**SOUTHERN RENT ASSESSMENT PANEL**

**LEASEHOLD VALUATION TRIBUNAL**

**Case Number CHI/OOML/LSC/2008/0094**

In the matter of section 27A of the Landlord & Tenant Act 1985 (as amended)

**and**

In the matter of Devonian Court, Park Crescent Place, Brighton ("the property")

**BETWEEN**

Mrs F Markwick (1) and Devonian Court Residents' Association (2)
Applicant(s)

**and**

Witnesham Ventures Limited Respondent(s)

**Appearances:**

Mr S Kinch, solicitor of Messrs Burt Brill & Cardens and Mr Gartside for the Applicants

Mr T Evans of Counsel instructed by The Mitchell Plampin Partnership for the Respondent

**Decision**

**Hearing :** 16th and 17th March 2009

The Tribunal reconvened in order to make its decision on 9th April 2009

**Date of Issue:** April 2009

**Tribunal**
Mr R P Long LLB (Chairman)
Mr N I Robinson FRICS
Mr T W Sennett MA MCIEH

## Application and Decision

1. This matter arises from an application originally made by Mrs Frances Markwick and Devonian Court Residents Association ("the Association") that came before the Tribunal in 2006 for the determination of disputed items of service charge for the financial years ending 31st March 1999 to 31st March 2005. The application was made pursuant to section 27A of the Landlord & Tenant Act 1985 (as amended) ("the Act"). The Tribunal's decision, the final part of which was dated 8th December 2006, was in part the subject of an appeal to the Lands Tribunal by the landlord, Witnesham Ventures Limited ("Witnesham"), and the decision was quashed as to items totalling £155,337-86. The matter was remitted for consideration by a differently constituted tribunal, and so came before this Tribunal. Mrs Markwick withdrew from further participation in the matter by letter to the Tribunal dated 26th November 2008.

2. The matters in issue were set out in a Scott Schedule prepared by the parties that was before the Tribunal. The Tribunal was told that the numbering of the Schedule before it derived from the Scott Schedule in the original proceedings, which accounted for the fact that the numbering of its paragraphs did not follow successively. The decisions that it has made in respect of each of those items is summarised in paragraph 139 at the end of this note. The reference numbers used in that paragraph and in the rest of this note are the numbers shown against the relevant items in the Scott Schedule as the Tribunal now has it. If any discrepancy arises in respect of any matter set out in the summary and that set out in the relevant part of the detailed reasons set out below then the reasons rather than the summary are to have precedence.

## Inspection

3. The Tribunal inspected Devonian Court on the morning of 16th March 2009, prior to the hearing. Mr Gartside and Mr Kinch on behalf of the Association, and Mr Butler, Mr Evans and Mr Hunt on behalf of Witnesham accompanied its members. It saw a development that consists of two buildings, built in the 1930's on the site of a former factory, and containing between them originally 33 flats. The smaller block (Block 1) lies on the easternmost part of the site whilst the larger block (Block 2) lies to the west. Block 2 is "L" shaped in its plan form. The leases date from the early 1980's, but the Tribunal was told by the parties, and some art deco features of the building seem to confirm, that the construction dates from the 1930's.

4. Before building had originally taken place it appeared that a large part of the site had been excavated to a depth of some seven or eight feet to form what was referred to as "the void". Both buildings were erected in the void and the Tribunal was told that they had stood upon steel pillars so that the ground floor of the building was at roughly the level of the surrounding land, and the area beneath it was open and accessible. The remainder of the void (which formed the greater part of the site) was covered by a roof that was itself supported by steel pillars and cross girders. The roof was substantial, and the Tribunal was told that it created a courtyard for the flats at ground floor level, so that access

to the larger of the two blocks was obtained by passing across it. The parties did not know what the original use, if any, of the covered void had been, or when the roof had been created.

5. The Tribunal was told that in the 1990's the buildings had been affected by dampness in the void, and that some of the steel supporting the roof over the void had become corroded. It had been decided that it was necessary to remove the roof over the void in order to improve ventilation as part of the cure for the dampness. This was done towards the end of the 1990's, and Witnesham had then developed the space beneath the buildings that lay below ground floor level by creating seven new flats, so that there are now forty flats in all upon the site.

6. The Tribunal saw the outside of these new flats, as well as the retaining walls that had been revealed upon removal of the roof over the void, a substantial steel walkway that had been erected in order to give access to the larger of the two buildings following removal of the roof that had formerly performed that function, the reformed bin storage area and the gas installations that had taken the place of the old installations when the new flats were formed. In particular this had involved the provision of exterior gas meters to replace what had been meters inside the original flats, and external piping serving upper flats and some exposed piping in the entrance halls serving the flats. Some of this piping was shown to the Tribunal in a ground floor entrance to Block 2.

7. The Tribunal was also shown where fire escapes that were said to be in poor repair had been removed and guardrails had been placed in front of the doors that formerly opened onto the fire escapes. At those points coal stores that had previously existed had been bricked up. It also saw, and asked about, a joint between what appeared to be a metal down pipe and a lower plastic one referred to at paragraph 92 below.

**The Leases**

8. The Tribunal was shown a copy of a specimen of the original leases of the thirty-three flats. The lease is dated 6th July 1984. It was made between City and Country Properties Limited (1) and Barry Alan Davies and Patrice Lynn Davies (2), and relates to flat 20. The Tribunal understands that the copy it saw is for all material purposes representative of the terms of all of those flats. It provides for the lessees to pay, by way of further rent, a service charge equal to 3.03 per cent of the annual cost of the items there listed.

9. The expression "the Buildings" is defined as referring to Devonian Court. For the purpose of these proceedings the relevant items whose cost is included in the service charge are set out in clause 2(2)(a)(iii). They are the cost of maintaining repairing and renewing:

    a. the structure of the Buildings including the main drains roofs walls foundations chimney stacks gutters and rain water pipes and the main water tanks (if any)

b. the cost of decorating the exterior of the window frames and the exterior part or parts of the door or doors giving entry to the Flat and of repairing the same before such decorating if the same shall not have been properly repaired by the Lessee .....

c. the gas and water pipes electric cables and wires under and upon the Buildings and

d. All entrances drives pathways entrance hall passages staircases and landings of the Buildings and all parts of the Buildings not included in this demise or in the demise of any of the other flats in the buildings including the cleaning and lighting (if the same be provided by the Lessor) thereof.

10. Clause 2(2)(a)(x) allows the Lessor also to recover the cost of any other service or facility which the Lessor may in its absolute discretion provide for the comfort or convenience of occupiers of the Buildings or for their proper maintenance safety and administration.

**The Law**

11. Section 18 of the Landlord & Tenant Act 1985 (as amended) ("the Act") provides that the expression "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, improvements or insurance or the landlord's costs of management, and

b. the whole or part of which varies or may vary according to relevant costs"

"Relevant costs" are the costs or estimated costs incurred or to be incurred by the landlord in connection with the matters for which the service charge is payable, and the expression "costs" includes overheads.

12. Section 19 (1) of the Act provides that:

"Relevant costs shall be taken into account in determining the amount of a service charge payable for a period:

a. only to the extent that they are reasonably incurred, and

b. where they are incurred on the provision of services or the carrying out of works only if the services or works are of a reasonable standard

and the amount payable shall be limited accordingly".

13. Subsections (1) and (2) of section 27A of the Act provide that:

"(1) An application may be made to a Leasehold Valuation Tribunal for a determination whether a service charge is payable and, if it is, as to –

a. the person to whom it is payable

b. the person by 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) Subsection (1) applies whether or not any payment has been made."

14. Since the works the subject of dispute arising under section 20 of the Act were all carried out before 31st October 2003 when the amendments to the Act contained in the Commonhold & Leasehold Reform Act 2002 came into force, they are governed by that section as it stood before amendment. Thus the monetary limits governing whether or not the section is engaged arise where the cost is to be whichever is the greater of £50 per flat or a sum of £1000. At least two estimates are to be obtained for the work, a notice accompanied by a copy of the estimates must be given to the tenants concerned or appropriately displayed, the notice must describe the works, and must state a date not less than one month after its date by which observations maybe sent to a stated address. The landlord must then have regard to any observations received. The Tribunal was not told whether the Association was at the relevant time a recognised association but, if it was, then the similar provisions in section 20(5) of the Act as it then stood would have to be followed in respect of it. The jurisdiction to grant a waiver in respect of any of the requirements of section 20 was at that time exclusively that of the Court pursuant to section 20(9).

**The Hearing**

15. At the hearing each of the items referred to in the Scott Schedule provided to the Tribunal was individually considered, and the Tribunal heard evidence and representations concerning it from each side before moving on. In this note the issues have been dealt with in the same manner, and the Tribunal's finding in respect of each issue, and its reasons for it are given at the end of each of the sections. The matters are prefaced by sub headings in italics, the number in which refers to the relevant section of the Scott Schedule. Although the items in the Scott Schedule that related to section 20 of the Act were dealt with together on the second day of the hearing, they have been dealt with in this note in the order in which they appear in the Scott Schedule in the hope that this may assist any future consideration of this note. The only proof of evidence before the Tribunal was that of Mr Gartside, although Mr Butler gave some oral evidence as recorded towards the end of the hearing.

