CHI/00ML/LSC/2009/0114
CHI/00ML/LIS/2009/0053
CHI/00ML/LDC/2009/0021

THE RESIDENTIAL PROPERTY TRIBUNAL SERVICE

DECISION OF THE SOUTHERN LEASEHOLD VALUATION TRIBUNAL

LANDLORD AND TENANT ACT 1985 S.27A

52-54 THE DRIVE HOVE EAST SUSSEX BN3 3PD

Applicant: 52-54 The Drive Ltd (Landlord)

Represented by: Claire Whiteman of Dean Wilson Laing, solicitors

Respondents: Richard Brearley and Kate Brearley (Flat 19)

Date of Applications: 1 June 2009, 16 July 2009, 31 July 2009

Date of hearing: 2 and 3 November 2009

Members of the Leasehold Valuation Tribunal:

MA Loveday BA Hons MCI Arb

Mr N Robinson FRICS

Miss J Dalal

INTRODUCTION

1. These are three linked applications arising from service charges relating to 52-54 The Drive Hove East Sussex BN3 3PD. The applications are as follows:

   (a) Application no. CHI/00ML/LIS/2009/0053. The application dated 1 June 2009 was brought by the lessees of Flat 19, Mr and Mrs Brearley. They sought a determination under s.27A of the Landlord and Tenant Act 1985 in respect of liability for service charges relating to the 2007/08 and 2008/09 service charge years. The application named the landlord, 52-54 The Drive Hove Ltd, as respondent.

   (b) Application no. CHI/00ML/LDC/2009/0021. The application dated 16 July 2009 was brought by the landlord. It sought an order under s.20ZA of the Landlord and Tenant Act 1985 to waive consultation requirements in respect of qualifying works carried out in 2008 and 2009 and a qualifying long-term agreement entered into in 2006. The application named Mr and Mrs Brearley as respondents, but it also listed the lessees of 18 other flats as parties to the application.

   (c) Application no.CHI/00ML/LSC/2009/0114. The application dated 31 July 2009 was brought by the landlord. It sought a determination under s.27A of the Landlord and Tenant Act 1985 in respect of liability for service charges relating to the 2009/10 service charge year. The application named Mr and Mrs Brearley as respondents.

2. Directions were given on 4 June 2009, 13 August 200913 August 2009 and 23 October 2009 and the three applications were consolidated. For the purpose of this decision, "the applicant" is 52-54 The Drive Hove Ltd and "the respondents" are Richard Brearley and Kate Brearley. The remaining parties are the lessees of the eighteen flats listed in the letter dated 16

June 2009 from Messrs Dean Wilson Laing solicitors attached to the application in case no. CHI/00ML/LOC/2009/0021. These lessees support the application to dispense with the consultation requirements, and they are not referred to separately below.

3. A hearing took place on 2 and 3 November 2009. The applicant was represented by Ms Claire Whiteman, a solicitor. Mr Brearley appeared in person.

4. At the start of the hearing, the issues were identified as follows:
   (a) The 2007/08 charges comprised £1,496.88 for maintenance and refurbishment and £675 for heating and hot water. The heating and hot water charge was in dispute.
   (b) The 2008/09 charges comprised £748.44 for maintenance and refurbishment and £1,350 for heating and hot water. The relevant costs of the provision of a TV aerial (part of the maintenance and refurbishment charge) and the heating and hot water charge were in dispute.
   (c) The 2009/10 charges comprised £748.44 for maintenance and refurbishment and £675 for heating and hot water. All sums were in dispute.
   (d) Major works to replace TV aerials were undertaken in 2008 and works to remove the fire escape were carried out in 2009. The applicant sought dispensation from the consultation requirements under s.27ZA of the 1985 Act in respect of both.
   (e) A qualifying long term agreement for the supply of gas to the premises was entered into in March 2006. The applicant sought dispensation from the consultation requirements under s.27ZA of the 1985 Act, and this was disputed by the respondents.

(f) The maintenance and refurbishment charge in each of the three service charge years included a contribution towards a £5,000 "refurbishment fund". The applicant disputed this contribution.

INSPECTION

5. The Tribunal inspected the property before the hearing.

6. The property comprises two semi detached houses in central Hove c.1880, which have been converted into 18 flats. The building is close to the sea front and is in a prominent raised position with the southern flank wall facing the sea. Accommodation is on three storeys plus dormers and basement and there are gardens to the front and rear. The northern flank wall has had an area of brickwork replaced measuring approximately 3m x 2m at ground floor level where it appears that a low level extension has been removed. There are signs that a cast iron external fire escape has also been removed from this wall – although other houses in the vicinity retain similar fire escapes. The three access points to the escape have been made good at each level and the openings fitted with Juliet balconies and full height windows. The rainwater and water goods have been recently refurbished and replaced and the woodwork painted and restored. There is a service room accessed from the light well to the front of the property which contains two boilers c.30 years old. One boiler serves hot water and space heating to the flats which are in what used to be 52 The Drive (i.e. flats 1, 3, 5, 7, 9, 11, 15, 17 and 19). The other provides space heating only to the flats in the former no.54 (i.e. flats 2, 4, 6, 10, 12, 14, 16, 18 and 20). Internally, the decoration in the common parts was fair. The Tribunal inspected the interior of two flats. Flat 6 on the ground floor had space heating provided by way of old cast iron radiators supplied from the communal boiler. Hot water was provided by way of an electric water

heater. Flat 19 on the 3rd floor had modern panel radiators supplied from the communal system.

THE LEASE

7. The Tribunal was provided with a copy of a lease of Flat 19 dated 9 March 2007 which was granted to the respondents when they purchased their flat. It was agreed that this was in similar form to the leases of the other flats.

8. Clause 2(18) of the lease requires the lessees to contribute a share of the "*Service Charge*" and the "*Interim Charge*" and under paragraph 1.6 of the recitals to the lease states this contribution is 322/3786 of the landlord's total costs (i.e. 8.505%). The Service Charge and Interim Charge are defined in the Fifth Schedule. The Service Charge is defined in paragraph 1 as follows:

> *1. "The service charge shall mean the total of all sums actually spent by the reserved by the lessor or for which the Lessor has incurred a liability during the accounting period to which the Service Charge relates in the performance of the Lessor's covenants in Clause 4 hereof and otherwise in connection with the management and maintenance of the Building and shall without prejudice to the generality of the foregoing include:*
> *...(c) "The annual rentals or other expenditure involved in supplying and maintaining an internal telephone system (if any) and such communal television and/or radio aerial system (if any) as may from time to time be installed in the Building and in relation to those flats which are connected thereto the domestic hot water and central heating systems to the intent that only those lessees whose flats are so connected shall pay and contribute to the Lessor an equal proportion (related to the number of flats so connected) of the cost of maintenance repair replacement and servicing of such systems as are now installed in the Building"*
> *...(g) Such sums as the Lessor or his Managing Agent of Surveyor shall reasonably consider desirable to be retained by the Lessor by way of a Reserve Fund as reasonable provision for the costs expenses and outgoings referred to in paragraphs (a) to (f) above."*

The Interim Charge is defined by paragraph 2 as:

"such sum to be paid on account of the Service Charge as the Lessor or his Managing Agent or Surveyor shall specify at their discretion to be a reasonable interim payment".

