**SOUTHERN RENT ASSESSMENT PANEL**

**LEASEHOLD VALUATION TRIBUNAL**

Case Numbers CHI/15UG/LIS/2008/0116 and CHI/15UG/LDC/2008/0016

In the matter of Section 27A and of section 20 ZA of the Landlord & Tenant Act 1985 (as amended ("the Act")

**and**

In the matter of Chymedden, Trebarwith Crescent, Newquay, Cornwall

**Between:**

Mr B Tait and others "the residents"

**and**

Osprey Management Co Limited "Osprey"

Mr K Platt and Mr G Hanks for the residents

Mr T Osborne FRICS for Osprey

**Reasons for decision**

**Hearing**: 11 and 12 August 2008

**Date of Issue:** 15th September 2008

**Tribunal:** Mr R P Long LLB (Chairman)
Mr R Batho FRICS
Mr A J Lumby FRICS

Cases referred to:

*Eltham Properties Limited v Kenny and others [LRX/161/2006]*

*Finchbourne v Rodrigues [1976] 3 AER 581 CA*

*London Borough of Camden v The Leaseholders of 37 Flats at 30-40 Grafton Way [LRX/185/2006]*

*Warrior Quay Management Company Limited and another v Joachim and others [LRX/42/2006].*

**Applications**

1. There were applications before the Tribunal made both made by Mr Tait on behalf of New Chymedden Residents' Association ("NCRA") and by made The Osprey Management Company Limited ("Osprey").

2. Those made by Mr Tait on behalf of NCRA were:

    a. to determine service charges pursuant to section 27A of the Landlord & Tenant Act 1985 (as amended) ("the Act") in respect of the years 2005-2006, 2006-2007, 2007-2008 and for subsequent years to 2011, and
    b. for an Order in pursuant to section 20C of the Act in respect of the landlord's costs of that application.

3. Those made by Osprey were for dispensations pursuant to section 20ZA of the Act in respect of:

    a. the renewal of the lift contract,
    b. works to repair the lifts, and
    c. the works of redecoration and of repair to the balconies carried out in 2007.

**Decisions**

4. If there is any inconsistency between anything in this summary and that in the body of the reasons appearing below then the position set out in the body of the reasons is to have precedence. The Tribunal has been unable to grant Osprey's application for dispensation from the provisions of section 20 of the Act for the reasons set out in paragraphs 64-83 of this note. Accordingly the limitations contained in section 20 to the amounts recoverable in respect of the lift maintenance contract, the lift repair or upgrade work and the exterior decorating work and to the exterior woodwork apply. However, the Tribunal concluded for the reasons set out in paragraph 57 that it must properly regard the contracts with St Piran for the decorations and with Mr Hirst for the carpentry work as two separate contracts.

5. As the Tribunal indicated at the hearing, it is unable to make an order for repayment, as the residents asked, of anything they may have overpaid. It has instead determined the amounts payable by each class of flat in the relevant years for the items in dispute so that they may be factored into the accounts for the relevant years to establish the amount of any credit that maybe due to any flat in accordance with the service charge scheme that the leases contain. Those figures are summarised at paragraph 83 at the end of this decision. Mr Osborne assured the residents and the Tribunal at the hearing that Osprey will not look to them for any of its costs in the matter so that it was not necessary for the Tribunal to deal with the application under section 20C of the Act, made by Mr Tait and amplified by Mr Hanks, at this juncture.

**Reasons**

Inspection

6. The Tribunal inspected Chymedden before the hearing on 11th August 2008 in the presence of Mr Edwards on behalf of NCRA, of Mr Osborne and Miss Hands on behalf of Osprey and of Ms Restall the House Manager. It saw a purpose-built block of thirty flats and a warden's flat, all of which it understands were erected in or about 1985, that overlooks Newquay Bay. The building appeared to be of brick and rendered blockwork under a tiled roof. Internally the Tribunal was shown the laundry room containing two washing machines and two dryers that were operated by use of tokens, and the two Otis passenger lifts, each of which serves the whole of Chymedden. It was also shown by way of example the interior of the balconies of flats 15 and 16. Externally the Tribunal's attention was directed to the condition of the external decorations and of the balconies. The external condition is detailed in a joint report ("the Report") dated 31st July 2008 agreed between Mr T G Morehen BSc MRICS and Mr S M Tucker Dip Bld Cons MRICS acting respectively on behalf of NCRA and of Osprey that was before the Tribunal and whose content it accepted, and so is not further described here.

The Leases

7. There was before the Tribunal a copy of a lease dated 31st July 1987 made between Speyhawk Retirement Homes Limited (1) Joyce Gladstone Symons (2) and Osprey (3). The Tribunal understood that for all purposes material to the matters before it this document reflected the terms of the leases of the flats at Chymedden. Clause 2(20) of the lease requires the tenant to pay sums payable pursuant to the provisions of the Fourth Schedule. That schedule sets out the service charge regime, which consists of a liability to pay by quarterly instalments in advance a sum estimated to be the expenses of providing the services described in the Sixth Schedule. There is provision for the collection of any shortfall or for any excess payment to be credited, as the case may be, once an annual account is prepared following 30th September in each year.

8. For the purposes of the matters presently before the Tribunal it suffices to record that those services include the cost of maintenance of the lifts, of exterior decoration and of providing other services for the general benefit of Chymedden or of its occupiers in terms that appear sufficiently wide to embrace the provision of the laundry room and laundry equipment. Despite the fact that the Lease is unclear as to liability for maintenance of the balcony woodwork, the parties were agreed at the hearing that that cost is properly to be included in the service charge. The Tribunal mentions that it would have had no jurisdiction to rule upon the interpretation of the lease in this respect except for the purposes of the proceedings before it, and if the parties at any time require a formal determination upon the matter the appropriate forum will be the County Court.

The Law

9. The statutory provisions primarily relevant to applications of this nature are to be found in section 18, 19, 20, 20ZA and 27A of the Act. The Tribunal has of course had regard in making its decision to the whole of the relevant sections as they are set out in the Act, but here sets out what it intends shall be a sufficient extract (or a summary, as the case may be) from each to assist the parties in reading this decision. Sections 18, 19 and 27A relate to service charge applications like that made in this case by NCRA; the relevant provisions of those sections are summarised first below, followed by a summary of the provisions of sections 20 and 20ZA that relate primarily to the application for dispensation made by Osprey.