16. References to "Documents" are references to the copy documents numbered 1–17 in the bundle before the Tribunal that it understands were provided (perhaps originally in connection with the earlier proceedings) by Witnesham, and references to "pages" are reference to the copy documents in pages 1-151 in that bundle that it understands to have been provided by the Association.

17. The Tribunal was not provided with copies of the various service charge accounts for the years in question, although a copy of the 2004 account was by fortuity produced at the hearing. It has therefore been able only to record its findings in respect of each of the issues before it, but has not been put in a

position to calculate how they will affect the various accounts. That will have to be a matter for the parties.

18. Following the comments of the Lands Tribunal in paragraph 14 of its decision that the LVT would have to determine these issues in the light of findings of fact, the Tribunal records its disappointment that in many cases little evidence has been put before it upon which it may arrive at findings of fact. It was entitled to expect, given those comments, that the parties may have endeavoured to gather evidence that, despite the fact that many of the events in question happened some years ago, it anticipates from what it was told would have been available in many instances at least to some degree. To avoid what will otherwise become tedious repetition in this note, it records that in every case it has done the best it could with the limited firm information, and greater amount of mostly unsupported speculation, given to it in order to arrive at its findings, and that it could do no more than that.

19. The parties seem to have relied on the Scott Schedule as constituting their statement of case. The Tribunal was left to understand that it may have been prepared at least originally by Mrs Markwick. Little effort appeared to have been made by either party to bring it up to date or to correct apparent errors (in the absence of Mrs Markwick, who might have explained them) that appeared in it during the hearing.

20. The background information contained in the description of the inspection at paragraphs 3-6 above was given to the Tribunal variously by the parties, and was not disputed. So far as they are material to the determination of the matters before the Tribunal and do not consist of surmise the Tribunal finds the matters there set out to be matters of fact.

21. The parties confirmed their agreement that no issues arose at this hearing over any failure to comply with section 20B of the Act, and that so far as any breach of covenant to repair may be found Witnesham was not liable to the lessees for any breach by a previous landlord. There was therefore no question that the lessees might seek to set off sums claimed from the earlier landlord against amounts found to be owing by them to the Respondent The parties confirmed that no issues arose in respect of limitations. In order somewhat to contain the length of what will be an unavoidably long decision this note seeks to record the essence of the evidence that was given, but does not give all of its detail. The Tribunal simply records that in reaching its decision it has had full regard to all of the information given to it and representations made to it including, for the avoidance of doubt, all that is said in the Scott Schedule.

**Year ending March 1999**

3. ***Surveyor's fee re installation of internal fire alarm system - £3664-98 (£111-06 per flat) - Documents 1 and 2 and Page 4***

22. In his witness statement Mr Gartside argued that the surveyor's fees in respect of these matters seemed to have been charged at more than 10% of the cost of work done, whereas they had been charged at 10% in respect of work that he

had done for Witnesham's own account. He questioned whether it had been necessary to appoint a surveyor to do that work. In reply to Mr Evans he said that he had no building experience, having been a bank manager. He suggested that the charge of £3119-13 shown as 12.5% of £24953 in Messrs Bret Hallworth's (the surveyors) account at page 4, and there described as "as agreed", was the subject of a generous agreement. He had no reason to suppose it was not commercially arrived at. He accepted that the work was part of the larger fire prevention work described by Bret Hallworth in their report ("the Report") at document 1 and that Mrs Markwick when chairman a of the association had acknowledged the involvement of the surveyors in a letter written by her whose date was not apparent from the extract at Document 2.

23. Mr Evans submitted that this was a commercial agreement, and that the extent of the works was such that it was unsustainable to suggest that they should be carried out without professional involvement. The fee was charged against a lower cost out-turn than eventually had proved to be payable. Whether or not the agreement was "generous" was in his submission irrelevant.

Decision

24. The Tribunal was able to see from Messrs Bret Hallworth's bill no. 71/98 dated 1st December 1998 at page 4 that the charge in respect of this aspect of the matter was for preparing the specification and administering the contract for the fire alarm systems and emergency lighting. In its judgement it would certainly have been desirable to appoint a surveyor to prepare a specification and to supervise work as extensive as this and, whether or not the matter was agreed, the charge rate of 12.5% falls well within the range that is commonly used for such work and is not unreasonable. For these reasons the Tribunal finds that the cost of this work was reasonably incurred and that the cost itself was reasonable.

25. Clause 2(2)(a)(xv) allows the landlord to recover the cost of complying with statutes and bye-laws. The evidence from paragraph 1.07 in the Report (being Document 1) is that the fire escapes were beyond economic repair and had to be removed. That paragraph sets out briefly the nature of the alternative work that would be required by the local authority if the fire escapes were not replaced, and this is the work that was eventually carried out. The cost of preparing the specification for it and of supervising it is the subject of the cost dealt with here. It appears to the Tribunal therefore that the cost in question is properly recoverable under the terms of the lease.

*4. Surveyors' fees for works other than Item 2 (understood to be fire prevention) - £3857-00 (£116-87 per flat) – Documents 3,4,5, and 6 and Page 5*

26. Mr Gartside suggested that these were fees for a mixture of work in connection with Witnesham's development of the flats beneath the two existing buildings, and eradication of the damp problem. To the extent that they were payable for the development works they were not part of the service

charge, and to the extent that they were payable to deal with the damp problem they were incurred due to the failure of Witnesham properly to maintain the building. In any event Witnesham had chosen to treat the damp problem by developing the new flats. That was an improvement that did not fall within the service charge regime.

27. In response to Mr Evans Mr Gartside said that he had bought his flat in 1999 and assumed that the damp problem had built up over time before that. He noted the fee for the Report of £2880 plus VAT at page 4, and that document 1 page 6 showed that penetration of water had occurred from both basement and roof. The advice given by Bret Hallworth in his opinion extended beyond what the leaseholders might be required to pay for in the normal course. In response the Tribunal he was unable to say what proportion of the cost may have related to redevelopment. He did not know what the "improvements" referred to at page 5 might have been. He considered that the landlord to the extent that the landlord was using information from the report towards planning the creation of the new flats this was a "windfall" whose cost should be borne by it.

28. Mr Kinch submitted that the fees seemed to be split between a number of elements, as documents 3, 4, 5 and 6 showed. The Association said that they should not be attributable to service charge so far as they were attributable to the work of redevelopment or to a failure to maintain. So far as they related to the dangerous structure that the roof over the void threatened to become they were payable. So far as the breach may have been on the part of a previous freeholder there was no set off against this landlord.

29. Mr Evans submitted that the only basis on which one might assume that the fees in question were for the landlord's benefit arose from the reference to "improvements" at page 5. Certainly the Report provoked discussion of improvements. But the reference to improvement also referred to the work to remove the fire escape. The author of the report used the word in that way. As to the suggestion that the landlord should bear a part of the fee for the report, the fee was paid for the report and not for the development.

30. Mr Kinch pointed to the reference to proposals for roof development in a mansard referred to at page 3. He submitted that although that proposal was not implemented work had plainly been done in connection with it.

Decision

31. Paragraph 1.04 paragraph 1.07 in the Report refers to possible development, but a reading of the report as a whole clearly shows that it was not concerned with development in the sense of the extension of the buildings or the creation of further accommodation. It deals with the repair works required to overcome problems that were being experienced, and in the Tribunal's judgement does no more than to refer to possible "development" in the sense described above when it recognises the point referred to by Mr Kinch that the creation of mansard accommodation is a possibility. It describes the work to elevations as an "improvement" at paragraph 2.03.1 and refers at paragraph 3.02 to the possible enhancement of the value of the flats (and here it is clearly referring

to the flats then existing) as a result of the works it proposes. The Tribunal consequently finds as a fact that the report is not dealing with the "development" of Devonian Court in the sense described above, but with works of repair and maintenance, and that the references to "improvements" in Messrs Bret Hallworth's bill at page 4 are references to those works and not to works in connection with the creation of other premises by the landlord.

32. Clearly the problems of dampness and the other problems the subject of the Report had existed for some time. They appear to have predated the time when Witnesham purchased the reversion to Devonian Court. The Tribunal has not been told what if any discussions had been held between the freeholders and the Association before Witnesham commissioned Messrs Bret Hallworth to prepare the Report. It was, however, clearly the case that by the time the Report was published there were a number of problems that needed to be addressed.

