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FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/00AW/LSC/2014/0615**
Property	:	**Flats 6 and 7 Tedworth Square, London SW3 4DY**
Applicants	:	**Lynne Miller (Flat 6) and Sergey Ogorodnov and Tatiana Ogorodnov (Flat 7)**
Representative	:	**Miss R Cattermole, Counsel**
Respondents	:	**Tedworth North Management Limited and Tedworth Square North Limited**
Representative	:	**Mr P Harrison, Counsel**
Type of Application	:	**For the determination of the liability to pay a service charge**
Also present	:	**Mr R Hardwick (Brethertons LLP), Mr J Byers (Applicants' expert), Mr H Miller Applicants' witness), Ms K Glanville and Ms C Penna (Pemberton Greenish LLP), Mr S Harris (Respondents' expert), and Mr M Thompson, Mr T Fulford and Ms P Barham (Respondents' witnesses)**
Tribunal Members	:	**Judge P Korn** **Mrs E Flint DMS FRICS IRRV** **Ms S Wilby**
Date and venue of Hearing	:	**12th to 14th October 2015 at 10 Alfred Place, London WC1E 7LR**
Date of Decision	:	**1st December 2015**

DECISION

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Decisions of the Tribunal

(1) Mrs Miller's contributions towards the reserve fund for 2014/15 are reduced from £5,381.24 to £2,712.14 and Mr and Mrs Ogorodnov's contributions to the reserve fund for 2014/15 are reduced from £5,250.00 to £2,646.00.

(2) Each of the Applicants' contributions towards the management fee element of the service charge (or of the estimated service charge if the actual service charge has not yet been levied) is reduced to £100.00 for 2013/2014 and £100.00 for 2014/15.

(3) It is noted that the Applicants' challenge to the cost of repairs to the waterproofing of balconies in 2012/13 has been withdrawn.

(4) No cost applications have been made.

Introduction

1. The Applicants seek a determination pursuant to section 27A of the Landlord and Tenant Act 1985 as to the reasonableness and payability of certain service charges in relation to the Property. The Property comprises 2 flats contained in a purpose-built block ("**the Building**") constructed circa early 1980s. There are 49 flats in total, all of which are let on long leases.

2. The disputed service charges at the start of the hearing were as follows:-

2012/13 service charge year

The cost of repairs to the waterproofing of balconies.

2013/14 service charge year

Professional fees payable to D&G Block Management under a management agreement.

2014/15 service charge year

Professional fees payable to D&G Block Management under a management agreement.

The Applicants' contributions towards the cost of major works, in particular the installation of Crittall windows and the cost of new sub-frames.

The Respondents have not as yet produced the final costs for the major works.

3. In relation to the windows and sub-frames, replacement windows were only provided to those leaseholders (28 out of 49) who had opted to pay for them at their own expense. The costs associated with their installation, including new sub-frames and making good of damage was borne by the Respondents who have sought to recover the cost through the service charge.

4. The relevant statutory provisions are set out in the Appendix to this decision. The lease of Flat 6 is dated 2nd July 2004 and made between Tedworth Square North Limited (1) Tedworth North Management Limited (2) and Sawyer Properties Limited (3). The lease of Flat 7 is dated 30th August 2004 and made between Tedworth Square North Limited (1) Tedworth North Management Limited (2) and Christopher Greetham and Elizabeth Greetham (3) and it incorporates by reference a previous lease dated 10th October 1984.

Conceded points

5. During the course of the hearing the Applicants conceded that the cost of repairs to the waterproofing of balconies incurred during the 2012/13 service charge year was payable in full and accordingly they withdrew their challenge to this item.

6. Also during the course of the hearing the Respondents conceded that, save in relation to the period 24th March to 23rd June 2015, D&G Block Management's professional fees had been incurred pursuant to a management agreement which constituted a qualifying long term agreement in respect of which the Respondents had failed to go through the statutory consultation procedure. The Respondents were not seeking dispensation from those consultation requirements and conceded that – save in relation to the period 24th March to 23rd June 2015 – they were not entitled to charge more than £100.00 per year. The Applicants confirmed that the failure to consult was the sole (or sole remaining) basis of their challenge to these fees, notwithstanding certain other arguments having also been raised initially.

7. The Applicants had initially sought to argue that the Respondents had failed to comply with the consultation requirements in relation to the major works themselves, but in the end they did not pursue this particular line.

Initial observation

8. The written and oral submissions in this case were extensive and wide-ranging, and some submissions were significantly more pertinent than

others. It is not considered either practical or useful to summarise every submission made, and therefore only those submissions considered to be the most relevant are referred to.

Applicants' opening submissions

9. Miss Cattermole set out some of the background to the application, which mainly related to the cost of installation of Crittall windows and the cost of new sub-frames. There had been discussions in 2009 about the benefits of replacing the windows but concerns had been expressed as to who would be liable for the cost. A trial window replacement was later organised. A building survey in 2010 prepared by Tuckerman Management Limited stated that the windows were "in general good condition" and "maintained well with no reports of failed locks or rusted hinges".

10. In April 2011 the Respondents gave leaseholders formal notice of an intention to replace the Crittall windows with double-glazed units, and there was a follow-up letter explaining the likely cost but then the Respondents did not (at that point) proceed with the replacement.

11. In an email dated 9th October 2012 Michael Cole of Tuckerman Management stated that he had inspected just under 100 of the windows and that he had found very little corrosion to the metal frames and that the sub-frame timber decay was isolated but serious in the places where it did exist.

