

**SOUTHERN RENT ASSESSMENT PANEL**  
**LEASEHOLD VALUATION TRIBUNAL**

**Case No. CHI/24UF/LIS/2008/0035**

**REASONS**

**Application** : Sections 27A and 20C of the Landlord and Tenant Act 1985 as amended (“the 1985 Act”)

**Applicant/Leaseholder** : Mr George Edward Newton

**Respondent/Landlord** : Trustees of the Locker Foundation

**Building** : Fair oak Court, Tower Close, Gosport, Hants, PO12 2TX

**Flat 2** : Mr Newton’s flat in the Building

**Lease** : the lease of Flat 2 dated the 14 June 1973

**Deed of Covenant** : the deed of covenant relating to Flat 2 also dated the 14 June 1973

**Date of Application** : 7 August 2008

**Date of Provisional Directions** : 15 August 2008

**Date of Directions Hearing** : 13 October 2008

**Date of substantive hearing** : 12 January 2009

**Venue** : Room B, 3<sup>rd</sup> Floor, Portsmouth Central library, Guildhall Square, Portsmouth

**Appearances for Applicant/Leaseholder**: Mr Newton

**Also in attendance** : Mrs J Newton, Mr and Mrs Bodkin (Flat 4, Ashurst Court), and Mr and Mrs Flower (6 Shirrel Court)

**Appearances for Respondent/Landlord**: Mr Brett Williams BSc, MRICS, FIRPM, of Curry & Partners

**Members of the Tribunal** : Mr P R Boardman JP MA LLB (Chairman), Mr D Lintott FRICS, and Mr R T Dumont

**Date of Tribunal’s Reasons** : 15 January 2009

## Introduction

1. The Building is one of 6 blocks, each of 12 flats, at a development known as Six Courts on the Fort Gomer Estate in Gosport
2. At the directions hearing on the 13 October 2008 the following matters were identified as issues for the Tribunal to determine at the substantive hearing of this application, namely, in relation to the year ending the 29 September 2006 :
  - a. whether a service charge was in principle payable by the Applicant/Leaseholder in respect of the cost of works for the refurbishment of balconies at the Building and/or at any of the other blocks forming the Six Courts
  - b. if so :
    - whether the cost was reasonably incurred
    - whether the works were of a reasonable standard
    - whether the consultation requirements of section 20 of the 1985 Act had been either complied with or dispensed with
    - whether the Respondent/Landlord should have carried out external decoration at an earlier date
    - if so, whether the Respondent/Landlord's failure to do so affects the payability by the Applicant/Leaseholder of the service charge in respect of the cost of works for the refurbishment of balconies at the Building
    - if so, whether any case law, such as the Lands Tribunal decision in **Continental Property Ventures Inc v Jeremy White** LRX/60/2005, is of relevance to the issues in this application
  - c. whether, and, if so, to what extent, the costs incurred by the Respondent/Landlord in relation to these proceedings should not be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the Applicant/Leaseholder
3. No dispute has been raised concerning the identity of the person by whom such a service charge would be payable, the person to whom it is payable or when or in what manner it is payable

## Documents

4. The documents before the Tribunal are :
  - a. the Applicant/ Leaseholder's bundle
  - b. a profile of Curry & Partners submitted by Mr Newton at the substantive hearing
5. References in these reasons to page numbers are to pages in the Applicant/Leaseholder's bundle

## Inspection

6. The Tribunal inspected the Building on the morning of the hearing on the 12 January 2009. Also present were Mr Newton, Mrs Newton (Flat 2 only), Ms E Pack (Flat 3 only), and Mr Williams
7. The Building was of traditional cavity wall brick construction, with pitched interlocking tiled roofs. It comprised 4 storeys, and 12 flats. There were integral garages on the ground floor. The flats all had balconies except the 3 ground floor flats.
8. The Tribunal inspected the balcony balustrade of Flat 2, which was in good condition. Mr Newton said that he had regularly maintained it himself, using Hammerite paint. Mr Williams said that an appropriate adjustment would be made to Mr Newton's service charge as a result
9. The Tribunal also inspected Flat 3. The decorative condition of the balustrade was poor. There were signs of rust. Mr Newton scraped the surface of one small section with his fingernail to demonstrate the lack of thickness of the layer of paint applied
10. The Tribunal briefly inspected the outside of the other blocks. Even from a distance, the decorative condition of the balustrades could be seen to be poor
11. A helpful photograph of Marchwood Court, which the Tribunal noted was similar to the Building, was at page 113

