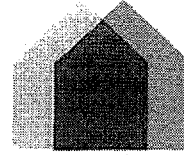


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Residential
Property
TRIBUNAL SERVICE

**RESIDENTIAL PROPERTY TRIBUNAL SERVICE
LEASEHOLD VALUATION TRIBUNAL for the
LONDON RENT ASSESSMENT PANEL
LANDLORD AND TENANT ACT 1985**

LON/OOAW/LSC/2007/0057

Premises: 106 Coleherne Court, Old Brompton Road, London,
SW5 OED

Applicant: Mr P Changizi

Respondent Coleherne Court Freehold Ltd.

Appearances

Mr P Changizi	
Mr S Latifi	For the Applicant
Mr G Corbett	
Mr M Black	
Mr W Freyer	
Mr D Beiny	
Mr A Colvin	
Mrs S Innes	
Mr W Bass	
Mr J Shannon BSc MRICS	
Mr I Long BSc MRICS	For the Respondent

Tribunal: Mrs J Goulden
Mr F Coffey FRICS
Mr O Miller BSc

Date of Hearing: 23,24&25 July 2007

Date of Decision:

LON/00AW/LSC/2007/0057

PROPERTY: 106 COLEHERNE COURT, OLD BROMPTON ROAD, LONDON, SW5 OED

BACKGROUND

1. The Tribunal was dealing with

(a) an application dated 16 February 2007 under Section 27A of the Landlord and Tenant Act 1985, as amended (hereinafter referred to as "the Act") for a determination whether a service charge is payable and, if it is, as to

- (a) the person by whom it is payable
- (b) the person to whom it is payable
- (c) the amount which is payable
- (d) the date at or by which it is payable
- (e) the manner in which it is payable

(b) an application dated 16 February 2007 under Section 20C of the Act to limit landlord's costs of proceedings.

(c) An application by the Respondent raised in its Response dated 29 June 2006 and clarified at the Hearing for an Order for penal costs against the Applicant under Schedule 12, paragraph 10 of the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act")

2. Coleherne Court, Old Brompton Road, London, SW5 OED is hereinafter referred to as "the subject property". The Applicant purchased Flat 106 in August 2006. Flat 106 is held under an underlease dated 4 October 1996 and made between Coleherne Court Headlease Ltd (1) and Wolfe Securities Ltd (2) (hereinafter referred to as "the lease") for a term of 130 years (less the last 10 days) commencing 25 March 1996 and expiring on 14 March 2126 at the rents and subject to the terms and conditions therein contained. The Tribunal was advised that all leases of the subject property were essentially in the same form. The Applicant, Mr P Changizi, was present at the inspection initially, but did not remain.

INSPECTION

3. Coleherne Court was inspected by the Tribunal on the morning of 23 July 2007 in the presence of members of the Respondent company, namely Mr M Black, Chairman; Mr G Corbett, Finance Director; and Mr D Beiny, Chairman, Fabric Committee. In addition, the Tribunal were shown around the estate by Mrs S Innes, Estate Manager, Mr W Bass, Maintenance Manager and Mr R Jezard-Dodds, Residents' Services Manager.

4. The subject property comprised eleven blocks over six storeys (including basement) constructed of brick and ornamental sandstone with double hung sash windows c 1900. External decorations were good. The blocks formed a "U" shape fronting three streets

with three blocks on The Little Boltons, four blocks on Old Brompton Road and four blocks on Redcliffe Gardens. The blocks enclosed a large and attractive garden with lawns, planted areas and a childrens' play area. The garden was well cared for. Each block had its own entrance with entryphone, a central staircase and one lift. The Tribunal was advised that the subject property contained 210 residential units (which included two porter's flats and one flat which was let), eight courtyards and thirty seven lightwells. There were Estate offices in Blocks L (maintenance) and K (finance and administration)

5. At the time of the Tribunal's inspection, some parts of the subject property were in the process of decoration. Scaffolding was noted to the elevations of Block H and work was being carried out to the courtyard of Blocks A and B (where the coal bunker had been removed). The Tribunal also inspected Block G where a similar coal bunker was still in situ.

6. The roofs were inspected by two members of the Tribunal, both of whom are Surveyors. The roofs were of mansard construction clad with slate, and with lead and asphalted flat areas. The accommodation on the uppermost floor was formed within the mansard. The main roof had a large number of dormer constructions comprising double hung sash windows within flat roofed dormers covered with sheet lead. The pitched surfaces generally comprised natural welsh slate and a number of asphalt and lead roofs, the latter having been recently renewed. The condition of the pitched roof over Block H was in very poor condition and in need of extensive repair of asphalt and slate surfaces. In the view of the Tribunal, this roof was probably in need of renewal. There was evidence of past replacement of slates and a considerable number of slipped, cracked, broken, missing or otherwise defective slates were noted.

7. The common parts in the blocks inspected were neat, clean and carpeted. On the ground floor of Block G there was a manned porter's desk with CCTV and fire alarm console

HEARING

8. The Hearing took place on 23, 24 and 25 July 2007.

9. The Applicant, Mr P Changizi, appeared in person on 23 and 24 July 2007 and was unrepresented. He was accompanied on 23 July 2007 only by Mr S Latifi who appeared on behalf of his father, Mr AK Latifi. Mr Changizi gave oral evidence on 23 and 24 July 2007. He said that he was unable to attend the hearing on 25 July 2007, since he was going abroad in respect of a court case due to be heard in Spain. The Tribunal said that it was regrettable that Mr Changizi was not able to attend the hearing on 25 July 2007 since his input would be desirable, but of course this was his decision.

