9079

FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	CHI/24UJ/LSC/2012/0120
Property	:	Admirals Court, Quay Road, Lymington, Hampshire, SO41 3ET
Applicant	:	Mr C Beamish (Appointed manager)
First Respondent	:	Leaseholders as per attached appendix
Representative	:	Mr Evans
Second Respondent	:	Mr W Stone (Lessor)
Representative	:	Mr Andrews of Coles Miller Solicitors.
Type of Application	:	Section 27A of the Landlord and Tenant Act 1985
Tribunal Members	:	Judge J Brownhill (Chair) Judge Mr P Boardman (Lawyer member) Mr J Mills
Date and venue of Hearing	:	2nd July 2013 Forest Park Hotel, Brockenhurst Hampshire, SO42 7ZG
Date of Decision	:	11th July 2013

DECISION

Introduction

1 Where numbers appear in square brackets [] in the body of this decision, they refer to pages of the bundle before the Tribunal.

2 The Applicant applies under section 27A of the 1985 Act for a determination of the reasonableness of specific service charges for the year 2010/2011 and in relation to service charges for future years. The Tribunal had the benefit of 2 pre-trial review hearings in dealing with this matter. The first was held on the 30/11/2012. A copy of the issues identified and agreed with the parties at that hearing appear at paragraph 9 on [55][56]. A trial date was fixed for 03/05/2013 but an application was made (and acceded to) to vacate the trial and hold a second pre-trial review.

3 At the second pre-trial review on the 03/05/2013 it became clear that while a number of issues had been agreed there were other issues which remained outstanding. The Tribunal together with the parties identified and agreed the remaining issues which were to be determined by the Tribunal. Those issues appear on the third page of the directions given on the 03/05/2013. Unfortunately the pages have been included in the bundle out of order at [213] - [219], but the relevant page is [218].

4 The agreed issues to be determined by the Tribunal were:

a. Whether £408 of repairs, paid in respect of wooden panels to the balconies of flats 4 and 5, fell within the Second Respondent Lessor's obligations under the lease. The Second Respondent Lessor conceded that the sum of £408 in respect of the actual work done was a reasonable amount.
b. Whether the following items in the Draycott Chartered Surveyors schedule of condition and repair ('the Draycott Schedule') are in need of repair (it being agreed that such repairs are the responsibility of the Second Respondent Lessor and recoverable through the service charge) namely items 1.0; 2.0; 23.0; 41.0; 57.0
c. If item 57 (balcony railing) on the Draycott Schedule is in disrepair, is the Applicant's suggested method of repair reasonable;
d. Whether item 42.0 in the Draycott Schedule would, if incurred, be payable by way of service charge, and whether in fact it is in need of repair.
e. Whether the Applicant/Manager's fees in connection with this application, at that time estimated at in excess of £7000 (plus VAT), are payable by way of service charge. It was agreed that this issue was to be considered at the final hearing in the context of the principle as to whether such fees were recoverable per se, and that the actual cost and timings relating to the Applicant Manager's fees could, if appropriate, be considered on an adjourned date.
f. Whether the fire safety works appearing in the 2012 service

charge accounts at a cost of £10,698.57 are payable as falling within the Second Respondent Lessor's obligations as a category (c) service charge item (flats 42.5% and commercial 57.5%) under the terms of the leases.

5 The Tribunal had the benefit of a paginated bundle numbered from [1] to [250]. The contents sheet prepared by Mr Andrews on behalf of the Second Respondent was unfortunately inaccurate and incomplete, but provided some assistance in navigating the bundle.

Summary

6 The Tribunal concluded that:

a. The £408 repair to the wooden railings to the rear balcony to flats 4 and 5 fell within the Second Respondent Lessor's obligation under clause 5(4)(i) of the lease.

b. The lintel and brickwork enclosing the balcony to flat 8 were part of the main structure of the building, and were therefore within the ambit of the lessor's obligations under clause 5(4)(i) of the lease.

c. Mr Beamish was able in principle to claim his fees associated with applying to the Tribunal through the service charge provisions.

d. The cost of the fire safety works could not be recovered through the service charge on the basis that they were a category (c) matter.

The Inspection

7 The Tribunal had the benefit of inspecting the property on the morning of the 02/07/2013. Present at the inspection were the Tribunal, Mr Andrews (for the Second Respondent), Mr A Carter (from Goadsby and for the Second Respondent), Mr Evans, Mr Colquhoun, and Mr Wheatley (on behalf of the First Respondent leaseholders), and Mr C Beamish (the Applicant).

8 The building was constructed in or about 1970 and comprises three storeys of residential flats above ground floor retail units (currently let to 'Yachtmail' and a cafe) and an integral garage. The building has a number of separate entrances: One next to the garage which provides access to flats 1-5; one which provides access to a first floor commercial unit, and a third which provides an entrance to flats 6-10. The commercial units are individually and separately accessible. One cannot normally gain access internally between the two separate sides of the building (one side containing flats 1-5 and a lift, and the other containing flats 6-10).

