LEASEHOLD VALUATION TRIBUNAL

Case numbers : CAM/42UB/LSC/2004/0045 & 0049

Property	:	**Flats 4, 6, 14, 15, 18, 24, 35, 38, 40, 41, 44, 45 & 47 Sproughton Court, Sproughton, Ipswich IP8 3AJ**
Applicant (0045)	:	**Sproughton Court Maintenance Co Ltd ("SCMC"), c/o Prettys Solicitors, Elm House, 25 Elm Street, Ipswich IP1 2AD**
represented by	:	**Mr Malcolm Sheehan, counsel, instructed by Prettys**
Respondents	:	**Flats 4 & 41 – Longstop Investments Ltd †** **Flat 6 – Mr David Wallis †** **Flats 14 & 47 – Witnesham Ventures Ltd †** **Flat 15 – Framlingham Properties Ltd †** **Flat 18 – Mrs Patricia Anne Walter (acquired by Witnesham Ventures Ltd) †** **Flat 24 – Mr John Michael Bowden** **Flat 35 – Oakhurst (East Anglia) Ltd** **Flat 38 – Mr Kenneth Ferris †** **Flat 40 – Mr David W Clowes †** **Flat 44 – Miss Annabel D'Arcy** **Flat 45 – Omnicorp Ltd †**
† represented by	:	**Mr David W Clowes**
representing themselves	:	**Mr J Michael Bowden** **Mr & Mrs Hewett (Flat 10)**
those also present	:	***for SCMC* :** **Mr John Scannell & Ms Claire Jarvis, of Prettys** **Mr David Williams, director** **Mr Charles Ingram, chairman & director** **Mr Patrick Robson, civil and structural engineer; consultant and project/client manager** ***as individual leaseholders* :** **Mrs D Fletcher (with Mr Stuart R Barnes)** **Mr Duncan Foster** **Mr David Wallis**

Tribunal :	**G K Sinclair (Chairman), F W J James FRICS & J B Shrive FRICS FAAV**
Hearing :	**Monday 13th & Friday 17th December 2004, at the Holiday Inn, London Road, Ipswich IP2 0UA**

Applications

0045

By application dated 14th September 2004 Sproughton Court Maintenance Company Ltd applied to the Tribunal, on its own behalf as freeholder and management company (a company wholly owned by all the tenants of flats on the estate), for determination of the Respondent tenants' liability to pay the service charge levied by it on 31st March 2004, comprising the third tranche of the individual contributions required in respect of expenditure incurred on a major repair project affecting every flat.

On 19th October 2004 Mr Michael Bowden filed a response to SCMC's application plus various detailed written reports, appendices and specialist summaries concerning aspects of the repair contract and its implementation. Together with further submissions and written requests to the Tribunal for disclosure by SCMC of additional documentation (including the actual contract) and a final request (withdrawing certain earlier requests) dated 15th December, handed in during the second day of the hearing, Mr Bowden contributed about 250 pages of the material before the Tribunal.

On 3rd November 2004 Mr David Clowes, on his own behalf and of those other tenants marked †, filed a Statement in Reply, identifying 14 specific matters in dispute.

0049

By application dated 18th October 2004 (received on 28th October) Mr David Clowes, on his own behalf and of those other tenants marked †, applied to the Tribunal for determination of his liability to pay not only the third charge levied in March 2004 but also the second charge, levied in July 2002, the general service charge levied for each of the years 2001/02 and 2002/03, and SCMC's liability to pay him (or his ability to set off) an amount by way of compensation in respect of his flat being out of use and in the contractors' possession during the year 2002. The application also put at issue SCMC's ability to recover the costs of its application to the LVT as part of the service charge.

THE DECISION OF THE TRIBUNAL

Handed down 5th January 2005

- Summary ..... paras 1 - 11
- The lease ..... paras 12 - 14
- The relevant law ..... paras 15 - 18
- Inspection, hearing and evidence ..... paras 19 - 47
- Findings & decision ..... paras 48 - 50

Summary

1. The background to these two applications is a series of unforeseen events which arose during the carrying out of a major repairs project affecting four blocks of maisonettes and flats (hereafter referred to simply as "flats"), the reasonableness of which had been approved by a Leasehold Valuation Tribunal in July 2001.[1] The summary recorded in paragraphs 1 to 6 of the 2001 decision provides a helpful introduction, as follows :

   1. This decision concerns a 1960s development of four 3-storey blocks comprising 32 maisonettes and 16 flats. The construction of each block is a 3-storey concrete frame with brick infill panels under a pre-cast reinforced concrete plank roof, with a suspended wooden floor at second floor level, and pre-cast reinforced concrete planks at first floor level. A useful diagram showing the construction of the roof and first floor appears at para 3.2 in the report of engineers Raymond Callcut and Patrick Robson, for the Richard Jackson Partnership, in January 2000.[..]

   2. The development has been managed by the Applicant maintenance company, which in November 1993 acquired the freehold "as a defensive measure" after the scale of remedial work necessary to deal with corrosion of the pre-cast beams (shown in black on the diagram) became apparent. As a result of the corrosion the flats and maisonettes became virtually unsaleable except at very low prices, and a number of leaseholders have a negative equity in their properties.