10. The Respondent, Coleherne Court Freehold Ltd. was represented, in the main, by Mr G Corbett, Finance Director, assisted by Mr M Black, Chairman; Mr W Freyer, Director; and Mr D Beiny, Chairman Fabric Committee; Mr Beiny was unable to attend the hearing on 25 July. Also in attendance on all three days of the hearing were Mrs S Innes, Estate Manager, and Mr W Bass, Maintenance Manager. Mr J Shannon BSc MRICS of

Sanderson Weatherall attended on 23 July 2007 only. Mr I Long BSc MRICS of William Martin & Partners LLP and Mr A Colvin attended on 24 July 2007 only. Oral evidence on behalf of the Respondent was provided by Mr Shannon, Mr Long, Mr Colvin, Mr Bass and Mrs Innes.

11. At the commencement of the Hearing the Tribunal asked the parties whether they wished to discuss matters between themselves in order to ascertain whether they could resolve their differences or narrow the issues. Mr Corbett said that he was not prepared to do so without the Respondent's solicitors being present and Mr Changizi said that there was no point in a meeting.

12. The matters which required the determination by the Tribunal related to the service charge years 2006 and 2007. Although the application had stated that a determination in respect of the service charge year 2008 was also required, the Tribunal was advised that the budget for that year had not yet been prepared. Accordingly no determination is possible for that year. The issues in dispute were as follows:-

- (a) **Consultation under S20**
- (b) **Coal Bunker Removal and reinstatement of paved area.**
- (c) **Installation of fire detection and alarm system to common parts**
- (d) **Block H front elevation refurbishment project**
- (e) **Sinking fund**
- (f) **Staff costs**
- (g) **Limitation of landlord's costs of proceedings under S20C of the Act**
- (h) **Penal costs**

13. Although Mr Changizi had indicated in his application that the question of insurance was also disputed, this was not raised by him at the hearing.

14. In addition to the above, Mr Changizi said that he had made an application for the appointment of a manager under S24 of the Act and would be seeking dispensation of requirements to serve a notice under S22 of the Act. No such application was before the Tribunal and no such application had been received by the Respondent. On checking with the Clerk to the Tribunal, she confirmed that although a faxed copy of the application had been received, no hard copy had arrived at the Tribunal with a cheque and therefore no application could be processed. This is therefore a matter which cannot be considered by this Tribunal. Mr Changizi confirmed that he would deal with this application on another occasion.

The expert witness

15. The Respondent's expert was Mr J Shannon BSc MRICS of Sanderson Weatherall. Mr Shannon is a Chartered Building Surveyor and was questioned on the contents of his report dated 22 June 2007. He had been instructed by the Respondent on 8 June 2007. Mr Shannon's report was based on one inspection made some eight weeks earlier,

information supplied by the estates office, consultants who had contributed "*in part*" to the contested works and photographs.

16. In law, an expert witness is in a special category. He provides expertise established through evidence and provides opinions. The Tribunal must consider whether it is safe to rely on the expert and the questions asked of him must test the quality and validity of opinions. The Tribunal must assess whether a witness is a true expert in the field of which he speaks, for example, whether he is truly independent, whether he has been unduly influenced so that his views can be fairly described as subjective, whether he is authoritative, whether he assumes the role of an advocate rather than a witness and whether the opinions expressed are based on sound judgement.

17. Mr Shannon's opinions are not considered to be either wholly objective or impartial. His witness statement did not contain the usual expert witness declaration and in some respects (eg construction of the lease terms) he clearly strayed from his area of expertise. Although he had commented on the roof and elevation repairs, he confirmed that he had not inspected the same. A considerable amount of background information was supplied by the Respondent's estate office who naturally would wish to place their own position in the most advantageous light.

18. In the view of the Tribunal, and for the reasons set out above, although Mr Shannon's evidence was helpful, he is not considered to be truly independent and the Tribunal is reluctant to accept his evidence as that of an expert witness.

Considerations of the Tribunal

19. As a general point, the Tribunal is critical of both sides. Mr Changizi, although not a lawyer and with a tenuous grasp of legal principles, was adamant that he knew all aspects of the relevant law and was unwilling or unable to accept or even consider any views which were contrary to his own, as evidenced by his own difficult relationship with his independent surveyor and his statement on the second day of the hearing that whatever the outcome, he was not going to pay his arrears and would go to court if necessary. The Respondent is run by a small group of people who, whilst maintaining that all their decisions were made for the good of the subject property as a whole, nevertheless made all the decisions themselves. Whilst they were, of course, entitled to do so, and exercised great care in making such decisions, these decisions affected a great many people financially. The Tribunal was directed on several occasions to extracts from the lease which indicated that the Respondent could make decisions in their discretion and if it was desirable but, as was explained, this was subject to the Tribunal's remit to determine whether such decisions translated into costs being reasonably incurred, a concept which certain members of the Board may have found hard to accept. In the view of this Tribunal the Respondent has adopted a somewhat cavalier attitude. The Respondent does not have an unfettered discretion to adopt the highest conceivable standard and to charge the tenants with it, although the tenants cannot insist on the lowest conceivable standard. In all of these matters, it is a balancing exercise.

20. The attitude of both sides patently made any compromise between the parties difficult. In making its determinations, the Tribunal has taken into account that the Respondent is a tenant led organisation with no funds of its own.

