

**THE RESIDENTIAL PROPERTY TRIBUNAL SERVICE  
SOUTHERN RENT ASSESSMENT PANEL &  
LEASEHOLD VALUATION TRIBUNAL**

In the matter of an Application under Section 168 (4) of the Commonhold and  
Leasehold Reform Act 2002 (Breach of Covenant/Forfeiture Application)

Case No. CHI/21UFLSC/2006/0079

Property: 26 Warrior Square, St. Leonards-on-Sea, East Sussex, TN37 6BS

**Between:**

Paul Curzon  
(otherwise Pavel Ludevit Vaclav Curzon)  
("the Applicant")

and

Lawrence Robin Hobbs & Beryl Lucia Hobbs (Ground Floor Flat)  
Mark Wolstenholme (Flat 2)  
Christina Marina Child (Flat 3)  
Victor Kinsey (Flat 4)  
("the Respondents")

Members of the Tribunal: Mr J.B. Tarling, MCMI, Lawyer/Chairman  
Lady J. Davies, FRICS  
Miss J. Dalal

Date of the Decision: 9<sup>th</sup> February 2007

**THE DECISION  
OF THE LEASEHOLD VALUATION TRIBUNAL**

**The Tribunal determines under Section 168(4) of the Commonhold and Leasehold Reform Act 2002 that no breach of covenant by any of the Tenants has taken place in respect of any of the matters contained in this Application.**

**REASONS FOR THE TRIBUNAL'S DECISION**

1. The Application which this Decision relates to is made under Section 168 (4) of the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act") for a determination that various breaches of covenant in the five Flat Leases have occurred. Section 168 of the 2002 Act was inserted to prevent a Landlord under a long Lease from serving a Notice under Section 146 of the Law of Property Act 1925 until a breach of covenant by a Tenant has been finally determined or admitted. This Section of the 2002 Act was brought into force with effect from 28<sup>th</sup> February 2005 by the Commonhold and Leasehold Reform Act 2002 (Commencement No. 5 and Savings and Transitional Provisions) Order 2004.

## **2. Background to the Application**

In August 2006 the Applicant made three Applications to the Tribunal:

- (a) Under Section 27A of the Landlord and Tenant Act 1985 (“the 1985 Act”) for a determination of the liability of the Respondents to pay certain items of Service Charges that he had demanded under the terms of the Flat Leases.
- (b) Under Section 20ZA of the 1985 Act for dispensation of all of the consultation requirements contained in Section 20 of the 1985 Act.
- (c) Under Section 168(4) of the Commonhold and Leasehold Reform Act 2002 for a determination that various breaches of covenant in the Leases of the five Flats had occurred.

This Decision relates solely to the Application under (c) above. The Tribunal’s Decision under the other two Applications is set out in a separate Document of the same date.

3. A Pre Trial Review Hearing took place on 2<sup>nd</sup> October 2006 when Directions were given as to the preparation and exchange of various documents with a view to preparing for a full Hearing of the Applications.

## **INSPECTION**

4. The Tribunal carried out an Inspection of the Property on the morning of 18<sup>th</sup> January 2007. The Building is a terraced house near the Seafront at St. Leonards-on-Sea and overlooking Warrior Square. The house has been split into six self-contained flats. The Applicant had himself sold off Leases of five of the Flats on long leases and had retained one Flat on the first floor for himself. The front of the Building appeared to have been recently redecorated and appeared to be in a good decorative condition. The common parts inside the building were rather shabby and in need of repair and decoration. The stairs and landings showed signs of damp and in places the plaster had fallen off. The Tribunal members inspected the rear of the Building which had not been decorated for some years, although it appeared to be in a sound condition.
5. The Tribunal members also inspected the interior of Flats 1 (retained by Mr Curzon) and Flat 2 (owned by Mr Wolstenholme) which was immediately above Flat 1. In Flat 1 there were signs of damp staining in the rear bedroom immediately under the rear balcony of Flat 2. In the front bedroom of Flat 1 there were cracks in the ceiling which was immediately under the kitchen of Flat 2. In Flat 2 the rear balcony had been covered with tiles and there was a drainage hole from the balcony which connected to a hopper and rainwater pipes to the lower ground floor. Material to this Application the Tribunal members observed the floor coverings in Flat 2. In the two bedrooms there was close fitted carpet covering the whole of the floors of those rooms. In the front Lounge there was a large carpet which covered the majority of the room. There

were very small areas around the carpet and just inside the door of the room which were not carpeted and where the bare floorboards could be seen. In the hallway there was a large rug which again covered most of the hallway. The kitchen and bathroom floors had no floor coverings, but were tiled.

**6. HEARING**

A Hearing took place at Hastings on 18<sup>th</sup> January 2007. The Tribunal had before it a Hearing Bundle of 349 pages. Most of this documentary evidence related to the other two Applications, although there was sufficient documentary and oral evidence on which the Tribunal could make a decision relating to this Application. The Applicant represented himself and he was accompanied by his father Mr V. Curzon. The Respondents were all represented by Nicola Muir, of Counsel.

**7. The alleged breaches of covenant**

The Applicant, Mr Paul Curzon gave evidence first and referred to the documents in the Hearing Bundle. In particular documents on pages 38 onwards in the Hearing Bundle set out the Landlord's grounds for his application. It is convenient for the Tribunal to go through each and every allegation of breach of covenant and the Tenants replies and then make a finding in respect of each allegation.

**8. Breach of covenant to pay Service Charges**

- (a) The Landlord alleges all of the Tenants are in breach of covenant to pay Service Charges. The covenant in question is set out in the Sixth Schedule to all the Leases. Clause 2 of the Sixth Schedule requires the payments of Service Charges to be paid (a) on account by two equal payments on 25<sup>th</sup> March and 29<sup>th</sup> September and (b) the balance within 7 days of the service on the Tenant of the Certificate of the Landlord's auditors. The Sixth Schedule to the Leases also contains various other details of the Service Charge arrangements.
- (b) The items of Service Charge in dispute are for the years 2003 and 2005 and are in respect of Architects Fees (£5,525.52), Engineers fees (£1,333.32) and the costs of repairs works to the front of the Building (£12,349.92) By the Tribunal's Decision of even date relating to the two other Applications in respect of those same items of Service Charge, the Tribunal has decided that the Tenants are not liable to pay any of those items of Service Charge for the reasons set out in that Decision. As the Tribunal has already decided that these items are not legally payable by any of the Tenants, then the Landlord's Application for a determination for breach of this covenant must clearly fail as the items are not legally payable. Further the Landlord has also failed to comply with the provisions of each of the Flat Leases in that he has not provided the Tenants with a "Certificate of the

Landlord's auditors" which is required by the wording of the Flat Leases.