10. Section 18 provides that the expression "service charge" for these purposes means:

"an amount payable by a tenant of a dwelling as part of or in addition to the rent-

a. which is payable directly or indirectly for services, repairs, maintenance, improvements or insurance or the landlord's costs of management, and
b. the whole or part of which varies or may vary according to relevant costs"

"Relevant costs" are the costs or estimated costs incurred or to be incurred by the landlord in connection with the matters for which the service charge is payable, and the expression "costs" includes overheads.

11. Section 19 provides that:

"Relevant costs shall be taken into account in determining the amount of a service charge payable for a period:

a. only to the extent that they are reasonably incurred, and
b. where they are incurred on the provision of services or the carrying out of works only if the services or works are of a reasonable standard

and the amount payable shall be limited accordingly".

12. Subsections (1) and (2) of section 27A of the Act provide that:

"(1) An application may be made to a Leasehold Valuation Tribunal for a determination whether a service charge is payable and, if it is, as to –

a. the person to whom it is payable
b. the person by whom it is payable,
c. the amount which is payable,
d. the date at or by which it is payable, and
e. the manner in which it is payable.

Subsection (1) applies whether or not any payment has been made."

There are certain exceptions that limit the Tribunal's jurisdiction under section 27A but none of those exceptions has been in issue in any way in this case.

13. To such extent (if at all) as the point is not implicit in the wording of the Act, the Court of Appeal laid down in *Finchbourne v Rodrigues [1976] 3 AER 581* CA that it could not have been intended for the landlord to have an unfettered discretion to adopt the highest possible standards of maintenance for the property in question and to charge the tenant accordingly. Therefore to give business efficacy to the lease there should be implied a term that the costs recoverable as service charges should be fair and reasonable.

14. Section 20 of the Act lays down consultation requirements ("the section 20 requirements") respectively to be followed when either qualifying works are to be carried out, or a qualifying long term agreement is to be entered into, in circumstances where the terms of the lease require a tenant to contribute to their cost by way of service charge payment. Those requirements as they now stand replace a simpler consultation regime originally contained in section 20 of the Act, and came into effect on 31st October 2003.

15. The respective procedures now to be followed are, for the purpose of the matters in dispute in this matter:

    a. as to qualifying long term agreements as set out in Schedule 1 to the Service Charges (Consultation Requirements) (England) Regulations 2003 (SI 2003/1987) ("the Regulations"), and
    b. as to qualifying works as set out in Part 2 of Schedule 4 to the Regulations.

16. Briefly, each procedure requires notice to be given to all the tenants and to any recognised tenants' association where an either a long-term agreement is to be entered into or works are to be carried out, as the case may be, and in respect of which the provisions of section 20 are engaged. The notice is to set out details of the proposed agreement or works and to invite the tenant to propose the name of any person from whom the landlord should seek to obtain an estimate in respect of the relevant matters. When estimates have been obtained, the landlord must provide particulars of them to the tenants and notify them to the tenants and to any recognised tenants' association and must have regard to any observations they may make (individually or collectively) upon them. Unless the landlord accepts an estimate from a person nominated by the tenants or the lowest estimate he must give reasons for the course he intends to take, and summarise them and respond to them, making this document available to the tenants and to any association.

17. The Regulations provide in regulation 4(1) that the section 20 requirements for qualifying long term agreements are engaged when the relevant contribution of any tenant in the (annual) accounting period in question exceeds £100 and

in respect of qualifying works regulation 6 provides that the section 20 requirements are engaged when that contribution exceeds £250.

18. By section 20 ZA of the Act, the Tribunal may dispense with all or any of the consultation requirements in relation to any qualifying works or qualifying long-term agreements if it is satisfied that it is reasonable to dispense with them.

The Issues

19. The residents challenged some only of the components of the service charges for the years the subject of their application, but added some other elements to the matters that they said that they wished the Tribunal to determine. The matters for the Tribunal in its application were therefore:

    a. in the year 2005, the laundry charges
    b. in the year 2006, the laundry charges and the cost of the lift maintenance contract
    c. in the year 2007 the laundry charges, the lift maintenance contract and the cost of certain lift maintenance works together with the cost of external decorations and balcony maintenance work
    d. in the year 2008 the four points mentioned in the preceding sub paragraph above, and a request for ruling from the Tribunal as to the responsibility for balcony maintenance
    e. a request to the Tribunal to determine service charges ahead to the year 2011, and
    f. an application to limit Osprey's costs of the matter in accordance with the provisions of section 20C of the Act

20. Osprey made application to the Tribunal in turn for dispensation from compliance with the section 20 requirements in respect of the lift maintenance agreement, the lift maintenance works and the external decoration and external balcony maintenance works.

Hearing and Determinations

21. It proved more practical at the hearing to deal successively with the issues described above by topic rather than by year. The relevant matters put to the Tribunal concerning, and its decision upon, each of them is set out under the relevant heading below. Many hundreds of pages of documents were provided to the Tribunal in a large number of different bundles ("the papers"), and some very late in the day. Not very many of those documents were referred to at the hearing although more are referred to in the written statements of case. The Tribunal has sought as far as possible to identify documents referred to in this note by the various indexing systems used, but by the numbers of clauses in the lease where that has been more appropriate.

22. Because the Tribunal has, for the reasons given at paragraphs 64-83 below, concluded that it was unable to grant the dispensations from the requirements of section 20 of the Act sought by Osprey, this note deals only briefly with

representations concerning the reasonableness of individual costs where they might otherwise have breached the cap imposed by section 20 of the Act in order to contain somewhat its inevitable length.

23. At the beginning of the hearing, and after drawing attention to the relevant statutory provisions, the Tribunal pointed out that it has no jurisdiction to make repayment orders in the way that the Residents' application had been couched, but was only able to determine what sums were payable in the relevant years so that adjustments might be made in accordance with the terms of the lease. It made the point for two reasons. First, the service charge mechanism in paragraph 4 of Part 1 of the Fourth Schedule to the lease does not make provision for repayment but instead provides for any overpayment to be credited against the next service charge demand. Secondly the statutory scheme of section 27A in the Act does not provide for the Tribunal to have such a jurisdiction, a point confirmed by the Lands Tribunal in *Warrior Quay Management Company Limited and another v Joachim and others [LRX/42/2006]*.

