



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

**Case reference** : **LON/00AW/LSC/2015/0064**

**Property** : **Daska House, 234 Kings Road,  
London, SW3 5UA**

**Applicant** : **Ms Laura Carrara-Cagni and others**

**Representative** : **Mr Ben Maltz, Counsel**

**Respondent** : **Christopher Moran Holdings Ltd**

**Representative** : **Ms Elizabeth Fitzgerald, Counsel,  
instructed by Darwin Law Ltd**

**Type of application** : **(1) Liability to pay service charges  
(2) Appointment of Manager**

**Tribunal members** : **Judge Robert Latham  
Mr Trevor Sennett FCIEH  
Mrs Laurelie Walter**

**Date and venue of hearing** : **20 and 21 July 2015 at  
10 Alfred Place, London WC1E 7LR**

**Date of decision** : **14 August 2015**

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**DECISION**

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- (1) The Tribunal makes the following reductions in the service charges payable by the Applicant and the other tenants who have been joined to this application, each of whom has liable for 1/26 of the charge:
  - (i) £46,334.50 in respect of the major works contact (Issue 1)
  - (ii) £7,956 in respect of legal fees relating to tribunal proceedings (Issue 3);
  - (iii) £13,256.47 in respect of legal costs relating to the major works contract (Issue 4).
- (2) The Tribunal disallows the administration fee of £120 which the Respondent has levied against the Applicant (Issue 5).
- (3) The Tribunal does not make an order for the appointment of a Manager.
- (4) The parties are agreed that it is not open to the Respondent to pass its costs of these proceedings to the tenants through the service charge. Had the Respondent been minded to do so, the Tribunal would have made an order under section 20C of the Landlord and Tenant Act 1985.
- (5) The Tribunal determines that the Respondent shall pay the Applicant £630 within 28 days of this Decision, in respect of the reimbursement of the tribunal fees paid by the Applicant.

### **The Application**

1. On 5 February 2015, Ms Laura Carrara-Cagni (referred to in this decision as “the Applicant”) made two applications to this Tribunal:
  - (i) An application pursuant to Section 27A of the Landlord and Tenant Act 1985 (“the 1985 Act”) and Schedule 11 to the Commonhold and Leasehold Reform Act 2002 (“the 2002 Act”) as to the amount of service charges and administration charges payable by the Applicant (“the service charge dispute”).
  - (ii) An application pursuant to Part II of the Landlord and Tenant Act 1987 (“the 1987 Act”) for the appointment of a manager for Daska House (“the appointment of manager application”).
2. The Respondent is Christopher Moran Holdings Limited (“the Respondent”). The Respondent is not only intermediate landlord of the residential premises at Daska House; it is also the lessee of four of the

flats, namely Flats 21, 22, 23 and 25 (the “Penthouse”). The freeholder and head lessor is currently Sun Life Assurance Company of Canada (UK) Ltd.

3. Upon receipt of the application for the appointment of the manager, the Tribunal notified all the tenants at Daska House of this application and invited them to apply to be joined to the application. Procedural Judges have made directions joining the following tenants: Mr J Ghandour (Flat 2); Ms P Perez (Flat 3); Mrs A Bingham (Flat 4); Mr and Mrs Rutter (Flat 7); Ms Michaela Leti-Messina (Flat 8); Dr D Pratt (Flat 10); Ms R Chen (Flat 11); Dr A Al-Kutoubi (Flat 13); Ms C Hudson (Flat 14); Mr K O’Reilly (Flat 16); Mr C Miller (Flat 19); and Mr N Greisamer and Ms Laiwejpitaya (Flat 20). Thirteen tenants therefore support this application for the appointment of a Manager.
4. At the hearing, the following 11 tenants applied to be made parties to the service charge dispute: Ms P Perez (Flat 3); Mrs A Bingham (Flat 4); Mr O Oskar (Flat 5); Mrs D Rutter (Flat 7); Dr D Pratt (Flat 10); Ms R Chen (Flat 11); Dr A Al-Kutoubi (Flat 13); Mr C and Ms C Hudson (Flat 14); Ms D O’Reilly (Flat 16); Mr C Miller (Flat 19); and Mr N Greisamer Laiwejpitaya (Flat 20). Ms Fitzgerald opposed the late joinder of these applicants. The Tribunal is satisfied that there is no prejudice to the Landlord by the late joinder. Whilst these additional parties will be able to benefit from our determination, they will also be bound by it. Were they not to be joined, it would be open to them to bring separate proceedings in the light of our determination. They seek to do no more than adopt the contentions raised by Ms Carrara-Cagni, the tenant, in her application.
5. On 10 March 2015, the Tribunal gave Directions. Both applications were consolidated. Pursuant to those Directions:
  - (i) The Applicant has filed a detailed Statement of Case, dated 31 March.
  - (ii) The Respondent has filed a detailed Statement of Case, dated 21 April.
  - (iii) Both parties have filed a number of witness statements.
  - (iv) The Applicant has filed a Bundle of Documents totalling 1,100 pages. Reference to this Bundle will be pre-fixed by “A\_\_”. Documents are photocopied on both sides. The reverse side is not paginated, and is referred to as “A\_\_R”).
  - (v) The Respondent has filed a Bundle of additional Documents totalling 373 pages. Reference to this Bundle will be pre-fixed by “R\_\_”.

## **The Hearing and Inspection**

6. The Applicant was represented by Mr Ben Maltz and the Respondent by Ms Elizabeth Fitzgerald. Both provided the Tribunal with Skeleton Arguments and a number of authorities. Mr Maltz also provided a draft Management Order. After the hearing, he provided an amended version taking on a number of concerns raised by the Respondent. These applications have raised a number of complex issues and we are grateful to the assistance provided by both Counsel.
7. Mr Maltz adduced evidence from the following:
  - (i) Mr Ian Gilbert, a Property Manager at Faraday Property Management Ltd (statements at A99 and A52R). Mr Gilbert is the manager proposed by the Tenant. Mr Sennett asked Mr Gilbert a number of questions to assess his suitability as a fit and proper person to be appointed as a manager on behalf of the Tribunal. The Tribunal is satisfied that he is.
  - (ii) Ms Laura Carrara-Cagni, the Applicant (statement at A93). She is an architect. She has been the tenant of Flat 12 since 2002.
  - (iii) Mr Charles Hudson, the husband of the tenant of Flat 14 (at A100). They have lived in their flat for some 20 years. Mr Hudson suggested that Cluttons would not have been procrastinating for so long on the essential work required to the block, but for the approach adopted by the Landlord.
  - (iv) Ms Catherine Bingham, the daughter of the tenant at Flat 4 (at A101). Ms Bingham suggested that there was a clear difference in quality of materials used and the workmanship to the Penthouse compared with the other flats. This suggestion was not confirmed by our inspection. The major works contract had never extended to replacing the external mosaic tiles. These had rather been cleaned and, where necessary, repaired.
  - (v) Ms Mar Perez, the tenant of Flat 3 (at A102)
8. The Applicant also asked us to have regard to the witness statements of:
  - (vi) Dr Aghlad Al-Kutoubi, the tenant of Flat 13 (A103);
  - (vii) Ms Diana O'Reilly, the tenant at Flat 16 (at A104). Her husband, Kevin, now deceased, had taken the first steps to mobilise the lessees to take action to improve conditions at Daska House.
9. Ms Fitzgerald adduced evidence from:

(i) Mr Ian Alexander, a partner of Cluttons LLP (“Cluttons”) (at A112 and R376). Cluttons have managed the property on behalf of the Landlord since 2008. Mr Alexander took over responsibility for the management of the major works contract when Mr Lee Clarke left Cluttons in late December 2012. On 27 February 2015, Cluttons gave notice that they were withdrawing from managing Daska House with effect from 23 June.

(ii) Mr Andrew Darwin, of Darwin Law Ltd, who is the Landlord’s Solicitor (at A108R). His evidence was particularly relevant to Issue 4.

(iii) Mr Jamie Moran (at A117A and R385). Mr Moran is a director of the Respondent Company. He is the son of Mr Christopher Moran, the leading light behind the company. He has only been directly involved with Daska House since January 2015 upon the retirement of Mr Cutting. Mr Maltz put to Mr Moran that the Respondent Company had been wilfully obstructive of the tenants. Mr Moran denied this suggestion. Mr Moran had no knowledge of the circumstances in which the Respondent had acquired its interests in the Penthouse and the intermediary lease in 1975.

10. The Respondent also asked us to have regard to the witness statements of:

(iv) Mr Christopher Moran (at A116A). Mr Moran states that the conservatory extensions had been erected shortly before the Respondent acquired (i) the head lease of Daska House; and (ii) the sub-lease of the Penthouse. The Respondent’s interests in both these leases were registered at the Land Registry on 30 June 1975. The Tribunal were given no explanation as to why Mr Moran was not available to give evidence. Had he been called, Mr Maltz would have had a number of questions to put to him relating to the circumstances in which he acquired his interests in Daska House, the inquiries which he had made about the two conservatories which had recently been installed in breach of an absolute prohibition against alterations, and the lack of maintenance at Daska House over the past 40 years.

(v) Mr Sandeep Kohli (at A105A and R364). Mr Kohli is a Property Manager employed by Cluttons who has been primarily responsible for managing Daska House since February 2013. Mr Kohli was not available as he was in India. However, Mr Alexander was in a position to field the questions which Mr Maltz would have wished to put.

(vi) Mr Ben Martin (at R378). Mr Martin is Head of Residential Management at Cluttons. He was able to confirm that the service charge demands had been accompanied by the appropriate Summary of Rights and Obligations.

11. On 21 July, the Tribunal inspected Dhaka House accompanied by Mr Maltz, Mr Darwin, the Applicant and Mr Jamie Moran. We inspected the following:

(i) The Penthouse. We noted the two conservatory extensions; the defect to the drain below the bedroom conservatory which had now been remedied; the continuing defects to the four panel patio door; and the parapet wall which was a possible cause of water penetration to the Applicant's flat. The Penthouse was being refurbished to a high standard. It affords excellent views of London.

(ii) Flat 12. We noted the stalactite; the defects to the four panel patio door; the bedroom where there has been a history of dampness; the smoke vent louvre that may be a possible source of cold bridging. The bedroom also had a patio door. The Applicant had elected not to have a trickle vent installed on the door. There was secondary glazing which the Applicant had installed. There was no other ventilation to this room.

(iii) Flat 4. We noted the defects to the four panel door; the patio step which had been discoloured by the concrete filling and looked as if it had cracked; and the mosaic tiling to the balconies.

(iv) The common parts which were "tired". The tenants had installed the carpet on the common parts on the fifth and sixth floors. They had also painted the common parts. The block has a lift. However, the staircase was "Spartan". The lighting fittings were poor and appeared to be original features.

### **Issues in Dispute**

12. In their Statements of Case, as refined in their Skeleton Arguments and Closing Submissions, the parties have identified the following issues for us to determine:

#### **Service Charge Dispute**

Issue 1: The Penthouse Conservatories. The Applicant contends that the cost of demolishing and rebuilding these conservatories should not be borne by the service charge account as they were not part of the "reserved property" at Daska House falling within the Landlord's obligation to repair.

Issue 2: Balancing Service Charge relating to the windows. Some tenants were given the option of retaining the window and patio doors that they had installed. The Applicant contends that the account needs to be adjusted to reflect the fact that not all the windows and doors

were replaced. The Landlord asserts that it has only paid for the actual windows and doors that have been replaced.

Issue 3: Balancing Service Charge relating to legal fees. A previous Tribunal found that the Respondent is not entitled to pass on legal costs relating to tribunal proceedings through the service charge. The Applicant contends that the service charge should have been credited with the sum of £7,956.

Issue 4: Legal Costs: The Applicant disputes the Respondent's right to charge to the service charge account, legal fees of £14,276.47 which were paid to RLS Law LLP.

Issue 5: The Respondent claims an administration charge of £120 in respect of two letters, dated 23 January 2012 and 15 February 2012 relating to unpaid service charges. The Applicant disputes her liability to pay this.

Issue 6: Balancing Service Charges of £434.90 for 2011/2 and £12.14 for 2012/3. The Applicant contends that the Respondent failed to comply with the statutory requirements imposed by Section 20B(2) and Section 21B of the 1985 Act.

#### The Appointment of Manager Application

Issue 7: Should the Tribunal appoint Ian Gilbert as a manager pursuant to Section 24 of the 1987 Act?

#### The Background

13. Daska House is a nine storey building which was constructed in about 1970. It is situated in Kings Road opposite Chelsea Town Hall. This is an extremely desirable location. However, this unexceptional 1970's building is not of the quality that one might expect to find in this location. The ground, first and second floors consist of commercial units, whilst the third to ninth floors comprise 25 residential flats. The Applicant is the tenant of Flat 12 which is on the 5<sup>th</sup> floor.