9 The Tribunal were specifically shown the outer railing to the terrace of flat 9 (on the third floor). This was seen both externally from the pavement, and also from the terrace of flat 9, the Tribunal having been granted access to that flat by the owner.

10 The Tribunal were also taken to the garage, as well as through flat 5 to the steel balcony serving flats 4 and 5. The glass panels to part of the roof of the garage were visible from this balcony, as was the rear box guttering to the garage.

11 The Tribunal were also directed to the fire safety systems installed at the property as part of the fire safety works, and an area of brickwork to the front wall of the building above the enclosed balconies to flats 6 and 8.

The Law

12 The statutory provisions primarily relevant to applications of this nature are contained in sections 18, 19 and 27A of the 1985 Act.

The Lease

13 The Tribunal has seen a copy of the lease to flat 1 in the building, and understands that all the flat leases are in substantially the same form, save that the leases to flats 6-10 make no reference to a lift, as there is no lift present in that side of the building. The Tribunal also noted that the copy of the lease provided in the bundle was in original form. The parties agreed that in fact clause 3(2)(f) of the lease had been substantially amended by virtue of an order of the Leasehold Valuation Tribunal in case number CHI/24UJ/NAM/2003/0003 [232]

14 The Tribunal identified the following provisions of the lease to be of particular note:

a. [40] Clause 1 definition of the flat "...hereby demises unto the tenant ALL THAT the flat (hereinafter called "the flat") numbered one and being on the mezzanine floor of the Building and shown edged red on Plan Number 287/2.2E ....."

b. [41]Clause 3(2) (tenant's obligations) "To pay to the lessor..... a fair and proper proportion of the expenses and outgoings calculated as hereinafter mentioned incurred by the lessor in the repair maintenance renewal management of the Building and also the insurance of the common parts of the Building and the provisions of services therein and the other heads of expenditure (except as hereinafter provided) incurred by the lessor in the performance of its covenants hereunder including the fees of its managing agents such further and additional rent (hereinafter called the service charge) being subject to the following terms and provisions:- ....."

c. [42] Clause 3(2)(f) –as amended (see paragraph 13 above). "The annual amount of the service charge payable by the tenant as aforesaid shall be an amount equal to one ninth part of 42.5% of

the said expenses and outgoings incurred by the lessor in the year to which the certificate relates PROVIDED THAT in respect of the expenses and outgoings in connection with the repair maintenance renewal and insurance of the lift the tenant shall not pay a contribution calculated as aforesaid but shall instead pay a one fifth share of such expenses and outgoings and PROVIDED FURTHER that in respect of the expenses and outgoings in connection with the cleaning lighting and decorating only of the passages landings staircases and main entrances serving exclusively the flats in the Building the tenant shall not pay a contribution calculated as aforesaid but shall instead pay a one-ninth share of such expenses and outgoings."

d. [44] Clause 3(4) "...Maintain uphold and keep the demised premises (other than the parts thereof comprised and referred to in paragraphs (4) and (6) of clause 5 hereof) and (subject to clause 7(1) hereof) all walls sewers drains pipes cables wires and appurtenances thereto belonging in good and tenantable repair and condition."

e. [48] Clause 5(4) (Lessor's obligations) "That (subject to contribution and payment as hereinbefore provided) the lessor will maintain and keep in good and substantial repair and condition

   i. The main structure of the building including the foundations and the roof thereof with its gutters and rain water pipes

   ii. .....

   iii. The main entrances passages landings staircases and the lift and forecourt of the Building and the other parts of the Building enjoyed or used by the tenant in common as hereinafter provided and the boundary walls and fences surrounding the Building".

f. [48] Clause 5(5) "That (subject as aforesaid) the lessor will so far as practicable keep clean and reasonably lighted the passages landings staircases and other parts of the building so enjoyed or used by the tenant in common as aforesaid"

g. [48] Clause 5(6) "That (subject as aforesaid) the lessor will so often as reasonably required decorate the exterior of the building in the manner in which the same is at the time of this demise decorated or as near thereto as circumstances permit."

15 The Tribunal considered each of the previously identified issues in turn. Present at the hearing, were Mr Beamish (Applicant), Mr and Mrs Evans, Mr Colquhoun, Mr Wheatley (First Respondent leaseholders) and Mr Andrews and Mr Carter (for the Second Respondent)

The wooden railings to the steel balcony to flats 4 and 5

16 This issue, as identified at the PTR, was expressed in the following terms: 'Whether £408 of repairs, paid in respect of wooden panels to the balconies of flats 4 and 5, fell within the Second Respondent Lessor's obligations under the lease. The Second Respondent Lessor conceded that the sum of £408 in respect of the actual work done was a reasonable amount.'

17 It became apparent at the inspection that what was being referred to by the parties were the wooden railings surrounding the steel balcony at the rear of the building and at the rear of flats 4 and 5. The wooden railings were attached to vertical metal uprights which were in turn attached to the steel balcony. This balcony had a ladder going up from the platform to the roof (allowing access for cleaning of the roof valley gutter and various pipes) and another metal ladder going down from the platform to the terrace/ balcony of flat 1 below.

