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LON/00AH/LSC/2005/0182

DECISION OF THE LEASEHOLD VALUATION TRIBUNAL FOR THE RESIDENTIAL PROPERTY TRIBUNAL SERVICE ON APPLICATIONS UNDER SECTIONS 27A AND 20C OF THE LANDLORD AND TENANT ACT 1985, AS AMENDED

Applicant: Key Flats Ltd

Respondents: Ms S Gajree, Dr N Sood, Orbitview Ltd, Commercial Holdings Ltd and Boston Capital Ltd

Address: Warwick Gardens, London Road, Croydon, CR7 7NA

Date of Transfer from Croydon County Court: 8 November 2004

Date of Transfer from Willesden County Court: 16 November 2004

Hearing Dates: 12, 13 and 14 December 2005 and 28 February 2006

Appearances:

Mr M P Comport, Solicitor, Dale & Dale
Mr S Unsdorfer, FIRPM, Parkgate-Aspen
Mr C Negus BSc FRICS, Brooke Vincent & Partners
Mr P Farrell, Caretaker
Mr A Uzzaman, Flat 42, Warwick Gardens
For the Applicant

Mr R Hayes of Counsel
Mr R Taylor FRICS
For Commercial Holdings Ltd and Boston Capital Ltd

No appearances by or on behalf of the remaining Respondents

Members of the Leasehold Valuation Tribunal:

Mrs J S L Goulden JP
Mr M A Mathews FRICS
Mr D J Wills ACIB

LON/00AY/LSC/2005/0182

PROPERTY: WARWICK GARDENS, LONDON ROAD, CROYDON, CR7 7NA

BACKGROUND

1. The Tribunal was dealing with

   (1) an application under Section 27A of the Landlord and Tenant Act 1985, as amended (hereinafter referred to as "the 1985 Act"), 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) An application under Section 20C of the 1985 Act to limit landlord's costs of proceedings.

INSPECTION

2. Warwick Gardens, London Road, Croydon, CR7 7NA (hereinafter referred to as "the subject property") was inspected on the morning of 12 December 2005 in the presence of Mr R Hayes of Counsel and Mr R Taylor FRICS.

3. The subject property was situated on a very busy road which was a bus route and also a red route. It was a 1930s brick built estate of three 4-storey blocks, one behind another, interspersed with basic lawned areas with some shrubs. The Tribunal was advised that there were 60 flats in all, with 20 flats in each block. Entry to the flats in each block was via a basic glass fronted original entrance door with entryphone.

4. The Tribunal noted that the original Crittal windows, where not replaced, were generally in a poor state of repair and the feature concrete lintel and sills had spalled, revealing exposed reinforcements which had rusted. Some downpipes were in poor condition, with evidence of overflowing and/or leaks which had caused staining to the brickwork.

5. There were minimal parking facilities within the estate, which appeared to be by way of permit only.

6. The Tribunal inspected internally the front block only, the common parts of which were basic and spartan and in which there was no heating. Internal courtyards with metal fire escapes were noted. The Tribunal, by way of a steel ladder, inspected the roof covering of the front block which appeared to be covered with sheeting of differing materials. Extensive ponding was noted and some of the upstands appeared to have been covered in a felt material.

7. The Tribunal was invited to inspect internally the caretaker's flat, Flat 6, which was on the first floor of the front block and which comprised three rooms,

kitchen, bathroom and separate WC. This flat had independent central heating.

JURISDICTION

8. The matters before the Tribunal were transferred to the Leasehold Valuation Tribunal by Orders of the Croydon County Court dated 8 November 2004 (Claim No 4QZ27834) and Willesden County Court dated 16 November 2004 (Claim Nos 4QZ, 35149, 35152, 35156, 35160, 35433 and 35434).

9. One of the Respondents, Ms S Gajree, is the lessee of Flats 1 and 1A both of which are used as a dental surgery. The Tribunal has no jurisdiction over commercial premises, and in the view of the Tribunal, where the outstanding issues relate to Flats 1 and 1A, jurisdiction remains with the County Court.

BACKGROUND

10. The Tribunal was provided with a copy of the lease of Flat 1 (hereinafter referred to as "the lease") dated 17 June 1991 and made between Hanpier Ltd (1) and Dr N Kumar and S Gajree (2) for a term commencing on 17 June 1991 and terminating on 25 March 2183 at the rent and subject to the terms and conditions therein contained. The Tribunal was advised that all the leases were in the same form.

11. The tenant's covenants in respect of the payment of service charges are contained in Clauses 3 and 4 and Parts 5 and 6 of the Fourth Schedule to the lease. The Tribunal will return to these covenants, where relevant, in the body of this decision.

12. The landlord's covenant in respect of the service charge is contained in Clause 5 of the lease. The Tribunal will return to this covenant, where relevant in the body of this decision.

HEARING

13. The Hearing took place on 12, 13 and 14 December 2005 and 28 February 2006.

14. The Applicant, Key Flats Ltd, was represented by Mr M P Comport, Solicitor, of Dale & Dale. Evidence on behalf of the Applicant was given by Mr S Unsdorfer FIRPM of the Applicant's managing agents, Parkgate-Aspen, Mr C Negus BSc FRICS of Brooke Vincent & Partners, Mr P Farrell and Mr A Uzzaman.

15. The Respondents are Ms S Gajree, Dr N Sood, Orbitview Ltd, Commercial Holdings Ltd and Boston Capital Ltd. Mr R Hayes of Counsel appeared on behalf of Commercial Holdings Ltd and Boston Capital Ltd only, and evidence on behalf of those two companies was given by Mr R Taylor FRICS.

16. There were no appearances by or on behalf of the remaining Respondents namely Ms S Gajree, Dr N Sood or Orbitview Ltd.

17. It is considered helpful to set out the background (as advised to the Tribunal during evidence) to those parties who provided evidence to the Tribunal in the order in which they appeared before the Tribunal:-

For the Applicant

(a) Mr P Farrell is the resident caretaker on the estate, and has been employed since 2001. His flat is Flat 6. He pays no rent and the rental on his telephone land line and mobile telephone are paid by the landlord. The landlord also pays for the cost of telephone calls from the land line. Mr Farrell pays for the telephone calls on his mobile telephone. His instructions are taken from Parkgate-Aspen, the managing agents.

(b) Mr A Uzzaman is the long lessee of Flat 42 which he purchased in approximately 2000. His flat is on the ground floor in the rear block.

(c) Mr C Negus is a Chartered Surveyor who had been instructed by Parkgate-Aspen in 2001. His instructions were in respect of, and limited to, the roof covering of the blocks only. He said that he gave evidence to the Tribunal as an expert witness.

(d) Mr S Unsdorfer is a property manager and director of Parkgate-Aspen. His firm took over management of the estate in approximately 1997.

For the Respondents

(a) Mr R Taylor is a Chartered Surveyor who appeared as witness on behalf of Commercial Holdings Ltd (in respect of Flats 17, 20, 21, 22, 33 and 54 which were purchased between 1988 and 2001) and Boston Capital Ltd (in respect of Flats 19, 43 and 49, which were purchased between 1998 and 1999). Mr Taylor was neither a director or shareholder in these companies. Mr Taylor said that he gave evidence to the Tribunal as an expert witness.

(b) Flats 5, 7, 38, 40, 41, 44 and 55 are owned by Tobicon Ltd, a company which was in the same ownership as Commercial Holdings Ltd and Boston Capital Ltd.

(c) Derri Properties Ltd own another six flats on the estate, Flats 2, 18, 28, 29, 34 and 36. Mr Taylor is one (of two) directors.

(d) Mr Taylor confirmed that he managed all 22 flats referred to above for Alpha Management, a company of which he is the sole principal, and that all service charges payable in respect of all those 22 flats have not been paid since approximately 2002.

(e) Dr N Sood or his wife Ms S Gajree (both Respondents in this case) own another six flats on the estate, Flats 46, 48 and 51 (Dr Sood) and 1, 1A and 3 (Ms Gajree) either themselves or through Orbitview Ltd (a Respondent in this case). Neither appeared before the Tribunal. The Tribunal was advised that Dr Sood is a Director of Orbitview and

Ms Gajree is the Company Secretary. Mr Taylor does not manage the flats on behalf of Dr Sood and Ms Gajree although he said Dr Sood finds tenants for Commercial Holdings, Boston Capital and Tobicon.

18. At the commencement of the Hearing, Mr Comport provided the Tribunal and Mr Hayes with a Scott Schedule. Since Mr Hayes had had no opportunity to consider this in detail and since some of the amounts in issue appeared to be small, the parties were requested to adjourn in order to see if issues could be narrowed. The salient points in respect of the outstanding issues are given in the body of this Decision. The Tribunal's determinations are set out in the Scott Schedule, a copy of which is attached as the Appendix to this Decision.