- (c) **The Tribunal's determination in respect of this item is that there has been no breach of covenant by any of the Tenants for the reasons given above.**

**9. Breach of covenant to make payments into the Reserve Fund**

(a) The Landlord alleges that all of the Tenants have failed to make payments in a Reserve Fund. The covenant contained in the Flat Leases is contained in the Sixth Schedule to the Flat Leases. Clause 1 (d) of the Sixth Schedule confirms that the Service Charges shall include "a contribution fixed annually by the landlord to provide a reserve fund to cover accruing and anticipated expenditure in respect of the compliance by the landlord with his said covenants" The Landlord alleges that he demanded that each of the five Tenant pay £12,000 into a reserve fund to enable him to fund the proposed repairs to the Building.

(b) By the Tribunal's Decision of even date relating to the two other Applications in respect of the Service Charges, the Tribunal has decided that the Tenants are not liable to pay any of the Service Charge items demanded for the reasons set out in that Decision. In respect of the allegation that the Tenants are in breach of covenant in that they have failed to make payments into the Reserve Fund, the Tribunal reminds the Landlord that the wording of the Leases is very strict and requires the Landlord to serve the Tenants with the "Certificate of the Landlord's Auditors" before payment is made. As the Tribunal has already decided that no such Auditors Certificate was served, it is clear that the Tenants were not legally obliged to make any payment into the Reserve Fund. The Landlord had simply not complied with the wording of the Leases which he himself had granted to the Tenants.

- (c) **The Tribunal's determination in respect of this item is that there has been no breach of covenant by any of the Tenants for the reasons given above.**

**10. Flat 3 – Breaches of covenant**

- (i) **not to part with possession**
- (ii) **not to cause nuisance or annoyance**
- (iii) **to pay legal costs (or Flat 2)**
- (iv) **not to do anything that may render insurance void or voidable.**

The Tribunal decided to deal with each allegation separately

- (i) not to part with possession.

(a)The Landlord alleges that the Tenant of Flat 3 had sub-let. The covenant in question in the Lease of Flat 3 is contained in Part 1 of the the Third Schedule. Clause (l) reads "not to part with possession of the flat or any part

thereof except by way of assignment.” Ms Child appears to have admitted that she had sub-let.

(b) Ms Child’s Defence to this allegation is that the Landlord has waived this breach of covenant by accepting Ground Rent. Pages 117 and 120 of the Hearing Bundle contain documents which clearly show a payment of Ground Rent. At the Hearing the Landlord was questioned by the Tribunal as to the payments of Ground Rent by all the Tenants. From that evidence the Tribunal makes a finding of fact that the Landlord had accepted Ground Rent from all the Tenants. He indicated that most of the payments were paid direct into his Bank Account by standing orders. He confirmed that he had not refused to accept any payments of Ground Rent nor was there any evidence that he had returned such payments to the Tenants. Accordingly the Tribunal finds that as the Landlord has accepted Ground Rent from Ms Childs knowing about the breach of covenant not to part with possession, he was waived his rights in the matter.

**(c) The Tribunal’s determination in respect of this item is that there has been no breach of covenant by Ms Childs for the reasons given above.**

(ii) not to cause nuisance or annoyance

(a) The Landlord alleges that Ms Child allowed her sister to occupy Flat 3, that her sister caused a serious nuisance. The covenant in question is contained in Part 2 of the Third Schedule of the Lease. Clause 2 reads “Not to do or suffer to be done any act or thing causing nuisance or annoyance to the Landlord or the owners lessees and occupiers of the other flats...” The Landlord alleges that the Tenant of Flat 2 requested him to take action against Ms Child’s sister.

(b) Ms Child’s Defence is that there is no evidence before the Tribunal in support of this allegation. Even if there was a finding of fact that such a nuisance or annoyance has been caused, the Landlord appears to have accepted Ground Rent knowing about the complaint and has accordingly waived his rights by accepting such Ground Rent. In all the circumstances the Tribunal does not find any evidence that a nuisance or annoyance has been caused and concludes that there has been no breach of covenant.

**(c) The Tribunal’s determination in respect of this item is that there has been no breach of covenant by Ms Child for the reasons given above.**

(iii) to pay legal costs (Flats 2 and 3)

(a)The Landlord alleges that he sought legal advice in order to evict Ms Child’s sister in Flat 3 and in doing so incurred costs of approximately £900. The clause in the Lease which the Landlord relies upon is in respect of the costs of a Section 146 Notice. This is set out in Part 1 of the Third

Schedule to the Leases. Sub-clause (q) reads “To pay to the Landlord all costs charges and expenses (including solicitors costs and surveyors fees and together with any tax including value added tax payable by the Landlord in respect thereof) including in connection with (i) any notice under section 146 of the Law of Property Act 1925 notwithstanding that forfeiture may be avoided otherwise than by relief granted by the court. In respect of Flat 2, where the Tenant had requested the Landlord to take action to enforce the covenants, the Landlord relies upon Clause 9 of the Fourth Schedule to the Lease which reads “If reasonably so required by the tenant to enforce the covenants in the third Schedule entered into ..by the tenants of the other flats... the Tenant indemnifying the Landlord against all costs and expenses in respect of such enforcement..

