SOUTHERN LEASEHOLD VALUATION TRIBUNAL

In the matter of section 19 of the Landlord & Tenant Act 1985 and in the matter of Melville Court Chatham Kent

Case number: ~~CHI/24UJ/NAM/2003/0003~~
CHI/00LC/NSP/2003/0007
CHI/29UH/NSI/2003/0029

BETWEEN:

Mhs Limited	Applicant
and	
The Lessees at Melville Court	Respondents

Hearing: 7th August 2003

Appearances:

Miss A Dabor, Mr R Collins and Mr D Salisbury FRICS for the Applicant

Mr Knott Mr Clark and Mr Galvin spoke for the Respondents. Mrs Field, Mr Rees, Miss Cook, Mr & Mrs Arrow, Mr Swan, Sheila Osborn, and Mr Wright, attended the hearing. Written representations had been received from Mr Swan and Mr Rees.

Statement of the tribunal's decision

Date of Issue: 27th August 2003

Tribunal:

Mr R P Long LL B (Chairman)
Mr R Athow FRICS
Mr T Wakelin

Applications

1. Mhs Limited as landlord of Melville Court made three applications pursuant to section 19 of the Landlord & Tenant Act 1985 (as amended) ("the Act") to the tribunal at times in March and April 2003. They were:

    a. an application pursuant to section 19(2A) to determine the reasonableness of service charges incurred in respect of work carried out to replace the lifts at 51- 106 Melville Court ("the tower block")

    b. an application pursuant to section 19(2A) to determine the reasonableness of service charges incurred in respect of concrete repair works carried out to the tower block

    c. an application pursuant to section 19(2B) to determine the reasonableness of service charges proposed to be incurred in respect of concrete repair works carried out to the low-rise blocks at Melville Court.

2. Our decisions in respect of all these matters are summarised at the end of this note in paragraph 60.

Inspection

3. We inspected the property on 7th August 2003. Melville Court is a development that we were told was undertaken by the local council in the late 1960's. It consists of the fourteen-storey tower block and of eleven low-rise blocks of four floors apiece. The construction, for purposes relevant to this note, is essentially of reinforced concrete beams with a brick outer skin and block work inner skin.

4. We were first shown the lifts in the tower block. We were able to see that new lifts with a CCTV system have been installed. We were told that the original lifts each served the ground floor, but one of them then served the even-numbered floors whilst the other served the odd-numbered floors. All of the lifts now serve both floors with the exception of the fourteenth (top) floor, which is still served by only one lift.

5. The concrete work to the tower block has been finished. The evidence for it that we could see lay primarily in the decorative protective coating that has been painted onto both the concrete of the ring beams and the vertical beams, both of which are exposed on the tower block. We could see to some degree that the brickwork panels have been repointed on that block but we could not of course see the polyurethane foam that we have been told has been injected into each brick panel there.

6. The concrete of the horizontal ring beams on the low-rise blocks is exposed, but it was explained to us at the inspection that almost all of the vertical beams in those blocks are internal. The work of repairing these blocks was still in progress when we visited. Much of it is now complete, but some had yet to be

undertaken. Thus we were able to see many examples of spalling of the concrete of the ring beams. Furthermore, it was apparent in many of the places where the spalling had occurred that the steel reinforcement of the beams at those points lay very close to the surface of the concrete and were exposed following the spalling. It was explained to us that the spalling in the tower block had been similar in all respects to that in the low-rise blocks.

The Leases

7. We were shown samples of the leases of the flats that have been sold at Melville Court that were granted between 1983 and 1992. At that time the landlord was The City Council of Rochester upon Medway, and the property has since been transferred to the present landlord. Those relating to flats in the tower block differ from those relating to flats in the low-rise blocks primarily because the former make provision for the lessee to contribute to maintenance repair and replacement of the lifts, but otherwise the leases are in similar form.

