THE RESIDENTIAL PROPERTY TRIBUNAL SERVICE
SOUTHERN RENT ASSESSMENT PANEL
LEASEHOLD VALUATION TRIBUNAL

S.27A & S20C Landlord & Tenant Act 1985(as amended)("the Act")

Residential Property
TRIBUNAL SERVICE

Case Number:	**CHI/OOML/LIS/2008/0027**
Property:	**8 Grand Parade, Brighton East Sussex BN2 9QB**
Applicant/Leaseholders:	**James Watts Dr S Chatu (Joined in) Dr M Chatu (Joined in)**
Respondent/Landlord:	**8 Grand Parade, Brighton, Limited**
Appearances for the Respondent:	**Emily Fitzpatrick of Dean Wilson Laing Solicitors Gareth Elliott of Pepper Fox Managing Agents**
Date of Inspection /Hearing	**20th October 2008**
Tribunal:	**Mr R T A Wilson LLB (Lawyer Chairman) Mr A MacKay FRICS (Valuer Member) Ms J Dalal (Lay Member)**
Date of the Tribunal's Decision:	**31st October 2008**

THE APPLICATION

The applications made in this matter by the Applicants are as follows: -

1. for a determination pursuant to Section 27A of the Landlord and Tenant Act 1985 for a determination in relation to their liability to pay service charges for their flats covering the years 2006 and 2007 and

2. for an order pursuant to Section 20C of the Act that the Respondent's costs incurred in these proceedings are not relevant costs to be included in the service charge for the building in future years.

3. The Tribunal is also required to consider, pursuant to regulation 9 of the Leasehold Valuation Tribunal (England) Regulations 2003 whether the Respondent should be required to reimburse the fees incurred by the Applicants in these proceedings.

DECISION IN SUMMARY

4. The Tribunal determines for the reasons set out below that only the following amounts are payable by the Applicants to the Respondents by way of service charge for the years in question: -

Year ending 29th Sept 2006	£
Buildings insurance	674.89
Light and heat	182.29
Roof repair	150.00
Scaffolding	940.00
Fire alarm and testing	375.00
Management charges	450.00
Accountancy	70.50
Total expenditure payable by the leaseholders in accordance with the maintenance percentages contained within their leases	**2,842.68**

Year ending 29th Sept 2007	£
Buildings insurance	377.15
Solicitors fees	Nil
Roof repair	12,220.00
Surveyors fees	822.50
Cleaning	270.00
Rubbish clearance	80.00
Management charges	2,166.00
Accountancy	70.50
Total expenditure payable by the leaseholders in accordance with the maintenance percentages contained within their leases	**16,006.15**

5. An order under Section 20C of the Act is made

6. No order is made in relation to the repayment of fees incurred by the Applicants in these proceedings.

PRELIMINARYS / ISSUES IN DISPUTE

7. The hearing took place on the 20th October 2008. The Applicant appeared in person whilst Ms Emily Fitzpatrick of Messrs Dean Wilson Laing solicitors represented the Respondents.

Both parties had set out their respective positions in their statements of case and both parties had prepared and submitted a large bundle of evidence. The Applicants statement of case set out the issues remaining in dispute at the hearing, which were reduced in number from the issues identified at the Pre-Trial Review. The Tribunal dealt with the matter by reference to items set out in the Applicant s statement of case and each of the disputed items for the relevant service charge year is considered below.

INSPECTION

8. The Tribunal members inspected the property before the hearing in the presence of Mr Watts. 8 Grand Parade, Brighton is a terraced property comprising of a café on the ground floor with a basement and with three self contained flats on the floors above. The access to the flats is separate from the café. The Tribunal inspected the front and rear elevations externally and also inspected the interior of flat 1. The common ways looked as if they had been re-decorated internally fairly recently. From the exterior the Tribunal could see that the roof had recently been replaced but the external window frames were in poor repair. There was evidence that the external rendering to the rear of the property was cracked and generally the property gave the appearance of being neglected and in need of considerable external repair and redecoration.

DELIBERATIONS

9. Items in dispute for the year ending 29th September 2006

i) Scaffolding £940

The Applicants case was that an earlier decision issued by the Tribunal dated the 31st March 2006 capped scaffolding charges and that a figure in excess of this cap had been applied to the service charge account. The Respondent conceded that the Tribunal had limited the charges payable for scaffolding but that limit came to £1,156.20. In the event the charge made by the Respondent was less than the capped rate and therefore the whole amount was due. In the 2005 accounts, scaffolding charges were debited and credited and re-invoiced in 2006. Accordingly there had been no overcharging.

The Tribunal found as a matter of fact that the earlier Tribunal decision had capped scaffolding to £1,156.20 and was therefore satisfied that the figure of £940 was both payable and reasonable.