12. A further notice of intention in relation to proposed window works was sent out on 25th September 2013, and by a letter dated 31st January 2014 Mr & Mrs Miller wrote to the directors of Tedworth Square North Limited inter alia objecting to the particular proposals put forward by the Respondents. On 6th February 2014 there was an annual general meeting of Tedworth North Management Limited at which the window replacement issue was discussed. On 27th March 2014 leaseholders were sent a statement of estimates for the cost of the works. A decision was then taken to place the contract with Woodgrove and the works to replace the windows and the sub-frames commenced in October 2014. The hearing bundle also contains a more detailed chronology of events.

13. In Miss Cattermole's submission, the main issue in relation to the windows was not merely whether it was more economic to replace the windows and the sub-frames than to take an alternative maintenance route. In her submission one first needed to consider whether the sub-frames were in poor condition and then – if so – what works were required to remedy any defects. One also needed to consider whether the windows themselves were in a damaged condition.

14. As a separate issue, Miss Cattermole submitted that the Applicants should not have to pay any associated costs relating to the replacement of the windows as distinct from the sub-frames.

Respondents' opening submissions

15. In Mr Harrison's submission the Applicants' position was too narrow. In relation to the question of whether the cost of installation of the windows and the cost of new sub-frames was recoverable through the service charge, the starting point was simply whether there existed a state of disrepair. If there was disrepair then all courses of action to remedy that disrepair were open in principle. The Respondents accepted that it was not necessary to replace the windows and sub-frames; their position was that it was more economic to do so than to opt for an alternative repairing solution.

Witness evidence

Mr Byers

16. Mr Byers is a chartered building surveyor and was instructed by the Applicants as an expert witness to prepare a report on the condition of the original fitted metal windows and fitted timber sub-frames, the effect on future maintenance costs of replacing the windows and sub-frames, the Respondents' proposed apportionment of the building contract costs, and other miscellaneous issues.

17. Mr Byers first visited the Building in October 2014 and in total visited 5 times. In his opinion all metal Crittal windows were in satisfactory condition and any small defects could be dealt with by normal maintenance/redecoration. The only actual defects were that some opening casements were possibly a little stuck and in need of slight adjustment and that there were one or two loose handles. No substantive repair was needed, for example there was no corrosion and no new sections needed to be welded in. Likewise the sub-frames were, in his view, in satisfactory condition.

18. In cross-examination Mr Harrison put it to Mr Byers that he had seen some retained frames and some discarded frames and questioned whether his evidence regarding discarded frames was statistically reliable. Mr Byers conceded that he felt more confident about his views in relation to the retained frames. He also conceded that his analysis of the window survey attached to the building contract did not take account of the fact that it only related to 60% of the windows. Mr Harrison also suggested that the retained frames were likely to be in a better condition than the discarded ones and that therefore one could not extrapolate from one to the other.

19. Mr Byers accepted that some work was needed but did not accept that it was a case of disrepair; what was needed was mere maintenance and/or decoration, although he accepted that such maintenance/decoration if carried out would be a legitimate service charge item. He also accepted that decay is not always observable just by inspection and that there may have been some concealed rot.

20. Mr Harrison cross-examined Mr Byers on his life cycle costings. In cross-examination Mr Byers conceded that his methodology was different when estimating future costs in two different scenarios, one in which the windows had been replaced and the other in which the windows had not been replaced. Mr Byers also conceded that his analysis contained certain specific errors, which ultimately led him to concede that replacing the windows was in fact the cheaper of the costed options.

21. Mr Harrison also noted that Mr Byers' report contained some criticisms on the standard of work, but Mr Harrison remarked that practical completion was in February 2015 and that therefore the rectification period had not yet expired. He therefore put it to Mr Byers that any issues could still be addressed during this period, but Mr Byers was not prepared to concede that it was as straightforward as that. Mr Byers did, though, concede that there were some factual errors in sections 7.06 to 7.19 of his report.

22. On re-examination by Miss Cattermole Mr Byers said that he had inspected 496 windows in total. Specifically in relation to the inspection on 13th October 2014 he looked at about 100 to 150 windows, went up to the top floor, opened windows and looked for signs of damage and decay. The frames that he inspected were in need of minor decorative work only. Specifically regarding any mould spores in the timber sub-frames, these could have been rubbed down but would not have been needed to be treated. He did not see any rot or anything to indicate that there would be severe rot or decay in the future. During his inspection on 13th October 2014 he had access to the roof and rear balconies and therefore was able to see more. In response to a question from the Tribunal he said that there was no particular pattern as to where repair or redecoration was needed.

Mr Harris

23. Mr Harris is a chartered building surveyor and was instructed by the Respondents as an expert witness to prepare an expert report on the original design and materials comprising the windows and sub-frames and their expected longevity, the likely state and condition of the original windows and sub-frames, possible options for dealing with any necessary repairs and their comparative cost, whether the Respondents' overall approach was reasonable, the standard of works undertaken and other miscellaneous issues.

24. Mr Harris disagreed with Mr Byers' approach to assessing preliminary costs, his view being that in practice contractors do not calculate preliminaries as a percentage of total costs. He also disagreed with Mr Byers projected costs in 2039 relating to the making good of the powder coating. Powder coating only takes place in factory conditions and is a multiple stage process, therefore in Mr Harris' view it was extremely unlikely that it would ever deteriorate unless damaged. Furthermore, the fact that the powder coating comes with the benefit of a 25 year guarantee does not mean that it is likely to fail in Year 26, which is what Mr Byers' financial modelling appeared to suggest.

