10655

FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)
EASTERN REGIONAL OFFICE

Case Reference	:	**CAM/26UG/LSC/2014/0114**
Property	:	**3-4-5-6 The Clock Tower, Goldring Way, Napsbury Park, London Colney, St Albans, Herts AL2 1 GF**
Applicants	:	(1) Tim Rajan (Apartment No 3) (2) David Decio (Apartment No 4) (3) Peter Celiz (Apartment No 5) (4) Mark Novitt (Apartment No 6) In Person
Respondent	:	Hurford Salvi Carr Property Management Ltd
Represented by	:	Managing Director Jim Thornton
Landlord	:	Crest Nicholson (Eastern) Ltd
Date of Application	:	24th November 2014
Type of Application	:	Section 27A Landlord & Tenant Act 1985 Determination of reasonableness and payability of service charges
Tribunal	:	Tribunal Judge G M Jones Mr D S Brown FRICS MCIArb Ms C St Clair MBE BA
Date and venue of Hearing	:	**24th February 2015** **The Thistle Noke Hotel, St Albans**

DECISION

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PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)
EASTERN REGIONAL OFFICE

CAM/26UG/LSC/2014/0114

3-4-5-6 THE CLOCKTOWER, NAPSBURY PARK, LONDON COLNEY, ST ALBANS, HERTS AL2 IGF

ORDER

UPON HEARING the Applicants in person and the Respondent by its Managing Director Mr Jim Thornton at St Albans on 24th February 2015

IT IS DECLARED THAT: -

1. The disputed service charges, namely the demands made in July 2014 by the Respondent for direct contribution from the Applicants by way of advance service charges towards the anticipated cost of internal decorations at The Clock Tower, at a total of £4,621.20, are not payable by the Applicants and, insofar as the same have been paid, the Applicants are entitled to a refund.

2. It was reasonable for the Respondent to award the contract for internal decorations at The Clock Tower at a quoted price of £2,400.00 plus £600.00 for preliminaries and an allowance of £414.50 for contingencies, plus VAT where applicable.

3. An allowance of 12.8% of the tender price in the sum of £436.50, plus VAT if applicable, for the fee of a supervising surveyor was reasonable.

4. For the avoidance of doubt the Tribunal finds that the allowances for preliminaries, cost of works, contingencies and surveyor fees will all fall to be reviewed in the light of the final contract price.

AND IT IS ORDERED THAT: -

5. The Respondent shall not be entitled to add to the Applicants' service charges any sums in respect of the costs of defending this Application, the Tribunal considering it just so to order.

6. The Respondent shall reimburse the Applicants in respect of the application fee of £125.00 and hearing fee of £190.00, the Tribunal considering it just so the order.

Judge G M Jones
Chairman
4th March 2015

REASONS

0. BACKGROUND

The Property

0.1 The properties the subject of the Application are apartments in The Clock Tower at Napsbury Park, an Estate of 403 dwellings, leasehold apartments and freehold houses, created out of former Victorian hospital buildings (listed Grade II) and new build in the grounds of the former hospital. The whole comprises a high quality housing environment on an attractively landscaped private estate with a separate social housing development adjoining. The Clock Tower was originally the administration block of the hospital (with a clock tower above the main entrance) and is enclosed within its own modest gardens by a security fence. It is an impressive building of its genre but not cheap to maintain. A number of problems with the roof and with the imposing porch leading to a central entrance hall were not resolved by the developers and are still ongoing.

0.2 The entrance hall is about 4 metres wide and 6 metres long (the Applicants put it at 25 sq.m.) with a high ceiling (About 3 metres). Large double doors flanked by full-length windows, open from the porch into the entrance hall and a further door, also flanked by windows, leads out to the rear of the block. The hall, carpeted and tastefully decorated with a typical Victorian dado rail and ceiling cornices, contains a utilities cupboard with double panelled doors and four panelled doors leading to Apartments 3 to 6. Apartments 3, 4 and 6 are two-room flats (living room and one bedroom), while Apartment 5 is a four-room flat (living room, two beds and boxroom or small study). At each end of the block are two sizeable town houses with separate entrances.

0.3 The Application is concerned with the internal redecoration of the entrance hall, the expense of which, under the lease terms, falls to be borne by the leaseholders of Apartments 3 to 6. The Tribunal has been provided with a number of useful photographs showing the work, which was carried out in November 2014, in progress. It appears to be common ground that the entrance hall, originally refurbished in 2006, was in reasonable decorative order before the work was done; but it is equally common ground that it was reasonable for the Respondent Management Company to redecorate after an interval of 8 years alongside fairly substantial external works also scheduled for the block. The whole project was in turn part of a major overhaul of six blocks on the Estate. This substantial project was itself Phase 3 of a major overhaul of the whole leasehold Estate, Phases 1 and 2 having been completed, apparently successfully, by contractor T Gunning Ltd. Further, it is common ground that to approach Phase 3 in this manner i.e. by contracting for the remaining six blocks together, was a sensible management decision, likely to give rise to economies of scale. There is, however, an issue as to whether the internal decorative works should have been subject to a separate tender process from the more structural external works.

0.4 In 2006, we were told, the entrance hall was papered above the dado rail; but the paper has been removed and the walls (lined with plasterboard in 2006) are now

painted with emulsion, with different but complementary creamy tones above and below the dado rail. The ceiling is painted in white emulsion; the woodwork (windows and doors and skirting boards) and dado rail are painted in eggshell white.

