10896

FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**LON/OOBK/LDC/2014/0145**
Property	**:**	**Basement Flat No 1, 87 St Georges Square, London SW1V 3QW**
Applicant	**:**	**87 St Georges Square Management Limited**
Representative	**:**	**Mr Edward Denehan – Counsel instructed by Nash & Company Solicitors LLP** **Mrs N Simmons**
Respondent	**:**	**Mr Michael Henry Anthony Whiteside**
Representative	**:**	**In person** **Accompanied on first day by his brother Raymond Whiteside**
Type of Application	**:**	**Section 27A and Section 20ZA of the Landlord and Tenant Act 1985 and Section 168(4) of the Commonhold and Leasehold Reform Act 2002**
Tribunal Members	**:**	**Tribunal Judge Dutton** **Mr S Mason BSc FRICS FCIArb** **Mr A D Ring**
Date and venue of Hearing	**:**	**10 Alfred Place, London WC1E 7LR on 16th and 17th March 2015 with a further meeting on 9th April 2015**
Date of Decision	**:**	**12th May 2015**

DECISION

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DECISION

1. **The Tribunal determines that the Respondent is required to pay the Applicant the sum of £20,830.68 in respect of service charges for the years in the question, the breakdown of which appears on the schedule attached.**
2. **For the reasons set out below the Tribunal finds that dispensation should be granted to the Applicant under the provisions of Section 20ZA of the Landlord and Tenant Act 1985 and finds that the Respondent has suffered no prejudice.**
3. **The Tribunal finds that in the light of the decision in respect of outstanding service charges there has been a breach of the Respondent's lease.**
4. **The Tribunal finds that the Respondent has acted in a manner which is unreasonable within the provisions of Rule 13 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 for the reasons set out below. Directions are given in respect of the continuance of that application. Such costs shall be limited as provided for in the findings section of this document.**

BACKGROUND

1. By applications dated 27th October 2014 the Applicant, 87 St Georges Square Management Limited, firstly sought from this Tribunal a determination as to the payability and reasonableness of service charges for the period ending December 2009 through to December 2014. Full details of the amounts claimed are set out in the application. By a second application under Section 20ZA of the Landlord and Tenant Act 1985 (the Act) the Applicant sought dispensation from some or all of the consultation requirements under Section 20 of the Act. Finally, if it was found that the Respondent had failed to pay the service charges, the subject of the application under Section 27A of the Act, then an allegation was made by virtue of Section 168(4) of the Commonhold and Leasehold Reform Act (the 2002 Act) there had been a breach of covenant of the lease and an order from the Tribunal was sought confirming such breach.

2. In addition the Applicant, for reasons which we will deal with in due course, sought costs against the Respondent under the provisions of Rule 13 of the Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013 (the Rules) on the grounds that the Respondent had acted unreasonably in defending and subsequently in his conduct of the proceedings before the Tribunal.

3. The application under Section 27A of the Act covered a number of matters from 2009 to December 2014. There were two major items of work, one in respect of fire safety work in year ending 2009 and the other in respect of redecoration and refurbishment works in the year ending 2014. In addition to those issues for the years ending December 2010 and 2011 the Respondent had failed to pay his contribution, which was 16% of the total expense, in relation to the cleaner's taxes and holiday pay. In addition also, he had indicated an intention to challenge some remedial works following a flood and lift repairs in year ending December 2011. For the years ending 2012, 13 and 14 there was a certain commonality of disputes. These related to the cost of the electricity to the lighting in the common parts, the

lift telephone, general maintenance, stationery and miscellaneous costs and for the years ending 2013 and 2014 insurance. There was also a dispute relating to the electrical costs associated with the lift and in the last two years for cleaning.

4. The Applicant is the freehold owner of 87 St Georges Square, London SW1V 3QW (the building). The freehold of the building was acquired in June of 1999 and the Articles of Association of the Applicant Company provide that its members and shareholders must be tenants of the flats in the building. It appears that the tenants of Flats 2 – 5 are owners and shareholders. The Respondent, who is the tenant of the basement flat (Flat 1) we are told declined to be a member and shareholder of the Applicant Company.

5. We did not inspect the building but it appears accepted that it is an early Victorian Grade II listed mid-terrace house comprising five storeys plus a mansard and basement converted into six residential flats all let on long leases. These were originally granted for a term of 150 years, less 12 days from the 25th December 1951 subsequently varied by an order of this Tribunal in 2010. In 2012 new leases were granted to all the flats, save the Respondent's, creating terms of 999 years.

DOCUMENTS

6. One thing that this case did not lack was the amount of paperwork. There were some six files produced running to in excess of 2,000 pages. Apart from copies of the applications and the lease held by Mr Whiteside the Respondent, we had copies of directions made by the Tribunal, a witness statement from Mrs Nina Simmons, the owner of Flat 6 in the building and associated documentation in respect of the major works both relating to the fire safety and the internal and external decoration and refurbishment. In addition to the above we had a substantial Applicant statement of case with a number of exhibits, a Respondent statement of case likewise with a number of exhibits, a response to that with further exhibits and on the morning of the Hearing a skeleton argument prepared by the Applicant which we were told had been served on the Respondent a few days before. We also had the Respondent's skeleton argument, something of a misnomer, in that it ran to some 90+ pages. It is, we think, not inappropriate to make the comment at this stage that this was not an uncommon feature of the Respondent's conduct of these proceedings and indeed his correspondence with various parties prior to the applications being issued. We should also record that the skeleton argument was apparently sent to the Applicant's solicitors, who practice in the West Country, on the Friday before the Hearing was due to start on the Monday. This therefore gave no chance for the skeleton argument to be in the Applicant's hands in advance of the Hearing. As a result Mr Whiteside agreed that he would not make reference to the skeleton argument in the course of the Hearing.

7. It is we feel unnecessary to recount in great detail that which is set out in the written statements of case which have been exchanged between the parties.

HEARING

8. It was agreed at the Hearing that we would deal with matters on a year by year basis with each side putting forward their position. We started, therefore, with the

year ending December 2009 for which the items in dispute related to fire safety works and a fire assessment fee. The total amount claimed from Mr Whiteside was £2,011.12. Mrs Simmons gave evidence throughout on behalf of the Applicant and Mr Whiteside, with the assistance of his brother on the first day only, spoke for himself on the issues between them.