33. Thus it cannot be said that it was not reasonable to incur the cost of addressing them. That cost includes the cost of eradicating the damp problem. If there had been such neglect by the past landlord it may or may not be that the lessees may have some claim against them that might possibly be the subject of set off. However, the parties have agreed that the lessees have no right of set off against the Respondent in this respect, and the matter has not otherwise been advanced before the Tribunal. There is no other suggestion (other than mentioned above that the items may in part relate to the creation of new flats by the Respondent) that the costs in question are not payable in accordance with the terms of the lease. The Tribunal therefore finds that the items under this heading are payable.

5. ***Rewiring of basement - £2350-00 (£71-21 per flat) – Pages 17, 21 and 23 and Document 7***

34. This was the first of the items in the Scott Schedule that involved consideration of Section 20 issues. The figure involved is shown as £2350-00 in the Scott Schedule, though Mr Evans said that it was actually £2229-57. The invoice is now lost, he said, although a copy is understood to have been produced at the previous hearing in 2006. It was possible that there had been additional work to bring the cost to £2350.

35. Mr Kinch said that the wiring in question was part of the development of the flats. The suggestion of a double charge arose because it was done anyway as part of the fire precaution work and as part of the reinstallation of that work. There was no invoice. The breach of section 20 arose because no consultation took place. The cost exceeded £1650 (33 times £50 per flat – the work having been done after 1st September 1988 when the limits were altered from those originally in the Act) so that section 20 had been engaged. There had been no dispensation from compliance as far as the Association was aware. These representations were supported by Mr Gartside's evidence upon the matter.

36. Mr Gartside accepted that the works in question were emergency works.

37. Mr Evans submitted that there was no evidence that there was no section 20 notice. There was no need at that time for consultation. It appeared now that the case against Witnesham was that they had not produced estimates. That had not been clear from the reference to consultation in the Scott Schedule. Mr Kinch replied that the argument that section 20 was not complied with had at least put Witnesham on enquiry. It might have requested further and better particulars had it been concerned at a lack of particularity, but had not done so. He said that he did not pursue the double charging point raised in the Scot Schedule.

Decision

38. This is the first of the issues in this case that turn in whole or in part upon whether or not the requisite procedure under section 20 of the Act was followed. The cost of the work was more than the greater of £1000 or £50 per flat (ie it exceeded £1650-00). On the face of the matter there was a need for compliance, and Mr Evans did not explain why he submitted that there was no such need. It was clear that the matter had been pleaded in the Scott Schedule as it stood before the Tribunal, and that submission in any event appears to be contradicted by his earlier submission that there was no evidence that there had not been a section 20 notice. Mr Gartside's evidence was that there had been no consultation under the section. There was no evidence of any later dealings between the parties that was put before the Tribunal to explain why the Respondent appeared surprised by the fact that the matter was still in issue. Mr Kinch submitted that there was no compliance, whilst Mr Evans suggested that the lack of compliance (if it was required) lay in a failure to produce two estimates.

39. This is a matter that could readily have been resolved by production of the relevant documentation. None has been produced and even the original invoice is said to have been lost between the previous Tribunal hearing and this one. On such evidence as is before it the Tribunal finds that the requirements of section 20 of the Act were not followed in this instance. It has been given no explanation to justify any other proposition. That being so, the maximum sum that may be recovered under this heading is £1650-00.

40. It has concluded that the cost of the work was reasonably incurred. There was plainly a sudden loss of supply, and Mr Gartside accepted that these were emergency works. A Dangerous Condition Notice dated 24th August 1998 had been served by Brighton Fire Alarms Limited & Electrical Contractors because of the corroded state of the conduits that served the flats at Devonian Court (Document 7). The notice also suggested that a contributory cause of the failure may have been that the cables were too small and had been overloaded. The Tribunal has therefore concluded that the cost is a proper cost to be borne by the service charge account. There is nothing before it to justify a conclusion that this cost arose only because of the works of the creation of the additional flats in the basement.

41. The Tribunal has been given no evidence whatever upon which to form a view as to the reasonableness or otherwise of the cost of the work that was done.

But the cost itself has not been challenged. Consequently, should any retrospective dispensation from the application of section 20 in this instance be granted it states that it would have found, for want of further evidence, that the cost was reasonable.

Year Ending March 2000

*6&7 Replacement Fire Doors (Part Payment) - £9042-35 ((£274-01 per flat) and £4626-70 (140-20 per flat) pages 12 and 31*

42. Mr Gartside said that he accepted that Witnesham was entitled to something in respect of the doors. The invoice for repairs at flat 9 on page 31 showed the nature of the problems. The doors were those that led from individual flats to the common parts landings. The original work had been badly carried out. There was a problem with the spindles to the handles and work had to be done to make them good and a problem whereby the door to flat 9 had too great a gap that admitted draughts and had to be made good. The cost of all this was the total of £79-90 (invoice from Dynalocks on page 20), £428-00 (invoice from Macrocarpa Builders on page 29) and £91-00 (invoice from P C M Contracts on page 31). He agreed that the original cost less deduction of those three items would be a reasonable amount for the lessees to pay.

43. Mr Evans said there was no indication that the sums in the three invoices mentioned had been charged to the lessees. They may have been borne by the original contractor or by Witnesham. If they or any part of them had been charged to the lessees his clients would re-credit the amount so charged to the lessees.

Decision

44. For the avoidance of doubt the Tribunal therefore determines that the costs referred to in the heading to this section were reasonably incurred and were reasonable in amount subject only to the deduction of the sums mentioned at the end of the preceding paragraph.

*8,9 & 10 Guardrails for kitchen doors and bricking up coal stores £10191-02 (£308-02 per flat), reversing and repainting kitchen doors - £4458-18 (£135-10 per flat), replacement of upvc kitchen windows and doors -£4468-05 (£135-40 per flat) – As to 8, Pages 17,23,24 32, 34 and 35; as to 10 Pages 36 and 37, Document 8, 8A, 8B and 8C*

45. Mr Gartside said that the removal of the fire escapes was within his memory of the property. It was required only because Witnesham wished to develop the basement flats. The bricking up of the coal stores and the reversing of the kitchen doors was a necessary concomitant of that work being done. Mr Gartside accepted that there had been a section 20 notice dated 14th April 1998, but said that was two years before the work in question was done and did not cover the work that was done. The Respondent accepts in the Scott Schedule that there was some "deviation" in the actual detail of the works. He confirmed the evidence in the Scott Schedule about the height of the guardrails

because he said that he himself had made the measurements, and compared them with the building regulations. He said there was certainly no section 20 consultation.

46. Mr Evans contended that the cost of the fire escape work had been accepted because it had not been before the previous Tribunal. The Tribunal understands the implication of that argument to be that there can now be no argument that the items set out above were not reasonably incurred. He agreed that there was no document now available relied upon as a section 20 notice, but Mr Butler said he had seen one dated 14th April 1998 that had been discussed with Mrs Markwick. That being so, he submitted that it was not open to the Tribunal to determine that there had been no notice. It was only now that Witnesham had known what the section 20 case was against them. The Tribunal should take the reference to non-consultation in the Scott Schedule in the ordinary sense rather than as an allegation that there was no notice.

47. The parties agreed that the arguments concerning the reversing of the kitchen doors turned upon just the same arguments as those concerning the guardrails, as did those concerning the kitchen windows and doors.

Decision

48. There clearly was a section 20 notice in April 1998. The first question for the Tribunal to determine is rather whether that notice extended to cover the work that was done, and whether whatever other requirements of section 20 as it then stood that Mr Gartside characterises as consultation were complied with.

49. No copy of the notice has been produced. There is no suggestion that when served it was not accompanied by estimates and presumably the opportunity to make representations would have been implicit in it at the time. The question before the Tribunal thus appears to be whether or not what was actually done two years later was so materially different that it would have required the service of a further notice to define, to give estimates for and to give the opportunity to make representations about the work as it was then to be. There is no evidence at all of what constituted the "deviation in the actual detail of the work". The Tribunal finds it difficult to understand, in the absence of any explanation, how the Respondent is able to say in the Scott Schedule that there was a deviation in the nature of the works that were finally carried out if no copy of the original notice is now available.

50. On the meagre information before it the Tribunal is driven to conclude on the balance of probabilities that there are likely to have been material differences between the work itemised in the 1998 section 20 notice, and the work that was finally done such that may have properly required either the service of a new notice or that a dispensation under section 20(9) be obtained. It finds accordingly. Such a conclusion is supported by Mr Gartside's concerns about a lack of consultation. Section 20 afforded little opportunity for consultation properly so called before it was amended, but a lack of opportunity to make representations about work that was different from that originally proposed

reasonably reflects his concerns. The Tribunal is not in a position to say from the limited information that has been given to it whether these works amounted to work under one contract so that an overall limit of £1650 applies, or whether a limit of £1650 applies to each, or to more than one, item.