**The lease of Flat 2 (pages 7 to 19)**

12. For the purposes of these proceedings the material parts of the lease are as follows :

***Recitals***

*(1) The Lessor is [the owner of] the block of ..... 12 flats.....known as [the Building].....*

***Clause 1 [demise]***

*..... and also paying yearly.....a due proportion .....of all moneys expended pursuant to the Lessor's obligations hereunder in the maintenance or repair of [the Building].....provided nevertheless that in calculating the moneys expended.....the cost of employing agents surveyors and managers shall be included*

***Clause 4 [Lessor's covenants]***

*(1)(a) to repair and maintain and keep in repair and maintenance.....the main structure of [the Building] and the roofs and all external parts (excluding the glass of the windows) thereof.....provided always that it is expressly not agreed that the Lessor shall be in any way responsible for any damage caused by any defects of or in relation to [the Building] by any want of repair of [the Building].....unless and until notice in writing of any alleged defect failure want of repair or defect.....has been given to the Lessor and the Lessor has failed to make good or remedy such neglect failure want of*

*repair or defects alleged.....within a reasonable time of receipt of such notice*

**Deed of covenant relating to Flat 2 (pages 22 to 25)**

13. For the purposes of these proceedings the material parts of the deed of covenant are as follows :

***Clause 1 [Lessee's covenants]***

*.....[to] pay.....*

- (a).....the due proportion attributable to [Flat 2] of the total cost and expense incurred from time to time in maintaining and providing the ..... services [described in the schedule] and*
- (b) such sum as is attributable to [Flat 2] of the estimated future cost of providing the major service of maintenance of the structure and fabric of [the Building] the external decoration thereof.....*

***The schedule***

- 1. [insuring the Building]*
- 2. the maintenance repairing and renewing of :
  - (a) [roofs gutters and pipes]*
  - (b) [pipes drains sewers fences and wires used in common with other lessees in the Building]*
  - (c) [passages staircases landings entrances used in common with other lessees in the Building]*
  - (d) [drives gardens and grounds of the Building]*
  - (e) the main structure of the [Building] including party walls**
- 3. [lighting of entrance halls staircases landings passages and approaches of the Building]*
- 4. [outgoings of the Building]*
- 5. redecoration of the exterior of [the Building].....at four yearly intervals*
- 6. the employment and maintaining of such staffs as may be necessary.....to attend to the care of [the Building]*
- 7. [cost of repairing boundary walls and fences]*
- 8. [water rates for the Building]*
- 9. [provision of TV aerial]*
- 10. cleaning of windows of common landings and porches*
- 11. the cost of management of the foregoing services or items*

**Summary of the Applicant/ Leaseholder's case (pages 1 to 6)**

14. The Applicant/Leaseholder stated that the 6 Courts comprised 72 flats. 54 had balconies. The remainder were ground floor flats. The Applicant/Leaseholder and his wife bought Flat 2 on the 15 April 1999. The managing agents had at all times been Curry & Partners

