IN THE LEASEHOLD VALUATION TRIBUNAL
LANDLORD & TENANT ACT 1985

Case Number	CHI/00ML/LSC/2009/0097
Address of property	Bristol Court/ Bristol Court West 142 Marine Parade Brighton
Applicant	Bristol Court Accumulation and Maintenance Trust *in the names of* Barbara Patricia Maddows (*Trustee*) Clair Vee Masters (*Trustee)* *Represented by* Teacher Stern LLP
Respondents	*(1)* Mr Brian Colin Evans *(Flat 4)* *(2)* Mrs Stella Knight (*Flat 3*) *(3)* Mr Ant Howells (*Flat 12*) (4) The Lessees
Date of Hearing	19 November 2008
Date of decision	9 December 2008
Tribunal Members	Ms H Clarke (Barrister) (Chair) Mr D Lintott FRICS Ms J Dalal

1. **THE APPLICATION**
   The Applicants asked the Tribunal to determine that costs for certain proposed works would be reasonably incurred and that service charges to recover the cost of those works would be payable under the terms of the Leases. In response to the Respondent's submissions, if the Tribunal took the view that the proper consultation procedures had not been followed, then the Applicant asked the Tribunal to dispense with the relevant parts of the requirements. The Tribunal was asked by Mr Evans, Respondent, to make an order that the Applicant's costs of the proceedings could not be recovered through the service charge.

2. **THE DECISION**
   The Tribunal decided that the proposed work to the fire escapes and roofs was work for which the tenants were liable to pay service charges within the meaning of their Leases.
   The Tribunal decided on the evidence that the costs of the proposed work in the sum of £135,472 for main tender and £19,320 for steelwork finish plus Roc's surveyor fees of 12.5% were reasonably to be incurred.

The Tribunal decided that the consultation procedures had been followed and there was no need to dispense with any part of the procedure.
The Tribunal decided not to make an order preventing the Applicant from recovering its costs of the proceedings through the service charge.

3. **THE PARTIES**

The Application was brought in the names of Barbara Maddows and Clair Masters, two of the Trustees of the Bristol Court Accumulation and Maintenance Trust which owns the freehold of the property. All of the current tenant lessees of the Property were named as Respondents. Mr Brian Evans, tenant of Flat 4 Bristol Court West, Mrs Stella Knight, tenant of Flat 3 Bristol Court West, and Mr Ant Howells, Flat 12 Bristol Court, made written submissions to the Tribunal in opposition to the application. Letters were received from Ms P Charlton, Flat 11, Bristol Court, and Mr R Wells, Flat 10 Bristol Court stating that they had no objection to the application. The Tribunal did not receive any document indicating that any Respondent had authority to speak for any other party.

4. **THE LAW**

The relevant sections of the Landlord & Tenant Act 1985 provide as follows:
section 18(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.'*
Section 19:
'(1) Relevant costs shall be taken into account in determining the amount of a service charge payable for a period—
(a) only to the extent that they are reasonably incurred'
Section 27A:
'(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'

5. **THE LEASES**

The Tribunal was told that the Leases for the property were in two forms, 'modern' and 'old'. Under the 'old' format the tenant is obliged to pay a share of the costs of the lessor's obligations and certain matters specified in the 4th Schedule, including "*the expenses of maintaining repairing redecorating and renewing: 1) the main structure of the building and in particular the ...roofs...fire escapes...*" and "*Legal Fees in connection with the Building and management thereof*". Under the 'modern' format

the lessor shall '*keep the main structural parts of the building..including the roof roof timbers..fire escapes...in good and tenantable repair and condition..*' and the tenant shall pay a proportion of the cost of doing so.

6. **THE INSPECTION**

The Tribunal inspected the exterior and common staircase of the property and, at Mr Evans' request, the interior of Flat 4. The property comprised a substantial sea-front building containing 15 flats and also a public house and a cottage which were not within the title and not concerned in the application. The internal common staircase and lift were generally in good order and appeared well maintained. The exterior of the property showed a need of redecoration, and disrepair to ironwork on balconies. To the rear the property had 2 external metal fire escapes running the full height of the building, one enclosed within a masonry shaft and the other exposed, and both with crumbling and decayed ironwork. The building had a series of pitched slate tiled roofs with gutters between, and there were slipped and loose slates visible. The Tribunal was notified that the property was Grade 2 listed. The interior of Mr Evans flat showed some areas of staining and marking to plaster work apparently associated with damp penetration.

