



Case Number: CHI/00HH/LSC/2010/0106

**RESIDENTIAL PROPERTY TRIBUNAL SERVICE
SOUTHERN LEASEHOLD VALUATION TRIBUNAL**

PROPERTY: Castle Circus Court, Ash Hill Road, Torquay, Devon, TQ1 3JA

Applicant: Anchor Trust

and

Respondent: Patricia H.Hill and Raymond A. Hill (Flat Nos. 8, 9 and 13) and 13
other Lessees

In The Matter Of

**Section 27A of the Landlord and Tenant Act 1985
(Liability to pay service charges)**

**Landlord's application for the determination of liability to pay a
service charge**

Tribunal

Mr A Cresswell (Chairman)
Mr W H Gater FRICS ACI Arb

Date of Hearing: 5 November 2010

Appearances: Mr R Sheridan of Counsel for the Applicant
Mr & Mrs Hill in person

DETERMINATION

The Application

1. On 23 June 2010, the owner of the freehold interest in the property made an application to the Leasehold Valuation Tribunal for the determination of the liability to pay a service charge. The application referred to a dispute as to who has responsibility under the relevant lease for repairs to the retaining walls at the boundary of the property.

Preliminary Issues

2. There was objection by Mr and Mrs Hill to Mr Gater being a member of this Tribunal by reason of bias. Mrs Hill related that Mr Gater was a panel member in an earlier case in early 2007 when she was an applicant. She had made an appeal to the Lands Tribunal, having been refused permission to appeal by the Residential Property Tribunal, which appeal had been rejected by the Lands Tribunal. In her grounds of appeal to the Lands Tribunal, Mrs Hill had made the very serious allegation that Mr Gater had a financial interest in that case and was an associate and friend of a Respondent. Mrs Hill believed that Mr Gater was aware of the serious allegation that she had made to the Lands Tribunal and that he would consequently be biased in the hearing of this case.
3. Mr Sheridan submitted that there was no possibility of bias by Mr Gater and that the case should proceed.
4. The Tribunal adjourned to consider Mrs Hill's submissions. Mr Gater was able to confirm that there was no truth whatsoever behind the serious allegation made by Mr and Mrs Hill. In fact, neither he nor his firm, Waycotts, had any financial interest in the earlier case; Mr Gater had never spoken to the person concerned, a Mr Ashton, other than during the course of the hearing; Mr Gater had made proper enquiries before the earlier hearing within Waycotts and with the President of the Southern RPTS panel when he had seen mention of Waycotts in the case papers prior to the hearing, and was

entirely satisfied that there was no question whatsoever of any interest in that case, financial or otherwise; he had known nothing of the allegations against him until days before this Hearing, when the issue was raised by Mrs Hill in correspondence.

5. The Tribunal concluded, having considered the guidance of the Court of Appeal in **Locabail v Bayfield Properties Ltd** (2000) IRLR 96, that there was no question here of any form of interest or bias on Mr Gater's behalf, that the serious allegations made were entirely without foundation, and that there was no reason of any kind why Mr Gater should recuse himself.
6. At the end of the Hearing, Mrs Hill apologised to Mr Gater.

Inspection and Description of Property

7. The Tribunal inspected the property on 5 November 2010 at 1000. Present at that time were Mr Mark Tilley of Anchor Trust, Ms Natalie Peel, solicitor for Anchor Trust, Mr Robert Sheridan of Counsel, Mr Raymond Hill and Mrs Patricia Hill. The property in question consists of two blocks of eight flats joined by two garages between the two blocks. The blocks stand in their own grounds and there are further garages and spaces where garages have been demolished. The property is approached from Ash Hill Road. The driveway to the property is bounded by retaining walls which sweep to the left and the right upon approach to the property, and which have the purpose of retaining the grounds of the two adjoining properties, Walmer House and Esdaile House (10 Ash Hill House). The retaining walls consist of single blocks laid end to end vertically with a painted rendered finish.. It was apparent that in places there were severe cracks to these walls, and in places minor cracking. We also noted areas where the walls were leaning inwards towards the property. It was apparent that rudimentary methods had been employed with a view to stabilising parts of the walls by the use of gabions of rubble and block-built supports. A visual inspection suggested that damage may have been caused or exacerbated by trees and vegetation on the sides of the wall facing Walmer House and Esdaile House.