15. The leasehold terms applied to all 6 courts, with one common service charge fund

16. Painting of the exterior had to be done every 4 years. Most of the windows and doors of the flats were UPVC, but there were still some wooden window frames and doors. They had not been painted for 9 years
17. In about 2002 the Applicant/Leaseholder noticed rusting of the balcony metalwork. The balustrade had been refurbished about 5 years earlier. The Applicant/Leaseholder asked Curry & Partners why the balustrade had not been painted. Curry & Partners said that they were considering replacing the balustrade with new ones, so that they were not going to refurbish the old ones
18. At the AGM in May 2002 Mr Nigel Curry on behalf of Curry & Partners stated that a new balustrade would cost a few hundred pounds and asked for a vote. The residents attending, who were less than half, agreed by a show of hands (page 76)
19. Planning permission was applied for. Surveyors were engaged. Prices and costs for different types of balustrade were received. The cost of the design chosen by the residents was now approximately £4,000 plus costs for each balcony (page 80)
20. The residents were divided, mainly because of the cost. Some wanted a new balustrade, whilst others wanted the old ones refurbished. The Respondent/Landlord wanted a 100% agreement to avoid the service charge becoming unmanageable, since those with new balustrades would not be willing to contribute to the cost of refurbishing old ones (page 80). The Respondent/Landlord stopped chasing the idea of a new balustrade when a resident of the Building obtained a signed questionnaire from all residents in the Building that 90% of them wanted the present balustrade maintained (page 79)
21. The Applicant/Leaseholder arranged for his own balustrade to be refurbished
22. Curry & Partners instructed AG Bice of ER Surveyors to draw up contract documents and a schedule of work and put the work out to tender. M&J Maintenance Ltd listed a price against each item on the schedule of work, and put forward a price of £31,960 plus VAT, ie £37,553.50 (pages 48 to 60). The only other contractor to tender, K&N Finishers Ltd, put forward a price of £58,500 plus VAT, ie £68,737.50 (page 47). The contract was awarded to M&J Maintenance Ltd. Curry & Partners allowed them to use Hammerite paint, which was the only change to the specification. Curry & Partners later stated that this was good for a 7-year life (page 97)
23. On the 27 September 2005 Curry & Partners asked for an interim charge to pay for the works, namely £611.95 from those residents with balconies, and £458.98 from those without balconies (page 90)
24. The work was completed in October 2006
25. On the 6 August 2007, only 10 months after the refurbishment of the balconies had been completed, the Applicant/Leaseholder wrote to Curry & Partners informing them that the balustrade was rusting (Page 102). No reply was received
26. On the 27 September 2007 Curry & Partners wrote to the Applicant/Leaseholder stating that the balcony repair had exceeded budget (page 27). A balancing service charge demand dated the 26 September 2007 was for £357.03 (page 28). A service charge certificate dated the 26 September

2007 stated that the total expenditure on building maintenance for the year 1 October 2005 to 30 September 2006 was £70,139 (page 29). The figure demanded for residents with balconies was now £611.95 plus £357.03, ie £968.98. The total refurbishment cost of £70,000 divided by 54 balconies was £1,296 each

27. The Applicant/Leaseholder requested and perused the invoices and contract documents. He asked the surveyor, Mr Bice why :
  - a. the contractor was claiming extras when the contract used the words fixed price
  - b. certain items on the schedule of work had not been completed
  - c. the balustrade was rusting after only 10 months
  - d. the pro-forma payment of £10,000.07 had been claimed in addition to the fixed price of £37,553 (page 33)
  - e. the sums totalling £67,982 claimed by invoice from M&J Maintenance Ltd (pages 33 to 46) exceeded the fixed price of £37,553
28. Later the same week the Applicant/Leaseholder contacted Mr Bice again, but was told that he had been instructed by Curry & Partners not to talk to the Applicant/Leaseholder or anyone else from the estate
29. In November 2007 the Applicant/Leaseholder obtained a quote for a new balustrade for £1,069 including VAT from Tombi Wrought Iron (page 103). This was for a bellying style railing with galvanised finish, and included removing the old one
30. If the residents of the 6 courts had been given the choice of cost comparisons between old and new, it is likely that the consensus would have been for new

#### **The Respondent/Landlord's response 10 November 2008**

31. The Respondent/Landlord stated that the custom had been to run the Six Courts as a single site with all costs being subject to a single service charge to which all 72 flats contributed. The percentages were 1.1111% for those flats without balconies, and 1.4815% for those with balconies
32. The residents requested consideration of a balcony replacement project instead of the regular routine external redecoration. Mr Bice was instructed to provide a specification and budget. The specification provided for stainless steel and glass construction to minimise future routine maintenance. The residents considered the costs to be too high. Some blocks wanted to proceed on a majority vote, but the Respondent/Landlord was prepared to proceed only on a 100% basis
33. Mr Bice was instructed to provide a specification for redecoration and associated repairs. Tenders were sought. The section 20 consultation was undertaken. There were insufficient reserve funds. Additional service charge contributions were requested and collected. Mr Bice instructed the contractor to proceed. Time had elapsed since the tender, and the contractor requested a price increase. This was accepted, as it remained considerably lower than the other tender. The specification was modified with a view to providing a superior finish using Hammerite instead of traditional primer, undercoat and topcoat. The Curry & Partners property managers who managed the project were no longer employed by Curry & Partners, so Curry & Partners were unable to provide a first-hand account

