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Residential
Property
TRIBUNAL SERVICE

DECISION OF THE LEASEHOLD VALUATION TRIBUNAL ON APPLICATIONS UNDER SECTIONS 27A, 20ZA AND 20C OF THE LANDLORD AND TENANT ACT 1985 as amended

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Ref: LON/00AU/LSC/2006/0109
LON/00AU/LDC/2006/0039

Premises:	Flat 8, 121 Essex Road, London, N1 2SN
Applicants:	Mr Jonathan Earle (Sections 27A and 20C) Mr Sotos Charalambous (Section 20ZA)
Respondents:	Mr Sotos Charalambous (Sections 27A and 20C) Mr Jonathan Earle (Section 20ZA)
Dates of Hearing:	29 and 30 June 2006
Date of Tribunal's Decision:	
Tribunal:	Mrs J S L Goulden JP (Chairman) Mr D D Banfield FRICS Mrs A Moss

JG

LON/00AU/LSC/2006/0109

PROPERTY: FLAT 8, 121 ESSEX ROAD, LONDON, N1 2SN

BACKGROUND

1. The Tribunal was dealing with the following applications:

Tenant's applications

(1) An application dated 16 March 2006 under Section 27A of the Landlord and Tenant Act 1985, as amended (hereinafter referred to as "the 1985 Act") for a determination whether a service charge is payable and, if it is, as to –

(a) the person by whom it is payable
(b) the person to whom it is payable
(c) the amount which is payable
(d) the date at or by which it is payable and
(e) the manner in which it is payable

(2) An application dated 4 May 2006 under Section 20C of the Act to limit landlord's costs of proceedings.

Landlord's applications

(3) An application dated 18 May 2006 for the dispensation of all or any of the consultation requirements under the 1985 Act.

(4) An application dated 18 May 2006 for the determination as to penal costs under Schedule 14 paragraph 10 of the Commonhold and Leasehold Reform Act 2002 (hereinafter referred to as "the 2002 Act").

2. Both sides requested an Order for reimbursement of fees.

3. No provision was made in Directions issued by the Leasehold Valuation Tribunal for an inspection of Flat 8, 121 Essex Road, London, N1 2SN (hereinafter called "the property") to be made and no request for an inspection was made by either party at the hearing.

HEARING

4. The hearing took place on 29 and 30 June 2006. In view of the cross applications, Mr Earle will be referred to as "the tenant" and Mr Charalambous as "the landlord" in the body of this Decision.

5. The tenant, Mr J Earle, appeared and was represented by Mr D Moore, Solicitor, of Rodgers & Burton. Miss N Raja, Trainee Solicitor, Rodgers and Burton attended. Mr Earle gave oral evidence.

6. The landlord, Mr S Charalambous, appeared and was represented by Mr P Letman of Counsel and Mr H Y Smith, Solicitor, of Henry Y Smith & Co. Mr D Clarke, pupil to Mr Letman attended. Mr Charalambous gave evidence.

7. The points in issue which required the Tribunal's determination related to the following:-

(a) Consultation requirements in respect of Section 20 Notice dated 10 January 2002;
(b) Consultation requirements in respect of Section 20 Notice dated 31 December 2003;
(c) Dispensation of consultation requirements in respect of Section 20 Notice dated 31 December 2003;
(d) Whether demands were made out of time under Section 20B of the Act;
(e) Reasonableness of costs;
(f) Limitation of landlord's costs of proceedings under Section 20C of the Act;
(g) Reimbursement of fees;
(h) Penal costs

(a) Consultation requirements in respect of Section 20 Notice dated 10 January 2002

8. Mr Moore, for the tenant, said that the Notice was defective in that it did not follow the requirements of Section 20 of the 1985 Act with the consequence that the costs were capped.

9. Mr Letman, for the landlord, referred the Tribunal to a House of Lords' case **Mannai Investment Co Ltd v Eagle Star Assurance Co Ltd (1997)**. He said that the recipient of the Notice would clearly realise that there had been an error and would not have been misled by what he described as "*a slip*".

