UPPER TRIBUNAL (LANDS CHAMBER)

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UTLC Case Number: LRX/85/2012

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – service charges – cost of repairs to structure of building – "historic neglect" – appeal allowed

IN THE MATTER OF AN APPEAL AGAINST A DECISION OF A LEASEHOLD VALUATION TRIBUNAL OF THE LONDON RENT ASSESSMENT PANEL

BETWEEN:

DAEJAN PROPERTIES LTD **Appellant**

and

SEAN GERALD GRIFFIN
ALPHONSA MATHEW **Respondents**

Re: Crown Terrace
Cricklewood Lane
London
NW2 1EY

Before: Martin Rodger QC, Deputy President and P D McCrea FRICS
Sitting at 45 Bedford Square, London WC1
on
13-14 February 2014

Edward Peters, instructed by Hammond Bale LLP, for the appellant
Brynmor Adams, instructed by Comptons Solicitors LLP, for the respondents

The following cases are referred to in this decision:

Continental Ventures v White [2006] 1 EGLR 85 (LT)

British Telecommunications plc v Sun Life Assurance Society plc [1996] Ch 69 (CA)

Langford Court (Sherbani) v Doren Limited LRX/37/2000

Conway v Jam Factory Freehold Limited [2013] UKUT 0592 (LC)

Windermere Marina Village Ltd v Wild [2014] UKUT 0163 (LC)

Sella House Ltd v Mears [1989] 21 HLR 147 (CA)

Gilje v Chargrove Securities Limited [2002] 1 EGLR 41 (CA)

Arnold v Britton [2013] EWCA civ 902

Schilling v Canary Riverside Development PTE Limited LRX/26/2005

Decision

Introduction

1. Crown Terrace is a three-storey Victorian building in Cricklewood Lane, Barnet, with nine shops on the ground floor and 18 flats on the upper floors. Access to the upper floor flats is by a walkway along which runs a parapet wall supported by concealed steel beams. For very many years the steel beams corroded, unobserved and unrepaired, until in 2008 one of them failed and threatened to tip the parapet into Cricklewood Lane. Emergency repairs were carried out to remove the most dangerous section of the parapet and to replace the failed beam. After further investigation the rest of the parapet was removed and the remaining beams will soon have to be replaced.

2. Each of the flats is let on a long lease which includes a landlord's covenant to keep the structure of Crown Terrace in repair and a tenant's covenant to pay for such repairs through a service charge. This appeal is about who must pay for the work necessitated by the condition of the beams.

3. By a decision given on 20 March 2012 a leasehold valuation tribunal of the London Rent Assessment Panel ("the LVT") found, in summary: that some of the steel beams ought to have been replaced as long ago as about 1960; that one beam had been replaced 20 to 30 years earlier and that all of the beams ought to have been replaced at that time; and that, if the beams had been replaced when they ought to have been, the cost of the work (in particular the emergency work) would have been less than it will now be. As a result of those findings the LVT determined that, while in principle the cost of replacing the beams was recoverable through the service charge, the cost was irrecoverable to the extent that it had been increased by being carried out as an emergency response to the imminent collapse of the parapet. The net effect of the LVT's decision was to reduce the amount recoverable through the service charge by £44,665, which is about 13% of the anticipated total cost of £333,632.

4. The appeal is brought by Daejan Properties Ltd, the owner of Crown Terrace since 1973 and landlord of the flats; the respondents to the appeal are the tenants of two of the flats: Mr Sean Griffin of flat 12 and Ms Alphonsa Mathew of flat 3. The parties are agreed that our decision in this appeal will also determine the rights and obligations of the current or former tenants of another 11 flats at Crown Terrace, listed in the appendix to this decision, all of whom joined in the application to the LVT commenced by Mr Griffin on 20 March 2011. The application sought a determination under section 27A, Landlord and Tenant Act 1985 ("the 1985 Act") of the extent of their liability to contribute towards the cost of the works. That agreement having been confirmed to the Tribunal at the outset of the hearing, an application by Mr Adams to join two further tenants as respondents to the appeal fell away.

5. The appeal is brought with the permission of the Tribunal (George Bartlett QC, President) given on 11 September 2012, which directed that the appeal be by way of a rehearing.

By way of a cross-appeal the respondents have also sought to support the decision of the LVT on additional grounds.

6. Mr Edward Peters of counsel appeared for the appellant. He called Mr Mark Doody, Mr Andrew Dawson, Mr Felix Maguire, and Mr Mark Shevlin as witnesses of fact, and Professor Malcolm Hollis as an expert witness. Mr Brynmor Adams of counsel appeared for the respondents. He called Mr Griffin and Ms Mathew as witnesses of fact, and Mr Rudy Fattal as an expert witness.

Crown Terrace

7. Crown Terrace is a three-storey Victorian terrace. On the ground floor is a row of nine shop units, three of which (including shops 10 and 12) have been divided to form smaller units. On the first and second floors there are 18 separate flats. The design of the building is such that each shop with two flats above forms one of nine self-contained units separated on each side from the adjoining units by party walls running the full height of the building. The ground floor shops extend forward and beyond the upper storeys by a distance of several feet. Above this forward extension, at first floor level, there is an external concrete walkway which gives access to the front doors of the flats.

8. At the front of each shop unit, between the ceiling of the shop and the floor level above, three steel beams span the party walls. Two of these beams are a pair sitting immediately above the shop front. As designed, the inner beam of the pair supported the front edge of the concrete walkway, while the outer of the pair supported the brick parapet wall above. The parapet wall ran along the whole frontage of the building and was topped by metal railings. The third steel beam is located along the inner edge of the walkway, directly below the front elevation of the upper floors.

9. The steel beams were part of the original design of Crown Terrace. As was common at that time, it is likely that they were untreated and unprotected against corrosion. Their dimensions were also inadequate by modern standards, as were the padstones on which they were supported. The front pairs of steel beams were surrounded on all sides by the brickwork of the parapet wall, the shop fronts and the concrete walkway. Those beams were not visible and could not be inspected without extensive opening up works.

10. The appellant, a company within the Freshwater Group, purchased the freehold interest in Crown Terrace in November 1973. Ms Mathew first became the registered proprietor of the lease of Flat 3 in March 2004 and her lease was extended in 2005 to a term of 189 years from 1958; Mr Griffin was granted his lease of Flat 12 in November 2007 for a term of 125 years. Of the other tenants concerned with this appeal, the earliest leasehold interest is that of Mr and Mrs Jain who were granted their lease of flat 11 by the appellant in October 1983.

The remedial works

11. The outer beam of the pair above shop 16 was replaced on a date which cannot be identified with much precision but which we find was before 1990 (the LVT thought it as early as about 1960). The beam above shop 20 has also been replaced in the past, more recently than that over shop 16 and probably between about 1985 and 2000 (although Mr Maguire, who had been employed as a management surveyor by the appellant's Freshwater Group since 1997, had no recollection of the work being done). Neither replacement beam was to a standard that would now be considered satisfactory.

12. In around August 2008 the parapet wall above numbers 10 and 12 cracked and rotated outwards. Photographs show that the rotation was very obvious by the time it was noticed by Mr Maguire on a routine visit to Crown Terrace on 20 August 2008. Temporary propping of the affected section of the parapet wall was immediately installed and an inspection was undertaken by Mr Dawson of JNP Consulting Engineers the following day. As a result of that inspection it became apparent that the beams above shops 10 and 12 had failed. There is a dispute as to whether the rotation of the parapet wall happened gradually or suddenly.

13. The appellant has carried out a series of works which were conveniently broken down by Professor Hollis before the LVT as follows;

Phase 1

This involved the removal of the parapet wall above shops 10 and 12, propping of the front pair of steel beams above shops 10 and 12, and the fascias of those shops being opened to expose those beams. The cost of the work was £17,760.71 (including VAT at 17.5%); it was completed over a period of four days before 30 October 2008 when an invoice was delivered by the contractor.

Phase 2

The replacement of the two outer beams above shops 10 and 12, the reinstatement of the ceilings to those shops, and other works. The cost of the work was £27,039.52. In addition there were legal fees of £1,711.00, incurred in a previous application to the LVT for a dispensation from the consultation requirement under s. 20 of the Landlord and Tenant Act 1985, and engineer's fees of £7,690.22. The bulk of this work had been carried out by 16 February 2009 under a contract entered into on 24 November 2008. The costs and fees included VAT at 15% for work done after 1 December 2008 and at 17.5% for work done before that date.

Phase 3

Investigation of the front beams above the seven shops other than Numbers 10 and 12. These investigations were undertaken in July 2010 and resulted in advice that the remainder of the brick parapet wall ought urgently to be removed and the walkway propped and that the front pair of beams above each of the shops required replacement. The cost of the destructive opening up and inspection work was £15,843.23 (including VAT once more at 17.5%).

