SOUTHERN RENT ASSESSMENT PANEL
LEASEHOLD VALUATION TRIBUNAL

Case No. CHI/21UC/LVT/2010/0001

REASONS

Application : Section 37 of the Landlord and Tenant Act 1987 as amended ("the 1987 Act")

Applicant/Landlord : Priory Court (Eastbourne) Ltd

Respondent/Leaseholders : the leaseholders listed in the schedule attached to these reasons at Appendix 1, including Mr and Mrs E Pilkerton of Flat 11

Building : the two blocks comprising Priory Court, 4 to 6 Granville Road, Eastbourne, East Sussex BN20 7ED

Flats : the 21 residential flats in the Building

Date of application: 19 January 2010

Date of Directions : 11 February 2010

Date of Hearing : determined on the papers without a hearing pursuant to regulation 13 of the Leasehold Valuation Tribunal's (Procedure) (England) Regulations 2003 as amended

Members of the Leasehold Valuation Tribunal : Mr P R Boardman JP MA LLB (Chairman), and Miss R B E Bray BSc MRICS

Date of Tribunal's Reasons : 14 April 2010

Introduction

1. This is an application by the Applicant/Landlord for a variation of clause 5(1) of the leases held by the Respondent/Leaseholders. The grounds of the application are as follows :
    a. the Building is a development comprising two blocks of purpose-built flats, totalling 21 Flats, constructed in the early 1960s
    b. the original freeholder created a headlease, to which the Applicant/Landlord was party with responsibility for the maintenance and management of the Building
    c. each Flat was sold on a long underlease with an original term of 99 years starting on 24 June 1961, with the Applicant/Landlord named as landlord, and each of the 21 leaseholders becoming the only members of the Applicant/Landlord
    d. in 1999 and 2001 the Applicant/Landlord acquired the freehold of the two parcels of

land on which the Building was constructed

e. the leases of the 21 Flats were then all varied by deeds of variation
f. the 21 leaseholders remained as members of the Applicant/Landlord
g. a problem has arisen about the liability for the replacement and maintenance of the external metal balcony railings and glass screens attached to all of the balconies within the Building
h. the balconies are not expressly referred to in the leases
i. a previous application to the LVT was made under section 27A of the Landlord and TenantAct 1985 to establish whether the costs of repair and maintenance of the balcony railings and glass screens were chargeable to the service charge
j. the LVT decided that there was nothing in the leases which could reasonably be construed as creating a contractual obligation, either on behalf of the Applicant/Landlord towards the leaseholders or in the other direction, in respect of the maintenance and repair of the balcony railings
k. the LVT concluded that "the leases are plainly defective, at least in this particular, because they are drawn in such a way as to create a lack of any provision for the responsibility to maintain or repair the balcony railings. It would be helpful if they could all be amended following careful consideration and discussion (if need be using the mechanisms provided by the [1987 Act]) in order to resolve the uncertainties they present"
l. the Applicant/Landlord has attempted to resolve the matter amicably with all leaseholders
m. a letter was sent to all leaseholders on 22 October 2009 requesting their consent to a variation of the leases
n. positive responses have been received from 19 of the leaseholders
o. one leaseholder has refused to consent
p. the remaining leaseholder has not responded as he is overseas and currently uncontactable
q. this application is made under section 37 of the 1987 Act on the basis that the Building contains more than eight leases, that the application has not been opposed for any reason by more than 10% of the total number of parties concerned, and that at least 75% of the leaseholders have consented to it

2. Attached to the application, amongst other documents, were copies of :
    a. the previous LVT decision referred to, a copy of which is attached to these reasons as Appendix 2
    b. a draft deed of variation, a copy of which is attached to these reasons as Appendix 3
    c. a list of leaseholders entitled "deed of variation replies re balconies" showing "agree" by 19 of the 21 leaseholders' names, no reply by the name of the leaseholder of Flat 10, and "disagree" by the name of Mr and Mrs E Pilkerton of Flat 11

Statutory provisions

3. Section 37 of the 1987 Act provides as follows :

37 — (1) Subject to the following provisions of this section, an application may be made to the court in respect of two or more leases for an order varying each of those leases in such manner as is specified in the application.

(2) Those leases must be long leases of flats under which the landlord is the same person, but they need not be leases of flats which are in the same building, nor leases which are drafted in identical terms.

(3) The grounds on which an application may be made under this section are that the object to be achieved by the variation cannot be satisfactorily achieved unless all the leases are varied to the same effect.

(4) An application under this section in respect of any leases may be made by the landlord or any of the tenants under the leases.

(5) Any such application shall only be made if—

(a) in a case where the application is in respect of less than nine leases, all, or all but one, of the parties concerned consent to it; or

(b) in a case where the application is in respect of more than eight leases, it is not opposed for any reason by more than 10 per cent. of the total number of the parties concerned and at least 75 per cent. of that number consent to it.

(6) For the purposes of subsection (5)—

(a) in the case of each lease in respect of which the application is made, the tenant under the lease shall constitute one of the parties concerned (so that in determining the total number of the parties concerned a person who is the tenant under a number of such leases shall be regarded as constituting a corresponding number of the parties concerned); and

(b) the landlord shall also constitute one of the parties concerned

4. Section 38 of the 1987 Act provides as follows :

31 — (1) If, on an application under section 35, the grounds on which the application was made are established to the satisfaction of the court, the court may (subject to subsections (6) and (7)) make an order varying the lease specified in the application in such manner as is specified in the order.

