness on the evidence presented to it (*Yorkbrook Investments Ltd v Batten [1985] 2EGLR100 / Daejan Investments Ltd v Benson [2011] EWCA Civ 38*).

41. In relation to the test of establishing whether a cost was reasonably incurred, in *Forcelux v Sweetman* [2001] 2 EGLR 173, the Lands Tribunal (as it then was) (Mr P R Francis) FRICS said:

> "39. ...The question I have to answer is not whether the expenditure for any particular service charge item was necessarily the cheapest available, but whether the charge that was made was reasonably incurred.
>
> 40, But to answer that question, there are, in my judgement, two distinctly separate matters I have to consider. Firstly, the evidence, and from that whether the landlord's actions were appropriate, and properly effected in accordance with the requirements of the lease, the RICS Code and the 1985 Act. Second, whether the amount charged was reasonable in the light of that evidence. The second point is particularly important as, if that did not have to be considered, it would be open to any landlord to plead justification for any particular figure, on the grounds that the steps it took justified the expense, without properly testing the market."

42. In *Veena v Cheong* [2003] 1 EGLR 175, the Lands Tribunal (Mr P H Clarke FRICS) said:

> "103. ...The question is not solely whether costs are 'reasonable' but whether they were 'reasonably incurred', that is to say whether the action taken in incurring the costs and the amount of those costs were both reasonable."

43. In *The London Borough of Hounslow v Waaler [2017] EWCA Civ* 45, the Court of Appeal was considering whether the cost of replacing windows by Hounslow was reasonable where there was also an option of repair. The repair option (replacement of hinges) was substantially less than the cost of replacing the windows. The Court said that in applying the

statutory test under section 19 to Hounslow's decision, it was necessary to go further than just consider whether the decision-making process was reasonable; the outcome of that process also needed to be considered (paragraph 37) as did the legal and factual context (at least in consideration of expenditure on improvements) (paragraph 42).

44. Paragraph 37 of the *Waaler* decision says:

> "It must always be borne in mind that where the landlord is faced with a choice between different methods of dealing with a problem in the physical fabric of the building (whether the problem arises out of a design defect or not) there may be many outcomes each of which is reasonable. I agree with Mr Beglan that the tribunal should not simply impose its own decision. If the landlord has chosen a course of action which leads to a reasonable outcome the costs of pursuing that course of action will have been reasonably incurred, even if there was another cheaper outcome which was also reasonable."

45. In connection with the consultation requirements set out in section 20 of the Act, and the Service Charges (Consultation Requirement) (England) Regulations 2003 ("the Regulations"), where qualifying works are proposed, the cost of which may exceed £250.00, the landlord is under a duty either to consult or to obtain dispensation from the obligation to consult. Failure to do one of these results in the landlord being unable to collect more than the set sum of £250.00 for the qualifying works.

46. In the Regulations, a Notice of Intention where works are proposed and there is a qualifying long-term agreement in place, must comply with the following requirements, contained in Schedule 3 of the Regulations:

> "(2) The notice shall—
>
> (a) describe, in general terms, the works proposed to be carried out or specify the place and hours at which a description of the proposed works may be inspected;
>
> (b) state the landlord's reasons for considering it necessary to carry out the proposed works;
>
> (c) contain a statement of the total amount of the expenditure estimated by the landlord as likely to be incurred by him on and in connection with the proposed works;
>
> (d) invite the making, in writing, of observations in relation to the proposed works or the landlord's estimated expenditure;
>
> (e) specify—
>
> (i) the address to which such observations may be sent;

(ii) that they must be delivered within the relevant period; and

(iii) the date on which the relevant period ends.

**Discussion**

47. We will consider the four issues that we identified in paragraph 5 above in order.

*Does the lease oblige the Applicant to pay for the Works?*

48. At this point, we are not considering whether the decision to carry out electrical work was right, nor whether the work was necessary.

49. We are not persuaded that any of the express covenants in clause 3 of the Deed of Variation cover the Works, except for any part of the Works which was required to maintain the staircase lighting. None of the works as set out in paragraph 28 above seem to have been for that purpose.

