10428

**First-tier Tribunal**
**Property Chamber**
**(Residential Property)**

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| **Case reference** | : | **CAM/00KF/LVL/2014/0002** |
| **Property** | : | **11/12 Eastern Esplanade, Southend-on-Sea, Essex SS1 2ER** |
| **Applicant** | : | **Mohiuddin Mahamood** |
| **Represented by** | : | **Monika Derveni, solicitor advocate (DH Law Ltd.)** |
| **Respondents** | : | **Ajay and Dikisa Pamneja, Neil Howe and Christopher Clarke** |
| **Represented by** | : | **Nicholas Grundy, counsel (Capsticks)** |
| **Date of Application** | : | **25th July 2014** |
| **Type of Application** | : | **(1) Application to vary leases (Part IV Landlord and Tenant Act 1987 as amended) and (2) Application to determine reasonableness and payability of service charges** |
| **The Tribunal** | : | **Bruce Edgington (lawyer chair) Duncan Robertson (lawyer) Roland Thomas MRICS** |
| **Date and venue of hearing** | : | **3rd November 2014, The County Court, Tylers House, Tylers Ave., Southend-on-Sea, Essex SS1 2AW.** |

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# DECISION

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1. By consent, Dikisa Pamneja is added to these applications as a Respondent

2. The Tribunal refuses the application to vary the leases of the residential part of the property.

3. As far as the planned works to the exterior and common parts of the property are

concerned, the Tribunal's determination is that (a) the consultation requirements have been complied with and (b) a reasonable amount for service charges payable in advance is £6,982.34 for Ajay and Dikisa Pamneja, £6,982.34 for Neil Howe and £13,964.68 for Christopher Clarke. The Respondents allege that a properly completed claim notice has not been served. They have the ability to waive strict compliance. If they do not waive compliance, payment is to be made when a compliant notice is served.

4. The Tribunal makes an order pursuant to Section 20C of the **Landlord and Tenant Act 1985** ("the 1985 Act") preventing the Applicant from recovering its costs of representation before this Tribunal from the Respondents as part of any future service charge demand.

5. The Tribunal refuses to make any other costs order or to order the refund of any fees paid to the Tribunal.

## Reasons

### Introduction

6. This is the second application to the Tribunal involving this property with the same parties. The previous application was by the leaseholders to appoint a manager for the property and that was refused largely because of serious and fatal technical flaws in the application. The building known as 11/12 Eastern Esplanade, Southend-on-Sea is situated on the Southend sea front close to the tourists' amusements. The residential part of what is a semi-detached building covers the first and second floors. There is a commercial unit on the ground floor.

7. This new application is by the landlord for 2 orders. Firstly he wants to vary the 3 residential leases because of what he perceives to be defects and secondly he wants the Tribunal to order that the amounts requested for payments on account of service charges are reasonable. Both applications are contested by the 4 leaseholders of the residential part of the building. They don't want the leases varied at all and they challenge the amount requested for service charges, the extent of the work and whether it should all be undertaken at the same time.

8. As far as the **lease variations** are concerned, the relevant terms of the 3 residential leases are the same save that Mr. Clarke contributes one third of the costs and the other 2 flats contribute one sixth each. The perceived defects as set out in the application are:-

    (a) As the commercial lease for the ground floor does not, according to the Applicant, permit charges to be imposed on the commercial lessee for maintenance of the entrance, stairs and landings leading to the residential flats, the residential leases are defective and should be varied so that the residential leaseholders pay the whole of such costs between them and

    (b) The residential leases do not make adequate provision for management fees in that they only allow a 10% levy on service charges rather than a

flat rate per flat as is the normal commercial arrangement nowadays.

9. As far as the **service charges** are concerned, the landlord wants to undertake extensive and overdue works and the leaseholders are refusing to pay the amounts demanded on account of the cost of such works as is permitted by the leases. He therefore wants an order that the amount demanded is reasonable and that the work does not need to be 'phased' to spread the cost.

10. The Tribunal chair issued a directions order on the 1st September 2014 timetabling the case to a final determination. It indicated that the case could be determined on a consideration of the papers and any written submissions and it intended to do so on or after the 21st October 2014 unless anyone asked for an oral hearing. Mr. Howe did ask for an oral hearing. A hearing bundle of some 658 pages was lodged, albeit late.