However it did not accept the explanation from the Respondents that a sum for scaffolding had been both debited then refunded in 2005 and re-invoiced in 2006 for the new figure of £940. The evidence presented to the Tribunal included an extract from the cash statement of the service charge account for 2005, which showed a debit of £827.20 for scaffolding having been made on the 6th April 2005 and on the same day a transfer from a reserve of the same amount. In the Tribunal's view a reserve consists of lessees monies already paid and held in reserve for future expenditure and any transfer from this account acts as a payment and not a refund. Accordingly a transfer from reserve does not amount to a refund and in effect represents the leaseholders having already paid £827.20 for this item. Mr Gareth Elliott was unable to provide a satisfactory explanation on the basis that his firm was not instructed at the time. The Tribunal is of the view that the

Respondents must investigate this issue and provide a satisfactory response to the Applicants so that they can be assured that there has been no double charging.

The liability of the Applicants to pay the sum of £940 for the scaffolding is therefore dependent upon the Respondents producing satisfactory documentary evidence to the effect that the sum of £827.20 for scaffolding has not already been taken from a reserve in an earlier year.

10. Items in dispute for the year ending 29th September 2007

i) Solicitors fees £8,736.64

The essence of the Respondent s case pleaded by both Mr Watts and Dr's M & S Chatu was that these solicitors costs had all been incurred by the Respondents as a result of proceedings issued against the Respondents by Mr Bloom the owner of flat 3, 8 Grand Parade. In these circumstances it was neither reasonable nor right that these charges should fall upon the service charge to be payable by all the lessees. In their opinion it was a private matter between the Respondents and Mr Bloom. They also questioned how such a large sum of money could have been incurred in relation to proceedings, which in their opinion should have been resolved at an early stage.

Miss Fitzpatrick for the Respondent referred the Tribunal to copies of her firm's bills, which had been submitted in evidence. These totalled the sum of £8,736.64. She confirmed that the bills had been incurred wholly and exclusively in relation to County Court proceedings that her client had with Mr Bloom. The proceedings had been commenced not by the Respondent but by Mr Bloom and that the legal costs were as a result of the Respondents defending the proceedings and issuing a counter claim. The subject matter of the proceedings was an alleged failure on the part of the Respondents to comply with its repairing obligations under the various leases and/or negligence and/or breach of statutory duty arising from the disrepair at the subject property.

Emily Fitzpatrick confirmed that the court case had been heard last week and that the County Court was seized with jurisdiction on the costs. If the County Court ordered that the costs were payable by Mr Bloom then her clients would give credit to the service charge account for the relevant amount . In these circumstances she invited the Tribunal merely to make a determination that the lease provided that the costs and bills in question were in principal chargeable to the service charge account but to make no determination on reasonableness. If the Tribunal were to make a determination on reasonableness then this would cut across and interfere with the direction of the County Court.

The Applicants were not in favour of the Tribunal dealing with the matter in this way. Mr Watts asserted that he had applied to the Tribunal for a determination in respect of these costs and that as the Tribunal had jurisdiction to make such a determination it should do so.

The Tribunal adjourned the hearing so that they could consider this point as a preliminary issue. The Tribunal on reflection preferred the approach suggested by Mr watts. The Tribunal was satisfied that it had jurisdiction to consider both payability and reasonability. Furthermore if on the construction of the lease there was no contractual obligation on the part of the Applicants to contribute, then there would be no necessity for the Tribunal to consider whether or not the costs were reasonable. The Tribunal

considered that the Applicants had a right for this issue to be heard and therefore directed the parties that they would hear evidence on the payability and if necessary the reasonableness of those costs.

Emily Fitzpatrick then presented her submissions in relation to payability. The provisions covering the calculation , payment and scope of the service charge were to be found in clauses 4 (B) (i) and 6 (D) (iv). Clause 4 (B) (i) provided an obligation on the leaseholder to, *"pay and contribute in manner hereinafter provided the lessees proportion as defined in clause (D) (5) hereof of all monies expended by the lessor in complying with its covenants in relation to the block as set forth in clauses 6 (B) & (D) hereof"*.

Clause 6 (D) (iv) which is headed 'Enforce Covenants Against Other Lessees and Occupants' provides an obligation on the lessor, *"if so required by the lessee and upon the lessee indemnifying the lessor against all costs and expenses in respect thereof and providing such security in respect of costs and expenses as the lessor may reasonably require*

a) to enforce the covenants similar to those hereinbefore contained entered into or to be entered into by the lessees and other of the other flats in the Block and their successors in title and enforce the provisions of the relevant lease or tenancy agreement against any occupant of any flat in the Block which is not let out on a long lease

b) to enforce the covenants entered into by the lessee of the ground floor café and basement.

It was Miss Fitzpatrick's submission that the combined effect of these clauses was to enable the Respondent to charge legal costs of defending the action by Mr Bloom to the service charge account. She maintained that the costs of enforcing the covenants must mean the legal costs. In her opinion it was only legal costs that would be incurred.

In the course of her submissions, Miss Fitzpatrick confirmed that all of the legal costs that were being demanded did relate to the case against Mr Bloom.

The nub of Mr Watt's evidence, supported by the evidence adduced by Drs Chatu, was that it was neither reasonable nor right that the service charge should have to bear the legal costs of an action brought against the Respondent for alleged disrepair. Whilst they were not legal experts, it was their view that the clauses cited by Miss Fitzpatrick did not in effect cover the costs claimed.

