Y Tribiwnlys Eiddo Preswyl

Residential Property Tribunal Service (Wales)

Leasehold Valuation Tribunal

ReferenceLVT/0045/02/19 AND LVT/0046/02/19

In the Matter of Premises at Flat 1, 73 Cardiff Road, Llandaff, Cardiff, CF5 2AA

And in the matter of Applications under s27A of the Landlord Tenant Act 1985 and s.168(4) of the Commonhold and Leasehold Reform Act 2002

Applicant: **Marguerite Anne Edmunds**

Respondent: **Bryan John Newell**

Tribunal: **Jim Shepherd**
Roger Baynham FRICS
Kerry Watkins FRICS
Angie Ash

DECISION

1. No sums are payable by the Respondent.

2. The application pursuant to the Commonhold and Leasehold Reform Act 2002, s168 is dismissed.

Background

1. On 30th January 2019 the Applicant made two applications to the Tribunal. The first made pursuant to Landlord and Tenant Act 1985, s.27A sought a determination as to the reasonableness of service charges for the period 2015-2016 ("the first application"). The second made pursuant to Commonhold and Leasehold Reform Act 2002, s.168(4) sought a determination that a breach of covenant had taken place (" the second application").

2. In relation to the first application the Tribunal allowed an extension of the period of determination to include service charges sought. The Applicant also restricted her application to seeking a determination in relation to two sums: namely £31680 for the cost of removing the rear wall of the premises ("The wall works") and £65766.66 for the cost of the works to be carried out pursuant to a quotation from Litespeed dated 1st April 2015 ("The Litespeed works"). Both sums had been formally demanded on 17th June 2017.

3. In relation to the second application the Applicant restricted her application to a breach of covenant based on the ingress of water into Tyn-y-Coed.

4. The Tribunal heard evidence over two days having previously inspected the premises. As there are parallel proceedings in the County Court which are due to be heard imminently it was considered prudent to issue a summary decision with full reasons to follow in due course.

5. In relation to the First Application the Tribunal determined that no sums were due. The wall works were unjustified. The Tribunal preferred the evidence of Mr North over that of Mr Varma. The works caused extensive damage to the building and in particular the flat owned by The Respondent. Further at the date that the Applicant demanded the sums for the Litespeed works the Tribunal considers there was no genuine intention to carry out those works. The Tribunal considers that the Applicant and her husband had an intention to develop the building in accordance with planning applications or to sell the building. The Tribunal dismissed the Second Application. On a balance of probabilities and with the benefit of the report produced by Lapider the water ingress into Tyn-y-Coed was not the responsibility of the Respondent.

6. These are the full reasons for this decision.

Background

7. The Respondent was granted a lease of the premises at Flat 1, 73b Cardiff Road, Llandaff, Cardiff, CF5 2AA ("the premises") on 14th January 1999. This is part of a building converted into flats ("the building"). The lease was granted by Lawrence Edmunds the husband of the Applicant, who plays a central role in this case. He and the Applicant occupy premises at the rear of the building called Tyn-y-Coed ("Tyn -y-Coed"). The lease was at page 36 of the bundle. The lease was for a term of 99 years commencing on 1st September 1997.

8. On 9th September 2010 Lawrence Edmunds who was at the time the freeholder of the building served a s.20 notice on Mr P Matthews, another leaseholder in the building (139). It was claimed that the same notice was served on the Respondent. The Respondent denied this. In any event the Tribunal does not consider it relevant to the case being heard. A dispute followed the service of the notice and this resulted in the formation of a Right to Manage Company involving the leaseholders, Mr Matthews, Mr Johns and Mr Newell (The Respondent). This was 73 Cardiff Road RTM Company ("The RTM").

9. In November 2014 it is alleged by the Applicant that water from the Respondent's conservatory began to ingress into Tyn-y-Coed.

10. In January 2015 a damp survey report was commissioned by the RTM to assess the cause of the water ingress into Tyn-y-Coed (681). It was found that a large volume of rainwater from the roofs and rear external areas of the building ran into the channel between the entrance to Tyn-y-Coed and the conservatory to Flat 1. The downpipes did not connect to the gulley but discharged ad hoc into the channel. The channel was not correctly lined. There was only a 75 mm up stand to the side wall of Tyn-y-Coed

and there was no water proofing protection to the wall above. The channel was full of debris. The rainwater was saturating the walls around the channel and in turn this was saturating the walls and roof structure of the basement to Tyn-y-Coed. Further the stairs and basement to Tyn-y-Coed were constructed below ground level. The tanking had been punctured or there was poor construction detailing of the tanking allowing water to penetrate. The water ingress was not caused by a leak from a main or a sewer. In summary the "Lapider report" confirmed that the water ingress into Tyn-y-Coed did not originate from the premises.