50. However, we do consider that the term implied by the Housing Act 1980 (now the Housing Act 1985 – see para 13 above), to:

> "ensure, so far as practicable, that services which are to be provided by the landlord and to which the tenant is entitled (whether by himself or in common with others) are maintained at a reasonable level and to keep in repair any installation connected with the provision of those services"

is wide enough to include any work that was required on the electrical installation at Pensby Close. Our reading of the lease and the Deed of Variation together leads us to conclude that the Applicant is entitled to a supply of electricity to his flat, and the right contained in the Third Schedule of the lease indicates to us that the Council are obliged to provide that service.

51. Our view is therefore that, provided the Works were necessary, a liability will arise under the lease for the Applicant to pay a service charge for the costs of those Works.

*Were the Works necessary?*

52. There is some doubt in our minds about whether the Works were required. There is an Electrical Report carried out by Dobbs only a short time before the Works were undertaken which disclosed no real issues with the electrical installation.

53. The Council have based their case upon two arguments. Firstly, that the wiring was reaching the end of its useful life, and secondly that it was not to current standards, being only 6mm² cable. They relied upon the documentation we have summarised in paragraphs 20 and 21 above.

54. We remind ourselves that we may not, as a tribunal, substitute our own view on this point for that of the Council. Our responsibility is to consider whether the Council's view was a reasonable one. In our view, a decision to replace an electrical installation which was not up to current regulatory standards, through wiring that was at least close to the end of its anticipated useful life, cannot be characterised as unreasonable.

55. We have therefore concluded that it was reasonable for the Council to incur cost on the Works. As the cost of those Works falls within the service charge provisions in the lease, our view is that the Applicant has some liability to contribute towards those costs.

*The effect of the consultation obligations*

56. We set out in paragraph 27 what the Council's Notice of Intention actually said, and in paragraph 46 what the Regulations require it to say.

57. We find that the Notice of Intention dated 4 July 2019 contained the following deficiencies:

    a. It did not specify the works to be carried out in general terms, or specify a place where plans might be inspected. The three-word phrase "main service upgrade" was in our view wholly inadequate to enable the Applicant to understand what works would be carried out, even in general terms. We do not take the view that more details provided later can cure the defect in the Notice. The Act and the Regulations are clear on the required content of the Notice itself. It is a statutory requirement with time limits applying to the consequential rights of the recipient, and in our view the Notice itself must be right.

    b. It did not state the landlord's reasons for considering it necessary to carry out the works. The reason that should have been identified was that the electrical wiring had reached the end of its useful life, was potentially unsafe, and that it needed to be replaced. The offered wording was wholly inadequate.

    c. It did not contain a statement of the landlord's anticipated total expenditure. The Appendix 2 provided referred to the wrong block, and provided the wrong figures. It meant that the Applicant had no information about the overall proposed cost of carrying out the Works to block 68-92 or to all the flats at Pensby Close, and no basis upon which he could relate the individual estimate for the costs to his own flat with any overall cost.

58. The Council say that in fact the individual estimated cost for Flat 82 was correctly shown in the Notice, as all flats were to be charged the same amount, namely one fifteenth of the overall sum quoted by Barrie Beard plus associated on-costs. So, although the wrong Appendix 2 was included in the Notice, the Appendix 1 figure was correct. In our view that is not the point. The Notice was deficient. We have not been referred to any authority for the proposition that a notice that contains errors such as those we have identified should nevertheless be regarded as complaint with the Regulations, and we know of none.

59. The consequence of a deficient Notice being served is that the Notice does not have effect. There has therefore been no effective consultation, and the collectable service charge for the costs incurred in carrying out the Works is limited to the sum of £250.00.

60. The Council may of course apply for dispensation from consultation, in order to cure this defect, but there is no formal application before us. In the current edition of Service Charges and Management Charges (Westlaw – editors Tanfield Chambers), the following paragraph appears at paragraph 13.37:

> "In *Warrior Quay v Joaquim*, *LRX/42/2006 Lands Tribunal*, it was held that where there is an issue in relation to compliance with the Consultation Regulations and there is no formal dispensation application before the tribunal, then, at least where a landlord is not professionally represented, the tribunal should ask the landlord whether it wishes to apply for dispensation, rather than not raising the point and omitting to consider at all whether dispensation should be granted. However, in practice the tribunal usually requires the landlord to make a separate application for dispensation and to pay the appropriate application fee."

61. This is a determination on the papers, and we are of the view that in accordance with the over-riding objective, we should not delay issuing a determination yet again (we have already done so once). We therefore do not wish to adjourn to ask the Council if they wish to apply for dispensation.