The Tribunal then adjourned to consider the evidence submitted. Before coming to its decision it recalled the parties and established that no lessee had called upon the Respondent to defend or counter claim in the proceedings. Furthermore it established that the costs being claimed were exclusively the legal costs of defending and counter claiming Mr Bloom's action.

The Tribunal carefully considered the wording of clause 6(D)(iv) of the lease. In their opinion this particular clause was quite clear and was not wide enough in its scope to enable the costs claimed to be charged against the service charge. The point of the clause was in effect to enable one lessee to call upon the freeholder to remedy a breach of covenant committed by another lessee This was necessary because there is no privity of

contract between two lessees whereas there is privity of contract between the landlord and each of the lessees. Leases commonly contain clauses enabling a lessee to call upon a landlord to take action against another lessee. When the landlord receives such a request it is common to seek security and an indemnity from the lessees against all costs and expenses arising. The Tribunal noted that the beginning of the covenant contains the words, **if so required by the lessee and upon the lessee indemnifying the lessor.** Bearing in mind that no lessee had made such a request the Tribunal considered that on its true construction the clause was not wide enough to enable the Respondent to charge the legal costs of the Bloom action to the service charge.

When the Tribunal reconvened after a lunch break Miss Fitzpatrick requested the opportunity to make further written submissions in relation to the issue of costs to be submitted by both parties within seven days from the date of the Tribunal. This was on the basis that her firm had not anticipated that the Tribunal would arrive at a decision on legal costs bearing in mind the County Court jurisdiction. Furthermore she indicated to the Tribunal that there were other 'sweeping up clauses' in the lease which were applicable to the issue in question. The Applicants opposed this request. Having considered the matter the Tribunal concluded that it had given all parties ample opportunity to make all their submissions in relation to the issue of costs and that Miss Fitzpatrick had addressed the Tribunal at length on the matter. In these circumstances justice would not be served by re-opening an issue, which had effectively been properly determined on the evidence out forward to the Tribunal. The Tribunal therefore rejected the request and invited the parties to continue with the balance of the application.

In the course of further submissions Emily Fitzpatrick referred the Tribunal to the sweeping up clause, which was clause 6(D)(xi) headed "Good estate Management". This reads, "*without prejudice to the generality of the covenants on its part hereinbefore contained do all such things that shall in the lessor opinion be reasonably necessary or desirable in the interests of good estate management or for the benefit of the occupiers of the Block*". The Tribunal considered this clause and concluded that even if its construction of clause 6(D) (iv) was found to be flawed then clause 6(D)(xi) was also not wide enough to enable the Respondent to charge the Bloom costs to the Service charge account. In its view it was not the intention of the parties when the lease was drawn up that this clause pick up the costs of a legal action, which was being pursued primarily for the personal benefit of the Respondent and not for the benefit of either the lessees or in the interests of good estate management. The Tribunal could not identify any material benefit that flowed to the Lessees or the block as a result of the Bloom litigation.

ii) Management Charges £2,166.00

The essence of Mr Watt's case was that even the reduced figure of £2,166 was too high. Mr Watts asserted that the Managing Agents were not acting fairly in failing to serve demands in accordance with the provisions of the lease. They had not taken timely action to repair the building as a result of which he had suffered terrible water damage because of the defective roof. He was therefore of the opinion that the charges should be reduced. When asked by the Tribunal to state what figure he thought would be reasonable Mr Watts was unable to supply an alternative. The evidence of Drs Chatu was essentially the same as Mr Watts. They were not qualified to put forward a lower figure which they thought was reasonable, but they were highly critical of the way in which Mr Elliott had managed the Block. They attempted to enumerate a number of general grievances, which were not relevant to the issue of management charges.

Miss Fitzpatrick confirmed that the reduced figure of £2,166, which was conceded, was based on 12.5% of the contract price having deducted therefrom the fees of the independent surveyor. This charging basis was inline with market rates and was quite reasonable. The work had included the preparation and service of the consultation notices to include obtaining the relevant tenders. In addition her clients' managing agents had attended at the property on a number of occasions to inspect the progress of the work and to liaise with the Council. In these circumstances she contended that the full amount should be payable.

The Tribunal was satisfied that the charging provisions of the lease did enable the freeholder to charge management fees to the service charge account. In its opinion a fee of 12.5% of the contract price was the norm and they were satisfied in this particular case that work had been done and value for money given. The Tribunal therefore determined that the whole of the amount claimed namely £2,166 was payable.

iii) Cleaning Charges £270

Mr Watt's submissions were that there were very infrequent attendances by cleaners to the property and when they did come they were there on average for no more ten minutes. There were only two flights of stairs and in his opinion a charge of £30 per visit was too high. Miss Fitzpatrick for the Respondent stated that it was hard in practice to get any commercial cleaners to take on such a small job at all let alone for a figure as little as £30 per visit. The figure of £270 represented three quarterly visits of £90 and in her view this was reasonable.