(2) If—

(a) an application under section 36 was made in connection with that application, and

(b) the grounds set out in subsection (3) of that section are established to the satisfaction of the court with respect to the leases specified in the application under section 36,

the court may (subject to subsections (6) and (7)) also make an order varying each of those leases in such manner as is specified in the order.

(3) If, on an application under section 37, the grounds set out in subsection (3) of that section are established to the satisfaction of the court with respect to the leases specified in the application, the court may (subject to subsections (6) and (7)) make an order varying each of those leases in such manner as is specified in the order.

(4) The variation specified in an order under subsection (1) or (2) may be either the variation specified in the relevant application under section 35 or 36 or such other variation as the court thinks fit.

(5) If the grounds referred to in subsection (2) or (3)(as the case may be) are established to the satisfaction of the court with respect to some but not all of the leases specified in the application, the power to make an order under that subsection shall extend to those leases only.

(6) The court shall not make an order under this section effecting any variation of a lease if it appears to the court—

(a) that the variation would be likely substantially to prejudice—

(i) any respondent to the application, or

(ii) any person who is not a party to the application,

and that an award under subsection (10) would not afford him adequate compensation, or

(b) that for any other reason it would not be reasonable in the circumstances for the variation to be effected.

(7) The court shall not, on an application relating to the provision to be made by a lease with respect to insurance, make an order under this section effecting any variation of the lease—

(a) which terminates any existing right of the landlord under its terms to nominate an insurer for insurance purposes; or

(b) which requires the landlord to nominate a number of insurers from which the tenant would be entitled to select an insurer for those purposes; or

(c) which, in a case where the lease requires the tenant to effect insurance with a specified insurer, requires the tenant to effect insurance otherwise than with another specified insurer.

(8) The court may, instead of making an order varying a lease in such manner as is specified in the order, make an order directing the parties to the lease to vary it in such manner as is so specified; and accordingly any reference in this Part (however expressed) to an order which effects any variation of a lease or to any variation effected by an order shall include a reference to an order which directs the parties to a lease to effect a variation of it or (as the case may be) a reference to any variation effected in pursuance of such an order.

(9) The court may by order direct that a memorandum of any variation of a lease effected by an order under this section shall be endorsed on such documents as are specified in the order.

(10) Where the court makes an order under this section varying a lease the court may, if it thinks fit, make an order providing for any party to the lease to pay, to any other party to the lease or to any other person, compensation in respect of any loss or disadvantage that the court considers he is likely to suffer as a result of the variation.

Documents

5. The documents before the Tribunal are :
   a. the application and supporting papers
   b. a bundle of papers submitted by the solicitors for the Applicant/Landlord with an accompanying letter dated the 4 March 2010
   c. a letter from Mr and Mrs D Greenwood dated 5 March 2010, consenting, as new occupants of Flat 18, to the variation of the lease as sought by the Applicant/Landlord

Inspection

6. In view of the detailed and helpful description of the Building at paragraphs 3 to 5 of the previous LVT decision copied at Appendix 2 to these reasons, the Tribunal has not carried out a separate inspection for the purposes of this application

The Leases

7. The Tribunal adopts, with respect, the helpful summary of the terms of the leases set out in paragraphs 7 and 8 of the previous LVT decision copied at Appendix 2 to these reasons

Letter from solicitors for Applicant/Landlord 22 October 2009

8. The letter stated that the Applicant/Landlord proposed that a new paragraph should be inserted into the landlord's repairing covenants in clause 5(1) of each lease to confirm that the duty to maintain and keep in repair each and every part of all the balconies of all the Flats should rest with the landlord, with the cost of any works to be born equally by each of the leaseholders by way of service charge
9. It was acknowledged that one leaseholder was objecting to this recommendation. However the proposal would not only ensure unanimity of appearance and that the exterior of the Building was maintained for the benefit of all leaseholders, but would also ensure that the works could be carried out as quickly and cost effectively as possible
10. Historically, repairs and works to the balconies had been undertaken by the Applicant/Landlord and charged to the general service charge without issue. However, in recent months, an objection had been raised by some lessees, which had resulted in the [previous] application to the LVT
11. Another possible solution would be to vary the leases so that the liability for each individual balcony would be transferred to the leaseholder to whom the balcony belonged. However this

would then mean that the Applicant/Landlord would not have the authority to carry out works to the balcony without the agreement of the leaseholder and at the expense of the leaseholder. That would create a significantly more complex administration procedure for repair works and might also mean that works to the balconies would not be undertaken at the same time and might lead to a break in the uniformity of appearance of the Building. In addition, if water ingress or a leak occurred through any balcony and the leaseholder would not sanction or undertake the work, the Applicant/Landlord would not be able to carry out works quickly and might have to make an application to the LVT to force a leaseholder to fulfil the leaseholders repairing covenants. That would in turn lead to significant delays and possible damage to the structure and other Flats

12. The leaseholders were requested to complete a reply form to indicate whether they agreed to the proposed variation

Letter from managing agents 28 January 2010

13. The managing agents stated that the proposed variation was to add the following subparagraph to clause 5(1) of each lease, namely "(f) each and every part of the balconies of all flats in the mansion including the balcony of the flat (if any)"