9. Paragraph 7 of the Fifth Schedule requires annual accounts of actual expenditure to be certified by the landlord or its agents and by paragraphs 5 and 6 provision also is made for the application of any surplus or the recovery of any deficit once the accounting exercise has taken place.

10. The Second Schedule to the lease contains rights included with the demise. These include:

"1. The right (in common with the Lessor and all persons deriving title under or authorised by the Lessor and the lessees for the time being of the other flats in the Building ...) for the Lessee his servants and licensees to use for the purpose of passing and repassing to and from the Demised Premises and in accordance with the Regulations the entrance-way entrance-hall staircases lifts (if any) landings passages paths forecourts and driveways and (in case of fire) fire escapes (if any) in the Building"

11. Clause 4.1 of the lease sets out the landlord's repairing obligations:

"4.1 That the lessor will when and as necessary maintain repair cleanse repaint redecorate and renew:-

(a) the roofs ...

(b) the main structure of the Building including but in particular (but not by way of limitation) the foundations and exterior walls thereof

(c) the passages staircases landing entrances and all other parts of the Building (including the ceilings thereof) enjoyed or used by the Lessee in common with all or any of the other lessees or occupiers of the Building

...

(e) the entrance ways paths and forecourts of and leading to the Building (including the boundary walls and fences of or appertaining thereto."

ACCOUNTING GENERALLY

12. Ms Whiteman relied on statements of case dated 16 July and 7 September 2009. She produced a skeleton argument at the hearing and developed her arguments in her oral submissions. The applicant was a company formed by the lessees which acquired the property in December 2003. It managed the property itself and had throughout sought to minimise unnecessary charges. The applicant raised maintenance costs by way of interim charges only and it had not at any stage produced certified annual accounts or demanded balancing charges at the end of the year. However, in future it was likely that the applicant would do so.

13. Ms Whiteman produced statements of relevant costs incurred in 2007/08 and 2008/09 and various statements of heating and hot water charges, which were of considerable assistance to the Tribunal. The landlord's statement of case dated 16 July 2009 gave some information about these statements. They were prepared for the purpose of statutory company accounts and were not formally certified, but they were checked by the applicant's accountants when preparing annual returns for Companies House. Mr Brearley admits that at least some of the statements were provided to the lessees.

14. However, the only sums ever demanded from the respondents were interim charges under paragraph 2 of the Fifth Schedule to the Lease. The landlord has not operated a conventional procedure for recovering service charges as required by the terms of the lease. A similar situation arose in the Lands Tribunal case of ***Warrior Quay v Joacquim*** (2007) LRX/42/2006 where the Tribunal gave guidance to LVTs as to their obligations at paragraph 25:

> *"It is clearly unsatisfactory that [the landlord] has failed to comply with its obligations [to provide certified service charge accounts]. However, I am unable to read the lease as meaning that if [the landlord] has failed to comply with this provision then this*

automatically thereby proclaims that in respect of the service charge year to which the failure relates [it] had lost the right to be paid any service charge whatever, such that the entirety of any sum paid on account must be dealt with on the basis that the leaseholder is either entitled to credit for this sum or to be re-paid (as to which see below) the whole of the amount paid on account. I agree with [counsel for the landlord] that for this dramatic result to ensue from a failure to comply in proper time with the obligation under the [lease] would require clear words. However, I also conclude that [the landlord] cannot take advantage from its own breach of covenant and cannot unilaterally put off into the future the ability of a tenant to obtain finality of decision as to how much is payable for a particular year. Section 27A of the 1985 Act clearly contemplates that a tenant can apply to an LVT to obtain a binding decision on this point. I therefore also agree with [counsel for the landlord]'s submissions that, if in such circumstances a leaseholder does make an application to the LVT for a decision (as happened in the present case), the LVT must reach the best informed decision it can upon the material available to it. The absence of any proper certificate is a matter which may weigh against [the landlord] and may result in the LVT deciding that a lesser sum than hoped for by [the landlord] may be decided to be the amount payable. Also the absence of the certificate should result in the position being that the amount which is decided by the LVT to be payable by way of shortfall will not be payable until a proper certificate (certifying that at least this amount is payable) is provided by [the landlord's] auditors or accountants. However, if the LVT's decision is that the service charge payable for the relevant year is less than the sum paid on account, then the leaseholder is entitled to the benefit of that decision immediately (and without waiting for a certificate from the relevant auditor or accountant).

The Tribunal adopts this reasoning and proceeds to make the "...*best informed decision it can upon the material available*."

HEATING AND HOT WATER

15. <u>The case for the applicant</u>. Ms Whiteman relied on statements of case dated 16 July and 7 September 2009. She produced a skeleton argument at the hearing and developed her arguments in her oral submissions. She referred to the Heating and Hot Water charge statements for 2007/08 and 2008/09 which included breakdowns of these costs. The bulk of the cost in 2007/08 (£8,694.21) was for gas fuel for

the boilers, although certain maintenance costs were also included (£520.18). Similarly, in 2008/09, the bulk of the charges (£9,106.66) was for fuel, although there were also maintenance costs (£214.50). The landlord demanded £675 in respect of these costs in each of the relevant service charges years. A further sum of £675 was also demanded on 2 April 2009 in respect of the 2009/10 service charge year.

16. Ms Whiteman accepted that when the applicant inherited the management of the property, the apportionment of the relevant cost of providing heating and hot water to the building had not been calculated in accordance with the formula in paragraph 1(c) of the Fifth Schedule to the Lease. The applicant then continued to apportion these fuel costs on the basis of the size of each flat rather than on the basis of an equal contribution from each flat towards the true cost of supplying heating and hot water. By a letter dated 26 October 2009 the applicant formally conceded that this method of apportioning fuel costs was wrong, and Ms Whiteman presented figures which adjusted the sums claimed from the respondents for heating/hot water to £900 in each of the service charge years.

17. Ms Whiteman contended that the applicant was entitled under the express terms of the Fifth Schedule to the Lease to recover a contribution towards the relevant costs of fuel for supplying heating and hot water. She submitted that Fifth Schedule had to be read as a whole, including the opening words of paragraph 1 (she referred to ***Woodfall*** at 11.009 to this effect). These showed that the intention was to provide an indemnity to the landlord in respect of its "*management and maintenance of the Building*". The specific words of paragraph 1(c) should be construed so that the recoverable costs under paragraph (3) were for "*supplying and maintaining*" were (1) "*an internal telephone system*" and (2) a "*communal television and/or radio aerial system*" and (3) "*the domestic hot water and central heating systems*". These latter

costs could only be imposed on those flats which were "*connected*" to the domestic hot water and central systems. The apportionment was then dealt with in the remaining words of the clause. Ms Whiteman submitted that the word "*supplying*" applied to "*the domestic hot water and heating systems*" and that "*supplying*" must, as a matter of commonsense, include the cost of fuel for the centralised space and water heating systems. Furthermore, the factual matrix at the date of the lease in 2006 supported this, since at that time the hot water for Flat 19 was supplied from the communal system.