On this issue the Tribunal preferred the evidence submitted by the Respondents. It was their experience that commercial cleaners rarely charged a figure of less than £30 per visit and in the circumstances the Tribunal determined that the full amount of £270 was payable.

iv) Rubbish Clearance £80

Mr Elliott the managing agent confirmed that this was a one off fee charged by a contractor to move a whole lot of rubbish and debris dumped at the rear of the property, which represented a health/fire hazard. It was not possible to attribute the rubbish dumping to the owner of the café and in the circumstances he had no option than to have the rubbish removed and the cost of removal was a reasonable service charge item.

Mr Watts did not agree. He felt that the costs of removing the rubbish should be borne entirely by the café owner who was responsible for the dumping, although he could not prove this .

The Tribunal preferred the evidence of Mr Elliott. It accepted that it was not possible to determine who had dumped the rubbish and in these circumstances it was the proper thing to do to have the rubbish removed and the costs to be debited to the service charge account.

11. Explanation of the entries contained in the service charge accounts for 2006/2007

Paragraph 5 of the Directions issued in this case on the 2008 directed that the Respondent must provide the Applicants with demands in writing of the amounts due from the Applicants in accordance with the provisions of the lease by the 13th August 2008. This was intended to provide the Applicants with definitive statements of the amounts being demanded by the Respondent, statements which were long overdue. When questioned Mr Elliott accepted that no such notices had been provided . Mr Elliott was not able to adequately explain why the Respondent had failed to comply with the Tribunal directions in this respect. On being further questioned, it became apparent that his firm had not served any of the Applicants with a compliant service charge demand since September 2007, over a year ago. Miss Fitzpatrick stated that the reason for the absence of service charge demands was that the Respondent was taking action to forfeit Mr Watts lease and the service of a rent/service charge demand would prejudice that action. However, no explanation were given as to why Drs Chatu had not been served with any demands bearing in mind that no proceedings were contemplated against them. When asked to provide the Tribunal with assistance in interpreting the accounts, which had only just been produced following the directions of the Tribunal, Mr Elliott was unable to do so. He was unable to explain or provide a breakdown of a carried forward debit entry in the accounts for the year ended 29th September 2006 of more than £4000. He was unable to provide an explanation or any assistance as to what had happened to reserve monies, which the previous managing agents had stated to be in existence He told the Tribunal that his firm had only received instructions to manage the property in October 2006. At that time they had inherited a debit balance unsupported by vouchers and had not realized that there was a long and unhappy history in relation to managing the building. Mr Elliott stated that with the benefit of hindsight his firm had been in his words "mad to take on management of the building." Whilst he could not provide an explanation for any of the entries, he made the point that his firm had given all the vouchers that they had and all their records to a reputable firm of accountants who had prepared the accounts and signed them off. He mentioned to the Tribunal that his firm had recently required a new accounting programme, which would shortly be brought into operation. This would then produce accounts in accordance with the provisions of the lease on the pushing of a button. He considered that the new system would resolve all the problems.

Whilst accepting that Mr Elliott is only an employee of the managing agents and not its owner, the Tribunal records its disquiet at the lack of effective management of the building over a long period of time Whilst Pepper Fox Management may well have inherited problems, the firm should have made enquires before they accepted instructions to ensure that all proper records were handed over. Furthermore they have now held management instructions for some two years which in the opinion of the Tribunal is ample time to rectify matters and to ensure that timely service charge demands are sent out to all lessees in accordance with the procedures set out in the leases. Furthermore they have failed during their period of management to deliver timely annual statements of accounts, failed to produce reliable annual budgets and failed to amend known incorrect demands. The culmination of these failures has been to leave the lessees in the dark as to the correct amounts payable by them. Notwithstanding this uncertainty, evidence produced to the Tribunal shows that the Respondents advisers have been actively and recently engaged in correspondence with the mortgagee of Mr Watts apparently alleging arrears of ground rent, service charges and legal costs. This has been the case even though the Respondents have failed to serve Mr Watts with accurate

information or demands. The Tribunal is critical of this approach, which we consider to be premature for the reasons apparent from this decision.

In the circumstances the Tribunal orders that the sums found to be due in this decision shall only come payable when lawful demands have been made by or on behalf of the Respondents. This will have to include statements of account complying with clause 6(D)(vi)(b) of the lease and including the information required by a statute as to a summary of the lessees rights pursuant to the service charges (Summary of Rights and Obligations and Transitional Provisions) (England) Regulations 2007. In addition the statements should give credit for and include the date and amount of all payments made by each Applicant or their predecessors by way of service charge for the years 2006 and 2007. Furthermore the Tribunal orders that payments made by the Applicants as a result of this decision shall be applied by the Respondent firstly in discharge of the heads of expenditure referred to in this order, secondly in discharge of estimated sums properly demanded by the Respondents for periods commencing on or after the 29th September 2008 and thirdly with any balance being credited to the reserve fund on behalf of the Applicants.