Evidence

21. The salient parts of the evidence and the Tribunal's determination are given under each head.

Consultation under S20

22. The challenge in this connection by Mr Changizi related to several of the issues in dispute, further details of which are given under each relevant head, but in general terms he said that unless the full consultation procedures were carried out, *"the landlord was not entitled to recover service charges above the statutory minimum of £250 per annum...for works carried out"*. Since Mr Changizi was disputing the notices, he maintained that he was liable to pay only £250 in respect of all service charge items (including major works) for each of the years 2006 and 2007.

23. There is no prescribed form for the Notices and Mr Changizi is wrong in law in maintaining that if the notices were invalid, he was liable for £250 only per annum (for all service charges).

24. Regulation 7(4) of the Service Charges (Consultation Requirements) (England) Regulations 2003 sets out the qualifying works for which public notice is not required and in order to assist the parties, these can be summarised as follows:-

Notice of intention

A notice of the landlord's intention to carry out qualifying works (ie works on a building or any other premises) must be sent to each leaseholder and to any recognised tenants' association (RTA)(if any). This notice must, inter alia,

- (a) Describe in general terms the works proposed to be carried out or specify a place and hours where the proposals can be inspected;
- (b) State the landlord's reasons for considering it necessary to carry out the proposed works;
- (c) Invite observations in writing;
- (d) Specify:
 - The address to which such observations must be sent;
 - The date on which the consultation period ends (30 days);
 - Nominate a person from whom the landlord should try to obtain an estimate for carrying out the works (again within 30 days).

The place and hours for inspection must be reasonable and a description of the relevant matters must be available for inspection free of charge. If copies cannot be made on inspection, the landlord must provide a copy, on request by the tenant, and again free of charge.

Where observations are made within 30 days, the landlord must have regard to them.

Obtaining estimates

At least two estimates must be obtained and where a contractor is nominated by the leaseholders, the regulations provide that if only one leaseholder nominates a contractor, the landlord must try and obtain an estimate from that contractor. There are further provisions where nominations are made by more than one leaseholder.

Following the receipt of tenders, a further notice must be sent.

Notification of the estimates

This notice must be sent to each leaseholder and the RTA (if any).

It must include a statement containing:-

- (i) for at least two of the estimates, the amount specified in the estimate as the estimated cost of the proposed works (one of which must be from a contractor wholly unconnected with the landlord. In addition, one of them must be from a nominated contractor, if an estimate was obtained);
- (ii) where leaseholders have made observations by the due date, the landlord must provide a summary of them and his responses to them;
- (iii) specify a (reasonable) place and hours at which all the estimates may be inspected;
- (iv) invite observations in writing regarding the estimates;
- (v) give the address and the date by which (30 days) observations must be sent;
- (vi) state that they must be delivered by the due date;
- (vii) if facilities to provide copy of the documents referred to in 3(i) are not available at the place specified, then copies must be provided free on request.

The landlord must have regard to any observations received by the due date.

Award of contract

Notification of the award of contract

This notice is not required if a tender from a nominated contractor or the lower tender is accepted. Otherwise within 21 days the landlord must send a notice to each leaseholder and the RTA (if any) –

(a) Stating the reasons for awarding the contract, or giving the place and hours where those reasons may be inspected, and

(b) Giving a summary of leaseholders' observations on the estimates and the responses to them at a place and on hours where they may be inspected.

Coal bunker removal and reinstatement of paved area

25. This work was carried out in November 2006 and the cost placed to the service charge account was £44,986 inclusive of VAT.

26. Mr Changizi considered that the coal bunkers were *"the original, permanent and integral part of the structure of Coleherne Court.....looking from the windows they look like Russian space stations of Siberia and is extra-ordinary sight and pleasing. It shows the antiquity, gravity and prestige of the whole apartment complex. As the original and permanent part of the structure in common ownership of the leaseholders and freeholders, every millimetre square of it belongs to all leaseholders and is indivisible.....this work was unnecessary, non-qualifying (is not maintenance, repair or upkeep) non beneficial to residents and above all illegal"*. In his view, demolition could only have taken place with the formal written consent of every tenant. He wanted the moneys returned and the coal bunker reinstated. With regard to cost, this was too high. He had asked an independent contractor working in the vicinity of the subject property to price the work and he had received a quotation (supplied to the Tribunal) for £9,876.69. There had been no compliance with S20 consultation procedures.

27. Mr I Long BSc MRICS of William Martin & Partners LLP gave evidence for the Respondent. He said that his firm had been instructed in January 2006 to provide a specification for the removal of the coal bunker and repair of the surrounding concrete wearing surface located in the courtyard of Blocks A and B. This courtyard was accessible only from a basement level door via the services corridor and staircase to the common parts. Mr Long described the coal bunker as *"a semi subterranean concrete and steel structure positioned centrally within the courtyard"* and its condition as *"derelict with the perimeter walls leaning, suffering cracking and with the steel structure corroding. The surrounding concrete wearing surface was badly cracked, undulating and was hollow when walked upon and tap tested. A number of areas of wearing surface had plant growth through it. Several areas of concrete wearing surface could be lifted by hand revealing poorly made up ground beneath"*. Since the Respondent had a duty to provide a safe environment for their staff and window repair and redecorations would necessitate the use of a tower or scaffolding, this consideration, together with the bunkers poor state of repair led to the recommendation that the coal bunker be demolished and a new wearing course be laid.