19. Evidence for the Applicant was given by the caretaker, Mr P Farrell, whose flat (Flat 6) had been inspected by the Tribunal. Mr Comport said that Mr Farrell's evidence went to the conduct of the parties in respect of the non-payment of service charges, the refuse removal which he had been required to undertake, and to the application under Section 20C.

20. Mr Farrell said that he had been a caretaker on the estate since 2001. He worked Monday to Friday from 8am to 4pm. After 5pm, the tenants could telephone an emergency number at Parkgate-Aspen. Mr Farrell did not work at weekends. In his flat, there was a landline on permanent answerphone, although he always had his mobile telephone with him and the tenants had his mobile number. He did not pay rent on his flat and the landlord also paid for outgoings such as the telephone land line and the mobile telephone rental (although not the telephone calls on the mobile). He said that he was permitted to use the land line for occasional personal calls (which he estimated to be 20-25%), of its use but he said that the telephone was mostly used in order to get in touch with contractors.

21. With regard to the rent, he thought that if he was not living at his flat rent free, a similar flat would cost £700 to £800 per month to rent, excluding the bills. When he had moved into his flat at the subject property, it had been unfurnished and there had been carpets and a cooker only.

22. Mr Farrell said that when he had started employment, there had been many owner/occupiers on the estate but now the turnover was *"astounding"*. He said that there were now many more people living on the estate and he knew nobody. This high turnover had occurred in the last eighteen months to two years. He confirmed that he had entered into one of the flats, Flat 28, of which Derri Properties was the landlord. He said that four people were living in a three bedroom flat and there were Yale locks on each bedroom door. In his opinion, the flat was used as bedsits.

23. Evidence was given on behalf of the Applicant by Mr A Uzzaman, the lessee of Flat 42, which was a ground floor flat in the rear block. He said that the position was getting *"from bad to worse"*. He said that the people who now resided on the estate were not there for very long and he thought they had been placed there temporarily by the local authority. In his view about 80% of the flats were now in multiple occupation and of these, *"about half"* were bedsits. He said that he had seen refuse in the corridors, graffiti, drains which

had been blocked with rice, food and fat, inconsiderate parking, furniture and mattresses dumped on the estate and the estate suffered from loud noise. He said that these tenants had a total disregard for the estate on which they lived. In the view of Mr Uzzaman, Alpha Management dealt with some 20 to 30 flats on the estate.

24. Mr Uzzaman said that he had always paid his service charges and had been shocked to be informed by Parkgate-Aspen that others had refused to pay their service charges. He said *"the flats are in desperate need of work. To say they are not paying is just ludicrous"*. He added that Parkgate-Aspen *"can't be expected to be responsible for the state of the flats if they've got no money"*. He said *"I sincerely hope that this gets resolved to everyone's benefit. It's got to breaking point now – something needs to be done"*.

25. Certain issues were resolved by the parties either during or after the December 2005 hearings. The matters which remained in issue, and which required the determination of the Tribunal are as follows:-

(a) Notional rent in respect of the caretaker's flat
(b) Roof repairs
(c) Insurance Claims and insurance excess
(d) Legal and professional fees
(e) Photocopying charges
(f) Additional managing agents' fees
(g) Section 20C application (limitation of landlord's costs)
(h) Reimbursement of hearing fees
(i) Penal costs

26. Oral evidence was given in respect of roof repairs only. The salient points of the evidence are given under each head.

(a) <u>Notional rent in respect of the caretaker's flat</u>

27. It is understood that the porter pays no rent and the Applicant pays no rent on behalf of the caretaker. The Respondents reject the suggestion that the Applicant is able to charge notional rent, together with rates, gas, electricity and telephone charges on the caretaker's flat to the service charge account, and contend that there is no appropriate provision in the lease which would entitle the Applicant to do so. Mr Hayes referred to clauses in the lease on which he wished to rely, and maintained that it is *"actual expenditure"* only which must be considered. He accepted that the landlord would be entitled to recover expenditure on repairs to the caretaker's flat under the terms of the lease. There was no dispute as to quantum.

28. Mr Comport accepted that the lease was badly drafted, but said that the Applicant employed the caretaker on such terms and conditions considered appropriate, whether or not the caretaker lived on the estate. He rejected Mr Hayes' reference to *"actual expenditure"* and pointed out that the lease referred also to reserve fund contributions (which was not actual expenditure) being placed on the service charge account. Mr Comport referred to clauses in the lease on which he wished to rely.

29. Both Mr Hayes and Mr Comport referred to the Court of Appeal case of **Gilje and others v Charlgrove Securities Ltd (2002)**.

30. The basic and additional service charge provisions are set out in Parts 5 and 6 of the Fourth Schedule to the Lease and are as follows:-

Part 5

The Basic Service Charge

1. In respect of any year of the term commencing prior to the service of a notice of increase upon the Tenant in accordance with the provisions of paragraph 3 below:-

The sum of £500.00 per annum.

2. In respect of any year of the term commencing after the service of any such notice of increase:

Such annual sum as is specified in the relevant notice of increase

3. The Lessors by themselves or their Agents shall be at liberty during the course of any year of the term hereby granted to decide that the Basic Service Charge shall be revised and adjusted in the light of the actual expenditure incurred by the Lessors in carrying out their obligations under Clause 5 hereof for the previous years of the term and on making such decision the Lessors shall as soon as practicable thereafter serve upon the Tenant a notice of increase signed by the Lessors or their Agents stating that the amount of the Basic Service Charge has been revised and adjusted and will thenceforth be such increased sum as is specified in such notice.

Part 6

The Additional Service Charge

4. In this Part of the Schedule the following Expressions following meanings respectively:-

(1) "Total Expenditure" means the total expenditure incurred by the Lessor in any accounting period in carrying out their obligations under subclause (6) of Clause 5 of this Lease.

(2) "the Tenant's Share of Total Expenditure" means the percentage of Total Expenditure specified at the foot of this Part of this Schedule or (in respect of the accounting period during which this Lease is executed) such proportion of such percentage as is attributable to the period from the date of this Lease to the 31st December next following.

5. **If the Basic Service Charge paid by the Tenant in respect of any accounting period exceeds the Tenant's Share of Total Expenditure for that period the Tenant shall not be liable for any Additional Service Charge in respect of that period and the surplus of the Basic Service Charge so paid over and above the Tenant's Share of Total Expenditure shall be accumulated by the Lessors and credited to the account of the Tenant in computing the Additional Service Charge in succeeding accounting periods as hereinafter provided.**

6. **If the Basic Service Charge paid by the Tenant in respect of any accounting period together with any surplus from previous accounting periods accumulated as aforesaid is equal to the Tenant's Share of Total Expenditure for that accounting period the Tenant shall not be liable for any Additional Service Charge in respect of that accounting period.**

7. **If the Tenant's Share of Total Expenditure in respect of any accounting period exceeds the Basic Service Charge paid by the Tenant in respect if that accounting period together with any surplus from previous years accumulated as aforesaid the excess shall be the Additional Service Charge for that accounting period.**

8. **If an Additional Service Charge is due from the Tenant in respect of any accounting period there shall be served upon him by the Lessors of their Agents a certificate signed by such Agents containing the following information:**

   (a) **The accounting period in respect of which the Additional Service Charge is due;**

   (b) **The amount of the Total Expenditure for that accounting period;**

   (c) **The total of the Basic Service Charge paid by the Tenant in respect of that accounting period together with any surplus accumulated from previous accounting periods;**

   (d) **The amount of Additional Service Charge due from the Tenant in respect of that accounting period.**

The Tenant's Share of Chargeable Expenditure
1.44%

31. Clauses 5(5)(g) and (h) state

(5) **Subject to and conditional upon payment being made by the Tenant of the Basic Service Charge and the Additional Service Charge at the times and in the manner hereinbefore provided:-**

(g) **To pay and discharge any rates (including water rates) taxes duties assessments charges impositions and outgoings assessed charged or imposed on the Building and the curtilage thereof as distinct from any assessments made in respect of any flat in the Building not including the rates (including water rates) assessed on any flat or flats or accommodation whether in the Building or not occupied or used by any caretakers porters maintenance staff or other persons employed by the Lessors in accordance with the provisions of paragraph (h) of subclause (6) of Clause 5 of this Lease and also all or any other outgoings payable in respect of such accommodation.**

(h) **For the purpose of performing the covenants on the part of the Lessors shall in their discretion think fit one or more caretakers porters maintenance staff or such other persons as the Lessors may from time to time consider necessary and in particular to provide accommodation either in the Building or elsewhere (free from payment of rents or rates) and any other services considered necessary by the Lessors for them whilst in the employ of the Lessors.**

32. Clause 5(5)(h) provides for a caretaker to be employed on such terms and conditions as the landlord shall in its discretion think fit and, in particular, to provide accommodation either in the building or elsewhere free from payment of rents or rates.

