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**LON/00BK/LSC/2005/0277**

**DECISION OF THE LEASHOLD VALUATION TRIBUNAL ON AN APPLICATION UNDER SECTION 27A OF THE LANDLORD AND TENANT ACT 1985 (AS AMENDED)**

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| **Applicant:** | Thornfield Securities (Holdings) Ltd |
| **Represented by:** | Dawsons, Solicitors |
| **Respondents:** | Faysek Services Limited – Flat 3<br>HRH Raja Perempuan of Keletan – Flat 4<br>Mr and Mrs Z Masters – Flat 7 |
| **Represented by:** | Pettman Smith, Solicitors |
| **Re:** | Flats 3, 4 & 7 Albert Gate Court, 124 Knightsbridge, London SW1X 7PE |
| **Inspection date:** | 21 March 2006 |
| **Hearing dates:** | 21 and 22 March 2006 |
| **Appearances:** | Ms G Ward of Counsel<br>Mr A Banyard MRICS, Farrar Property Management<br>Mr J Rawes – Farrar Property Management<br>Mr P Crane – Director and Chairman of Thornfield Securities (Holdings) Ltd<br>**For the Applicant**<br><br>Mr G Cowen of Counsel<br>Miss T Cox – Pupil<br>**For the Respondents** |

**Members of the Residential Property Tribunal Service:**

Mrs J S L Goulden JP
Mr C Kane FRICS
Mrs G V Barrett JP

**LON/00BK/LSC/2005/0277**

**PROPERTY: ALBERT GATE COURT, 124 KNIGHTSBRIDGE, LONDON, SW1X 7PE**

## BACKGROUND

1. The Tribunal was dealing with

(a) an application dated 3 October 2005 under Section 27A of the Landlord and Tenant Act 1985, as amended (hereinafter referred to as "the Act") for a determination whether a service charge is payable and, if it is, as to:

(a) the person by whom it is payable
(b) the person to whom it is payable
(c) the amount which is payable
(d) the date at or by which it is payable
(e) the manner in which it is payable

(b) a cross application made on behalf of the Respondents at the Hearing under S20C of the Act to limit landlord's costs of proceedings before the Tribunal.

## INSPECTION

2. Albert Gate Court (hereinafter referred to as "the subject property") was inspected on the morning of 21 March 2006. It was a seven storey (including lower ground floor) Victorian mansion block c1900 in Knightsbridge comprising twelve residential units on the upper floors, individual commercial units on the ground floor and a mixture of commercial and residential storage units on the lower ground floor. Private balconies served the residential units on each floor.

3. The rear of the building (which had a small garden) faced Hyde Park. The front of the building was in Knightsbridge. The subject property was immediately adjacent to Hyde Park Barracks on the west boundary.

4. The subject property was of red facing brick construction with painted artificial stonework surrounds to doors and windows. Part of the side elevation was rendered. There was an external cast iron fire escape adjacent to Hyde Park Barracks on the Knightsbridge side. External decorations were good and appeared to have been recently decorated, save for some paint peeling on the rendered areas to one side.

5. One entrance to the subject property was in Park Close (a pedestrian only passageway) and the other entrance was in Knightsbridge itself. There was an entryphone to each entrance. Both entrances led to the same common parts.

6. The common parts were comfortable, but rather tired. On the ground floor, which had marble flooring, there was a manned porter's desk and a lift which served the upper floors. The stairs to the upper floors and landings were carpeted with somewhat worn carpeting, particularly to the upper floors.

7. The Tribunal was invited to inspect the roof, which was of mansard construction covered with natural slates with extensive lead dressings and lead covered dormers. Between the mansard and external walls the flat roof area was covered in asphalt. The roof covering appeared to have been renewed. Telephone and television cables were bound together neatly. The Tribunal noted that there was some evidence that work had been carried out to the fire escape. A parapet at first floor level was also inspected, from which one of the light wells could be seen. This appeared to have been redecorated and new pigeon netting was noted.