18 It was agreed between the parties that prior to their removal, the wooden railings had been rotten and in a state of disrepair.

19 Mr Beamish explained that he had 'no view' in relation to this item. He explained that Mr Wheatley (the leaseholder of flat 4) had informed the surveyor that the railings were rotten. It was suggested that Mr Wheatley carry out the repair and send the invoice into Mr Beamish who stated he'd said "we will see if we can pay." Later however Mr Beamish did add his view that the external decorations were not just cosmetic as they protected the fabric beneath those decorations.

20 The leaseholders represented by Mr Evans stated that the relevant clause of the lease was the lessor's obligations under clause 5(6) [48]. Mr Evans initially argued that the replacement of the wooden rails was 'decoration' and so within the ambit of this clause of the lease. Mr Evans explained that previously the lessor had always decorated the railings (in order to keep a uniform exterior appearance) and the cost had been included under the service charge. Mr Evans stated "...we were prevented from decorating the balcony previously, had we been able to do so it would have stopped it rotting..." referring at this point to schedule 1 paragraph 8 of the lease. He submitted that it was the lessor's failure to decorate which caused the deterioration.

21 Mr Evans then submitted that the wooden rails to the balcony were part of the structure of the building: stating that if the rails were not present then the balcony would not be useable. When Mr Evans was taken by the Tribunal to clause 5(4)(i) of the lease [48] he stated that in his view while the wooden railings were part of the structure of the building he did not think that they were part of the main structure. Mr Evans further submitted that he did not think that the situation fell within the spirit of clause 5(4)(iii) of the lease.

22 Mr Wheatley of the First Respondents also spoke in relation to this issue. He submitted that in his view the balcony and the railings were part of the 'main structure' of the building, as it was attached to the building and formed part of the building's structure, indeed part of its main structure, and therefore the obligation to repair, fell within the lessor's obligations under clause 5(4)(i) of the lease.

23 Mr Andrews for the Second Respondent submitted that the balconies were demised to the individual lessees. The Tribunal were taken to various lease plans included within the bundle. The Tribunal were also handed colour copies by Mr Andrews. It was agreed between the parties that the common intention at the time the leases were executed was that the balconies were demised to the individual lessees. That had been done in most cases, however in relation to the balcony in question, while one half of the balcony had been correctly demised to flat 4, on the corresponding plan concerning flat 5, the balcony had not been included within the delineated demise. The parties agreed that the correct position was that the balcony was indeed demised to flats 4 and 5, and so this was not an issue before the Tribunal.

24 Mr Andrews stated that while the lessor is liable for the main structure, the individual lessees responsibility is set out by clause 3(4) [44], namely to maintain the demised premises. His argument was that as the balconies were demised, the lessees had an obligation to maintain them, and that this was entirely distinct from the lessor's obligation to decorate them. Mr Andrews drew a distinction between the lessees obligation to put the railings into repair (treating the wood, rubbing down) and the lessor's obligation to decorate – something he described as a cosmetic step giving the building its look and appearance. Mr Andrews submitted that it was the lessees failure to keep the railings in repair that had led to them becoming rotten.

25 The Tribunal specifically asked Mr Andrews his view as to whether the wooden railings were part of the main structure. He answered by referring to the end point of the demise, and the fact that this lease did not refer to a ½ brick width as being the split in the divisions of responsibility. He continued, when pressed, by arguing that one should look at the cause of the wood rot to identify the liability to repair. He also stated that if there had been a sudden catastrophic failure of those railings then he might concede they were part of the main structure. When asked why that event would result in a distinction he stated that "..the main structure obligation of the landlord is to maintain the integrity of the building to keep it up and sound." He submitted that the issue of what amounted to the main structure "...is about keeping the building intact.".

26 The Tribunal suggested to Mr Andrews that the main structure is something which gives the building its essential appearance. Mr Andrews then proceeded to describe the balcony as akin to an external room without a roof, stating "I say it isn't the main structure as it's a room without a roof." He added that he didn't think that the balconies were part of the character of the building which was really defined by the front of the building.

27 The Tribunal suggested to Mr Andrews that his attempt to define the main structure by reference to parties responsibilities was to look at the issue the wrong way around. In the Tribunal's view the key question was whether the balconies were part of the main structure. Mr Andrews conceded that it can be a lessor's responsibility to repair the demised premises. He also accepted the argument if the railings and balcony were part of the main structure then they were not part of the lessee's responsibility under clause 3(4) of the lease.

28 The Tribunal concluded that the balcony to the rear of the building at the back of flats 4 and 5 was part of the main structure of the building and therefore fell within the ambit of clause 5(4)(i) of the lease. The Tribunal considered that it was important to identify what was meant by the main structure first. The Tribunal did not agree with Mr Andrews's approach to look at who was responsible for repairs to the balcony and railings first when trying to resolve this issue.