34. The lowest tender was £37,553.50 including VAT. The contractor had been nominated by a resident under the section 20 procedure. The figure was included in the section 20 notices. Mr Bice's tender report was posted on notice boards in the entrance halls and by post on request to individual lessees
35. Curry & Partners charged a management fee for dealing with major works projects as it was considered to be outside their annual management fee for routine management
36. There were costs which were unknown until work commenced. There were extras (repairs and redecoration of lead flashings and balcony ceilings) instructed by the property manager as beneficial to undertake whilst contractors were on site
37. The requirement to repair the asphalt surface of the balconies was omitted to save costs
38. The contractor issued a pro-forma invoice at the start of works, and a series of invoices throughout the project. The final account totalled £67,987.45 including VAT and including extras
39. The chosen contractor, M&J Maintenance Ltd, had undertaken the previous refurbishment to the balustrades at Six Courts. Their tender price was £31,960 plus VAT, namely £37,553.50 (wrongly shown as £37,553.50 plus VAT on their tender page)
40. The management fee was 10%. Mr Bice's fee was £2,303.00 including VAT. The balance of £1,452.35 was due to Curry & Partners, but no invoice had yet been submitted as the project was not yet completed
41. Because of the time taken to undertake the section 20 consultation and collect the additional sums required, the contractor increased their tender by £5,000 plus VAT, bringing the revised tender to £36,960 plus VAT, ie £43,428. Mr Bice accepted the increase as fair, and as still lower than the other tender. Curry & Partners notified the lessees at the point of instructing the contractor and received no significant objections
42. The total of the invoices submitted by the contractor was £57,861.66, ie £67,987.45
43. *The project costs*
44. Mr Bice's valuation analysis was as follows :

Contract sum			42,553.50
Add measured items	bolts	1,452.00	
	welds	2,340.00	
	asphalt repairs	120.00	
	new poles	800.00	
	flashing repairs	600.00	
	balcony edge repairs	80.00	
	balcony soffit painting	<u>3,975.00</u>	9,367.00
Deductions	balcony omitted	(588.02)	
	asphalting	<u>(1,500.00)</u>	<u>(2,088.02)</u>
sub-total			49,832.48
VAT			<u>8,720.68</u>

Total

58,553.16

45. There accordingly appeared to have been an overcharge of £9,434.29 (ie £67,987.45 invoiced less £58,553.16 valuation). Curry & Partners had requested repayment from the contractor. The overcharge largely comprised the pro-forma invoice sum of £10,000.07 paid at the start of the project, which should have been deducted from future invoices, but which had not been deducted
46. It was understood that the Applicant/Leaseholder objected to the “extras” being included in the cost accounting, but did not object to the “extra” works and the costs incurred. It was merely an accounting exercise to move the relevant costs to different headings of expenditure. These extras were the flashing repairs and balcony soffit painting totalling £4,575 plus VAT, ie £5,375.63. That total would be moved to a heading of general repairs for the year and would reduce the valuation of the project works to £53,157.53. Mr Bice felt that that sum was reasonable for the project and remained competitive compared with the other tender of £68,737.50
47. Based on that figure, the management fee should be £6,873.75, of which Mr Bice’s fee was £2,303.03, leaving a balance for Curry & Partners of £4,570.72 including VAT, which was yet to be invoiced
48. *Workmanship*
49. The Applicant/Leaseholder’s challenge was to the painting of the balcony balustrade. There was no challenge to the standard of the remainder of the work
50. No problems had been reported to Curry & Partners during the project
51. Sample balconies were inspected in the second half of 2008. Signs of rust showing through in areas were noted. ICI’s analysis showed that the paint micro-thickness varied from 80-200 indicating inconsistent application. There was evidence that some areas had been brushed and some rolled, creating the uneven coating. Mr Bice did not believe that the specification variation to use 2 coats of Hammerite and the levels of preparation and methods of application would give a life of 4-5 years which would be obtained by thorough preparation and appropriate application despite the marine environment
52. Curry & Partners had requested Mr Bice to require the contractor to return to site to make good where required
53. *Extent of the development*
54. Following the Chairman’s comments at the pre-trial review, Curry & Partners had obtained confirmatory advice from their solicitor that the Applicant/Leaseholder’s lease required all costs to be attributed to the Building only so far as building repairs were concerned
55. So far as grounds maintenance were concerned, the delineation on the site plan meant that it was possible that costs were to be shared between the Building and another block, Shirrel Court
56. It would be far too complicated to unpick this project or indeed any other historic service charges and relate them back to just one block. It was proposed to liaise with lessees and arrange to split the



service charges block by block, with grounds maintenance costs being shared between appropriate blocks according to the leases, with effect from the next service charge year

