HM Courts & Tribunals Service

Property Chamber
London Residential Property
First-tier Tribunal

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Fladgate LLP

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SLF\28074\0009\13396202V1\
Your ref: EG1
Our ref: LON/00AW/LSC/2016/0115

Date: 24 March 2017

Dear Sirs

RE: Landlord & Tenant Act 1985 - Section 27A(1)

PREMISES: Pointwest Building, 116 Cromwell Road, London, SW7 4XA

The Tribunal has made its determination in respect of the above application and a copy of the document recording its decision is enclosed. A copy is being sent to all other parties to the proceedings.

Any application from a party for permission to appeal to the Upper Tribunal (Lands Chamber) must normally be made to the Tribunal within 28 days of the date of this letter. If the Tribunal refuses permission to appeal you have the right to seek permission from the Upper Tribunal (Lands Chamber) itself.

If you are considering appealing, you are advised to read the note attached to this letter.

Yours faithfully

Mrs Cheryl Reid
Case Officer

GUIDANCE ON APPEAL

1) An appeal to the Upper Tribunal against a decision of a First-tier Tribunal (Property Chamber) can be pursued only if **permission to appeal** has been given. Permission must initially be sought from the First-tier Tribunal. If you are refused permission to appeal by the First-tier Tribunal then you may go on to ask for permission from the Upper Tribunal (Lands Chamber).

2) An application to the First-Tier Tribunal for permission to appeal must be made **so that it is received by the Tribunal within 28 days after the date on which the Tribunal sends its reasons for the decision.**

3) If made after the 28 days, the application for permission may include a request for an extension of time with the reason why it was not made within time. Unless the application is made in time or within granted extended time, the tribunal must reject the application and refuse permission.

4) You must apply for the permission **in writing**, and you must:
   - identify the case by giving the address of the property concerned and the Tribunal's reference number;
   - give the name and address of the applicant and any representative;
   - give the name and address of every respondent and any representative
   - identify the decision or the part of the decision that you want to appeal;
   - state the grounds of appeal and state the result that you are seeking;
   - sign and date the application
   - send a copy of the application to the other party/parties and in the application record that this has been done

The tribunal may give permission on limited grounds.

5) When the tribunal receives the application for permission, the tribunal will first consider whether to review the decision. In doing so, it will take into account the overriding objective of dealing with cases fairly and justly; but it cannot review the decision unless it is satisfied that a ground of appeal is likely to be successful.

6) On a review the tribunal can
   - correct accidental errors in the decision or in a record of the decision;
   - amend the reasons given for the decision;
   - set aside and re-decide the decision or refer the matter to the Upper Tribunal;
   - decide to take no action in relation to the decision.

   If it decides not to review the decision or, upon review, to take no action, the tribunal will then decide whether to give permission to appeal.

7) The Tribunal will give the parties written notification of its decision. **If permission to appeal to the Upper Tribunal (Lands Chamber) is granted**, the applicant's notice of

intention to appeal must be sent to the registrar of the Upper Tribunal (Lands Chamber) so that it is received by the registrar within **28 days** of the date on which notice of the grant of permission was sent to the parties.

8) **If the application to the Property Chamber for permission to appeal is refused**, an application for permission to appeal may be made to the Upper Tribunal. An application to the Upper Tribunal (Lands Chamber) for permission must be made within **14 days** of the date on which you were sent the refusal of permission by the First-tier Tribunal.

9) The tribunal can **suspend the effect of its own decision**. If you want to apply for a stay of the implementation of the whole or part of a decision pending the outcome of an appeal, you must make the application for the stay at the same time as applying for permission to appeal and must include reasons for the stay. You must give notice of the application to stay to the other parties.

These notes are for guidance only. Full details of the relevant procedural provisions are mainly in:

- the Tribunals, Courts and Enforcement Act 2007;
- the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013;
- The Tribunal Procedure (Upper Tribunal)(Lands Chamber) Rules 2010.

You can get these from the Property Chamber or Lands Chamber web pages or from the Government's official website for legislation or you can buy them from HMSO.