Letter from Mrs M Pilkerton 31 January 2010

14. Mrs Pilkerton stated that if the leases were varied as suggested then it would become increasingly difficult to sell the ground floor flats and would devalue them when it was disclosed to prospective buyers that they would be responsible for the maintenance of the lifts and the balconies, both of which were of no value to the ground floor residents. If the leases were varied as proposed then they would be in a worse position than before the previous LVT decision, as they would have to pay for other people's new railings, which was grossly unfair

Letter from solicitors for Applicant/Landlord 2 February 2010

15. Attached to the letter was a draft order confirming the variation sought. A copy of the draft order is at Appendix 4 to these reasons

Letter from Mr and Mrs M Pilkerton 20 February 2010

16. Mr and Mrs Pilkerton stated that they strongly objected to the application. They purchased the lease of ground floor Flat 11 without a balcony. That was their choice. The lease did not include in the costs the balconies or railings. They assumed that they would be dealt with under clause 6 of the lease being the responsibility of those flats having a balcony. When the question of the costs of the balconies and railings became an issue it was agreed at a meeting of the leaseholders that as it could not be agreed who should bear the costs the matter should be passed to the LVT and it was agreed that they would be bound by the decision of the LVT. It was clear from paragraph 24 of the LVT's decision that it would be incorrect for the ground floor flats to be responsible for any of the costs of the balconies or railings. Clause 6(4) of the lease dealt with the costs of the windows on an individual Flat basis as clearly it would be incorrect to have Flats bearing part of the cost of the repair of a window which did not belong to their Flat. The cost of the balconies and railings should not be treated any differently. The application to vary the lease should be resubmitted on that basis

Letter from solicitors for Applicant/Landlord 26 February 2010

17. The letter referred to the Tribunal's directions in this application. The application for the Tribunal to deal with the application without a hearing was to save costs. Any leaseholder

wishing to make a claim for compensation under section 38(10) of the 1987 Act should do so within 21 days of receipt of the Applicant/Landlord's bundle of documents

Applicant/Landlord's statement of case 3 March 2010

18. Additional submissions were that Mr and Mrs Pilkerton's objection to the variation, on the grounds that it would unfairly prejudice them as they lived on the ground floor and did not own a balcony, did not have any merit. Prior to this dispute, the maintenance and repair of the balconies had always been undertaken by the landlord and charged to the general service charge without challenge. Therefore Mr and Mrs Pilkerton's objection that the requested variation would devalue their lease was unsustainable. The leases had not previously been devalued by including the repair and maintenance of the balconies within the general service charge, and to the Applicant/Landlord's knowledge, the removal of this burden from the ground floor Flats would not increase the value of their leases. In addition, the Building had a lift in each block which was serviced and paid for from the general service charge. That charge was therefore apportioned to all leaseholders even though the lifts were not used to access the ground floor Flats

Letter from Mr E Pilkerton 9 March 2010

19. Mr Pilkerton's additional comments were that leaseholders had previously been informed that the balconies were part of the terms of the leases. That was why it was never challenged. However, problems had now arisen because it had been proved that the balconies (other than Flats 4, 6, 8) belonged to the leaseholders. The alternative proposal, namely that the liabilities should be transferred to each leaseholder, had not been followed through. The stated objections to that alternative proposal were unsustainable. In August 2003 a letter from the managing agents gave it as an option, with a surcharge to the leaseholders as was done with the windows. The Tribunal's decision in relation to the proposed variation would affect not only current leaseholders but all future residents

The Tribunal's findings

Responsibility for maintenance and repairs to balconies

20. The Tribunal adopts the findings of the previous LVT decision, and finds that there is no current provision in the leases dealing with the responsibility for maintenance and repairs to the balconies in the Building

21. The Tribunal has taken account of all the submissions by Mr and Mrs Pilkerton, but finds that:

    a. there should be such a provision, because its absence gives rise to uncertainty, a natural reluctance on the part of both the Applicant/Landlord and the Respondent/Leaseholders to carry out any necessary maintenance and repairs in the meantime, and a potential reduction in the value of the Flats accordingly

    b. the leases could have provided for the landlord to have responsibility, in the same way as the landlord has responsibility for the lifts under clause 5(1)(e), or for each leaseholder to have responsibility, in the same way as each leaseholder has responsibility for the structural repair of all windows and window frames belonging to that leaseholder's Flat under clause 6(4)

    c. it would be preferable for the landlord, rather than each leaseholder, to have responsibility, in the interests of uniformity (in the same way as the landlord has responsibility for external decoration of windows under clauses 5(2) and 6(4)), economy

of costs (e.g. scaffolding) in the event of more than one balcony requiring maintenance or repair at any one time, and good estate management practice

d. the provision for the landlord to have that responsibility should be included in the leases by way of a variation

e. the variation cannot be satisfactorily achieved unless all leases are varied to the same effect

f. the variation contended for by the Applicant/Landlord as set out in the draft deed of variation copied at Appendix 3 to these reasons achieves that result

g. each lease should be varied accordingly

Responsibility for paying for the maintenance and repairs to the balconies

22. The Tribunal finds that there is a distinction between responsibility for carrying out the work, and responsibility for paying for the cost. The fact that the Tribunal has found that the responsibility for carrying out the maintenance and repairs to the balconies should fall on the landlord under the leases does not necessarily mean that the leaseholders of each of the 21 flats should contribute to the cost