Phase 4

Work within and above the other seven shops to make safe the walkway and parapet wall, comprising the removal of fascias, the installation of temporary fascias, the removal of the parapet wall, insertion of a temporary railing in the scaffolding and the installation of temporary shop fronts leaving them waterproof. The work was carried out in August 2010 at a cost of £84,284.54 (including VAT at 17.5%).

The following additional work has also been proposed, but not yet carried out:

Phase 5

The work will comprise the removal of the temporary protection and railings, the casting of a new parapet wall, the provision of new steelwork above the shop openings, the reinstatement of railings and walkway up to the new concrete kerb, the reinstatement of the former shop signs and the removal of temporary scaffolding. The proposed cost of the work in 2010 was £174,115.21 including fees and VAT at 20%.

14. The estimated cost of carrying out the Phase 5 work was to be included by the appellant in an interim service charge account for the year 2010-11. The scale of the estimated charges, coming on top of costs already included in previous service charge demands, prompted the respondents to apply to the LVT for a determination of their liability to contribute to the works. While the proceedings before the LVT and this appeal from its decision have progressed, no further work has been carried out at Crown Terrace.

15. There were also other works referred to as Phases 6 and 7 but the parties agree that these do not form part of the appeal.

The LVT's decision

16. We have summarised the LVT's main conclusions in paragraph 3 above. In paragraph 17 of its decision it made six key findings of fact concerning the chronology of the deterioration of all the beams and the replacement of the beams above shops 16 and 20. The LVT found that all of the front beams had been in a condition which required that they be replaced, rather than repaired, from as early as about 1960, and all should have been replaced when the beam above shop 16 was replaced 20 to 30 years earlier. This led the LVT to conclude, at paragraph 17(vi), that:

> "If the other front steel beams had been replaced when the beam at No. 16 was replaced, some of the major works would not have been required – in particular emergency works – which would have resulted in a reduction of the cost of the major works."

17. In respect of Phase 1, the LVT allowed the cost of the opening of the fascias above shops 10 and 12, which they determined at £4,500 (including VAT). The cost of the remaining Phase 1 work was found to be reasonable, but was disallowed because the temporary removal

and replacement of the parapet wall and the temporary propping would not have been necessary had the beams been replaced at the same time as those at shop 16.

18. The LVT allowed £17,500 towards the cost of the Phase 2 work (other than the legal and engineers fees), on the basis that some part of the cost was unexplained, some of the work had been duplicated in other phases, and some would not have been necessary at all but for the "emergency", which would have been avoided had the beams above shops 10 and 12 been replaced 20 or 30 years previously at the same time as the beam above shop 16. Legal fees of £1,711 for the application for dispensation from consultation were disallowed on the same basis. Engineer's fees of £7,690.22, were found by the LVT to be reasonable but only £5,000 was allowed on the same basis as before, namely that some of the work would not have been required "but for the emergency".

19. The LVT allowed the cost of the Phase 3 investigative work in full, on the basis that all of the work would have been required even if it had been undertaken at the same time as the replacement of the beam above shop 16. The LVT stated that it would not be proportionate to consider whether the work might have been carried out more cheaply at an earlier date, or to consider the countervailing benefit to the tenants of their retaining the use of their own money while the work remained undone. The parties to the appeal have invited us to adopt the same approach, which we agree is sensible.

20. In respect of Phase 4, the LVT allowed £70,000 (including VAT) of the total cost of £84.284.54 on the basis that some part of the work had been duplicated in other phases. The LVT explained that the evidence was not sufficient to enable any exact calculation and that it had settled on this figure doing the best it could.

21. The LVT exercised its jurisdiction under s. 27A(3) of the 1985 Act to find that the proposed cost of Phase 5 of £174,115 was a reasonable sum which could be included in full as an interim service charge amount (being based on the lowest of three tenders obtained for the remaining work).

22. In paragraph 58 of its decision the LVT referred to the tenants' claim for "a set-off on the basis of historic neglect and loss of enjoyment". It allowed a set-off of a modest sum of £187.50 per flat for each of the flats affected by the relatively minor loss of enjoyment caused by the emergency works. This was based on a total of £1,000 a year for 3 years divided between 16 flats (from which we infer that the LVT found 2 flats were unaffected by the disruption). In reaching this assessment the LVT decided that the bulk of the work (including in particular the whole of the Phase 5 work) would have been necessary in any event and was not affected by "historic neglect".

23. The LVT also acceded to an application by the tenants under s. 20C of the 1985 Act that no part of the costs incurred by the appellant in connection with the proceedings themselves should be added to the service charge.

Common ground

24. In this appeal there was the following common ground between the parties' respective counsel and experts:

a. That the LVT's decision was wrong in law and on the facts, (although the parties cite different reasons for this contention).

b. That there was no evidence to support the LVT's conclusion that the steel beams required replacement from about 1960.

c. That the appellant was required by its repairing covenants in the various leases to keep the steel beams in repair.

d. That, until the failure of the beam above shops 10 and 12, there was nothing to alert the appellant to the need to replace the beams; there had therefore been no reason for the appellant to carry out any opening up or other destructive inspection work.

e. That by the time each tenant acquired their lease, the appellant was already in breach of covenant and under an obligation to replace the beams, despite having no actual knowledge of their condition.

f. That it was necessary and appropriate for the appellant to carry out Phases 1-5 of the work, and that all of the beams required replacement owing to their corroded condition.

g. That, in principle, the appellant was entitled under the service charge provisions of each lease to recover the cost of repairs.

h. That the works required within Phases 1 – 5 would be substantially the same whether the work was done as one continuous programme or as separate programmes.

i. That the work done in Phases 1 – 4 had been carried out to a reasonable standard.

j. That the engineers' fees as part of Phase 2 were reasonable.

Areas of dispute

25. The main area of dispute between the parties was the respondents' claim that their service charge liability for Phases 1-5 should be reduced for one or both of the following reasons: (1) because Phases 1-5 could have been undertaken more cheaply if they had been tendered and contracted as a single programme (although it was agreed that the work itself would have been substantially the same); or (2) because had the work been carried out earlier it would not have been done as emergency work and a saving would have been made.

26. Mr Adams supported the respondents' claim to a reduction in their liability on the basis that the cost of the works was greater than it would have been if the work had been done when it ought to have been done, and that the respondents were entitled to set-off against their service

charges so much of the costs as had been caused by the appellant's breach of its repairing covenant.

27. Mr Peters argued that all of the costs had been reasonably incurred by the appellant in discharging its repairing obligations owed to the tenants, and that there was no basis on the evidence for the conclusion that the works would have been cheaper if they had been undertaken at any earlier time

Factual evidence

28. A large proportion of the factual evidence was given on issues which we consider to be peripheral to the main areas of dispute; we summarise below the evidence given where it was relevant, or where necessary for background.

29. Mr Felix Maguire was employed as a management surveyor by the Freshwater Group from 1997 until 2010, and visited Crown Terrace approximately every week or so throughout that period. He could not recall any of the steel beams being replaced in his time, nor to his knowledge had the beams been exposed for inspection until 2008.

30. Mr Maguire said that he had not noticed any deflection of the parapet wall on his periodic inspections until 20 August 2008 when he noticed a significant deflection to the wall above shops 10 and 12 as shown in the photographs produced to us. He immediately reported this to his superior, Mr Shevlin.

31. Mr Mark Shevlin BSc(Hons) has been employed by the Freshwater Group as a building surveyor since July 2005. Following Mr Maguire's report of a structural problem on 20 August 2008, he arranged for the parapet wall to be temporarily supported and instructed JNP Group Consulting Engineers ("JNP") to advise.

32. Mr Andrew Dawson BSc CEng MICE and Mr Mark Doody BSc (Hons) CEng MICE are both chartered civil engineers, employed at the relevant time by JNP. Mr Dawson inspected the parapet wall on 21 August 2008. He considered that it had become structurally unsafe and that the steel beams required urgent replacement. He advised Mr Shelvin to provide temporary propping to the shop premises.

33. Mr Doody inspected Crown Terrace on 3 October 2008, by which time scaffolding had been erected to shops 10 and 12 and the shop fascias removed. He found that the front beams above shops 10 and 12 had severely corroded and the outer beams had almost entirely disintegrated. Mr Doody considered that it had not previously been possible to inspect the steel beams until the signs and fascia boards, some of which were electric, had been dismantled and removed and scaffolding erected.