Summary Decision

8. This case arises out of the landlord's application, made on 23 June 2010, for the determination of liability to pay a service charge for the repair of the boundary wall. Under Section 27A (3)(a) and (b) of the Landlord and Tenant Act 1985 (as amended), an application can be made to the Tribunal for "a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs and, if it would, as to the person by" and to whom "it is payable." The Tribunal determines that the lease does make the tenant liable to repair the retaining walls and that in the event that the landlord was to repair the retaining walls, the reasonable costs of that repair would be recoverable as a service charge levied upon the tenants of the property in equal 1/16th shares.

Directions

9. Directions were issued on 26 July 2010. These directions provided for the matter to be heard on the basis of an oral hearing.
10. The Tribunal directed that the parties should submit specified documentation to the Tribunal for consideration at the hearing.
11. This determination is made in the light of the documentation submitted in response to those directions.

The Law

12. The relevant law is set out in sections 18, 19 and 27A of Landlord and Tenant Act 1985 as amended by Housing Act 1996 and Commonhold and Leasehold Reform Act 2002.
13. The Tribunal has the power to decide about all aspects of liability to pay service charges and can interpret the lease where necessary to resolve disputes or uncertainties. Service charges are sums of money that are payable – or would be payable - by a tenant to a landlord for the costs of services, repairs, maintenance or insurance or the landlord's costs of management, under the terms of the lease (s18 Landlord and Tenant Act 1985 "the 1985 Act"). The Tribunal can decide by whom, to whom, how much and when service charge is payable. A service charge is only payable insofar as it is reasonably incurred, or the works to which it related are of a reasonable standard. The Tribunal therefore also determines the reasonableness of the charges.
14. The relevant law is set out below:

Landlord and Tenant Act 1985 as amended by Housing Act 1996 and
Commonhold and Leasehold Reform Act 2002

18 Meaning of "service charge" and "relevant costs"

(1) In the following provisions of this Act "service charge" 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 the relevant costs.

(2) The relevant costs are the costs or estimated costs incurred or to be incurred by or on behalf of the landlord, or a superior landlord, in connection with the matters for which the service charge is payable.

(3) For this purpose—

- (a) "costs" includes overheads, and
- (b) costs are relevant costs in relation to a service charge whether they are incurred, or to be incurred, in the period for which the service charge is payable or in an earlier or later period.

27A Liability to pay service charges: jurisdiction

(3) An application may also be made to a leasehold valuation tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs and, if it would, as to—

- (a) the person by whom it would be payable,
- (b) the person to whom it would be payable,
- (c) the amount which would be payable,
- (d) the date at or by which it would be payable, and
- (e) the manner in which it would be payable.

Billson v Tristrem (2000) L&TR 220: *Notwithstanding an ineptly worded clause in a lease which, when read literally, meant that the tenant of a basement flat was not liable to contribute towards the landlord's costs of maintaining those common parts of the building which she was not entitled to use, the overall intention of the parties was clearly that the tenant would pay a specified proportion of the landlord's costs of maintaining the common parts throughout the building and the lease should be interpreted accordingly.*

(1) *The provisions of the lease were unhappily drafted so that they were not apt to refer to the common parts of the building as a whole but were limited to the parts used by each tenant, with the result that if they were construed literally they would produce an extraordinary result.*

(2) *The function of the court in trying to construe the provisions of the lease is to ascertain, from the terms of the lease as a whole, the intentions of the parties evinced by the terms of the lease regardless of whether or not the parties had used inept words in which to describe their intentions.*

(3) *Looking at the provisions of the relevant clauses of the lease as a whole the intention expressed by the parties in that lease was that each tenant should pay the specified proportion of the costs to the landlord of carrying out its specified obligations in relation to all those parts of the building which were not comprised in a demise to one of the tenants of the five flats— in other words all the common parts.*

(4) *This intention was made abundantly plain by the existence in the lease of the catch-all obligation on the landlord to do all other works necessary*

for the proper maintenance, safety and administration of the building which was not limited to the parts used by the tenant and which would entitle the landlord to charge the tenant of each flat the stated proportion of those costs.

