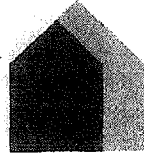


6053



Residential
Property
TRIBUNAL SERVICE

**LONDON RENT ASSESSMENT PANEL
LEASEHOLD VALUATION TRIBUNAL**

Case Reference: LON/00BK/LVL/2010/0023

**DECISION OF THE LEASEHOLD VALUATION TRIBUNAL IN THE MATTER OF
AN APPLICATION PURSUANT TO SECTION 35 OF THE LANDLORD AND
TENANT ACT 1987**

Premises:

Flats D to H (Inclusive), 4 Nottingham Street, London W1U 5EQ

**Applicants: (1) Zippoah Leah Bakst - Lessee Flat D
(2) Jonathan Howard Greenwood - Lessee Flat H**

Represented by: Brethertons Solicitors

**Respondents: (1) 4 Nottingham Street Limited - Freeholder
(2) Simon James & Lucy Helen Parkinson - Lessee Flat E
(3) Sandy Choy Wah Smith - Lessee Flat**

Represented by: Greenwood & Co Solicitors

Present:

**For the Applicant: Mr. R. Friend – Greenwood & Co Solicitors
Mr. T. Cowen – Counsel**

**For the Respondents: Mr. J. Sandham – Counsel
Miss. C. Cullen – Pupil
Mr. Kelleher of KDG Managing Agents**

**Date of directions:
13th December 2010**

**Date of hearing:
31st January 2011**

**Tribunal:
Mrs N Dhanani LLB(Hons)
Mr T N Johnson FRICS
Ms S Wilby**

DECISION

(NB: Unless otherwise stated the numbers in the square brackets correspond to the page numbers in the bundle produced by the first Respondent)

A. Background

1. On the 25th November 2010 the Applicants applied to the Tribunal for a variation of the leases (“The Application”) in respect of Flats D, E, F, G, and H, 4 Nottingham Street London W1M 3RA (“the Property”) under Part IV Section 35 of the Landlord and Tenant Act 1987 (“the 1987 Act”).
2. The property was originally known as 4/5 Nottingham Street and comprised 8 leasehold Flats.
3. On the 30th January 1997 the First Respondent 4 Nottingham Street Limited purchased the freehold interest in 4 Nottingham Street London W1M 3RA (“the Building”). The freehold title is registered at the H M Land Registry under title number 323088.
4. The Building purchased by the First Respondent is known as 4 Nottingham Street and comprises only five out of the original 8 flats. Each flat is demised under a lease as follows:
 - (i) Flat D : Lease dated 21st August 1991 made between Corporate Properties Limited(1) and Zipporah Leah Bakst (2) for a term of 125 years from 25th June 1991
 - (ii) Flat E: Lease dated 31st January 1990 made between Corporate Properties Limited(1) and Nigel Kenneth Rosner (2) for a term of 125 years from 25th December 1988
 - (iii) Flat F Lease dated 12th March 1990 made between Corporate Properties Limited(1) and Michael Joel Zwebner (2) for a term of 125 years from 25th December 1988

- (iv) Flat G Lease dated 12th March 1990 made between Corporate Properties Limited(1) and Michael Joel Zwebner (2) for a term of 125 years from 25th December 1988
 - (v) Flat H Lease dated 19th February 1990 made between Corporate Properties Limited(1) and Wilde Investments Limited(2) for a term of 125 years from 25th December 1988
5. The current leases are the subject of a decision of the Tribunal dated the 27th January 2011 ordering that the leases are varied as they failed to make satisfactory provision with respect to the computation of the service charge payable.
 6. The Applicants have submitted an application to the Tribunal for a further variation of the leases as they contend that the leases^o fail to make satisfactory provision for the repair and maintenance of the Building, within the meaning of Section 35(2)(a) of the 1987 Act.
 7. The Applicants have submitted a draft of the variations sought in the form of the draft annexed to this decision (Annex A).

B. Directions

1. Oral Directions were issued at a hearing of the Respondents Application on the 2nd December 2010 and confirmed in writing on the 13th December 2010. The matter was listed for a hearing on the 31st January 2011.
2. The Applicants failed to comply with the Tribunals Directions in particular they failed to file and serve a bundle for the hearing as required, despite repeated requests from the first Respondents Solicitors. As a result the first Respondents assumed responsibility and prepared filed and served bundles for the hearing.
3. The Applicants Counsel Mr Cowen appeared at the hearing and produced bundles for the hearing prepared by the Applicants.
4. Since the hearing bundles produced by the first Respondents had been served in advance and were more comprehensive than that produced by the

Applicants, Counsel for the Applicants agreed to use the bundle filed by the first Respondent for the purpose of the hearing.

5. Counsel for both parties agreed that they did not wish to take issue with the compliance of the Directions. Mr Sandham Counsel for the first Respondent did however state that he may seek to rely on the Applicants non compliance of the Directions in relation to the issue of costs.

C. Inspection

The Directions did not specify an inspection and the Tribunal did not consider an inspection to be necessary.

D. Application for Dismissal

1. Mr. Sandham Counsel for the first Respondent relied on his skeleton argument and invited the Tribunal to dismiss the Application on the ground that it would be “unconscionable and/or otherwise an abuse of process for the Applicants to seek to amend the leases as pleaded, or at all because when the leases were drafted the Second Applicant was a director of the Landlord’s predecessor in title, Corporate Properties Limited (“CPL”). Further at the material time the Second Applicant was instructed by CPL in his capacity as solicitor to draft and/or negotiate and approve the leases. Mr Sandham submitted that the Second Applicant, as solicitor, as director of CPL and as signatory, approved the leases that he now claims fail to make satisfactory provision with respect to the repair and maintenance of the Building. Mr Sandham submits the Application amounts to an abuse of process within the meaning of Paragraph 11 of the Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003.
2. Mr. Cowen on behalf of the Applicants objected to the application for dismissal, although he admits that the first Applicant was a director of CPL. He stated that he had no instructions as to whether or not the first Applicant was involved in the drafting the leases.
3. **The law**

The Tribunal has the power pursuant to Regulation 11 of the Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003 to dismiss an application subject to paragraph (2) (which governs the notice to be given);