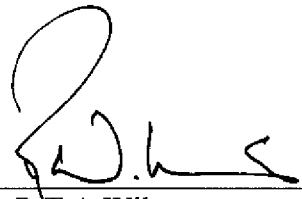
SECTION 20C AND REIMBURSEMENT OF FEES

12. Both of these matters can be taken together as the Tribunals considerations in relation to both are largely the same. The section gives the Tribunal discretion to disallow in whole or in part the costs incurred by a landlord in proceedings before it. The Tribunal has a very wide discretion to make an order that is, 'just and equitable' in the circumstances.

13. In the Tribunals opinion the Applicants were right to make this application even though many of the items initially in dispute were either agreed or not disputed at the hearing. There have clearly been historic problems with the collection of service charge. Compelling evidence was submitted to the Tribunal revealing on going shortcomings in the accounting systems and in the systems set up for delivering service charge demands and accounts to the lessees. The Respondents have failed to produce end of year accounts on a timely basis. The Respondents have failed to send out interim demands in accordance with the provisions contained in the leases and having submitted incorrect demands they have failed to correct errors in a timely manner. In the Tribunal's view, valid questions put to the Respondents managing agents by the lessees have not been addressed adequately or at all. The Respondent only produced the end of year accounts for 2006 and 2007 following the directions of this Tribunal. Whilst there is no legal requirement to produce accounts by a certain date, a delay of two years in is not consistent with good practice. We accept the view of the Applicants that they were left with no alternative other than to bring these proceedings. The Respondents representative has made submissions to the effect that none of the issues in dispute were brought up by Mr Watts before the Tribunal application. Furthermore when the application was made the Respondents made a full reply to Mr Watts and invited him to contact the managing agents to deal with any queries an offer, which he did not take up. They assert that many of the points made by Drs Chatu were largely irrelevant and could have been avoided if legal advice had been sought before hand. They assert that most of the issues raised by the Applicants could have been satisfactorily resolved outside of the Tribunal. Whilst some of these points might be valid in the Tribunals view had the Respondent generated interim service charges in accordance with the terms of the lease and also generated annual statements of account on a timely basis this would have resulted in a narrowing of the issues and it might have been possible to avoid these proceedings. However it was the directions issued

in this case which has lead to the narrowing of issues, which is justification for the proceedings having been brought. In these circumstances the Tribunal finds favour with the application and considers that it is just and equitable for an order to be made under Section 20C of the Act and it so orders.

14. The Tribunal makes no order in relation to the reimbursement of fees. Although the Tribunal has found fault with the standard of management in this case the Tribunal is satisfied that the managing agents made reasonable attempts to communicate with the lessees even though their answers were hampered by the failure of their systems and lack of clarity in their accounting procedures. Furthermore Mr Elliott at the hearing assisted the Tribunal by providing honest answers to the best of his knowledge and belief based on the limited information available to him. It would not be just and equitable to order a reimbursement of fees in these circumstances.

Chairman 

R.T.A.Wilson

Dated 31st October 2008

RESIDENTIAL PROPERTY TRIBUNAL SERVICE
SOUTHERN RENT ASSESSMENT PANEL
LEASEHOLD VALUATION TRIBUNAL

Residential Property
TRIBUNAL SERVICE

APPLICATION FOR PERMISSION TO APPEAL
SECTION 175 of the COMMONHOLD AND LEASEHOLD REFORM ACT 2002 ("the Act")

Case Number:	CHI/OOML/LIC/2008/0027
Property:	8 Grand Parade Brighton East Sussex
Applicant:	8 Grand Parade (Brighton) Limited
Respondents:	James Watts Dr S and Dr M Chatu

DECISION AND REASONS

BACKGROUND

1. By application dated the 20th November 2008 Messrs Dean Wilson Laing Solicitors, acting on behalf of the Applicant, have applied to the Tribunal for permission to appeal paragraphs 10.i, 13 and 14 of the decision of the Leasehold Valuation Tribunal dated the 31st October 2008 ("the Decision").

GROUNDS FOR APPEAL

2. In summary the grounds for appeal are as follows:-

   i) The Tribunal failed to apply the law correctly or at all in relation to clause 6(D) (xi) of the lease.

   ii) The Tribunal has failed to take into account the relevant considerations or the evidence in reaching its decision.

iii) The Decision failed to give sufficient weight to the Applicant's request for the Tribunal not to make a determination on costs, and that it adjourn such.

iv) The Decision failed to recognise that the County Court had concurrent jurisdiction and was better placed to make the determination.

v) The Decision failed to allow the Applicant to make further representations on the issue of costs.

vi) The Tribunal relied on unsupported assertions, which were untrue.

vii) The Tribunal made findings without reasons and without any evidence on points and without allowing the parties to address the Tribunal on those points.

DECISION

3. Permission is given to the Applicant to appeal on the one issue identified at paragraph 14 below.

REASONS

Grounds ii iii iv v vi and vii (all of which relate to the item of Solicitors fees)

4 The above grounds can be considered together because they largely cover the same issues. The Applicant contends that the Tribunal was wrong in proceeding with a determination because the County Court was seized with the same jurisdiction and was better able to come to a decision. The Tribunal rejects this assertion.