0.5 At the time of inspection on the morning of the hearing the whole building was shrouded in scaffolding, though no workmen appeared to be making use of it that day. Temporary wiring for an alarm system fitted to the scaffolding was seen to enter through a hole in the door frame (with a little damage to the carpeting – which is due for replacement in the near future) and run (neatly tacked to the flooring) across the front door of No 5 to the utilities cupboard. A contractor's extension lead was plugged into a power point (no doubt installed for the use of the cleaners) and ran across the floor to a window. Overall, the quality of the decorative work is reasonable; but it is not a Rolls Royce job. The finish in some places is a little patchy and making good, particularly between the cornices and the walls, could be better. There was a little paint on the window glass and on the chromed hinges of the utilities cupboard.

0.6 The estimated cost, for the purposes of the advance service charge, of the internal decoration of the entrance hall, which formed part of a section 20 consultation on the overall project, was £2,400.00, this being the cost allocated to the work by the successful tenderer, T Gunning Ltd. Of the preliminaries included in the contractor's quotation, £600.00 was allocated to this aspect of the contract. To that was added £414.50 for contingencies, making the contractor's total for the job £3,414.50. To this has been added an apportioned figure of the fee charged by the contract administrator, Terry Pearce of McCoy Pearce Partnership, an experienced building surveyor. His apportioned fee is £436.50 (not £437.00 as stated in the Respondent's Statement of Case). The total cost is thus £3,851.00 + VAT = £4,621.20. This is the disputed sum, claimed from the Applicants (together with other undisputed sums for the proposed external works) by way of advance service charges.

0.7 For reasons that will become apparent, it is necessary to mention that the advance service charges in connection with the proposed internal and external works were demanded from the Applicants by separate invoices issued on 22nd July 2014 and not as part of any half-yearly advance service charge. Mr Celiz (page 58 of the bundle), who has the largest flat and thus pays 37.47% of the total for internal works to the entrance hall, was asked for £1,731.56. When they did not pay, the Applicants were, as is usual in case of unpaid service charges, threatened with interest, administrative charges and legal action. This has been a particular problem for Mr Novitt, who is trying to sell his flat and has been forced to pay the sums demanded in order to persuade his purchaser to exchange contracts (see page 160 of the hearing bundle).

The Leases

0.8 It is common ground that the leases require the designated Management Company to maintain and decorate the structure of the block and common parts in accordance with the Second Schedule. The costs of maintaining and decorating common internal parts are Apartment Costs under Part B of the Sixth Schedule, chargeable only to the apartment holders in the block. Paragraph 6 of the Seventh Schedule entitles the Management Company to make advance charges to leaseholders on 1st December and 1st June each year or such other dates as the Manager shall

reasonably determine – but always on a half-yearly basis. The sums so charged to leaseholders may under paragraph 13 of Part D of the Sixth Schedule include reasonable contributions to a reserve fund or funds and such funds must be held in a separate trust account. In practice, the Respondent allocates reserves to a series of funds. More of that later.

1. THE DISPUTE

1.1 Two main issues are directly raised by the Application. Firstly the Applicants contend that the Respondent held in a reserve account specifically for internal maintenance of common parts of The Clock Tower sufficient funds to cover the cost of the proposed works and ought not, in those circumstances, to have called upon the leaseholders to pay advance service charges to cover those anticipated costs. A similar approach was adopted in respect of the external works, as regards which the Respondent holds a separate reserve fund that could and, say the Applicants, should have been put towards the cost of the proposed external works.

1.2 Secondly, the Applicants contend that the tender process was flawed; that observations made by leaseholders were ignored; and that, as a result, a tender was accepted for the internal decorative work at The Clock Tower at a price that was wholly unreasonable for the job. The Applicants' Statement of Case argues that the more extensive external works, involving substantial elements of structural repair, should have been tendered separately from the internal decorative works. Indeed, that is what the leaseholders were expecting, given that the two sets of works were the subject of separate section 20 consultations. The Applicants argue that the tender documentation demonstrates that this would have resulted in substantial savings on the internal decorative works without any increase in the cost of the works as a whole. The Applicants do not, however, argue that the consultation process was sufficiently flawed to render the consultation abortive and thus give rise to a penal reduction in the sums chargeable to leaseholders.

1.3 The Applicants also comment in the Application that, in their view, the Respondent's staff have been evasive and unhelpful in addressing the concerns of the Applicants, who would have preferred to have dealt with the issue without recourse to the Tribunal. This does not appear to raise any additional substantive issue; but it is relevant to the second issue (failure in the consultation process) and may, depending upon the outcome, be relevant on issues as to costs.

2. THE ISSUES

2.1 For the purposes of the 1985 Act, service charge costs are not treated as incurred until such time as the landlord or manager becomes liable to pay them. T Gunning Ltd has not yet finished the Phase 3 works and accordingly is not yet in a position to render a final account. While no doubt stage payments have fallen due under the provisions of the contract, the internal decorative costs of The Clock Tower have not yet been incurred. The legal issues raised by the Application thus appear to be as follows:

2.1.1 Under section 19(2) of the Landlord & Tenant Act 1985, were the sums demanded by way of advance service charges for internal decorative works at

The Clock Tower reasonable?