The Upper Tribunal (Lands Chamber) may be contacted at:

5th Floor, Rolls Building, 7 Rolls Buildings
Fetter Lane, London EC4A 1NL

Tel: *0207 612 9710*
Goldfax: *0870 761 7751*

Email: *lands@hmcts.gsi.gov.uk*

The Upper Tribunal (Lands Camber) form (T601 or T602), Explanatory leaflet and information regarding fees can be found on www.justice.gov.uk/trbunals/lands.

Yours faithfully

Mrs Cheryl Reid
Case Officer

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	:	**LON/00AW/LSC/2016/0115**
Property	:	**Pointwest Building, 116 Cromwell Road, London SW7 4XA**
Applicant	:	**Pointwest GR Limited**
Representative	:	**Mr K Gunaratna of Counsel instructed by Fladgate LLP**
Respondents	:	**The lessees listed in the schedule to the application (as amended)**
Representative	:	**In part represented by Mr D Dovar of Counsel instructed by Wallace LLP**
Type of application	:	**For the determination of the reasonableness of and the liability to pay a service charge**
Tribunal members	:	**Judge N Hawkes** **Mr L Jarero BSc FRICS** **Mrs R Turner JP BA**
Dates and venue of hearing	:	**6th and 7th March 2017 at 10 Alfred Place, London WC1E 7LR**
Date of decision	:	**24th March 2017**

DECISION

Decisions of the Tribunal

(1) The Tribunal finds that it has jurisdiction to determine this application.

(2) The Tribunal determines that the interim service charges which have been demanded by the applicant in respect of the service charge year 2016 and the first quarter of 2017 are reasonable and payable.

(3) The Tribunal determines in respect of the costs set out in the CAPEX Plan for the years 2016 to 2020 inclusive that the sums claimed by the applicant in respect of each service charge year are reasonable and payable.

(4) The Tribunal directs that, by 4pm on 8th May 2017, the applicant shall serve a breakdown of the CAPEX Plan expenditure for the service charge years 2016 to 2020 on the leaseholders, in accordance with Paragraph 83 below.

(5) Any leaseholder who wishes to raise a dispute concerning the issue of apportionment shall, on or before 4pm on 19th June 2017, apply to the Tribunal for a determination.

(6) The Tribunal does not make an order under section 20C of the Landlord and Tenant Act 1985.

The application

1. By an application dated 10th March 2016, the applicant seeks a determination pursuant to s.27A of the Landlord and Tenant Act 1985 ("the 1985 Act") in respect of the proposed service charge expenditure for a 10 year programme of major works which the applicant intends to undertake to the Pointwest Building, 116 Cromwell Road, London SW7 4XA ("Pointwest") in the years 2016 to 2025.

2. The programme is referred to by the applicant as the "Capital Expenditure Plan" or "CAPEX Plan" and the estimated cost of the proposed work is approximately £8,360,000 (including VAT but excluding professional and administrative costs). The work commenced in 2016.

3. Reference is made in the service charge budget to a "reserve fund contribution". However, the Tribunal was informed that the costs which form the subject matter of this application are in fact the proposed costs for each year payable in advance and that the costs do

not relate to a "reserve fund" in the legal sense. It was explained that the applicant has used the phrase "reserve fund contribution" for the purpose of distinguishing capital payments on account from ordinary operating expenditure.

4. The relevant legal provisions are set out in the Appendix to this decision.

5. Directions were issued by the Tribunal on 14th March 2016, 11th May 2016, 4th October 2016 and 22nd February 2017. The Directions of 22nd February 2017 were issued in response to an application made by some ten respondents for a postponement of the final hearing, which was refused.

The hearing

6. The applicant was represented by Mr Gunaratna of Counsel instructed by Fladgate LLP at the hearing and 277 of the respondents were represented by Mr Dovar of Counsel instructed by Wallace LLP ("the respondents"). The lessees who were not represented by Wallace LLP took no part in these proceedings ("the non-participating respondents").

The background

7. PointwestPoint is a mixed residential and commercial development on Cromwell Road which is situated close to the junction with Gloucester Road, on the site of the old West London air terminal.

8. Pointwest comprises 399 apartments (352 flats on floors one to nine and 47 penthouse flats on floors 10 to 18); 320 parking spaces; approximately 20,000 square metres of commercial space; and a private road on three out of four sides of the complex.