   3. A number of firms of structural engineers have reported on the problem, suggesting various levels of repair, but the Richard Jackson investigation revealed a problem with what had until then been a promising method of repair, viz cathodic protection. It was discovered that the steel reinforcing rods did not extend the full length of each beam, rendering them susceptible to shear failure near the load-bearing walls. Cathodic protection would not therefore provide an effective remedy. At about the same time a new problem developed, viz the crumbling and failure of parts of the concrete roof edging. This posed a serious health and safety risk to the leaseholders and their visitors.

   4. Mr Patrick Robson, having been appointed project manager, narrowed the range of repair options to two – patch & mend, and full repair – and explored with the leaseholders' various mortgagees which would attract further mortgage funding. The result, hardly surprisingly, was that of full repair at a total estimated cost of about £1,042,000. That total stood to be reduced by a grant from Babergh District Council of £310,000 spread over 3 consecutive financial years. Mr Robson also managed to secure overdraft support for the project from a high street bank.

[1] Case Number CAM/LVT/96/SC/067.

5. The two options were put by the Applicant company to an extraordinary general meeting of its members (the leaseholders) in October 2000. The full repair option was the solution favoured by the overwhelming majority of those present (30 to 8, with one abstention). Part of this option included the replacement of the existing flat roof of each block by a new pitched roof with gable ends. The tribunal is not satisfied that the strict lack of need for this additional expense was fully explained to the meeting in October 2000. It nevertheless appreciates that the provision of a pitched roof has certain long-term benefits and enhances the value of each unit. It considers that the leaseholders would probably have voted for taking this opportunity when the roof required repair in any case, and that it is therefore a reasonable course for the Applicant to adopt.

6. The tribunal, whilst surprised that contracts for the project were actually signed before this application was made, concludes that the full repair option selected by the Applicant and voted upon by a substantial majority of the leaseholders was the subject of full and proper consultation and the amounts likely to be incurred in connection with the project and to be recovered by way of service charges are reasonable.

2. The building contract, not seen by either tribunal but believed to take the form of an ICE Minor Works contract, was prepared by Richard Jackson Partnership ("RJP") (the contract administrator engaged by SCMC) and was awarded after a proper tendering process to Jackson Building Services Ltd ("JBS" – which is not believed by the tribunal to be connected with RJP), the lowest bidder.

3. The unforeseen problems comprised :

   a. An almost immediate dispute with JBS as main contractor over the alleged complexity (and hence cost) of the cutting out of the defective steel reinforcing bars

   b. A series of adverse adjudication awards under the contract leading to an increase in costs

   c. The dismissal of JBS as main contractor later being adjudicated wrongful

   d. The insolvency of the replacement main contractor (Larcombe & Young Ltd) when the project was nearly complete

   e. The need to employ a third contractor (Byford Cheeseman) to complete the works

   f. The escalation in cost – plus the intimation of a £650,000 damages claim

for loss of profit by JBS – forcing SCMC in March 2004 to enter into a Company Voluntary Arrangement with most of its creditors (but not the bank) in order to avoid insolvency.

4. The expenditure (net of a grant provided by Babergh District Council) which had been approved by the tribunal in 2001 was easily recovered (the "first charge"). Increased costs forced SCMC to levy a second charge in July 2002 and all but one tenant paid it. After further problems developed, and after a 2-stage EGM and a postal ballot of tenant shareholders, a third charge was levied in March 2004 and, after protests by some of the current Respondents about its legitimacy and their unfulfilled threats to apply to the tribunal, the directors eventually referred the matter to this tribunal for consideration.

5. The total cost of this repair project has grown substantially since approved by the tribunal in 2001. The options are now stark. The tribunal can approve the amount of the third charge and require the individual tenants to pay SCMC, so that it may discharge its contractual obligations and continue to own and manage the estate on their behalf. Alternatively, the tribunal may reject the amount now levied on the grounds that it is unreasonable (or in excess of the amount allowed where there has been insufficient consultation) and leave SCMC unable legally to recover enough to meet its debts, thus "letting the debts sink with the company" and throwing the future ownership and management of the Sproughton Court estate into considerable doubt.

6. For the reasons which follow the tribunal considers that the directors, on behalf of the company, have been at pains to take professional advice when presented with fresh problems – with further trouble arising sometimes even though they have followed that advice to the letter – and to inform, consult and ask for help from the tenants (as shareholders in the company) when serious developments have arisen. They have received no help, but almost constant criticism, it seems from a small determined band mainly of investor (as opposed to owner-occupier) tenants who have sought to minimise their own expense, regardless of the effect

on the rest of the tenant body or on the company.

7. The tribunal rejects the suggestion that the information provided to tenants has been deliberately misleading and agrees with the directors that from the moment that problems first arose with JBS, right until the crystallisation of that company's claim at the CVA meeting in March 2004, it has been impossible to predict the final cost of the repairs project and whether it would result in a successful claim by SCMC against JBS or vice versa. Those tenants, such as Mr Clowes, who were anxious to know from the directors the precise extent of their financial liability at specific times while one adjudication followed another – and fortunes ebbed and flowed, were searching for certainties where none existed.

8. The tribunal rejects Mr Clowes' implicit suggestion that work should have been halted after the lengthy delay in finishing the first block (in which his flat is situate) and the cost increases which had then become evident. By that stage JBS had been ordered off site and the replacement contractors, Larcombe & Young, were making efficient progress. All the tenants had contributed rateably (more for maisonettes than for flats) to work which had taken place only to one of the four blocks. Further, Babergh District Council had already served a Notice of Disrepair on SCMC which required the work to be completed to all the blocks. The tribunal considers that it was both necessary and fair that the work should be completed and the blight lifted from all the properties on the estate.