## HEARING

8. The Hearing took place on 21 and 22 March 2006.

9. The Applicant, Thornfield Securities (Holdings) Limited was represented by Miss G Ward of Counsel. Attending on behalf of the Applicant were Mr P Crane, Director and Chairman of the Applicant company (on 21 March 2006 only) and Mr A D Banyard MRICS and Mr J Rawes, both of Farrar Property Management, the Applicant's managing agents. Oral evidence on behalf of the Applicant was given by Mr Banyard and Mr Rawes.

10. The Respondents, Faysek Services Limited, Mr and Mrs Z Masters and HRH Raja Perempuan of Kelantan, were represented by Mr G Cowen of Counsel. Ms T Cox, Pupil, attended on 22 March 2006 only. No oral evidence was given by or on behalf of the Respondents.

11. The matters which required the determination by the Tribunal related to the following issues:-

**(a) Service of the Section 20 Notices**
**(b) Additional costs in respect of major works**
**(c) The contribution to be made by the commercial tenants**
**(d) Interim service charge for the service charge year 2005**
**(e) S20C application (limitation of landlord's costs)**
**(f) Application for reimbursement of fees**

12. The salient parts of the evidence and the Tribunal's determinations are given under each head.

### (a) Service of the Section 20 Notices

13. The Respondents' challenge under this head was that since the Applicant's managing agents were aware that all of the tenants in the subject property either reside overseas or spend much of their time out of the country, they would not have had an opportunity to review the S20 Notices or exercise their rights of consultation under the Act unless such Notices were served on them at their usual residential addresses.

14. Mr Cowen, in his skeleton argument, contended that Mr Banyard merely authorised the Notices to be sent to various correspondence addresses. The caretaker employed by the Applicant knew when the flats were or were not occupied. The owner of Flat 3 had only discovered the S20 Notice "*months after it was delivered*

*and far too late to make comment within the 30 day period stipulated"*, and although the owners of Flat 7 had completed their purchase in January 2004, they had not moved in for a few months due to extensive refurbishment. Mr Cowen was unable to comment on the position in respect of Flat 4. He contended that it was insufficient for the Notices to be posted and they had to be given. Mr Cowen accepted that he was unable to produce evidence that the Notices had not been received. In his view, the Applicant had not discharged the burden of proof.

15. Ms Ward said that it was sufficient for the Notices to have been posted to the last known address of the Respondents, and it was not necessary to prove receipt. The Notices had been served under the lease terms. The proper procedures had been followed.

16. Mr Banyard, for the Applicant, said in evidence that the S20 Notices had been sent to the usual addresses of the Respondents for correspondence and service charge demands. Mr Banyard said that these addresses, details of which were set out in Mr Banyard's witness statement of 24 January 2006, had been notified to him on the assignment to the tenants. In the case of Flat 7 he was aware that the purchasers had recently bought and that the flat was in the process of refurbishment. The purchasers' solicitors should, in his view, have informed the purchasers that major works were proposed to the building and therefore they would have been aware.

**The Tribunal's determination**

17. There were four Notices under the consultation requirements, a Notice of Intent dated 19 February 2004 and three S20 Notices dated 24 June 2004, 9 March 2005 and 27 May 2005 respectively, copies of which were provided to the Tribunal.

18. The provisions with regard to S20 Notices state that the Notice of landlord's intention and the subsequent S20 Notice itself must be given to each leaseholder and to any recognised tenants' association, but the Act is silent on how the Notice is to be given. In this case, the Tribunal was advised that the majority of the tenants were abroad for a considerable length of time and it is noted that the majority had paid their contribution to the major works.