(b) The Tribunal reviewed the evidence it had read and heard and came to the conclusion that there was no evidence that might allow a Tribunal to conclude that Ms Child’s sister had caused a nuisance. The Landlord had produced no copy of any details of the £900 he says he had spent on legal fees. He had agreed that he had not served a Section 146 Notice on Ms Childs. In all the circumstances until a Section 146 notice is served there can be no liability on a Tenant to pay the costs incurred. If no such Notice is ever served then it is the opinion of the Tribunal that no costs can be charged under this Clause in the Lease.

(d) In respect of the liability of Flat 2 to indemnify the Landlord in respect of these alleged legal costs, the Tribunal has seen no evidence that the Landlord incurred such costs, or have any details of any Solicitors Bill been provided. The Tribunal finds that there is no liability on either Tenant to make any such payment.

**(e) The Tribunal’s determination in respect of this item is that there has been no breach of covenant by the Tenant of either Flat 2 or Flat 3 for the reasons given above.**

(iv) not to do anything that may render insurance void or voidable

(a) The Landlord alleges that the Tenant of Flat 3 had sub-let her Flat without notifying the Landlord, and accordingly he had wrongly stated to the Insurers that the Flat was unoccupied. He further alleges that the sub-letting of this flat by the Tenant without notifying the Landlord may have rendered the insurance of the building void or voidable. The covenant in question is contained in Part 2 of the Third Schedule to the Lease. Clause 8 reads “Not to do or suffer to be done any act or thing which may render void or voidable any policy of insurance in respect of the Building.”

(b) The Tenant in reply says that no copy of any policy of insurance or premium invoice had been produced to show that the Building was insured. Documents numbered 335 and 336 in the Hearing Bundle refer to insurance quotations, but there appears to be no other documentary evidence before the Tribunal to show that any Buildings Insurance existed. In all the circumstances as the Landlord has not proved that any such Buildings Insurance Policy ever existed, the Tribunal has little difficulty in deciding that an insurance policy can

not be rendered void or voidable without proof that such a policy ever existed in the first place.

**(c) The Tribunal's determination in respect of this item is that there has been no breach of covenant by Ms Child for the reasons given above.**

**11. Ground Floor Flat – Breaches of covenant**

**(i) not to part with possession**

**(ii) responsibility for waste water pipes**

**(iii) to keep in repair pipes serving the flat**

**(iv) not to block waste pipes**

**(v) not to do anything that may render insurance void or voidable.**

(i) not to part with possession.

(a) This Flat has a Deed of Variation dated 8<sup>th</sup> March 1989 (Pages 162/164 of the Hearing Bundle) which modifies the wording of the original Lease. The amended clause reads "Not to underlet or part or share possession of the Flat or any part thereof without obtaining the consent in writing of the Landlord such consent not to be unreasonably withheld." The Landlord alleges that the Tenants sub-let the Flat without his written consent. In reply the Tenants say that consent for the most recent subletting was requested on 6<sup>th</sup> September 2006 and the Landlord ignored their request.

(b) The Tenants rely on Section 19 of the Landlord and Tenant Act 1927 and its commentary in paragraph 11:125 of Woodfall's Landlord & Tenant. This seems to put the onus on the Landlord to refuse consent and say why he refuses consent. In the absence of any reply to a request for consent it seems likely that there will not be any breach of covenant. Certainly there was no document produced to the Tribunal showing that the Landlord had refused consent or giving reasons why any such consent was or should be refused. Accordingly the Tribunal finds that there has been no breach of this covenant.

**(c) The Tribunal's determination in respect of this item is that there has been no breach of covenant by the Tenants of this Flat for the reasons given above.**

Items (ii), (iii) and (iv) waste water pipes

The Tribunal decided to deal with these three items together as they all relate to similar facts.

(a) There are various covenants in the Lease of the Ground Floor Flat relating to keeping the pipes in repair and not to block waste or soil pipes. These are contained in Clause 9 of the Third Schedule of the Lease. The Landlord alleges that the sub-tenant blocked the waste pipe by pouring fat down the sink. This is alleged to have caused a nuisance to the Tenant of the Basement Flat. There is another covenant in the Lease at Clause 2 of Part 2 of the Third Schedule which prohibits a nuisance or annoyance to another occupier of the Building.

(b) The Tenants reply that these allegations are wholly without any proof and there is no evidence before the Tribunal that any such pipes were ever blocked in the way that the landlord alleges. They

also say that even if a pipe was temporarily blocked this does not amount to a disrepair. The Tribunal reviewed the evidence and could find no direct and reliable evidence that these pipes had ever been blocked. The Tribunal took the view that it was for the Landlord to satisfy the Tribunal that what he was alleging was true. Without any such direct or reliable evidence the Tribunal found this allegation not to have been proved.

**(c) The Tribunal's determination in respect of this item is that there has been no breach of covenant by the Tenant of the ground Floor Flat for the reasons given above.**

Item (v) Not to do anything that may render insurances void or voidable

(a) The Tribunal repeats what it has above in Paragraph 10 (iv).

The Landlord has failed to provide any evidence that an insurance policy ever existed and for the reasons given previously the Tribunal finds that there has been no breach of covenant by the Tenants of the Ground Floor Flat.

**(b) The Tribunal's determination in respect of this item is that there has been no breach of covenant by the Ground Floor Tenants for the reasons given above.**

## 12. Flat 2 – Breaches of covenant

**(i) structural alterations**

**(ii) keep all floors carpeted**

**(iii) not to cause nuisance**

**(iv) not to do anything that may render insurance void or voidable.**

(i) Structural alterations

(a) The Landlord alleges that the Tenant has made structural alterations to his Flat. The Lease contains a covenant in Clause (k) of the Third Schedule which reads “not to make any structural alterations or additions to the Flat without the previous consent of the Landlord or to remove or alter any of the Landlords fixtures.” The Tribunal has reviewed all the evidence and can find no details of exactly what it is that the Landlord is complaining about. Without knowing what the allegation is it is difficult for the Tribunal to make a determination as to any alleged breach of covenant.

**(b) The Tribunal's determination in respect of this item is that there has been no breach of covenant by the tenant of this Flat for the reasons given above.**

(ii) keep all floor carpeted.