“Dismissal of frivolous etc applications

- (1) *Subject to paragraph (2), where—*
- (a) *it appears to a tribunal that an application is frivolous or vexatious or otherwise an abuse of process of the tribunal; or*
 - (b) *the respondent to an application makes a request to the tribunal to dismiss an application as frivolous or vexatious or otherwise an abuse of the process of the tribunal, the tribunal may dismiss the application, in whole or in part.*
- (2) *Before dismissing an application under paragraph (1) the tribunal shall give notice to the applicant in accordance with paragraph (3).*
- (3) *Any notice under paragraph (2) shall state—*
- (a) *that the tribunal is minded to dismiss the application;*
 - (b) *the grounds on which it is minded to dismiss the application;*
 - (c) *the date (being not less than 21 days after the date that the notice was sent) before which the applicant may request to appear before and be heard by the tribunal on the question whether the application should be dismissed.*
- (4) *An application may not be dismissed unless—*
- (a) *the applicant makes no request to the tribunal before the date mentioned in paragraph (3)(c); or*
 - (b) *where the applicant makes such a request, the tribunal has heard the applicant and the respondent, or such of them as attend the hearing, on the question of the dismissal of the application.”*

4. Decision on application for dismissal

The Tribunal considered the Application to dismiss. The provisions of Regulation 11 above give the Tribunal a discretion to dismiss an application that is frivolous vexatious or otherwise an abuse of process. The Tribunal is not required to dismiss an application on the ground that it is “unconscionable”. The fact that the first Applicant may have been involved in the drafting, negotiating or approval of the leases does not of itself render the application an abuse of process. Section 35 of the 1987 Act gives the Tribunal jurisdiction to vary a lease where it fails to make satisfactory provision for the repair and maintenance of the Building, Section 35(1) of the 1987 Act provides that “*Any party to a long lease of a flat may make an application to the court for an order varying the lease in such manner as is specified in the application*”. There is no proviso to the right to make an application preventing a party involved in the drafting, negotiating etc of the lease from applying for a variation. In any event prior to dismissing an application a notice in accordance with Regulation 11(3) is required to be served and such a notice had not been served in this case. The Tribunal was not minded to dismiss the Application and did not find the Application to be frivolous, vexatious or otherwise an abuse of process.

E. Matters Agreed

1. The Counsel for the Applicants agreed that they would not be pursuing the following variations:
 - a. Clause 5(4) the substitution of the words “ good and substantial condition” for the words “*good and substantial repair and condition*”
 - b. Clause 5(4) substituting the words “and upon” for the words “*or upon*”,
 - c. Clause 5(4) substituting the word “flats” for the singular “ flat”
 - d. Clause 5(4) amending the grammar by the inclusion of commas, and
 - e. Paragraph 3 of the Fourth Schedule omitting the words “*and to collect rent*”.

F. Hearing:

1. The Applicant’s case

- i. The Applicants rely on the schedule to the Application [158] and the “Reasons for Proposed Variations Sought for all Leases” [159-160] in support of the Application. Mr Cowen Counsel for the Applicants set out the background to the case and explained that the Application is made by two Long leaseholders. The First Applicant being the leaseholder owner of Flat D and the Second Applicant being a leaseholder owner of Flat H. He confirmed that notice of the application has been given to all the remaining leaseholders and the mortgagees of the flats D- H. The copies of the correspondence appear in the Applicant’s bundle [9 – 22].
- ii. Mr Cowen submits the application is made on the ground set out under Section 35(2)(a)(ii) of the 1987 Act, because the leases fail to make

satisfactory provision for the repair and maintenance of the building containing the flats. He acknowledged that there had been a history of dispute as to the proper management and maintenance of the Building. He submits that the LVT should consider the application on its own merits and should not take into account previous history. He referred the Tribunal to the decision in Baystone Investments Limited v Mr S Perkins and others [LRX/115/2008] where HH Judge Jarman QC stated *“In my judgement the LVT did not fall into error in failing to take into account the history of disputes between parties. Various orders, including costs orders have been made in the course of those disputes and the LVT properly focused upon the need to vary the leases in question in deciding how the costs of such variation should fall”*.

iii. The leases are all in substantially identical form, and the proposed amendments to the leases are set out in the draft attached to this decision (Annex A). The Applicants have applied for a variation to the following provisions of leases:

- a. Amendments to Clauses 5(4) and 5(8),
- b. Deletion of Clause 5(5),
- c. Addition of a new Clause 5(9), and
- d. Amendments to paragraphs 1 and 3 of the Fourth Schedule

iv. Clause 5 of the leases sets out the Landlords covenants. In order to understand the extent and nature of the variations sought by the Applicants it is helpful to set out the relevant provisions of Clause 5 as set out in the leases:

“The Landlords hereby covenant with the Tenant as follows:

.....

(4) That (subject to contribution and payment as hereinbefore provided the Landlord not being liable in respect of any loss damage or inconvenience caused by its failure to do so) the Landlords will maintain and keep in good and substantial repair and condition

(i) the main structure of the Building including the roof thereof with its gutters and rain water pipes (excluding any parts

thereof which are the responsibility of any lessee of any part of the Building)

(ii) all such gas and water pipes drains and electric cables and wires in under and upon the Building as are enjoyed or used by the Tenant in common with the owners or lessees of the other flats.....

(5) That (subject as aforesaid) the Landlords will in every third year of the term decorate and paint the exterior of the Building in the manner in which the same is at the time of this demise decorated or as near thereto as circumstances permit

.....

