

**In the matter of**  
**Shinereach Limited**  
**(the Applicant)**  
  
**and**  
  
**The Lesees named on the Tenancy Schedule attached to the Application**  
**(the Respondents)**  
  
**and in the matter of**  
  
**the Applicant's applications to the Leasehold Valuation Tribunal for**  
**a determination of reasonableness of service charges under section 27A of**  
  
**the Landlord & Tenant Act 1985**  
  
**in relation to**  
  
**37-43, Tower View Road, Great Wyrley, Walsall, WS6 6HF**

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**Background:**

On the 2<sup>nd</sup> August 2004 the Applicant submitted an application to the Midland Leasehold Valuation Tribunal ('the Tribunal ') for a determination of the Respondents' liability to pay service charges in respect of the subject property under Section 27A of the Landlord and Tenant Act 1985 ("the Act "), specifically relating to the cost of major works which the Applicant was proposing to undertake -- full details of which had been provided to the Respondents as part of the consultation process under Section 20 of the Landlord and Tenant Act 1985 (as amended) following notice for that purpose given to the Respondents on 27<sup>th</sup> October 2003.

In the application, the Applicants sought determination of the Respondents' liability to pay their due proportion of the costs of the major works, a significant proportion of which were required to be carried out to comply with any Notice dated 3 May 2002 served by South Staffordshire District Council under Section 215 of the Town & Country Planning Act 1990 (as amended by the Planning and Compensation Act 1991), by which the Council gave notice to the Applicant that it appeared that the amenity of part of the area of the authority was adversely affected by the condition of the land and premises forming the subject of the Application. The Council had required the Applicant to take such steps were remedying the condition of the land and premises/the property within two years after 28<sup>th</sup> June 2002, to be extended by agreement with the Council.

A Pre-Trial Review was held on the 10<sup>th</sup> September 2004, when the principal areas in dispute were identified as being the following aspects of the proposed major works to the subject property:

1. the amount of the costs for the work recoverable from the Respondents,

2. the scope and nature of the proposed work,
3. the timescale for the completion of the work,
4. the timing and amount of payments by the Respondents,
5. the current amount held in reserves for the proposed work and details of the accrued interest on those deposits,
6. documentary evidence of compliance by the Applicant with the required consultation procedures of Section 20 of the Landlord & Tenant Act 1985 in relation to the work,
7. whether or not the Applicant can recover from the Respondents, either through the service charge or otherwise, the financing costs of the work.

Directions were issued on 15<sup>th</sup> September 2004 following the Pre-Trial Review, and the matter was listed for a hearing on 12<sup>th</sup> October 2004 at the offices of the Tribunal.

Following an application for a postponement, the hearing was rescheduled for 9<sup>th</sup> November 2004 and was preceded on 4<sup>th</sup> November by an inspection of the subject property, including an internal inspection of a number of the flats. Apart from the individual Respondent lessees of the flats which were inspected internally, neither the Applicant nor the Respondents were present or represented at the time of the inspection.

The subject property forms part of a mainly residential development constructed in the 1960s as part of the Tower View Road Estate, comprising a three storey block of twelve flats. There are also limited open landscaped areas and further parts of the grounds for use as car parking. Each of the flats is let on a long term lease.

At both the Pre-Trial review, and in a subsequent note to other residents, the Respondents' representatives acknowledged that:

- there was no disagreement between the parties that work on the subject properties was urgently required,
- that there was similarly no disagreement as to the scope of the required work, and
- there was little dissent at the proposed cost of the work to be carried out.

At the hearing on the 9<sup>th</sup> November 2004, the Respondents were represented by Mrs Christine Astbury of 21 Penny Court, Tower View Road (the adjoining section of the development) and Mr & Mrs C J Hill of 1A Penny Court. The Applicant was represented by Mr A. Garwood-Watkins, a Director of Shinereach Ltd. and the Respondent's expert witness, Mr N Woolley, Chartered Surveyor, of Tecton Services Ltd.