19. Mr Cowen had been unable to produce evidence that the Notices had not been received. In the case of Flat 3, a letter dated 13 September 2004 from a Mr M Wooff who had been instructed by the tenant of Flat 3 made it clear that he had been instructed in respect of *"the proposed works to the roof"*. This letter referred to correspondence which had been sent to the tenant of Flat 3 by Mr Banyard. In the case of Flat 4, Mr Cowen had been unable to comment. In the case of Flat 7, the tenants of that flat (who had recently purchased) were not resident whilst their flat was being refurbished. It is considered that the onus was on them to provide the managing agents with an alternative correspondence address, in the absence of which the managing agents were entitled to rely on the address for the tenants in their possession. It is also felt that presumably those tenants or their agents would be checking the state of the refurbishment periodically and at the same time would be collecting the post.

20. The Tribunal notes that the managing agents sent the Notices to the addresses as notified to them by the tenants on assignment. Mr Banyard had been aware that the tenants were often absent from the subject property, and the Tribunal accepts that this is a justifiable reason for not posting the Notices in the common parts. The Tribunal rejects the Respondents' contention that the managing agents should have checked the position with the non resident porter as to the whereabouts of any particular tenant as at the date of the proposed service.

21. The Tribunal determines that there was good service of the Notices for the purpose of the Act.

**(b) Additional costs in respect of major works**

22. The Respondents' case was stated to be:-

*"It was required to serve further Section 20 Notices on the Respondents..... further administrative costs were incurred by the Applicant. The Respondents ..... request the Tribunal to determine whether the service of the three additional Section 20 Notices would have been necessary if an adequate survey had been carried out prior to the commencement of the works, so that the resulting additional administration costs should be borne by the Applicant rather than the Respondents"*

The Respondents were of the view that as the only survey carried out before the works were sent out to tender was a photographic survey, this did not suffice, and a more detailed and full survey would have resulted in lower costs. In particular, costs relating to additional roof works, security to the adjoining barracks, additional scaffolding to the park elevation and park administration costs in relation to various items were challenged.

In Mr Banyard's witness statement of 10 March 2006 he said that he had carried out a survey of all accessible parts of the property and "*I found that many roof coverings were at the end of their useful life, and therefore were in need of replacement ..... This is demonstrated by the numerous photographs that I took at the time During my initial survey, access to the front slated slopes was not possible without full scaffolding to the front façade, access to the upper levels of the light wells was not possible again without full scaffolding to the light wells, and close access to certain parts of the main slated and asphalt roof were not possible without access plant to inspect closely the lead breakers where changes in roof pitch are weathered. It would have been senseless to erect scaffolding to carry out a full survey in advance of commencing the works that we already knew were required, given that the scaffolding would have to go up in order to carry out these works in any event.*

*As the additional roof covering disrepairs were discovered early on during the contract, the preparation of the schedule of additional works, and the obtaining of competitive estimates and the serving of statutory Section 20 Notices did not delay the extent of the contract by any significant period. If these disrepairs had been discovered during the initial survey, the cost of their repair would have been the same as the additional costs which were incurred when the additional repairs were carried out during the main contract. If we had delayed these additional works until the next external redecoration cycle, we would have needed once again a full temporary tin*

*roof to keep the areas of work watertight during the roof covering replacement. We therefore felt it prudent to carry out these works while the existing temporary tin roof was in pace during the current external redecoration cycle, to save substantial additional costs that would be incurred if the additional works were postponed until the next external redecoration cycle.*

***Additional costs relating to access for scaffolding***

*When we initially approached the commanding officer and the senior non-commissioned officer at Knightsbridge Barracks prior to writing the specification, no indication was made that there would be any charge for placing scaffolding within Knightsbridge Barracks on the west façade of Albert Gate Court. However, in the period between the specification being written, the estimates being obtained, and the Section 20 notices being served, there was a significant increase in terrorist activity which increased the state of security alert at the Barracks, ..... which meant that the scaffolding on the party wall between Albert Gate Court and Knightsbridge Barracks had to have close circuit television capability wired into the Knightsbridge Barracks comprehensive 24-hour CCTV coverage, and therefore special sub-contractors were employed by the main contractor to carry out this security work in conjunction with Knightsbridge Barracks. In addition, Knightsbridge Barracks indicated to us that they would have to carry out 24-hour armed patrols of the scaffolding where it was standing within Knightsbridge Barracks as entry could easily be gained into Knightsbridge Barracks by climbing down the scaffolding. The commanding officer ..... indicated to me after consultation with his security advisers that they would have to make the charge of £1500 per week that the scaffolding was placed within their property to cover the cost of this 24-hour armed patrol. As the Household Cavalry are a prestige regiment and have previously been the target of IRA terrorism, we could not question the need for this increase in security and we therefore had to agree to pay the security patrol charges and the CCTV charges as our scaffolding was breaching their security perimeter and reducing their security level.*