9. The core residential block is spread over 18 floors. It has a 24 hour concierge service; multiple lifts; and various ancillary services. The penthouses are known as "Sky Apartments" and there is a separate Sky Reception which services these apartments on the tenth floor of the block.

10. The Tribunal has been informed that Pointwest was originally constructed approximately 60 years ago, with the residential building being converted, extended and/or refurbished in a piecemeal phased operation some 15-30 or more years ago by at least three different developers.

11. Pointwest is bounded by London underground lines which are operated by Transport for London ("TfL"). TfL maintains rights and/or interests in relation to parts of the land, with the applicant's title being a part freehold and part long leasehold estate (registered at H.M. Land Registry under title numbers 301583, GL416811, BGL26695 and BGL31738).

12. The applicant acquired Pointwest on 4th July 2014 from an unrelated company known as Pointwest London Limited. Pointwest London Limited went into administration in June 2012 and, on 30th July 2014, it went into a creditors' voluntary liquidation. It appears that Pointwest London Limited failed to adequately repair and maintain the Pointwest complex.

13. The lessees listed in the schedule to this application (as amended) ("the leaseholders") hold long leases of flats at Pointwest which require the landlord to provide services and the tenant to contribute towards their costs by way of a variable service charge.

14. The Tribunal has been provided with a specimen lease. The service charge expenditure is set out at clause 6(4) of the lease and the landlord is entitled to levy interim and final service charges on the tenants in each accounting year (which is the calendar year) in accordance with the Fifth Schedule to the lease.

15. Neither party requested an inspection and the Tribunal did not consider that one was necessary, nor would it have been proportionate to the issues in remaining dispute at the time of the hearing.

16. The Tribunal is aware that there have been previous applications to the First-tier Tribunal concerning Point West (case references LON/00AW/LSC/2015/0524, LON/00AW/LSC/2015/0525, LON/00AW/LSC/2015/0411 and LON/00AW/LSC/2015/0412).

The issues

17. The applicant seeks a determination under section 27A(3) of the 1985 Act in respect of the proposed costs of the CAPEX Plan. In respect of the calendar year 2016 and the first quarter of 2017, demands have now been sent out to the leaseholders and the applicant also seeks a determination under section 27A(1) of the 1985 Act in respect of this period.

18. The parties were directed by the Tribunal to prepare a Scott Schedule identifying the matters in issue and certain challenges were initially raised by the respondents in the Scott Schedule.

19. However, following a change of representation, the respondents no longer rely upon the challenges set out in the Scott Schedule. The respondents currently contend that the Tribunal has no jurisdiction to make a determination under section 27A(3) of the 1985 Act unless:

(i) the correct statutory consultation has been carried out (this is a reference to a consultation in accordance with section 20 of the 1985 Act and the associated Service Charges (Consultation Requirements)(England) Regulations 2003); and

(ii) the sum claimed is the actual cost to be incurred.

20. Further, the respondents submit that to make a determination, in principle, spanning a period of 10 years and concerning costs of the order which form the subject matter of this application would be tantamount to making a declaration and the Tribunal has no jurisdiction to give declaratory relief.

21. This issue of jurisdiction was dealt with as a preliminary issue.

22. The respondents also contend that if, contrary to their primary case, the Tribunal has jurisdiction, the Tribunal should find on the facts of this case that nothing is payable because no statutory consultation has been carried out and that the Tribunal should therefore dismiss the application in its entirety. In the alternative, the respondents submit that the scope of the application is far too wide and should be substantially reduced.

23. In the context of their challenge to the scope of the application, on 28th February 2017, the respondents raised the issue that on account demands have been made and monies have been paid by the leaseholders in respect of the year 2016 but not all of the sums paid have been applied to expenditure.

24. In particular, the following items of work included in the CAPEX Plan for the year 2016 have not been carried out:

(i) Item 20 – Soffit repair - £150,000

(ii) Item 5 – Sky reception rebranding - £50,000

(iii) Item 6 – Sky reception re-modelling - £50,000

(iv) Item 46(part) – CCTV upgrade - £20,000

25. The respondents contend that the applicant has underspent by between 40% and 85% in the first year of the CAPEX Plan and the respondents argue that this is a matter which the applicant should have brought to the Tribunal's attention.