28. The Respondent had obtained quotations on a specification drawn up by William Martin & Partners, but the costs had exceeded the original budget due to the need to manually handle all materials into and out of the courtyard area as mechanical means

would need to either pass through occupied apartments or require closures for cranes to lift materials over the roof tops. The Respondent therefore obtained two further quotations. Mr Long's firm had provided assistance on the specification and works required to be carried out but the Respondent had instructed DJF Contractors to carry out the work and managed the project itself through to completion.

29. Mr Bass confirmed that the bunker had been in a dangerous condition. He said that there was a gap between the drain covers. The concrete "*bounced*" and would not have stood the weight of scaffolding.

30. Mr Corbett said that the coal bunkers had been a matter of concern for some time.

31. The Tribunal inspected a similar bunker, together with an inspection of the completed works in the courtyard of Blocks A and B and photographs of the bunker which had been removed.

32. In the view of the Tribunal, Mr Changizi's arguments are without merit. The Tribunal cannot agree with Mr Changizi's view that the bunker was a thing of beauty. Mr Long has persuaded the Tribunal that it was reasonable to demolish the bunker on grounds of safety. Mr Changizi is wrong in law that the bunker belongs equally to all the tenants and written consent would be required from each and every tenant in order to demolish the same. As to the quotation provided by the Applicant in the sum of £9,876.69 from Ahmed AL-Rashed Building Contractor, this is undated and it appears that he is not VAT registered. The quotation was not based on the specification issued to the other contractors, and is therefore not on a like for like basis. The quotation makes no mention of the cost of associated works. The Tribunal accepts that the cost would be greater since the materials would have to be taken through the building. Mr Beany said that "*quantities of rubble*" were removed. From its inspection, the Tribunal accepts that this must have been the case.

33. With regard to Mr Changizi's challenge in respect of the consultation process, the Tribunal notes that since the statutory threshold per unit has not been breached, there was no need for S20 Notices to be served in any event.

34. The Tribunal determines that the cost of £44,986 inclusive of VAT in respect of coal bunker removal and reinstatement of paved area is relevant and reasonably incurred and properly chargeable to the service charge account.

Installation of fire detection and alarm system to common parts

35. This work was carried out on all eleven blocks between May 2006 to January 2007 and the cost placed to the service charge account was £145,676.00.

36. Mr Changizi said that there had been no fire alarm system at the subject property before, and as such was non qualifying work within the Act. It was not repair, maintenance or upkeep of the building, but an addition to it and not chargeable to the

tenants. The system was for the benefit of employees of Coleherne Court and "*no employees worked in the corridors*". There was no benefit to any of the flat owners. It was not necessary. The system was overpriced and could have been carried out for £10 per unit. He had obtained an alternative quotation from EMS Radio Fire & Security Systems Ltd. dated 27 April 2007 for supply of the equipment and radio integrity testing only in the sum of £11,308.29 plus VAT. The total cost, including installation and supply, should not be more than approximately £35,000.00 for battery operated units, including fixing, based on one man working for two days. The cost was unreasonably incurred. Mr Changizi also said that proper consultation notices had not been served since it was not explained why the works were deemed necessary, and therefore the Respondent was limited to £250.

37. The Respondent said that it had a duty to safeguard employees from fire which became mandatory in October 2006. The Respondent's health and safety consultants, the Health and Safety People had advised the Board to install a fire detection system since 2003. In 2005 the Respondent invited a member of the Institution of Fire Engineers to compile an independent fire risk assessment. The Respondent said that any system would need to be monitored centrally and therefore a choice had to be made between hard wired and radio controlled installations. The radio controlled wire free system would be cheaper, take less time to install, with aerials and minimum wiring concealed in loft spaces and lightwells. After S20 consultation, the contract was awarded in May 2006 to Starcrest Engineering Ltd who were not the lowest bidder, but who were preferred on the basis of their experience. The system was further modified as a result of the contractors' findings and recommendations.

38. The quotation from EMS Radio Fire & Security Systems Ltd. was for the supply of the equipment and radio integrity testing only. This quotation stated that it did not include installation, commissioning or certification of the new system and "*as an approximate rule of thumb, a 20-25% uplift on the quotation provided should give an approximate budgetary figure for the installation*".

39. Whilst Mr Changizi's challenge as to the S20 consultation procedure has some merit, this is a situation where there was no previous fire alarm system in the common parts. The first S20 Notice dated 31 January 2006 refers to "*the installation of a fire detection and alarm system*". In the view of the Tribunal, the necessity of such installation speaks for itself. A fire risk assessment was carried out much earlier, on 28 February 2003, when the Respondent was advised to initiate a fire alarm system immediately. It is no argument that since there was no fire detection and alarm system in the blocks previously, there was no need for such a system now. The Respondent is entitled to take into account existing and imminent regulatory requirements which relate to health and safety. Under Clause 11.1(b) of the lease (which relates to works and services towards which the Applicant must contribute), there is specific reference to "**....provisionof, and compliance with codes of practice and the requirements of statutes and regulations affecting....fire alarm systems....**". It is noted from the second S 20 Notice dated 5 April 2006 that no written replies were received concerning the works.

40. In making its determination, the Tribunal has taken into account that the Respondent is a tenant led company with no funds of its own.

41. The Tribunal determines that the sum of £145,676 in respect of the installation of the fire detection and alarm system to the common parts is relevant and reasonably incurred and properly chargeable to the service charge account.

