**LEASEHOLD VALUATION TRIBUNAL**

**OF THE**

**MIDLAND RENT ASSESSMENT PANEL**

BIR/31UH/LSC/2004/0006

*DECISION OF THE LEASEHOLD VALUATION TRIBUNAL*

*ON A PRELIMINARY ISSUE IN CONNECTION WITH AN APPLICATION UNDER SECTION 27 OF THE LANDLORD & TENANT ACT 1985*

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| Applicant: | J. R. & R Wilson Trust (freeholder) |
| Respondents: | The leaseholders of various flats |
| Subject property: | Knighton Court<br>Knighton Park Road<br>Leicester |
| Application to the LVT: | 3rd November 2004 |
| Hearing of preliminary issue: | 7th July 2005 |
| Appearances: | |
| *For the Applicant:* | Mr Andrew Mold of Counsel<br>Ms Emma Brown of Fishers, Solicitors<br>Mr Richard Clark of Richard Clarke & Associates, Building Surveyors<br>Mr Ivan Lloyd of Fallowells Managing Agents |
| *For the respondents:* | Mr Andrew Harper of Counsel<br>Mrs C Huges of Barlow Poyner Foxon, solicitors |
| Members of the LVT: | Mr D.B. Power FRICS<br>Mr W J Martin<br>Mr M H Ryder |
| Date of determination: | 7th July 2005 |

**Background**

1. An application for a determination of liability to pay service charges for the years 2005, 2006 and 2007 under section 27a of the Landlord and Tenant Act 1985 was made by J. R. and R Wilson Trust on the 3rd November 2004. The Applicant had prepared proposals for a major renovation scheme and sought a determination from the Tribunal as to whether if incurred the costs were reasonable. On the 12th May, a hearing was convened at which the respondents challenged the inclusion of the renewal of the windows in the proposed renovation scheme. As this was a significant part of the scheme, the Tribunal decided that the issue as to whether the renewal of the windows was the responsibility of the landlord and the cost recoverable through the service charge, should be resolved as a preliminary matter. Initial arguments were heard on the 12th of May, but, as the Applicant had not been given proper opportunity to consider the issue, and the Respondents were not professionally represented, a full hearing on this issue was convened.

2. The Tribunal had given a preliminary decision on the issue subject to further representation.

3. In December 2000 a different Tribunal had considered an application for approval to proposals for increases in the service charge to meet the costs to be incurred pursuant to a proposed Forward Maintenance Plan and to establish a reserve fund. That decision determined, subject to qualifications, that if costs were incurred in carrying out the works proposed, those costs would be reasonably incurred ("the 2000 Decision").

**Hearing**

4. At the hearing, the Respondents were now represented by counsel. Due to the late instruction of the respondent's advisers, their skeleton argument had not been submitted by the date set in the further directions, and authorities not presented until the day of the hearing. In the interests of enabling the hearing to proceed, the documents were accepted subject to any later challenge by the applicant should this prove necessary.

5. A number of the Respondents were present at the hearing.

6. Counsel for the Applicant submitted that the renewal of the windows was the responsibility of the landlord and the cost could be charged to the service charge on at the following grounds;
    (a) an estoppel arises out of the 2000 Decision of the Leasehold Valuation Tribunal.
    (b) on the true and proper construction of the lease the Applicant is entitled to levy a service charge in respect of the replacement of the windows
    (c) alternatively, there is an implied term in the sixth schedule to the lease entitling the Applicant to levy a service charge in respect of the replacement of the windows
    (d) further or alternatively, on the basis of an estoppel by convention, the leaseholders are prevented from denying the Applicant's right to levy a service charge in respect of the replacement windows.

    The submission was thoroughly argued with extensive Authorities.

7. For the Respondents, counsel argued that the windows and frames are included in the demise to each tenant and not within the landlord's repairing obligation and not a proper cost constituent of the service charge. The lease

contains an express repairing covenant placing liability for repairing "the flat" as defined. An estoppel by convention cannot be raised by general allegations against "the tenants" as a class. The 2000 decision does not render the issue *res judicata* because they were made in excess of jurisdiction.

8. In response, counsel for the Applicant claimed that estoppel by convention can be made against a class and cited the parallel of a pension scheme. In the present case, all the tenants had been aware of the intention to include the renewal of the windows and have never complained.

9. The parties to the 2000 Decision were obliged to bring forward all aspects of the case and cannot go back

10. Counsel for the Respondents claimed that the construction of the lease was entirely clear and in express terms and it was not necessary to imply further terms. To do so would implicate the principal of non-derogation from grant and breach the covenant for quiet enjoyment.

11. Estoppel by convention needs the agreement of each tenant and 35 individual leases were not directly analogous to a pension scheme. A proprietary estoppel might bind successors but a promissory estoppel would not. The variation of contractual liability as to who pays for what would be a promissory estoppel. As to what constitutes agreement was considered; tenants would probably not even notice a minor repair cost claimed in a service charge and not challenging cannot be construed as agreement; is silence consent?