26. The applicant accepts that it underspent by a significant amount in 2016 (this was referred to by the parties during the course of the hearing as "the 2016 underspend"). However the applicant rejects the suggestion that it was for the landlord to raise the point against itself.

27. The applicant submits that it was incumbent upon the respondents to raise the issue and that the respondents have known, at least in broad terms, about the 2016 underspend for approximately three months yet they have failed to adduce any evidence on the issue or to identify the issue in a skeleton argument within the time scales set out in the Tribunal's Directions.

28. Counsel for the applicant was instructed that the Soffit repair could not have been carried out in 2016 because a licence was required from TfL which TfL has only recently granted and that this is a matter wholly outside the applicant's control.

29. The Tribunal was also informed through counsel that the CCTV upgrade works were delayed due to a change in personnel; that delays have also resulted from the applicant's involvement as a respondent in previous litigation before the First-tier Tribunal concerning Pointwest; and that it was not possible for the applicant to obtain full instructions regarding the 2016 underspend in the limited time available following the raising of the issue by the respondents some 3 working days prior to the hearing.

30. It is the applicant's case that it is disadvantaged by the late raising of the point in that it has not had a realistic opportunity of adducing any evidence in support of its position that (a) there are good reasons for the 2016 underspend and (b) the work in question will be carried out in 2017.

31. The applicant states that, prior to the hearing, the respondents confirmed that they would not require the attendance of any witnesses and that none of the points raised would require evidence of fact. At paragraph 2 of their skeleton argument dated 28th February 2017, the respondents acknowledge the late raising of the points which are currently in issue but state that "they require no further evidence (whether of fact or expert)".

32. The possibility of adjourning the hearing in order to enable evidence to be adduced regarding the 2016 underspend was discussed. However, neither party wished the proceedings to be adjourned and it was

ultimately agreed that (a) the Tribunal can have regard to the fact that not all of the sums paid in respect of the year 2016 have been applied to expenditure and (b) that the point will carry limited weight given the absence of an opportunity on the landlord's part to adduce evidence explaining the reasons for the 2016 underspend.

33. In the leases, the service charge is broken down into five headings, namely estate expenditure, residential expenditure, sky lobby expenditure, car park expenditure and commercial expenditure. The CAPEX Plan provided in support of this application does not break down the proposed expenditure into these five separate headings.

34. After some discussion, it was agreed that following receipt of this determination the applicant will prepare a breakdown and that, in the event of any dispute concerning apportionment, the parties should have the opportunity to apply to the Tribunal for a determination.

35. Having heard submissions from the parties and having considered all of the documents to which it was referred, the Tribunal has made determinations on the various issues as follows.

The preliminary issue

The submissions

36. The respondents submit that the Tribunal has no jurisdiction to make a "comfort determination"; that insofar as this application is made under section 27A(3) of the 1985 Act the application is premature; and that to make a determination, in principle, spanning a period of 10 years and concerning costs of the order which form the subject matter of these proceedings would be tantamount to making a declaration when the Tribunal has no jurisdiction to give declaratory relief.

37. The respondents further submit that, unless the applicant is able to show that (a) the correct statutory consultation has been carried out and (b) the sum claimed is the actual cost to be incurred, the Tribunal has no jurisdiction. In support of this proposition, the respondents rely upon Kensington and Chelsea RLBC v Lessees of 1-124 Pond House [2015] UKUT 396 (LC) and, in particular, upon paragraph [66] of the judgment which provides:

66 It is important first to consider the scope of this application and the extent of the jurisdiction of the Tribunal. The application is made under section 27A(3) of the Landlord and Tenant Act 1985. This provides for an application to be made to the Tribunal for a determination of the liability to pay costs "if costs" were to be incurred. It is therefore not an examination of whether costs have been reasonably incurred or whether works and services are of a

reasonable standard. It may however, include a consideration of whether, at a particular point in time, the correct consultation has been carried out in accordance with the consultation regulations.

38. The respondents argue that the true meaning of the last sentence of this paragraph is that, where a statutory consultation is required, the Tribunal can only make a determination regarding future costs after the consultation process has been undertaken.

39. The applicant submits that it is wrong or mistaken to seek to introduce a new statutory precondition under s27A(3) of the 1985 Act to the effect that the Tribunal can only make a determination regarding future costs after a statutory consultation has been undertaken. The applicant relies upon the conditional wording of section 27A(3) and states that Pond House is not authority for the proposition which is advanced by the respondents.