2.1.2 Under section 27A(1) of the Act, were the said sums payable by the Applicants?

2.1.3 Under section 27A(2) of the Act, if costs are incurred in respect of the said works in accordance with the intentions of the Respondent pursuant to their contract with T Gunning Ltd, what sums will be payable by the Applicants?

3. THE EVIDENCE AND THE HEARING

3.1 The hearing bundle in this case was unusually well organized and properly indexed. The only criticism the Tribunal makes of it is that it contained perhaps too much financial documentation. However, the Tribunal recognises that it is not always easy to know what issues may arise during the hearing of an Application and that it is better to err on the side of caution. The parties conducted themselves very well during the hearing and the Tribunal is grateful for the assistance of all concerned.

3.2 It was apparent from the hearing bundle that the Respondent has been allocating service charge reserves collected from leaseholders to a series of separate funds for different purposes and for different blocks. These funds are held in a single trust account; but records are kept for each separate funds and these are separately shown in the Respondent's annual accounts (see e.g. pages 244 and 246 of the hearing bundle). This is necessary because costs incurred in respect of an individual block are payable by the leaseholders of units in that block. In some cases, block costs must be divided into internal and external block costs, the former being payable only by those enjoying the use of internal common parts.

3.3 Such is the case for The Clock Tower, external block costs being payable in specified proportions by the Applicant leaseholders and the owners of the town houses, while internal block costs, relating exclusively to the entrance hall, are payable only by the Applicants, who have the use of it. Accordingly, there are two reserve funds for The Clock Tower and page 246 shows that as at 31 May 2014 the Clock Tower (external) reserve amounted to £700, while the Clock Tower (internal) reserve amounted to £5,050. Moreover, in the first half of the following accounting year, additional sums were charged to leaseholders for reserves, increasing the Clock Tower (internal) reserve by £370 to £5,420. Bearing in mind the character of the entrance hall and its state of repair, it seems wholly unlikely that any further repair or redecoration will take place over the next five years during which time, no doubt, further reserves will be accumulated.

3.4 In those circumstances, the Tribunal was initially puzzled as to why the internal reserve was not earmarked to pay for the Phase 3 works. Had that been done, there would have been no need to ask the Applicants for any additional contribution at all. However, it appears that the Respondent had a problem. The accounts at page 246 show "accounts receivable" amounting to £94,955.38. These are unpaid and overdue service charges. Of this sum a total of £70,475 is owed by five individuals; some of the defaults have been continuing over a long period (since before the Respondents took over management of the Estate) and recovery has been difficult. None of the Applicants are in default. However, as Mr Thornton explained in a letter of 30 January 2015: -

> "It was decided to request cash from people in order to assist the situation, and 67 people in seven blocks were requested for £46,067.40 to assist the funding of the internal decoration. Apart from The Clock Tower only six people have not yet contributed. None of the people who have not contributed have been pursued for this cash. While we regret that some people chose not to support the community by contributing cash, we understand the reasons why they might not do so .....
> "We would anticipate that in consultation with the Residents' Association, and taking into account the cash situation on the Estate as a whole, and also taking into account the process of regularizing the management structure of the development, it would be appropriate in the 2015 accounts to utilize the reserve funds set apart for internal decoration to pay for this work."

3.5 This explanation gives the impression that the contributions complained of by the Applicants were voluntary and that everyone understood that to be the case. Unfortunately, this is not entirely true. It appears that the issue was being managed by Simon Gwynn, former managing director of the Respondent (he is no longer with the company). The hearing bundle contains exchanges between the Applicants and Mt Gwynn and the Property Manager Sue McNamara. The issue was raised by Mr Celiz in an e-mail of 28th July 2014 to Mr Gwynn (page 119). It appears that this was followed up by a letter of 14th August 2014. Mr Gwynn responded by e-mail on 11 September (page 122). He referred to arrears of service charges at the Clock Tower. As a result, he said, the money was not sitting in the bank account. He went on to explain that, ultimately, the sums paid would be credited back so that no resident would pay "any more than they are required to".

3.6 On 3rd October Mr Celiz replied (page 124) that it was his belief that all Clock Tower internal reserve contributions were up to date. He added, "It's surely not for us four Clock Tower Internals to subsidise other works elsewhere on the Estate ...?" On 7th October Mr Celiz copied the exchange to Mr Thornton. Mr Thornton's response of 11th October to the suggestion that the Applicants were being double-charged, was: -

> "You have not been 'charged' twice. A charge only arises when the accounts have been audited and a Balancing Charge raised. If therefore you allege a 'double charge', please indicate to me where in the audited accounts this has arisen."

3.7 In further exchanges, Mr Celiz directed Mr Thornton's attention to the audited accounts from year ending 31st May 2013, pointing out that, by his calculations, the internal reserves amounted to £4,850. Mr Thornton replied, rather patronizingly, that he was sure an accountant would be able to explain it. Mr Celiz was not satisfied and indicated that he knew of no alternative but to refer the matter to the Tribunal. Mr Celiz nevertheless attempted to resolve the matter through the Residents' Association NPRA (of which he was not a member). Mr Furman of the NPRA agreed to take it up with the Respondent and did so by passing on the concerns of Mr Celiz to Sue McNamara; but this produced no satisfactory response.

