RESIDENTIAL PROPERTY TRIBUNAL SERVICE
SOUTHERN LEASEHOLD VALUATION TRIBUNAL

Case No: CHI/00HN/LSC/2009/0084

In the matter of: Bourne Court, Bourne Avenue, Bournemouth, Dorset BH2 6DT

And in the matter of: an application to determine liability to pay future service charges under Sections 27A of the Landlord and Tenant Act 1985 (as amended) and an application under Section 20C of that Act.

BETWEEN:

1. Mr. Michael Filer and Mrs. Joan Robin
2. Mr. Michael Filer, Mrs. Joan Robin and Mrs. Anne Filer Applicants

and

1. Ms. E Pond (Flat 1)
2. Mr. and Mrs. J Rowe (Flat 2)
3. Mr. M Saunders (Flat 3)
4. Miss L Heath (Flat 4)
5. Ms. J Collins and Mr. P Lewis (Flats 5 and 15)
6. Mr. P Rees (Flat 6)
7. Mr. J Cannings (Flat 7)
8. Flymast Trading Co Ltd (Flats 8 and 10)
9. Mr. P Trubody (Flat 9)
10. Mr. A Finch and Miss A Currie (Flat 11)
11. Mr. J Hyman (Flat 12)
12. Ms. G Field (Flat 13)
13. Mr. P Baker (Flat 14)
14. Mr. J Benamore (Flat 16)
15. Westgate (2) Housing Association Ltd (Flat 17)
16. Ms. J Lubrano (Flat 18)
17. Mrs. R Joseph (Flat 19)
18. Mr. J Morris and Miss N Hancox (Flat 20) Respondents

Date of Application: 9 June 2009
Date of hearing: 4 and 5 February 2010
Members of the Tribunal: Mr. J G Orme (lawyer chairman)
Mr. A J Mellery-Pratt FRICS (valuer member)
Mr. J Mills (lay member)
Date of decision: 10 March 2010

Decision of the Leasehold Valuation Tribunal

For the reasons set out below, the Tribunal determines that:

1. **If costs are incurred by the 1st Applicants for the repairs, improvements and decorations listed in Parts I and II of the Schedule to this decision, the costs would be reasonably incurred and a proportion of the costs would be recoverable from the 2nd Applicants under the terms of the Head Lease as defined in the reasons.**

2. **If costs are incurred by the 2nd Applicants for the repairs, improvements and decorations listed in Parts II and III of the Schedule to this decision, the costs would be reasonably incurred and would be recoverable, together with the costs payable by the 2nd Applicants under paragraph 1 above, from the Respondents under the terms of their respective Under Leases of their flats at Bourne Court.**

3. **The Applicants have complied with the provisions of the Service Charges (Consultation Requirements) (England) Regulations 2003 SI 2003/1987 in relation to the said works provided that the Applicants enter into a contract with the person who submitted the lowest estimate and no further statement is required.**

4. **The Tribunal makes no order pursuant to Section 20C of the Landlord and Tenant Act 1985 (as amended).**

The Schedule to the Decision

(References in the schedule are references to the subheadings and paragraph numbers used in the Scott Schedule presented to the Tribunal at the hearing of the Application.)

Part I

Items which are the responsibility of the 1st Applicants which the Tribunal is satisfied would be reasonably incurred and which are chargeable under the provisions of the Head Lease and therefore a fair and proper proportion of the cost would be recoverable under the terms of the Under Leases;

Parapet repairs - Items 4.1.1 - 4.1.17 and 4.9.7
Roof repairs – Items 4.2.1 – 4.2.40
Tank room and lift motor room – Items 4.3.1 – 4.3.11
Window lintels – Items 4.4.1 – 4.4.4
Wall tie treatment – Items 4.5.1 – 4.5.9
Other brickwork repairs – Items 4.6.1 – 4.6.7 and 4.6.9 – 4.6.11 (but not 4.6.8)

Windows and balcony doors – Items 4.7.1 – 4.7.11 including 4.7.4a
External Plumbing – Items 4.8.1 – 4.8.9
Miscellaneous repairs – Items 4.9.2 – 4.9.6
External decorations – Items 4.10.1 – 4.10.4
External doors – Items 4.11.7, 4.11.8 and 4.11.9a
Fire safety – Item 4.13.3
General electrical repairs – Items 4.14.3 – 4.14.9, 4.14.13 – 4.14.15
Mechanical – Items 4.14.17 – 4.14.28
Lift repairs – Items 4.15.1 – 4.15.35
Miscellaneous internal repairs – 4.16.1 – 4.16.10 and 4.16.12
Internal decorations – 4.17.1, 4.17.4 and 4.17.6 – 4.17.9

Part II

Items which are partly the responsibility of the 1st Applicants and partly the responsibility of the 2nd Applicants. The Tribunal is satisfied that these items would be reasonably incurred. In so far as they are the responsibility of the 1st Applicants, the Tribunal is satisfied that they are chargeable under the provisions of the Head Lease and that a fair and proper proportion of the cost would be recoverable under the terms of the Under Leases. In the case of those items which are the responsibility of the 2nd Applicants, the reasonable cost is recoverable under the provisions of the Under Leases.

Internal doors – Items 4.11.1 – 4.11.6 and 4.11.9 (but excluding the front doors of the flats)
Fire signage – Items 4.12.1 – 4.12.2
Fire alarm – 4.13.1 – 4.13.2
Emergency lighting – 4.14.1 – 4.14.2
General electrical repairs – 4.14.16
Miscellaneous internal repairs – 4.16.11
Internal decorations – Items 4.17.2, 4.17.3 and 4.17.5

Part III

Items which are the responsibility of the 2nd Applicants and which would be reasonably incurred and which are chargeable under the terms of the Under Leases.

General electrical repairs – Items 4.14.10 – 4.14.12 (but excluding the 1st Applicants' part)
Miscellaneous internal repairs – Item 4.16.13 (but excluding the 1st Applicants' part)

Part IV

Items which are not recoverable from the Respondents under the terms of the Head Lease and the Under Leases.

Other brickwork repairs – Item 4.6.8
Miscellaneous repairs – Item 4.9.1
Internal doors – Item 4.11.1 (replacement of the front doors of the flats.)
General electrical repairs – Items 4.14.10 – 4.14.12 (in so far as it is the responsibility of the 1st Applicants.)
Miscellaneous internal repairs – Item 4.16.13 (in so far as it is the responsibility of the 1st Applicants.)
Landscaping – Items 4.18.1 – 4.18.5.