57. *Summary*

58. A credit of £9,434.29 would be made to the service charge account for the overcharge. Curry & Partners would pay it, and pursue Mr Bice and the contractor for reimbursement

59. Through Mr Bice, Curry & Partners would require the contractor to return to site and make good those areas where the painting was not of an acceptable standard at no charge to the lessees. Subject to advice from Mr Bice it was expected that the work would not take place until the spring of 2009 to allow for appropriate weather conditions

60. Curry & Partners would raise their fee invoice for the balance of fees in the sum of £4,570.72 including VAT

61. All comments related to the whole development known as Six Courts. Steps would be taken to separate service charge accounting and property management of the entire site into a block-by-block arrangement with effect from the next service charge accounting year

62. Curry & Partners would make no charge to the service charge account for their time involved in this LVT case

**The Applicant/Leaseholder's response 14 November 2008**

63. *New balustrades*

64. The Applicant/Leaseholder stated that the delay in pursuing the possibility of new balustrades allowed already rusting metal to deteriorate further, with parts of the balustrade actually falling apart

65. Only one block wanted to proceed with new balustrades, namely Marchwood Court

66. Curry & Partners knew by the time of their letter dated the 9 December 2004 that new balustrades were not going to happen (page 80), but they still went ahead with surveys and planning applications, wasting time and money

67. *Late contract award £5,000*

68. Curry & Partners' letter dated the 13 June 2006 (page 95) stated that the extra £5,000 was to be taken out of the service charge fund, and was not an addition to the interim payment at that time. The Applicant/Leaseholder had not seen a condition in the contract relating to that sum, or time factors related to costs. The £5,000 could not be accepted

69. *Changes to contract*

70. Curry & Partners had stated that changes had been made. Page 10 of the schedule of works (page 57) stated that no alterations could be made. The only change notified to the lessees was the paint specification

71. *Tenders*

72. The 2 tenderers were not tendering on the equal terms because the other tenderer was not aware of the changes to the contract

73. *Extras*

74. Moving extras to general repairs would only confuse the situation more. It would be best left where it was. The Applicant/Leaseholder was not contesting the need for extras in principle, but the extent of the extras. However, the Applicant/Leaseholder was unable to quantify this. Only Mr Bice would know

75. What the Applicant/Leaseholder was challenging was that the contract was supposed to be a fixed price, so that if extras were taken away the fixed price of £37,553 should remain

76. The one-off payment request in Curry & Partners' letter dated the 28 September 2005 was very misleading to residents. It would have been better, when later requesting an additional sum of £357, it would have been better to have given a better estimate of final costs with contingencies allowed for

77. *Analysis of final figures*

78. The Applicant/Leaseholder's analysis was as follows :

Contract sum		31,960.00
Late contract award		5,000.00
Add measured items		
	bolts	1,452.00
	welds	2,340.00
	asphalt repairs	120.00
	(new poles not down as extras)	-
	flashing repairs	600.00
	balcony edge repairs	80.00
	balcony soffit painting	<u>3,975.00</u>
		8,567.00
Deductions		
	balcony omitted	(588.02)
	asphalting	<u>(1,762.00)</u>
		(2,350.00)
sub-total		43,177.00
VAT		<u>7,566.00</u>
Total		50,733.00

79. Mr Bice's analysis had added VAT to his total, which had included the contract sum of 37,553. However, that sum was itself inclusive of VAT