33. Further, the tenant must contribute within the service charge under Clause 5(5)(a)(v) for the maintenance and good substantial repair and condition of **"the flat or flats or accommodation whether in the Building or not occupied or used by any caretakers, porters, maintenance staff or other persons employed by the Lessors in accordance with the provisions of paragraph (h) of subclause (6) of Clause 5 of this lease.**

34. It is clear from the wording in Clause 5(5)(h) that the Applicant would be entitled to provide caretaker's accommodation **"elsewhere (free from payment of rent or rates)"** and the Tribunal considers that the Applicant is not acting unreasonably in providing such accommodation within the estate.

35. The services of a resident caretaker are clearly of benefit to the tenants and a non-resident caretaker would be of less benefit and would cost more.

36. In the view of this Tribunal and taking the lease as a whole, a reasonable tenant or prospective tenant, would perceive that Clause 5(5)(h) would oblige the tenant to contribute to the notional cost to the landlord of providing the caretaker's flat.

37. The Tribunal determines that the notional rent forms part of the service charge.

38. With regard to outgoings and on consideration of the lease terms, the Tribunal considers that these are recoverable within the service charge under Clause 5(5)(g).

(b) <u>Roof repairs</u>

39. Evidence was given on behalf of the Applicant by Mr C Negus BSc FRICS of Brooke Vincent & Partners, who said that he had been instructed by Parkgate-Aspen in relation to the subject property in early 2001. He had been instructed to *"advise on the condition of the external fabric of Warwick Gardens, specify the necessary repair works and oversee the building works."* Mr Negus said that his instructions had been to waterproof the flat roofs in a cost effective manner and to prolong its life for another ten years. He said that on his inspection, he had noted that the original asphalt was approximately 70 years old and at the end of its life, and the felt overlay was about ten years old but had been patch repaired with a variety of materials.

40. In his statement Mr Negus said *"Given the significant ponding that all roofs suffer, I considered that stripping the roof coverings and renewing them would be very expensive as such work would need to entail the installation of a temporary roof over the structure to guard against the possibility of water ingress occurring when the covering was stripped, the problem being exacerbated by the ponding water that lies on the roof. I therefore considered, to avoid the significant cost of a temporary roof, that the most sensible solution would be to renew defective sections of the felt coverings and overlay the roof with a liquid roofing system."*

41. Mr Negus had recommended over-painting the flat roof with a waterproof product, Nuflex 95, which had been recommended to him by roofing contractors, and which he had used twice before on other blocks with no adverse effects. He said that the problems with the flat roof was that it suffered from ponding and there was a real risk of water ingress from water standing on the roof. He accepted that he had been constrained by the cost factor. He said that ideally the roof should have been recovered but this would have involved scaffolding and a temporary roof and, in his view, the final costs could be up to three times more expensive.

42. Mr Negus said that *"the works entailed the removal of sections of defective felt coverings, and their replacement, and the removal of redundant communal heating pipework at roof level. The new roof coating was applied to the main flat roof areas and also to the top and inner faces of the roof parapet walls which had previously been felt covered or rendered."*

43. Mr Negus said that the works to the front roof (carried out by the lowest tenderer, Collins (Contractors) Ltd) commenced in October 2001 and practical completion was in December 2001. The defects period expired in December 2002. Some 5/6 months after the defects period had expired, Mr Negus had been called back to inspect the roof. He said that he had noted localised blistering and staining by way of red dye. In his view, there had been some form of chemical breakdown of the product. Unfortunately, there had been no insurance backed guarantee (because of the expense factor) and the

manufacturer had ceased distributing that particular product and had, in fact, gone out of business. Mr Negus insisted that there had been no fault in the application of the material or the workmanship. He said he would not have signed the work off if it had been poorly carried out.

44. With regard to the flat roofs to the middle and rear block, Mr Negus had been instructed to prepare a specification and obtain tenders. Tenders were obtained in January 2003. Mr Negus said *"the Specification of Works included slightly more significant works than undertaken to the roof of the front block insofar as, in addition to the removal of the old section of blistered felt and other works, works were also undertaken to the tank room roof where the existing felt covering was in need of renewal"*.

45. Mr Negus said that he had had to take a pragmatic view. He had used a different liquid type on the other blocks and there had been no problems. He said it was *"an extremely unusual situation"*.

46. With regard to continuing water ingress into the top floor flats, he said that he had inspected Flat 38 and there could be a multitude of reasons for water ingress, e.g. condensation, water ingress via the concrete lintel feature above those flats, or water ingress through the brickwork to the parapet, which was porous. He said that it was not indicative of leaks continuing through the roof. He said that his advice to Parkgate-Aspen had been qualified and he had told them that the works to the roof covering would not eliminate water ingress from other sources. His instructions had been limited to the roof surface only.

47. Mr Negus had re-inspected the roofs on 12 January 2004 and considered them free from defect save for *"minor pinholing to one area"*. Although it was considered that it was unlikely to be the cause of water ingress the contractors had been instructed to re-coat that section of the roof.

48. In Mr Negus' view the roof works to the central and rear blocks had been successful. The works had been completed in August 2003 (using an alternative applied roofing product).

49. Evidence to the Tribunal was given by Mr S Unsdorfer, property manager and director of Parkgate-Aspen, the Applicant's managing agents.

50. In his statement dated 12 August 2005, Mr Unsdorfer said *"None of the Respondent lessees have made any payments whatsoever towards these arrears for the last 2 years and some for even longer period of up to 6 years ... Together the Respondent lessees own approximately 50% of the flats at Warwick Gardens which are rented out as investments and by not paying any service charges for all those years have made the management of the building very difficult indeed. Put into perspective, the Respondents' aggregate arrears of £246,000 is two-and-a-half times the annual service charge budget"*.

51. Mr Unsdorfer said that he had had discussions with his surveyors as to priorities. He said that since there was damp penetration into some flats, it was felt that rain water penetration should be eliminated. He was unaware of

the condition of the roof and had left it to surveyors. The surveyors had been instructed to prepare a specification for external works.

52. Mr Unsdorfer said that the estate had deteriorated because of the *"takeover"* of the estate by a number of companies. In his view, there had been an abuse of the common services and the estate was *"completely out of control"*. In his view, Derri Properties had bought flats elsewhere, brought the building to its knees and then subsequently bought the freehold. He said *"it's one big operation"*. Mr Unsdorfer said that he had managed properties for 30 years and had never come across a similar situation before.

53. Mr R Taylor FRICS, who had provided a report, said that he gave evidence for two of the Respondents, Commercial Holdings Ltd and Boston Capital Ltd, as an expert witness. This aspect was challenged on behalf of the Applicant on the grounds that there was a lack of independence.

54. Mr Taylor confirmed that he was one of two directors of Derri Properties Ltd, a company which held long leases on six of the flats in the block. In addition, Mr Taylor managed, for Alpha Management, twenty-two flats (including those owned by Derri Properties Ltd), all which were let on assured shorthold tenancies. Although Alpha Management dealt with administration and maintenance issues on the flats let, they did not collect monies. Mr Taylor acknowledged that service charges on these twenty-two flats had remained unpaid since approximately 2002. He said that the flats were at the lower end of the market and were not easy to let, particularly in view of the problems with the damp, which he said were caused by the hoppers, drains and the roof.

55. With regard to the roof, which he said had been inspected on several occasions, Mr Taylor said that he had first inspected the same after the works to the front roof had been completed, probably in 2002. In his view, the action taken to repair the roof was *"totally inappropriate ... a total waste of money ... the liquid application was useless and anyone in the construction industry would say that anything painted on would not work"*. In his view, the only method to make the building watertight was to install a new asphalt roof, although he accepted that the costs would be higher. He suggested that the costs would be in the region of £50,000 to including scaffolding fees and a temporary roof. Mr Taylor produced photographs of the existing roof which he said had been taken by a professional photographer some five weeks before the Hearing.

56. Mr Taylor said that the managing agents had suggested that the damp in some flats had been caused by condensation rather than from leaks from the roof. Although he accepted that there had been some condensation, he was of the view that the *"constant stream of water through the ceiling"* of top floor flats was entering through leaks in the roof.