23. The Tribunal has taken account of Mr and Mrs Pilkerton's assertion that the cost should be borne only by the leaseholders of those Flats with balconies. That assertion is not without attractions. It would be theoretically possible to provide in the leases that only those leaseholders whose Flats had balconies should pay a proportion of the cost of repairing balconies. For example, if there were 16 Flats with balconies, the leases could provide that the leaseholders of each of those Flats should pay a 1/16 share of the cost of repairs of the balconies, rather than their 1/21 share of other expenses

24. The Tribunal has also taken account of Mr and Mrs Pilkerton's assertion that the value of the ground floor Flats will be reduced if the leaseholders of those Flats are responsible for a share of the cost of maintenance and repairs to the balconies

25. However, the Tribunal finds that :

a. it is standard practice, in the Tribunal's collective experience, for every leaseholder in a block of flats to contribute in that leaseholder's sharing proportion to all expenditure of this kind, irrespective of whether an individual leaseholder derives any specific benefit from the expenditure, such as a ground floor leaseholder not deriving specific benefit from expenditure to the roof, a top floor leaseholder not deriving specific benefit from expenditure to foundations, and a leaseholder on one side of the block not deriving specific benefit from expenditure to the other side of the block

b. the leases of Flats in the Building so provide in other respects, such as the provision for each leaseholder, including leaseholders of the ground floor Flats, to contribute to the cost of repairs to the lifts

c. according to the Applicant/Landlord, all leaseholders have in the past in practice contributed an equal share of costs of repairs to the balconies

d. there is no evidence before the Tribunal, as distinct from assertion, that the values of any of the ground floor Flats have reduced in the past as a result of those contributions or that they will reduce in the future if the proposed variation of the leases is made

e. in relation to the theoretical possibility that the leases could provide that only those

leaseholders whose Flats had balconies should pay a proportion (for example 1/16) of the cost of repairing balconies, it would be no more unfair for the leaseholders of the ground floor to contribute a 1/21 share of the cost of maintenance and repairs to the balconies then it would be for the leaseholder of a Flat with a balcony in one of the blocks comprised in the Building to pay, say, a 1/16 proportion of the cost of repairs to a balcony in the other block

f. in all the circumstances, including the fact, as the Tribunal finds, that none of the other leaseholders of ground floor Flats have opposed the proposed variation, the Tribunal is satisfied that it is appropriate for each leaseholder, including leaseholders of the ground floor Flats, to contribute a 1/21 share of the cost of maintenance and repairs to the balconies

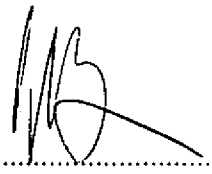
g. for the purposes of sections 38(6) and 38(10) of the 1987 Act, and for the sake of completeness, the Tribunal is satisfied, for reasons already given, that :

- the variation is not likely to prejudice any of the Respondent/Leaseholders, including the leaseholders of the ground floor Flats
- it is not appropriate to make an order for compensation under section 38(10) of the 1987 Act, in respect of which the Tribunal notes that in any event the Tribunal has received no notice of a claim from any of the Respondent/Leaseholders

Decision

26. The Tribunal accordingly orders each Flat lease to be varied in accordance with a deed of variation in the form of the draft deed copied at Appendix 3 to these reasons

Dated 14 April 2010



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P R Boardman
(Chairman)

A Member of the Tribunal
appointed by the Lord Chancellor

RESIDENTIAL PROPERTY TRIBUNAL SERVICE
SOUTHERN RENT ASSESSMENT PANEL
LEASEHOLD VALUATION TRIBUNAL

Case No. CHI/21UC/LVT/2010/0001

Priory Court, 4 to 6 Granville Road, Eastbourne, East Sussex BN20 7ED

Appendix 1

List of leaseholders as attached to application

Mrs. V. Hall	Flat 1
Mr. & Mrs. R. A. Baker	Flat 2
Mr. M. R. Howard	Flat 3
Mrs. C. H. Wish	Flat 4
Mrs. J. V. Whittaker	Flat 5
Miss. J. Pharaoh	Flat 6
Mr. &. Mrs. P. A. Short	Flat 7
Mr. & Mrs. R. F. Sanders	Flat 8
Miss. G. Lightfoot	Flat 9
Dr. D. C. J. Wickramarachchi	Flat 10
Mr. & Mrs. E. Pilkerton	Flat 11
Mr. & Mrs. P. Knight	Flat 12
Mr. D. R. J. Webb	Flat 13
Mrs. P. Hale	Flat 14
Miss. V. Roberts	Flat 15
Miss. J. Kennedy	Flat 16
Mr. & Mrs. T. Williams	Flat 17
Mr. & Mrs. D. Greenwood	Flat 18
Mr. & Mrs. R. V. Kellett	Flat 19
Mr. & Mrs. J. D. Leeming	Flat 20
Miss. B. Barford	Flat 21

RESIDENTIAL PROPERTY TRIBUNAL SERVICE
SOUTHERN RENT ASSESSMENT PANEL
LEASEHOLD VALUATION TRIBUNAL

Case No. CHI/21UC/LVT/2010/0001

Priory Court, 4 to 6 Granville Road, Eastbourne, East Sussex BN20 7ED

Appendix 2

LVT decision relating to the Building in case number CHI/21UC/LSC/2009/0054

SOUTHERN RENT ASSESSMENT PANEL

LEASEHOLD VALUATION TRIBUNAL

Case Number CHI/22IUC/LSC/2009/0054

In the matter of Section 27A of the Landlord & Tenant Act 1985 (as amended ("the Act")
and
In the matter of Priory Court, Granville Road, Eastbourne, East Sussex