8. The leases were granted at varying times, but each demises its relevant flat at Melville Court for a term of One hundred and twenty-five years from 2nd September 1982 subject to the payment of a yearly rent of ten pounds. Those that we have seen were all granted following the exercise by the lessee of a right to buy. The description in paragraphs 9-12 below is of a lease of a flat in the tower block.

9. The service charge provisions appear primarily in clauses 4 and 5. Clause 4 provides for the payment by the lessee of a defined proportion of the costs expenses and outgoings set out in parts I and II of the Third Schedule to the lease incurred by the landlord in carrying out its obligations under the lease. Other than repair (which we have mentioned separately below) those costs and expenses in summary relate to the costs of insurance, of taxes payable other than in respect of any individual flat, of decoration of the exterior and of decorating and lighting the common parts, fees of managing agents, costs of arbitration, value added tax, cost of communal refuse bins and of playground equipment, other costs of maintaining and running and managing the block, costs of enforcement of covenants and sums for a reserve fund. The council is also to light the common parts.

10. The costs of repair included in the service charge are those of repairing the structure and exterior of the block, of the common accesses, ways, walkways and fences, of the various pipes wires and cables conducting services and of the lifts. An exception that was referred to at the hearing lies in paragraph 2 of Part I of the Third Schedule. That paragraph, which is describing a head of expense to be included in the service charge, reads:

"The expenses incurred by the Council in carrying out its obligations under sub clause 4(a)(b) and (c) of Clause 5 of this Lease insofar as this does not arise from the making good of structural defects not falling within paragraph 17 of Schedule 2 of the Housing Act 1980"

Sub clauses 4(a)(b) and (c) of Clause 5 of the Lease are those that require the landlord to maintain the structure and exterior of the flat and of the Block, the access decks walkways and fences and the conducting media.

For practical purposes paragraph 17 of Schedule 2 of the Housing Act 1980 was replaced following the repeal of the relevant portions of that Act by paragraph 18 of Schedule 6 to the Housing Act 1985. It appears from the copies of leases of the low rise blocks that we have, dated respectively in 1985, 1989 and 1992, that the leases that were granted following the coming into effect of the Housing Act 1985 on 1st April 1986 make reference in paragraph 2 of Part I of the Third Schedule in them to the provisions of that Act rather than the 1980 Act.

11. It is particularly material that clause 4(1)(d) of the leases provides that in the event of a dispute arising (amongst others) between a lessee or lessees and the landlord relating to the service charge provisions then that dispute is to be referred to arbitration by a chartered surveyor as described in that clause under the Arbitrations Act 1950 or any statutory modification or re-enactment thereof.

12. A further service charge provision appears, rather unexpectedly, in the latter part of clause 3(12) of the Lease. The first part of this clause requires the lessees to observe rules and regulations made by the landlord, but its second part adds:

"any costs or expenses incurred by the Council in preparing such rules and regulations or in supplying copies of them *or in doing works for the improvement of the block* or in providing services to the lessee and other lessees of flats or maisonettes or in employing porters or caretakers or other staff shall be deemed to have been properly incurred by the Council in pursuance of its obligations under clause 5 of this lease notwithstanding the absence of any specific covenant by the Council to incur them and the Lessee shall keep the Council indemnified from and against his due proportion of them."

The italics in the above quotation are ours.

Hearing

13. The hearing was attended by those named on the front sheet to this note. We introduced ourselves, drew attention to the fact that we are an independent tribunal, and outlined both the applications before us and the relevant law contained in section 19(2A) and 19(2B) of the Act. We explained that the tribunal had taken the view that the subject matter was such that it would be more convenient to all of those concerned bring it immediately to a hearing rather than to direct a pre trial review. Furthermore, no request for such a review had been made to us by any of the parties. We explained the way in which we proposed that the hearing should be conducted.

14. Miss Dabor handed a summary of the position of the Applicant to us and to each of the lessees present. She explained that mhs homes (formerly Medway Housing Society) owns over 7000 homes and outlined the background to the dispute.

