



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

Case Reference : LON/00AM/LSC/2016/0144

Property : Various Flats, 63-67 Dalston Lane
London E8 2NG

Applicant : Avon Ground Rents Limited

Representative : *Mr Philip Sissons Counsel*
(instructed by Scott Cohen
Solicitors, Henley-on-Thames)

Respondents : Leaseholders of Flats 1-15 (1)
Metropolitan Housing Trust (2)
Advance (3)
May Hampstead Partnership (4)

Representatives : Mrs D Cowley appeared in person
for herself and the other residential
leaseholders as First Respondent;
Mr Tim Clarke Counsel (instructed
by Legal Services, Metropolitan
Housing Trust) appeared for the
Second Respondent; Ms Mariana
Senior in person for the ~~Fourth~~
Third Respondent. The ~~Fourth~~
Third Respondent did not appear
and was not represented.

Type of Application : For the determination of the
liability to pay a service charge
under s 27A(3) of the Landlord and
Tenant Act 1985 ("the Act");
applications under section 20ZA
and 20C of the Act. A rule 13
application was made at hearing by
the First and Second respondents.

Tribunal Members : **Mr Charles Norman FRICS
(Valuer Chairman)
Mr Anthony Harris LLM FRICS
FCIArb**

**Date and venue of
Hearing** : **19 September 2016 at
10 Alfred Place, London WC1**

**Date of Original
Decision** : **14 November 2016**

**Date of Corrected
Decision** : **11 January 2017**

INTERIM DECISION

**Re-Issued with Clerical Corrections under rule 50 of The Tribunal
Procedure (First-tier Tribunal) (Property Chamber) Rules 2013**

This is the Interim Decision in this matter re-issued with clerical corrections pursuant to rule 50 of The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013. The corrections are shown by use of strike-through and underlining of new words.

Decisions of the Tribunal

- (1) The Tribunal determines, as an Interim Decision, that if costs were incurred for the repairs specified by the Applicant, a service charge would be payable in respect of the quotation from Cemplas Waterproofing (£251,954.64) together with surveyor's fees of 8% and managing agent's fees of 5% subject in each case to deductions first in respect of insurance receipts from NHBC.
- (2) The Tribunal declines to make a finding of payability until the contribution to be made by NHBC is known, so that the amounts payable can be quantified. The Applicant must apply to the Tribunal within two calendar months of the date of this Decision for a final determination in respect of specific sums against each of the First and Second Respondents.
- (3) The Tribunal records the agreements reached at the hearing by the Applicant, First and Second Respondents that the specified works all fall within the definition of "Estate provision" under the leases (with the proportionate contributions for each of the flats shown on the schedule at B86 in the bundle, appended) and that the Second Respondent has agreed that its proportion for the Estate Provision is 25.95%. The leases of the First Respondent have a stated aggregate proportion of 49.05%.
- (4) The Tribunal has no jurisdiction in respect of the amounts payable by the Third and Fourth Respondents each of which is a commercial occupier.
- (5) The Tribunal finds that the section 20 notices were not effectively served on the second respondent.
- (6) The Tribunal **GRANTS DISPENSATION** under section 20ZA in respect of (5) above.
- (7) The Tribunal reserves consideration of the applications for orders under section 20C until the final determination of the case.
- (8) The Tribunal finds that the Applicant has acted unreasonably in relation to its conduct of the proceedings.

The application

1. The Applicant seeks a determination pursuant to s.27A (3) of the Landlord and Tenant Act 1985 (“the 1985 Act) whether, if costs were incurred for specified works of repair and professional fees, a service charge would be payable for the costs.
2. In addition, the Applicant seeks determinations in respect of the proportionate costs payable by the Respondents and whether it has complied with the section 20 consultation procedure.
3. Application was also made for dispensation for compliance with the consultation requirements under section 20ZA of the Act.
4. The relevant legal provisions are set out in the Appendix to this decision.

The hearing

5. The Applicant was represented at the hearing by Mr Philip Sissons, Counsel. Mrs D Cowley appeared in person for herself and the other First Respondents. Mr Tim Clarke, Counsel appeared for the Second Respondent. Ms Mariana Senior appeared in person (for part of the hearing) for the Third ~~Fourth~~ Respondent. The ~~Third~~ Fourth Respondent did not appear and was not represented.
6. Immediately prior to the hearing the parties handed in further a further report from Trace Surveys dated 14 September 2016. Counsel handed up written skeleton arguments.