51. It is clear from paragraph 1.07 of the Report that the fire escapes were beyond economic repair and that the local authority required that they be removed. The cost of their removal appears accordingly to be a proper cost to the service charges by virtue of clause 2(2)(a)(xv) of the leases and the remainder of the work described is a necessary concomitant to that removal. Whilst the guard rails may have been fitted at a lower level than they should have been the Tribunal does not feel able to conclude from that one fact that the work the subject of this section of the decision was not done to a reasonable standard overall. This was one relatively small element in a much larger piece of work, and many of the guardrails at least have been corrected since it was done. There has been no suggestion that any other part of the work the subject of this section was not carried out to a reasonable standard except for an unsupported suggestion in the Scott Schedule that the materials for bricking up the coal stores were not a of a suitable standard.

52. If the Tribunal is wrong in its conclusions about the section 20 procedure, or if a retrospective dispensation is obtained then it concludes that the costs within this section were reasonably incurred and that overall the work was done to a reasonable standard. There has been no suggestion that the actual costs were unreasonable, and so it concludes that they were reasonable for what was done.

**Year Ending March 2003**

***22. Unblock Drains - £1645-00 (£41-13 per flat) – Pages 38 to 40 and 45, Document 9.***

53. This issue arose from a dispute of fact. Mr Gartside's evidence was that the reason why the drains became blocked was that debris had washed into them during the building works. An extract of part of a letter, apparently written by Mrs Markwick, dated 22nd November 2002 and addressed to the then managing agents alleged that the blockage was caused or at least exacerbated by an accumulation of builder's rubble in the drains. She said that no competitive quotes had been obtained and that Draincall, a local contractor, said that it would have done the work for £500. A letter from her dated 30th June 2002 (page 45) stated that the drain had been blocked for some months before it was cleared and referred to a claimed reduction of £500 that had been negotiated by Mr Petit (whom the Tribunal was told had acted as a sort of local agent for the landlord for a period at around that time). The Respondent averred that the blockage had been caused by an accumulation of fatty substances from domestic drainage over the years.

54. The parties agreed that the matter was one of assertion, with little evidence. Mr Evans said that Mr Butler could give evidence about the shape of the drains but the Tribunal ruled that such evidence should have been provided in

accordance with the directions and that it was not prepared to accept it at so late a stage. The account from Masco on page 39 is marked that only £500 was paid. Mr Evans pointed out that this matter had not been pleaded. Neither party pursued at the hearing a point that was clearly pleaded in the Scott Schedule, namely that the work would have required a section 20 notice.

Decision

55. The Tribunal concluded that the invoice from Masco appeared quite clearly to show that £500 was all that had been paid. The Association's anecdotal evidence was that this would have been a reasonable price to pay for the work in the light of the quotations that they had obtained. It was not suggested that the cost was not in principle recoverable under the leases. Clearly it was reasonable to incur the cost of unblocking drains that apparently served all, or many, of the flats. Once more seeking to do the best it could with the sparse evidence available, the Tribunal concluded that a sum of £500 was a reasonable sum to pay for the work that had been done, and that it was indeed probably the amount that had actually been paid. In any event the blockage may well have been caused by a combination of the factors that the parties advanced. It would be reasonable for a sum of £500 to be payable as service charges for the work.

*29. New Gas Pipe work - £7695-78 (£192-40 per flat) – Document 10 and Pages 60-64*

56. It was the Applicant's case that this work (and that referred to below in respect of items 35 and 49 in the Scott Schedule) arose only because of the work of development of the new flats in the basement. The charge related to new gas pipe work that appears to have been the new external pipe work and that within the entrance at Block 2 referred to in the account of the Tribunal's inspection above. The Association's case was that the new piping was required only as a result of the development of the new flats because the old supply piping could not be connected to the new pipes in the basement, or because it had been left exposed when it should not have been. It abandoned at the hearing what might have been described as the "Transco will pay" point in the Scott Schedule. Mr Gartside said that he was satisfied that Witnesham wanted the work done when it was done to suit its own convenience. He did not know what the extent of the corrosion problem was.

57. In reply to a question from the Tribunal the parties indicated that the removal of the roof over the void (which had covered the supply pipe) was carried out in or about 2000. There was agreement that the supply pipe was supported on trestles some five or six feet above the ground in the open between that time and the time of its replacement, which appears to have taken place in 2003.

58. A letter from MBM Services Limited at Document 10 addressed to Witnesham dated 9 July 2004 states that the incoming gas supply pipe was in poor condition, having been exposed to the weather, and unprotected. It had not been possible to apply a gas soundness test to it but if one had been

applied it would probably have been unsuccessful. Hence it was thought appropriate to replace the installation.

59. Witnesham's case was that the pipe needed replacement because it was corroded, as MBM had indicated, and that it was within the scope of the landlord's remit to replace it. His motive in doing so was not material. It had itself borne the cost of the connection from the main to the new flats, and that was not part of the charge in dispute. Mr Evans said that to any extent that a part of the cost was found to be attributable to the landlord's development of the new flats it would be credited back to the service charge account.

Decision

60. The Tribunal found from the evidence before it that the gas pipe, which would by then in any case have been approaching seventy years old, was exposed as a result of the removal in or about 2000 of the roof over the void. It then remained exposed, and supported upon a trestle but without protection against the elements, for a period of more than three years. There was no evidence of the condition of the pipe in 2000, but by 2004 the report from MBM indicated that replacement was essential.

61. It may be that the installation of the new pipe served the Respondent's purposes by assisting it in the development of the services to the seven new flats. However, these works clearly fall within the service charge regime in the leases. Clause 2(a)(iii)(b) is in point; the reference there to the Buildings, when read in conjunction with the definition of that word in clause 1, appears clearly to envisage a pipe that would have been within the structure formed by the roof over the void. Neither the cost nor the standard of the work has been challenged. Thus, subject to any credit of the sort referred to by Mr Evans being given, the Tribunal determined that the amount the subject of this issue was reasonably incurred, was reasonable and was payable in accordance with the terms of the leases. It has not been suggested that the standard of the work was in any way unreasonable.

62. No issue was taken in respect of this item under section 20 of the Act. The Tribunal observes that the cost was part of a larger cost for services, and infers that the requisite procedures must have been followed as part of that larger element of work.

*30. Works to Freeholder's New Flat - £1116-25 (£27-91 per flat) – Page 64*

63. Some of this work to a cost of £640-38 inclusive of VAT was carried out to repair damaged footings that were found during the course of the work of development of the new flats. The remainder was related to boxing in services that originally ran beneath the roof over the void. The invoice is at page 64 and Masco Limited carried out the work. It describes the boxing-in as having applied to services that supplied upper flats. The Association's contention, supported by Mr Gartside in his statement, was that the work to the footings was necessitated by the lowering of the floor at basement level to increase head height in the new flats, and would not have been necessary otherwise.

Similarly it contended that the boxing-in was necessary only for the purposes of creating the new flats. He could not say if the surveyor had supervised this work.

64. No-one was able to say just where the boxing-in had occurred, or what services were boxed in. Mr Butler averred that the work was done for the benefit of the existing flats, and Mr Evans submitted that the services boxed in should always have been boxed in. He submitted that the area of footings involved was a small one and that the work was for the benefit of the building as a whole.

Decision

65. The Tribunal determined from an examination of the text of Masco's invoice at page 64 that the work to the footings was expressed there to be for the purpose of reinforcing the footing to the supporting wall. It appeared therefore that this was done as a repair for the benefit of the building as a whole and not, as Mr Gartside had suggested may have been the case, in order to improve the increase in ceiling height in the basement for the benefit of the flats being created there. There was no suggestion that he work was not done properly or that the cost of what was done had been unreasonable. It appeared that if the work was required as a repair then the cost of it was reasonably incurred. Accordingly that element, being £545-00 plus VAT, a total of £640-38, was a proper charge to the service charge account in that year.

66. Conversely there appeared to the Tribunal to have been no real reason to have boxed-in the services to upper flats where they ran through the new flats unless the work was to improve the aesthetic appearance of the interior of the new flats. From what Mr Evans said, the services had apparently not been boxed in for the best part of seventy years since the flats were built, and there is no suggestion that they had not survived very well in that period. The Tribunal determined that the work had been done for the benefit of the new development and its cost did not fall to be paid by the service charge payers. The cost of that element was £405 plus VAT, a total of £475-87.

*34. Installation of Water Supply - £1285-45 – (£32-14 per flat) Page 66*

67. Mr Gartside said that this work was carried out to provide a water supply to the new flats. He had seen nothing to support the contention that it was to replace existing pipes. It was carried out at a time when the work to develop the new flats was being done. In reply to Mr Evans he agreed that he was aware that this was a temporary connection. He had no doubt that in its course a lead pipe was replaced. Mr Evans said that the cost of the new pipe was a charge elsewhere and no information had been supplied in respect of it. The invoice in question was from MBM Services Limited, and referred to the supply and installation of a temporary water pipe at Devonian Court.