9. In respect of the fire safety works, it appears that in October 2007 Mrs Simmons received a letter from Landsdown Insurance Brokers which indicated that Norwich Union the then insurers felt it was the responsibility of the freeholder to carry out a fire risk assessment. It seems that thereafter Mrs Simmons contacted the local fire authority who attended the premises and gave certain advice which included the need to obtain a fire risk assessment report. At about the same time she was also advised by her solicitors of the obligations that the Applicant had under the Housing Act 2004 and the Regulatory Reform (Fire Safety) Order 2005. Mrs Simmons proceeded to instruct Help and Safety at Work Limited who prepared a full assessment in respect of the fire risk for the premises by a report dated 22nd April 2009. The recommendations made formed the basis of the works which were undertaken by Elektratek and completed in December of 2009.

10. Prior to these works the Applicant had undertaken the consultation procedures as provided for at Section 20 of the Act. It is alleged by the Respondent that they failed to comply with the first step in the consultation process in that they did not provide him with an initial notice. We will deal with the evidence we received on that point in a moment. Not content, however, with that as an issue, Mr Whiteside said that he did not think it was necessary for the Applicant to instruct Help and Safety at Work to prepare a fire risk assessment. He said that what the fire authority had said was sufficient. Further, he said the premises were not ones that required detailed fire safety arrangements and that there was no requirement for a system now in place to be installed. In support of this he produced a plethora of documentation including the regulations and fire safety risk assessment documents produced by the Government. He also indicated that the building would have complied with the building regulations in 1991 and that this was further reason to deny the need for the works to be undertaken.

11. In response Mrs Simmons' position was simply this. She had been advised by the insurers to arrange for investigations into fire safety issues. She had consulted with the local fire authority who in turn had advised her to undertake a fire risk assessment. She had undertaken that fire risk assessment and the Applicant had implemented the recommendations made.

12. On the question of the consultation requirements, it was said by Mr Whiteside that he did not get the initial notice, 30th June 2009 until 2nd July 2009 and was therefore not given the statutory 30 days. He said he found it in his post box in the common parts of the main building. His argument was that the document should have been delivered to his own letter box in his front door. He says the same happened with the second notice. In addition, an unsigned letter accompanied the second notice. Mrs Simmons said that as far as she understood it the arrangements for mail delivery to the premises was that letters were delivered through the main door. Whoever passed, usually her, she said, puts them into the pigeon-holes designated for each tenant bearing the tenant's name and flat number. She said in this instance, insofar as the initial notice was concerned, she

put one copy in the pigeonhole and one was sent by post. She said that she did the same with the second notice. Asked why she had not posted the notices through Mr Whiteside's door, she told us that Mr Whiteside was not always resident at the flat and that he had not given any other address at which notices could be served. She did not think it was her responsibility to hand deliver letters through his front door as there was a clearly marked pigeonhole for post to be delivered. She did not wish to set any form of precedent by hand delivering this letter to his front door.

13. We then turned to the question of outstanding service charges for the years 2010 through to 2014 excluding the major works. In a number of years there was a certain commonality in respect of items in dispute. One related to communal electricity. Mr Whiteside's complaint was that the Applicant was being charged at a business rate rather than a residential rate. In the papers we were provided with an email from Zak Gibson, a Customer Services Adviser with EDF the energy supplier. This email said in part that historically all landlord supplies and communal areas have been billed as a business. However, due to recent changes in regulations it appeared that some landlords could be billed as residential premises and that it was likely that this would be the case for the building going forward. It was accepted by Mr Whiteside that the difference would have been fairly minimal. Perhaps no more than £20 per year representing his 16% share.

14. Also in the years 2010 and 2011 there was a dispute concerning the cleaner's taxes and holiday pay which totalled £103.04 in the year ending December 2010 and £85.22 in the year ending 2011. This being Mr Whiteside's share. His complaint was that there was no receipt for these monies and he did not see why he had to pay cleaner's taxes and holiday pay. Copies of P60s for a Maria Pinhao were included in the bundle. In response the Applicant's position is that the lease requires them to provide for cleaning of the common parts. Mrs Simmons said that the cleaner for whom taxes was paid was not the same throughout. For the two years in question Miss Pinhao wished to have the position set out officially and she became the Applicant's employee. This, however, altered in the last two years. Any discrepancy in the figures paid to the Revenue compared to those shown in the annual accounts could be explained on the basis that the annual accounts ended in December which is not of course the same as the tax year. Mr Whiteside had no complaints as to the cleaner's standard. Furthermore investigations made by Mrs Simmons as to costs of cleaning and alternative quotes indicated that the sums that were being paid by the Applicant were certainly no more than the commercial quotes that she had been able to obtain. In the year ending 2011 there was an issue initially relating to the cost of remedial works following a leak in the sum of £191.36. However, Mr Whiteside accepted that this figure was correct and was payable. In respect of the lift repairs of which Mr Whiteside's share was £269.60 he confirmed that having seen the receipts for the works that sum was now no longer in issue.

15. For the year ending December 2012 we again had the costs of providing lighting to the common parts as an issue but as a result of documentation produced to Mr Whiteside, he accepted that the outstanding issues of maintenance, lift telephone and sundry cleaning products and miscellaneous matters were no longer in issue. It left only the electricity, which was objected to on the same basis. In respect of the year ending December 2013 Mr Whiteside at the Hearing confirmed that he did not dispute the costs associated with the lift telephone, stationery or part of the

general maintenance costs. Further no specific challenge was made to cleaning costs for this year. He did dispute a £34.56 liability towards costs of Albion because this was in respect of fire safety issues which did not need to have been done in the first place. On the question of insurance, initially he had challenged this on the basis that there was a qualifying long term agreement as the same insurers and brokers had been used but did not pursue this at the Hearing. He did, however, have criticism of the extent of the cover providing for contents, employers liability, legal expenses etc. He did not, however, have any evidence that the premium had been inflated nor any evidence of any comparable insurance policy or premium and accepted therefore that the amount charged was payable. In respect of the year ending December 2014 putting aside for the moment the decoration and refurbishment works, he conceded that the only item in dispute was the electricity charge on the same basis as previously.