29 The Tribunal concluded that the structure of a building is less than the whole, but more than merely the load bearing elements. The structure is those elements of the building which give it its essential appearance stability and shape. To be part of the structure something must be a material or significant element in the overall construction. In the Tribunal's view, having inspected the property, the rear balconies to the building, were part of the structure of the building. They formed an essential part of the appearance and shape of the building from the rear.

30 The Tribunal also considered whether the use of the phrase '**main** structure' (emphasis added) altered what was being meant in this provision of the lease. While the clause itself referred to the main structure as including the roof and the foundations, this was clearly not meant as a definitive list. In the Tribunal's view the use of the word 'main' when talking about the structure added no more to the definition set out above. In the Tribunal's view it was not a reference to looking only at load bearing parts. The main structure is still the elements of the building which give it its essential appearance stability and shape.

31 The Tribunal found that the £408 repair to the wooden railings to the rear balcony to flats 4 and 5 fell within the Second Respondent Lessor's obligation under clause 5(4)(i) of the lease.

Items on the Draycott Schedule

32 The second issue for determination by the Tribunal was whether the following items in the Draycott Chartered Surveyors schedule of condition and repair ('the Draycott Schedule') are in need of repair (it being agreed that such repairs are the responsibility of the Second Respondent Lessor and recoverable through the service charge) namely items 1.0 (rear roof glazing to garage); 2.0 (rear box gutter); 23.0 (roof); 41.0 (roof); 57.0 (balcony railing to flat 9). Taking each in turn:

a. *Item 1.0: The rear glazing to the garage roof [7].* This item on the Draycott schedule reads "Garage, rear roof glazing, Georgian wired glass 2 No cracked panels. Replace." The parties had agreed that this item was the lessor's responsibility under the terms of the lease, and further it was conceded that there were a number of cracked glass panels which did require replacement. The parties indicated that there were currently believed to be 6 cracked glass panels needing replacement. As a result of the agreement between the parties there was no issue for the Tribunal to determine in this regard.

b. *Item 2.0 The rear box gutter [7].* This item on the Draycott schedule reads "Garage, rear box gutter, full of debris, clear out debris and reline with single ply roofing felt." The parties had agreed between themselves that this item was within the lessor's responsibilities and it was acknowledged that at the time of the hearing the box gutter needed clearing. The Tribunal was asked by the parties to record their agreed position in relation to the relining of the box gutter with single ply roofing felt, namely that the repair and maintenance of the box gutter is within the lessor's obligations. It was agreed that regular maintenance and clearing of the box gutter, at least yearly, was required. It was also agreed that the gutter would be relined with single ply roofing felt as and when needed as it was within the lessor's obligations. As a result of the agreement between the parties there was no issue for the Tribunal to determine in this regard.

c. *Item 23.0 and item 41.0 the roof [10][13].* These items in the Draycott report referred to a lack of lateral bracing causing racking (distortion) in the roof trusses. The Tribunal noted the expert report obtained by the Second Respondent in relation to this issue and appearing at [220] [228] of the bundle. The parties indicated to the Tribunal that they were all agreed that there was no disrepair and therefore there was no issue for the Tribunal to determine in this regard.

d. *Item 57 flat 9 balcony railing [15].* The Draycott schedule records this item in the following terms "the outer decorative railing is in poor condition with severe corrosion to the railing and fixings. Remove this railing and make good the brickwork and replace railing like for like." There were two railings to the balcony/ terrace to flat 9, the first 'internal railing' being a straight metal railing, and beyond this, extending out beyond the

side of the building was a separate curved decorative railing (mirroring the shape of the bay windows below it). At the inspection the Tribunal were able to see the considerable amount of rust and corrosion to this outer decorative railing. The parties were agreed that this outer decorative railing ought to be removed. The only concern was whether local authority consent would be given for such a removal. It was agreed between the parties that in the event that the local authority's consent could not be obtained for the rail's removal that the item was within the ambit of lessor's obligations under the lease. As a result of the agreement between the parties there was no issue for the Tribunal to determine in this regard.

Method of repair to item 57- the decorative balcony railing.

33 This issue as formulated at the pre-trial review was: if item 57 (balcony railing) on the Draycott Schedule is in disrepair, is the Applicant's suggested method of repair reasonable. As a result of the agreement recorded at paragraph 32 (d) above, there was no issue for the Tribunal to determine in this regard.

Item 42 of Draycott Schedule: corroding lintel

34 The issue as formulated at the pre-trial review was: Whether item 42.0 in the Draycott Schedule would, if incurred, be payable by way of service charge, and whether in fact it is in need of repair. Item 42.0 of the Draycott Schedule [13] read "Flat 8 Enclosed front balcony. Iron lintel corroding and causing damage to brickwork. Cut out lintel and replace making good to brickwork. The area of brickwork being referred to was above a window to flat 8's enclosed front balcony.