10. The Section 20 Notice dated 10 January 2002 was in the form of a letter from the landlord's solicitors. The Notice indicated that major works of repair were to be carried out to the property which involved, in phase 1 "*urgent roof works and all associated drainage and brickwork repairs*" and in phase 2 "*roof light replacement*". It was stated that although quotations were sought from a number of contractors, only three had replied. Their quotations were:-

> *"Greenwood Roofing Contractors - £25,140.00 plus VAT plus scaffolding at £2,900.*
>
> *Wedge Roofing - £31,375.00 plus VAT plus scaffolding at £3,250.*
>
> *N J Bridger - £22,670.00 inclusive of VAT plus the cost of scaffolding."*

The recommendation was for acceptance of the tender from N J Bridger.

11. The letter of 10 January 2002 ended:-

> *"In accordance with the requirements of the Landlord and Tenant Act 1985, Section 20, your comments and observations are duly invited. Any*

representations you may wish to make must be in writing and sent to our office to be received no later than 31 January 2001."

12. At the time of the issue of the Section 20 Notice on 10 January 2002, the statutory requirements as set out in the 1985 Act were as follows:-

> **"(1) Where relevant costs incurred on the carrying out of any qualifying works exceed the limit specified in subsection (3), the excess shall not be taken into account in determining the amount of a service charge unless the relevant requirements have been either –**
>
> **(a) complied with, or**
>
> **(b) dispensed with by the court in accordance with subsection (9);**
>
> **and the amount payable shall be limited accordingly.**
>
> **(2) In subsection (1) "qualifying works", in relation to a service charge, means works (whether on a building or on any other premises) to the costs of which the tenant by whom the service charge is payable may be required under the terms of his lease to contribute by the payment of such a charge.**
>
> **(3) The limit is whichever is the greater of –**
>
> **(a) £50, or such other amount as may be prescribed by order of the Secretary of State, multiplied by the number of dwellings let to the tenants concerned;**
>
> **or**
>
> **(b) £1,000, or such other amount as may be so prescribed.**
>
> **(4) The relevant requirements in relation to such of the tenants concerned as are not represented by a recognised tenants' association are –**
>
> **(a) At least two estimates for the work shall be obtained, one of them from a person wholly unconnected with the landlord.**
>
> **(b) A notice accompanied by a copy of the estimates shall be given to each of the those tenants or shall be displayed in one or more places where it is likely to come to the notice of all those tenants.**
>
> **(c) The notice shall describe the works to be carried out and invite observations on them and on the estimates and shall state the name and the address in the United Kingdom of the person to whom the observations may be sent and the date by which they are to be received.**
>
> **(d) The date stated in the notice shall not be earlier than one month after the date on which the notice is given or displayed as required by paragraph (b).**
>
> **(e) The landlord shall have regard to any observations received in pursuance of the notice; and unless the works are urgently required they shall not be begun earlier than the date specified in the notice. ..."**

13. It is clear from the wording of paragraph (4)(d) that the date by which representations were invited as stated in the 2002 Notice was **"earlier than one**

month after the date on which the notice was given or displayed ..." and therefore the relevant requirements as set out in paragraph (1)(a) of the 1985 Act have not been complied with. In the view of the Tribunal, the Notice is defective and therefore invalid.

14. It was acknowledged by both sides that at the time of the issue of the Section 20 Notice on 10 January 2002, the Tribunal had no power to dispense with any or all of the consultation requirements. Dispensation was reserved at that time to the court (although the power to dispense with any or all of the consultation requirements was subsequently transferred to the Tribunal under the 2002 Act). However, the parties requested the Tribunal to express a view, and the Tribunal therefore considered whether if it had had the power to dispense at that time, it would have done so.

15. In the tenant's reply to the landlord's statement of case dated 23 May 2006, it would appear from the chronology that Mr Earle complained of damp patches in his ceiling from January or February 2000.