18. The applicant stated in its Reply to the Applicant's Statement of Case that the heating was turned off each year in the summer months. Mr Copeland gave evidence that he did not believe that there was any problem with the heating system. He accepted that the landlord had not done anything about the complaints about the heating made by the tenants in 2007. However, the landlord had recently asked an engineer to inspect the flat and found that there was no problem (the Tribunal was referred to a letter from ADM Heating & Plumbing dated 29 October 2009 which stated that all six radiators in the flat were hot, except one which was switched off with a lock shield valve). The main evidence on this was given by Mr Paul Sutherland, the tenant of Flat 6. He was familiar with maintenance issues and helped the applicant with maintenance issues – indeed, he described himself as "*close to that of being a caretaker*". Once the applicant acquired the freehold, a meeting of lessees decided on the periods that the heating system was to operate. The heating was switched off between April to October in each year and it was usually serviced in October. Mr Sutherland switched the system off in the Spring, and the service engineers switched it on in the Autumn – although if there was a cold patch in April Mr Sutherland occasionally flicked the system on again. From October to April the heating was on a timer and was set to come on at 5.00am and

go off at 11.00pm (the hot water was set to go on at 4.00am and go off and 10.00pm). From his own point of view, the heating system seemed to work well. The feed pipe from the boiler was always hot and the return pipe was cold – indicating that the system was working. He formed the view that there was "*no real problem*" with the heating system. At one point Mr Sutherland had put a note under the door of flat 19 inviting Mr Brearley to come down to the boiler room to explain how the system operated, but Mrs Brearley stated that Mr Brearley would not come, because he did not like dealing with complaints on an informal basis. The system had only broken down once, and the engineers had repaired it in less than a day. In 2006 the system was also fitted with a compensator which switched the system back on if it dropped below a certain temperature. Mr Sutherland gave evidence that the other flat on the top floor of the building is flat 18, and the radiators in that flat had to be bled a few times. No one else in the building had complained about the level of heating in the property. Ms Whiteman submitted in her skeleton argument that the evidence of the landlord should be preferred.

19. The respondents' case. Mr Brearley relied on a statement dated 9 June 2009 which he supplemented with oral evidence and submissions at the hearing. He did not accept that one could construe paragraph 1(c) of the Fifth Schedule as suggested by the landlord. In any event, the opening words of paragraph 1 and paragraph 1(c) indicated that "*supplying*" meant the fixed cost of providing the "*systems*" themselves and not the variable costs of things which were fed into the systems such as fuel. One should only construe the Lease as a whole in cases of ambiguity. As to the factual matrix, it had not been immediately obvious at the date of the Lease that there was a communal supply.

20. The respondents also contended that part of the costs of heating and hot water were not "*reasonably incurred*" and that the service provided was not of a "*reasonable standard*" under section 19 of the Landlord and Tenant Act 1985. Mr Brearley had no issue with the hot water element of the bill, but the space heating had been inadequate. At paragraph 10 of his statement he gave evidence that from 1 May 2007 the heating was turned off in the entire building and that it did not come back on again until October 2007. The radiators in Flat 19 were mostly inoperative and poorly operating. Mr Brearley referred to written complaints about the heating. For example, a letter of 16 October 2007 complained that there was no heating coming from radiators at any time of the day or night. There was no heating from 6.30am in the morning or in the evenings. He did not receive any reply to this letter. Eventually, by July 2008 Mr Brearley decided that the best option was to install a separate system serving the flat. Mr Brearley produced extensive correspondence with the landlord about this, which culminated in a letter from the landlord dated 17 January 2009. This stated that the tenant would only be permitted to disconnect from the communal system and install their own system once "*all arrears for heating hot water and maintenance are discharged*" and a cheque was received for the costs of disconnection. In his statement of case dated 11 September 2009, Mr Brearley stated that there had been almost no heating in the bedrooms for 2½ years. On that date the temperature in the bedrooms was 8 degrees Celsius. Mr Brearley further stated that there was no heating for seven months of the year and the landlord had not responded to the continuous complaints that the radiators did not heat up properly. He submitted that fifty per cent of the relevant costs could be said to relate to hot water and fifty per cent to heating – he allowed nothing for heating but accepted that the other half was reasonably incurred. As for the visit by ADM heating on 29 October, Mr Brearley referred to a memo to Mr Sutherland made on the same day

which stated that the radiators were cold both before and after the visit by the engineer, and he accused the landlord of turning the thermostat up for the period of the visit alone.

21. The Tribunal's determination. The first question is whether the cost of supplying fuel can be recovered as part of the service charge. As far as contractual recovery is concerned, the Lease is unhappily drawn, and the Fifth Schedule would be an eminently suitable candidate for variation by Deed or an application to vary the terms under the Part IV of the Landlord and Tenant Act 1985. However, the Tribunal considers that the fuel supplied to the boilers is a recoverable cost under the Fifth Schedule. This is for three reasons. First, the opening words of paragraph 1 to the Schedule "*otherwise in connection with the management and maintenance of the Building*" are drawn very widely. The subparagraphs which follow, including subparagraph 1(c), are expressed be "*without prejudice to the generality of the foregoing*" and they do not detract from the wide scope of those opening words. Secondly, we agree that the word "*supplying*" in subparagraph 1(c) applies to the "*domestic hot water and heating system*" as analysed by Ms Whiteman. We see no reason why the word "*supplying*" should be limited to the capital cost of the heating/hot water system. This provision envisages some recurring costs (e.g. "*annual rentals*", and "*maintenance, repair, replacement and servicing*" and the draftsman cannot therefore have meant to limit the costs to capital costs only. Fuel can be taken as another such recurring cost. Thirdly, the factual matrix at the date of the lease favours the landlord's interpretation. At that date fuel was in fact provided by the landlord to the communal system which served Flat 19 – whether the lessees were in fact aware of it at the time or not. The parties ought to have been aware of this, and there is no obvious reason why they would have intended the landlord to supply fuel without any provision for it to

recover the cost through the serviced charge in the same way as other relevant costs.

22. An argument has also been raised under section 19 of the 1985 Act that the costs were not reasonably incurred and/or that the standard of the heating service was not reasonable. Mr Brearley has raised a *prima facie* case that the hot water supplied to his radiators was so cold that it was of no value. He accepts 50% of the cost incurred for heating and hot water, which (based on the landlord's concession) amounts to £450 per annum. There is no real evidence in rebuttal from the landlord. Mr Sutherland appeared to have taken the view that there was no problem and no proper investigation was ever made following the written complaints made by the respondents. Although the evidence about the cause of lack of space heating in the flat is scant, the Tribunal finds (bearing in mind the guidance given in ***Warrior Quay***) that the heating element of the charge was not reasonably incurred and that the heating was not of a reasonable standard under section 19 of the 1985 Act.

23. The Tribunal can only make a broad estimate of the allowance to be made for these matters. No breakdown has been given of the proportion of the fuel costs which relate to heating and the proportion which relates to hot water. Furthermore, the parties did not address the Tribunal on the small element of the hot water and heating charge which relates to maintenance. The Tribunal was not addressed on the non-fuel elements of the heating and hot water charge. The Tribunal cannot do any better than the allowance of 50% of the total charge made by the respondents.

24. The Tribunal therefore finds that the heating and hot water charge payable for both the 2007/08 and 2008/09 service charge years should

be £450. It should be said that this allowance applies only to the respondents – other lessees may of course have had a reasonable level of heating.

25. As far as the 2009/10 heating and hot water charges are concerned, these were interim charges on account and they fall to be determined under section 27A(3) of the 1985 Act. However, the landlord's concession referred to above includes an admission that the appropriate heating and hot water charges for 2009/10 should be the same as in 2007/08 and 2008/09. For the reasons given above, the Tribunal therefore determines under section 27A(3) that interim heating and hot water charges of £450 are payable in 2009/10.