9. The tribunal therefore rejects the Respondents' challenge to both the second and third charges levied by SCMC, and determines that they are payable rateably in the amounts calculated by the directors. The tribunal also rejects as fanciful Mr Clowes' suggestion that the general service charges levied for insurance, grass cutting, window cleaning, and minor maintenance should be reduced because the buildings insurance (which covers the whole estate) should have been replaced by individual buildings policies covering only the periods when the contractors were not in possession of each site, and that tenants out of occupation should not share in the expense of keeping the rest of the estate tidy. The general service

charges for the two years in question are allowed in full.

10. Had there been a precise, binding agreement between SCMC and each tenant that a specific amount as compensation would be paid for each week or month that a flat had to be vacated then the tribunal might well treat that as an item to be set off against the gross amount payable by a tenant by way of service charge. However, the tribunal notes that all parties accept that there was never in fact any such liability; merely an understanding that if SCMC could claim against JBS it would pass on any amount recovered to the affected tenants. Mr Robson may unintentionally have misled tenants into thinking that they would be able to claim full compensation (as opposed to liquidated damages) from JBS for breach of its contract but the adverse adjudication on this point, and SCMC's financial inability to challenge it at an arbitration, put paid to any such claim. Had this question of compensation remained a live issue between the parties the tribunal agrees with Mr Sheehan that determination of this point lies outwith its statutory jurisdiction.

11. The application by SCMC (number 0045) is therefore granted and that by the Respondents (number 0049), including the request under section 20C of the Act, is dismissed.

The lease

12. Before the tribunal on this occasion the sample lease was that for flat 49,[2] a maisonette in block D. It is dated 19th September 1978 and granted for a term of 99 years from 24th June by Taymount Property Holding Company as lessor and Richard Eustace as tenant. SCMC is named as a third party, with responsibility under clauses 4 and 5 for discharging the maintenance obligations set out in the Fifth Schedule from a maintenance fund collected from the tenants in accordance with, and in the proportions defined in, the Fourth Schedule. Paragraph 3 of the Fifth Schedule refers specifically to SCMC's obligation :

> "...at all times during the Maintenance Period to keep the interior and exterior walls and ceilings and floors of the buildings and the whole

[2] Although there are only 48 flats and maisonettes one number was applied to a small building by a garage block, perhaps intended as a caretaker's bungalow but in fact used as a site office

structure roof balconies foundations... in good repair and condition... and also properly to cultivate and preserve in good order and condition the gardens and grounds of the Estate and the trees and to keep the entrance drives forecourts and paths thereof properly maintained and surfaced..."

13. The Fifth Schedule also records, *inter alia*, as purposes for which the maintenance fund is to be applied :

a. The employment of a surveyor and accountant (paragraph 1)

b. The decoration and repair of common parts (paragraph 4)

c. Employment of staff and contractors (paragraph 7)

d. Payment of legal costs (paragraph 8)

e. Payment of costs and fees in the auditing of the accounts (paragraph 9)

f. Insuring the buildings and common parts against fire, etc (paragraph 12), and

g. The provision of such other services for the benefit of the tenants and the carrying out of such other repairs, improvements and additions as are considered necessary (paragraph 17).

14. By clause 3 and paragraph 3 of the Third Schedule the leaseholder covenants in respect of each maintenance year to pay the maintenance contribution to the Applicant by two equal instalments on the 24th June immediately preceding the commencement of and on 25th December in the maintenance year, plus a due proportion of any maintenance adjustment as provided by paragraph 3 of Part II of the Fourth Schedule.

The relevant law

15. The Tribunal's powers to determine whether an amount by way of service charges is payable and, if so, by whom, to whom, how much, when and the manner of payment are set out in section 27A of the Landlord and Tenant Act 1985.[3] Provided that the application is made to the tribunal after 30th September 2003 these powers apply irrespective of whether the costs were incurred before

[3] As introduced by the Commonhold and Leasehold Reform Act 2002, section 155(1)

the coming into force of this new section.[4] Please note sub-sections (5) & (6), which provide that a tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment, and that an agreement by the tenant of a dwelling (other than a post-dispute arbitration agreement)[5] is void in so far as it purports to provide for a determination in a particular manner or on particular evidence of any question which may be the subject of an application to the Tribunal under section 27A.

16. The overall amount payable as a service charge continues to be governed by section 19, which limits relevant costs[6] :

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.

17. A provision raised briefly in argument by Mr Clowes is section 20B, which applies a further control on service charges by imposing a time limit on the making of demands. It states :

(1) If any of the relevant costs taken into account in determining the amount of any service charge were incurred more than 18 months before a demand for payment of the service charge is served on the tenant, then (subject to subsection (2)), the tenant shall not be liable to pay so much of the service charge as reflects the costs so incurred.

(2) Subsection (1) shall not apply if, within the period of 18 months beginning with the date when the relevant costs in question were incurred, the tenant was notified in writing that those costs had been incurred and that he would subsequently be required under the terms of his lease to contribute to them by the payment of a service charge.