Decision

68. The Tribunal was shown no copy of the quotation or of the specification for this work. It was invited to take the view that the work involved, at least in some part, the replacement of a section of lead pipe. It was not clear whether that formed a large or a small element of the work that was done. It is clear that the work was temporary and was done at the time when the new flats were being developed. It appeared, in the absence of any concrete evidence, more likely on the balance of probabilities that this work was undertaken in connection with the development of the new flats and to ensure a continued supply to the existing flats whilst new connections were being made. Accordingly the sum in question was a proper charge to the Respondent and not to the service charge account. On that analysis of the position the Respondent was doing no more than to ensure a continuing supply of water to the existing flats when by its own actions it might otherwise have cut off that supply, and any other benefit was incidental to the Respondent's works.

*35. Refixing Gas Boxes for the New Gas Supply - £1060-00 - (£26-50 per flat) – Pages 67 and 68*

69. The arguments and considerations in this connection were, as the parties agreed at the hearing, the same as those set out at paragraphs 56 to 59 above relating to items 29 in the Scott Schedule concerning the new gas pipes. The refixing of the boxes was made necessary by the provision of the new supply pipe.

Decision

70. The Tribunal determined, for essentially the same reasons as are set out in paragraphs 60 to 62 above that the amount in issue in this section is payable by the service charge payers, subject to any credit that may arise of the sort referred to in paragraphs 59 and 61.

*36. Replacement upvc door unit - £1029-30 – (£25-73 per flat) – Page 69 and Document 11*

71. Mr Kinch conceded at the hearing on behalf of the Association that the sums in issue under this heading are properly payable as service charges.

*37. Remedial Electrical Works - £1895-09 –(£47-38 per flat) – Pages 70 to 71*

72. Mr Kinch said that these costs were to repair earlier faulty works and should have been recovered against the contractors. The invoice (page 70) stated that it was for work "in conjunction with the loss of fire alarm supply and a sub main supply in the entrance to flats 14-19 and 29-34." Mr Gartside said that the "loss of power" was as a result of Masco's negligence in earlier works. Mr Evans said that he was not in a position to say what the works described in the invoice related to. The item at page 71 of £60-90 had not been charged to the lessees.

Decision

73. The Tribunal considered the wording of the invoice for this work from CSL Electrical Contractors Limited that appears at page 70. It refers to carrying out works "in conjunction with loss of fire alarm supply and to install sub main supply to public way entranced 14-19 and 29-34." This wording suggested to it that additional work had been necessary to make the alarm function properly. That being the case it concluded that the cost of the work in question had been reasonably incurred. There was no suggestion before it that such cost was not recoverable under the terms of the lease, nor that the work had been in any way unsatisfactory.

*38. Drain Repairs - £12925-00 – (£323-13 per flat) – Pages 71 to 76*

74. This was a pure section 20 dispute. Correspondence about it, including a faint copy of the estimate, was produced, but no copy invoice. The evidence was that only one estimate was provided to the lessees, although Witnesham's response in the Scott Schedule seems to suggest that more than one was obtained. Mr Evans said that the cost itself was not challenged, and indeed the Association has not sought to do so. The quotation was a commercial one from Messrs Patchings. The Applicants agreed in the Scott Schedule with Mr Evans submission that if the Tribunal found that the requirements of section 20 had not been followed then his clients were limited to recovery of £2000 because there were by that time forty flats (the new ones having been developed) rather than thirty three and section 20 limited the recoverable cost in these circumstances to £50 per flat.

Decision

75. The Tribunal has no alternative but to find that the sum of £2000 is all that is recoverable by Witnesham from the lessees for this cost because section 20 was clearly engaged and there is no evidence that its requirements were complied with. The parties accept that the work was done before 31st October 2003 when section 20 was amended. Messrs Patchings' estimate is dated 7th October 2002 (page 72). It is open to Witnesham to seek retrospective dispensation from compliance with section 20 from the County Court in accordance with section 20(9) of the Act as it stood at the time of the events in question. In the event that such dispensation is granted then, in order to avoid a need to come back to the Tribunal, it states that it would have found that the sum of £12925-00 had been reasonably incurred and was reasonable in amount for the work that was done had that decision been required of it at this juncture.

*42. Excess Rendering Cost - £1567-98 – (£39-20 per flat) – Pages 77 to 80*

76. Mr Gartside confirmed that the Association withdrew its challenge to this item. It becomes payable accordingly.

*43. Supervision Costs - £550-78 (£13-77 per flat) – No document reference*

77. Following discussion at the hearing, the Association accepted that the sum of £254-07, part of the above sum, was properly payable, and Mr Evans accepted on behalf of Witnesham that the remaining amount of £296-71 is not recoverable by it from the lessees.

*44. General Repairs –*

*i. Masco Limited – Brick work Repairs - £582-80 – (£14-57 per flat) – Page 81*
*iii. PCM Contracts – Pipe work Repairs - £121-00 – (£3-02 per flat) – Page 82*
*iv. PCM Contracts – Walkway Repairs - £265-00 – (£6-62 per flat) – Page 83*
*v. PCM Contracts – Various Works - £250-00 and £155-00 – (£10-13 per flat) – Page 84*

78. As to the brickwork repairs at item (1) above, Mr Evans conceded that a sum of £152-75 (being £130 plus VAT, the charge for dealing with a leaking internal pipe) was not payable by the Lessees. Mr Kinch accepted on behalf of the Association that the remaining sum of £366 plus VAT (£430-05) for brickwork repairs was so payable.

79. As to the pipe work repairs at item (2) above, Mr Kinch did not pursue the point on behalf of the Association. £121-00 is payable accordingly. He similarly accepted, after discussion, that the sum of £265-00 was properly payable for the walkway repairs under item (3) and that the sums of £250-00 and £155-00 were properly payable for the works under item (4).

**Year Ending March 2004**

*49. New gas pipe work for Block 2 (part payment) - £13861-93 – (£346-55 per flat) – Pages 86 and 88*

80. Mr Evans said that, as the Scott Schedule showed, the cost of connection to five new flats to the gas supply was clearly not applicable to the service charge and should be reversed. He was not sure if that had been done and gave an assurance that if it had not been reversed before the time of the hearing then that would thereafter be done so that no liability would attach to the applicants. That cost amounted to £3906 plus VAT (see page 87).

81. The remaining argument between the parties thus related to the remaining cost (if taken in accordance with page 87) of £10916 plus VAT. The parties agreed that the arguments were exactly the same as those advanced in respect of item 29 in the Scott Schedule (paragraphs 56-59 above), and did not repeat them.

82. The Applicants further averred in the Scott Schedule that the invoice for this work was for £12120-34 (page 88) and not £13861-93 as claimed. They said that no explanation had been given for this. None was offered at the hearing.

Decision

83. The work in issue under this head arises directly from the need to replace the gas supply pipe. It follows in the Tribunal's judgement that since the cost of replacement of the supply pipe has been found to be a charge properly payable by the service charge payers then the cost of this work is similarly so payable. The matter stands upon just the same basis as the issue of the replacement of the supply boxes dealt with at paragraph 69.

84. Here, however, there is a question about the amount of the sum that is payable. The Respondent seeks £13861-93 but has offered no explanation of how that figure is arrived at. The Applicants challenge the figure. They say that the invoice was for £12120-34, being that at page 88. The Tribunal does not see how the competing figures are to be reconciled, and certainly is not required of itself to spend time striving to reach a reconciliation. It has determined that the invoice before it is for £12120-34, and that in the absence of an explanation of the requirement for an additional £1561-59 it has no alternative but to determine that £12120-34 is the sum payable. There is no issue before it as to the quality of the work that was done, or the need to do such work as part of the replacement of the supply pipe, nor is there any suggestion that the work was not of adequate standard.

*50. **Replacement down pipes and soil stacks - £30894-00 – (£772-35 per flat) – Pages 89 - 95***

85. Mr Kinch said that pages 89 and 90 in the bundle showed an estimate by Messrs Patching & Son for various items including scaffolding and replacing pipe work to the rear and side elevation. It amounted to £31714 excluding VAT. Page 92 was an invoice from Blockbusters for a total of £12328-65 that reflected a settlement of litigation between themselves and Patchings for a sum that appeared to include that indicated in the copy invoice on page 91 and another invoice that the Tribunal did not see. The Tribunal could not therefore tell whether the work carried out by Blockbuster apparently on Patchings' behalf was all of the work in Patchings' estimate, or only part of it.

86. The argument between the parties turned upon the reasons why this work had been carried out. Mr Kinch argued that it was carried out in order to enable the Respondents to connect the new flats to the drainage system because pvc pipes for the new flats could not be connected to the iron pipes from the old ones. This was the effect of Mr Gartside's anecdotal evidence. He said that replacement of the pipes in question would not otherwise have been necessary. The burden lay upon the Respondent to show otherwise, and how long it might have taken to spend as much as £30,000 in repairs before replacement was required.