(a) Again, the allegations by the Landlord are not clearly set out in any document which was before the Tribunal. There is indeed a covenant in Clause (p) of the Third Schedule of the Leases which reads “to keep all floors in the Flat covered with carpets except in the kitchen and bathroom...” Details of the Tribunal's findings at the Inspection of the property which took place immediately prior to the Hearing, are set out in Paragraph 4 on Page 2 of this Decision. The two bedrooms were indeed covered with close-fitted carpet. It is presumed that the allegation refers to the Lounge and hallway. In the opinion of the Tribunal, using its expert knowledge and experience, the Tenant has complied



sufficiently with this covenant. The very small areas of floor that are not carpeted are *de minimis* and insufficient to determine that this covenant is breached.

**(b) The Tribunal's determination in respect of this item is that there has been no breach of covenant by the Tenant for the reasons given above.**

(iii) not to cause a nuisance

(a) Again, it is not clear to the Tribunal exactly what it is that the Landlord is complaining about. Without such evidence the Tribunal can not make a determination that any alleged breach of covenant has taken place.

**(b) The Tribunal's determination in respect of this item is that there has been no breach of covenant by the Tenant for the reasons given above.**

(iv) not to do anything that may render insurance void or voidable.

(a) This follows the allegations made in respect of other Flats. However in the case of this Flat the Landlord alleges that the Tenant has removed the fire doors and by doing so may have rendered the insurance void or voidable. The Tenant denies that he has breached this covenant. The Landlord has failed to provide any documentary evidence to the Tribunal in support of this allegation. Without such evidence the tribunal can not make a determination that any alleged breach of covenant has taken place.

**(b) The Tribunal's determination in respect of this item is that there has been no breach of covenant by the Tenant for the reasons given above.**

13. Section 20C Order

For the avoidance of doubt, the Order made by the Tribunal under Section 20C of the 1985 Act in its Decision of even date regarding the Service Charges Applications also applies in relation to any costs incurred by the Landlord regarding this Application as well as the other Applications.

Dated this 9<sup>th</sup> day of February 2007

*J.B. Tarling*



John B. Tarling, MCMI Lawyer/Chairman

A member of the Panel appointed by the Lord Chancellor

**THE RESIDENTIAL PROPERTY TRIBUNAL SERVICE  
SOUTHERN RENT ASSESSMENT PANEL &  
LEASEHOLD VALUATION TRIBUNAL**

In the matter of Applications under Sections 27A and 20ZA and 20C of  
the Landlord & Tenant Act 1985

Case No. CHI/21UFLSC/2006/0079

Property: 26 Warrior Square, St. Leonards-on-Sea, East Sussex, TN37 6BS

**Between:**

Paul Curzon  
(otherwise Pavel Ludevit Vaclav Curzon)  
("the Applicant")

and

Lawrence Robin Hobbs & Beryl Lucia Hobbs (Ground Floor Flat)  
Mark Wolstenholme (Flat 2)  
Christina Marina Child (Flat 3)  
Victor Kinsey (Flat 4)  
("the Respondents")

Members of the Tribunal: Mr J.B. Tarling, MCMI, Lawyer/Chairman  
Lady J. Davies, FRICS  
Miss J. Dalal

Date of the Decision: 9<sup>th</sup> February 2007

**THE DECISION  
OF THE LEASEHOLD VALUATION TRIBUNAL**

1. **The Tribunal determines under Section 27A of the Landlord and Tenant Act 1985 ("the 1985 Act") that none of the following items of Service Charges are legally payable by any of the Respondents:**
  - (a) **2003 Architects fees incurred in applying for a Grant £5,525.52**
  - (b) **2003 Engineers fees incurred in managing the Grant (£1,333.32)**
  - (c) **2005 cost of urgent works front façade of Building (£12,349.92)**
2. **The Tribunal determines under Section 20ZA of the 1985 Act that no dispensation from all of the consultation provisions of Section 20 of the 1985 Act shall be granted.**
3. **The Tribunal makes an Order under Section 20C of the 1985 Act that any costs or expenses incurred by the Landlord in connection with these proceedings shall not be chargeable through the Service Charge Account.**

**REASONS FOR THE TRIBUNALS DECISION**

1. **Background to the Application**

In August 2006 the Applicant made two Applications to the Tribunal:  
(a) Under Section 27A of the Landlord and Tenant Act 1985 ("the 1985 Act") for a determination of the liability of the Respondents

to pay certain items of Service Charges that he had demanded under the terms of the Flat Leases.

- (b) Under Section 20ZA of the 1985 Act for dispensation of all of the consultation requirements contained in Section 20 of the 1985 Act.
2. A Pre Trial Review Hearing took place on 2<sup>nd</sup> October 2006 when Directions were given as to the preparation and exchange of various documents with a view to preparing for a full Hearing of the Applications. At that Pre Trial Review Hearing it was agreed between the parties that there was no longer a dispute as to the item relating to unpaid Insurance Premium for 2006 in the sum of £1,050.00. As this item was agreed it was necessary for the Tribunal to make any further determination regarding that item.
3. A Summary of the remaining items in dispute had been prepared (Item 36 in the Hearing Bundle) and these items were:
- (a) 2003 Architect's fees incurred in applying for a refurbishment grant (£5,525.52)
  - (b) 2003 Engineer's fees incurred in managing the application for a refurbishment grant (£1,333.32)
  - (c) 2005 The cost of urgent works in refurbishing the façade of the front of the building (£12,349.92)

#### **INSPECTION**

4. The Tribunal carried out an Inspection of the Property on the morning of 18<sup>th</sup> January 2007. The Building is a terraced house near the Seafront at St. Leonards-on-Sea and overlooking Warrior Square. The house has been split into six self-contained flats. The Applicant had himself sold off Leases of five of the Flats on long leases and had retained one Flat on the first floor for himself. The front of the Building appeared to have been recently redecorated and appeared to be in a good decorative condition. The common parts inside the building were rather shabby and in need of repair and decoration. The stairs and landings showed signs of damp and in places the plaster had fallen off. The Tribunal members inspected the rear of the Building which had not been decorated for some years, although it appeared to be in a sound condition.
5. The Tribunal members also inspected the interior of Flats 1 (retained by Mr Curzon) and Flat 2 (owned by Mr Wolstenholme) which was immediately above Flat 1. In Flat 1 there were signs of damp staining in the rear bedroom immediately under the rear balcony of Flat 2. In the front bedroom of Flat 1 there were cracks in the ceiling which was immediately under the kitchen of Flat 2. In Flat 2 the rear balcony had been covered with tiles and there was a drainage hole from the balcony which connected to a hopper and rainwater pipes to the lower ground floor.

