10098

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case Reference	:	**CHI/43UB/LSC/2014/0026**
Property	:	**Berkley Court, Oatlands Drive, Weybridge, Surrey, KT13 9HY**
Applicants	:	**Dinn Kotsias Properties** **Mr E Vinci** **Mr S & Mr C Harry**
Respondents	:	**Midopen Ltd** **Mr J McIntyre** **Mr G & Mrs G Barnard** **Mr J Santos** **Mrs M Clark** **Mr J & A Campion** **Mr I Garlick** **Ms C Wilson** **Ms S-L Jerman** **Ms M Ireland** **Mr T Goodhead** **Mr P Rowe**
Type of Application	:	**Section 27A Landlord and Tenant Act 1985 (the 1985 Act). Determination of the reasonableness and payability of service charges.**
Tribunal Members	:	**Mrs H C Bowers MRICS** **Mr M Loveday** **Miss J Dalal**
Date and venue of Hearing	:	**27th June 2014** **Kingston County Court, St. James Road, Kingston upon Thames, Surrey, KT1 2AD**
Date of Decision	:	**15th August 2014**

DECISION & REASONS

Introduction:

1. This matter is an application made under sections 27A and 20C of the Landlord and Tenant Act 1985 (the 1985 Act) dated 17th March 2014. Directions were issued on 19th March 2014 and these summarised the issues in dispute between the parties and provided details of how evidence was to be served in this case.

The Law:

2. A summary of the relevant legal provisions is set out in the Appendix to this decision.

Background:

3. Berkeley Court is a residential development of 66 units. Twenty of the units are houses held on a freehold basis and the remaining 46 units are flats held on a leasehold basis. The owner of each residential unit is a shareholder in Midopen Ltd. Midopen Ltd, the main Respondent in this case is the landlord in respect of the individual flat units. GCS Property Management manages the development on behalf of Midopen Ltd. The application relates to service charges to be incurred in the 2014 service charge year for major works to the development. The anticipated costs resulting from the major works equates to approximately £18,000 per leaseholder.

The Leases:

4. Included with the application was a copy of a lease relating to flat 44. This lease is dated 6th April 1982 and is for a term of 999 years from 31st March 1982. In respect of the service charge contribution it is provided that the specified proportion of the "Flat Service Provision" is 1/45th, that the specified proportion for the "Garage Service Provision" is 1/51st and that the specified proportion for the "General Service Provision" is 1/65th. The lease defines the Property, Building, the Common Parts, the Garages, the Gardens and the Premises.

5. Under clause 3(3) of the lease the leaseholder covenants to pay the service charge in accordance with clause 7. Clause 7 states that the service charge year runs from 1st April to 31st March. The arrangements for the payment of the service charge contributions are set out in clause 7(2) and state "*The Leaseholder HEREBY COVENANTS with the Landlord to pay the Service Charge during the term by equal payments in advance on the first day of each month PROVIDED ALWAYS all sums paid to the Landlord in respect of that part of the Service Charge as relates to the reserve referred to in sub-clause 4(b) hereof shall be held by the Landlord in trust for the Leaseholder until*

applied towards the matters referred to in sub clause 4(5) hereof and all such sums shall only be so applied. .... ". Clause 7(4)(b) states that the Service Provision is to include "*an appropriate amount as a reserve for or towards such of the matters specified in sub clause (5) as are likely to give rise to expenditure after such Account Year being matters which are likely to arise either only once during the then unexpired term of this Lease or at intervals of more than one year including (without prejudice to the generality of the foregoing) such matters as the decoration of the exterior of the Building (the sad amount to be computed in such manner as to ensure as far as is reasonably foreseeable that the Service Provision shall not fluctuate unduly from year to year....".*