Reasons

The Application

1. This application relates to a property known as Bourne Court, Bourne Avenue, Bournemouth BH2 6DT ("the Property"). The Property comprises of 7 floors with a basement. Parts of the ground and first floors are occupied as commercial premises. The 2nd to 6th floors ("the Leasehold Premises") are divided into 20 purpose built residential flats.

2. Mr. Michael Filer and Mrs. Joan Robin ("the Freehold Consortium") own the freehold of the Property. Mr. Michael Filer, Mrs. Joan Robin and Mrs. Anne Filer ("the Leasehold Consortium") own the lease of the Leasehold Premises which is referred to here as the Head Lease. The Freehold Consortium and the Leasehold Consortium are, together, the Applicants in this application. The Respondents are the sub-lessees of the individual flats in the Leasehold Premises and their leases are referred to here as the Under Leases.

3. The Applicants wish to carry out refurbishment works at the Property and recover part of the cost of those works from the Respondents. On 9 June 2009, the Applicants applied to the Tribunal under Section 27A(3) of the Landlord and Tenant Act 1985 (as amended) ("the Act") for a determination as to whether, if the Applicants incur costs of £648,881 plus VAT and surveyor's fees in carrying out those works, part of those costs could be recovered from the Respondents through the service charge and in particular, whether:

    a. The service charge provisions in the Head Lease and the Under Leases entitle the Applicants to recover the expenditure;

    b. Whether the costs would be reasonably incurred within the meaning of Section 19(1)(a) of the Act; and

c. Whether the Applicants have complied with the consultation requirements imposed by Section 20 of the Act.

4. A pre-trial review was held on 8 July 2009 when directions were given for the parties to prepare written statements of case, for the use of expert evidence and for the preparation of a Scott schedule. Those Respondents who were present at or who were represented at the pre-trial review made an oral application for an order to be made under Section 20C of the Act. A direction was made for that application to be determined at the same time as the substantive application.

The Law

5. The statutory provisions primarily relevant to matters of this nature are set out in sections 18, 19, 20, 27A and 20C of the Act, the relevant parts of which read as follows:

6. *18 (1) In the following provisions of this Act "service charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent-*
(a) which is payable, directly or indirectly, for services, repairs, maintenance, improvements or insurance or the landlord's costs of management, and
(b) the whole or part of which varies or may vary according to the relevant costs.
(2) The relevant costs are the costs or estimated costs incurred or to be incurred by or on behalf of the landlord, or a superior landlord, in connection with the matters for which the service charge is payable.
(3) For this purpose-
(a) "costs" includes overheads, and
(b) costs are relevant costs in relation to a service charge whether they are incurred, or to be incurred, in the period to which the service charge is payable or in an earlier or later period.

7. *19 (1) Relevant costs shall be taken into account in determining the amount of a service charge payable for a period-*
(a) only to the extent that they are reasonably incurred, and
(b) where they are incurred on the provision of services or the carrying out of works, only if the services or works are of a reasonable standard;
and the amount payable shall be limited accordingly.
(2) Where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable, and after the relevant costs have been incurred any necessary adjustment shall be made by repayment, reduction or subsequent charges or otherwise.

8. Section 20 provides that the amount that an individual leaseholder may be required to contribute by payment of service charges towards the cost of

works is limited to £250 unless the consultation requirements have been complied with or dispensed with by a leasehold valuation tribunal. The consultation requirements are set out in the Service Charges (Consultation Requirements) (England) Regulations 2003 SI 2003/1987 ("the Consultation Regulations"). The requirements applicable to this case are set out in part 2 of schedule 4 to the Consultation Regulations. In the interests of brevity, that part will not be set out in full in these reasons but, in essence, it requires a 3 stage process:

I. A written notice to each tenant and any recognised tenants' association of the landlord's intention to carry out qualifying works, describing the works in general terms, stating why it is necessary to carry out those works, inviting written observations on the proposed works and inviting tenants and the association to nominate a contractor from whom the landlord should obtain an estimate for the proposed works;

II. A statement sent to each tenant and any recognised tenants' association setting out the estimated cost of the proposed works specified in at least 2 estimates obtained by the landlord, to include an estimate from a nominated contractor if there is one, stating where the estimates may be inspected, inviting written observations in relation to the estimates and giving details of any observations received following the first notice and the landlord's response to them;

III. Where the landlord has entered into a contract for the carrying out of those works, a statement sent to each tenant and any recognised tenants' association setting out the reasons for awarding the contract and giving details of any observations received following the statement of estimates and the landlord's response to them. This provision does not apply where the landlord contracts with the person who submits the lowest estimate.

9. *27A (3) An application may also be made to a leasehold valuation tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs and, if it would, as to -*
(a) the person by whom it would be payable,
(b) the person to whom it would be payable,
(c) the amount which would be payable,
(d) the date at or by which it would be payable, and
(e) the manner in which it would be payable.

Subsections (1), (2) and (4) to (7) are not relevant to this application.

10. *20C (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 ... leasehold valuation tribunal ... 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) ...
(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.

The Head Lease

11. By a lease dated 6 December 1978 made between Flymast Trading Company Ltd as lessor and Wessex Flat Maintenance Ltd as tenant ("the Head Lease") the lessor let to the tenant *"the second third fourth fifth and sixth floors of the building (hereinafter called "the building") known as Bourne Court, Bourne Avenue, Bournemouth in the County of Dorset comprising Twenty residential flats (including the staircase leading upwards from the first floor)...."* for a term of 99 years from 29 September 1978. There is expressly excluded from the demise, amongst other items, *"the exterior and main structural parts of the building including the main walls main timbers roof fire escapes and the lift".*

12. The Head Lease includes covenants by the tenant to keep the interior of the demised premises in a good and tenantable state of repair and decoration, to paint every 7 years and in clause 2(6) *"to pay to the Lessor a fair and proper proportion to be determined by the Lessor's Managing Agents for the time being of the costs charges and expenses incurred by the Lessor in carrying out its obligations under clause 4 hereof and other heads of expenditure as are set out in the schedule hereto. The amount of such contribution shall be ascertained and certified by the Lessor's Managing Agents for the time being (the amount so certified by the Lessor's Managing Agents being final and binding on both parties) once a year on the 29th day of September in each year commencing on 29 day of September 1979. The Tenant shall on the execution hereof pay the sum of ... on account of the contribution for the period to the quarter day immediately following and thereafter shall on the usual quarter days in each year pay a sum equal to one quarter of the Lessor's Managing Agents' estimate of the amount payable by the Tenant for the following year under the provisions of this clause on account of such contribution and shall on demand pay the balance (if any) ascertained as aforesaid ..."*

13. Clause 4 of the Head Lease contains the following covenants by the lessor:

"(ii) to maintain and keep in good repair and condition the exterior and main structure of the building including the main walls main timbers roof fire escapes and the lift (excluding such parts as are herein made the obligation of the Tenant)."