5. The costs formed a service charge item in 2007 and had been demanded by the Applicant who was actively pursuing the Respondents for recovery of it. The Applicants requested that this item should be adjourned and not be heard by the Tribunal but by the County Court who was better placed to deal with this issue. The Respondents opposed an adjoumment arguing that this was the most costly item of service charge expenditure subject to challenge in their application, and they were entitled to have a ruling on the same from the Tribunal.

6. After listening to the arguments put forward by both parties the Tribunal decided that it would make a determination on the solicitors' costs as it unquestionably had jurisdiction to do so. The Tribunal was well aware that the County Court would make a determination on who should pay the costs of the case before it as between the parties, however, there was no evidence that the County Court would decide if the costs of the Bloom action (as referred to in the Decision) should form part of the service charge. Furthermore not all of the Respondents were party to the County Court proceedings and therefore had not made representations within those proceedings. As such they were

liable to be prejudiced by the Tribunal declining its jurisdiction. Therefore the Applicant is, in the view of the Tribunal, wrong to suggest that the Respondents would not be prejudiced if the Tribunal left the issue of costs to the County Court (Para 12). Indeed the contrary is the case.

7. Once the decision to proceed had been made the parties were given the opportunity to present their evidence and develop the submissions made by them in written evidence. Both parties gave evidence on the content of the Bloom case. Some material from the Bloom case was included in the Tribunals bundle and both the Applicant and the Respondents gave further details. The information provided to the Tribunal is set out in paragraph 12 below.

8. The Applicant asserts in its appeal that the Respondents gave incorrect evidence on the detail of the Bloom case at the hearing(Para18). However, the Applicant could have challenged the Respondents evidence in this respect at the hearing but did not do so. The Tribunal also rejects the assertion that the Applicant was denied the opportunity to make submissions that the Bloom litigation was necessary and desirable (Para18). The Tribunal is satisfied that both parties were given ample time to make submissions and develop their cases when this issue was being heard by the Tribunal. When the parties had completed giving their evidence and submissions the Tribunal adjourned so that it could come to a decision on the issue of solicitors' costs which it did. Its decision was that on the evidence before it, the solicitor's fees were not recoverable by way of service charge. This decision was communicated to the parties before the Tribunal adjourned for lunch.

9. Immediately after lunch the Applicant made an application to the Tribunal for a second opportunity to make representations on the issue of solicitors' costs. This application was rejected on the grounds that the Tribunal had already determined the matter .The Tribunal also declined the Applicants request to make written representations on the issue within seven days following the hearing for the same reason, namely that it had already arrived at its decision and had communicated this to the parties. A hearing is set down with ample notice to both parties and it is incumbent upon them to arrive at the hearing prepared to make all the submissions required to effectively plead their case.

Ground i)

10. The submissions made by the Applicant at the hearing centred almost entirely on the interpretation of clause 6(D) (iv) of the lease for the subject property. In the Applicants opinion this clause was wide enough in scope to enable the Applicant to charge the costs of the Bloom action, whether successful or not, to the service charge account. The Tribunal disagreed with this interpretation for the reasons set out in its decision, which it stands by. No particulars are set out in this application as to the manner in which the Tribunal has wrongly applied the law in relation to this clause and the Tribunal is satisfied that its interpretation of this clause is a reasonable one.

11. In arriving at its decision the Tribunal also had proper regard to clause 6(D) (xi) even though the Applicant made no reference to this clause in their written submissions and also failed to make reference to the Iperion case now mentioned in their application for leave to appeal.

12. In their appeal the Applicant asserts that the Tribunal was told the bare minimum of information regarding the Bloom case and as a consequence the Tribunal did not have enough factual evidence on which to decide if clause 6 (D) (xi) was wide enough in its scope to encompass legal costs (Para 18) .The Tribunal rejects this assertion. It was aware of the subject matter of the County Court proceedings, namely an alleged failure on the part of the Applicant to comply with its repairing obligations and or negligence and also breach of statutory duty arising from disrepair, and also the fact that the Applicant had issued a counter claim for non payment of service charge. The Applicant asserts that it was denied the opportunity to make submissions that it acted reasonably in defending and counter claiming in the Bloom litigation which was necessary and desirable in the interest of good estate management. The Tribunal did not prevent the Applicant from making this point. Put simply the Applicant failed to raise this issue of reasonableness / good estate management at the appropriate time and now seeks 'a second bite of the cherry'. The Applicant also infers in its appeal, that its counter claim for non payment of service charge was a benefit to other lessees. The Tribunal could not identify any such benefit in the counter claim for non payment of service charge. This is because the Applicant's obligation to repair and maintain the subject property is an absolute one and is not dependent on any lessee paying their service charge. Non payment of service charge is therefore primarily a cash flow issue for the Applicant.

13. On the evidence before it at the hearing the Tribunal concluded that clause 6(D)(xi) was not wide enough in scope to cover the legal costs of the Bloom action and it stands by this decision. The Tribunals view was and remains that for legal costs to be recoverable then there must be a clear and unambiguous clause in the lease to that effect. In its opinion neither Clause 6(D) (xi) nor indeed any other in the lease contains sufficiently clear and unambiguous wording to allow the costs of the Bloom case to be recovered as a service charge item.