**The Inspection**

11. The members of the Tribunal inspected the outside of the building from the road together with the entrance hall and internal stairs leading to the 3 flats at property. The commercial tenant permitted the surveyor member to go into the back yard to see what he could of the back from the ground floor. It was raining quite hard and vision was limited.

12. In the previous decision of the Tribunal, the property was described as follows:-

> *"10. The basic building is as described above. It is of solid brick construction under a combination of pitched and flat roofs. It is semi-detached although the other part of the building has been added at a later date. The ground floor is completely of commercial use and the entrance to the flats is in Beach Road in the return frontage. There is a very small entrance and narrow stairs up to the first floor where flats 2 and 3 come off a small landing. They consist of a lounge/kitchen, 2 bedrooms and a bathroom/WC. There is then a further stair case to the second floor which consists of only flat 3. This is a much larger flat with a very large lounge/diner with kitchen area off. There are 2 double bedrooms and, potentially a small third bedroom or dressing room. Finally there is a shower room/WC."*
>
> *11. The inspection was undertaken on a bright summer's morning and there had not been much rainfall in the weeks before. However there were obvious signs of long term water ingress through the walls in the staircase and in the flats themselves. Flat 3 was undergoing complete refurbishment but the Tribunal saw into one cupboard where there was mould all up the wall. It was pointed out that there had been more evidence of damp penetration from above before the refurbishment work had been started. All the window frames except one small one to the rear of flat 3 (which was a modern double glazed unit) were wooden and most were showing signs of age with some evidence of rotting, particularly in the staircase area.*

*12. Of relevance to the problems at the property, the structure at the rear in particular was very awkward in terms of access and any scaffolding would be complex. The front and side were adjoining fairly narrow public pavements which would require scaffolding with the usual health and safety protection for the public who would have to have access under it.*

**The Leases**

13. The Tribunal was shown copies of both the residential and the commercial leases. The residential leases are all for terms of 199 years from the 19th September 1986 with a ground rent of £1 per annum. This is extremely low, even for 1986. However, as part of the service charge regime, the landlord is also entitled to claim 10% of the service charge bill as an additional service charge.

14. There are the usual covenants on the part of the landlord to maintain the common parts and structure of the building and to insure it and the Respondents are liable to pay a total of two thirds of the cost which includes "*all other expenses (if any) reasonably incurred by the Landlord in and about the maintenance and proper and convenient management and running of the building*".

15. Of particular relevance is the description of the demises which numbers each flat and states what floor it is on and then says "*...being in the building known as 11 & 12 Eastern Esplanade, Southend-on-Sea Essex....*". In other words the definition of the building includes all of the structure known as 11 & 12 Eastern Esplanade.

16. The commercial lease is dated 9th March 2006 i.e. nearly 20 years after the commencement of the residential leases. It appears to have a number of drafting defects in the 'particulars':-

    (a) It seems that the term was intended to be for 20 years. However, interpreted literally it is for 40 years because the 'Term Commencement Date' is defined as "*20 years from the date hereof*" i.e. 9th March 2026. The 'Term' is defined as "*20 years beginning on the Term Commencement Date*".

    (b) The 'Premises' are defined as "*The Ground Floor premises 11 and 12 Eastern Esplanade, Essex as edged in red to the plans attached hereto*". There was no red edging but from the uncoloured plan it would appear that the entrance and stairs to the flats are not included.

    (c) The 'Building' is defined as "*ALL THOSE premises situate at The Ground Floor premises 11 and 12 Eastern Esplanade, Essex and shown for the purpose of identification only upon the plans annexed hereto and thereon edged red*". Similar comments about the red edging are relevant i.e. the 'Building' does not include the entrance and stairs to the flats.

17. There is a further definition of 'building' in clause 1.1.2 but this simply refers to

the particulars and does not extend the defined building to anything other than the ground floor save for any building build pursuant to the terms of the lease or additions or alterations carried out during the term, of which there appear to be none.