The background

7. The subject property is a multi-storey mixed use development completed in 2008 on basement ground and four upper floors. The structure is roughly rectangular with a central podium (approximately 600 sq. m.) at ground level. The centre of the podium includes a light well. The basement is occupied by two commercial tenants. The ground and upper floors comprise residential flats. Thirty-four of the flats are demised to individual tenants on long leases (the First Respondents). Fifteen of the flats are included within a single long lease to Metropolitan Housing Trust (“MHT”) which is a social landlord (the Second Respondent).
8. It is common ground that water is leaking into the commercial units from above and that a remedy is required. There was a dispute as to whether sufficient investigations had been carried out to identify the source and nature of the leaks and therefore whether the landlord’s

proposed works would be reasonable. The reasonableness of professional fees was also disputed. The second respondent disputed that section 20 notices had been served on it. The Respondents also advanced further arguments, set out below.

9. Prior to the hearing, the classification of this work under the lease repairing provisions and the proportions payable by the first and second respondents was disputed. However, at the hearing, both First and Second Respondents agreed that all work fell within the definition of "Estate Provision" under the leases. A further issue arose as "Estate Provision" under the Second Respondents' lease is defined only as a "fair and reasonable percentage." Mr Clarke at the suggestion of the Tribunal was able, helpfully, to obtain instructions during a short adjournment to agree a percentage with the applicant and the Tribunal recorded this as 25.95%.
10. There are various NHBC insurance policies benefiting the development. A putative acceptance has been reached between the applicant and NHBC that the latter will contribute to the works. There was no evidence of quantification or the likely net liability to the respondents.
11. Neither party requested an inspection and the Tribunal did not consider that one was necessary.
12. The Respondents each hold long leases of the property which requires the landlord to provide services and the tenant to contribute towards their costs by way of a variable service charge. The specific provisions of the lease and will be referred to below, where appropriate.
13. A Case Management Conference was held on 3 May 2016 at which all parties attended and/or were represented and Directions were issued on the same day. Further Directions were issued on 6 July 2016.

Jurisdiction

14. The Tribunal raised the issue of its jurisdiction early during the hearing having regard to the fact that this was a mixed-use development. Having regard to *Jeanna Gater v Welling Real Estate and LCP Commercial* [2014] UKUT 0561 (LC) to which the Tribunal referred, it considered that it had jurisdiction to determine the matter in respect of the applicant and first and second respondents. It accepts Mr Sissons' submission that its determination does not bind the Third or Fourth Respondents.

The Applicant's Case

15. Mr Josh Bernholz, gave evidence. He is employed by Y & Y Management Limited, the Applicant's managing agents. The gist of his evidence was that his clients purchased the property on 3 March 2015. On 28 July 2015 leaks were first reported in respect of commercial unit 2. This was investigated and JMC Chartered Building Surveyors ("JMC") were instructed on 20 July 2015 who attended on 7 August and reported on 11 August. JMC in turn advised that a specialist leak inspection consultant be appointed. Trace Surveys ("Trace") were so instructed and carried out smoke pressure and dye tests. They reported on 17 September 2015. On 12 October 2015 leaks into commercial unit 1 were reported. A further report by Trace stated that the membrane within the podium was faulty. On 8 December 2015 Mr Bernholz received a schedule of works document from JMC and began a s.20 consultation. On 13 January 2016, this was sent to all leaseholders.
16. His firm's fee of £18,896.60 was 7.5% of the contract sum. This was to cover issue of notices, administration of tender, liaison to surveyors, administration of the funds required, payments to contractors and administration of the NHBC claim.
17. On 15 March 2016 NHBC asked Mr Bernholz to clarify the percentage contribution from the leaseholders.
18. Mr Bernholz considered that the works were necessary, that the section 20 notice procedure had been correctly followed and that a claim against NHBC had been made promptly.
19. In cross-examination Mr Bernholz agreed that there were several different NHBC warranties for different parts of the development. He was unable to say why there had been no prior attempt to agree the second respondents' proportionate contribution prior to the hearing. He did not know how much NHBC would contribute.
20. In answer to a question from the Tribunal Mr Bernholz explained that the section 20 letters were produced using a mail merge system with facsimile signatures added electronically. These were placed by him in a post tray and were then taken to a post room where they were franked. Those addressed to the second respondent had not been returned by the Post Office.
21. Prior to Mr Haber MRICS of JMC being called, the Tribunal raised the issue that his report of 11 August 2016 did not comply with rule 19 of The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 which governs experts' reports. It was not prepared as an experts' report, instead taking the form of a short report addressed to the Applicants. Mr Clarke objected to it as did Mrs Cowley. Following an