16. The Tribunal notes from the witness statement of Mr Charalambous that he had approached a local firm of surveyors to prepare a schedule of works in June 2001 after, he said "*Mr Earle was particularly affected by the leaks and when in December 2001 temporary work was necessary, I arranged for him to discuss the nature of those works with the roofer and provided him with cash to pay the roofer on the spot.*" The witness statement also referred to a telephone call from the tenant on 1 March 2002 complaining of water ingress "*in different places*". These statements were not challenged by the tenant.

17. The Tribunal concludes that the damp suffered by the tenant in 2000 must have become worse by the time of the Section 20 Notice in January 2002 and it is noted Mr Earle was still complaining of water ingress in March 2002.

18. Whilst the landlord did not give the full month required by the Act for observations, and therefore the Notice was invalid, in view of the particular circumstances surrounding the service of the Notice, if the Tribunal had the power to dispense at the relevant time, it would have done so.

(b) Consultation requirements in respect of Section 20 Notice dated 31 December 2003

19. Mr Moore, for the tenant, said that the Notice was defective in that it did not follow the requirements of Section 20 of the 2002 Act. The tenant had had no opportunity to nominate a contractor and he had therefore been prejudiced. The works had not commenced until May 2004 and therefore were not treated by the landlord as urgent. In his view, the Notice was invalid with the consequence that the costs were capped. Mr Moore said that there was no challenge as to quality and/or cost.

20. Mr Letman accepted that the Notice was not in the correct form, but he pointed out correspondence to indicate that not only had Mr Earle been fully aware of the situation and the works, but his solicitors were actively pressing for the work to be carried out and threatened legal proceedings if the works were not carried

out. There was, he said, extensive consultation with the tenant and the tenant would not have wished there to be further consultation. A further argument expounded by Mr Letman was that these were part and parcel of the works which had been the subject of the original Section 20 Notice in 2002 and, in effect, there had been no need to serve the 2003 Notice in any event, since the works had been carried out under the transitional provisions to the 2002 Act.

21. Although Mr Letman argued that the works were covered by the 2002 Notice, this is not accepted by the Tribunal, since the 2002 Notice referred to different contractors who were instructed at a different time. Indeed even if the same contractors had been invited to tender, it is reasonable to assume that the estimated price would bear no relation to the estimated price in 2003.

22. The Tribunal also rejects the contention that the works form part of the transitional provisions which envisages that the contract for such works starts just before and finishes just after the new Act came into force and as part of the same contract. The first Notice was sent in January 2002 but the cost of the first tranche of works were only invoiced in July 2003. The provisions of the 2002 Act therefore apply in this case.

23. The Tribunal then considered the Notice which was sent by the landlord's solicitors to the tenant. This was dated 31 December 2003 and stated, inter alia,

> *"Further to our previous correspondence, we have now reached the stage that we can report on the proposed action to deal with the major works of repair to the Property.*
>
> *The steps taken following the meetings held in June and August this year involved instructing the Daniel Connal Partnership in place of Malacay Walsh in view of concerns particularly regarding the high cost of the work as indicated by the tenders obtained by them and set out in our previous correspondence. They advised that it would be feasible to arrange the works in two stages. Phase 1 of the works involves urgent roof works and all associated drainage and brickwork repairs. Phase 2 relates to roof light replacement works which should be carried out within the next six months.*
>
> *Daniel Connal Partnership approached some six firms including Tony Roofing, the contractor, who carried out part of the roofing work earlier this year at a cost of £18,000. The tender documents were divided into two sections referred to as Phase 1 and Phase 2 respectively and the contractors were requested to submit a third combined quotation which might represent some saving if the works of both phases were carried out at the same time. Part of the cost will be represented by provision in the service charge account about to be served and the balance should be paid at the time the works are completed.*

Four competitive tenders based on the specification and drawings were received by the Surveyors who subsequently clarified figures with them and report as follows:

	Phase 1:	*Phase 1* (sic)*:*	*Combined*
Acclaim Contracts Ltd	*£13,699.13*	*£13,458.25*	*£27,157.38*
Diebelius Builders Ltd	*£20,750.00*	*£18,000.00*	*£36,500.00*
Dore Building Services Ltd	*£44,553.00*	*£20,042.00*	*£60,806.00*
MCS Construction	*See text*	*See text*	*£96,270.00*

Copies are available for inspection but we are currently awaiting the same from the Surveyors.