"(vi) (a) to use its best endeavours to ensure that all common entrances entrance halls staircases lifts access ramps and other parts of the building of which the use is common to the Lessor the Tenant and other tenants or occupiers for the time being of the building are kept cleaned lighted decorated and in good repair and condition.
(b) to use its best endeavours to ensure that the lifts are kept in good working order and condition and to arrange for the maintenance and service and replacement thereof at such time or times as the Lessor or its agents shall deem practicable ..."

14. The other heads of expenditure set out in the schedule to the Head Lease to which the Leasehold Consortium is required to contribute include:

(1) All costs and expenses whatsoever incurred by the Lessor in or about the discharge of its obligations set out in sub-clause 4 (ii) (iii) (iv) and (vi) (hereinafter referred to as "the said sub-clauses").
(7) The cost of taking all steps deemed desirable or expedient by the Lessor in complying with and making representations against or otherwise contesting the incidence of the provisions of any legislation or orders or statutory requirements thereunder concerning Town Planning Public Health Highways Streets Drainage or other matters relating or alleged to relate to the building or the curtilage of the building for which the Tenant is not directly liable hereunder save where the same arises from the act or omission of the Lessor.
(8) The cost of the setting aside of an annual sum to be determined by the Lessor or its Managing Agents for the time being in order to create a fund (hereinafter referred to as "the Contingency Fund") to cover the Lessor's costs and expenses in carrying out its obligations under these premises and in respect of all matters referred to in this Schedule."

15. By a deed of variation dated 30 November 1983 made between Michael Harold Filer and Eugene Henry Robin as landlords and Wessex Flat Maintenance Ltd as tenant, the parties agreed that the expression *"the building"* where used in clause 4 (ii) of the Head Lease means "*the whole of the building known as Bourne Court and not merely the premises demised by the Lease."*

16. By a deed of variation dated 7 March 2008 made between the Freehold Consortium as landlord and the Leasehold Consortium as tenant, the parties

agreed that the term of the Head Lease was replaced by a term of 999 years. The deed also varied the rent. The parties agreed that *"save as modified by this Deed the Lease shall continue in full force and effect in all respects."*

The Under Leases

17. The Tribunal had before it a copy of the under lease relating to Flat 1. The Tribunal was informed that the under leases of the other flats were in similar form. New leases have been entered into by the lessees of Flats 5, 12 and 15 granting 999 year leases but they include terms in the same terms as those set out below.

18. The under lease of Flat 1 is dated 27 December 1978 and was made between Wessex Flat Maintenance Ltd as lessor and Flymast Trading Company Ltd as lessee. The demised premises were defined in the 3rd schedule as the flat forming flat number one together with the balcony *"except and reserving from the demise the main structural parts of the Building of which the said Flat forms part including the roof foundations and external parts thereof (other than the balcony) and joists and beams but not the glass of the windows of the said Flat nor the interior faces of the external walls as bound the said Flat ..."* The demise was for a term of 99 years (less 10 days) from 29 September 1978.

19. The under lease of Flat 1 defines the *"Reserved Property"* in the 2nd schedule as *"All those the halls staircases landings and other parts of the buildings forming part of the Property which are used in common by the owners or occupiers of any two or more of the Flats."* The Property is defined in the 1st schedule as *"All those the second third fourth fifth and sixth floors of the building known as Bourne Court ..."*

20. The covenants by the lessee are set out in the 6th schedule and include the following:

"19 ... Any costs charges or expenses incurred by the Lessor in preparing or supplying copies of such regulations or in doing works for the improvement of the Property providing services or employing gardeners porters or other employees shall be deemed to have been properly incurred by the Lessor in pursuance of its obligation under the Seventh Schedule hereto notwithstanding the absence of any specific covenant by the Lessor to incur the same and the Lessee shall keep the Lessor indemnified from and against his due proportion thereof under clause 21 of this Schedule accordingly.

21 The Lessee shall keep the Lessor indemnified from and against 5.54% of all costs charges and expenses (other than rent) incurred by the Lessor in

carrying out its obligations under the Seventh Schedule hereto and of the fees or other remuneration of the Managing Agents hereinafter referred to and ....

22 The Lessor shall be entitled to apply to the Lessee for and to receive from the Lessee quarterly advances on account of the Lessee's obligations under the last preceding clause."

21. The covenants by the lessor are set out in the 7th schedule and include the following:

"2 The Lessor shall keep the Reserved Property and all fixtures and fittings therein and additions thereto in a good and tenantable state of repair decoration and condition including the renewal and replacement of all worn or damaged parts ...

4 The Lessor shall keep the halls stairs landings and passages forming part of the Reserved Property properly cleaned and in good order and shall keep adequately lighted all such parts of the Reserved Property as are normally lighted or as should be lighted.

5 The Lessor shall pay the rent reserved by the Head Lease and shall perform and observe all the covenants on its part therein contained so far as neither the Lessee nor any other owner of a Flat is liable for such performance under the covenants on its part contained in this or a similar lease."

22. There have been a number of deeds of variation of the Under Leases but the terms of those deeds are not relevant to the issues in this application.

The Inspection

23. The Tribunal inspected the Property on 4 February 2010 in the presence of Mr. Norman, counsel for the Applicants, Mr. Mathieson, a chartered building surveyor employed by the Applicants, Mr. Cannings, the owner of Flat 7, and Mr. Trubody, the owner of Flat 9.

24. The Property comprises of 7 floors and appears to have been built in about 1930. There is a restaurant and cafe on the ground floor and a hair salon on the first floor and part ground floor. Above that are 5 floors of flats with 4 flats on each floor. The front facade of the building is a mixture of brick and painted concrete. There is a mansard roof with green glazed tiles. The windows are metal casement windows, commonly known as Crittal windows. The Tribunal noted some signs of cracks in the concrete and rust stains beneath the windows. The rear elevation is faced in brick. The Tribunal noted some signs of cracking in the brickwork. The windows are mostly metal casement windows. The windows in 4 flats have UPVC windows fitted.