adjournment, the Tribunal announced that it would allow in the report on condition that a compliant report was served within seven days of the hearing with the respondents then being given 14 days in which to make written representations in respect of that report. The Tribunal arrived at this decision having regard to proportionality, the importance of the subject-matter of the report and the fact that Mr Haber was ready to give evidence. The respondents were offered a short adjournment to prepare for cross-examination, but declined. As directed, Mr Haber served a compliant experts' report following the hearing.

22. Mr Haber said that he qualified 6 years ago. He has experience of several leaking decks. It was necessary to instruct Trace Surveys. Exhibited to his report were Trace Survey reports dated 3 September 9 September and 2 November 2015. A further report dated 14 September 2016 was handed up at the hearing. In his compliant report at Paragraph 4 Mr Haber described the property as follows which the Tribunal accepts:

“The building is constructed as a quadrangle residential apartment block around a centralised podium deck courtyard with commercial space on the ground floor and basement of the building. The units in question are located directly below the central courtyard. The building is constructed of steel frame with reinforced concrete floor slabs, in this case the roof of the basement. Externally, the building is clad in a mixture of brickwork and vertical timber slat panelling. The courtyard is topped with stone pavements finished with a mortar joint, with falls to perimeter Aco channels and centralised channels around the central basement access light-well. The channels are constructed of precast concrete and lined with a liquid plastic. These fall towards a deep Aco trough to the left-hand side exit of the building which drains to an access chamber located on Dalston Lane. To the perimeter of the courtyard walls are clad in a vertical slat timber panel with an aluminium flashing dressed in behind the panel. Behind the panel are timber battens to support cladding with extruded polyurethane insulation between the battens and a breathable membrane behind.

There is also an acrylic rendered wall to the left of the courtyard constructed of polystyrene insulation board with a breathable membrane behind a cavity tray that laps onto an aluminium sill. There are brick and block cavity walls finished masonry brickwork with cavity trays and weep holes to areas of the perimeter walls. To the centre of the courtyard, is a light-well with a galvanised steel spiral staircase to access the basement and acts as a secondary exit from the basement.

The walls to this light well are clad in stretcher bond clay brickwork with a high-level render panel. There is also a render panel to the external section of the perimeter wall which is topped with a precast concrete coping stone fitted with galvanised steel handrails. The build up of the deck consists of paviours which are set in hundred and 120 mm structural screed, 100mm extruded polyurethane insulation and a composite non-woven geotextile fabric and drainage mat, with an assumed liquid applied membrane below. Beneath this, we understand that there is a further structural topping atop the precast Bison planks, however this has not been confirmed."

23. Mr Haber said that there are no as-built drawings. His evidence was that it is extremely difficult to identify the source of leaks. Mr Haber was taken to marked up plans showing his notes of water ingress. With reference to the Trace reports, dye testing had come through the membrane. Part only of the membrane might be defective but the cost of lifting flagstones was very high. There was evidence that trays around the perimeter wall had been lined after installation suggesting a prior problem. Mr Haber said that he believed that the waterproofing treatment was the "RIW" system which was a painted-on material and not well-regarded.
24. In his compliant report Mr Haber explained that the "Aco" drainage channels were rejected as the cause of leaks. These had been coated in a liquid membrane. There was evidence of a previous patch repair to a small part of the podium surface. Trace surveys were then instructed to undertake a rain simulation test which proved negative. A flood test was then also carried out which after some weeks showed that dye had penetrated the surface into the basement.
25. Mr Haber's firm then decided that following the inconclusive investigations, further investigation would require removal of large sections of the deck which would be uneconomic. Mr Haber also expressed concern about the design of the deck, being a sealed system with the paviours laid on a screed, resulting in the membrane being inaccessible. Mr Haber stated that this design meant that it was almost impossible to find the source of leaks. As part of the remedial action the podium deck would be supported on a pedestal system allowing areas to be lifted to facilitate future inspections. Mr Haber said that there were some issues with the cavity trays to some brickwork sections which might require repairs. However, he did not consider that these were the main source of water ingress. This work was included in the proposed remedial action, to ensure water tightness. In his opinion the entire membrane would require replacement. Mr Haber also referred to defects in the coping stones surrounding the central lightwell and indicated that these would also be repaired as part of the remedial works, although in his opinion the defects were not the substantial cause of the water ingress. Mr Haber did not consider that the apparent

