



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

Case Reference : CHI/45UD/LSC/2017/0099

Property : 1 Budgenor Lodge, Dodsley Lane,
Easeborne, Midhurst, West Sussex GU29
0AD ("the property")

Applicants : (1) Mr W Cooper
(2) Mrs S Cooper

Representative : None

Respondent : Budgenor Lodge Limited

Representative : None

Type of Application : For the determination of the liability to pay
a service charge

Tribunal Member(s) : Tribunal Judge H Lederman

**Date of
Determination** : 16 April 2018

Date of Decision : 24 May 2018

INTERIM DECISION

Summary of Decision

1. The Tribunal is minded to determine that the sum of £7500.00 being the total cost of repairs to conservatory roofs at Budgenor Lodge in the service charge years 2016/2017 and 2017/2018 is payable out of service charge under the provisions of clause 2.2, the First and Seventh Schedules of the lease of the individual units.
2. The Tribunal is unable to reach a final determination upon whether the costs incurred are payable under those provisions of the Lease on the limited evidence available and adjourns the determination to enable the parties and any others with relevant information to provide further evidence in accordance with the directions given below.

Further Directions of the Tribunal

3. The Tribunal directs the Respondent and the Applicants to provide to the Tribunal by 4 pm on 28th June 2018 the following evidence and submissions to enable a final decision to be made:
 - a. Documents and/or witness statements evidencing the nature of the repairs such as invoices, estimates, reports of defect/disrepair (possibly held by the Respondent's managing agent).
 - b. Documents and/or witness statements confirming the decision to carry out the repairs and the reasons for that decision such as minutes of Board meetings or records of decisions made by managing agents and/or instructions to managing agents and/or contractors.
 - c. Copies of any demands for service charges (or other charges) made to the Applicants for the property (Unit 1) and the witnesses listed below in respect of or which include the costs of repairs to the conservatories.
 - d. Written comments upon whether an order should be made preventing any of the costs incurred in connection with these Tribunal proceedings from being regarded as relevant costs to be taken to account in determining the amount of service charge payable by the Applicants or other Lessees of Budgenor Lodge
 - e. Written comments upon whether an order should be made reimbursing the Applicants for any fees paid to the Tribunal in connection with these proceedings.
4. The Respondent and the Applicants do each have permission, if they so wish, to send to the Tribunal and to the other party, witness statements (including further witness statements from each of the witnesses listed below) and/or further documents in response to the evidence supplied in accordance with the direction numbered 3 above. If such witness statements or further documents are supplied, this must be done by 4 pm on 10th July 2018.

5. To comply with the above directions the Applicants or the Respondent may provide signed witness statements from persons who are not lessees, or not employees of the Respondents if they wish.
6. The Applicants and the Respondent each have permission to send to the Tribunal written comments upon the contents of this interim decision and upon the coloured copies of the plans A, B, C and D (and plan E) incorporated into the Lease annexed to this Decision, supplied to the Tribunal during the preparation of this interim Decision. Any such comments must be sent to the Tribunal and to the other party by 4 pm on 28th June 2018.
7. All documents and witness statements sent to the Tribunal should be indexed paginated, consecutively to the Determination Bundle and the coloured copies of the plans A, B, C, D and plan E, all of which are currently unpaginated. All witness statements should be signed, dated and accompanied by a statement of truth by the witness saying, "I believe the contents of this statement to be true."
8. If the Respondent wishes the final decision of the Tribunal to bind all the lessees at Budgenor Lodge, a copy of this interim decision should be provided to each of the lessees by 4 pm on 14th June 2018 and each lessee should be invited to write to the Tribunal to become a Respondent or provide their written consent to being bound by the final decision of the Tribunal. The Respondent must provide written evidence of compliance with this direction to the Tribunal by 4 pm on 28th June 2018.
9. The Tribunal is minded to make no order about the costs of these proceedings. This means that the costs of these proceedings might be regarded as relevant costs for the purpose of determining the amount of service charges payable by Lessees of Budgenor Lodge, if those costs are properly included within service charges under the Lease. Each of the lessees of Budgenor Lodge should consider whether they wish to make written submissions upon this issue. If they wish to comment, they must do so in accordance with the timetable given in the above directions, whether or not they provide comments or evidence about other issues.

Reasons for interim decision

The application

10. The Applicants seek a determination pursuant to Section 27A of the Landlord and Tenant Act 1985 ("the Act") as to the amount of service charges payable by the Applicants in respect of the service charge years 2016/2017 and 2017/2018 for repairs to conservatory roofs at Budgenor Lodge.
11. The relevant legal provisions are set out in Appendix A to this decision.

Procedure

12. The Tribunal issued directions on 10th November 2017 (“the Directions”) indicating this application was to be determined without a hearing in accordance with rule 31 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013/1169 (“the 2013 Rules”), unless any party objected to that procedure within 28 days of receipt of those directions.
13. The Directions recorded that the Applicants consented to a determination without a hearing by e-mail of 20th October 2017. No party indicated that a hearing was required.
14. None of the statements from other lessees included within the Determination bundle at section 4 (Colin Sanderson and Enny Sanderson of 10th December 2017, Jacob GP Roell of 5th December 2017, Kate Henderson of 5th December 2017, TS Manns of 12th December 2017) indicated that a hearing was requested.
15. The application is therefore determined without a hearing. No inspection of Budgenor Lodge took place. No party or witness contended that such an inspection was appropriate or necessary. The Tribunal did not consider that an inspection was proportionate to the issue in dispute as it would not have significantly influenced the outcome.

The Determination bundle

16. The Bundle consisted of 5 sections, which, contrary to paragraph 14 of the Directions were not paginated. The contents are summarised below. It was supplemented by coloured copies of plans A, B C and D supplied during preparation of this Decision and annexed as Appendix B to this Decision.

The background - Budgenor Lodge

17. Budgenor Lodge is a Grade II Listed building in Easeborne built in the late 18th century as a workhouse (Midhurst Union workhouse). In 2007 it was redeveloped into private residential dwellings together with other buildings now known as Budgenor Lodge. The main building (“the Main Lodge”) faces east and has a hipped tiled roof. The Respondent landlord is a company whose shareholders are restricted to those who are owners and whose directors are also shareholders. The Respondent appears to have acquired the freehold of Budgenor Lodge (as defined below) in 2015. The Respondents were not the original landlords at the time of the redevelopment in 2007. The original landlords appear to have been a commercial entity.

18. The Respondents asserted, and it has not been disputed that at the relevant times Budgenor Lodge consisted of 42 dwellings, some of which were added as “new build” at the time of the redevelopment in 2007. At all relevant times the development comprised 21 apartments in the Main Lodge Building, 11 houses and 3 apartments in two wings, 4 apartments in a separate building and 3 “freehold” new build cottages, according to the landlord’s statement of case sent under cover of letter dated 9th January 2018.
19. A schematic representation of the development known as Budgenor Lodge can be found in the plans labelled A, B, C, D and E incorporated in to the specimen Lease in section 2 of the Bundle.