18. The reason why the description of the Building in particular is termed as a defect is because of the 'knock-on' effect. For example, the landlord is only required to insure the 'Building' under clause 4.3. Thus there is no contract with the commercial lessee for the landlord to insure the 1st and 2nd floors. Similarly, clause 4.2 is the landlord's covenant which is only to keep in repair "...*the main structure of the Building and common Conduits...*" i.e. only the ground floor and probably excluding the entrance and stairs to the flats.

19. The service charge regime in clause 3.5.1 and the Fifth Schedule only requires a contribution towards the maintenance repair and renewal of 'the Building' i.e. the ground floor excluding the entrance and stairs to the flats.

**The Law**

20. Section 35 of the **Landlord and Tenant Act 1987** ("the 1987 Act") permits any party to a long lease of a flat (not commercial premises) to apply to this Tribunal for an order varying such lease if it "*fails to make satisfactory provision with regard to one or more of the following matters*". There then follows a list of matters such as repair or maintenance of the building, insurance, repair or maintenance of 'installations' or services and the ability to recover all the service charges from the tenants.

21. The Applicant has not identified the particular grounds it relies upon but the variations requested could come within these provisions. In particular section 35(4) says that where the aggregate amount of service charge recoverable by a landlord would be more or less than the whole of such expenditure, the Tribunal could rectify this.

22. Section 27A(3) of the 1985 Act enables a Tribunal to determine the reasonableness of service charges to be incurred for repairs, maintenance, improvements etc.

23. At the hearing, counsel for the Respondents said that his clients were disputing that the consultation requirements had been met. Section 20 of the 1985 Act limits the amount which lessees can be charged for major works unless the consultation requirements have been either complied with, or dispensed with by a leasehold valuation tribunal (now called a First-tier Tribunal, Property Chamber). The detailed consultation requirements are set out in Schedule 4, Part 2 to the **Service Charges (Consultation Requirements) (England) Regulations 2003**.

24. These require a Notice of Intention, facility for inspection of documents, a duty to have regard to tenants' observations, followed by a detailed preparation of the landlord's proposals. The landlord's proposals, which should include the observations of tenants, and the amount of the estimated expenditure, then has to be given in writing to each tenant and to any recognised tenant's association.

Again there is a duty to have regard to observations in relation to the proposal, to seek estimates from any contractor nominated by or on behalf of tenants and the landlord must give its response to those observations.

25. As the Respondents have correctly pointed out, the Upper Tribunal has confirmed that assessing reasonableness of service charges can include a consideration of affordability on the part of the long leaseholders (**Garside and Anson v RFYC Ltd and another** [2011] UKUT 367 (LC) and LRX/54/2010 ("the **Garside** case")).

26. Section 20C of the 1985 Act also enables a Tribunal to make an order that the landlord's costs of representation before a Tribunal cannot be recovered from a tenant as part of a future service charge. This power must be exercised so as to make the decision 'just and equitable'. There are similar rules applying to the refund of any fee paid to the Tribunal.

27. Finally, rule 13 of the **Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013** ("the rules") enables a Tribunal to order a party to pay costs incurred by another party if there is a finding that such party has acted unreasonably in bringing or defending Tribunal proceedings.

**The Hearing**

28. The hearing was attended by Qalab Ali and Zainub Altaf from the managing agents, Hexagon Property Co. Ltd., together with the Applicant's advocate, Moniza Derveni. There was no explanation for the absence of the Applicant himself. From the Respondents there were Messrs. Pamneja, Howe and Clarke together with their witness Roy Victor Hilton MRICS and counsel, Nicholas Grundy. Mr. Grundy had produced a helpful 12 page statement of case.

29. As an initial point, the Tribunal chair noted that one of the residential leaseholders, Dikisa Pamneja, was not a Respondent. It was agreed that this should be rectified and a formal order was made that she was added as a Respondent. Her husband, Ajay Pamneja confirmed that he represented her views and no adjournment was sought.

30. Mr. Grundy then confirmed that it was part of his case that the consultation requirements of section 20 of the 1985 Act had not been complied with. No point was taken by Ms. Derveni that she had been taken by surprise and, again, no adjournment was sought. The main points being made were that (a) the late production of the letter referred to in paragraph 32 below (b) lack of evidence as to a specific consultation (c) lack of evidence that the comments of the leaseholders were taken into account and (d) lack of reasons for choosing Bishop & Baron Contractors Ltd.