15. We have dealt separately with the issues the subject of the three applications before us. Each has its own sub heading. The question of jurisdiction in the light of the arbitration clause was a preliminary issue and we have dealt with it in the same way. Mr Salisbury and Mr Collins acted as the primary spokesmen for the Applicant and Mr Knott acted as primary spokesman for the Respondents. We also received written representations from Mr Rees and from Mr Swan. In each case we have simply set out the case advanced by each side without identifying the individual who dealt with any given aspect, whether orally or in writing.

16. As appears below, a number of the conclusions in this note go beyond the present jurisdiction of the tribunal, although all of them, we believe, will fall within its remit later this year following the coming into effect of the Commonhold & Leasehold Reform Act 2002. To the extent that we have expressed views on matters that are not technically at present within our jurisdiction we have done so purely in an effort to assist the parties. We make it very plain however, that in the case of any matters presently outside of our jurisdiction nothing in our conclusions will bind either a County Court or an arbitrator appointed under the terms of the lease in any subsequent proceedings arising out of any of those matters.

The Arbitration Clause

17. We raised the question of the arbitration clause mentioned in paragraph 11 above as a preliminary matter because it goes to the whole question of the tribunal's jurisdiction to deal with the applications. This was a point that might ordinarily have been dealt with at a pre trial review. We drew attention to the limitation upon the tribunal's jurisdiction contained in paragraph 19(2C)(b) of the Act. That paragraph provided that the tribunal had no jurisdiction in a matter in which "under an arbitration agreement to which the tenant is a party is to be referred to arbitration".

18. The Applicant told us that the question of arbitration had been considered. It carried the considerable disadvantages that first it would only bind those lessees who agreed to be party to it, and secondly it would be very expensive, potentially adding a considerable additional cost for them. Only one lessee had expressed a willingness to follow that route when it had first been proposed. The Applicant had concluded that it was preferable to obtain a ruling from the tribunal.

19. Those lessees present indicated that they would all prefer to have the matter dealt with by the tribunal for that reason, but we were conscious that not all of the lessees affected by this application attended the hearing. We understood from all of those present that despite the various limitations upon our jurisdiction they wished us to deal with the issues as far as we may, and

whether or not they fell strictly within our jurisdiction in the hope that by doing so they may be able to resolve the issues between the Applicant and the Respondents arising out of them without the expense of further proceedings elsewhere.

20. We accepted that an argument had been advanced in past cases that clause 19(2C)(b) applied only where there was an actual intention to refer a matter to arbitration under an arbitration agreement, and that if the matter was not actually to be referred to arbitration under that agreement then the tribunal would have jurisdiction. We bore in mind that these were matters of pressing concern to the both the Applicant and the Respondents.

21. Whilst not entirely convinced by the argument we have described, we agreed that in the circumstances we would hear the matter. We explained that we could only do that upon the basis that if that argument were correct then, subject to any changes to our decision made following an upon appeal, the decision would be a binding one. If, however, it were not then the decision on any of these matters would amount to no more than an informal indication of our views. We have also endeavoured to present an informal view upon the issue of what was and what was not structural repair out of the work undertaken, again in the hope that this will assist the parties to resolve that aspect of the matter. Miss Dabor indicated that in any event the Applicant would be prepared to consider itself bound by our decisions.

The cost of replacing the lifts

Representations

22. The Applicant told us that the tower block had been served since it was built by two lifts. The report mentioned below indicates that they were installed in 1964, but that may have been an error. Both lifts served the ground floor, but thereafter one lift served the odd-numbered floors and the other served the even-numbered floors. It was found that the lifts broke down more frequently as they got older, and eventually the Applicant was advised by its engineers that spares for them would in due course become unobtainable.

23. It decided to commission a report from GW Building Services Consulting Limited ("GW"), a copy of which was provided to us. The report indicated that in a number of respects the lift equipment either was obsolete, or alternatively did not meet modern requirements. It clearly proceeds on the basis that the lifts should be replaced. A basic scheme to replace the lifts in their existing format would cost about £170,000.