6. Clause 7(5) sets out the items of expenditure to be covered by the Service Provision and includes all reasonable costs and expenses incurred by the Landlord generally with regard to its affairs whether or not they relate/relating to the Building the Garages or the Gardens and all expenditure of the Landlord in connection with the repair management maintenance and provision of services. The expenditure includes the costs associated with the Landlord complying with its covenants insure, maintain, repair, redecorate and renew, together with the provision of service to clean, keep lighted and keep cultivated the relevant parts of the development. In particular 7(5)(d) states "*all fees charges expenses payable to any solicitor accountant surveyor valuer or architect or any other professional adviser whom the Landlord may from time to time reasonably employ in connection with the management or maintenance of the Building the Garages and the Gardens including the computation and collection of rent (but not including fees charges or expenses in connection with the effecting of any letting or sale of any premises) including the cost of preparation of the account of the Service Charge and if any such work shall be undertaken by an employee of the Landlord then a reasonable allowance for the Landlord for such work.*"

Inspection:

7. Berkeley Court is a residential development located off Oatlands Drive in Weybridge. The development comprises of 46 flats situated in two blocks. The first block contains flats 14-47 and the second block contains flats 68-79. Between the two blocks are 20 houses, numbered 48-67 Berkeley Court.

8. The development is dated from the late part of the twentieth century. The two blocks that are the focus of this application are four storey and would appear to be a concrete framed construction with infill panels, of brick, tile hung and window panels. It was noted that some of the tiling had slipped and it was explained that the timber battens holding the tiles had deteriorated and that there were issues with asbestos in the cladding panels and consequently the whole of the cladding required replacing. The windows were a mix of original

windows and new double-glazed units. The external ground floor areas to the first block were painted, but it was noted that there were signs that some re-decoration was required. At the lower ground floor level to Block one was a garage area and it was noted that the window frames to this area, required re-decoration. It was observed that there was some staining to the wall of Block one.

9. On a few flats were a number of "Juliet" balconies that appear to be an addition from the original construction.

10. The Tribunal did not inspect the flat roof construction of either block. However the Tribunal had the benefit of some photographs of the roof areas and these were considered with the benefit of observations at ground floor level.

11. The Tribunal were able to inspect the area of land at the side of the second block of flats that is subject to an option to purchase.

The Hearing:

12. A hearing was held on 27th June 2014 at Kingston County Court. In attendance at the hearing on behalf of Dinn Kotsias was Mrs L Birch, accompanied by Mr T Pegley. The Respondents were represented by Miss A Sedgwick of counsel. Evidence was given on behalf of the Respondents by Mr P Walker a Chartered Surveyor from DHP LLP, Miss G Dixon, a senior property manager of GCS, the managing agent for the Midopen Ltd and Mr G Barnard a director of Midopen Ltd and a leaseholder in the development. Evidence and submissions were completed at the hearing, but occupied all the available time. Indeed it was necessary for the parties to make further written submissions regarding the planned arrangements for the recovery of costs in respect of the replacement of the windows and Juliette balconies. Given the detail of the issues raised by the parties it was therefore necessary for the Tribunal to subsequently re-convene to consider their decision. This decision and the reasons take full account of the written and oral submissions by all parties. A brief summary of each case is provided below.

13. During the hearing the Tribunal were referred to an invoice that was issued on 7th March 2014 and was for £17,715.00. The invoice describes the sum as the costs of works as per Notice of Estimates dated 29th January 2014. Towards the end of the hearing it was confirmed that Midopen Ltd had withdrawn all the invoices that related to the major works. They indicated that they were preparing to review the consultation process and to re-issue the invoices following the outcome of the Tribunal's decision. Both parties indicated that they wished the Tribunal to proceed to determine the points on principle, as this would guide them on the re-issue of the invoices.

14. Given the status of the withdrawn invoice and the fact that such sums that were being demanded were interim charges before the final expenditure was incurred, the Tribunal consider it appropriate to make a warning. This decision can only consider the general points of principle and the reasonableness of any sums actually incurred can only be considered at the outcome of any works once the actual cost is known in light of the actual work undertaken.