Block H front elevation refurbishment project

42. The figure in the 2007 budget is £265,000.00

43. Mr Changizi said that the works were unnecessary. The roof did not need recovering and the elevation did not need cleaning. S20 consultation procedures had not been complied with. Mr Changizi had obtained an independent survey report from David Booth, Chartered Surveyors, dated 3 May 2007.

44. Although Mr Shannon agreed that on a cursory inspection at the elevations from ground level Mr Changizi may have thought that the elevation did not need cleaning, from his analysis of the priced specification, it indicated that the majority of the cost related to works at high level where the elements are more exposed and deterioration more prevalent.

45. Mr Long in his witness statement of 21 June 2006 said that he had been asked to provide a budget estimate for repair works to Block H elevation and roof repairs in July 2006, and in September 2006 prepared a specification for the works to be tendered. Mr Long described the works to be carried out which included, but were not limited to, slate re-roofing, timber repairs and lead covering to the flat roof areas, re-fixing of lead flashings, repairs and redecoration to timber double hung sash windows, repairs to balcony structures external repairs and cleaning to the brickwork and brick facing repairs. A tender report was issued in October 2006. Mr Long had met Mr Changizi in February 2007. It had been intended that Mr Changizi would inspect the roof, but in the event, he had declined to do so stating it would be too difficult for him to climb up and access the loft hatch. Mr Long said *"it was clear that Mr Changizi had misunderstood the nature of the work proposed"* Mr Changizi had nominated an alternative contractor, DR Limerick, and the nominated contractor was asked to tender which in the event was higher than that chosen, Minerva Building Restoration Ltd.

46. As stated above, two members of the Tribunal, both Surveyors, had inspected the roof and were of the opinion that it was in poor condition. Mr Changizi had been invited to inspect the roof both before the Tribunal inspected and also at the time of the Tribunal's inspection. He did not do so. The specification and tender quotation has been considered.

47. Mr Changizi's Surveyor's report of 3 May 2007 is clear. In the conclusion, Mr Booth states *"there are some urgent repairs need to the roof and to effect these repairs safely, scaffolding will have to be provided. Since scaffolding is the major proportion of cost for works to the roof, it is thought more economic in the long run that the roofs be re-covered"*

as per the published specification". Mr Changizi was unhappy with Mr Booth's report and wrote to him on 9 May 2007 stating "I write to emphasise that my instruction to you, regarding the above, was to inspect the state of the roof and report to me saying if the roof is repairable....." Mr Booth's replied in a letter dated 1 June 2007 which stated "as mentioned in my report the roof is repairable. However, assessing the practicalities of whether to repair or replace the roof, all aspects of the situation should obviously be considered. This would include the method and cost of access for repair work which would be an ongoing requirement on a year by year basis" The response from Mr Changizi was in a letter dated 3 June 2007 when he accused Mr Booth of "showing favour to my adversaries in the hope of getting more jobs from them".

48. The Tribunal is of the view that the works to Block H were necessary and indeed this view is supported by Mr Changizi's own independent surveyor. The Tribunal has also considered the priced specifications which are within an acceptable band.

49. With regard to the S20 Notices, the first, dated 6 February 2007, refers to the works as *"part of the on-going refurbishment to the fabric of the buildings on the estate...".* The Tribunal was advised that this was part of a 10 year plan to refurbish a once tired building which had been described as being in *"a serious state of repair"*. Mr Long said that the plan was deemed important *"to provide evidence to the occupiers/owners of the apartments forming the Estate of the extensive repairs required to maintain it.....I believe the Estate Office has provided the 10 year plan to the main board and owners/occupiers alike to provide confirmation of the anticipated capital works expenditure and to provide a budgeting mechanism that is transparent to all parties in line with good estate management"*. Since the works were part of a 10 year refurbishment programme, the Tribunal, in this case considers that the necessity for the works is made out in the S20 consultation procedure.

50. Again the Tribunal has taken into account that this is a tenant led company with no funds of its own.

51. The Tribunal determines that the cost of £265,000 as set out in the 2007 budget if incurred in respect of the Block H front elevation refurbishment project would be relevant and reasonably incurred and properly chargeable to the service charge account.

Sinking fund

52. There is approximately £250,000 in the Reserve Fund. Mr Changizi considered that an appropriate contribution to the Reserve Fund should be no more than £250 per flat per annum.

53. The Tribunal has considered the lease terms. Paragraph 9 of Part II states that the service costs of any accounting period are all the expenditure liabilities and overheads paid or incurred by or on behalf of the lessor, and it states:-

"9.5 The service costs shall also include such sums as the Lessor may require to be contributed to the Reserve Fund"

54. The Reserve Fund is defined in the lease as:

"a fund established by the Lessor in order to meet future capital works expenditure which it expects to incur in maintaining replacing rebuilding or renewing those items which it is obliged or entitled to maintain replace rebuild or renew under the terms of this Underlease"

55. The parties are reminded of the practice guidelines issued by the RICS in the Service Charge Residential Management Code which explains the nature of a reserve fund and states **"The usual method of working out how much money is to go into the fund each year is to take the expected cost of future works and divide it by the number of years which may be expected to pass before it is incurred..."** and **"...one of the purposes of reserves is to facilitate the carrying out of expensive non-annual items of work. Unless money is accumulated collectively there is always the likelihood of work not being carried out due to lack of funds. Even if Leaseholders/Tenants intend to live at a property for a short period of time they can achieve financial benefit on sale by pointing out to purchasers the existence and extent of the reserve fund"**

56. The Respondent was undertaking major works every year under a 10 year plan. From the accounts it appeared that the Respondent had made every effort to calculate the future costs of major works, albeit that annual provision allows for substantial reserves over and above the annual need.