25. In cross-examination Miss Cattermole put it to Mr Harris that his inspection in 2013 would have been limited to taking a preliminary look at the windows and sub-frames. In response he said that he felt that he had got a good 'feel' for the condition of the Building. There would have been site notes at the time, but he accepted that these were not in the hearing bundle. In response to a question as to whether the integrity of the windows and of the metal frames had changed, Mr Harris said that windows do warp over time and that he has yet to see a building of this nature with good condition Crittall windows.

26. Miss Cattermole put it to Mr Harris that the issues here were in fact purely decorative. Mr Harris disagreed, saying that there were also ill-fitting windows, although he conceded that ill-fitting windows could arguably be dealt with by ongoing maintenance. Miss Cattermole referred him to the Tuckerman report which found no rot or corrosion or warping and concluded that in 2010 the windows were well-maintained with merely a need for some repainting. Mr Harris commented, whilst stating that he did not wish to cast aspersions on Tuckerman, that it takes a degree of skill to notice warping etc. He did not, though, disagree with the statement attached to the minutes of Tedworth North Management Limited's annual general meeting on 6th February 2014 that the windows should last for many years.

27. Miss Cattermole said that Mr Byers had found no reference to repairs being undertaken to any retained windows, but Mr Harris did not feel that he was necessarily the right person to ask about any repairs actually undertaken. He accepted in cross-examination that his own report contained a degree of speculation. Miss Cattermole pressed him on whether the windows needed anything other than redecoration and whether therefore it followed that replacement was neither reasonable nor necessary. In response Mr Harris said that it might be prudent to do more than mere redecoration and that in his view replacement was an option.

28. Regarding the sub-frames, Mr Harris accepted that rot on the surface could be repaired/treated using resin, but he said that there could also be hidden rot. Miss Cattermole put it to him that on the basis of the sub-frames which had been inspected it seemed that only 2% of all sub-

frames needed replacing; in reply he said that the potential for decay in the future made the problem more serious than it might seem on the surface.

29. Mr Harris accepted that no feasibility study had been carried out in this case.

30. Miss Cattermole raised a number of individual points with him. He accepted that there was no formal obligation under the leases to redecorate every 5 years. He did not accept, in the context of costing assumptions, that the scaffolding would be needed for other works except possibly at the point at which widespread redecoration of the windows was needed. There was also discussion regarding the life expectancy of the powder coating, the cost of redecoration and the cost implications of retaining sub-frames where windows have been replaced.

31. In response to a question from the Tribunal Mr Harris said that the life cycle of the mahogany cills was about 30 years. In response to the question of whether he was asked to take the condition of the windows and sub-frames into account when giving an opinion as to whether the decision to carry out the works in the way that the Respondents did was reasonable, he said that he could not recall. When asked how comfortable he was about his conclusions on repair issues given that his report concentrated much more on financial modelling he replied that he was just responding to the questions raised in his instructions.

Mr Thompson

32. Mr Thompson is a chartered building surveyor and was instructed by the Respondents to provide an expert witness statement in relation to the project. His involvement with the project began in May 2013, and shortly afterwards his firm TMD Building Consultancy Limited was appointed to project manage the repair and decoration of the exterior of the Building and the repair and replacement of the windows.

33. His witness statement summarises the process of preparing a scope of the works, liaising with Crittall, Woodgrove and others, as well as the Respondents' directors, carrying out a tender analysis, consulting with leaseholders and attending on site during the carrying out of the works.

34. In cross-examination Mr Thompson accepted that part of the Respondents' reason for wanting the windows and sub-frames to be replaced was the ancillary benefits that this would bring, in particular the improvement of having double-glazing.

35. In relation to his figures, he conceded that the figure for repairs in 2019 was incorrect as it failed to recognise the fact that all of the windows would have been replaced.

36. Mr Thompson accepted that the only defect recorded in relation to the metal frames was two rusting windows and accepted that no more than 10 to 12 timber sub-frames needed replacing. Miss Cattermole noted that he had kept no record of the condition of the sub-frames, to which he replied that he had not been asked to do so. In relation to the observable rot on the sub-frames he accepted that a resin repair would have been sufficient to deal with this, and that this was all the more so with any mould spores. He also accepted that his figures as to the number of sub-frames needing to be replaced were anecdotal, albeit that they were consistent with what was in his skip, and he also accepted that no repairs had been carried out to the metal frames.

Ms Barham

37. Ms Barham is an associate director of D&G Block Management Limited with responsibility for the management of the Building. Her witness statement covers D&G's terms of engagement, the service charge budget, the reserve fund, the consultation in relation to the works and payment for the works.

38. It was now accepted that each of the Applicants' contributions towards D&G's management fees should be capped at £100.00 for the service charge year 24th June 2013 to 23rd June 2014 and £100.00 for the partial service charge year 24th June 2014 to 23rd March 2015 as the service had been supplied pursuant to a qualifying long term agreement in respect of which the Respondents had failed to consult leaseholders. However, the management services for the period 24th March to 23rd June 2015 had been supplied pursuant to a new agreement which was not a qualifying long term agreement and therefore the cap did not apply in respect of this period. The overall management fees for the 24th March to 23rd June 2015 period amounted to £5,679, of which Flat 6's share was 4% (£227.16) and Flat 7's share was 4.1% (£232.83).