35 The parties initially indicated to the Tribunal, and during the inspection, that they were having trouble identifying in what way the brickwork above the iron lintel was damaged. Mr Beamish himself stated that he had a "..question mark..." in relation to this item in the Draycott schedule. He indicated that after the Tribunal had left the inspection it was thought that a crack to the lintel was visible.

36 Mr Colquhoun (the leaseholder of flat 6) read from a new surveyor's report. The parties agreed that they were not suggesting that this report be put into evidence before the Tribunal, at which point the Tribunal indicated that they were not then able to take such new surveyor's report into account.

37 Both Mr Beamish and Mr Evans indicated to the Tribunal that the issue that they wanted to be determined today was not whether the lintel was in disrepair, but rather if, as was suspected there was disrepair, who was responsible for remedying the same: the tenants of flat 8, or the lessor?

38 Mr Andrews for the Second Respondent indicated that he was not taking a jurisdictional point, and that he too wanted the Tribunal to

determine the issue of responsibility for the lintel and brickwork. The Tribunal therefore heard submissions on this issue:

39 Mr Beamish made no submissions on how the Tribunal should determine this issue.

40 Mr Evans on behalf of the First Respondents submitted that the item was within the ambit of the service charge items and not an obligation on the individual lessee of flat 8.

41 Mr Andrews on behalf of the Second Respondents submitted that the balconies to flats 6 and 8 were at the time of the original construction open balconies. His instructions were that at a later date and with the permission of the lessor the balconies were enclosed. The date of this was not clear, but Mr Evans stated it must have been before 1985 as this was when he moved into the building and the balconies were already enclosed by this point.

42 Mr Andrews made essentially the same argument in relation to this item as he had in relation to the wooden railings (see paragraphs 16-31 above). He submitted that clause 3(4) of the lease sets out the lessees obligations in relation to the demised premises, as the balcony is included within the lessee's demise it is his/her responsibility. In his submission the enclosure of the balcony did not alter the definitions or alter who had responsibility for it.

43 The Tribunal specifically asked Mr Andrews what his position would be if the Tribunal found that the wall and the lintel were part of the main structure. He accepted that if the Tribunal were against him on that issue then the matter would fall within clause 5(4)(i) as a lessor's obligation, whether or not the lessee had constructed the wall and lintel.

44 The Tribunal found that the brickwork and lintel enclosing the front balcony to flat 8, did form part of the main structure of the building. The Tribunal repeats paragraphs 27 to 30 above. The area of brickwork and the lintel above the window to the enclosed balcony to flat 8 was part of the building's essential appearance and shape. It was a significant element in the overall facade of that part of the building, giving the building its distinctive appearance.

45 The Tribunal find that the lintel and brickwork were part of the main structure of the building, and were therefore within the ambit of the lessor's obligations under clause 5(4)(i) of the lease.

Applicant's fees

46 This issue as formulated at the Pre-Trial Review was whether the Applicant/Manager's fees in connection with this application, at that time estimated at in excess of £7000 (plus VAT), are payable by way of service charge. It was agreed that this issue was to be considered at this stage in the context of the principle as to whether such fees were

recoverable per se, and that the actual cost and timings relating to the Applicant Manager's fees could, if appropriate, be considered on an adjourned date.

47 Mr Beamish first took the Tribunal to the amended order relating to his appointment. A copy appears at [36][37]. The relevant paragraph is paragraph 9 at [37] and reads "The Manager shall be entitled to the following remuneration:

a. A basic annual fee of £2,600 for performing the duties set out in paragraph 2.5 of the Code.....
b. Such amount as may be reasonable (as to which the parties have leave to apply to the Tribunal to determine what is reasonable in the case of any dispute) for performing duties additional to those set out in paragraph 2.5 of the Code and not otherwise provided for in this Order.
c. ....."

48 A copy of the paragraph 2.5 of the RICS Service charge residential management code of practice (in force in 2007) appears at [190][191] of the bundle. It is to be noted that this differs from the current edition of the code.

49 Mr Beamish submitted that his work in relation to this application before the Tribunal is additional to those matters set out in paragraph 2.5 of the code (then in force). He argued that therefore his fees should fall within paragraph 9(b) of the order varying the terms of his appointment and as such those fees were payable through the service charge.

50 Mr Evans on behalf of the First Respondent had no submissions or comment to make on this item.

51 Mr Andrews for the Second Respondent submitted that in the original proceedings appointing Mr Beamish it was concluded that there was no provision in the lease to allow for the recovery of the cost of LVT proceedings as service charge. Mr Andrews submitted that the £2,600 fee referred to under paragraph 9(a) of the order of varied terms of appointment was recoverable through the service charge, and that Mr Beamish could recover all of his fees which are recoverable under the terms of the lease. He submitted that paragraph 9(b) of the order allowed Mr Beamish to recover such fees as are not included within paragraph 2.5 of the code, but that such fees must also be recoverable under the terms of the lease. Essentially Mr Andrews submitted that Mr Beamish cannot recover any more than the lessor could have recovered under the provisions of the lease: he submitted that Mr Beamish stands in the shoes of the lessor and the lease doesn't permit recovery of costs/fees of Tribunal proceedings.