34. Mr Shevlin explained that, given the urgency of the situation, there had not been time to consult the tenants of Crown Terrace before Lambourn Contracts Ltd ("Lambourn") was instructed urgently to carry out the Phase 1 and Phase 2 work in August 2008. Lambourn had worked satisfactorily for Freshwater in the past and Mr Doody was appointed as contract administrator. The LVT subsequently granted dispensation from the statutory consultation requirements for the Phase 1 and 2 works on 17 December 2008.

35. Mr Shelvin confirmed that Mr Ray Barnes, a regional surveyor with the Freshwater Group, had also inspected Crown Terrace at the time of the Phase 1 and 2 works. On 8 October 2008 Mr Barnes sent a memo to his colleague, Mr Chris Hall, commenting on what he had observed, as follows:

> "It is my opinion that all the other steel beams with the exception of one supporting the walkways will be in a condition that will require replacement. It is possible to see one end of the beam that has been replaced which has been attached to an adjacent corroded beam, which means they are not secure. I suggest that once the works to the steels we have exposed is complete, we should investigate all of the other front support steel beams to discover whether they are in a safe condition or require replacement."

Mr Shelvin himself said he had remained concerned over the condition of the beams, but it was not possible to inspect them without removing shop signs and fascias. For reasons which were not explained, despite Mr Barnes' memo to his colleague further investigation of the condition of the remaining beams was not regarded as urgent and Mr Shevlin did not commence a statutory consultation exercise in anticipation of the Phase 3 investigative works until December 2009.

36. As part of those investigative works, Mr Dawson carried out a further inspection on 20th July 2010, when he was able to view the exposed beams above shops 18, 16, 14 and 8. The outer beam above shop 16 had been replaced in the past but he observed that it had already corroded. The original beams above shops 18, 14 and 8 showed severe corrosion which, in Mr Dawson's opinion affected their structural capacity. It had been possible for him to feel behind the outer beams to assess the condition of the inner beams, and these were also corroded. Mr Dawson was asked by the appellant on 20 July 2010 whether the structure would remain safe for the six months which was required for them to carry out a further statutory consultation with the tenants. He advised that he could not guarantee the safety of the beams for that period.

37. Following Mr Dawson's inspection and recommendations, the Phase 4 work (to make safe the remainder of the parapet wall) was carried out as an emergency by Lambourn in July 2010. The LVT subsequently granted dispensation from consultation for this work on 20 December 2010.

38. The Phase 5 work was then the subject of further consultation with the tenants and a tendering exercise in which Lambourn provided the lowest tender. The Phase 5 work remains outstanding pending this appeal.

39. As far as the cost of the works was concerned, Mr Doody accepted in cross examination that had the beams above the remaining seven shops been replaced at the same time as those above shops 10 and 12, there may have been some economies of scale, but he was not able to quantify these. The scale of work would have been similar for seven units in comparison with nine, but on the basis of works being competitively tendered, there might have been some economies in scaffolding costs or preliminaries. The beams above shops 10 and 12 had, however, been replaced as emergency works without time to put the project out to tender.

40. Neither Mr Doody nor Mr Dawson was formally called as an expert. Nonetheless, both were asked their views on the state of the beams above the remaining seven shops in 2008. Mr Dawson said that had he been able to inspect the beams in 2008, he believed he would have provided the same advice in respect of the urgent need to replace them as he had in 2010. Mr Doody also considered that had the opening up works to inspect the beams been carried out in August 2008 rather than July 2010, the replacement of those beams would also have been considered to be an emergency. In those circumstances Mr Doody thought that the cost of replacement of all of the beams would have been disproportionately higher than the cost settled on by competitive tender. In addition, he considered in those circumstances the cost of scaffolding would have been similar or if anything higher than had actually been the case.

41. Mr Doody considered that had the beams been exposed 15 years before, they would have been sufficiently corroded at that point to the extent that replacement would have been required as an emergency. He did not consider that there would have been any saving in his firm's fees had the works had been carried out as one programme.

42. The Respondents, Mr Griffin and Ms Mathew, both agreed that there was a general lack of maintenance of Crown Terrace by the appellant. Ms Mathew said that water occasionally pooled on the walkway to a depth of approximately 20 to 25cm. Mr Griffin's estimate of the depth of ponding was about 4cm.

43. The only point of real dispute in the factual evidence concerned the question whether the deflection of the parapet had been capable of observation before October 2008. Ms Mathew thought that she had been able to see the wall bowing over a considerable period. She suggested in a witness statement prepared for the appeal that she had first noticed in 2004. Despite this evidence, a home information pack commissioned by Ms Mathew in June 2008 made no mention of any cracking to the parapet wall. She accepted in cross examination that she contacted the appellant on a number of occasions regarding management issues, including pooling water on the walkway and a leak from the flat above hers, but that she made no complaint about the condition of the parapet wall until 2008. Nor had Mr Griffin observed any deflection above shops 10 and 12, although he saw cracks in the asphalt cover of the walkway and said that the parapet wall wasn't in particularly good repair.

44. Mr Dawson considered that the rotation of the parapet wall would have happened relatively quickly. This was consistent with the evidence of Mr Maguire and with that of Mr Shelvin, who confirmed that the appellant had no record of any report from any of the tenants of

Crown Terrace of the parapet wall deflecting or being unsound. Mr Doody also considered that the rotation of the parapet wall would have been a sudden event, caused by the abrupt failure of the beam, rather than a more gradual process.

45. We will comment on this disagreement further after considering the expert evidence which bears on the mechanism of failure of the steel beams.

The expert evidence

46. From the extensive written and oral evidence given, we summarise below the expert evidence of Mr Fattal, called by the Respondents, and Professor Hollis, called on behalf of the Appellant, so far as it affects the issues now in dispute.

Mr Fattal

47. Mr Rudy Fattal BA (Hons) MSc DipImp DipSurv MRICS is a chartered surveyor and sole principal of RD&D Associates. He first inspected Crown Terrace on 15 March 2011, when he had observed blocked drainage gullies and some water ponding on the walkway during a time of modest rainfall.

48. Mr Fattal considered that the damage and corrosion of the steel beams was due to prolonged water penetration through the defective parapet wall and through splits and defects in the asphalt membrane covering the walkway. He thought it was likely that corrosion was fairly advanced before the structure gave way, and that it had been occurring gradually over decades. He considered that the deflection of the beam is likely to have commenced 10-15 years after the onset of water penetration, although it was impossible to say when that point had been reached.

49. Mr Fattal's opinion was that the rotation of the parapet wall is likely to have been a gradual process, rather than a sudden event, and ought to have been apparent to the appellant from a relatively early stage. He said that had the failure of the beam been sudden there would have been collateral damage to the adjoining areas of the walkway and the parapet wall. On his inspections he had seen no evidence that there had been any separation of the asphalt surface of the walkway from the adjoining wall such as would have occurred if the failure had been sudden.

50. Whilst there may have been little visible deflection to the parapet wall in the early years of corrosion, there would have been clear evidence of cracks or splits which would have alerted the appellant to actual or potential water penetration, and the likelihood of further concealed damage. Mr Fattal considered that had the appellant acted on this evidence at an early stage, the beams would not have been affected to the degree they were before repairs were undertaken, and the emergency works could have been avoided. Even had the appellant not carried out remedial work immediately, it could still have carried out work at any time for

several years before the damage to the steel beams became irreparable. He thought it highly likely that only some sections of the steel beams may have had to be exposed and strengthened. Wholesale replacement of the beams would then have been avoided and the cost of the strengthening work was likely to have been no more than circa 20% of the actual cost of the emergency works.

51. In his expert report, Mr Fattal said that had the work actually done not been undertaken as an emergency, all phases could have been carried out on a tendered basis, as one project, which would have resulted in an overall saving of circa 30%.

52. Mr Fattal agreed that it was not possible to inspect the beams without some form of opening up, but considered that it would have been possible to carry out a limited inspection of the front beams at relatively low cost, and without removing the whole shop front in each case. He accepted that an inspection of the inner beams would involve more intrusive work. He also accepted in cross examination that until the bowing of the parapet wall and prior to any visible defect in the surface of the walkway became visible there was no reason for the appellant to carry out invasive inspection works.

53. Mr Fattal was quite clear in stating the limitations of his evidence. He considered that it was impossible to say when corrosion of the beams had reached the point when their replacement, as opposed to repair, became unavoidable. It was not possible to know when corrosion had commenced, and while it was likely that replacement would have become necessary after 10 or 15 years of corrosion it was impossible for him to express a view on when that point had been reached. Mr Fattal said it was "quite possible" that had the appellant opened up the beams 15 years before 2008 they would have been found to be in a condition which necessitated emergency remedial work and their wholesale replacement would have been required.