Representations:

Applicants' Case

15. Mrs Birch spoke on behalf of Dinn Kotsias Properties (the leaseholders of flats 44 and 76) and although she stated that she was also speaking for other leaseholders in the development, although the Tribunal were not provided with any documentation to indicate that she represented any of the other Applicants. There were no written representations from Messrs Vinci and Harry.

16. As an explanation to the background of the application Mrs Birch stated that there were concerns about the nature of the proposed works. A question arose whether some of the proposed works amounted to improvements that would be excluded under the service charge mechanism of the lease. The leaseholders had only been given six to eight weeks to finance the contribution of nearly £18,000 per unit and there had been a threat of forfeiture. There was no underlying dispute that the works were required. Mrs Birch frankly stated that one of the purposes of the application was to allow the Applicants time to finance the sums being claimed.

17. It had been assumed that some excess land was to be sold and the proceeds from that sale would have assisted in paying for the works. The Tribunal explained that in their initial opinion the sale of the land by Midopen Ltd was a company matter and not within the scope of the service charge jurisdiction of this Tribunal. The Tribunal would hear submissions from either party if it were to be argued that this was an issue for the Tribunal. In the end no submissions were made and accordingly this is an issue that was not decided by this Tribunal.

18. The Tribunal took Mrs Birch through her witness statement to explore the various issues she had raised.

Juliet Balconies - £14,299.00

19. Mrs Birch stated that the sum of £14,299 had been added to the tender but that leaseholders had been informed that if they required the installation of a new Juliet balcony then they would be charged separately for this sum. It

appeared that Mrs Birch sought greater clarity on this issue. In her response of 14th July 2014 she appeared satisfied with the explanation given by Mrs Dixon.

Roof Works – Guard Rail - £12,504.00 and Ladders - £5,448.00.

20. Whilst appreciating the benefits of these works, Mrs Birch considered that the works were improvements and therefore not recoverable as a service charge item. It was stated that the new roof covering will involve the provision of additional insulation and that will increase the height of the lip on the flat roof.

Provisional Sum - £5,000

21. There was concern that this sum had been added to the tender price when it should have been included in the contingency element. There is a possibility that the contractor would be able to recover the £5,000 even if no work is undertaken for this sum.

Communal Aerials - £40,204

22. This is an acceptable improvement, but requires the consent of the leaseholders. As the work has previously been delayed there was sufficient time to gain all the leaseholders' consent. In Mrs Birch's opinion the costs could be reduced.

Roof Access Hatches and Folding Steps - £6,651.00 & £5,448.00

23. Again it is suggested that this work is an improvement and therefore not recoverable by the service charges.

Vertical Hung Tiles - £90,182.00

24. It was explained that the replacement of the panels with rendered panels was a more expensive option. It was the opinion of Mrs Birch only a few tiles needed to be replaced and if whole panels needed replacing then the use of uPVC panels would be a cheaper option. She had no evidence to support this contention and explained that she is an experienced property manager, in her opinion the cost reduction would be in the region of 25%. The render panels would amount to an improvement.

Damage to Reveals

25. It is stated that the contract specifically excludes a cost element for any contribution for making good to the internal finishing's to the flats as a consequence of the replacement windows. In her opinion the work should been identified and a provision made for this work.

Scaffolding

26. An issue appears to have been raised as to whether there was an element of double counting and an explanation is sought. The scaffolding costs amount to

£89,147 as set out in the Schedule of Works. In addition the total of the roofing works are allocated separately in the Schedule of Works and amount to £91,083 plus £5,000 for a provisional sum, considered above.

Miscellaneous Works - £7,700 and £6,313

27. A number of small items of work were identified. These included the replacement of a door and a hinge; redecoration of concrete columns, walkway and railings and soffits a timber louvre, six garage windows; the replacement of another door all totalling £7,700 and a further £6,313 for other miscellaneous external repairs. It is suggested that these works are general repair work that were not included in the consultation process and they should be financed from the reserve fund account.