6. **HEARING**

A Hearing took place at Hastings on 18<sup>th</sup> January 2007. The Tribunal had before it a Hearing Bundle of 349 pages. The Applicant represented himself and he was accompanied by his father Mr V. Curzon. The Respondents were all represented by Nicola Muir, of Counsel.

7. **The Applicant's Case**

The Applicant, Mr Paul Curzon gave evidence first and referred to the documents in the Hearing Bundle. He outlined the history of the matter. It was agreed by all the parties that the Building needed some repairs and decorations. Under the terms of the Leases the usual arrangements applied in that the Landlord was obliged to repair and decorate the structure and exterior of the Building and the Tenants had to contribute one sixth each to the costs of these repairs and decorations.

8. **Architects Fees (£5,525.52)** - A Grant had been available from the Local Authority to assist with the external repairs and decorations. The building was in an area which the Local Authority wished to improve and certain Grant Funds were available on certain conditions. The Applicant went through his version of events first. In summary the Applicant engaged the services of an Architect to prepare a Schedule of Works and to assist in applying for the Grant. It was a condition of the Grant that an approved Architect was engaged to supervise the work. The Applicant said that the Tenants were all aware of the proposed works and had agreed to them. However he had admitted to the Tribunal that he had failed to serve the Tenants with a Notice under Section 20 of the 1985 Act and the Regulations made thereunder in respect of the Architects Fees.
9. **Engineers Fees** – The Applicant was himself a Civil Engineer and had claimed £1,333.32 in fees for himself for the fees he had incurred in managing the application for the Grant. He admitted to the Tribunal that he had failed to serve the Tenants with a Notice under Section 20 of the 1985 Act and the Regulations made thereunder in respect of these Engineering Fees.
10. **Costs of the works.** The Applicant claimed that he had paid the amount of £12,349.92 to carry out certain repair and decoration works to the front façade of the Building. He admitted that he had failed to serve the Tenants with a Notice under Section 20 of the 1985 Act and the Regulations made thereunder in respect of these repair and decoration costs.
11. The Applicant was asking the Tribunal to grant retrospective dispensation under Section 20ZA of the 1985 Act for all of the consultation requirements of the 1985 Act. The Applicant set out his grounds for making the Application. He said the Tenants were all aware of the proposed works, they had all been given an opportunity of objecting to the proposed works and of providing their own contractors. There was a long history of arguments about whether or not the Tenants would pay their respective shares of the costs of the Fees and the works and these were set out fully in the Hearing Bundle. Eventually as no agreement had been reached the Grant failed to materialize and Grant funding was lost.

12. The Local Authority then put pressure on the Applicant to carry out repairs and decorations to the front façade of the Building which he did. However he failed to serve a Section 20 Notice on the Tenants in respect of these repairs and decorations. The Applicant was asking the Tribunal to grant retrospective dispensation in respect of the cost of those repairs and decorations. In support of his Application he said that the works had to be carried out urgently and he did not have time to serve a Section 20 Notice.
13. Just before the lunch break the Tribunal asked the Landlord to read the Leases during the lunch break and return to tell the Tribunal under which Clause in the Leases he can claiming payment of his Engineering Fees. After the lunch break he returned to say that he was claiming them under Clause 1(b) of the Sixth Schedule of the Lease which reads “the fees and disbursements paid to any managing agents for the management of the Building and the provision of services therein”.
14. The Applicant was cross-examined by Nicola Muir of Counsel on behalf of the Tenants and he was also asked some questions by the Tribunal members. His replies to these questions may be summarized as follows:
  - (a) He had failed to send the Tenants any Specification of works, or Tenders, but maintained that the Tenants were well aware of what works were to be carried out. The Tenants Solicitor had inspected the Tenders and was aware of the works.
  - (b) He did not obtain two estimates from Architects in respect of their fees as he believed that all Architects charged a scale fee and they were not negotiable. The document from the Architect on which the Applicant relied did not appear to be a proper Invoice and it did not have a VAT number on it. He agreed the tenants did not participate in the decision as to which Architect to appoint.
  - (c) In respect of his own claim for Engineers Fees he agreed he had not set out his basis for charging, nor did any document he had produced contain details of the work he had done.
  - (d) There was only one Invoice for the cost of the repair and decoration work (and associated scaffolding) and that was from his Father Mr V. Curzon who had acted as the main contractor. Mr V. Curzon had then engaged sub-contractors to carry out the actual work. No Schedules of work, costings or other documents were available for the Tribunal to look at from any of the sub-contractors or from the scaffolding contractors in support of his application.
  - (e) In respect of the urgency of having the work done he said he was under pressure from the Local Authority to carry out the work and he had been threatened with prosecution and penalties. He agreed that he had had at least a month from the date when he had received the letter from the Local Authority threatening him and the date when the scaffolding had been erected for the work to commence. He agreed he had not informed the Tenants of the commencement of the work or told them what work he was carrying out. He also confirmed that the urgency of the works was

not due to a structural emergency, but because the Local Authority was threatening him with an enforcement order.

- (f) He said he had not asked the Tenants for the money to be paid in advance as he was entitled to under the terms of the Leases. He said the reason he did not do it this way was because the Tenants had all agreed to pay the money. He agreed that he could have set up a sinking fund to fund the cost of the repairs through the service charge account, but gave no clear explanation why he failed to do this.