11. In 2015 the RTM identified works needed to the roof exterior and forecourt of the building. Quotes were sought in April 2015 from two firms called Beacon and Litespeed. The Litespeed quote came in cheapest at £197000 (173). At a meeting of the RTM on 27th May 2015 the works in the Litespeed quote were formally approved and it was agreed that the RTM would write to tenants to request a deposit of a specified share of the funds for the agreed works (145). A proposed schedule of works was attached to the minutes of the meeting (146).

12. On 28th May 2015 the RTM wrote to the Respondent requesting his contribution of £77587.64 (148). This sum was not paid.

13. On 21st September 2015 the Chair of the RTM , Chris Johns wrote to Litespeed stating that the RTM has agreed now to move forward with *some of the works*, namely removal of the redundant fire escapes and clean repair and renew guttering. Litespeed were asked to update their quote based on these to items together with any scaffolding requirements (475). There was some debate during the Tribunal hearing as to the purpose of this letter. The Applicant claimed it was requesting additional works over and above those in the original Litespeed quote. The Respondent said it was a significant reduction in the works proposed. The Tribunal accepts the latter interpretation. The letter read as a whole suggests the RTM had reconsidered the position and decided to reduce the amount of work. Regrettably there is no minutes of a decision confirming this and Mr Johns did not attend the hearing to give evidence. However there was a further letter from Mr Johns to Lawrence Edwards dated 8th November 2015 stating *have you managed to get the long awaited quote from Litespeed*. In the event no works were carried out.

14. On 27th January 2016 Lapider produced a joint report with Dan McShane (691) . This confirmed that the water ingress was not caused by a water main or a sewer. Much of the findings were the same as in the original Lapider report.

15. On 28th January 2016 Lawrence Edmunds and Trevor Edmunds, his father, were appointed to the RTM and Mr Johns and Mr Matthews resigned as a prelude to the sale of their flats to Lawrence Edmunds on 27th May 2016.

16. In March 2016 Lawrence Edmunds arranged the demolition of the Respondent's conservatory without permission. The Respondent sought to rebuild the conservatory only for it to be demolished again on 17th September 2016. Lawrence Edmunds sought to justify his actions during the tribunal. Eventually he accepted that the conservatory was on the Respondent's demise. The Tribunal considers that this repeated destruction of the Respondent's property was a blatant trespass which was a prelude to Mr Edmunds' later conduct in relation to the wall works.

17. On 4th August 2016 Lawrence Edmunds and the Applicant obtained a restraining order against the Respondent (132). The Applicant provided no background evidence in relation to this order. At a very late stage she sought to include a letter in the bundle from some former tenants alleging nuisance by the Respondent. In the event the Applicant did not pursue this limb of the breach of covenant application which was limited to the allegation in relation to water ingress into Tyn-y-Coed. In any event the Tribunal was not impressed by the evidence of nuisance. The parties in the case had clearly been at loggerheads for a number of years, as evidenced by the extensive litigation between them. On occasions it seems likely that both sides have behaved badly. The parties had to be warned on several occasions to desist from unseemly squabbling during the hearing which did not advance the case on either side. It is the task of the Tribunal to put these strong feelings aside and resolve the issues objectively.

18. On 8th August 2016 a planning application was made by Varco Consultants Ltd Consultants Ltd on behalf of Lawrence Edmunds. Extensive works were planned extending the rear facade and including the installation of lifts etc (399).

19. On 23rd August 2016 the Respondent commissioned a report by Roger North, a structural surveyor as to the condition of the building (423). The works recommended were largely patch repairs and were estimated to cost £20899.

20. On 27th September 2016 Arshad Varma of Varco Consultants Ltd produced a report for Mr Edmunds following a visual inspection of the rear external wall of the building. He said the wall was bowing excessively. He recommended complete removal of the wall and rebuilding the brickwork (570).

21. On 23rd September 2016 MLM Cartright Solicitors wrote to the RTM confirming that urgent works were required to the rear wall (555).

22. On 3rd October 2016 MLM Cartright Solicitors wrote to The Respondent and his wife attaching the Varco Consultants Ltd report dated 27th September 2016 and stated Mr Edmunds' intention to remove the rear wall and rebuild it. £1000 per month was offered for alternative accommodation alternatively temporary studwork could be provided within the premises. A response was sought within 7 days. In the event the rear wall was removed soon after without studwork being fitted or the Respondent obtaining alternative accommodation.

23. On 14th October 2016 Roger North inspected the building again. In his report (578) he said when he had found no evidence of serious deflection or failure to the rear wall when he had inspected on 23rd August 2016. He said that Ian Newsham of Cardiff Council who had attended prior to the demolition of the wall had confirmed that the wall was not a danger to the public. He considered that the wall works had been carried out in preparation for the works proposed in the Planning Application.