Between:

Priory Court (Eastbourne) Limited — **Applicant**

and

The lessees of the flats at Priory Court — **Respondents**

Appearances:

Mrs C Pearce of Messrs Stredder Pearce for the Applicant

Mr E Pilkerton

Decision

Hearing: 19th August 2009

Date of Issue: 26th August 2009

Tribunal:
Mr R P Long LLB (Chairman)
Miss C D Barton BSc., MRICS,
Mrs J E S Herrington

Application

1. This was an application by Priory Court (Eastbourne) Limited ("the Company") made to the Tribunal pursuant to section 27A of the Landlord & Tenant Act 1985 (as amended) ("the Act") in order to determine whether, if costs were incurred for works that may be carried out by it to the balconies at Priory Court in the year 2009-10 (or possibly 2010 – 11), then service charges would be payable by the lessees of the flats at Priory Court, or some of them, as a result.

Decision

2. The Tribunal has determined that if the Company were to incur costs for works for the replacement of the balcony railings at Priory Court then a service charge would not be payable by the lessees of the flats at Priory Court to reimburse the cost of those works. The leases of the flats place no obligation upon the lessees to make such payments, nor any obligation upon the Company to undertake such works, and neither is it possible to infer any such obligations.

Inspection

3. The Tribunal inspected the exterior of Priory Court, and viewed the balcony of flat 7 from within that flat, on 19th August 2009 before the hearing took place. It saw that the great majority of the flats at Priory Court are provided with concrete balconies projecting beyond the walls of the building that appear to be of cantilevered construction. The balconies have railings that appear to be of steel containing reinforced glass panels within an outer frame. Flat 21 has a balcony formed by a part of the roof of the flats beneath, but is also supplied with a similar railing.

4. The railings have variously rusted to a greater or lesser degree, and the result has been that (at least in the case of flat 7) the pressure caused by the build-up of rust within the frames has caused a glass panel to crack. In many cases the steel frames are spalling, and in some cases the rust has affected the wooden handrail that is seated above the steel frames. The rust has caused some staining to the concrete beneath the frames, and in some cases the wire mesh within the reinforced glass panels shows signs of rust where water penetration has occurred.

5. Three of the flats that are on the southwest elevation of the building have balconies that do not project but are formed of open areas within the volume of the building itself. One of those, flat 9 on the ground floor, has with the consent of the Landlord enclosed that balcony area for security reasons.

The Law

6. The Tribunal prefaces its observations by pointing out that the law relevant to the determination of service charges is to be found primarily in sections 18, 19

and 27A of the Act. In brief summary, section 18 defines what is a service charge in terms that present no difficulty here and section 19 provides in the context of this case that a service charge must be reasonably incurred. Section 27A(3) allows the Tribunal to determine in this context 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. It is this latter provision that is particularly relevant to the present application.

The Leases

7. The Tribunal was supplied with sample copies of the leases of various types of flat at Priory Court. The counterpart leases (other than that for Flat 18, which seems to have been mislaid) were available at the hearing. For the purposes of the matters before the Tribunal all were in very similar form. The leases were granted in or about 1962 for terms of 99 years (less the last three days) commencing on 24th June 1961 at rents of either £25 or £30 per annum. The terms of all leases appear to have been extended in 2000 to 999 years from the same starting date and the rents were at the same time reduced to a nominal sum.

8. The relevant provisions of the leases appeared to be those set out below, namely:

8.1 "the Mansion" is defined in Clause 1(2) as "the blocks of flats erected on the site (which is shown on the site plan attached to the lease) and known as "Priory Court"

8.2 "the flat" is defined in clause 1(3) as "the suite of rooms situate on the ..... floor of the Mansion and shewn edged red on the other plan annexed hereto (that is to say the other plan than the block plan) and to be known as Flat Number ....."

8.3 It is appropriate here to say that the plans of the various flats indicate that the limit of the demise within the building itself is the inner surface of the walls bounding the flat in question, and that in the case of most of the flats having balconies the red line extends around the edge of the balconies, although its thickness means that it covers what would be an area a few inches wide around their edges.

8.4 However, in the case of three flats at least having balconies that protrude from the building, namely flats 4, 6 and 8, (the position in respect of flat 18 is not known), the red line does not extend around the balcony but appears to exclude the balcony from the definition of the flat. Neither, in those cases, does the lease appear to grant any right to the lessee of the flat to use the balcony, despite the fact that access to it can only be gained through the flat in question. A similar situation applies in the case of Flat 21, save that there the extensive balcony appears to be formed from part of the roof of the flat beneath. The word "Balcony" appears on each of the plans of the flats to indicate that this is what the area is. It appears nowhere else at all in the leases.

8.5 "The Service and Maintenance Charge" is defined in Clause 1(5) as "the amounts actually expended by the Landlord during the period ended 5th April in every year in performing the obligations specified in Clause 5 hereto and such other amounts as the Landlord shall be entitled to charge for the administration upkeep and maintenance of the Mansion and the site in accordance with the provisions hereinafter contained."