(5) The construction contended for by T would deprive a substantial part of the lease of any meaning at all and would produce such a bizarre result in the way of overall contributions by the tenants of the maintenance costs that it was impossible to believe that it represented the intentions of the parties to the lease.

Duke of Westminster and Others v Guild [1985] Q.B. 688 SLADE L.J.:

Accordingly, for the purpose of considering whether the suggested contractual obligation falls to be implied in the present case, we can see no justification for applying a test more favourable to the defendant than the test applicable to the construction of any ordinary commercial lease of unfurnished premises or land which does not fall into a special category such as was referred to by Lord Wilberforce or Lord Cross of Chelsea. While this test is capable of being formulated in many different ways, it is clearly stated by Lord Cross in Liverpool City Council v. Irwin [1977] A.C. 239, 258:

"Sometimes, however, there is no question of laying down any prima facie rule applicable to all cases of a defined type but what the court is being in effect asked to do is to rectify a particular - often a very detailed - contract by inserting in it a term which the parties have not expressed. Here it is not enough for the court to say that the suggested term is a reasonable one the presence of which would make the contract a better or fairer one; it must be able to say that the insertion of the term is necessary to give - as it is put - 'business efficacy' to the contract and that if its absence had been pointed out at the time both parties - assuming them to have been reasonable men - would have agreed without hesitation to its insertion."

This is the test which we consider relevant in the present instance; as Lord Edmund-Davies pointed out in the last-mentioned case, at p. 266, "the exercise involved is that of ascertaining the presumed intention of the parties," by which of course he meant both parties to the contract.

Applying this test to the construction of the lease in the present case, we find ourselves quite unable to supply the suggested provision in the favour of the defendant by a process of implication. There are far too many factors which seem to us to point in the opposite direction.

First, clause 2 of the lease contains a number of careful and elaborate provisions defining the tenant's contractual obligations in regard to repair and maintenance. If it had been intended that other contractual obligations relating to repair should be placed on the landlords themselves, one would prima facie have expected this particular lease to say so.

Secondly, the obligations which it is now sought to impose on the landlords by a process of implication would be obligations of an extensive and onerous nature. Mr. Lewison accepted, and contended that, if the landlords were under an obligation to repair the drains mentioned in clause 2(iv) of the lease, a similar obligation would fall upon them in regard to all the other

items mentioned in that sub-clause (such as party and other walls and gutters and the surface of the roadway) - and indeed that they would be subject to a positive obligation to preserve "the amenities of the demised premises and adjacent or neighbouring premises."

Thirdly, as Mr. Lightman pointed out, the implied covenant contended for by the defendant would in some respects be in direct conflict with express provisions of the lease. For, as has already been said, the implied covenant is claimed to extend to all the items mentioned in clause 2(iv) of the lease. But these items include, *inter alia*, walls, gutters and sewers "belonging to the demised premises," which the tenant is plainly obliged to repair by virtue of clause 2(iii).