The topography of the conservatories

20. A monochrome Photograph of Unit 1’s “conservatory” accompanied the application form was provided in the hearing bundle. The Applicants say, and it is not disputed that the “conservatory” for each of the 11 apartments was not a later addition but an integral structure to the conversion of Budgenor Lodge with a brick partition wall between the dwellings and the conservatories: the letter 14 December 2017 from William Cooper the First Applicant makes this clear.
21. The photograph annexed to the application notice shows that the conservatory depicted is a ground floor structure with a sloping glass roof. The photograph is consistent with the description of the conservatory on page 10 of the application notice as “incorporating brick walls/glass roofs”. That part of the application notice asserts that the only glass roofs in Budgenor Lodge are the conservatory roofs. The accuracy of that assertion is not challenged. The Tribunal finds that photograph and description to be typical of the layout of the conservatories at Budgenor Lodge.
22. That description is consistent with Plan A, Plan B and Plan C incorporated into the specimen Lease which depict the conservatory as a ground floor structure named as “Garden Room” in the legend to the plans. Plan B (the first floor plan) depicts the conservatory roofs. It is unclear from the red edging in Plans A and Plan B whether the roofs were intended to fall within the demise (the grant) to the Lessee. The red edging is expressed to be “for the purpose of identification only” in the definition of “the Unit” in clause 1.1 on page 5 of the Lease. Accordingly, the presence or absence of red edging around the conservatory roofs is not conclusive of whether the roofs are part of the structure demised for the reasons given below.

The leasehold structure

23. The Applicants hold a long lease of the property for a term of 125 years from February 2007 which requires the Landlord to provide services and the Lessee to contribute towards their costs by way of a variable

service charge. The specific provisions of the lease will be referred to below, where appropriate.

24. Michael Deadman a director of the Respondent confirmed that all the leases (including those dwellings which do not have a conservatory) are in substantially the same form as the Lease accompanying the application notice by a letter dated 28th November 2017 in section 3 of the Bundle. The fact that all Leases are in a materially identical form has not been the subject of any dispute. The Tribunal considers the significance of any variations below.
25. Clause 1.1 of the Lease contains a large number of definitions. One of the key definitions for the purpose of understanding the service charge provisions of the Lease is "the Units". This phrase is defined on page 12 of the Lease to mean:

"the Premises and all the other units contained in the Building and sold or intended to be sold on long leases and "Unit" shall mean any one of them".

The phrase "the Building" is defined on page 6 of the Lease in clause 1.1 to mean:

"all that the land and buildings (including the Units the Internal Common Parts and the Main Structure) intended to be known as Budgenor Lodge Dodsley Lane Easebourne Midhurst West Sussex as the same are shown *for the purpose of identification only* coloured brown mauve and red on Plan D" (emphasis added)

The significance of this definition is that "the Units" for this purpose do not include any freehold units or units are not coloured brown mauve and red on Plan D ("the Estate plan"). It has been long settled that emphasised words "*for the purpose of identification only*" mean that the plan is not determinative or conclusive of whether a piece of land is within a parcels clause or demise but may be looked at provided it does not contradict an explicit verbal description: see *Wigginton & Milner Ltd v Winster Engineering Ltd* [1978] 1 W.L.R. 1462 as an example of an application of this principle.

The issue

26. The sole issue for determination identified by the Directions is whether upon a proper construction of the terms of the relevant leases the cost of works of repair to conservatory roofs to certain premises at Budgenor Lodge are recoverable through service charge. The determination which the Tribunal is required to make is clarified in the following paragraphs of this Decision.

The scope of the Tribunal's jurisdiction

27. The Tribunal's jurisdiction under the 1985 Act does not extend to considering the payability or interpretation of any covenants or other obligations imposed upon freehold owners in respect of any contribution to the costs under consideration in this Decision. Nothing in this Decision should be read as determining that issue directly or indirectly. As some of the owners of the dwellings might be freeholders, the Tribunal occasionally uses the words owner or dwelling owners where it is not necessary to distinguish between lessees and such owners for the purpose of ascertaining the significance of apportionment of costs of the Budgenor Lodge development in 2007.
28. The Tribunal is required to determine the answer to the statutory question posed by section 27A(1)(c) of the Act (the amount payable) by determining the amounts payable as service charges for conservatory roofs as service charges: see *Jarowicki v Freehold Managers (Nominees) Limited v Prokhorova* [2016] UKUT 435 (LC). Alternatively, if the costs have not yet been incurred the Tribunal is able to determine whether those costs would be payable under the analogous provisions of section 27A(3) of the Act. The Tribunal is not empowered to decide those issues "in principle" or without providing a determination upon specific amounts payable by the Applicants.

Legal principles governing interpretation of Leases (and other contracts)

29. The approach to interpretation of Leases and other contracts was the subject of authoritative guidance by the Supreme Court in the decision known as *Arnold v Britton* [2015] 2 W.L.R. 1593. The relevant principles which derive from that decision are as follows (adapted for the context of the Tribunal's jurisdiction).
30. When interpreting a written contract, the Tribunal is concerned to identify the intention of the parties by reference to "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean. And it does so by focussing on the meaning of the relevant words,..... in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions": see *Arnold* (paragraph 15 Lord Neuberger).

31. Reliance “.... placed in some cases on commercial common sense and surrounding circumstances should not be invoked to undervalue the importance of the language of the provision which is to be construed. The exercise of interpreting a provision involves identifying what the parties meant through the eyes of a reasonable reader, and, save perhaps in a very unusual case, that meaning is most obviously to be gleaned from the language of the provision. Unlike commercial common sense and the surrounding circumstances, the parties have control over the language they use in a contract.” see *Arnold* (paragraph 17 Lord Neuberger).
32. “commercial common sense is not to be invoked retrospectively. The mere fact that a contractual arrangement, if interpreted according to its natural language, has worked out badly, or even disastrously, for one of the parties is not a reason for departing from the natural language. Commercial common sense is only relevant to the extent of how matters would or could have been perceived by the parties, or by reasonable people in the position of the parties, as at the date that the contract was made.” (see *Arnold* paragraph 19 Lord Neuberger).
33. Service charge clauses are not the subject of any special rule of interpretation and do not need to be interpreted “restrictively” (see *Arnold* paragraph 23 Lord Neuberger).
34. The approach in *Arnold* has been clarified. The Tribunal does not start from the position that any particular “magic” words are required to make sums recoverable as service charge or that the factual background or the language used have priority. It is a question of looking at the Lease as a whole with an “iterative process” against the background of the purpose of the contract and seeing which (if any) of the competing interpretations are correct: see *Wood v Capita Insurance Services Ltd* [2017] 2 W.L.R. 1095 paragraphs 1-13.
35. None of this is new law. Historically, Courts and Tribunals would sometimes start with a presumption that if there is ambiguity or competing interpretations, that which least favoured the party who prepared the draft would be adopted. That is now only one possible factor to be considered. One background factor is that the Leases were all in standard form, not negotiable and a landlord who was a commercial entity who was associated with marketing units in the development would be expected to attempt to draft Leases which ensured that as much of potential expenditure as possible would be recoverable through service charge. This might ensure that at least in the first few years of the development when marketing of units was still relevant, the landlord’s expenditure could be recovered. However, this is only one factor to be considered.
36. The approach required by the *Arnold* and *Wood* decisions does not require any attention to be paid to legal advice received by individual lessees when purchasing various units, except insofar as the content of

that advice may illuminate a correct interpretation. Nor is it relevant in the context of the issue currently before the Tribunal that the landlord or the managing agents, have assumed that one interpretation is correct, whether based upon advice from solicitors or not.