16. In respect of the refurbishment and redecoration works we were told that his share of the costs was £18,727.04. The parties' cases were argued fully in their statements. The issue with regard to the Section 20 consultation related to the initial notice. Apparently this was dated 30th August 2013, a Friday it seems. The notice itself appeared to have been unsigned but was accompanied by a letter from Bryan Packman Marcel which was signed. Apparently the letter was posted on the Friday and received the following week. The complaint by Mr Whiteside was that he was not given 30 days' notice; that the requirement that the contractor to be nominated by him, if any, complied with the Applicant's requirements was unreasonable; that the notice was not in fact signed and finally that the description of the proposed works was too generic.

17. It is right to record, however, that Mr Whiteside responded to this initial notice in full and did not nominate any contractor.

18. The second notice, which is dated 14th February 2014, was then provided stating who would be carrying out the works and the works that were to be undertaken. The notice gave a right of response by 21st March 2014. In fact Mr Whiteside responded on 21st March 2014 by hand delivering a lengthy letter to the surveyor's offices after it had closed. One of his complaints was that the second notice indicated that works would not be commenced until the end of May when in fact they started on 24th March. Mr Whiteside complained that he had not seen a survey of the property and that the accepted tender from Head & Co was late, others having been submitted in December 2013 and the Head & Co one arriving in January of 2014.

19. The hearing adjourned on 16th March, reconvening the following day. At the commencement of the reconvened hearing Mr Whiteside raised issues about an inspection chamber to the front of his property, the fact that the lift did not go to the basement and thus serve his flat and the allegation of dampness which really flowed from alleged breaches of the lease on the part of the landlord. He also questioned whether the works that were undertaken in 2014 were covered by the terms of the lease. There was he said limited evidence to support the need for the works, there being no condition report or findings as to the state of repair. He also sought to challenge certain specific matters. These were the upgrade of the satellite system, new door furniture including a keypad, the porch steps, carpets to the common parts, a cabinet installed over the fire alarm, an outside tap, glass

panels to the walls in the common parts, an enlarged letter box, damage caused to the tiling inserts to the manhole cover to the front of his property and the replacement of a manhole cover to the rear of his property. He did confirm that he had no challenge as to the cost of the fire safety works, just their need and the non-compliance with section 20 procedures. He was not willing to put himself forward for cross examination. On the question of prejudice relating to non-consultation, he did add that the non-production of a survey report was in his view prejudicial. On the question of certification of the accounts, an issue that had been raised peripherally, he referred to the Act and the provisions of Sections 21/22. However, he conceded that he had not asked for an accountant's certificate to be produced and accepted that the Applicant Company neither charged nor recovered VAT.

20. Mrs Simmons then gave extended evidence as to the issues in dispute. She confirmed the circumstances surrounding the involvement of Help and Safety at Work Limited who were recommended to her by her solicitors, she having had no dealings with them previously. She told us that she was convinced she had to take this step as the Applicant has responsibility to keep the house safe. Furthermore, the upper flats had no escape route other than via the main stairs. She told us that the other tenants had paid their share and a number of offers had been made to Mr Whiteside for him to attend her flat to see documentation and in this particular instant to nominate an alternative contractor, none of which he had undertaken. She felt she had no alternative but to implement the recommendations made by the experts.

21. As to the electricity supply to the common parts, she confirmed that EDF were the supplier and that hopefully the charges would be rendered on a residential basis in the near future. So far as stationery costs were concerned, she said that she had receipts available for these but these were minimal and merely reimbursed her the cost that she incurred in writing letters etc. The same applied to the cleaning products, which she purchased for the cleaner.

22. She was asked then about the major works in 2013. She told us that there were often discussions between the leaseholders as to how the house should be managed and Mr Whiteside had been invited to attend meetings but never did. Between the leaseholders it was agreed that a better regular maintenance programme should be put in place, as they wanted to keep the property in good condition and consistent with the locality. She admitted that no condition survey had been undertaken but they had hired a firm of consultant civil and structural engineers (Bryan Packman Marcel) to undertake the specification and tendering process. She was, therefore, satisfied that this fulfilled that obligation and they relied on that company's professional expertise. She pointed out that Mr Whiteside had been offered the chance to inspect the specification both at her flat and at Bryan Packman Marcel's offices but had declined. He had put forward neither nominations nor his own condition survey. It had not, however, stopped him writing lengthy letters concerning the works that were to be undertaken but he conflated matters relating to the major works and the general running of the building which meant that the chartered surveyors had to reply to part of the letter and she had to reply to the other part. A point had been made concerning the replacement of the stone facings of steps to the main entrance. She told us that she had been advised by Bryan Packman Marcel that these were in part broken and that grout was disintegrating and that there was the potential for hidden

problems. They had advised her that it would be a good idea to lift the covering and to carry out an inspection and in so doing found a number of problems. Indeed, she suggested that in carrying out this work they may have prevented more serious issues arising.

23. She was asked why the works had started in March when initially May had been the commencement date. She told us that having decided upon Head and Co to carry out the works she was told that if they could not start in March they would have been unable to do so until the autumn when the weather would not be so good and the tenders would need to be reviewed. As all other leaseholders had paid their contributions and wished to proceed, the work commenced earlier than had originally been anticipated. She explained the differences between some of the figures which were set out on the second notice. This indicated the costs of Head and Co at £66,530 excluding VAT but there were specialist works outside that contract for wallpapering, carpeting, the replacement of the porch steps and upgrading of the satellite system added a further £15,900 and roofing works which added a further £13,000 plus VAT. The total cost of works, therefore, was assessed at just over £95,000 plus professional fees and VAT. The contract apparently took some 16 weeks and when asked whether Mr Whiteside had made any representations during the course of the works she said yes but only relating to the manhole covers.

24. In respect of the specific items that Mr Whiteside had objected to, she told us that insofar as the satellite dish was concerned this had been put up some 25 years ago and was now somewhat out of date. With the change in technology it needed to be upgraded. It was decided this could be done when scaffolding was in situ and that the new cabling would enable enhanced services to be provided. The fact that Mr Whiteside did not decide to avail himself of this service was a matter for him to decide. She believed it was a reasonable service to provide. He would be able to join subject to paying the connection costs to his flat from the cabling now in place.