18. The alleged lack of proper consultation is a major issue in the instant case. As the

[4] See the Commonhold and Leasehold Reform Act 2002 (Commencement No 2 and Savings) (England) Order 2003 [SI 2003/1986], Article 2(c) and Schedule 2, paragraph 6

[5] Eg. provisions in a lease stating that the landlord's accountant's certificate shall be conclusive, or that any dispute shall be referred to arbitration

[6] Including the costs of insurance

works were carried out prior to 31st October 2003[7] the new consultation procedure introduced by section 151 of the Commonhold and Leasehold Reform Act 2002[8] does not apply. One must look to the provisions of the unamended section 20 of the 1985 Act. This imposes certain limitations on the recoverability of service charges in the absence of estimates and consultation by the lessor with the tenant. By the Service Charge (Estimates and Consultation) Order 1988[9] the limits referred to in section 20(3) (£25 and £500 respectively) were doubled from 1st September 1988. For present purposes the compulsory consultation threshold is therefore £2,400.00.[10] It is not disputed that the old section 20 applies to this determination.

Inspection, hearing and evidence

19. The tribunal inspected the development at Sproughton Court at 10:00 on the morning of Monday 13th December 2004, when the weather was cold but dry. Also present was Mr Clowes, who showed the tribunal around the grounds – which looked well maintained – and also into his own maisonette, number 40, which was currently unlet. Although the new pitched roofs and built-up gables were an obvious improvement nothing could be seen of the repairs inside the maisonette. The tribunal was surprised to see that what appeared to be the original kitchen and bathroom fittings, and the parquet floor on the first floor landing did not look disturbed. According to Mr Clowes this is because the work was carried out from below, without removing the floors or anything resting on them, and all evidence of repair was therefore covered up by the new ceilings.

20. The tribunal noted that the maisonette was quite generously proportioned for its period and type but still displayed its original fittings, including single glazed windows. The tribunal also noted that on the second floor landing there was

7 See the Commonhold and Leasehold Reform Act 2002 (Commencement No 2 and Savings) (England) Order 2003 [SI 2003/1986], Article 3

8 Which introduced an amended section 20 of and added a new section 20ZA to the 1985 Act

9 SI 1988/1285

10 £50 per flat x 48 flats = £2,400

now a trapdoor to the new loft space, and wondered how or whether this had been incorporated into the lease within an adjusted demise.

21. The hearing commenced at 11:10 with Mr Sheehan supplying the tribunal and the other parties with his own chronology and *dramatis personae*. He then took the tribunal through the applications and statements bundle and the two documents bundles, referring in particular to those at Tabs 6 to 9 inclusive. He drew the tribunal's attention to what he described as "a large and significant document" comprising Mr Robson's report of affairs up to May 2002. The report runs from page 85-101, with Appendices at pages 103-180, and deals with the position up to and after termination of the contract with JBS. Amongst the appendices is the careful consideration given by SCMC to its options, including (at pages 175-178) its risk assessment. Some new documents were inserted in the bundles by Mr Sheehan, and in addition a further 11 page document from Mr Bowden, marked "Proximate Cause", and a letter dated 1st December 2004 from Mr & Mrs Hewitt had to be considered by the tribunal.

22. Mr Sheehan called Mr David Williams, a director of SCMC, to confirm the content of his witness statement, deal with the additional documents he wished to insert, and to answer questions – principally from Mr Clowes. Mr Robson had also made a short statement, referring to the fact that he produced many reports for distribution to the tenants – all of which were included in the first documents bundle, and confirming the content of the statement by Mr Williams. As it is the nature of Leasehold Valuation Tribunal hearings that more informality is allowed than in a court Mr Clowes' many questions were answered by either Mr Robson, if technical, or by Mr Williams (with Mr Ingram chipping in from time to time), if relating to information provided (or not) to shareholders and tenants by SCMC.

23. Mr Clowes had served no witness statement of his own; merely his two-page Statement in Reply to the application in which he listed his 14 points in dispute. He was therefore encouraged by the chairman to put his case by asking questions of Mr Williams. This he did by taking him through his statement, paragraph by

paragraph, at some length.

24. Grouping them logically, Mr Clowes' concerns can be summarised as follows :

a. Lack of consultation with tenants

b. The unwillingness (or inability) of SCMC to provide tenants with details of the expenditure despite numerous requests

c. The giving of misleading information to tenants, creditors, solicitors and the previous LVT

d. Failure to put items – some in excess of £100,000 – out to competitive tender

e. The appointment of Richard Jackson Partnership as consultant engineers and contract administrator

f. Excessive and unnecessary expenditure in connection with the client manager (Mr Robson) and the consultant engineers (RJP)

g. Excessive and unnecessary expenditure in respect of legal costs

h. Excessive and unnecessary expenditure on miscellaneous items (which were first particularised at the hearing as the carrying out by Mr Robson of experiments not attended by JBS)

i. Starting repairs to the second, third and fourth blocks in the knowledge that costs would far exceed the agreed £17,426 per maisonette (they are now £45,000 per maisonette)

j. Payment of the sum of £110,000 to JBS, not for works done but for "loss of future profits" following termination of its contract

k. Failure to refer this matter earlier to the LVT

l. Claiming monthly service charges throughout the repair period when tenants were not in possession of their properties

m. Refusal to pay or agree payment of compensation, to be offset against the repair charges.

25. On the related subjects of consultation with and provision of information to the tenants Mr Williams was emphatic. Detailed reports had been written by Mr Robson and distributed to tenants regularly, information was provided at AGMs

and at the EGM held in November and adjourned to December 2003, one-to-one surgeries were offered with tenants in advance of such meetings, and a postal ballot had been arranged when it became clear that HSBC, the company's bankers, would not permit a further increase in the overdraft to cover the cost of an application to the LVT for approval of the third charge of the project cost. He referred to copies of Mr Robson's reports and the detailed minutes of the various company meetings, which were included in the documents bundle. In short, the consultation with their fellow tenants was as open and comprehensive as that approved by the last tribunal.