37. The Tribunal's task is to identify the intention of the parties by reference to "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean", whether or not that meaning has been adopted or understood previously.
38. The Tribunal turns to the language of the various service charge provisions.

Definition and extent of the conservatory within the Lease

39. Despite 9 pages of definitions in clause 1.1 on pages 4- 13 of the Lease, there is no definition of "the conservatory". It is also not explicit whether the conservatory roof is the subject of the demise of "the premises" in clause 2.1. The definition of "the premises" in clause 1.1 on page 6 of the Lease confirms "the premises" is a synonym for "the Unit".
40. Taking the definition of "the Unit" in clause 1.1 on page 5 (set out at length elsewhere in this Decision), and the definition of "the Main Structure" in clause 1.1 on page 6 of the Lease, the conservatory roof is not the subject of the demise. In particular the verbal description of the demise of the Unit in paragraph (d) when read with the demise in paragraph 2 excludes all structures above ceilings and ceiling finishes.
41. The definition of "the Unit" must be read together with the definition of "the Main Structure" in clause 1.1 on page 6. "the Main Structure" is defined to mean:

"the whole of the Building excluding the Units and the Internal Common Parts which shall for the avoidance of doubt but without limitation to the generality of the foregoing *include all roofs at all levels of the Building (including all glass roofs or skylights)* and the foundations of the Building and its main walls (including party walls) and timbers and the joists beams and floor slabs supporting the floors in the Building and all other structural parts together with all alterations and additions thereto from time to time" (emphasis added)

42. One view is that these definitions (and in particular the emphasised words) mean that the roofs of the conservatory roofs are not part of the demise and are part of the land retained by the landlord. The definition

of “the Main Structure” which could not sensibly be taken to mean that all roofs apart from the conservatory roofs are not demised because of clause (l) in the definition of “the Unit” on page 5 of the Lease which include “the conservatory” in the demise. This reading is supported by the absence of any red edging around the conservatory roofs depicted in plans A and B, taken with the absence of any other glass roofs in the Budgenor Lodge development.

43. The alternative interpretation placing emphasis upon “the conservatory” in clause (l) in the definition of “the Unit” on page 5 of the Lease would mean that the only roofs in the development which were not held by the landlord would be the conservatory glass roofs. It would also mean that the lessee would be responsible for maintenance and repair of the glass roof but not the other roofs of his unit.
44. It is helpful to test both interpretations against the scheme of the other provisions in the Lease.
45. The Lease is a professionally drafted modern document. Unless the drafting is found to be defective, it can be assumed it was intended to provide a comprehensive scheme for raising funds for the cost of repairs and maintenance of conservatory roofs. There are two principal possibilities as to the source of the obligation to carry out and pay for the cost of repairs to the conservatory roofs. The first is that the repairing obligation rests with the landlord, normally expect to be reimbursed through service charge. The second is that the obligation is imposed on the lessee but supervised and enforced by the landlord/its agents.

The service charge provisions in the Lease – initial allocations of contribution and percentages

46. To understand the provisions of the Lease which might apply to recovery of the cost of repair of conservatory roofs, it is helpful to look at the overall scheme for recovery of costs as service charges, to see which costs were intended to be included. The initial allocations between several types of service charge cost in the Lease provide some indication of the objective meaning of the words used against the background of the configuration and construction of the Budgenor Lodge development in 2007 into 42 separate dwellings.
47. The first textual point of significance is that the draftsman of the Lease did not express the definitions in clause 1.1 to be qualified by or dependent upon context with phrases as “unless the context so requires...”. This qualification of a definition clause is a common drafting feature in modern Leases. The omission of such a qualification means, that other things being equal, significant weight must be given to the definitions in the Lease in ascertaining the meaning, as opposed to the issues of whether the definitions are displaced by context.

48. Service charges recoverable from the lessee are divided into 7 types identified by clauses 2.1 – 2.7 and the definition of “the Rents” in clause 1.1 of the Lease as follows: Insurance Rent, the Building Charge, the Main Lodge Internal Common Parts Charge, the Clock House Internal Common Parts Charge, the Estate Charge, the Conservatory Charge and the Main Lodge Heating Charge.
49. Those separate charges are broadly reflected in duties imposed upon the Landlord to provide services of a corresponding type and description in the Lease. These are found in clause 5.1 (Insurance), Building Services (clause 4.3), Internal Common Parts services (clause 4.4), Clock House Internal Common Parts Services (clause 4.5), Estate Services (clause 4.6) Conservatory Services (clause 4.7) and Main Lodge Heating services (clause 4.8).
50. Each type of service charge is the subject of a separate apportionment (percentage of total cost of that type of charge) payable by individual lessees who may (or may not) be liable to pay the particular type of charge if so designated by the Lease. In practice, the initial apportionment of the charges appears to have reflected whether the individual unit benefited from the service or incurred the costs, by use or otherwise. Thus, for the purposes of Unit 1, one of the 11 units which has a conservatory, the Conservatory Charge is 9.09%. That can readily be translated into an almost one eleventh share of conservatory costs. It might be inferred that such costs would not ordinarily be charged to Units which did not have such a conservatory. The Tribunal returns to the significance to be attached to that allocation of conservatory costs in the overall scheme of service charge recovery, later in this Decision.
51. In accordance with that principle, Unit 1 is required to pay a Nil percentage of the Main Lodge Internal Common Parts Charge (clause 1.1 page 9 of the Lease) and a Nil percentage of the Clock House Internal Common Parts Charge (clause 1.1 page 10 of the Lease) and a Nil percentage of the Main Lodge Heating Charge (clause 1.1 page 12 of the Lease). It may be inferred from the layout of the Budgenor Lodge development in the Estate plan (Plan D) that lessees of Units such as Unit 1 would have no or hardly any benefit from those services and would not have incurred or caused the Respondent landlord to have incurred those costs.
52. In line with that principle however, Unit 1 was required to pay 2.38% of the Estate Charge percentage (see clause 1.1 page 11 of the Lease) and 2.38% of the Building Charge (see clause 1.1 page 8 of the Lease). This reflect the fact that a lessee of Unit 1 would benefit from and be expected to contribute towards the Building Services and the Estate Services. Consistent with that inference the 2.38% percentage for each of the Estate Charge and Building Charge corresponds almost completely to an equal contribution by each of the 42 dwelling owners (that is lessees and freehold owners).

53. The initial allocation of percentages is subject to variation in subsequent service charge years if the conditions set out in paragraphs 6 and/or 7 of the Seventh Schedule to the Lease are satisfied. This does not detract from the significance of the initial percentages in ascertaining the intention of the draftsman to the Lease in 2007.
54. The initial allocation of percentage of costs incurred for liability for service charge as between different classes of unit depending upon whether individual units benefited from the cost or expenditure to be incurred, is potentially consistent with an interpretation by which those lessees of Units with conservatories might be expected to bear the costs of repair and maintenance relating to the conservatories, through service charge or otherwise.
55. The Tribunal turns to see whether that approach is borne out by natural meaning of the words used. The starting point is to consider the conservatory charge.