*I have also been asked to comment on the fees charged by Hyde Park for access into the Park and for erecting scaffolding on the garden at the rear of Albert Gate Court which belongs to Hyde Park. Prior to costing the works, I contacted the Hyde Park authorities who informed me that the fees charged by them would depend on the size of the scaffolding on their land and the length of time which it was there. Hyde Park would not give me a firm estimate of their costs until they saw the size and height of the scaffolding, and saw the damage it was likely to have on the plants in the garden beneath. I therefore allowed for the likely fees payable in the contingencies. However, when the scaffolding was erected, the area of Hyde Park which it covered was greater than I had expected. I had not anticipated that a platform would have to be erected over the entire garden area at 2 4 metres above ground level to take the scaffold lift, the welfare and the storage facilities and the rubbish storage. I warned the leaseholders of these additional costs in my letter dated 3 March 2005. These fees are at a standard rate for all those contractors who wish to gain access through the park, and all who wish to erect scaffolding on land belonging to Hyde Park. These fees are not negotiable."*

23. Mr Banyard in cross examination rejected Mr Cowen's contention that more modest works could have been carried out to the roof in that the additional costs in respect of licences, scaffolding, security etc could have been negotiated to arrive at a lower figure. Mr Banyard said that his survey and the subsequent project management was well within his capabilities and did not warrant additional costs of an outside expert.

24. Mr Banyard said that in the circumstances, there was no possibility of obtaining alternative quotations because he was dealing with Knightsbridge Barracks and/or Crown Estate who had made non negotiable demands.

**The Tribunal's determination**

25. The additional works are covered in the second and third S20 Notices dated 9 March and 27 May 2005, the first of which dealt with additional costs in relation to access from the park, additional scaffolding, additional security and the reinstatement of the garden and the second of which dealt with the extra roof works which had been ascertained only when full scaffolding had been erected.

26 With regard to those works referred to in the S20 Notice of 9 March 2005, the Tribunal is satisfied that reasonable enquiries had been made and the cost of those additional works would have been non negotiable in the particular circumstances of this case.

27. Mr Banyard conceded in evidence that his contingency provision of £8,000 in respect of access and licences payable to the Crown Estate (first notified to the tenants in a letter of 2 August 2004) was insufficient, but this is with the benefit of hindsight. The costs rose dramatically but it is not considered that this could reasonably have been anticipated at the time that the contingency provision was made.

28. With regard the costs charged by Knightsbridge Barracks for additional security, these were high but it is recognised that security was of great concern at that time and the Applicant, in the circumstances, had to pay what was demanded of it.

29. With regard to the additional roof works referred to in the S20 Notice of 27 May 2005, Mr Banyard conceded that in hindsight the extent of the works had been underestimated by him, but the Tribunal has to consider the position as at the date the additional roof works were commissioned. At that time Mr Banyard felt that isolated roof repairs would suffice and he was not to know that that part of the roof not visible during his survey was in a far worse condition necessitating roof renewal rather than repair.

30. In the view of the Tribunal it was appropriate to carry out the additional roof works at the time the scaffolding and temporary tin roof were in place. The works went out to competitive tender. The lowest price was accepted

31. The Tribunal determines that the cost of additional works is relevant and reasonably incurred and properly chargeable to the service charge account.