## **Hearing & Determination**

The hearing was conducted by reference to the major issues identified in the Directions issued on 15<sup>th</sup> September 2004, a copy of which is attached. Representations were heard from the parties on the matters in dispute, and those representations are outlined below in the context of the determination of each matter.

In its determination of the issues in dispute between the parties, the Tribunal took account of all relevant evidence and submissions presented by the parties.

### **Scope and nature of proposed works:**

Mr Woolley referred to his witness statement and outlined the scope and nature of the proposed works. He also provided an overview of the procurement process which had involved an invitation to tender to four separate contractors from the approved list maintained by Staffordshire County Council, all of whom had submitted bids. It was proposed to accept the lowest tender and for the work to be undertaken in accordance with the JCT 98MW form of Contract.

As indicated previously by the respondents representatives there was no disagreement as to the scope of the work required.

Mr Garwood –Watkins also detailed the process of consultation with lessees as required by Section 20 of the Landlord & tenant Act 1985 (as amended) starting with the formal notice to all lessees on 27<sup>th</sup> October 2003.

**Accordingly, the Tribunal determines that the scope and nature of the proposed works as detailed in the specification attached to Mr Woolley's witness statement as "NW1" are reasonable, subject to the deletion from the specification of any reference to replacement of existing windows with upvc units, which had been included in error in the letter of 27<sup>th</sup> October to all of the lessees from the managing agents.**

**The Tribunal is also satisfied that the Applicant has complied with the consultation requirements of the Landlord & Tenant Act 1985.**

### **Cost of works:**

Mr Garwood Watkins referred to his witness statement and highlighted the fact that the necessary scheme of work had been procured by competitive tender in accordance with the appropriate procedures and requirements of Section 20 of the Landlord & Tenant Act 1985 (as amended) and it was proposed to award it the lowest tender for the contract, Rugeley Construction Ltd : £32,279.72 (inclusive of 10% (+VAT) supervision fee on behalf of the Respondents by Tecton Services Ltd)

As indicated previously by the Respondent's representatives, there was no material dispute about the cost of the proposed works.

**The Tribunal therefore determines that the costs of the works as detailed above are reasonable and recoverable from the lessees.**

### **Timescale for completion of the works:**

It was indicated by Mr Garwood-Watkins that the Respondents wished to implement the work as soon as possible but this would clearly depend upon the timescale of the decision of the Tribunal and the availability of funds from the lessees. In addition, the start date would depend upon the availability of the successful contractors and whether they would wish to undertake the work one after the other or concurrently. As indicated in the invitation to tender, the timescale for the completion of the contract was seven weeks.

The Respondents were concerned about when the works might be carried out, given the history of lack of maintenance of the development, and the general level of mistrust this had generated.

Whilst noting the proposed timetable, this aspect of the matter was not one which called for the Tribunal to make a determination, but was principally for the information of the Respondents.

### **Current amounts held in reserves for the proposed works:**

Mr Garwood-Watkins pointed out that a schedule showing the amounts due from individual lessees was attached to his witness statement, together with a schedule showing that only the lessees of two flats had actually paid anything towards the costs of the proposed works – No. 41:£5,680 and No. 43a:£540, which together with accumulated interest of £1.32 (up to 20/10/04), gave a total balance of £6,226.32 as against the total amount required to fund the works of £41,719.89 and the total amount demanded to date of £15,000. However, since the preparation of that schedule, the amount held on account in respect of No. 41 had been reduced to £3,476.66 following repayment to the lessee of the excess, which meant the total figure now held on account of the major works was actually £4,017.98 (including interest of £1.32).