14. However the Applicants in their application for appeal now seek to plead new submissions on the correct interpretation of clause 6 (D) (xi) which were not raised at the hearing. Firstly by drawing the Tribunals' attention to the Iperion case and secondly by asserting that the Tribunal did not have the full facts of the Bloom case without which they could not arrive at a sound and sustainable decision. Neither of these points were advanced at the hearing, and as a consequence the Tribunal considers that it was entitled to arrive at the decision that it did. That said the Tribunal accepts that a fuller account of the Bloom case and also the Iperion case could have a bearing on the question of whether or not clause 6(D)(xi) enables the Applicant to recover the costs of the Bloom action as a service charge item. It also accepts the Applicants assertion that the Tribunals determination in relation to the payability of the solicitors' costs as a service charge item has a potentially wide implication. One such implication is that future lessees might be dissuaded from taking court action against landlords for breach of covenant because even if the lessees action is successful, the costs of any hearing might be borne by them as service charge.

15. Having regard to the above and in accordance with Section 175 of the Commonhold and Leasehold Reform Act 2002 the Tribunal grants the Applicant leave to appeal on the narrow issue of whether or not the costs of the Bloom action may be recovered as a service charge item pursuant to clause 6(D) (xi) of the lease relating to the subject flat.

Section 20 C Order.

15. The written evidence presented to the Tribunal alone amounted to just under 200 pages. The fact that the decision does not refer to all the evidence presented to it does not mean that all the evidence was not duly considered. The Tribunal is satisfied that it gave due weight and consideration to all the evidence presented to it including the issues raised at paragraphs 22 (a) to (i) inclusive of this application for leave to appeal.

16. The grounds of appeal are effectively little more than a restatement of the submissions made by the Applicant in respect of the original hearing, which were considered in detail and at length by the Tribunal in the Tribunals Decision.

17. The Tribunal in reaching its decision made careful findings of fact and applied the law on the basis of all oral and written evidence presented to it, whether referred to or not in its written decision. Having given careful consideration to the application for appeal and all the points made in it, the Tribunal is not persuaded that - with the exception of the issue indentified at paragraph 14 above - a different body presented with the same information would have reached a different conclusion on the facts and law. Therefore with the exception of the issue dealt with at paragraph 14 where leave to appeal is granted, the Tribunal does not accept that the Applicant has established proper grounds for appeal on any other issue and their request is therefore refused. For the avoidance of doubt the section 20C order is affirmed by the Tribunal.

Signed

R T A Wilson LLB Chairman

Dated 19th December 2008

RESIDENTIAL PROPERTY TRIBUNAL SERVICE
SOUTHERN RENT ASSESSMENT PANEL
LEASEHOLD VALUATION TRIBUNAL

Residential Property
TRIBUNAL SERVICE

APPLICATION FOR PERMISSION TO APPEAL
SECTION 175 of the COMMONHOLD AND LEASEHOLD REFORM ACT 2002 ("the Act")

Case Number:	CHI/OOML/LIC/2008/0027
Property:	8 Grand Parade Brighton East Sussex
Applicant:	8 Grand Parade (Brighton) Limited
Respondents:	James Watts Dr S and Dr M Chatu

DECISION AND REASONS

BACKGROUND

1. By application dated the 20th November 2008 Messrs Dean Wilson Laing Solicitors, acting on behalf of the Applicant, have applied to the Tribunal for permission to appeal paragraphs 10.i, 13 and 14 of the decision of the Leasehold Valuation Tribunal dated the 31st October 2008 ("the Decision").

GROUNDS FOR APPEAL

2. In summary the grounds for appeal are as follows:-

   i) The Tribunal failed to apply the law correctly or at all in relation to clause 6(D) (xi) of the lease.

   ii) The Tribunal has failed to take into account the relevant considerations or the evidence in reaching its decision.

iii) The Decision failed to give sufficient weight to the Applicant's request for the Tribunal not to make a determination on costs, and that it adjourn such.

iv) The Decision failed to recognise that the County Court had concurrent jurisdiction and was better placed to make the determination.

v) The Decision failed to allow the Applicant to make further representations on the issue of costs.

vi) The Tribunal relied on unsupported assertions, which were untrue.

vii) The Tribunal made findings without reasons and without any evidence on points and without allowing the parties to address the Tribunal on those points.

DECISION

3. Permission is given to the Applicant to appeal on the one issue identified at paragraph 14 below.

REASONS

Grounds ii iii iv v vi and vii (all of which relate to the item of Solicitors fees)

4 The above grounds can be considered together because they largely cover the same issues. The Applicant contends that the Tribunal was wrong in proceeding with a determination because the County Court was seized with the same jurisdiction and was better able to come to a decision. The Tribunal rejects this assertion.

5. The costs formed a service charge item in 2007 and had been demanded by the Applicant who was actively pursuing the Respondents for recovery of it. The Applicants requested that this item should be adjourned and not be heard by the Tribunal but by the County Court who was better placed to deal with this issue. The Respondents opposed an adjournment arguing that this was the most costly item of service charge expenditure subject to challenge in their application, and they were entitled to have a ruling on the same from the Tribunal.

