SOUTHERN RENT ASSESSMENT PANEL
AND LEASEHOLD VALUATION TRIBUNAL

Case No: CHI/21UD/LSC/2009/0094

BETWEEN:-

MARINE COURT RESIDENTS ASSOCIATION Applicants

and

ROTHER DISTRICT INVESTMENT LIMITED Respondents

Premises: Marine Court, Marina, St Leonards on Sea, East Sussex TN38 0DZ
("the Premises")

Representatives: Mr A Martin for the Residents' Association
Ms Calder Counsel for the Respondent

Witnesses: Mr Charles Strickland for the Applicant
Mr N Standon BSC MRICS
Mr G John
and Mr Samuels for the Respondent.

Tribunal: Mr D. Agnew BA LLB LLM (Chairman)
Mr B. Simms FRICS MCIArb

1. Background

1.1 On 13 July 2009 the Applicant made an application under Section 27A of the Landlord and Tenant Act 1985 for the Tribunal to determine the liability for and reasonableness of service charges sought by the Respondent for the service charge year 2008 in respect of works of repair to a canopy at the Premises and an application under Section 20C of that Act asking the Tribunal to determine that the Landlords' costs of responding to the application should not be added to future service charges.

1.2 Both parties filed statements of case. The Applicant filed and served a witness statement by Mr Charles Strickland who is the Secretary of the Applicant Residents' Association and the Respondent filed and served a witness statement by the Respondent's managing agent Mr Godfrey John, and a copy of a report by Mr N Standon BSC MRICS who is a chartered surveyor.

The Application came on for hearing on 3 and 4 November 2009. The hearing was adjourned part heard to enable the Respondent to adduce further evidence as to whether the cost of the works the subject of this application had been demanded by a proper and valid service charge demand. The Respondent was given the opportunity of responding to such further evidence by 9 December 2009 prior to the adjourned hearing taking place on 5th January 2010.

1.4 Before the hearing began on 3 November 2009 the parties reached limited agreement as follows:-

a) the apportionment of the cost of the works in question between the residential part of Marine Court, the retail part of the premises on the ground floor and the office premises. As a result of this agreement it was no longer necessary for the Tribunal to make a determination as to that apportionment but the parties accepted that their agreement related only to the works to the canopy of the premises, that it did not bind anyone other than the Residents' Association and the Landlord, that it had not been arrived at as a result of a judicial construction of the Lease and that the Tribunal's acceptance of the agreement did not bind any future tribunal and prevent it from construing the Lease in a different way.
b) that the Lease made no provision to enable the Landlord to cover its costs of responding to the Applicants' application in future service charges and that there was therefore no need for the Tribunal to make any determination under Section 20C of the Act.

2. The Premises

2.1 Marine Court is a large Grade II listed building situated on the seafront at St Leonard's on Sea. It comprises 168 flats, a row of retail shops and at the eastern end of the building an integral block of offices. All the retail units are on the ground floor with the flats above. A canopy extends out over the public pavement at first floor level and it runs continuously along the front of the building extending round the east corner of the building. This canopy is constructed of reinforced concrete supported by steel and concrete beams.

2.2 The upper surface of the canopy is covered in a waterproof material. It was this canopy and the cost of repairs to it which formed the subject of this application.

The Tribunal inspected the premises immediately before the hearing on 3 November 2009. It was not possible to gain access to the surface of the canopy but it was viewed from the balcony of one of the flats. The underside and front edge were visible from the pavement below and the promenade opposite.

3. The Tribunal's jurisdiction.

3.1 By Section 27A of the 1985 Act it is provided that:-
(1) An application may be made to a Leasehold Valuation Tribunal for a determination whether a service charge is payable and, if it is, as to –
(a) the person by whom it is payable,
(b) the person to whom it is payable,
(c) the amount which is payable,
(d) the date at or by which it is payable; and
(e) the manner inn which it is payable.

Subsection (1) applies whether or not any payment has been made.

3.2 By Section 19 of the Act "relevant costs shall be taken into account in determining the amount of a service charge payable for a period only to the extent that they are reasonably incurred....."

3.3 By Section 20B of the Act it is provided that:-

"(1) If any of the relevant costs taken into account in determining the amount of any service charge were incurred more than 18 months before the demand for payment of the service charge is served on the tenant, then (subject to subsection (2) the tenant shall not be liable to pay so much of the service charge as reflects the costs so incurred.