39. In cross-examination Miss Cattermole noted that Ms Barham's witness statement referred to various drafts of D&G's new management agreement having been disclosed to the Applicants but that a copy of the actual agreement had not been provided. Miss Cattermole put it to Ms Barham that it had not been supplied because the Respondents realised that – if indeed it had been entered into – it too was a qualifying long term agreement on which they had failed to consult. In relation to the 2013 management agreement, Miss Cattermole asked Ms Barham whether a notice of termination of that agreement had ever been served, but Ms Barham did not know. Nor could Ms Barham say when the new management agreement had been signed.

Mr Fulford

40. Mr Fulford is a director of Tedworth Square North Limited. His witness statement covers the process of planning a major programme of external works in 2005, the issues and the debates surrounding the windows and sub-frames, the Tuckerman survey, the thought process and actions of the board, the views of leaseholders and the carrying out of the works.

41. In cross-examination Mr Fulford accepted that no major expenditure actually took place in or around 2005. He also accepted that a major factor in the decision to replace the windows was the fact that certain leaseholders wanted to have double-glazing, and on this point Miss Cattermole referred him to a note from the Respondents to all leaseholders dated 1st June 2011. Miss Cattermole put it to him that replacement was therefore not about future maintenance but rather about the desirability of double-glazing.

42. Mr Fulford confirmed that no feasibility study had been commissioned in addition to the Tuckerman report. Miss Cattermole asked him whether he was concerned that the Respondents might not be able to recover the cost of replacing the sub-frames under the leases, to which he replied that the sub-frames would have to be replaced at some point and that it would be crazy to put new windows into old sub-frames. When asked why those leaseholders who had chosen to put in new windows at their own expense were not also expected to pay for their own new sub-frames, Mr Fulford said that the principal benefit of the new sub-frame was to the freeholder, not the leaseholder, and it made sense to take advantage of the fact that a leaseholder was choosing to spend his/her own money in replacing the window frame. However, he seemed to accept in cross-examination that no windows or sub-frames needed replacing. He also accepted that in retrospect the Respondents' worries about the likelihood of severe internal rotting were misplaced.

Mr Miller

43. Mr Miller is the husband of Mrs Lynne Miller, the leaseholder of Flat 6. His witness statement covers his analysis of the historical state of the windows, the replacement of the windows in Flat 6, the replacement of the windows in other flats, the consultation process, the management agreement and miscellaneous other matters.

44. In cross-examination, Mr Harrison challenged his summary of the minutes of a discussion following an annual general meeting on 21st November 2012, in particular his statement that it showed that the Respondents were plainly of the view that the windows should not be replaced. On the contrary, said Mr Harrison, the minutes reflected a decision that the windows should in fact be replaced. Mr Harrison also referred Mr Miller to a passage in his own letter dated 19th November

2013 in which he stated that the condition of all of the sub-frames was extremely poor, rather contrary to his position now. In response Mr Miller said that he did not know why he had made such a statement in that letter.

45. Mr Harrison noted that Mr Miller had cross-referred in his witness statement to the contents of a defect inspection report, but when asked to explain how this demonstrated the point being made in his witness statement he was unable to do so. Mr Harrison also put it to Mr Miller that his witness statement contained a large amount of irrelevant material which merely demonstrated that he had several personal grievances against the board. In response Mr Miller said that the information was there merely to provide context.

46. Mr Harrison also asked Mr Miller a number of questions in relation to his analysis of the costs and benefits of replacing the windows, the Respondents' motivation in seeking to replace the windows and sub-frames and the minutes of certain key meetings, and he put it to Mr Miller that many of the comments in his witness statement were misleading or constituted an attempt to 'spin' the reasoning or were simply inconsistent with other evidence. Mr Miller did not accept this. Mr Harrison commented that Mr Miller's letter to the board dated 31st January 2014 was so aggressive that it effectively amounted to a letter before action, but Mr Miller did not accept this either. Mr Harrison also noted that Mr Miller had described the board as a self-perpetuating fiefdom despite the fact that his son had been on the board at the time and that the board was on record as seeking new directors. Mr Miller retorted that they only wanted new people who agreed with them, although he conceded that he was himself invited to join the board.

47. In re-examination by Miss Cattermole Mr Miller said that his opinion had changed since his letter of 19th November 2013 because he had originally assumed that there had been so much neglect that serious action needed to be taken, but now that he had more information he accepted that things were not in fact that bad.

Applicants' closing submissions

48. At the request of the Tribunal Miss Cattermole clarified in more detail than had been provided to date the precise basis of the Applicants' challenge to the cost of the major works. She confirmed – this point having been debated earlier in the hearing – that it was now accepted by the Applicants that the challenge to the cost of the major works just related to the 2014/2015 service charge year. Their position was that the Respondents had funded the works in part by making demands for contributions towards the reserve fund during that year. Due to the direct linkage between the works and the demands for advance contributions towards the reserve fund, the reality was that these were

ordinary on-account service charge demands, and the Applicants' challenge was to the payability of those contributions.