damp to the bottom few courses of brickwork was caused by failure of a cavity tray but resulted from backsplash from rain hitting the podium deck.

26. The Tribunal noted that the conclusions of the Trace report dated 14 September 2016 which state *“The inspections show that the perimeter walls of the podium and lightwell have a rudimentary waterproofing over their external face. This coating is letting water through it which is letting water arrive inside the connecting commercial units. We note that the results of historical dye testing indicates that the horizontal waterproofing of the podium is also leaking and allowing water ingress. ...We believe that a new waterproofing system needs to be introduced over the podium area to prevent water ingress.”*
27. As to the form of specification used, in his opinion, Mr Haber considered that a performance specification was most appropriate because most deck membrane suppliers provided their own design details. Cemplas Waterproofing were a well-regarded contractor.
28. The Applicant’s case was that they had taken professional advice, acted on such advice and accordingly the works were reasonable. The lowest of three tenders was the one intended to be accepted. The fees were reasonable. There was no basis for making a s.20C order.

The First Respondents’ Case

29. The salient points of the first respondents case were that (i) the cost of the works was not reasonable so that either the original developer Space Homes or the landlord should be responsible for the cost; (ii) the managing agents’ fees of 7.5% were unreasonable; (iii) the full cost of the work should be borne by the commercial tenants; (iv) the leaseholder’s contribution should be reduced to reflect any sums recovered from NHBC.
30. Mrs Cowley, for the First Respondents did not call witnesses but adopted the position of the Second Respondent as set out at the hearing. An order under s.20C was sought in the statement of reply by the First Respondent. At the hearing, Mrs Cowley also sought an order under rule 13, adopting the position of the Second Respondent.

The Second Respondent’s Case

31. In its statement of case the Housing Trust (i) denied that the landlord has complied with the section 20 procedure and asserted the dispensation should not be granted; (ii) asserted that the application is premature because a claim under the NHBC’s policy should be pursued first; (iii) asserted that the works are not reasonable because the landlord has failed to fully consider alternative remedies.

32. Mr Clarke called Ms Cordeliah Amoah the Second Respondent's Housing Services Manager. The gist of her evidence was that the Applicant had not served either section 20 notice and the Housing Trust did not therefore know of the proposed works until proceedings were issued. Dispensation should be refused and MHT will suffer prejudice because it will be unable to pass the costs onto its tenants. Funding for housing associations was being reduced. A proper diagnosis of the cause of the water ingress had not been established and it is not appropriate to determine the necessary works or their costs until this had been done. A section 20C order should be made in favour of MHT as the proceedings were premature. A claim should be brought against the builder and the applicant is bringing a claim against NHBC. It would be artificial to seek to determine the reasonableness of the costs at present. Ms Amoah when questioned by the Tribunal confirmed that the two section 20 letters had been addressed to an office of MHT but not the office at which she worked.
33. Mr Clarke called Mr Peter Dalton BSc Hons CEng MStructE MCIOB MRICS as an expert who had prepared a compliant experts' report. Mr Dalton has 35 years' experience. His instructions were to review documents served by the Applicants. His report was supplemented by some questions in chief following the late service of a further report from Trace dated 14 September 2016.
34. The gist of Mr Dalton's written evidence was that the investigations undertaken by JMC and Trace Surveys were inconclusive. There was no evidence that the junction of the cavity tray /horizontal damp proof course had been investigated. References to a "drainage mat" by JMC did not make clear whether this was a waterproof membrane. On-site checks of the installed tanking membrane should be made against manufacturers' requirements but this had not been done. If the tanking membrane was the cause of the leaks, replacement of the podium membrane would not cure the defect. There were likely to be gaps around the render coat to the central lightwell. The location of the leaks had not been established. In chief and regarding the final Trace report Mr Dalton explained that the RIW system required bonding to the perimeter. He agreed that additional tanking could solve the problem but confirmed that RIW was not the best waterproofing system. Mr Dalton made a general point that the plans and documents referred to by Mr Haber were not clear.
35. JMC had not designed a solution but had left the design to the contractor. The specification of works is very brief and imposed responsibility for design on the contractor. When the contractors come to flash the membrane around the podium roof other problems may be apparent increasing the cost substantially. A protection system has not been specified. The terracing tests are inconclusive because water took a month to appear in the commercial units following one of the tests. Mr Dalton also posed several questions in his report.