12. In summing up, counsel for the Respondents asked the Tribunal to have regard for the following:
    a) the Tribunal had the power to review an earlier decision
    b) on the construction of the lease, clause 3 was clear and reference to "interfering with the outside surfaces..... of the window frames" was a cosmetic proviso
    c) the claim for estoppel by convention had class problems and in any event it would be a promissory estoppel and not a proprietary estoppel

13. Counsel for the Applicant summed up with the following points
    a) the *Compton Court* case cited by the Applicant did not address the principal of *res judicature*.
    b) in the 2000 Decision, the issue of the windows was fundamental.
    c) the Tribunal must construe the lease and the proviso "not to interfere with the windows" was of significance and cannot be ignored. The terms to be implied should be read into the lease.
    d) any claim for derogation of grant must be substantial.
    e) clause 19 in schedule 6 cannot override express obligations but may be used to overcome defects in the lease.
    f) on estoppel by convention, the right claimed is under the lease and is therefore proprietary and not promissory. All tenants had been informed of the landlords proposals.

14. Mr Martin of the Tribunal raised with counsel for the Applicant the question of the principal of *contra proferentem*. Counsel considered this was not a strong principal and should not be given too much weight. He accepted this could lead to a decision against the applicant.

**Determination**

15. The Tribunal considered all aspects of the arguments from both parties and determined that it had the authority to determine the issue of the inclusion of window replacement in the service charge in spite of the decision of the earlier LVT on the 20th December 2000 ("the 2000 Decision") and found that the responsibility for the repair and re-placement of the windows is the obligation of each Respondent and therefore the inclusion of that work in the service charge was invalid.

16. In reaching this decision, the Tribunal examined each aspect of the Applicant's submissions to reach its conclusion.

17. **The Respondents are estopped under the doctrine of res judicata from bringing forward arguments turning on the ability in law of the Applicant to levy a service charge by reason of the decision of the Leasehold Valuation Tribunal on 20th December 2000 ('the 2000 Decision').**

    a) Counsel for the Applicant argued that the six constituents of *res judicata* issue estoppel laid down in *Midland Bank Ltd. v Green (1980) Ch 590* were applicable to the present case. He proceeded to enumerate each of the constituents, all of which must be satisfied, to establish his contention.

    b) Counsel for the Respondents argued that following another decision of a Leasehold Valuation Tribunal in respect of Compton Court, Victoria Crescent, London S.E 19 dated 17th January 2002, Leasehold Valuation Tribunals are established under a statutory framework and that the common law doctrine of *res judicata* does not apply to them. In the alternative, if the common law doctrine does apply to Leasehold Valuation Tribunals, the issue of whether the Applicant has the power to replace the windows and recover the cost was not argued and in any case was collateral to the 2000 Decision as to the reasonableness of the quantum of the proposed charges.

    c) The Tribunal determines that the Applicant's case fails on the fifth constituent laid down in *Midland Bank Ltd. v Green*, i.e that the 2000 Decision involved a determination of the same question that is now sought to be re-opened by the Respondents in the current application. The 2000 Decision was made in respect of an application to it under Section 19 (2B) of the Landlord and Tenant Act 1985 which provides as follows:

> *'An application may also be made to a leasehold valuation tribunal by a tenant by whom, or a landlord to whom, a service charge may be payable for determination-*
>
> *(a) whether if costs were incurred for services, repairs, maintenance, insurance or management of any specified description they would be reasonable,*
> *(b) whether services provided or works carried out to a particular specification would be of a reasonable standard, or*
> *(c) what amount payable before costs are incurred would be reasonable.'*

    d) The present application is made under Section 27A of the 1985 Act, which was inserted by the Commonhold and Leasehold Reform Act 2002. S 27A (1) provides:

*'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 by which it is payable*
(e) *the manner in which it is payable'*

e) The jurisdiction of the Tribunal that determined the 2000 Decision did not extend to an examination of whether the service charge was payable but only to the reasonableness of the amount, under sub clauses (a) and (c) or the standard of a proposed specification (sub clause (b)). Accordingly, the Tribunal determines that the 2000 Decision could not have involved a determination of the same issue now brought before the Tribunal as part of the current application.