87. There was said, Mr Kinch, no evidence that the existing pipes were fragile or had deteriorated. Mr Gartside averred that this was shown by the Respondent's statement in the Scott Schedule that if the new pipes had been required as part of the new development they could simply have been extended into the

basement area. That, he said, must assume that the existing pipes were in satisfactory condition.

88. Mr Butler produced a photograph (not produced with the bundle) that he said showed that the pipes were in poor condition. He said that it was possible to connect plastic pipes to metal ones. He had not taken the photograph himself and could not say who had taken it or when, save that it was apparently taken before the work was done.

89. Mr Evans said that the matter was one of fact and degree. The probability was here that the work was reasonably required. Expert evidence would have been required to sustain the position.

90. Since Mr Butler had provided evidence that was not previously made available the Tribunal permitted Mr Gartside to add that at his home he had a cast iron down pipe of a similar age to those that had been at Devonian Court, and it remained in perfectly good condition.

Decision

91. This was yet a further instance where the Tribunal is asked to determine an issue on, for practical purposes, mere assertion. Even the photographs that Mr Butler produced were not capable of being substantiated as might be expected. There is for example no evidence of who took them, or when, or even to show that they are of the down pipes in question. Even so, the Tribunal accepted that they are offered as an attempt to assist it, and that they appear so far as it is able to tell from some of them to be of pipes at Devonian Court.

92. The Tribunal saw during its inspection an example at the rear of the smaller block of the joining of what appeared to be a remaining metal down pipe to a upvc one. The work was carried out by means of what might appear to a lay eye as a large version of the sort of joint to be found in the cooling system of some cars. It was unsightly, but appeared to work. It concludes from that observation and from the general knowledge and experience of its members that such joins can be effected, even if not in an aesthetically pleasing way.

93. In the Tribunal's collective knowledge and experience metal pipes would have to be well looked after to have survived in good condition for some seventy years. Bearing in mind the history of disrepair that had led to the need for the works in the late 1990's, it seemed more likely than not to the Tribunal that the down pipes would similarly have been subject to some neglect. It bore in mind too that they are located little more than a mile from the sea, and so subject to a greater attack than normal by salt borne upon the wind. If that were to the case, then it was more likely than not that pipes of this age would reasonably have required to be replaced at the time when the other work was done, or at the very least that they would have required to be replaced within a fairly short time thereafter.

94. The invoice for the work was that of Messrs Patching at page 94. The cost seems to have reflected in some part the result of a settlement of litigation (the

precise subject of which was not clear) arrived at between Messrs Patchings as primary contractor and Messrs Blockbusters Contracts Limited as their sub contractor. It is not suggested that cost of the work is not recoverable as normal maintenance under the terms of the lease, nor has any issue been raised over the standard of the work that was done or the reasonableness or otherwise of the cost of that work.

95. The Tribunal therefore determined, once more having resort to the balance of probabilities in the absence of concrete evidence, that it was more likely than not that the down pipes required to be replaced. That being so, and in the light of its conclusions set out at the end of the preceding paragraph, it determined that the sum of £30894-00 is properly payable by the lessees as part of the service charge for the year in question.

*51. Scaffold for Temporary Walkway - £940-00 – (£23-50 per flat) - Page 96*

96. Mr Kinch conceded at the hearing that this amount was payable.

*52. New Entrance - £635-67 – (£15-89 per flat) – Page 97*

97. The work in connection with this account was carried out to provide a new entrance to flats 14- 19 as the original area was taken up by the provision of a new bin storage area. It was the Applicant's case that the work was required only as a result of the need for such provision following the creation of the new basement flats, and so the charge should not fall upon them. Mr Gartside further argued that this was technically an "improvement" and so not caught by the service charge provisions in the leases. The lessor had interfered with the lessees' rights under their leases by carrying out the work and was fortunate that none had taken action as a result.

98. Mr Evans responded that the question was whether the matter was a service charge issue. The lessor was entitled to tidy up the bin area following installation of the new walkway to make for ease of collection. It was entitled to lay out the estate in the best and most convenient manner. The assertion that the work was connected with the creation of the basement flats was unfounded. The work fell within the service charge covenant and the landlord was entitled to exercise its discretion. The cost of the work was chargeable under clause 2(x) of the lease, which referred to "the cost of any other service or facility which the Lessor may in its absolute discretion provide for the comfort or convenience of occupiers of the building or for their proper maintenance safety amenity and administration". The land was also part of the common pathway the cost of whose upkeep fell within the service charge under clause 2(iii)(d). The benefit to the lessees lay in the tidying up that resulted from the work.

Decision

99. The Tribunal accepts that the lessor is entitled to lay out the estate in the best and most convenient manner, and that the work that was done is upon land that forms the common pathway. However, it appeared to it upon inspection to

be clear that the need for the work to be carried out in the manner that has been undertaken arose either because of the development of the new flats or of the creation of car parking spaces in part of the area once occupied by the void, or perhaps from a combination of the two. It was told during the inspection that the car parking spaces are available for rental by anyone (owners of the flats included). The new bin area that has been created as a result of the work is just outside the one of the main entrances to the flats and by no stretch of the imagination is it in a position that could be described as "best and most convenient", except perhaps in the sense that one does not have to walk far from the entrance to reach it.

100. Although the work was carried out on the common pathway, it has resulted in the creation of a bin store in a place where the smell is likely to affect persons entering and leaving the building, and likely also to affect those flats nearby on occasions when they wish to have their windows open. Whilst no doubt a bin store was necessary somewhere, this is in as poor a position as might be imagined. As a matter of fact therefore the Tribunal finds that the work did not involve the Respondent in laying out the site in the best and most convenient manner.

101. It is not disputed that the work in question was occasioned by the need to create a new entrance following the repositioning of the bin store. In the Tribunal's judgement the position of the new bin store appears to have been dictated by the Respondent's wish to make best development use of the land available to it, and had another more suitable position been found for the store on what is quite a large site the work in issue under this heading may well not have been necessary. Consequently the Tribunal finds that the cost was not reasonably incurred as a potential service charge cost when better solutions for the benefit of the lessees (albeit that they may have inhibited the Respondent's plans in some way) must surely have been available.

*53. Internal Fireproofing - £9953-89 – (£248-84 per flat) – Pages 15 and 98*

102. A letter from Mrs Markwick to Brighton and Hove Council dated 30 September 2005 (page 98) stated her understanding that the installation of fire doors with resistant glass above, new door stops and closers was the result of the removal of the "courtyard", by which the Tribunal understood her to refer to the roof over the void, and the development of the basement. She asked for confirmation of that fact, and the Council's reply dated 7 December 2005 at page 15 gives that confirmation. It was the Applicant's case that the lessees should not have to pay for work that was occasioned by the landlord's redevelopment.

103. The Respondent's reply in the Scott Schedule was to the effect that the courtyard was demolished because it had reached the end of its useful life, and its removal gave rise to the need for the fireproofing. Mr Evans did not pursue that point. He submitted that it did not matter why the work had been done. The work fell within the service charge covenant. The fire proofing was for the safety of the lessees as a whole. The fact that it would not otherwise have been necessary was neither here nor there.

Decision

104. In this respect the Tribunal accepts Mr Evans' argument. This is work that falls within the service charge regime and was plainly done for the benefit of lessees in that they would have been at greater risk from fire without it. The cost of the work was therefore reasonably incurred. No issue was raised as to the standard of the work or of its cost. In the context in which the matter has been put before it the Tribunal finds that the cost is payable by the lessees as part of the service charge.

*56. Supervision Fees - £9958-70 – (£248-97 per flat) – Pages 99-102*

105. The Applicants conceded at the hearing that this sum was payable.

*58. Supervision Fees - £1243-54 – (£31-09 per flat) – No page reference*

106. The Respondents conceded at the hearing and in the Scott Schedule that this sum was not recoverable by them. They indicated that it had been included in error in the Schedule.

*59. Certification Fee - £1880-00 – (£47-00 per flat) – No page reference*

107. The Applicants conceded at the hearing that this sum is properly payable.

*60. Loan Interest - £863-10 – (£21-12 per flat) – Documents 12, 12B and 13.*

108. Document 12 showed detail of a loan of £20,000 made by Cromwell Restorations Limited ("Cromwell") and sent to the then managers of Devonian Court on September 12 2003 with a letter of that date on Witnesham Ventures Limited notepaper. It included a copy of a resolution of Cromwell that a short term loan be made to the Devonian Court leaseholders' account "to assist in the completion of the development of Devonian Court Brighton" at a rate 4% over HSBC base rate from time to time payable quarterly in arrears. The loan was to be guaranteed by Witnesham Ventures Limited. A calculation of the interest over a period of some six months was also included. The interest amounted to £863-10. The then managers acknowledged the payment on 21 January 2004 by reference to a letter from Witnesham Ventures Limited of the previous day. The letter refers to an acceptance of "the terms and conditions of the loan". As it stands the letter does not demonstrate that the terms and conditions were those in the letter of 12 September or those in the resolution, but the interest calculation suggests that the interest rate at least remained as stated in the resolution.