GCS Fees - £1,440

28. The dispute about GCS fees is that there as there is currently a management fee, there should be no further charge for the section 20 consultation process.

DHP Fees - £75,501 including VAT

29. This fee is 10% of the contract sum and Mrs Birch considers that this percentage is excessive. She has dealings with surveyors and is of the opinion that a fee of 7.5% would be appropriate. In her belief the contract should be re-negotiated.

Building Regulation Fees - £3,600

30. The Applicants seek further information on these costs. In Mrs Birch's opinion the costs should be in the region of £999. In her final representations Mrs Birch referred to further investigations she had made with Elmbridge Borough Council and that works up to £75,000 would result in a fee of £830 and any works in excess of this limit would be subject to negotiation. But the cost of the works would reflect the works that were subject to the building control. The local authority, which would make more frequent inspections than a private inspector, do not seek to make a profit, so should be a cheaper alternative.

Penalty Clause

31. Mrs Birch questioned the adoption of the penalty clause in the contract.

32. In summary the proposed service charge was a significant increase on contributions from previous years. Although everybody would like the work to proceed, there are concerns with the threats of forfeiture over non-payment. It is acknowledged that there is significant disrepair at the development, but consideration should be given to the phasing of the works and to use the scaffolding in the most effective method. The miscellaneous works could be stripped out and delayed in order to minimise the impact of the works.

Respondents' Case:

33. In response to questions from the Tribunal as to why the reserve fund provision under the terms of the lease had not been utilized to fund these works, it was explained that the current reserve fund contained £67,800 as the contribution from the flats. A few years previously the caretaker's flat had been sold and the plan was to spend the proceeds on the current planned works. However, there were major drainage issues on the development and the money had been spent on resolving those problems. Additionally it had been hoped that the sale of the surplus land would bring in some funds to offset against the major works costs. To date this transaction has not been concluded.

Juliet Balconies - £14,299.00.

34. In oral evidence Mr Walker a partner with DHP Property Consultants explained that it would be necessary to remove all the Juliet balconies to ensure the wooden sub-frames could be accessed and the full repairs could be carried out, to ensure adequate fixing and to give a uniform appearance.

35. There was a further statement of Ms Dixon dated 7th July 2014 as a response for further information requested by the Tribunal. In dealing with the existing Juliet balconies it was explained that these additions had become part of the fabric of the building and as such the landlord's lease obligations extended to these elements. As part of the overall replacement works including the patio doors and infill panels it would be necessary to replace all the existing Juliet balconies. The total cost of removing the existing balconies would be £860.04 in total and a further £5,544.45 to replace. The full quotation includes the cost of supplying a further 12 balconies. The anticipated cost of the additional 12 balconies is £7,392.60 and it is anticipated that this cost will not be included in the service charge account, but will be payable by individual leaseholders. The patio doors are to be dealt with in a similar manner in that the 12 additional patio doors, at a total cost of £10,432.80 is not to be included in the service charges, but payable by individual leaseholders who may require this work. . If the affected flats decide against the installation of patio doors or the balconies then the cost of the direct window replacement will need to be added back into the account and would be payable as a service charge item. If none of the 12 leaseholders take up the option to have the Juliet balconies/patio doors fitted then a sum of £4,923 will be needed to be added into the overall cost to be recovered from the service charge.

Roof Works – Guard Rail - £12,504.00 and Ladders - £5,448.00.

36. It was explained that this work was needed due to the requirements of the Work at Heights Regulations 2005. There would be maintenance works including clearing the perimeter gutters and maintenance work to the proposed communal aerials. Mr Walker stated he would not be happy to ask

contractors to work in this environment without the proper safety arrangements.

Provisional Sum - £5,000

37. Mr Walker explained how the provisional sum arrangement works in a contract of this nature. The sum would only be incurred if works were actually undertaken. The project manager would ensure supervision and reconcile the accounts to reflect what work was undertaken.