25. In the question of main entrance door furniture, she told us that the door closing system was old and needed replacement and this work coincided with the decorating. The previous lock and closing device did not work properly. The new lock was fitted because the existing one was almost falling off. In addition the new keypad was providing access for emergency services. It also facilitated access for residents who might lose keys and lock themselves out. We were told that Mr Whiteside had been provided with the new key. An outside tap had been installed at the rear of the property to enable cleaning of the main flat roof. The tap has apparently been connected to the water supply for Flat 4 and will be metered. The boxing of the fire alarm was undertaken by the use of a box bought from John Lewis and she accepted was for aesthetic value only. The glass panels to the wall provided protection for the wallpaper, and the marble steps, which she believed had been installed when the property was originally developed, had now been replaced after remedial works had been undertaken.

26. Insofar as the carpets were concerned she said that these had been down for many years and were now fraying and becoming detached. It did not, she thought, meet the standards of the property to just replace the carpet at ground floor level as there were problems further up. The question of carpet rods had been discussed at a meeting which Mr Whiteside had not attended. It was considered by the

residents that it would be nicer to leave a margin on each side of the carpet hence the need to use stair rods. Mr Whiteside had raised an issue with regard to the extent of the external front basement area rendering but Mrs Simmons said that the builder had removed some to a certain height and had found that there were matters to be addressed and the rendering had been replaced with waterproof rendering. The letterbox had been enlarged to enable larger parcels to be delivered and the manhole cover had been replaced because it was damaged in lifting. It appeared that it had been previously re-laid incorrectly by contractors instructed by Mr Whiteside.

27. She was asked questions by Mr Whiteside but she did not depart from the evidence that she had given. She reiterated that the fire authority had not carried out a survey but had recommended that one be undertaken. She confirmed that the entrance steps had required replacement because of cracks and gaps and that a damp proof membrane had also been installed to prevent further problems. The hallway had been wallpapered before and although Mr Whiteside had not paid for the installation of the satellite system in 1999, it was felt that the upgrading was a charge that he could contribute towards as it was the appropriate standard required for a property of this nature. He could connect to the system, which now ran to his flat, although he would have to pay the cost of bringing it into his property.

28. Having concluded the evidence relating to the application under Section 27A of the Act, Mr Denehan briefly advised that if the Applicant was correct concerning the Respondent's non-payment of his service charges, then that constituted a breach of covenant. Mr Whiteside referred to his response contained in bundle 3 at page 186 onwards. He considered that the application was vexatious, unreasonable and an abuse of process which should be dismissed. He was aware of the variation carried out in October of 2010 but did not think that that could be applied retrospectively and that the Applicant sought to recover inflated, excessive and unnecessary costs.

29. We then invited submissions from both parties. Mr Denehan dealt with the three applications. Starting point was he said the terms of the lease and reminded us of the landlord's obligations to keep the property in good repair and condition and the provisions of paragraph 1 of the fourth schedule which included the wording *"and any costs and expenses incurred by the lessor in providing any other services and/or facilities which the lessor shall reasonably consider to be for the communal benefit of the occupants of the flats in the building."* To avoid responsibility under this head he said Mr Whiteside would have to show that the works were not for the communal benefit of the residents and asked us to bear in mind Mrs Simmons' evidence in that regard. The fact that a different view could be taken is not sufficient to fall foul of the terms of the lease. He reminded us that this was mid-19th century Grade II listed building in a desirable location and that the works which had been undertaken were consistent with maintaining a property of that nature. It was, he said, in all parties' interests for the building to be well maintained and that whilst it may be said that Mr Whiteside did not get the full benefit of these works, because he had his own front door, nonetheless the lease is the lease and that is the document which under which he purchased. We noted all that was said in respect of the specific items such as electricity, satellite dish, door furniture etc. On the question of the dispensation application for the works in 2009, he suggested that the only issue related to the service of the notice in respect

of the fire safety works. He said there was no evidence of a failure to comply with the Section 20 procedures in 2009. In respect of the works in 2013, there was no issue in respect of the second notice and we should bear in mind that Mr Whiteside in replying to that second notice had delivered it after 5.30pm on the last day available. His submission was that there was a huge amount of ill will on the part of Mr Whiteside. His explanation for not attending meetings etc was risible. Insofar as the works in 2013 were concerned, at worst the notice was received some two days late. Mr Whiteside would need to show real prejudice but there was no evidence that the two days' delay had caused this. His response was full and clearly he had been able to deal with any concerns that there may have been. Insofar as any lack of survey was concerned, Mr Whiteside had refused to inspect and there was no evidence from any surveyor on his behalf. The absence of a condition survey was something of a red herring. Mr Whiteside had made no concessions since the bundles had been delivered to him at the beginning of February and the Applicant sought unconditional dispensation, there being no financial prejudice.

30. We then heard submissions on the Applicant's claim for costs under the provisions of Rule 13 of the Rules. Mr Denehan referred us to Rule 13(1)(b) and alleged that the Mr Whiteside had acted unreasonably in defending the proceedings and his conduct in the course of proceedings. He was unreasonable he said because a reasonable person would form the view that the expenditure fell within the lease and should have been paid. The complaints about the fire safety work, which prompted the application under Section 20ZA was not in truth reflected in Mr Whiteside's statement of case. There was no real evidence of prejudice. His conduct was 'disproportionate', 'borderline slanderous' and 'petty'. The documents were on many occasions irrelevant and the case presented only barely touched upon his pleaded allegations. It was difficult to understand the real issues and for the Applicant to assist the Tribunal. The allegations made by Mr Whiteside concerning the Applicant's solicitor were inappropriate. His conduct in choosing to post his skeleton argument to the Applicant's solicitors knowing that it would not arrive in time and failing to provide a copy to Counsel in advance of the hearing was unreasonable. In his view it was an extreme case and fell within provisions of Rule 13 (1)(b) and that the matter should be dealt with by way of detailed assessment. If we found in the Applicant's favour then directions could be issued.