24. A further report by Mr North was dated 21st October 2016 (582) following an inspection on the same date. He found that the wall to the rear of the building had been demolished from roof level to first floor level. Scaffolding had been erected and temporary protection works carried out fixed by staples. He warned of damp

penetration to the ceilings. He said the premises had been left vulnerable from damp penetration and the wall had been significantly weakened by the crude removal of the external face to the solid masonary wall to the whole of the ground elevation.

25. On 13th March 2017 Glenn Ernest of GRE Building Services who carried out the wall removal submitted an invoice for £95040 for this work (266).

26. On 30th May 2017 the RTM was dissolved.

27. On 19th July 2017 solicitors on behalf of Lawrence Edmunds sent a service charge demand for the period 2015-2016, 2016-2017 (page 178 onwards). There were three schedules attached.

28. Schedule A included:

- The full cost of the demolition and removal of the "unsafe/unstable" conservatory (£4080)
- The full cost of water ingress (£25393.92)
- A third share of the wall works (£31680)
- A third share of the proposed Litespeed works contained in original quote (£65766.66 plus VAT)
- Legal fees (£4000)
- Ground rent (£50)

29. Invoices and quotes were attached from page 182 onwards.

30. Schedule B (192) included:

- Insurance (£503.33)
- Interim legal fees (£36500)
- Ground rent (£50)

31. Schedule C included:

- A third of the cost of proposed additional works by Litespeed including providing lifts and carrying out works in accordance with the planning application (see 195).

32. As already indicated the Applicant (presumably upon advice) limited her claim in the Tribunal to only two charges: £31680 for the cost of removing the rear wall of the premises ("The wall works") and £65766.66 for the cost of the works to be carried out pursuant to a quotation from Litespeed dated 1st April 2015 ("The Litespeed works").

The Tribunal considers that the overly inflated original claim in three schedules demonstrates the overall lack of credibility in the Applicant's claim. The Tribunal also notes that it was not until the actual hearing that the claim was properly focussed. This reflects badly on the Applicant (in truth upon Mr Edwards who appeared the main operating force) and her solicitors.

33. On 17th May 2018 Lawrence Edmunds was declared bankrupt. The chargee subsequently sold the premises to Marguerite Edmunds his wife on 3rd September 2018. The Tribunal has no doubt that notwithstanding his bankruptcy Mr Edmunds remained in control of all relevant affairs.

34. On 30th November 2018 Varco Consultants Ltd produced another report (158). They stated that a second planning application had been submitted. They also said it was imperative that the building was enveloped to make it water tight and structurally sound as soon as possible. They said that the building had deteriorated substantially since a previous inspection. and stressed the urgency of undertaking measures to complete the partially complete works at the earliest opportunity in order to protect from further water damage deterioration and stabilise the roofs.

35. The present applications were made on 30th January 2019 (page 1 onwards). The matter was due to be heard on 21st June 2019 but had to be adjourned because the parties were not ready for trial. There was an issue concerning service of the Respondent's documents. The Tribunal had some difficulty identifying what had gone wrong and attributes no blame for the mix up which was partly caused by the fact that there are parallel proceedings in the County Court and much of the evidence is repeated. The Tribunal had sought to encourage the county court proceedings to be stayed but they continued regardless which was disappointing and caused confusion. The adjourned Tribunal hearing took place on 2nd and 3rd September 2019.

The Inspection

36. The subject property comprises a substantial 3 storey detached house constructed some 120 years ago located on one of the main arterial roads leading to the centre of Cardiff which is about two miles distant where all amenities are available. The property is within easy reach of local shops and other facilities in Llandaff.

37. The property was constructed with solid brick and stone exterior walls which have been, in part, cement rendered and had the benefit of a slate roof. The front garden is totally laid in brick providing hard standing for a number of cars.

38. Approximately 20 years ago and due to the topography of the site a substantial apartment – Tyn–y–Coed was built at a lower level in the rear garden with access to the side of the premises.

39. The house was subsequently converted into 3 self contained flats with the Respondents Flat 1 comprising the ground floor which also included a conservatory within its demise.

40. At the time of the site visit the weather was variable with heavy showers. Scaffolding had been erected to the property and the rear elevation brick and stone

work had been removed with a steel frame erected at the rear in part where the Respondents' conservatory had previously been. A portion of the main roof covering had been replaced with new slate but the majority of the roof frame was open to the elements albeit with some areas covered by plastic sheeting which was not secure.

41. The inadequate roof covering has resulted in extensive water penetration and Flat 1 is uninhabitable with the majority of the ceilings collapsed and continuous water running through the flat from the upper flats.

The hearing

42. In the early part of the hearing the Applicant made an application to extend the period of service charges included in the application to include 2016-2017 and 2017-2018. This appeared to the Tribunal to be a sensible course as all of the evidence was before it. The Application notice had only contained a request for a determination for 2015-2016 although the attached particulars went beyond this period. Accordingly the application was allowed.