8.6 Clause 4(5) of the leases obliges the tenant "at all times to keep in repair the inside parts of the demised premises and all fixtures and fittings therein in good and substantial repair and condition and in particular will as occasion requires thoroughly clean all windows chimneys and flues and will keep all water electricity gas and other service pipes wires and drains and equipment in good order and condition". There follows a provision relating to things used in common with other tenants that is not relevant here.

8.7 Clause 4(6) of the leases requires the tenant "in every fifth year and also in the last year of the term completely and properly to redecorate all the inside parts of the demised premises and the outside of the doors in colours approved by the Landlord (so far as the said doors are concerned) painting with two coats at least of good quality paint those parts that are usually painted and treating all the other parts in an appropriate manner and to whiten all ceilings and repaper the walls usually so decorated"

8.8 Clauses 4(9), (10) and (11) contain provisions enabling the landlord to enforce covenants in a form usual at the time when the leases were granted.

8.9 The Landlord's obligations are set out in clause 5 of the lease. The repair covenant is in clause 5(1), and requires the Landlord:

"at all times during the term (to) keep in good and substantial repair and condition:

(a) all the roofs and all the outside walls of the Mansion (and the garage) including all drains gutters and downpipes
(b) all halls passages landings and staircases inside the Mansion (but outside the Flat) and all pipes wires and cables therein or thereunder
(c) all the roadways footpaths and gardens in and surrounding the buildings on the Site and all pipes wires and cables passing over through or under the same
(d) the boundary walls of the grounds of the site
(e) the lifts serving the Flat Provided that the Landlord shall be under no liability to the tenant his family servants guests or other persons for any failure stoppage or other defect whatever of or to the said lift however caused"

8.10 The decorating and common parts covenants are set out respectively in clauses 5(2) and 5(3) as follows:

5.2 "Will as often as shall be reasonably necessary paint all the outside parts of the Mansion (and the garage) usually painted"

5.3 Will at all times during the term keep all the halls passages landings and staircases above referred to properly cleaned and lighted and in reasonably decorative condition and will not cause any of the same to be obstructed."

Hearing

9. Following the usual introductions and explanations of procedure the Tribunal established two points. The first was that the issue which the Tribunal was asked to decide was whether, if costs were incurred for replacing the existing balcony railings in either 2009-10 or 2010-11 a service charge would be payable, whether by all or by any of the lessees. The second was that Mr Pilkerton appeared to present the arguments that he (and, he said, other lessees) wished to advance to counter the interpretation of the leases for which the landlord wished to contend.

10. Mrs Pearce said that Priory Court consisted of two blocks totalling 21 flats in all that had been built in the early 1960's. The Company had acquired the freehold reversion in respect of the whole of the site as a result of transactions in 1999 and 2001. All of the lessees were equal shareholders in the Company. Her firm had managed Priory Court since 1994.

11. The problem that had arisen resulted from the fact that the balconies at Priory Court were nowhere mentioned in the leases of the flats there. It had become apparent that the metal frames of the balcony railings had become heavily corroded over the years by the action of salt air. This resulted in the failure of paintwork shortly after redecoration, even when rust treatment had been applied, and the rusting of the metal was causing the glass screens that were set in it to crack. The Board of the Company took the view that it was no longer cost effective to continue simply to repair and redecorate the railings as the benefits of such work were of a short-term nature. Further, the condition of the railings, and the glass screens they supported, was beginning to present a safety risk.

12. Until now the Company had redecorated the railings and had carried out such minor repair work as may have been necessary from time to time. It had charged the cost both of redecoration and repair to the service charge account and there had until now been no complaint. A minority of the lessees now took the view that it was not proper for the cost of replacing the railings and the screens to be borne by the service charge account. They considered that individual owners were responsible for replacing their own railings and screens, subject to the fact that it appeared in any case to be for the Company to replace the railings and screens in the four flats whose demise did not include their balconies.

13. The difficulty arose because neither the term "balcony " nor "balcony railings" was mentioned in the leases. The matter had been referred to the Company's solicitors in February 2008. They had advised in a letter dated 7th February

2008 (page 127 in the Tribunal's bundle) that they considered it was not possible to give a definitive answer to a question asking them to define the responsibility for funding the replacement of the screens. The solicitors had initially concluded that the provisions of clauses 4(5) and 4(6) of the leases (set out above) were even then problematic because of their references to the "inside" of the premises. Whilst they suggested in a subsequent letter of 20th February (their attention having been drawn to the landlord's obligations to decorate the exterior in clause 5(2)) that it might be possible to construe the leases as obliging the landlord to replace the railings and screens, the solicitors nonetheless advised that the only safe course may be to vary the leases.

14. Other solicitors had advised one of the lessees (page 136-7 of the Tribunal's bundle) that there was no obligation on the part of the Landlord to undertake the redecoration and maintenance of the railings and screens.

15. Mrs Pearce produced history going back to 1983 to show that in the past glass screens had been replaced by the Landlord within the service charge regime. She accepted at the hearing, however, that there was no authority to which she could refer the Tribunal that would support the contention that such a practice in the past would override obligations contained in the leases. She explained that it was highly desirable that the work of replacing the screens should fall within the obligation of the Landlord and within the service charge regime. As well as minimising cost if the work were done at the same time, such a course would secure the external appearance of the building. If the matter were left to individual lessees it would be done in a piecemeal fashion over a period of time. Because similar parts may not be available over such a period, or regulations may change, it may be that the external appearance would be compromised by the use of parts that did not quite match or because different regulations, perhaps as to height or some other overt matter, required a different treatment.