49. However, the Applicants were not objecting to the whole of the cost of the works, as they accepted that some of that cost was properly payable. The total cost of the work was £792,519.00. Taking out of the equation the cost of the window replacement carried out by individual leaseholders at their own cost (and therefore not forming part of the service charge) the figure fell to £500,938.00. Of this amount £248,609.44 was accepted as being properly recoverable through the service charge but the remainder was considered to be irrecoverable. On the Applicants' analysis, it followed that 49.6% of the cost was irrecoverable and therefore that 49.6% of the contributions towards the reserve fund demanded in respect of the 2014/15 service charge year was likewise irrecoverable.

50. The Applicants were also challenging the management fees for 2013/14 and 2014/15 on the basis that the fees had been incurred pursuant to a qualifying long term agreement in respect of which the Respondents had failed to consult leaseholders and therefore that each Applicant's contribution should be limited to £100.00 for each of these years.

51. Regarding the work to the windows, Miss Cattermole submitted that the issue was whether the Respondents were entitled to carry out these works and put the cost through the service charge, and on this point she referred the Tribunal to the case of *Hammersmatch Properties (Welwyn) v Saint-Gobain Ceramics & Plastics (2013) EWHC 1161* and the general principles set out in that case in relation to repairing covenants. The standard of repair informed what works were needed, and the landlord could only charge for work that was reasonably necessary to remedy the defect. She also referred to *Postel Properties Ltd v Boots the Chemist (1996) 2 EGLR 60* as authority for the proposition that ancillary works could be carried out if necessary but not merely if just desirable or convenient.

52. Replacement was only an option, in her submission, if repair was not reasonably or sensibly possible: see *Hammersmatch* again and *Mason v Total FinaElf UK Ltd (2003) 3 EGLR 91*, and the burden of proof was on the landlord.

53. In relation to the sub-frames there was very little evidence of disrepair. It was true that Mrs Miller's own sub-frames were rotten but it was certainly not a widespread problem in the Building. The trigger for the replacement of all sub-frames was simply individual leaseholders wanting to replace their windows. The onus was on the Respondents to show that replacement was appropriate but they had instead relied solely on the economic argument. No feasibility study had been carried out.

54. In written submissions Miss Cattermole also referred to the case of *Reston Ltd v Hudson and others (1990) 2 EGLR 51.*

Respondents' closing submissions

55. As regards the condition of the windows and sub-frames, Mr Thompson had looked in the skip and had made regular visits to the Building. Mr Harris' view was that the problems with the windows and sub-frames were widespread and that some windows were ill-fitting. When the sub-frames were removed 20% were found to contain rot, and Mr Byers himself had accepted that replacement would make maintenance easier in the future.

56. Mr Harrison submitted that Mr Harris was credible in cross-examination in relation to the cost benefit analysis whereas Mr Byers was poor.

57. As regards what was in the directors' minds, Mr Fulford had given evidence indicating that the directors were aware of their responsibilities, whereas Mr Miller's evidence on this issue was self-contradictory. They believed their actions to be reasonable and the Respondents' experts' view was that the course of action taken was the cheapest available.

58. Mr Harrison disputed Miss Cattermole's analysis of the *Hammersmatch* case; in his view the issue was whether the window and sub-frame replacement was sensible. He also referred the Tribunal to *Irvine v Moran (1992) 24 HLR 1* and submitted that this case was authority for the proposition that the test of whether something is in disrepair is not a burdensome one; there just needs to be some deterioration. In addition, disrepair to part could justify repair to whole if sensible.

59. Mr Harrison also referred to *Credit Suisse v Beegas Nominees Ltd (1994) 1 EGLR 76* as authority for the proposition that a covenant to keep in good condition was separate from a covenant to repair and did not require deterioration for the covenant to be engaged. In his submission, the case whose factual matrix was closest to that of the present case was *Wandsworth LBC v Griffin (2000) 2 EGLR 105.* In that case there was no reason why repair was not technically possible and yet the case was still decided in the landlord's favour.

60. Mr Harrison also referred to a passage in the textbook "Service Charges & Management" in which it was stated that there is a duty to replace if in the particular circumstances it would be unreasonable to spend money on repair.

Tribunal's analysis

61. We have noted the parties' respective written and oral submissions and have taken these into account in reaching our decision.

D&G Block Management's professional fees

62. The Respondents have conceded that they cannot recover more than £100.00 per Applicant per year in relation to the period 24th June 2013 to 23rd March 2015. The point remaining in dispute is whether they can recover the full amount of these fees for the period 24th March to 23rd June 2015.

63. The Respondents state that a new management agreement was entered into on 24th March 2015. They argue that the charges for the provision of management services pursuant to the new agreement should not be capped by virtue of a failure to consult before entering into the new agreement, as the new agreement is not a qualifying long term agreement and therefore is not subject to an obligation to consult.

64. We note that the original management agreement dated 16th April 2013 is not expressed to be for a fixed term or for a maximum term but instead is expressed to continue until terminated by written notice in accordance with the terms of the agreement. No evidence has been provided that this agreement was in fact terminated by written notice and the Respondents have been unable to provide a copy of a completed new management agreement relating to the period from 24th March 2015. In any event, the Tribunal only has the Respondents' bald assertion that the new management agreement (if it exists and if it supersedes the 2013 agreement) does not itself constitute a qualifying long term agreement.