25. The Tribunal made a full tour of the exterior and interior of the common parts of the Property including the flat roof, the tank room, the lift motor room and the basement. Access is gained to the flats through a door on the ground floor which leads to an entrance hall leading to a staircase. The lift shaft is formed within the main stairwell. The shaft enclosure is comprised of large wire mesh panels secured to a steel frame. Parts of the shaft enclosure, between panels, have no protection against objects entering the shaft.

26. Mr Mathieson pointed out the various areas in the Property where it was proposed that works should be carried out. As these are fully detailed in the Scott schedule, it is not necessary to set out details here. Suffice it to say that the Tribunal noted that the Property appears to be in need of considerable work of repair and decoration. It appears dated.

The Hearing and the Issues

27. A hearing took place at The Royal Bath Hotel, Bournemouth on 4 and 5 February 2010. Mr. Norman of counsel represented the Applicants. Mr. Rees, the owner of Flat 6, Mr. Cannings and Mr. Trubody spoke on behalf of the majority of the Respondents. They produced written forms of authorisation from the owners of all flats except Flats 5, 8, 10, 14, 15 and 17. Ms. Collins and Mr. Lewis, the owners of Flats 5 and 15, appeared in person. Mr. Baker, the owner of Flat 14, appeared in person but took no part in the proceedings. Flymast Trading Company Ltd, the owner of Flats 8 and 10, and Westgate (2) Housing Association Ltd, the owner of Flat 17, did not appear at the hearing.

28. Mr. Cannings is chairman of the Bourne Court Leaseholders Association. Although the Applicants had been dealing with that Association and were prepared to continue to do so, it did not appear that it was a recognised tenants' association within the meaning of Section 29 of the Act.

29. Mr. Mathieson had prepared a schedule of the proposed work. That schedule formed the basis of a Scott schedule on which both the Applicants and the Respondents had entered their comments. The Scott schedule listed 103 separate items or groups of items of work and, after the parties had added their comments, it ran to 115 pages. The Respondents objected to each item on the schedule. Many of their objections were in similar form and from those objections it was possible to identify the following generic issues:

    a. Do the terms of the Head Lease permit the Freehold Consortium to recover from the Leasehold Consortium the cost of repairs to the structure of the Property including repairs and decorations to the common parts of the basement, ground and first floors?

b. Do the terms of the Head Lease permit the Freehold Consortium to recover from the Leasehold Consortium the cost of improvements to the Property including the basement, ground and first floors?

c. What proportion of the costs incurred by the Freehold Consortium is payable by the Leasehold Consortium?

d. Do the terms of the Under Leases permit the Leasehold Consortium to recover from the Respondents any cost of repair or improvement which it is obliged to pay to the Freehold Consortium?

e. Do the terms of the Under Leases permit the Leasehold Consortium to recover from the Respondents any costs of repair and decoration to the common parts of the Leasehold Premises?

f. Do the terms of the Under Leases permit the Leasehold Consortium to recover from the Respondents any costs of improvements to the common parts of the Leasehold Premises?

g. Does historic neglect by either the Freehold Consortium or the Leasehold Consortium prevent recovery of the cost of repairs from the Respondents?

h. Have the Freehold Consortium and the Leasehold Consortium complied with the Consultation Regulations?

i. Should an order be made under Section 20C of the Act?

30. Once those issues have been resolved, it was necessary to apply the decisions on those issues to the individual items in the Scott schedule.

The Evidence

31. Mr. Roderick John Mathieson, a chartered building surveyor and the managing director of Ellis Belk Associates Ltd, gave evidence on behalf of the Applicants. Initially, he had been instructed to act for the Respondents to comment on a previous specification of work prepared in 2006 by PH Warr plc on behalf of the Applicants. As a result of his involvement, Mr. Mathieson had been instructed to act for the Applicants. Mr. Mathieson produced a copy of the schedule of work which he had prepared. He had used that schedule as the basis for a tendering exercise in November 2008. He produced a copy of his tender analysis report dated 28 November 2008 which recommended acceptance of the lowest of 4 tenders, being that received from Britannia Contracting in the sum of £648,881 plus VAT. He produced a report on the proposed work dated 30 November 2009. His comments on each individual

item of the proposed works are set out in the Scott schedule and he expanded on those comments in his oral evidence.

32. Mrs. Margaretta Rees, a property manager employed by Burns Property Management, gave evidence on behalf of the Applicants. Burns Property Management is a member of the Association of Residential Managing Agents and has been employed as managing agent for the Property since about 1984. Mrs. Rees has been involved as property manager since July 2003. Her evidence is set out in a witness statement dated 21 January 2010. Her statement sets out details of repair works undertaken to the property since 1996. She also gave evidence as to how the cost of works had been apportioned between the Leasehold Consortium and the commercial tenants on the ground and first floors in the past. She gave evidence about the attempts to obtain planning permission for the installation of new windows at the Property.

33. The Applicants also relied on a fire risk assessment prepared by the Building Consultancy Bureau Limited dated 26 June 2007 which made various recommendations for work to be undertaken at the Property in relation to fire prevention.

34. The Applicants also relied on 2 reports prepared by the Gerald Honey Partnership about the state of the lift at the Property. The 1st report, dated July 2008, is a general report on the lift installation. It lists a number of health and safety issues which required attention. The conclusion of the report was that the lift should be modernised rather than replaced. The report recommended that consideration be given to enclosing the lift shaft with imperforate material. The 2nd report, dated 21 January 2010, concludes that *"the current lift installation has exceeded its expected life cycle and is in need of further upgrading in order to ensure continued reliability"*. Again, it concluded that the lift should be modernised rather than replaced. It recommended that works should be carried out on a planned basis rather than a re-active basis in order to reduce inconvenience to the residents. Finally, the Gerald Honey Partnership produced a letter dated 26 January 2010 in which they confirmed that *"if the work set out within the Ellis Belk lift specification were completed fully, the resultant lift installation would address all of the health and safety/DDA issues identified within my report."*

35. The Respondents relied on a report dated November 2009 prepared by Barry Peter Milton MRICS, a building surveyor employed by Bennington Green Associates. In his report, Mr. Milton comments on the scope of the works proposed by the Applicants.

36. Mr. Rees, Mr. Cannings and Mr. Trubody had made written comments on individual items in the Scott schedule. They expanded on those comments in oral evidence, as did Miss Collins and Mr. Lewis.