The “Conservatory Charge”

56. This is defined as the conservatory charge percentage of the Annual Conservatory Expenditure (clause 1.1 page 11 of the Lease). The Annual Conservatory Expenditure is defined to mean:

“(a) all costs expenses and outgoings whatever incurred by the Landlord during a Financial Year in or incidental to providing all or any of the Conservatory Services and
 (b) any VAT payable on such sums costs expenses and outgoings

but excluding any expenditure for which the Tenant or any other tenant is wholly responsible and excluding any Annual Conservatory Expenditure that the Landlord recovers under any policy of insurance maintained by the Landlord pursuant to its obligations in this Lease”

57. The Lessee is required to pay the conservatory charge by and subject to the terms of the covenant in clause 2.6 of the Lease (page 15) and the Seventh Schedule (pages 33-34).
58. However, recovery of and the lessee’s obligation to pay for the Conservatory Charge is defined by reference to and limited to the cost of Conservatory Services,. These are listed exhaustively in the Fifth Schedule of the Lease at pages 31-32 as follows:

- 1 “As and when the Landlord shall consider it necessary to *clean the external glazed surfaces* of the conservatories (if any) appurtenant to the Units

- 2 To take out and maintain in force an effective insurance policy against any and every liability of the Landlord for injury to or death of any person {including every agent servant and workman of the Landlord) and damage to or destruction of the property of such person arising out of the provision of the Conservatory Services and in particular but without limitation
 - 2.1 employer's liability and
 - 2.2 insurance against such injury death damage or destruction due to the act neglect default or misconduct of the agents servants or workmen of the Landlord employed in connection with the provision of the Conservatory Services
- 3 To employ at the Landlord's discretion a firm of managing agents to manage the Conservatory Services and discharge all proper fees charges and expenses payable to such agents or such other persons who may be managing the Conservatory Services including the cost of computing certifying and collecting the Conservatory Charge
- 4 To keep proper books of account of the sums received from the Tenant and all others in respect of the Annual Conservatory Expenditure and of all costs charges and expenses incurred by the Landlord pursuant to its covenants in this Schedule
- 5 To do all further acts as the Landlord in its absolute discretion may consider necessary or advisable for the proper maintenance safety amenity and administration of the Conservatory Services”

(emphasis added)

59. There is no provision the cost of for repair or maintenance of the external conservatory glass or roof within the definition of the Conservatory Services or the Conservatory Charge. This apparent omission is equally consistent with such expenditure being that for which the tenant is “wholly responsible”, recoverable under a policy of insurance (both excluded from the Annual Conservatory Expenditure) or the subject of some other service charge provision.
60. There is nothing in any of the provisions relating to Conservatory Services, Conservatory Charge Annual Conservatory Expenditure which could be read as providing that expenditure by the landlord upon the conservatory can only be recovered under those provisions but not under other provisions of the Lease.
61. Accordingly, the omission of the cost of repair for repair or maintenance of the external conservatory glass or roof within the

definition of the Conservatory Services or the Conservatory Charge is of no material significance in determining whether the conservatory roofs are within the demise or whether the cost of the same are recoverable as service charge.

62. The Tribunal turns to see whether the cost of repairs to conservatory roofs might be recovered by the landlord under some other service charge provision. If so, that would be an objective indicator that the draftsman did not intend the Conservatory Charge to be exhaustive of recovery of costs of works to the conservatory through service charge and might confirm that the terms of the Demise of the Unit excluded the conservatory roofs.

Are repairs to conservatory roofs within the scope of “the Building Charge”?

63. The “Building Services” which are the subject of “the Building Charge” are defined by reference to “the Annual Building Expenditure” and the First Schedule to the Lease: see the definitions of those terms in clause 1.1 on page 8 of the Lease. “Annual Building Expenditure” in clause 1.1 is defined to mean:

- “(a) all costs expenses and outgoings whatever incurred by the Landlord during a Financial Year in or incidental to the provision of all or any of the Building Services and
- (b) any VAT payable on such sums costs expenses and outgoings

but excluding any expenditure in respect of any part of the Building for which the Tenant or any other tenant is wholly responsible and excluding any Annual Building Expenditure that the Landlord recovers under any policy of insurance maintained by the Landlord pursuant to its obligations in this Lease”

(emphasis added)

64. As far as relevant to conservatory roof repairs, the “Building Services” are defined by the First Schedule to the Lease as the Landlord’s obligations (subject to the terms of clause 4.3) to mean:

1. “To maintain in good and substantial repair and condition and renew or replace the Main Structure *in compliance with any statutory requirement* provided that the Landlord shall not be liable for any disrepair until the Landlord has had written notice of it from the Tenant and a reasonable time to remedy it
2. When necessary but not more often than every 3 years and not less often than every 5 years to decorate in a

good and workmanlike manner the external parts of the Building

3. As and when the Landlord shall consider it necessary to clean the windows of the Building (where such windows are not included in this demise or in the demise to another tenant)
4. To pay and discharge any rates (including water rates) taxes duties assessments charges impositions and outgoing assessed charged or imposed on the Building as distinct from any assessment made in respect of any Unit
5.
6.
7. To do or cause to be done all works installations acts matters and things as in the discretion of the Landlord may be considered necessary or desirable for the proper maintenance safety amenity and administration of the Building including without limitation to the generality of the foregoing the provision of security fire safety and fire prevention equipment
8.
9.
10. To do all further acts as the Landlord in its discretion may consider necessary or advisable for the proper maintenance safety amenity and administration of the Building” (emphasis added)

65. To understand the scope of the landlord’s duty to provide “Building Services” it is necessary to return to the definition of “the Building” in clause 1.1 on page 6 of the Lease which provides that term means:

“all that the land and buildings (including the Units the Internal Common Parts and the Main Structure) intended to be known as Budgenor Lodge Dodsley Lane Easebourne Midhurst West Sussex as the same are shown for the purpose of identification only coloured brown mauve and red on Plan D”

66. Plan D shows the Units and the conservatories (as well as other parts) to be shaded brown. That colouring is consistent with the conservatories falling within the meaning of the term “the Building” as defined in clause 1.1 of the Lease.

67. The phrase “the Units” is defined by clause 1.1 on page 12 of the Lease to mean “the Premises and all the other units contained in the Building and sold or intended to be sold on long leases and “Unit” shall mean any one of them”. The term “the Premises” is defined by clause 1.1 on page 6 of the Lease to mean “the Unit”.

68. The phrase “the Unit” is further defined in clause 1.1 on page 5 of the Lease as follows:

“all that ground, first and second floor Unit in the Building shown for the purpose of identification only edged red on Plans A, B and C includes:

- (a) the internal non-structural walls within the Unit
- (b) the inner half severed medially of all internal non-structural walls shared with any other Unit or with the Common Parts
- (c) the floors (including the floor screeds and floor finishes but not any floor joists or slabs) of the Unit
- (d) the ceilings and ceiling finishes but not the beams joists or slabs above or forming any part of the ceilings
- (e) the doors door frames windows window frames and the glass in the doors and windows
- (f) the plaster work of all structural walls within or bounding the Unit
- (g) all Pipes that exclusively serve the Unit
- (h) all the Landlord's fixtures and fittings and fixtures of every kind that shall from time to time be in or on the Unit (whether originally affixed or fastened to or upon the Unit or otherwise) including (without limitation) all central heating and air conditioning and water ventilation and sanitary plant equipment and apparatus exclusively serving the Unit
- (i) all additions and improvements made to the Unit other than Tenant's fixtures and fittings therein at any time during the Term
- (j) All stairs and staircases situated within the Unit and all other internal surfaces and partitions therein
- (k) The tiles and surface finishes and boundaries of the roof terrace or balcony (if any) forming part of the Unit
- (l) *The conservatory (if any) and the garden (if any) appurtenant to the Unit”* (emphasis added)

69. As indicated above, the use of the term “for identification purpose only” relegates the red markings on plans A, B and C, in importance to give priority to the verbal description of the Unit.