62. We have carefully noted paragraph 38 of the Council's Statement of Case in which the Council say:

> "In the circumstances it is submitted that the applicant has not in any material way been prejudiced by reason of the errors made in the appendices accompanying the notice of intention and has not been deprived of his rights to proper statutory consultation in respect of the subject works carried out under the long-term agreement as appears to be alleged."

63. We have asked ourselves whether we should treat this paragraph as a request for dispensation under section 20ZA of the Act. It uses language which is highly relevant to a dispensation application. We have concluded that it would not be right to do so. A section 20ZA application is a separate application to the tribunal. None has been made. This is a determination on paper, and the Applicant is unrepresented. He may well have some basis for challenging an application for dispensation, and it is beyond doubt that at the very least he should be given the opportunity to do so.

64. We therefore conclude on this issue that the Council have failed to consult properly on the Works, and accordingly the sum it claims by way of the service charge for the Works is at this point limited to £250.00.

*Reasonableness of the service charge*

65. Bearing in mind the conclusion we have reached on the consultation issue, there is strictly no necessity for us at this stage to make a determination of what further sum might be payable as the Applicant's service charge contribution towards the cost of the Works.

66. Regretfully, we have also found ourselves in some difficulties in understanding the extent and cost of the Works in any event, even on the basis of the new information provided. Our jurisdiction is to determine whether the costs claimed in the Invoice were reasonably incurred. This requires that we are provided with sufficient information to know what the job entailed, and how it was priced. We can then assess whether those works and the pricing attaching to them are reasonable, taking into account both parties' evidence and representations.

67. It was for this reason that we requested the Council to provide "a detailed description … of the work actually undertaken and the breakdown of the cost between labour and materials" in our directions dated 17 May 2021. We have read the paragraphs from paragraph 4 onwards in the Council's further submission dated 1 June 2021, but in our view, it has not fully addressed the question we raised.

68. The focus of the Council's further submissions of 1 June 2021 was to establish the value of the items for which the Applicant is <u>not</u> liable, in order to calculate the "discount" from the Invoice. That is in our view the wrong approach. We need to know what the Council's payment of £85,800.19 was for; what work was undertaken (in more detail than already provided) and how much it cost, so that we can reach a conclusion on how much the Applicant <u>is</u> liable for.

69. At this point, the Tribunal therefore declines to reach a determination on the final amount which the Applicant might be required to pay for the Works, should an application for dispensation be granted. That issue remains at large within these proceedings, and in our view either party

may request that the Tribunal considers the issue further to reach a final conclusion. We would need a further submission from the Council dealing with the information we consider we still need outlined in the preceding paragraphs. In addition, we have reached certain conclusions as set out in the following paragraphs, which the Council may also wish to address if this issue returns to the Tribunal.

70. Firstly, we do not consider that any costs for supplying and installing any cabling at all in the path from the pavement to the outside of flat 84 (i.e., the intake position of the DNO's supply) should be included in the charge to the Applicant. It is unclear to us from the Council's representations and documents as to why it, rather than Western Power, should have paid to upgrade the incoming power supply to the intake position. The Applicant represented to us, following a conversation he said he had with Western Power, that in his view Western Power did not feel it was necessary to upgrade, though of course they would be willing to do so if the Council asked and paid them to do so. If so, whether or not the Council still felt it was necessary to upgrade wiring in the Building, the upgrading of the mains supply by the DNO is much more in question.

71. We were supplied with an information sheet from UK Power Networks which confirms that a building network operator ("BNO") takes responsibility only from the intake position. It confirms that the DNO would take responsibility for providing a service cable from their LV distribution network to the intake position.

72. Whilst we note that the Council have reduced its charge as a result of accepting that 2 metres of the cable in the pavement should not be on-charged to the Applicant, in our view they should deduct all of the cost of installing that cable. Using the Council's calculations, our view was that the deduction should be at least £498.12 for the 13 metres of cabling, rather than £389.10.

73. It is unclear what the total cost of the installation of new cabling from Pensby Close to the new distribution point was, and so it is unclear whether the deduction referred to in the previous paragraph is sufficient. We were shown a document that gave a figure of £6,703.00 as the Western Power connection offer. We noted that the Barrie Beard quote included an allowance for Western Power costs. Did that mean that the £6,703.00 had been paid to Western Power by Barrie Beard, or they had done work for them, or were the total costs of that cable higher than £6,703.00?