43. For her part the Applicant restricted her application to seeking a determination in relation to two sums: namely £31680 for the cost of removing the rear wall of the premises ("The wall works") and £65766.66 for the cost of the works to be carried out pursuant to a quotation from Litespeed dated 1st April 2015. Both sums had been formally demanded on 17th June 2017. In relation to the breach of covenant application the Applicant restricted her application to an alleged breach of covenant based on the ingress of water into Tyn-y-Coed.

44. Richard Roberts appeared on behalf of the Applicant and the Respondent, Mr Newell represented himself. We are grateful for the assistance of both. In particular the tribunal considers that Mr Roberts acquitted himself well in difficult circumstances and was at all times aware of his responsibilities as an advocate.

45. Mr Roberts opened his case by setting out the background to this matter. He said that in 2010 when Mr Edmunds was the freeholder he had surveyors acting for him and they had determined that works were required to the building including window renewal, roof works and the provision of fire escapes. This led to the s.20 notice served on 9th September 2010 on Mr Matthews (139-141). The tenants had been invited to make written representations. This went to the issue of dispensation he said. It showed that Mr Matthews had been consulted and it is the Applicant's case that the notice went to all three tenants including the Respondent.

46. Mr Roberts explained that in 2013 the RTM had been formed. They carried out none of the works required. In April 2015 Litespeed and Beacon were asked to quote for works. There was a meeting of the RTM in April 2015 in which the works were approved. The works were to be carried out once the required funds had been deposited. The Respondent was at the meeting. Mr Johns wrote to the Respondent asking for payment. There is no record of any reply. The Respondent did not deposit the agreed sums and progress was stalled according to Mr Roberts. It is not clear whether the other members of the RTM paid anything.

47. Mr Roberts stated that there was water ingress into Tyn-y- Coed in 2015. Mr Ernest of GRE Building Services did some work in late 2015 to try and remedy the water ingress (184-185). There was then the Lapider report. Relations broke down in the RTM and Mr Johns and Mr Matthews resigned. Mr Roberts accepted that there was not a lot of substance to the nuisance claim outside of the water ingress claim.

48. He submitted that the Varco Consultants Ltd report on the rear wall was clear .Some stripping out works had been carried out and the rear wall was found to be in a poor condition. It was recommended that the wall be removed. Mr Roberts submitted that Mr Varma was discharging his obligations as a structural surveyor and gave a proper view of risk. The rear elevation was removed at a cost of £95040 (186-187).This was paid in part. The invoice for asphalt front and back at £25000 had been paid. However the works to rear elevation ground to a halt. In May 2017 the RTM dropped out of the picture. There was then the demand in July 2017.

49. Mr Roberts submitted that the works carried out or proposed to be carried out were reasonable. There was a background of conflict between the parties. Since 2010 Mr Edwards had been trying to have the work done. Reasonableness should be assessed at the time that the demand was sent in July 2017.Mr Roberts submitted that it was reasonable for the sum to be demanded in full and it should have been paid by the Respondent.

50. In his opening, the Respondent, Mr Newell said he was party to some of the RTM meetings and not party to others. He highlighted the fact that there were negotiations between Mr Edwards and the other two members of the RTM whereby the former agreed to waive any claim against them. He was left to deal with the issue.

51. Mr Newell said the Lapider report made it clear that the water ingress was nothing to do with him. It was due to the poor construction of Tyn-y-Coed. The water board had come out and tested for leaks and found none.

52. Mr Newell said that he received the Varco Consultants Ltd report and a few days after that the rear wall was taken down. A surveyor Charles Tilley came the following morning but was not given access by Mr Edmunds (419).Mr Newell said he wrote to the solicitor for Mr Edmunds and told him he wanted a second opinion about the need to take the wall down. The flat was occupied at the time the wall was removed. There was water ingress through the lights.

53. In relation to the Litespeed quote Mr Newell said that Mr Johns letter at page 475 indicates the intention to limit the works to those in the letter and requesting a further quote.

54. As regards the wall works Mr Newell said that it was clearly a guise for carrying out development works. The wall could have been repaired.

The expert evidence

55. Mr Varma gave evidence on behalf of the Applicant on the first day of the hearing. He was the structural surveyor instructed by Mr Edmunds to investigate the condition

of the rear wall. His firm VARCO CONSULTANTS LTD were instructed to make the planning applications in relation the building.

56. Mr Varma said that he was a chartered structural engineer and had been practicing since 1984. He said that when he inspected the rear wall of the building it was bowing excessively. The stripping out works had discovered this. These works were a prelude to the planning works extending the building at the rear. Part of the planning application was to remove the rear wall.

57. Mr Varma was asked why the bowing wall had not been discovered before. He said outside is the brick face and inside is the stone wall. He could see the bulging when he inspected the inside of the wall. He said there were cracks and signs that the arches over the windows were falling down. He made recommendations. There was an option to repair but for the planning application the wall had to be removed. If the wall had been left it was a danger to the public. He said the wall was failing between the displaced arches. He didn't know the condition of the lintel. He did not measure the bowing. He said that there could have been a repair involving a resin injection to remedy the limestone. He did no costings of the different options. He said that Ian Newsome the council officer said that the wall was not a danger to the public and that he would be guided by Mr Varma.