Submissions on the generic issues

37. Mr Norman provided a case summary and opening statement in which he set out written submissions on the issues. He submitted that the terms of the Head Lease still apply notwithstanding the deed of variation dated 7 March 2008. The deed of variation took effect by way of surrender and re-grant so that the terms of the Head Lease remained unchanged except for variations in the length of the term and the rent. He relied on Section 150 of the Law of Property Act 1925. He submitted that the definition of *"the building"* in the Head Lease referred to the whole of the Property and not just to the Leasehold Premises. The Freehold Consortium was under an obligation to keep the exterior and structure of the Property in good repair and to keep the internal common parts (other than those included within the Leasehold Premises) decorated and in good repair. The Freehold Consortium was entitled to recover from the Leasehold Consortium a fair and proper proportion of the costs incurred in carrying out its obligations. Those costs included all professional and legal fees by virtue of paragraphs 1, 2, 6 and 9 of the schedule to the Head Lease. It was for the managing agents to determine the fair and proper proportion to be charged to the Leasehold Consortium taking into account what benefit was derived from the works by the Respondents.

38. Mr. Norman submitted that the Leasehold Consortium was under an obligation to keep the Leasehold Premises in good repair and decorated. He relied on paragraph 21 of the 6th schedule to the Under Leases to entitle the Leasehold Consortium to recover its costs from the Respondents, applying the proportion specified in paragraph 21. Those costs included recovering whatever the Leasehold Consortium had to pay to the Freehold Consortium by virtue of paragraph 5 of the 7th schedule.

39. As far as improvements were concerned, Mr. Norman accepted that there was no provision in the Head Lease which entitled the Freehold Consortium to charge for improvements except in so far as they fell within the provisions of paragraph 7 of the schedule to the Head Lease. However, he submitted that as the Freehold Consortium's covenant was to repair and maintain, this would, on occasions, include what might otherwise appear to be an improvement. It was necessary to determine whether the works amounted to keeping in good repair and condition or an improvement. He submitted that the Leasehold Consortium was entitled to recover the cost of improvements to the Reserved Property from the Respondents by virtue of paragraph 19 of the 6th schedule to the Under Leases.

40. In relation to historic neglect, Mr. Norman submitted that the allegation that the proposed work would now be more expensive to carry out than if it had been done earlier, was not relevant to the issue of whether the work would be reasonably incurred. If the Property was in a state of disrepair, there was an obligation to repair it. In order for an individual Respondent to claim a defence by set off, he would need to show that, at a particular time, there was a state of disrepair, that the landlord was in breach of the repairing covenant and that that breach had resulted in damage to the Respondent. There was no evidence of any such damage.

41. In relation to the Consultation Regulations, Mr. Norman submitted that they had been complied with. He invited the Tribunal to consider the notices which had been served, copies of which were before the Tribunal.

42. Mr. Norman accepted that the proposed works in section 4.18 of the Scott schedule (creation of a bin store and cleaning of the car park area at the rear of the Property) did not fall within the charging provisions of the Head Lease. Mr. Norman accepted that the front doors of the individual flats form part of the demise of the individual flats and, therefore, the Leasehold Consortium was not under an obligation to repair or replace them. However, in so far as those doors did not comply with fire regulations, he submitted that the Leasehold Consortium could require the Respondents to replace the doors and, in default, the Leasehold Consortium could carry out the work and recover the cost as a debt from individual Respondents. He submitted that such a debt would be a service charge within the meaning of section 18 of the Act.

43. In their replies to the Scott schedule, the Respondents had said *"not our responsibility within remaining lease structure (no linked head lease exists)"* against a substantial number of items. It is assumed that the Respondents meant by that that there existed no obligation to contribute towards the costs of the Freehold Consortium. Mr. Rees said that he relied on the Tribunal to establish whether or not the leases allowed recovery of costs. He submitted that the charging clauses were unfair as they left the Respondents wide open to pay for any work carried out by the Freehold Consortium without any control mechanism.

44. Mr. Rees accepted that the Property was in a state of disrepair but he submitted that much of the proposed work should have been attended to by a planned maintenance program over a number of years. The failure to repair earlier meant that the cost of repair was now going to be greater. Furthermore, the Respondents were now being asked to pay for all repairs at one time rather than having the cost phased over a number of years. Mr. Rees had no evidence as to what the cost of repair would have been if it had

been carried out earlier and he had no evidence of any damage suffered by any individual Respondent as a result of the failure to repair.

Conclusions

45. This is an application under section 27A(3) of the Act. Having heard the evidence the Tribunal is able to determine whether, if the Applicants carry out the proposed work, the cost is recoverable from the Respondents through the service charge provisions of the leases. That involves considering whether the Freehold Consortium and the Leasehold Consortium are entitled to recover the cost of works from the Respondents and whether the proposed works would be reasonably incurred. The Tribunal is not able to determine the amount which would be payable for 2 reasons. First, although the work has been put out to tender, the Tribunal has no evidence as to what the final cost will be as the tendered price may be re-negotiated and part of the estimated cost relies on provisional sums. Secondly, the Tribunal does not know what proportion of the costs to be incurred by the Freehold Consortium is to be recovered from the Leasehold Consortium and whether that proportion can be justified.

46. **Issue a.** Having considered the terms of the Head Lease, the Tribunal concludes that the terms of the Head Lease permit the Freehold Consortium to recover from the Leasehold Consortium the reasonable cost of repairs to the structure of the Property including repairs and decorations to the common parts of the basement, ground and first floors. The Tribunal is satisfied that the terms of the Head Lease remain in effect notwithstanding the deed of variation dated 7 March 2008. The deed of variation varied the term of the lease and the rent but in all other respects, the Head Lease remains in full force and effect. Further, the deed of variation did not affect the Under Leases. This is made clear by Section 150 of the Law of Property Act 1925.

47. Under the terms of the Head Lease, the Freehold Consortium is obliged to keep the main structure of the Property in good repair and condition, to keep the common parts of the basement, ground and first floors in good repair and decorated and to keep the lift in good working order and condition. Clause 2(6) of the Head Lease obliges the Leasehold Consortium to pay a fair and proper proportion of the cost incurred by the Freehold Consortium in discharging those obligations. The Tribunal is satisfied that the costs to which the Leasehold Consortium must contribute include professional fees in connection with repair work. That is covered by paragraph 1 of the schedule to the Head Lease.