(2) Subsection (1) shall not apply, if, within the period of 18 months beginning with the date when the relevant costs in question were incurred, the tenant was notified in writing that those costs had been incurred and that he would subsequently be required under the terms of his lease to contribute to them by the payment of a service charge."

3.4 Section 20C of the Act states that "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...."

3.5 By Section 27A(3) of the Act "an application may 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...."

4. The Lease

The Tribunal was furnished with a specimen copy lease and was given to understand that all the leases at marine Court were similar insofar as the clauses that are relevant to this case are concerned and the Tribunal has proceeded on that basis.

4.1 By clause 5 (5) of the Lease the Landlord covenanted as follows:-
"Subject to and conditional upon payment being made by the tenant of the basic service charge and the additional service charge at the times and in the manner hereinbefore provided:-

(a) to maintain and keep in good and substantial repair and condition:-

(i) the main structure of the building including the principal internal timbers and the exterior walls and the foundations and the roof thereof and its main water tanks main drains gutters and rainwater pipes (other than those included in this demise or in the demise of any other flat in the building) ...

(vi) all other parts of the building not included in the foregoing sub-paragraphs (i) to (v) and not included in this demise or the demise of any other flat or part of the building."

4.2 By clause 1 (9) of the Lease "the basic service charge" is defined as meaning "the annual sum of money specified in paragraph 7 of the particulars". Paragraph 7 of the particulars states that the basic service charge is £135 per annum (in the case of the specimen lease seen by the Tribunal) (subject to variation in accordance with clause 2 and the fifth schedule of this lease)."

4.3 By clause 1(10) of the Lease the additional charge is stated to mean "such sum of money as may from time to time be specified in any certificate signed by the Lessors' agents as being due from the Tenant in respect of the accounting period referred to in

such certificate as additional service charge in accordance with the provisions of part 2 of the fifth schedule hereto".

4.4 By clause 1 (11) of the Lease "the building" means "the buildings of which the demised premises form part and specified in paragraph 4 of the particulars. Paragraph 4 of the particulars states that the building and address is Marine Court Marina St Leonards on Sea Sussex.

4.5 The Fifth Schedule to the lease sets out the mechanism whereby the stated basic charge may be increased and an Additional Service Charge claimed where the lessee's share of the total expenditure incurred by the lessors in any accounting period exceeds the basic charge.

5 The Evidence

5.1 Mr Strickland, the secretary of the Residents' Association gave evidence on behalf of the Applicants. He had been a lessee of Marine Court since 1992. He confirmed that the Applicants were not saying that the works to the canopy were unsatisfactory or that the price for what was done was unreasonable: Their case was simply that the works had been identified as being required to be done in 2003 at a certain cost and that by delaying the work until December 2007 the state of the concrete had deteriorated as had been predicted in 2003. This had led to an increase in the cost of the works for which the Tenants should not be responsible. He confirmed that the only evidence the Applicants had of quantification of the equitable set off that the Applicants were asking the Tribunal to make in respect of the increase in the cost of the works due to this delay was the figures quoted in two bills of quantities: the first contained in a report obtained by the managing agents in 2003 and the second in a report prepared in 2006. He accepted the Respondents' counsel's proposition that there was an economic advantage to the lessees in paying for the work later rather than sooner but only provided that the same amount was being charged. He considered that there had not been a proper demand for the cost of canopy repairs but if there had been a demand it would have been that dated 12 May 2008 for £62,739 subject to apportionment between the residential and commercial premises. He confirmed that the only evidence he had as to an alleged agreement to limit the professional fees to be charged was in a document purportedly emanating from Godfrey John and Partners of 3 April 2007. He recalled that there was a meeting between Mr John, Mr Fantilau of the Residents' Association, and Mr Smith and himself. He could not recall when this took place. He remembered that the discussion included reference to the apportionment of costs between the residential and commercial part of the building but he did not remember any discussion on professional fees.

5.2 For the Respondents Mr Standon, a Chartered Surveyor, gave evidence. He referred to a report he had prepared for the Respondents' solicitors dated 30 October 2009. The purpose of this report was to comment on the difference in repair costs between the initial report by Concrete Corrosion Consultancy Practice Ltd (CCCP), the costings prepared by CCCP in September 2003 and the contract costs agreed with APA Concrete Repairs Limited in November 2007.