57. Mr Taylor said that all service charge payments ceased in approximately 2002 on advice from lawyers. He said *"we felt we were being ripped off and were getting nowhere with complaints"*. A meeting with the managing agents had not proved fruitful. Although Mr Taylor had offered a settlement figure of

£100,000, this was on the basis that he could offset a deduction of some £14,000 to £15,000 in respect of loss of rental income, which was unacceptable to the managing agents. He considered the suggestion that he was bringing the building to its knees as *"outrageous"*.

58. In questioning, Mr Taylor confirmed that Derri Properties Ltd (a company of which he was one of two directors) had purchased the freehold of a block of flats at Commonside Court, Streatham High Road, SW16 some eighteen months to two years earlier, having bought five out of sixteen flats in that block some five years earlier. Mr Taylor had approached the freeholder and bought the block at auction. He understood that the then freeholder sold the building because of a dispute with one lessee. That property had required a new roof and a major overhaul of the lift. Mr Taylor said that he had *"inherited"* with the purchase an application to the LVT for the appointment of a manager. He had not objected to the appointment.

59. Mr Hayes argued that the cost for a ten year repair (rather than replacement) was unreasonably incurred and/or the works were not carried out to a reasonable standard.

60. Mr Comport argued that to replace the roofs would cost 2½ to 3 times the cost of repair and the landlord had been starved of funds since the Respondents had paid no service charges since 2002. The works had been completed in 2001 and no defects had been notified until 2003. He rejected the suggestion that the roof had failed. The expenditure had been reasonably incurred at the time incurred.

Consideration of Mr Taylor as an expert witness

61. In law, an expert witness is in a special category. He provides expertise established through evidence and provides opinions. The Tribunal must consider whether it is safe to rely on the expert and the questions asked of him must test the quality and validity of opinions. The Tribunal must assess whether a witness is a true expert in the field of which he speaks, for example, whether he is truly independent, whether he has been unduly influenced so that his views can be fairly described as subjective, whether he is authoritative, whether he assumes the role of an advocate rather than a witness and whether the opinions expressed are based on sound judgement.

62. Mr Taylor manages, as sole principal of Alpha Management, 22 flats on this estate, 16 of which are owned by either Commercial Holdings or Boston Capital (both Respondents in this case) or their associated company, Tobicon. Another Respondent, Dr Sood, apparently finds tenants for Commercial Holdings, Boston Capital and Tobicon. The remaining 6 flats managed by Alpha Management are owned by Derri Properties. Mr Taylor is one of the two directors of Derri Properties.

63. In the view of this Tribunal, the interests of Mr Taylor are inextricably entwined with the interests of all the Respondents. Counsel took instructions from Mr Taylor throughout the proceedings.

64. Mr Taylor's opinions are not considered to be either objective or impartial. He is not truly independent and the Tribunal does not accept his evidence as that of an expert witness.

Nature of works in respect of repairs to the front block

65. The first question for the Tribunal was whether it was reasonable to treat the roofs with over-painting with a waterproof product at the time the costs were incurred.

66. The landlord had instructed Mr Negus in 2001 to advise on the condition of the external fabric of Warwick Gardens, specify the necessary repair works and oversee the building works. It was Mr Negus' recommendation that the most sensible situation would be to renew defective section of the felt coverings and overlay the roof with a liquid roofing system. The landlord was entitled to rely on that professional advice.

67. With limited funds, the Tribunal does not consider it was unreasonable for the landlord to undertake those works to the roof notwithstanding that they had an expected lifespan of approximately 10 years.

68. Section 20 Notices were served and there had been no response from any of the Respondents.

69. The Tribunal determines that the cost of roof repairs to all three blocks is relevant and reasonably incurred and properly chargeable to the service charge account.

Standard of works in respect of repairs to the front block

70. There is no dispute that parts of the roof to the front block had failed and had required repair.

71. Mr Negus said that the failure of parts of the roof covering was due to the failure of the material used, it was unfortunate that the manufacturer had gone out of business and, due to the cost, there had been no insurance backed guarantee.

72. Mr Taylor's view was that a new roof covering had been the only solution and Mr Hayes suggested that it was not possible for the Tribunal to determine that the roof covering was of a reasonable standard because *"on any view the works have failed."*

73. For whatever reason, part of the roof covering to the front block failed and failed within a relatively short period of time. It is most unfortunate that the manufacturer went out of business and therefore the 15 year guarantee in respect of the liquid roofing system had been worthless. The Tribunal does not consider the Applicant had been unreasonable in not obtaining an insurance back guarantee in the circumstances. At that time it was thought that the liquid roofing system had been covered by a 15 year guarantee and the Applicant was entitled to take into account the cost of an insurance backed guarantee.

74. The Tribunal determines that the sum of £28,818 including VAT in respect of roof covering to the front block is relevant and reasonably incurred and properly chargeable to the service charge account.

75. The Tribunal is of the view that the Respondents' challenge as to the standard of works has some merit but limited to the cost of actual repairs carried out in 2004 by All London Roofing Ltd. No invoice was provided, but it is understood that the cost was in the region of £2,000. The total cost of actual repair by All London Roofing Ltd including VAT is disallowed.

Standard of works in respect of repairs to the middle and rear blocks

76. With regard to the middle and rear blocks, although Mr Hayes accepted that the condition of the roofs were significantly better than the roof on the front block, his general challenge (as set out in paragraph 59) remained. He said that there were ongoing problems in the middle and rear blocks as evidenced by work carried out to top floor flats after the roof works had been carried out.

77. Mr Negus had given other reasons for the possibility of water ingress other than failings of the roof coverings.

78. No persuasive evidence was provided by Mr Taylor to substantiate his claim that any water ingress must be due to failings of the roof coverings and to no other reason, and although photographs of roof coverings had been provided by him, they related solely to the front block. No internal photographs showing water damage had been provided by Mr Taylor to the Tribunal.

79. There appears to be no challenge as to quantum but there is a general challenge as to the decision making process.

80. The Tribunal determines for the reasons set out above in relation to the front block that sums expended including VAT in respect of roof coverings to the middle and rear block are relevant and reasonably incurred and properly chargeable to the service charge account. No sums were specified in the Scott Schedule.

(c) Insurance claims and insurance excess

81. The amounts in dispute are £1,840.05 for the year 2001 and £400 (being the insurance excess on a total claim of £1,311.30) for the year 2004.

82. In the view of Mr Hayes, these sums plainly related to internal work, and the cost thereof should be borne by the individual tenants rather than placed on the service charge. Any suggestion that the landlord could argue that such sums could be recovered from the insurer, but the insurer had gone into liquidation, was rejected by Mr Hayes. He said whether the tenant could or could not obtain monies from the insurers did not translate into the landlord being able to place such sums on the global service charge. There was no provision in the lease which entitled the landlord to do so.

83. Mr Comport referred the Tribunal to the insurance covenants in the lease. Although he accepted that in respect of the sum of £1,840.05 (including VAT) in 2001, it related to a top floor flat, and a claim had been submitted, he said that the insurance company had gone into liquidation, and the liquidators would not pay any monies at present. The landlord may or may not receive the excess of £400 in 2004. With regard to that excess, where a tenant causes damage to another tenant's flat, the excess would be obtainable from the defaulting tenant, but where no other person is deemed to be at fault, it is correct to place the excess on the service charge. It is part of the administration of the building, and it is preferable for the tenants to pay lower premiums with a policy excess.

84. The responsibility for repair etc of the interior of a flat, prima facie, lies with the tenant under Clause 4(1) as follows:

> **"Throughout the said term to repair maintain renew uphold and keep the Demised Premises and all parts thereof (other than such parts as are comprised and referred to in paragraphs (a) and (b) of subclause (6) of Clause 5 hereof) including so far as the same form part of or are within the Demised Premises all windows glass and doors (including the entrance door to the Demised Premises) locks fastenings and hinges sanitary water gas and electrical apparatus and walls and ceilings drains pipes wires and cables and all fixtures and additions in good and substantial repair and condition save as to damage in respect of which the Lessors are entitled to claim under any policy of insurance maintained by the Lessors in accordance with their covenant in that behalf hereinafter contained except in so far as such policy may have been vitiated by the act or default of the Tenant or a person claiming through the Tenant or his or their servants agents licensees or visitors"**

85. The building was insured by the landlord. The relevant clause in the lease is Clause 5(5)(e) as follows:

> **"To insure and keep insured (unless such insurance shall be vitiated by any act or default of the Tenant or any person claiming through the Tenant or his or their servants agents licensees or visitors or the owner tenant or occupier of any other flat comprised in the Building or any person claiming through him or his or their servants agents licensees or visitors) against loss or damage by fire explosion storm tempest earthquakes aircraft and risk of explosion and damage in connection with the boilers and heating apparatus and all plant associated herewith and such other risks (if any) as the Lessors think fit in some Insurance Office of repute in the full value thereof including an amount to cover professional fees and other incidental expenses in connection with the rebuilding and reinstating thereof and to insure the fixtures and fittings plant and machinery of the Lessors against such risks as are usually covered by a Flat Owners'**