(8) That (subject as aforesaid) the Landlords will so far as practicable use its best endeavours to maintain keep clean and reasonably lighted the passages landings staircases and other parts of the Building so enjoyed or used by the Tenant in common with other Tenants and users of the Building”

Clause 5(4)

- v. Mr Cowen contends that Clause 5(4) of the leases as currently drafted is the biggest obstacle to the satisfactory repair and maintenance of the Building. He states that it is important to appreciate that Clause 5(4) has two elements. The first being that it is arguable that the Landlord’s repairing obligation is subject to a condition precedent on the payment of a contribution towards the service charge, and thus the Landlord’s maintenance obligation does not arise until the Landlord has received payment. If this is the case then the lease fails to make proper provision for repair and maintenance, as if one lessee fails to pay all the others suffer. Mr Cowen submits that if this clause were to be varied so that there was an absolute covenant imposing an obligation on the Landlord to repair, the leaseholders would have a remedy against the Landlord for breach of the covenant. However he accepts that it is far from certain that the wording of the Clause amounts to a condition precedent, and referred to the head note in the Court of Appeal case of Yorkbrook Investments Ltd v Batten [1986] 52P.&C.R.51 which states that “ .. *that the question whether liability in respect of one covenant in a lease was conditional*

upon the performance of another was to be decided upon the true intentions of the parties to be gathered from the instrument as a whole; that in so deciding the court was entitled to take into account the statutory background at the time of the lease to look for guidance and indications from within the lease itself, and to examine the possible consequences of each interpretation contended for; that in the circumstances of the present case it was clear that the parties to the lease did not intend the words "subject to the lessee paying the maintenance contribution" to be a condition precedent to the performance by the lessor of his obligations to maintain the premises...".

- vi. The second element to the Clause 5(4) is that the Landlord is not liable for any "*.....loss damage or inconvenience caused by its failure...*" in complying with the repairing covenant. Mr Cowen submits this is the most objectionable part of the Clause. He contends that if the Landlord is not liable for failure to comply with the repairing covenant it cannot be said that there is satisfactory provision for repairs. He submits that this is a serious inadequacy that requires variation.
- vii. The variation proposed to Clause 5(4) requires the words "*...(subject to contribution and payment as hereinbefore provided the Landlord not being liable in respect of any loss damage or inconvenience caused by its failure to do so)...*" are deleted. In addition further variations to the Clause are required as they clarify the parts of the Building that the Landlord is obliged to repair and maintain by making specific reference to the foundations of the Building, and seek to perfect the Clause by adding punctuation and changing the words "*...in under and upon...*" to "*in under or upon*". Although Mr Cowen accepts that the words "*the main structure of the Building*" in the current Clause 5(4) would include the foundations of the Building.

Clause 5(5)

- viii. The Applicants propose that Clause 5(5) is deleted and replaced by words: "*That the Landlords will in every third year of the term decorate and paint those parts of the exterior of the Building usually so painted*".

Mr Cowen submits that the words “*(subject as aforesaid)*” in Clause 5(5) as currently drafted refers back to Clause 5(4) and if the submissions in respect of Clause 5(4) are accepted then these words should be removed from Clause 5(5).

- ix. Mr Cowen submits that the current provisions which require the Landlord to “*decorate and paint the exterior of the Building in the manner in which the same is at the time of this demise decorated or as near thereto as circumstances permit*”, are unworkable as in order to know whether the Landlord has complied with the provision one needs to know how the Building was decorated at the time of the demise in 1990 or 1991, so these words should be replaced by the suggested variation. Mr Cowen further submits that the words “*or as near thereto as circumstances permit*” dilute the Clause so that not only is it unworkable but it lacks any teeth and as a result fails to make adequate provision for the maintenance of the Building.

Clause 5(8)

- x. The Applicants proposed variation to Clause 5(8) requires the words “... *(subject as aforesaid)*” to be deleted. Mr Cowen relies on his earlier submissions in support of this variation. He submits that the words “... *will so far as practicable use its best endeavours to...*” weakens the Landlord’s obligation which he contends should be an absolute obligation.

Clause 5(9)

- xi. The Applicants propose an additional sub clause 5(9) is inserted into Clause 5 of the leases requiring the Landlord to paint the internal common parts as the current leases provide for the repair of the Building, the repair of the common parts and the painting of the exterior but not the painting of the interior common parts. The Applicants allege the Landlord appears to have neglected to decorate the common parts for over 20 years. The Applicants propose the following Clause 5(9) is inserted:

“That the Landlords will in every fifth year of the term decorate and paint the common entrance, passages, landings and staircase and other internal parts of the Building enjoyed by

the Tenant in common with the other Tenants of the Building such parts as are usually so painted.”

Fourth Schedule

- xii. Mr Cowen relied on the submissions in “Reasons for Proposed Variations Sought for all Leases” [159-160], in support of the proposed variations to the Fourth Schedule, the basic point being that the Landlord should only be able to recover costs and expenses in so far as they are reasonable. In addition if the Tribunal is minded to order that a new Clause 5(9) as proposed is added to the leases then a reference to Clause 5(9) needs to be added to the list of Clauses referred to in the Fourth Schedule.

2. The First Respondent’s Case

- i. Mr Sandham helpfully filed a skeleton argument in support of his case. He relies on the skeleton argument and made the following further oral submissions.
- ii. He submits that the Applicants need to satisfy the Tribunal that the leases fail to make satisfactory provision with respect to the Building within the meaning of section 35(2) of the 1987 Act. He states that the first Respondent does not dispute that “the maintenance of the building by the landlord is paramount”.

Clause 5(4)

- iii. Mr Sandham submits that the provisions of Clause 5(4) include a condition precedent. He states the Landlords obligation to repair is subject to the payment of a service charge and the words “... (*subject as aforesaid*)..” which repeats the condition precedent. He submits that if the Clause does not include a condition precedent then the whole Application is academic. He relies on the case of Yorkbrook in support of his argument that the provisions of the Clause can be read disjunctively and there is no need to vary the leases.
- iv. On the basis that the provisions of Clause 5(4) include a condition precedent Mr Sandham submits that it is not for the Tribunal to determine a matter within the jurisdiction of the County Court. The function of the Tribunal is to determine whether the leases do not

provide for something they ought to provide in order to ensure that a lease is workable. He submits that the Applicants are seeking to renegotiate a contractual obligation, and the Tribunal should not seek to provide any party with better terms than were bargained for, as this is not a function of Section 35 of the 1987 Act. He submits that the function of the Tribunal under Section 35 is to address deficiencies and a requirement in a lease that the lessees put the landlord in funds as a condition precedent cannot be construed as an inadequacy or a deficiency. He referred the Tribunal to the obiter in the Court of Appeal case in Bluestorm Ltd v Portvale Holdings Ltd [2004] EWCA Civ 289, CA where a clause of this type was approved. He relies on the Court of Appeal decision in Bluestorm which held that:

- (a) *“the Defendant’s failure to pay service charges on its flats was a substantial cause of the Claimant’s non- performance of its repairing covenants;*
- (b) *given that the Claimant was dependent on the tenants paying their service charges to fund repairs to the building, it would have been unreasonable for it to undertake any major works”.*

- v. Mr Sandham drew the Tribunals attention to the similarities of the position of the first Respondent and the landlord company in the Bluestorm case in that in both cases they landlord companies are owned and managed by the leaseholders and are entirely dependent on service charge contributions in order to fund works or maintenance of the Building. He quoted Lord Justice Buxton in Bluestorm who stated *“...the landlord company was a creature of the tenants, dependent on their cooperation for its justification and being. That is why ... the Landlord had no power under the lease to raise external funds. That is why it would have been simply imprudent and unreasonable of Bluestorm to go ahead with any major scheme when it knew that 31 per cent of any funding for that scheme was not going to be available.”* He relied on Lord Justice Buxton’s judgement in Bluestorm in particular paragraph 36 which he states shows that the case in Bluestorm to be on all fours with this case. He stated that the Applicants in this case are

accountable for paying 28% of the service charge for the Building and according to the schedule of arrears [191] they are in substantial arrears in the payment of service charge.

- vi. He stated that although he was loath to ask the Tribunal to decide whether or not the provisions of Clause 5(4) amount to a condition precedent, the words "...(*subject as aforesaid*).." are repeated in two subsequent sub clauses 5(5) and 5(8) and so he submits that it was intended that the words create a condition precedent.
- vii. He submits that the provisions of Clause 5(4) are perfectly clear and entirely satisfactory. The tenant pays the service charge and in exchange the freeholder carries out his obligations to maintain the Building. Although he accepts that one criticism of the provisions might be that the lessees could be held to ransom the service charges are nonetheless subject to reasonableness under the provisions of Section 19 of the Landlord And Tenant Act 1985 and the tenants can make an application to the Tribunal under Section 27A of the Landlord and Tenant Act 1985 in order to challenge the reasonableness of any service charge. He states that the Applicants in this case have not made such an application but have simply failed to pay the service charge.
- viii. Mr Sandham submits that it is not the function of the Tribunal under the provisions of Section 35 of the 1987 Act to omit or remove clauses or parts of clauses from a lease simply because the lessees would prefer them to be expressed differently. Mr Sandham contends that the leases do make satisfactory provision for the maintenance and repair of the Building.
- ix. He submits that it is a nonsense to state that the provisions of Clause 5(4) are such that a where a tenant had paid the service charge the landlord would not be liable for a breach. He submits that this is not the way the Clause reads and there is nothing in Clause 5(4) that is unsatisfactory or deficient which would interfere with the maintenance of the Building.
- x. Mr Sandham confirmed that his submissions apply equally to all other variations sought by the Applicants.
- xi. As to the addition of the words "*foundations*", "*railings*", "*external areas*" "*staircases*" and "*all (gutters)*", Mr Sandham submits that there

is no evidence to suggest that the Landlord has failed to carry out any repairs or maintain these because they are not specifically provided for in the leases or as a result of any ambiguity or deficiency in the leases. In any event he states that the main structure of the Building is adequately defined in Clause 1 of the leases. Furthermore he states that Clause 5(8) which provides that the Landlord must maintain “...*other parts of the Building so enjoyed or used by the Tenant in common with other Tenants and users of the Building*” sets out in the clearest terms that the landlord must maintain the common parts of the Building.

Clause 5(5)

- xii. He relied on his earlier submissions in relation to the words “(*subject as aforesaid*)”. The words “*as circumstances permit*” he contends may be old worldly language but its meaning is perfectly clear. He argues that the words do not dilute the clause as is suggested by Mr Cōwen but assist in that the words give the landlord discretion as to how to decorate and paint the exterior of the Building. He argues that there is still an obligation on the landlord to decorate and paint the Building as near as possible to as it was when the Property was originally demised, so for example a landlord would not be permitted under this Clause to paint a mural where none had previously existed, but it does permit the landlord to take into account modern methods and tastes. He states that in any event the leaseholders can challenge the recoverability of an item as a service charge by way of an application under Section 27A of the Landlord & Tenant Act 1985.

Clause 5(8)

- xiii. Mr Sandham relied on his earlier submissions in relation to the words “(*subject as aforesaid*)”. As to the words “*the Landlords will so far as practicable use its best endeavours*” are concerned, Mr Sandham submits that these words simply give the landlord a discretion as to how the obligation is carried out, as there may be circumstances where it is not practicable to maintain a Building in a particular way and removing these words as suggested by the Applicants would create an absolute obligation even if it was not practicable for the landlord to comply with such an obligation. He submits that the test

is whether or not the provision in the lease is satisfactory and there is a difference between that and saying that with the benefit of hindsight would the lessees accept a lease in this form. He states that there is a difference between what we would want in an ideal document and whether or not the provisions are satisfactory. In this case the Applicants complaint is that the landlord has some discretion. Mr Sandham submits that it is not for the Tribunal to renegotiate the terms of the lease.

Clause 5(9)

- xiv. Mr Sandham objected to a new Clause 5(9) proposed by the Applicant on the basis that it introduces an entirely new covenant that was not part of the original bargain between the parties, and in any event it imposes an obligation to maintain already covered under the provisions of Clause 5(8) save for the fact that the new covenant requires the landlord to decorate and paint the common parts every five years. Mr Sandham argues that the obligation to “*maintain*” under the provisions of Clause 5(8) covers a wide range of works and includes an obligation to paint, re-build, repair, re-plaster etc.

Fourth Schedule

- xv. Mr Sandham argues that the Applicant’s proposal to qualify the costs and expenses specified under the Fourth Schedule with the words “*reasonable and reasonably incurred*” adds no more than is already implied under Section 19 of the Landlord & Tenant Act 1985. Mr Sandham argues it is an entirely unnecessary amendment. He states that although the Applicants justification is that the leaseholders should be able to sue on an obligation, as opposed to relying on a covenant implied by statute is “...*bad in law and /or misconceived*...” ,the covenants in the Fourth Schedule are the lessees covenants and not the landlords covenants. He states that “.....*Moreover, it is further predicated on the fallacious proposition that the lessees are presently prohibited from insisting that the costs incurred by the Landlord should be reasonable....the remedy was and remains statutory*...” pursuant to Sections 19 and 27A of the Landlord and Tenant Act 1985.