14. There are three leases which are relevant to this determination:

(i) The head lease, dated 15 August 1972, was granted by Nesadean Properties Ltd to Deltrane Properties Limited for a term of 99 years from 24 June 1972 (at A139-167). The demised premises are restricted to the residential premises and the associated common parts at Daska House. By Clause 3(9), there is an absolute covenant by the lessee against erecting any new or additional building upon the demised premises or any external addition. There is a lease plan of the

Penthouse at A161R and of the roof space at A162. The Respondent was registered as acquiring this leasehold interest on 30 June 1975 (see A165)

(ii) The under-lease in respect of the Penthouse, dated 29 June 1972 (sic), was granted by Deltrane Properties Limited to Leonard Phillips for a term of 99 years less ten days from 24 June 1972 (at A168-189R). This flat is larger than the other flats and its contribution towards the service charge is 2/26 compared to 1/26 for each of the other 24 flats. The Sixth Schedule specifies the lessee's covenants. By paragraph 21, the lessee covenants to perform and observe all the covenants and conditions in the superior lease. By paragraph 27, the lessee covenants not to erect any new or additional building upon the demised premises or any external addition. This mirrors Clause 3(9) in the head lease. There is a lease plan of the Penthouse at A189 and of the roof space at A189R. These are consistent with the lease plans in the head lease. The Respondent was also registered as acquiring this leasehold interest on 30 June 1975 (see A167).

(iii) The under-lease in respect of Flat 12, initially dated 9 May 1973, was granted by Deltrane Property Limited to Lussett Limited for a term of 99 years less ten days from 24 June 1972. The Applicant acquired the leasehold interest in 2002. On 1 June 2006, the Respondent extended her lease pursuant to the Leasehold Reform, Housing and Urban Development Act 1993. The extended lease created a term of 189 years less 10 days commencing 24 June 1972 (at A120-138). The terms of the extended lease mirror the terms of the original lease.

15. In about 1973, two conservatories were added to the Penthouse. These are not self-contained structures but form part of the living accommodation of the flat. One conservatory on the southern side links the kitchen with the living room; the other extends a bedroom. There are no longer any doors or windows between the original flat and these structures. They have become an integral part of the flat. Planning permission was granted on 15 December 1972 (A343). It is common ground that these conservatories were added before the Respondent acquired its respective interests in both the head and under leases. The additions were constructed in breach of the express covenant in both leases. The Respondent must have been aware that the layout of the Penthouse did not reflect that in the lease plans and that the additions would have been constructed in breach of the absolute prohibition against such additions. There is no evidence that the Respondent took any steps to regularise the position. The position of the Respondent seems to be that these conservatories were erected in breach of covenant but that the breach occurred more than 40 years ago and the Respondent is now "immune from enforcement" (see Mr Darwin's letter, dated 29 November 2013, at A382).



16. Mr Alexander explained how the conservatory which extended the bedroom was constructed over part of the roof drainage system. Specifically, water which would be taken off the Penthouse roof would run through a channel which was located underneath the conservatory. On 21 May 2002, an inspection by Kennedy Haywards (at A375R) identified that rain water appeared to be running directly off from the balcony surface cascading down the side of Daska House causing severe staining to the brick pier. Kennedy Haywards had been instructed by the managing agents to investigate the cause of mould growth to the external wall of Flat 16, which was occupied by Mr Kevin O'Reilly. This flat is situated directly above Flat 12. The problem is confirmed in a report by Housecheck, dated 5 July 2002, which was prepared for Mr O'Reilly (at A408). The dampness was also affecting the interior of the flat.
17. At this time, Daska House was being managed by Hayward Property Services ("Haywards"). On 8 March 2007 (at A379), Mr O'Reilly complained of the lessees' dissatisfaction with the services that Haywards were providing and their failure to adopt a ten year maintenance programme. He noted the need for urgent attention to the roof. On 26 April 2007, Haywards responded that they could not proceed with a ten year work plan until the Respondent gave "the green light". Such comments have led the lessees to believe that the management of the property is unreasonably being curtailed by the Respondent.
18. It is apparent that the then head lessor, Lincoln Assurance Ltd was also becoming increasingly impatient with the failure of the Respondent to maintain Daska House in a proper state of repair. It commissioned two reports from Beaumont Lord, Building Surveyors, in December 2007 and July 2008. In 2008, it also issued proceedings against the Respondent in the County Court (at A212), to secure access to inspect all parts of the residential parts of Daska House.
19. In early 2008, Haywards went into administration and the Respondents appointed Cluttons to manage Daska House. On 18 December 2008, Cluttons obtained a report from Malcolm Hollis which identified defects to the mosaic cladding, brickwork, the penthouse roof, windows, decorations, mechanical and electrical installations and other matters. In January 2009, Cluttons embarked on the statutory consultation required by Section 20 of the 1985 Act. The lessees welcomed the appointment of Cluttons, subject to the proviso that the Respondent was willing to proceed with the works that were required (see Mr O'Reilly's letter of 12 March 2010 at A381). A Schedule of Works was prepared. Tenders were sought and major works finally commenced in June 2012.
20. The delays were too long for the tenants. On 29 April 2011, Mr O'Reilly supported by 11 other lessees including the Applicant, issued two

applications to a Tribunal to determine the reasonableness of the service charges and for the appointment of a Manager. A Procedural Judge directed that the appointment of a Manager should be determined first. The case was heard over three days in November and the Tribunal gave its decision on 20 December 2011 (LON/00AW/LAM/2011/0008 at A190). The lessees had proposed to appoint Cluttons as Manager to ensure that they were directed by the Tribunal, rather than by the Respondent. Cluttons withdrew their consent to act as a Tribunal appointed Manager between the first and second days of the hearing. The Tribunal concluded that the tenants' Section 22 Notice was defective, but was willing to proceed to consider whether it would be just and equitable to appoint a Manager. The Tribunal inspected the premises on 25 November. The Tribunal did not give a detailed account of the want of repair as it was common ground that the property was in need of thorough-going major works. Reference was made to the report of Malcolm Hollis, dated 8 December 2008, and a separate report relating to the windows dated, 6 December 2010. Works, costed in excess of £1m, were due to commence during the Spring. The Tribunal noted that works had delayed because, after consultation with the lessees, a decision was taken to replace the windows. The Tribunal also noted that the Respondent was in arrears with the service charges payable in respect of the four leases that it owned in the sum of some £100k. Mr Michael Cutting, a Chartered Accountant employed by the Respondent, asserted that the Respondent had never obstructed or blocked the execution of the necessary works. The tenants had no confidence that the works would commence in April 2012. The Tribunal concluded that even had the Section 22 Notice which had been served on 11 April 2011 been valid, it would not have been minded to appoint a manager. Although the Tribunal accepted that there may be some very considerable merit in the lessees' disquiet about the current situation, it did appear that at long last the long awaited works were now on track. These would be delayed were a new Manager to be sought.