Communal Aerials - £40,204

38. It was submitted that the adoption of a communal aerial system was a logical step to take.

Roof Access Hatches and Folding Steps - £6,651.00 & £5,448.00

39. Mr Walker's comments for the guardrail and ladders considered above, applied to the proposed roof access hatches and folding steps.

Vertical Hung Tiles - £90,182.00

40. Mr Walker told the Tribunal that there were a number of deficiencies with the current cladding system and the frameworks holding the window panels, such as asbestos issues and the deterioration in the structural integrity. Accordingly it would be necessary to remove the existing frames. As more than 50% of the cladding needed to be replaced then it was necessary to comply with Building Regulations and this required sufficient insulation to be installed. All possible cladding systems would require similar compliance. The render system that is suggested is low maintenance and the most durable and the cost differential is negligible in comparison to other options, including the uPVC option which had been considered when they decided on the render system as the most effective solution in the long term.

Scaffolding

41. Regarding the two roof layers it explained that the scaffolding would be put in place to allow access and for the installation of a temporary roof, described as a "tin hat" covering whilst the main roofing works are carried out. The current construction of the roof is as a "cold roof" construction, without any insulation. As more than 50% of the roof requires replacing, then to comply with Building Regulations, the specification needs to include a vapour barrier and insulation, with two top layers. This specification is part of the full specification for the proprietary roofing system known as the IKO system.

Miscellaneous Works - £7,700 and £6,313

42. Miss Sedgwick suggested that the original Notice of Intention refers to a specification, which included the miscellaneous works. If the Tribunal did not agree, then Midopen would be obliged to make an application under section

20ZA and rely on the principles set out in Daejan Investments Ltd v Benson & others [2013] UKSC 54.

GCS Fees - £1,440

43. Mrs Dixon explained that for the 2013/4 service charge year the management fee was £198 per unit plus VAT and for 2014/5 the charge will be £185.00 plus VAT. There is an additional tariff for work that is beyond the normal management fee and that the fee for section 20 consultation is £20 plus VAT.

DHP Fees - £75,501 including VAT

44. The usual range of fees for the project management of a scheme such as the one under consideration would be in the range from 10-15%, dependent on the number of specialists required. In this scheme there has been the involvement of an architect, a building surveyor and an electrical consultant. DHP were not the only company quoting for this scheme. In his evidence Mr Barnard stated that when seeking consultants to oversee the scheme, DHP had been approached, as had two other contractors. One of those contractors had proposed a fee of 15%. Mrs Dixon confirmed this position.

Building Regulation Fees - £3,600

45. In evidence Mr Walker stated that the scale of building regulation fees is set by Elmbridge Borough Council. On a project with a value of £150,000 the fee would be £1,000. Therefore on a proportionate basis the fee of £3,600 is not unreasonable.

Penalty Clause

46. The penalty clause arrangement was a standard element of a JCT formal contract and sets out the arrangements of liquidated damages for any delay to the scheme. It is an arrangement that is beneficial to the leaseholders.

47. Responding to the comments of Mrs Birch, Mr Walker stated that it was not cost effective to phase the scaffolding and the works as the second scheme of works would be subject to price inflation and there would be the on-going risk of water ingress to the block dealt with in any second phase. Scaffolding was required to deal with the cladding and window panels, so it would be logical that any scaffolding would be utilized in the roof repairs. That being said, the work would commence on one block, then move to the second block, but it would be part of the same scheme of works.

48. In his summary, Mr Barnard stated that 60% of leaseholders had paid up front without any pressure. The project has already been delayed for one year and funds had been returned. The remaining leaseholders had been annoyed at the further delay to the works. Mrs Dixon suggested that it was easier for

leaseholders to be faced with one large demand of £17,000 for the major works, as arrangements could be made for the financing of those works.

49. A feature that arises in many of the disputed items is the distinction between repairs and improvements. Miss Sedgwick relies on Postel Properties Ltd v Boots the Chemist Ltd [1996] 2 E.G.L.R. 60, in that during the course of repairs or replacement of an item, then will be an inherent improvement. This aspect of inherent improvement would be insufficient to exclude the work from being only a repair and an item of work that includes an improvement could be recoverable under the current service charge regime for the subject development.