3. Second and Third Respondents Case

The Second and Third Respondent did not appear at the hearing and were not represented. They did not submit any written representations.

4. Applicants Reply and Final Submissions

- i. Mr Cowen accepts that rectification of a lease where the lease fails to represent the bargain struck by the parties does not fall within the Tribunal's jurisdiction. He states that the Tribunal's jurisdiction is to address a deficiency in the lease. Mr Cowen submits that the Tribunal has the power to undo a bargain and vary the agreement for the reasons set out in Section 35 of the 1987 Act.
- ii. Mr Cowen also submits that it is not a function of the Tribunal to second guess whether or not a County Court would determine the provisions of the relevant clauses of the lease amount to a condition precedent. He states that it is a two stage process for the Tribunal. First the Tribunal needs to decide whether the lease makes satisfactory provision and in doing so it has to interpret the lease. He submits that it is a necessary precursor to applying Section 35. It may be that having done so the Tribunal finds that it is not clear what the lease means and that in itself means that the lease should be varied as if it is difficult to construe then that by definition means it fails to make satisfactory provision. He referred the Tribunal to paragraphs 33, 35, 36 and 37 of Lord Justice Buxton's judgement in the Bluestorm where he examined the judgement in Yorkbrook and considered the possible consequences and difficulties of interpreting the requirement for a lessee to covenant pay as a condition precedent to the lessor undertaking certain obligations:

".. The court decided that the term was not a condition precedent. ... if it were really the case that a simple failure to pay absolved the landlord entirely, then he could refuse to provide services in circumstances where the tenant's lack of payment was not culpable. The court pointed out that as a condition precedent the requirement for prepayment would largely stultify any attempt by the tenant ... to express

dissatisfaction, either with the landlord's performance or with the level of service charges..."

He stated that Mr Sandham's contention that either the provisions amount to a condition precedent or they mean nothing at all is not supported by the Bluestorm case and the matter is not quite as black and white as Mr Sandham suggests. Mr Cowen contends that it is all very well to say the landlord does not have to do works unless the tenant pays but maybe the works need to be done in the interim and the landlord cannot hold back. Mr Cowen stated that he did not accept Mr Sandham's proposition that it is very simple. The tenant pays the service charge and in exchange the landlord carries out its obligation. Although this may work where there is one landlord and one tenant it is not clear as to how this would work where there are several tenants. Anything short of an absolute covenant would fail to make adequate or satisfactory provision. The words "...(*subject to contribution and payment as hereinbefore provided the Landlord not being liable in respect of any loss damage or inconvenience caused by its failure to do so*)..." in Clause 5(4) need to be read very carefully. Just because the words appear in the same bracket does not mean that they should be read as one. Mr Cowen asks the Tribunal to consider what is meant by the words "...*its failure to do so*..." He states that this must refer to the landlord's failure as although the landlord is a single company the landlord is referred to in the plural throughout the lease. That said it is not conditional on anything and simply says the landlord is not liable for failure. It is a phrase which is capable of entirely undoing the repairing covenant. The purpose of Section 35 is to prevent matters such as this reaching the County Court. Parliament has given the Tribunal the power to make satisfactory any provisions that are unsatisfactory and thereby create an ideal lease..

- iii. Mr Cowen stated that the question of service charge arrears is irrelevant as this is about the structure of the lease as a whole and not about the service charge alone. Particular debts should not form part of the Tribunal's understanding. Although there are arrears this is due to a dispute about service charge. The letter of the 29th April 2008

[page 20 of Mr Greenwoods Witness Statement] shows that a cheque for £2960 for Flats D and H was sent to County Estate Management specifically as a payment in respect of the projected service charges for the year ending 24th March 2009. The letter dated 9th May 2008 from JB Leith & Co Solicitors [page 22 of Mr Greenwoods Witness Statement] shows the cheque was returned with a letter stating the cheque was returned “...as the terms of payment are unacceptable.”.

- iv. Mr Cowen submits that similarly the nature of the landlord company is irrelevant, he states that it is not a company made up of all the tenants, Mr Greenwood and Mr Baskt are not members of the company, and whether the company makes a profit or not is irrelevant. The lease has to stand on its own, it has to work with any parties.
- v. He states that although Mr Sandham claims that there was no incidence of the landlord refusing to undertake its obligation, this is irrelevant as the matter before the Tribunal is a question of whether this lease makes adequate provision. It is not for one party to show that the other party has not complied with any obligation under the lease.
- vi. Mr Cowen submits the use of the words “*best endeavours*” simply creates a weaker covenant than an absolute covenant. He illustrated his point by the example of a garage when agreeing to repair a car agreeing that it will repair the car, as opposed to a garage saying they will use their best endeavours to undertake the repairs. It is clear in the former case that the repair will be carried out but not so in the latter. He contends that Mr Sandham’s suggestion that the words “*best endeavours*” create a condition precedent that if the landlord does not have any funds the landlord is not obliged to perform its obligation under this covenant cannot be correct, as the words appear only in this covenant and are not repeated in the lease. The removal of the words “*best endeavours*” does not remove the landlord’s discretion as the landlord still has a discretion as to which contractor to choose etc the words “*best endeavours*” do not add to the landlord’s discretion.

vii. Mr Cowen stated that although Mr Sandham's view that the obligation to paint is included in the obligation to maintain the common parts is true to some extent, there is a difference between an obligation to maintain and a separate obligation to decorate. Mr Cowen referred to the following comments in Hill & Redman Law of Landlord & Tenant as to the Standard of decorations in relation to tenants covenant which he states apply equally to landlords covenants :

"A covenant "to repair" may include within it some degree of decoration. Thus a covenant to "substantially repair, uphold and maintain" a house was held to oblige the tenant to paint the interior. The obligation on a tenant under a general repairing obligation , however, has been held to be limited to carrying out such decoration as is necessary for the prevention of decay and does not extend to decoration for ornamentation".