48. **Issue b.** The Tribunal concludes that the terms of the Head Lease do not permit the Freehold Consortium to recover from the Leasehold Consortium the cost of improvements to the Property except in so far as they fall within

paragraph 7 of the schedule to the Head Lease. That paragraph entitles the Freehold Consortium to recover the cost of any steps deemed desirable or expedient to comply with the provisions of any legislation or statutory requirements concerning public health or other matters relating to the Property. So, for example, the Freehold Consortium is entitled to recover the cost of installing a fire alarm system provided that it is able to show that such a system is necessary to comply with the provisions of legislation. However, it is not able to recover the cost of cosmetic improvements such as the installation of improved lighting in those parts of the entrance hall and staircases which are not part of the Leasehold Premises.

49. **Issue c.** The Tribunal is not able to give a definitive answer to this issue. The Leasehold Consortium has to pay a fair and proper proportion of the costs incurred by the Freehold Consortium in carrying out its obligations under clause 4 of the Head Lease. The amount of such contribution has to be ascertained and certified by the managing agents acting for the Freehold Consortium. The managing agents have to provide a certificate of the amount once a year on 29 September in each year. Mrs. Rees gave evidence that, historically, 25% of the costs incurred by the Freehold Consortium have been charged to the commercial premises and 75% to the Leasehold Consortium. She did not know how that proportion had been calculated and it was clear from her evidence that she had not specifically considered whether that would be a fair and proper proportion in relation to the proposed work. Indeed, she appeared to suggest that the proportion was only applied to external works as opposed to internal works. The Tribunal does not consider that that is the correct approach as it is the costs incurred by the Freehold Consortium that should be apportioned, whether those costs are incurred internally or externally. At some stage in the future, the managing agents at the time will have to decide what fair and proper proportion of the cost to charge to the Leasehold Consortium and will have to be prepared to certify and justify that decision. It may be that different proportions should be applied to different items of work.

50. **Issue d.** The Tribunal concludes that the terms of the Under Leases permit the Leasehold Consortium to recover from the Respondents the reasonable cost of repair or decoration which it is obliged to pay to the Freehold Consortium. Paragraph 5 of the 7th schedule to the Under Leases requires the Leasehold Consortium to observe its covenants in the Head Lease. One of those covenants is to pay a contribution towards the costs incurred by the Freehold Consortium. Paragraph 21 of the 6th schedule to the Under Leases requires the Respondents to pay a specified proportion of the costs incurred by the Leasehold Consortium in carrying out its obligations under the 7th schedule. Mr. Rees was concerned that this, in effect, gave the Freehold

Consortium an open cheque to spend what it wished without any controlling mechanism. That is not the case. The Respondents are entitled to apply under Section 27A of the Act for a determination as to the reasonableness of service charges if they consider that the costs are unreasonable.

51. **Issue e.** The Tribunal concludes that the terms of the Under Leases permit the Leasehold Consortium to recover from the Respondents the reasonable cost of repair and decoration to the common parts of the Leasehold Premises. The 7th schedule of the Under Leases requires the Leasehold Consortium to keep the Leasehold Premises in a good state of repair and decoration. Paragraph 21 of the 6th schedule requires the Respondents to pay a specified proportion of the cost of carrying out that obligation.

52. **Issue f.** The Tribunal concludes that the terms of the Under Leases permit the Leasehold Consortium to recover from the Respondents the reasonable costs of improvements to the common parts of the Leasehold Premises. Paragraph 19 of the 6th schedule provides that any costs of doing works for the improvement of the Property are deemed to have been properly incurred by the Leasehold Consortium in pursuance of its obligation under the 7th schedule.

53. **Issue g.** The Tribunal has sympathy with the position of the Respondents. The Applicants are proposing to carry out a substantial amount of work in one contract and will look to the Respondents to pay for that work in one year's service charge. That will amount to a considerable sum which some of the Respondents will find difficult to pay. Some of the work could have been done in past years. Some of it could be deferred for a short time. However, the Applicants are under obligations to keep the Property in repair and if they fail to do so, they would be in breach of their covenants. The Tribunal has no evidence before it to show that any extra cost has been or will be incurred by any delay in carrying out repairs. Furthermore, the Tribunal is not satisfied that there has been any undue delay in carrying out repairs. The schedule attached to Mrs. Rees's statement indicates that a number of repairs have been carried out since 1996 at substantial cost.

54. **Issue h.** The Tribunal has inspected the notices served by the Applicants and is satisfied that they comply with the Consultation Regulations. Mr. Rees accepted that the notices had been sent to individual Respondents and to the residents association. He was not able to point to any area in which they were defective. The Tribunal concludes that the Consultation Regulations have been complied with provided that the Applicants enter into a contract with the person who submitted the lowest estimate and no further statement is required.

55. In summary, the Tribunal is satisfied that, provided that either the Freehold Consortium or the Leasehold Consortium is obliged to carry out the proposed works by the terms of either the Head Lease or the Under Leases and provided that the works are reasonably incurred, then the Freehold Consortium and the Leasehold Consortium are entitled to recover the appropriate proportion of the cost of those works from the Respondents.

56. It is now necessary to turn to the Scott schedule and to consider whether individual categories of work fall within the obligations of the Applicants and whether those works will be reasonably incurred. It is not necessary for the Tribunal to deal with each individual item in the Scott schedule. Having inspected the Property and having heard the evidence, the Tribunal is satisfied that the vast majority of the proposed works are necessary, would be reasonably incurred and are ultimately chargeable to the Respondents through the service charge. The Tribunal notes that both Mr. Milburn and Mr. Rees accept that a substantial amount of repairs are required. There is a schedule to the decision which is divided into 4 parts. References in the schedule are references to the subheadings and paragraph numbers used in the Scott schedule. The parts in the schedule are:

I. Items which are the responsibility of the Freehold Consortium which the Tribunal is satisfied would be reasonably incurred and which are chargeable under the provisions of the Head Lease and therefore a fair and proper proportion of the cost would be recoverable under the terms of the Under Leases;

II. Items which are partly the responsibility of the Freehold Consortium and partly the responsibility of the Leasehold Consortium. The Tribunal is satisfied that these items would be reasonably incurred. In so far as they are the responsibility of the Freehold Consortium, the Tribunal is satisfied that they are chargeable under the provisions of the Head Lease and that a fair and proper proportion of the cost would be recoverable under the terms of the Under Leases. In the case of those items which are the responsibility of the Leasehold Consortium, the reasonable cost is recoverable under the provisions of the Under Leases.