16. Cases decided by other Leasehold Valuation Tribunals in the past that had placed obligations upon the landlord, whilst not binding on this Tribunal, provided a helpful background, said Mrs Pearce. She referred to Flagship Estates Limited v Albany Apartments Limited (CHI/OOHN/LSC/2005/0013) and to Fairhazel Mansions Limited v Ms Marsha Cummings (LON/OOAG/LSC/2005/0063), and provided copies of those decisions.

17. Mrs Pearce added at the hearing that in the past asphalt repairs to the balconies had been done by the Company as part of the service charge regime to prevent water ingress. It had retiled the balcony floors. If it was agreed that the floor was the responsibility of the Company then so also should be the railings. Whoever drafted the leases, she said, would have intended the property to look the same, and that may not be achieved if the railings were dealt with individually.

18. Her arguments over the desirability of the Company doing all the work went back to what must have been the intention of those preparing the leases originally. The balcony railings could not be an "inside" fitting the responsibility of the individual lessee. Since the balconies were projections

from the wall it may be possible to regard them as an extension of it and thus to fall within the Company's obligations. One of the dictionary definitions of a wall was a "protective or restrictive barrier" and another referred to "each of the sides and vertical divisions of a building". Since there was no proper definition it was reasonable that any interpretation of the lease should rest on what had happened historically.

19. In reply Mr Pilkerton accepted that the view before 2008 had been that the balconies were outside of the demised property and within the service charge regime. However, as an analogy he had paid for new window frames in his flat, but the windows were not within the demised property. He contended that the balcony rails and screens were inside "fixtures and fittings" that fell within the obligations placed upon the lessee in paragraph 4(5) of the leases. As such the landlord could use the provisions of clauses 4(9) –4(11) to compel the lessees to do the replacement work at the same time. The balconies were part of the structure of the building but the railings were "fixtures and fittings". The balconies and the railings were different items.

Decision

20. So far at least as regards the provisions relating to the maintenance of the balconies is concerned the leases at Priory Court are plainly defective. Apart from the reference to a balcony on the plans they make no further reference to them. In four cases at least the balcony has not even been included in the demise. It is difficult in the light of these very material discrepancies to conclude that the draftsman, or the parties who negotiated the leases, addressed his or their minds to the existence of the balconies. It is surprising that the problem now before the Tribunal seems not to have been raised during the numerous sale and purchase transactions at Priory Court that must have occurred since the leases were originally granted.

21. The hearing made very clear that the problem in the present case is that there is no reference to the balconies in the leases other than on the plans. Their existence seems entirely to have been ignored both by those who prepared the leases and by those who entered into them, so that it is difficult to find that they had any intention at all with regard to their maintenance and repair. Despite Mrs Pearce's argument concerning the intention of the draftsman with regard to external appearance, it is also difficult to conclude that he had any thought about the matter at all so far as the balconies were concerned, or even to conclude that that he bore in mind their existence in any way. It is equally difficult to regard the railings and their screens as being anything other than an integral part of the balcony to which, especially now that rust has taken hold, they appear almost welded. They certainly could not physically now be removed without being cut away, even if that has ever been the case.

22. In the Tribunal's judgement, the arguments that the parties have put forward require the wording of the lease to be stretched in one way or another beyond a meaning that it could reasonably be said to bear. Given that a part of the argument that Mr Pilkerton (himself a ground floor lessee) puts forward is that it would be unfair for ground floor lessees to contribute to the cost of

balconies from which they do not benefit, it is equally difficult to seek in the circumstances to try to give commercial effect to the leases by accepting the arguments of either party. The fact, mentioned at the hearing, that the ground floor lessees are responsible for contributing to the maintenance of lifts (for which they have little if any use) cannot in the Tribunal's judgement reasonably be said to be determinative in that respect.

23. Equally, as Mrs Pearce accepted, the history of previous dealings with the balconies has no effect upon the contractual arrangements that the parties made when they entered into the leases. The Tribunal has been referred to no authority to the contrary.

24. All of this being so, the Tribunal is driven to agree with the analysis of the Company's solicitors in their letter of 7th February 2008. They said there that they concluded that (except in the case of the four flats whose balconies are not included in their demise) the responsibility for the railings seems to rest with the lessees of the individual flats to whom balconies were demised. Even that view rests upon an assumption (which seems on an examination of the plans, but without a survey, much more likely to be true than not) that the railings are actually within those demises. If they were not then the obligation would be that of the Company, as it seems to be in the case of the four flats where the balcony is not included in the demise.

25. There is quite simply nothing in the leases that can, in the Tribunal's judgement, reasonably be construed as creating a contractual obligation either on behalf of the Company towards the lessees or in the other direction in respect of the maintenance and repair of the balcony railings. The responsibility that may rest as a result upon the individual lessees is not a contractual responsibility to the Company as Landlord, because there is no such agreement in the leases. It is a general responsibility of the sort that arises under the Occupier's Liability Acts. Equally, except so far as the Company may have an obligation to decorate at least the outer half of the railings, it is difficult to construe any further obligation in respect of them towards the lessees of the flats whose balconies are included in their demise, or any ability to recover any other cost as part of the service charge.