54. In terms of the cost of work, Mr Fattal agreed that all of the work in Phases 1 and 2 was necessary and appropriate. He accepted that the engineer's fees were reasonable for the work involved.

55. In respect of Phase 3, Mr Fattal considered that while the appellant was carrying out the Phase 1 and 2 work, it would have been relatively easy to carry out a sufficient limited inspection to disclose the existence of a similar problem to the remainder of the beams, which would have enabled the appellant to carry out the remainder of the work as one project.

56. Mr Fattal accepted that the whole of the Phase 4 work had been necessary and appropriate, and that it was required to be carried out on an urgent basis; the Phase 5 work was also necessary and appropriate. He had no objection to the actual work itself, although he expressed some surprise at the scale of the final cost. He considered that there was some duplication in site set up in the different stages.

57. Mr Fattal and Professor Hollis agreed that had the works been done as a single programme, starting in 2008, the same works would all have had to be carried out, and that this would also have been true if the works had started in 2000. Mr Fattal also accepted that had the beams been found to require replacement 15 years before 2008, the same physical work would again have been required.

58. Mr Fattal nonetheless considered that the total cost of the remedial work could have been reduced. There were two main reasons for this. First, a saving of 10 to 15% could have been achieved if the whole programme of work had been undertaken under a single contract. He settled on a saving of 12.5%, but accepted that this was not scientific. The saving would have been achieved through economies of scale as a result of tendering the work as one contract. These would include reductions on overheads and supervision, and the duration of the contract would have been shortened, meaning savings on preliminaries, setting up and scaffolding. He accepted that he had not itemised these in detail and that they were based on his experience of similar contracts. Secondly, Mr Fattal considered that contractors would have accepted a profit margin of 10% to 15% for a job worth £300,000, whereas they would require a 20% margin on a contract of only £5,000. He could not demonstrate whether the contractor for Phases 1, 2 and 4, which were not tendered, built in a higher profit margin than the Phase 3 works which were not.

59. Mr Fattal also thought that there could have been a further saving of around 15% had the Phase 5 work been re-tendered, as only three contractors had provided a quote. In his view the cost of the work was generally too high and he would have expected it to be less. (In closing Mr Adams did not rely on this evidence, as he accepted that once the Phase 5 work was undertaken it would be open to the respondents to challenge the cost if it was then considered to be unreasonable).

Professor Hollis

60. Professor Hollis is a chartered surveyor, and has been Professor of Building Pathology at Reading University since 1988.

61. He had inspected the steel beams at Crown Terrace while they were exposed in 2010 and had noted that the outer beams were generally in worse condition than the inner beams. He considered that the pattern of failure of the beams was consistent with a combination of condensation and water penetration from the outside, largely through the shop fascias, and moisture entering the brick parapet wall from the rear. He said that had penetrating moisture been the sole cause of corrosion then he would have expected the inner beams to be in worse condition than the outer ones, which was not the case.

62. Professor Hollis believed that the unprotected steel beams would have shown oxidisation within 10-20 years of the building having being erected towards the end of the 19th century. Corrosion would have started slowly and after a further period of 30 to 50 years or so there would have been a visible loss of metal had the beams been exposed for inspection. Thereafter

corrosion would have accelerated and replacement of the beams would have been necessary after about 70 years. In his view, anyone observing the state of the outer steel beam in the 30 years predating his inspection would have recommended their replacement.

63. Based on examples of steel corrosion in other buildings, and studies he had made of rates of corrosion, Professor Hollis considered that the time required for corrosion to progress to the extent he had observed at Crown Terrace, as shown on the photographs in evidence, would have been in the order of 50 years. He considered that the appearance of the steel beams in 2008 would have been similar to their appearance 15 years earlier. It was likely that you would have had to go back at least 30 years before an inspection of the beams would have revealed them to be to be safe enough not to require replacement on an emergency basis.

64. Professor Hollis disagreed with Mr Fattal's assessment of the mechanism of failure of the beams and said that it was highly likely the rotation of the parapet wall would have been relatively sudden rather than gradual. In his experience steel tended to fracture as a result of a specific trigger after it had been progressively weakened over a period of years. He doubted Ms Mathews' account of having observed a gradual rotation of the parapet wall, and thought it more likely that the movement would have been visible only for a matter of days before the Phase 1 work was undertaken.

65. Professor Hollis also took issue with Mr Fattal's view that the work could have been undertaken more cheaply as part of a single contract. None of the work could have been avoided even if it had all been done as a single programme, and Professor Hollis was not comfortable with the concept of giving a percentage of reduction in cost because he could not identify what could have been avoided. Preliminaries might have been less, but he doubted it. He also doubted that the whole of the building could have been scaffolded (so saving on setting up costs) given the disruption that that would have caused to the traders on the ground floor.

66. A simple comparison put to him by Mr Adams between the cost of the work at shops 10 and 12 and the costs for later Phases was not accepted by Professor Hollis because of uncertainties in what had been included in the different invoices relied on. This was a risky project with the potential for liabilities given the shops below and the public street; there had been a higher risk associated with the work at shops 10 and 12 owing to the precarious condition of the wall, whereas there was a lesser risk for the remaining shops. The insurance costs for shops 10 and 12 were likely to have been higher and that also might explain the relatively greater expense of the Phase 2 works. Professor Hollis was not surprised that the cost per shop unit of cutting back ceilings and making good shop fronts for the remaining seven shops would be lower than for the first two, because the contractors would be more familiar with the construction, where services were etc, whereas for the first two units they would have been somewhat in the dark. In essence, a like for like comparison could not be made.

67. Professor Hollis also had difficulty in accepting that there would be any saving in scaffolding costs, because it would need to be erected and dismantled the same number of times. He considered the comparison to be too broad brush to be useful.

68. Professor Hollis struggled with Mr Fattal's suggestion of a general reduction in the contractor's profit margin for quantum, as the project was not one in the order of £10 million. He considered that there would not have been much of a difference as the contractor would still require their profit on the work involved.

69. Finally, he disagreed with Mr Fattal's approach of applying a general percentage to the cost of the project as a whole, and he considered that, to be able to demonstrate with any cogency that a reduction could have been achieved under a single contract, all of the invoices would have had to be looked at in detail to ascertain what (if any) saving could have been made.

Submissions

70. On behalf of the appellant, Mr Peters submitted that there had been no basis for the LVT to disallow the recovery of some of the cost of work through the service charge. It was common ground that the works were necessary and appropriate at the time they were undertaken, that the appellant was obliged to carry out the work under the terms of the leases, and that the work had been done to a reasonable standard. The underlying reasons for the work being required were that, when Crown Terrace was built, the steel beams were of inadequate dimensions and had not been protected from corrosion. Their eventual replacement was therefore inevitable, as the LVT had accepted.

71. Having concluded that the beams ought to have been replaced in about 1960, the LVT had been wrong to accept the respondent's "historic breach" argument because none of the leaseholders had any valid claim to damages which could be set off against their liability to pay the service charge. Although the appellant had been in breach of covenant by not carrying out repairs sooner, that breach had caused no loss. A leaseholder could not set off a claim to damages for a breach of covenant which had occurred before the leaseholder acquired his or her interest. It was common ground that the same work would have been required to replace the beams at all times since the earliest of the leaseholders had acquired their interest in their flat. It therefore followed that, whenever the appellant had carried out the work, the respondents and the current leaseholders would have been required to pay for it through the service charge.

72. Mr Peters relied upon Professor Hollis's evidence that the beams would have started corroding when they were approximately 20 years old, and that had they been inspected at any time in the 30 years predating their replacement they would have been shown to be beyond repair and in a condition which necessitated replacement.

73. The earliest date on which any of the current leaseholders had acquired a lease of one of the flats at Crown Terrace was 1983, being Mr and Mrs Jain of flat 11. At that time the replacement, rather than repair, of the beams was already required. Indeed, that there was no clear evidence that emergency works would have not been required in 1983. From the time that the remainder of the current leaseholders acquired their interests, from 1995 (flat 8) onwards, any inspection of the beams would have shown that emergency work was required.

74. Mr Peters referred to the work done. Had the work been done as one programme in 2008, the experts were agreed that the same work would have been carried out. He said that the reasons for phasing were logical and reasonable. The Phase 1 and 2 work was done when that it was evident that there was an urgent problem. None of the tenants objected to the landlord's dispensation application to the LVT, which was granted.

75. In respect of the Phase 3 works, the landlord had a judgment to make as to whether to push ahead without consulting the tenants, but that whilst there was a suspicion that the other beams were in a similar state to those above shops 10 and 12, there was no knowledge that they were. By reason of the delay in undertaking immediate investigative work the tenants had obtained the benefit of the Phase 3 works being tendered and the lowest tender being accepted by the appellant.