III. Items which are the responsibility of the Leasehold Consortium and which would be reasonably incurred and which are chargeable under the terms of the Under Leases.

IV. Items which are not recoverable from the Respondents under the terms of the Head Lease and the Under Leases.

57. These reasons will only deal with those specific items where specific comment is required either because there was disputed evidence or because the proposed work is not chargeable or would not be reasonably incurred.

58. **Item 4.2.7-roof lights**. The roof lights are currently covered with Georgian glass. The Tribunal is satisfied that the existing lights present a health and safety hazard and need to be replaced. They will need to be replaced with safe and thermally efficient roof lights. The Tribunal is satisfied that that will be properly regarded as a repair and not an improvement.

59. **Item 4.4.1-4.4.4-window lintels.** The schedule provides for replacing window lintels on all windows to the front and rear of the Property. Mr. Milton suggests that the lintel design at the rear of the property is different from that on the front and that it is not necessary to replace the lintels at the rear. He suggests that there should be further investigation at the rear before proceeding with the work. Mr. Mathieson accepted that the problem on the rear elevation was different from the front but there were still signs of cracking. He considered that work on the front elevation was required urgently. He could not be sure whether work was required on the rear elevation until investigations had been carried out. The schedule of work provides for the cost of replacing all lintels but only if it is found, on investigation from scaffolding, that the work is necessary. The Tribunal is satisfied that that is a proper approach. If, the lintels on the rear elevation are replaced, the Freehold Consortium will have to provide evidence to show that the work was necessary before passing on the cost to the Respondents.

60. **Item 4.5-wall tie treatment.** Mr. Milton was not convinced that this work is required. He did not detect any structural distress in the brickwork and he considered that the brickwork panels are not of sufficient size to create a problem. Mr. Mathieson was relying on the report of a specialist company, Remcure Ltd, which had carried out repairs to Flat 16 and which reported that there was a significant problem with corrosion of wall ties. He could not be certain whether the work was required until investigations were carried out. This would require scaffolding. If, on investigation, the work is unnecessary, it will not be done. The Tribunal is satisfied that this is a proper approach. Again, if the work is carried out, it will be necessary for the Freehold Consortium to provide evidence to show that the work was necessary before passing on the cost to the Respondents.

61. **Item 4.6.8-cleaning brickwork**. The schedule provides for cleaning brickwork using the Joss system at a cost of £34,000. Mr. Milton considered that work to be unnecessary. Mr Mathieson thought that it was sensible to carry out this work while the scaffolding was erected. Cleaning the brickwork would improve the appearance of the Property and highlight any defects in the brickwork. He

relied on paragraph 27 of the Building Research Establishment Good Repair Guide which recommends that cleaning is best considered when maintenance or repair work is needed. Mr Mathieson did not assert that the state of the brickwork was causing a problem. The Tribunal is not satisfied that this work is necessary at the present time and does not consider that it would be reasonably incurred if carried out. The cost of this work should not be chargeable to the Leasehold Consortium nor the Respondents.

62. **Item 4.7-windows and balcony doors**. The schedule provides for removing all external windows and doors, incorporating new lead trays underneath each window, forming raised upstands to the balcony doors and then replacing the windows and balcony doors with new double glazed units. The new windows and doors on the front elevation would be aluminium framed double glazed windows. Those on the other elevations would be UPVC. Mr. Mathieson said that the existing metal windows are at the end of their useful lives and beyond economic repair. There are varying degrees of degradation but some of the windows have distorted and are causing the glass to crack. Some of the Respondents have already replaced their windows with UPVC Windows. In any event, the windows will have to be removed in order to replace the lintels and that is likely to cause further damage. Mr. Milton agrees that it is prudent to replace the windows on the front elevation but considered that the windows on the rear elevation could be replaced in the future. Mr. Rees did not consider that it was necessary to replace the windows in the front elevation with more expensive aluminium units rather than UPVC units. Mrs. Rees said that an application had been submitted for planning permission to replace the windows with UPVC in 2006. She had made two visits to the planning authority to discuss the windows and there had been substantial correspondence. She produced a copy of a case officer's report which recommended refusal of the application on the basis that it would materially harm the character or appearance of the area. The application was withdrawn and replaced with an application for permission to install aluminium frames. Planning permission was granted on that application on 13 March 2007. Having made its own inspection and having heard the evidence, the Tribunal is satisfied that this work is necessary and that it is appropriate to replace all of the windows. Further, it accepted the evidence of Mrs. Rees concerning the application for planning permission and it is satisfied that it is reasonable to replace with aluminium framed windows and doors on the front elevation. The Tribunal is satisfied that the replacement of single glazed windows with double glazed windows is not an improvement. It is an economical repair driven by statutory requirements as installation of single glazed windows in residential premises no longer complies with Building Regulations.

63. **4.9.4-4.9.5-external fire escape**. Mr. Milton considers that the state of the steel work on the staircase indicates that it has not been properly maintained in the past. He says that the Respondents should not have to bear the cost of repair or replacement of any steelwork. Mr. Mathieson said that the staircase has a finite lifespan and, however much it is repaired and decorated, it is coming to the end of its useful life. He is proposing that the staircase is cleaned by grit blasting and that any corroded steel is replaced before re-painting. The schedule to Mrs. Rees' statement shows that the staircase was re-painted in 2001. The Tribunal is satisfied that this work is necessary. The Tribunal accepts that the staircase was redecorated in 2001. The Tribunal is not satisfied that the present state of disrepair is due to lack of repair in the past and so the cost of this work will be reasonably incurred.

64. **Item 4.15-lift installation**. The schedule proposes a refurbishment of the passenger lift including lining the lift shaft with a solid plasterboard wall. Mr. Milton is not certain that the works are necessary for health and safety reasons and suggests that the work should be deferred as part of a planned maintenance programme. Mr. Mathieson said that he is not an expert in lifts and he relied on the reports from the Gerald Honey Partnership. Mrs. Rees said that it was necessary for the Freehold Consortium to address health and safety risks. The lift pit is cleaned on a regular basis but rubbish is still thrown through the metal cage and that constitutes a fire hazard. The Tribunal accepts the evidence contained in the reports from the Gerald Honey Partnership. It is satisfied that it is necessary to refurbish the lift in order to comply with health and safety requirements. Although it might be possible to delay the refurbishment work, that increases the risk of the lift failing in the interim. The work needs to be done and the Tribunal is satisfied that the cost would be reasonably incurred. In so far as the works constitute an improvement, such as enclosing the lift shaft, the Tribunal is satisfied that that is necessary as a result of legislation and falls within paragraph 7 of the schedule to the Head Lease.