32. Although not specifically challenged by the Respondents, the Tribunal considered whether professional and supervision fees should have been referred to in the S20 Notices. Mr Banyard was of the view that this had not been required.

33. S20 of the 1985 Act imposes a more mechanical limitation on the recovery of service charge expenditure. It effectively requires landlords to consult leaseholders before committing themselves (and ultimately the leaseholders) to major items of expenditure. Prior to the amendments introduced by the 2002 Act, S20 applied only in respect of "qualifying works", that is "works on a building or on any other premises" (S20(2)); but the amended S20 extends also to long term contracts for the provision of works or services. If the landlord fails to comply with the consultation requirements, any costs incurred by the landlord in excess of the prescribed amounts cannot be recovered through the service charge, unless those requirements are dispensed with pursuant to S20(9). The costs are still subject to the general requirement of reasonableness.

34. The purpose of S20 is to ensure that, before service charge payers are committed to paying significant sums of money for works, they are informed about, and given the opportunity to comment on, the nature of the works, their costs and the choice of contractor. In **Martin v Maryland Estates [1999] 2 EGLR 53 (CA),** Robert Walker LJ stated:

*"The basic statutory purpose of section 20 is, as the sidenote indicates, consultation with tenants on estimates provided to them. Parliament has recognised that it is, of great concern to tenants, and a potential cause of great friction between landlord and tenants, that tenants may not know what is going on or what is being done, ultimately at their expense".*

35. The Notice required under S20 must describe "the works to be carried out". In **Marionette Ltd v Visible Information Packaged Systems Ltd** [2002] **All ER (D) 377 (ChD),** that requirement was held to be limited to the works to be carried out by the contractor; but the notice and the estimates must cover "the whole cost which the contractor estimates he will charge for delivery of the completed project". Where the contract undertakes design work and obtains building consents, that work and its cost must be included; but, on the facts, it was held that the notice and the estimates need not include separate professional fees of a project designer or project supervisor. In the judgement of Nicholas Warren QC it was stated:-

*"It can no doubt be said that this approach fails to give effect to the obvious policy of the legislation which is (a) to let tenants know what it is going to cost them to have repairs carried out and (b) to give them the opportunity to object. I fully understand that objection to the construction which I think that the language of the section leads to, the answer, I think, is that tenants will readily recognise that repairs of any significant scope will be likely to require supervision and that relevant costs, to be recoverable, are subject to the "reasonableness" provisions of section 19. Accordingly, I do not consider that there was any need for the notice served under section 20 to deal with the professional fees."*

36. On that basis it would appear that the professional and supervision fees of Farrar Property Manager did not have to be included in the S20 Notices, although this

Tribunal is of the view that this would have been good practice, and in the spirit of the new legislation.

(c) **The contribution to be made by the commercial tenants**

37. The Respondents' case was the commercial premises comprised at least 14% of the total internal floor area of the building, with 12 residential flats on the first to seventh floors and commercial premises on the ground floor and part of the basement.

38. In the Respondents' skeleton argument, it was stated:-

*"By Clause 3 of the commercial lease, the commercial tenant covenanted with the Applicant to observe and perform the covenants set out in the Fifth Schedule to the commercial lease.*

*By Paragraph 8 of the Fifth Schedule, the commercial tenant thereby covenanted*

*"To pay on demand to the Landlord or as the Landlord shall direct as reasonable share to be ascertained by the Architect or Surveyor for the time being of the Superior Landlord of the cost incurred whether by the Landlord or by the Superior Landlord or any other person in making cleaning repairing renewing and rebuilding all party walls fences drains sewers pipes cables wires watercourses gutters downspouts and other structures conveniences and appurtenances (whether or not similar to those specifically hereinbefore mentioned) used or employed or capable of being used or enjoyed by the owner or occupier of the demised premises in common with the owners or occupiers of any neighbouring property ... ".*