24. GW proposed two optional extensions of that basic approach, those of providing a lift system modified to serve all levels in a duplex format or of providing a system to serve all levels other than level fourteen in a duplex format. It also recommended the installation of a CCTV system to help counter vandalism that has been experienced. The duplex format would mean that each lift would serve each floor. The reason for it was to allow for better traffic handling and thereby to reduce waiting times. The first alternative

would cost an additional £105,000 and the second an additional £95,000. A CCTV system might cost £20,000.

25. The Applicant commissioned GW to obtain tenders for the work, including the cost of the two options and the CCTV installation. It received five tenders within the specified period, rejected two of them as being too high, and analysed the remaining three. In the event, GW recommended that Apex Lift & Escalator Engineers Limited's ("Apex") tender was the best, and the Applicant decided to proceed on the basis of the second of the options mentioned, that of providing lifts that stopped at all floors, save that only one would serve the fourteenth floor. It said that was in order to meet present day standards and because there was now a high traffic use. The Applicant then went through the appropriate consultation procedure under section 20 of the Act, after which Apex undertook the work. It was the Applicant's contention that the cost of those works was demonstrably reasonable because of the procedure that it had followed to obtain the best price it reasonably could and to consult.

26. The Respondents based their objections on two primary grounds. The first was that children were now allowed into the block whereas they had not at first been allowed in it. They used the lifts a great deal and that increased both the traffic in them and the wear upon them. They agreed that there had been vandalism. There was no longer any caretaker to prevent the children from doing this and the Respondents were being called upon to pay the cost of the children's activities. The second was that there had been a form of sinking fund expressly for the cost of replacing the lifts in due course. In the event it had proved to be severely deficient, and the Applicant should have kept it up to an appropriate level by budgeting properly. Those lessees who had bought in recent years were now facing paying for the cost of wear that arose before they bought. The Respondents considered that they had been misled about the sinking fund by the content of the Applicant's booklet issued to them.

27. At the time of the hearing we were under the impression that the lease did not allow for the Applicant to recover the cost of improvements and asked if that was indeed so. No-one corrected that impression and it is only upon further consideration of the matter that we located clause 3(12) mentioned in paragraph 12 above.

Decision

28. We bore in mind that as the law presently stands we have no jurisdiction to adjudicate upon the cost of improvements because they do not come within the definition of service charges in section 18 of the Act. The position will be different when the Commonhold & Leasehold Reform Act 2002 comes into effect as indeed it will also be in respect of the arbitration clause situation. In view of the present situation we express our decision in two parts, as to the cost of replacement and as to the cost of the duplexing and CCTV installation, which latter items we find as a matter of fact are specifically improvements on the system that was replaced. Contractually clause 3(12) of the lease

(mentioned in the preceding paragraph) appears to allow the Applicant to recover the cost of improvements.

29. We are satisfied that it was reasonable to decide to replace the lift system. The report by GW shows that much of its machinery was obsolete, it did not comply with many of the modern requirements for such systems (although we add that GW indicates that it complied with the requirements as they stood when it was first installed). There is some suggestion that corrosion may have been to affect the structural integrity of the cars. The system had become unreliable, spares were likely to become unobtainable, and it did not meet the requirements of present traffic.

30. It would be difficult for us to find that the cost of the basic work was unreasonable. We accept that the Applicant went through the proper steps to establish what needed to be done, to obtain competitive tenders and to have them properly analysed before acceptance of the tender that was recommended to them by GW as experts in that field. In the hope of assisting the parties (although the matter is plainly beyond our jurisdiction at present) we indicate that following the same reasoning it would be difficult in our opinion to find that the cost of the additional work was unreasonable. The levels of traffic and of vandalism seem respectively to have required it, as well as accepted modern standards. There has been no suggestion that the work was not done to a reasonable standard.