Tony Roofing and Guaranteed Asphalt Ltd failed to submit tenders and MCS submitted a single quotation, pricing to execute both phases concurrently.

Acclaim Contracts Ltd's tender did not initially price all the items and following discussions with them, their quotation was revised as follows:

Acclaim Contracts Ltd	*£15,679.13*	*£13,459.25*	*£29,137.38*

The contractor has confirmed that allowances have been made within the tender for the erection of scaffolding to elevations only where it is possible to do so without affecting adjoining properties. The contractor proposes to repair and re-point areas of brickwork at high level to the rear and side elevations from a mobile access platform.

With Health & Safety in mind, the Surveyors strongly recommend that scaffolding should be erected to all elevations of the property where high level works are to be carried out. The contractor has confirmed that the additional cost of erecting scaffolding over adjoining properties amounts to £1,500 over the above figures. ...

In addition to the fees due to the surveyor, we write to confirm that they have agreed to accept a reduction of usual charges to 10% of the final contractor's invoice plus VAT and out of pocket expenses, thus meeting the standard agreed between us last August. This does not include any additional work which may be necessary in connection with any scaffolding licences over adjoining property and schedules of condition which may also need to be prepared. The Surveyors normally charge £100 per hour plus out of pocket expenses and VAT.

The Surveyors therefore recommend that you accept Acclaim Contracts Ltd tender of £29,137.38 plus VAT and allow a further £1,500 for the erection of scaffolding to the rear and side elevations. The total costs are estimated as £46,115.05 as set out in the Schedule below.

In accordance with the requirements of the Landlord and Tenant Act 1985, Section 20, this letter is being formally served to enable your comments and observations to be made. Any such observations must be

in writing and sent to this office to be received no later than 30 January 2004.

It is hoped, however, that the only question which you address is the endorsement of the recommendation of the Surveyors. We would therefore ask you to respond by the 15 January, 2004 as the work is urgent and the contractor can be instructed to make the property wind and watertight immediately thereafter."

24. Regulation 7(4) of the Service Charges (Consultation Requirements) (England) Regulations 2003 sets out the qualifying works for which public notice is not required, and, in order to assist the parties, these can be summarised as follows:-

Notice of intention

A notice of the landlord's intention to carry out qualifying works (i.e. works on a building or any other premises) must be sent to each leaseholder and to any recognised tenants' association (RTA) (if any). This notice must, inter alia,

(a) Describe in general terms the works proposed to be carried out or specify a place and hours where the proposals can be inspected;

(b) State the landlord's reasons for considering it necessary to carry out the proposed works;

(c) Invite observations in writing;

(d) Specify:

- the address to which such observations must be sent;
- the date on which the consultation period ends (30 days);
- nominate a person from whom the landlord should try to obtain an estimate for carrying out the works (again within 30 days).

The place and hours for inspection must be reasonable and a description of the relevant matters must be available for inspection free of charge. If copies cannot be made on inspection, the landlord must provide a copy, on request by the tenant, and again free of charge.

Where observations are made within 30 days the landlord must have regard to them.

Obtaining estimates

At least two estimates must be obtained and where a contractor is nominated by the leaseholders, the regulations provide that if only one leaseholder nominates a contractor, the landlord must try and obtain an estimate from that contractor. There are further provisions where nominations are made by more than one leaseholder.

Following the receipt of tenders, a further notice must be sent.

Notification of the estimates

This notice must be sent to each leaseholder and the RTA (if any).

It must include a statement containing:-

(i) for at least two for the estimates, the amount specified in the estimate as the estimated cost of the proposed works (one of which must be from a contractor wholly unconnected with the landlord. In addition, one of them must be from a nominated contractor, if an estimate was obtained);

(ii) where leaseholders have made observations by the due date, the landlord must provide a summary of them and his responses to them;

(iii) specify a (reasonable) place and hours at which all the estimates may be inspected;

(iv) invite observations in writing regarding the estimates;

(v) give the address and the date by which (30 days) observations must be sent;

(vi) state that they must be delivered by the due date;

(vii) if facilities to provide copies of the documents referred to in 3(i) are not available at the place specified, then copies must be provided free on request.