57. The Applicant gives no reason why he considers the contribution should be £250 per annum. This figure bears no relation to the annual demand for future contributions to major works. The Applicant's contention is rejected by the Tribunal

Staff costs

58. The amounts placed to the service charge under this head are £322,000 for the service charge year 2006 and the budget figure for 2007 increases this sum by approximately 13%.

59. Mr Changizi said that the subject property was similar to many others in London and required only one administrator and two porters, which would cost £60,000 to £70,000. He said *"your claim in your 2006 annual account staff cost of £415,661 and that of budgeted for 2007 a colossal £463,498 an increase of 11.5% is not reasonable, justifiable or necessary"*

60. Mr Corbett said that the Respondent did not understand how Mr Changizi's figures for staff costs were reached. The total staff costs for 2006 were £322,000. There were 10 full time and one half time employee in 2006. There is no part time employee at present. The

average salary cost per employee was £25,000 plus 10% pension contributions plus 12.8% National Insurance contributions. He thought that Mr Changizi's estimate that only one administrator and two porters were required as *"totally unrealistic and believe our current staffing levels fall properly within the discretion of the board as provided in Mr Changizi's lease"* The maintenance staff carry out all day to day maintenance, particularly window repair and replacement. Porterage and security was complex. The 2007 budget envisaged an increase of about 13% to reflect new, and additional, porterage arrangements and a further addition to the in house maintenance team.

61. Mr Colvin, a tenant since 1973 and an estate agent, confirmed that *"in every case"* previous managing agents had proved unsatisfactory. He had researched the market for comparable service charges on similar blocks in the same borough and had deduced that *"the majority were very much in line with our own"*.

62. This issue was the subject of considerable discussion both at the Hearing and between members of the Tribunal thereafter. The Tribunal has some sympathy with Mr Changizi's challenge under this head. Although the average salary is within an acceptable band, in the view of the Tribunal, the number of staff is high. Mrs Innis accepted that the service provided was *"almost"* a Rolls Royce standard. It is not enough for Mr Corbett to say that staffing levels fall within the discretion of the Board. The question for the Tribunal is whether such costs were reasonably incurred.

63. Having taken into account the cost per unit, the Tribunal determines that for the level of service provided, the staff costs in the sum of £322,000 for the service charge year 2006 are relevant and reasonably incurred and properly chargeable to the service charge account, but it should be carefully noted that the Tribunal has been influenced by the fact that the Respondent company is formed of the tenants themselves and this has persuaded the members of the Tribunal, with reservations, that the costs have not been unreasonably incurred. However, it is also noted that the 2007 budget envisages an increase of about 13% to reflect provision made for an additional porter and an additional member of the in house maintenance team. This Tribunal wishes to make it clear that although it has determined that staff costs to date have not been unreasonably incurred, the cost of additional staff proposed would, in the view of this Tribunal, not be supportable. Although this Tribunal cannot bind another Tribunal, it is of the view that any such proposed additional staff costs would not be reasonably incurred. If the Respondent proceeds with this plan, this Tribunal considers that there would be a real risk that such costs might be successfully challenged.

Limitation of landlord's costs of proceedings under Section 20C of the Act

64. Mr Corbett said that the amount which was to be placed on the service charge account was £27,920.79 as shown on a spreadsheet provided to the Tribunal. The amounts shown on that spreadsheet were the costs incurred up to 27 June 2007, together with estimated amounts as at 25 July 2007 being the last day of the hearing. Some invoices were produced, at the request of the Tribunal, subsequent to the hearing.

65. As stated above, Mr Changizi did not attend the third day of the hearing, and was therefore asked to send written submissions to the Tribunal on the application under S20C and also the Respondent's application for penal costs. By a letter dated 23 July 2007, Mr Changizi said:

"In my applicationunder "Limitation of Costs" where it says "do you wish to make a S20C application" I ticked the box "YES" after reading the guidance note underneath it. I thought this was enough and would be taken by the tribunal as my S20C application and presumed tribunal would make an order preventing the Landlord from taking this/or any step to recover costs incurred in connection with the proceedings before the LVT as part of the service chargein the first place I presumed from...the application, at the time of application, that I have the right not to incur (sic) cost and that the Landlord cannot claim cost against me. In the 2nd place I had examined carefully the reasons and the documents that I could produce in claiming excessive service charges by the landlord and I believe I am right in my claim and Landlord is wrong in his defence".

66. In oral submissions, Mr Corbett said that it had caused great distress that there was no mechanism to discuss Mr Changizi's concerns. The Respondent had always discussed concerns with tenants but because of Mr Changizi's defamatory comments, it had been necessary to instruct solicitors. Mr Changizi had no desire for a solution.

67. S20C of the Act states:

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

(2) The application shall be made;

- (a) in the case of court proceedings, to the court before the proceedings are taking place or, if the application is made after the proceedings are concluded, to a county court;**
- (b) in the case of proceedings before a leasehold valuation tribunal, to the tribunal before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to any leasehold valuation tribunal;**
- (c) in the case of proceedings before the Lands Tribunal, to the tribunal.**
- (d) in the case of arbitration proceedings, to the arbitral tribunal or, if the application is made after the proceedings are concluded, to a county court.**

(3) The court or tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances."