76. In respect of Phase 4, it was necessary for the work to be done urgently and again there was no objection to the appellant's application to the LVT for dispensation from the statutory consultation requirements. The Phase 5 work was competitively tendered, although had not yet been done.

77. Although Phases 1, 2 and 4 had not been put out to tender, some comfort could be drawn from the fact that they were carried out by the successful tendering contractor of Phase 3, and of the proposed Phase 5. Accordingly, Mr Peters submitted, for all five phases, the costs incurred were reasonable in all respects.

78. Mr Peters submitted that the LVT posed the wrong questions. All of the Phase 1 work would have been required in any event. In respect of Phase 2, he confirmed that the figure contended for by the appellant was £27,039.52, rather than the provisional figure of £25,687 plus an estimated balance of £5,150.00. Phases 3 and 5 were allowed in full, and that in respect of Phase 4 it was common ground between the experts that the same works would have been required.

79. Mr Peters submitted that while the respondents accepted that the LVT was wrong on the facts and the law, their new argument that some costs could have been avoided had the work been carried out earlier or programmed in some different way was equally unsustainable.

80. On behalf of the respondents, Mr Adams did not seek to support he LVT's reasoning, which he described as flawed. His fundamental point was that by neglecting to undertake the required repairs between its acquisition of Crown Terrace in 1973 and the failure of the beams in 2008, the appellant had allowed an emergency to develop, which had been more expensive to remedy than would have been the case if the same work had been undertaken in a timely manner. The difference between the costs which would have been incurred under a timely programme and the costs actually incurred was available to the respondents as a claim in damages which could be set off against their liability to pay the full amount of the service charge.

81. Mr Adams submitted that the urgency in replacing the failed beams above numbers 10 and 12, and the decision not to investigate the beams above the other shops at the same time meant that the project of renewing the beams and the parapet wall had proceeded unnecessarily in two distinct stages with consequential duplication of costs. A single project could have been carried out (though it would also have involved distinct stages) to deal with all nine shop units. Mr Adams relied upon Mr Fattal's evidence that a discount of 12.5% could have been achieved through the avoidance of the emergency and economies of scale, and noted that the discount determined by the LVT had also been about 12%. He invited us to accept Mr Fattal's view that there could have been reduction in costs at the start and end of the project, and a reduction in the contractor's profit margin.

82. Mr Adams sought to illustrate the duplication of costs by relying on the comparison he had put to Professor Hollis in cross examination (see paragraph 67 above). He submitted that there was duplication in the start and end of project costs. As the amount or work done in Phase 1 was much smaller, the cost per shop was disproportionately higher. The scaffolding costs of £3,318.68 for Phase 1 equated to £1,659.34 per shop, whereas for Phase 4 the cost of £6,251.00 equated to £893.00 per shop. Similarly preliminaries equated to £1,829.79 per shop for Phase 1 compared with £1,244.00 for Phase 4.

83. Mr Adams also suggested that the cost of cutting back the ceilings and making good shop fronts in Phase 2, for two shops, equated to £2,062.50 per shop whereas in Phase 5 the cost of the same items equated to £552.86. Removing temporary propping, clearing the site and scaffold hire equated to £1,406.63 per shop in Phase 2, and is proposed to cost £1,382.86 in Phase 5.

84. Mr Adams submitted that carrying out the work in several stages prolonged the period of disruption and inconvenience to the tenants. The LVT had awarded each tenant a modest sum of £187.50 to reflect loss of enjoyment, and Mr Adams requested that the Tribunal do the same.

85. Although the LVT had determined that approximately 10% of the service charges were not payable, Mr Adams asked the Tribunal to rely on Mr Fattal's figure of 12.5% given in oral evidence. In any event, he said, Professor Hollis was plainly wrong to suggest that the appellant's delay in effecting the repairs had resulted in no increase in costs.

Discussion

86. It is common ground, and we accept, that the LVT's focus on the condition of the steel beams in the 1960's was inappropriate and could provide no basis for its conclusion that the service charge should be reduced on the basis of "historic neglect". The appellant did not purchase the freehold interest in Crown Terrace until 1973, and any failure to carry out remedial work in the 1960s was not its responsibility. Moreover, none of the current leases in the building existed in the 1960s.

87. The earliest date that the respondents, or any of the original applicants to the LVT, became the registered proprietor of a leasehold interest of a flat at Crown Terrace was in 1983, when Mr and Mrs Jain became lessees of flat 11. Mr Peters' submissions on this aspect of the case are clearly correct. None of the leaseholders has any entitlement to damages referable to breaches of covenant committed by the appellant between 1973 and the date on which the leaseholder acquired his or her own interest in their lease. The assignee of a lease granted before 1 January 1996 cannot maintain an action for a breach of covenant which occurred before the assignment (see Woodfall's Law of Landlord and Tenant, para. 16.133). The same is true of a lease granted after that date by virtue of s. 23(1), Landlord and Tenant (Covenants) Act 1995.

88. As the Lands Tribunal (HH Judge Rich QC) explained in *Continental Ventures v White* [2006] 1 EGLR 85 an allegation of historic neglect does not touch on the question posed by s. 19(1)(a), Landlord and Tenant Act 1985, namely, whether the costs of remedial work have been reasonably incurred and so are capable of forming part of the relevant costs to be included in a service charge. The question of what the cost of repair is does not depend on whether the repairs ought to have been allowed to accrue. The reasonableness of incurring the cost of remedial work cannot depend on how the need for a remedy arose.

89. The only route by which an allegation of historic neglect may provide a defence to a claim for service charges is if it can be shown that, but for a failure by the landlord to make good a defect at the time required by its covenant, part of the cost eventually incurred in remedying that defect, or the whole of the cost of remedying consequential defects, would have been avoided. In those circumstances the tenant to whom the repairing obligation was owed has a claim in damages for breach of covenant, and that claim may be set off against the same tenant's liability to contribute through the service charge to the cost of the remedial work. The damages which the tenant could claim, and the corresponding set off available in such a case, is comprised of two elements: first, the amount by which the cost of remedial work has increased as a result of the landlord's failure to carry out the work at the earliest time it was obliged to do so; and, secondly, any sum which the tenant is entitled to receive in general damages for inconvenience or discomfort if the demised premises themselves were affected by the landlord's breach of covenant.

90. The repairing covenant in this case required the appellant to keep the structure of Crown Terrace in repair. It is common ground that the appellant has been in breach of its covenant since it acquired its interest in the freehold in 1973, because it is agreed that the steel beams supporting the walkway had deteriorated significantly from their original condition by that time. It is also not in dispute that the appellant's obligation to repair did not depend on it having actual notice of the condition of the beams. Where part of a building is not demised, but remains within the possession of a landlord which has covenanted to keep it in repair, the risk of undetected deterioration falls on the landlord whether or not it has, or could have, knowledge of the condition of that part (see *British Telecommunications plc v Sun Life Assurance Society plc* [1996] Ch 69).

91. The principal issue for us to consider is therefore whether the remedial work which the appellant carried out in 2008 and 2010, and the further work which it proposes to carry out in future, could have been carried out at a lower cost had it been done earlier. This assessment must be made separately for both of the respondents and for each of the other leaseholders who joined as applicants

in the original application to the LVT, because it depends upon the repairing obligation owed to each of them by the appellant from the time they first became registered proprietors of their respective leasehold interests.

92. The respondents claim to be entitled to a set off against their service charge liability on two grounds. The first is the appellant's suggestion that earlier intervention would have meant the beams could have been repaired, rather than being replaced in their entirety, while the second is their contention that the some of the remedial work could have been avoided or its cost reduced if it had been done earlier. We can state our conclusions on those issues quite shortly.

93. We prefer Professor Hollis's evidence to Mr Fattal's in respect of the cause of beam failure. If the severe corrosion of the beams had been caused by direct water ingress from a failure of the asphalt covering of the walkway, it is more likely than not that, of the pair of beams supporting the front of the walkway, the inner beam in each case would have been as badly, or more badly damaged than the front beam. The evidence is to the contrary, and that in each case the outer of the pair of beams was the more seriously corroded. That is consistent with Professor Hollis's view that corrosion occurred as a result of a combination of condensation over a long period, water ingress through the shop fascias, and some moisture from the rear of the parapet wall – although we do not discount some penetration through the walkway.