74. We noted the Council's calculations regarding deduction from the Invoice of the costs of wiring that exclusively served the Applicant's flat and reached the view that these costs were broadly right. At least £915.65 should be deducted. If that is right in principle, the Applicant should not have to contribute either to the same expenditure on all the other fourteen flats for the work that exclusively serves those other flats. In our

view a further deduction would have to be made to strip out the same level of cost for the other flats, thus reducing the overall communal cost for which the Applicant has to pay a share by a potentially significant sum.

75. We had other questions in our minds and this summary is not to be taken as an exhaustive list of the Tribunals concerns about the reasonableness of the Invoice. We will mention two others. We were not sure that the Council's lease covenant covered the building of a new enclosure for the distribution equipment. We were also concerned about management and on-cost fees for the sub-contractor, Wates, and the Council all being reasonably incurred; the cumulative percentage might be excessive.

76. Our view is that there will be a sum due from the Applicant towards the cost of the Works. We have determined that the lease allows a service charge to be made for works on the electrical installation, we are clear that works have been carried out for which the Council have paid some £85,000.00, and that those Works were necessary. We can be confident that the eventual sum will exceed the sum of £250.00 should dispensation be granted, hence we see no reason to restrict the Council from collecting at least that sum.

*Date for payment*

77. Whilst this issue was not expressly raised by the Applicant, it is clear to the Tribunal that the provisions of the Appendix to the Deed of Variation require that, unless interim payments have been demanded (which they have not), no payment for the subject matter of the Invoice can be demanded until the Council complies with its obligation to provide a final account for 2020/21. The only sum which it may collect at that point towards the Works (until any dispensation application is determined) is £250.00. The Council should not have demanded immediate payment when it issued the invoice dated 23 June 2020. In fairness, the Council have acknowledged this in their latest submission, and we stress the point because our jurisdiction in section 27A of the Act specifically refers not simply to the determination of the amount of service charge, but the timing of the payment.

## Costs and fees

78. The Applicant has asked for orders to the effect that he should not have to pay any of the Council's costs of this application via the service charge, and that any costs he may be liable for under any clause in the lease allowing the Council to charge an administration charge for their costs should not be payable.

79. We make the orders requested as we cannot identify any clauses in the lease or the Deed of Variation that would allow the Council to reclaim its

costs under the service charge or as an administration charge. Had there been any, on the merits it would not have been just and equitable for the Applicant to have to pay any of the Council's costs when, in our view, without these proceedings he would have been unlikely to have achieved the level of success in these proceedings that he has.

80. We have also considered whether the Applicant should have to shoulder the financial cost of the application fee to the Tribunal. We have a discretion to order that any party must reimburse to any other party the whole or any part of the fee. In view of our view of the merits as set out in the preceding paragraph, we think the Council should bear that fee, and we so order.

**Summary**

81. We determine that the sum of £250.00 is payable by the Applicant towards the costs incurred by the Council in connection with the Works. Payment is not due until compliance by the Council of their obligations to provide a certificate of the service charge due and an account under paragraphs 2 and 8 in the Appendix to the Deed of Variation dated 7 March 1984.

82. The payable sum of £250.00 is capped because of the application of the consultation requirements contained in the Act and the Regulations. A final determination of the amount that may be chargeable, were dispensation from the consultation requirements to be granted, remains at large. Either party may request this question be resolved by the Tribunal at a future date upon written request.

83. We order that any costs that the Council may have wished to charge to the Applicant as an administration charge under his lease for the cost of these proceedings are extinguished.

84. We order that any of the Council's costs in these 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 Applicant.

85. We order that the Council must reimburse the Applicant for the application fee paid in order to commence these proceedings of £100.00.

**Appeal**

86. Any appeal against this decision must be made to the Upper Tribunal (Lands Chamber). Prior to making such an appeal the party appealing must apply, in writing, to this Tribunal for permission to appeal within 28 days of the date of issue of this decision (or, if applicable, within 28 days of any decision on a review or application to set aside) identifying the decision to which the appeal relates, stating the grounds on which

that party intends to rely in the appeal, and stating the result sought by the party making the application.

Judge C Goodall
Chair
First-tier Tribunal (Property Chamber)