18. **On a true construction of the Lease the Applicant is entitled to levy a service charge in respect of the replacement of the windows.**

a) Both parties agree that the windows and window frames form part of the demise but differ in their interpretation of the qualification to the repairing obligation at paragraph 3(a) of the fourth schedule to the lease which states that

*'The tenant will not paint or otherwise interfere with the outside surfaces of...the window frames...'*

b) The Applicant claims that this prevents the Respondents from undertaking any repair or replacement of the windows but the Respondents claim that this only relates to cosmetic matters.

c) There is no specific covenant on the part of the Landlord to repair or replace the windows; the Applicant seeks to find this obligation in paragraph 19 of the sixth schedule to the lease which may be interpreted as having been included to bring into the service charge regime any matter which had not been dealt with elsewhere.

d) The Tribunal determines that, as the windows are clearly within the demise of each flat and the respondents individually have a specific repairing obligation, the 'sweeping up' provisions of paragraph 19 should not be used to override the express obligations in the fourth schedule. Additionally, the Tribunal determines that to construe the lease as argued by counsel for the Applicant would be contrary to the doctrine of derogation from that grant in that the Applicant would be able to take away a benefit, i.e. the ownership of the windows and the ability to either repair or replace at the decision of the Tenant, which is enjoyed by the Tenants by virtue of the grant of the lease.

e) The Tribunal does not accept that the condition to the Respondents' obligation at paragraph 3(a) of the fourth schedule is intended to prevent the Respondents from carrying out repairs or replacement. The Tribunal determines that the words 'or otherwise interfere with' were intended to ensure consistency of appearance and no more.

f) In its determination of the construction of the lease the Tribunal had regard to the generally restrictive approach of the courts in construing service charge clauses, and that in cases of ambiguity the construction of the lease will be against the landlord. The Tribunal noted the dictum of Laws LJ in *Gilge v Charlegrove Securities Ltd (2001) EWCA Civ 1777 (at paras s.27 and 28)*

> *'The landlord seeks to recover money from the tenant. On ordinary principals there must be clear terms in the contractual provisions said to entitle him to do so. The lease, moreover, was drafted or proffered by the landlord. It falls to be construed contra proferentem.'*

g) The Tribunal noted also that Mummery LJ in the same case (at paras s.31 and 32) similarly emphasised as established the proposition that courts construe service charge provisions restrictively.

**19. There is an implied term in the Sixth Schedule to the lease entitling the Applicant to levy a service charge in respect of the replacement of the windows.**

a) Counsel for the Applicant argued that because the lease did not specifically contain an obligation on the Landlord to repair the windows, and that because of counsel's contention that the proviso to paragraph 3(a) prevents the Tenants from replacing the windows, there is a clear lacuna in the lease. In view of the Tribunal's decision with regard to the construction of the lease this lacuna does not arise and there is therefore no need to imply a term.

b) The relevant test for whether the insertion of a term is necessary to give 'business efficacy', as set out in *Liverpool City Council v Irwin 1977 AC 239*, has not been met because to imply the term suggested by the Applicant would reverse the obligations contained in the lease.

c) Whilst paragraph 2 of the sixth schedule expressly provides for the repair of *'the whole of the...balconies..'* to be included in the Applicant's obligations, and therefore the cost recoverable through the service charge, in spite of the surface of the floor and railings surrounding the balconies being part of the demise, similar provisions were not included in relation to the windows. The Tribunal determines that if it had been the intention of the parties that the Applicant should have the repairing obligation of the windows, a similar proviso to that relating to the balconies would have been included.

20. **The Applicant is entitled to levy the costs of the replacement of the windows through the service charge in reliance of an estoppel by convention**

a) Counsel for the Applicant contended that an estoppel by convention arises because both the Applicant and the Respondents have proceeded on the shared misunderstanding of the obligations contained in the lease and that it would be unfair for the Respondents to resile from this shared understanding. Counsel referred the Tribunal to the definition of estoppel by convention contained in *Spencer Bower, Estoppel by Representation* and to the cases of *Amalgamated Investment v Texas Commerce 1982 QB 84* and *The 'August Leonhardt' 1985 Lloyds Rep 28* which explain the principal of the doctrine. He then enumerated many separate actions taken by the Applicant which

establish that the Applicant has proceeded on the assumption that the windows were part of the service charge and that on no occasion has any Tenant questioned the Applicant's ability to proceed on this basis. Given the shared misunderstanding, under which the parties have acted for a number of years, and the specific reliance placed by the Applicant upon it, counsel argued that it would now be unjust for the Tenants to be permitted to go back on it.

b) Counsel for the Respondents argued that an estoppel by convention cannot be raised by general allegations against 'the Tenants' as a class. A case would have to be made out against each individual Tenant in the absence of a proved agency and there is no recognised Tenant's Association. If it were found that an estoppel can arise it would be important to establish whether the estoppel was promissory or proprietary. If the estoppel were promissory it was personal to the party concerned and could not bind a successor in title to the lease. A proprietary estoppel might bind successors, but not necessarily.

c) As a counter to the above submissions regarding the establishment of estoppel against a class counsel for the Applicant introduced the cases of *Redrow Plc v Pedley and Others (2002) EWHC 983* and *ITN v Ward and others (1997) PLR 131.* These cases both concern pension schemes, which Counsel suggested are analogous to a group of tenants. In particular Counsel referred the Tribunal to the judgement of Laddie J in *ITN v Ward* that it is not necessary to have evidence of what every member of the scheme thought before an estoppel by convention might arise. However, the Tribunal note the comments of the Vice Chancellor in *Redrow v Pedley* (a) that estoppel by convention cannot bind future members and (b) *'what must be proved is that each and every member has "by his course of dealing put a particular interpretation on the terms of" the Rules or "acted upon the agreed assumption that a given state of facts is to be accepted by them as true". This involves more than merely passive acceptance.... I suggest that it requires clear evidence of intention or positive conduct to bind the general body of members to such an assumption'.*

d) The Tribunal finds that in all the circumstances the Applicant has not established that an estoppel by convention has arisen which can bind all of the Tenants and their assignees. If the arguments of the Applicant are accepted, this would effectively override the repairing obligations in the lease of each flat and which would bind all of the Tenants and their assignees, regardless of whether individually they had by any action agreed or acquiesced. That interpretation would be wholly unreasonable.