3.8 The documents in the hearing bundle show that the Applicants, in their different ways, took up with the Respondent's staff and management, up to and including Mr

Thornton, all the concerns they now raise before the Tribunal and that they were dissatisfied with the Respondent's attitude and explanations. That is why they made the Application to the Tribunal. For the Respondent's response to the Application, we must look to Mr Thornton's letter of 30th January 2015 (pages 51-2), already quoted on the issue of double charging.

3.9 Generally, the evidence is almost all contained in the hearing bundle, the hearing being devoted almost entirely to submissions made on the basis of that evidence.

4. THE LAW

Service Charges

4.1 Under section 18 of the Landlord & Tenant Act 1985 (as amended) service charges are amounts payable by the tenant of a dwelling, directly or indirectly, for services, repairs, maintenance, improvement, insurance or the landlord's costs of management. Under section 19 relevant costs are to be taken into account only to the extent that they are reasonably incurred and, 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. Where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable.

4.2 Under section 27A the Tribunal has jurisdiction to determine whether a service charge is payable and, if so, the amount which is payable; also whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for those costs and, if so, the amount which would be payable.

4.3 In deciding whether costs were reasonably incurred the Tribunal should consider whether the landlord's actions were appropriate and properly effected in accordance with the requirements of the lease and the 1985 Act, bearing in mind RICS Codes. If work is unnecessarily extensive or extravagant, the excess costs cannot be recovered. Recovery may in any event be restricted where the works fell below a reasonable standard.

4.4 The Service Charges (Summary of Rights and Obligations) Regulations 2007, made under section 21B of the 1985 Act and taking effect from October 2007, require a landlord (other than a local authority) serving a demand for service charges to accompany that demand with a statutory notice informing the tenant of his rights. If this is not done, the tenant is entitled to withhold the service charge payments so demanded. The Tribunal standard forms of directions may include reference to these Regulations.

Consultation

4.5 Under section 20 of the 1985 Act (as substituted by section 151 of the Commonhold & Leasehold Reform Act 2002 with effect from 31 October 2003) and the Service Charges (Consultation Requirements) (England) Regulations 2003 landlords must carry out due consultation with tenants before undertaking works likely to result in a charge of more than £250.00 to any tenant ("qualifying works") or entering into long term agreements ("qualifying long term agreements") costing any tenant more

than £100.00 p.a. This process is designed to ensure that tenants are kept informed and have a fair opportunity to express their views on proposals for substantial works or on substantial long term contracts and to nominate if they so wish potential contractors to compete in the statutory tendering process.

4.6 The consultation requirements vary depending upon the circumstances of the case and, in particular, whether the landlord is a designated public body for the purposes of statutory regulations dealing with public works, services and supplies and, in such case, whether the value of the contract exceeds the relevant threshold set under the Public Contracts Regulations 2006. These regulations are designed to provide a level playing field for contractors from EU member states bidding for large public sector contracts in such states. The threshold is, for obvious reasons, set at a fairly high level.

4.7 In this case the relevant requirements are those set out in Part 2 of Schedule 4 to the 2003 Regulations. The landlord must first provide to the tenants (and, if applicable, to the tenants' association) prescribed information about the proposed works and invite them to put forward a contractor. The consultation period is 30 days. The landlord must have regard to the tenants' observations, which might result in a change in the specification of works. After that, the landlord may be obliged to seek an estimate from a contractor or contractors nominated by the tenants. That is likely to occupy a further period of at least 14 days. The landlord must then inform each tenant of the amounts of at least two estimates and the effect of any observations received and the landlord's responses and invite observations on the estimates. All estimates must be made available for inspection. The second consultation period is also 30 days. The landlord must have regard to any observations made. There are other requirements to provide information; but these should not delay the works.

4.8 Landlords who ignore these requirements do so at their peril. Unless the requirements of the regulations are met the landlord is restricted in his right to recover costs from tenants; he can recover only £250.00 or £100.00 p.a. per tenant (as the case may be) in respect of qualifying works. However, it is recognised that there may be cases in which it would be fair and reasonable to dispense with strict compliance.

4.9 Accordingly, under section 20ZA (inserted by section 151 of the Commonhold & Leasehold Reform Act 2002) the Leasehold Valuation Tribunal may dispense with all or any of the consultation requirements if satisfied that it is reasonable to do so. This may be done prospectively or retrospectively and, under recent case law, may be done on terms. In particular, in appropriate cases the Tribunal may impose, as a condition of dispensation, a reduction in the charges to tenants. Typically, prospective dispensation will be sought in case of urgency or, perhaps where a tenant is refusing to co-operate in the consultation process. Retrospective dispensation will be sought where there has been an oversight or a technical breach or where the works have been too urgent to wait even for prospective dispensation. These examples are not meant to be exhaustive; there may be other circumstances in which section 20ZA might be invoked.

Information for tenants

4.10 Under section 21 of the Landlord & Tenant Act 1985 a tenant liable to pay service charges may in writing require the landlord, directly or through his agent, to supply him with a written summary of the costs incurred in the last accounting period which are relevant costs in relation to the service charges payable or demanded. Amongst the information the landlord must provide is the aggregate of any amounts received by the landlord on account of the service charge in respect of relevant dwellings and still standing to the credit of the tenants at the end of the relevant accounting period. The landlord must supply the summary within one month of the request or within 6 months of the end of the accounting period, whichever is the later.