5.2.1 Mr Standon set out in his report a history of the matter. He also gave a brief explanation as to how reinforced concrete structures deteriorate in time and the cause of such deterioration. He explained how deterioration occurs due to a gradual loss of alkalinity in the concrete which occurs from the outer surface inwards over time. The

natural alkalinity of the concrete provides protection to the steel reinforcement and inhibits corrosion. The loss of alkalinity is called carbonation. When the depth of the carbonation reaches the steel reinforcement the steel begins to corrode. Corrosion is also caused by the presence of chlorides and other contaminants present in the aggregates used to construct the concrete and also sometimes present in a marine environment. Whether the cause be as a result of the presence of chlorides or carbonation of the concrete or a combination of the two similar remediation works would be required.

5.2.2 Mr Standon pointed out that for the 2003 report only four small sections of the boarding covering the underside of the canopy had been removed. The bill of quantities produced at that time allowed for a four week repair contract. Forty repair areas were allowed for in varying depths and sizes. The works were priced at £47,081 in total presumably excluding VAT. The conclusions to the report warn of potential problems with continuing deterioration. The conclusion is that "cover to steel is varied but acceptable in the majority of instances. In the case of the spalling on the eastern side of the structure mainly at test sites 3 and 4 low cover is almost certainly a major contributing factor". From the carbonation testing CCCP conclude that "whilst there is only spalling occurring towards the eastern end of the structure due to the carbonation front reaching the steel reinforcement, passivity being lost and the resulting corrosion expanding, the carbonation test results indicate that the carbonation front is already beyond the depth of steel reinforcement embedded with the concrete in all instances and it is only a matter of time until further reinforcements succumb to a similar fate. Major spalling will now occur if a remedial measure treatment is not carried out".

5.2.3 The 2006 CCCP report states that "a full visual inspection could not be carried out (in 2003) as boards were covering the majority of the concrete soffit and only areas that were exposed were inspected". By 2006 all the soffit boards had been removed and CCCP stated that this gave them "a better understanding of the soffit than in 2003". The result was that far more repair work was recommended in 2006 than had been recommended in 2003. The defects schedule had increased significantly from the 2003 to the 2006 report and this was reflected in the repair items noted in the bill of quantities. The contract period increased from 4 – 6 weeks and the total cost estimate had increased from £47,801 in 2003 to £94,871 in 2006. The 2006 report concludes that "from the 2003 report we concluded that the majority of steel cover varied but was acceptable in the majority of instances. Unfortunately, we could not ascertain the condition of the whole soffit due to the cladding. The cladding has now been removed enabling us to ascertain the condition of the entire soffit. We can conclude that there is low cover and exposed bars ..."

5.2.4 Mr Standon went on to say that for various reasons a contract was not placed with CCCP but with their intended subcontractor APA. This company quoted on the basis of the CCCP bill of quantities and entered into a fixed price contract. The price fixed was lower than that which CCCP would have charged. Certain additional items were requested by the Landlord including lighting and a waveband around the edge of the canopy. A higher specification for the waterproof covering to the canopy was sought. This was because the original specification was not of a high enough standard to withstand workers having access to use the canopy whilst carrying out maintenance and repair work. The total cost of the canopy repairs including extras and VAT came to £212,878.18. The surveyors fees totalled £22,410.81. A grant was obtained from Hastings Borough Council towards the cost of the works in the sum of £91,907.20 and

the commercial units contributed £50,601.07 to the cost leaving a balance payable by the residential tenants of £92,780.72. Of that sum the main concrete repair items increased from £686 to £22,500. The waterproof canopy roof coating had not been included in the bills of quantity of CCCP for 2003 or 2006.