40. The applicant states that, if a demand has already been issued, the service charge is payable and section 27A(1) of the 1985 Act applies. Section 27A(1) concerns what is presently payable, whether by way of an interim payment or a final payment. By contrast, section 27A(3) of the 1985 Act is about the future, it is about conditionality.

41. Under section 27A(3), a determination may be made in respect of certain specific types of expenditure. If there were a precondition that a section 20 consultation already had to have been undertaken before a determination could be made under section 27A(3), that would negate the utility of the jurisdiction because it could only be invoked at a very late stage after the identity of the contractor had been ascertained. The purpose of section 27A(3) is to obtain a determination in advance.

42. It was stressed that the applicant is not seeking to fix the actual amount of the final service charge; that in, applying for determinations under section 27A(3) of the 1985 Act, the applicant is seeking to provide transparency for the benefit of all of the leaseholders (including those who have played no part in these proceedings); and that it is particularly important for the applicant to obtain such determinations in light of the fact that proposed items of expenditure were initially disputed in the Scott Schedule and in light of the fact that there have been previous Tribunal proceedings and there is a "contentious background".

43. The Tribunal was referred to Woodfall:Landlord and Tenant Paragraph 7.192.1 (in particular, footnote 5).

The Tribunal's determination

44. The applicant is not asking for a declaration but rather it is seeking a determination pursuant to section 27A(3) of the 1985 Act. The question for the Tribunal is therefore whether or not it has jurisdiction pursuant to section 27A(3) of the 1985 Act which provides:

(3) An application may also be made to the appropriate tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs and, if it would, as to -

(a) the person by whom it would be payable,

(b) the person to whom it would be payable,

(c) the amount which would be payable,

(d) the date at or by which it would be payable, and

(e) the manner in which it would be payable.

45. The Tribunal notes that the wording of section 27(3) is conditional and that section 27(3) does not specify that unless (a) the correct statutory consultation has been carried out and (b) the sum claimed is the actual cost to be incurred, the Tribunal has no jurisdiction.

46. In Kensington and Chelsea RLBC v Lessees of 1-124 Pond House [2015] UKUT 396 (LC), the applicant sought a determination that certain framework agreements were qualifying long term agreements for the purposes of the statutory consultation requirements and that it was therefore entitled to follow a restricted form of consultation with lessees before embarking on specified works of repair.

47. The consultation issue was important because the value of the contracts for the works could potentially have reached £130 million over a four to six year period. Also, since procurement through framework agreements was a practice which had already been adopted by a number of local authorities, clear guidance on what consultation was required was much needed.

48. The applicant in Pond House contended that the works of repair would be carried out under qualifying long term agreements and that the consultation requirements were therefore limited. However, the respondents in Pond House stated that the framework agreements were

not qualifying long term agreements and that the applicant's consultation therefore had been and would be inadequate.

49. The Upper Tribunal stated at paragraph [69]:

There is no doubt, in our view, that although this is a section 27A(3) application, the main purpose was to obtain a determination on the consultation issue. However, we are satisfied that the application under section 27A(3) was an appropriate way to secure such a determination and we consider that issue first.

50. At paragraph [66], it is stated that the Tribunal's jurisdiction under section 27A(3) of the 1985 Act "may" include a consideration of whether, at a particular point in time, the correct consultation has been carried out in accordance with the consultation regulations. The Upper Tribunal did not expressly state that unless (a) the correct statutory consultation has been carried out and (b) the sum claimed is the actual cost to be incurred, the Tribunal has no jurisdiction to make a determination pursuant to section 27A(3) and the Tribunal is not of the view that such a restriction upon its jurisdiction is to be inferred from the Upper Tribunal's judgment.

51. Accordingly, the Tribunal finds that it has jurisdiction to determine this application. The Tribunal informed the parties of this decision orally at the hearing on 6th March 2017. The Tribunal confirmed that written reasons would be provided for its decision on the jurisdiction issue and that time for seeking permission to appeal the decision on jurisdiction would be in accordance with the paragraph headed "Rights of Appeal" at the conclusion of this determination. The 28 day period for seeking permission to appeal did not therefore commence on 6th March 2017. Both parties were content for the Tribunal to proceed to hear the remaining issues on this basis.