*It is submitted that works to the external structure of the building including the roofs of the building would fall within the definition of "structures ... used or enjoyed by the owner or occupier of the demised premises in common with the owners or occupiers of any neighbouring property" It is abundantly clear from the definition of the demised premises in the First Schedule to the commercial lease that the structure of the building was not demised. It is fanciful to suggest that the commercial tenant does not share in the benefit of the external repair of the building and its roofs merely because it is on the ground floor and basement.*

*Accordingly, it is submitted that the commercial tenant ought to be required to contribute towards the cost of the major works and that such contribution ought to be credited against the Total Expenditure with which the residential lessees are being charged*

*In its letter dated 27 January 2006, the Applicant accepted for the first time that the commercial tenant ought to bear 10% of part of the cost of the major works, limited to what are termed "relevant works". A table of the works referred to is attached to that letter and 10% of the relevant works is said to amount to £12,430.50*

*The Respondents do not accept this figure for the following reasons.*

*(a) The contribution of 10% appears to have been decided by the Applicant. It is for the Superior Landlord to decide on the apportionment pursuant to the commercial lease (or, it is submitted, the Tribunal);*

*(b) Despite requests, the 10% figure has not been justified by the Applicant. The Respondents believe that if based on internal floor areas, the figure ought to be 14%;*

*(c) There seems to be no good reason why the commercial tenant should contribute to certain works but not to others which have an equally important bearing on the structural integrity of the building: see eg the main roof, the preliminaries, scaffolding. No explanation has been given as to how the "relevant works" are relevant;*

*(d) Notwithstanding the Applicant's apparent concession, the Applicant appears to be pressing for a determination in respect of the amounts initially claimed and has not, therefore, given credit for the contribution of the commercial tenant.*

*The Respondents respectfully submit that there should be a 14% contribution across the board by the commercial tenant and that the amount of the Total Expenditure to be borne by the residential tenants should be reduced to take such a contribution into account".*

39. Ms Ward accepted that the total expenditure is the costs incurred on the building, save for the common parts, and agreed that works carried out for the benefit of the residential units and the commercial premises did form part of the general expenditure. She pointed out that there was no suggestion in the residential leases that contributions would be forthcoming from any other source and *"clearly the tenants must pay up front for costs going to be incurred by the landlord"*. She said that the contributions under the residential leases (the only leases with which the Tribunal were concerned) totalled 100%.

40. Ms Ward said that Mr Cowen's arguments were based on a consideration of the commercial lease in which there was no provision for the regular payment of a service charge. She did not dispute that there was a provision in the commercial lease which allowed the landlord to recover *"something"* but the Tribunal should not go outside the terms of the residential leases. There was no need to interpret the commercial lease. There was nothing problematic in the residential lease and no ambiguity.

41. Since structural major works had been carried out to the building since 1981, Ms Ward said it was not possible to predict what the head landlords would say is a reasonable contribution from the commercial tenants. When and if contributions were paid by the commercial tenants, the residential tenants' service charge account would be credited, but there was no prospect of recovery until some time in 2006 or possibly 2007.

42. Ms Ward rejected Mr Cowen's suggestion of a 10% contribution across the board since she said that various items related solely to the residential parts and could not be considered in common. She thought that 10% was *"optimistic"*.

**The Tribunal's determination**

43. The Tribunal has no jurisdiction in respect of commercial premises and the service charge provisions in respect of the residential units total 100%.

44. The Respondents accept that it is for the Superior Landlord, and not the Applicant, to decide any apportionment to be obtained from the tenants of the commercial leases, and the Tribunal is of the view that agreement on this aspect could take a considerable length of time.

45. The Tribunal's duty is to determine the appropriate proportion as at the date that the costs were incurred after consideration of the terms of the residential leases.