5.2.5 With regard to increases in building costs Mr Standon stated that clearly they would have increased between September 2003 and November 2007. Using various indices used in the industry Mr Standon demonstrated that there had been an increase in prices of somewhere in the region of 24 – 30% during the period in question. Mr Standon attributed the difference in cost between the amount actually charged in 2007 and the figure contained in the bill of quantities of 2003 to three factors: first, the increase in repair costs, second to some further deterioration although the deterioration was not substantial and third, to the fact that the 2003 CCCP report was based on what he regarded as inadequate assessment of repair works due to the fact that the soffit was largely obscured by boarding. This meant that the full extent of the repair works necessary in 2003 was not noted and therefore priced. Mr Standon did not think it was possible for anyone to quantify a true difference in cost between the state of the canopy in 2003 and in 2007 because the 2003 report was unreliable in his view in establishing the true amount of repair work required in 2003. Mr Standon under cross examination thought it impossible to say due to the presence of the boarding when the canopy first became in a state of disrepair. He thought that there would have been some evidence of disrepair in 2003. He explained that after work is undertaken there is a re-measurement of the work carried out upon which the original bill of quantities was based. If it turns out that the original bill of quantities was not right then the costs would be adjusted after the re-measurement.

5.3 The Respondents' managing agent, Mr John, gave evidence that the costs of the canopy repairs were first demanded on 8 April 2008 and again on 1 July 2009. As far as he was concerned the effect of the canopy costs being included in the brought forward figure appearing in the 26th June 2009 demand was that the canopy costs had been properly demanded. Mr John confirmed that the freeholder had to advance money by way of loans in order to pay for the canopy repair and other costs. He confirmed that the meeting with Mr Strickland and others that Mr Strickland had referred to in his evidence was a meeting simply to discuss the apportionment of repair costs as between the residential lessees and the commercial tenants. He was adamant that they did not discuss professional fees. He would never have agreed to charge the residents only 5% of the contract price for his administration and management fees in respect of the repair work. He did agree to reduce his fee to 7.5% for this and one other fee for these residents because he considered that those reduced fees were fair for the work he had done in those instances. That did not mean to say that this was evidence that he would agree to reduce his fee even further to 5%. He denied all knowledge of the document which purported to come from his office dated 3 April 2007 in which the surveyor's supervision fees were quoted at 8% of the basic cost and his administration fees at 5% of the basic cost. He was not aware of what had transpired between the freeholder and Mr Standon with regard to the setting of Mr Standon's fee.

6. The Applicants' submissions

6.1 The Applicants' challenge to the service charge being sought by the Landlord in respect of the canopy works was on the following bases:-

(1) That there had been no proper demand issued by the Landlords to the Tenants in

respect of these costs. The situation in this regard was somewhat confusing and resulted in the hearing being adjourned from 4 November to 5th January 2010 for further evidence to be adduced. In the hearing bundle was a copy of a letter from the managing agents to a lessee dated 12 May 2008 which contained estimated costs for the canopy. This letter referred to the managing agents' "latest demand" being unclear as to the collection procedure and apportionment of canopy costs. There was no evidence in the hearing bundle as to what was the "latest demand" referred to. The total estimated costs in the 12th May letter were stated to be £183,957. There was then a letter addressed to one of the tenants dated 1 July 2008 which showed a payment by that tenant in respect of major works to the canopy of £92.94 and accompanying that document was a statement of account for that tenant showing a contribution due as at 8 April 2008 of £1,321.92. The accounts for Marine Court for the year ended 31 December 2008 show that the total cost of the canopy repairs was £212,878.18. The Respondent also produced a service charge demand dated 26 June 2009 which showed a balance brought forward of £1,190.89 and which was accompanied by a statement of account showing how that figure was made up including an entry dated 8 April 2008 for canopy contribution of £1,321.92. The question was whether any of the aforesaid documents constituted a sufficient demand for the proposed repair works to the canopy.

6.2 The Applicants' second challenge to the service charge claim was that the Respondent was in breach of the repairing covenant under the Lease by failing to carry out repairs to the canopy which had been reported by specialist concrete contractors in 2003 to be necessary. The works were not carried out until December 2007. The Applicants say that during that time the condition of the building deteriorated resulting in the eventual cost being much greater than would have been the case had the work been carried out in 2003. If the work had been carried out in 2003 the cost of repair would have been £47,081. When the same company carried out the report in 2003 it reported again in July 2006 the cost of the works had risen to £94,871. The work was actually carried out by a company who were originally going to be the sub-contractor of the specialist concrete contractors CCCP at a price of £91,440. The actual total cost for the works done on the canopy including additional items which were not included in the original report came to £212,878.18. It was originally the Applicants' case that the amount of canopy repair work costs that should be charged to the Tenants should be limited to the costs identified in the 2003 report, namely £47,081 and that the balance between that and the costs actually incurred should be the subject of a set off by way of damages due to the Respondents' breach of contract in failing to carry out the works timeously. Authority that an equitable set off that can be made in such circumstances is the case of Continental Property Ventures Inc v White LRX/60/2005.