36. In cross-examination, Mr Dalton confirmed that he had only viewed the deck area from its edge and had not entered the property nor inspected the basement. He agreed that Trace had carried out a “reasonable number” of tests. The only way to definitively identify the source would be to lift the podium flagstones. Cephas Waterproofing would be competent if they had enough information. He was concerned about the absence of as-built drawings.
37. At the hearing, Mr Clarke applied for an order under rule 13 (adopted by Mrs Cowley) in respect of breaches of direction by the Applicants.
38. Following the service of a compliant report from Mr Haber, the Second Respondent made further submissions as provided for by the Tribunal at the hearing. The salient points were that the Second Respondent had not had the opportunity to cross-examine Mr Haber fully on his report but Mr Dalton had prepared observations on the Applicant’s compliant report, which were annexed to the submission. The experts had not had an opportunity to discuss their respective positions and narrow issues. The manner in which the Applicant’s expert evidence had been produced had caused additional costs to be incurred by the second respondent.
39. Mr Dalton accepted that Mr Haber had a better knowledge of the property as it was Mr Haber who had undertaken the visual inspections, opened up the structure and analysed defects. Mr Dalton’s addendum report stated that various investigations had not been carried out in relation to the drainage membrane on top of the RIW tanking. Secondly, there existed a latent defect with the waterproofing of the podium structure which Mr Haber had not considered. One possible cause could be the construction detailing of the pre-stressed concrete slabs. These are supported on steelwork shelf angles on the main steel beams. If the beams are long, these could cause deflections and rotation leading to stresses and cracking in the waterproofing layer. Mr Dalton accepted that the coping detail to the lightwell parapet was not the main cause of water ingress. Mr Dalton also stated that the precast concrete paving slabs should be set on a proprietary chair system so that the membrane can be accessed and checked.
40. Mr Clarke submitted that the Applicant should have sought to agree an apportionment with the Second Respondent which would have reduced costs.

The Third Fourth Respondents Case

41. The Fourth Third respondent ~~did not make a statement of case and was not represented at the hearing.~~

The Fourth Third Respondent

42. The ~~fourth~~ Third respondent did not submit a statement but was represented for part of the hearing by Ms Senior. Ms Senior asked some questions concerning drainage.

The Leases

43. The First Respondents each hold long leases in respect of flats 1-34. A sample lease in respect of flat 10 was supplied, dated 22 July 2008. The demised term was 125 years. By clause 3.3 the tenant was obliged to pay service charges. Detailed machinery is set out at clause 6 which makes provision for reserve funds. Relevant expenditure under clause 6.5 includes repair management maintenance and improvements.
44. The Second Respondent holds under a lease dated 16 January 2006 for 125 years and similarly contains provisions entitling the landlord to recover proportionate expenditure for repair management maintenance and improvements.

Findings

45. The Tribunal finds that Mr Dalton was a well-qualified expert doing his best to assist the Tribunal. However, he was unable to inspect the property in any detail and therefore, the Tribunal considered that some of his observations were speculative. His task was not assisted by the late service of the Trace report of 14 September 2016.
46. Mr Haber's evidence was in part dependent upon the reports of Trace who did not themselves provide a witness. The failure of those instructing him to obtain a compliant report from Mr Haber prior to the hearing did not assist the Tribunal's task. Overall where there was a conflict, the Tribunal preferred the evidence of Mr Haber to Mr Dalton, because Mr Haber had personally inspected the property in detail.
47. The Tribunal finds on the balance of probabilities that the works are a reasonable approach. In arriving at that conclusion, it has placed weight on the opinion of Trace (see above) and the common position between the experts that a RIW waterproofing system is less than satisfactory. It has also placed weight on evidence of poor design causing the inaccessibility of the waterproof membrane and the absence of as-built drawings. The Tribunal agrees with Mr Dalton that further work may be identified when the flagstones are taken up and the details of the junction with the perimeter walls definitively established. The same applies to additional work that may be needed to the lightwell area. However, this does not detract from the works proposed being reasonable.
48. The Tribunal noted that it was not disputed that the proposed work fell within the relevant lease covenants. The Tribunal is satisfied that the