52 The Tribunal suggested to Mr Andrews that paragraph 9(b) did not expressly limit Mr Beamish's fees to those recoverable under the terms of the lease. He replied by submitting that the phrase 'performing duties' in paragraph 9(b) must be read as being referable only to duties under the lease. He continued that while the Tribunal has a power to appoint a manager outside the terms of the lease, to be recoverable as service charge his fees must be recoverable under the terms of the lease.

53 After a short adjournment the parties were able to provide copies of the LVT's original 2005 decision appointing Mr Beamish as manager (CHI/24UJ/NAM/2003/0003), and the 2007 decision varying the terms of such appointment (CHI/24uj/lvm/2007/0001). The Tribunal were directed by Mr Andrews to paragraphs 56-59 of the 2005 decision, and paragraphs 26-30 and 33 of the 2007 decision. These paragraphs were read to those present at the hearing.

54 Having heard these submissions the Tribunal considered matters for a few minutes and then gave a preliminary view to the parties, inviting further submissions, if desired, in response to the preliminary view. No party made any additional or further submissions.

55 The Tribunal took into account the decisions of the LVT in 2005 and 2007 in which it was found that the lessor's costs for dealing with applications to the LVT were not recoverable under the terms of the lease. The Tribunal drew a distinction between an LVT appointed manager like Mr Beamish and the lessor or a managing agent as appointed by the lessor. Mr Beamish's appointment was outside the terms of the lease. The lessor and a managing agent appointed by the lessor would need to operate under or within the terms of the lease. A Court appointed manager is not limited, in the Tribunal's view, in the same way as a lessor is limited, by or under the lease. Indeed this is borne out by paragraph 3 of the 2007 order which sets out the managers obligations/duties: not all of which are referable to the lease.

56 The 2007 LVT decision refers at paragraph 29 to Mr Beamish's fees for complying with directions or applications to vary or discharge his terms of appointment. The LVT did not in 2007 award any costs on that application and "...decided not to make any specific provision in this respect for the future." That of course was in relation to an application to vary or discharge. The application currently before the Tribunal was of a different nature. The Tribunal were not persuaded that the comments at paragraph 29 of the LVT decision in CHI/24UJ/LVM/2007/0001 altered its view as expressed at paragraph 55 above. The comments made at paragraph 29 of the LVT 2007 decision were in relation to an application to vary the terms of or discharge Mr Beamish's appointment. The application before the Tribunal was of a different nature.

57 The LVT order of 2007 states that Mr Beamish is entitled to the fees specified. The Tribunal find that this means he is entitled to the fees through the service charge. That finding is irrespective of whether the lease does or doesn't restrict the lessor from claiming, through the service charge, the fees of going to a Tribunal. As Mr Beamish's powers and remuneration are governed by the LVT order, and not limited as the lessor would be under the lease, the Tribunal determined that Mr Beamish's fees of this application were recoverable through the service charge.

58 In construing the 2007 order appointing Mr Beamish the Tribunal were satisfied that he was able to claim his fees associated with applying to the Tribunal through the service charge provisions. That was the plain meaning to be attributed to the wording used and the scheme adopted.

59 The Tribunal should highlight that it has made no determination on the reasonableness or level of such fees or any assessment of the time taken by Mr Beamish in connection with this application.

The Fire safety works

60 The issue as identified at the Pre-Trial review was whether the fire safety works appearing in the 2012 service charge accounts at a cost of £10,698.57 are payable as falling within the Second Respondent Lessor's obligations as a category (c) service charge item (flats 42.5% and commercial 57.5%) under the terms of the leases. It was clarified at the hearing that the reference to 'category c' was a reference to how items were identified in the service charge accounts for Admirals Court as opposed to under the terms of the lease. In terms of the provisions of the lease, the issue was expressed to the Tribunal as being whether the items should be charged under clause 3(2)(f) with the lessees paying a 1/9th share of the total cost (hereinafter referred to as a category (b) item), or alternatively a 1/9th share of 42.5% of the cost (hereinafter referred to as a category (c) item).

61 The cost of the fire safety works had been put through the service charge accounts on the basis that it was a category (b) item: namely that the lessees all individually paid a 1/9th share of the total cost. Mr Evans on behalf of the First Respondents submitted that in fact it should have been a category (c) item and the lessees should individually only have paid a 1/9th share of 42.5% of the costs.

62 The Tribunal asked Mr Evans to identify the relevant term in the lease which he relied upon in support of his argument. He explained to the Tribunal that he wished to argue his point by exception, as the fire safety requirements which necessitated these works did not exist at the time the leases were executed. Mr Evans submitted that as a result of the Regulatory Reform Fire Safety Order the lessor was obliged to carry

out a fire safety risk assessment. Mr Beamish obtained that risk assessment: the Tetra report. This report covered only the residential parts of the building, as that was all Mr Beamish had instructed Tetra to consider as that was the limit of his responsibility. A quotation was obtained in relation to the cost of carrying out the works identified in the risk assessment, and a section 20 notice (pursuant to the consultation provisions of the 1985 Act) was issued. That notice was however subsequently withdrawn as it was discovered the quotation obtained related only to the supply of the relevant equipment and not to its installation.