Mr Cowen contends that the lease currently fails to make satisfactory provision in accordance with Section 35(2)(d) as it does not make provision for the maintenance of any services which are reasonably necessary to ensure that occupiers of the flat enjoy a reasonable standard of accommodation

Mr Cowen stated that as the Building is a Georgian Grade II listed building it is something one would expect to be kept at a certain standard.

5. First Respondents Reply and Final Submissions

The First Respondent referred the tribunal to the Land Tribunal decision in Anna Gianfrancesco v Derek Haughton LRX/10/2007.

G. The Law

The relevant statutory provisions are set out under Section 35 Part IV of the Landlord and Tenant Act 1987 and are as follows:

Part IV

Variation of Leases

Applications relating to flats

35. Application by a party to lease for variation of lease.

(1) Any party to a long lease of a flat may make an application to the court for an order varying the lease in such manner as is specified in the application.

(2) The grounds on which any such application may be made are that the lease fails to make satisfactory provision with respect to one or more of the following matters, namely

(a) the repair or maintenance of—

(i) the flat in question, or

(ii) the building containing the flat, or

(iii) any land or building which is let to the tenant under the lease or in respect of which rights are conferred on him under it;

(b) the insurance of the building containing the flat or of any such land or building as is mentioned in paragraph (a) (iii);

(c) the repair or maintenance of any installations (whether they are in the same building as the flat or not) which are reasonably necessary to ensure that occupiers of the flat enjoy a reasonable standard of accommodation;

(d) the provision or maintenance of any services which are reasonably necessary to ensure that occupiers of the flat enjoy a reasonable standard of accommodation (whether they are services connected with any such installations or not, and whether they are services provided for the benefit of those occupiers or services provided for the benefit of the occupiers of a number of flats including that flat);.....

(3) For the purposes of subsection (2)(c) and (d) the factors for determining, in relation to the occupiers of a flat, what is a reasonable standard of accommodation may include

(a) factors relating to the safety and security of the flat and its occupiers and of any common parts of the building containing the flat; and

(b) other factors relating to the condition of any such common parts.....

(5) Rules of court shall make provision

(a) for requiring notice of any application under this Part to be served by the person making the application, and by any respondent to the application, on any person who the applicant, or (as the case may be) the respondent, knows or has reason to believe is likely to be affected by any variation specified in the application, and

(b) for enabling persons served with any such notice to be joined as parties to the proceedings.

(6) For the purposes of this Part a long lease shall not be regarded as a long lease of a flat if

(a) the demised premises consist of or include three or more flats contained in the same building; or

(b) the lease constitutes a tenancy to which Part II of the Landlord and Tenant Act 1954 applies.....

H. Costs

The Applicants Case

1. The Applicants made no application for costs but opposed the application for costs submitted by the Respondents.

The First Respondents Case

2. Mr Sandham submits that the Landlord is entitled to recover costs of this application and so he submits that the Tribunal should not make an order under Section 20 C. He states that a landlord is generally entitled to recover the costs of proceedings before the Tribunal so long as the right is clear and unambiguous: St Mary's Mansions Ltd v Limegate Investments Co Ltd [2003]1 EGLR 41. He states that in the St Mary's Mansion case the Court of Appeal held that legal costs were not recoverable because the landlord sought to rely on a sweeping-up clause which read "*the cost of all other services which the lessor may in its absolute discretion provide or install ..*" and "*the reasonable and proper fees of the lessor's managing agents.... And for the general management thereof*". Mr

Sandham submits that the construction of the leases in these proceedings is very different and goes further than simply fees of the managing agents. Paragraph 3 of the Fourth Schedule to the leases provides for the landlord to recover the “.. *cost of management of the building*”. He submits that an almost identical construction has been approved by the Court of Appeal in Iperion Investments v Broadwalk House Residents Ltd [1995] 2 EGLR 47; (1994)27 HLR 196 where a similar provision permitting the recovery of costs incurred by the landlord “... *in the proper and reasonable management*” of the block was held to include costs of proceedings properly brought in managing the property.

3. Mr Sandham states that the Tribunal may under Section 20C make any order which it considers just and equitable⁹ in all the circumstances. He submits this is a broad power the exercise of which must be considered on the facts of each case. He contends that the starting point is that a Section 20 C order will deprive the landlord of a valuable contractual right, bargained for when the lease was granted and reflected by the premium paid. He states that where the landlord has succeeded the Tribunal is bound to consider the following points relevant to these proceedings:
 - i. The hearing took place at the behest of the Applicant and so the cost of these proceedings could not have been avoided by the Landlord;
 - ii. The Applicant’s challenge was misconceived;
 - iii. The fact that the Applicants have been unsuccessful is an important factor;
 - iv. Even where the landlord has been unsuccessful the costs are reasonable costs of management: Iperion;
 - v. The Applicants are protected by Section 19 of the Landlord and Tenant Act 1985 even without a Section 20 (c).order. The costs charged as a service

charge are open to challenge by an application under section 27A Landlord and Tenant Act 1985.

4. Counsel submits that it would be appropriate in this case for the Tribunal to make an order as to costs under Paragraph 10 Schedule 12 of The Commonhold and Leasehold Reform Act 2002 on the basis that:
 - i. The Application has failed;
 - ii. The landlord (and therefore the leaseholders) have been put to the expense of time, money and resources in circumstances where the Applicants have not made a genuine attempt to remedy deficiencies in the lease but have instead sought to gain an advantage by watering down their obligation to pay service charges.

The Second and Third Respondents Case

5. The Second and third Respondents made no representations on the issue of costs.

I. Decision

1. The Application is made on the ground that that the leases fail to make satisfactory provision for the repair and maintenance of the Building, within the meaning of Section 35(2)(a) of the 1987 Act.
2. However Mr Cowen in his closing submissions did contend that the lease does not make satisfactory provision for the maintenance of any services which are reasonably necessary to ensure that occupiers of the flat enjoy a reasonable standard of accommodation within the meaning of Section 35(2)(d) of the 1987 Act. This ground was not pleaded in the Application and other than stating that the building is Georgian Grade II listed, which one would expect to be kept at a certain standard Mr Cowen made no further submissions in support of this ground. On the evidence the Applicant has failed to establish this ground and so the Tribunal rejected a variation of the lease on this ground.