31. Mr Whiteside's response was that the fourth schedule of the lease should have a limited interpretation. It should be construed narrowly. This of course being the provision for works which benefitted the occupants of the flat. As to conduct, he agreed that some letters were rather long and repetitive but asked us to bear in mind the significant costs of the works that were proposed to be carried out. Furthermore, he repeated that he had not seen a condition report to justify the works in 2013. This was not, he said, a building that had been neglected. It had money spent on it over the years. The works were excessive and more than expected. Whilst he considered the works may be within the provisions of the lease, why they had been undertaken he could not say. The prejudice he said was the huge sums of money that he was being asked to pay. He had sought to investigate each item of works which he thought a reasonable person would do. He also submitted to us that he had acted reasonably during the course of the Hearing in that he had conceded some matters as stationery and had withdrawn others before the Hearing, such as the management fee. He said that if receipts

had been provided he would have accepted the charges in some cases. He had no dispute with the comments made by Mrs Simmons in her evidence.

32. Returning to the fire safety works he thought that the system in place was more appropriate to a school and that the works were excessive. He did not think that it was necessary to undertake a complete refurbishment of the common parts and the exterior, although accepted that some repairs were required in the context of the location, the building and its character. He accepted there had been no internal repairs since 2009 and that the property had to be maintained in a good standard and accordance with the lease. As to prejudice, he thought it might have been possible for him to obtain another opinion as to the cost of the works but he had not done so. He considered the claim for costs against him was itself vexatious. He had to defend as a result of the application under the 2002 Act, which could result in his eviction and the consequences to him were therefore very serious. He also renewed his application for an order under section 20C of the Act, thinking it was just and equitable so to do. In a brief response Mr Denehan denied that he had been deprived of the full consultation process and referred us to the Supreme Court Case of Daejan. An application was made for a refund of the application and hearing fees, both of which were objected to by Mr Whiteside.

THE LAW

33. The law applicable to these applications is set out in the attached schedule.

FINDINGS

34. As is often the case, although we had six bundles of documents running to in excess of 2,000 pages perhaps only a quarter or so of that was specifically referred to during the course of the hearing. We did have some sympathy with Mr Denehan's view on the conduct by Mr Whiteside in the course of these proceedings. Although substantial statements of case had been produced it was not always easy to follow the specific issues that he complained about.

35. A flavour of Mr Whiteside's attitude to these proceedings can be gleaned from his statement of case. For example he alleges because the building is used as the registered office of the Applicant Company, it is used more than it would be if that were not the case and that there should be an apportionment of the Respondent's service charges to reflect this additional use. In fact, of course, the registered office address is nothing more than that. It is Mrs Simmons who undertakes the management of the building at no particular charge to the Respondent. It would be wholly appropriate for the Applicant to employ managing agents which would result in a substantial increase in the obligation of the Respondent in respect of service charges. Further, there were allegations that the Applicant had not conducted the financial affairs appropriately. Indeed the phrase "financial fraud and dishonest statement" is used. However, no such evidence to support that allegation was produced at the Hearing by Mr Whiteside and he did not raise these issues before us. Reference was made to the self-certification of the accounts, which is allowed under the terms of the lease but Mr Whiteside refers to those as "sham certification." Reference is made to qualifying long term agreements in respect of insurance and cleaners, but again was not pursued at the hearing and some levels of expense were, to say the least, minor in the overall expenditure, £30 or so disputed, here and there. Many pages are taken up in dealing with the fire

safety issues and frequent reference is made to the Respondent being significantly and substantially prejudiced but in truth no evidence consistent with that set out in the guidelines of the Supreme Court in Daejan is produced. Issues were raised concerning alleged failure to repair by the landlord but that was not a matter for us to deal with and would have to be dealt with by way of a separate application to the County Court.

36. All in all we are satisfied that where there was a conflict of evidence we preferred that given by Mrs Simmons. It is right to say that Mr Whiteside did make various concessions during the course of the hearing, which was helpful, but by and large he did nothing to undermine the Applicant's statement of case or its claims for monies due in respect of the years in dispute.

37. We will deal now with the specific matters starting with the fire safety work. We accept Mrs Simmons' evidence as to the service of the initial Section 20 notice and indeed the second notice. No other address was given by Mr Whiteside for service and we accepted that she had left the notice in his pigeonhole. The fact that he had not attended the premises to recover it is a matter for him. We accept also that there was no Fire Brigade report. They had attended and given advice. Armed with that and the indication given by the insurers the Applicants really had no alternative but to undertake a fire risk assessment. That in turn had to be implemented. The fourth schedule of the lease in effect allows improvements where they are to the communal benefit of the occupants. We agree with Mr Denehan's submission that the fact that one tenant does not find them to his benefit does not mean that they should be ruled out. The fire safety order post-dates the 1991 Building Regulations and would need to be reviewed. It would be a strange landlord indeed who having received a fire risk assessment report from an independent expert then ignored those recommendations, which they would do at their peril. In those circumstances we find it perfectly reasonable for these works to be implemented and allow the costs in full of £2,011.12.

38. We turn then to the communal electricity which is a common issue for a number of years. The difference between the residential and commercial cost is minimal. Indeed it appears that Mr Whiteside undertook this exercise in his skeleton argument. However, having seen the email from EDF we accept that the Applicant's position is reasonable and that the costs incurred in each year are recoverable. We are pleased to note that going forward, as a change of policy, the charges may be dealt with on a residential basis but we cannot find that the Applicants have acted unreasonably in seeking to recover the communal electricity charge for each year. This is £188.48 for 2012, £230.40 including electricity for the lift in 2013 and £264 for electricity in 2014.

39. In the year 2010 there was also an issue concerning cleaning. It seems to us that the issue is resolved by the evidence by Mrs Simmons who says that she investigated alternative quotes which were as much if not more than the costs that were then being incurred. Mr Whiteside said that the standard of cleaning was good. In those circumstances it seems to us that taking a pragmatic view and without going into the whys and wherefores of the tax status of the cleaner the costs incurred in employing her were reasonable and are recoverable. In the year 2010, therefore, the sum of £103.04 is claimed and allowed and in the year 2011 the sum of £85.22 is allowed as being the amount claimed. As was suggested, we

suspect any anomaly between the figures shown in the annual accounts and those payable on a tax year basis can be simply explained by the differing accounting period. In 2011 the remedial works of £191.36 for the leak were accepted by Mr Whiteside as being payable and the lift repair the contribution of which was £169 and already paid by Mr Whiteside is no long in issue.