58. Mr North who is also a structural surveyor gave evidence on behalf of the Respondent by telephone on the second day of the hearing. He said that the first time he had inspected the building in August 2016 he saw no significant movement to the wall at the rear. The report he produced following his inspection on 23rd August 2016 was a general report regarding the freeholder's repairing obligations. He only inspected externally. He saw no bowing on the landing common parts. He said it can be expected that lime mortar is friable. Lime mortar can be raked out easily. There was no sign of deflection of the wall. He did not accept that if he had seen the inside he would have arrived at a different conclusion. He would expect to have seen bowing externally. He said he had not heard of resin bonding a wall. He recalled that Mr Newsham from the council had told him that the wall was not a danger.

59. The Tribunal found the evidence of Mr North to be more reliable. It was surprised that although instructed at the time Mr Varma had not produced any costings as to the work required or for any alternatives such as repair. Neither had he properly measured or monitored the alleged bowing of the wall. He appeared vague in his evidence at various points and gave confusing answers in relation to the reasons for the removal of the wall. He did not bring his report with him or any supporting notes or photographs. When questioned about a photograph contained in his report which purported to indicate severe separating cracking it became evident that this was not cracking but a space where an internal wall or a timber section had been removed. The report detailed that there was evidence of water penetration through the rear elevation but Mr. Varna conceded that this was an assumption.

60. It was compellingly clear from Mr Varma's evidence however that at the time the rear wall defect was diagnosed Mr Edmunds was in the process of carrying stripping out works as a pre- cursor to the major planning development on which Varco Consultants Ltd themselves had been instructed.

61. In contrast to Mr Varma Mr. North's answers were consistent with his report and reliable. In his opinion, any major bowing of the internal section of the rear wall would be visible on the external face. Admittedly Mr. North did not have the benefit of an internal inspection of the internal face of the wall but after studying the relevant photographs and visiting the property on two occasions he stated his opinion would not have changed.

62. The Tribunal found Mr North to be clear and assured in his answers. He appeared to have a much better knowledge of the building even though he hadn't inspected the interior. He also appeared more independent and was willing to admit on occasions that he could not remember specific aspects of the case. Overwhelmingly his evidence was clear - the removal of the rear wall was not necessary. The Tribunal accepts this conclusion.

The evidence of fact

63. Lawrence Edmunds gave evidence first. He was not the Applicant, following his bankruptcy his wife had taken over ownership of the building however as already indicated he was clearly the person in control.

64. He said that Chris Johns had written to Litespeed to ask for additional works and denied that his letter sought to reduce the scope of the original quote. There was an agreement in place to carry out all of the works proposed by Litespeed. He said the fire escape was dangerous and he wanted to address that as he was the freeholder at the time. He said the RTM didn't want to spend any money. He said he had reached an agreement with Mr Johns and Mr Matthews whereby he would not pursue them for costs when he purchased their flats.

65. Mr Edmunds was asked why he had not rebuilt the wall after taking it down. He said he could not afford the cost of this. When he started the development works he thought the Respondent was selling him his flat. He started the planning procedure on the basis that Mr Newell was selling he said. He started works on the flats above.

66. Mr Edmunds said that as soon as he knew the potential danger of the rear wall he made the decision to remove it. The roof was also removed. He put in tarpaulins and put a steel frame in. He took the battens off. He said that once he knew Mr Newell was not going to sell he was refurbishing the flats above. This was not the planning works he said. He said that he and the Respondent had made three sale agreements. One of these involved buying a caravan for the Respondent. The agreements were verbal. He repeated that when he started the refurbishment of the two flats he was not pursuing the planning development.

67. Mr Edmunds accepted that the steels had been placed on the Respondent's land. He said that he had funding in place to carry out the development works.

68. Mr Edmunds said that when he removed the wall he offered to fund the Respondent's alternative accommodation. He admitted that he had removed the Respondent's conservatory without permission on two occasions. He said a carpenter had put his foot through the roof on the first occasion and on the second occasion the brickwork had been faulty. It had not been tied properly.

69. In relation to the Lapider report Mr Edmunds said that he had complied with what Lapider had suggested but the water ingress had continued. Guttering repairs had taken place on three occasions. The channel and asphalt was done in 2015 and 2016 and the works at the front of the building had taken place in March 2016. Glenn Ernest of GRE Building Services and a cousin of Mr Edmunds had done some of the works. Cardiff Drains had also done some works. He said that the only time water ingress stopped in Tyn-y-Coed was when he accessed the Respondent's flat and turned the stopcock off. He said the steels were put up at the rear of the premises for the development and to stabilise the wall. He said it was clear that the purchase of the Respondent's premises was not going to go through in January/February 2017.