52. The Tribunal noted that the exercise of its jurisdiction under section 27A(3) of the 1985 Act could include a consideration of whether, a particular point in time, the statutory consultation procedure had been carried out.

The substantive application

The submissions

53. After the Tribunal had expressed a preliminary view that it could see force in the submissions advanced on behalf of the respondents that the application is wide in scope and following a brief adjournment, the applicant indicated that it would be content with a determination of the amounts in question for a period of 5 years, that is half the lifespan of the CAPEX Plan.

54. This indication was given by the applicant with a view to demonstrating flexibility and without any departure from the applicant's position that its application for a determination spanning a period of 10 years had been appropriate.

55. However, the applicant argues that a determination in respect of any period which is shorter than 5 years would be unattractive in that it would be likely to lead to more frequent Tribunal proceedings or to Tribunal proceedings in relation to a longer period than 5 years.

56. Whilst the proposed costs are not evenly distributed over the 10 year period of the CAPEX Plan, the applicant explains that this is a consequence of the applicant's intention to limit the duration of the time for which scaffolding is required.

57. The applicant emphasises that, whilst a certain body of tenants are asking the Tribunal to dismiss this application in its entirety, there are other tenants who have not sought to oppose the application and the landlord has in mind the interests of all of the leaseholders as well as its own interests.

58. The applicant states that it is important for the landlord to be ensured of its ability to raise funds on account so that it can proceed to commit to contracts for the works. It is also important for the landlord to have a period of certainty and the respondents' case has changed several times.

59. The applicant emphasises that the concession on the part of the landlord that the "2016 underspend" can be taken into account goes hand in hand with the landlord's explanation that there are good reasons for the delay and with the landlord's position that the work in question will be carried out in 2017. The applicant states that the documents are consistent with an intention on the part of the landlord to carry out the work.

60. The applicant submits that any proposal to reduce the amount of the payments puts in issue questions about scheduling which cannot be considered on a reasoned basis because there is no evidence before the Tribunal to explain how any rescheduling might prejudice the CAPEX Plan. Further, the applicant states that it is obliged to carry out certain works pursuant to a headlease with TfL.

61. If, contrary to the applicant's case, the Tribunal makes a determination in respect of quantum for a period of less than 5 years, the applicant seeks a determination in respect of the categories of expenditure which will be payable for a five year period and states that the Tribunal has the jurisdiction to make such a determination.

62. As regards the statutory consultation issue, the applicant submits that it is wrong to describe a section 20 consultation as mandatory either in law or in a discretionary sense. To do so would negate utility of 27A(3) of the 1985 Act and the applicant notes that applications under section 27A(3) can take a year to be determined.

63. The respondents contend that, in the absence of any evidence that a statutory consultation has been carried out, the Tribunal should dismiss the applicant's application in its entirety.

64. The respondents state that the sums in respect of which a determination is sought are subject to the vagaries of the market and they note that applicant states that matters will be kept under review.

65. The respondents submit that the Tribunal needs to treat the figures with caution and that the way that in which the figures will be tested is through the statutory consultation process. Accordingly, in the absence of any evidence that a statutory consultation has been carried out, the Tribunal should find that nothing is payable.

66. In the alternative, the respondents contend that 2-3 years would be an appropriate line at which to drawn any determination having regard to the lack of certainty in the budget. The respondents referred the Tribunal to paragraph 17 of the witness statement of Mr Nicholson dated 20th January 2017 where he states:

"It has been made clear within the Plan that the figures provided at this stage should be treated with caution. The costings are intended to provide an approximate guide for budget purposes and it will be necessary to undertake a more detailed inspection of each of the relevant parts of the complex ahead of the tender process for any element of the plan."

67. Further or alternatively, the respondents submit that the proposed sums should be reduced by 40% to take account of the "2016 underspend". They point out that, whilst the non-participating respondents have not sought to oppose this application, they have not informed the Tribunal that they positively support it.

68. Further, the respondents submit that the Tribunal has no jurisdiction to make a determination in relation to categories of expenditure without specifying an amount.

The Tribunal's determination

69. The respondents are concerned about the scope and effect of this determination. The Tribunal confirms that this determination does not

in any way obviate the need for statutory consultation, where applicable.