Comprehensive Policy and to insure against third party claims made against the Lessors in respect of the management of the Building and in the event of the Building or any part thereof being damaged or destroyed by fire or other insured risks as soon as reasonably practicable to lay out the insurance monies in the repair rebuilding or reinstatement of the premises so damaged or destroyed subject to the lessors at all times being able to obtain all necessary licences consents and permissions from all relevant authorities in this respect PROVIDED ALWAYS that if for any reason other than default of the Lessors the obligation on their part hereinbefore contained to rebuild or otherwise make good such destruction or damage as aforesaid becomes impossible of performance the said obligation shall thereupon be deemed to have been discharged and the Lessors shall stand possessed of all moneys paid to them under and by virtue of the Policies of Insurance hereinbefore required to be maintained upon trust to pay to the Tenant such proportion (if any) of the said moneys as may be agreed in writing between the Lessors and the Tenant or in default of agreement as aforesaid as shall be determined by a Valuer appointed by the President for the time being of the Royal Institution of Chartered Surveyors upon the request of the Lessors or the Tenant to be fair and reasonable having regard only to the relative values of the respective interest of the Lessors and the Tenant in the Demised Premises immediately before the occurrence of the said destruction or damage and it is hereby declared that any such determination as aforesaid shall be deemed to be made by the said Valuer as an expert and not as an Arbitrator."

86. The 3 July 2001 invoice stated that the works carried out were as follows:-

> *"Lounge: Hack off and replaster one wall. Prepare and decorate walls, ceiling and 2 no windows.*
>
> *Bedroom: Strip one wall and reline. Paint walls with 2 coats of emulsion and windows with one undercoat and one gloss coat."*

and although the invoice does not state specifically, both sides agreed that this work was carried out following damage caused by water penetration.

87. The 4 May 2004 invoice was in the total sum of £1,311.30 including VAT but this was paid by the insurers save for the £400 excess now disputed. The invoice stated that the works carried out were as follows:-

> *"FRONT DOOR: To attend on site & make safe kicked in door.*
> *Supply & fit one outsize door with 6 glass panels, new insurance locks & letter box.*
> *Undercoat, prime & gloss door & clear all mess from site."*

88. With regard to the 2001 invoice the Tribunal accepts that the tenant is responsible for repairs etc. to his own flat and therefore prima facie obliged to meet such costs under the provisions of the lease, unless the damage was caused by an insurable risk.

89. The landlord had insured and it is most unfortunate that the insurance company had gone into liquidation.

90. With regard to the failed insurance claim on Flat 31 in the sum of £1,840.05 in 2001, the Tribunal determines that in the particular circumstances it is relevant and reasonably incurred and properly chargeable to the service charge account. It is understood that there is litigation in progress and the claim may, in due course, be met by the regulator. If such be the case any refund should be credited to the service charge account.

91. With regard to insurance excess of £400 in respect of Flat 11, the tenant's responsibility is as stated above and the excess should be obtained from the person causing the damage to the door. That person is unknown. The Tribunal accepts Mr Comport's contention that where the person deemed at fault cannot be traced, the excess should be placed on the service charge account.

92. The Tribunal determines that the sum of £400 policy excess in 2004 in respect of Flat 11 is relevant and reasonably incurred and properly chargeable to the service charge account.

(d) <u>Legal and professional fees</u>

93. The amount in dispute was £1,176 in respect of the managing agents' in-house charges associated with recovery of arrears in 2004, at a charging rate of £40 per hour.

94. Mr Hayes argued that in the absence of any provision to place legal costs on the service charge account in the lease, it was not contractually possible to place any such fees on the service charge account.

95. Mr Comport referred to clauses in the lease on which he wished to rely. He said that since February 2006, a landlord must obtain a determination from the LVT before forfeiture proceedings could proceed in the county court and therefore there was an element of management and administration in this respect. This aspect was rejected by Mr Hayes on the basis that the Tribunal should consider the position as at the time the costs were incurred.

96. The clauses relied on in the lease are as follows:-

Clause 5(5)(k)

> **To employ a firm of Managing Agents to manage the Building and discharge all proper fees charges and expenses payable to such agents in connection therewith including the cost of computing and collecting the rents hereby reserved.**

Clause 5(5)(o)

> **Without prejudice to the foregoing to do or cause to be done all such works installations acts matters and things as in the absolute discretion of the Lessors may be considered necessary or advisable for the proper maintenance safety and administration of the Building.**

97. Having considered the relevant case law and, in particular, the cases of **Sella House v Mears (1989)** and **Iperion Investment Corporation v Broadwalk House Residents (1995)** the Tribunal is of the view that the clauses relied on are not sufficiently wide so as to allow the Applicant to place legal costs on the service charge account. The Tribunal considers that there is an absence of clear words showing that a class of expenditure was contemplated and accordingly the Tribunal adopts a restrictive construction.

98. The Tribunal determines that the legal costs are not relevant costs and are therefore not reasonably incurred or properly chargeable to the service charge account.

99. Mr Unsdorfer said that the fees of £1,176 were in respect of *"Credit watch"*. He said that the managing agents ran an in-house debt collector service *"as a mezzanine level of arrears control"*. This was run by a separate employee who liaised with solicitors and it saved solicitors' fees. Mr Unsdorfer rejected Mr Hayes' contention that these fees should form part of the normal management fees.

100. The fees referred to are either quasi legal fees (in which case the Tribunal determines that they are not recoverable under paragraph 97 above) or management fees (in which case they are prima facie recoverable under Clauses 5(5)(k) and 5(5)(o)). However, under the RICS Standard Terms of Appointment, managing agents should use their *"best endeavours to collect ... any arrears."*

101. Accordingly the Tribunal determines that such fees should fall within the basic management fees. The sum of £1,176 is therefore disallowed.

(e) <u>Photocopying charges</u>

102. The amounts in dispute under this head are £617.12 in 2003 and £617.12 in 2004.

103. Mr Hayes maintained that these should fall within the general management charge for the respective years. Whilst he accepted that, in principle, these amounts could be recovered, they were unreasonably incurred because the management fees were *"significant"*. In his view the photocopying charges were *"excessive in the context of the charge already made"*.

104. Mr Comport said that it was general practice with professionals to charge fees for photocopying at an hourly rate. The charges in this case were calculated on the size of the block, and the figure used was approximately £10 per hour.

105. It is noted that in the RICS Service Charge Management Code states at paragraph 2.6 that as part of the terms of engagement, a "menu" of charges outside the scope of the basic fee could include, inter alia, *"copying documents, insurance policies and accounts"*.

106. The Tribunal does not consider that the management fees were significant or that the photocopying charges were excessive in the context of the charge already made, as suggested by Mr Hayes.

107. The Tribunal determines that the sums £617.12 in 2003 and £617.12 in 2004 in respect of photocopying charges are relevant and reasonably incurred and properly chargeable to the service charge account.

(f) <u>Additional managing agents' fees</u>

108. The amounts in dispute under this head were £2,953.10 for 2003 and were fees in respect of the management agents' major works fee.

109. Mr Taylor had said in evidence that he considered that the total percentage for supervising works should be no more than 10%.

110. Mr Hayes said that the total percentage in this case was 15%, being 12.5% in respect of the fees of Brooke Vincent & Partners (BVP) and 2.5% in respect of the fees of Parkgate-Aspen. He said since BVP were administering the contract and charged significant sums for so doing, the managing agents' fees should be included within the general management fee and it was unclear what the managing agents did to justify the fee or how it was negotiated.

111. Mr Comport said that BVP's total percentage of 12 5% was split as to 10% for contract administration and 2.5% for Planning Supervision in respect of CDM Regulations.

112. Mr Comport said that the additional fees charged by Parkgate-Aspen were in respect of major works and under RICS guidelines the managing agents were entitled to make such additional charges. The additional duties involved, inter alia, attending pre-contract and tender meetings, consultation with tenants, preparation and service of notices, site meetings, liaising between tenants and contractors and attending to the snagging lists. These duties related specifically to the major works, and were not the same duties as those carried out by BVP.

113. The duties of BVP and the managing agents in connection with the major works differed. The duties of the managing agents in respect of the major works are considered to be outside the scope of duties covered by the annual management fee. 2.5% of the cost of the major works is considered to be within an acceptable percentage range. The percentage charged by BVP is within an acceptable range.