4.11 Under section 22 the tenant may, within 6 months of receiving the summary, require the landlord in writing to afford him reasonable facilities for inspecting the accounts, receipts and other documents supporting the summary and for taking copies or extracts from them. The landlord must make those facilities available to the tenant for a period of two months beginning not later than one month after the request was made. Under section 25, failure to comply with the provisions of sections 21 or 22 is a criminal offence. The Commonhold & Leasehold Reform Act 2002 contained provisions amending these sections; but those provisions are not yet in force.

4.12 Section 21B(1) provides that a demand for the payment of a service charge must be accompanied by a summary of the rights and obligations of tenants of dwellings in relation to service charges. The summary must be in statutory form, in accordance with the requirements of the Service Charges (Summary of Rights and Obligations and Transitional Provisions) (England) Regulations 2007, which came into force on 1 October 2007. Section 21B(3) provides that a tenant may withhold payment of a service charge which has been demanded from him if subsection (1) is not complied with in relation to the demand. By section 21B(4), where a tenant withholds a service charge under section 21B any provisions of the lease relating to non-payment or late payment of service charges do not have effect in relation to the period for which he so withholds it.

Service charge funds held by landlords or managing agents

4.13 Under section 42 of the Landlord & Tenant Act 1987, where the tenants of two or more dwellings are liable to contribute towards the same costs by the payment of service charges, any sums paid by contributing tenants must be held on trust to defray costs incurred in connection with the matters for which the relevant service charges were payable and, subject thereto, on trust for the contributing tenants. It follows that the landlord (or his agent) is under a duty to account to the tenants for any interest received on funds so held. The funds are "client funds" and the tenants as well as the landlord are the agent's "clients" for this purpose. However, tenants are not entitled to a refund. On termination of any lease, the leaseholder's share passes to the remaining tenants and upon termination of the last lease, to the landlord.

4.14 The Commonhold & Leasehold Reform Act 2002 contained provisions amending this section and requiring that service charge contributions be held in designated accounts; but those provisions are not yet in force.

4.15 The RICS Service Charge Residential Management Code (2nd Edition) approved by

the Secretary of State under the terms of section 87 of the Leasehold Reform Housing & Urban Development Act 1993 sets out good practice for landlords' agents and managers of residential blocks. Part 10 of The RICS Code deals with "Accounting for Service Charges". Agents and managers are advised that accounts should reflect all expenditure in respect of the relevant accounting period, whether paid or accrued and should indicate clearly all the income in respect of the accounting period, whether received or receivable. Copies of such accounts should be made available to all those contributing to them. Service charge funds for each property should be identifiable and either placed in a separate bank account or in a single client/trust account. Where interest is received this belongs to the fund collectively; it should be shown as a credit in the service charge accounts and retained in the fund and used to defray service charge expenditure.

4.16 All chartered surveyors and others engaged by way of business in residential property management should be familiar with the provisions of this Code, to which the Tribunal is required to have regard.

Proportionality and the Overriding Objective

4.17 The Civil Procedure Rules 1998 introduced into the civil courts in England and Wales a new concept; the Overriding Objective. This was designed to ensure that cases are dealt with justly and is stated in CPR Part 1. Rule 1.1(2) provides as follows:

> "Dealing with a case justly includes, so far as is practicable –
> (a) ensuring that the parties are on an equal footing;
> (b) saving expense ...
> (c) dealing with the case in ways which are proportionate –
> (i) to the amount of money involved;
> (ii) to the importance of the case;
> (iii) to the complexity of the issues; and
> (iv) to the financial position of each party;
> (d) ensuring that it is dealt with expeditiously and fairly; and
> (e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases."

4.18 CPR Rule 1.2 provides that the court must seek to give effect to the overriding objective when it exercises any power given to it by the Rules; or interprets any rule. CPR Rule 1.3 requires the parties to help the court to further the overriding objective. Provisions of this sort are inevitable once it is recognised that the resources available to parties to access justice and to the courts to dispense justice are finite and must be controlled and allocated in a principled manner.

4.19 The Tribunal Service is not governed by the CPR; but the provisions of CPR Part 1 are echoed in the Tribunal Procedure (First Tier Tribunal) (Property Chamber) Rules 2013 with a view to ensuring that the Tribunal is able to deal with cases fairly and justly (Rule 3(1)). Rule 3 further provides as follows:

> "(2) Dealing with a case justly includes, so far as is practicable –
> (a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties and of the Tribunal;

(b) avoiding unnecessary formality and seeking flexibility in the proceedings;
(c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;
(d) using any special expertise in the Tribunal effectively; and
(e) avoiding delay, so far as compatible with proper consideration of the issues.

(3) The Tribunal must seek to give effect to the overriding objective when it –
(a) exercises any power under the Rules; or
(b) interprets any rule or practice direction.

(4) Parties must –
(a) help the Tribunal to further the overriding objective; and
(b) co-operate with the Tribunal generally."

Costs generally

4.20 The Tribunal has no general power to award inter-party costs, though a general power now exists under section 29(4) of the Tribunals, Courts & Enforcement Act 2007 and Rule 13(1) of the Tribunal Procedure (First Tier Tribunal) (Property Chamber) Rules 2013 to make costs orders in cases where costs are wasted or a party has acted unreasonably. In general, if the terms of the lease so permit, the landlord or designated manager is able to recover legal and other costs (eg the fees of expert witnesses) associated with an application to the Tribunal from the tenants through the service charge provisions i.e. he is entitled to recover a contribution to such costs not only from the defaulting tenant but from all tenants.