**Decision on the Preliminary Issue**

21. The Tribunal determines that the replacement of the window frames by the landlord and the inclusion of the cost within the service charge is contrary to the terms of the lease and would not be recoverable from the tenants.

D B Powell

Signed .....
Chairman

Date 29 JUL 2005

# LEASEHOLD VALUATION TRIBUNAL

# OF THE

# MIDLAND RENT ASSESSMENT PANEL

*DECISION OF THE LEASEHOLD VALUATION TRIBUNAL*

*APPLICATIONS UNDER THE LANDLORD & TENANT ACT 1985 ("the Act")*

| | |
|---|---|
| Subject property: | Knighton Court<br>Knighton Park Road<br>Leicester LE2 1ZB |

**BIR/31UH/LSC/2004/0006 - Section 27a – Determination Of Liability To Pay Service Charges For The Years 2005, 2006 & 2007**

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|---|---|
| Applicant: | J. R. & R Wilson Trust (Freeholder) |
| Respondents: | The Leaseholders of various flats |
| Application to the LVT: | 3rd November 2004 |

**BIR/00FN/LDC/2005/0001 - Section 20ZA - Application for Dispensation of the Consultation Requirements**

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|---|---|
| Applicant: | J. R. & R Wilson Trust (" The Freeholder") |
| Respondents: | The Leaseholders of various flats ("The Leaseholders") |
| Application to the LVT | 22nd February 2005 |

**Section 20C – Applications that Costs of Proceedings shall not be included in the Service Charge**

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|---|---|
| Applicants: | Mr J G Crane<br>Mrs T Morgan |
| Applications to LVT: | 17th January 2005<br>27th August 2006 |

**BIR/00FN/LIS/2006/0008 – Section 27a – Determination of Liability to Pay Service Charge for the Year 2005**

| | | |
|---|---|---|
| Applicant: | | Mrs T. Morgan acting on behalf of Mr G Morgan, the leaseholder of Flat 22 and 22 other Leaseholders.("The Leaseholders") |
| Respondent: | | J. R. & R Wilson Trust ("The Freeholder") |
| Hearing | : | 30th January 2007 |

Appearances:

| | |
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| *For the Freeholder:* | Mr A. Mold of Counsel<br>Mr C. Killin and Ms L. Taylor of Fishers, Solicitors<br>Mr R. Clark of Richard Clarke & Associates, Building Surveyors<br>Mr I Lloyd of Fallowell & Partners, Managing Agents |
| *For the Leaseholders:* | Mrs T. Morgan |
| Members of the LVT ("The Tribunal"): | Mr D.B. Power FRICS<br>Mr W J Martin<br>Mr M H Ryder |
| Date of determination: | 30th January 2007 |

**Background**

1. An application for a determination of liability to pay service charges for the years 2005, 2006 and 2007 under section 27a of the Landlord and Tenant Act 1985 was made and by J. R. and R Wilson Trust, the Freeholder of the subject property, on the 3rd November 2004. Proposals had been prepared for a major renovation scheme and a determination was sought from the Tribunal for prior approval of the works proposed and that if costs were incurred to carry out the works, the service charge would be payable for those costs.

2. On the 12th May 2005, a hearing was convened at which the Leaseholders challenged the inclusion of the renewal of the window frames in the proposed renovation scheme. As this was a significant part of the scheme, the Tribunal decided to deal with this as a preliminary issue and, to give the parties adequate opportunity to prepare, the hearing was adjourned and reconvened on the 7th July 2005 to take submissions on that aspect only, and then adjourned again pending the determination of the Tribunal on that point. The decision was made and the reasons issued on the 29th July 2005 to effect that the replacement of the window frames by the Freeholder and the inclusion of the cost within the service charge was contrary to the terms of the lease and would not be recoverable from the Leaseholders.

3. The Freeholder referred this decision to the Lands Tribunal who allowed the appeal, determining that the replacement of the window frames was the responsibility of the Freeholder by virtue of paragraph 19 of the 6th schedule of the lease.

4. Due to incorrect information being available to the Freeholder, formal consultation notices under section 20 of the Act had not been served on some of the Leaseholders. On The 22nd of February 2005, the Freeholder made an application to the Tribunal under section 20ZA of the Act seeking dispensation of the consultation requirements in respect of those flats, namely 5, 12, 16, 31 and 32.

5. In the submissions made in respect of the first hearing, Mr J. G. Crane leaseholder of flat 4 made a request to the Tribunal for a determination under the provisions of section 20C of the Act that all or any of the costs incurred or to be incurred by the Freeholder in connection with proceedings before the 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 Leaseholders.

6. On the 27th August 2006 an application was made by Mrs T. Morgan on behalf of Mr G. Morgan, flat 22, and 22 other Leaseholders, under section 27a of the Act for a determination of liability to pay the service charge demanded for the year ended 31st December 2005, the issue being limited to the amount of legal and professional fees and costs totalling £34,220.63. This application also made a request for a determination under section 20C.

7. In December 2000 a different tribunal had considered an application for approval to proposals for increases in the service charge to meet the costs to be incurred pursuant to a proposed Forward Maintenance Plan and to establish a reserve fund. That decision determined, subject to qualifications, that if costs were incurred in carrying out the works proposed, those costs would be reasonably incurred ("the 2000 Decision").

**Inspection**

8. Prior to the first hearing, the Tribunal had carried out an inspection of the subject property, Knighton Court, accompanied by Mr Hilliard, Miss Brown, Mr R. Clark and Mr Lloyd on behalf of the Freeholder and Mr Crane, flat 4 and

Mrs Riddell, flat 27. It was noted that the property comprises three independent blocks of which only blocks A and B were the subject of the application. They comprise self-contained flats on three stories built about 1930 with internal common access staircases. They are built of brick with rendered areas to bays, balconies and parapets. The roofs are flat, asphalt covered and the windows are steel framed.

9. The Tribunal noted corrosion to metal balustrades and window frames, defective rendering and rainwater pooling to the roofs

10. At the invitation of the respective leaseholders, the interior of flats 4, 10 and 34 were inspected where water penetration and mould growth was noted, serious corrosion to window frames and plaster having fallen from the underside of a balcony.

**Hearing**

11. Whilst at earlier hearings, there had been a number of Leaseholders in attendance, together with counsel representing them at the hearing in July 2005, only Mrs T. Morgan representing Mr G. Morgan of flat 22, and other Leaseholders attended the hearing on the 30th January 2007. She confirmed that she was a lay representative, without legal qualification or expert knowledge. The Freeholder was however represented by counsel, two solicitors, a chartered building surveyor and the managing agent who is a chartered surveyor.

12. All outstanding applications were to be heard together and the Tribunal directed that the initial section 27a application should be heard first, followed by the section 20ZA application, section 20C applications, followed by the a final section 27a application relating to legal fees. As "Applicant" and "Respondent" therefore refers to different parties in the various applications, the titles referred to will be "The Freeholder" and "The Leaseholders" for consistency throughout.

13. Comprehensive bundles of documents had been provided by both parties which were of great assistance to the Tribunal.

***Section 27a application dated 3rd November 2004***

14. The initial application was in respect of future service charges for the years 2005, 2006 and 2007. Mr Mold, counsel for the Freeholder advised the Tribunal that due to delays caused by the hearings before both this Tribunal and the Lands Tribunal, it had not been possible to commence works and that the scheme was now scheduled for the years 2007, 2008 and 2009. The Tribunal pointed out that they were unable to consider applications other than for the years 2005, 2006 and 2007 as none of the Leaseholders had been given notice of any application for other years. Mr Mold accepted the position but asked if the Tribunal could, on giving its determination of the year 2007, give some indication if, had applications be made for the two subsequent years, the scheme and costs would have been approved. It was now in the interests of all parties to bring this matter to a conclusion without further delay.

15. Mr Mold led the Tribunal through the proposed project giving details of the defects requiring attention and the works of repair and maintenance proposed. He explained the outcome of consultations with Leaseholders on the need for the works and the extent. Regrettably there had been no consensus and this application was to obtain the decision of the Tribunal as to whether the works were necessary and the cost proposed reasonable. He

concluded that the majority of Leaseholders were in favour of the work going ahead, particularly that most wanted all windows replaced and the problem was more of meeting the cost rather than the need. To assist with this, the Freeholder proposed to proceed with the work in three phases to enable the cost to be spread even though it would have been cheaper to do all the work at once.

16. In April 2005, the Leaseholders had instructed chartered surveyors Snow and Astill to review the schedule of works on their behalf, to advise whether the proposals were reasonable and the surveyor concluded *"there is very little doubt that all the works are necessary for the ultimate preservation of the structure"* and *"that as there were some areas of the loose render to overhanging balconies, I can do nothing but recommend that they should be carried out and that the works proposed are well specified and reasonably costed"*

17. In a letter dated 27th August 2006 to the Lands Tribunal in connection with the appeal before them, Mrs Morgan had stated that *"there is no doubt that most of the works intended are necessary and welcomed by the large majority of residents"* and *"the vast majority of residents need and want the windows replaced as a matter of urgency by the landlord at a reasonable cost"* concluding that *"the majority of residents are desperate for new windows to be installed."*

18. The Freeholder had undertaken more than the consultation requirements as required by section 20 of the Act. There had been no comments on the nomination of contractors following the notice to carry out the works. Tenders for the work proposed and the financial options available to the leaseholders had been notified to them. Most Leaseholders had failed to respond.

19. Mr Mold submitted that it was not clear what opposition to the proposals now remained. He reviewed the totality of objections previously raised relating to the procedures adopted, the tendering methods, the cost inflation and the extent of the work proposed. None of these had any substance and proposals for less comprehensive repairs, particularly to the parapet walls would only have provided a short-term solution.

20. In view of the passage of time since the works were originally priced, the Freeholder's surveyors had re-tendered the works in January 2007 and the total cost was now £462,382.72 include building works, VAT and building surveyors fees. This was to be apportioned as follows;

| Year 1 (2007) | Year 2 (2008) | Year 3 (2009) |
|---|---|---|
| £145,030.21 | £153,601.88 | £163,750.62 |

These prices include contractor's estimates for annual inflation in respect of years 2 and 3. The actual price will be adjusted to take into account known inflation once the relevant phase has been completed. Certain works cannot be accurately priced until the true extent can be determined once the works are in progress. This may mean the cost is higher or lower than the estimate but all variations are to be negotiated by the Freeholder's building surveyors in order to ensure they are fair and proper.

21. In the original notification to the Leaseholders of the cost of the scheme as part of the consultation, the total had been £511,950. Whilst a tender price of £407,662 had been obtained in early 2006, the latest figure obtained in this month reflects increased costs due to passage of time and a more

competitive tendering position. The Leaseholders have not yet been advised of this latest price but the Freeholder is in course of notifying them.

22. Each leaseholder would be required to pay their respective percentage of the total cost for each year in accordance with the terms of their lease.

***Section 20ZA application dated 22nd February 2004***

23. This application had become necessary because the some former leaseholders concerned has failed to notify the Freeholder that they had assigned their interests or that the correspondence address differed from the address of the flat concerned. In consequent those Leaseholders did not receive the original section 20 notice and consultation documents. This was remedied immediately the problem was discovered and the same correspondence and information provided to the other Leaseholders has been sent to those who were the subject of the section 20ZA notice.

***Section 20C applications made by Mr JG Crane and Mrs T. Morgan***

24. Mr Crane included his request for the Tribunal to consider making an order under this section in a letter dated 17th of January 2005 but has made no submission in support thereof.

25. Mrs Morgan had submitted representations which included full copies of the service charge account for the year ended 31st December 2005 including the schedule of the Forward Maintenance Plan costs summarising details of the Freeholder's legal and professional fees totalling £34,220.63. She did not challenge the Freeholder's ability to charge reasonable fees.

26. Mr Mold drew the attention of the Tribunal to the decisions in *Iperion Investment Corporation v Broadwalk House Residents Ltd, Schilling v Canary Riverside Development Pte Ltd* and *Tenants of Langford Court v Doren,* the latter providing important guidance on how a section 20C application should be approached. He strongly opposed the application and set out the actions which his client had had to follow in connection with the proceedings. The purpose of this section is to ensure that the right to claim costs as part of the service charge is not used in circumstances that make its use unjust.

**Section 27a application dated 27th August 2006**

27. This application made by Mrs Morgan requests the Tribunal to determine whether the quantum of the costs claimed in the service charge for the year to 31st December 2005 are reasonable. Mrs Morgan said the Leaseholders were shocked at the amount claimed. The cost was outrageous and the Leaseholders had no control. There was concern that these costs had been taken from the Forward Maintenance Fund to which several Leaseholders had made contributions in the expectation this would be used for the repairs planned in the Forward Maintenance Programme. The proceedings had generated excessive paperwork, and questioned the need for the landlord to have 5 professional representatives at the hearing. The arguments had all been rehearsed previously. The Leaseholders were concerned that payments made in future should not be used to pay fees and they want to see the work being done.

28. Mr Mold said that the actions by the Freeholder were fully justified because of the opposition of some Leaseholders and the extent of the works. The bundles were not oppressive in size and were needed to inform the Tribunal on all applications. It was necessary to produce the bundle in total because it was not known who would be attending the hearing. Mrs Morgan had criticised the total of charges but had not identified any specific costs as being

unreasonable. He referred the Tribunal to the case of *Canary Riverside Development Pte Ltd v Schilling* where the Lands Tribunal indicated that the amount of costs which would be allowed on assessment by a Costs Judge must be of significant assistance as a starting point in determining the amount of the cost that the landlord could reasonably incur. The costs had been prepared by an experienced independent cost draftsman and the rates used were those which have been approved by the Court in other circumstances. These costs should be on the standard basis of party and party costs.

29. He referred to Mrs Morgan's concern as to the number of professional advisors in attendance and, after consultation with Mr Killin, confirmed that where there were two solicitors present, only one, at the higher rate, would be charged.

30. He drew the attention of the Tribunal to paragraph 9 of schedule 6 of the lease which enabled the Freeholder to recover all the legal costs and in his opinion this included legal costs in connection with proceedings before the Leasehold Valuation Tribunal.

**Consideration**

31. Section 27a of The Landlord and Tenant Act 1985 at subsection 3 states

> *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 in which it would be payable.*

This relates to service charges due for future years and is the clause relevant to the initial application. However subsection 1 relates to previous years and is relevant to the application made by Mrs Morgan and reads;

> *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 in which it is payable.*

Section 20ZA which enables a leasehold valuation tribunal to determine to dispense with all or any of the consultation requirements in relation to qualifying works reads;

> *1) Where an application is made to a leasehold valuation tribunal for a determination to dispense with all or any of the consultation requirements in relation to any qualifying works or qualifying long term agreement, the tribunal may make the determination if satisfied that it is reasonable to dispense with the requirements.*

Section 20C (1) Deals with the limitation of service charge costs and reads;

*A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a court or leasehold valuation tribunal, or the Lands Tribunal, or in connection with arbitration proceedings, are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application.*

And Subsection (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.*

32. The Tribunal was greatly assisted by the representations of the parties in what has become a complex and contentious matter.

33. Consideration was first given to the initial section 27a application. The Tribunal cannot make any determination for years other than 2007 because it is the only remaining year of those for which the application was specified.

34. The works specified in the schedule submitted with the application prepared by Richard Clarke and Associates on behalf of the Freeholder appears comprehensive and includes those items of disrepair noted by the Tribunal at its inspection. The schedule includes the renewal of the windows which is part of the service charge responsibility as determined by the Lands Tribunal. The Tribunal considers that phased replacement of those windows is the proper way forward having regard for the present condition and the uniformity of appearance Knighton Court generally. The consultation procedure as laid down in the Service Charge (Consultation Requirements) (England) Regulations 2003 (S.I 2003 No 1987) has been followed. Other than the initial observations made by certain leaseholders that repairs to the parapet walls were excessive, there have been no representations that the schedule is unreasonable. The Tribunal agrees that it would not be appropriate to undertake repairs to the parapet walls of a temporary nature, as it would be against the long-term interests of the Leaseholders. The surveyor appointed by the Leaseholders confirmed his view that the works were necessary and Mrs Morgan stated both in correspondence to the Lands Tribunal, and verbally, that most of the works intended are necessary and welcomed by the large majority of the residents. The Tribunal finds that the works proposed are reasonable and the costs thereof should be recoverable from the Leaseholders through the service charge.

35. Because the conflict over the service charge has been drawn out now over more than three years, it is inevitable the costs will have changed since the original notification to the Leaseholders through the consultation procedure under the provisions of section 20 of the Act. The surveyors to the Freeholder have undertaken a number of re-tendering exercises in order to ensure that prices obtained are current and competitive and represent a fair cost for the work proposed. The Leaseholders have been kept informed of changes in the estimated cost. It is perhaps fortuitous that by virtue of this process the estimated cost now is less than that originally notified as otherwise there could have been an issue that re-consultation under section 20 might have been necessary. The Tribunal has been assured that all Leaseholders will be advised of the latest costs as submitted to the hearing which result in a figure for the year 2007 amounting to £145,030.21, to include the total cost of building works, the fees of the building surveyors and

VAT. The building surveyors will be responsible for negotiating any variation in this cost which may result from any changes in the extent of the works carried out which become apparent once the project commences and inflation allowances (for years subsequent to year 1) which, when known, may differ from the provisional allowances. Because of the process in arriving at the cost, the Tribunal is satisfied that the estimate is reasonable and should be recoverable from the Leaseholders under the terms of the service charge provisions within the lease.

36. It should be noted that, should the cost of the work when incurred vary materially from that given, once included within a service charge statement, could be the subject of an application by the Leaseholders to the Tribunal under the provisions of section 27a of the Act for a determination that the costs incurred for the works undertaken is reasonable. Similarly, should the works actually undertaken vary materially from the specifications, the need for further consultation under the provisions of section 20 should be carefully considered by the Freeholder.

37. The Tribunal determines that if the costs incurred for repairs and maintenance as specified in the schedule as attached to the application are incurred, the service charge would be payable based upon the most recent estimates provided. For the year 2007 this is in the sum of £145,030.21, payable by each leaseholder in the proportion as set out in the individual leases.

38. Turning now to the application under section 20ZA, the Tribunal notes the reason why the determination to dispense with all or any of the consultation requirements in this matter is necessary. It is evident that the Leaseholders concerned have subsequently been kept fully informed of all aspects and had the opportunity to make representation and have been in no way disadvantaged. Dispensation is therefore granted.

39. The Tribunal next considered the applications under section 20C. It should be noted that this Tribunal has no jurisdiction in respect of any costs incurred before the Lands Tribunal and consideration therefore is limited to costs incurred other than those.

40. In the case of the *Tenants of Langford Court v Doren Ltd*, His Honour Judge Michael Rich QC said at paragraph 31;

> *"In my judgment the primary consideration that the LVTs should keep in mind is that the power to make an order under s20C should be used only in order to ensure that the right to claim costs as part of the service charge is not used in circumstances that make its use unjust."*

And at paragraph 32

> *"Oppressive and, even more, unreasonable behaviour however is not found solely among landlords. Section 20C is a power to deprive a landlord of a property right."*

In *Iperion Investments Corporation v Broadwalk House Residents Ltd*, in the Court of Appeal, the judge found that the plaintiff clearly provoked the defendant into litigation. In this case the Freeholder would have been failing in his duty had he not sought to undertake the works of repair and maintenance as a sensible and prudent landlord and had no option but to bring the matter before the Tribunal in the face of opposition by several Leaseholders. It would be unreasonable in the circumstances to deny the

Freeholder appropriate costs he has incurred. Mrs Morgan acknowledged the right of the Freeholder's to recover their reasonable legal costs.

41. The Tribunal holds that paragraph 9 of the sixth schedule of the lease is drafted sufficiently widely to include the Freeholder's costs in bringing the case before the Tribunal. The Tribunal therefore determines that no order under section 20C shall be made and all reasonable costs are payable within the service charge.

42. The application by Mrs Morgan under section 27a of the Act seeks a determination as to whether the quantum of the costs is reasonable and her principal objection is that the totality is excessive. The Tribunal does not challenge the statement of time spent on individual activities as detailed in the bill of costs submitted as there is no evidence that these have not been properly calculated. The bill of costs was prepared by an independent costs draftsman. The hourly rates applied have been approved by the Court in other circumstances. It was noted that in the summary provided in respect of part 1 of the bill of costs, the total is shown as £10,148.20 whereas the amount actually claimed on the invoice was £10,354.00, the justification being the difference between the standard method of calculation and the contract between solicitor and client. The Tribunal does not accept the higher figure is recoverable and the cost should be reduced by £205. 80 plus VAT.

43. When the question of the appearance by two solicitors acting for the Freeholder at the hearing was raised, it was stated unequivocably by counsel for the Freeholder that in these circumstances a charge would be made only for one, at the higher rate. It is noted in the detail of the bill of costs that in several instances, a charge has been included for two solicitors and the second, at the lower rate should be deleted, as follows;

| | |
|---|---|
| Part 1 item 3 | £511.50 |
| Part 1 item 11 | £155.00 |
| Part 2 item 43 | £95.00 |
| Part 2 item 46 | £186.00 |
| Total | £947.50 plus VAT |

44. The Tribunal determines that the total of costs incurred and included in the service charge for the year ended 31st December 2005 should be reduced as follows;

| | | |
|---|---|---|
| Total claimed | | £34,220.63 |
| less amount disallowed in part 1 | £205.80 | |
| less reduction for 2nd solicitor | £947 50 | |
| Total disallowed | £1153 30 | |
| add VAT | £201.83 | |
| | | £1,355.13 |
| Total costs allowed | | £32,865.50 |

45. Whilst the allocation of costs incurred and service charge payments received from leaseholders within the service charge account is not a matter for the Tribunal, only the totality, it was with some surprise that it was noted the legal and professional charges incurred were included as expenditure within the Forward Maintenance Plan which Leaseholders believed to be funds being accumulated specifically towards the cost of carrying out repairs and maintenance.

46. It was noted from the bill of costs provided in respect of the 2005 service charge that there will be further legal and professional fees for work carried

out subsequent to the 24th of August 2005 which have not yet been included in a service charge.

47. Whilst appreciating the reasons that the Tribunal was requested to give an indication that, had the initial application included the years 2008 and 2009 (the second and third years of the scheme), the works would be approved and the cost reasonably incurred, no such indication can be given as this would be outside the powers available to the Tribunal and contrary to the relevant Regulations.

48. These various applications to the Tribunal must be determined even though an Initial Notice by Qualifying Tenants dated 22nd November to acquire the freehold of Knighton Court has been served on the Freeholder. There is no certainty that the purchase will be concluded and in the meantime, both the freeholders and the leaseholders continue to have responsibilities under the terms of the relevant leases.

**Determination**

49. The Tribunal determines that in respect of the section 27a application dated 3rd November 2004 that the costs totalling £145,030.21, if incurred in respect of works of repair and maintenance as proposed will be payable by the Leaseholders.

50. Dispensation of consultation requirements under section 20ZA is granted as requested in the application made by the Freeholder dated 22nd February 2005.

51. No order under section 20C in relation to the costs of the proceedings is made.

52. The Tribunal determines that in respect of the application under section 27a dated 27th August 2006 the cost of legal and professional fees included in the service charge for the year ended 31st December 2005 is excessive and shall be reduced to £32,865.50.

Signed .....
Chairman

Date 13 FEB 2007