68. In applications of this nature, the Tribunal endeavours to view the matter as a whole including, but not limited to, the degree of success, the conduct of the parties and as to whether, in the Tribunal's opinion, resolution could or might have been possible with goodwill on both sides.

69. In the judgement of His Honour Judge Rich in a Lands Tribunal Decision dated 5 March 2001 (**The Tenants of Langford Court v Doren**), it was stated, inter alia, *"where, as in the case of the LVT, there is no power to award costs, there is no automatic expectation of an order under Section 20C in favour of a successful tenant, although a landlord who has behaved improperly or unreasonably cannot normally expect to recover his costs of defending such conduct. In my judgement the primary consideration that the LVT should keep in mind is that the power to make an order under Section 20C should be used only in order to ensure that the right to claim costs as part of the service charge is not to be used in circumstances that makes its use unjust"*.

70. Under new legislation, there is now a limited power for the Tribunal to order costs, but Judge Rich's comments are still valid.

71. In accordance with Section 20C(3), the applicable principle is to be the consideration of what is just and equitable in the circumstances. Of course, excessive costs unreasonably incurred would not be recoverable by the landlord in any event (because of Section 19 of the 1985 Act) so the Section 20C power should be used only to avoid the unjust payment of otherwise recoverable costs.

72. In the judgement, Judge Rich indicated an extra restrictive factor as follows:-

"Oppressive and, even more, unreasonable behaviour however is not found solely amongst landlords. Section 20C is a power to deprive a landlord of a property right. If the landlord has abused his rights or used them oppressively that is a salutary power, which may be used with justice and equity, but those entrusted with the discretion given by Section 20C should be cautious to ensure that it is not itself turned into an instrument of oppression"

73. The relevant clause in the lease is Clause 9.1(i) which states that the service costs of any accounting period are all the expenditure liabilities and overheads paid or incurred by or on behalf of the Respondent relating to, inter alia,:-

"the cost of employing or engaging solicitors, counsel and other professional persons in connection with dealings with the freeholders the management of the Building and the administration and collection of the Ground Rent and Service Charge Percentage payable by the Lessee and by the other tenants in the Building and third party costs awarded by any court or arbitrator or which the Lessor is advised to pay on advise (sic) of counsel or solicitors"

74. The clause is wide enough to cover the costs referred to. The question for the Tribunal is whether it is just and equitable to do so.

75. Mr Changizi has not been successful in his application and, in some respects, appears to have adopted a confrontational approach. From the correspondence supplied, it appears that the Respondent had endeavoured to address Mr Changizi's concerns.

76. A letter from the Respondent's solicitors, Russell-Cooke, to the Applicant dated 30 January 2007 sought to clarify the position with regard to works. This letter stated "*while we consider your concerns have been fully addressed, to answer any further enquiries you may have and for the purpose of resolving this matter we confirm our client would be prepared to meet with you to fully explain the situation. Our client would invite you to bring a representative to the meeting (we would suggest preferably a representative who understands the nature of leasehold interests and leasehold rules and regulations). If you do not wish to attend such a meeting, we would urge you to seek independent legal advice before continuing to resist payment*". Mr Changizi wrote back to the Respondent's solicitors on 3 February 2007. This letter referred to suspicions of misappropriation of funds, suspicions of corruption and illegal works. Mr Changizi ends this letter by stating "*for your and your clients information, I have owned before and I own at present several freehold and leasehold properties in London. I have promoted building projects for 40 years. I know the law*". As indicated above, the Tribunal considers that Mr Changizi's knowledge of the law is scant. A letter from Mr Black, the chairman of the Respondent company to the Applicant dated 2 March 2007, although complaining about the Applicant's "*provocative language*" states "*despite this unfortunate start it remains the wish of the Board to welcome you into the harmonious relationship which characterises the community of Coleherne Court. We suggest a meeting to resolve any differences or misunderstandings which might hinder the establishment of such a relationship and which would end the present disruption to the smooth running of the Estate*". It does not appear that any meeting took place.

77. From the invoices supplied it appears that certainly part of the costs are in respect of matters relating to the dispute with Mr Changizi only (and not the other tenants). The Tribunal considers that those costs should therefore be borne solely by Mr Changizi and should not be a burden on the service charge. As was explained at the hearing, the Tribunal is only able to deal with service charge items.

78. As to the invoices produced, the Tribunal is critical in some respects. The invoices from the Respondent's solicitors who dealt with contentious matters on its behalf have little information, and what is produced is meagre. There is no evidence that a further £2,937.50 (presumably including VAT) has been incurred in the one month since their invoice for fees up to 27 June 2007. From a perusal of the invoices which were supplied, some matters were, in the opinion, of this Tribunal, directly relating to the dispute with Mr Changizi, rather than a general service charge matter, which should therefore not be placed on the service charge account as a burden to the other tenants. If the Respondent wishes and is able to do so, then it must pursue Mr Changizi directly for payment. Whilst the Respondent was entitled to instruct Mr Shannon, his fees are high (particularly when

compared with the fees of Mr Long), and an hourly rate of £150 per hour plus VAT only is considered reasonably incurred. The number of hours claimed, namely 21, is also considered high, but this is allowed providing it includes Mr Shannon's attendance at the hearing. On the other hand, Mr Long's hourly rate is considered acceptable as are the number of hours worked. His fees for the work carried out including the fees for the attendance at the hearing are allowed in full. There is no explanation of why there is so much reliance on couriers – documents could surely be faxed, posted or emailed? Similarly, there is no explanation as to why taxi fares "to and from lawyers" in the sum of £236 were necessary.