#### **15. The Respondents Case**

Mr Hobbs (Ground Floor), Mr Kinsey (Flat 4) and Mrs Wolstenholme (Flat 2) all gave evidence to the Tribunal and Mr Curzon was permitted to cross-examine them all. In summary, their evidence supported the documentary evidence supplied in the Hearing Bundle. They all said they were anxious to have the property repaired and decorated but the Landlord had failed to tell them full details of what work he proposed to carry out and what it would cost. There had been a breakdown of trust between the parties as the Landlord had not followed the correct statutory consultation procedures in Section 20 of the 1985 Act. They had now applied to the Tribunal in separate proceedings for enfranchisement and those proceedings were in the course of being concluded. They challenged the Landlord to proof of the items he was claiming under the service charge provisions of the Leases.

#### **16. THE TRIBUNAL'S CONSIDERATION**

Following the conclusion of the Hearing the Tribunal retired to consider its decision. First of all it reviewed all the evidence it had seen, read and heard. This had been a sad history of a breakdown of communication between a Landlord and the Tenants. The result of this had been the loss of a substantial Grant from the Local Authority. The Tribunal worked through the individual items being claimed.

17. **Architects Fees.** (£5,525.52) The Landlord had admitted that he had not given the Tenants an opportunity to approve or comment on the involvement of the proposed Architect before he was instructed. He just went ahead and instructed him to prepare the Specification and assist to obtain the Grant. The original scheme of works was considerably more than the work which was eventually done. It came as a shock to everyone when the result of the tenders was received when the cost of the proposed works doubled from £70,000 to over £140,000. In the end the work done by the Architect was abortive as the Grant funding was not obtained. There appeared to be no justification for the Landlord not giving the Tenants a Section 20 Notice in respect of these fees. The Landlord appeared to have no grounds for applying for dispensation for consultation regarding these fees. He certainly had time to do it before he instructed the Architect but seemed to have failed to consider the matter or take advice.
18. At the Hearing the Landlord seemed not to be aware of the very strict provisions and consultation requirements contained in Section 20 of the 1985 Act. He said he did not know if there was a particular form of wording that he should have used in a Section 20 Notice. He appeared

particularly ignorant of the Consultation Regulations and what the law obliged all Landlords to do when embarking on major expenditure. So far as the Landlord's contention that all Architects charge the same fees is concerned the Tribunal, using its expert knowledge and experience, does not agree with the Landlord. In the experience of the Tribunal Architects often do negotiate their fees when bidding for a major works contract, as in this case. It was clear from the evidence that the Landlord had failed to consider any such negotiation of Architects fees and then expected the Tenants to contribute to them. For all the above reasons the Tribunal decides that this item will be disallowed in full.

19. **Engineering Fees.** (£1,333.33) Again the Landlord admits that he did not serve any Section 20 Notice on the Tenants regarding his fees. He had plenty of opportunity of doing so, but just failed to do so. His claim that his fees are recoverable under the provision in the Leases for Managing Agents fees must fail. He was clearly acting as an Engineer and not as a Managing Agent. There appears to be no other clause in any of the Leases which would allow him to recover Engineers fees. For these reasons this item will be disallowed in full.
20. **Costs of repair and decoration to front façade** (£12,349.92) The Landlord had admitted that he had not served a Section 20 Notice in respect of these works but was asking for dispensation from all the consultation requirements. The Tribunal spent some time going through the evidence and considering the law. Section 20ZA (1) of the 1985 Act says that "the Tribunal may make the determination if satisfied that it is reasonable to dispense with the requirements". This gives the Tribunal an unfettered discretion having regard to the facts of each case. Traditionally, one of the reasons Tribunals have given for granting such dispensation has been in respect of a genuine emergency where the Landlord had little option but to carry out urgent works at the cost of the service charge account. Another example where Tribunals have granted dispensation is where there is an emergency which causes a risk of danger to the health and safety of any occupiers of a building.
21. The Tribunal makes a finding of fact that certainly there was no urgency in respect of the Architects fees and the Engineers fees and has no difficulty in rejecting the application for dispensation in respect of both these items. It was clear from the evidence that the Landlord had little experience of the Section 20 requirements and had failed to take advice. He had had plenty of time to serve a Section 20 Notice and had simply failed to do so.
22. In respect of the costs of the repair and decoration works to the front façade of the Building the Tribunal notes all the evidence. The Tribunal makes a finding of fact that there was no such emergency or need for any urgent work to be carried out. No documentary evidence was before the Tribunal to conclude that the matter was urgent. All that was produced was some correspondence from the Local Authority saying that it wanted a limited amount of work carried out and there was an implied threat of enforcement action. The Tribunal found that this was merely a whim of the Local Authority and did not regard this as sufficient evidence of a need for urgent work that would have prevented the Landlord from serving a Section 20 Notice on the Tenants. The Landlord could have

tried to ask the Local Authority for more time to serve a Section 20 Notice and deal with the matter properly. He failed to do this. There was certainly no evidence of any imminent risk to the Health and Safety of any of the occupiers of the property which might have given the Landlord a reason not to serve such Notices. For these reasons the Tribunal decides not to grant dispensation under Section 20 ZA of the 1985 Act.

23. The Tribunal also noted in passing that the Landlord had failed to comply fully with the terms of the Flat Leases. He had not appointed any Managing Agents, despite the Lease providing for such appointment and payment of managing agents fees. He had not prepared any formal Service Charges Accounts nor prepared a “certificate of the Landlords auditors” as required by Paragraph 2(b) of the Sixth Schedule of the Leases. Even if the Tribunal had granted dispensation, the Service Charges demanded were not legally payable by any of the tenants as the requirements of the Leases had not been complied with by the Landlord. He had also flagrantly failed to comply with even the basic provisions of the RICS Service Charge Residential Management Code regarding the carrying out of repairs. This Code is an approved Code under Section 87 of the Leasehold Reform, Housing and Urban Development Act 1993. It sets out guidance to all Landlords as to good management.
24. The Tribunal then reviewed the Regulations relating to the Consultation Requirements which are set out in the Service Charges (Consultation Requirements)(England) Regulations 2003 (“the 2003 Regulations”). Schedule 4 of those Regulations relates to the consultation requirements for qualifying works and applies to these Applications. That Schedule contains the details of what a Landlord should do to serve a Notice under Section 20 of the 1985 Act. In this case the Tribunal had already decided that no dispensation from all the consultation requirements should be granted for the reasons given above.
25. Section 20 of the 1985 Act reads as follows:
- (1) Where this section applies to any qualifying works ... the relevant contributions of tenants are limited ... unless the consultation requirements have been either: (a) complied with in relation to the works, or (b) dispensed with in relation to the works by ... a leasehold valuation tribunal.