26. Messrs Williams, Robson and Ingram denied misleading tenants, creditors, etc or of failing to provide accurate information. Mr Williams stated :

> Part of due diligence by the directors was to try to pare back the claim by JBS, taking professional advice from Knowles.[11] At one stage you could say there was another £650,000 on the cost, but we could not close it down because the job was constantly changing. What happened at the end of last year was that the company was effectively insolvent, and JBS wanted to adjudicate on the £650,000. The bank changed its mind, and we were reacting to events. We were struggling at the time to finish the project, to keep JBS off our backs, and to take decisions.
>
> Clearly we were not trying to hide anything, and you [Mr Clowes] were asked to join the board, and I think it churlish of you to say now we were trying to hide the figures. The costs were given as parameters. Up to the actual determination of the contract JBS were working within the parameters of the contract – but delaying. When the adjudicator disagreed, effectively the 2nd stage was that now the contract had been wrongly determined there was a further sum due to JBS. That came in at Christmas before last, with them saying : "You owe us another £650,000". That continued until last Christmas, when they made us an offer, just before the CVA; then we were surprised when they attended the CVA. It allowed us to draw a line under it.

27. The greatest disagreement between Mr Williams and Mr Clowes appeared to concern the date on which postal ballot letters were sent out to tenants. The document appears at Tab 10, pages 297 - 301. The first page of the letter, at page 297, shows a date of 12th January 2004, while pages 299 - 301 bear the date

[11] The specialist construction lawyers engaged by SCMC in November 2001

25 January 2004 in the top right corner.[12] The importance was that Mr Clowes claimed that at a meeting he held with Mr Williams no mention was made of a decision, which must already have been taken, to go back on the vote at the EGM to bring the issue of the third charge before an LVT. Mr Williams insisted that his computer had generated a typographical error and that the later date was the correct, and that the decision to seek another vote was not taken until after the directors had taken legal and accountancy advice on the impending insolvency of the company.

28. Mr Williams stated, at paragraph 38(2) of his witness statement, that all three contractors employed in turn on the project were selected after a competitive tendering process. This may technically be accurate, but Mr Robson conveys the real flavour in the transcript of his report to the company EGM held on 7th June 2002. After outlining in considerable detail the problems experienced with JBS, leading to the decision to determine the contract in May 2002, he describes, at page 191, the difficulty in finding contractors :

> I also have to say we've never had a huge choice when it comes to finding contractors willing to do the work. Before tenders were invited, more than a year ago, the engineer combed East Anglia to find experienced contractors wanting to get on our tender list. More said no than yes. Of those that said yes, only a few provided a truly competitive tender. This time round, we've got exactly one competitive tender.[13]
>
> I'm happy with the one we've got. That's just as well. We don't have a reserve.

29. The appointment of Richard Jackson Partnership as consultant engineers and contract administrator, and the rate of remuneration of both RJP, as engineer and contract administrator, and of Mr Robson, as client manager, were fixed by their respective contracts of engagement long before the 2001 tribunal was convened. The reasonableness of the project having been decided upon then, these matters cannot be revisited. In any case, Mr Williams stated that both had agreed to a

[12] Although the ballot paper, at page 301, concludes with a request to return the voting slip immediately before Friday 16th January 2004

[13] A reference to Larcombe & Young, which had worked with RJP on many contracts in the past without dispute

reduced percentage rate once the escalating level of costs became apparent, and by deferring payment until the end of the contract they had been obliged to join in the CVA and take a 10% reduction in their outstanding fees. RJP's proof of debt at document bundle 2, page 449, submitted for the purposes of the CVA, shows an amount outstanding of £160,923.10. Mr Robson's proof of debt, at page 576, shows £104,093.86. Both agreed to accept the reduced sums of £144,830.79 and £93,684.47 respectively. These are the figures used by SCMC in calculating the third charge.

30. On the subject of legal costs incurred, Mr Williams stated that the reality was that the directors and their professional advisers were confronted with numerous legal points. The directors are unpaid, and have to have professional advice to protect everyone. Asked by the chairman whether they had ever challenged bills or asked for a taxation he said that they had not, but went on :

> We did ask for specific pieces of advice, and did compare prices. But we did try to get the best advice. People were recommended to us, and we tried to get the best advice. If the tenants had approached us during the contract and shown us their legal opinion we would have taken it aboard.

There was no evidence before the tribunal to suggest that the advice given was negligent in any way, or that the Respondents (or any other tenant) had sought and obtained legal or other professional advice at any stage, even in connection with these current applications

31. In his report to the EGM on 7th June 2002 Mr Robson had also gone into detail about the cost of legal advice. He said, at page 190 :

> ...we have spent a lot on legal advice. I believe we had no alternative. We have been in a prolonged dispute with an aggressive company which has the backing of a large group with a large turnover, and we know they have employed experts in contract dispute, as well as a firm of London solicitors who specialise in construction law. We could not have stood up to that without our own specialist advice. In these circumstances, which we all wish had never arisen, money on advice has been money well spent. We've had good advice.

He also commented that not all the advice required concerned the contract dispute. Some was required on landlord and tenant law, because not all the tenants wanted to co-operate with the project, on problems with the Party Wall

Act, and on the Housing Grants, Construction and Regeneration Act. Much later, of course, legal advice was required from insolvency specialists.