Fourthly, the implication of the suggested obligation does not seem to us in any way necessary to make the scheme of the lease a workable one. The subject of the dispute, that is the landlords' part of the green drain, is property in respect of which the tenant enjoys an easement of drainage governed by the general law of easements. It is well settled that the grant of an easement ordinarily carries with it the grant of such ancillary rights as are reasonably necessary to its exercise or enjoyment: Jones v. Pritchard [1908] 1 Ch. 630, 638, per Parker J. In our opinion, therefore, it is plain that the tenant would have the right, when reasonably necessary, to enter the landlord's property for the purpose of repairing that drain and to do the necessary repairs. In contrast, however, it is an equally well settled principle of the law of easements that, apart from any special local custom or express contract, the owner of a servient tenement is not under any obligation to the owner of the dominant tenement to execute any repairs necessary to ensure the enjoyment of the easement by the dominant owner; apart from special local custom or express contract, the law will ordinarily leave the dominant owner to look after himself: see Gale on Easements, 14th ed. (1972), p. 47 and Holden v. White [1982] Q.B. 679, 683-684 per Oliver L.J.

Thus, if regard is to be paid to considerations of business efficacy, we think that a perfectly workable scheme may be derived from this lease in regard to the green drain, without implying any such obligations as that for which the defendant contends. The scheme is as follows. (a) The tenant is under a contractual obligation to keep in repair at his own cost the tenant's part of the green drain: clause 2(iii). (b) If the tenant allows the tenant's part of the green drain to go into disrepair, the landlords have the right under clause 2(vi) to enter the demised premises, do the necessary repairs themselves and debit the tenant with the cost. (c) The landlords have the right, if they choose, to do repairs to the landlords' part of the green drain and to demand reimbursement of the cost of such repairs by the tenant, under clause 2(iv). (d) If the landlords do not keep the landlords' part of the green drain in good repair, the tenant has the right, as ancillary to his easement of drainage, to enter the landlords' property and do the necessary repairs, again at his own cost.

Perhaps it would have been sensible or even reasonable for the defendant on entering into the lease to exact an express covenant by the plaintiffs to do these repairs. But he did not do so and we find it impossible to presume an intention on the part of all parties to the lease that such a covenant should be included. An obligation of this nature cannot in our judgment properly be added to the lease by a process of implication.

Continental Property Ventures Inc v White and another [2006] 1 EGLR 85: *As guarantee works could have been carried out at no cost, the LVT had been entitled to conclude that carrying out such works at a cost was to incur the cost other than reasonably. "Relevant costs", which, by section 19(1)(a), are limited to those that are "reasonably incurred", are defined by section 18(2) as the costs incurred by the landlord in connection with, inter alia, repairs and maintenance. The question of what the cost of repairs is does not depend upon whether the repairs ought to have been allowed to accrue. The reasonableness of incurring costs for their remedy cannot, as a matter of natural meaning, depend upon how the need for remedy arose. However, damages are payable for breach of a landlord's covenant to repair, and such damages would give rise to an equitable set-off. Accordingly, the LVT had been wrong in its interpretation of section 19(1)(a), but it had been entitled to reach its decision on the facts in the exercise of its jurisdiction under section 27A to determine what service charges were payable. An LVT should, none the less, exercise restraint in the exercise of that jurisdiction to determine claims for damages.*

"there can be no doubt that breach of the landlord's covenant to repair would give rise to a claim in damages. If the breach were to result in further disrepair, imposing a liability upon the lessee to pay service charge, that is part of what may be claimed by way of damages. At least to that extent it would, as was held by the Court of Appeal in Filross Securities Ltd v Midgeley (Peter Gibson, Aldhous and Potter LJJ, 21 July 1998), give rise to an equitable set-off within the rules laid down in Hanak v Green [1958] 2 QB 9 and, as such, constitute a defence. This would not mean that the costs incurred for the "nine stitches" had not been reasonably incurred. It would, however, mean that there would be a defence to their recovery.

Ownership and Management

15. Anchor Trust is the owner of the freehold interest.

Mrs Knight's Lease

16. The parties are agreed that a lease, which was made on 14 September 1965 between J R Stubbs Limited as lessor and Mrs D J Knight as lessee sets out the terms of the leases of all Flats within the property.