70. The Applicant, Marguerite Edmunds gave evidence. She said candidly that the works that were carried out at the premises by Mr Edmunds were not discussed with her. She was asked how she was going to fund future works and replied that was not the Respondents' concern. She said that the Respondent had caused the problem because he had not paid his service charge. She accepted they would have to pay a two thirds share.

71. Mr and Mrs Edmunds left the Tribunal at 12.15 am on the second day citing a problem with their family but providing no evidence as to this. They agreed that the Tribunal could continue in their absence. They left their counsel, Mr Roberts to represent them in their absence. The conduct of Mr and Mrs Edmunds placed further doubt on the credibility of their overall account.

72. Mr Newell, the Respondent, gave evidence. He was asked in cross examination about the RTM and their insurance responsibilities. Mr Newell said that he had his own insurance in place. He said that Mr Edmunds had told the RTM that he was going to insure the building and pass on a portion of the bill. He said he was never given a copy of the insurance. The Respondent's insurers had refused to insure the building he said because it was the responsibility of the freeholder.

73. The Respondent accepted that some works were necessary in the building. The first Roger North report confirmed that works of £21000 were needed. He said that Mr Edmunds' father was living in his flat as a tenant. There was an agreement that he did not need to pay service charges in return for the father's occupation. He said that he was not served with the s.20 notice in 2010. He also accepted that from 2012 when he moved into the premises he was liable for service charges.

74. Mr Newell said that he had not agreed to the Litespeed quote even though he was present at the meeting of the RTM when it was agreed (111).He said that the other two members of the RTM had been planning to sell their flats and that was why the scope of the Litespeed work was reduced by Christopher Johns.

75. Mr Newell accepted that he had received a service charge demand in July 2017. He said that the RTM had carried out works to the windows in the building. He confirmed his view that the wall works were carried out in order to remove him and his wife from the building as part of the development process.

Closing submissions

76. In closing Mr Roberts said that the Tribunal could assess the reasonableness and payability of the service charges. He said that the costs of the wall removal were incurred by Mr Edmunds in late 2016. He said this was really the responsibility of the RTM. He asked could Mr Edmunds demand a service charge which he had incurred when the obligation to provide services was with the RTM? He said that the RTM was in effect acting on behalf of the freeholder. The bill for the wall works was incurred at a time when the RTM was still in existence. Mr Roberts submitted that it was open to Mr Edmunds to say retrospectively that the sums incurred were incurred on his behalf. That was the intention of the lease.

77. Mr Roberts submitted that the cost of the wall works were reasonably incurred. He said that when Mr Edmunds started stripping out Flats 2 and 3 he was no longer intending to take the development works forward. He was aiming to refurbish the flats and sell them. Mr Varma had been involved in the planning application. He had examined the building from inside. Mr North had not. When he carried out his inspection Mr North was looking at the building generally. The wall may have been bowing and he didn't notice it. Mr Edmunds incurred the cost of the work reasonably.

78. In relation to dispensation from consultation for the wall works the key issue was prejudice. The works were urgent. Even if Mr Newell had been consulted the wall was dangerous.

79. Turning to the Litespeed quote Mr Roberts said that the works had been agreed properly by the RTM and given the go ahead. There was no valid demand however until July 2017. He submitted that Chris Johns' email was not seeking to limit the works but add to them. At the very least Mr Roberts submitted the first North report confirmed that some works were necessary at the premises and therefore some works were reasonably required.

80. In terms of dispensation Mr Roberts said that the Litespeed works were well trailed. It was clear that the works were needed from 2010. Mr Newell was involved in the RTM discussions regarding the quotes and he suffered no prejudice.

81. In relation to the application for a determination that there had been a breach of covenant Mr Roberts added little save to say that the proposed works by Lapider had been carried out.

82. In his closing submissions Mr Newell accepted that some works had been necessary but not to the extent of the Litespeed quote. He said that the RTM had carried out some works including replacing windows. He repeated his allegation that works were being carried out in accordance with the planning application. The roof structure had been changed to accommodate the lift. He read the contents of a report produced by Chris Hyatt in September 2016 which confirmed that the rear wall was not unstable. This report was not in the hearing bundle and was not taken into account by the Tribunal.

83. He said his flat was destroyed by the removal of the rear wall. It was now worth nothing. He was still paying a mortgage. He said he had wanted to appoint someone

for a second opinion before the wall was removed. He had asked for a copy of Varco Consultants Ltd's report but had not received it until most of the wall had been removed. He was 100 percent sure that the wall had been removed in order to allow for development.

The lease

84. Under clause 4 (1) (b) the Respondent was required to pay the service charge and other sums payable in accordance with the terms of the fifth schedule.