The landlord must have regard to any observations received by the due date.

Award of contract

Notification of the award of contract

This notice is not required if a tender from a nominated contractor or the lower tender is accepted. Otherwise within 21 days the landlord must send a notice to each leaseholder and the RTA (if any) –

(a) stating the reasons for warding the contract, or giving the place and hours where those reasons may be inspected; and

(b) giving a summary of leaseholders' observations on the estimates and the responses to them on a place and hours where they may be inspected;

(c) Dispensation of consultation requirements in respect of Section 20 Notice dated 31 December 2003

25. It is quite clear from the Notice dated 31 December 2003 does not fulfil the requirements under the 2002 Act. The Notice is defective and therefore invalid. This was accepted on behalf of the tenant.

26. Section 20ZA(l) of the 2002 Act states:-

"Where an application is made to a leasehold valuation tribunal for a determination to dispense with all or any of the consultation requirements in relation to any qualifying works or qualifying long term agreement, the tribunal may make the determination if satisfied that it is reasonable to dispense with the requirements".

27. In the view of the Tribunal, this legislation was enacted for a purpose which included a greater involvement in the consultation process by those who ultimately will be paying the bill. Because of this, greater transparency must be shown by those incurring the costs in the first instance.

28. The question for the Tribunal in this case is clearly one of reasonableness. Section 20ZA does not require the Tribunal to be satisfied that the landlord acted reasonably but rather whether it is reasonable in the circumstances of this case to dispense with all or any of the consultation requirements.

29. It was clear from the correspondence that Mr Earle was most anxious for the work to be carried out and was fully aware of the nature of the work to be carried out. His attitude was that the landlord should carry out the work without delay. Indeed, in Mr Earle's letter of 4 April 2003 to the landlord's solicitors, he said, inter alia:-

> *"I enclose for your attention copies of letter sent over the last three months or so. On one previous occasion, you stated that you had no copy of a number of letters that I had written. Therefore, in a spirit to keep you and your client fully informed, I enclose copies of the following:*
>
> 1. *Letter dated 10 December 2002, detailing the partial collapse of my kitchen ceiling and my imminent move from the property.*
>
> 2. *Letter dated 16 December 2002, informing you of my move out of my property.*
>
> 3. *Letter dated 31 January 2003, requesting the tender documentation (which I duly received albeit in an incomplete format with yet more promises from you that you would continue to chase/seek etc other tenders).*
>
> 4. *Removal invoice from Scott's Removals.*
>
> *I would be grateful if you could make your client aware of these letters, as I have had no acknowledgement from either him or yourself regarding the fact that I have had to vacate the property.*
>
> *These documents, as with other letters, will obviously form part of my case. Please inform your client that I am in the process of instructing my solicitor to appoint a Barrister and file a damages suit against him.*
>
> *With regards to point 3 above, could you please advise regarding the state of play with the sourcing of and administration of tender documents? In your letter dated 26 February 2003, you state that you had been unable to provide a detailed breakdown from MCS; could you please source one?*

Furthermore, you state that a fourth quote is awaited? Where is this and why have you not forwarded this to me?"

30. Meetings to discuss the works were attended by Mr Earle. Mr Earle embarked on litigation to force the work to be carried out. A challenge as to the validity of the Notice was not made until January 2006. The application to dispense was dated 18 May 2006.

31. At the time of the Notice, the works to be carried out were clearly urgent, but the Tribunal has not been persuaded that the landlord treated such works as urgent so as to reinforce his arguments that consultation requirements should be dispensed with. The works were not carried out immediately (which would have carried more weight) but some five months later.

32. The Tribunal considered whether the tenant had been prejudiced in view of the fact that he lost the right to nominate a contractor. It is considered that this loss of opportunity in law does amount to prejudice.