Provisional conclusion – Building Charge

70. The definition of “the Building” as including “the Unit” is consistent with a conclusion that the landlord could carry out works of repair to conservatory roofs on the basis that they were part of the Building Services defined in paragraphs 7 or 10 of the First Schedule to the Lease which empowered the landlord:

“7. To do or cause to be done all works installations acts matters and things as in the discretion of the Landlord may be considered necessary or desirable for the proper *maintenance safety amenity and administration of the Building* including without limitation to the generality of the foregoing the provision of security fire safety and fire prevention equipment”

.....
10. To do all further acts as the Landlord in its discretion may consider necessary or advisable for the proper maintenance safety amenity and administration of the Building”

(emphasis added)

71. The Tribunal turns to see whether that provisional conclusion is negated by or inconsistent with other provisions of the Lease referred to in letters from solicitors consulted by the Landlord or its managing agents Scott Bailey (letter 04 April 2017) and MacDonald Oates LLP (20 February 2017).

72. The Macdonald Oates LLP letter of 20 February 2017 proceeds on the basis that “the Units” are excluded from “the Building” as “the Units” are not part of “the Main Structure”. It is correct that the definition of “the Main Structure” in clause 1.1 on page 6 expressly excludes the Units and glass roofs and skylights as follows:

“the whole of the Building excluding the Units and the Internal Common Parts which shall for the avoidance of doubt but without limitation to the generality of the foregoing include *all roofs at all levels of the Building (including all glass roofs or skylights)* and the foundations of the Building and its main walls (including party walls) and timbers and the joists beams and floor slabs supporting the floors in the Building and all other structural parts together with all alterations and additions thereto from time to time”

(emphasis added)

73. The authors of the Macdonald Oates letter and the Scott Bailey letter both attach great significance to the fact that the landlord’s duty to repair under paragraph 1 of the First Schedule excludes (or might appear to exclude) repairs to the main structure including the roof of the conservatories.

74. This view is not accepted by the Tribunal for the following three reasons. Firstly Paragraph 1 of the First Schedule only affects the landlord’s duty to repair the Main Structure “in compliance with any

statutory requirement". The absolute duty to perform those services is imposed by the covenant in clause 4.3 of the Lease in respect of the services described in paragraphs 1, 2, 4 and 8 of the First Schedule. The covenant in paragraph 4.3 says nothing about the landlord's duty or power to carry out repairs to the Main Structure where there is no statutory requirement. In other words, the restriction on repairs to the Main Structure in paragraph 1 of the First Schedule does not apply where there is no statutory requirement.

75. Secondly, the list of services in paragraphs 2 to 10 of the First Schedule was clearly intended to be additional or alternative to the service described in paragraph 1. If the repairs to the conservatory roofs were required to comply with a statute, there is nothing in the definition of "the Building", in clause 1.1 on page 6 of the Lease, which prevents the landlord from carrying out repairs to the conservatory roofs within paragraphs 7 or 10 if considered necessary or desirable for the proper maintenance safety amenity and administration of the Building. "The Building" is defined to include the Main Structure and to include the Units which include the conservatory.
76. Thirdly, the covenant in clause 4.3 of the Lease, grants the landlord a contractual discretion or power to use reasonable endeavours to perform the services listed in paragraphs 7 or 10 of the First Schedule "as the Landlord shall in its reasonable and proper discretion deem necessary or desirable". Assuming without deciding that the conservatory roofs were not part of the Main Structure and not within paragraph 1 of the First Schedule, the landlord still had power to carry out works to the roofs as part of the Building defined on page 6 and coloured brown on plan D, if it decided that it was necessary or desirable for the proper maintenance, amenity and administration of the Building.
77. This conclusion accords with the commercial and factual background to this development. The original landlord would wish to reserve power to carry out such repairs and charge them to ensure they were carried out swiftly and to a similar standard and specification, rather leaving individual lessees to carry out repairs to conservatory roofs as this might adversely affect the amenity and desirability of the entire development. This would not necessarily prevent the landlord from seeking to enforce any alleged breaches of the tenant's repairing covenant in respect of such repairs, if it was found that the roofs were within the scope of that covenant.
78. Whether the landlord decided to carry out repairs to conservatory roofs so for reasons of amenity or for other reasons under the First Schedule is not clear. However, it cannot be said that the landlord did not have the power to do so on a reading of the First Schedule, whether or not the conservatory roof was part of the demise and within the definition of the Unit.

Conclusion

79. The cost of repairs to conservatory roofs at Budgenor Lodge in the service charge years 2016/2017 and 2017/2018 was in principle capable being charged to service charge as part of the Building Charge under the provisions of clause 2.2, the First and Seventh Schedules of the lease of the property. The Tribunal defers a final determination of this issue until the further evidence, information and submissions referred to in the Directions given in paragraphs 3-9 to this Decision have been provided and considered.

Name: Tribunal Judge H Lederman

Date: 24 May 2018

RIGHTS OF APPEAL

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application to the First-tier Tribunal at the Regional office which has been dealing with the case.
2. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.
3. If the person wishing to appeal does not comply with the 28 day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.
4. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking

IMPORTANT NOTES ON DIRECTIONS

- (1) They are formal Orders made to assist the parties and the Tribunal in dealing with the application swiftly and economically.
- (2) They **must be complied with**. Failure to comply may result in the Tribunal refusing to hear the defaulting party's case and ordering that party to pay costs.
- (3) If a party wants to alter the directions or propose new ones the party must immediately apply in writing to the Tribunal giving full reasons and, if possible, obtain the consent of the other party to the amendment.
- (4) The Tribunal will only **accept documents if served by post or hand**. A party wishing to serve documents by email or fax must obtain the permission of the Tribunal which will only be given in exceptional circumstances.
- (5) No written communications should be sent to the Tribunal unless a copy is also sent to the other party and this is so marked on each communication.
- (6) A party requires the Tribunal's permission before calling expert evidence.
- (7) The Tribunal may decline to hear evidence which is not provided in accordance with the directions above.

Appendix A: 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.