4.21 However, under section 20C of the Act of 1985 the Tribunal has power, if it would be just and equitable so to do in the circumstances of the case, to prevent the landlord or manager from adding to the service charge any costs of the application. The Lands Tribunal in the case Tenants of ***Langford Court –v- Doren Ltd*** in 2001 said that the Tribunal should use section 20C to avoid injustice. It ought not to be used in a manner oppressive to the landlord or manager. Clearly the manner in which this discretionary power is (or is not) exercised will depend upon the facts of the case. The relevant factors in this case are discussed in section 5 of this Decision.

4.22 In addition, under Rule 13(2) of the 2013 Rules the Tribunal may order a party to reimburse the Applicant in respect of application and hearing fees. This power is likely to be exercised in cases where the applicant is substantially successful, unless he has been guilty of unreasonable conduct in connection with the application, e.g. where he has unreasonably rejected a proposal for mediation or a fair and proper offer of compromise.

5. DISCUSSION AND CONCLUSIONS

5.1 As it turned out, the second issue identified under paragraph 2 above was readily resolved. Mr Thornton conceded at the start of the hearing that the lease did not permit the Respondent to make additional demands for payment outside the framework of the twice-yearly demands for service charge payments in advance and the final balancing charge at the year end. Thus the demands made in July 2014 were not payable by the Applicants.

5.2 Technically, that makes it unnecessary for the Tribunal to decide the first question i.e. whether the sums demanded by way of advance contribution towards the internal decorative works at the Clock Tower were reasonable. The Tribunal merely comments that it would be unreasonable to demand sums for specific items of work if the monies to pay for such work had already been collected and were in hand. It seems clear that the purpose of the Clock Tower Internal Reserve Fund was to pay for the decoration of the entrance hall and that, provided all contributing leaseholders paid their due contribution, it would be unreasonable, in circumstances where the building had been refurbished only eight years earlier and there were no structural defects in the interior of the entrance hall, not to use the Fund for that purpose, while continuing to collect reasonable sums towards the next round of works.

5.3 Generally, it is perhaps not widely appreciated by leaseholders that management companies responsible for repair and redecoration are not expected (unless penalized by the Tribunal) to fund works at their own expense. Accordingly, if there are arrears of payments that are genuinely difficult to collect, it will be necessary either to postpone scheduled works or to ask the leaseholders to advance the necessary sums. In due course, sums recovered from the defaulters will then be credited to the account, so that the leaseholders who have paid their dues will, in most cases, not lose out in the long term. However, there may occasionally be cases in which a defaulter is found to be insolvent and there is insufficient equity in his flat to cover the unpaid sums and the costs of collection. In such cases, the other leaseholders will indeed have to bear the deficit and will, to that extent, be double-charged.

5.4 In this case, however, Mr Thornton conceded, as Mr Celiz had insisted all along, that none of the Applicants were in default. What Mr Gwynn had sought to do, as an interim measure in order to gather the funds needed to pay for the Phase 3 works as a whole, was to collect additional sums from all of those who would pay, on the basis that in due course all of the monies would be properly attributed in the accounts so that, in the long term, nobody would lose out. It appears that he was well aware that the Respondent could do this only on a voluntary basis and that to pursue legal proceedings against those who refused to pay would be futile. It might be reasonable to adopt this approach provided it was made clear to all concerned that the payments were voluntary. But this was where it went wrong. It is not clear whether this was the result of deliberate policy or merely the consequence of failing to explain to situation to the accounts department. Whatever the position, pressure was improperly applied to leaseholders to get them to pay without them being told that payment was optional. On the contrary, Page 59 shows a reminder sent to Mr Celiz, stating, "under the terms of your lease I regret to inform you that this amount is now overdue and incurring interest".

5.5 In the judgment of the Tribunal this ought not to have happened. On any view, it involved serious management failings. The Respondent made explanation only when pressed hard by Mr Celiz and even then failed to give a proper explanation of the situation with the Reserve Funds. The accounts were prepared on an accruals basis, which means that they showed what ought to have happened during the accounting year, i.e. they showed income as including income that ought to have been received (listed under 'Accounts Receivable') and payments that ought to have been made or

that fell due in the accounting period but were not made until later (listed as 'Accounts Payable'). As a result, the balance sheet showed what the position would be at the end of the accounting period when all service charge payments had been paid in full and all debts incurred had also been paid. The sums listed at page 246 as being held in the various reserve funds did not represent cash at the Bank. There ought to have been £260,000 in hand; but in fact there was only £165,000 or thereabouts available. The final account from T Gunning Ltd was expected to be around £266,000 + VAT.

5.6 Moreover, Mr Celiz was told there were defaulters at The Clock Tower. He clearly made enquiries and ascertained that this was not the case, at least so far as the Applicants were concerned, a fact that was conceded by Mr Thornton at the hearing. It follows that there were sufficient funds actually in hand as regards the Clock Tower Internal Reserve Fund to cover the cost of the internal decoration of the entrance hall, even if the entire contingency allowance was used up. There was absolutely no basis on which the Respondent could require the Applicants to contribute towards that cost. It should have been made absolutely clear to them that they were under no obligation to make any further contribution towards the internal decorations.