94. We also find, on balance, that Professor Hollis (supported in his view by the evidence of Mr Dawson and Mr Doody) is correct in saying that the deflection or rotation of the parapet wall happened relatively suddenly. The evidence of Mr Maguire confirms this, and we do not think he would have failed to observe the movement of the parapet and the hand rail over a period of years. We do not doubt the sincerity of Ms Mathew's evidence that she believes the deflection was obvious over a prolonged period, but we do not accept it. Neither Mr Griffin nor Ms Mathew raised the issue of the wall deflecting with the appellant, nor was it mentioned in Ms Mathew's HIP report in June 2008. As significantly, it was not mentioned by Ms Mathew herself in her original witness statement, which concentrated on the problem of pooling water on the surface of the walkway from 2004 onwards.

95. We are satisfied that there was nothing to alert the appellant to the condition of the beams above the shop fronts prior to the failure of the beam over shops 10 and 12 in August 2008. The beam above shop 16 had been replaced at some time in the past, which Mr Doody estimated to be "probably at least 20 to 30 years" before his inspection of the replacement beam in July 2010. Beyond being satisfied that the beam above shop 16 was replaced before 1990, the evidence does not allow us to make any further finding. The beam above shop 20 was also replaced, and its relatively good condition led Mr Doody to estimate that it had been in place for 10 to 15 years before his inspection of it in 2010. Mr Maguire, who was first appointed to manage Crown Terrace in May 1997, had no recollection of the installation of this beam, and it is therefore possible that it occurred before that date. There is no evidence to suggest that in each case the beams replaced were not the originals. Although the question of notice is not legally relevant, we think it likely that a prudent landlord would have taken the need to replace the beams over shops 16 and 20 as suggesting the potential of a more general problem, and that such a landlord would have carried out an inspection of other beams when an opportunity arose

(for example when a shop front was changed or before a new tenant took occupation). What would such an inspection have revealed?

96. Neither Mr Fattal nor Professor Hollis was able to estimate with any confidence or precision the point at which the beams reached a condition in which they were beyond repair and required replacement, or the point at which replacement was required as an emergency measure. Professor Hollis said that had the beams been inspected at any time in the last 30 years (which we took to mean 30 years before his inspection in 2010), they would have been found to be in a condition that necessitated immediate replacement. Mr Fattal did not contradict that view and said it was "perfectly possible", but for his own part, thought that it was impossible to say when the beams first reached the state in which they required to be replaced. Taken together, the views of the experts do not support the conclusion that a lesser amount of work might have been sufficient if the problem of corrosion of the beams had been addressed at any time after about 1980. This period covers all of the dates when the current leaseholders first became the registered proprietors of their leases.

97. On balance we accept that by 1983, the earliest date at which any current leaseholder acquired their interest, a decision to replace all of the beams would have been inevitable had they been inspected. We are also satisfied that at any time during that period the necessary work to make the area safe would have to have been carried out as an emergency. The location of the parapet (above a busy pedestrian thoroughfare), and the undersized beams (by modern standards), would have prompted urgent action to take down the wall and support the walkway, once it was appreciated by a competent engineer that the problem was as widespread as it has subsequently proved to be. While a prudent landlord ought to have taken the need to replace the beams over shops 16 and 20 as a warning to carry out further investigations, we are therefore satisfied that the conditions which would have been revealed by such inspections after 1984 would have resulted in substantially the same course of remedial action being followed.

98. We therefore find that substantially the same work would have been required at any time in the 30 years preceding the commencement of the works in 2008. Accordingly, we consider that no real savings would have been made had the beams been inspected and work carried out at any relevant earlier time.

99. The second element of the respondent's claim is that the cost of work would have been reduced if all five phases been carried out under one contract.

100. We are satisfied that Phases 1 and 4 of the work were properly considered to be emergency work, and that there was insufficient time for the appellant to consult the leaseholders and tender a contract. That would have been the case whenever the requirement for these phases became apparent.

101. The parties agreed that all of the work actually carried out, and proposed to be carried out in Phases 1-5, would have been required had the work been done as a single project. However the parties differ on whether a single project would have resulted in a saving. Mr

Fattal considered that this would have resulted in a saving of between 10-15%, and settled on 12.5%. Mr Adams did not pursue Mr Fattal's contention that a further 15% saving could have been achieved had Phase 5 been re-tendered. Professor Hollis was doubtful that there would be any saving at all.

102. We prefer Professor Hollis's evidence that there was unlikely to be any significant savings as one project. Whilst we accept his criticism of Mr Adams' comparison of various items on a two shops versus seven shops basis in that they are not necessarily like for like, we find that the argument in favour of a saving falls away when the need for emergency work is appreciated. The appellant had no option but to carry out Phase 1 as emergency work. It was also specifically advised by Mr Dawson in July 2010 that the remainder of the parapet might not be sufficiently safe to be allowed to remain in place for the 6 months required to carry out the statutory consultation, and on the basis of that advice it had no alternative than to carry out the Phase 4 works immediately. Phases 3 and 5 were tendered after a consultation with the leaseholders. If the contract for all phases was to be instructed as one, it would all have had to be on an emergency basis, as the appellant could not have risked waiting while the contract was tendered.

103. We therefore find that the respondents' contentions that savings would have been made on either basis have not been made out.

104. As far as the LVT's award of general damages is concerned, as it is accepted that all of the remedial work was within the appellant's repairing obligation, and all would have been required, there is no basis on which an award of damages could be made to compensate the leaseholders for the disruption they have experienced as a result of the work being necessary. The completion of the work has been delayed while this appeal has proceeded so the leaseholders who live at Crown Terrace have had to put up with scaffolding and a temporary guard rail for longer than they should have done following the removal of the parapet wall in 2010. Others have no doubt found it impossible to sell their flats due to the continuing uncertainty over the extent of their liability. Neither the Tribunal nor the LVT heard evidence concerning the effect of the prolongation of the works on the comfort and enjoyment of occupation of the flats, or on the ability of leaseholders to let or sell their premises. In those circumstances we do not consider it would be appropriate to make a nominal award in favour of all leaseholders, since to do so might deprive some of more substantial claims.

105. The LVT also made an order under section 20C, Landlord and Tenant Act 1985, that no part of the costs incurred by the appellant in connection with the proceedings before it was to form part of the service charge payable by any of the leaseholders who were applicants in the proceedings before it. In the event that the appeal succeeded Mr Peters indicated that he would wish to make submissions to the effect that the section 20C order ought also to be set aside. We agreed that the parties should have the opportunity to make further submissions in writing on that issue once our substantive decision had been released to them.

Conclusion

106. We are satisfied that the cost of the works claimed is appropriate, and therefore allow the following amounts as relevant costs which may be included in the service charges payable by the respondents (and in the case of the Phase 5 works, the interim service charge):

Phase 1:	£17,760.71
Phase 2:	£27,039.52
Phase 3:	£15,843.23
Phase 4:	£84,284.54
Phase 5:	£174,115.21
Total:	£319,043.21

107. We also find that the engineer's fees of £7,690.22 and the legal fees of £1,711 incurred in Phase 2 were reasonably incurred and were reasonable in amount and may therefore be recovered under the service charge.

108. The appeal is accordingly allowed. If either party now wishes to make further submissions concerning the LVT's order under s. 20C of the 1985 Act, or any further application in relation to this appeal, they should do so in writing with 21 days of the date of this decision.

Martin Rodger QC, Deputy President

P D McCrea FRICS

14 May 2014

Addendum on applications under section 20C, Landlord and Tenant Act 1985

109. Submissions have now been made in writing on the appeal against the decision of the LVT to make an order under section 20C, Landlord and Tenant Act 1985. The effect of that order was that no part of the costs incurred by the appellant before the LVT were to be added to the service charges payable by those lessees of flats at Crown Terrace who were parties to the proceedings.

110. The basis on which the order was made appears from paragraphs 69 and 70 of the LVT's decision, in which it said this:

> "69. Although the respondent has succeeded in justifying the bulk of the service charges, the Applicants have, by making this application, succeeded in reducing the service charges by several thousand pounds – which they would not have otherwise achieved.
>
> 70. In these circumstances, we consider it just and equitable to make orders under section 20C of the Act and for reimbursement of the fees paid by the applicants (pursuant to Regulation 9 of the Leasehold Valuation Tribunals (Fees) England Regulations 2003."

Submissions

111. For the appellant Mr Peters submitted that the sole basis on which the LVT had considered it just and equitable to make an order under section 20C was that the leaseholders had achieved some measure of success in reducing the service charges. The effect of the LVT's decision had been to prevent the appellant from adding to the service charge £44,665 of the costs of carrying out the repairs. No other reason was advanced by the LVT for the exercise of its discretion in favour of the leaseholders and, Mr Peters pointed out, that limited success had been reversed by the decisions already reached by the Tribunal on this appeal. It followed, he submitted, that the Tribunal should set aside the LVT's order under section 20C.