21. On 12 February 2013, a Tribunal determined two further applications brought by the Respondent landlord in respect of the reasonableness of service charges (LON/00AW/LSC/2012/0758 at A199). Both applications related to the removal of asbestos which had become apparent after the major works had commenced. In July 2012, asbestos was found in the internal roof void when the fascia panelling had been removed, and in November 2012 further asbestos was found when floorboards within the Penthouse were removed. The Tribunal determined that £146,565 was payable in respect of the first application and £6,321.60 in respect of the second. In the latter case, the Tribunal reduced the sum sought by the Respondent Landlord as it was not satisfied that it was reasonable to remove the asbestos, rather than encapsulate it. In each case, the Tribunal made orders under Section 20ZA of the 1985 Act dispensing with the statutory consultation requirements which would have further delayed the works.

22. On 11 June 2012, the major works commenced. This included the installation of new aluminium double glazed windows and patio doors. The windows are manufactured by Smart Architectural Aluminium (“Smart”) and are installed by Pentagon Installations Ltd (“Pentagon”).
23. The Applicant would have preferred the installation of windows manufactured by Fineline. However, it is apparent that Smart were Pentagon’s preferred supplier and that their price was somewhat cheaper (£312,564 as opposed to £333,488 – see A283). Cluttons also found that Fineline were slow to respond (see R191). This Tribunal is satisfied that the landlord was entitled to use the windows manufactured by Smart to be installed by Pentagon.
24. On 28 March 2013, the major works were completed. A 10 year FENSA guarantee was issued for each flat. A certificate of practical completion was issued on 5 April. Under the contract, there was a 6 months defect period. In June, Cluttons completed the final accounts (at A318). These were revised on 29 July and 10 September. The final account was £1,014,629.44 increasing to £1,379,535.24 with the addition of fees and VAT. The situation at the time of the hearing is that Cluttons are still holding a retention of 2.5% (£25,235.74) in respect of the windows. The landlord accepts that there are still defects to the four panel patio doors which need to be resolved.
25. On 29 January 2014, the Applicant served her Preliminary Notice pursuant to Section 22 of the 1987 Act (at A17). The Respondent was required to remedy three matters within three months. On 9 April, the Respondent served its Response denying that it was in breach of covenant and stating that any necessary works were now in hand (at A412R).
26. On 5 February 2015, the Applicant made her two current applications to this Tribunal.
27. Events have not stood still. On 27 February 2015, Cluttons tendered their resignation with effect from 23 June 2015 (see A542R). Mr Maltz put to Mr Alexander that Cluttons had only terminated their management agreement because of the lack of cooperation that they had received from the Respondent. Mr Alexander did not accept this. In a letter to the Applicant, dated 23 March 2015 (at A15), Mr Alexander described how Cluttons do not like to continue to offer management services where the lessees would like to make other arrangements. Their resignation should be seen in this light. He added: “a new appointee should be able to have a stronger relationship with all the interested parties at Daska House.” In his witness statement (at A115R), he described how Cluttons had found it extremely difficult to deal with the Applicant and other members of the Residents Association. Mr Kohli made a similar point in his first witness statement. However, he was not available to be cross-examined on this.

28. On 11 April (see R372), the Respondent invited written observations on proposals to appoint new managing agents under a long-term qualifying agreement. However, on 16 July (see R394), the Respondent notified the lessees that it intended to appoint Faradays as managing agents from 22 July for a term of one year, less one day at a fee of £10,000 + VAT. Mr Jamie Moran stated that the Respondent had taken this decision because the timescale for putting a long term qualifying agreement in place was always going to be tight. A quotation had also been obtained from Prinipia which had proved more expensive. Following the appointment of Faradays, the Respondent intends to commence the planned maintenance programme as soon as possible.

### **The Applicant's Lease**

29. The Applicant's under lease in respect of Flat 12 is at A120-138. The terms of her lease are uncontroversial, save for two matters namely whether the Applicant is obliged to contribute to

(i) the cost of repairing the two conservatories which have been added to the Penthouse (Issue 1); and

(ii) the legal costs incurred by the Respondent in connection with the major works contract (Issue 4).

30. The landlord's obligations are set out in the Seventh Schedule. The landlord covenants to keep the reserved property in a good and tenable state of repair. The reserved property is defined in the First Schedule. The tenant's obligations the Sixth Schedule. This includes an obligation to pay 1/26 of the service charge. The 24 other under-lessees occupy their flats under similar leases.

### **Issues in Dispute – Service Charges**

31. The relevant legal provisions of the 1985 Act are set out in the Appendix to this decision.

#### **Issue 1: The Penthouse Conservatories**

32. The Applicant contends that the cost of demolishing and rebuilding these conservatories should not be borne by the service charge account as they were not part of the "reserved property" at Daska House falling within the Landlord's obligation to repair. The Applicant contends that the sum which should be disallowed is some £91,334 and relates to (i) removal of the conservatories: £1,540 + VAT; (ii) drainage repairs (£1,853.50 + VAT); (iii) replacement of the conservatories: £51,787 + VAT; (iv) Cluttons' supervision fee of 10%; (v) Pro rata preliminaries: £4,400; and (vi) scaffolding (£14,120). The cost of replacing the

conservatories is to be found at A382. There are a number of photos showing the state of the conservatories prior to the major works at R115.

33. The Respondent's case is rather that these additions have now become part of the structure at Daska House and are therefore included in the definition of "reserved property" and/or constitute "additions" to the reserved property which fall within the Landlord's obligation to repair which it is entitled to pass on to the tenants through the service charge account.

34. In determining this issue, we must interpret the leases which govern the residential tenancies at Daska House. We have regard to the guidance given by the Supreme Court in *Arnold v Britton* [2015] UKSC 36; [2015] 2 WLR 1593, per Lord Neuberger at [14] – [23]:

(i) Service charge clauses are not subject to any special rules of interpretation. However, in *McHale v Earl Cadogan* [2010] HLR 412, Rix LJ stated that the court should not "bring within the general words of a service charge clause anything which does not clearly belong there".

(ii) The court is concerned to identify the intention of the parties by reference to "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean" (per Lord Hoffmann at [14] in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] AC 1101).

(iii) In interpreting the meaning of words used in a number of leases, the Court should focus on their documentary, factual and commercial context. That meaning has to be assessed in the light of (a) the natural and ordinary meaning of the clause, (b) any other relevant provisions of the lease, (c) the overall purpose of the clause and the lease, (d) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (e) commercial common sense, but (f) disregarding subjective evidence of any party's intentions.

(iv) Where an event subsequently occurs which was plainly not intended or contemplated by the parties judging from the language of their contract, if it is clear what the parties would have intended, the court will give effect to that intention.