80. There was nothing in the invoices for new poles as extras

81. Asphalting in the tender had been £1,500 plus VAT, so the deduction had to be plus VAT as well
82. *Management fee*
83. The figure of £6,873.75 had been based on the tender price of the other tenderer. It should have been based on the actual price
84. In a letter dated the 9 December 2005 (page 94) Curry & Partners stated that Mr Bice would charge £140 plus VAT a week for site visits. The number of weeks was expected to be 14. His fee would be deducted from the 10% management fee. Therefore Curry & Partners would charge £1,452.35. That figure conflicted with the figure now being proposed by Curry & Partners
85. There was a lack of good management from the start of the project in 2002 to the contractor leaving the site in 2006
86. *Workmanship*
87. There were problems during the contract. Residents had to call the workmen back to apply a second coat of paint. Those who were not at home did not benefit from a second coat. There was only one man in charge of the group of painters
88. The Applicant/Leaseholder agreed with Mr Bice's analysis of the sub-standard workmanship
89. The contractor had already refused to come back on site to make good. Would the Respondent/Landlord hire another contractor to finish the job to Mr Bice's satisfaction if the original contractor would not ?
90. The Applicant/Leaseholder had received replies from 54 questionnaires circulated over the site. Very few people were satisfied with their paintwork, costs, and project management (pages 110 to 141), including residents of the following flats at the Building : Flat 2 (the Applicant/Leaseholder, page 116), Flat 3 (Ms Pack, page 113), Flat 4 (Ms Bell, page 123), Flat 7 (Mr Cripwell, page 114), Flat 8 (RH Hallett, page 115), Flat 11 (Mr Dickens, page 110), and Flat 12 (JR Hellen and JC Hellen, page 121)
91. *Extent of development*
92. The Respondent/Landlord's insistence on no-one having a new balcony without 100% agreement from all residents over the whole site might now be questioned

#### **Other documents in Applicant/Leaseholder's bundle**

93. Amongst other documents were the following :
- a. M&J Maintenance Ltd sales invoices :
- 22 September 2006 flats 2, 3, 4 at the Building (page 43) :
- |                 |               |
|-----------------|---------------|
| 3 balconies     | 2,364.06      |
| 3 extra welds   | 180.00        |
| 3 ceiling paint | <u>225.00</u> |
|                 | 2,769.06      |

- |       |               |
|-------|---------------|
| VAT   | <u>484.59</u> |
| Total | 3,253.65      |
- 22 September 2006 flats 5 to 12 at the Building (“please note : still to invoice for 2 felting works on [2] flats at [the Building] due to minor problems”) (page 44) :

6 balconies	4,728.12
4 extra welds	240.00
6 ceiling paint	<u>450.00</u>
	5,418.12

VAT	<u>948.17</u>
Total	6,366.29
  - 5 October 2006 6 felt repairs (page 46) :

2 asphalt repairs	120.00
2 front edge repairs	80.00
2 new balcony tops	<u>400.00</u>
	600.00

VAT	<u>105.00</u>
Total	705.00
- a. an inspection report by Mr Bice 26 April 2005 (pages 61 to 70)
  - b. a note entitled “Hammerite made for metal” and “hints and tips” and finishing with “© Copyright 2005 Imperial Chemical Industries” (pages 104 and 105)

### **The substantive hearing**

#### **Preliminary points**

2. There were applications to join in the proceedings as joint applicants from several lessees of flats at the Six Courts, including Mr Dickens of flat 11 at the Building. Mr Cripwell of flat 7 at the Building had also applied to join as an applicant, but had later withdrawn that application by letter received by the Tribunal on the 30 December 2008
3. The Tribunal indicated at the substantive hearing that :
  - a. the only lease before the Tribunal was Mr Newton’s lease of Flat 2
  - b. the service charge provisions in that lease relating to the matters in issue in these proceedings related only to expenditure at the Building, not to expenditure at other blocks
  - c. the issues in Mr Cripwell’s case were likely to differ from those in Mr Newton’s case, in that Mr Newton’s balustrade was in good condition because of his own refurbishment work, and Mr Cripwell was not present to give evidence about the condition of his own balustrade
  - d. the interests of the other lessees were not likely to coincide with those of Mr Newton accordingly
  - e. however, Mr Williams confirmed at the hearing that the Respondent/Landlord would be treating the Tribunal’s decision in Mr Newton’s case as applying in principle to the other flats in the Building and in the other blocks in any event
  - f. in those circumstances the Tribunal declined to make an order joining in the other lessees in these proceedings