26. The conclusion that the Tribunal has reached is in many ways an unsatisfactory one from the point of view of most of the parties, although it may perhaps be acceptable to the ground floor lessees who wanted to avoid paying for other people's railings. The leases are plainly defective, at least in this particular, because they are drawn in such a way as to create a lack of any provision for the responsibility to maintain and repair the balcony railings. It would be helpful if they could all be amended following careful consideration and discussion (if need be using the mechanisms provided by the Landlord & Tenant Act 1987) in order to resolve the uncertainties they present.

27. The Tribunal adds its appreciation of the careful efforts that those appearing before it had made, although not themselves lawyers, to assist it in the manner in which they had prepared and then presented their cases.

Robert Lemp
Chairman

RESIDENTIAL PROPERTY TRIBUNAL SERVICE
SOUTHERN RENT ASSESSMENT PANEL
LEASEHOLD VALUATION TRIBUNAL

Case No. CHI/21UC/LVT/2010/0001

Priory Court, 4 to 6 Granville Road, Eastbourne, East Sussex BN20 7ED

Appendix 3

Draft deed of variation attached to application

THIS DEED OF VARIATION is made the day of Two thousand and nine

BETWEEN:-

(1) PRIORY COURT (EASTBOURNE) LIMITED (Company no. 00672903) whose registered office is c/o Stredder Pearce Dyke House 110 South Street Eastbourne East Sussex BN21 4LZ (hereinafter called "the Landlord") of the one part and

(2) THE TENANT being the person or persons referred to in the Schedule hereto (hereinafter called "the Tenant") of the other part

WHEREAS:-

(A) This deed is supplemental to the Lease (hereinafter called "the Lease") and the Deed(s) of Variation thereof (if any) short particulars of which are set out in the Schedule hereto

(B) The freehold reversion expectant on the expiration of the Lease together with other property is registered at the H M Land Registry under Title Numbers EB6533 and EB18537 and known as Priory Court 4 and 6 Granville Road Eastbourne aforesaid is vested in the Landlord

(C) The Tenant is registered as proprietor at the H M and Registry under the Title Number and in respect of the premises respectively referred to in the said Schedule

(D) It has been agreed between the parties hereto to vary the terms of the Lease (as hitherto varied if applicable) in the manner hereinafter appearing

NOW THIS DEED WITNESSETH as follows:-

1. IN PURSUANCE of the said agreement and in consideration of the premises the Landlord and the Tenant hereby agree and declare that:-

   1.1 Paragraph (f) shall be added to Clause 5(1) of the Lease following paragraph (e) thereof namely:-

   "(f) each and every part of all the balconies of all flats in the Mansion including the balcony of the Flat (if any)"

   1.2 The plan annexed hereto shall be substituted for the plan of the Flat annexed to the Lease

2. IT IS FURTHER AGREED AND DECLARED by the parties hereto that subject only to the variations expressed in Clause 1 hereof all the clauses covenants conditions and provisions of the Lease (as varied if applicable) shall continue in full force and effect and the Lease shall henceforth be construed as if such amendments were originally contained therein

3. THE parties hereto request the Chief Land Registrar to make such entries on the registers relating to the titles hereby affected or to open a new title or titles as shall be deemed appropriate for the purpose of recording and giving effect to the terms of this deed

4. IT IS HEREBY CERTIFIED that (a) there is no agreement for a lease to which this deed gives effect and (b) the transaction hereby effected does not form part of a larger transaction or series of transactions in respect of which the amount or value or aggregate amount of value of the consideration exceeds one hundred and seventy-five thousand pounds (£175,000.00)

IN WITNESS whereof the parties hereto have executed this deed the day and year first before written

THE SCHEDULE before referred to

Particulars of the Flat and Lease

Date of Flat Lease :

Date(s) of any Deed of Variation thereof :

Flat Number :

Garage number (if any) :

Title Number :

The Tenant :

SIGNED as a deed by the said....

EXECUTED as a deed....

RESIDENTIAL PROPERTY TRIBUNAL SERVICE
SOUTHERN RENT ASSESSMENT PANEL
LEASEHOLD VALUATION TRIBUNAL

Case No. CHI/21UC/LVT/2010/0001

Priory Court, 4 to 6 Granville Road, Eastbourne, East Sussex BN20 7ED

Appendix 4

Draft order

Case No: CHI/21UC/LVT/2010/0001

IN THE MATTER OF AN APPLICATION UNDER SECTION 37(1) OF THE LANDLORD AND TENANT ACT 1987

BETWEEN:

PRIORY COURT (EASTBOURNE) LIMITED

Applicant

-and-

THE LESSEES OF PRIORY COURT

Respondents

DRAFT ORDER

Pursuant to Section 37(1) of the Landlord and Tenant Act 1987 it is ordered that each and every Lease of Priory Court, details of which are attached hereto, be varied in the following terms:

The Service Charge provisions in Clause 5(1) of each Lease shall be amended by inserting the following sub-clause (f) after sub-clause (e):

"(f) Each and every part of all the balconies in the mansion including the balcony of the flat (if any)"

IT IS FURTHER ORDERED:

That subject only to the variations expressed in this Order all the clauses, covenants, conditions and provisions of each Lease (as varied if applicable) shall continue in full force and effect and the Lease shall henceforth be construed as if such amendments were originally contained therein.

IT IS FURTHER ORDERED:

That the Chief Land Registrar shall make such entries on the registers relating to the titles hereby affected or to open a new title or titles as shall be deemed appropriate for the purpose of recording and giving effect to the terms of this Order.

Dated this day of 2010