31. Whilst we can understand the irritation of some lessees at the additional use of the lifts by children, it does not seem to us that the lessees could have anything other than a general hope that children might not be allowed into the block. We have seen nothing that would create any legal obligation in that respect and nor was our attention drawn to any such. The provision of a caretaker does not seem to be an obligation upon the landlord under the terms of the lease, although paragraph 10 of Part I of the Third Schedule appears to be wide enough to allow the cost of such provision to be recovered as service charge if there is a caretaker at any time. If there were such a person then of course the service charges would be higher by virtue of their cost. None of this in our opinion permits the lessees to seek to pay a lesser sum towards the cost of replacement of the lifts.

32. Similarly the sinking fund for the provision of new lifts contained whatever sum the lessees or their predecessors had paid into it. We accept that it might have been helpful if a better control had been kept over it, but that would of course have resulted in higher service charges in previous years. That of itself might have produced a problem. In short, the lessees would only have had the benefit now of monies that they or their predecessors had paid into the sinking fund in the past, and any interest earned upon it. One way or another they would have paid the money themselves. They have, of course, lost an opportunity to spread the cost over a much longer period although we were told by the Applicant that it would both be prepared to consider trying to assist in cases of hardship. Whether or not the handbook was misleading, it does not appear to have been part of the contractual obligations that governed the relations between the parties.

33. For completeness we deal with some additional points raised by the lessees. First, it seems to us that a fairly recent buyer would have been able to establish the level of the sinking fund when making his enquiries about service charges generally at the time of his purchase. That is what would be expected of a prudent buyer, who might then if he chose seek to adjust the price he was to pay for the property he was buying if it appeared that there was an under provision. If he failed to do that, it is in our view not reasonable then to expect the landlord to bear some part of the cost of his failure. Furthermore, it would have been open to any existing lessee to have made just the same enquiries if he were concerned about the matter.

34. Secondly, we do not consider that the circumstances amount to a breach by the Applicant of its covenant for quiet enjoyment such that their actions either render the costs incurred in replacing the lifts either unreasonable or to be set off by a damages arising from such an alleged breach. It does not appear to us that a covenant for quiet enjoyment would be breached by a request in good faith for service charges provided for in the lease, even if those are large.

35. Finally, the amount to be paid by the lessee of a flat on the fourteenth floor towards the cost of the lifts will depend entirely on the provisions of the lease relating to the flat in question. In view of the additional cost it was not in our opinion unreasonable for the Applicant to decide not to duplex the lifts on the fourteenth floor. Lessees on that floor have the use of only one lift, but the leases require them as a matter of contract to pay whatever proportion of overall expenditure is incurred for service charges unless their individual leases (which we have not seen) make any specific exception in this respect.

Repair of the tower block

Representations

36. The Applicant told us that the tower block is of cast in-situ concrete framing with traditional cavity walls as in fills between the exposed framing. For several years the block had been subject to water penetration, especially on the exposed corners overlooking the River Medway to the west of the block. Attempts at sealing suspect gaps did not cure the problem. A report was commissioned from Messrs Challengers ("Challengers"), who are Chartered Building Surveyors, in 1998. As a result of their recommendations remedial works were commenced to a single unoccupied flat on a pilot basis. Those works revealed that the original steel wall ties were corroding, and spalling of the concrete frame. Instability of the inner cavity walls became apparent. The cost of works on the pilot project proved prohibitive, and so the Applicant commissioned a survey from Corderoy Project Services Limited ("Corderoys") in July 2000.

37. Corderoys recommended repairs under two headings, those to the reinforced frame and structural elements, and those that they described as "non structural repairs". In the former they indicated that previous repairs showed a history of deterioration in the concrete. There was now some cracking to a number of

columns and beams. They said that the options now were to do nothing, which they would only recommend if complete refurbishment or demolition were anticipated in the short term, to do temporary localised repairs or to undertake full concrete repair.