#### **The issues**

96. The parties' submissions at the hearing in relation to each item, and the Tribunal's decision and reasons in each case, were as follows
97. *The total contract price for the Six Courts (Mr Newton's calculations at page 126a)*
98. The parties agreed that the original tender price by M&J Maintenance Ltd was £31,960 plus VAT (page 60)
99. Mr Newton said that he was conversant with the consultation procedure under section 20 of the 1985 Act, and there was no issue before the Tribunal in that respect in relation to the £31,960
100. However, Mr Newton was challenging the additional sum of £5,000 sought by M&J Maintenance Ltd because of delays since their tender
101. Mr Williams conceded, on reflection, that :
- a. the addition of £5,000 had not been contemplated in the original tender
  - b. the addition of £5,000 therefore altered the tender price from £31,960 to £36,960
  - c. a new section 20 consultation procedure should have been undertaken accordingly in relation to the new price
  - d. the only written notification to the lessees in that respect was the letter from Curry & Partners dated the 13 June 2006 (page 95)
  - e. that notification did not comply with the section 20 consultation procedure
  - f. only the original tender price of £31,960, not the increased tender price of £36,960, could therefore be included in the service charge
102. Mr Newton said that there was no issue before the Tribunal about any of the extras, except the figure of £800 for poles, namely the uprights for the balustrades. They were not mentioned specifically in the schedule of works (page 58) or in any of the invoices (pages 33 to 46), apart from an unpriced item "renew 4 poles and plates and re-weld" in the invoice dated the 18 August 2006 relating to Ashurst Court (page 34)
103. Mr Williams stated that the figure of £800 had apparently been calculated by taking the difference between the total on the invoices and the rates for measured works, ie the unit rate of £60 for each welded section shown in the schedule of works (page 58)
104. Mr Williams conceded that :
- a. he did not have any evidence of the price of a pole
  - b. the only reference to poles in the invoices was the reference to 4 poles identified by Mr Newton
  - c. it was highly unlikely that the price for each pole would be as much as £200 ( $£800 \div 4$ )
  - d. it was unclear whether the replacement of poles was included in the tender price of £31,960
  - e. in any event the invoice at page 34 did not relate to the Building
  - f. in the circumstances the item for "poles" at £800 could not be included in the service charge, but Mr Williams would consider whether it should be moved to an item of general repairs for the block in question

105. So far as deductions were concerned, Mr Newton conceded, on reflection, that, as all the other figures up to that point in the calculation were net of VAT, the figure for deduction for asphaltting should be net of VAT as well, and should be £1,500 not £1,762

106. *The Tribunal's findings*

107. The Tribunal accepts the concessions made by the parties at the hearing, and finds that the total contract price for the purposes of payability of the service charge in this case would be, in principle, if the work had been carried out to a reasonable standard, £38,438.98 plus VAT, calculated as follows :

Contract sum			31,960.00
Add measured items	bolts	1,452.00	
	welds	2,340.00	
	asphalt repairs	120.00	
	new poles	-	
	flashing repairs	600.00	
	balcony edge repairs	80.00	
	balcony soffit painting	<u>3,975.00</u>	<u>8,567.00</u>
			40,527.00
Deductions	balcony omitted	(588.02)	
	asphaltting	<u>(1,500.00)</u>	<u>(2,088.02)</u>
			38,438.98

108. *The contract price for work carried out at the Building*

109. The invoices for work carried out at the Building at pages 43 and 44 for £2,769.06 and £5,418.12 plus VAT respectively, totalled £8,187.18 plus VAT

110. The parties agreed that, in principle, it ought to be possible to reconcile the figure of £38,438.98 for the Six Courts as a whole with the figure of £8,187.18 for the Building alone, after :

- a. making adjustments for the deduction of the £5,000 from the total contract price, and the figure of £800 for poles
- b. investigating whether any of the items mentioned in the invoice at page 46 related to the Building
- c. taking into account the number of flats in the Building and the number of flats in the Six Courts as a whole

111. *The Tribunal's findings*

112. There was insufficient evidence before the Tribunal to make a finding in that respect. The Tribunal would adjourn that aspect of the case to enable the parties to try to reach agreement, with permission for either party to bring the matter back to the Tribunal with further evidence and submissions for a decision in the event of dispute