109. The relevance of Document 12B to this item is not immediately apparent. It consists of the minutes of a meeting between Mrs Markwick, Mr Bigge of the then managers and a Mr Stubbs held on 6th October 1999. Document 13 is an extract of the lease showing the service charge provisions and appears to have been included to show that the cost of interest upon loans incurred to defray the cost of services is recoverable as service charge by virtue of the provisions of clause 2(xii) of the lease. Mr Evans said that the service charge account for

2004 (a copy of which was shown to the Tribunal) shows a deficit, and that the Cromwell loan was incurred to help to cover it. Mr Kinch replied that the resolution showed by its wording that the loan was made for the landlord's own purposes in completing the work of development.

Decision

110. The Tribunal observed that the fourth page of Document 12 shows that a loan was made by the Respondent on 28th November 2003 to enable payment of the Blockbuster invoice for £12628-65. The balance sheet for 2004 that Mr Evans produced at the hearing shows assets of some £41000 and debts of some £91000. It includes the loan from Cromwell Restorations Limited whose existence was evidenced by the copy of the minute authorising it dated 12th September 2003 at Document 12. That minute describes the loan as having been made "to assist in the completion of the development of Devonian Court". The letter from the Respondent to Mr Bigge, the managing agent, dated 12th September 2003 encloses the cheque from Cromwell for £20,000, and expresses the hope that a cheque from the Respondent (amount not specified in the letter itself) enclosed with it and the cheque from Cromwell will enable him to get the rendering contractor back on site.

111. The question for the Tribunal was that of the purpose of the Cromwell cheque. If advanced for the benefit of the lessees then the interest was properly chargeable as a part of the service charge, but if applicable ultimately for the landlord's purposes then it was not. The rate of interest and the calculation of interest was not in issue. The Tribunal has had to balance what appears to be a clear statement that the money was for the "development" of Devonian Court against the arguments first that the works carried out there for the benefit of the lessees were a part of the development referred to in the minute, and secondly that the account shows that they were applied against the debt appearing in the 2004 service charge balance sheet.

112. Once more seeking to do the best it could with the benefit of considerable assertion and not very much fact, the Tribunal has reached the conclusion that the loan was made, or made primarily, to further the landlord's works of creating the new flats and parking spaces at Devonian Court. It was influenced in reaching that conclusion first by the use of the word "development" in the resolution. It concluded that the ordinary meaning of the word in that context implied an element of creation. Had the company intended merely to fund the cost of works being carried out under the service charge regime then a reference to "work" at Devonian Court might have been the more usual expression.

113. The Tribunal was fortified in that view by the fact that, being aware that its entitlement to the interest was challenged, the Respondent could very well have brought a more detailed explanation of what the money had been used for. It might for example have explained in more detail the purpose of the loan and how it was applied, or have shown the rest of the detail of the payment from the Respondent (as opposed to that of Cromwell) referred to in the letter of 12th September 2003 in order to support its position. It did not explain how

the deficit in the service charge account had come about, and who owed the monies making up that deficit. Taking these factors together the Tribunal was not satisfied that the Respondent had shown that the loan was not made for what were effectively its own purposes rather than those of the lessees as a whole, and concluded that the interest in question is not be payable as part of the service charges.

*61. Excess Rendering Costs - £7198-43 – (£179-96 per flat) – Pages 34, 89 and 90*

114. The challenge to this item was withdrawn by Mr Kinch at the hearing, and accordingly the sum is payable.

*62. Gardening - £110 - (£2-75 per flat) – Page 105*

115. Mr Kinch conceded on behalf of the Applicants at the hearing that this sum is payable.

*63. General Repairs*

*(v) Refit Guard Rail - £164-50 - (£4-10 per flat) – Page 107*
*(vii) Soil Pipe Replacement - £377-00 – (£9-43 per flat) - Document 14*
*(viii) Soil pipe replacement - £145-00 – (£3-63 per flat) - Document 15*
*(ix) Pipe Repairs - £185-65 – (£4-64 per flat) – (Document 16)*

116. Mr Kinch said that the Applicants did not know why the guardrail at item (v) above had been removed in the first place, nor were they able to identify the rail in question. In those circumstances it was unreasonable to ask them to pay the cost. Mr Evans relied that on the submission that the item plainly fell within the service charge provisions of the leases, although he did not refer the Tribunal to the provision that he had in mind. The invoice showed that it had been replaced. There was no evidence to show why it came off. He submitted that the Tribunal had no alternative but to allow the sum in question.

Decision

117. The invoice from Messrs Young & Stevens at page 107 clearly shows that this work was done and that the rail in question was on the southwest block, and on the southeast corner of it. The work is plainly that of repair of the sort that is envisaged in Clause 2(a) (iii) (a) of the lease, and its cost is recoverable as service charge. Its location is clearly stated in the invoice and the Applicants could on the face of the matter have made further enquiries to satisfy themselves about the matters of which they said they were uncertain. They had not done so.

118. The Tribunal was satisfied that this was a cost that falls within the service charge regime. It was not suggested that the cost was unreasonable or that the work was unsatisfactory. The Tribunal determined that the amount claimed under this heading was payable. It was not in its judgement sufficient for the

Applicants merely to assert a lack of knowledge of matters that it appeared they could very well have established upon proper enquiry.

119. As to the soil pipe replacement at (vii) above, Mr Kinch conceded at the hearing on behalf of the applicants that this sum is payable. He similarly conceded that the cost of the other soil pipe at item (viii) and of the pipe repairs at item (ix) were payable.

*64. Excess Cost of Roof Repairs. - £1735-52 – (£43-39 per flat) – Pages 110- 112*

120. After discussion at the hearing Mr Kinch abandoned this claim. The sum accordingly is payable.

*65. Excess Scaffolding Costs - £1692-00 – (£42-30 per flat) – Pages 113 - 119*

121. After discussion at the hearing Mr Kinch abandoned this claim. The sum accordingly is payable.

*66. Legal Costs - £1608-00 – (£40-20 per flat)- No page reference*

122. Mr Kinch said that this appeared to have been a simple claim that should properly have been compromised before major costs were incurred. He referred to page 93, from which it appeared that Messrs Farringdon Webb had been involved. The Tribunal drew the attention of the parties to the fact that Mr John Tarling, presently a Vice President of the Southern Panel, had been a partner in that firm at the time when these events occurred in case it may be thought that any prejudice might arise. The parties agreed that none of them raised any issue in that respect.

123. Mr Evans submitted that the amount of the costs was negotiated, and that there was no evidence to show that they arose from unreasonable behaviour. Mr Kinch submitted that here should plainly have been an earlier deal. The parties said that there was no evidence to show what the dispute had been about. It appeared to the Tribunal upon subsequent examination of the papers that arose from the dispute between Patchings and Blockbusters referred to at paragraph 69 under item 50 above. The amount of the settlement referred to in the document at page 93 is the same as that in Blockbusters' revised invoice at page 92.

Decision

124. Upon examination of the papers before the Tribunal it transpired that these costs appear to be the costs ordered to be paid by the then managing agents to Russell Asphalt Limited. That company is the roofing contractor, copies of whose invoices appear at pages 108 and 109. A copy of a consent Order of Hastings County Court dated 31st January 2004 relating to an action brought by Russell Asphalt Limited against the former managing agents appears at pages 118 and 119. It is apparent that Russell Asphalt Limited obtained judgement for a sum (whether or not that originally claimed is not clear) and an order against the former managing agents for costs of £1608-00. If the

figure negotiated in the dispute with Blockbuster is the same figure that is a considerable coincidence. There is no evidence on the point before the Tribunal, except that the initial response to the Scott Schedule points back to the Russell Asphalt dispute.

125. In either event, if the monies are to be recoverable by the Respondent the Tribunal requires to be satisfied that the costs were reasonably incurred. It was told nothing of the background to the dispute, and notes that the Court was minded, however the matter was resolved, to award costs against the then managing agents. If the costs were actually incurred in the dispute with Blockbuster (which seems unlikely) then again the Tribunal has been told nothing of the background. In the light of that information the Tribunal was not satisfied that the costs in question were reasonably incurred. There was in the light of that decision no need for it to go on to consider whether the terms of the lease may have entitled the Respondent to recover such costs.