3. Mr Cowen and Mr Sandham on behalf of the parties addressed the Tribunal on the extent of the Tribunal's power and the proper approach to variations of leases under section 35 of the 1987 Act.
4. The Tribunal having considered the submissions is of the view that the power to make variations to a leases is intended to be used only where the lease in question fails to make satisfactory provision in respect of the matters specified under Section 35(2) of the 1987 Act, such as the repair and maintenance of the flat or building, the insurance, the repair and maintenance of any installations etc. The purpose of the power under Section 35 of the 1987 Act is to vary a lease whose provisions are unsatisfactory and not merely because one part is dissatisfied with the terms of the lease or considers the lease could be improved. In order for an application to vary a lease to succeed the Applicant must satisfy the Tribunal that one of the Statutory grounds in Section 35 of the 1987 Act applies. The fact that the Applicant would prefer the lease to be drafted differently does not give the Tribunal power to vary the lease.
5. The Tribunal is guided by the judgement of George Bartlett QC, in Anna Gianfrancesco v Derek Haughton LRX/10/2007 in particular paragraphs 21;

“Before it can make an order under section 38 of the Act the tribunal has to be satisfied that the lease fails to make satisfactory provision with respect to one or more of the matters specified in section 35(2) and referred to in the application.....Whether the lease fails to make satisfactory provision is one for the tribunal to judge in all the circumstances of the case. A lease does not fail to make satisfactory provision in my judgement, simply because it could have been better or more explicitly drafted. For instance the need to imply a term is not necessarily, or even probably, an indication that the lease fails to make satisfactory provision for the matter in question.”

The Tribunal accepts that the application should be considered on its own merits and the Tribunal should not take

into account previous history. The Tribunal needs to consider whether or not the lease fails to make satisfactory provision regardless of the history and even regardless of the parties themselves, as the provisions of the lease should be such that it should be workable and make satisfactory provision with any landlord and any tenant. This view is supported by George Bartlett QC, in the Gianfrancesco case at paragraph 22 stated:

“Although it is right that the question of satisfactory provision should be determined in all the circumstances, the weight to be given to particular matters need careful consideration. What the landlord or the tenant says that he is willing to do in addition to his obligations may have some relevance^o as to how, in practice the provision in question is likely to operate. But it would normally be wrong, it seems to me, to base a decision on such an expression of willingness since the person in question could change his attitude or be replaced as landlord or tenant by another person differently disposed”.

6. The statutory provisions require a two stage process. First the Applicant must establish that the lease in question fails to make satisfactory provision for one or more of the matters specified under section 35(2) of the 1987 Act. The Tribunal cannot make an order varying the lease if it is likely substantially to prejudice any Respondent to the application or any person who is not a party to the application (and an award would not afford him adequate compensation) or that it would not be reasonable in the circumstances for the variation to be effected Section 38(6) of the 1987 Act.
7. The matters detailed above suggest that the Tribunal has a limited discretion under Section 35 to vary a lease and does not have a general discretion simply because the provisions of a lease could be improved. A lease only fails to make satisfactory provision for

something if the relevant provision in the lease is unworkable or makes inadequate provision either due to poor drafting or as a result of changes affecting the property since the demise.

8. In the light of the above we turn to the individual variations proposed by the Applicants:

i. Clause 5(4)

The Yorkbrook case illustrates that the question of whether liability in respect of one covenant in a lease was conditional upon the performance of another is a difficult question of construction of the provisions of the lease as a whole, and is not a matter that this Tribunal need determine in order to decide this application. The Tribunal finds that the lease as drafted does make satisfactory provision for the repair and maintenance of the Building as it requires the landlord to repair and maintain the Building albeit subject to the payment by the tenant of the service charge. The Tribunal does not accept Mr Cowen's submission that lease fails to make satisfactory provision for the repair and maintenance of the Building simply because the landlord's obligation to repair and maintain the building is stated to be subject to the payment by the tenant of the service charge.

As to the second element of Clause 5(4) which provides that the landlord is not liable for any "*.....loss damage or inconvenience caused by its failure...*" in complying with the repairing covenant, the Tribunal is of the view that this should be construed *contra proferentum* as against the landlord and could not be relied upon by a landlord as negating its obligation to repair and maintain the Building.

The other variations proposed to Clause 5(4) are simply improvements to the drafting of the Clause and the Tribunal's power to vary does not extend to them.

ii. Clause 5(5)

The reasons given above as to the Tribunal's decision in respect of Clause 5(4) apply equally to this Clause and so the

Tribunal refuses the application for variation of Clause 5(5). The Tribunal is of the view that Clause 5(5) as drafted makes adequate and satisfactory provision for the decoration and painting of the exterior of the Building even though it is subject to the same matters as in Clause 5(4). The fact that this obligation provides that the Building is to be painted and decorated “*in the manner in which the same is at the time of this demise decorated or as near thereto as circumstances permit*”, is surely desirable given that the Building is a Georgian Grade II Listed Building.

iii. Clause 5(8)

The comments above apply equally to the amendments proposed to this Clause. The words “... *will so far as practicable use its best endeavours to....*” may weaken the landlords obligation so that it is not an absolute obligation but it is a greater obligation than had it required the landlord to use all reasonable endeavours. It is a nonsense to say that an obligation in a lease to repair and maintain the building which falls short of an absolute obligation fails to make satisfactory provision for the repair and maintenance of the building. There use of the words “... *will so far as practicable use its best endeavours to....*”, simply gives the landlord some discretion but it certainly does not render the obligation unsatisfactory.

iv. Clause 5(9)

The Applicants propose a new Clause 5(9) which is said to be required to maintain the appearance of the Building. The Clause details more specifically the landlord’s obligation to decorate and paint the common parts. However Clause 5(8) already provides for the maintenance of the common parts. The Tribunal is of the view that the obligation to maintain includes an element of decoration, even though it may not be a particularly high standard. A lack of decoration over a significantly long period would in the Tribunal’s view be

tantamount to a lack of maintenance. The fact that the new Clause 5(9) more explicitly defines the landlord's obligation does not mean the current obligation in Clause 5(8) fails to make satisfactory provision for the repair and maintenance of the common parts.

v. Fourth Schedule

The variations sought simply expressly state the words implied by statute under Section 19 Landlord and Tenant Act 1985. The Tribunal is not satisfied that without the express inclusion of the "reasonable" and "reasonably" in respect of the cost and expenses the lease fails to make satisfactory provision for the repair and maintenance of the Building..