TV AERIALS

26. The maintenance and refurbishment charge for 2008/09 amounts to £748.44. A breakdown of actual costs incurred for the building in 2008/09 was provided and this includes a charge of £3,432.44 for "*Southeast Aerial Services*" dated 5 March 2009. The respondents' proportion of this was 8.505%, namely £291.92. In their statement of case the respondents objected to the cost on the ground that the landlord had not complied with the consultation requirements imposed by section 20 of the 1985 Act and the Service Charges (Consultation Requirements) (England) Regulations 2003. It was submitted that by reason of s.20 of the Act, the recoverable charge was limited to £250. The issue relating to the TV aerials therefore amounted to £41.92. Ms Whiteman relied on the application to dispense with the consultation requirements under section 20ZA of the Act. Given the amounts involved, during the course of the hearing Mr Brearley conceded that an order under s.20ZA should be made in respect of the TV aerials.

MAJOR WORKS 2009

27. Major works took place in 2009 for the removal of a fire escape to the northern flank wall of the property and decorations to the flank wall. These costs have been incurred in the sums of £6,566.75 and £3,150 respectively and the respondents' contribution to these costs would ordinarily be £558.17 and £270.72. However, the costs have not yet been billed to the leaseholders other than as part of the interim service charges and reserve fund contribution. In their statement of case the respondents objected to these costs on the ground that the landlord had not complied with the consultation requirements imposed by section 20 of the 1985 Act and the Service Charges (Consultation Requirements) (England) Regulations 2003. It was submitted that by reason of s.20 of the Act, the recoverable charges were in each case limited to £250. Ms Whiteman relied on the application to dispense with the consultation requirements under section 20ZA of the Act.

28. The case for the applicant. The statement of case of 16 July 2009 explained that the fire escape to the south elevation had been removed some years ago by a firm called AW Matthews Ornamental Fabrication. It had become clear for some time that the fire escape to the north elevation was becoming dangerous and that it was not needed since internal fire precaution works had made it redundant. On 3 April 2007, AW Matthews provided an estimate for taking down and removing the northern fire escape and for supplying scaffolding and installing Juliet balconies. The total estimate was £1,400 + VAT for removing the fire escape, £850 + VAT for the Juliet balconies and a PC sum of £1,600 + VAT for scaffolding. In early 2009, a cat got stuck on the fire escape and a neighbour had attempted to rescue it. Part of the fire escape fell off and the fire brigade had to be called to rescue the neighbour. It was therefore decided to proceed with urgent works to the north elevation. Mr Sutherland telephoned AW Matthews Ornamental Fabricators who confirmed that their written estimate of 2007 still applied. This was

checked against other local contractors (copies of estimates from Prefab Steel Co Ltd dated 4 February 2009 and PMG Engineering dated 20 February 2009 were produced). AW Matthews were not the cheapest contractors, but the landlord knew about the quality of their work. The landlord therefore commissioned AW Matthews to carry out the main works, namely £1,400 + VAT (£1,610) for the fire escape and £850 + VAT (£977.50) for the balconies. Scaffolding was provided by Framework Scaffolding Ltd (£1,863) and building work to demolish a ground floor extension and make good the brickwork was carried out by Rob Nye Bricklaying (£2,445). At the same time, with scaffolding erected, the landlord decided to carry out repainting of parts of the flank wall. Estimates were obtained for decorating window frames and downpipes, together with painting the lobby areas exposed by the removal of the fire escape. Mr Arpad Iengyel gave the lowest estimate (£3,150), although copies of estimates from Pavilion Painting & Decorating Services and P&S Ltd were also produced. The total costs in the estimates were £6,566.75 for removal of the fire escape, erection of scaffolding and installation of Juliet balconies and £3,150 for redecoration. In his evidence, Mr Sutherland confirmed the contents of the statement of case. Mr Copeland contended that all the other lessees were happy to talk informally about the cost of works, but that the respondents refused to do so. Matters were discussed fully at the AGM of the applicant. He accepted that planning consent had been obtained to remove the fire escape in 2007, but it had not been clear at that stage that the works would proceed. There had been problems with the Council about removing the fire escape, but when cross examined, Mr Copeland was unclear whether these problems had been overcome by April 2007. They had certainly been dealt with by the time of the second demand for service charges on 27 September 2007. When the solicitors' letter of June 2008 was put to Mr Copeland, he explained that the applicant went ahead with the fire escape works without consulting

because of the event involving the cat and the neighbour. The fire escape had become dangerous. Mr Copeland also referred to minutes of the applicant's AGM on 10 January 2008 which gave details of plans to remove the fire escape. The minutes would have been posted through the door of every flat or posted to tenants within a week of the AGM. He also confirmed that none of the estimates for the 2009 works were sent to the respondent before they were disclosed in the present proceedings. Mr Copeland explained to the Tribunal that the decision to go ahead with the fire escape works was made by him and Mr Sutherland. Mr Sutherland also gave evidence that the respondents had not attended Annual General Meetings where the works were discussed. He explained that "*consultation in [his] mind meant getting the best job for the company at the best price*". Mr Sutherland had dealt with the builders.

29. Ms Whiteman submitted that the works fell within clause 4.1 of the lease, and in particular the work to remove the fire escape fell within clause 4.1(c). The Second Schedule gave an express right to use the fire escape and this therefore brought the fire escape within the landlord's repairing obligations. The objection to the Juliet balconies was misplaced since these were simply part of making good.

30. As far as the s.20ZA application was concerned, Ms Whiteman accepted that the applicant had failed to comply with the consultation requirements. She argued that the Tribunal should dispense with the requirements under s.20ZA. Ms Whitmore referred the Tribunal to the Lands Tribunal cases of ***Camden v Leaseholders of 30-40 Grafton Way*** (2008) LRX/185/2006, ***Warrior Quay v Joacquim*** (supra) and ***Eltham Properties v Kenny*** [2008] L&TR 14. The landlord had carried out some informal consultation with the lessees, these were lay persons who were not aware of the law and the lessees in the Building had (with the

exception of the respondents) agreed to deal with the works in this way. The works were urgent, and no substantial prejudice was caused to the respondents since there was no evidence that the costs were excessive and they were unlikely to have been able to find any alternative specialist contractors such as steel fabricators. The factors were similar to those in the ***Warrior Quay*** case where the Lands Tribunal refused to dispense with the consultation requirements.