6.3 After the evidence had been heard, however, Mr Martin amended his case to limit the amount of the set-off to "somewhere between £686 being the amount stated in the 2003 bill of quantities as being the cost of the concrete repair work alone and the equivalent cost when the works were actually carried out of £22,500. He accepted that the lessees would have had an advantage in being required to pay several years later than 2003 but that the cost of building works had outstripped inflation so the lessees should be able to claim the difference. He thought that taking all things into consideration 50% of the difference between £686 and £22,500 would be a fair figure to take but invited the Tribunal to use its own knowledge and experience to come up with an appropriate figure. Further Mr Martin contended that the leases in respect of Marine Court are similar to the lease in the case of Yorkbrook Investments Limited v Batton (1985) 2EGLR 100 where it was held that the Landlord was not absolved from

his obligation to repair even though the tenant was in arrears of rent and that the wording "subject to the lessee paying the maintenance contribution pursuant to the obligations under clause 4 hereof" in that lease did not create a condition precedent. The Applicants contended that the obligation to repair arose immediately the property went into disrepair (British Telecom PLC v Sun Life Assurance Society PLC (1995) 2EGLR44)). The Applicants also cited Loria v Hammer (1989) 2EGLR249 as authority for the proposition that if the Landlord fails to make a timeous repair he cannot pass on additional costs which become necessary simply because the repair was not made in good time. The Applicants distinguished their case from that of Blue Storm Limited v Portvale Holdings Limited (2004) EWCACIV 289. The circumstances in that case were quite different, they say,from their own case, that any doubts that had been raised in that case as to the incorrectness of the decision in Yorkbrook were obiter and that Yorkbrook remained the binding authority on this tribunal.

6.4 Thirdly, the Applicants contended that there was an agreement between the managing agent and the Residents' Association that managing agents' fees for dealing with the repair work to the canopy would be restricted to 5% of the total cost of the repair work and that Mr Standon's fees in respect of that work would be charged to the residents at 8% of the total cost of the work. In the event the managing agent has charged 7.5% and Mr Standon 10%. The Applicants say that the fees should be reduced to the amounts agreed.

7. The Respondents' submissions

7.1 The Respondents denied that the canopy repair costs had not been properly demanded. Initially, they submitted that the demand dated 26 June 2009 which included a figure for the canopy repairs was the demand on which they relied but their position altered in this respect at the adjourned hearing on 5th January 2010. (See paragraph 8 below).

7.2 With regard to the equitable set off counsel for the Respondent submitted that due to the nature of concrete degrading continually over time it was difficult to say whether there was any point of time when the concrete became in a state of disrepair. In that regard this particular defect is more akin to a decorating liability where one would expect to see in a lease the requirement to redecorate after a certain number of years. She contended that the report in 2003 showed that the state of the concrete was not yet critical but may become critical. By 2006 the report showed that the work needed to be done. She contended that the Applicants had not shown that the breach had occurred in 2003. Her main point, however, was that the Applicants had produced no evidence that the alleged breach had resulted in damage that could be quantified. Equitable set off is normally something that would be determined by a court and a court would not order damages unless there is proof of loss that can be quantified. The Tribunal, notwithstanding its expertise, should be careful not to stray into speculation where a court would not tread.

7.3 The Respondents' counsel considered that the situation in this case was more akin to that in Blue Storm than in Yorkbrook and she maintained that it was the tenants themselves who had created the delay in the repair works being carried out by their failure to put the Landlord in funds. The situation here was not one where the work had to be done immediately as it would if there had been for example a burst pipe. It

was a case of gradual dilapidation and not sudden damage. The work was carried out within a relatively short time compared with the overall age of the canopy.

7.4 The Respondents contended that it is unsustainable for the lessees to counterclaim as damages and set off against the service charge demanded the difference between the original costs in 2003 and cost of repair to the concrete in 2007. Any increase in the cost of the work due to inflation should be stripped out of the claim as it is not a legitimate component to claim. Further, there was no evidence before the Tribunal as to the amount of the cost increase that was attributable to inflation.