112. Mr Adams, on behalf of the respondents, submitted that the Tribunal should first determine the extent to which any of the respondents was liable as a matter of contract to contribute towards the appellant's costs. That would require us to construe the service charge provisions of the individual leases and to consider whether they included terms sufficient to enable the appellant to add its legal costs to the service charges payable by each leaseholder who was party to the LVT proceedings. There are five different forms of lease in use at Crown Terrace each of which imposes a slightly different contribution obligation on the leaseholders.

113. Mr Adams then submitted that, in any event, the Tribunal should leave the LVT's decision to make an order under section 20C undisturbed and that we should make a further order under section 20C in respect of the costs of the appeal. Alternatively, he submitted, as the respondents had always acknowledged that the decision of the LVT had been made on an erroneous basis, they should not be liable to contribute towards the appellant's costs both of the proceedings before the LVT and of the appeal. One or other should be the subject of an order under section 20C.

114. In response to Mr Adams' submissions, Mr Peters contended that there were no grounds for the Tribunal to consider the appellant's contractual right to recover the costs it had incurred in these appeal proceedings via the service charge provisions in the various leases. No such service charge had yet been raised and the issues of construction of the individual leases had not been a matter for consideration by the LVT. In those circumstances it should not be considered to be within the scope of the appeal.

Discussion

115. Section 20C confers a wide discretion to make such order on the application as the Tribunal considers just and equitable in the circumstances. The circumstances in which disputes to which section 20C applies come in a great variety of forms. It is impossible to lay down rules on how the discretion should be exercised, other than at the highest level of generality and even then only as factors to be taken into account. That is reflected in the well known observation of His Honour Judge Rich QC in *Tenants of Langford Court (Sherbani) v Doren Limited* LRX/37/2000 (at paragraph 28) that the only principle upon which the discretion should be exercised is "to have regard to what is just and equitable in all the circumstances." In *Conway v Jam Factory Freehold Limited* [2013] UKUT 0592 (LC) the Tribunal emphasised the importance of considering the practical and financial consequences for all of those who would be affected by an order under the section when deciding on the just and equitable outcome (paragraph 75). In paragraphs 51 – 58 of that decision the Tribunal reviewed the best known of the relevant authorities and it is not necessary to repeat that exercise here.

116. We do not accept Mr Peters submission that a consideration of the contractual entitlement of the appellant to add the costs of proceedings to the service charges payable by the various leaseholders lies outside the legitimate scope of our consideration of the appeal against the LVT's section 20C order. We reach that conclusion for the following reasons.

117. First, if the appellant has no contractual entitlement to recover the costs of proceedings through the service charge that would render the section 20C application, and the appeal on that issue, entirely redundant, and there would be no need for us to spend further time considering it (as occurred in *Windermere Marina Village Ltd v Wild* [2014] UKUT 0163 (LC) at paragraphs 54 and 55).

118. Secondly, the contractual position between each individual leaseholder and the appellant is part of the circumstances which we ought to take into account in considering the just and equitable outcome in every other case. It may be relevant for us to reflect on whether it is just and equitable for some leaseholders to bear a proportion of the expenses incurred by the appellant, while others suffer no liability.

119. Thirdly, it is relevant to consider the extent of the appellant's entitlement to recover its costs and the shortfall which it may sustain if some but not others of the leaseholders are liable to contribute.

120. Fourthly, the issue is one which is likely to arise between the parties in the near future in any event. As it has been fully argued in writing by counsel on both sides it would be no service to any of the parties for us to express no conclusions on it and to leave a further source of dispute to be resolved at further expense in the future.

121. The leaseholders of 13 flats (flats 1-14, including 1A and excluding 5 and 13) were parties to the application before the LVT. Of those flats, 6 are held on leases in form A (Flats 1A, 3, 4, 6, 7 and 8); 2 are held in form B (Flats 9, 11 and 14). Flat 1 is held on a lease in form C; Flat 2 is in form D and Flats 10 and 12 are in form E.

122. Only the lease in form E refers expressly to the costs of proceedings as being amongst the costs which may be included in the service charge. Clause 2(a)(xiii) entitles the appellant to include within the service charge:

> "The cost of taking or defending any legal proceedings (including arbitration) in connection with the rights and obligations arising out of any lease or tenancy of the Buildings or any part of it where such proceedings result in a judgment or order in favour of the Lessor credit being given for any costs recovered by the Lessor from any other party to the proceedings in question …."

We are satisfied that this language is clearly sufficient to include costs incurred by the appellant in responding to the application made by the leaseholders to the LVT under section 27A, Landlord and Tenant Act 1985 for the determination of the extent of their liability to contribute through the service charge towards the cost of repairs to Crown Terrace.

123. None of the other forms of lease includes a provision as specific as form E and none refers expressly to the costs of legal proceedings. We have been reminded by Mr Adams of the decision of the Court of Appeal in *Sella House Ltd v Mears* [1989] 21 HLR 147 (CA) in which it was said that "clear and unambiguous terms" were required before the costs of litigation could be added to a service charge. We were also referred to *Gilje v Chargrove Securities Limited* [2002] 1 EGLR 41 (CA) in which the need for "clear terms" was also emphasised. Other authorities were also mentioned by both sides.

124. As the Court of Appeal has recently confirmed in *Arnold v Britton [2013] EWCA Civ 902* (at paragraph 39) no special principles of construction apply to the interpretation of a service charge clause. Nor is it productive to compare the language of the leases at Crown Terrace with the language of other leases relating to different buildings. Our task is to construe the contract between these parties.

125. The leases in form A, the most numerous type, include at clause 2(6) (or in some examples clause 2(4)) a covenant by the tenant in the following terms:

> "At all times during the said term to pay and contribute a rateable or due proportion of the expenses of the making of repairing, maintaining, rebuilding and cleansing the exterior of the flat and of the building of which it forms part … and other conveniences which shall

belong to or serve or be used at the flat hereby demised and the said building such proportion in case of difference to be settled by the Surveyor for the time being of the Lessor whose decision shall be final and to be paid to the lessor on demand."

We agree with Mr Adams that this clause is not apt to entitle the appellant to include the costs of the proceedings in the service charge. The cost of proceedings are not "expenses of making repairing maintaining etc" the building.

126. Form B includes a general entitlement on the part of the appellant to recover, as part of the service charges, any costs incurred in performing its obligations to maintain and repair the structure of the building. In addition, at clause 2(2)(a), it includes the following two items which may form part of the service charge:

"(v) The cost of all other services which the Lessor may at its absolute discretion provide or install in the said Buildings for the comfort and convenience of the lessees.

(vi) The fees of the Lessor's Auditors and the fees of the Lessor's Managing Agents for the collection of the rents of the flats in the said Buildings and for the general management thereof."

127. We do not consider that the language of sub-clause (v) is apt to include the costs of proceedings brought by the leaseholders against the appellant (nor, for that matter, the costs of the appellant's subsequent appeal). Those proceedings and the appeal cannot be described as "services" provided by the Lessor, nor were they for the comfort and convenience of the lessees. The limited scope of the discretionary power to provide "other services" is also emphasised by the specific reference to fees in sub-clause (vi) (which is not said to be without prejudice to the generality of sub-clause (v)). Sub-clause (vi) is confined to the fees of auditors and managing agents, and clearly does not include the fees of lawyers. Moreover not all fees paid to managing agents come within the scope of the clause; only those incurred for the collection of rents and "for the general management" of the buildings are included. We do not consider that costs incurred by a managing agent in connection with proceedings before the LVT or this Tribunal fall within the scope of "general management".

128. The lease in form C is a variant on form B. The version of sub-clause (vi) which it includes extends to the cost of any other service *or facility* which the Lessor may in its absolute discretion provide for the comfort or convenience of the occupiers of the Buildings *or for their proper maintenance, safety, amenity and administration*. We do not consider that the addition of the words "*or facility*" makes any difference to the conclusion we have expressed in paragraph 127 above; in no sense can these adversarial proceedings be regarded as a "service or facility" which has been provided by the appellant. Nor do we consider that the costs of legal proceedings relating to the payment of service charges can be described as a service or facility which the lessor "provides" for the proper maintenance safety amenity and administration of the building.

129. Form C also includes the following at clause 2(2)(a):

> "The cost of employing managing agents for the management of the Buildings and the collection of rents and service charge or (if the Lessor does not employ managing agents) a fee for the Lessor based on the forgoing amount …"

None of this language is apt to include the costs of employing solicitors and counsel, or engaging expert witnesses, in connection with these proceedings.