31. As far as the windows over and above the 2 in the communal area are concerned, the Tribunal pointed out that it was simply unable to determine whose responsibility they were to maintain as the lease plans had no red edging. It was agreed by both advocates that the Tribunal was not being asked to determine that issue. The cost of the other windows was not being claimed as part of the current service charge demand.

32. Evidence was given by Qalab Ali and Zainub Altaf for the Applicant and Mr. Hilton, Mr. Howe and Mr. Clarke for the Respondents. They all confirmed that their various statements and, in Mr. Hilton's case, his 'reports' which did not contain the appropriate endorsements for experts reports, were correct. The only additional document of note produced by Mr. Ali was a copy of a letter allegedly written to MGH Construction Ltd. dated 21st August 2013 inviting a tender.

33. There was an allegation made on behalf of the Respondents that this not a genuine copy letter. It had not been produced before, despite requests from the Respondents. The Tribunal noted that the typeface for the telephone numbers on the top right hand side and the address at the bottom of the page were a slightly different from the letters written to the other 3 contractors which were in the bundle. The problem with that allegation was that both Mr. Howe and Mr. Clarke had contacted MGH Construction Ltd. who confirmed that they had received a letter asking them to tender. They said that they could not really remember the details but believed there was insufficient time to prepare the tender and the specification provided was not clear.

34. Mr. Ali was also found wanting in terms of his understanding of the contractual terms in the 4 leases as he had incorrectly set these out in his statement. He had completely misunderstood the terms of the commercial lease.

35. As far as the second part of the application to vary the residential leases is concerned, Ms. Derveni made it clear that the real problem with the leases was that the existing terms did not make it clear whether accountancy fees could be collected.

**Discussion – lease variation**

36. The most significant wording in section 35 of the 1987 Act is that there is a requirement that the lease "*fails to make satisfactory provision*". The question for determination therefore appears to this Tribunal to start with a consideration of the position in 1986 when the residential leases were both dated and commenced their terms.

37. The service charge and repair regimes appear to have been clear to everyone. Flat 3 would pay a third of the cost of maintaining the building and flats 1 and 2 would paid a sixth each with the ground floor premises, i.e. the freeholder or any tenant, being liable for the other third. That was logical because that would mean, in effect, that each floor of the building would pay one third of the total.

38. The service charge included maintaining the side entrance, stairs and landings serving the 3 flats. That may have appeared to be unfair on the ground floor occupant but that often happens with flats. For example, in this Tribunal's experience, leaseholders on the ground floor of a building often feel it is unfair that they contribute to maintaining a lift serving the upper floors only. The fact is that this was the regime agreed by everyone at the time.

39. The lease to the ground floor was created some 20 years later. The Respondents

have consistently asked to see a copy of any previous ground floor lease but this has not been produced. The fact is that this lease fails to provide for the lessee to pay for anything above the ground floor nor, arguably, the common parts referred to. Thus, the commercial lessee must contribute towards the maintenance of the structure on the ground floor only.

40. If a landlord fails to make sure that a subsequent commercial lease dovetails into the management regime, that is unfortunate but is no reason to then ask the residential leaseholders to pay more. Apart from anything else, a commercial lease may be surrendered at any time and there may be very good commercial reasons why a lease with an open market rent is drawn in a particular way.

41. This landlord is bound by the contracts entered into in 1986 by his predecessor in title. No failure to make satisfactory provision was present in 1986. It was created either by this landlord's failure to draft the commercial lease properly or his decision to draw it in the terms he did, which is not what this statutory provision was designed to deal with. If the ground floor lease had been a long residential lease of a flat, the position might have been different.

42. As to the creation of a more generous clause for the landlord to collect management fees, the residential leases already provide for the landlord to collect "*all other expenses (if any) reasonably incurred by the Landlord in and about the maintenance and proper and convenient management and running of the building*". This, again, is a contractual matter and this Statutory provision was not intended be used just to allow the landlord to collect more money in the event that the lease does not give him what he wants.