7.5 With regard to professional fees, the Respondent's counsel submitted that there was no evidence of any agreement that the managing agent would limit the fees of himself and Mr Standon to 5 and 8% respectively. Mr Strickland could not recall discussing professional fees at the meeting with Mr John when it was alleged that the agreement had been made. The Applicants are relying solely on a document which was included in the hearing bundle purporting to come from Godfrey John and partners and dated 3 April 2007 where those percentages had been applied to the cost of "works as per specification of £94,871". Mr John however had denied all knowledge of that document and said in evidence that he would never have agreed those figures. He had no authority to agree to cap Mr Standon's fees in any event.

8. The Adjourned Hearing on 5th January 2010.

8.1 At the adjourned hearing Mr John gave evidence in the form of a witness statement, and Mr Samuels, who had prepared the documents, gave oral evidence as to the demands that had been served on the lessees with regard to canopy works. He relied on a document dated 11th April 2008 as being a valid demand. There was some discussion between the Tribunal and Mr Samuels as to whether indeed this was a demand for the canopy works or merely a statement of account and Mr Martin cross examined Mr Samuels along similar lines. This document included the following wording at the top: "We apply on behalf of Rother District Investments Limited.... for the following....." There then followed a list of items under headings "Demanded", "Received" and "Balance". Amongst these figures was an item for "Canopy contribution: 08/04/2008 for £852 and underneath an item under the "Received" column for "Grant Payment: £383.50."

Below this, under a heading "Terms of Payment" were the following words: "Your payment is requested within 14 days" There then followed the statutory information under Section 48(1) of the Landlord and Tenant Act 1987 and below that was a reply slip saying: "I enclose my payment of £1360.11 for the account of Rother Coastal Properties Ltd..."

8.2 A further demand had been issued on 8th January 2010 without prejudice to the validity of the demand of 11th April 2008.
The copy of the 11th April 2008 document in the papers before the Tribunal did not have with it the prescribed information to the tenant under Section 21 as substituted by the Commonhold and Leasehold Reform Act 2002, but Mr Samuels told the Tribunal that this information is printed on the back of the documents used for this purpose and, indeed, the notice sent out in January 2010 had such information on the reverse side.
In final submissions on the validity of the demands for payment of the service charge for the canopy works, Ms Calder submitted that the document of 11th April 2008 was a

demand for payment and not just a statement of account. She accepted that this demand had not been effected in strict accordance with the terms of the lease but she submitted that the service charge provisions in the lease were complex and extremely difficult to implement. Furthermore, the lessees had over a considerable period of time accepted service charge demands in the form and in the manner that had been effected in this case. The lessees having required the landlord to carry out these repairs, it would be inequitable now to deny the landlord its ability to recover the service charge simply because the landlord had not strictly followed the requirements of the lease which the lessees had hitherto accepted. This was a matter of equity and she invited the Tribunal to exercise its discretion to, in effect, excuse the landlord for not having strictly complied with the lease in this respect.
If the Tribunal was not prepared to do this then she submitted that the demand sent out on 8th January 2010 would cure the defect. It would be necessary for the Tribunal to determine whether there had nevertheless been sufficient notification in writing to the lessees that the costs in question had been incurred and that they would subsequently be required to contribute to them by payment of a service charge, in accordance with Section 20B(2) of the 1985 Act.

8.3 These arguments had been put forward in a skeleton argument received by Mr Martin only the day prior to the adjourned hearing. He therefore requested time to enable him to seek counsel's advice on Ms Calder's argument. She accepted that it had been made late in the day and did not oppose that application. The case was therefore further adjourned but the tribunal, having by this stage heard all the evidence and most of the legal submissions decided that it could deal with these outstanding points of law by means of receipt of written submissions from the parties. The parties agreed to this course of action and further directions were therefore given to that effect.

9. **Further written submissions**

9.1 The further written submissions on behalf of the Applicant were made by counsel, Mr Mark Sefton (who had not been instructed to appear on behalf of the Applicant at the earlier hearings) and were dated 19th February 2010. The Respondent's counsel's submissions were in the form of an amended skeleton argument and were dated 20th February 2010.