40. For the year 2012 the disputes in respect of the general maintenance, lift telephone and stationery fell away and we find that those are payable. In the year 2013 the challenge to the Albion bill of £216 is not accepted by us. The share payable by Mr Whiteside is £34.56. As we have found that the costs associated with the fire safety works are reasonable and recoverable this sum would also be payable by him. It was accepted that the insurance was not a qualifying long term agreement and no evidence was produced by Mr Whiteside to show that the premium had been inflated by the cover provided. Indeed he appeared to accept that the premium was payable. In those circumstances, therefore, those items claimed in 2013 being the building insurance of £756.89, cleaning of £240, electricity for the lighting of £42.24 and for the lift of £118.16, for general maintenance in the sum of £66.24, cost of the lift telephone of £330.72 and stationery in the sum of £24 are found by us to be due and owing.

41. In respect of the year ending December 2014, at the end of the day apart from the redecoration and refurbishment works, the only item that was under challenge was the electricity cost, which we have already dealt with. Accordingly, putting aside the major works we find that the stationery and cleaning of £8, building insurance of £800, cleaning of £240, electricity of £164, the lift telephone of £85.20 and stationery etc of £16 all due and owing.

42. We then turned to the major works in 2014 of which the costs to Mr Whiteside is £18,727.04, the amount confirmed as being due at the hearing. Mr Whiteside sought to challenge this on a number of fronts, firstly that there had been non-compliance with Section 20 of the Act, secondly that the works were not necessary as there was no survey done setting out the required necessity, thirdly that Head and Company had lodged their tender sometime after the others, that the works were not covered by the lease and that certain items were unnecessary and were not recoverable.

43. On the question of non-compliance with Section 20 of the Act, we find that the initial notice sent by Bryan Packman Marcel on 30th August would not have reached Mr Whiteside in time for him to have the 30 day response. Accordingly, we find that there was a breach of the consultation process at this point.

44. We bear in mind the findings of the Supreme Court in Daejan Investments Limited v Benson and others [2013]UKSC14. The judgment of Lord Neuberger at paragraph 44 sets the scene. He says that the purposes of the requirement are to ensure that tenants are *"protected from (1) paying for inappropriate works or (2) paying more than would be appropriate."* The situation in this case is that it seems Mr Whiteside says that the initial notice did not give him the 30 days, a finding with which we agree, and as a result he was prejudiced. He alleges that there was not a survey which he could review for the purposes of assessing the need for the works and raises the other issues we have referred to above. As put in the Applicant's skeleton argument, he alleges that he was not able to inspect the

documents, that written observations were not summarised, estimates not provided and that his written observations were not taken into account.

45. There is no doubt that Mr Whiteside has been able to respond to the initial notice and the subsequent stage 2 notice in some detail. Lengthy letters were sent and he was able to fully put forward his views. He declined to nominate another contractor. Although there does not appear to have been a condition survey we accept the evidence of Mrs Simmons that the chartered surveyors who dealt with the Section 20 consultation, and the works, had undertaken a review of the building and prepared a specification based on that inspection. If he had chosen to avail himself of a view of the specification then he would have been able to have seen what was intended and to have taken steps to obtain alternative quotes if he so wished. Indeed, there is amongst the papers produced a document prepared by Mr Whiteside headed Head and Co general maintenance tender works costs list. He has gone through the tender on a step by step basis and produced a number of photographs. Had he availed himself of the offer to have inspected the specification earlier this could have been done. He did not do so. He is his own worst enemy. Nowhere in his statement of case or his response does he set out any evidence of prejudice that he has suffered. We must assess the real "prejudice" to the tenant flowing from the landlord's breach. It is impossible to see from the voluminous documentation produced by Mr Whiteside what that prejudice is. As was stated in the Daejan case, the factual burden of identifying some relevant prejudice would be on Mr Whiteside. In our finding he has not discharged that burden.

46. He does not challenge the quantum of the cost of works. He snipes around the edges dealing with matters such as the satellite dish, door furniture and other items of expenditure. We do not propose to go through those on an item by item basis. Suffice to say that in our findings the evidence given by Mrs Simmons justified these various items of expenditure which are included within the figure of £18,727.04 which we find is due and owing.

47. At paragraph 9.1 of the Applicant's statement of case (Bundle 2) it is said that the Respondent's arrears total £20,830.68. This is after various credits and allocations appear to have taken place. It is not a figure which was challenged at the hearing We therefore conclude that the total sum payable by the Respondent is £20,830.68, being a proportion of the service charges we have found to be payable as set out on the attached schedule.

48. We must also address the application under Section 168(4) of the Commonhold and Leasehold Reform Act 2002. It seems to us that the provisions of section 81 of the Housing Act 1996 have been met by our findings in relation to the outstanding service charge monies. Having found that the Respondent owes the Applicant the sum of money as set out above and has done so for some time, we conclude that there has been a breach of the Respondent's lease in particular paragraph 4(b) which provides for him to contributed 16% of the costs, expenses, outgoings and matters mentioned in the fourth schedule of the lease. Such payment to be made on or as soon as reasonably possible after 24th December for the proceeding period of 12 months and to be paid within 28 days of such demand.

49. The final question for us to consider is whether or not the provisions of Rule 13 of the Rules should apply in this case. What has Mr Whiteside done which could be

classified as unreasonable either in the defending or the conduct of the proceedings? Apart from the fire safety works and the major works, the other items of expenditure are relatively minor and were by and large conceded by Mr Whiteside at the Hearing. In so doing of course it does cause us to question why he did not make those concessions earlier in the day. He continued to run with the dispute in respect of electricity but much of the other items fell away either because of the production of invoices which had been with him for some time, or because he concluded that he had no evidence to substantiate his dispute, for example the insurance premiums. It was in our finding unreasonable for him not to have made these concessions earlier. The question, however, is whether he would have continued with the fire safety and the major works in 2014 and we suspect the answer to that is that he would have done. Insofar as the fire safety works were concerned we heard all that was said and whilst we disagree with the submissions made, nonetheless he was entitled to raise those points. Insofar as the major works were concerned there was a failure by the landlord to comply with the Section 20 consultation process but in a relatively minor way and certainly did not cause Mr Whiteside prejudice. He chose not to nominate his own contractor but sought to challenge, once the Section 20 point had been raised, a number of relatively minor inconsequential costs incurred in the refurbishment works. We have found against him in respect of those issues and some of them were, with respect to him, a pointless exercise. To argue over the size of the letterbox or the door furniture and other items of repair is and was unreasonable. The same applies to the replacement of the steps. The photographs clearly show that there were problems brewing beneath the marble surface and the replacement seems to us to have been a perfectly reasonable step to have taken by the Applicant. He does not in truth challenge to any great degree the bulk of the cost of the works.