63 Mr Evans then explained that it was at this point that the lessor stated he regarded the works as an improvement and so were payable as a category (b) item not category (c). Mr Evans stated that the residents' association then met and decided that they would fund the works and at the same time have all the halls and landings in the building redecorated. Mr Evans accepted that the redecoration of these areas was a category (b) item. He explained that the costs of the redecoration were not included in the figures currently before the Tribunal. At this point Mr Evans did not make any reference to the resident's association's conclusions about whether a contribution to the cost of the works should be sought from the lessor. However at a later stage in proceedings, when responding to Mr Andrews arguments Mr Evans stated that around April 2012 the association determined they would pay for the works to get them done as the lessor was not willing to pay for them and that "...we'd seek to get money back from the lessor at a later date." Mr Evans stated that this was made clear in a letter to Mr Beamish. It was apparently Mr Beamish (said Mr Evans) who relayed all this to the lessor. The Tribunal were not shown any documentation in this regard, and noted that Mr Beamish himself claimed to have no personal recollection of this, as the project was being dealt with by a project manager at his firm.

64 Mr Evans in his original submissions went on to describe to the Tribunal that the fire safety works were not only in the landing and stairwells (which he accepted were only used by the residential units in the building) but works were also carried out in the rubbish room, the garage and the lift shaft. Mr Evans accepted that the lift was only used by the residential lessees. There was some disagreement between the First Respondents as to whether the rubbish room was used by residential lessees only (Mr Evans's position). Mrs Evans indicated her view that at times the rubbish room has been used by the commercial lessees. Mr Evans accepted that only the residential lessees had spaces in the garage, but, he submitted there was a fire escape route through the garage for one of the commercial units. Though Mr Evans accepted this route was currently blocked off by the commercial lessee's internal shop fittings. He did though point out that the route could be unblocked at another stage or by a subsequent commercial tenant.

65 Mr Evans took the Tribunal to clause 3(2) of the lease [41] and the specific references to 'repair maintenance renewal management of the Building'. The Tribunal noted that this clause related to the lessees obligations to pay the lessor, and not the lessor's covenants to the lessees.

66 Mr Evans continued by referring to the lessor's obligations under The Regulatory Reform (Fire Safety) Order 2005, to "..get the fire risk assessment and then make sure risks which are identified are mitigated."

67 Mr Evans then referred the Tribunal to clause 3(2)(f) of the lease (as amended) [42] submitting that because the fire safety works benefit the whole building, including the commercial tenants (as they benefit the integrity of the building overall), he submitted that they should not be a category (c) item, but rather a category (b) item payable under the service charge.

68 Mr Andrews position was essentially twofold:

a. That the works amounts to an improvement to the residential part of the building and this wasn't provided for under the terms of the lease nor was the cost recoverable through the service charge. The works were not works of repair, maintenance or renewal or management;

b. That the lessees should be estopped from raising this claim now: the lessor had initially told the lessees that the works were an improvement and the lessor's view was that they did not fall within the service charge provisions. The lessees had responded saying that they were going to do the works anyway and the works would be paid for by each lessee contributing 1/9th of the cost. Mr Andrews argued that the lessor relied on this and suffered a detriment to the extent that the lessor had not commented on the cost of the works. Despite asking to be pointed to the relevant documentation in which these assertions/representations were made, we were not taken to any such documents. Mr Evans claimed that the lessees association had made it clear they would seek to recover the costs of the works even if they initially paid for the works themselves: and so he disputed such a representation as was contended for by Mr Andrews had in fact been made.

69 It was clear that while previously there had been fire alarms in each flat in the building there had not previously been an interlinked fire alarm system. Mr Andrews submitted that the works only benefitted the residential lessees of the building, and that the fire escape route

provided to one of the commercial tenants through the garage was not being used, and had been blocked up.

70 Mr Andrews explained that the commercial tenants had paid for and installed their own fire alarm systems. He accepted that the cost of the assessment itself was recoverable as it was a statutory obligation. In relation to the works identified in the assessment he argued that the decision whether or not such works should be done was to be taken after assessing the respective risks. When asked by the Tribunal where the cost of the fire risk assessment (as opposed to the actual works) would fall under the terms of the lease he agreed with a suggestion that it came within "management of the building" under clause 3(2). But, he argued, the cost of the works were not recoverable under the lease.

71 Mr Andrews was asked by the Tribunal whether the works benefited the commercial premises, even if not the current commercial lessee: The Tribunal asked how it could be legitimate for a tenant to block up an escape route himself and then say I don't get the benefit. Mr Andrews referred the Tribunal to potential arguments of abandonment.