38. A summary report by Mr Salisbury apparently prepared after the report from Corderoys proposed the fitting of aluminium trim on the corner of the west elevation to seek to eliminate water penetration there. It would also be necessary to cure cavity wall tie and fish tail anchor tie failure and cavity base tray failure, failure of weep vents, erosion of mortar joints and weathering of brickwork.

39. In the events it was decided to carry out repair to the concrete spalling, to secure the walls by means of a polyurethane injected foam that acted as a glue to tie the inner and outer leaves of the wall and gave some degree of thermal advantage, and to repoint the brickwork. The pointing had deteriorated especially at the upper levels. The exposed concrete was to be covered by a decorative protective coating that gave protection equivalent to a further 25mm of concrete covering. A tender process was carried out. On this occasion the tenders were analysed internally and Mr Collins gave a report to the Board (page 65 in the bundle relating to this application). The appropriate section 20 procedure of consultation appears to have been followed. The contract was awarded to Sandells Maintenance ("Sandells") in a sum of £393,560-90 plus VAT.

40. In reply to questions from us Mr Salisbury told us that if the work in question was not carried out there would be a possible loss of integrity to the structure of the tower block in some ten to fifteen years time, and in some twenty-five to thirty years in the case of the low rise blocks. The remedy adopted presupposes regularly, in future, revisiting the protective coatings applied to the concrete. That is because the material forming them is guaranteed only for ten years.

41. The Respondents accepted that the work in question has to be done. Their arguments centred around two points. The first was that these were structural repairs of which they were unaware when they purchased so that the leases placed the onus for them upon the landlord. The second was that the landlord had been negligent in allowing matters to reach the stage when such expensive work had to be done and that provision should have been made by means of a sinking fund against their cost. Even if the leases did not provide for a concrete fund, the handbook to lessees indicated that the Applicant maintained sinking funds. They could not say if the sum required was reasonable. Mr Arrow summed up their position by saying that the point was not in this case whether the sums were reasonable but whether the lessees were responsible for defects in the building. The Respondents pointed out that in the tenants' handbook issued by the Applicant it was stated that the Applicant maintained sinking funds where appropriate. They thought it might have been appropriate to establish a "concrete" fund to provide against such expenses as the present ones, but nothing had been done.

42. The Applicant replied that the building had been kept under regular review and smaller repairs had been done in the past. Mr Salisbury told us that the tower block had a long life expectancy of perhaps 150 years when it was constructed. The major problems only became apparent more recently.

Decision

43. Any jurisdiction that we may possess in this matter is in any case limited to the question of the reasonableness of, or the cost of, the works. There was no material issue between the parties about these aspects. The lessees accept that the work now recently completed to the tower block had to be done. They say that they are unable to comment about the reasonableness of the cost. However, the cost has been established by means of what appears to us to have been a proper and careful process of tendering and the lowest tender was eventually accepted. On that basis it is not open to us to conclude that the cost incurred in carrying out the work to the tower block is unreasonable, for it was established by means of proper procedures in the open market. Therefore we find that the cost is reasonable within the terms of the application. The work is accepted to have been necessary so that the cost was reasonably incurred, and there is nothing before us in the case of the tower block to suggest that it has not been done to a reasonable standard.

44. Anything we say about the question of recoverability of the service charge in this instance is said purely in the hope of assisting the parties, but is outside of our present jurisdiction. Consequently it is not in any way binding on any Court or arbitrator before whom the matter may properly come at some future time, or even to be regarded as persuasive. It is merely an expression of the view we formed without the benefit of full argument before us.

45. It appeared to us from what is before us that the repairs to the reinforced concrete frame must be regarded as a matter of fact to be repairs of structural defects. In this case Mr Salisbury very properly accepted that the failure to do these repairs would affect the structural integrity of the buildings and greatly shorten their life expectancy. We could see on our inspection that the steel reinforcement of the concrete lay close to the surface where spalling had occurred. The report by Corderoy indicated (page 48 of this bundle) that spalling had occurred where bars with little or no cover had corroded.