43. As to accountancy fees in particular, the Tribunal would also point out that the RICS Service Charge Residential Management Code makes it clear, at paragraph 2.4, that the annual management fee of a managing agent includes the following work i.e. "*produce annual spending estimates to calculate service charges and reserve, as well as administering accounts*" and "*produce and circulate service charge accounts...*". Thus, when managing a relatively small building such as this, one would not expect a separate accountant's fee to be claimed in any event.

**Discussion – service charges**

44. Trying to dissect the amount of service charges as a precise figure for work to be undertaken in the future is rarely helpful. The tender documents include various allowances which may or may not be used. It is also trite to say that an estimate is an estimate.

45. As far as the consultation requirements are concerned, the Tribunal was somewhat puzzled by the change of position of the Respondents. They all want the property to be put into good order particularly as the roof still seems to be leaking. All that will happen if the Tribunal decides that the consultation regulations have not been complied with is that the Applicant will start again and this will delay matters for at least 2 or 3 months. This Tribunal has not been asked to dispense with the consultation requirements. If it were dealing with such an application, it would take account of the fact that there has been much litigation over the years about the issues to be determined by a Tribunal in such a

case which culminated with the recent Supreme Court decision of **Daejan Investments Ltd. v Benson** [2013] UKSC 14.

46. That decision made it clear that a Tribunal is only really concerned with any actual prejudice which may have been suffered by the lessees. In this case, there was a meeting when concerns about the project were reviewed and there was a letter sent after that meeting explaining what the Applicant's views were about those concerns. The Respondents may not have liked what they heard or read but that is a different issue. It is also clear to the Tribunal, on the balance of probabilities, that MGH Construction Ltd. had been asked to tender as part of the most recent consultation process. As to the choice of Bishop & Brown Construction Ltd., there is evidence of consultation 3 letters having been sent out and there is no obligation to explain why a particular contractor has been invited to tender.

47. The next issue is the reasonableness of the amounts claimed. The evidence was that the original 'specification' was drawn up by a Mr. A.U. Rahman B.Sc. (Hons) under the 'guidance' of T. J. Gregson FRICS FFBE MEWI. It has either been created as or used as the tender document. This was then passed on to a new expert employed by the Applicant, Mr. P Madden of SM Surveyors who seems to have just adopted that 'specification'.

48. Mr. Hilton has used the copy of such specification which was completed by the successful contractor, Bishop and Baron Contractors Ltd. and criticized it by suggesting that the figures are too high. In fact his comments, by and large, amount to a criticism of the specification itself. It is interesting to note, for example, that the Respondents own nominated contractor, had used a very similar tender document and put prices in as a tender for external works which they submitted as part of the previous consultation process on 6th February 2013.

49. Mr. Hilton started to prepare a sort of Scott Schedule and the Tribunal has used that document as a base for its own assessment. A précis of his comments and the Tribunal's conclusions are:-

| Item | Cost(£) | Mr. Hilton | The Tribunal |
|---|---|---|---|
| 1.1 | 2,350 | No compound required | A very limited site and storage may be needed. The cost will have to be justified. Not agreed |
| 1.3 | 400 | Tenants should not have to pay | Agreed |
| 1.9 | 150 | Why a cost for restricted hours? | Builders often work at weekends etc. and these are people's homes - there could be a cost, not agreed |
| 3.1.1 | 300 | Only damp affected areas may require replacement | Yes, but the item is for stripping back only – not agreed |
| 3.1.2 | 2,700 | No evidence that roof joists are rotten | They will have to be checked - not agreed. Actual cost will have to be justified |
| 3.1.3 | 100 | Why does roof cavity have to be cleared | Because it does – not agreed |