### **Timing and amount of payments by the respondents + Financing costs:**

Mr Garwood-Watkins pointed out that there were two different forms of long lease by virtue of which the lessees of 37 – 43 Tower View Road occupied their individual flats. The first and by far the most numerous (in 11 out of 12 cases) were those granted prior to the acquisition of the development by Shinereach Ltd. on 1<sup>st</sup> October 1999 and these provided, in Clause 3 for the recoupment of annual service costs in respect of expenditure incurred not only during the current year but also sums by way of reasonable provision for anticipated future expenditure. In the case of the remaining lease (“the Shinereach leases”), the corresponding provisions were to be found in Clause 3.5, by virtue of which the annual service costs in each year were deemed to include not only actual expenditure incurred by the landlord in that year but also such money as would provide a reasonable provision for anticipated future expenditure in respect of the management and maintenance of the building.

Against this background, Mr Garwood-Watkins submitted that he did not believe the Tribunal could direct a scheme of payment outside the terms of the leases, and whilst he understood the concerns of lessees about paying substantial sums of money in advance of the work being done, he pointed out that apart from the subject property together with one flat in another part of the Tower View Road development and an associated single garage, Shinereach Ltd did not have any other assets. Consequently, while the company was not the corporate equivalent of ‘a man of straw’ it did not have significant sums of free cash with which to finance such significant works as those now being contemplated, and as agreed by both parties as being essential.

It was for this reason, and in response to concerns expressed at the Pre-Trial review on the 10<sup>th</sup> September 2004, that Mr Garwood-Watkins had written to all lessees on the 14<sup>th</sup> October 2004 ("the October letter") explaining the financial position and offering what he regarded as a pragmatic solution whereby, subject to all leaseholders paying outstanding service charge exclusive of major works contributions immediately, then the Applicant would accept payment for the major works in two tranches -- the first 50% being payable prior to work starting and the second 50% being payable upon completion of the works. In order to finance that, (as Shinereach Ltd would have to borrow the money) it would be necessary to add an interest charge to the account of all leaseholders taking up the offer, and this would be at the rate of 2% above Base Rate.

Mr Garwood-Watkins acknowledged that it was in neither party's interest for the present situation to continue but emphasised that the lessor's covenant to repair was conditional on payment of the service charges, and in any event, Shinereach Ltd simply could not pay for the scale of work which was required out of its own cash resources. It would have to borrow in order to fund the work.

Whilst accepting that the Tribunal could not direct a payment scheme which was outside the scope of the contract represented by the individual leases, Mr Garwood-Watkins asked whether the Tribunal would support such an approach.

As an alternative, he questioned whether the Tribunal would endorse the recovery of interest under the terms of the leases in order to finance the proposed work, given that this was clearly contemplated by and provided for under clause 3.5 of the Shinereach leases, although it was less specific in the other forms of lease. Clause 3 (5) (a) of those documents provided for the annual service cost to include "the cost of and incidental to the observance and performance of each and every covenant on the part of the lessor contained in Clause 5 hereof (except the covenant in sub-clause (1) thereof)".

In summary, the costs of financing the works needed to be recovered by one of the following means if lessees were either unwilling or unable to make the necessary payments before the contractors started work: --

- Through the terms of the lease -- if the Tribunal was able to confirm that the leases provided for such a course of action,
- By means of the mechanism set out in the October letter whereby 50% of the costs of the major work would be paid by the lessees prior to a commencement on site, and 50% would then be paid upon completion, subject to the addition of interest on the outstanding second payment during its currency based on 2% above base rate.
- Via the County Court if the Tribunal determined that the costs themselves were recoverable but interest was not, and lessees thereafter failed to comply with the requirement to pay their proportion of the amount due prior to the work starting. In such circumstances, the Applicant would have to pursue the matter through the County Court in the hope of obtaining judgement and statutory interest as a means of financing the cost of the works.

**In considering these issues the Tribunal was conscious of the significant amount of money being asked of lessees and the inevitable difficulty that would place some of them in. However, the terms of the leases clearly contemplate and allow for the payment of service charge monies to include**

anticipated expenditure such as that now being considered. Furthermore, it seems clear that all parties are agreed on the urgent need for major works of refurbishment and repair to be carried out at 37-43 Tower View Road and as the leases clearly provide a mechanism and framework for the payment of the costs associated with carrying out such work, the Tribunal determines that it is reasonable for the Applicants to recover the costs of the major works (as detailed above) from the lessees as part of the Service Charge for 2004 and in advance of the works actually being undertaken. In doing so, it is implicit in the Tribunal's determination that the works will be carried out in a timely manner (given all the circumstances) and to a satisfactory standard. In the event of there being any undue delay in the completion of the works, or if they are not carried out to a satisfactory standard, then it would be open to the Respondents to apply to the Tribunal to consider the reasonableness of these aspects of the matter.