46. Mr Salisbury told us in connection with the low rise blocks (but it was accepted that the position in this respect is the same for both blocks) that the steel coverage was inadequate, at least where spalling had occurred, and that the steel should have had a coverage of at least two inches of concrete. It appears in the light of modern knowledge of these matters to follow as a matter of fact that the buildings had a defect in their construction. We were not told what was the accepted norm at the time of their construction in respect of coverage but, even if they were built in accordance with those norms, it is now clear that the construction is in practice defective.

47. It does not appear to us that the remainder of the work is 'structural'. The deterioration of the wall ties proved to be such that extensive steps of injection

into the cavities of polyurethane foam that acted as a glue to hold the two leaves of the cavity together had to be taken. However, the failure of wall ties is something that quite commonly occurs within the life of a building and in our view is properly to be regarded as a matter of maintenance. Much the same argument applies to the need to re-point brickwork from time to time and to doing the remaining work other than the repairs to the concrete. This accords with the view apparently taken by Corderoys in its report where it refers on page 48 in the bundle relating to this application to the work to the frame as 'structural' and on pages 51-52 to the other work as 'non-structural'. We agree with that distinction.

48. So far as anything may turn upon the point, it further appeared to us from what was before us that the Applicant became aware of the structural nature of the problems facing the building in 1998 or 1999. It was then, as we understand it, that the work of investigation of the defects in the vacant flat was undertaken. We accept that work had been done on the building before that time, notably in 1987, but from all we have heard that appears to us to have been work of general maintenance. It is indicative that the nature of the defects that then presented themselves did not require the sort of investigation that preceded the present work.

49. As an expert tribunal entitled to take into account its own knowledge and experience of matters before it we accept that structural problems in buildings of this nature can appear with rapidity, even when regular maintenance has been carried out. It is therefore not unusual in our collective experience for it to be established that there are structural problems in buildings of this sort in the way that occurred here, and indeed it is often impossible to know that there are major problems until work of the sort that was carried out following Challenger's report is undertaken. It does not appear to us that the Applicant's standard of care in dealing with the building fell below the standard that we might have expected from a competent manager of a building such as this. Thus it is not in our view, and on the information that we have, appropriate to suggest that it was negligent in failing to identify these problems more quickly than it did.

50. In particular, from what Mr Salisbury told us, it was not until the work of investigating the external walls in the vacant flat was undertaken, and one at least of those walls were removed for the purpose, that the extent of the problems became apparent. It could be seen then that they were of a truly structural nature. Whilst Mr Knott suggested that the 1987 work may have been structural in its nature, we were not given any detail by either side of that that we felt supported that view. It seems to us to be inherently more likely that the structural nature of these problems would have become apparent as a result of the extensive 1998 investigations and of the subsequent work.

51. We do not have the information before us to enable us to consider what the effect of this is upon recoverability, and in any event we would be trespassing far beyond our present jurisdiction if we had endeavoured to conduct an enquiry into the point. Nor are the individual leases that would be necessary in to form such a view in each case before us. We hope however that the

indications of our conclusions about the nature of the work that are set out above may well be of assistance to the parties in enabling them to resolve that point, if they are so minded, without the need for further proceedings of any sort. If they are unable to do so then we reiterate that the view we have expressed is entirely informal, and is not binding in any way on an arbitrator or the Court.

52. We add that the leases allow for the creation of sinking funds by the terms of paragraph 12 of Schedule Three. However, there is no binding obligation to set up such funds. The paragraph in question is permissive in its terms and does not create an obligation to create such funds. If we are right in our conclusion that the Applicant only became aware of the structural nature of the work from the investigations made following Challenger's report, there would have been little time to set up a meaningful sinking fund before the costs of repair were to be incurred. Even if that had not been so, a sinking fund would again materially have increased service charges in previous years in the way that we have mentioned in paragraph 32 of this note.