*The Laundry Charges*

24. The factual basis underlying this topic was largely undisputed. Osprey had put in place a rental agreement for the washing machines in the laundry room that had run for some years until 2004. Figures provided by Mr Platt to the Tribunal (page G6 in the papers) that were not disputed before it showed that its cost increased each year by a factor that was not explained to the Tribunal. In the year 2004-05 the cost was £2359. In 2005-06 that cost increased to £2488 and in 2006-07 to £2812.

25. The residents had queried the cost of the maintenance agreements for the laundry at meetings in August 2004 (minute reference OMC/A1), in September 2006 (OMC/A2) and in September 2007 (OMC/A3). In 2007 they had been told that there were still two years of the contract to go and that it would be prohibitively expensive to withdraw then (OMC/A3). They had asked to see a copy of the contract, and when it eventually arrived at around Christmas 2007 it became apparent, as the letter accompanying the copy contract made clear, that the contract had expired in March 2005. Osprey told the residents in a letter dated 17 January 2008 that the contract could now be cancelled on three months notice.

26. The contract was so cancelled, and the residents decided that they would prefer to purchase washing machines rather than to rent them. With the aid of advice from a resident who had professional experience of washing machines Mr Hanks obtained quotations for the supply of two new machines that were installed on 9th May 2008. Their cost was variously stated to have been either £1460 or £1480 and Mr Platt was inclined to accept that the latter figure, advanced by Mr Osborne, was probably correct.

27. In addition to the cost of the washing machine rental the residents had established, at much the same time as they received details of the washing machine hire agreement, that a part of the cost of service charges for the

laundry room arose from a maintenance agreement for the two driers there. The driers were old and had been purchased through the service charge regime. Both they and the new washing machines were described, whether or not with strict accuracy, as "belonging to the residents". Mr Platt had calculated that the cost of the maintenance contract must be £431 per annum, but Mr Osborne said the cost was £245 per annum. Mr Osborne also drew attention to the fact that because the machines are operated with tokens there is a net receipt from them to the service charge account. For the full year to 30 September 2007 this had amounted to £1835, and for the period from March 2005 to April 2008 the amount of the receipts had been approximately £4976.

28. Mr Platt said that despite the residents' requests for details of the cost of operating the laundry rooms Osprey had for a long time appeared unaware that the contract for the hire of the washing machines had expired. It had still budgeted on the basis that the contract was continuing. As recently as September 2007 the residents had been told that it still had two years to run and that it would be prohibitively expensive to withdraw. Had the residents been aware of the true position they could have purchased machines when the contract came to an end in 2005, and Osprey's failure to identify the true position had resulted in a net cost to the residents between April 2005 and April 2008 that he calculated, taking into account the cost of the dryer maintenance contract, to be £5498. That cost had been unreasonably incurred because professional managers such as these should have been aware of the true position and have given the residents the opportunity in April 2005 of taking the steps that they actually took in April 2008 after they had finally become aware of the true position.

29. Mr Platt's calculations took the amount of the service charge for the cost of the laundry room, or the relevant part of it for the portion of the year in question, and deducted from that the amount that he contended the residents would not have had to pay if they had been made aware of the position with regard to the rental and the maintenance contracts. However, he credited the amounts so produced with what was in effect the depreciation that would be suffered by the new washing machines and added back the capital cost of the new machines. His figures which appear at page G6 of the papers are designed to produce the figure for what he said was the effective overpayment in the period rather than the amount of service charge that would have been payable in each of the years that the Tribunal is to determine.

30. Mr Platt said that the residents had arranged fore the cancellation of the dryer maintenance contract as soon as they had become aware of its cost. Had they been told of that cost earlier they would similarly have wished to cancel it earlier. These were old machines, and instead of paying for an expensive maintenance contract the residents should have had the choice of paying for minor repairs but replacing the machines (at a cost of around £650 each) if and when more serious problems developed. As it was, the residents had paid more or less the cost of one machine over the three year period for a maintenance contract that on that basis they did not need, and because the information they had requested had not been provided to them they had been denied a proper opportunity to contain the cost incurred.

31. Mr Osborne replied as to the dryer maintenance agreement that insurance upon which one does not claim always seems expensive. He accepted that the contracts for the washing machines and for maintenance could have been terminated earlier. The new washing machines were domestic in character and he questioned the value of the guarantee that accompanied them. Despite the questions that had been raised no individual resident had questioned the subsequent budgets. The Tribunal should take into account the receipts from the token system. He submitted that the cost of providing the new machines in 2005 would have been greater than it was in 2008 because the cost of white goods had fallen over the period, but had no specific evidence upon the point. He suggested that the point was one of general knowledge. The total amount involved in relation to the laundry was little more than 5% of the total budget annual at Chymedden of around £60000.

32. Mr Osborne said that he did not dispute the calculations, as such but that some other changes needed to be made that would alter them. The residents had deducted the cost of the maintenance agreement for the dryers, at what he said was £245 per annum, and that should not be deducted. He thought the depreciation total should be approximately £933, being taken over a period of three years and one month rather than three and a half years, although he accepted that other adjustments meant that there was in practice no significant difference between the parties on the figures.

33. The evidence before the Tribunal was that the residents had been questioning the high cost of the laundry room since 2004, and had been told that nothing could be done about it. Osprey appear to have realised at the very end of 2007 that the contract for hire of the washing machines had overrun, and properly notified the residents of that fact as soon as they did so. At much the same time it first appears to have divulged the cost of the dryer maintenance agreement.

34. In the Tribunal's judgement it would have been reasonable to expect a professional management company to have provided all of this information shortly after it was first requested. It found as a fact that instead there were three minuted requests for information from 2004 to 2007, and that only the last of the three appears to have elicited any action on the part of Osprey properly to check the situation. That action showed that the hire agreement had overrun, by that time by two and a half years, despite previous assurances that it had yet to expire. It also revealed the cost of the maintenance agreement for the first time so that only then were the residents able to consider its effect.