85. Under the fourth schedule, para 2 of the lease services include the following:

> (a) Repairing maintaining rebuilding reinstating replacing renewing repointing inspecting and cleansing the structure of the building and in particular the roofs foundations walls external woodwork etc
>
> (b) Redecorating the exterior of the building as often as the landlord shall consider necessary.
>
> (d) Providing and retaining the services of all servants agents and contractors as the landlord considers necessary for the efficient maintenance and management of the building.....
>
> (i) Carrying out all other work or providing goods and services of any kind whatsoever or desirable for the purpose of maintaining or improving the Building....

86. Under the fifth schedule paragraph (d) the landlord is entitled to demand a further sum or sums on account of service charge (over and above that in the reserve fund or on account) such sum or sums to be paid to the Landlord within fourteen days of demand.

87. There was no evidence of there being a reserve fund nor of any proper accounting systems in accordance with the fifth schedule accordingly the Applicant presumably relied solely on this latter provision in respect of prospective costs. The Respondent did not seek to argue that the provision of estimates was a condition precedent to recovery of service charges expended.

88. Under the sixth schedule the Respondent was responsible for paying 33.3per cent of the costs excluding the forecourt and 25per cent of the costs in respect of the forecourt.

89. By Clause 4 (12) of the Lease the Respondent covenanted not to *do anything which may in the reasonable opinion of the Landlord be or become a nuisance disturbance damage or annoyance to the landlord or tenants or the owners or occupiers of any premises in the building...*

The law

Reasonableness and payability of service charges

90. Section 19 of the Landlord and Tenant Act 1985 deals with the reasonableness of service charges:

> *19.— Limitation of service charges: reasonableness.*
> *(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 provision 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.*

91. Section 20 of the Landlord and Tenant Act 1985 deals with the consultation requirements in relation to service charges. Section 20ZA deals with applications to dispense with these requirements:

> *20ZA Consultation requirements: supplementary*
> *(1) Where an application is made to[the appropriate tribunal] 2 for a determination to dispense with all or any of the consultation requirements in relation to any qualifying works or qualifying long term agreement, the tribunal may make the determination if satisfied that it is reasonable to dispense with the requirements.*

92. The primary concern in dealing with a dispensation application is the prejudice suffered by the tenant: *Daejan Investments Ltd v Benson* [2013] UKSC 14.

93. Section 27A of the Landlord and Tenant Act 1985 states the following:

> *27A Liability to pay service charges: jurisdiction*
> *(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.
(6) An agreement by the tenant of a dwelling (other than a post-dispute arbitration agreement) is void in so far as it purports to provide for a determination—
(a) in a particular manner, or
(b) on particular evidence,
of any question which may be the subject of an application under subsection (1) or (3).
(7) The jurisdiction conferred on[the appropriate tribunal] 2 in respect of any matter by virtue of this section is in addition to any jurisdiction of a court in respect of the matter. [...]

Determination of breach of covenant

94. The Commonhold and Leasehold Reform Act 2002,s.168 states the following:

168 No forfeiture notice before determination of breach
(1) A landlord under a long lease of a dwelling may not serve a notice under section 146(1) of the Law of Property Act 1925 (c. 20) (restriction on forfeiture) in respect of a breach by a tenant of a covenant or condition in the lease unless subsection (2) is satisfied.
(2) This subsection is satisfied if—
(a) it has been finally determined on an application under subsection (4) that the breach has occurred,
(b) the tenant has admitted the breach, or
(c) a court in any proceedings, or an arbitral tribunal in proceedings pursuant to a post-dispute arbitration agreement, has finally determined that the breach has occurred.
(3) But a notice may not be served by virtue of subsection (2)(a) or (c) until after the end of the period of 14 days beginning with the day after that on which the final determination is made.
(4) A landlord under a long lease of a dwelling may make an application to[the appropriate tribunal] for a determination that a breach of a covenant or condition in the lease has occurred.
(5) But a landlord may not make an application under subsection (4) in respect of a matter which—
(a) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,

(b) has been the subject of determination by a court, or
(c) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.

(6) For the purposes of subsection (4), "appropriate tribunal" means—
(a) in relation to a dwelling in England, the First-tier Tribunal or, where determined by or under Tribunal Procedure Rules, the Upper Tribunal; and
(b) in relation to a dwelling in Wales, a leasehold valuation tribunal.

The First Application - reasonableness and payability of the service charges

94. The Tribunal were presented with vastly conflicting accounts by two parties who clearly have been at loggerheads for years. According to the Applicant the wall works were urgent and essential and there was a genuine intention to carry out the works in the Litespeed quote. According to the Respondent the wall works were carried out as a deliberate attempt to drive him from his home and there was no intention to carry out the Litespeed works rather there were plans to redevelop the building. Both parties were robustly litigious and willing to differing degrees to embellish their accounts with the principal aim of inflicting maximum damage on the other.