Repair of the low-rise blocks

Representations

53. It was apparent from external inspection that the low-rise blocks were constructed in a similar fashion to the tower block and that they appeared to have been built at much the same time. Mr Salisbury confirmed that this was the case, but drew out attention at the inspection to the fact that the horizontal ring beams in the low-rise blocks were also exposed at the surface. This was not the case with the tower block. In this instance no report seems to have been obtained from Challengers, but it appears that their findings in respect of the tower block caused the Applicant to commission a report from Corderoys in 2000 at the same time as Corderoys conducted their investigation into the tower block.

54. A copy of that report was made available to us with our papers. It appears at pages 11-28 of the bundle relating to the application concerning the low-rise blocks. Once more it describes the repairs to the reinforced concrete frame and what it describes as the "structural elements" (on page 15 in the bundle) and sets out the options for repair. It was the Applicant's contention that, for the same reasons that applied in the case of the tower block, the work had to be done to preserve the integrity of the blocks. In this case Challengers had prepared specifications and obtained tenders in the ordinary way, and notices under section 20 of the Act had been given.

55. As indicated in paragraph 1 above, this application was made under section 19(2B) of the Act relating to costs that had not then been incurred, the work was well in hand by the time of our inspection and only a few of the blocks remained to be dealt with.

56. The Respondents once more did not dispute that the work had to be done. Their case was in essence the same as for the tower block, that they were

unaware of the structural problems when they bought their leases and that the landlord ought to have dealt with the matter before it had reached the present stage. There should have been a sinking fund, and this might have been practical if the problems had been identified earlier.

Decision

57. Just the same reservations about our jurisdiction apply in this instance as in the case of the previous two applications, and we do not repeat them here. For the same reasons that we have given above, because the construction and the resultant work to remedy the defects are so similar (save that work was not presently necessary to the infill panels), we conclude that the cost of the work is reasonable. There is again nothing before us to suggest that it has not been done to a reasonable standard. We accept that there may be some problems with painting or other work that will be necessary to be dealt with when snagging is to be carried out, but those matters are not in our view so significant that they render the overall standard of the work unreasonable.

58. This was an application made under section 19(2B) of the Act so that it referred to costs that had yet to be incurred at the time when it was made. Most of the work has by now been done and most of the costs have therefore been incurred. We have therefore dealt with the matter, as is our practice on these occasions, by expressing a view on the work as we now find it. We have no reason to suppose that the remainder of it will not be carried out to the same standard and in the same way.

59. Again, by way of an informal indication, it appears to us on what is before us that the work to the reinforced concrete frame is work of a structural nature for the same reasons that we have given in the case of the application relating to the tower block. Similarly the same comments that we have made above (in paragraph 49) about the suggestion that the Applicant should have identified the problems sooner apply here.

Summary

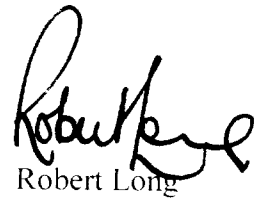
60. We summarise our findings as follows:

(a) the cost of the works that were carried out in respect of the lifts was reasonable, and was reasonably incurred. The standard of the work is reasonable. The 'duplexing' of the lifts and the installation of the CCTV system were works of improvement. It appears that the provisions of clause 3(12) of the leases may allow the Applicant to recover the costs of the work as part of the service charge.

(b) the cost of the work to the tower block is reasonable and was reasonably incurred. The standard of the work is reasonable. We indicate informally that in our opinion the work done to the reinforced concrete frame, but not the remaining work, amounted to work of structural repair.

(c) the cost of the work to the low-rise blocks is reasonable and is reasonably incurred. The standard of the work is reasonable. We indicate informally that in our opinion the work done to the reinforced concrete frame, but not the remaining work amounted to work of structural repair.

(d) it appeared to us that the Applicant became aware of the structural nature of the problems with the frame following the 1998 investigations and the subsequent work carried out in the vacant upper flat.



Robert Long
Chairman
26th August 2003