35. As a result the residents were deprived of the opportunity in respect of the washers to have a less expensive alternative, and in respect of the dryers to request, for the reasons that they gave at the hearing and which the Tribunal concluded were sufficient, effectively themselves to carry the risk of the dryers going wrong. The Tribunal accepted Mr Osborne's point that in retrospect insurance upon which one has not claimed may always appear to have been expensive, but was satisfied from what Mr Platt had said that had the residents been made aware of the position over the maintenance contract

when they first enquired about it they would have sought to cancel it at that time for the reasons that he gave. The cost of the maintenance agreement was high by reference to the then likely value of the drying machines and the fact that by that time only straightforward repair was likely to be economical by reason of their age.

36. In consequence of these findings, the Tribunal concluded that the costs sustained by Osprey in continuing the expenditure on the hire agreements and on the maintenance agreement for the laundry room were unreasonably incurred to the extent that they would not have been offset by depreciation costs that the residents would have had to bear in respect of the new machines. Mr Platt's hypothetical cost of depreciation shown in his figures represents the best estimate that can be made, in the Tribunal's judgement, of the value to the residents of the continuation of the hire agreement. On such information as was before the tribunal it seemed that had the matters been properly investigated when they were first raised then the new arrangements might have been capable of being put into force with effect from 1st April 2005, and the Mr Platt's calculations and representations proceeded upon that basis, whereas Mr Osborne's calculations for depreciation appeared to run from 1st October 2005. It appeared to the Tribunal for the foregoing reason that Mr Platt's calculations for the amount of depreciation were to be preferred.

37. The Tribunal is required by the terms of section 27A to determine what may be payable in each year rather than to determine the total amount of any purported loss as Mr Platt set out to do. Although the service charge accounts for the years 2005 – 2007 were included in the papers before the Tribunal they were not referred to in detail at the hearing, perhaps because only certain elements of the service charge have been challenged. What the Tribunal has done is to determine what should be the charge for this and for the other elements before it for the relevant years: it is for the parties to adjust the accounts accordingly. They may then deal with the situation by way of crediting the account of individual flats as the lease indicates or as they may otherwise collectively agree. The Tribunal heard no argument upon the point, but the only relevant provision in the lease appears to be in paragraph 4 of Part 1 of Schedule 4.

38. It follows that the cost of the new washing machines would have been borne in 2004-05 and must be added there, so that the figure is correctly made up of Mr Platt's figure of £1285 (his "accepted figure for the year at page G6) and the £1480 cost of the two new machines, giving a figure of £2765. The Tribunal is thus able for the most part to adopt Mr Platt's figures. However, although his deduction for the recovery by Osprey of direct debit expenditure is appropriate to a loss calculation of the sort that he prepared, it does not arise in the service charge calculation since that recovery will occur outside of that calculation.

39. The Tribunal accepted Mr Osborne's evidence that the cost of the maintenance contract was actually £245 per annum. He was able to give factual evidence upon the point whereas Mr Platt had been obliged to try to derive a figure from the information he had. There was insufficient evidence before it to enable it to make such adjustments as may have been necessary to Mr Platt's

figures to reflect this point and the discrepancy of £20 between the figures given for the cost of the washing machines. However, it is satisfied that in the circumstances the difference that those variations would make is very marginal, and may properly be treated as being de minimis in the overall context of an annual budget that Mr Osborne said was £60,000 or so.

40. No adjustment appears to be necessary in respect of the income that Mr Osborne mentioned. It would arise whatever working machine was installed. Hence the revised element of service charge for the laundry room costs for the years in dispute is to be taken as follows in place of the original figure (the 2007 figures being those that the Tribunal is told are the subject of the present budget):

| Year | Original figure | Revised figure |
|---|---|---|
| 2004-05 | £2359 | £2765 |
| 2005-06 | £2488 | £296 |
| 2006-07 | £2812 | £296 |
| 2007-08 (7mths) | £1472 | £173 |
| 2007-08 (5mths) | £1228 | £123 |

*The Lift Contract*

41. The Tribunal saw upon inspection that Chymedden is provided with two Otis passenger lifts. They are side by side, and each serves the whole of the building. The issues under this heading related to the renewal of the maintenance contract.

42. Mr Hanks dealt with this aspect on behalf of the residents. He explained that the residents had become concerned at the rising cost of lift maintenance. He referred to pages RAB1 and RAB2 in the bundles before the Tribunal. These showed that in 2002 the maintenance cost was £3919 and in 2007 it had risen to £5237. The residents had become aware in December 2007 that a new lift maintenance contract had been signed by Osprey with Otis in 2006 at an initial annual fee of £4190-82 plus VAT for a term of five years. The annual fee was subject to escalation. The residents had then obtained an alternative quotation from a company called Liftserve at the beginning of 2008 when they had become aware of the position, and had found that it would have been possible to have engaged that company's services, albeit on terms that were somewhat less beneficial than those provided by Otis, at an initial annual cost of £1960-00 plus VAT. Liftserve was a company used by a major national firm of managing agents at nearby property, and employed an engineer who had previously worked for Otis and said he was familiar with the Chymedden lifts.

43. In response Mr Osborne said that it was better in his opinion to use the manufacturer to service important items like lifts. That was also a view that had been expressed by Mr Hargreaves, one of the residents, at a meeting in September 2007. Any break in such a chain made it easier for responsibility to be passed from manufacturer to servicing company and so on. He considered that the additional features in the Otis contract, as for example the more

frequent service visits, and a larger number of included call outs made it better value than the Liftserve alternative. He did not suggest that any feature of the Otis contract took it outside the ambit of the requirements of Schedule 1 to the Regulations.