65. In the circumstances, we consider on the balance of probabilities that the management services continued to be provided pursuant to a qualifying long term agreement during the period 24th March to 23rd June 2015 and that therefore – in the absence of any application for dispensation or any other arguments as to why the fees should not be limited by virtue of a failure to consult – the fees are limited in the same manner as for the period 24th June 2013 to 23rd March 2015. Consequently, the management fees for both 2013/14 and 2014/15 are limited to £100.00 per Applicant per year. If and to the extent that the charges are technically estimated charges at this stage then it is the estimated charges which are limited to £100.00 per Applicant per year.

The cost of installation of Crittall windows and the cost of new sub-frames

66. The Applicants have argued that the 2014/15 demands for contributions towards the reserve fund were in reality ordinary service

charge demands, and the Respondents have not sought to challenge this analysis. We note the direct linkage between the decision to carry out the specific works in question and the demands made for contributions towards the reserve fund, and we accept on balance that these were effectively ordinary service charge demands. However, they are described in invoices as Quarterly Reserve Fund in advance, and we have also been told that the total cost of the works has still not been finalised. Therefore it seems that these are estimated advance service charges rather than actual service charges.

67. One practical consequence of the charges being estimated advance service charges is that the actual standard of work is not relevant to the issue of payability of those estimated charges. The charges merely need to be a reasonable estimate of what the charges should be on the assumption that the works are carried out to a reasonable standard. Therefore the merits of the issues raised by Mr Byers in his report regarding quality of workmanship do not need to be considered.

68. The Applicants have not sought to argue that the 2014/15 demands for contributions towards the reserve fund reflected an unreasonable assessment of the anticipated cost of the works, and therefore the key issue to be addressed is whether the cost of the works is recoverable in principle under the terms of the leases. To deal with this question it is necessary to consider the nature of the works, the state of repair of the relevant parts of the Building at the relevant time, the terms of the leases, the parties' respective arguments on financial modelling, relevant case law and legal principles and other aspects of the factual background to the dispute.

69. We turn first to the financial modelling. Under cross-examination Mr Byers was forced to accept that his own financial projections contained a large number of errors, some of which were very significant and had a major effect on the validity of his conclusions. By contrast, Mr Harris' expert opinion on financial modelling held up reasonably well under cross-examination. Therefore, on the issue of financial modelling we prefer the Respondents' view and we accept the validity of their financial projections in broad terms.

70. As regards the factual background, the consultation process and the directors' decision-making process, we have received evidence from Mr Thompson, Ms Barham, Mr Fulford and Mr Miller on a range of points, some more relevant than others. Some of it relates to consultation, the adequacy of which in relation to the works is no longer an issue in the formal sense of its being a basis of challenge. Mr Fulford accepted that a major factor in the decision to replace the windows was the fact that certain leaseholders wanted to have double-glazing. Mr Miller's evidence was extremely poor. There are a number of significant discrepancies between Mr Miller's witness statement and the documentary evidence, including documentary evidence actually

referred to in his statement. Much of his evidence was misleading, and some of his responses to Mr Harrison's questions came across as evasive. In short, Mr Miller regrettably did not come across as a particularly credible witness.

71. However, whilst the background information and the description of the process of consultation help to contextualise the dispute, ultimately these are not the main issues in this case. Instead, the main issues (aside from the financial modelling referred to above) are what level of repair if any was required and whether the cost of the work done is recoverable as a matter of construction of the leases in the light of the relevant legal principles and relevant case law.

72. Paragraph 4 of the Fourth Schedule to the lease of Flat 6 and to the original lease of Flat 7 (which has been incorporated by reference into the current lease) requires the management company (inter alia) *"to keep the interior and external walls and ceilings and floors of the Building (other than those included in this or in any other demise) and the roof structure and foundations and main drains thereof in good and substantial repair and condition"*, and it is common ground between the parties that the repair of the window frames and the sub-frames falls within this obligation, in particular as the window frames, window linings and window cills are all expressly excluded from the demise.

73. Under each lease the tenant covenants to pay a specified proportion of the costs, charges and expenses incurred by the management company in carrying out its duties and obligations and the matters set out in the Fourth Schedule. The Third Schedule sets out the mechanism for payment of the service charge, and the Fourth Schedule contains a specific obligation on the management company to set up a reserve fund to cover expenses likely to be incurred in periods greater than one year. Therefore, in principle the management company is entitled to recover the cost of repair of the window frames and the sub-frames through the service charge and to characterise contributions towards expenses likely to be incurred in periods greater than one year as reserve fund contributions. The Applicants do not dispute this.

74. Turning to the condition of the window frames and sub-frames themselves, here there is conflicting evidence. The Respondents' position, at least initially, was that there was widespread disrepair and that the replacement of the frames and sub-frames was the most economical way of remedying that disrepair.

75. In Mr Byers' report he states that he did not observe any significant defects to the metal windows and that in his opinion the windows were not in disrepair. He also states that the sub-frames generally appeared to be in reasonable condition and that for those defects recorded a resin style repair would have been sufficient.

76. In Mr Harris' report he states that the typical life expectancy for these windows is 45 to 50 years but that this can vary depending on a number of factors, and that the typical life expectancy for the wooden sub-frames is about 30 years. He states that in 2013 the windows and sub-frames were decoratively poor and that he concluded at the time that if window replacement did not take place then repair works to the sub-frames would certainly be expected and that some repairs to the steel frames would be required. He also concluded at the time that there was a real risk that rotten wood existed. However, he did not consider, either then or now, that the windows were in an extended state of disrepair such that replacement was the only option. He also refers in his evidence to discussions with Woodgrove during which he was told that a number of sub-frames that were removed were found to be rotten.