Clause 5. THE Tenant hereby further covenants with the Lessor as follows:-

(4) At all times during the said term well and sufficiently and in a workmanlike manner to repair support uphold maintain pave purge empty cleanse scour paint glaze amend and keep the demised premises (and in particular the roof thereof in the case of a first floor flat) and all walls and buildings erected or that may at any time hereafter be erected on and all additions made to the demised premises and all party

the two adjoining properties, Walmer House and Esdaile House (10 Ash Hill House), "the adjoining properties". The land was bought by the developer of the property, J R Stubbs Limited, which entered into a personal covenant to "*maintain in good and substantial repair that part retaining and part boundary wall marked A, B and C and the retaining wall between points C and D*" on a plan attached to the original conveyance of 21 August 1962. J R Stubbs Ltd was wound up on 16 May 1975. The Tribunal notes the agreement of the parties that this was a personal covenant, which became unenforceable with the winding up of J R Stubbs Ltd.

18. Mr Tilley says that the Applicant acquired the freehold title by Deed of Gift, the freehold being subject to the 16 flat leases.
19. In recent years, the boundary and retaining walls have begun to fail. The Applicant has undertaken some investigatory and remedial work so as to ensure safety but denies that it has any liability to repair the boundary and retaining walls. The Applicant is willing to undertake the repairs needed to these walls, but only upon the basis of reimbursement in equal shares by the Lessees.
20. The Applicant set out its proposal to undertake the work on the basis of equal share reimbursement by letter of 15 July 2009. Thirteen of the "flats" have agreed to pay a 1/16th contribution, subject to the statutory consultation process, but Mr and Mrs Hill expressed disagreement.
21. Historically, there had been landlord's insurance cover which made specific reference to retaining walls. There had never been a claim upon this insurance cover. Mr Tilley did not know the reason for this failure to claim, but opined that because there was no obligation upon the Applicant to insure other than against fire, cover beyond fire is irrelevant to this case. He further opined that cover would have been excluded on the basis of wear and tear, and further that there was a £10,000 claim limit in relation to the walls. In subsequent years, cover excluded the boundary walls at the property.
22. The Respondents had not used Schedule 4 Clause 2(1) to carry out the works and claim from the other flat owners.

23. The Applicant believes that the costs of the works are recoverable under Clause 5(6) and seeks a declaration that a 1/16th contribution would be due from each leaseholder.
24. The Applicant relies upon **Billson v Tristrem** (2000) L&TR 220 at page 231 as holding that a clause which included reference to boundary walls referred to the common parts or parts used in common of the property. This means that notwithstanding the Lease here providing liability for the Respondents to contribute to the repair of "*all party and other walls*", additionally retaining walls are also parts in common and are included within Clause 5(6).
25. The Lease should be construed (so says Woodfall, Landlord and Tenant at 7.164) such that the service charge clause includes all parts of the property which are not demised to individual flat owners. This would include the boundary and retaining walls.
26. A landlord is under no implied obligation to repair; such obligations must be expressly included within a lease. In **Southwark LBC v Mills** (2001) 1AC1, it was held that "*the parties are free to let and take a lease of poorly constructed premises and to allocate the cost of putting them in order between themselves as they see fit. The principle applies whether the complaint relates to the state and condition of the demised premises themselves or ... of other parts of the building in which the demised premises are located.*"
27. The Respondents assert that damage has been caused to the walls by the adjoining owners, by virtue of damage from tree roots. The Applicant would prefer to effect the repairs and to then consider any action which might be available against the owners of the adjoining properties. The cooperation of the owners of the adjoining properties would be required to effect the works.
28. The Respondents point to other defects in the Lease, but that issue is irrelevant to this application and would merely delay the matter further and increase costs.
29. Mr Tilley said at the Hearing that it was his belief that each of the 16 flats should contribute 1/16th of the cost of repairing/replacing the retaining walls.