72 In relation to Mr Andrews's argument concerning estoppel, the Tribunal were not satisfied on the evidence before it that an estoppel could be established. There was no documentary evidence of the alleged representations before the Tribunal, only disputed uncorroborated oral recollections of Mr Evans and Mr Andrews. The Tribunal were not satisfied, on the balance of probabilities that there was a representation by the lessees as alleged by Mr Andrews. Nor were the Tribunal satisfied that the lessor had suffered the detriment alleged. The lessor had been served with a copy of the relevant section 20 notices and had commented to the extent of asserting that the works were improvements.

73 The Tribunal found that the fire safety works did not fall within the provisions of either clause 3(2) [41] or clause 3(2)(f). The starting point of clause 3(2) is that 1/9th of 42.5% of the 'said expenses and outgoings incurred by the lessor' are payable by the lessees. Items relating to the lift are payable at a separate level and expenses and outgoings in connection with the cleaning lighting and decorating of the passages, staircases etc are payable on the basis of a 1/9th share. But clause 3(2)(f) expressly refers us back to "..the said expenses and outgoings" which are referred to at [41] under clause 3(2), namely the repair maintenance renewal and management of the building. In the Tribunal's view the fire safety works are not works of repair maintenance renewal or management of the building. For the avoidance of doubt the Tribunal were not satisfied that the cost of the fire safety works could be properly described as costs of management of the building. The costs of the works do not therefore fall with these terms of the lease. The Tribunal concluded that the fire safety works were, in fact, an improvement.

74 Nor do the works fall within the ambit of the lessor's obligations under clause 5 of the lease [48]. The Tribunal had considered whether the

works fell within clause 5(5) of the lease but concluded that this would be to stretch the meaning of those words too far.

75 The parties were unable to direct the Tribunal to any express obligation in the lease covering these works or allowing for the recovery of the cost of such works through the service charge. This is not surprising given that at the time the lease was executed there was no Regulatory Reform Order in existence.

76 Nor was the Tribunal persuaded that there was any implied obligation covering these works or allowing the recovery of the cost of such works through the service charge. The Tribunal considered the manager's obligations under his terms of appointment [36] para 3, and the RICS code in force when the works were completed (the second edition). Paragraph 7.18 of the RICS code states "You should be aware of your obligations under the various regulations regarding fire safety" but this is not sufficiently clearly a reference to the manager having to carry out fire safety works to be of assistance to the lessees. The manager is not obliged under the terms of the code to carry out the fire safety works, only to be aware of his obligations.

77 The Tribunal found that while the fire safety works did indirectly benefit the commercial tenants, the fact remains that all the works were carried out within the residential parts of the building. While the Tribunal are of the view that a commercial tenant cannot prevent himself being liable for the cost of works by blocking up a fire door so as to enable him to say he no longer had the benefit of a fire escape route through the garage, on the facts here, and given the terms of the lease, nothing in fact turned on this.

78 The Tribunal therefore concluded having considered the terms of the lease, and the terms of Mr Beamish's appointment, that the cost of the fire safety works could not be recovered through the service charge on the basis that they were a category (c) matter.

Conclusions

79 The Tribunal therefore finds as follows:

a. The £408 repair to the wooden railings to the rear balcony to flats 4 and 5 fell within the Second Respondent Lessor's obligation under clause 5(4)(i) of the lease.

b. The lintel and brickwork enclosing the balcony to flat 8 were part of the main structure of the building, and were therefore within the ambit of the lessor's obligations under clause 5(4)(i) of the lease.

c. Mr Beamish was able in principle to claim his fees associated with applying to the Tribunal through the service charge provisions.

d. The cost of the fire safety works could not be recovered through the service charge on the basis that they were a category (c) matter.

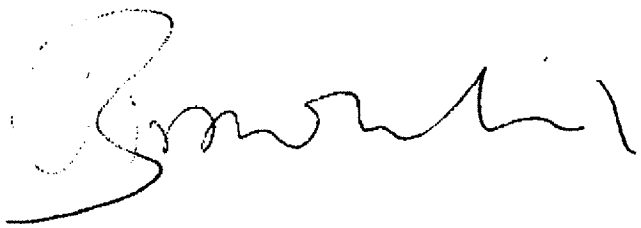
Appeals

80 A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making a written application to the First-tier Tribunal at the Regional office which has been dealing with the case.

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

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

83 The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking.



Judge J Brownhill(Chair)

Dated; 16th July 2013

Appendix

First Respondent Leaseholders:

Mrs M Harding (Flat 1)
Mr and Mrs E H Barklem (Flat 2)
Mr and Mrs S Hooper (Flat 3)
Mr and Mrs M J Wheatley (Flat 4)
Mr and Mrs R J Evans (Flat 5)
Mr and Mrs I Colquhoun (Flat 6)
Mr and Mrs M Simpson (Flat 7)
Mr and Mrs R J Mayes (Flat 8) and
Mr and Mrs R J Phillips (Flat 9).