9.2 Mr Sefton analysed the service charge provisions of the lease with particular regard to what the Respondent's agent needed to do to comply with those provisions. He demonstrated that they had failed to comply with them and that therefore no valid demand had yet been served. Next he dealt with the Respondent's argument that an equitable estoppel should operate to save the demands. He says this is wrong for two reasons: first, that equitable estoppel can only be used as a "shield" (i.e. defensively) and not as a "sword." The doctrine, where it applies, prevents the enforcement of existing rights but does not create new ones. Secondly, he says that it is wrong to characterise the Respondent's position as responding to a claim and not bringing one. He says that the landlord can only recover the service charge if it has a right of action for it and that here the landlord is asserting that he has a right of action because of an equitable estoppel. Hence, the landlord is attempting to use equitable estoppel to found an action and not defend one. In any event, he says, there is no estoppel here. There has been no representation made by one party which has been acted on by the other to his detriment.

9.3 With regard to Sec 20B of the Act Mr Sefton pointed out that one first has to ascertain the date on which the works were incurred. This could either be the contract date (10th December 2007) in which case the eighteen month time limit would have expired (subject to a Sec 20B notification) on 10th May 2009. Alternatively, it could be the date when the Landlord became obliged to make payment, in which case there is a sequence of dates upon which the sums due would become time barred. He argued that the Landlord had not done sufficient to comply with Sec 20B(2). He submitted that the Landlord has to give notification of the contract sum that the landlord has incurred. This comes from the wording of the section which says that the notification must be of the "relevant costs that are going to be taken into account in determining the amount of the service charge". It is not therefore the amount that any individual is going to be required to pay that the section requires to be notified. Secondly, the tenant must be notified that he would subsequently be required under the terms of his lease to contribute to them (i.e. the relevant costs) by way of service charge. He argued that it was not enough to send a tenant a demand for a "canopy contribution". He argued that this is rather a demand for an immediate contribution of an unspecified proportion of some costs in respect of which the landlord may not, at that time, have incurred a liability. He argued further that the landlord had failed to identify which document it says comprises the Section 20B(2) notification which he says, the Respondent must do if it is to invoke Sec 20B(2).

9.4 The Respondent's counsel's arguments in respect of Sec 20B(2) of the Act were that there is no requirement that notification has to be in a specific form nor that notification be of a specific amount nor that it cannot be given in a series of documents.

10. **The Determination**.

10.1 The Tribunal decided that the document of 11th April 2008 did constitute a demand for payment in law. Whilst it had the hallmarks of a statement of account rather than a demand, it did contain words which made it clear that a payment was being sought and the amount that was being required to be paid was sufficiently clear. A reasonable recipient of the document would have known that they were being required to pay the amount stated on the reply slip at the foot of the document. Although that document is in the Tribunal's opinion a demand, it has clearly not been demanded in accordance with the terms of the lease as the Respondent's counsel accepted. It has not been properly demanded It is therefore necessary for the Tribunal to consider the Respondent's counsel's argument that equitable estoppel could be prayed in aid to save the demand. The Tribunal agreed with Mr Sefton that not only would this involve estoppel being used as a sword and not a shield but the constituents of an estoppel were not present. Nor was the Tribunal persuaded that some vaguer concept of equity could be invoked to overlook the defects and permit the Respondent nevertheless to recover the service charges.

10.2 The Tribunal did not accept that the service charge provisions of the lease were overly difficult to understand or implement. With care and a little effort the lease provisions are perfectly workable. The Tribunal, having considered the arguments of both parties carefully, decided that it did not accept the Respondent's arguments that although not effected as required by the lease the demand was in accordance with accepted practice. If there had been a clear course of action where both Landlord and Tenants had accepted a procedure for collecting service charges in a way not strictly in accordance with the lease then that would have been one thing but in this case there had been a

plethora of demands issued willy-nilly. The whole situation had become very confused and confusing and it was difficult for anyone to follow the managing agent's practice and procedure. If the lease terms are to be departed from, there has to be a limit as to how far this can be taken and, in the Tribunal's view any alternative procedure has to be clearly accepted by the paying party. That is not the case here.

10.3 The Tribunal did consider, however, that the lessees had been sufficiently notified of costs incurred and that the lessees would be required to contribute towards them by way of service charge within 18 months of the date the charges were incurred as provided under Section 20B(2) of the 1985 Act. First, the Tribunal considered that in this case the charges were incurred on the dates when payment was certified as being due from the landlord to the contractor. Next, the Tribunal decided that the letter of 12th May 2008 from the landlord to the lessees and the certified accounts for 2008 which were sent out to the lessees under cover of a letter of 29th May 2009 together constituted sufficient notification to satisfy the section. The letter of 12th May 2008 set out the total estimated costs for the canopy work, the fact that this would be charged to the service charge account for Marine Court residents and that this would be adjusted by the contribution from the commercial units and the local authority grant. They were informed that the final figure would be shown in the certified accounts. The final amount of the total costs was shown in the certified accounts for 2008 which the lessees received in May 2009. Thus, the lessees had been informed of the total costs incurred by the landlord by these documents and had been told that they would be charged their proportion in accordance with their leases by way of service charge. The Tribunal considered that this was sufficient to satisfy Section 20B(2) of the Act. The lessees were not being taken by surprise over 18 months after the costs had been incurred by being asked to pay their share of those costs. The Tribunal did not consider that the section should be so narrowly construed as contended for by Mr Sefton. The Tribunal considered that the purpose of the section is to enable a landlord recover costs incurred some quite considerable time before a demand is made where it does not take the tenant by surprise and the tenant knows that in due course it will be required to pay for or contribute to the cost that has been incurred. In the case of Marine Court, the tenants were also notified of the actual amounts that the landlord was seeking from them in respect of the canopy costs. Consequently, time is no longer running under Section 20B(1) of the Act and, provided the managing agents can use the procedure set out in the lease to claim the basic and additional service charge correctly, they will be able to cure the problem and require the tenants to pay their proportion of the costs of the canopy woks which appears in the certified accounts to December 2008.

10.4 As the Tribunal has determined that at present there is not a valid demand for service charges in respect of the canopy, it could be said that it is unnecessary for the Tribunal to say anything further as to the reasonableness of those charges or to determine the Applicant's case for an equitable set-off. However, the Tribunal recognises that there have already been three days of oral hearing on this matter and both parties have incurred considerable costs to date. Furthermore, the Tribunal does have jurisdiction to determine prospective service charges under Section 27A(3) of the Act.

10.5 The Tribunal does therefore go on to determine that the costs of the canopy repairs as sought and as stated in the 2008 certified accounts were reasonably incurred and will therefore be payable when properly demanded. It accepts Mr Standon's evidence that the original estimate was probably given in ignorance of the true extent of the remedial works required at that time and that it is impossible to say now what the true

extent of the necessary work was then. Although some costs will have increased due to the passage of time, the fact that the tenants have had the use of the money in the interim also has to be taken into account. The Tribunal does not accept the Respondent's arguments that it could not be said that the Respondent was in breach of its repairing obligations because of the gradual deterioration of the state of the concrete rendering it impossible to say at any particular time whether or not the building was out of repair. Nor does it accept the Respondent's arguments that this case is more akin to the Blue Storm case than the Yorkbrook case. However, the Tribunal does agree with the Respondent's counsel that the Applicant has simply failed to adduce any evidence that the landlord's breach has caused it loss and it is not sufficient to say that the Tribunal as an expert tribunal can and should provide a figure for which there is no basis from the evidence. The Tribunal understands and sympathises with the Applicant's difficulties in being able to obtain the necessary evidence but it is for the Applicant to prove its case and the Tribunal finds that it has failed to do so. Finally, the Tribunal finds that there is insufficient evidence of any agreement made by Mr John that the lessees would not be asked to pay more than 5% of the costs for his fees or 8% of the costs for Mr Standon's fees.

10.6 The Tribunal decides that it is reasonable for an order to be made under Section 20C of the Act and so orders. The landlord's managing agent has in the Tribunal's view largely brought this application on itself by initially delaying in proceeding with the necessary work to the canopy when first advised that it was out of repair and then in the confusion created by failing to adhere to the terms of the lease for levying service charges. The length of the hearings and the complexity of the issues to be addressed have been attributable in large part to the, frankly, shambolic state of much of the evidence provided by the Respondent. In any event, the Respondent accepts that there is no provision in the lease for the landlord to be able to recover the costs of these proceedings through the service charge.

Dated this 8th day of April 2010

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D. Agnew BA LLB LLM
(Chairman)