44. There was considerable discussion at the hearing about the relative merits of the two alternative companies' approach. However, because of the conclusion that the Tribunal reached that it was unable to grant dispensation from compliance with the provisions of section 20 of the Act it concluded that Osprey is limited from June 2006 (when the new Otis contract was signed) onwards from recovering more than £100 per annum per flat by the operation of the operation of subsections 5 and 6 of section 20 of the Act and of paragraph 4(1) of the Regulations. The Tribunal noted that the price quoted by Liftserve was lower for a lesser service than that offered by Otis. Upon the information before it, the Tribunal would have felt unable to conclude that it would have been unreasonable to enter into a contract wither with Otis or with Liftserve upon the terms offered. The fact that the Liftserve price was lower for a lesser service did not mean that the Otis contract was either unreasonable in its terms or its price. It merely offered a better service at a greater price.

45. The total percentage contributions reported to the Tribunal at the hearing amount to 99.75% of the cost, but those figures differ slightly from those quoted in the tenants' application. The discrepancy is explained in the application by saying that the figures quoted are those actually used rather than those contained in the leases. The lease percentages, if strictly applied, would generate a total of more than 100%. The Tribunal has therefore used the figures quoted in the application. On this basis, the 2006-07 costs incurred by the flats at Chymedden based on a VAT inclusive cost of the Otis contract in its first year of £4923 would have been:

| | | |
|---|---|---|
| Penthouse flats | @ 4.105% | £202-09 |
| Two bed flats | @ 3.678% | £181-07 |
| One bed flats | @ 2.661% | £131-00 |

so that on any test the annual recoverable amount from the time the new Otis contract was entered into exceeds £100 from each flat, so that section 20 of the Act is engaged.

46. Mr Platt's figures on sheet G6 before the Tribunal showed that the cost of the Otis contract in the 2005-06 account was £4750. That was presumably (in the absence of the actual service charge account for that year) made up in part of an apportioned part of the cost in the last year of the old contract and of the first year of the new. His figures were not disputed. They show that after allowing for the full proportion payable under the former contract, but allowing a proportion of £100 per flat for the period from June to September 2006 under the new contract the sum that should have been paid by way of service charge was £4167 instead of £4750. That figure, using the proportion mentioned above, provides a contribution for the lift maintenance for each class of flat for 2005-06 as follows:

| | | |
|---|---|---|
| Penthouse flats | @ 4.105% | £171-06 |
| Two bed flats | @ 3.678% | £153-26 |
| One bed flats | @ 2.661% | £110.88 |

47. In each of the subsequent years in which the present Otis contract remains current, Osprey is limited to recovery of £100 per flat per annum for lift maintenance costs.

*Lift Upgrade*

48. Mr Hanks again dealt with this matter on behalf of the residents. He said that there had been concern for some time over aspects of the operation of the doors and of the levelling of the lifts. Minutes of meetings in 2004 and 2006 referred to discussions on the point. He did not suggest that the work had been done in any way improperly, or that its cost had been unreasonable. However, Osprey had once more failed in its duty to consult under section 20. The result of the provisions of subparagraphs 5 and 6 of section 20 and of paragraph 6 of the Regulations was that it was limited to recovering a maximum if £250 from each flat towards the cost of the works. The total cost had been £8332 so that some flats, but not all, would have had to contribute more than £250 to its cost. Had the residents been consulted they would have wished to nominate alternative and possibly cheaper contractors to do the work.

49. Mr Osborne pointed out that the work should have been entrusted to Otis for much the same reasons as those set out in paragraph 39 above. It would have been necessary to engage consultants to evaluate any alternative quotations, and that would have added to expense. If others had done the work then Otis's guarantee would have been invalidated.

50. As previously indicated, the Tribunal has found itself unable to grant the dispensation sought by Osprey under section 20ZA from compliance with the provisions of section 20. Accordingly it accepted that the standard of he work carried out by Otis was acceptable and its cost was reasonable. However the cost of its work in the year 2006-07 was to be limited in the same proportions (and subject to the same reservation about the precise apportionment) as before so that the following amounts were payable under this head:

| | | |
|---|---|---|
| Penthouse flats | @ 4.105% | £250 |
| Two bed flats | @ 3.678% | £250 |
| One bed flats | @ 2.661% | £221-63 |

*Exterior Maintenance*

51. Two sets of work were carried out in 2007 to the exterior of Chymedden. The more extensive works were those of external redecoration carried out by St Piran Decorating Services ("St. Piran")at a cost of £17812. The lesser works were carried out by Mr. Hirst and consisted of carpentry work to remedy defects in external woodwork, principally if not entirely comprising the railings around the balconies. Its cost was £7911. There had been a dispute

about liability for work to individual balconies, and the lease is unclear upon the point, but the parties told the Tribunal at the hearing that they were agreed that that cost should be borne by the service charge account rather than by individual lessees. The decorating work was let to St Piran after a tendering process carried out by Osprey against a specification prepared by Akzo Nobel, the manufacturers of the paint to be used. The service charges arise for practical purposes in the 2006-07 account.

52. The parties were agreed that the work had been carried out in a less than entirely satisfactory fashion. The Report describes these defects and the Tribunal gladly adopted its content in that respect for its own purposes.

53. There were thus two issues before the Tribunal. The first related to the application of section 20 of the Act since there had been no consultation before the works were carried out. A supplementary issue in that respect related to the use by the contractor of a different stain on part of the external woodwork. There was an issue over who if anyone had authorised this departure from the specification and as matters stood Osprey had not paid a sum of £2543-01 claimed by the contractor in respect of that work. The second issue related to the cost that should in any event be borne by the residents in respect of the work that had been done.

54. As to the section 20 point, it has already been recorded that the Tribunal declined to grant the dispensation from its provisions that Osprey sought. On behalf of the residents Mr Hanks argued that the Tribunal should regard the contracts with St Piran and with Mr Hirst as being in effect one contract. The work that each was to do was necessarily interwoven; Osprey had asked St Piran for the name of a carpenter with whom it could work, and had instructed him. To all intents and purposes there was one contract and because there had been no consultation the Tribunal should limit the amount recoverable from each flat to a maximum of £250 for all of the work.

55. As to the work, itself Mr Hanks argued that it was plain from the terms of the Report that it would largely have to be redone at considerable expense. In practice the residents would have received no tangible benefit from it because they would no, doubt have to pay the full price on the occasion when the work was re-done. They would thus finish up by paying more than the proper cost of having the work done once if they had to make any contribution on this occasion. What they were being asked to pay would have been appropriate for a proper job. Mr Hanks said that the price claimed for the St Piran work would result in each flat contributing more than £250, whilst some flats would have to pay more than £250 towards Mr Hirst's work.