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|---|---|---|---|
| 3.1.5 | | Existing roof is laid to suitable fall | no deduction stated |
| 3.1.6 | 4,400 | Warm air system is an Improvement | Not agreed (see below) but alternative of £3,886 needs to be deducted |
| 3.1.8 | 750 | Roof light not required | Not agreed – leases provide for roof light to be maintained |
| 3.2.1 & 3.2.3-7 | 5,033 | Only rendering is rear parapet | Allow £2,500 as figure includes re-pointing. Ultimate figure will have to be justified. |
| 3.2.9 | 111 | No bricks need replacing | This is only an allowance and any actual cost will have to be justified – not agreed |
| 3.4.2 | 100 | Only section of cast iron down pipe can be left or removed | Agreed because it is included in 3.7.3 |
| 3.6.1 | 600 | Pigeon spikes an improvement | Agreed but see below |
| 3.7.4 | 2,154 | No metal pipes and only 2 coats of paint needed | Not agreed. The building is subjected to constant salt laden winds and 3 coats will extend the period before re-decoration |
| 3.5.3 | 4,500 | remove 6 windows | Agreed |

50. In summary, therefore, the Tribunal agrees to the deductions in items 1.3, 3.4.2, 3.6.1 and 3.5.3 i.e. £400 + £100 + £600 + £4,500 = £5,600. It also agrees to other deductions in items 3.1.6 and 3.2.1 etc. i.e. £3,886 + £2,533 = £6,419. This makes a total deduction of £12,019 in actual costs.

51. As far as the flat roofs were concerned, Mr. Hilton's evidence was that the first alternative was an improvement. However, when questioned by the Tribunal he agreed that the first alternative would be likely to last 30 or 40 years whereas the second would last 20 or 25 years. As there is only a difference of £514, the Tribunal takes the view that the first alternative is not an 'improvement' in the technical sense as the value added exceeds the additional cost.

52. As far as the pigeon guards are concerned, these are an improvement but they will undoubted avoid damage to paintwork which is likely to save cost in the long run. The Respondents are encouraged to agree to this item.

53. Finally, as far as supervision is concerned, Mr. Ali said that the claim of 15% is made on the basis that the supervisor is not claiming money in advance. His evidence was that the normal market rate for supervision is 10-15%. Mr. Hilton's evidence was that it is 7.5-10%. The Tribunal's view is that the leaseholders should not be penalised because the Applicant cannot or will not pay the supervisor for some of the work in advance. The appropriate rate is, in the Tribunal's view, 10%.

54. Using the Bishop and Baron Construction Ltd. tender of £53,913.01 as a starting point, the Tribunal deducts £12,019 leaving a balance of £41,894.01 i.e. £6,982.34 for flats 1 and 2 and 13,964.68 for flat 3. The costs for VAT and supervision cannot be calculated and will not have to be met until the end of the

contract and the Tribunal does not therefore consider these to be monies which can reasonably be claimed on account.

55. The **Garside** case does confirm that the long leaseholders' ability to pay is a factor which can be taken into account when determining the reasonableness of undertaking a whole contract in one year. It was an appeal against the Leasehold Valuation Tribunal's finding that this could not be taken into account. However, the facts in that case were significantly different because there were substantial amounts to pay over several years and some of the tenants were having to sell their flats to pay. Around £7,600 and £9,000 per flat was being demanded for 2010 with almost as much the following year.

56. Of significance, and relevance to this case, were the comments of HHJ Robinson who said, at paragraph 16 of the decision, that "*If a lessee wishes to put forward a case of particular hardship by reference to their personal circumstances they may do so, though the weight to be attached to such an argument would depend on the cogency of the evidence to support it*". She went on to say that there was a paucity of evidence in that case and if the Tribunal had not wrongly decided the point of principle, it may well have rejected such evidence.

57. She also added, in paragraph 20, "*it is important to make clear that liability to pay service charges cannot be avoided simply on the grounds of hardship, even if extreme. If repair work is reasonably required at a particular time, carried out at a reasonable cost and to a reasonable standard and the cost of it is recoverable pursuant to the relevant lease then the lessee cannot escape liability to pay by pleading poverty*".

58. According to the tender document at page 528 in the bundle, the part of the total cost attributable to the internal decoration and repairs is £5,143.40 compared with a total for the whole contract of £53,913.01 plus VAT and supervision costs less 6 out of 8 windows. That would appear to be the only work which did not need scaffolding for most, if not all of the work.