32. The complaint that excessive and unnecessary expenditure had been incurred on miscellaneous items could not be answered by Mr Williams due to its complete lack of precision. When challenged by the chairman, Mr Clowes stated that he meant the carrying out by Mr Robson of experiments not attended by JBS. Mr Robson answered this at the hearing, but in his presentation to the EGM on 7th June 2002 he had also gone into the reasons why, after JBS refused to allow the adjudicator to set a price for the work of cutting out and also refused to provide any evidence or agree a figure, some independently monitored testing was required. In evidence to the tribunal he said :

> Knowles[14] suggested we should have an independently supervised trial (by Barry Hipwell), and he timed the operations. He found that this obstruction took less than 3 minutes per metre to remove it entirely. As a result of his report the engineer felt that he had been a little overgenerous in his calculation, but we stuck with that. Later on we videoed Larcombe & Young doing the work, and we found it was easier still, and we used it in a later adjudication.

This was a reference to the evidence used successfully by SCMC in the fourth adjudication, on pricing.

33. Dealing with the allegation that the directors had authorised the start of repairs to the second, third and fourth blocks in the knowledge that costs would far exceed the agreed £17,426 per maisonette, Mr Williams said :

> This is 20/20 hindsight. We were assured by JBS that they could take this on the chin. This was discussed at the AGM and the second charge was largely paid up. The third charge was a result of matters outside our control.

He went on :

> We have gone over this many times and my point on Monday was that the contract moved on, it was disrupted by JBS and we were told by Knowles that we could get this money back. At any contract you never know the final cost until its finished. You really are familiar with this because we had discussions throughout. In mid-2003 we had the fifth adjudication, which changed things totally concerning the wrongful determination of contract.

[14] The construction lawyers retained by SCMC

34. Also pertinent are some comments from Mr Robson, first to the June 2002 EGM (at page 191) and secondly to the AGM on 25th June 2003 (at page 225) :

> Something happened... which at the time I thought was relatively unimportant. Babergh District Council served a Notice on us, requiring Sproughton Court to carry out structural repairs. At the time, I thought: "That's what we intend to do. It doesn't put any pressure on us."
>
> It does now. It means that we cannot abandon the scheme. When the contract with Jacksons went sour, we had no option but to press on – whether we pressed on with Jacksons or with Larcombe & Young.

Twelve months later Mr Robson was able to report a dramatic improvement. 39 of the 48 homes now had their Certificate of Structural Adequacy and the rest were due in the following few weeks. A bigger price had been paid than intended, or expected, but he was confident that the uplift in value would still comfortably exceed the cost of repair. This would not have happened if SCMC had done nothing about the contaminated concrete. He thanked Larcombe & Young for their hard work and steady progress.[15]

35. However, he went on to discuss the ongoing dispute with JBS and the referral of the determination of the contract to a fifth adjudication. A copy of the actual adjudication was not before the tribunal, so the passages quoted by Mr Robson to the tenants at the AGM (at pages 225 - 226) are the only available account :

> Our dispute with the original contractors is not over. When they departed, they threatened us with a £½m claim. We certainly didn't want that hanging over our heads until 2008, so we took advice on what to do and we started an Adjudication a few weeks ago.
>
> The subject of the Adjudication was what was a fair cost for breaking out the contaminated concrete. We got the answer yesterday. The Adjudicator says we should pay an extra £14 per metre above the tender price. This is more than I want to pay, more than I think is fair to pay, but it is only a tiny fraction of what the contractor is claiming for. It is not such a good answer as I would have hoped for, but amounts to less than £20,000 as against several hundred thousand.
>
> JBS started a separate Adjudication on the grounds that we should not have determined the contract. We got the answer to that yesterday and it makes very interesting reading. I shall read a couple of bits from it.

[15] A question was asked by a tenant about rumours that Larcombe & Young was in financial difficulties. Sadly, these rumours soon proved to be true, forcing SCMC to look for a third main contractor to finish the job

"They should have been conscious of the problems of decanting residents, providing temporary accommodation and then re-housing them. Instead they appear to have taken a casual approach to the progress. Works were some six months late at the time of the programme Revision D and there was, I consider, no entitlement to an extension of time. Sproughton must have been in despair as to Jackson's ability to complete the works without further substantial delay." Despite which, he went on to say : "I am of the opinion that Sproughton should have first given JBS notice of their interpretation of the position and a final warning to rectify the considered default."

In other words, we should not have determined the contract. This is very disappointing. We have taken advice from TC[16] and we feel confident that the Adjudicator is wrong on a point of law and that it is not necessary to give someone a warning before determining the contract. He said some pretty critical things about JBS and not anything about us. Where this leaves us I'm not exactly sure. It may encourage JBS to claim against us for loss of profit. Evidence is they were not making a profit and only making a loss. Against any claim they make for loss of profit, we would claim damages for their delays. We have a long list of claims, but we should have to spend a lot of money to assemble the evidence and make our case.

36. This leads to the question why SCMC later agreed to pay the sum of £110,000 to JBS, not for works done but for "loss of future profits" following termination of its contract. Mr Williams dealt with this point at paragraph 38(6) of his witness statement and also told the tribunal :

> Effectively, we were about to be taken to an adjudication by JBS on this £650,000. At that time the advice was that we had no money to support an adjudication. Our advice was that if we could not defend we would lose, and would expose the company to a claim of that size. We took insolvency advice, and called the CVA. We were surprised to see JBS at the CVA, and we took the view we could not defend the £650,000 but we should try to draw a line under it.