56. Mr Osborne said that although the residents were not formally consulted in accordance with the section 20 procedures there was a whole body of evidence to show that they were made aware of the situation at various meetings. Osprey had tried to get the cheapest price against the Akso Nobel specification. The Report indicated a view that a more realistic price against that specification may have been around £24000, so they had avoided cost as well as fees associated with a full tendering process. The work done was

effective to the extent that the Report pointed out. Whilst he envisaged possible problems in getting St Piran to come back to put right defects in the decorating work he was hopeful that the carpenter would do so as far as his work was concerned. Mr Osborne said that the estimates for the work were available in the manager's office at Chymedden but Mr Hanks said that the residents were unaware of the fact if that were the case.

57. The Tribunal was unable to accept Mr Hanks' submission that the two contracts with St Piran and with Mr Hirst were to be treated as one. Although St Piran had indicated to Osprey that Mr Hirst was a carpenter with whom it could work, and although the work was carried out at much the same time and using the same scaffolding, the fact is that there were two separate contracts, one with each contractor, for the work that the contractors were to do. There has certainly been no suggestion that either contractor had any responsibility under the contract entered into by the other. There were two contracts as a matter of fact, and the Tribunal saw no alternative to treating them literally as such. It is unaware of any authority that would enable it to take any other view.

58. The Tribunal adopts the conclusions as to the condition of the various works that were done that were agreed by the surveyors who prepared the Report. They carried out a more extensive survey than its brief inspection allowed, but it saw nothing during that inspection that in any way contradicted their conclusions. It is satisfied that whilst remedial works as detailed in the Report will be required, nonetheless the residents have received value for the work that has been done. Chymedden is in a very exposed position facing the sea and exposed to spray from it. If no more, the property has been protected to the extent that the Report describes by what was done, and is likely to be so protected until remedial work can start as long as that is done within a reasonable time frame. The Report indicates, for example, in its paragraph 2.8 that surface finishes will be likely to show early failure, if exposed to another winter. The matter of investigation of the balcony supports to which the Report refers appears to be a quite separate matter.

59. As to the value of the work carried out, Mr Hanks suggests that it has none, whilst Mr Osborne argues that, bearing in mind that the Report indicates in paragraph 2.14 that a proper cost to fulfil the specification may have been of the order of £24000, the amount in the estimate (subject to the sum in issue) is likely to represent fair value for what was done. The Report gives no indication at all of the views of those who prepared it on the value of what was done. The Tribunal has been given no further evidence on the matter beyond that. It has reached the conclusion that there was value in what was done, and that is reflected by the fact that those works have protected Chymedden since they were completed in 2007.

60. In trying to form some view in the light of the limited nature of the evidence put before it on the point, the Tribunal concluded that it seems unlikely that further work to deal with the defects may not now be done until 2009. There is debate about how that further work should be done, and about how it should be funded. The issue with St Piran over the changed stain remains live. The

end of the summer period is approaching and it maybe difficult, even if all of these points were overcome, to be able to arrange for extensive work to be done before the weather deteriorates. The lease simply provides in paragraph 2 of the Sixth Schedule for external decoration "at such times as the management company shall reasonably consider necessary". At the hearing Mr Osborne referred to a three-year external decoration cycle as being reasonable. The Tribunal accepts that there may be circumstances when that would be right but would not see intervals of up to five years as unreasonable in this instance. Whatever the defects in the carpentry work that was done the balconies have received repair work that will last longer than the decorating work, and Mr Osborne's evidence, which the Tribunal accepted, is that there is a reasonable chance that Mr Hirst will return to remedy defects as part of the original contract.

61. Doing the best it could with all of that the Tribunal reached the conclusion that the work that has been done will at the least protect Chymedden for almost one half of the decorating cycle that it would have expected to be reasonable for such a property, and the acceptable carpentry work will do so for considerably longer. In the face of that conclusion it would find it difficult to say that the residents will not receive value for what has been done at least to the level of the amounts that they will collectively have to pay as a result of the Tribunal's decisions on the section 20 aspects of the application. The evidence before it was insufficient for it to reach any more accurate conclusion with any degree of confidence.

62. The result of that decision is that each flat will have to contribute the sum of £250 towards the work done by St Piran. So far as Mr Hirst's work is concerned, the same Section 20 limit applies, this time against a cost of £7911. Thus the contribution against the same apportionment as before are:

| | | |
|---|---|---|
| Penthouse flats | @ 4.105% | £250 |
| Two bed flats | @ 3.678% | £250 |
| One bed flats | @ 2.661% | £210-51 |

*Service Charges to 2011*

63. The residents had asked the Tribunal to determine service charges payable up to 2011. Only the 2006-07 service charge account was made available to it, and no arguments were advanced upon the point except so far as it related to the lift maintenance agreement and liability for the cost of additional decoration work. So far as the lift maintenance contract is concerned only £100 per annum per flat is payable during the continuance of the present Otis contract, as explained at paragraph 43 above. As to the cost of decorations the logical consequence of the Tribunal's findings is that the parties will have to contribute in the usual proportions to the cost of further work assuming that the proper procedures have been followed.

*Section 20 ZA Dispensation*

64. At the start of that part of the hearing that was to deal with this aspect of the matter the Tribunal read to the parties the following extract (paragraph 33 of the decision) from the decision of the Lands Tribunal in *London Borough of Camden v The Leaseholders of 37 Flats at 30-40 Grafton Way [LRX/185/2006]* ("Grafton"):

> The principal consideration for the purpose of any decision on retrospective dispensation must, in our judgement, be whether any significant prejudice has been suffered by a tenant in consequence of the landlord's failure to comply with the requirements or requirements in question. An omission may not prejudice a tenant if it is small, or if, through material made available in another context and the opportunity to comment on it, it is rendered insignificant. Whether an omission does cause significant prejudice needs to be considered in all the circumstances. If significant prejudice has been caused we cannot see that it would ever be appropriate to grant dispensation.