works are within the scope of the leases. The Tribunal finds that the Applicant has taken reasonable investigative steps to establish the cause of the water ingress and propose a reasonable solution based on professional advice. The Tribunal noted that the tender proposed to be accepted was the lowest price. It does not consider that the use of a performance based specification vitiates the tender process. The Tribunal therefore determines that if costs were incurred for the repairs specified by the applicant, a service charge would be payable in respect of the quotation from Cemplas Waterproofing (£251,954.64) subject to reduction for sums first recovered from NHBC. The Tribunal reminded Mr Sissons of the effect of *Continental Property Ventures Inc. v White* [2006] 1 E.G.L.R. 85. That decision of the Lands Tribunal made it clear that costs are not reasonably incurred to the extent that they could be funded by a guarantee. As referred to at the hearing, the Upper Tribunal in *The Royal Borough of Chelsea v Lessess of Pond House and Others* [2015] 0395 UKUT said at Para 82 “Section 27A(3) requires a Tribunal to make a specific finding of payability.” The Tribunal will therefore give its principal findings as an Interim Decision, but declines to make an immediate finding of payability.

49. The Tribunal considers that the surveyors’ fees are reasonable at 8% but that the managing agents’ fees at 7.5% are too high and should be set at 5%, giving a total of 13%. The Tribunal rejects the first respondents’ submission that the commercial units should pay the whole cost or that the present freeholder should be required to pursue the original owner. This is because there was no evidence before the Tribunal that the original owner remains liable for defects and no evidence as to the financial status of the original owner.

Section 20 Compliance

50. The Tribunal finds that the two section 20 notices were not effectively served on MHT. The Tribunal accepts that they were sent by Mr Bernholz to a business address of MHT. Mr Sissons however conceded that as he could not prove the receipt, (which was disputed) to succeed on this point he would have to rely on deemed service provisions. He cited firstly s.196 of the Law of property Act (see Annex). However, the Tribunal finds that section 196 does not apply to the facts of this case. Although section 196(5) may apply to certain notices required to be served under the lease it cannot apply to the service of section 20 notices. This is because the definition of “instrument” in s.196(5) excludes a statute under the general definitions at s.205(1) and the notices are required to be served under the 1985 Act. Further s196(4) only applies to notices served by recorded delivery, which was not the case here.
51. Secondly Mr Sissons relied on section 7 of the Interpretation Act 1978. This states “Where an Act authorises or requires any document to be served by post (whether the expression “serve” or the expression “give”

or “send” or any other expression is used) then, unless the contrary intention appears, the service is deemed to be effected by properly addressing, pre-paying and posting a letter containing the document and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post.”

52. The difficulty here is that, somewhat surprisingly, the Landlord and Tenant Act 1985 does not contain provisions authorising documents thereunder to be served by post. It follows that section 7 also cannot assist the Applicant.

Dispensation under section 20ZA

The Tribunal has no doubt that unconditional dispensation from section 20 compliance should be granted to the applicant. It does so having regard to the principles in *Deajan v Benson* (Supreme Court) on the basis that no prejudice has in fact been suffered by the Second Respondent. This is because MHT (i) received notice of the proceedings (ii) fully engaged in the proceedings (iii) the Applicant has had regard to MHT’s representations. Accordingly, the Tribunal **GRANTS DISPENSATION**.

Applications under s.20C

53. The First and Second Respondents have applied for orders under section 20C. The Tribunal considers in the interests of justice that decisions in respect of these applications should be reserved until the Final Decision has been issued in this case.

Applications under rule 13

54. The Tribunal has power to make a costs order against a party only in the limited circumstances set out in rule 13 of The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 (the “rule”) (appended). Rule 13 is engaged only when a party has committed some form of misconduct as particularised in the rule.

55. In *Ridehalgh v Horsfield* [1994] CH 205 the Court of Appeal said

“Unreasonable” ... means what it has been understood to mean in this context for at least half a century. The expression aptly describes conduct which is vexatious, designed to harass the other side rather than advance the resolution of the case, and it makes no difference that the conduct is the product of excessive zeal and not improper motive. But conduct cannot be described as unreasonable simply because it leads in the event to an unsuccessful result or because other more cautious legal

representatives would have acted differently. The acid test is whether the conduct permits of a reasonable explanation. If so, the course adopted may be regarded as optimistic and as reflecting on a practitioner's judgment, but it is not unreasonable. (emphasis added).

56. The Tribunal considers that the Applicant has acted unreasonably in respect of the following matters: (i) failure to comply with a direction to serve the hearing bundle by 5 September 2016 with eventual receipt on 14 September 2016; (ii) the failure to serve a compliant expert's report upon which it sought to rely at the hearing; (iii) the failure as directed to respond to the Second Respondent's letter of 31 May 2016 by 17 August 2016 with a reply not being served until 13 September 2016; (iv) the tendering at the hearing of a further report by Trace Surveys dated 14 September 2016, in breach of the directions. No explanation was given for these breaches.
57. The Tribunal is therefore minded to make a summary assessment of costs in favour of the First and Second Respondents under rule 13 and directs the First and Second Respondents to provide schedules of costs incurred within 14 days of this decision. Thereafter, the Applicants shall have 14 days to respond. The parties should be aware that the Tribunal may order that part only of costs properly and reasonably incurred should be recovered under rule 13.

Further Directions

58. The Applicant must apply to the Tribunal within two calendar months of the date of this Decision for a final determination in respect of specific sums against each of the First and Second Respondents together with an additional statement of case showing how the sums have been arrived at, with supporting documentation. The Respondents will be entitled to respond.

Name:	C Norman FRICS	Original Date:	14 November 2016
		Re-issued with clerical corrections	11 January 2017

ANNEX - RIGHTS OF APPEAL

[Clerical corrections under rule 50 do not extend previous rights of appeal]

- The Tribunal is required to set out rights of appeal against its decisions by virtue of the rule 36 (2)(c) of the Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013 and these are set out below.

- If a party wishes to appeal against this decision to the Upper Tribunal (Lands Chamber) then a written application for permission must be made to the First-tier Tribunal at the Regional office which has been dealing with the case.
- The application for permission to appeal must arrive at the Regional office within 28 days after the Tribunal sends written reasons for the decision to the person making the application.
- If the application is not made within the 28-day time limit, such application must include a request for an extension of time and the reason for not complying with the 28-day time limit; the Tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.
- The application for permission to appeal must identify the decision of the Tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal, and state the result the party making the application is seeking.

Appendix of relevant legislation

Landlord and Tenant Act 1985 (as amended)

Section 18

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

Section 19

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

Section 27A

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

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

Section 20

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

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

Section 20C

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

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

Section 196 Law of Property Act 1925

Regulations respecting notices.

- (1) Any notice required or authorised to be served or given by this Act shall be in writing.
- (2) Any notice required or authorised by this Act to be served on a lessee or mortgagor shall be sufficient, although only addressed to the lessee or mortgagor by that designation, without his name, or generally to the persons interested, without any name, and notwithstanding that any person to be affected by the notice is absent, under disability, unborn, or unascertained.
- (3) Any notice required or authorised by this Act to be served shall be sufficiently served if it is left at the last-known place of abode or business in the United Kingdom of the lessee, lessor, mortgagee, mortgagor, or other person to be served, or, in case of a notice required or authorised to be served on a lessee or mortgagor, is affixed or left for him on the land or any house or building comprised in the lease or mortgage, or, in case of a mining lease, is left for the lessee at the office or counting-house of the mine.
- (4) Any notice required or authorised by this Act to be served shall also be sufficiently served, if it is sent by post in a registered letter addressed to the lessee, lessor, mortgagee, mortgagor, or other person to be served, by name, at the aforesaid place of abode or business, office, or counting-house, and if that letter is not returned [F1 by the postal operator (within the meaning of [F2 Part 3 of the Postal Services Act 2011]) concerned] undelivered; and that service shall be deemed to be made at the time at which the registered letter would in the ordinary course be delivered.
- (5) The provisions of this section shall extend to notices required to be served by any instrument affecting property executed or coming into operation after the commencement of this Act unless a contrary