6. After listening to the arguments put forward by both parties the Tribunal decided that it would make a determination on the solicitors' costs as it unquestionably had jurisdiction to do so. The Tribunal was well aware that the County Court would make a determination on who should pay the costs of the case before it as between the parties, however, there was no evidence that the County Court would decide if the costs of the Bloom action (as referred to in the Decision) should form part of the service charge. Furthermore not all of the Respondents were party to the County Court proceedings and therefore had not made representations within those proceedings. As such they were

liable to be prejudiced by the Tribunal declining its jurisdiction. Therefore the Applicant is, in the view of the Tribunal, wrong to suggest that the Respondents would not be prejudiced if the Tribunal left the issue of costs to the County Court (Para 12). Indeed the contrary is the case.

7. Once the decision to proceed had been made the parties were given the opportunity to present their evidence and develop the submissions made by them in written evidence. Both parties gave evidence on the content of the Bloom case. Some material from the Bloom case was included in the Tribunals bundle and both the Applicant and the Respondents gave further details. The information provided to the Tribunal is set out in paragraph 12 below.

8. The Applicant asserts in its appeal that the Respondents gave incorrect evidence on the detail of the Bloom case at the hearing(Para18). However, the Applicant could have challenged the Respondents evidence in this respect at the hearing but did not do so. The Tribunal also rejects the assertion that the Applicant was denied the opportunity to make submissions that the Bloom litigation was necessary and desirable (Para18). The Tribunal is satisfied that both parties were given ample time to make submissions and develop their cases when this issue was being heard by the Tribunal. When the parties had completed giving their evidence and submissions the Tribunal adjourned so that it could come to a decision on the issue of solicitors' costs which it did. Its decision was that on the evidence before it, the solicitor's fees were not recoverable by way of service charge. This decision was communicated to the parties before the Tribunal adjourned for lunch.

9. Immediately after lunch the Applicant made an application to the Tribunal for a second opportunity to make representations on the issue of solicitors' costs. This application was rejected on the grounds that the Tribunal had already determined the matter .The Tribunal also declined the Applicants request to make written representations on the issue within seven days following the hearing for the same reason, namely that it had already arrived at its decision and had communicated this to the parties. A hearing is set down with ample notice to both parties and it is incumbent upon them to arrive at the hearing prepared to make all the submissions required to effectively plead their case.

Ground i)

10. The submissions made by the Applicant at the hearing centred almost entirely on the interpretation of clause 6(D) (iv) of the lease for the subject property. In the Applicants opinion this clause was wide enough in scope to enable the Applicant to charge the costs of the Bloom action, whether successful or not, to the service charge account. The Tribunal disagreed with this interpretation for the reasons set out in its decision, which it stands by. No particulars are set out in this application as to the manner in which the Tribunal has wrongly applied the law in relation to this clause and the Tribunal is satisfied that its interpretation of this clause is a reasonable one.

11. In arriving at its decision the Tribunal also had proper regard to clause 6(D) (xi) even though the Applicant made no reference to this clause in their written submissions and also failed to make reference to the Iperion case now mentioned in their application for leave to appeal.

12. In their appeal the Applicant asserts that the Tribunal was told the bare minimum of information regarding the Bloom case and as a consequence the Tribunal did not have enough factual evidence on which to decide if clause 6 (D) (xi) was wide enough in its scope to encompass legal costs (Para 18) .The Tribunal rejects this assertion. It was aware of the subject matter of the County Court proceedings, namely an alleged failure on the part of the Applicant to comply with its repairing obligations and or negligence and also breach of statutory duty arising from disrepair, and also the fact that the Applicant had issued a counter claim for non payment of service charge. The Applicant asserts that it was denied the opportunity to make submissions that it acted reasonably in defending and counter claiming in the Bloom litigation which was necessary and desirable in the interest of good estate management. The Tribunal did not prevent the Applicant from making this point. Put simply the Applicant failed to raise this issue of reasonableness / good estate management at the appropriate time and now seeks 'a second bite of the cherry'. The Applicant also infers in its appeal, that its counter claim for non payment of service charge was a benefit to other lessees. The Tribunal could not identify any such benefit in the counter claim for non payment of service charge. This is because the Applicant's obligation to repair and maintain the subject property is an absolute one and is not dependent on any lessee paying their service charge. Non payment of service charge is therefore primarily a cash flow issue for the Applicant.

13. On the evidence before it at the hearing the Tribunal concluded that clause 6(D)(xi) was not wide enough in scope to cover the legal costs of the Bloom action and it stands by this decision. The Tribunals view was and remains that for legal costs to be recoverable then there must be a clear and unambiguous clause in the lease to that effect. In its opinion neither Clause 6(D) (xi) nor indeed any other in the lease contains sufficiently clear and unambiguous wording to allow the costs of the Bloom case to be recovered as a service charge item.

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Signed

R T A Wilson LLB Chairman

Dated 19th December 2008