It explained that because these were applications for retrospective dispensations it appeared to the tribunal that the foregoing represented the test that it must apply in dealing with each of them, and that it considered that the parties ought to be aware of the observations of the Lands Tribunal so that they could either comment upon them or consider how they might wish to address the test that it proposed.

65. Mr Osborne said that the dispute between the parties, however it was put, was about money. The residents sought to reduce the service charges they should pay by over £35000 in total. That was to be measured against Osprey's management fees for the period in question of £ 25900. If one added the management fee for 2004-05 that total became £33700, so that the claim for reduction was grossly excessive against the fees charged.

66. He argued that Osprey was a small company by any definition. It specialises in managing accommodation for the elderly. Its Board comprises two unpaid non executive directors with over forty years experience respectively in the law and as a Chartered Surveyor, as well as Miss Hands as its managing director, assisted by a P.A. Miss Hands had over twenty years experience of managing accommodation for the elderly. The company carefully complied with the relevant covenants in the leases with which it dealt but had to admit that it had not directed much time and energy to understanding more recent statutes. None of the directors or staff had any previous experience of LVT hearings.

67. The management team was supplemented by a local manager in each development it managed, by a part time relief manager and by a part time gardener and handyman. There were regular weekly reporting procedures, and it was sensitive to the needs of residents. Its policy, as the well-recorded minutes in the various bundles provided to the Tribunal showed, was to consult residents.

68. Osprey had not complied with the formal requirements of the legislation by service of notices. It would not fail to do so again. The hostile application by residents had caused anxiety amongst those residents who wanted nothing to

do with it. The previous manager had left because of the stress that had been created and now contemplated an action for unfair dismissal on the grounds that his position had been made intolerable. The whole experience had been distressful for Miss Hands.

69. Significant prejudice could be linked to financial damage, Mr Osborne said. He submitted that there had been no significant financial damage and so no significant damage to the position of the leaseholders. Failure to follow the requirements of the legislation was to be regretted, but it had not prejudiced the position of the tenants nor had it caused them disadvantage.

70. Osprey sought dispensation only in respect of the matters before the Tribunal. Finally, Mr Osborne hoped that the Tribunal would recognise that failure to grant dispensation would result in significant disadvantage to Osprey which had not, to date, charged the full management fees that the leases entitled it to charge.

71. The Tribunal drew the attention of the parties at that point to paragraphs 34 and 35 of the decisions in Grafton, and in particular to two extracts from them that it marked for them to see as follows. From paragraph 34:

> We cannot accept however that the particular effects on the landlord or the tenant in the case in question are properly to be taken into account. It is in the very nature of the provisions that the landlord will suffer financially and the tenant will gain financially in the event that the dispensation is given.

From paragraph 35:

> The requirements relating to estimates are clearly fundamental to the scheme of requirements. The landlord must obtain estimates (in the plural), must include in the paragraph (b) statement the overall estimate of at least two of them, and must make all of the estimates available for inspection. The purpose is to provide the tenants with the opportunity to see both the overall amount specified in two or more estimates and all the estimates themselves and to make on them observations, which the landlord is then required to take into account. In the present case stage 2 was completely omitted. It was a gross error, which manifestly prejudiced the tenants in a fundamental way.

72. Mr Osborne said he accepted that in the light of the Lands Tribunal's observations some of his remarks might not carry too much weight. He relied on the assertion that the residents had not suffered significant prejudice, especially in the light of the more informal consultations that had gone on over the preceding twenty years. The position would not have changed if Osprey had followed the procedures carefully, so that there had been no significant prejudice.

73. Miss Hands confirmed in response to questions from the Tribunal that no part of the section 20 procedure had been followed, but said that estimates were available at Chymedden if anyone had wished to see them. The residents had not been told that they were there. The lease said that they could charge a fee of 20% of expenditure but Osprey had charged a lower fee as she had thought it fairer.

74. Mr Hanks said on behalf of NCRA that he saw no excuse for a company with three well-qualified directors to fail to follow the required procedures. There had been no proper consultation as there had been no debate. He denied that the information (by which the Tribunal understood he referred to the estimates) had been in the manager's office at Chymedden. If the residents had seen the lift maintenance contract details in 2006 they would have asked for investigation of alternatives. Osprey was, on the advice of the residents' surveyor, responsible for putting matters right in respect of the decorating and woodwork.

75. The Tribunal bore in mind the statutory test of reasonableness set out in paragraph 17, above as well as the test proposed by the Lands Tribunal in Grafton as illustrating the statutory test in cases of this nature. . It also bore in mind, and mentioned, observations of the same Tribunal in *Eltham Properties Limited v Kenny and others [LRX/161/2006]* that the sanctions created by section 20 and section 20 ZA of the Act are not punitive in nature.

76. It had to apply those tests against three sets of circumstances, namely those relating to the lift maintenance contract, those relating to the works carried out to the lift by Otis, and to the external maintenance and decorating works. In each case the application is for retrospective dispensation from the requirements of section 20.

77. So far as the lift maintenance contract is concerned the evidence before the tribunal was that the residents had been asking for information concerning the cost of the lifts since 2004. It was not until the end of 2007 that this information was supplied and the residents discovered that a new five-year contract had been entered into with Otis in 2006. Mr Osborne confirmed at the hearing that he did not pursue there the argument in a letter to the residents from Osprey dated 17 January 2008 (RAB 8) that no section 20 notices were required because there were two lifts, and accepted in this instance as in the others before the Tribunal that the section 20 procedure was applicable but was not followed.

78. There was a lengthy, but inconclusive, debate between the parties during the hearing concerning the relative merits and demerits of the Otis contract terms and the terms in accordance with which Liftserve had provided its cheaper quotation, as well as the potential benefits if any of employing Otis as manufacturer to maintain the lift rather than another contractor. It is not for the Tribunal to form a speculative view upon the possible outcomes of such a discussion had it occurred before the Otis contract was renewed. Osprey obtained no other quotation for the maintenance work, and the scheme of section 20 very clearly anticipates that competitive quotations will ordinarily be obtained.