35. The head lease, dated 15 August 1972, is at A139-167. The lessee's covenants are at Clause 3. Clause 3(9) provides:

"that the Lessee will not erect any new or additional building upon the demised premises or any part thereof and will neither make any external additions to nor increase the height of any of

the buildings now comprised in the demised premises and will not make any structural alterations or additions to the demised premises.”

36. The demised premises are defined in the First Schedule. The critical description of the demised premises relates to the ninth Floor. This is described as:

“The Pent House Flat shown on the plan marked “Pent House” and the lift shaft staircase landing refuse chute and room adjoining the staircase housing water storage tanks.”

37. The lease plan of the Ninth Floor is at A161R. It is common ground that this does not include the two conservatories which were constructed subsequently to the grant of the lease. Given that there was an absolute prohibition against any “external additions”, the erection of these conservatories would have been unlawful. Mr Maltz argues that when the Applicant acquired her lease, she would not reasonably expect to be required to contribute to the landlord’s costs of repairing and maintain these unauthorised structures.

38. Ms Fitzgerald, on the other hand, argues that these conservatories are now part of the “reserved property” which the landlord is obliged to repair, the cost of such repairs being something that the landlord can pass on to the tenants through the service charge account. She contends that they are either (a) an integral part of the property; (b) a fixture; or (iii) a chattel. Ms Fitzgerald refers us to the following provisions of the Applicants lease (at A120-138):

(i) The definition of the “reserved property” in the First Schedule which includes all premises demised in the Superior Lease other than the 25 flats. Paragraph 1 includes “all fixtures and fittings in the reserved property”.

(ii) The obligations of the Landlord in the Seventh Schedule. By paragraph 1, the Landlord covenants to (emphasis added) “keep the Reserved Property and all fixtures and fittings and furnishings therein and additions thereto in a good and tenantable state of repair decoration and condition and proper working order including the renewal and replacement of all worn and damaged parts..”

(iii) The Service Charges payable by the Tenant which are specified in the Ninth Schedule. This extends not only to the cost of maintaining, repairing and renewing the main structure including the roofs and walls of the Property but also “all other parts of the Reserved Property.

39. Ms Fitzgerald referred us to “Dilapidations: The Modern Law and Practice” (Dowding, Reynolds and Oakes) confirming the well

established rule that anything that is attached to the land becomes part of it. Thus in an ordinary case, a reference to “demised premises” will include new buildings attached during the term, alterations and additions to existing building carried out during the term. The effect of this as a covenant to repair will be construed as applying to subsequent alterations and additions unless there is something in the language used to show that a different result was intended.

#### Our Determination on Issue 1

40. We are satisfied that the two conservatories were in disrepair and that the appropriate repair was for them to be removed and rebuilt. Thus we reject Mr Maltz’s suggestion that that the works fell outside the scope of a covenant to repair. However, the issue is rather whether the Applicant and the other tenants were required to contribute to the cost of these repairs through the service charge.
41. The Applicant derives her interest as tenant from a lease granted on 9 May 1975. The landlord, Deltrane Properties Limited, could only grant such interest as it derived from the superior lease which had been granted to it by Nasadean Properties Limited on 15 August 1972. In construing these two leases, the original parties to the agreement would have had regard to two factors:
  - (i) the unqualified prohibition against any external addition which was a feature of not only these two leases but also the other 24 sub-leases;
  - (ii) the lease plan of the Penthouse which did not include the conservatories.
42. We are satisfied that it would not have been the intention of the original parties to these subleases that the sub-lessees of Flats 1-24 would be required to contribute, through the service charge, to the cost of repairing and maintaining an unlawful addition erected whether by the sub-lessee or, indeed, the intermediate landlord of the Penthouse.
43. The situation has been complicated by the fact that since 30 June 1975, the Respondent has held both the landlord and the tenant interests in the Penthouse under-lease. The Respondent has therefore had no interest in regularising the situation. It is unclear whether the head lessor is aware of the unauthorised additions. Were steps to be taken to regularise the situation, it may be that a Court would be reluctant to order reinstatement given the passage of time. However, a Court would seek to put all parties in the position that they would be had there been no breach of covenant. That would extend to protecting the other under-lessees from any prejudice, namely from being required to contribute to the additional cost of repairing and maintaining these unauthorised structures.

44. We are therefore satisfied that the Applicant should not be liable to pay any additional cost arising from the unlawful erection of the conservatories. Our primary ground is that the cost of these works is not payable pursuant to the terms of the Applicant's lease. If we are wrong on this, and the sums are payable in law, we are satisfied that it would not be reasonable for the Respondent to pass on these costs to the tenants through the service charge, given the circumstances in which these additions were constructed and were subsequently adopted by the Respondent.
45. One conservatory was erected negligently and interfered with the roof drainage system. Had these conservatories not been erected, the landlord would have been required to replace the original windows and patio doors. We estimate the cost of these repairs at some £45,000 (including the associated costs). We therefore disallow £46,334.50 (namely £91,334.50 less £45,000).

#### Issue 2: Balancing Charge relating to the Windows

46. Some tenants were given the option of retaining the window and patio doors that they had installed. The Applicant contends that the account needs to be adjusted to reflect the fact that not all the windows and doors were replaced. The total cost of the replacement of the windows was £324,069. We are told that the tenants of Flats 3, 7, 10, 16 and 24 retained their existing windows,
47. The Respondent asserts that it has only paid for the actual windows and doors that have been replaced. Mr Alexander confirmed this in evidence. The Tribunal found Mr Alexander to be an impressive witness. We have no hesitation in accepting his evidence. No adjustment is to be made to the service charge account.

#### Issue 3: Balancing Charge relating to Legal Fees.

48. A previous Tribunal (in LON/00AW/LAM/2011/0008) found that the Respondent is not entitled to pass on legal costs relating to tribunal proceedings through the service charge. The sum debited to the service charge account is £6,000 (see A338R). The Applicant first raised this on 23 September 2013 (see A396). Mr Darwin, in evidence, conceded that the tenants should have been credited with this sum.
49. These legal costs of £6,000 were included in a bill totalling £146,565.48 in respect of asbestos removal. To this sum, a number of additional charges were added: (i) contract administration fee of 10%; (ii) CDM fee of 5%; and (iii) VAT of 20% (see A317A). The Applicant therefore contends that the total sum that should be credited is £7,956. The Tribunal is satisfied that the Applicant is correct on this and that a credit of £7,956 should be made.



50. The Tribunal records its concern that the Respondent did not give effect to the Tribunal's decision in LON/00AW/LAM/2011/0008. It should not be necessary for tenants to bring a second application to enforce an earlier decision. A landlord must expect to pay the cost of that second application where such action is required.