The Respondents' Case

30. Mr and Mrs Hill are the only lessees who have raised objections to the application.
31. They submit that there are two distinct continuous cement panel walls, each bordering one of the adjoining properties.
32. They ask who is responsible for keeping the walls in good order. They point to a failure by the Applicant to deal with what has been an ongoing problem for over 15 years.
33. They argue that the term "*part retaining, part boundary walls*" is not used in Clause 5(6). The thin boundary wall, which stands outside the older stone retaining wall of 10 Ash Hill Road, is not a "*party wall or party structure*". The Applicant could only claim it to be described within Clause 5(6) as "*all structures used in common*". Even then, some leaseholders in block 9-16 could argue that the wall facing block 1-8 is not used by them in any way.
34. The wall has only ever in the past been repaired and reinforced by the Applicant, and supported by buttresses at the far end installed by the four leaseholders whose garages were damaged by the lean of the wall. In the 1990s, the Applicant drilled holes adjacent to 10 Ash Hill Road for the escape of water. Even when gabions were delivered to hold up panels of the wall, there was not communication with leaseholders nor request for contribution to the cost. The Respondents assumed that the Applicant had inherited responsibility for the walls because it alone did surveys and repairs to the walls over the years at its own expense. The Applicant has effectively claimed "squatter's rights" to the walls.
35. They contend that Clause 5(4) is irrelevant as it refers only to "*the demised premises ... and appurtenances thereof*".
36. The Applicant freeholder is not mentioned at all in Schedule 4 Clause 2(1).
37. The Applicant has not properly insured the property.

38. The case law quoted by the Applicant is not strictly relevant as the cases concern contributions to the costs of repairing and maintaining buildings or internal common parts. In those cases, the leases appear to have required contributions of specific proportions or amounts of service charges annually.
39. The Respondents rely upon *Continental Property Ventures Inc v Mr & Mrs White* [2006] 1 EGLR 85, where it was held that if a tenant has a claim for damages against its landlord, the damages can be set off against any service charge claimed and that a landlord who delays undertaking necessary repairs, or who fails to make timely claims under guarantees that cover the costs of the works, will not be able to recover the additional costs incurred as a result of its conduct.
40. The Respondents ask the Tribunal to ask questions of one leaseholder as to the reason why she agreed to be a contributor to the costs of the proposed works, and other leaseholders about arrangements they have made with the Applicant. They also ask the Tribunal to direct the Applicant to take out a policy of insurance specifically for the property in accordance with the Lease.
41. They ask that the Applicant should vary the current leases or produce new ones before selling the freehold. They ask that the Applicant should take legal action against the owners of the adjoining properties for the damage caused by their trees. There is clear distinction between the covenant by J R Stubbs Ltd with the owners of the adjoining properties to maintain the walls and damage caused directly by the latter's irresponsible actions or neglect. The Respondents believe that all leaseholders of the property have a "good case" against the owners of the adjoining properties for the irresponsible action of allowing trees and hedges to grow and seed beyond their own stone walls for decades, and against the Applicant for its negligence as the freeholder in not asking for leaseholders' cooperation and taking action against the owners of the adjoining properties.
42. They ask the Applicant to inform the Tribunal as to why no claim was made on the insurance policy in the mid-1990s when the problem was first notified to it.

43. During the course of the Hearing, the issues troubling Mr and Mrs Hill became far more finite. They accepted that the Lease placed responsibility upon the tenants to pay for repairs to the retaining walls. They accepted also that the appropriate level of charge should be upon the basis of 1/16th per flat; indeed, when they themselves had effected repairs to the tarmac of the drive, they had sought reimbursement from other lessees on the basis of 1/16th share per flat.
44. What really concerns Mr and Mrs Hill is the cost of the work proposed and how much of that cost should actually be recoverable by the lessor. Mrs Hill pointed to the fact that when she had purchased flat 9 in 2001, her solicitor had given her a measure of assurance based upon an insurance policy then in force and held by the Applicant, which, subject to wear and tear, gave a measure of insurance for the retaining walls in the sum of £10,000 subject to an excess of £500. The lessees had been required to pay the lessor in respect of that policy and in respect of subsequent policies. It appeared that subsequent policies had not covered the retaining walls, but the tenants had not been specifically informed of the change in the nature of the cover. Mrs Hill did acknowledge that she had subsequently purchased flat 13 in 2004, and that she had been provided with policies subsequent to 2001. Her contention was that, although she and her husband accepted that there was no requirement within the Lease to effect insurance cover other than for fire at the premises, the facts that there was insurance cover for the retaining walls in 2001 and there was no claim made by the Applicant at that time, should lead to a reduction in the sum which the Applicant could now demand of the lessees in respect of works to the retaining walls.