50. It was submitted that as the Applicants had admitted that the work was necessary that this was more important than the issue of affordability. The reserve mechanism had not been used as it had been anticipated that funding from other means would have been secured. The alternative finding had not happened, but this was not an issue for the current Tribunal.

Tribunal Findings:

Juliet Balconies - £14,299.00

51. The Tribunal agrees with the Respondent's contention that the existing balconies have become part of the fabric of the building and that the replacement of these elements are service charge items. Likewise if there is no take up of the opportunity to replace existing windows for additional Juliet balconies and patio doors, then the actual cost of replacing the windows should be treat as a service charge item. The Tribunal is re-assured with the approach suggested by the Respondent that if individual leaseholders require additional works, then they will pay for these works separately and the service charge account will be adjusted. It will be necessary for the full work to be undertaken to ascertain the level of take up and to adjust the accounts accordingly. For clarity the cost of the replacement of the existing Juliet balconies is £6,404.49 (£806.04 + £5,544.45) and the replacement of windows in the 12 flats which will have the option to take Juliet balconies is £4,923.00 (12 flats x £410.25). The total sum recoverable by the service charge provisions is £11,327.49. If any of the flats do take up the option, then the sum of £11,327.49 will be reduced by £410.25 per flat.

Roof Works – Guard Rail - £12,504.00 and Ladders - £5,448.00/ Roof Access Hatches and Folding Steps - £6,651.00 & £5,448.00

52. These headings are considered together as the same principles apply to both categories of work. The Tribunal acknowledges the point being taken by Miss Sedgwick in respect of the inherent improvement involved in a repair, maintenance or replacement. However, a distinction can be made between those works that are an upgrade within a constructional element of a repair, and those works that are separate items of work (connected, but not the same

constructional element). The Tribunal considers that the use of guard rails, ladders, access hatches and folding steps are all items which will help to ensure that the building is efficiently maintained and best practice in regard to facilitating maintenance work. However, even though the works are desirable, they are additional works not involved with the replacement of an element and therefore the Tribunal finds that these works are improvements and beyond the scope of the service charge regime.

Provisional Sum - £5,000

53. This sum is within the contract in anticipation of additional works in circumstances when those works are identified once an area of the building's structure is fully exposed. We accept Mr Walker's explanation that such costs will only be incurred if any work is actually carried out and that it is the task of the project manager to ensure a reconciliation of works is undertaken in relation to the respective sums involved.

Communal Aerials - £40,204

54. The Tribunal were not directed to any particular clause in the lease that identified these works as being service charges items. Again, whilst the works may be desirable, we accept Mrs Birch's contention that these works are improvements and are not recoverable as a service charge item under the current regime.

Vertical Hung Tiles - £90,182.00

55. During the inspection, the Tribunal noted that many of the tiled panels showed signs of deterioration and we accept that this work is needed. In fact Mrs Birch accepted this position. The Tribunal accepts the submissions made on behalf of the Respondent in that as more than 50% of the cladding was to be removed it was necessary to comply with current Building Regulations. The additional insulation works that are needed are an improvement, but as they are an essential element of the constructional element, then this satisfies the Tribunal that the total of the work can be classified as a service charge tem. The next aspect to consider is whether the solution proposed by the Respondent is a reasonable methodology for the repairs. Although Mrs Birch states that in her opinion the specification is excessive and a cheaper solution could be sought, no specific evidence was presented on this point. The Tribunal is satisfied with the explanation given by Mr Walker that there was a minor cost differential between the rendered system and an uPVC system, once all the thermal insulation works had taken place. It is accepted that the rendered panel system will have maintenance benefits and be of greater durability. It is in consideration of these factors that the Tribunal accepts that the proposal to use rendered panels in the repairs is reasonable.