The Tribunal further determines that interest on financing costs for the proposed work is not recoverable by the Applicants under the terms of any but the one Shinereach lease.

In relation to the October letter from Shinereach, the proposed payment in two tranches, but with an interest charge may well provide a pragmatic way forward for a number of lessees, depending upon their individual circumstances. It is however a payment scheme outside the terms of the lease and not one over which the Tribunal has jurisdiction and can therefore make any comment.

#### **Costs:**

Mr Garwood –Watkins tabled a schedule of costs faxed to him during the hearing by the Applicant's solicitors, detailing the total legal costs incurred by the Applicants in advising their clients and pursuing the application to the Tribunal. This showed initial advice and preparation of application costs totalling £1,975 (+ VAT); dealing with the application and the residents "post lodging" of the application, and preparation of witness statements, together with collating further evidence and the preparation of material for the hearing at a cost of £8,500 (+VAT); and ongoing work connected with the application in finalising witness statements and costs relating to the service of documents on residents and the filing of bundles with the Tribunal, totalling £1,535 (+VAT).

In addition, there were disbursements totalling £3,527.30 (+VAT) in connection with photo-copying, hearing fees, issue fees, process serving and travel.

The total amount of the legal costs therefore was £18,081.33p inclusive of disbursements and VAT.

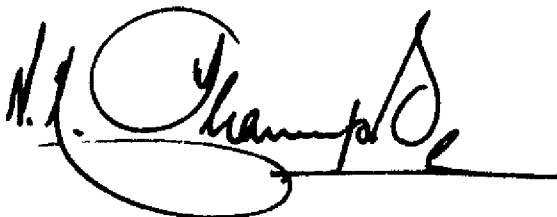
This sum related to both 37 -43 Tower View Road and another part of the same development, known as 1-11 and 1 – 29 Penny Court, being dealt with separately by the Tribunal (under reference BIR/41UF/LSC/2004/0002). Consequently, the costs needed to be apportioned between the two elements of the development/cases. Mr Garwood –Watkins submitted that as the lessees had demonstrably been unwilling to pay the costs of the proposed major works in advance, the Applicants had been left with little option but to make the application to the Tribunal, and as such, it was reasonable for the lessees to meet the Applicant's costs of doing so.

The Tribunal determined that whilst it was reasonable for the Applicant to obtain initial advice from its solicitors and for them to deal with the

preparation and service of the application, a substantial element of the costs incurred since August 2004 were related directly to the preparation of the Applicant's case and the protection of its interest rather than matters related directly to the management of the property. The Tribunal does not accept the argument by the Applicants that the application was necessary as a result of the lessees being unwilling to pay for the proposed major works before the contract was placed. The purpose of applying to the Tribunal prior to incurring the costs of major works of this nature is to minimise the potential of lessees subsequently challenging the recoverability of such expenditure as being reasonable. That is a perfectly proper course of action for the lessor (in this case, the Applicant) to take in order to secure a declaration that the works have been properly procured and are reasonable in terms of both scope and cost. Such a ruling by the Tribunal does not however place the lessees under any greater obligation to pay the appropriate proportion of such expenditure; that is something which is provided for in the leases (or not, as the case may be). Consequently, the application must be considered as a measure principally designed to protect the Applicant's interests, and as such, significant elements of the legal costs are not considered to be reasonably chargeable to the service charge or the Respondents. In other words, while the Applicant may have quite properly regarded it as sensible to apply to the Tribunal for the determinations sought, the principal purpose was to protect themselves from the possibility of not being able to recover substantial monies spent on the refurbishment and repair of the subject property at some time in the future. As such, it does not seem to the Tribunal reasonable that the lessees should bear the major part of the legal expenses involved in that process.