37. Mr Robson told the tribunal :

> Our legal advisers were saying we should go to arbitration, and would win, but that we should get counsel's opinion, for about £5,000. But the bank would not pay anything other than contractor's cheques at that stage. We might have won, or we could have lost at arbitration. The difference between those two extremes is so vast that it is difficult to advise properly. We had money in the bank to finish. Then, if people willed it, we could go against JBS for our losses. Unfortunately we later

[16] Tony Coles, a solicitor from Knowles, who attended this AGM

lost that opportunity. There was a chance we could come out in credit.

38. The failure of SCMC to bring this matter before the tribunal at an earlier stage is not really material to the present tribunal's decision, save that Mr Clowes does not agree that it was reasonable for the directors to incur the cost of counsel's fee for advising that it was unlikely that the tribunal would object to the issuing of the third charge. The directors had, at the resumed EGM in December 2003, themselves voted to make an application, but they were then stymied by the bank's refusal to meet the cost by extending the overdraft. No explanation was offered by the Respondent tenants why they had not been prepared to incur the costs of making their own application before the company finally did so.

39. Mr Clowes objected to the fact that, while his flat had been in the contractors' possession for about 13 months, he was still being asked to pay the general service charges, details of which appear at tabs 25 & 26 in the second documents bundle. Mr Williams stated that these general items included repairs to leaks in pipes in the block under the contractors' control. Other block owners did want work to be done, so as soon as each block came back people living there still wanted the grass cut. He said that SCMC had an obligation under the lease to provide services. If there was a surplus then it would reduce the size of service charges in the future. He hoped that it would go down to grass and window cleaning in future. Further, he commented that no queries were raised about the service charge budgets at the various AGMs.

40. Mr Clowes asked whether the buildings insurance policies should not have been tailored so that nothing was payable for a block while it was in the contractor's possession, and therefore under its policy of insurance. Mr Williams disagreed, saying that this was unrealistic, as there was one block policy for the entire site – not for individual buildings, and they could not know accurately in advance just how long a block was going to be out of possession. Mr Robson, in his report to the June 2002 EGM, had commented on precisely ths problem of disputed hand-over dates, and delayed completion, when JBS had been the main contractor.

41. Mr Clowes' final point concerned payment by SCMC of compensation to tenants for the costs of obtaining alternative accommodation (if residents) and loss of rental income (if investors) while out of possession during the works. On behalf of SCMC Mr Sheehan stated at the outset that he did not consider that this fell within the tribunal's jurisdiction under section 27A. The tribunal agreed. There was, however, a degree of questioning and to-and-fro between Mr Clowes and Mr Williams and Mr Robson on this issue, but eventually Mr Clowes, in answer to a question by the chairman, agreed that there was never any question of the company being liable to pay compensation to an individual tenant unless it could first recover any such loss from JBS. As that possibility had been dashed, he agreed that there was no claim. Mr Robson had talked of no more than an understanding, although he had asked tenants to keep records in order to assist with a damages claim against JBS should one come to be brought. Quite how this tallies with there being a liquidated damages clause in the contract, with damages fixed (he believed) at £6,000 for each month's delay, was not clear.

42. Mr Clowes called no evidence of his own, and was not cross-examined.

43. Mr Bowden had presented the tribunal with a large volume of paperwork by way of evidence and submissions. However, the chairman pointed out to him that it was neither the tribunal's task to determine the rights and wrongs of a building contract dispute – especially with only one of the parties advancing a case before it, nor to decide whether any of SCMC's professional advisers were guilty of negligence (and hence liable to it in damages). Rather, the tribunal had to decide whether it was reasonable, once problems with an already-approved scheme had arisen, for the directors to incur the further costs of proceeding with the job and obtaining a lot of professional advice from various specialists. Mr Bowden then served a further document, effectively withdrawing a number of the questions he was asking the tribunal to consider, and instead he chose to ask a few careful questions on accounting matters, existing funds in the service charge account to cover normal expenditure, the size of JBS' claim for damages, etc.

44. He asked how long a clerk of works had been employed on site, as £75,000

seemed a lot of money just to check figures. In answer, Mr Robson said that he could not remember the first date of the clerk of works' employment, but that it was before the first adjudication – perhaps in October or November 2001. It carried on after that because of JBS' promise that the work would carry on with good progress. He said that SCMC received a lot of charts which could not have been obtained without him, which provided useful evidence. A clerk of works stayed in post until the end of the JBS contract, employed by RJP, not by SCMC.

45. Mrs Hewitt asked questions concerning the cost of obtaining advice, etc and also why, on the subject of controlling costs, monitoring and administration, a quantity surveyor had not been employed. In reply, Mr Robson said that it was RJP's job to draw up the contract and it should have provided all the information, including drawings and documents. The documents are a quantity surveyor's task. It was something RJP did in-house, as they traditionally do. They do have someone with QS skills whom they call on. If asked to project manage they do so without going outside. However, he had to concede that if RJP had engaged their in-house quantity surveyor he (Mr Robson) never met him or saw him on site.

46. In his closing submissions Mr Clowes argued that the original cost approved by the 2001 tribunal was reasonable but, due to lack of consultation and proper tendering, SCMC should be limited under section 20 to recovery of £1,000 in respect of both the second and third charges. Alternatively, he raised the possibility that the demand in the third charge included the cost of items incurred more than 18 months previously, so were irrecoverable under section 20B. He also argued that it was not reasonable to require tenants temporarily out of possession to pay the two disputed annual service charges, and sought to set-off compensation, which in his case he calculated at £400 per month for 10 months. Other tenants had, he said, calculated their loss on different bases, so each claim would need to be considered individually.