31. The respondents' case. The respondents contended that the works were not permissible under clause 4.1 of the lease. In particular, the balconies were improvements and not "*necessary*" repairs. As far as the section 20ZA application was concerned, the respondent's statement of case dated 11 September 2009 argued that there must be a cogent reason for dispensing with the consultation requirements. The purpose of the legislation is that the lessees who ultimately foot the bill should be aware of what works are proposed and the costs thereof. The expense of serving notices under the consultation regulations was minimal. The 'informal' methods of consultation adopted by the applicant led to greater expense. In any event, no-one had knocked on the respondents' door in almost two years to have such 'informal' consultations. The respondents had never agreed to such an informal approach and it was not an appropriate way to deal with such large sums of money. Indeed, in a letter dated 6 June 2008 the applicant's then solicitors Griffith Smith Farringdon Webb had stated that "*Our client is aware of the need to consult prior to undertaking any major work and intends to adopt the appropriate procedures for all proposed major works.*" The respondents were sceptical whether all the other lessees were happy to forgo their statutory rights, but in any event that did not mean that the respondents were not able to rely on their formal legal rights. The works were not "urgent" in 2009. Indeed, the landlord had indicated since 2007 that it intended to carry out this work. The

respondents relied on a letter dated 9 February 2007 which gave information to the respondents at the time of their purchase of flat 19. The letter stated that "*in the near future*" it was intended to carry out works including "*removal of the fire escape at the north side of the building*". On 14 April 2007 there was a demand for service charges which suggested that "*we have obtained planning permission to remove the North fire escape and provide [Juliet] balconies for the flats.*" This was repeated in the demand dated 27 September 2007. At that stage the landlord stated that "*some initial quotes have been obtained for the removal of the fire escape...*" Indeed, Mr Brearley had written on 21 June 2007 suggesting that these costs were not recoverable under the terms of the Lease. In his evidence, Mr Brearley accepted that he did not know any scaffolders or steel fabricators and he had not obtained any alterative evidence. The information about the works that the applicant had supplied in various letters was inadequate and did not give basic information such as the potential cost or scope of the works. It was also reasonable to have done the decorative works at the same time. All in all, the factors were closer to those in the ***Eltham*** case where the Lands Tribunal dispensed with the consultation requirements.

32. The Tribunal's determination. The first issue is whether the works carried out in 2009 fall within the repairing covenants in the lease. The Tribunal considers that they all are. The removal of the fire escape itself and ancillary brickwork was a work of repair to the "*main structure of the Building*" within the meaning of clause 4.1(b) of the Lease in that it involved works to the load bearing flank wall of the property. However, these works were also within the meaning of 4.1(c) of the lease in that they are "*other parts of the Building ... enjoyed or used by the Lessee in common with all or any of the other lessees or occupiers of the Building*". The Second Schedule to the lease refers expressly to the respondents

rights to use the fire escapes in common with other lessees. The repainting of windows and rainwater goods also falls within clause 4.1 of the lease. The Tribunal also takes the view that although the Juliet balconies are technically improvements, they are a perfectly ordinary means of making good the voids on each floor created by the removal of the fire escape. They are cosmetically better and only no more expensive than bricking up the voids or providing window units. Finally, the Tribunal does not accept that the words "*when and as necessary*" in clause 4.1 require works to be carried out only when it is absolutely urgent to carry out repairs etc. The clause would be unworkable if the landlord was unable to adopt a prudent preventive maintenance programme to avoid serious damage occurring.

33. The more complex issue relates to section 20ZA. The relevant provisions are as follows:

> ***Limitation of service charges: consultation requirements***
>
> ***20*** *(1) Where this section applies to any qualifying works or qualifying long term agreement, the relevant contributions of tenants are limited in accordance with subsection (6) or (7)(or both) unless the consultation requirements have been either—*
> *(a) complied with in relation to the works or agreement, or*
> *(b) dispensed with in relation to the works or agreement by (or on appeal from) a leasehold valuation tribunal.*
> *(2) In this section "relevant contribution", in relation to a tenant and any works or agreement, is the amount which he may be required under the terms of his lease to contribute (by the payment of service charges) to relevant costs incurred on carrying out the works or under the agreement.*
>
> ...
>
> *(5) An appropriate amount is an amount set by regulations made by the Secretary of State; and the regulations may make provision for either or both of the following to be an appropriate amount—*
> *(a) an amount prescribed by, or determined in accordance with, the regulations, and*
> *(b) an amount which results in the relevant contribution of any one or more tenants being an amount prescribed by, or determined in accordance with, the regulations.*

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

The "*appropriate amount*" under s.20(5)(b) has been set at £250.

34. Dispensation is dealt with in s.20ZA:

> ***Consultation requirements: supplementary***
> ***s.20ZA*** *(1) Where an application is made to a leasehold valuation tribunal for a determination to dispense with all or any of the consultation requirements in relation to any qualifying works or qualifying long term agreement, the tribunal may make the determination if satisfied that it is reasonable to dispense with the requirements.*
> *(2) In section 20 and this section—*
> *"qualifying works" means works on a building or any other premises, and*
>
> ...
>
> *(4) In section 20 and this section "the consultation requirements" means requirements prescribed by regulations made by the Secretary of State.*

35. The Lands Tribunal has dealt with the exercise of this discretion under s.20ZA in three important decisions in recent years. The decisions in ***Warrior Quay Management v Joachim***, ***Eltham Properties v Kenny***, and ***Camden v Leaseholders of 30-40 Grafton Way*** (supra) were referred to in argument. The principles to be derived from these decisions are that the LVT has a wide discretion to dispense with the consultation requirements where it is reasonable to do so "*in an overall sense or in all the circumstances*": see ***Eltham*** at para 27. ***Eltham*** and ***Camden*** can be considered as 'bookend' decisions, which set out the limits of the LVT's discretion. One end is marked by ***Eltham***, where there was only a "*minor*" breach of procedure and "*no*" prejudice was caused to the leaseholders. In such a case it would generally be right for the LVT to

dispense. As the Lands Tribunal stated in that case, the object of the consultation regulations is not to "*punish*" landlords. The other end of the bookshelf is marked by **Camden**, where the breach was "*fundamental*" to the regulations and "*significant*" prejudice was caused to the lessees. The vast majority of cases before the LVT fall somewhere between ***Eltham*** and **Camden** – where the breach is of a greater or lesser magnitude and there is more or less prejudice to the leaseholders. However, s.20ZA requires the LVT to take all relevant factors into account and not simply any prejudice to the leaseholders. The decision in **Camden** did not say that prejudice was the "*only*" factor, but merely that it was the "*principal*" factor.

36. In this case, there has been a complete failure to comply with the consultation requirements in Part 2 of Schedule 4 to the regulations. There was no initial notice of intention, no opportunity given to inspect the proposed works, no statement of estimates and no contract statement. The breach cannot be considered to be a minor one. Furthermore, the prejudice caused to the tenants is more than theoretical. They have been denied the opportunity to consider the scope of the works and to comment on them – for example by suggesting alterative works. They have been denied the opportunity to nominate alternative contractors and to be informed of the landlord's process for choosing its contractors. They have been denied the opportunity to comment on the contracts entered into – particularly where informal contracts of this kind are entered into with sole traders and where disputes with contractors are not uncommon.

37. The applicant suggests that any such prejudice is mitigated by the opportunity for informal consultation with the respondents either by way of correspondence or by the chance to attend meetings (or even discuss matters on the doorstep). The Tribunal does not consider that

these are adequate substitutes for proper consultation. Details of the scope of works, contractors and contracts were never presented to meetings or set out in correspondence. In any event, the obligation is on the landlord to set out this information rather than remain passive. The respondents rightly state that the "informal" consultation is inadequate. Indeed, the answer given by Mr Sutherland about the purpose of consultation betrays the real problem with the process adopted by the landlord. Consultation is intended to protect the tenant from excessive service charges – not to assist the landlord in getting the best price for the job.