114. Whilst not specifically referred to in the Scott Schedule, the Tribunal determines that the sum of £2,953 10 in respect of additional managing

agents' fees for the major works are relevant and reasonably incurred and properly chargeable to the service charge account.

(g) Section 20C application (limitation of landlord's costs)

115. In written submissions, Mr Comport, on behalf of the Applicant, set out the chronology of the dispute between the parties. He said, inter alia *"of the 60 flats in Warwick Gardens those owned by the Respondents or managed by someone connected with the Respondents total 27 (45%) ... even on the Respondents' case the undisputed expenditure for the years 2001 to 2004 inclusive are £533,669.50 of which on a rough calculation of the proportions by each of the lessees equating to 45% as mentioned above means that the Respondents had no dispute with £240,151.41 of the service charges. Taking the above into consideration, the Applicant questions the conduct of the Respondents in making no payments whatsoever towards the undisputed service ..."* At the Hearing, Mr Comport relied on Clause 5(5)(o) in the lease to justify recovery of costs (as set out in paragraph 96 above). He said that the clause was wide enough to cover legal fees.

116. In written submissions on behalf of the Respondents for whom he acted, Mr Hayes disputed that legal costs could be recovered contractually under the lease. He said that if this contention was not accepted by the Tribunal, then the Tribunal should concentrate on the pleaded issues between the parties. He said *"it is submitted that Commercial and Boston could already be said to have achieved a degree of success on their challenges"*. Mr Hayes set out concessions made on behalf of the Applicant and whilst he accepted that certain concessions may have been commercial decisions, he argued that some commercial decisions stood no real prospect of success and others were concessions of principle. Mr Hayes maintained that the landlord had wrongfully placed significant sums to the service charge account and had originally attempted to defend those items. With regard to the non payment of service charges by the Respondents, Mr Hayes said *"the Applicant's rather sinister analysis is not, it is submitted, borne out by the evidence. Rather, Mr Taylor said he was dissatisfied with the services being provided under the service charge."* Mr Hayes said *"there is a general no costs rule in the LVT. This is a factor to consider under Section 20C. To enable the landlord to recover legal costs of LVT proceedings under the lease would undermine the policy behind that general rule"*.

117. Under Section 20C of the Act

> **"(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 or leasehold valuation tribunal, or the Lands 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 the proceedings are taking place or, if the application is made after the proceedings are concluded, to a county court;

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

(c) in the case of proceedings before the Lands 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."

118. In applications of this nature the Tribunal endeavours to view the matter as a whole including, but not limited to, the degree of success, the conduct of the parties and as to whether, in the Tribunal's opinion, resolution could or might have been possible with goodwill on both sides.

119. In the judgement of His Honour Judge Rich in a Lands Tribunal Decision dated 5 March 2001 (**The Tenants of Langford Court v Doren Ltd**), it was stated, inter alia, *"where, as in the case of the LVT, there is no power to award costs, there is no automatic expectation of an order under Section 20C in favour of a successful tenant, although a landlord who has behaved improperly or unreasonably cannot normally expect to recover his costs of defending such conduct, in my judgement the primary consideration that the LVT should keep in mind is that the power to make an order under Section 20C should be used only in order to ensure that the right to claim costs as part of the service charge is not to be used in circumstances that makes its use unjust".*

120. Under new legislation, there is now a limited power for the Tribunal to order costs, but Judge Rich's comments are still valid.

121. In accordance with Section 20C(3), the applicable principle is to be the consideration of what is just and equitable in the circumstances. Of course excessive costs unreasonably incurred would not be recoverable by the landlord in any event (because of Section 19 of the 1985 Act) so the Section 20C power should be used only to avoid the unjust payment of otherwise recoverable costs.

122. In his judgement, Judge Rich indicated an extra restrictive factor as follows:-

> *"Oppressive and, even more unreasonable behaviour however is not found solely amongst landlords. Section 20C is of a power to deprive a landlord of a property right. If the landlord has abused his rights or used them oppressively that is a salutary power, which may be used with justice and equity; but those entrusted with the discretion given by Section 20C should be cautious to ensure that it is not itself turned into an instrument of oppression".*

123. Although the Tribunal considers that resolution between the parties would not have been possible without an application before the Tribunal, in the view of this Tribunal and for the reasons as set out in paragraph 96 above the wording in Clause 5(5)(o) of the lease is not sufficiently wide so as to entitle the Applicant to place the legal costs in connection with proceedings before the Tribunal on the service charge account. The question of whether or not the Tribunal should exercise its discretion therefore does not arise.

124. In order to assist the parties, if the Tribunal is incorrect in its determination that legal costs are irrecoverable under the terms of the lease, it is the Tribunal's view that the Applicant was starved of funds due to the fact that the Respondents, who owned a large number of flats on the estate, had stopped paying all service charges (and not merely service charges which had been disputed) since 2002. Accordingly the Tribunal would have determined that it would have been just and equitable that the landlord's costs of proceedings before the LVT would have been regarded as relevant costs which would have been able to be placed on the service charge account.

(h) <u>Reimbursement of hearing fees</u>

125. In accordance with paragraph 10 of Directions issued by the Leasehold Valuation Tribunal on 7 September 2005, the Tribunal considered whether to exercise its discretion under Regulation 9 of the Leasehold Valuation Tribunals (Fees) (England) Regulations 2003.

126. The submissions from both sides were similar to those made in connection with the Section 20C application.

127. The Tribunal acknowledges that both sides have incurred costs which are irrecoverable. It is felt that to make an order for the Respondents to reimburse any part of the Hearing fees would be punitive. Since this case was transferred from the County Court, there are no application fees.

128. The Tribunal does not intend to exercise its discretion in this case and declines to make an Order for reimbursement by the Respondents to the Applicants of the Hearing fee or any part thereof.

(i) <u>Penal costs</u>

129. Schedule 12 paragraph 10 of the Commonhold and Leasehold Reform Act 2002 states:-

"(1) A leasehold valuation tribunal may determine that a party to proceedings shall pay the costs incurred by another party in connection with the proceedings in any circumstances falling within sub-paragraph (2).

(2) The circumstances are where –

(a) he has made an application to the leasehold valuation tribunal which is dismissed in accordance with regulations made by virtue of paragraph 7, or

(b) he has, in the opinion of the leasehold valuation tribunal, acted frivolously, vexatiously, abusively, disruptively or otherwise unreasonably in connection with the proceedings.

(3) The amount which a party to proceedings may be ordered to pay in the proceedings by a determination under this paragraph shall not exceed –

(a) £500, or

(b) such other amount as may be specified in procedure regulations.

(4) A person shall not be required to pay costs incurred by another person in connection with proceedings before a leasehold valuation tribunal except by a determination under this paragraph or in accordance with provisions made by any enactment other than this paragraph."

130. The Tribunal declines to make an Order under this head.

131. **The Tribunal's determinations as to service charges are binding on the parties and may be enforced through the County Courts if service charges determined as payable remain unpaid.**

CHAIRMAN .....

DATE 29.3.06.

JG

Re: Warwick Gardens, London Road, Thornton Heath Surrey
LVT Case Reference: LVT CASE REF: LON/00AH/LSC/2005/0182
RESPONSE TO ITEMS QUERIED BY RESPONDENTS

APPENDIX

Service Charge 1998				
No service charges are disputed [Save – decision on porters accommodation will be applied to all years. Both sides reserve position as to whether any re-claim can extend to years Respondents did not own flats]				
Service Charge 1999				
No service charges are disputed [Save for porters accommodation as above]				
Service Charge 2000				
No service charges are disputed [Save for Porters accommodation as above]				

Page No:	Description of Works	Reason	Applicant's Comments	Tribunal's Decision/Concessions
Service Charge 2001				
11 £8419	Porter's flat, rent, rates, gas, electricity, repairs and telephone	Disputed as leases do not allow for the recovery of these expenses.	Quantum is not disputed. Clauses 5(5)(a)(v), 5(5)(d), 5(6)(g) and 5(6)(h) allows for such expenditure. Furthermore the Applicant does not charge a market rent for the flat.	Respondents concede £181.00 repairs **See paragraphs 36 and 37**
12 £28818	Repairs to roof of front block	The cost of repairs to the roof to the front block and the associated surveyor's fees are disputed as it is felt that this work has either not been carried out or has been carried out ineffectively.	Quantum is not disputed. Works were carried out and effectively. Please see statement of Mr. Negus.	**Allowed in full (paragraph 74) but see paragraph 75.**
13 £595.25	Ground rents	We dispute the item for ground rents of £595.25 and require further explanation.	Although the demand was included within paperwork the ground rents to superior landlord were not included within the service charge expenditure.	Respondents concede as not in accounts