Damage to Reveals

56. The Tribunal find that as a matter of contract that if there are any repair works carried out to the building and those works caused consequential damage to the areas demised to individual leaseholders, then such a leaseholder would be able to recover the cost of those works from the landlord. The cost of making good the reveals within the individual flats can therefore properly be included in the cost of any repairs to existing Juliet balconies. However, this would not apply to improvements, such as the installation of a new Juliet balcony, that cost would not be consequential upon works to carry out a repair etc. under the leases. The costs of making good the reveals to the new Juliet balconies could not therefore be added to the service charges.

Scaffolding

57. The explanation given by Mr Walker of the temporary roof covering whilst the main roof works are being undertaken and his description of the new roofing method was clear and logical. The Tribunal find that there would be no duplication of works and the proposed works are reasonable given the circumstances of the development.

Miscellaneous Works - £7,700 and £6,313

58. Mrs Birch raised the issue as whether the current consultation process included these miscellaneous works. The original Notice of Intention is dated 10th May 2012 and a further Notice of Intention is dated 19th November 2013. In the second notice it states that a full description of the works to be carried out under the agreement was available at the offices of GCS Property Management Ltd for a thirty-day period. Although this was a very general reference to the works, the full specification was available. In conclusion the Tribunal finds that there was a proper consultation process in respect of the miscellaneous works.

GCS Fees - £1,440

59. It is quite usual for managing agents to have a set management fee per flat for the normal management function and then to have a separate "menu" of charges that reflect work that is beyond the normal management role. Conducting a section 20 consultation would normally be regarded as in addition to the "day to day" management. Therefore the Tribunal determines, that it is appropriate for GCS to charge the additional fees for the consultation work. We were given no specific evidence to indicate that the level of fees, £20 per unit was excessive. Indeed in our opinion the fees appear reasonable.

DHP Fees - £75,501 including VAT

60. Although Mrs Birch states that the fees for DHP were excessive, she adduced no specific evidence on this point. We note the oral evidence of Mr Barnard and Mrs Dixon that three consultants had been approached and that one firm proposed a fee based on 15% of the works and the other two firms, including DHP proposed a 10% fee. In the opinion of the Tribunal from the evidence

submitted and from its own experience the fee proposal from DHP at 10% is reasonable.

Building Regulation Fees - £3,600

61. The Tribunal notes the further submissions made by Mrs Birch in respect of her conversation with Elmbridge Borough Council. However, there is no evidence that the officer who spoke to Mrs Birch had access to the full specification. The Tribunal accepts the evidence of Mr Walker as to the fee and as such it determines that Building Regulation Fees in the region of £3,600 are reasonable.

Penalty Clause

62. As explained by Mr Walker and accepted by this Tribunal, the penalty clause arrangement is a protective measure that benefits the leaseholder. No specific determination is required on this point as this is an aspect that could reduce any potential service charge contributions form the leaseholders.

63. Overall the Tribunal notes that the proposed works are acknowledged to be required and desired by the leaseholders. We accept the evidence of Mr Walker, that there would be no financial benefit to the phasing of the works, it was not practicable and in particular the risks resulting from a delay of works could result in greater damage to the blocks with the potential of water ingress into some of the flats.

64. In the reasons stated above the Tribunal has identified certain works that it classifies as improvements in contrast to repair or maintenance works. Accordingly, those works are not within the service charge regime set out in the lease. However, this decision does not affect the parties in reaching an agreement outside the scope of the lease to undertake those works.

Section 20C Application:

65. Mrs Birch stated that a section 20C order should be made and explained that as the directors of Midopen had an insurance policy in place, then they should make a claim under the policy to cover the costs of the current application.

66. Miss Sedgwick accepted that Midopen Ltd.'s costs in dealing with this application would be covered under clause 7(5)(d) of the lease. It was stated that the Respondent company is a leaseholder company and is a "not for profit" organisation. If the costs in dealing with the application were not covered by the service charges then Midopen would be obliged to seek funds from the same individuals but in their capacity as shareholders of Midopen, rather than as leaseholders. It is submitted that no one has acted unreasonably and the Respondent Company has the support of many of the leaseholders who want to see the major works completed as soon as possible.