47. On behalf of SCMC Mr Sheehan supplied both the tribunal and other parties with copies of some outline submissions, which he expanded upon slightly at the hearing. They comprise some 11 pages, which it is unnecessary to repeat here.

Findings & decision

48. Having considered the material and evidence before it, both documentary and oral, the tribunal determines that :

a. The general service charges for the years 2001/02 and 2002/03 deal with services which SCMC was required to provide to the estate as a whole under the lease, and there is no legal basis for apportioning the cost block by block, or for excusing certain tenants from liability to pay their full share. The suggestion that the buildings insurance policy should, for the duration of the contract, have been replaced by policies covering each individual building only for those portions of the year in which it was not in contractor's possession is fanciful and unworkable in practice. Because of the delays caused by JBS it was unclear how long each building would be unoccupied.. No evidence was produced showing that such cover could reasonably have been obtained on the market, or that its cost would have been cheaper. These general service charges are therefore allowed in full and are payable by all tenants in their due proportions.

b. The question of any liability to pay compensation for loss of use is not for the tribunal to determine.

c. The terms of the contract, and of the original appointment of Mr Robson and RJP, were matters already agreed before the 2001 tribunal met to consider – and ultimately to approve – the repairs project. These items cannot be reopened now.

d. The directors consulted the tenant/shareholder body and provided as much information as was possible. Messrs Ingram and Williams, both unpaid and without any professional property management qualifications between them, were perhaps a little naïve, asking for specialist (and hence expensive) advice at almost every turn, but they stuck to their posts when no-one else would assist, despite regularly and openly asking for help from their fellow tenants – some of whom may well have been better qualified to help but chose not to assist.

e. Although there is some confusion over the minor matter of the timing and circumstances of the postal ballot, the allegation that the directors deliberately misled their fellow tenants, company creditors, solicitors and

the earlier tribunal is rejected. As was repeatedly made clear by Mr Robson and the directors, until such issues as pricing the work, ending delay, and finding out whether JBS would make a substantial claim against SCMC or it could make a claim against JBS were determined, the financial position was very uncertain. Mr Clowes was chasing a will o' the wisp.

f. When contractually bound to a deliberately obstructive JBS the directors sought advice from specialist construction lawyers on how best progress could be ensured and costs contained. They took that advice. When asking for tenders from a number of replacement contractors they were presented with a choice of only one (which would be a lot cheaper than JBS were demanding to finish the contract) and had to bear in mind that there was a lot of hired equipment on site continuing to cost money.

g. The Adjudications produced a series of unfortunate results, but those affecting the nature and cost of the cutting out were proved wrong by both the speed and ease of work demonstrated by Larcombe & Young, the subsequent contractor.

h. So far as the second and third charges levied by SCMC are concerned, the cost of the adjudications and of investigations involved in them were necessary, but a clear breakdown in relations between project managers and JBS did not help. Again, the directors acted reasonably on the advice of Knowles, their construction lawyers.

i. The section 20B argument, presented rather half-heartedly, is without foundation. Liability to pay the second and third main contractors arose within 18 months of the third charge being levied. So far as liability to JBS was concerned, the cost to be allowed for the additional work was not adjudicated upon until mid-2003, and its claim for wrongful determination was not settled until the CVA in March 2004. In any case, the nature of further liabilities, if not their actual amount, had been fully discussed at meetings and in written reports by Mr Robson from 2002 onwards.

j. The tenants as a corporate body should not be able to avoid personal liability by letting the company go down with the debts, especially where large majorities had voted for the very steps now criticised. As the directors said to the tribunal, when this proposition was put to them :

"Who would deal with us again?"

k. Without proceeding with the repairs the estate would remain blighted. The tribunal believes that the increase in value of each flat exceeds the eventual cost of the work.

l. The costs of bringing this application, being legal costs recoverable under the provisions of the Fifth Schedule in the lease, are recoverable as part of the service charge and were reasonably incurred. Bearing in mind the vote by the tenants at the resumed EGM in December 2003 that the company should apply to the tribunal, and Mr Clowes' complaint that despite that vote it did not do so before issuing the levy for the third charge, his application that such costs should be disallowed is mystifying.

49. The application by SCMC is therefore allowed in full and the cross-application is dismissed. The charges demanded are therefore payable.

50. The tribunal wishes to note the genuine concern by many tenants that the costs of this project have far exceeded those discussed at the tribunal in 2001. They have been the victims of a series of most unfortunate – and largely unforeseeable – events. What Lady Bracknell might have said about the loss of not one but two main contractors would have been unfair. The tribunal wishes to record its understanding that most tenants have not been unwilling to pay but have merely sought a satisfactory explanation for this dramatic escalation in costs, particularly those in respect of professional fees. In an ideal world it may have been possible to obtain legal and other professional services more cheaply, but when faced with a large, well-funded adversary which seemingly adopted a consistently aggressive approach, the directors had little option but to protect the company's interests by seeking urgent defensive advice from recommended professionals. Lawyers tend to work on a piece-work basis, so without knowing how many adjudications there would be, and what other problems would arise, the directors could not possibly have predicted the eventual level of these costs.

.....

Graham Sinclair – Chairman

for the Leasehold Valuation Tribunal