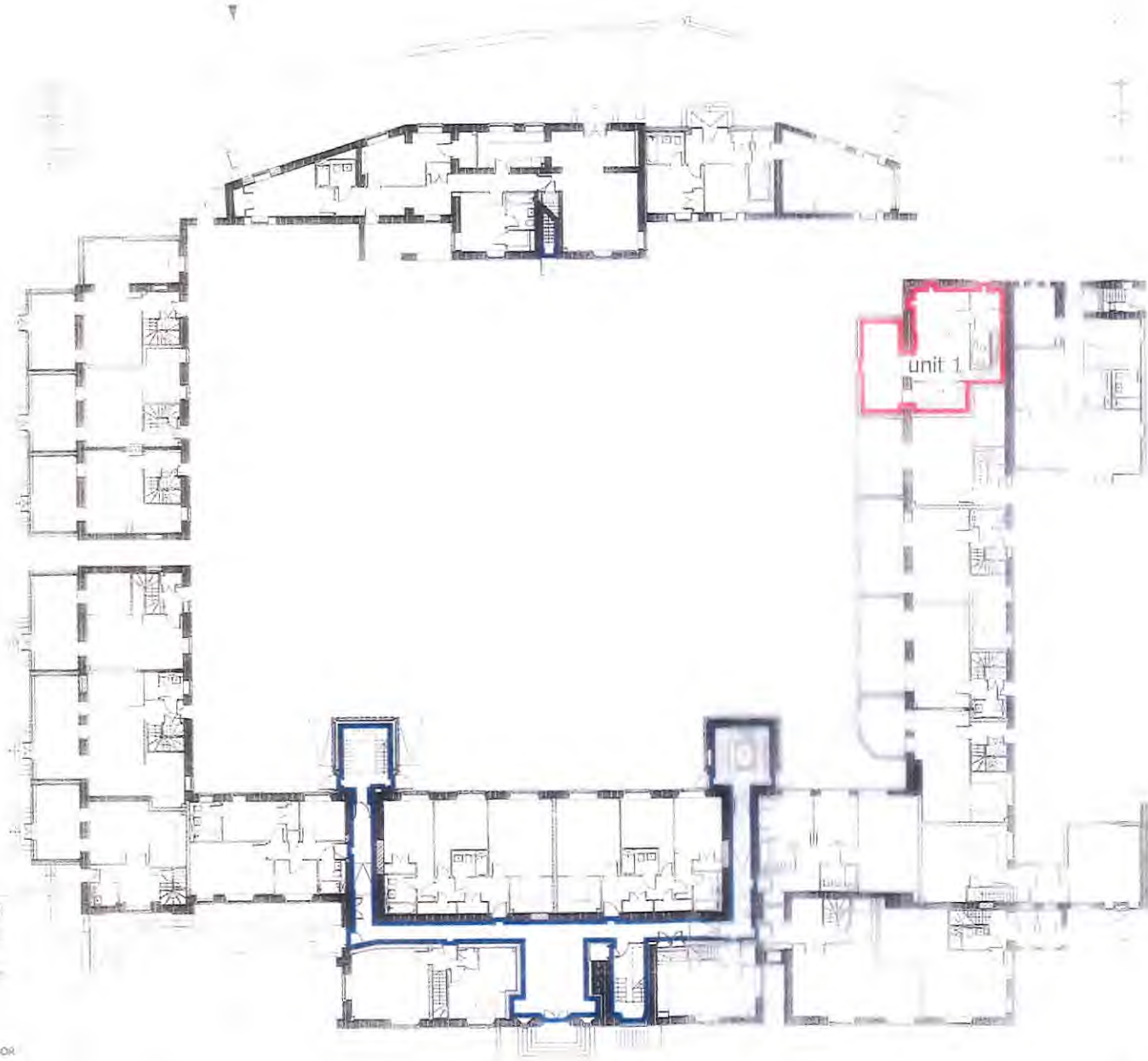
Section 20C

- (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.

**Appendix B: coloured copies of the plans A, B, C, D and plan E
incorporated into the Lease**

GROUND FLOOR



Notes:
 1. All dimensions are in millimeters.
 2. All dimensions are to the center of the wall unless otherwise stated.



- 1. Living Area
- 2. Kitchen
- 3. Bedroom
- 4. Bathroom
- 5. Study
- 6. Office
- 7. Corridor
- 8. Staircase
- 9. Lift
- 10. Storage
- 11. Cycle Store
- 12. Utility
- 13. Reception
- 14. Reception
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- 50. Reception

LEASE PLAN

CAPITAL CITY

SUBJECT TO LOCAL REGULATIONS

LEASE PLAN UNIT 1 GROUND FLOOR

CCD 01/10/2018

25.02 Leasehold plan showing the unit to be leased as indicated by the red outline. The unit is shown in red.



- 101 Living/Dining Area
 - 102 Kitchen
 - 103 Master Bedroom
 - 104 Bedroom
 - 105 Living Bedroom
 - 106 Dressing Room
 - 107 Bathroom
 - 108 Utility
 - 109 Moppy
 - 110 Terrace
 - 111 Stairs
 - 112 Garden Area
 - 113 Cycle
- 1 week of possession
— 1 month of possession

Handwritten signature in blue ink.

Scale: 1/500

LEASE PLAN

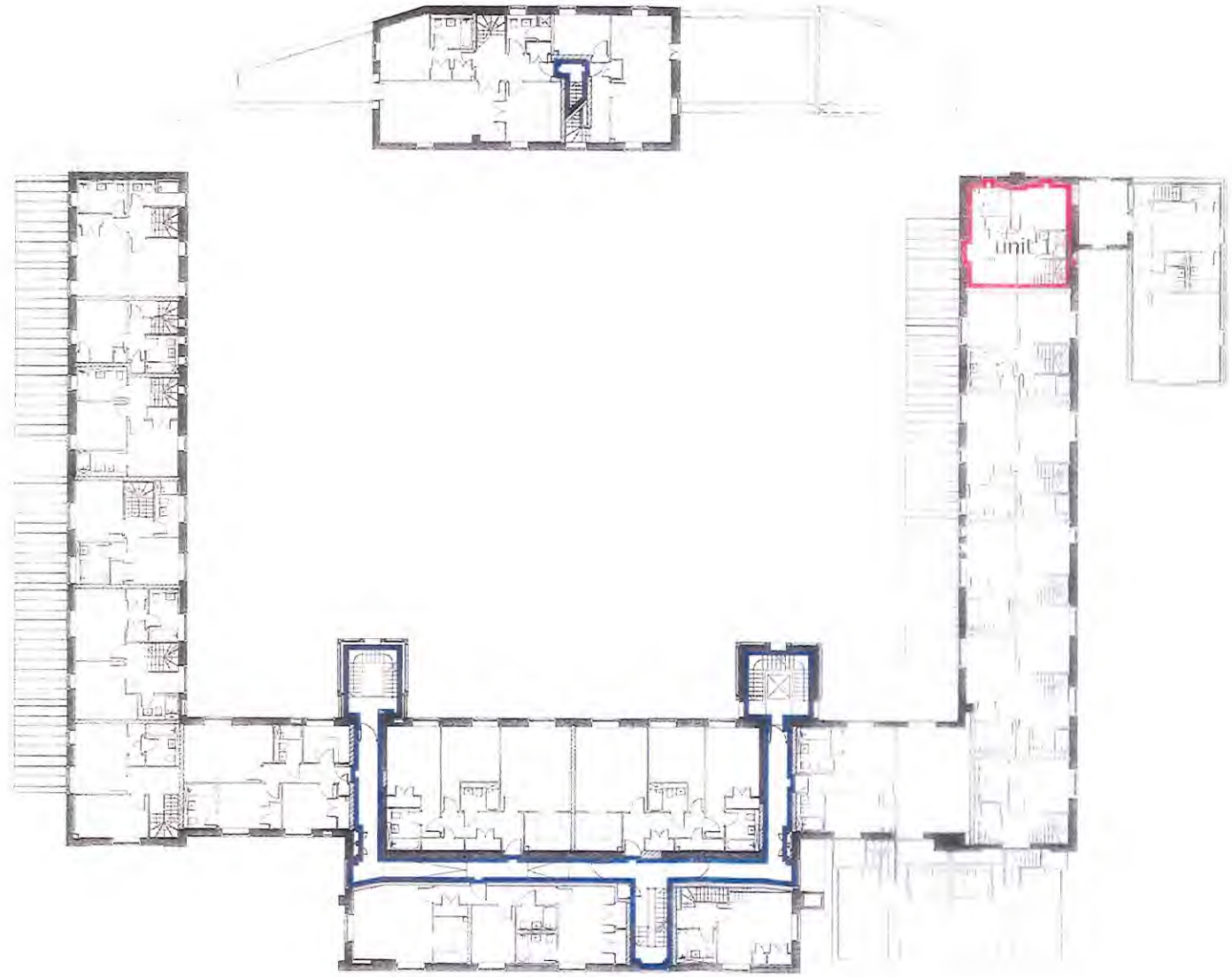
CAPITAL CITY
 118 The Quadrant - Ormeau Road - DUBLIN SW10
 Tel: 01 274 3100 / Fax: 01 274 3111