The Tribunal has already decided that the consultation requirements have not been complied with and has refused to grant dispensation under Section 20ZA of the 1985 Act. For the avoidance of doubt, the amount of relevant costs which would have been payable by any tenant in this matter is more than £250 as required by Regulation 6 of the 2003 Regulations. The effect of this is that none of the Tenants have any liability to pay for any of the qualifying works which the Landlord carried out to the front façade of the Building.

26. Section 20B of the 1985 Act

The Tribunal has already decided that the Landlord has failed to comply with the consultation requirements of Section 20. The Tribunal has also decided that it would not grant any dispensation under Section 20ZA. Although it is not necessary to go on to consider Section 20B of the 1985 Act, the Tribunal notes in passing that all of the Architect’s Fees and



probably some of the Engineer's fees were incurred in 2001, but were not demanded from the Tenants until 2005. This is clearly outside the 18 month period specified in Section 20B. This is yet another reason for the Tribunal reaching the conclusion that these fees are not legally payable by the Tenants.

27. Section 19(1) of the 1985 Act

For the avoidance of doubt the Tribunal has made no findings as to the requirements of Section 19 (1) of the 1985 Act. This provides that relevant *service charge* costs shall be taken into account (a) only to the extent that they are reasonably incurred and (b) only if the works are of a reasonable standard. The reason for the Tribunal deciding not to make such findings is because it was unable to do so on the documents and other evidence produced to it by the Landlord. During the proceedings the Landlord had failed to supply the Tribunal or the Tenants with any detailed Specification or Schedule of exactly what repair works had been carried out or a detailed breakdown of what work had been done to justify the claim for Architects fees and Engineers fees. No copies of any tenders or estimates showing the costings had been supplied during the proceedings.

28. Section 20C Application

Towards the end of the Hearing Counsel for the Respondents made an Application under Section 20C of the 1985 Act that any costs incurred by the Landlord in connection with these proceedings should not be regarded as relevant costs in determining the amount of any service charge payable by the Tenants. Mr Curzon was invited to agree that the terms of the Leases did not allow him to make any charge in connection with these proceedings. He was either unwilling or unable to make such agreement and said that he was considering making a charge for his time. The Tribunal reviewed the matter and as the Tenants had been wholly successful in defending these proceedings, it was fair and reasonable for such an Order to be made. The Tenants had quite properly instructed Solicitors and Counsel to represent them and had incurred the costs of those instructions. It was not fair that they should also have to be responsible for any costs which the Landlord might choose to levy through the service charge. It was also very doubtful that the terms of the Leases would allow such recovery. As the enfranchisement was imminent it was considered helpful to the parties for a decision on this point to be made to avoid any further argument. **The Tribunal hereby makes an Order under Section 20C of the Landlord and Tenant Act 1985.**

29. At the very end of the Hearing Counsel for the Tenants invited the Tribunal to consider whether it had jurisdiction to make a decision on those matters that took place prior to 30<sup>th</sup> September 2003, being the date on which the relevant Sections of the Commonhold and Leasehold Reform Act 2002 came into force. No mention of this apparent challenge to the Tribunal's jurisdiction had been made in Counsel's skeleton argument, and no application had been made to the Tribunal to challenge jurisdiction at the beginning of the Hearing. In all the circumstances the Tribunal has decided that it does have jurisdiction to deal with all the matters referred to herein. The Application itself was quite properly

made after 30<sup>th</sup> September 2003 and at the date of its decision the powers given by the 2002 Act were fully in force. If Counsel had seriously wished the Tribunal to consider its jurisdiction she should have raised this as a preliminary point at the very beginning of the Hearing.

30. This Decision deals with the service charge matters in dispute between the parties. At the same Hearing the Tribunal dealt with an Application by the Landlord under Section 168 of the Commonhold and Leasehold Reform Act 2002 for a determination that there had been breaches of covenants by the tenants. The Tribunal's Decision relating to that Application is recorded in a separate Decision document.

Dated this 9<sup>th</sup> day of February 2007

*J.B. Tarling*



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John B. Tarling, MCMJ Lawyer/Chairman  
A member of the Panel appointed by the Lord Chancellor

**THE RESIDENTIAL PROPERTY TRIBUNAL SERVICE  
SOUTHERN RENT ASSESSMENT PANEL &  
LEASEHOLD VALUATION TRIBUNAL**

Case No. CHI/21UFLSC/2006/0079

Property: 26 Warrior Square, St. Leonards-on-Sea, East Sussex, TN37 6BS

**Between:**

Paul Curzon  
(otherwise Pavel Ludevit Vaclav Curzon)  
("the Applicant")

and

Lawrence Robin Hobbs & Beryl Lucia Hobbs (Ground Floor Flat)  
Mark Wolstenholme (Flat 2)  
Christina Marina Child (Flat 3)  
Victor Kinsey (Flat 4)  
("the Respondents")

In the matter of an  
**APPLICATION FOR PERMISSION TO APPEAL**  
**The Tribunal's Decision dated 9th February 2007**  
**(Section 175 of the Commonhold and Leasehold Reform Act 2002)**

**DECISION AND REASONS**

**BACKGROUND**

1. By a Request for permission to appeal from the Applicant's Solicitors, Messrs Menneer Shuttleworth dated 2<sup>nd</sup> March 2007, the Applicant applied to the Tribunal for permission to appeal the Decision of the Tribunal to the Lands Tribunal. The Tribunal's Decision is set out in two documents both dated 9<sup>th</sup> February 2007. The first Decision is in respect of the Applicant's applications under Sections 27A and 20ZA of the Landlord and Tenant Act 1985 (the Service Charge application). That Decision also dealt with the Respondents application under Section 20C of the 1985 Act. The second Decision is in respect of the Applicant's application under Section 168(4) of the Commonhold and Leasehold Reform Act 2002 (the breach of covenant application).