Tribunal Findings:

67. The Tribunal considers that there were merits to both parties' cases and in particular noted that Mrs Birch accepted that the majority of the work was required and even the "improvements" were desirable. Additionally she stated that one of the motives behind the application was to allow the Applicants time to source finance for the works. In this case the Respondent is a "leaseholder" company and any costs that are excluded due to a section 20C order, would still become payable by the leaseholders in their capacity as shareholders. Mrs Birch suggests that the use of the director's insurance policy should finance this application. However, no evidence was given to indicate that such a policy would cover this eventuality. Given these circumstances the Tribunal makes no section 20C order.

Conclusions:

68. For clarity the Tribunal notes that the interim service charge demands have been withdrawn. However under the provisions of section 27A(3) of the 1985 Act if costs were incurred for the services, repairs and maintenance of the description specified in the application, a service charge for the following costs would be reasonable and therefore payable:

Works	**Amount Claimed**	**Determined**	**Notes**
Juliet Balconies	£14,299	£11,327.49	Reduced if the option taken up.
Roof works – Guard Rails & Ladders	£12,504 + £5448	£0	Improvements
Provisional Sum	£5,000	£5,000	
Communal Aerials	£40,240	£0	Improvements
Roof Access Hatches & Folding Steps	£6,651 + £5,448	£0	Improvements
Vertical Hung Tiles	£90,182	£90,182	
Scaffolding	£89,147 + £91,083	£89,147 + £91,083	Includes scaffolding & roofing works
Miscellaneous Works	£7,700 + £6,313	£7,700 + £6,313	
GCS Fees	£1,440	£1,440	
DHP Fees	£75,501 + VAT	£75,501 + VAT	
Building Regulation Fees	£3,600	£3,600	

Appeal Provisions

69. A person wishing to appeal against this decision must seek permission to do so by making written application to the First-tier Tribunal at the Regional office that has been dealing with the case

70. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision

71. If the person wishing to appeal does not comply with the 28-day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28-day time limit; the Tribunal will then decide whether to extend time or not to admit the application for permission to appeal

72. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result that the person is seeking.

Chairman: Helen C Bowers **Date: 15th August 2014**

APPENDIX

LANDLORD AND TENANT ACT 1985

Section 19 Limitation of service charges: reasonableness

(1) 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 of the services or works are of a reasonable standard;
and the amount payable shall be limited accordingly.
(2) Where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable, and after the relevant costs have been incurred any necessary adjustment shall be made by repayment, reduction or subsequent charges or otherwise.

Section 20C Limitation of service charges: costs of proceedings

(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 ....., are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application.
.....
(3) The court or tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances.

Section 27A Liability to pay service charges: jurisdiction

(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 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 it which it is payable.....
(2) Subsection (1) applies whether or not any payment has been made.
(3) An application may also be made to a leasehold valuation tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs and, if it would, as to –
(a) the person by whom it would be payable,
(b) the person to whom it would be payable,
(c) the amount which would be payable,

(d) the date at or by which it would be payable, and
(e) the manner it which it would be payable.
(4) No application under subsection (1) or (3) may be made in respect of a matter which –
(a) has been agreed or admitted by the tenant,
(b) has been, or is to be , referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,
(c) has been subject of determination by a court, or
(d) has been subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement,
(5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.
.....

Taylor, Joanne

From: helen.bowers@aol.co.uk
Sent: 18 August 2014 17:21
To: Agnew, Donald; Taylor, Joanne
Subject: Berkley Court
Attachments: Berkeley Crt, Weybridge .docx

Dear Donald and Joanne

I thought I sent an email out to you last night with this decision, but now can't find it in my out box. So Decision attached in case you have not got it.

Kind regards, Helen