59. All 3 flats appear to be let out by the Respondents to sub-tenants for most if not all the time. None of the Respondents has provided any evidence of hardship and the part of the work they want to be delayed is about 10% of the total. All the Respondents, Mr. Clarke in particular, accept that the proposed work needs to be done. In fairness to Mr. Grundy, he did indicate that he was not pressing this particular point too hard for these reasons.

**Conclusions**

60. The application to vary the leases is refused for the reasons stated.

61. The Tribunal members were satisfied that the residential parts of this building had not been managed effectively for some years. As was said in the previous decision, this must have been perfectly obvious to any purchaser of a leasehold interest and it was noted that Mr. Clarke had bought his leasehold interest at auction which usually indicates a difficulty in selling on the open market such as lack of repair or maintenance. This 'neglect' will, perversely, have resulted in a saving for the leaseholders. Without any clear and cogent evidence as to any

'extra' cost incurred, the Tribunal cannot, at this stage, determine whether the cost of the present works have been inflated because of the neglect.

62. In the absence of cogent evidence of hardship, no order will be made that the works have to be staged over more than one service charge year.

63. As far as the consultation process was concerned, the Tribunal determined that it had been complied with in the sense that although the Applicant's managing agents did not cover themselves in glory, the Applicant did ask MGH Construction Ltd. to tender and did listen to the Respondents comments and reported his conclusions to them albeit not in the 'official' consultation letters.

**Costs**

64. Both sides had asked for costs orders in the pre-hearing papers. At the hearing Ms. Derveni, quite properly, recognised her client's difficult position for such an application and said that she was not pursuing it. She acknowledged that the residential leases probably did not allow for the recovery of legal costs as a service charge. In order to avoid any doubt and convey the message clearly, the Tribunal does make an order pursuant to section 20C of the 1985 Act.

65. For the further avoidance of doubt, and in case the Applicant is considering a claim under clause 2(1)(d) in the residential leases for its costs "*for the purpose of or incidental to the preparation and service of a notice under Section 146 of the Law of Property Act 1925*", the Applicant's evidence is that no decision has yet been made to pursue forfeiture. This means that none of the work in connection with this application can have been 'for the purpose of or incidental to' a section 146 notice.

66. In contrast, Mr. Grundy's position was that he was asking for a determination that the landlord had unreasonably brought and pursued both applications and he claimed his brief fee of £1,500 plus VAT for attendance at the hearing.

67. Proceedings before this Tribunal do not normally involve costs orders. It is a 'no costs' regime. With almost every application there is a winner and a loser but, unlike courts, there is no presumption that costs 'follow the event'. This is because expert Tribunals are there to exercise their expertise and can make determinations whether parties are represented or not. In other words it is the parties' own decision as to whether legal costs, in particular, are to be incurred and there is no 'prospect' of costs being reimbursed by the losing party.

68. In this case 2 applications were brought at the same time and were dealt with at the same hearing. Whilst it could possibly be argued that the application to vary the leases had no prospect of success, the application in relation to the service charges was needed to resolve the issues. The Tribunal considers that it would not be just and equitable to make any costs order. It is simply not satisfied that the rule 13 'threshold' has been crossed.

**The Future**

69. Despite the orders made in this case, the resolution of the issues has revealed that there are serious deficiencies in the 'specification' which became the tender

document. Furthermore, the way in which Bishop & Baron Construction Ltd. completed the tender form is not what one would expect from an experienced and established company. Costings have been put against items when they should not have been. Many of the items are simply conditions. Under the 'General' heading all the provisions are just conditions of work and do not require specific costings. They just need to be taken into account when costing the remaining items. However Bishop & Baron gave figures for some of these items.

70. If Hexagon want an example of how this exercise should have been undertaken, they only have to look at the tender from MGH Construction Ltd. which is much more professionally prepared.

71. Whilst it is not part of the Tribunal's decision, the Tribunal members are concerned that positions have become polarised, that there have now been 2 sets of litigation over works which both sides want done and that even at the hearing mistrust was the pervading atmosphere.

72. It appears that a contract has been entered into with Bishop & Baron Construction Ltd. which really shuts the door on any further tender process taking place. If that had not been the position, the Tribunal may well have recommended a re-consideration of the specification and a further tender process.

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**Bruce Edgington**
**Regional Judge**
**5th November 2014**