33. The views of the Tribunal as to the purpose of the Act are set out in paragraph 27 above. In this case, the Tribunal has not been persuaded that any exceptional circumstances exist for the Tribunal to depart from the statutory requirements, and the Tribunal adopts a restrictive interpretation of the Act in this respect.

34. All cases must be decided on its merits. In the circumstances of this particular case, the Tribunal determines that that part of the consultation requirements contained in Section 20 of the Act which have not been complied with may not be dispensed with and the tenants' contribution is therefore capped with the statutory limit.

35. It is noted in any event that the final costs have not yet appeared on the service charge accounts and if the Tribunal had dispensed with consultation requirements, it would not have had jurisdiction where sums have not yet been demanded.

36. Whilst, of course, the Tribunal appreciates that its determination will have considerable financial implications for the landlord, the Tribunal considers that the defects in the Notice were not minor and the intention and spirit of Section 20 were wholly disregarded.

(d) Whether demands were made out of time under Section 20B of the Act

37. The Tribunal considered the arguments on both sides under this head and in each case challenged, the Tribunal considered when the sums were demanded within the service charge and when they were incurred (which was sometimes difficult to ascertain).

Section 20B of the Act states:-

> **"If any of the relevant costs taken into account in determining the amount of any service charges were incurred more than 18 months before a demand for payment of the service charge is served on the**

tenant then (subject to sub section (2)), the tenant shall not be liable to pay so much of the service charge as reflects the costs so incurred

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

38. The Tribunal also considered the definitions set out in Section 18 which provides as follows:-

"In the following provisions of this Act "service charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent

(a) which is payable directly or indirectly for services repairs maintenance or improvements or insurance of the landlords cost of management and

(2) the whole or part of which various or may vary according to the relevant costs are the costs or estimated costs incurred or to be incurred by or on behalf of the Landlord or a superior Landlord in connection with the matters for which the service charge is payable (3) for this purpose – (a) "costs" includes overheads, and (b) costs are relevant costs in relation to a service charge whether they are incurred or to be incurred in the period for which the service charge is payable or an earlier or later period."

The service charge year to 23 June 2002

39. The amounts challenged were interim service charge of £600 and management fees of £126.06, both of which had not been demanded until 13 December 2004.

40. The Tribunal rejects Mr Letman's argument that these were not sums incurred, but merely demands for payments on account and therefore not caught by Section 20B. The Tribunal also rejects Mr Letman's arguments with regard to the management fees that the charge did not crystallise until the total sum was certified and therefore this sum was also not caught by Section 20B.

41. The costs are incurred when the liability arises. The Tribunal determines that in respect of the service charge year to 23 June 2002, the interim service charge of £600 and the management fees of £126.06 are both out of time.

The service charge year to 23 June 2003

42. The amounts challenged were the excess service charge balance of £442.47 (£258.56 having been conceded) and management fees of £157.45, both of which had not been demanded until 13 December 2004.

43. Having considered the accounts, the Tribunal determines that in respect of the service charge year to 23 June 2003, the excess service charge of £442.47 and management fees of £157.45 are out of time.

The service charge year to 23 June 2004

44. The amounts challenged were the excess service charge balance of £2,820.16 (£997.31 having been conceded) and management fees of £768.66 which had not been demanded until 17 November 2005.

45. Having gone through the relevant accounts, the Section 20 Notice had notified the tenants of the proposed expenditure on this item and therefore the amount subsequently determined by the Tribunal has not been caught by Section 20B. The Tribunal rejects the contention that the insurance is not a service charge item and this amount is out of time.

46. The Tribunal determines that in respect of the excess charge for the service charge year to 23 June 2004 only the expenditure relating to the roof repairs is allowable. The total sum is detailed in paragraph 54 below (£15,000). The amount chargeable to the tenant is therefore £1,875 (12.5%).

47. With regard to the management fees, some period is not caught by Section 20B. The fees are higher than usual because works are carried out, the Tribunal accepts that there would be an appropriate increase in management fees (which in this case would include supervision fees in respect of the roof.