38. As to other factors, the Tribunal recognises that the applicant is not a professional landlord. However, it should be aware of the minimum legal requirements for major works or employ competent managing agents who have that expertise. In any event, this argument is untenable in the light of the letter of 6 June 2008 where the landlord's solicitors expressly stated that the landlord was "*aware of the need to consult prior to undertaking any major work*". The Tribunal does not consider that it is material that other lessees do not object to the works. The respondents are entitled to rely on their formal legal rights. Moreover, it is clear that the works were not in any real sense "urgent" in 2009 so as to justify dispensation in an emergency. Planning consent has been in place since at least 2007 and the letters of 9 February 2007 and 14 April 2007 indicate that not only were works to the fire escape proposed, but also that estimates had been obtained. The applicant has had at least two years to operate the consultation procedure but has chosen not to do so. Even after Mr Sutherland and Mr Copeland concluded that the works had become urgent, it does not appear that they saw fit to circulate estimates or give the lessees any details of the major works.

39. There is also the linked issue of the external decorations to the northern flank wall. It is true that this work was more conveniently and more cheaply dealt with at the same time that scaffolding was erected for the fire escape works, but the landlord made no attempt whatsoever to give any advance information about these costs. The same considerations apply to the painting of the windows etc as apply the fire escape works.

40. It follows that the Tribunal declines to dispense with the consultation requirements under section 20ZA either in relation to the fire escape works or the decorations. Under section 20(1) of the Act, the respondents' contribution for the fire escape works (which include the Juliet balcony, scaffolding and brickwork) is limited to £250 and their contributions to the external decorations are also limited to £250.

QUALIFYING LONG TERM AGREEMENT

41. Mr Brearley did not pursue objections to the costs incurred under qualifying long term agreements for cleaning and insurance. The only issue was a qualifying long term agreement for the supply of gas.

42. As stated above, the heating and hot water costs in each year included the cost of gas fuel. The costs in the relevant years were:

    (a) 2007/08: £8,694.21

    (b) 2008/09: £9,106.66

    There was no breakdown for the 2009/10 service charge year. It was common ground that the agreement was a qualifying long term agreement and that the consultation requirements of Schedule 1 to the 2003 regulations had not been complied with. The issue was whether the consultation requirements should be dispensed with under s.20ZA of the 1985 Act. Otherwise the fuel cost charge was limited to £100.

43. The applicant's case. Ms Whiteman relied on a supplementary statement dated 4 August 2009 and evidence from Mr Copeland and Mr Sutherland. Prior to 2006, the landlord had a contract with Powergen for the gas supply. The charge for the final year of this contract was £4,123.62, based on a standing charge of 59.18p/day and a unit charge of 3.5p/kWh. Mr Sutherland had carried out extensive research with all the reputable suppliers on the internet and by telephone. The best price obtained was from British Gas who offered to supply gas for 3 years at a fixed standing charge of 32.45p/day and a unit charge of 2.498p/kWh. Mr Sutherland only carried out informal consultation with some of the lessees. A contract was then entered into with British Gas on 16 February 2006 on the above terms. This contract expired in February 2009 when it was replaced with a one year supply contract from British Gas. Mr Copeland gave evidence that he had not been aware that there were regulations which required consultation about this kind of agreement until he had discussed the matter with the solicitors in 2009. Mr Sutherland confirmed the contents of the supplemental statement which gave details of this process.

44. Ms Whiteman submitted that the applicant had acted in good faith without any specialist advice. The respondents had not been caused any prejudice since it was unlikely that the gas charges were excessive. She produced evidence that gas supply prices had increase dramatically over the three year period, so the respondents had obtained a very good deal. The issue was historic only, since the three year contract expired in 2009. From February 2009, s.20 did not apply since the present annual agreement with British Gas was not a qualifying long term agreement.

45. The respondents' case. The respondents contended that the consultation requirements of Schedule 1 to the 2003 regulations had not

been complied with and that the relevant costs should therefore be limited to £100 per flat. The respondents had been denied the chance to look at the contract and the level of proposed charges and they had been unable to help negotiate the best gas price deal. Mr Brearley did not produce comparables to show that the cost was excessive but he stated that he had no idea how one could obtained such comparables.

46. The Tribunal's determination. Although this is a qualifying long term agreement, as opposed to major works, broadly similar principles apply as set out above. The Tribunal takes into consideration that the respondents have been denied the opportunity to comment on the scope of the contract and the choice of contractors. There has been prejudice to the respondents. However, in this case, the Tribunal considers that the prejudice is theoretical and not real. In the case of an ordinary small scale contract for the supply of domestic gas in Hove, there are relatively few large scale suppliers in the market. The landlord appears to have tested the market and chosen what is probably the largest such supplier. There is no evidence from the respondent that the cost has increased as a result of the failure to comply with the consultation requirements – indeed the unchallenged evidence from the landlord is that the cheapest supplier was chosen. The Tribunal also takes into account the conduct of the landlord, which involved some consultation, albeit not in the form prescribed by s.21 of the Act. It is also relevant that that relatively modest sums are involved, and the fact that the supply contract has now expired. In these circumstances, the Tribunal makes an order under section 20ZA that the consultation requirements should be dispensed with in respect of the gas contract with British Gas dated 16 February 2006.

47. Two further observations should also be made. First, the order dispensing with the consultation requirements is only material to the 2007/08 and

2008/09 heating and hot water charges. The heating and hot water charges made in 2009/10 are not covered by the long term qualifying agreement made in 2006. Secondly, it should be noted that these are the same costs covered by the determination above in relation to gas fuel – the relevant costs of which the Tribunal has decided to limit under section 19 of the 1985 Act.

RESERVE FUND

48. In each of the three service charge years in question, the maintenance/refurbishment contribution included a sum paid towards a "*refurbishment fund*". The landlord sought to add £5,000 to this fund in each year, and the respondents' annual contribution was £425.

49. The applicant's case. In its statement of case dated 16 July 2009, the landlord explained that the landlord was "*trying to build up a surplus because we were left in a position previously where the building was run constantly in deficit and there were no monies available when we completed the purchase of the premises.*" However, there was no requirement to separate a reserve fund from other moneys. Mr Copeland's statement dated 1 August 2009 gave details of the Reserve. The landlord initially estimated that general maintenance costs would be in the order of £5,668 but that £9,000 would be needed towards a refurbishment fund. In March 2006 this fund was increased to £10,000. This would enable the landlord to build up a fund of £10,000 towards works which were required. This was justified by the costs which were in fact incurred – for example £10,460.97 was spent on all maintenance in 2006/07 (which included £1,375 for maintenance and decoration), £7,661.80 was spent in 2007/08 and £9,838.07 in 2008/09 (excluding the television aerial cost). The excess collected by the landlord in each year was available for "*extras*" which "*is a sensible sum to build up each year*". The aim was to keep up a contingency fund in the region of

£7,500 per year. The landlord had some major projects to carry out in future including rewiring and external decoration of the east, south and west elevations. In his oral evidence, Mr Copeland stated that in each year the landlord looked at past expenditure and then added something for anticipated major works. It did not however have any figures in mind for these works. The landlord simply knew how expensive these works could be. £5,000 was reasonable balance to build up. Mr Copeland accepted that the lessees who administered the property on behalf of the landlord had no formal training in property management. They picked matters up from the internet and from Companies House. He was not aware of the RICS (Royal Institute of Chartered Surveyors) Residential Service Charge Management Code. The landlord had previously been "*hit with large bills for works, so we went all out to get hold of the freehold and spread out the costs.*" Mr Sutherland also gave evidence of the reason for the fund. In his oral evidence he explained that when the lessees acquired the freehold, no service charge moneys were handed over by the previous landlord. The landlord was "penniless". He went on to say that "*the main need was to accumulate money*" to avoid the problem of unpaid bills.