50. We bear in mind that this is generally a no cost jurisdiction. The standard of unreasonableness in our findings should be read in conjunction with the provisions that applied under the terms of the 2002 Act namely that they flow from the vexatious, abusive and frivolous elements contained within the Act. The fact that a party has lost does not of itself mean that they have acted unreasonably either in the defending or the conduct of proceedings. We do, however, find in this case that Mr Whiteside's inability to condense his argument into documents of a reasonable length dealing with the issues in dispute was unhelpful and has undoubtedly caused additional costs to be incurred by the Applicant in bringing this case. The production of a skeleton argument just before the weekend before the Hearing and the failure to send that to Counsel for the Applicant or to get it to the Applicant's solicitors in time for them to see it before the Hearing commencing on the Monday is unreasonable. However, that document was not admitted and therefore no great inconvenience has been caused to the Applicants in that regard. The Applicant's statement of case and responses are lengthy but need to be to respond to the issues raised by Mr Whiteside in his pleaded case. Putting it in the vernacular it seems to us he has gone 'overboard' in his defence of the claims brought by the Applicant. Conduct prior to the commencement of proceedings is not relevant but certainly the letters he wrote and the somewhat unpleasant allegations made in that correspondence, to an extent, flowed over into the papers presented to us for this case. We do understand that Mr Whiteside may feel that he is somewhat side-lined by occupying the basement and having little use of the common parts. However, that is the lease he purchased and he has to stand by that. His request that the lift should service his flat, when it never did is a case in

point. The lease clearly allows for works to be undertaken which are to the benefit of the residents, and we have found that all items of work fell within the terms of the lease. We conclude that his behaviour has been unreasonable, such as to give rise to some liability for costs under provisions of Rule 13. However, we do not consider it appropriate for him to pay the totality of the Applicant's costs. They are at fault in respect of the Section 20 procedures in relating to the major works in 2014. Taking the matter in the round, we conclude that Mr Whiteside's conduct in pursuing matters that should not have been pursued or should have been discontinued at an earlier stage and in the verbose nature of his documentation has caused the Applicant to incur additional and unnecessary costs. It is very difficult to determine what the level of those costs should be. The conduct in our view does not extend to defending the major works in respect of fire safety and the external and internal refurbishment. There were issues that he was entitled to pursue. Doing the best we can we conclude that Mr Whiteside should contribute a sum equal to 20% of the Applicant's costs.

51. We set out below the directions with regard to the assessment of these costs. We believe they can be dealt with on a summary basis and probably without the need for a further Hearing. However, if either party wishes there to be a Hearing to determine those costs, then that is provided for within the directions that we have included below.

DIRECTIONS

1. The Tribunal considers that this application may be determined by summary assessment, pursuant to rule 13(7)(a).

2. The application is to be determined **without a hearing unless either party makes a written request (copied to the other party) to be heard before the paper determination**.

The applicant's case

3. By **26th May 2015** the applicant shall send to the respondent a statement of case setting out:

   (a) The reasons why it is said that the respondent has acted unreasonably in bringing, defending or conducting proceedings and why this behaviour is sufficient to invoke the rule;

   (b) Any further legal submissions;

   (c) Full details of the costs being sought, including:

   - A schedule of the work undertaken;
   - The time spent;
   - The grade of fee earner and his/her hourly rate;
   - A copy of the terms of engagement with applicant;
   - Supporting invoices for solicitor's fees and disbursements;

- Counsel's fee notes with counsel's year of call, details of the work undertaken and time spent by counsel, with his/her hourly rate;

The respondent's case

4. By **9th June 2015** the respondent shall send to the applicant a statement in response setting out:

    (a) the reasons for opposing the application with any legal submissions;

    (b) any challenge to the quantum of the costs being claimed with full reasons for such challenge and any alternative costs;

    (c) details of any relevant documentation relied on with copies attached.

The applicant's reply

5. By **16th June 2015** the applicant shall send to the respondent a short statement in reply.

Documents for the hearing/determination

6. The applicant shall be responsible for preparing the bundle of documents (in a file, with index and page numbers) and shall by **26th June 2015** send one copy to the other party and send four copies to the Tribunal.

7. The bundle shall contain copies of:

    - The Tribunal's determination in the substantive case to which this application relates;
    - These directions and any subsequent directions;
    - The applicant's statements with all supporting documents;
    - The respondent's statement with all supporting documents.

Hearing arrangements

8. The Tribunal will determine the matter on the basis of written representations received in accordance with these directions in the week commencing 13th July 2015

9. If an oral hearing is requested, the hearing shall take place on **15th July 2015** at 10 Alfred Place London WC1E 7LR starting at 10.00 with a time estimate of 1-2 hours.

10. Any letters or emails sent to the tribunal must be copied to the other party and the letter or email must be endorsed accordingly. Failure to comply with this direction may cause a delay in the determination of this case, as the letter may be returned without any action being taken.