48. With regard to the management fees, the Tribunal determines that those relating to the roof works allowed are payable in full as are those relating to the period not out of time i.e. 17/5/04 to 23/6/04. Doing the best it can from the information available, it deducts £144 in respect of the fees relating to the eleven months or so which were out of time. The balance of £624.66 is therefore chargeable to the tenant.

(e) Reasonableness of costs

49. The challenges were in respect of –

(a) the service fund of £1,500 for each of the service charge years 2002 and 2003;

(b) the reserve fund of £2,500 for the service charge year 2004;

(c) the interim service charge of £1,500 for the service charge year of 2004;

(d) the cost of roofing works in the sum of £18,000.

50. With regard to the reserve fund for the service charge years 2002 and 2003, there was no challenge to the amount per se, but that the two sums had been requested at the same time. With regard to the reserve fund for the service charge 2004, the challenge was as to the increased amount.

51. The Tribunal determines that the sum of £1,500 reserve fund for each of the service charge years 2002 and 2003 and the increased reserve fund of £2,500 (which was in anticipation of Phase 1 and Phase 2 works being carried out) are relevant and reasonably incurred and properly chargeable to the service charge account.

52. The Tribunal determines that the interim service charge of £1,500 for the service charge year 2004 is relevant and reasonably incurred and properly chargeable to the service charge account.

53. With regard to the roofing works, these were invoiced in July 2003. In the particular circumstances of this case, it was reasonable for the landlord to have agreed that the roofing works could proceed and the landlord reimbursed the tenant who had arranged for the work to be carried out to the leaking roof over Flat 7. The Tribunal does accept that there is some duplication in costs in that if the roofs had all been attended to at one and the same time, some savings could have been obtained in respect of the cost of scaffolding and preliminaries and there could have been economies of scale if one contractor only had been instructed. The Tribunal makes an appropriate deduction.

54. The Tribunal determines that the sum of £15,000 in respect of the roofing works is relevant and reasonably incurred and properly chargeable to the service charge account. The tenants are of course liable for the sum determined in accordance with their proportions as set out in their respective leases.

(f) Limitation of landlord's costs of proceedings under Section 20C of the Act

55. It was accepted by both sides that the relevant clause relied on in this case is under Clause 4(3) of the lease to the landlord which states:-

> **"To provide any other services and to carry out any other works of whatever nature as a Lessor may from time to time deem necessary or expedient for the efficient management of the building and the forecourt and the footpaths belonging thereto"**

56. Mr Letman confirmed that the costs which were intended to be placed on the service charge account were legal costs.

57. Under Section 20C of the Act –

> **"(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.

(2) The application shall be made –

(a) in the case of court proceedings, to the court before the proceedings are taking place or, if the application is made after the proceedings are concluded, to a county court;

(b) in the case of proceedings before a leasehold valuation tribunal, to the tribunal before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to any leasehold valuation tribunal;

(c) in the case of proceedings before the Lands Tribunal, to the tribunal;

(d) in the case of arbitration proceedings, to the arbitral tribunal or, if the application is made after the proceedings are concluded, to a county court.

(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."

58. In applications of this nature, the Tribunal endeavours to view the matter as a whole including, but not limited to, the degree of success, the conduct of the parties and as to whether, in the Tribunal's opinion, resolution could or might have been possible with goodwill on both sides.

59. In the judgement of His Honour Judge Rich in a Lands Tribunal Decision dated 5 March 2001 (**The Tenants of Langford Court v Doren Ltd**), it was stated, inter alia, *"where, as in the case of the LVT, there is no power to award costs, there is no automatic expectation of an order under Section 20C in favour of a successful tenant, although a landlord who has behaved improperly or unreasonably cannot normally expect to recover his costs of defending such conduct. In my judgement the primary consideration that the LVT should keep in mind is that the power to make an order under Section 20C should be used only in order to ensure that the right to claim costs as part of the service charge is not to be used in circumstances that makes its use unjust".*

60. Under new legislation, there is now a limited power for the Tribunal to order costs, but Judge Rich's comments are still valid.