79. The residents were unaware of the intended renewal of the contract and of the terms on which it might be renewed. They would plainly have wished to nominate other contractors and to consider other quotations. They would equally plainly have wished to follow to a conclusion the debate that was started at the hearing, whatever its outcome might have been. The fact alone

that they were unable to do that, and so to have an opportunity of considering whether the costs of the contract may properly be contained, amounts in the Tribunal's judgement to a significant prejudice to their position within the test proposed by the Lands Tribunal. It is not in consequence open to it to grant the dispensation that Osprey has sought in connection with the renewal of the lift maintenance contract.

80. The impression from the copies of minutes, other contact with the residents and the in-house manager's returns was generally of a caring and involved management company. Nevertheless, it appeared to the Tribunal from the minutes of the meetings that it has been shown and from such other evidence of occasions when discussions may have taken place outside those meetings (and they seem to have been few), that that residents were not provided with the information that the section 20 procedure required. Indeed it appears that on every material occasion that information came to them after the event.

81. The arguments relating to the lift repairs (sometimes referred to as the lift upgrade) are similar in nature. There was no consultation at all, as Mr Osborne admits and the residents became aware of the details at the same time as they found about the new lift maintenance contract. Once more no competitive quotation was obtained. The residents would, had they been aware of the position, have wished to advance the possibility that Liftserve might be asked to quote, and there would not doubt then have been a similar debate about the relative merits and demerits of the offers from the two contractors. That would have been likely to encompass any issues arising from the possible invalidation of any guarantee from Otis that may have been in place. Whatever may have been the outcome of that debate, the residents were deprived of the opportunity to have it because they were not consulted in any way at all. Their position was thus significantly prejudiced, and the Tribunal is thus unable to grant the dispensation that Osprey has sought in connection with the lift repair contract. It is not possible to say if there was in fact a financial loss; to do so would presuppose that discussions that would have taken place had the Section 20 procedures been implemented would have resulted on each occasion in the residents fully accepting Osprey's position as Mr Osborne advanced it at the hearing. However, whether or not there would have been a financial loss would not in any case, for the reasons stated above, have been the whole of the test that the Tribunal had to apply.

82. So far as the contracts with St Piran and with Mr Hirst respectively for the external decorating work and for the external carpentry work are concerned Mr Osborne again admitted that there was no formal section 20 consultations at all. He had admitted that Osprey "had not directed much time and energy to understanding more recent statutes". Whilst the point forms no part of the reason for its refusal to grant dispensation in this instance, the Tribunal was nonetheless surprised that a professional management company having the varied and relevant experience on its Board that he described appeared to have been unaware even of the legislation that preceded that in section 20 as it now stands. That legislation would, from 1985 to 2003, have required a rather more basic formal consultation by notice so far as the works, though not the long-term contracts, was concerned, but not even notices of that sort were given.

83. There seems to have been one quotation only for the carpentry work although on this occasion other quotations were obtained for the decorating. However the residents did not see any of them nor were they given any kind of notice of them; if copies of the quotations were in the manager's office the residents appear to have been quite unaware of the fact, and did not see any of them until some time after the work had been carried out and problems had arisen. Once more the residents were deprived by the failure of any sort of formal consultation of the opportunity to nominate contractors or indeed to have any other sort of input into the process. Such discussions of the need for the external works as may have preceded the obtaining of the quotations for the decoration and the placing of the contract for the woodwork were plainly not adequate in any way to provide the information that formal consultation would have given. There was accordingly significant prejudice to the residents' position, and it is not possible in consequence for the Tribunal to grant the dispensation sought.

*The Section 20C Application*

84. Mr Tait had applied for an Order under section 20C of the Act that all or any of Osprey's costs incurred or to be incurred by them in connection with the application should not be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or by any other person specified in the application. Mr Hanks confirmed at the hearing that the application was intended to relate to the charges payable by any of the residents. Mr Osborne dealt with the matter at the hearing by assuring the residents and the Tribunal that Osprey would not make any such charges. It has not been necessary therefore for the Tribunal formally to deal with that application at this juncture in reliance upon that assurance.

Effect of the Tribunal's decisions

85. The Tribunal has not undertaken detailed calculations to show the effect on the accounts of the decisions it has made. It has revised the amounts to be charged to the laundry costs in the years in question as follows:

| Year | Original figure | Revised figure |
|---|---|---|
| 2004-05 | £2359 | £2765 |
| 2005-06 | £2488 | £296 |
| 2006-07 | £2812 | £296 |
| 2007-08 (7mths) | £1472 | £173 |
| 2007-08 (5mths) | £1228 | £123 |

Those figures will require to be apportioned in accordance with the accurate scheme of apportionment for each of the relevant years, and the accounts for those years will require adjustment accordingly.

The following figures for percentage apportionment may as previously indicated require slight revision to accommodate the fact that the proportions

appear to total 99.75% of the whole whilst Osprey is plainly entitled under the lease to recover 100% of the relevant expenditure.

It has determined that the sums to be borne by the respective flats for the lift maintenance contract in 2005-06:

| | | |
|---|---|---|
| Penthouse flats | @ 4.105% | £171-06 |
| Two bed flats | @ 3.678% | £153-26 |
| One bed flats | @ 2.661% | £110.88 |

For each of the subsequent years to date the contribution of each flat for the lift maintenance contract is limited to £100 per annum, and will remain so whilst the present contract remains in force.

It has determined that the sums to be borne by the respective flats for the lift repairs or upgrade to be taken into the 2006-07 accounts are:

| | | |
|---|---|---|
| Penthouse flats | @ 4.105% | £250 |
| Two bed flats | @ 3.678% | £250 |
| One bed flats | @ 2.661% | £221-71 |

It has determined that the sums to be borne by the respective flats for the exterior decoration works to be taken into the 2006-07 accounts are £250 for each flat.

It has determined that the sums to be borne by the respective flats to be taken into the 2006-07 accounts for the woodwork are:

| | | |
|---|---|---|
| Penthouse flats | @ 4.105% | £250 |
| Two bed flats | @ 3.678% | £250 |
| One bed flats | @ 2.661% | £210-51 |

On the face of matters, and without having heard argument upon the point, it appeared to the Tribunal that these matters will require to be adjusted by the mechanism for dealing with overpayments in Schedule 4 of the Lease.

Robert Long
Chairman
12th September 2008