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Residential Property
TRIBUNAL SERVICE

LONDON RENT ASSESSMENT PANEL
LEASEHOLD VALUATION TRIBUNAL

Case Reference: LON/00AN/LSC/2009/0709

DECISION OF THE LEASEHOLD VALUATION TRIBUNAL ON AN APPLICATION UNDER S.27A LANDLORD AND TENANT ACT 1985

Premises:	Latymer Court, 148 Hammersmith Road, London W6		
Applicants / Leaseholder:	(1)	Ernest Shaw	flat 137
	(2)	David Hindle	flat 291
	(3)	Humphrey Cattrall	flat 172
	(4)	John Bennett	flat 150
	(5)	Brian Sampson	flat 114
	(6)	Margaret Sampson	flat 115
Respondent:	Latymer Court Freehold Company Ltd.		
Respondent's Representative:	Mr M Loveday, counsel, instructed by Forsters LLP		
Tribunal:	Ms F Dickie, Barrister (Chairman) Mr J Power, FRICS Mr D Wills		
Date of Hearing:	12th and 13th April 2010		
Date of Decision:	28th May 2010		

Summary of Determination

1. The Tribunal finds for the Respondent in respect of all heads of the application.

Preliminary

2. The Applicants seek a determination under s.27A of the Landlord and Tenant Act 1985 (as amended) ("the Act") of the reasonableness and/or liability to pay service charges. The application was made on 3rd November 2009 and an oral pre trial review

held on 1st December 2009 at which the Tribunal issued directions for a hearing to take place on 12th and 13th April 2010.

3. The Applicants are each holders of the leasehold interest in one of the flats in the subject premises known as Latymer Court 148 Hammersmith Road, London W6 ("the premises"). The Respondent is the freehold company of which leaseholders of 304 of the 375 flat are members, enfranchisement having been completed in June 2003. The lessees of the remaining 71 flats are not members of the freehold company and have no interest in the freehold of the premises. The premises have been the subject of a number of previous applications to the Leasehold Valuation Tribunal. Most recently, the works referred to in this decision at the "windows project" were the subject of application LON/00AN/LSC/2008/0471 and the decision of the Tribunal dated 11th July 2008 that the cost of the windows project were recoverable as a service charge under the terms of the leases of the flats.
4. Since enfranchisement the managing agent had been John Mortimer Property Management Ltd. until replaced by Willmotts on 15th March 2010. Three Applicants – namely Mr Shaw, Mr Hindle and Mr Cattrall are former Directors of the Respondent company whose office terminated after an Emergency General Meeting on 3rd November 2008 and subsequent poll vote. Mr Bennett resigned as a Director on 5th August 2009. The source of this dispute are new decisions made by the newly elected Directors after the EGM.

The Premises

5. The premises are a 1930s mansion block of 375 flats plus shops at ground floor level on Hammersmith Road, together with associated roadways, footpaths, garages and refuse sheds, and a self-contained former sports hall known as the Judokan. The Tribunal inspected the premises on the morning of 12th April 2010, before the commencement of the first day of the hearing. The Tribunal found the construction and condition of the block to be as described by the previous Tribunal's decision in case LON/00AN/LSC/2008/0471:

> "The property comprises a substantial and purpose built series of blocks, with the front elevation of the principal block facing onto Hammersmith Road. All blocks are of brick / concrete construction under mansard roofs covered with plain clay tiles. They were evidently constructed in the 1930s. This block is 9 storeys high, with commercial/retail accommodation on the ground floor and flats over.

Natural lighting to the flats is by means of ungalvanised and single glazed steel casement windows. Over the common staircases to, principally, the main front elevation, the windows are set within splayed, projecting bays under flat roofs. The aprons beneath the windows being formed with metal sheeting. The accommodation at the uppermost level is formed with a Mansard roof, with the windows being set within timber-framed dormers. To the rear of this block and separated from this by a service road, is a further large block. This is arranged around a series of five courtyards which are well landscaped. Access to the upper floors of the blocks is by means of both lifts and common stairs from a number of locations on both front and rear elevations .... many of those windows ... were affected to greater or lesser degree by corrosion of the frames and casements, chiefly to the cills and horizontal members and around the hinge fixings. This corrosion had advanced to such a degree in many cases that lamination and expansion of the metal-work had occurred with associated cracking of the glass in the glazing".

6. Archways connect the principal block on Hammersmith Road to the rear blocks that are arranged around courtyards. Construction of the archway soffits is understood to be render reinforced by concrete on steel hangers. The Tribunal furthermore observed that scaffolding had been erected on all elevations to the blocks of flats and commercial premises to first floor level. There are three large boilers providing heating to all 375 flats, shops and other areas within the premises and three smaller boilers providing hot water for the domestic hot water system.

The Law

19. *Limitation of service charges: reasonableness.*

(1) *Relevant costs shall be taken into account in determining the amount of a service charge payable for a period—*

(a) *only to the extent that they are reasonably incurred, and*

(b) *where they are incurred on the provision of services or the carrying out of works, only if the services or works are of a reasonable standard; and the amount payable shall be limited accordingly.*

(2) *Where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable, and after the relevant costs have been incurred any necessary adjustment shall be made by repayment, reduction or subsequent charges or otherwise.*

The Leases

7. "The Building" is defined by reference to the freehold interest in the premises known as Latymer Court registered under Title Number NGL490481. Clause 3(3)(f) provided for payment of interim service charges in advance, and 3 (3)(g) for a balancing charge or credit on preparation of the service charge accounts at the year-end.

8. Each of the Applicant's leases contains at clause 5(a)(2) an obligation on the Respondent to:

> *maintain repair and redecorate and renew such part of the main structure of the Building as shall include the main brick and brick like fabrics of the roof and foundations of the Building the common parts of the Building and the exterior of the building including the windows and window frames (other than glass) and all other parts of the Building (other than those parts of the Building as are hereby demised.*

The Third Schedule - Costs Expenses Outgoings and Matters in respect of which the Lessee is to make a Contribution – defines the service charge contributions by reference to the Lessor's expenditure on the Building, including the cost fuel for the supply of heating and hot water serving the Building and the cost of maintaining repairing and where necessary replacing the whole of the heating and domestic water systems serving the Building. Paragraph 14 provides:

14 THE cost so far as the Lessors shall deem it impossible to recover the same from the Lessee or Lessees concerned

a. OF enforcing covenants against any and all such lessees and

b. IN connection with the recovery of rent and maintenance contributions from any and all such lessees

.....

19 The reasonable and proper fees and costs (including legal fees) of the Lessor's agents (which may be a company connected or associated with the Lessor) or the Management Company for the collection of rents and service charge of the flats in the Building and for the general management of the Building but not including fees charges expenses or commissions on or in connection with the letting or sale of any other flats in the Building.

The Hearing

9. The parties did not object to the constitution of the Tribunal containing Mr Power and Mr Wills even though each was understood previously to have sat on a Tribunal of the Residential Property Tribunal Service with Mr Loveday, counsel for the Respondents and also himself appointed as a Chairman on the Southern Panel of the RPTS. At the pre trial review the Applicants withdrew their application relating to the 2010/11 service charge year. The items disputed are more conveniently arranged according to a description of the expenditure than by the year charged:

    i. Judokan Service Charge arrears
    ii. Flat 323 legal costs
    iii. Proposed major works including window replacement
    iv. Protective scaffolding costs
    v. Underpass scaffolding costs
    vi. Cancellation of boiler house repairs

10. The Applicants' case was presented by the first Applicant, Mr Shaw (a retired quantity surveyor) and the Tribunal heard evidence from the second Applicant Mr Hindle, himself a retired civil engineer. Ms Naila Nanji, leaseholder of flat 194 and a Director of the Respondent company since 11th January 2006, gave evidence for the Respondent. The Tribunal was provided with a substantial number of documents contained in 7 large bundles and totalling over 2,500 pages. It advised the parties that they must draw to its attention any particular document on which they relied. The Tribunal was surprised at the relatively small number of documents referred to by both parties.

Judokan Service Charge arrears

11. By clauses 1.1 and 3.1.2 of the Judokan lease the tenant agreed to pay by way of a service charge *"a fair and reasonable proportion of the aggregate of the costs and expenses incurred by the landlord in providing the Landlord's Services."* Clause 5.2 defines those services as including *"the supply of hot water to the hot water taps and between 1st October and 30th April hot water to the radiators in the Premises..."*. The Judokan has historically been charged .65% of the cost of boiler maintenance, though this proportion is not specified in the lease, and the leaseholders' contributions are calculated on the remainder.
12. The current leaseholder of the Judokan is Ring Properties Ltd, who purchased in 2006. The Judokan has been unoccupied throughout the period since, and no hot

water has been supplied to its hot taps or radiators. Ring Properties Ltd. disputed liability to pay a service charge in respect of the boiler and heating costs in these circumstances, and in any event that it was liable for any other service charge costs (including estate maintenance). All service charges that have fallen due since 1st February 2006 had been demanded and are in arrears in the sum of £28,375 to the end of September 2009. The Applicants object that this substantial debt has been written off by the Respondent in the certified service charge accounts issued by the managing agent dated 15th January 2010.

13. The accounts for Latimer Court are prepared on an accruals basis. Mr Loveday submitted that whether the commercial lessees have paid their bills is a contentious issue for leaseholders as the landlord carries over any deficit to the following year's service charge. In the case of any default in respect of service charge contributions from the leaseholders of the shops and the Judokan, the service charge account would be in deficit and an invoice issued to all leaseholders for that amount. There was no dispute by the Applicants as to the Respondent's accounting method and entitlement to issue such an invoice for a balancing charge in these circumstances. However the Applicants considered there was insufficient reason for the Respondent to have written off the debt since (referring to the terms of the Third Schedule) it was not impossible to recover it. Accordingly they argued that service charges in respect of the deficit, invoiced to leaseholders, were not reasonably incurred. Neither party to the Judokan lease had sought to exercise a right contained in clause 4.6 allowing the landlord or leaseholder to terminate the terms as to provision of the landlord's services.
14. The Respondent relied on evidence of service charge demands and correspondence from its solicitors to the Judokan leaseholders. There had also meetings with Ring Properties Ltd. to discuss the situation. The Respondent produced various written advices from their solicitors from 2009 stating that recovery was "far from straightforward", that recovery was "doubtful" and "unlikely to be imminent" and that "there was no point going to court as the situation was not at present winnable".
15. Ms Nanji observed that the landlord had at all times taken advice from solicitors and the managing agent regarding the recoverability of service charges from the Judokan. She explained that it was the managing agent John Mortimer who (having received notice to terminate his contract from the Board on 12th December 2009) had taken the decision, without the Board's knowledge or authority, to write off this debt and have

the service charge accounts for the year ending September 2009 certified without consultation with the Directors. However, the Board had been advised that now the accounts had been produced the deficit (which included not only the Judokan arrears but also £25,000 in unreconciled amounts with the company accountant Nicholas Ridge, which the agent had also written off) must be invoiced to the tenants. The Tribunal was informed that the landlord had instructed new solicitors who were taking steps to seek to recover the Judokan service charges according to the terms of the lease. Any such money recovered would reduce the debt applied to the service charge account.

16. Mr Loveday argued that a deficit charged to the leaseholders as a result of sums written off is not a "service charge" or "relevant cost" within the meaning of s.18 of the Act, which provides that those costs must relate to "services, repairs, maintenance, improvements or insurance or the landlord's costs of management". He submitted that a shortfall on another lessee's service charge account (even a commercial lessee) does not fall within any of these heads of cost and the Tribunal does not have jurisdiction in relation to it.

Determination – Judokan

17. There was no dispute between the parties that the leaseholders' service charge liabilities extended to the entire expenditure on the freehold building, including the commercial premises, and that the Landlord properly calculates that expenditure net of service charge contributions in respect of the commercial leases. The Tribunal was not persuaded that any shortfall on such contributions recovered from the residential lessees was not a service charge, and is satisfied that it does fall within the definition of s.18 of the Act.

18. Whilst the Judokan lease requires the Landlord to maintain the access roads, there is no express corresponding obligation on the lessee to contribute towards their maintenance. The Tribunal questions, however, the completeness of the Respondent's previous solicitor's advice as to the recoverability of service charges for the costs associated with the provision of heating and hot water, notwithstanding that those services for the time being were not being provided. Nevertheless, the issue raised by the Applicants is whether the Respondent has acted reasonably in failing to take more affirmative steps with regard to recovery of these service charge arrears, and instead writing off the sum with the consequent liability to leaseholders. Paragraph 14 of the

Third Schedule is not relevant as it relates only to recovery of costs of enforcing covenants or recovering rent and maintenance contributions from other lessees.

19. The Tribunal is satisfied that the Respondent's then Directors did no more and no less than act in accordance with their solicitor's advice in failing to pursue the Judokan arrears. The Tribunal concludes such a course of action was reasonable and, having heard Mrs Nanji's evidence, that the current Board did not sanction or approve the writing off of this debt. New solicitors have been instructed in respect of the matter and no doubt will clarify for the Respondents whether further steps are advisable at this stage.

Flat 323 Legal Costs

20. The tenants of Flat 323 disputed certain service charge liabilities during 2006-2008 and, having fallen into service charge arrears, proceedings were issued in the West London County Court in May 2008 by solicitors then acting for the Respondent, prior to the EGM and change of Directorship. The then Directors had decided not to settle the claim in response to advice from that solicitor, and referred to their successful policy vigorously to pursue arrears. Those proceedings were settled by the new Directors on terms which did not include recovery of the solicitor's costs of £6,512.27 in the year 2007/08 and £1074.38 in the year 2008/09, sums which were added as service charges payable by the lessees in general in each of these years.
21. There was no dispute between the parties to the present dispute as to the liability of the lessees of Flat 323 to pay service charges and that the solicitor's costs were reasonable. The Applicants argued that the Respondent had acted unreasonably in reaching such a settlement. They considered a precedent had been set of which other leaseholders would become aware. The leaseholder of flat 323, Ms Davies, is a solicitor and was at the material time, and apparently for a short time only, a Director of the Respondent company. Ms Davies absented herself from that part of the meeting of the Board when the decision was made to settle her claim.
22. In essence the Respondent's position was that it had acted at all times on professional legal advice and Mr Loveday referred the Tribunal to various advices in correspondence from the solicitor to the effect that it was not cost effective to pursue this small claim further. The solicitor did not advise whether or not in the small claims jurisdiction the legal costs could be recovered under a clause of the lease.

Determination Flat 323

23. The Applicants produced no evidence of impropriety or bad faith on the part of the new Directors and Ms Davies, and any such inference was oblique at best. For the avoidance of doubt, the Tribunal was not persuaded that there had been a breach of trust or impropriety on the part of the Directors in respect of the decision to reach the aforementioned settlement.
24. Regardless of the completeness of the previous solicitor's advice, the Tribunal considers that the Board members acted reasonably in seeking and following professional legal opinion. That the previous Directors had taken rigorous action in respect of arrears did not affect the fact that a solicitor advised that the costs incurred could not be recovered from the leaseholder through legal proceedings. In the face of this advice there was little the Respondent could reasonably do but settle on the recommended terms. The costs are recoverable through the service charge under paragraph 14 of the Third Schedule to the leases.

Windows Project

25. Under the direction of the previously appointed Board, a major works project ("the windows project") involving maintenance and window replacement was proposed and consulted upon according to s.20 of the Act. The first statutory notice (the "Notice of Intention" was served on the leaseholders dated 1st August 2007. Tenders were obtained in July 2008 and the second statutory notice (the "Notice of Estimates") was dated 3rd September 2008. A contractor (Triton Restorations) was identified and the project was due to commence on 6th January 2009. The estimated costs were approximately £4,500,000 and were included in the 2008/09 service charge budget. The Managing agent John Mortimer issued invoices dated 1st October 2008 for the first payment due on the estimated costs, some of which were paid. Works to make the windows safe were to be part of the contract. The project was controversial amongst the leaseholders, however, owing to its cost.
26. Before a meeting with leaseholders planned by the Respondent for 9th October 2008 could take place, an Extraordinary General Meeting of the company was called by petition of the members at which a resolution was passed to postpone the windows project until a review of it was undertaken by a new Board. No notice was given to leaseholders of the decision or that the invoice had been withdrawn. Upon a poll of

around 80 leaseholder members after the EGM the decision was taken to remove 3 of the existing directors, including Mr Shaw and Mr Hindle.

27. In a report dated 12th June 2009 the new Directors concluded that the project as proposed was indeed the best and cheapest option available, and that correct tendering procedures had been followed. At a meeting of the lessees on 29th June 2009 a programme of works, modified only slightly, was agreed. Nevertheless, the decision was taken to retender the work and a further Notice of Intention dated 6th July 2009 was served on the lessees.

28. Mr Shaw argued that it was improper of the landlord to suspend the windows project as the result of a decision of a majority of member leaseholders, voting out of self-interest as service charge payers, without consulting the leaseholders in general. By the date of the hearing the windows project had been re-tendered and estimates produced, apparently at lower cost, and work was scheduled to begin in July 2010 – 18 months after they had been scheduled to begin. Mr Hindle did not consider it was reasonable to review the windows project. In his view the decision was unreasonable on safety grounds, because the work was necessary, the scheme devised was the best option, and the decision to review was improperly made by the company members thinking of their pockets.

29. The Applicants contended that the decision to suspend, review and retender the project had caused excessive delay and, far from resulting in a cost reduction for the leaseholders, had caused additional costs to be charged to the service charge account. Mr Shaw produced a schedule showing his estimate of additional costs incurred as a result of the delay in the programme of works. He sought to show that any notional savings on the contract price had been absorbed by additional costs occasioned by the delay. He estimated additional costs such as fees of the agent on the retender. He also adjusted the contract prices for the loss of opportunity to pay VAT at 15% prior to 31st December 2009, for an anticipated increase in VAT to 20%, for the amendments to the specification agreed prior to retendering (principally the removal of solar glass), and for additional scaffolding, legal and consultancy costs during the delay. His calculations brought the revised windows project costs to within a small margin of those that would have been incurred in contracting Triton Restorations. Under cross examination, Mr Shaw agreed the Respondent's figures for the cost of Watts' services, for solicitors and for interim scaffolding associated with the review and retendering.

30. The Applicants contended that the issue of s.20 notices to the lessees and payment thereon constituted a contract binding the Respondent to proceed with the window project as consulted upon.

31. Ms Nanji said she had the impression at the time of a great sense of dissatisfaction at Latymer Court with the proposed window programme. The EGM was called by a petition, necessarily of the members. The members are 82% of the leaseholders and accordingly she did not feel that the landlord should have canvassed the decision to suspend the programme with the leaseholders in general. Ms Nanji gave evidence that on 19th November 2008 at the first meeting of the Board after the EGM on 3rd November 2008 they resolved to take the advice of the Council and instruct surveyors Watts PLC to carry out a risk assessment immediately. That risk assessment was dated 3rd December 2008 and the Board acted upon is recommendations.

32. Ms Nanji gave evidence that during the period from suspension to the decision to retender, a questionnaire was issued to tenants asking for their opinion on a number of cost saving options. The Board was looking at various issues regarding the timing of the contract, and ways in which the financial burden on the lessees might be less (such as doing the front elevation first, or leaving the courtyard windows until last). Watts had quoted £5,900 to re-tender, and had been asked to make resulting changes to the specification (principally removing the specification of solar glass). Mr Webster was the Director in charge of the re-tendering process, and was meeting regularly with one other director and with Watts, in between monthly Board meetings. Mrs Nanji considered that the directors were at the mercy of Watts in moving this matter forward, and that there had been some delays over the summer caused by Watts once the report on the review had been issued. Watts, she emphasised, had advised that the contract should be retendered. Leaseholder contributions of £72,000 in respect of the invoice already issued for the windows project had been received and no refund requested. That money was being held in trust for those leaseholders and would be applied against their costs of the new contract. Scaffolding costs for the current year have been paid from the general service charge account and not from these leaseholders' contributions.

33. Mr Nanji confirmed that the Respondent's solicitors had advised new statutory consultation should take place in light of the modest alterations to the scheme of works. The Respondents disputed that safety and cost grounds constituted a reason why the project ought not to have been suspended. Mr Loveday argued that Mr

Shaw's projected costings were highly speculative. The figures for legal costs, for example, were based on the entire annual service charge expenditure in the year 2008/09 under that head, and not solely on the windows project.

Determination – Windows Project

34. Latymer Court has the benefit of a significant number of able and professional leaseholders who have done or now do take responsibility as members and Directors of the freehold company for the management of the estate. Mr Shaw and Mr Hindle, by virtue of their professions, were well qualified to take the lead on the complex windows project, on which they had been working without remuneration since 2005. They had clearly done a proficient and thorough job of preparing the reasonably costed windows project. The very size of the bill however was sufficient to cause discontent amongst the leaseholder members of the company, who appear to have been suspicious about the size of the £4.4million contract. The Tribunal's view, and all of the evidence including that contained in the review clearly demonstrates that the previous Board had acted properly and in the best interests of the tenants. That review subsequently confirmed that their scheme of works was indeed the most appropriate for Latymer Court.
35. Rather than receiving the gratitude of leaseholder members, however, members of the Board received their disapproval. This, doubtless, caused those Directors offence, and being sure that they had adopted a robust and reasonable administration of the project, they disputed the rationality of the alternative approach to its management (namely suspension, review and retendering). However, the Tribunal was not persuaded by their reasoning.
36. Pursuant to section 19(1)(a) of the Act service charges may only be recovered for amounts that have been "reasonably incurred". Had the windows project proceeded and concluded as planned and budgeted by the previous Board, those costs would have been recoverable as reasonably incurred. Indeed, the decision of the Tribunal in case LON/00AN/LSC/2007/0491 is to this effect. However, this does not mean, and cannot mean, that service charges incurred on any alternative management approach could not also be reasonably incurred: there may well be more than one reasonable approach. In this case, there was clearly discontent from a highly significant number of tenants (who were also members of the company), such that they took a radical step

in removing the directorship to force the project to be rethought. The new Directors reasonably took the strength of feeling into account.

37. The Tribunal is conscious that the new Directors did not have equivalent depth of experience of the project, or professional knowledge to help them. Theirs was an unenviable task. It is almost inevitable that the project would have experienced delays at this point. In a project of this size and cost, and in the circumstances, it was in the view of the Tribunal reasonable that the Directors should decide to review the options for the windows project to satisfy themselves whether there were other options more economical and acceptable to the tenants.

38. The new Directors who took the burden of responsibility for the management of the estate did what, in this Tribunal's view, they ought properly to have done in obtaining and relying on the advice of professionals including solicitors, surveyors and the managing agent. Simply selecting the most cost effective option is not necessarily the most or only reasonable course in any given situation. In this case, the leaseholders having been given a choice on some options that presented modest cost savings, their approval was obtained at the meeting of 29th June 2009 and this was clearly of some practical significance in moving the project forward. The obtaining of new tenders can reasonably be considered consequent on there being an amended scheme.

39. The Tribunal considers that the decision to retender the project reasonable in the circumstances. In this matter the Directors again acted on professional advice to take advantage of a perceived reduction in building costs. The lower cost of the new tenders vindicates to a degree this decision. The Tribunal was not persuaded that Mr Shaw's analysis of the expected costs was robust. Some of his estimated interim costs (legal £39,000, consulting £46,000 and scaffolding £69,000) were demonstrated to be substantially inaccurate, and the inclusion of VAT at 20% was not justified. It is unnecessary for the Tribunal to address in more detail its opinion on the items of projected costs in Mr Shaw's schedule. The decision to retender was reasonable. Even were that not so, the Tribunal considers that the new tenders represent a genuine saving to tenants and the Respondents could not at present demonstrate any increased service charges occasioned by the decision to suspend and retender.

40. The s.20 consultation procedure and payment of an invoice does not in law constitute a contract to proceed with the work. The contractual relationship between landlord and tenant is contained in the lease and the landlord's obligations to carry out works

within the repairing covenants therein. There is no legal principle prohibiting a landlord from fresh s.20 consultation on an amended project of major works.

Protective Perimeter Scaffolding

41. As a result of the suspension of the windows project, the risk assessment thereafter and at the insistence of the insurance company, temporary protective scaffolding was erected in February 2009 along the Hammersmith Road elevation of the premises in the first instance and ultimately in July 2009 to the remaining elevations. The Applicants accepted that the cost of this scaffolding at £17,000 per month was reasonable. They argued that the Respondent should be responsible for the cost of this scaffolding for the 18 months over which it was forecast to be required (assuming the works began in June 2010), and that it was partly irrecoverable for failure to carry out s.20 consultation thereon. Mr Loveday and Mr Shaw agreed the actual protective scaffolding costs incurred for the service charge year 2008/09 to be £69,622 as stated in service charge accounts. For the service charge year 2009/10 the Respondents had receipted invoices for the scaffolding to 16th December 2009 which amount to £13,497.10, with no figures being available for the costs after 16th December 2009.
42. Mrs Nanji explained that protective scaffolding costs were not included in the 2009/10 service charge budget and leaseholders would therefore be charged the actual costs on a historical basis. She advised, but could not produce documentary evidence, that the Board had renegotiated the cost of scaffolding from £16,000 per month to £10,000 per month from March 2010 until the start of the contract for the replacement of the windows. From that point the contract for protective scaffolding would be taken over by the contractor (and there would ultimately be a reduction in the contract price to reflect the saving of £6,000 per month to the contractor in maintaining the protective scaffolding contract).

Determination – Protective Perimeter Scaffolding

43. By virtue of Regulation 6 of the Service Charges (Consultation etc.)(England) Regulations 2003 consultation is required under s.20 when the contribution of any tenant would exceed more than £250. Neither party had any evidence of the highest percentage service charge contribution of any leaseholder. The Tribunal could not therefore determine at what total expenditure s.20 consultation was triggered. The

freeholder company had always applied a figure of £93,750 as the ceiling for service charge recovery without consultation, of which the highest contribution of a leaseholder would be approximately £450.

44. The Applicants offered no threshold figure based on the agreed costs incurred for the scaffolding. The burden of proof was on the Applicants to demonstrate their case. There was insufficient evidence upon which the Tribunal could conclude that the appropriate amount in Regulation 20 had been exceeded. Furthermore the Tribunal is satisfied that the contract for perimeter scaffolding was not for a term of more than 12 months, and was not therefore a qualifying long-term agreement.

45. In any event, were it exceeded the cost per flat above £250 would be negligible and this is certainly a case in which, subject to consideration of any representations from leaseholders, the Tribunal would have been minded to dispense with statutory consultation. The scaffolding was urgent and once erected the consultation upon the cost of replacing it with that of another contractor would have been unrealistic (and may have jeopardised insurance cover). In the Respondent's Statement of Case it was observed that all or part of the cost of scaffolding would in any event have been incurred had the original window repair scheme proceeded early in 2009. Scaffolding costs had formed part of the specification of works and when erected it was not known whether the scheme would proceed as consulted upon. However, the Tribunal was not asked to consider whether the previous s.20 consultation was sufficient to cover the protective scaffolding.

Underpass Scaffolding

46. The rendering and hangers to the underpass between courtyards 2 and 3 suffered a sudden and major collapse on 4th July 2009. Security scaffolding was erected on 7th July and work scaffolding on 27th July. A previous such collapse had occurred 15 years ago but the Respondent used an altered design in the repairs using timber on steel hangers. A specification for the work was relied on at the hearing but the Respondent was unable to produce a copy of the contract. Quotations were obtained in October 2009 and works estimated to take 6 or 10 weeks in fact finished on 20th January 2010. The repairs after the previous such collapse had been completed in much less time.

47. It was the Applicants' case that the Respondent had taken an unreasonably long period of time to complete these relatively straightforward repairs, and that additional scaffolding costs of £19,000 occasioned a 15 week delay.

48. Mrs Nanji gave evidence that the matter had been left in the hands of Watts, who had surveyed all the underpasses and advised that all the soffits should be replaced. The service charge budget did not provide for this work. Tenders were obtained and evaluated in October 2009 and the contract awarded to Medway Building Maintenance Limited at the end of that month. Work could not commence until 23rd November because parts had to be ordered and were anticipated to end on 6th January but were ultimately completed on 29th January.

Determination - Underpass Scaffolding

49. The lengthy scaffolding hire was caused in part because it had to be erected forthwith, but the repair work was delayed due to a number of reasons including funding and delays in obtaining a suitable quote from a builder. That previous repairs to one underpass soffit had been completed more expeditiously does not necessitate a conclusion that these works were delayed unreasonably and the landlord culpable. What is reasonable depends on the particular circumstances at the relevant time. The Tribunal accepts the Respondent's evidence of the history of this matter. Once again, the new Board properly relied on appropriate professionals in dealing with this matter. Having had the opportunity to hear that evidence, the Tribunal was satisfied that the landlord acted reasonably in progressing these emergency measures and full repairs.

Boilers

50. Latymer Court's 70 year old boiler house was considered by the previous Directors to be in need of modification and at risk of eventual collapse. The Applicants considered boiler maintenance costs amounting to 22-25% of the annual service charge to demonstrate the need for a new system. A specialist Heating Consultant was said to have carried out a detailed survey of the existing system and presented to the Landlord a complete proposal package for the redesign of the boiler equipment, piping and control systems modernisation to install heat exchangers. Drawings, specifications, programmes and draft costings were prepared to carry the work out

over 3 service charge years. The parties advised the Tribunal that none of the documentation was within the extensive bundles before it.

51. The first phase of the work was carried out during the 2007/08 service charge year. The second phase was due to take place during the service charge year 2008/09 and the estimated sum of £415,105 was included in the budget for that year. Statutory consultation notices on the second phase had been issued on 24th October 2008, shortly before the EGM. The new Directors decided to cancel the project.
52. Neither party sought to adduce expert evidence of the condition of the boilers, the works necessary and the costs of delay. Though a heating engineer's report obtained by the previous Board was referred to, neither party identified it as being within the documents presented to the Tribunal. In particular, there was no evidence to demonstrate the cost savings anticipated by changing the boiler.
53. The Applicants considered that the decision to cancel the project was unreasonable, particularly given the past and projected maintenance costs for the boiler, which in 2008 were £165,000 and in 2009 were £81,000. They argued that the cost of future boiler maintenance would not be recoverable as a service charge as it would not have been reasonably incurred. They also argued for a set off in respect of additional heating costs incurred in using the inefficient existing boiler system.
54. The Respondent argued that it was not guaranteed there would be no maintenance costs with a new boiler. A meeting of 2 directors (one being the Applicant Mr Bennett), with a Mr Parish of ES Consulting, the estate manager, managing agent and maintenance supervisor concluded that the modernisation of the boiler house was not absolutely necessary.

Determination regarding Boiler works

55. The previous Directors clearly took a long-term view of the potential benefits to the leaseholders in undertaking modernisation of the boiler system. The new Board were balancing this against the short-term financial burdens on the leaseholders owing to the windows project. In essence, the Tribunal considers both to be within the range of reasonable judgments. The Respondents have not acted unreasonably in cancelling, or cancelling for the time being, costly works and deciding instead to continue with the maintenance responsibility for the ageing boiler systems.

56. The Tribunal accepts the Respondent's argument that the decision to cancel the works was made with the assistance of competent and experienced professional advisers who concluded that the project was desirable but not essential at present. Furthermore, the Applicants have failed on the evidence to demonstrate any quantifiable loss to the lessees of the decision to cancel the boiler project.

s.20ZA application

57. The Respondents had indicated an intention to make an application under s.20ZA of the Act for dispensation from the statutory consultation requirements. The Tribunal in any event has a duty to consider s.20ZA in any such case. Observing that such an application had not been served on all the potential Respondents to it (Reg 5 of the Procedural Regulations not having been complied with), the Tribunal decided it would not hear such an application at this stage but would instead have made directions for its determination should that prove necessary. The Respondents withdrew their s.20ZA application, without prejudice to their right to issue such an application if relevant after this determination of the Tribunal. In the circumstances and given the Tribunal's reasoning above, such an application is not necessary.

s. 20C application

58. The Respondents have succeeded comprehensively in resisting this application. Accordingly the Tribunal declines to make an order under s.20C limiting the Respondent's right under the lease to recover the costs of these proceedings through the service charge account, if permitted by the lease.

Signed .....

Dated 28th May 2010