**Year Ending March 2005**

*70. Car Park Expenses - £1324-66 – (£33-12 per flat) – Page 122*

126. After discussion at the hearing Mr Kinch withdrew the challenge to this item. The amount is payable accordingly.

*72. Gardening - £100-00 – (£2-50 per flat) – Page 123*

127. After discussion at the hearing Mr Kinch withdrew the challenge to this item. The amount is payable accordingly.

*74. Interest on Unauthorised Loan - £1832-57 – (45-81 per flat) – No page reference*

128. The Respondent conceded at the hearing through Mr Evans that this sum is not payable as part of the service charges

*75. Legal Fees – £352-50 – (£8-81 per flat) – Page 124*

129. These were legal fees incurred by Messrs Blackett Hart & Pratt against the former managing agents. The Tribunal was told that they arise from the action against the roofing contractor and the costs appear to have been incurred for advice to the former managing agents. The Applicants contend that it is unreasonable that they should pay these costs. As indicated above the Tribunal was not made aware of the background to the matter. The Respondents reply that the Tribunal must determine the matter on the evidence before it.

Decision

130. The Tribunal concluded that it could not be satisfied that the cost were reasonably incurred for the same reasons as those set out in paragraphs 124 and 125 above in relation to item 66 in the Scott schedule.

*76. Professional Fees - £360-72 – (£9-02 per flat) - Page 125*

131. Mr Kinch suggested that these are fees and expenses incurred by Mr Butler for visiting Mr Bigge of the former managing agents in order to obtain papers relating to the management of the property. Mr Kinch argued that the lessees should not have to fund such an expense. Mr Butler says that his brief on behalf of the landlord was to audit the performance of the manager. Mr Evans submitted that this is a proper service charge expense pursuant to either clause 2(x) or 2(xi) of the leases.

Decision

132. The various cases relating to legal costs payable by lessees (a more recent example is St Mary's Mansions Limited v Limegate Investments Limited [2003] 05 EG 146) make it clear that if such a cost is to be recoverable as a service charge then the ordinary natural meaning of the words used must support that recovery. Within that definition, these costs do not fall within subclause 2(xi) because they are not the costs of employing a managing agent. They are the costs of monitoring his performance incurred by the Respondent. The question for the Tribunal is then whether it was reasonable for the Respondent to incur the cost of sending Mr Butler from Danbury in Essex to Darlington, a distance of 246 miles in each direction according to his account at page 125, to review copy and borrow records "in connection with the recent major works at Devonian Court, to obtain a background history and a resume of current difficulties and to discuss and identify current debtors".

133. The Tribunal concluded on the information before it that it could not find that the cost was reasonably incurred. Whilst works that had been done at Devonian Court certainly did involve the service charge account (as the present proceedings demonstrate) there were many others that did not, and it was apparent from the various references to the managing agents throughout the proceedings that they had been involved in some way in all of them. Without having a more detailed knowledge of the problems that Mr Butler had been asked to address, the Tribunal was unable to find that the cost of the work he did was reasonably incurred for the service charge account. It might be that some parts of it were so incurred, but that has not been shown.

*77 and 78. Rubbish Bin Rental - £3456-35 and £200-10 - (£86-41 and £5-00 per flat respectively) – Document 17*

134. Mr Gartside's evidence was that these bins appeared to be for contractors engaged in the development of the new flats. He said it would have cost only around £350 to buy new domestic bins for all of the residents of the flats. The Respondents replied that these were Eurobins of between 600 and 1100 litres. A letter from WasteTec of 28th March 2002 referring to the 2001-2002 contract refers to the disposal of non-toxic trade waste, which supports the view that the bins were for domestic waste over the period. The trade refers to domestic waste in that fashion, said Mr Butler. The Respondents invited the Tribunal to assume that the contracts for the other years in question (ie from 1998-9 to 2003-4 according to the Scott Schedule) were in similar form.

Decision

135. The Tribunal is satisfied that there was a need to provide suitable communal waste disposal whilst the work was in course and before new bin stores had been provided. It is equally satisfied from its collective knowledge and experience that the term "non toxic trade waste" is commonly applied to waste from blocks of flats like Devonian Court. Again from its own knowledge of such matters, it doubts that Eurobins would be appropriate to accommodate the sort of builders' waste that work such as that carried out at Devonian Court may have created. Such bins are more ordinarily used for domestic purposes from blocks of flats, or for lighter trade waste.

136. It may well be that it would have been cheaper to buy individual domestic bins outright, and the Tribunal saw during its inspection that wheelie bins are now in use. However it is not at all clear that it would have been practical to use such bins whilst the work was in progress before new bin stores had been provided. In such circumstances the use of larger Eurobins would have been reasonable, and the Tribunal accepts that the costs that were incurred in so doing reflect the sort of prices that it would have expected to see charged for such bins at the time of the contracts. The Tribunal adds for the information of the parties, but not as a matter upon which it has based its decision, that it is aware from its collective knowledge that such contracts usually include costs relating to vandalism, damage or theft that would otherwise fall to be met by the lessees. It finds that these sums are properly payable as part of the service charge.

*Section 20C*

137. The parties confirmed to the Tribunal at the end of the hearing that there is now no application under section 20C of the Act before it.

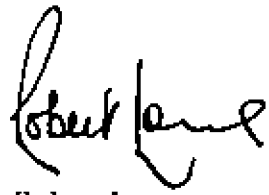
Summary

138. The following is a summary of the decisions that the Tribunal has made in respect of the matters in dispute.

| Item in Scott Schedule | Amount (if any) found payable |
|---|---|
| 3. Surveyor's fee re installation of internal fire alarm system - £3664-98 (£111-06 per flat) | £3664-98 |
| 4. Surveyors' fees for works other than Item 2 (understood to be fire prevention) – £3857-00 | £3857-00 |
| 5. Rewiring of basement - £2350-00 | £1650-00 (but see para. 41) |

| | | |
|---|---|---|
| 6&7 | Replacement Fire Doors (Part Payment) - £9042-35 and £4626-70 | £13070-05 (after deductions in para. 42) |
| 8,9 & 10 | Guardrails for kitchen doors and bricking up coal stores - £10191-02 , reversing and repainting kitchen doors - £4458-18, replacement of upvc kitchen windows and doors – £4468-05 | £1650-00 (but see para. 52) |
| 22. | Unblock Drains - £1645-00 | £ 500-00 |
| 29. | New Gas Pipe work - £7695-78 | £7695-78 |
| 30. | Works to Freeholder's New Flat - £1116-25 (£27-91 per flat) | £ 640-38 |
| 34. | Installation of Water Supply - £1285-45 | Nil |
| 35. | Refixing Gas Boxes for the New Gas Supply - £1060-00 | £1060-00 |
| 36. | Replacement upvc door unit - £1029-30 | £1029-30 |
| 37. | Remedial Electrical Works - £1895-09 | £1895-09 |
| 38. | Drain Repairs - £12925-00 | £ 2000-00 (but see para. 75) |
| 42. | Excess Rendering Cost - £1567-98 | £1567-98 |
| 43. | Supervision Costs - £550-78 | £ 550-78 |
| 44. | General Repairs : | |
| | i. Masco Limited – Brick work Repairs - £582-80 | £ 430-05 |
| | ii PCM Contracts – Pipe work Repairs - £121-00 | £ 121-00 |
| | iv. PCM Contracts – Walkway Repairs - £265-00 | £ 265-00 |
| | v. PCM Contracts – Various Works - £250-00 and £155-00 | £ 405-00 |
| 49. | New gas pipe work for Block 2 (part payment) - £13861-93 | £12120-34 |
| 50. | Replacement down pipes and soil stacks - £30894-00 | £30894-00 |
| 51. | Scaffold for Temporary Walkway - £940-00 | £ 940-00 |
| 52. | New Entrance - £635-67 | Nil |
| 53. | Internal Fireproofing - £9953-89 | £9953-89 |

| | | |
|---|---|---|
| 56. | Supervision Fees - £9958-70 | £9958-70 |
| 58. | Supervision Fees - £1243-54 | Nil |
| 59. | Certification Fee - £1880-00 | £1880-00 |
| 60. | Loan Interest - £863-10 | Nil |
| 61. | Excess Rendering Costs - £7198-43 | £7198-43 |
| 62. | Gardening - £110-00 | £ 110-00 |
| 63. | General Repairs | |
| | (v) Refit Guard Rail - £164-50 | £ 164-50 |
| | (vii) Soil Pipe Replacement - £377-00 | £ 377-00 |
| | (viii) Soil pipe replacement - £145-00 | £ 145-00 |
| | (ix) Pipe Repairs - £185-65 | £ 185-65 |
| 64. | Excess Cost of Roof Repairs. - £1735-52 | £1735-52 |
| 65. | Excess Scaffolding Costs - £1692-00 | £1692-00 |
| 66. | Legal Costs - £1608-00 | Nil |
| 70. | Car Park Expenses - £1324-66 | £1324-66 |
| 72. | Gardening - £100-00 | £ 100-00 |
| 74. | Interest on Unauthorised Loan - £1832-57 | Nil |
| 75. | Legal Fees – £352-50 | Nil |
| 76. | Professional Fees - £360-72 | Nil |
| 78 | Rubbish Bin Rental - £3456-35 | £3456-35 |
| 78. | Rubbish Bin Rental - £200-10 | £200-10 |



Robert Long
Chairman
21st April 2009