70. Further, all of the leaseholders, including those who have not participated in these proceedings, retain their rights in respect of all matters which are not covered by Tribunal or Court determinations including the right to potentially challenge the actual costs and the standard of work carried out under the CAPEX Plan and/or to potentially seek further determinations in the event that relevant circumstances materially change.

71. The applicant recognises that the leaseholders retain their rights in respect of all matters which are not covered by Tribunal or Court determinations and has expressed the clear intention to comply with its statutory consultation obligations.

72. The Tribunal is of the view there is merit in the submission which has been advanced on behalf of the respondents that that the scope of this application is wide.

73. It is stated at paragraph [82] of Pond House that precision as to the extent and duration of the works is required to support a section 27A(3) determination. The Tribunal has reviewed the CAPEX Plan and is of the view that the level of uncertainty in the applicant's budget is likely to increase with time. It is likely to be possible to more accurately predict the level of costs in the early years of the CAPEX Plan than the level of costs at the later stages of the 10 year period.

74. Further, the Tribunal accepts that it should take into account the 2016 underspend and that there is consequently some uncertainty as to whether or not the proposed timetable will be adhered to. However, the Tribunal places limited weight on this issue for the reasons set out above.

75. The Tribunal is also of the view that there is merit in the submission which has been advanced on behalf of the applicant that a period of certainty is needed and that the Tribunal should not decline to make a determination under section 27A(3) until the applicant reaches the stage of having completed the statutory consultation process.

76. In determining this application, the Tribunal takes account of the fact that it is not contended by the respondents that any of the proposed work which comprises the CAPEX Plan is not required. The Tribunal also takes account of the fact that none of the amounts set out in the CAPEX Plan have been challenged. Further, the Tribunal notes that, whilst they have not informed the Tribunal that they support the application, a significant number of the leaseholders have not in any way sought to oppose this application.

77. The Tribunal accepts the applicant's submission that any proposal to reduce the amount of the payments puts in issue questions about scheduling which cannot be considered on a reasoned basis because there is no evidence before the Tribunal to explain how any rescheduling might prejudice the CAPEX Plan.

78. The Tribunal is satisfied in all the circumstances that it is likely on the balance of probabilities that the CAPEX Plan is sufficiently precise for the first 5 years of the programme to support a determination under section 27A(3) of the 1985 Act in respect of those years.

79. The Tribunal is not satisfied on the balance of probabilities that the CAPEX Plan is likely to be sufficiently precise for the remainder of the 10 year period.

80. The Tribunal determines that (subject to the issue of apportionment) the interim service charges which have been demanded in respect of the service charge year 2016 and for the first quarter of 2017 are reasonable and payable.

81. The Tribunal determines in respect of the costs set out in the CAPEX Plan for the years 2016 to 2020 inclusive that the sums claimed by the applicant in respect of each service charge year are reasonable and payable (subject to the issue of apportionment).

82. The Tribunal directs that, by 4 pm on 8th May 2017, the applicant shall serve a proposed breakdown of the CAPEX Plan expenditure for the service charge years 2016 to 2020 on the leaseholders, in accordance with Paragraph 83 below.

83. The expenditure shall be broken down into five headings in accordance with the leases, namely estate expenditure, residential expenditure, sky lobby expenditure, car park expenditure and commercial expenditure. Further, each leaseholder shall be informed of the amounts which the applicant states that they are individually required to pay pursuant to their lease percentages.

84. Any leaseholder who wishes to raise a dispute concerning the issue of apportionment shall, on or before 4pm on 19th June 2017, apply to the Tribunal for a determination.

Application under s.20C

85. At the end of the hearing, the respondents applied for an order under section 20C of the 1985 Act. Having heard the submissions from the parties and taking into account the determinations above, the Tribunal determines that it would not be just and equitable in the circumstances for an order to be made under section 20C of the 1985 Act, so that the

applicant may not pass any of its costs incurred in connection with the proceedings before the Tribunal through the service charge.

86. The applicant has been substantially successful in its application and the respondents have been unsuccessful in their contention that the applicant's application should be dismissed in its entirety.