**GROUNDS FOR APPEAL**

2. In summary the grounds for appeal are:
  - (a) That the Tribunal interpreted and/or wrongly applied the relevant law.
  - (b) That the Tribunal failed to take account of relevant considerations and evidence.
  - (c) That the Applicant was disadvantaged and/or did not receive a fair hearing

**THE TRIBUNAL'S DECISION**

3. The Tribunal refuses permission to appeal.

## REASONS FOR THE TRIBUNAL'S DECISION

*(a) "That the Tribunal interpreted and/or wrongly applied the relevant law"*

4. The Tribunal in reaching its decision made careful findings of fact based on the evidence which it had seen at the inspection, and read and heard at the hearing. Based on those findings of fact the Tribunal applied the relevant law and reached its decision. Although not every individual piece of evidence was commented on in the Tribunal's written decision, that does not mean that the Tribunal did not consider all the evidence that was presented to it.
5. In respect of the allegation contained in paragraph 3 of the Applicant's written submissions, that the Tribunal did not have jurisdiction to rule on such matters, the Applicant himself made the applications to the Tribunal under Section 27A and 20ZA under the 1985 Act. That Application was made to the Tribunal in August 2006, which was well after the date when the Commonhold and Leasehold Reform Act 2002 came into force. In so making the applications he submitted to the Tribunal's jurisdiction and requested the Tribunal to exercise its jurisdiction under those Sections of the 1985 Act. It would be perverse for any Applicant on the one hand to submit to the jurisdiction of the Tribunal and then having received its Decision deciding against the Applicant, then to submit that the Tribunal did not have jurisdiction to make such a Decision.
6. In respect of the assertion contained in paragraph 4 of the Applicant's written submissions, this assertion was not made by the Applicant at the hearing nor in any document which was before the Tribunal at the time when it made its decision. In any event, Clause 8 of the Leases is a proviso for re-entry in the event of non-payment of ground rent. There was no evidence before the Tribunal that there were any arrears of ground rent and the Applicant did not produce any evidence of arrears of ground rent at the hearing. The Tribunal has dealt fully with the reasons for its decision in paragraphs 7 to 12 of its breach of covenant Decision document.

*(b) That the Tribunal failed to take account of relevant considerations and evidence.*

7. In respect of the matters contained in paragraphs 5, 6 and 7 of the Applicant's written submissions, at no time at the Pre Trial Review hearing held on 2<sup>nd</sup> October 2006 was the Applicant told that he could not produce the architect's specifications, drawings and other documents at the hearing. Following the Pre Trial Review hearing, various Directions were made by the Tribunal. Paragraph 4 of those Directions required the Applicant to send to the Tribunal a bundle of documents upon which he intends to rely at the hearing by 6<sup>th</sup> November 2006. In paragraph 9 of those Directions the Applicant was warned that if he failed to comply with the Tribunal's Directions the Tribunal could "refuse to allow a party to rely on evidence that is not produced at the time when these directions require them to do so." The Applicant failed to comply with those Directions and failed to include any architects specifications, drawings or other documents in his bundle of documents. As the architects specifications drawings and other documents were not before the Tribunal at the hearing, the Tribunal was neither able to read them nor consider them as evidence. Paragraph 14 (d) of the Tribunal's Decision on the Service Charge Application confirms the position. The Applicant had been taking advice from his own Solicitors during the course of the proceedings and he had had plenty


of opportunity of asking for advice on his position prior to the hearing if he had been in any doubt.

8. In respect of the matter referred to in paragraph 8 of the Applicant's written submissions, the Tribunal exercised its discretion whether or not to make an Order under Section 20ZA of the 1985 Act giving dispensation for failure to comply with the consultation requirements and decided not to make such an Order. The reasons for this are fully set out in paragraphs 16 to 25 of its Service Charge decision.

*(c) That the Applicant was disadvantaged and/or did not have a fair hearing (Paragraphs 9 & 10 of the Applicant's written submissions)*

9. The Applicant is a Chartered Civil Engineer and had produced a fully documented Bundle of documents in support of his case. At the hearing he spoke articulately and behaved in a perfectly professional manner. At the hearing he was given every possible opportunity to present his case. He did not give the impression to the Tribunal that he was having difficulty presenting his case and he seemed to be well able to deal with the hearing. He did not seem to be a lay applicant in the usual sense of the expression. So far as the allegation that "The Applicant found that he was unable to put forward his arguments without being continually opposed or put down by Counsel" is concerned, it is true that Counsel cross-examined the Applicant regarding his evidence, but at no time did the Tribunal find that the Applicant was being disadvantaged. It was clear the Applicant had difficulty sometimes in giving an answer to Counsel's questions, but that was usually due to his evidence failing to support his case, rather than any other reason. In respect of the allegation that "the Tribunal did nothing to ensure a more level playing field" is concerned, without knowing exactly what the Applicant is suggesting it is difficult to comment. Whilst Tribunals always attempt to allow and encourage non legally-qualified parties to present their evidence and arguments, Tribunals are independent and impartial and there is a limit to the extent to which they assist them to present their own cases.
10. In respect of the allegation regarding the interpretation of the words "the Tenants had quite properly instructed Solicitors and Counsel to represent them" suggesting that the Tribunal "took issue with the fact that the Applicant was a litigant in person" is concerned, those words were used in relation to the Tribunal's Decision on the Section 20C applications made by the Respondents (See paragraph 28 of the Tribunal's Service Charge Decision). In using those words the Tribunal was commenting that the Tenants had behaved perfectly reasonably in instructing Solicitors and Counsel in view of the many legal arguments involved and general complexity of the case. In considering whether or not to make an Order under Section 20C the fact that one party had behaved reasonably or not is a perfectly proper matter to consider when making such a decision. The reference to the non-production of the architect's plans, specifications and other documents has already been dealt with under paragraph 7 above.

Dated this 16<sup>th</sup> day of March 2007

*J.B. Tarling* 

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John B. Tarling, MCMi Lawyer/Chairman

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