#### Issue 4: Legal Costs

51. The Applicant disputes the Respondent's right to charge to the service charge account, legal fees of £14,276.47 which were paid to RLS Law LLP, Mr Darwin's previous firm. On 15 August 2014 (at A398), the Applicant had made a request for a breakdown of these costs pursuant to Section 21 of the 1985 Act. Mr Darwin stated in evidence that he could not recall receiving this. Mr Maltz responded that this request had also been annexed to the application form (at A37). Mr Darwin had no answer to this. He provides a breakdown of the work involved at [17] of his statement (at A110R). He also provides a timesheet at R102. He charges out his time at £350 per hour which is very much at the top end of the scale, particularly given the absence of any delegation to less experienced fee earners.
52. Mr Maltz submits that there is no provision in the lease that permits the Landlord to pass on legal costs and relies on the Tribunal decisions in LON/00AW/LAM/2011/0008 and LON/00AW/LAM/2012/0758.
53. Ms Fitzgerald submits that these costs are recoverable pursuant to the Ninth Schedule which relates to the Service Charge. Paragraph 9 provides for:

“The costs and expenses outgoings and payments of the Landlord without prejudice to the generality of such expression shall include ...and provision of any other service or facility or the making of any other payment which may be reasonably required for the efficient running of the Reserved Property”.

She relies upon the decisions in *Iperion Investments Corporation v Broadwalk House Residents Ltd* [1995] 2 EGLR and *Reston v Hudson* [1990] 2 EGLR 51. She contends that all this work was ancillary to the major works contract. Why should the landlord be able to recover the costs of engaging an architect or surveyor, but not a lawyer, she argues.

54. We agree that the Respondent is entitled to pass on the costs of employing a lawyer in connection with the major works, provided that these were properly and reasonably incurred in the management of the property. However, the Tribunal is also mindful that the landlord had engaged Cluttons to supervise a major works contract in excess of £1m in respect of which they were charging a contract administration fee of 10%. Cluttons are a long established firm of estate and managing

agents highly experienced in dealing with multi-farious issues relating to residential blocks in prime central London.

55. The Respondent claims in respect of the following:

(i) Responding to matters raised by the Applicant as part of the Section 20 consultation process: We are satisfied that Cluttons were competent to deal with this and disallow this work.

(ii) Reviewing and advising on the contents of the building contract and advising on a letter of intent: Again, we are satisfied that Cluttons were competent to deal with this and disallow this work.

(iii) Advising in respect of the repair of the conservatories: Mr Darwin accepted that this sum would only be recoverable if he had given the landlord the correct advice on this issue. We have found that he did not and disallow this item. The Respondent required advice on this issue not merely as landlord of Daska House, but also because it held the lease of the Penthouse. It is the Respondent which has adopted these unauthorised structures and has failed to regularise the position.

(iv) Advising in respect of planning matters, particularly whether or not certain works to external railings and replacement conservatories would require planning consent: We are satisfied that Cluttons were competent to deal with this and disallow this work.

(v) Advising in respect of repair to patio doors: We are satisfied that Cluttons were competent to deal with this and disallow this work.

(vi) Advising in respect of the possibility of advertising on the sheeting put on the scaffolding surrounding the Property: This issue had been raised by the Applicant. It was a matter on which the Respondent was entitled to seek legal advice. We allow £500 as a reasonable charge for this work.

(vii) Discussion with the freeholder concerning the scope of the work and whether a scaffolding licence was required. We are satisfied that Cluttons were competent to advise on this and disallow this work.

(viii) Advising in respect of repair of the louvres and the Landlord's repairing obligations regarding the same: We are satisfied that Cluttons were competent to deal with this and disallow this work.

(ix) Advising in respect of leaseholders who had already replaced their windows: We consider a charge of £350 to be reasonable in respect of this.

56. We find that legal fees of £850 have been reasonable incurred to which VAT at 20% should be added. We allow £1,020. We are satisfied that the Respondent has been too ready to seek legal advice where this was

not strictly required. Where a landlord feels the need to seek such advice, it must bear the cost. We are satisfied that the majority of these costs were not properly and reasonably incurred in the management of the property. We therefore make a reduction of £13,031.47 (namely £14,276.47 less £1,245). This may change because of vii above?

#### Issue 5: Administrative Charge

57. The Respondent claims an administration charge of £120 in respect of two letters, dated 23 January 2012 and 15 February 2012 relating to unpaid service charges. The Respondent was unable to produce a copy of these letters, but reference is made to these in the Applicant's letter, dated 17 February 2012 (at R177).

58. Ms Fitzgerald contends that this is recoverable pursuant to paragraph 5 of the Sixth Schedule of the lease. The Respondent landlord would need to satisfy the Tribunal that these costs were incurred "for the purpose of or incidental to the preparation and service" of a Section 146 Notice. We have had regard to the Court of Appeal decision in *Freeholders of 69 Marina v Oram* [2011] EWCA Civ 1258; [2012] L&TR 4 and the decision of the Upper Tribunal in *Barrett v Robinson* [2014] UKUT 0322 (LC). In *Barrett*, the Deputy President, Martin Rodger QC, gave guidance on how *69 Marina* should be applied by First-tier Tribunals. Having regard to his guidance at [51] and [52] and to the limited evidence before us, we are not satisfied that these letters were anything more than a debt collection exercise. We are not satisfied that these letters were a prelude to forfeiture proceedings.

#### 59. Issue 6: Balancing Service Charges of £434.90 £12.14

60. The Respondent claims balancing service charges of £434.90 for 2011/2 and £12.14 for 2012/3. The Applicant had contended that the Respondent had failed to comply with the statutory requirements imposed by Section 20B(2) and Section 21B of the 1985 Act. The Respondent has now satisfied the Applicant that there is no substance to these complaints and she no longer proceeds with them.

#### **Issue 7: The Appointment of a Manager**

##### The Grounds for the Application

61. On 29 January 2014, the Applicant served her Preliminary Notice pursuant to Section 22 of the 1987 Act (at A17). The Applicant relies upon three matters which the Respondent is required to remedy within three months:

(i) Failure to prepare and implement a long-term planned maintenance programme for Daska House in accordance with best practice and the RICS Service Charge Residential Management Code.

(ii) Failure to address and/or remedy water leaks and penetrating dampness occurring in the re-entrant south corner of Daska House between Flats 11 and 12 around the louvred zone.

(iii) Failure to address and/or remedy a lack of thermal and acoustic performance in the patio doors and windows installed as part of the major works contract.