46. The leases of Flats 3 and 7 contain the following definitions:

**"the Service Charge" is defined in clause 1(14) as 8.49% of Total Expenditure; "Total Expenditure" is defined in clause 1(13) as the total expenditure incurred by the Landlord in any Accounting Period in carrying out its obligations under Clause 5 of the Sixth Schedule hereto and any other costs and expenses reasonably and properly incurred in connection with the Building including without prejudice to the generality of the foregoing (a) the cost of employing the Managing Agents (b) the cost of any Accountant or Surveyor employed to determine the Total Expenditure and the amount payable by the Tenant hereunder but excluding any such expenditure relating to the Commercial Parts which does not benefit any part of the Building other than the Commercial Parts.**

47. The lease of Flat 4 is in identical terms save that there is no reference to the commercial parts.

48. The Tribunal rejects the Respondents' contention that there should be a 14% contribution across the board by the commercial tenants (or indeed any contribution from the commercial tenants) since it has no remit to do so.

49. It follows therefore that no determination can be made by the Tribunal as to the proportion paid by the residential tenants following any possible future contribution by the commercial tenants. The Tribunal cannot go outside the terms of the residential leases where there appears to be no ambiguity. The service charge contributions total 100% and are clear.

(d) **Interim service charge for the service charge year 2005**

50. The service charge arrears related to the tenant of Flat 4 only and, at the date of the Hearing, were in respect of the interim payments for the service charge year 2005 in the sum of £5,265.80, the service charge year 2004 having been paid in full.

51. The estimated service charge for the year ending 31 December 2005 was £124,340 and was based on the actual expenditure for the service charge year ending

31 December 2004. Ms Ward went through the actual expenditure for 2004 and produced all relevant invoices in support.

52. Mr Rawes, for the Applicant, explained that the estimated service charge was prepared at the beginning of the financial year by the in house accounts department who collated copies of bills and invoices, which were then sent for independent audit.

53. Mr Rawes explained that last redecoration works had been carried out in 1999, the costs of which had not been recovered at the time from the tenant of Flat 4 and legal action had ensued. By way of compromise, the tenant of Flat 4 had paid £1,000 per month and this contribution had continued to have been accepted because it had not presented a problem, but now that major works had been carried out, the payment of £1,000 per month by the tenant was insufficient. There was no reserve fund and Mr Rawes had not received instructions to set one up.

54. Ms Ward said that there had been no formal agreement entitling the tenant of Flat 4 to pay at the rate of £1,000 per month but merely that the landlord had chosen not to take action. There were no grounds for estoppel, there had been no agreement and no written variation of the lease terms.

55. Mr Cowen was without instructions.

**The Tribunal's determination**

56. Having gone through the service charge expenditure in some detail and examined the invoices in support, the Tribunal determines that the estimated service charge expenditure for the year ending 31 December 2005 is relevant, and, if incurred, would be reasonable and properly chargeable to the service charge accounts.

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

57. Mr Cowen said that he had offered no resistance to the general service charge application, but a major part of the application was in relation to the major works. He said that if the Respondents were successful to any extent, it would be "*wholly wrong*" for the Applicant "*to get via the back door what he can't by way of the front door*".

58. Ms Ward referred the Tribunal to the schedule of major works receipts and payments from which she said it could be seen that the proportions paid by the Respondents had been fairly small. She said that proceedings had had to be instigated to obtain any payment at all. Ms Ward confirmed that the costs incurred were both legal costs and the managing agents' costs in connection with proceedings before the Tribunal. She was unable to provide the Tribunal with an estimate of these costs.

59. Ms Ward relied on the Sixth Schedule to the lease which related to landlord's covenants, and in particular Clause 5(10)(i) and (ii). These covenants were subject to and conditional upon payment being made by the tenant of the interim charge and the service charge at the times and in the manner provided in the lease. Clause 5(10) states:-

**(i) To employ at the Landlord's discretion the Managing agents on the basis of an annual retainer (to be no more than is reasonable and normal in such circumstances) to manage the Building and discharge all proper fees salaries charges and expenses payable to such agents or such other person who may be managing the Building including the cost of computing and collecting all rents and service charges from time to time due from any tenants in respect of the Building or any parts thereof.**