65. **Item 4.16.2-blocking internal glass window**. The Tribunal is satisfied that this work is necessary in order to comply with paragraph M4 of the fire risk assessment and, as such, it falls within paragraph 7 of the schedule to the Head Lease.

66. **Item 4.11.1-internal doors**. The schedule requires the front doors of the flats to be replaced with new fire doors to comply with the fire risk assessment. Mr. Norman accepted that the front doors are not the responsibility of the Leasehold Consortium. As such, the Leasehold Consortium is not entitled to carry out the work and to charge it to the Respondents through the service charge. If the Leasehold Consortium is satisfied that this work is necessary, it should invite the Respondents to agree to the work being carried out. If any of

the Respondents refuses to have the work carried out the Leasehold Consortium will need to consider whether it is entitled to serve notice under paragraph 11 of the 6th schedule to the Under Leases and, in default, whether it is entitled to carry out the work and recover the cost as a debt. It is not for this Tribunal to determine whether or not it is entitled to do that. All the Tribunal is able to say, at this stage, is that the Leasehold Consortium is not entitled to carry out the work and is not able to recover the cost from the Respondents.

67. **Item 4.11 internal doors to common areas.** The other doors are partly the responsibility of the Freehold Consortium and partly the responsibility of the Leasehold Consortium. The Tribunal is satisfied that the internal fire doors do need to be replaced in order to comply with the fire risk assessment and, in so far as this is the responsibility of the Freehold Consortium, they fall within the provisions of paragraph 7 of the schedule to the Head Lease.

68. **Item 4.12-fire signage**. Again, this is partly the responsibility of the Freehold Consortium and partly the responsibility of the Leasehold Consortium. The Tribunal is satisfied that, in so far as this is the responsibility of the Freehold Consortium, the work is required to comply with legislation and, as such, it falls within paragraph 7 of the schedule to the Head Lease.

69. **Item 4.13-fire alarm system**. It is proposed to install a fire alarm system in the Property. This will cover parts of the Property which are the responsibility of the Leasehold Consortium and parts which are the responsibility of the Freehold Consortium. In so far as it is the responsibility of the Freehold Consortium, the Tribunal is satisfied that this work is required to comply with legislation and, as such, it falls within paragraph 7 of the schedule to the Head Lease. The Tribunal hopes that the Freehold Consortium will take note of the recommendation contained at paragraph M10 of the fire risk assessment which recommends installing heat detectors in each of the commercial premises and connecting them to the alarm system.

70. **Item 4.14-emergency lighting**. Again, this is partly the responsibility of the Freehold Consortium and partly the Leasehold Consortium. In so far as it is the responsibility of the Freehold Consortium, the Tribunal is satisfied that this is required in order to comply with legislation and, as such, falls within the provisions of paragraph 7 of the schedule to the Head Lease.

71. **Item 4.14.10-4.14.12-upgrade communal lighting**. It is proposed to upgrade the lighting in the communal areas to improve the overall ambience and appearance. The Tribunal is satisfied that this is an improvement. In so far as it is the responsibility of the Freehold Consortium, the cost is not chargeable. In so far as it is the responsibility of the Leasehold Consortium, the Tribunal is satisfied that the cost would be reasonably incurred and is chargeable.

72. **Item 4.16.13-dado rail**. It is proposed to install a dado rail on top of the Terrazzo finish throughout the communal stairs and corridors. This will be partly the responsibility of the Freehold Consortium and partly the responsibility of the Leasehold Consortium. In so far as it is the responsibility of the Freehold Consortium, it is an improvement and, consequently, is not chargeable. In so far as it is the responsibility of the Leasehold Consortium, the Tribunal is satisfied that this would be reasonably incurred and that it is chargeable to the Respondents.

73. **Item 4.0-site set up**. It is proposed to refurbish and redecorate a toilet and a store room in the basement. This forms part of the communal areas which are the responsibility of the Freehold Consortium. These areas will be used by the contractors during the work but will then be available for use by the Freehold Consortium. The Applicants put their case on the basis that the provision of toilet and storage facilities is required in a project of this size and that the cost forms part of the overheads of the work. The Tribunal agrees that this is a sensible proposal as it meets the requirement to provide toilet and storage facilities for the contractors and retain some benefit once the works have been completed. In view of the way in which the Applicants put their case, it is not necessary to determine whether the works will be reasonably incurred. The cost of the work will be included in the cost of the overall project and it is not for this Tribunal to consider the reasonableness of the cost at this stage.

74. **The preliminaries**. The Respondents challenge the inclusion in the cost of the works of a contingency sum of £10,000 and an element for contractor's overheads and profits. The Tribunal is satisfied that this is a perfectly normal method of tendering for work. These items are included in the overall costs of the work. What is important is whether the total cost of the works including these items is reasonable. As has already been indicated, the Tribunal is not presently able to determine whether the cost is reasonable. However, the Tribunal notes that the Applicants have obtained 4 tenders for the works and are proposing to accept the lowest tender. That, in itself, is strong evidence that the overall cost of the works is reasonable.

75. **Issue i. Section 20C.** Mr. Norman relied on paragraph 1 of the schedule to the Head Lease and paragraph 21 of the 6th schedule to the Under Lease to permit both the Freehold Consortium and the Leasehold Consortium to recover their legal costs in connection with this application. He said that this was a proper application to be made and that proper attempts had been made to consult with the Respondents. It had become clear that there was not going to be agreement. In view of the large cost of the proposed works, it was prudent for the Applicants to seek a determination for their own protection and for the protection of the Respondents. This was borne out by the fact that every item in the Scott schedule had been challenged by the Respondents.

Mr. Rees said that the Applicants had acted unreasonably and that if a proper planned maintenance programme had been carried out over a number of years, they would not now be facing substantial bills. Ms. Collins said that there had been a breakdown in communications and that the Applicants had not been open with information. It was only as a result of hearing the evidence in the Tribunal that she had discovered certain information. The Tribunal notes that the Applicants have been considering these works for almost 5 years and have been discussing them with the Respondents. It notes that the Respondents did have the benefit of legal advice and have still challenged every item in the schedule. The Tribunal does not make a determination as to whether or not the Applicants are entitled to recover their legal costs through the service charge but it is satisfied that it is just and equitable not to make an order under section 20C of the Act.

Dated 10 March 2010

Signed

J G Orme
Chairman