95. The extraordinary factor in the case was that for whatever reason Mr Edmunds had failed to protect the building after removing the wall. This had resulted in severe damage to the Respondents' flat and the building itself. The Tribunal does not accept that this was justified because the Respondent had not paid his service charge. Mr and Mrs Edmunds confirmed that they had funds available to carry out works but bizarrely had chosen not to protect the building despite the urging of Mr Varma in his report. The Tribunal found the building and in particular the Respondent's flat to be in an atrocious state as a direct result of this conduct.

96. The expert evidence given during the hearing has already been evaluated. Mr North's evidence was preferred to that of Mr Varma for the reasons given. Indeed Mr North's evidence was a key factor in the Tribunal's decision in relation to the Wall Works. Put simply these works were not necessary and should not have been carried out. Indeed the works were ultimately damaging to the building. This is not the sort of case where the Tribunal could decide that the landlord was entitled to rely on what he was allegedly being told by his expert and entitled to carry out the works accordingly. The advice if genuinely offered by Mr Varma at the time was thoroughly unreliable in the Tribunal's opinion.

97. Mr Varma and Varco Consultants Ltd itself were involved in the preparation of the planning applications on behalf of Mr Edmunds. This in itself raises issues about the integrity and reliability of his advice in relation to the removal of the wall. He was however candid in his evidence in confirming that the stripping out works carried out by Mr Edmunds was part of the planning works. In fact the Tribunal has no doubt that the removal of the wall, the erection of the steels etc was also carried out pursuant to these works. It is illuminating to say the least that the Applicant had been seeking originally to claim sums from the Respondent towards the cost of the proposed development works as quoted by Litespeed (see page 194-195). This quote was obtained on 17th July 2017. This says much about the intentions of Mr Edmunds at this point just two days before the service charge demand was made. The Tribunal

rejects the suggestion that Mr Edmunds' intentions had changed from a plan to redevelop the rear of the premises to simply improving the upper flats. Indeed the Tribunal finds that Mr Edmunds maintained a firm intention to redevelop the rear of the building come what may and without any recourse to the Respondent who had refused to sell to him which was entirely his prerogative.

98. The Tribunal's interpretation of the case before it was reinforced when it heard the evidence of fact. Although both parties were self - serving in their evidence to some degree the evidence of Mr Newell was preferred. He was largely honest although the Tribunal does not accept that he did not originally agree the Litespeed quote. He was at the RTM meeting when it was agreed. His unwillingness to admit that is attributed to the trench mentality that he and Mr Edmunds have developed during the dispute such that any concession would be considered a sign of weakness.

99. In contrast to Mr Newell the Tribunal found Mr Edmunds' evidence to be thoroughly unreliable. His account altered during his evidence as he recognised the weaknesses in his own case. His explanation that he had changed his approach and decided not to redevelop the building lacked any credibility and was not borne out by the objective facts that he had been pursuing works in accordance with a planning application he had submitted. Mrs Newell gave no evidence that assisted the Tribunal. She plainly knew nothing about what was going on and deferred to her husband in this regard. She was defensive and uncooperative when being cross examined. The Tribunal was unimpressed that Mr and Mrs Edmunds left before the conclusion of the case.

100. The Tribunal's view of the expert and factual evidence lead inexorably to the conclusion that:

> a) The wall works were not justified and should not have been carried out accordingly it was not reasonable to incur any sums in carrying them out.
>
> b) There was no genuine intention at the date of the service charge demand to carry out the works in the original Litespeed quote. Instead Mr Edmunds was intending to redevelop the building in accordance with the planning application. In these circumstances the sums claimed are not reasonable.

101. Mr Roberts in an effort at damage limitation sought to persuade the Tribunal that at the very least the original Roger North report confirmed that some works were necessary in the building and that therefore the Applicant was entitled to at least a share of the cost of these works. With respect to Mr Roberts this was at best a speculative argument. Moreover the Tribunal's view of the overall conduct and behaviour of Mr Edmunds does not support any form of concession in relation to the application.

102. In view of the Tribunal's findings it is not necessary to address the issue of dispensation however the Tribunal would comment that in relation to the wall works it would not have granted dispensation because the Respondent suffered prejudice by the failure to properly consult. If the consultation had been properly pursued he would have had the opportunity to put forward his contrary evidence in relation to the stability of the wall. Further no application was made by Mr Edmunds for dispensation before the wall was removed.

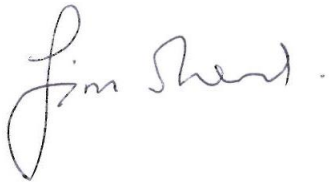
The second application - breach of covenant

103. This application is dismissed. It is clear from the Lapider reports that the water ingress into Ty-n-Coed was not caused by any action or omission by the Respondent.

Section 20C of the Landlord and Tenant Act 1985

104. In light of the Tribunal's findings it is determined that the Applicant is prohibited from seeking to recover the legal costs of these proceedings from the Respondent's service charge.

Dated this 4th day of November 2019



J Shepherd
Chairman