79. It may be that the Respondent would wish to pursue the Applicant for the costs in their entirety. That is a decision for the Respondent and those advising the Respondent. However, in respect of the S20C application before the Tribunal, and using a broad brush approach, the Tribunal determines that it is just and equitable that the costs incurred by the Respondent in connection with proceedings before this Tribunal are to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable, but limited to the sum of £10,000 plus VAT.

Penal costs

80. In support of the Respondent's application for penal costs, Mr Corbett produced two decisions of the Leasehold Valuation Tribunal dated 8 May 2005 and 15 September 2005 which, he suggested, supported a pattern of unacceptable behaviour on the part of Mr Changizi. He said Mr Changizi had brought the case but wished to make up his own rules and procedures. He had not brought an expert witness and had thrown the Respondent's evidence back at them, "*peppering his submissions with untrue statements*". The Respondent had had to undertake an immense amount of work and instruct an expert and seek good legal advice. Mr Corbett said that Mr Changizi had been vexatious because he had refused to engage in any rational debate or discussion, there had been an abuse of process since Mr Changizi had not acted responsibly and Mr Changizi had been disruptive in submitting papers very late in the day.

81. The Applicant had made no specific reference to penal costs save that in a statement dated 11 July 2007 he says that the Respondent "*in order to excite 41 leaseholders present against the Applicant and seek support, told them the applicant's application to the tribunal would cost the leaseholders £30,000. But.....he asks the tribunal to order for a maximum of £500 towards the cost from applicant, which I deny. The tribunal can clearly see that £500 is 1/60th of the £30,000, which is a relatively insignificant amount, and indicates only that Respondent was misleading the audience at AGM, and over-exaggerating costs incurred. These are some of the tactics being resorted to by the people running Coleherne Court*"

82. Schedule 12 paragraph 10 of the Commonhold and Leasehold Reform Act 2002 provides:-

- (1) A leasehold valuation tribunal may determine that a party to proceedings shall pay the costs incurred by another party in connection with the proceedings in any circumstances falling within sub-paragraph (2).**
- (2) The circumstances are where-**
 - (a) he has made an application to the leasehold valuation tribunal which is dismissed in accordance with regulations made by virtue of paragraph 7, or**
 - (b) he has, in the opinion of the leasehold valuation tribunal, acted frivolously, vexatiously, abusively, disruptively or otherwise unreasonably in connection with the proceedings.**
- (3) The amount which a party to proceedings may be ordered to pay in the proceedings by a determination under this paragraph shall not exceed-**
 - (a) £500, or**
 - (b) such other amount as may be specified in procedure regulations.**
- (4) A person shall not be required to pay costs incurred by another person in connection with proceedings before a leasehold valuation tribunal except by a determination under this paragraph or in accordance with provision made by any enactment other than this paragraph.**

83. The power to order penal costs is a draconian measure and should be exercised with reluctance.

84. The Tribunal considered the two LVT cases produced on behalf of the Respondent dated May and September 2005. In the first case, which was a service charge dispute, Mr Changizi was the Respondent landlord but he did not appear and was not represented. As in the present case, his explanation was that he was in Spain attending to other business (although the hearing date had been fixed four months earlier). In the second case, which was an enfranchisement case, Mr Changizi was due to appear to represent the Third Respondent, Mr Ghjeeve Changizi, but neither he nor the Third Respondent appeared.

85. In the case before this Tribunal, although Mr Changizi was the Applicant, it was noted that he did not remain at the Tribunal's inspection, and neither did he remain until the conclusion of the hearing. Mr Changizi said that he was due to appear in court in Spain, but it is clear from paragraph 7 of the Directions of the Leasehold Valuation Tribunal dated 17 April 2007 that the hearing was expected to last three days (as indeed it did). There is no letter on the file from Mr Changizi stating that he would not be able to attend for the full hearing. Although it is correct that the Clerk to the Tribunal wrote to the parties in order to canvass the possibility that the hearing would last only two days, and Mr Changizi, in a letter to the Tribunal dated 11 July 2007, indicated that this would be acceptable to him, he did not mention that he would not be able to attend on 25 July 2007 due to a court hearing in Spain or indeed for any other reason. By the 11 July 2007, Mr Changizi must have known that he was due in court in Spain on 25 July 2007.

86.The Tribunal concludes that there is a pattern of Mr Changizi either not appearing at hearings at all or, as in this case, not appearing for the full time allocated. In either case, the Tribunal considers this to be less than helpful and shows a lack of respect to his opponents and the Tribunal. This case was brought by Mr Changizi and he should be expected to see it through. From his arguments as stated above, he has clearly confused his application under S20C and the application for penal costs by the Respondent.

87.However, in view of the fact that the Clerk to the Tribunal did write to the parties in order to canvass the possibility that the hearing would last only two days, it is possible that there may have been some confusion in the mind of Mr Changizi as to whether the hearing would last two or three days and, on this basis, the Tribunal declines to make an order that the Applicant acted "**frivously, vexatiously, abusively, disruptively or otherwise unreasonably in connection with the proceedings**" under Schedule 12 paragraph 10 clause 2(b) above.

The Tribunal's determinations as to service charges are binding on the parties and may be enforced through the County Courts if service charges determined as payable remain unpaid.

CHAIRMAN..........

DATE..... 3 September 2007