Consideration and Determination

45. The Tribunal had regard to the guidance of the Court of Appeal in **Duke of Westminster and Others v Guild**, and concluded that the Applicant was correct in contending and the Respondent lessees, Mr and Mrs Hill, were correct in accepting that there is in the Lease here no requirement upon the lessor to undertake repair work to the retaining walls. The Tribunal also concluded, having regard to the wording of the Lease, that it was unnecessary

and not proper to find that there was an implied requirement upon the lessor to undertake repair work to the retaining walls. The Tribunal was satisfied that the retaining walls are "*other walls*", which are accordingly encompassed within the Tenant's Covenant of repair within Clause 5(4) of the Lease. The Tribunal was also satisfied that the retaining walls are "*structures*" within Clause 5(6). We further find that the Applicant is entitled both to undertake repair work to the retaining walls and to require the lessees to pay a proper proportion of the expense of such work.

46. The Tribunal notes that Mr and Mrs Hill now accept that the above findings are a correct interpretation of the Lease. The Tribunal did not receive submissions by any other of the Respondent lessees, but did observe that all other Respondent lessees had indicated their willingness to pay a 1/16th proportion of the cost of the repair work to the retaining walls.
47. The Lease is silent as to what a proper proportion of the expense might be. It was the submission of the Applicant, which was accepted by Mr and Mrs Hill, that costs should be reimbursed on the basis of 1/16th share per flat. We have recorded above the seeming acceptance of such a proportion by the other Respondent lessees. Such apportionment of the expenses of repair work to the retaining walls and, indeed, in relation to any of the works described within Clause 5(6) appears to the Tribunal to be entirely sensible, proper, and the correct way to bring business efficacy to the Lease. We can conceive of no other sensible apportionment of expenses, having regard to the terms of the Lease and the relative responsibilities of lessor and lessee within that Lease, the nature of the long leases held by the lessees who pay only £3 per annum each in ground rent to the lessor per flat and the nature of the property as observed by the Tribunal.
48. The Tribunal explained to the parties the limited nature of the application before it. Some matters raised in submissions were clearly not of relevance to the limited issues of the application under consideration.
49. Clearly, the next steps will involve the Applicant in assessing the scope of the works required and consulting the Respondent lessees in relation to proposed works and expenditure. In the event that the parties are subsequently unable to agree any service charge levied by the Applicant, there could be further recourse to this Tribunal. Whether the issues of insurance, alleged neglect and neighbour liability have relevance to the correct quantum of service

charge payable would arise at the time of service charge demand, and any subsequent application to this Tribunal. Any Tribunal hearing such an application would require far more detail in relation to the issues of insurance and the historic deterioration of the retaining walls than was available for the current application.

50. The Tribunal has determined that the historic personal covenant by the developer, J R Stubbs Ltd, and questions of actual quantum of future cost have no relevance to the immediate application, the latter having been explained above. The personal covenant by J R Stubbs Ltd did not exist following the liquidation of that company, as Mr and Mrs Hill accept. It is the Lease which determines the contractual relationship between lessor and lessee.

General

51. The Tribunal was very aware that there have been serious concerns by all parties in this case, and very much hopes that it has been able to bring some clarity to the meaning of the Lease.

Andrew Cresswell (Chairman)
A member of the Southern Leasehold Valuation Tribunal
Appointed by the Lord Chancellor

Date 8 November 2010