9. Section 20(c)

The Tribunal has considered the submissions made by the parties and the provisions of the leases. The Tribunal may make such order on the application as it considers just and equitable in the circumstances.

His Honour Judge Michael Rich QC in The Tenants Of Langford Court v Doren Limited[2001] EW Lands LRX 37 2000 considered the principles upon which discretion under Section 20(c) should be exercised and said:

" In my judgement the only principle upon which the discretion should be exercised is to have regard to what is just and equitable in all the circumstances. The circumstances include the conduct and circumstances of all parties as well as the outcome of the proceedings in which they arise there is no automatic expectation of an Order under s.20C in favour of a successful tenant, although a landlord who has behaved improperly or unreasonably cannot normally expect to recover his costs of defending such conduct.

In my judgement the primary consideration that the LVT should keep in mind is that the power to make an order under s.20C should be used only in order to ensure that the right to claim costs as part of the service charge is not used in circumstances that make its use unjust. Excessive costs unreasonably incurred will not, in any event, be recoverable by reason of s.19 of the Landlord and Tenant Act

1985Section 20C is a power to deprive a landlord of a property right. If the landlord has abused its rights or used them oppressively that is a salutary power, which may be used with justice and equity; but those entrusted with the discretion given by s. 20C should be cautious to ensure that it is not itself turned into an instrument of oppression.”

Any order under Section 20(c) would inevitably result in the Respondent being unable to recoup the cost of these proceedings as a service charge. In this case the Applicant leaseholder has not succeeded in the Application. Given the circumstances in this case the Tribunal does not consider an order under Section 20(c) to be just and equitable and so makes no order.

Paragraph 10 Schedule 12

1. The Tribunal has very limited powers to award a party to the proceedings costs under Paragraph 10 Schedule 12 of the Commonhold and Leasehold Reform Act, which provides as follows:

“(1)A leasehold valuation tribunal may determine that a party to proceedings shall pay the costs incurred by another party in connection with the proceedings in any circumstances falling within sub-paragraph (2).

(2)The circumstances are where—

(a)he has made an application to the leasehold valuation tribunal which is dismissed in accordance with regulations made by virtue of paragraph 7, or

(b)he has, in the opinion of the leasehold valuation tribunal, acted frivolously, vexatiously, abusively, disruptively or otherwise unreasonably in connection with the proceedings.

(3)The amount which a party to proceedings may be ordered to pay in the proceedings by a determination under this paragraph shall not exceed—

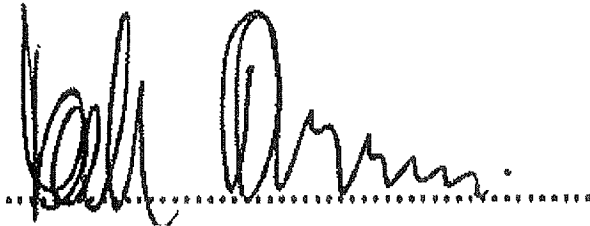
(a)£500, or

(b)such other amount as may be specified in procedure regulations.

(4) A person shall not be required to pay costs incurred by another person in connection with proceedings before a leasehold valuation tribunal except by a determination under this paragraph or in accordance with provision made by any enactment other than this paragraph."

2. The Tribunal noted the Applicants failure to fully comply with the Directions. The Tribunal considered the submissions made on behalf of the first Respondent but were not satisfied that the Applicants acted frivolously, vexatiously, abusively, disruptively or otherwise unreasonably in connection with the proceedings and therefore does not consider an award for costs to be appropriate.

Chairman: .Mrs N Dhanani. LLB (Hons)

A handwritten signature in black ink, appearing to read 'N Dhanani', is written over a horizontal dotted line. The signature is fluid and cursive.

Date: 21st April 2011.

DRAFT OF VARIATIONS SOUGHT FOR ALL LEASES

AMENDEMENTS TO CLAUSE 5

1. Subclause (4) shall be deleted and replaced with the following:

“That the Landlords will maintain and keep in good and substantial condition

- (i) the main structure of the Building including the roof and foundations thereof, the railings and external areas and staircases and all gutters and rainwater pipes (excluding any part or parts thereof which are the responsibility of any lessee of any part of the Building).
- (ii) all such gas and water pipes, drains and electric cables and wires in, under or upon the Building as are enjoyed or used by the Tenant in common with the owners or lessees of the other flat”

2. That subclause (5) be deleted and replaced with the following:

“(5) That the Landlords will in every third year of the term decorate and paint those parts of the exterior of the Building usually so painted”.

3. That subclause (8) should be deleted and replaced with the following: °

“(8) That the Landlords will maintain, repair, replace if not practicable to repair all fixtures and fittings within those parts of the Building used by the Tenant in common with the Landlord and other Tenants of the building keep clean and reasonably lighted the passages, landings, staircases and other parts of the Building so enjoyed or used by the Tenant in common with other Tenants and users of the Building”.

4. An additional clause 5(9) shall be added as follows:

“(9) That the Landlords will in every fifth year of the term decorate and paint the common entrance, passages, landings and staircase and other internal parts of the Building enjoyed by the Tenant in common with the other Tenants of the Building such parts as are usually so painted.”

AMENDMENTS TO FOURTH SCHEDULE

5. Clause 1 shall be deleted and replaced with the following:

“1. All reasonable costs and expenses reasonably incurred by the Landlords for the purpose of complying or in connection with the fulfilment of their obligations under clause 5 subclauses (4), (5), (8) and (9) of this Lease”.

6. Clause 3 shall be deleted and replaced with the following:

“3. The reasonable cost of management of the Building reasonably incurred and in particular the reasonable costs of employing managing agents to provide the services covenanted by the Landlords.”