50. Ms Whiteman stated that detailed accounts of the reserve had been supplied to the respondents. Clause 4 of the lease permitted the landlord to recover a contribution to a Reserve Fund. The RICS Code should not constrain the applicant who were acting unpaid and who had an equal interest in the premises. A lesser duty should be expected of lessees acting in person than from professional landlords. The figure of £5,000 was not simply a random one. Although no separate Reserve Fund was kept, the applicant was conscious that there were always works needed to the building. Ms Whiteman submitted that the landlord had done its best. The £5,000 contribution to the Reserve was included in the calculations of the respondents' maintenance/ refurbishment

contribution. There was also evidence that the landlord had consulted about the Reserve at meetings.

The respondents' case. The respondents' relied on a statement of case dated 11 September 2009 and Mr Brearley's witness statement dated 9 June 2009. They stated that they had never seen any calculations justifying the reserve fund contributions. The Reserve did not relate to the cost of running or refurbishing the building and/or the costs of doing so to date. In reality, the landlord was simply collecting a "*slush fund*" from which it discharged both regular running costs and works. Surpluses in each year are not allocated to a Reserve but simply to the balance of the account. The applicant submitted firstly that this was not permissible under paragraph 1(g) of the Fifth Schedule. The Reserve was only for expenditure which had already been incurred, not for anticipated expenditure in future years. The covenant did not permit the Reserve to be used to cover "*basic management and running costs*". Secondly, it was submitted that the Reserve contributions were not "*reasonably incurred*" or reasonable under sections 19(1) and 19(2) of the 1985 Act. The way the Reserve was dealt with was an affront to reasonableness. The Reserve was not managed in accordance with the RICS Service Charge Code. Furthermore, no details of any specific works, timescales, possible costs or expected life spans of those works were ever provided. It was impossible to see whether any amounts being collected were reasonable and the sums were not held in a separate trust account. In his oral submissions, Mr Brearley repeated the point that the landlord simply wanted to accumulate money because it had had a bad experience with deficits in the past. When cross examined he accepted that it would be reasonable to provide for a Reserve Fund. He accepted that £200 a year contribution might be reasonable but he lacked the information to be able to give a proper figure. The landlord simply did work when it felt the need on an *ad hoc* basis. Less urgent work (e.g. the

TV aerial) was done first. There was no consultation about the level of the Reserve. The annual contribution to this Reserve Fund exceeded the actual maintenance costs in each of the three years and it was not reasonable to charge 130% for a "*rainy day fund*" in these circumstances. It was not permissible simply to accumulate money for the sake of it.

51. The Tribunal's determination. The Tribunal rejects the respondents' submissions on the construction of the reserve provisions of paragraph 1(g) of the Fifth Schedule to the Lease. The wording clearly envisages that the reserve is to be accumulated for future expenditure. Indeed, the word "*retained*" in the paragraph suggests that the Reserve may only be collected for the purpose of expenditure incurred in future service charge years. The interim service charge provisions of paragraph 2 of the Fifth Schedule provide the landlord with an opportunity to demand sums which relate to the current service charge year. Furthermore, the purpose of the Reserve is expressly dealt with in paragraph 1(g) and extends to a wide range of ordinary expenditure. It is not limited to being a fund for major works to the building – as is commonly the case with such provisions. The covenant did permit the Reserve to be used to cover "*basic management and running costs*". The Tribunal considers that there is no contractual bar to recovery of the purposes for which the Reserve is collected.

52. However, there is also a requirement for the landlord to act reasonably, both under paragraph 1(g) of the Fifth Schedule (a sum which the landlord "*shall reasonably consider desirable*" and "*reasonable provision for the costs*" etc.) and under section 19(1) and 19(2) of the 1985 Act. In particular, section 19(1) requires the Tribunal to consider the process adopted by the landlord for assessing any relevant costs: ***Forcelux v Sweetman*** [2001] 2 EGLR 173. In this instance, the landlord's process for

arriving at a figure for the Reserve contribution was wanting. The landlord does appear to have made any periodic assessment or budget for the anticipated future costs. The impression given is that the Reserve contribution figure selected at random. The evidence given on behalf of the landlord lends substance to the argument by the respondents that the Reserve was simply a "*rainy day fund*" or a balance run on the service charge account. This appear from the evidence given by Mr Copeland about the desire to produce a surplus to fund "*extras*" and the evidence given by Mr Sutherland about the need to "*accumulate money*" to avoid unpaid bills. However, it is also notable that the landlord's annual calculations referred to a fund of £5,000 whereas Mr Copeland stated that the intention was to produce a surplus of £7,500 in each year. Furthermore, there is no proper accounting for the Reserve Fund and it is not treated by the landlord in any transparent manner. It does not appear that at any stage the landlord has prepared a separate statement of sums held in the Reserve and there is therefore no ability to account to the lessees for sums held in the Reserve. The Tribunal also considers it significant that the landlord has not complied with (and indeed does not appear to be aware of) the guidance given by section 10 of the First Edition of the RICS Residential Service Charge Management Code. Ms Whiteman is correct that the landlord is not a professional managing agent. However, both the First Edition and the 2009 Second Edition of the RICS Code have statutory force under s.87 of the Leasehold Reform Housing and Urban Development Act 1993 and a failure to comply with provisions of the Code are relevant on the question of reasonableness. In this instance the Tribunal finds that the landlord has failed to comply with paragraphs 10.2 and 10.9 of the Code:

> "*10.2 The usual method of working out how much money is to go into the fund each year is to take the expected cost of future works and divide it by the number of years which may be expected to pass before it is incurred. A better method of calculating the contribution is to have new estimates of the cost of replacing the item from time*

to time and thus to adjust payments into the fund to match costs. If the fund is invested prudently the interest earned will itself help to meet rising costs. Tax will be charged on the interest income. (See also Part 11).

10.9 You should review contributions annually and base them on current up-to-date forecasts including fees and VAT."

53. The Tribunal considers that the deficiencies in the calculation and handling of the Reserve Fund are such that the contributions requested in each of the service charge years were not reasonably incurred and/or reasonable under sections 19(1) and 19(2) of the 1985 Act and that they were not reasonable under paragraph 1(g) of the Fifth Schedule to the Lease. It should be born in mind that the landlord holds the Reserve Funds on the statutory trusts imposed by section 42 of the Landlord and Tenant Act 1987. It cannot simply seek contributions to a vaguely formulated "*rainy day fund*" for which no records are kept. Moreover, the Tribunal is not in position to determine that any contribution to a Reserve Fund would be reasonable where the landlord has not properly accounted for this money at any stage.