77. In Mr Thompson's witness statement he states that discussions with Woodgrove suggested that 20% of the removed sub-frames had observable rot and 30-40% had mould spores, but no record of their condition was kept.

78. Reference was also made to a 2010 report by Tuckerman which found no rot or corrosion or warping and concluded that the windows were well-maintained with merely a need for some repainting.

79. In cross-examination Mr Byers said that he was more confident about his analysis of the condition of the retained frames than that of the discarded frames and he accepted that the window survey attached to the building contract only related to 60% of the windows. Mr Harris accepted that the only non-decorative item referred to by him in cross-examination – namely some ill-fitting windows – could arguably be dealt with by ongoing maintenance. He also accepted that his own report contained a degree of speculation. Mr Harris further accepted that rot on the surface could be repaired/treated using resin, albeit that there might also be some hidden rot. Mr Thompson accepted that the only defect recorded in relation to the metal frames was two rusting windows and that no more than 10 to 12 timber sub-frames needed replacing. He also accepted that a resin repair would have been sufficient to deal with observable rot and with any mould spores and that his figures as to the number of sub-frames needing replacing were anecdotal.

80. As mentioned above, Mr Byers' financial modelling analysis has been weak. However, it does not follow that his evidence on the condition of the window frames and sub-frames should lack credibility as a result. He is a very experienced chartered building surveyor and has a great deal of experience relevant to the analysis of the condition of buildings (including window frames) in the context of residential long leases and tribunal and court proceedings. We consider Mr Byers to have carried out reasonably detailed/comprehensive inspections on a number of

separate occasions to enable him to give a detailed expert opinion on the condition of the window frames and sub-frames. His evidence on the condition of the window frames and sub-frames is not perfect, but it is credible. It is consistent with the Tuckerman report and also with certain concessions made by Mr Harris and Mr Thompson at the hearing.

81. The main expert evidence for the Respondents in relation to the condition of the window frames and sub-frames was provided by Mr Harris. Whilst Mr Harris came across as a straightforward witness, it was striking how little of his evidence actually related to the condition of the window frames and sub-frames, his focus being much more on the financial modelling. He does not seem to have carried out a particularly detailed inspection of the window frames and sub-frames, and some of his evidence is based on 'feel' or on anecdotal evidence from others. He did not offer a very convincing rebuttal to the proposition that the problems with the window frames and sub-frames were essentially decorative. He did not disagree with the statement apparently made in February 2014 that the windows should last for many years. It was revealing that he could not recall whether he had been asked to take the condition of the windows and sub-frames into account when giving an opinion on whether the decision to carry out the works was reasonable, and it was also revealing that when asked how comfortable he was about his conclusions on repair issues he replied that he was just responding to the questions raised in his instructions.

82. Having considered the various written and oral submissions on the above issues, on balance we prefer Mr Byers' opinion on the condition of the window frames and sub-frames.

83. On the basis that the condition of the window frames and sub-frames was (broadly) as described by Mr Byers, the next question is whether the cost, or more specifically the estimated cost, of the works is recoverable under the leases, and here we need to turn to the relevant case law cited by the parties.

84. *Hammersmatch Properties (Welwyn) v Saint-Gobain Ceramics & Plastics* is a dilapidations case, but it deals with the question of when a covenant to keep in good repair and condition is engaged. It was held in that case that for the covenant to be engaged there had to exist a state of disrepair, namely deterioration from some previous physical condition. When considering whether replacement rather than repair was appropriate, replacement was only required if repair was not reasonably or sensibly possible, although that point does not really assist us in our case as the issue here is rather whether the management company is **entitled** to carry out a replacement (and to recharge the cost through the service charge). It was also held in *Hammersmatch* that the fact that an item has exceeded its indicative life expectancy

does not mean that it is not in good repair and condition. This point is noted and is arguably of some relevance to our case.

85. *Postel Properties Ltd v Boots the Chemist* is more directly relevant in that it is a service charge case, the issue being whether the landlord's proposals to re-cover the roofs and repair the windows fell within the covenant to keep premises in good and substantial repair and condition and therefore whether the costs were recoverable under the service charge. The particular issue identified by Miss Cattermole was that it was held that a phased roof replacement could be more economic than continuing with patch repairs and therefore could be justified as an appropriate method of repair, her argument being that this logic does not apply in our case as the sub-frames were not in disrepair and therefore the Respondents were not entitled to replace them.

86. *Mason v Total FinaElf UK Ltd* is another dilapidations case. In giving judgment, Blackburne J stated that the fact that equipment was old did not mean that preventative works could be required to prevent it failing even though it continued to perform its function. Again, though, in our view one should be cautious about extrapolating from an analysis of tenants' obligations in a dilapidations context and using this to analyse the ability of a landlord or management company to recover the cost of particular works through a service charge.

87. In *Reston Ltd v Hudson* many of the timber windows frames in a block of flats were defective and required replacing. The landlord came to the conclusion, which was held to have been a reasonable one, that it would be cheaper and more appropriate to replace all of the windows in the block. Consequently, the cost of doing so was recoverable as service charge. Miss Cattermole's argument is that there is no evidence in our case that many frames needed replacing.