Tribunal Judge Andrew Dutton

Date 12th May 2015

Schedule of Service Charges

Re: 87 St Georges Square, London
Case LON/OOBK/LDC/2014/0145

Year	Claimed	Allowed
2009	Fire Safety - £2,011.12	£2,011.12
2010	Cleaner - £103.04	£103.04
2011	Cleaner - £85.22 Leak work - £191.36	£85.22 £191.36
2012	Electricity - £188.48 Maintenance - £37.76 Lift Phone - £32.32 Stationery etc - £16.00	£188.48 £37.76 £32.32 £16.00
2013	Electricity, lift & lighting - £230.40 Insurance - £756.89 Cleaning - £240.00 Maintenance - £66.24 Lift Phone - £330.72 Stationery etc - £24.00	£230.40 £756.89 £240.00 £66.24 £330.72 £24.00
2014	Electricity - £264.00 Stationery etc - £24.00 Insurance - £800.00 Cleaning - £240.00 Lift Phone - £35.20 Major Works - £18,727.04	£264.00 £24.00 £800.00 £240.00 £35.20 £18.727.04

Total of service charged found payable £24,403.79

Appendix of relevant legislation

Landlord and Tenant Act 1985

Section 18

(1) In the following provisions of this Act "service charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent -
   (a) which is payable, directly or indirectly, for services, repairs, maintenance, improvements or insurance or the landlord's costs of management, and
   (b) the whole or part of which varies or may vary according to the relevant costs.

(2) The relevant costs are the costs or estimated costs incurred or to be incurred by or on behalf of the landlord, or a superior landlord, in connection with the matters for which the service charge is payable.

(3) For this purpose -
   (a) "costs" includes overheads, and
   (b) costs are relevant costs in relation to a service charge whether they are incurred, or to be incurred, in the period for which the service charge is payable or in an earlier or later period.

Section 19

(1) Relevant costs shall be taken into account in determining the amount of a service charge payable for a period -
   (a) only to the extent that they are reasonably incurred, and
   (b) where they are incurred on the provisions of services or the carrying out of works, only if the services or works are of a reasonable standard;

and the amount payable shall be limited accordingly.

(2) Where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable, and after the relevant costs have been incurred any necessary adjustment shall be made by repayment, reduction or subsequent charges or otherwise.

Section 27A

(1) An application may be made to a leasehold valuation tribunal for a determination whether a service charge is payable and, if it is, as to -
   (a) the person by whom it is payable,
   (b) the person to whom it is payable,
   (c) the amount which is payable,
   (d) the date at or by which it is payable, and
   (e) the manner in which it is payable.

(2) Subsection (1) applies whether or not any payment has been made.

(3) An application may also be made to a leasehold valuation tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs and, if it would, as to -
   (a) the person by whom it would be payable,
   (b) the person to whom it would be payable,
   (c) the amount which would be payable,
   (d) the date at or by which it would be payable, and
   (e) the manner in which it would be payable.

(4) No application under subsection (1) or (3) may be made in respect of a matter which -
   (a) has been agreed or admitted by the tenant,
   (b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,
   (c) has been the subject of determination by a court, or
   (d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.

(5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.

Section 20

(1) Where this section applies to any qualifying works or qualifying long term agreement, the relevant contributions of tenants are limited in accordance with subsection (6) or (7) (or both) unless the consultation requirements have been either—
   (a) complied with in relation to the works or agreement, or
   (b) dispensed with in relation to the works or agreement by (or on appeal from) a leasehold valuation tribunal.

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

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

(4) The Secretary of State may by regulations provide that this section applies to a qualifying long term agreement—
   (a) if relevant costs incurred under the agreement exceed an appropriate amount, or
   (b) if relevant costs incurred under the agreement during a period prescribed by the regulations exceed an appropriate amount.

(5) An appropriate amount is an amount set by regulations made by the Secretary of State; and the regulations may make provision for either or both of the following to be an appropriate amount—
 (a) an amount prescribed by, or determined in accordance with, the regulations, and
 (b) an amount which results in the relevant contribution of any one or more tenants being an amount prescribed by, or determined in accordance with, the regulations.

(6) Where an appropriate amount is set by virtue of paragraph (a) of subsection (5), the amount of the relevant costs incurred on carrying out the works or under the agreement which may be taken into account in determining the relevant contributions of tenants is limited to the appropriate amount.

(7) Where an appropriate amount is set by virtue of paragraph (b) of that subsection, the amount of the relevant contribution of the tenant, or each of the tenants, whose relevant contribution would otherwise exceed the amount prescribed by, or determined in accordance with, the regulations is limited to the amount so prescribed or determined.

<u>Orders for costs, reimbursement of fees and interest on costs – Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013</u>

13.(1) The Tribunal may make an order in respect of costs only
 (a) under section 29(4) of the 2007 Act (wasted costs) and the costs incurred in applying for such costs;
 (b) if a person has acted unreasonably in bringing, defending or conducting proceedings in
  (i)an agricultural land and drainage case,
  (ii)a residential property case, or
  (iii)a leasehold case; or
 (c)in a land registration case.

(2) The Tribunal may make an order requiring a party to reimburse to any other party the whole or part of the amount of any fee paid by the other party which has not been remitted by the Lord Chancellor.

(3) The Tribunal may make an order under this rule on an application or on its own initiative.

(4) A person making an application for an order for costs
 (a)must, unless the application is made orally at a hearing, send or deliver an application to the Tribunal and to the person against whom the order is sought to be made; and
 (b)may send or deliver together with the application a schedule of the costs claimed in sufficient detail to allow summary assessment of such costs by the Tribunal.

(5) An application for an order for costs may be made at any time during the proceedings but must be made within 28 days after the date on which the Tribunal sends
 (a)a decision notice recording the decision which finally disposes of all issues in the proceedings; or

(b)notice of consent to a withdrawal under rule 22 (withdrawal) which ends the proceedings.

(6) The Tribunal may not make an order for costs against a person (the paying Person) without first giving that person an opportunity to make representations.

(7) The amount of costs to be paid under an order under this rule may be determined by
(a)summary assessment by the Tribunal;
(b)agreement of a specified sum by the paying person and the person entitled to receive the costs (the receiving person);
(c)detailed assessment of the whole or a specified part of the costs (including the costs of the assessment) incurred by the receiving person by the Tribunal or, if it so directs, on an application to a county court; and such assessment is to be on the standard basis or, if specified in the costs order, on the indemnity basis.

(8) The Civil Procedure Rules 1998(1), section 74 (interest on judgment debts, etc) of the County Courts Act 1984(2) and the County Court (Interest on Judgment Debts) Order 1991(3) shall apply, with necessary modifications, to a detailed assessment carried out under paragraph (7)(c) as if the proceedings in the Tribunal had been proceedings in a court to which the Civil Procedure Rules 1998 apply.

(9) The Tribunal may order an amount to be paid on account before the costs or expenses are assessed.