5.7 The position is less clear in relation to the External Reserve, which is mentioned in the Application. The sum in hand was very small by comparison with the overall cost of Clock Tower External Works (quoted at just over £60,000. It appears to make no significant difference to any individual leaseholder whether the £700 External Reserve is used or not. We will not comment further on this issue.

5.8 We turn to the third issue, namely, whether the sums that will in due course be payable to T Gunning Ltd in respect of the internal redecorations of the entrance hall will be payable by the Applicants. This depends upon whether those sums will have been reasonably incurred. We are not in a position to decide this now because although the work has been completed pursuant to a contract under which the Respondent will be obliged to pay, two important matters remain unclear. Firstly, it is unclear why 30% of preliminaries apportioned to The Clocktower were attributed to the internal works. This seems very odd given that the external works are costing 25 times as much as the internal works. It is difficult to envisage how these simple decorating works could incur preliminaries of £600. This apportionment will need to be justified when the final account is settled in order to ensure that the town house owners are not benefited at the expense of the apartment owners. Secondly, it is not clear whether any of the contingency allowance will in fact be called upon. There is no evidence that any unexpected contingencies occurred; nor is it easy to envisage how any such contingency could be claimed. However, we cannot rule out the possibility that Gunning Ltd may seek some contingency payment when the final account is rendered.

5.9 The first question that arises is whether the internal decorations aspect of Phase 3 ought to have been separately tendered. This issue was raised by the Applicants at the time. It should be noted that the information initially provided during the consultation process did not include any breakdown of costs as between the six blocks included in Phase 3. This was not necessarily unreasonable, given that the Applicants concede that they could not reasonably expect the Respondent to treat

The Clock Tower as a separate project, even less the internal redecoration of the entrance hall by itself. The information was provided when Mr Celiz asked for it (page 116) and the representations based upon that information were considered by the Respondent. Sue McNamara obtained from Mr Pearce (pages 295-6) the detailed breakdown of costs provided in the T Gunning Ltd tender.

5.10 It appears that the Respondent must have considered whether to tender the internal decorative works separately, as separate consultation letters (pages 209-12) were sent out. T Gunning Ltd (TGL) provided the second lowest tender for the external works, which was 13.6% higher than the tender of AD Construction Group (ADC – £207,136.50 + VAT). For the internal decorative works, TGL offered the lowest tender; ADC's tender at £42,630.50 + VAT was 19% higher. Overall, TGL at £271,060 + VAT was 8.5% higher than ADC. It is fair to point out that TGL was persuaded to reduce its overall costs by £5,000.00 + VAT, reducing the difference from ADC to 7%. On the face of it, the cheapest option would have been to employ ADC for the external works, which included substantial building works, and TGL for internal decorations. But each contractor had, in fact, tendered for both aspects of the work.

5.11 On the Respondent's evidence, which the Tribunal accepts, TGL had performed well overall on Phases 1 and 2. There may have been some criticism of their work from some quarters; but not widespread criticism, as has been suggested. ADC had presumably been identified as competent or the company would not have been invited to submit a tender; but how ADC would perform on this sizeable and complex contract was something of an unknown quantity. The Respondent gave considerable weight to past experience of TGL. It is clear that the Respondent's advisers were sufficiently troubled by the price difference to ask TGL to make a reduction. The reduction of £5,000 was a round figure, suggesting that it was a general reduction rather than being based on criticism of individual tender items. One would expect the person conducting the tendering process to compare individual items with the initial tender estimate and this appears to have been done: see Appendix B at pages 317-320C. But tendering involves a professional assessment of a variety of unknowns and it would be unreasonable to beat a contractor down on individual items unless they were obviously beyond reasonable limits. An experienced building surveyor is looking for a figure close to the tender estimate, built up in a professional manner.

5.12 The selection of a contractor involves a number of factors of which cost, although a very important factor, is not the only consideration. Whether to award a single contract or break down a multi-skilled contract into two or more parts, may be a complex decision. There is a considerable advantage to the customer in being able to hold a single company, with one set of managers, responsible for the whole of a project. The risk of complications, probably accompanied by additional expense, is considerable in large refurbishment projects. Knowledge of the performance of a contractor as regards quality of work, management and communication skills and reliability is a very powerful factor in making the selection.

5.13 The Tribunal has considered carefully whether the project should have been split into two and whether ADC should have been awarded the contract(s). Ironically, had the project been split into two contracts, it seems most likely that TGL would have been awarded the contract for internal decorations and ADC the contract for

external works. This cannot be known to a high degree of certainty because the tenderers were not invited to tender for the contracts separately, as might have been done. It is not at all clear whether TGL would have tendered for the internal decorations alone at that price. Ironically, had they done so, the Applicants would have been stuck with their quotation for internal decorations at The Clock Tower. It is no use for the Applicants to argue that ADC were cheap for the internal decorations at The Clock Tower, when they were 19% higher overall than TGL.