COSTS

54. The applicant's case. Ms Whiteman submitted that the landlord was entitled to add its costs in connection with the applications to the Tribunal under paragraph 1(f) of the Fifth Schedule to the lease. Ms Whitmore submitted that the Tribunal should not make an order under section 20C of the 1985 Act. She referred to the guidance given by the Lands Tribunal in ***Tenants of Langford Court v Doren*** LRX/37/2000. In this case, the respondent's claim had been brought by a solicitor, and counsel had been involved at an early stage. It was therefore reasonable for the applicant to employ a solicitor. The respondents had taken a legalistic approach which involved interpretation of many provisions of the lease. Furthermore, this was a lessee-owned landlord. Ms Whiteman provided the Tribunal with a bundle of correspondence

on the question of costs, which Mr Brearley agreed could be referred to by the Tribunal after it had made its determination on the substantive matters. The bundle included an offer to settle the claims from the respondents dated 14 September 2009 (this was marked "*without prejudice*", although a later letter from the applicant's solicitors dated 22 September 2009 submitted that this was in fact a letter "*without prejudice save as to costs*"). There was also a letter dated 2 October 2009 from the applicant's solicitors making a counter offer.

55. In response to the application by the respondents for a costs order under Schedule 12 paragraph 10 of the 2002 Act, Ms Whiteman submitted that the landlord had not acted frivolously or vexatiously or otherwise unreasonably "*in connection with the proceedings*". The respondent has conceded that the landlord had not acted improperly in connection with the applications themselves, and this was "the end of the story" as far as a Schedule 10 application for costs was concerned.

56. The respondents' case. Mr Brearley submitted that the landlord had brought the applications on itself by its long standing mismanagement and lack of consultation. He applied for an order under section 20C of the 1985 Act that all the costs incurred by the applicant in connection with proceedings before the LVT are not to be regarded as relevant costs to be taken into account in determining the amount of any service charges.

57. At a late stage, Mr Brearley made an oral application for a costs order under Schedule 12 paragraph 10 of the Commonhold and Leasehold Reform Act 2002. He submitted that the landlord had acted "*otherwise unreasonably*" by its poor management of the property. When asked by the Tribunal, he accepted however that he had no complaint about the landlord's conduct "*in connection with the proceedings*".

58. The Tribunal's determination. Section 20C of the Landlord and Tenant Act 1985 provides that:

> *"(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.*
> ...
> *(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."*

Having regard to the guidance given by the Lands Tribunal in ***Tenants of Langford Court v Doren*** LRX/37/2000 the Tribunal considers that it is just and equitable to make an order under s.20C of the 1985 Act. The applicant had failed in relation to significant issues before the Tribunal. Although the Tribunal is conscious that the applicant is a tenant owned company, and that the costs will in effect fall on the remaining lessees, this is outweighed by other factors. The applications display a history of poor (if well meaning) financial management of the property. Basic elements of service charge budgeting and accounting are absent. The landlord has been ignorant of or failed to follow the express provisions of the lease, statutory requirements and industry guidance on best practice. As a result, accounting is not transparent and lessees can have little confidence that sums demanded will be applied to the purposes for which they are paid. Furthermore, statutory consultation obligations have been ignored, notwithstanding apparent professional advice that they were required. This is the underlying cause of the various applications and it would not be just and equitable to allow the costs which flow from these deficiencies to be added to the service charges. The Tribunal has carefully considered the correspondence provided by the applicant's solicitors and in particular the offers to settle the matters

in issue dated 14 September and 2 October 2009 but these do not affect this conclusion.

59. Schedule 12 paragraph 10 of the Commonhold and Leasehold Reform Act 2002 permits the Tribunal to make an award of costs (limited to £500) where a party has acted "*frivolously vexatiously abusively disruptively or otherwise unreasonably in connection with the proceedings*". Mr Brearley concedes that he has no complaint about the landlord's conduct of the proceedings themselves. The Tribunal therefore declines to make any order under paragraph 10 of Schedule 12.

CONCLUSIONS

60. The Tribunal determines that:

(a) The heating and hot water charge payable in each of the 2007/08, 2008/09 and 2009/10 service charge years is £450.

(b) Under section 20ZA of the 1985 Act, the Tribunal dispenses with the consultation requirements in relation to the TV aerial works carried out by "*Southeast Aerial Services*" in 2009.

(c) The Tribunal declines to dispense with consultation requirements in relation to major works in 2009 under s.20ZA of the 1985 Act. Under section 20(1) of the Act, the respondents' contribution for the fire escape works (which include the Juliet balcony, scaffolding and brickwork) is limited to £250 and the respondents' contribution to the external decorations is also limited to £250.

(d) Under section 20ZA of the 1985 Act, the Tribunal dispenses with the consultation requirements in relation to the long term qualifying agreement made between the applicant and British Gas dated 16 February 2006.

(e) The relevant costs of contributions to a Reserve Fund (described as a "*refurbishment fund*") are not payable in respect of the 2007/08, 2008/09 and 2009/10 service charge years.

(f) Under section 20C the Tribunal orders that none of the costs incurred, or to be incurred, by the landlord in connection with proceedings before the leasehold valuation tribunal are to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the respondents.

(g) The Tribunal makes no costs order under paragraph 10 of Schedule 12A to the Commonhold and Leasehold Reform Act 2002.

None of the other costs incurred are disputed by the applicants.

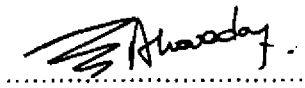
61. The amount payable by the respondents in the 2007/08 service charge year can therefore be calculated from the maintenance costs statements for 2007/08. Total expenditure on maintenance was £7,661.80 and none of this sum is disputed. The respondents' contribution to these costs is 8.505% or £651.64. To this is added the £450 contribution to heating and hot water determined above. Furthermore, as determined above no contribution is payable towards the Reserve Fund. **The total amount payable by the respondents to the applicant in relation to the 2007/08 service charge year is therefore £1,101.64.**

62. Similarly, the amount payable by the respondents in the 2008/09 service charge year can therefore be calculated from the maintenance costs statements for 2008/09. Total expenditure on maintenance was £13,270.44. The cost of the TV aerial works is recoverable in full and the remainder of this sum is not disputed. The respondents' contribution to the maintenance costs is 8.505% or £1,128.64. To this is added the £450 contribution to heating and hot water determined above. Furthermore,

as determined above no contribution is payable towards the Reserve Fund. **The total amount payable by the respondents to the applicant in relation to the 2008/09 service charge year is therefore £1,578.65.**

63. No accounts of actual expenditure have been provided in relation to the 2009/10 service charge year. The only determination can therefore be in relation to the interim charges demanded on 2 April 2009. Total estimated expenditure on maintenance in the demand is given as £3,800 (although this relates to a six month period, so the annual figure is £7,600). This sum is not disputed. The respondents' contribution to the estimated maintenance costs is 8.505% or £646.38. To this is added the £450 contribution to heating and hot water determined above. Furthermore, as determined above no contribution is payable towards the Reserve Fund. The total interim charges payable by the respondents to the applicant in relation to the 2009/10 service charge year is therefore £1,096.38. Paragraph 2 of the Fifth Schedule to the lease provides that the interim charge is payable on 25 March and 29 September in each year. It follows that **the interim service charges payable on 25 March 2009 and 29 September 2009 are £548.19**.

64. It appears that there are arrears on the service charge account. In accordance with the guidance given in ***Warrior Quay v Joacquim*** the amounts decided to be payable above by way of shortfall in relation to the 2007/08 and 2008/09 service charge years are not so payable until a proper certificate under the terms of the lease (certifying that at least this amount is payable) is provided by the applicants. The 2009/10 interim charges do not require any such certificate from the landlords, and these sums are therefore payable with immediate effect.



Mark Loveday BA(Hons) MCIArb
Chairman
23 December 2009