130. Form D includes at clause 4(viii) a further variant of the general power to incur costs and to include them in the service charge, this time extending to "the cost of any other service or facility which the Lessor may in its absolute discretion provide for their proper maintenance safety amenity and administration." Once again we consider that this does not include the cost of legal proceedings, which we do not regard as a "service or facility" provided by the Lessor.

131. Clause 4(x) in form D refers to:

> "The cost of employing managing agents for the Buildings to collect the rent and service charge and to provide management and other services (including disbursements and out of pocket expenses)…"

This clause focuses on the cost of employing managing agents, rather than lawyers. That specific focus excludes any intention that the leaseholders should be liable to contribute towards the costs of legal proceedings. We do not consider that the addition of a reference to "disbursements and out of pocket expenses" expands the scope of the clause sufficiently to enable it to be of assistance to the appellant in this case. The only "disbursements" referred to are those of managing agents in connection with the collection of rent and service charges and the provision of management and other services. Even assuming that the appellant obtains legal advice and representation as a result of instructions given by its managing agents (which we consider unlikely) we are not satisfied that the general focus of this clause on management and the provision of services is sufficiently precise and specific to include the costs of proceedings.

132. We therefore conclude, in agreement with Mr Adams' submissions, that only those leaseholders whose leases are in form E are under a contractual obligation to contribute towards the cost of the proceedings. As we have already indicated, leases in form E are held only by the lessees of flats 10 and 12.

133. We also accept Mr Peters' submission that the LVT's reasons for making an order under section 20C cannot survive our conclusion that the leaseholders are liable to contribute towards the full amount of the costs incurred by the appellant in carry out the works to Crown Terrace. Accordingly we allow the appeal against the LVT's order and set it aside.

134. No purpose would be served by us remitting the leaseholder's application under section 20C to the LVT for it to reconsider how it should exercise its discretion. Having re-heard the evidence and argument we are in as good a position as would be the LVT to exercise our own discretion in relation to the costs incurred before the LVT.

135. In considering how to exercise that discretion we first take into account the fact that the appellants ought to have been wholly successful before the LVT, as they have been on this appeal. Ordinarily that fact would be likely to outweigh all other considerations in determining what was just and equitable in the circumstances. As Judge Rich QC said in *Schilling v Canary Riverside Development PTE Limited* LRX/26/2005: "so far as an unsuccessful tenant is concerned it requires some unusual circumstances to justify an order under section 20C in his favour."

136. Nonetheless the circumstances of this case are unusual. As we have found in paragraph 90 of our decision the appellant was in breach of its obligation to keep the structure of Crown Terrace in repair at all times since it granted the earliest of the leases held by any of the leaseholders involved in these proceedings (1983). The work which the appellant undertook after the failure of the steel beam in 2008 was work which it had been under a contractual obligation to carry out for the previous 25 years. The two leases in form E were granted after 2000 and the effect of our findings in this case is that the appellant was in breach of its obligations to repair the structure of the building from the outset of those leases.

137. The nature of the disrepair was such that it was not obvious to a surveyor carrying out a non-intrusive inspection, such as would ordinarily be undertaken before the purchase of a leasehold flat. When they bought their flats the leaseholders of flats 10 and 12 had no real means of discovering that they were about to acquire a certain liability (for them or a subsequent purchaser) to contribute towards a very substantial programme of works. The appellant, on the other hand, did have opportunities for inspection (including in particular when the beam above shop 20 was replaced). In paragraph 95 of our decision we have found that as a result of having had to replace the beams above shop 20 and probably above shop 16 (if that work was undertaken after 1973) a prudent landlord in the appellant's position would have carried out an inspection of other beams along the Crown Terrace frontage when opportunities occurred. Although that fact was not legally relevant to the other issues in this appeal, we consider that it is relevant to our determination of whether it is just and equitable for the leaseholders of flats 10 and 12 to be required to contribute towards the costs incurred by the appellant in the LVT proceedings. Those two leaseholders could not have discovered that which the appellant had had many years to establish, namely that at the time they acquired their leases a major repair programme was already essential. In all likelihood, had the appellant taken the steps which we consider a prudent landlord would have taken, the corroded beams would have been replaced before the leases of flats 10 and 12 were granted, and certainly before those leases were acquired by their current owners.

138. While reflecting on the extent of the appellant's breaches of its own obligations, we cannot avoid commenting further on the lack of urgency in the appellant's response to the advice it received in 2008. As the memo from Mr Barnes to Mr Hall referred to in paragraph 35 above makes clear, the likelihood that all of the beams would require to be replaced was appreciated as early as 8 October 2008. It was also appreciated that the issue concerned a matter of safety (of the leaseholders, of the tenants of the shops immediately below the parapet and their customers, and of the general public making their way along Cricklewood Lane) yet nothing was done to instigate further investigations until, at the earliest, December 2009 when the statutory consultation was begun. While it might be said that the cost of the remedial work

would be no different if the appellant had responded with greater urgency and commitment after October 2008, we are nonetheless satisfied that the dilatory approach to its obligations exhibited by the appellant, and its indifference to the safety and amenity of its leaseholders, has had an indirect part to play in the costs incurred in connection with these proceedings. The leaseholders rightly considered that the appellant was in breach of its obligations and rightly considered that the appellant was not responding to the situation outside their front doors as urgently as it ought to have done. Those convictions made it inevitable that the leaseholders would resist the very large service charge bills when they did eventually arrive. A more considerate and attentive landlord would, we consider, have had a much greater prospect of resolving the dispute without the need for two rounds of extremely expensive legal proceedings.

139. Finally in identifying the factors that we considered to be relevant to the exercise of our discretion under section 20C, we come to the imbalance in the position of the various leaseholders. All of the leaseholders were owed the same obligation by the appellant; all have had to endure the dilapidated condition of Crown Terrace since 2008. Two leaseholders have the misfortune of occupying their flats under leases which oblige them to contribute to the cost of legal proceedings. We consider that for two of the thirteen leaseholders to be liable to contribute to what we have no doubt are six figure legal costs (which their neighbour will avoid) may also legitimately be taken into account as part of the circumstances relevant to the application under section 20C. We do not give it great weight, and we do not think it is of sufficient significance to tip the balance one way or the other, but we do not disregard it entirely when considering what is just and equitable.

140. Taking all of these matters into account we are satisfied that it is just and equitable to make an order under section 20C in relation to the costs of the proceedings before the LVT. The two leaseholders whose leases are in form E would never have found themselves involved in those proceedings if the appellant had complied with its obligations (including its obligations to the original grantees of the leases which they now hold) before they acquired their interests in their flats. That fact, and the other matters we have referred to, seem to us to be sufficient in this unusual and extreme case, to outweigh the success which the appellant ought to have enjoyed in the proceedings before the LVT.

141. When we come to consider the leaseholders' application for an order under section 20C in relation to costs incurred in the appeal to this Tribunal we do not feel able to strike the balance of fairness and equity in the same way. Not only had the appellant substantially succeeded before the LVT, but it succeeded wholly in its appeal to the Tribunal. In light of the thorough investigation undertaken by the LVT (whatever the flaws in its approach) the leaseholders were in a position to take stock of their situation and to decide whether to resist the appeal. Two have chosen to engage fully in the appeal (one of whom holds a lease in form E) and others have declined to respond or to concede the appellant's entitlement to the orders we have made. In those circumstances we can see no sufficient basis for depriving the appellant of its contractual entitlement to recoup a contribution towards its costs from the two leaseholders whose leases are in form E.

142. Our decision is, therefore, that no part of the costs incurred by the appellant in the proceedings before the LVT may be included in a service charge payable by any of the leaseholders who participated in those proceedings. But that no such restriction applies in relation to the costs of the appeal to the Tribunal in so far as the appellant is entitled to seek to recover those costs under the leases of flats 10 and 12. The appellant has no contractual entitlement to recover the costs of the proceedings, whether in the LVT or in the Tribunal, from the remaining leaseholders who were party to the LVT proceedings.

Martin Rodger QC

Peter McCrea FRICS

Dated: 10 July 2014

Appendix

List of Applicants

Flats	
Flat 1	Hanan Isaacs and Fatimah Cariban
Flat 1A	Franziska Fichter
Flat 2	Sara Taheri Panah
Flat 3	Alphonsa Mathew
Flat 4	Aleksander Slavov Dinev
Flat 6	Hanan Isaacs
Flat 7	Elizabeth Brennan
Flat 8	C F L Property Services Limited
Flat 9	Francis Kousi Appou Poke and Alison Jane Poll
Flat 10	Kulwant Jain
Flat 10	Robert Macdonald and David Rowley
Flat 11	Kulwant Jain and Madhu Mathi Jain
Flat 12	Sean Gerald Griffin
Flat 14	Stefan Ingemar Isendahl