61. In accordance with Section 20C(3), the applicable principle is to be the consideration of what is just and equitable in the circumstances. Of course, excessive costs unreasonably incurred would not be recoverable by the landlord in any event (because of Section 19 of the 1985 Act) so the Section 20C power should be used only to avoid the unjust payment of otherwise recoverable costs.

62. In his judgement Judge Rich indicated an extra restrictive factor as follows:-

> *"Oppressive and, even more, unreasonable behaviour however is not found solely amongst landlords. Section 20C is of a power to deprive a landlord of a property right. If the landlord has abused his rights or used them oppressively that is a salutary power, which may be used with justice and equity; but those entrusted with the discretion given by Section 20C should be cautious to ensure that it is not itself turned into an instrument of oppression".*

63. The Tribunal considers that resolution between the parties would not have been possible without an application before the Tribunal, but having considered the relevant case law and, in particular, the cases of **Sella House v Mears (1989) and Iperion Investment Corporation v Broadwalk House Residents (1995)**, the Tribunal is of the view that the clause relied on is not sufficiently wide so as to allow the landlord to place legal costs on the service charge account. The Tribunal considers that there is an absence of clear words showing that a class of expenditure was contemplated and accordingly the Tribunal adopts a restrictive construction, and the question of whether or not the Tribunal should exercise its discretion therefore does not arise.

64. The Tribunal determines that the legal costs are not relevant costs and are therefore not reasonably incurred or properly chargeable to the service charge account.

65. However, in order to assist the parties, and if the Tribunal is incorrect in its determination that legal costs are irrecoverable under the terms of the lease, it is the Tribunal's view that the Mr Earle had an arguable case, and it is noted that concessions had been made by Mr Charalambous. In addition, the Tribunal has determined that both the Section 20 Notices served on Mr Earle had been inadequate. Accordingly, the Tribunal would have determined that it would have been just and equitable that the landlord's costs of proceedings before the Leasehold Valuation Tribunal would not have been regarded as relevant costs which would have been able to be placed on the service charge account.

(g) Reimbursement of fees

66. In accordance with paragraph 6 of Directions issued by the Leasehold Valuation Tribunal on 8 May 2006, the Tribunal considered whether to exercise its discretion under Regulation 9 of the Leasehold Valuation Tribunals (Fees) (England) Regulations 2003.

67. The Tribunal acknowledges that both sides have incurred costs which are irrecoverable. It is felt that to make an order for either party to reimburse any part of the application and/or hearing fees would be punitive.

68. The Tribunal does not intend to exercise its discretion in this case and declines to make an Order for reimbursement by either party to the other of the application and/or hearing fees or any part thereof.

(h) Penal costs

69. Schedule 12 paragraph 10 of the Commonhold and Leasehold Reform Act 2002 states:-

> **"(1) A leasehold valuation tribunal may determine that a party to proceedings shall pay the costs incurred by another party in connection with the proceedings in any circumstances falling within sub-paragraph (2).**
>
> **(2) The circumstances are where –**
>
> **(a) he has made an application to the leasehold valuation tribunal which is dismissed in accordance with regulations made by virtue of paragraph 7, or**
>
> **(b) he has, in the opinion of the leasehold valuation tribunal, acted frivolously, vexatiously, abusively, disruptively or otherwise unreasonably in connection with the proceedings.**
>
> **(3) The amount which a party to proceedings may be ordered to pay in the proceedings by a determination under this paragraph shall not exceed –**
>
> **(a) £500, or**
>
> **(b) such other amount as may be specified in procedure regulations.**
>
> **(4) A person shall not be required to pay costs incurred by another person in connection with proceedings before a leasehold valuation tribunal except by a determination under this paragraph or in accordance with provisions made by any enactment other than this paragraph."**

70. Mr Earle had an arguable case and Mr Letman failed to persuade the Tribunal that any of the circumstances as set out in paragraph 2(b) above were made out.

71. The Tribunal declines to make an Order under this head.

The Tribunal's determinations as to service charges are binding on the parties and may be enforced through the County Courts if service charges determined as payable remain unpaid.

CHAIRMAN .....

DATE ..... 18 July 2006

JG