Project: **BUDGENOR / COZE
 RIDGEMOUNT**

Client: **B DEVELOPMENTS LIMITED**

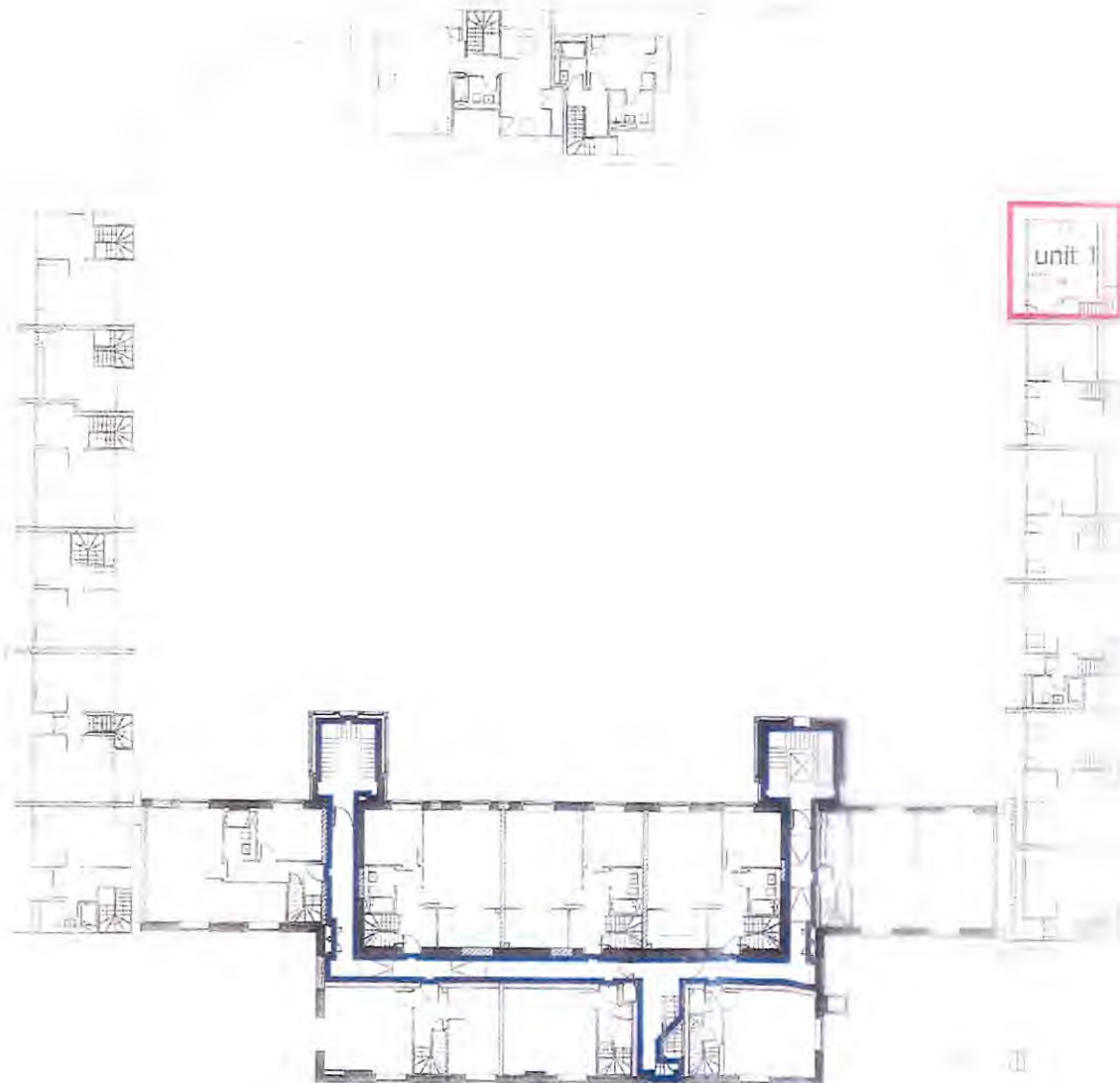
Lease Plan:
**UNIT 01
 1st FLOOR**

Drawing No:
CCD-010 LP 01-110



FIRST FLOOR

SECOND FLOOR



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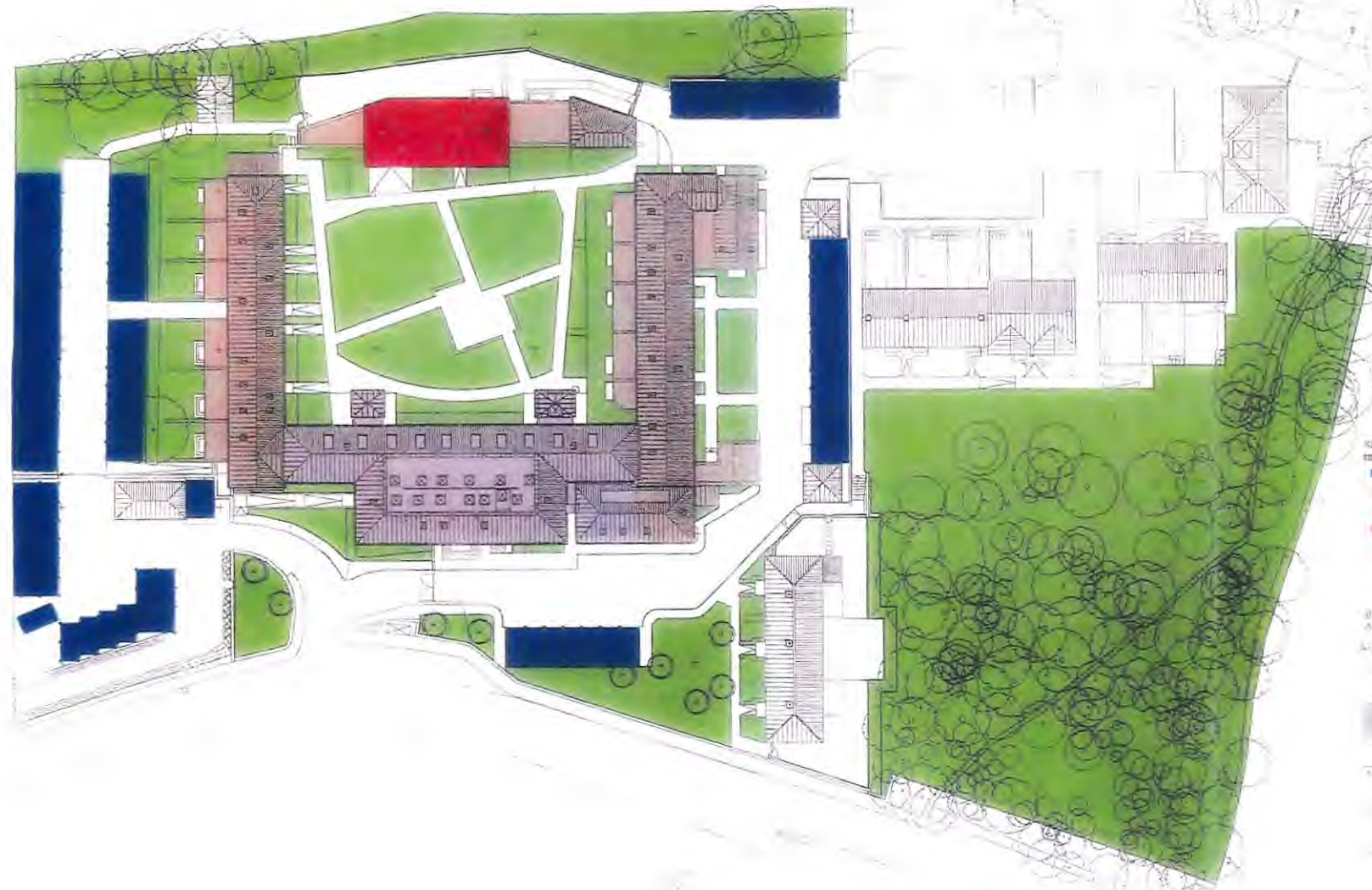
LEASE PLAN

CAPITAL CITY

100 Broad Street - London
EC2A 4DF (UK)

JLL HOLDINGS LIMITED

LEASE PLAN
REF: JLL/10/010



- KEY
- Blue: Parking Areas
 - Green: Lawns
 - Red: Building Footprint
 - Grey: Building Footprint
 - White: Building Footprint

1100 North Street, Suite 1000
Columbia, SC 29201
Tel: 803.733.1000 Fax: 803.733.1001

CONSTRUCTION

CAPITAL CITY

1100 North Street, Suite 1000
Columbia, SC 29201
Tel: 803.733.1000 Fax: 803.733.1001