5.14 The Tribunal considers that the Respondent did have an obligation to ensure that no leaseholder or group of leaseholders would be obliged to pay an unreasonably high sum for the work on their block. However, the internal decorations of the entrance hall were not entirely straightforward. The ceiling is high; it was necessary to strip wall paper off plasterboard, which might have caused significant damage; in any event the stripped plasterboard would need preparation for painting, which might be a time-consuming task; there are fussy decorative features; some woodwork is panelled; and the health and safety of residents and reasonable accessibility at all times to the four apartments must be taken into account. On balance, leaving aside preliminaries and contingencies (dealt with above), the Tribunal considers that the TGL contract price, as part of a large project, is not unreasonable.

5.15 It might have been reasonable to seek tenders for the internal decorative work as a separate contract, probably to be carried out after completion of the external works. But, particularly for a winter project, it was useful to have inside work available for the decorators, which they could continue during inclement weather. Onsite security would be facilitated by using a single contractor for the whole project. The final TGL contract price was only 7% higher than ADC's tender. Accordingly, it was not unreasonable to seek tenders for Phase 3 as a single project and to award the contract to TGL at a price of £266,060 + VAT. The Tribunal has also considered the amount of the surveyor's fee attributed to the internal decorations at The Clock Tower and concludes that a fee of 12.8% is not unreasonable. However, it will be incumbent on the Respondent, when apportioning the contractor's final account, to allocate the £5,000 price reduction fairly between the various aspects of the project. The obvious way of doing this would be a reduction of 1.85% across the board; but there may be others. In addition, the surveyor's fee, if based (as is usual) on a percentage of the contract price, ought presumably to be reduced proportionately.

5.16 The Applicants have put forward figures for the reasonable cost of the disputed work and the Tribunal has considered this evidence. The figures are based on quotations from Abbey Decorators (£900.00) and Colourways Painting and Decorating Services (£1,585.00). Unfortunately, these quotations are for a single small job the selected contractors were willing to undertake. The internal decorations for Phase 3 at a cost in the region of £40,000 present problems of which the majority of decorating firms have no experience and which incur additional costs. It is not a fair comparison. The likelihood is that T Gunning Ltd would employ sub-contractors and add to their invoice 25% or so for contract administration and profit. The price calculator at page 60 puts the hourly rate for decorators at £18.00. On top of that would be charges for administration and profit, giving a contractor's rate of perhaps £24.00 per hour.

5.17 The Applicants have also put forward detailed evidence of the time actually taken to complete the work. On the basis of observation of the decorators throughout the

period of work, they allow about 76 man hours. This does not include any time for travel to and from the depot with material and equipment. A further 10 hours should perhaps be allowed for that. The job seems to have gone fairly smoothly. It would not be unreasonable to allow 90 hours when quoting, in case it did not go smoothly. 90 hours at £24.00 amounts to £2,160.00. Adding materials, one is not far from £2,400.00. This not our assessment of the value of the job but it shows how TGL might reasonably have reached their quoted figure. The waters have been somewhat muddied by the suggestion put forward by Mr Pearce (based on time sheets alone) that the work took approximately 20 man days to complete, which seems unlikely, in our judgment. But we are not persuaded by the Applicants' evidence or submissions that the TGL price for the job, seen as part of a much larger project, is unreasonable.

5.18 Accordingly, in our judgment, the sums payable by the Applicants when lawfully demanded will be up to £2,400 by way of the cost of the works; a reasonable apportionment for preliminaries, which the Respondent must justify; an allowance for contingencies, if any are proved; and the surveyor's fee. The total may be subject to reduction to take into account the £5,000.00 reduction in the contract price; and the surveyor's fee may, if based on a percentage of the contract price, need to be reduced for the same reason. To these figures VAT must be added if applicable.

Costs

5.19 This Tribunal takes the view that it has a wide discretion to exercise its powers under section 20C in order to avoid injustice to tenants. In many cases, it would be unjust if a successful tenant applicant were obliged to contribute to the legal costs of the unsuccessful landlord or, irrespective of the outcome, if the tenant were obliged to contribute to costs incurred unnecessarily or wastefully. In many cases, it would be equally unjust were non-party tenants obliged to bear any part of the landlord's or (as in this case) the manager's costs.

5.20 However, in some cases, the manager's conduct of his defence may be a reasonable exercise of management powers even if he loses. The manager may have made an offer the tenant ought to have accepted. In such cases, it might be reasonable for the tenants generally to bear those costs. In other cases, for example where the non-party tenants supported the unsuccessful manager, it might be reasonable for the non-party tenants to contribute to the manager's costs. A wide variety of circumstances may occur and the section permits the Tribunal to make appropriate orders on the facts of each case.

5.21 In this case, the Respondent was forced to concede the Applicants' principal point, namely, that the service charge demands of July 2014 ought not to have been made. However, this concession was not made until after the start of the hearing. The fact that the parties were before the Tribunal provided an opportunity to consider the cost of the internal decorative works at The Clock Tower. But had the Respondent's concession been made at an early stage, as should have been done, in our view, the whole Application could have been avoided. The Applicants could and probably would have waited until the conclusion of Phase 3 in order to decide whether to challenge the final account. Overall, the Tribunal concludes that it would be just and equitable in the circumstances of the case to order that the Respondent should be disentitled from treating its costs of and arising out of the application as relevant costs to be taken into account in determining any service charge relating to the

property. In addition the Respondent must reimburse the Applicant in respect of the application and hearing fees, the Tribunal considering that such order would be just and equitable.

Tribunal Judge G M Jones
Chairman
4th March 2015