113. *Standard of workmanship*

114. Mr Newton submitted that the painting of the balcony balustrades had been carried out badly. The original paint specification had been sophisticated, with several coats on different days. Hammerite, on the other hand, needed only rubbing down and then the application of 2 coats which could be all be carried out in one visit. However, the preparation and application had been poor
115. Mr Williams said that Mr Bice had arranged for the contractor to return and apply an additional coat of Hammerite to some of the flats at the Six Courts. However, Mr Williams conceded that :
- a. it was not clear which flats had received the second coat
  - b. in any event, some flats' balustrades still had an unacceptable level of painting
116. Mr Newton said that only 2 of those lessees who had returned his questionnaires had stated that their level of painting was satisfactory
117. Mr Williams stated that Curry & Partners were now arranging for remedial works to be carried out no extra expense to the lessees, either by the original contractor or by a new contractor
118. *The Tribunal's findings*
119. The Tribunal finds that :
- a. the Tribunal has noted from the questionnaires at pages 110 to 141 only the following answers "no" to the question "is your balcony rusting now, and in need of repainting?" :
    - Mr Newton, Flat 2 (page 116)
    - Sarah Woodhouse, 3 Ashurst Court (page 138)
    - David and Lorna Love, 8 Seaview Court (page 139)
    - Mr J Gilbert, 2 Marchwood Court – "No (but painting badly done)" (page 140)
  - b. Mr Newton's own balustrade is in a good state of repair, but only because he has carried out the work himself
  - c. the standard of workmanship on other balustrades is generally not of a reasonable quality
  - d. there is insufficient evidence before the Tribunal to enable the Tribunal to make a finding :
    - how much of the total contract price of £38,438.98 relates to painting
    - how much of the total contract price which relates to painting has been carried out to a reasonable standard
  - e. the Tribunal will accordingly adjourn the hearing of this aspect of the case to afford the Respondent/Landlord a reasonable opportunity to arrange for remedial works to be carried out and for further evidence and submissions to be placed before the Tribunal in the event of dispute about the extent to which the £38,438.98 plus VAT is payable by way of service charge
  - f. in the meantime, in the circumstances, no part of the £38,438.98 is payable by way of service charge until further decision by the Tribunal
120. *Management charge*
121. Mr Williams submitted that :
- a. the wording in the proviso to clause 1 of the lease was wide enough to allow a management fee to be included in the service charge
  - b. 10% of the total contract price was a reasonable method of calculating the total management fee for a contract of this size in accordance with RICS guidelines

- c. it was reasonable to split that 10% fee between Mr Bice and Curry & Partners in the circumstances

122. However, Mr Williams conceded that the work had not been well managed
123. Mr Newton conceded in principle that, if the management of the work had been carried out properly, 10% of £38,438.98 plus VAT would have been a reasonable total management fee
124. The Tribunal asked the parties whether there was an issue before the Tribunal about the rate of VAT applicable to the management charge, in the light of the recent change in that rate
125. Mr Williams said that Mr Bice had already submitted an account, and that it had been paid. Curry & Partners had not yet submitted an account, and it was not clear whether the VAT rate would be at the rate applicable when the work was done or at the rate applicable when the account was eventually submitted
126. *The Tribunal's findings*
127. The Tribunal accepts Mr Williams submissions and Mr Newton's concession, and finds that, if the management of the work had been carried out properly :
  - a. 10% of £38,438.98 would have been a reasonable total management fee, split as a appropriate between Mr Bice and Curry & Partners
  - b. the management fee plus VAT would have been payable by way of service charge
128. However, the Tribunal also accepts Mr Williams's concession and finds that the management of the work has not been carried out properly
129. The Tribunal also finds that there is insufficient evidence before the Tribunal about whether the failure to carry out the management properly was attributable to Mr Bice alone, or to Curry & Partners alone, or to both, and, if the latter, in what proportions
130. In the light of the Tribunal's findings about the standard of workmanship, the Tribunal will accordingly also adjourn the hearing of this aspect of the case to afford the Respondent/Landlord a reasonable opportunity to arrange for remedial works to be carried out, and for the parties to provide evidence and submissions to the Tribunal at the adjourned hearing about any of the following matters which may then be in dispute between the parties :
  - a. whether a management fee is payable by way of service charge in the circumstances
  - b. if so :
    - the overall amount of the management fee payable
    - what rate of VAT is applicable to any management fee payable to Curry & Partners
131. In the meantime, in the circumstances, no part of the management fee is payable until further decision by the Tribunal
132. *Section 20C*



133. In the light of the statement by Curry & Partners that they would make no charge to the service charge account for their time involved in this LVT case, there is no need for the Tribunal to make an order under section 20C in this case

Dated the 15 January 2009



.....  
P R Boardman  
(Chairman)

A Member of the Tribunal  
appointed by the Lord Chancellor