JUDGMENT LOOSE
ATTORNEY

1100 North Street, Suite 1000

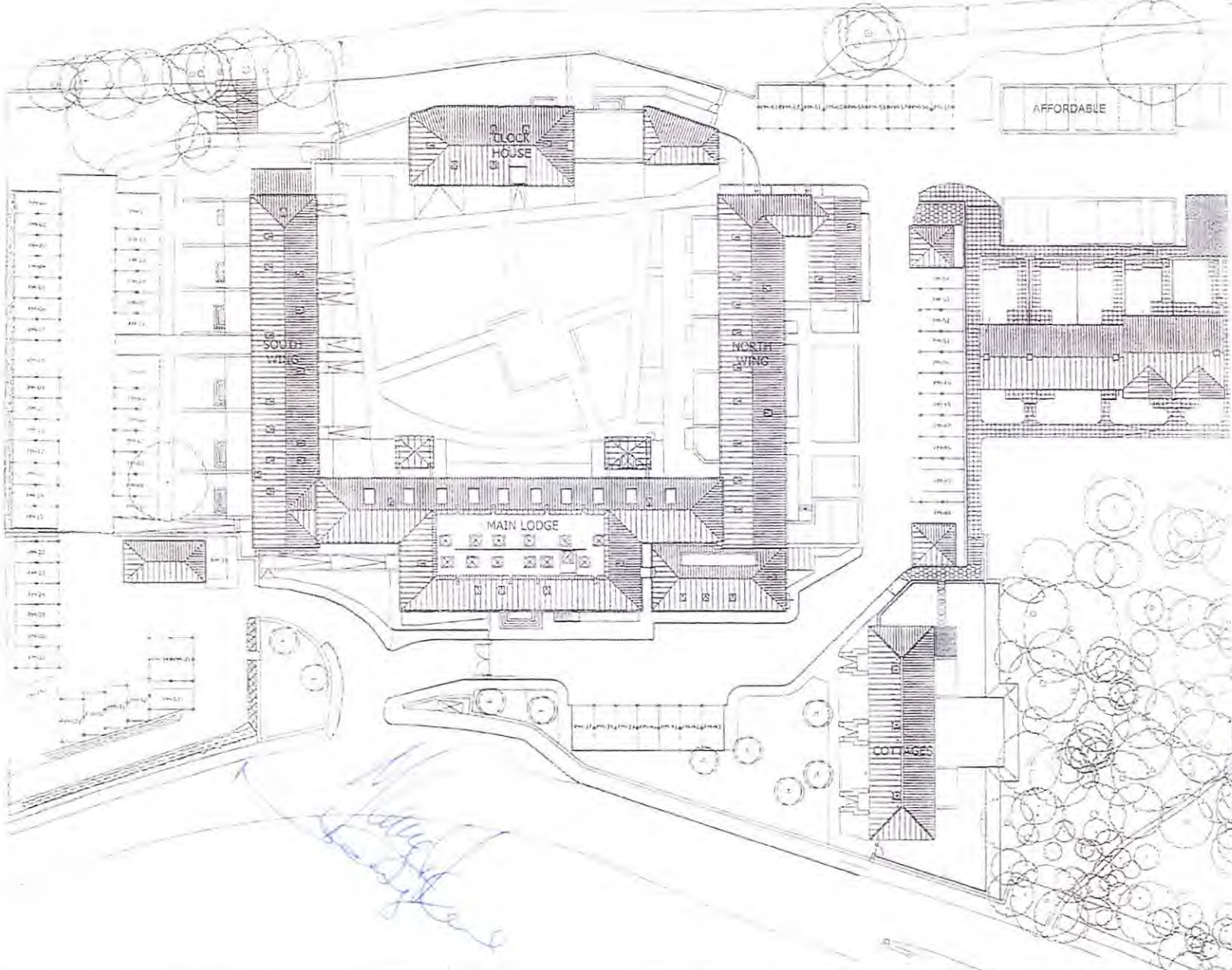
1100 North Street, Suite 1000

1100 North Street, Suite 1000
Columbia, SC 29201

Client shall use green information only, do not print on to be used in use and any discrepancies resolved on site.



AFFORDABLE



Please note:
Landscape levels are all shown in proposed levels.
Please note:
This drawing is to be used for landscaping and paving plan.

City of Henderson
Department of Public Works
Engineering Division

INFORMATION



Project: SUDGENOR LODGE
MICHURST
Client: SUDGENOR LODGE LIMITED
Drawing No: 010 249 03 212

Drawn	Scale	Date
CCD	1:100	12/2007
Checked	Reviewed By	Revised
CCD	010 249 03 212	

PLAN 1

Handwritten note: See attached plan