Page No:	Description of Works	Reason	Applicant's Comments	Tribunal's Decision/Concessions
14 £25.00	Rubbish clearance	The payment for rubbish clearance from builders carrying out renovations to flat is disputed as this should be a charge to the individual lessee.	Quantum is not disputed. The invoice is one covering various matters undertaken by the contractor and not related to one particular flat. The rubbish clearance is the only item specifically disputed. The alleged lessee denied responsibility and has sold the flat. The landlord has a duty to ensure the Building is safe for all.	Respondents concede
15 £68.70	Redecoration of caretaker's flat	This payment would appear to be in connection with the individual flat and should therefore not be charged to the service charge account.	Quantum is not disputed. Clause 5(5)(a)(v) and 5(6)(h) allows for such expenditure.	Respondents concede
16 £558.12	Furniture removal	Would appear to relate to furniture removal and no further information has been provided and is therefore disputed.	Quantum is not disputed. This relates to rubbish dumped on the estate, a by product of the rapid turnover of occupants in these sublet flats. Constant breakage of cheap furnishings by transient tenants.	Respondents concede

Page No:	Description of Works	Reason	Applicant's Comments	Tribunal's Decision/Concessions
17 £47.00	Internal repair	This is an internal repair to one of the flats and is therefore the responsibility of the lessee not the service charge.	Quantum is not disputed. This was simply an attendance to site to investigate. The repairs were carried out and paid for by the lessee.	Applicant concedes
18 £1840.05	Internal decorations	This would appear to relate to internal decorations to flat 31 and is therefore the expense of the lessee and not the service charge.	Quantum is not disputed. Whilst an insurance claim was made of the Buildings Insurers, Independent Insurance Co., those insurers went into liquidation in 2001 affecting hundreds of blocks. Outstanding claims are still the subject of class action litigation not involving the landlord and it may still be met by the insurance regulators. However pending the outcome of that litigation the landlord has had no option but to carry out such repairs to honour its obligations and also to pay the contractor in good faith for work done.	**Allowed in full but see paragraph 90.**

Page No:	Description of Works	Reason	Applicant's Comments	Tribunal's Decision/Concessions
19 £84.60	Internal repairs to flat 42	Is the responsibility of the lessee not the service charge.	Quantum is not disputed. Flat 51 is owned by Orbitview Limited one of the Respondents. If the item is disallowed it is suggested that a determination be made that it is reasonable and the sum can then be recovered from that lessee.	Applicant concedes
20 660.00	Callaghan	Ditto	Please see response to item 18	Applicant concedes
21 £1092.75	Flat 61 Reinstatement	Ditto	Please see response to item 18.	Applicant concedes
22 £47.00	Courtesy	Ditto	There is a question mark over whether the overflow is part of a demise. As the amount is so small and the matter was relatively urgent and the costs in litigating to interpret the lease would be very large this would not be cost effective and the landlord needed to protect the retained property.	Respondents concede

Page No:	Description of Works	Reason	Applicant's Comments	Tribunal's Decision/Concessions
23 & 24 £1762.50 and 445.09	Roof over front block	This is disputed as it is our contention that the works to the roof over the front block have either not been carried out or have been carried out to a very poor standard.	Quantum is not disputed in respect of either invoice. Please see statement of Mr. Negus. The second invoice relates to the lightwells and not the roof The lightwells are not disputed, please see item 2.	Respondents concede item 24 being £445.09 **Roof works allowed in full (paragraphs 74 and 113).**
25 £1007.95	Main roof of main block	Disputed as this relates to work in relation to the main roof of the front block.	Quantum is not disputed. Please see statement of Mr. Negus.	**Roof works allowed in full (paragraphs 74 and 113).**

Page No:	Description of Works	Reason	Applicant's Comments	Tribunal's Decision/Concessions
Service Charge 2002				
26 £8769	Porter's flat	All items relating to expenditure is disputed as these items are not properly recoverable under the covenants in the lease.	Quantum is not disputed. Please see response to item 11.	Respondents concede £579.00 repairs **See paragraphs 36 and 37.**
27 £1,700	Decorations works to flat 52	Appears to relate to decoration works to flat 52 and is therefore the responsibility of the lessee and not the service charge. In the alternative it would be subject to an insurance claim.	The landlord did indeed make an insurance claim but see response to item 18 re Independent Insurance Co.	Applicant concedes
28 £3748	Gas Explosion Costs ATP	This should be subject to an insurance claim.	Part of a major insurance claim for which £59,436.75 recovered into service charge account. Accounts for 2002 and 2003 clearly show this to be the case: "Gas Explosion Costs Net of Compensation"	All Gas explosion invoices now being paid or have been paid by insurers save for £1222 being part of the managing agents fees in dealing with the administration of the repairs but for commercial reasons only is prepared to concede.
29 £455.35	Gas Explosion Costs Alt Accomm	Ditto	Claimed as 28 above	Please see item 28
30 £91.38	Internal works	This appears to relate to works of an internal nature and should be the responsibility of the lessee not the	Quantum is not disputed. This invoice relates to the mains water and is therefore	Applicant concedes

Page No:	Description of Works	Reason	Applicant's Comments	Tribunal's Decision/Concessions
		service charge.	communal and a service charge item of expenditure.	
31 £1821.25	Gas Explosion Costs - Glass	Should be subject to an insurance claim.	Claimed as 28 above	Please see item 28
32 £658	Gas Explosion Costs – Glass	Ditto	Claimed as 28 above	Please see item 28
33 775.50	Gas Explosion Costs - Glass	Ditto	Claimed as 28 above	Please see item 28
34 £757.88	Gas Explosion Costs - Glass	Ditto	Claimed as 28 above	Please see item 28
35 £771.28	Gas Explosion Costs - Reinstatement	This appears to relate to works carried out internally and is therefore the responsibility of the lessee not the service charge.	Consequential damage following gas explosion. Claimed as 28 above.	Applicant concedes
36 £176.25	Gas Explosion Costs - Glass	Should be subject to an insurance claim.	Claimed as 28 above	Please see item 28
37 £455.35	Gas Explosion Costs Alt Accomm	Ditto	This is a photocopy of Page 29 inadvertently duplicated in the invoice bundle and has <u>not</u> been charged to the service charge expenditure twice.	Not placed in accounts
38 £2159.87	Gas Explosion Costs – Temp Heating	Ditto	Claimed as 28 above	Please see item 28

Page No:	Description of Works	Reason	Applicant's Comments	Tribunal's Decision/Concessions
39 £176.25	Gas Explosion Costs – Glass (Beading)	Ditto	Claimed as 28 above	Please see item 28

Page No:	Description of Works	Reason	Applicant's Comments	Tribunal's Decision/Concessions
266 £	Unknown	Ditto	Copy invoice not supplied	
40 £40	Gas Explosion Costs - Expenses	Ditto	Claimed as 28 above	Please see item 28
41 £4567.72	Gas Explosion Costs – Courtesy Ltd	Ditto	Claimed as 28 above	Please see item 28
42 £1762.50	Gas Explosion Costs – Gleeds	Ditto	Claimed as 28 above	Please see item 28
43 £1643.56	Gas Explosion Costs – BVP Fees	Ditto	Claimed as 28 above	Please see item 28
43 (a) £7,050	Gas explosion – entrance doors	Ditto	Claimed as 28 above	Please see item 28
44 £2702.50	Gas Explosion Costs – PA Fees	Ditto	Still part of gas explosion. Claimed and recovered as 28 above	Please see item 28
45 £99.68	Gas Explosion Costs - Expenses	Should be subject to an insurance claim.	Claimed and recovered as 28 above	Please see item 28
46 £1207.90	Gas Explosion Costs - Reinstatement	Works of an internal nature to flat 23 should be payable by the lessee not the service charge.	Smoke damage and claimed as 28 above	Please see item 28
47 £351.72	Gas Explosion Costs - Expenses	Should be subject to an insurance claim.	Claimed as 28 above	Please see item 28
48 £16560	Gas Explosion Costs - Reinstatement	Ditto	Claimed as 28 above	Please see item 28

Page No:	Description of Works	Reason	Applicant's Comments	Tribunal's Decision/Concessions

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49 £146.50	Internal works	Would appear to be work of an internal nature to flat 3 and is the responsibility of the lessee not the service charge.	Quantum is not disputed. Sublet flat 5 was the cause of the problem and is owned by Tobicon Ltd. As response to item 19	Applicant concedes
50 & 51 Each £26.93	Boiler Suits	Would appear to be a duplication.	Quantum not disputed. Invoices are of different dates and different colour items. No duplication.	Respondent concedes both items being £53.96
51 (a) £210.33	Investigating leak	Should be responsibility of individual tenant	?	Applicant concedes