62. The Applicant specified three grounds under Section 24(2) for making such an order:

(i) breach of an obligation owed to her under her lease (s.24(2)(a));

(ii) unreasonable service charges (s.24(2)(ab)); and

(iii) failure to comply with RICS Code of Practice which has been approved by the Secretary of State (s.24(2)(ac)).

63. On 9 April, the Respondent served its Response (at A412R). The Respondent denied that it was in breach of covenant. The Respondent addressed each of the three points:

(i) Prior to the receipt of the notice, Cluttons had been instructed to prepare a long-term planned maintenance programme. Once it had been approved by the landlord, it would be issued to the tenants for comment.

(ii) Cluttons had investigated the area of dampness. It is believed to be the result of cold bridging and water ingress around the south facing louvers which provide smoke venting to the common landings to the flats. This had not been included in the external major works. Cluttons had advised that it should be included as part of the forthcoming interior works.

(iii) The landlord was aware of the continuing problems with the new aluminium double glazed windows and was seeking to address these.

#### The Long Term Planned Maintenance Programme

64. Paragraph 8.8 of the RICS Management Code recommends the preparation of a Long Term Planned Maintenance Programme which should be discussed with those affected. A realistic budget should be fixed for this programme.

65. Mr O'Reilly had first raised the need for a 10 year management plan in a letter dated 8 March 2007 (at A379). Cluttons were appointed as

managing agents in January 2008. Mr Alexander stated that their initial priority had been to implement the major programme of external works to remedy the historic want of repair.

66. On 2 April 2014, Mr Alexander informed the Applicant that a colleague, Andrew Fletcher was preparing a planned maintenance inspection (see A539R). In May 2014, Cluttons prepared a Draft Planned Maintenance Summary Report (at A360-363). The yearly expenditure was some £75k to £100k or some £4k per tenant. On 13 June, Mr Alexander informed the Applicant that the landlord had approved this for consultation (A539). On 9 October, this was discussed at a meeting with the tenants. Mr Alexander described this meeting as “acrimonious”. A note of the meeting, with amendments added by the tenants, is at R25. The tenants were unhappy with the plan. It was therefore updated and reissued in March 2015 (at A364-8). The Respondent states that there is no reason why the programme should not proceed once the new manager is appointed.

#### Water Leaks

67. The Respondent accepts that prior to the major works, there were various defects affecting the exterior of the building which led to water ingress and damp penetration to various flats. In particular, water was penetrating the structure via the roof and flashing defects, through defective coping stones, around defective rainwater gullies, through defective asphalt to balconies and around cracks in the pointing and mosaic tiles. The Respondent contends that the major works have resolved most of these problems and the isolated minor defects are caused by a different set of problems.
68. There is a small stalactite on the underside of her balcony roof. This is illustrated in the photograph at A511. We saw this on our inspection. This seems to be an isolated problem which Cluttons had been seeking to resolve. We were also shown an area of the Applicant’s bedroom which was said to be prone to dampness. This was next to the ventilation louvres and was possibly caused by cold bridging. There was a high risk of condensation in this area. The Respondent hopes to address this through the planned maintenance programme.

#### Defects to the Patio Doors and Windows

69. It is common ground that there have been continuing problems with the new windows and patio doors which were installed as part of the major works. In their witness statements, Mr Alexander and Mr Singh explain the steps that they have taken to resolve these issues. The outstanding problem relates to the four panel patio doors which we were shown on our inspection. Some doors have been removed, altered and reinstalled. The doors were oversized; they are now undersized. The problem seems to be the size of the panels. There has been

excessive play. Some of the doors now bow creating a gap at the top and the bottom of the doors.

70. On 28 July 2013, the Applicant obtained a report on the windows from Mr Rodney Appleyard, a Surveyor (at A350). On 16 June, he had inspected four flats, including Flat 12. He was satisfied that the patio doors were of a good quality and that the window installation had been carried out in a good manner. He confirmed that thermal breaks were present. He noted that there was a problem of condensation but concluded that this was a lifestyle issue. However, he found that there were a number of defects which were common to all the flats. The seals were not effective and draughts were being experienced through the sealing gaskets joints.
71. The Applicant did not send a copy of the report to Cluttons until 23 January 2014 (see A396R). The Applicant explained that she had first wanted to discuss the report with the Residents Association which only met quarterly. We suspect that she delayed because she was not entirely happy with Mr Appleyard's conclusions.
72. On 12 September 2013, Cluttons inspected the windows and wrote to the tenants asking to be notified of any defects (R29). On 31 October, Cluttons issued a Schedule of Defects to the contractors in respect of the window units. In December 2013, the contractors returned to carry out works to the windows. On 11 March 2014, Smart, the manufacturers, inspected the windows to assess the concerns about air ingress, condensation and faulty self-cleansing glass. A number of doors were not properly aligned and window hinges were not correctly tensioned. Works were carried out on 8 and 9 May 2014 to Flats 3, 4, 8, 11, 12, 14, 15, 17, 20 and the Penthouse.
73. Cluttons had hoped that these works had resolved the problems. However, problems persist. Pentagon refused to return until specific details had been detailed. On 31 March 2015, Cluttons and Pentagon inspected all the flats. Defects were found to 14 of the four panel doors. It was agreed that Pentagon would return to trial a repair to the central set of doors. If successful, this would be rolled out across the other doors showing the same defect. It was agreed to trial the Applicant's flat. Works were undertaken in June, but these have not resolved the problem.
74. Notwithstanding that Cluttons are no longer managing Daska House, they will continue to oversee the completion of the remedial works to the patio doors until they operate to the contractual standard. Mr Alexander emphasised his concern about the problems that have arisen. He saw it as a matter of "professional pride" to see this contract through to a successful conclusion. The Tribunal were impressed by his evidence and are satisfied that he will ensure that these outstanding defects are remedied.

## **Our Determination on the Appointment of a Manager**

75. We are satisfied that the Applicant has served a Preliminary Notice that complies with the requirements of Section 22 of the 1987 Act. We are further satisfied that Mr Gilbert is a fit and proper person to be appointed as a manager. The issue is rather whether we are satisfied that it is “just and convenient” to appoint Mr Gilbert as a manager to carry out such functions with the management of the premises as this Tribunal may direct.
76. Mr Maltz initially asked the Tribunal to make an appointment for an indefinite period. Ms Fitzgerald suggested that any appointment should be for a maximum of two years. Mr Maltz responded that the Applicant would be satisfied with an appointment for three years.
77. Section 24(2) of the 1987 Act provides, in so far as is relevant:
- (2) The appropriate tribunal may only make an order under this section in the following circumstances, namely—
- (a) where the tribunal is satisfied—
- (i) that any relevant person either is in breach of any obligation owed by him to the tenant under his tenancy and relating to the management of the premises in question or any part of them or (in the case of an obligation dependent on notice) would be in breach of any such obligation but for the fact that it has not been reasonably practicable for the tenant to give him the appropriate notice, and
- (ii) that it is just and convenient to make the order in all the circumstances of the case;
- (ab) where the tribunal is satisfied—
- (i) that unreasonable service charges have been made, or are proposed or likely to be made, and
- (ii) that it is just and convenient to make the order in all the circumstances of the case;
- (ac) where the tribunal is satisfied—
- (i) that any relevant person has failed to comply with any relevant provision of a code of practice approved by the Secretary of State under section 87 of the Leasehold Reform, Housing and Urban Development Act 1993 (codes of management practice), and
- (ii) that it is just and convenient to make the order in all the circumstances of the case.

78. Mr Gilbert's firm, Faradays, have now been appointed by the Respondent to manage the property. The Applicant, supported by 12 other tenants, wants Mr Gilbert to be accountable to this Tribunal, rather than the landlord. The Respondent opposes this application, albeit that such an appointment would insulate the landlord from its day-to-day dealings with its tenants. It is apparent to this Tribunal that the relationship between the landlord and its tenants has become entrenched as a result to which the Respondent has had to resort to legal advice in circumstances when this would not normally be required.

79. Ms Fitzgerald asked us to have regard to the following principles, which are not disputed by Mr Maltz:

(i) The appointment of a manager should be a remedy of "last resort".

(ii) The focus of the Tribunal should not be on historic matters. The appointment of a manager deals with the future only. The Tribunal should be concerned with the likely future management of the property and whether the plans of the manager proposed by the Applicant would be any different if the application is permitted.

(iii) The appointment of a manager should be curative, rather than to penalise the existing management (See *Mason v 1 Vermont Road (Freehold) Ltd* LON/00AH/LSC/2011/0003 at [12]).

(iv) It is important to consider the steps taken by the landlord in response to the section 22 notice and whether any issues raised by the applicants are being or will be remedied. We are referred to 32.034-32-026 of "Service Charges and Management: Law and Practice" (3<sup>rd</sup> Ed), Tanfield Chambers.

80. The issue for us to determine is the same as it had been under LON/00AW/LAM/2011/0008, namely whether the managing agents should be subject to the direction of this Tribunal, rather than to the Respondent. The Tribunal makes the following findings:

(i) There has been a history of neglect at Daska House.

(ii) Since Cluttons were appointed in January 2008, a programme of major external works has been executed at Daska House at a cost of some £1.38m.

(iii) The Applicant has not adduced sufficient evidence to satisfy us that the Respondent has sought to thwart this programme of works.

(iv) There are outstanding defects to the four panel patio doors in a number of flats. Both the Respondent and Cluttons are taking reasonable steps to address these outstanding defects. We are satisfied



that the Respondent was entitled to engage Smart and Pentagon to manufacture and install the windows.

(v) There are still minor problems of dampness affecting Flat 12. Mr Alexander satisfied us that the landlord is seeking to resolve these.

(vi) There has been a delay in the preparation of a long term management programme. However, as a result of the service of the Section 22 Preliminary Notice, a programme has now been prepared which should proceed when the new managing agents are in place.

(vii) Although we have made some reductions in the service charges payable by the tenants, these are modest in comparison with the total cost of the major works. We note that the Tribunal only made modest reductions in LON/00AW/LAM/2012/0758.

81. We have some sympathy with the Applicant and the other tenants. There has been a history of neglect. The common parts are "tired" and in need of attention. Daska House has not been maintained to the standard that one would have expected in this desirable area of Chelsea. However, the Section 22 Preliminary Notice seems to have had its desired effect. A long term planned maintenance programme is now being implemented.

82. Had the Applicant satisfied us that the Respondent had failed to cooperate with Cluttons we would have had no hesitation in appointing Mr Gilbert as Manager. Mr Johnson denied that there had been any lack of cooperation. We accept his evidence. We therefore conclude that it would not be just and convenient to appoint Mr Gilbert as Manager on behalf of the Tribunal. Faradays will therefore manage the property on behalf of the Respondent. Were there to be any evidence that the Respondent is unreasonably curtailing their effective management of Daska House, it would be open to the tenants to make a further application for the appointment of a manager. However, they would need to adduce clear and cogent evidence to support their application.

83. Should this matter go further, we record that had we been minded to make an appointment, we would have approved the draft Order submitted by Mr Maltz and would have made the appointment for two years.

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

84. In the two previous decisions (LON/00AW/LAM/2011/0008 and LON/00AW/LAM/2012/0758), Tribunals have held that the leases do not permit the Respondent landlord to pass on the costs that it has incurred in connection with proceedings before this tribunal. Neither Counsel have asked us to revisit these decisions. Had we been asked to do so, we would have confirmed their decisions on this issue for the reasons that they gave. If we, and they, are wrong on this, we would

have concluded that it was just and equitable to make such an order having regard to our determinations above.

85. The Applicant also made an application for a refund of the fees that she had paid in respect of the application and the hearing<sup>1</sup>. Having heard the submissions from the parties and taking into account the determinations above, the Tribunal orders the Respondent to refund any fees paid by the Applicant within 28 days of the date of this decision. We understand that those fees total £630, namely an application fee of £440 for the service charge application and £190 for the hearing fee. The Applicant has been largely successful in the service charge dispute. The Tribunal is satisfied that a long term management programme would not now be in hand but for the Section 22 Preliminary Notice which was served. We have recoded our concern that the Respondent failed to give effect to a previous determination of this tribunal.

**Robert Latham**

**14 August 2015**

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

## **Appendix: 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 the appropriate tribunal for a determination whether a service charge is payable and, if it is, as to -
  - (a) the person by whom it is payable,
  - (b) the person to whom it is payable,
  - (c) the amount which is payable,
  - (d) the date at or by which it is payable, and
  - (e) the manner in which it is payable.
- (2) Subsection (1) applies whether or not any payment has been made.
- (3) An application may also be made to the appropriate tribunal for a determination whether, if costs were incurred for services, repairs,

maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs and, if it would, as to -

- (a) the person by whom it would be payable,
  - (b) the person to whom it would be payable,
  - (c) the amount which would be payable,
  - (d) the date at or by which it would be payable, and
  - (e) the manner in which it would be payable.
- (4) No application under subsection (1) or (3) may be made in respect of a matter which -
- (a) has been agreed or admitted by the tenant,
  - (b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,
  - (c) has been the subject of determination by a court, or
  - (d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.
- (5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.

## **Section 20**

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

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

### **Section 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.