87. Further, the respondents changed their case shortly before the hearing (when they changed their representation) having failed to comply with the Tribunal Directions for the service of their skeleton argument.

88. Whether or not adequate notice was given to the respondents before the application was issued, the application was issued in May 2016 and the respondents had sufficient time in which to respond to the application in compliance with the Tribunal Directions.

Name: Judge N Hawkes **Date:** 24th March 2017

Rights of appeal

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any right of appeal they may have.

If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber), then a written application for permission must be made to the First-tier Tribunal at the regional office which has been dealing with the case.

The application for permission to appeal must arrive at the regional office within 28 days after the tribunal sends written reasons for the decision to the person making the application.

If the application is not made within the 28 day time limit, such application must include a request for an extension of time and the reason for not complying with the 28 day time limit; the tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed, despite not being within the time limit.

The application for permission to appeal must identify the decision of the tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal and state the result the party making the application is seeking.

If the tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).

Appendix of relevant legislation

Landlord and Tenant Act 1985 (as amended)

Section 18

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

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

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

Section 19

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

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

Section 27A

(1) An application may be made to the appropriate tribunal for a determination whether a service charge is payable and, if it is, as to -
   (a) the person by whom it is payable,
   (b) the person to whom it is payable,
   (c) the amount which is payable,

(d) the date at or by which it is payable, and
(e) the manner in which it is payable.

(2) Subsection (1) applies whether or not any payment has been made.

(3) An application may also be made to the appropriate tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs and, if it would, as to -
(a) the person by whom it would be payable,
(b) the person to whom it would be payable,
(c) the amount which would be payable,
(d) the date at or by which it would be payable, and
(e) the manner in which it would be payable.

(4) No application under subsection (1) or (3) may be made in respect of a matter which -
(a) has been agreed or admitted by the tenant,
(b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,
(c) has been the subject of determination by a court, or
has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.

(5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.

Section 20

(1) Where this section applies to any qualifying works or qualifying long term agreement, the relevant contributions of tenants are limited in accordance with subsection (6) or (7) (or both) unless the consultation requirements have been either—
(a) complied with in relation to the works or agreement, or
(b) dispensed with in relation to the works or agreement by (or on appeal from) the appropriate tribunal .

(2) In this section "relevant contribution", in relation to a tenant and any works or agreement, is the amount which he may be required under the terms of his lease to contribute (by the payment of service charges) to relevant costs incurred on carrying out the works or under the agreement.

(3) This section applies to qualifying works if relevant costs incurred on carrying out the works exceed an appropriate amount.

(4) The Secretary of State may by regulations provide that this section applies to a qualifying long term agreement—

(a) if relevant costs incurred under the agreement exceed an appropriate amount, or
(b) if relevant costs incurred under the agreement during a period prescribed by the regulations exceed an appropriate amount.

(5) An appropriate amount is an amount set by regulations made by the Secretary of State; and the regulations may make provision for either or both of the following to be an appropriate amount—
(a) an amount prescribed by, or determined in accordance with, the regulations, and
(b) an amount which results in the relevant contribution of any one or more tenants being an amount prescribed by, or determined in accordance with, the regulations.

(6) Where an appropriate amount is set by virtue of paragraph (a) of subsection (5), the amount of the relevant costs incurred on carrying out the works or under the agreement which may be taken into account in determining the relevant contributions of tenants is limited to the appropriate amount.

(7) Where an appropriate amount is set by virtue of paragraph (b) of that subsection, the amount of the relevant contribution of the tenant, or each of the tenants, whose relevant contribution would otherwise exceed the amount prescribed by, or determined in accordance with, the regulations is limited to the amount so prescribed or determined.]

Section 20B

(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.

Section 20C

(1) A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a court, residential property tribunal or the Upper Tribunal, or in connection with arbitration proceedings, are

not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application.

(2) The application shall be made—

(a) in the case of court proceedings, to the court before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to a county court;

(aa) in the case of proceedings before a residential property tribunal, to that tribunal;

(b) in the case of proceedings before a residential property tribunal, to the tribunal before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to any residential property tribunal;

(c) in the case of proceedings before the Upper Tribunal, to the tribunal;

(d) in the case of arbitration proceedings, to the arbitral tribunal or, if the application is made after the proceedings are concluded, to a county court.

(3) The court or tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances.