7678

H M COURTS & TRIBUNALS SERVICE
LEASEHOLD VALUATION TRIBUNAL

In the matter of Section 27A of the Landlord & Tenant Act 1985 (Service Charges)

Case Number **CHI/00ML/LIS/2011/0083**

PREMISES: **75 Queens Park Road, Brighton, East Sussex, BN2 0GJ ("the premises")**

B E T W E E N :-

Adrian Anthony Marmont

Applicant

and

(1) Sarah Daltrop
(2) Gregory Sinden
(3) Adrian Anthony Marmont

Respondents

TRIBUNAL: Mr H D Lederman
Mr J B Tarling MCMI
Mr A O Mackay FRICS

HEARING: 7th February 2012

Representation Mr Dave Moore, Simon Royall and Sarah Le Surf of Oyster Estates for the Applicant
Gregory Sinden and Ms Charlie Taylor for Flat 3
Ms Sarah Daltrop Flat 2 (for some of the hearing)

DECISION

1. £12,035.98 would be a reasonable sum payable in advance to be apportioned between all lessees for the service charge year 2009, if validly demanded.

2. £7622.07 would be a reasonable sum payable in advance to be apportioned between all lessees for the service charge year 2010, if validly demanded.

3. £7625.00 would be a reasonable sum payable in advance to be apportioned between all lessees for the service charge year 2011, if validly demanded.

4. £8571.00 would be a reasonable sum payable in advance to be apportioned between all lessees for the service charge year 2012, if validly demanded.

5. The Tribunal orders that none of the costs incurred by the Applicant Landlord in connection with these proceedings are charged to service charge

6. The Tribunal declines to make an order reimbursing the Applicant the hearing fee and the application fee.

REASONS

1. The Applicant landlord asked the Tribunal to make a determination under the provisions of section 27A of the Landlord & Tenant Act 1985 ("the 1985 Act") in relation to service charges for 2009, 2010, 2011 and 2012 in respect of leases of the building known as 75 Queens Park Road Brighton East Sussex BN2 0GJ ("the premises") divided into 3 residential flats. Initially the Applicant in addition sought determination of service charges to be demanded in the service charge years 2013, 2014, 2015 and 2016 but withdrew that part of the application during the hearing. There was also application by Mr Greg Sinden for an order that costs incurred by the Applicant in connection with the hearing before this Tribunal should not form part of service charges recoverable under the Leases from any of the Respondents, pursuant to section 20C of the 1985 Act and an application by the Applicant for reimbursement of the hearing and application fees.

Parties

2. Greg Sinden is the lessee of Flat 3 the top flat at the premises and Ms Sarah Daltrop is the lessee of the middle flat (Flat 2). As well as being the landlord of the premises, the Applicant is a joint lessee with Deborah Marshall of the ground floor flat. The Applicant was named as a Respondent as well as being the Applicant. The Applicant is a builder by occupation trading as "Adrian Marmont Construction" and held himself out as an experienced and substantial award winning builder and designer in the Worthing and Brighton Area. He said he had contracts for local authorities and was a member of the Federation of Master Builders. Neither the Applicant nor Deborah Marshall resides in the ground floor flat; nor have they done so. It is tenanted. Greg Sinden and Charlie Taylor have resided in Flat 3 and Ms Daltrop resided in Flat 2 at all relevant times. The Tribunal heard evidence that Ms Daltrop had in the past suffered from illness which might lead her to be classified as a "vulnerable" person within the meaning of the Improvement Notice served by Brighton and Hove Council dated 9th November 2011.

Directions, Bundles attendance and evidence

3. On 2nd November 2011, the Tribunal gave detailed directions for the filing of a narrative statement referring to any specific clauses in the Lease, documents, including service charge accounts, and service charge demands (and supporting Summary of Information for 2009-2011).

4. The Applicant filed an 8 page "Written narrative" and a 278 page bundle ("the Applicant's hearing bundle"). In addition the Applicant filed a copy of the Counterpart Lease of Flat 1 (dated 16th July 2004, 125 years from 25th March 2005) and a 42 page bundle containing the Applicant's proposals (described as Estimated Budget reports) for each of the service charge years in issue. The Second Respondent filed a 35 page bundle. References to page numbers in square brackets in these reasons are to the Applicant's hearing bundle unless stated otherwise. All parties proceeded on the basis that the Lease of Flat 1 was typical of the lease of all 3 flats.

5. Sarah Daltrop attended the hearing and gave evidence until about 12.10 pm when she left without giving any reason or seeking an adjournment. Also in attendance were the Applicant (who gave evidence), Bruce Byrne described as a legal adviser (not a solicitor or legal executive) to Greg Sinden and David Sinden the father of Greg Sinden. Neither Mr Byrne nor Mr David Sinden gave evidence or made submissions, nor were they named as representatives.

The main issue

6. The principal issue raised by the application made on 27th October 2011 in respect of all service charge years was the raising of funds by way of service charges for major repair works to the front and rear elevations of the premises described in detail in a report by RG Wigmore of Philip Goacher Associates Consulting Civil and Structural Engineers dated 29th August 2009 [29-34]. There were subsidiary issues as to the recovery of various heads of costs alleged to have been incurred for each of the service charges years 2009, and 2010 2011 and 2012.

7. As no demands or invoices or any supporting statutory summary of rights for any relevant service charge years had been included within the Bundle in evidence by the Applicant, the Tribunal was unable to determine that any sums were payable for any of the service charge years in question. Accordingly, the Tribunal's determination is limited to considering those sums which would be reasonable and payable if demanded in accordance with the relevant Lease and the relevant legislation.

Jurisdiction and relevant legislation

8. The Tribunal has jurisdiction under section 27A(3) of the Landlord and Tenant Act 1985 (as amended) ("the 1985 Act") to consider the amounts which would be payable if costs were incurred for repairs

improvements maintenance or management of any specified description (including whether sums are payable under the Lease). There is also a separate jurisdiction to determine where service charges are payable before relevant costs are incurred what sums are reasonable to be paid in advance. Where a service charge is payable before relevant costs are incurred only reasonable sums are payable and after costs have been incurred an adjustment may be required under section 19(2) of the 1985 Act or under the terms of the Lease, or both.

9. Those costs are costs or estimated costs incurred or to be incurred by or on behalf of the landlord: see section 18(2) of the 1985 Act. There is no jurisdiction for this Tribunal to consider monies payable as ground rent.

10. Section 20 of the 1985 Act in its material parts provides that:

"20(1) Where this section applies to any qualifying works or qualifying long term agreement, the relevant contributions of tenants are limited in accordance with subsection (6) or (7) (or both) unless the consultation requirements have been either -

(a) complied with in relation to the works or agreement, or

(b) dispensed with in relation to the works or agreement by (or on appeal from) a leasehold valuation tribunal.

20(2) In this section "relevant contribution", in relation to a tenant and any works or agreement, is the amount which he may be required under the terms of his lease to contribute (by the payment of service charges) to relevant costs incurred on carrying out the works or under the agreement.

20(3) This section applies to qualifying works if relevant costs incurred on carrying out the works exceed an appropriate amount.

For the purposes of subsection (3) of section 20 the appropriate amount is an amount which results in the relevant contribution of any tenant being more than £250: see article 6 of The Service Charges (Consultation Requirements) (England) Regulations 2003 /1987.

Sections 20(6) and 20(7) of the 1985 Act provide as follows:

(6) Where an appropriate amount is set by virtue of paragraph (a) of subsection (5), the amount of the relevant costs incurred on carrying out the works or under the agreement which may be taken into account in determining the relevant contributions of tenants is limited to the appropriate amount.

(7) Where an appropriate amount is set by virtue of paragraph (b) of that subsection, the amount of the relevant contribution of the tenant, or each of the tenants, whose relevant contribution would otherwise exceed the amount prescribed by, or determined in accordance with, the regulations is limited to the amount so prescribed or determined."

The prescribed amount is £250.00 per lessee.

11. Under section 20ZA of the 1985 Act the Tribunal has power to dispense with all or any of the consultation requirements of the 2003 Consultation Regulations or other parts of section 20 of the 1985 Act. When the Tribunal raised the possible application of the 2003 Regulations with Oyster Estates to the costs of Phillip Goacher, and asked if the Applicant wished to seek dispensation at this hearing they did not take up the invitation

12. It was explained to all parties that the Tribunal has a discretion to accept jurisdiction in relation to some kinds of counterclaim which may be closely related to the service charge or other issue which it is required to determine. Such a counterclaim may also be pursued independently by the lessee in the Courts. Greg Sinden understood this and did not invite the Tribunal to take into account any counterclaim which he might have at the hearing. This should not be misunderstood as a waiver or abandonment of any counterclaim which Greg Sinden may have arising from the issues considered. This ruling should not be taken as fettering the discretion of any other Tribunal.

The Tribunal's Inspection of the premises

13. The Tribunal agreed with the description of the premises as three storey terraced building thought to have been constructed in the late 1800's subsequently converted into 3 self contained flats. The date of the conversion was unclear but thought to have been carried out by the Applicant's father also a builder within the Applicant's lifetime - probably some 20-30 years ago.

14. The Tribunal inspected the interior of each of Flat 1, Flat 2 and Flat 3 and the communal hallway to the building and the exterior rear elevation in the company of the Applicant and Dave Moore and Simon Royall and of Oyster Estates. The front elevation was also seen from the street. The interior of the rear elevation of Flat 3 showed signs of what may have been damp penetration which had been painted over on a temporary basis. The interior of Flat 2 showed signs of condensation on the windows.

15. Some other significant points to emerge from that inspection were as follows. The interior staircase and external windows appeared to be within the demise and front door of flats 2 and 3.

16. Part of the garden was used by Flat 2 and part by Flat 1. The rear boundary garden wall separating the property from the south (referred to in paragraphs 4.8 and 9.4 of the Phillips Goacher report at [32 and 34] was within the part of the Garden used by Flat 1. Photographs of the repair work carried out to that boundary wall since the date of that report apparently by the tenant (Vince) of Flat 1 are found at pages 16- 19 of the Respondent's Bundle. The appearance of that wall when inspected by the Tribunal was similar to the photograph at page 18 of that bundle. Fencing had been put in place. The front elevation of the premises appeared to be in reasonable or good condition in general as indicated in paragraph 3 of the Phillip Goacher report at [30-31].

17. The guttering to the rear addition roof was now missing and not displaced as indicated in paragraph 4.6 of the Phillip Goacher report at [31]. The original sash windows to the front elevation had been replaced by UPVC glazed window units.

The terms of the Lease of Flat 1

18. The following is not intended to be an exhaustive description of relevant terms but highlights some important features. The terms of the demise are set out in the First Schedule. The demise includes doors and window frames (other than external surfaces).The landlord's repairing covenant is at clause 5(5). The main part of that clause relating to structure and exterior is at clause 5(5(a)(i). The landlord's repairing obligations do not extend to those parts of the structure and exterior walls, which are included within the demise of the Flat or any other Flat within the premises. The inference which the Tribunal draws from this Lease is that the window frames demised to each individual flat are not included within the landlord's repairing covenant for this flat or other flats. For the purposes of these reasons the Tribunal finds that the costs of maintenance repair etc of the window frames (apart from

external faces) are not chargeable to service charge but are the responsibility of individual lessees and potentially within the lessee's repairing covenant in clause 4(1) of the Lease of Flat 1.

19. The service charge obligation and scheme is set out is clause 4(4) and the Fifth Schedule. As might be expected the service charge only extends to the cost to the landlord of carrying out its obligations under clause 5(5) of the Lease and "any other cost and expenses reasonably and properly incurred in connection with the Building": see the definition of "the Total Expenditure" in clause 1(1) of the Fifth Schedule. Other items of costs are also included as part of that definition. There is provision for an interim charge on account and a balancing charge to be payable following provision of a certificate: see the Fifth Schedule to that Lease.

20. There is a covenant by the Landlord in clause 5(5)(o) of the Lease " to do or cause to be done all such works installation acts matters and things as in the absolute discretion of the Lessor may be considered necessary or advisable for the proper maintenance safety amenity and administration of the building".

21. Clause 5(5)(p) of the Lease contains a covenant by the landlord to "set aside" such sums of money as the landlord reasonably requires to meet such future costs as the landlord shall reasonably expect to incur of replacing maintaining and renewing items within the landlord's repairing and other covenant.

22. As the Tribunal has not been provided with copies of all relevant Leases and is not able to reach a determination on sums which have been incurred, this summary should not be taken as a finding which binds any of the parties as to their liability for repairs or cost of repairs. It is intended as an indicative outline of the scheme of the Lease of Flat 1 solely for the purpose of determining such sums as are reasonable to demand in advance of costs being incurred or such sums as would be payable if demanded. When the costs have been incurred it may be open to all parties to seek an adjustment under section 19(2) of the 1985 Act or challenge the reasonableness or payability of costs incurred under section 27A of the 1985 Act.

The Phillip Goacher report upon condition and means of escape

23. None of the parties disputed the principal findings and conclusions of that report at [29-34] except those in relation to the rear boundary wall. None of the parties disputed that that the works in the schedule of prepared by Phillip Goacher & Associates in September 2009 at pages

[39-51] were required. It was the cost of the works, when the various parts of the works should be carried out with a view to urgency and spreading the cost that was in issue.

24. That report concluded that the front elevation appeared to have been redecorated in recent years (paragraph 3.1.) The report noted that the rear elevation "seemed to be in extremely poor condition and evidence of general lack of maintenance was noted" (paragraph 4.1.). It was also noted that the building lacked an adequate fire alarm and measure to prevent the spread of fire (paragraph 9.6.).

25. The Tribunal indicated that it regarded this finding with extreme seriousness. It indicated a risk of death or serious injury, particularly in the context of the apparent vulnerability of one of the lessees.

Events following the Phillip Goacher report

26. These may be summarised for the purpose of these reasons. On or about 8th September 2009 Oyster Estates on behalf of the Applicant served notice of intention to carry out works of redecoration remedial repair and fire prevention and attached copies of the Schedules of works [25-55]. On or about 13th January 2010 Oyster Estates on behalf of the Applicant served Statement of Estimates (priced specification) from three contractors Bramber Constructions Limited, Cambridge Building Services and Future Management and Construction [87-122]. The cheapest of these priced specifications was Bramber Construction, producing a price of £36,849.18 (inclusive of VAT) exclusive of "contract administration" and exclusive of Oyster Estates "standard administration charges".

27. There was extensive correspondence with Greg Sinden and Charlie Taylor about the cost of the works. On 9th May 2010 the Applicant produced a written proposal for his organisation (Adrian Marmont Construction) at a cost of £15,098.75 (inclusive of VAT but exclusive of administration charges and supervision) [133-135]. For a variety of reasons this proposal was not accepted by the Respondents.

28. In or about December 2009 Oyster Estates (according to the evidence of Dave Moore) served a Service Charge Estimated Budget report for the service charge year 2010 contained at page 18 of the bundle containing the application.

29. On 20th January 2010 Brighton Council commented upon the schedule of works proposed by Phillip Goacher in relation to fire prevention and the need for the proposed works to comply with the Regulatory Reform (Fire Safety) Order 2005: see [124-125].

30. On 16th February 2010 Greg Sinden and Charlie Taylor proposed that the rear elevation works were carried out first, the communal hallway was decorated by the lessees and the boundary wall works were deferred: see [127]. They also obtained a quotation for works to the rear elevation from another contractor PPJ Construction.

31. On about 22nd April 2010 Oyster Estates prepared what they described as an income and expenditure account for year ended 31st December 2009 [179].

32. On 28th May 2010 Oyster Estates indicated that they considered that Flat 1 (the flat under the control of the landlord) was in arrears in the sum of £2661.85: see [144]. Those arrears did not appear to include any sums demanded for the major repair works which are the subject of consideration in this determination. Those arrears continued at the date of issue of this application - see page 20 of the bundle containing the application. Adrian Marmont's evidence was that he withheld payment of those sums as he anticipated that his organisation (Adrian Marmont Construction) would be awarded the contract and did not wish to pay monies into the service charge fund account which he anticipated would then be repaid to him.

33. The Tribunal noted with concern that the Applicant landlord and Oyster estates appear to have treated a payment of £1000.00 to service charge fund in 2008 by the Applicant as a "loan" and permitted "repayment" of that sum in the 2009 service charge year to the Applicant landlord, thereby depleting the service charge fund. The status of service charge funds as trust funds should have been well known to the Applicant landlord and Oyster Estates. Accounting for this apparent misuse of service charge funds is not within the scope of this determination.

34. On 13th December 2010 a Combined Health and Safety and Fire Risk assessment was prepared relating to the premises: see [213-228]. That assessment made a number of recommendations in relation to fire prevention and means of escape and was said to expire one year later. That assessment again drew attention to the absence of a fire alarm or detection system [225] and the absence of any fire extinguishers [221]. It also highlighted a defect with the lighting to the ground floor, insufficient emergency lighting and inadequate balustrade [223-224]. Each of these hazards was described as "intolerable" and likely to give rise to "high likelihood of extreme harm".

35. On 1st February 2011 solicitors instructed by Charlie Taylor wrote to the Applicant suggesting a round table meeting to seek agreement as an alternative to seeking a full account [246]. This has not taken place.

36. On or about 18th June 2011 Oyster Estates prepared what they described as an income and expenditure account for year ended 31st December 2010 [229].

37. On 27th October 2011 this application was issued containing revised estimated service charge "budget" for 2012 which included a sum of £26,796 for "repairs maintenance". A further estimated service charge "budget" for 2012 which included a sum of £15,959 for "repairs maintenance". Subsequently when the Applicant's hearing bundle was filed it contained a further revision for the estimated service charge "budget" for 2012 which included a sum of £39,750 for "repairs maintenance" said to incorporate fire prevention and internal decoration works: see [2].

38. On 9th November 2011 Brighton and Hove Council issued an Improvement Notice under section 12 of the Housing Act 2004 requiring specified damp and fire prevention works to be begun by 9th January 2012: see [273-279]. It was common ground that no works in compliance with that notice have been commenced. Neither the Applicant nor Oyster Estates indicated any dispute with the requirements of that notice at the hearing. The Applicant suggests that enforcement of the notice should be deferred pending the hearing of this Tribunal in his letter of 12th November 2011.

Analysis

39. The Tribunal considers the estimated costs of the major works first as this is the major item. The Tribunal finds that the schedules of works prepared by Phillip Goacher need to be modified in two respects when considering sums that it is reasonable to demand in advance for service charge costs for the years 2009-2012 inclusive. The front elevation works are a comparatively low priority. The condition of the front elevation is not urgent and has not deteriorated as quickly or with such serious results as the rear elevation. The Tribunal accepts Mr Sinden's views about this. In addition the proposed works to windows are not service charge items and should not form part of the proposed costs. The rear boundary wall works are no longer necessary and also need to be deducted. It is difficult for the Tribunal to separate out the costs of works to the windows from the Phillip Goacher schedule of works as priced by the cheapest contractor, Bramber, as some of the costs are fixed costs or costs shared with other items of work such as "preliminaries overheads and profit" [97] and [102]. For the purpose of

demand of service charges in advance it is also unreasonable to expect the service charge fund to pay the entire costs "up front" when in contracts of this size, there should be stage payments and a retention.

40. As a starting figure the Tribunal takes the figure of £36,849.00 (the cost of works priced by Bramber inclusive of VAT). From this can be deducted £5520 for front elevation works and £1734.00 for rear garden boundary wall (items 8.2-8.6 of the Schedule of Works). It is difficult for the Tribunal to calculate a deduction for window works (items 4.7-4.10 and items 5.7-5.8) on pages [95-96] and to estimate whether taken as a whole the contractor would be prepared to take on the works with such a deduction. An overall figure of £29,595.00 (rounded to £30,000) for the works within the scope of service charge and which need to be carried out urgently is produced.

41. The costs of supervision and the cost of preparing the schedules are not included within these figures. The supervision costs would need to be adjusted to take account of the Tribunal's ruling about those works which can properly be charged to service charge.

42. Given the historic neglect of this building, the fact that the Applicant landlord is in significant arrears, has appeared reluctant to commit funds and the financial circumstances of the Respondent lessees, the Tribunal's view is that the greater part of that cost should be spread over at least 4 service charge years as follows:

Service charge year	Major works advance demand £
2009	10,000.00
2010	6,500.00
2011	6,500.00
2012	7,000.00

43. The Tribunal takes into account that not all of the cost of the works will be collected by the end of 2012, but envisages that, if all goes well, by the time that the budget for 2013 comes to be considered a further demand can be made for major works.

44. It is emphasised that this is not a determination that it is reasonable for the landlord to delay or defer any of the works within his repairing covenant or within his other obligations pending issue of demands or payment of funds. In the Tribunal's view some of the works need to be carried out with considerable urgency. The Tribunal's view would be (if it was asked to make a determination on the issue) that the Applicant

landlord is not entitled to rely upon his own defaults and breaches of covenant to argue that the service charge fund does not have sufficient funds to commence the necessary repair works: compare *Bluestorm Ltd v Portvale Holdings Ltd* [2004] EWCA Civ 289.

45. As the Tribunal explained at the hearing it is not considering the statutory consequences of the Improvement notice or any criminal or other liability which may arise from non-compliance. These consequences may arise irrespective of any determination which the Tribunal may make.

Service charge year January to December 2009

46. The sums which it would be reasonable to demand for this service charge year can be considered by reference to the income and expenditure account for this year of 22 04 2010 at [179] excluding items such as ground rent. No challenge was made to management fees (described as "management and admin fees"), insurance costs, utilities, "phone system" or accounts fees. The survey fees of £1448.94 referred to appear to comprise the initial costs of a site visit by Phillip Goacher & Co with Dave Moore and preparation of schedules of works charged at £670.98 in the invoice dated 2nd September 2009 [76], the fee from Oyster Estates for preparing letters requesting access and attending with Phillip Goacher of £208.73 [77], a total of £879.71. The Tribunal considered the extent to which these works could form part of the cost of qualifying works within the meaning of section 20(3) of the 1985 Act and the Service Charge (Consultation etc) (England) Regulations 2003 ("the 2003 Regulations"). After some hesitation the Tribunal considered that the costs of the initial report on condition *might* be regarded as outside the definition of qualifying works so that the costs of such a report would not be limited to £250.00 per lessee for the purpose of article 6 of the 2003 Regulations. The cost of the schedule of works could be argued to be part of the cost of the works but is not separately itemised, so it is difficult to separate from the costs of other work carried out by Phillip Goacher.

47. However the invoice from Phillip Goacher dated 9th November 2009 [75] for tender documents and tender analysis is clearly directly related to and part of the cost of qualifying works. There was no attempt to comply with the 2003 Regulations (Schedule 3 article 8 and 11) and no application for dispensation has been made.

48. For the purpose of the consideration of an advance payment for Phillip Goacher costs, if demanded, the Tribunal takes the view that it is not limited to considering costs solely by reference to how they are

invoiced. Accordingly doing its best on the available evidence the Tribunal allows £750.00 for the initial costs of surveying and reporting on condition. All Phillip Goacher costs in excess of £750.00 are considered to fall within the cost of "qualifying works" which were not the subject of consultation in accordance with the 2003 Regulations.

49. Oyster Estates' standard administration charge and Phillip Goacher supervision charges page [89]) are similarly likely to be disallowed as failing to comply with section 20(1), 20(6) and 20(7) of the 1985 Act and Schedule 3 (article 11 - failure to obtain at least two estimates).

50. It was emphasised at the hearing that the reasonableness of the cost of the works and whether the cost were reasonably incurred are entirely separate issues which can be reviewed and determined after works have commenced or finished. Indeed even if (contrary to the Tribunal's ruling) there has been adequate compliance with section 20 of the 1985 Act and the 2003 Regulations, the quotation obtained by Charlie Taylor from Green Builders dated 9th January 2012 for rear elevation works (pages 30-32 of Mr Sinden's bundle) suggests that the sums quoted by Bramber for those works may be open to challenge on the ground of cost alone.

51. As the Tribunal had evidence of actual costs incurred for this service charge year (2009) it uses the income and expenditure account in preference to the "estimated budget report" for this year prepared by Oyster estates at page 14 of the application bundle.

52. The Tribunal makes no finding or determination about whether, if some or all of the major works proposed by the Applicant were commenced and costs incurred, the costs incurred would satisfy section 20 of the 1985 Act or the 2003 Regulations. That issue can only be determined when the costs have been incurred or works carried out. This holds good for all service charge years considered in these Reasons. Any of the parties may make a further application to the Tribunal under section 27A of the 1985 Act after the works (or some of them) have been carried out and the cost has been demanded, if the costs of those works payable as service charges cannot be agreed.

53. The Tribunal makes no finding about legal fees charged and recovered as this is a cost neutral item apparently recovered in full.

54. Accordingly the sums which, if validly demanded, it would be reasonable to demand in this service charge year (inclusive of the major works demand) and would be payable can be described as follows:

Item service charge year 2009	£
Repair (maintenance contribution)	10,000.00
Managing agents fees	517.50
Surveys	750.00
Insurance	473.47
Utilities	70.05
Phone system	122.96
Accounts	92.00
Total	12,035.98

55. In addition the Applicant landlord will be required to comply with the terms and conditions of the Lease when that demand is made.

Service charge year January to December 2010

56. Very similar considerations apply to the service charge years 2010 save that there were no surveys and some costs budgeted in 2009 are now known.

57. As the Tribunal has evidence of actual costs incurred for this service charge year it uses the income and expenditure account in preference to the "estimated budget report" for this year prepared by Oyster estates at page 18 of the application bundle.

58. In this service charge year a sum of £482.93 is included for legal fees appears to have been recovered. On its face this does not appear to be a service charge item and no evidence was adduced to show that it was so recoverable.

59. Accordingly the sums which if validly demanded it would be reasonable to demand in this year (inclusive of the major works demand) and would be payable can be described as follows:

Item service charge year 2010	£
Repair (maintenance contribution)	6,500.00
Managing agents fees	528.76
Surveys	Nil
Insurance	511.06
Utilities	Nil
Phone system	Nil
Accounts	82.25
Legal fees	Nil
Total	7622.07

60. In addition the Applicant landlord will be required to comply with the terms and conditions of the relevant Lease when that demand is made.

Service charge year January to December 2011

61. Similar considerations apply to the service charge year 2011. Unfortunately no income and expenditure account is available so the Tribunal is asked to determine a reasonable sum to demand based upon the Estimated Budget report for this year at page 22 of the Applicant's application bundle.

62. Taking that Budget the sums which if validly demanded and if other conditions in the Leases are satisfied would be reasonable to demand in this year (inclusive of the major works demand) and would be payable can be described as follows:

Item service charge year 2011	£
Repair (maintenance contribution)	6,500.00
Managing agents fees	540.00
Surveys	Nil
Insurance	560.00
Utilities	Nil
Phone system	140.00
Accounts	85.00
Total	7265.00

63. In addition the landlord will be required to comply with the terms and conditions of the relevant Leases when that demand is made.

Service charge year January to December 2012

64. Similar considerations apply to the service charge year 2012. Unfortunately no income and expenditure account is available so the Tribunal is asked to determine a reasonable sum to demand based upon the Estimated Budget report for this year at page 2 of the Applicant's bundle.

65. Taking that Budget the sums which if validly demanded and if other conditions in the Leases are satisfied would be reasonable to demand and would be payable in this year (inclusive of the major works demand) for all three flats can be described as follows:

Item - service charge year 2012	£
Repair (maintenance contribution)	7,000.00
Managing agents fees	569.00
Surveys	Nil
Insurance	550.00
Utilities	Nil
Phone system	140.00
Accounts	90.00
Health and safety assessment	222.00
Reserve	Nil
Total	8571.00

66. In addition the landlord will be required to comply with the terms and conditions of the relevant Leases when that demand is made.

The application for an order under section 20C of the 1985 Act

67. Mr Sinden objected to the suggestion that the managing agents and other costs of these proceedings should be paid by him and other lessees through service charge.

68. Clause 5(5)(i)(i) of the Lease of Flat 1 empowers the landlord to

> "... employ at the Lessor's discretion a firm of Managing Agents to manage the Building an[d] discharge all proper fees salaries charges and expenses payable to such agents or such other person who may be managing the Building including the cost of computing and collecting the rents in respect of the Building or any parts thereof"

69. The Applicant's case for recovery of the managing agents fees relating to this hearing under this clause as service charge would involve construing the term "rents" in this clause to embrace service charges which are recoverable as rent in arrear by the covenant in clause 4(4) of the Lease under clause 5(5)(i)(i). This is far from a straightforward or obvious interpretation of clause 5(5)(i)(i). The extent to which Oyster Estates' costs of preparation for and attendance at this hearing are recoverable under this provision must be open to serious debate. Nothing in these reasons should be taken as reaching a decision on that issue, which is not before this Tribunal.

70. Nor is this Tribunal asked to decide whether the sum of £1500.00 for managing agents' costs of preparation for and attendance at this hearing were reasonably incurred under section 19 of the 1985 Act. If

this item were to be charged to service charge it could be the subject of a separate application under section 27A of the 1985 Act.

71. For the purpose of considering whether to make an order under section 20C of the 1985 Act, it is helpful to assume that the costs of Oyster Estates in relation to these proceedings are in principle capable of falling within clause 5(5)(i)(i) of the Lease. The next issue is whether the £1500 amounts to the "proper fees charges and expenses" of Oyster estates within clause 5(5)(i)(i). It suffices to say that the Tribunal is far from satisfied that attendance by three members of staff at Oyster Estates was necessary or proportionate to the issues, particularly as Ms Le Surf did not give evidence or make any representations and no witness statements were prepared which might have minimised or obviated the need for attendance of individual employees of Oyster Estates. The Tribunal also has serious concerns about the failure of Oyster Estates or the Applicant to comply with the directions made by the Tribunal requiring filing of all relevant service charge demands for use at this hearing. One consequence of that omission is that at least for service charge years 2009 and 2010 there may have to be a further hearing addressing payability or whether sums were reasonably incurred if valid demands are served and agreement cannot be reached. If that were to occur, a large part of the costs of attendance and preparation for this hearing would have been wasted, or at least be the subject of duplication. Similarly given that all the costs for service charge years 2011 and many of the budgeted costs for service charge year 2012 are now known, a more definitive ruling on payability of interim service charges for 2012 could have been reached, and possibly a final ruling upon service charge years 2009, 2010, 2011 and 2012.

72. The Tribunal has not been shown any terms of engagement or estimate for attendance at this hearing by Oyster Estates. The Tribunal is not in a position to make any ruling upon whether the sum claimed as fees might in other circumstances have been reasonably incurred.

73. One of Greg Sinden's objections to the payment of the managing agents' fees by service charge was that neither he nor Charlie Taylor had been informed of the £1500.00 to be charged by Oyster Estates before the application was made or before the bundle was served. It is unclear whether this sum is inclusive of VAT. Apart from a rather half hearted reference to alleged mention of such a fee in a telephone conversation with Mr Royall, no evidence of such a charge being mentioned was adduced by Oyster Estates. The Tribunal rejects the evidence of Mr Royall insofar as it was that he or Oyster Estates had informed Mr Sinden or any other lessee of the proposed charge let alone £1500.00. Consistently with Mr. Sinden's evidence about this,

there is no mention of an intention to charge those fees to service charge in any of the many estimated service charge budgets prepared by Oyster Estates contained in the various bundles. The failure to mention this fee, let alone seek agreement from lessees is also inconsistent with Service Charge Residential Management Code (2nd edition) part 8 (budgeting and estimating) in the Tribunal's view.

74. Section 20C of the 1985 Act provides in its material parts (immaterial amendments omitted):

> "(1) A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a court or leasehold valuation tribunal, or the Lands Tribunal, or in connection with arbitration proceedings, are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application."
>
> .....
>
> "(3) The court or tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances".

75. The issue of who has been successful in the application is clearly a very relevant factor to the exercise of discretion under section 20C of the 1985 Act: see *The Church Commissioners v Mrs Khadija Derdabi* [2011] UKUT 380 (LC). The Tribunal takes into account the fact that an order has been made in favour of the landlord for payment of a large proportion of the costs of major works by way of service charges which it sought. However, it is of considerable concern, that the amounts sought by way of major works included sums for works which on their face are not within the terms of the service charge (i.e. window works). This fact would have been clear to Oyster Estates as reference to the relevant clause in the lease was found in manuscript in the bundle filed by them on behalf of the Applicant: see for example the reference to "check lease" in manuscript at page 57 of the bundle in relation to "overhaul and replace window".

76. In addition the Applicant and Oyster Estates have been aware for some time that title to the boundary wall and liability for those works was in issue - certainly since 06 12 2011: page 4 of narrative statement (item 9).

77. On one view of matters, the Applicant and Oyster Estates have not achieved any significant degree of success in the application. When

originally issued, the application indicated that it was the intention to "take up" the Applicant landlord's offer to carry out the works through his own organisation: see page 13 of the application bundle under the heading of the 2009 service charge year. The Applicant accepted this would have placed him (and doubtless Oyster Estates) in a position of a conflict of interest as landlord carrying out major works for which he would then seek to charge himself and two other lessees. He appeared to accept that Oyster Estates would then have to attempt to act in the interests of service charge fund as well as in the interests of their employer (the Applicant landlord) and the contractor. Compared with that scenario, which the Applicant still wished to pursue in his evidence at the hearing, the outcome has not been any kind of success for him. To put this in context, the Applicant's evidence was if he carried out what he perceived to be the necessary major works at "cost" he would be able to set off any loss suffered by carrying out the work at what he described to be "cost" against the income tax which he might otherwise have to pay. He also indicated that he saw advantage in not having to pay monies into the service charge account if the cost of the major works was to be paid to him in due course.

78. Perhaps even more significantly however is that at least since 29th August 2009 and possibly from even earlier the Applicant and Oyster Estates have managed the premises where fire prevention and detection works have been required. The delay has been such that the local authority has resorted to an improvement notice recommending works to remedy that defect. That notice appears to have been flouted. According to the part of the application relating to the 2011 service charge year (page 21 application bundle) the significant arrears dating back to 2009 "prevented" the major works from being started. For the Applicant landlord to commence this application as a means of collecting service charge arrears to commence works when he was responsible as one of the lessees for a large proportion of those arrears and had taken no steps to pay those monies into service charge funds or to comply with his statutory duties, to then claim from the service charge fund the costs of these proceedings would be to reimburse or relieve him from the consequences of his default and/or the defaults of the Managing Agents acting on his instructions. That would not be just and equitable.

79. Against that must be weighed the well known proposition that section 20C is a power to deprive a landlord of a property right - the recovery of the costs under a lease. The Tribunal has looked at the above considerations carefully and separately in relation to each of the stages of these proceedings and concluded that the outcome which is most just and equitable is to make an order under section 20C in the terms sought by Mr Sinden.

80. That order will of course also apply to the application and hearing fees paid by or on behalf of the Applicant if those fees might otherwise been recoverable from service charge.

Reimbursement of application and hearing fees

81. Under paragraph 9(1) of the Leasehold Valuation Tribunal (Fees)(England) Regulations 2003, the Tribunal "may require any party to the proceedings to reimburse any other party to the proceedings for the whole or part of any fees paid by him in respect of the proceedings". The Applicant applies for reimbursement of fees by the Respondents. The provisions of those Regulations contain no indication of the criteria to be considered by the Tribunal. However, for similar reasons to those given in granting Mr. Sinden's application that no management costs of the proceedings should be charged as part of service charge, the Tribunal declines to orders reimbursement of fees by the Respondents. In summary the Applicant has not been successful in obtaining the orders which he initially sought and much of the costs of these proceedings have been incurred or increased by the Applicant's conduct or default or those of his agents.

Dated this 1st March 2012

.....

HD Lederman, (Lawyer Chairman)