Consequently, the Tribunal determines that the initial legal costs of £1,975, together with (a) £525 in respect of the review of the leases and advice to the Applicants on their interpretation, and (b) disbursement of £1,350 in respect of photocopying, hearing fee and travel should reasonably be paid by the Respondents.

Accordingly, the total amount of costs recoverable from the Respondents is limited to their proportion of £3,850 (+VAT). Given that the twelve flats at 37-43 Tower View Road constitute 28.5714% (or two sevenths) of the total development under consideration in the two applications before the Tribunal to which these costs relate, the proportion payable by the Respondents is limited to that amount i.e. £1,100 + VAT (if appropriate).

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N R Thompson  
Chairman

Date: - 7 APR 2005

**In the matter of Shinereach Limited (the Applicant) and the Lessees named on the Tenancy Schedule attached to the application (the Respondents) and in the matter of the Applicant's application to the Leasehold Valuation Tribunal for a determination of reasonableness of service charges under section 27A of the Landlord & Tenant Act 1985 in**

**relation to**

**37- 43 Tower View Road, Great Wyrley, Walsall, WS6 6HF**

**Application for leave to Appeal**

Further to the decisions of the Tribunal in the above matter, the Applicant's solicitors subsequently lodged an application for leave to appeal, (a copy of which is attached), detailing the specific elements of the decisions in respect of which they wished to appeal. It will be seen that these relate to the items concerned with the recovery from the Respondents of the Applicant's legal costs.

The Tribunal is not persuaded by the arguments put forward in the application, and adheres to the views expressed in its formal decisions.

Indeed, if the arguments put forward by the Applicant's solicitors are correct, it is possible to envisage a scenario under which a landlord could apply to the Tribunal for the type of confirmation sought in this case as a routine measure, secure in the knowledge that even in the absence of any real dispute, its costs would be chargeable to the tenants. It is not suggested that this was the case in the present instance, but it must be emphasised that there was no dispute by the Respondents regarding the need for the works; the scope of the works or even (to any material degree) the cost of the works. Their only concern was about the timing of the works and the possibility (borne of some degree of experience in their eyes) that having paid for the works, they might not be undertaken in a reasonable time scale. In its decisions the Tribunal attempted to address this point whilst noting that it was beyond the jurisdiction of the Tribunal to endorse or order any form of payment scheme beyond or additional to the contractual liability of the Respondents in their leases.

In summary, the main issues as set out in the further Directions following the Pre Trial Review on 10<sup>th</sup> September 2004, together with the "outcome" (in *italics*) in each case were:

1. the amount of the costs for the work recoverable from the Respondents – *Not contested*
2. the scope and nature of the proposed work – *Not contested*
3. the timescale for the completion of the work – *Concern by Respondents*
4. the timing and amount of payments by the Respondents – *Concern by Respondents*
5. the current amount held in reserves for the proposed work and details of the accrued interest on those deposits- *Details provided by the Applicants*
6. documentary evidence of compliance by the Applicant with the required consultation procedures of Section 20 of the Landlord & Tenant Act 1985 in relation to the work- *Details provided by the Applicants*
7. whether or not the Applicant can recover from the Respondents, either through the service charge or otherwise, the financing costs of the work – *Question to the Tribunal.*



The principal decisions of the Tribunal relate to the reasonableness of the costs of the proposed works and therefore their recoverability under the contractual terms of the leases. They do not represent any enhanced or separate grant of greater authority to secure payment.

Against this background, it is considered unreasonable for the Respondents to pay all of the Applicant's legal costs for the reasons set out in the Tribunal's decisions.

However, it is considered that the issue is one of much wider public interest and could have application in many other cases. Consequently, the Tribunal grants leave to appeal.

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N R Thompson  
Chairman

Date: *13th August 2005*