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Service Charge 2003				
52/53 £12033	Porter's flat	Similar comments apply as in previous years.	Please see response to item 11.	Respondents concede £2594.00 repairs **See paragraphs 36 and 37**
54 £2953.10	Major Works Fee	Disputed. Outside surveyors appear to be employed so why should the managing agents make an additional charge of this magnitude?	Quantum is not disputed. The managing agents charge 2.5% in connection with all administrative matters relating to major works e.g. preparing and serving notices and liasing with surveyors contractors and lessees and attending site meetings. Consistent with almost all managing agents and RICS practice.	**Allowed in full (paragraph 113)**
55 £5382.57	Water Damage Reinstatement	It is not clear whether this sum has been debited to the service charge account in respect of the renovation works for flat 32 which should not be charged to the service charge if this is the case.	Quantum is not disputed. This is not renovation works to a flat. It is repairing the flat damaged from water ingress from the roof.	Applicant concedes
56 £1779.17	Surveyor's Fees – Re Roof	Disputed.	No reasons given for the dispute. Please see statement of Mr. Negus.	**Roof works allowed in full (paragraph 74 and 113)**

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57 £2194.70	Surveyor's Fees – Re Roof	We have been unable to inspect the roofs of blocks 2 and 3, i.e. middle and rear blocks as access has been denied by the managing agents.	Access has always been made available by appointment. Please see statement of Mr. Negus.	**Roof works allowed in full (paragraphs 80 and 113)**
58 £617.12	Photocopying	A charge of £617.12 for photocopying would appear to be excessive.	The managing agents charge £8.61 plus VAT per unit that they manage for photocopying documents throughout the year.	**Allowed in full (paragraph 107)**
59 £1468.75	Accountants	Accountants have been employed and charged for, so why is it necessary to pay further professional charges for a certificate relating to the Statement of Service Charge expenditure for this year?	Quantum is not disputed. This is the accountants invoice for preparing the accounts. There is only one fee each year.	Respondents concede
60 £10.00	Legal Disbursement	This is not a chargeable to the service charge.	Quantum is not disputed. This is a service charge expenditure in obtaining office copy documents from the land registry needed to ascertain ownership within building.	Applicant concedes
61 £500.00	Legal Costs	Ditto	Quantum is not disputed. Please see clause 5(5)(k).	Applicant concedes

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62 £117.68	BVP	Disputed for reasons previously stated.	Quantum is not disputed. Standard stage payment of prof fees on major works. See statement of Mr Negus.	**Roof works allowed in full (paragraphs 74 and 113)**
63 £2593.20	BVP	Ditto	As above	**Roof works allowed in full (paragraphs 80 and 113)**
64 £1774.81	BVP	Ditto	As above	**As above**
65 £1983.41	BVP	Ditto	As above	**As above**
66 £2953.10	Major Works Fee	Disputed for reasons previously stated.	This is a photocopy of Page 54 inadvertently duplicated in the invoice bundle and has not been charged to the service charge expenditure twice.	Respondents concede as not part of accounts
67 £1508.05	Data Energy	This would appear to be included in Warwick Gardens service charge in error and should be adjusted.	Coding error discovered before accounts prepared. This expense never formed part of s/charge account. Copy invoice appears in error.	Respondents concede as not part of accounts
68 £82.25	Slate repairs	This relates to repairing slates but there are none at Warwick Gardens. Should be charged to another block.	Ditto as above.	Applicant concedes

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69 £185.65	Datamech	Ditto	Ditto as above	Applicant concedes
70 £76.38	Datamech	Ditto	Ditto as above	Applicant concedes
71 £63.45	Hayball	Payable by the individual lessee.	Source flat is owned by Commercial Holdings Ltd. As response to 19	Applicant concedes

Page No:	Description of Works	Reason	Applicant's Comments	Tribunal's Decision/Concessions
Service Charge 2004				
72 £10488	Porter's flat	Similar comments as previously regarding expenditure.	Please see response to item 11.	Respondents concede £217.00 repairs and £307.00 clothing. **See paragraphs 36 and 37.**
73 £70.50	Hayball	This should be the responsibility of the lessee not the service charge.	Accepted.	Applicant concedes
74 £1311.30	ATP Maintenance	Ditto	Quantum is not disputed. The damage due to a break in. This was an insurance claim which was settled by the insurers less the policy excess of £400.00. The policy excess was borne by the service charge as the damage was caused through no fault of a lessee.	Respondents concede £911.30 but not policy excess of £400.00 **Allowed in full (paragraph 92)**
75 £1447.60	ATP	Ditto	Quantum is not disputed. Part of same spate of break-ins. However, this flat is owned by the Respondent Boston Capital Limited and no claim form received from them.	Applicant concedes

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76 £739.66	ATP Flat 61	Ditto	Quantum is not disputed. Insurers would not entertain a claim. The landlord wishes to carry out roof repairs but the Respondent lessees refuse to pay their contributions to the same.	Applicant concedes
77 £1881.17	ATP	Ditto	Source of leak undetermined, not roof, not burst. Claim not accepted for lack of info. Landlord had to comply due to clearly external source of damage.	Applicant concedes
78 £1447.01	ATP Door Repairs	Ditto	Quantum is not disputed. A claim was made but the insurers would not entertain the claim as the lessee failed to provide event date.	Applicant concedes
79 £956.45	Flat 61 repairs	Ditto	Quantum is not disputed. Non insurance work carried out re damp penetration through structure. Landlord has to reinstate flat.	Applicant concedes

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80/81 £853.05	Cadogan	Would appear to be a duplication.	Quantum is not disputed. No duplication. Clearly, different amounts, different invoice numbers, different parts of roof.	Respondents concede
82 £63.45	Hayball	Responsibility of lessee not service charge.	Quantum is not disputed. The flat is owned by the Respondent Commercial Holdings Ltd. Please see response to other examples of such damage from flats sublet by respondent.	Applicant concedes
83 £95.18	Hayball - Roof	Ditto	Quantum is not disputed. Communal non-insurance issue.	Applicant concedes
84 £218.50	Broken door	Ditto	Quantum is not disputed. Damage caused by break in. The amount under the policy excess. Lessee not to blame therefore service charge expenditure.	Applicant concedes
85 £84.01	ATP	Ditto	Quantum is not disputed. Relates to tracing a suspected leak. Callout only. Subs works recharged.	Applicant concedes

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86 £1978.70	Gemcast	Ditto	Redecoration works in common part corridors.	Respondents concede
87 £2018.65	Gemcast	Ditto	Redecoration works in common part corridors.	Respondents concede
88 £413.60	ATP	Ditto	Quantum is not disputed. Non-insurance works to top floor flat following damp penetration. L/lord's obligation.	Applicant concedes
89 £408.90	ATP	Ditto	Quantum is not disputed. Same issue as above	Applicant concedes
90 £2,000	Legal Costs	This would appear to relate to payment to solicitors for Court proceedings, but the invoice/request form does not give any further information which may be possibly challenged.	Issue fees for the Court actions against all the Respondents in this LVT application, pending award of costs.	**No determination by Tribunal – costs outside Tribunal's jurisdiction**
91 £190.71	Brent Investigations	Further information required – may be subject to challenge.	This relates to the various breaches of covenant by some of the Respondents in carrying out multiple sublettings for their flats.	Applicant concedes
92 £1529.25	Carroll & Co	Ditto	Quantum not disputed. This is the accountants invoice for preparing the accounts. There is only one fee each year.	Respondents concede

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93 £1015.41	BVP Insurance Valuation	Ditto	Quantum is not disputed. This is a management expense for insurance purposes.	Respondents concede
94 £72.00	LR Search Fees	Further information required.	These are land registry fees in obtaining office copy documents regarding the flats at building ascertaining who owns which flat and is therefore a management expense.	Applicant concedes
95 £617.12	Disbursements	Ditto	The managing agents charge £8.61 plus VAT per unit that they manage for photocopying documents throughout the year.	**Allowed in full (paragraph 107)**
96 £240	Land Reg Search Fees	Ditto	See response to item 94.	Applicant concedes
758/95A £110.00	Unknown Land Registry Fees	Ditto	Copy not supplied/now supplied	Applicant concedes
97 £18.00	Land Reg Search Fees	Ditto	Please see response to item 94.	Applicant concedes
760/97A £270.25	Unknown/Parkgate Aspen	Ditto	Copy not supplied/now supplied	Applicant concedes
98-	Credit watch	Further information required	These are costs related to	**Disallowed (paragraph 101)**

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110 £1176.00			service charge recovery. Please see clause 5(5)(k)	