**(ii) To employ all such surveyors, builders, architects, engineers, tradesmen, accountants, or other professional persons as may be necessary or desirable for the proper maintenance safety and administration of the Building.**

**The Tribunal's determination**

60. Under Section 20C of the Act:

(1) **"A tenant may make an application for an order that all or any of the costs incurred or to be incurred, by the landlord in connection with proceedings before a court or leasehold valuation tribunal, or the Lands Tribunal, or in connection with arbitration proceedings, are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application.**

**(2) The application shall be made:**

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

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

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

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

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

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

62. In the judgement of His Honour Judge Rich in a Lands Tribunal Decision dated 5 March 2001 (**The Tenants of Langford Court v Doren Ltd**), it was stated, inter alia, *"where, as in the case of the LVT, there is no power to award costs, there is no automatic expectation of an order under Section 20C in favour of a successful tenant,*

*although a landlord who has behaved improperly or unreasonably cannot normally expect to recover his costs of defending such conduct, in my judgement the primary consideration that the LVT should keep in mind is that the power to make an order under Section 20C should be used only in order to ensure that the right to claim costs as part of the service charge is not to be used in circumstances that makes its use unjust".*

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

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

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

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

66. Ms Ward had relied on Clause 5 (10) (i) and (ii) which is set out in paragraph 59 above.

67. The Tribunal had to consider whether such a clause permitted recovery of the landlord's costs of proceedings by way of the service charge account.

68. Legal costs, including litigation costs, incurred by the landlord in recovering service charges from contributing tenants may themselves be recoverable as a service charge, but the wording in the lease must be clear and unambiguous.

69. Having considered the relevant case law, and in particular, the cases of **Sella House** v **Mears (1989)** and **Iperion Investment Corporation** v **Broadwalk House Residents (1995)** the Tribunal is of the view that there is an absence of clear words showing that a class of expenditure was contemplated and accordingly the Tribunal adopts a restrictive construction.

70. Although the Tribunal considers that resolution between the parties would not have been possible without an application before the Tribunal, in the view of this Tribunal and for the reasons as set out in paragraph 69 above the wording in Clause 5 (10) (i) and (ii) of the lease is not sufficiently wide so as to entitle the Applicant to place the legal costs in connection with proceedings before the Tribunal on the service charge account. The question of whether or not the Tribunal should exercise its discretion in respect of legal costs therefore does not arise.

71. In order to assist the parties, if the Tribunal is incorrect in its determination that legal costs are irrecoverable under the terms of the lease, it is the Tribunal's view that the Applicant was starved of funds. The arrears by the Respondents are considerable and the Respondents have been unsuccessful. Accordingly the Tribunal would have determined that if recoverable under the terms of the leases, it would have been just and equitable that the landlord's costs of proceedings before the LVT would have been regarded as relevant costs which would have been able to be placed on the service charge account.

72. The position in respect of the managing agents' costs is somewhat different in that the Tribunal does consider the lease terms wide enough to encompass the managing agents costs in respect of proceeding before the Tribunal.

73. The Tribunal determines that it is just and equitable that the Managing agents costs in connection with landlord's costs of proceedings before the Tribunal are relevant costs to be placed on the service charge account but limited to the sum of £3,000 plus VAT.

(f) **Application for reimbursement of fees**

74. In accordance with paragraph 7 of Directions issued by the Leasehold Valuation Tribunal on 3 November 2005, the Tribunal considered whether to exercise its discretion under Regulation 9 of the Leasehold Valuation Tribunals (Fees) (England) Regulations 2003.

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

76. The Tribunal acknowledges that both sides have incurred costs which are irrecoverable, but as stated above, the Respondents have been unsuccessful and the Tribunal has been provided with no concrete evidence that the Respondents actively sought a resolution before the Tribunal hearing.

77. The Tribunal intends to exercise its discretion in this case and makes an Order for reimbursement by the Respondents to the Applicant of the application and Hearing fees totalling £500.

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

**CHAIRMAN** .....

**DATE**.....19 April 2006.....