88. *Irvine v Moran* is a case relating to the construction of a tenant's repairing covenant. In that case Mr Recorder Thayne Forbes QC took the view that painting and decorating the exterior of a dwellinghouse involves a degree of protection against the elements and is inevitably part and parcel of keeping the exterior in repair. Again this is not a service charge case, and in any event we are not persuaded that a comment that painting and decorating can help to keep a property in repair is of much assistance in our case. It could simply mean that disrepair can be avoided if sensible precautions are taken.

89. *Credit Suisse v Beegas Nominees Ltd* relates to the construction of a landlord's repairing covenant, the question being whether certain leaks were caused by the landlord's breach of the covenant to keep the property in good and tenantable condition or the covenant to repair, amend and renew. It was held in that case that the obligation to keep in good and tenantable condition had the potential to cover works beyond mere repair, although in our view only in a limited sense. In a

long judgment which related to a very different factual matrix from that of our case, Lindsay J observed that there could be a scenario in which there is no specific disrepair to which one could point and yet the obligation to keep in good condition could still be engaged if there was evidence that the subject matter was out of the required condition. However, for our purposes it would still be necessary to demonstrate that the frames and sub-frames were in poor condition such that the obligation to keep them in "good and substantial repair and condition" had been engaged.

90. *Wandsworth LBC v Griffin* is the case which Mr Harrison submits is closest to our case. That case related to the replacement of a flat roof with a pitched roof and the replacement of metal-framed windows with double-glazed units and the ability of the landlord to recover the cost through the service charge even though the service charge provisions did not include the cost of replacement. It was held that the costs were recoverable as the works did not go beyond works of repair within the meaning of the landlord's repairing covenants. The reason why the works could be construed as repairs, even though they involved replacement, was that replacement was cheaper than the alternatives taking into account both initial and future costs.

91. In our view, the difficulty for the Applicants in the light of the evidence that we have seen and heard on the condition of the window frames and sub-frames is that we are not persuaded on the balance of probabilities that many of the frames and sub-frames were in disrepair or that many of the frames and sub-frames were in poor condition. We accept that the frames and sub-frames would not all have needed to be in disrepair or poor condition for the covenant to have been engaged generally, as is clear from the case of *Reston Ltd v Hudson*. However, the reasoning in *Reston Ltd v Hudson* does indicate that a few isolated and generally minor problems would not suffice to engage the covenant generally in relation to all frames and sub-frames. *Wandsworth LBC v Griffin* is indeed similar to our case in many respects, but the crucial difference is that in *Wandsworth LBC v Griffin* the clear conclusion on the evidence was that there was a serious state of disrepair and the issue was merely what would be the most economic way of remedying that disrepair.

92. If there had been persuasive evidence of disrepair or poor condition in relation to many of the frames and sub-frames then the analysis in *Wandsworth LBC v Griffin* would in our view have been of assistance to the Respondents. Given that we accept that their financial model held up quite well to the challenges made by the Applicants, we could well have concluded that their chosen option was a reasonable one and fell within the landlord's repairing obligations and the tenants' service charge payment obligations if the evidence had supported their claim that the disrepair was more widespread. Ultimately, though, we are not persuaded that there is sufficient evidence of disrepair / poor condition in relation to the window frames and sub-frames such that the relevant covenant is engaged, and the evidence indicates that such isolated

problems as were identified were either decorative or could be dealt with by rubbing down of mould spores, adjusting casements, tightening handles or other minor maintenance action.

93. In coming to the above conclusion we do not seek to imply that the Respondents were acting in bad faith in organising the works and claiming the cost through the service charge. We understand why they thought it a sensible course of action and we accept that they went through a proper consultation process. Mr Fulford came across well at the hearing and considerably better than Mr Miller. Nevertheless, poor and contradictory though Mr Miller's evidence was, ultimately its accuracy or otherwise is not relevant to the central question of whether the repairing covenant was engaged.

94. The Applicants state that only £248,609.44 of the total cost of £500,938.00 is accepted as being properly recoverable through the service charge. They go on to state that it follows that 49.6% of the cost is irrecoverable and therefore that 49.6% of the contributions towards the reserve fund demanded in respect of the 2014/15 service charge year is likewise irrecoverable. Whilst the Respondents have disputed the principle they have not argued with this figure or with the apportionment and therefore we have to assume that they do not dispute it.

95. In fact the Applicants appear to have made a slight arithmetical error, in that on the basis of their figures and assumptions it would seem that 49.6% is the **recoverable** percentage and that therefore 50.4% is irrecoverable. However, it is not for us to offer them more than they are seeking and therefore we accept that 49.6% of the contributions towards the reserve fund demanded in respect of the 2014/15 service charge year is irrecoverable. On that basis Mrs Miller's contribution to the reserve fund for 2014/15 is reduced from £5,381.24 to £2,712.14 and Mr and Mrs Ogorodnov's contribution to the reserve fund for 2014/15 is reduced from £5,250.00 to £2,646.00.

Cost Applications

96. No cost applications have been made.

Name: Judge P Korn **Date:** 1st December 2015

APPENDIX

Appendix of relevant legislation

Landlord and Tenant Act 1985 (as amended)

Section 18

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

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

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

Section 19

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

   and the amount payable shall be limited accordingly.

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

Section 20

(1) Where this section applies to any qualifying works or qualifying long term agreement, the relevant contributions of tenants are limited ... unless the consultation requirements have been either –

(a) complied with in relation to the works or agreement, or (b) dispensed with ... .

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.