7. **THE HEARING**

A hearing was held in Hove which was attended by Ms Clair Masters and Ms Barbara Maddows, the Applicants, with their Counsel Mr Justin Bates, their Surveyor Mr Sunil Palmer, and Mr Rob Maddows, also of the Applicant Trust. Mr Brian Evans, tenant of Flat 4 Bristol Court West and Mrs Stella Knight, tenant of Flat 3 Bristol Court West, attended and Mr Evans made submissions. Mrs Knight was not able to stay to make her submissions orally and the Tribunal had regard to her written representations.

8. **THE SUBMISSIONS**

The Applicant's case was that it had obtained a condition survey from its former managing agents in 2005 then in 2008 asked ROC Building Consultancy to review the schedule and prepare a list of the essential work to be done immediately. Notice of the proposed work was given to the tenants under a Stage 1 notice and meetings were arranged to discuss the matter. Following the Stage 1 notice a report was obtained from specialist structural engineers concerning the condition of the fire escapes and the remedial work required. This report made it plain they were unsafe and recommended they be removed and new metal fire escapes put in their places. Tenders were invited from four contractors and the lower of the two tenders received was to be adopted. A Stage 2 notice had also been sent out to the tenants. The date by which the contractors' tenders would expire was

imminent. In the light of opposition to the plans the Applicant thought it necessary to safeguard its position by making the Application.

9. Three Respondents opposed the Application. Mr Evans challenged the part of the work relating to the fire escapes and the roofs, and contended that it did not fall within the scope of his Lease wording. He had obtained a structural engineer's report of his own on which he relied to submit that the fire escapes could be repaired. In the circumstances what the Applicants proposed was so extensive as to amount to an improvement, which was outside the terms of the Lease. The previous managing agents' report had said that the roofs could be repaired so it was not necessary to replace them, which was what the Applicant's plans amounted to. Moreover he contended that the cost of the work would not be reasonably incurred because the work was more extensive or more costly than necessary. He challenged the consultation process, arguing that the work described in the stage 1 notice was different from the work specified in the tenders at Stage 2 of consultation, and that as a result the Applicant had not properly carried out the consultation process. He had been given a service charge demand but the amount exceeded what the Applicant could ask for in advance and in any event had not been incorporated in the budget.

10. Mr Evans had made a cross-application dated 3 November 2008 which he asked the Tribunal to deal with at the hearing, as he said it covered the same material. The cross-application was concerned with fees said to have been incurred by an earlier firm of surveyors and scaffolding costs charged during the 2007 and 2008 service charge years.

11. Mrs Knight in her written submission described how external decorations had been done to a poor standard in the past, leaving the exterior steelwork in a 'shocking state'. Mr Howells in his written submission also alleged that the building had been neglected in the past, leading to extra expense and need for work at the present time. In his view the front façade and windows were in urgent need of work.

12. **THE DECISION AND REASONS**

The Tribunal carefully considered Mr Evans' cross-application dated 3 November 2008 and concluded that the matters which it challenged were distinct and separate from the matters under the present Application. No other tenant had received the cross-application. The Tribunal therefore did not consider the matter

any further but remitted it to the Tribunal office to proceed as a separate application.

13. Mr Evans confirmed that he did not challenge the surveyor's fees under the works proposed in the Application save as to the costs which underlay them, and neither he nor any other Respondent objected to the balance of work proposed (save as to whether the charges were payable for want of consultation). The Tribunal therefore considered that the questions for it to determine were whether the proposed work to the fire escapes and roofs was work for which the tenants were liable to pay service charges within the meaning of their Leases; whether the costs of the proposed work were reasonably incurred; whether the consultation procedures had been followed, and if they had not, whether the Tribunal should dispense with any part of the procedure; and whether to make an order preventing the Applicant from recovering its costs of the proceedings through the service charge.

14. The Tribunal was not, of course, in a position to say whether the standard or quality of the work was reasonable, which could only be considered after it was done.

15. The Tribunal considered that the relevant clause of the Lease was not limited to works of repair, and accordingly the choice was not merely as between whether the work comprised repair or improvement. It was a matter of degree whether the work amounted to repair or renewal or fell outside the terminology of the covenant. Each of the fire escapes were to be removed and reconstructed in their entirety, with some additional characteristics (galvanising and coating) which would prolong their lives. However, what would be put in their place would be a substantially comparable item, namely a metal fire escape. The fact that it could be said to be to a higher specification was not such a change as to make it a different item. The Tribunal considered on the evidence that what was proposed amounted to a renewal and fell within the terms of the Lease.

16. Mr Evans submitted that the fire escapes were capable of repair, but the report on which he relied also remarked that the cost of a quality repair could be greater than the cost of replacement. At the hearing the Applicants' surveyor stated that replacement was without any doubt the cheapest option. The Tribunal noted that the Applicant was in any event not obliged to select the cheapest of alternative courses of action; the question was whether what the landlord proposed was unreasonable. If it was not, then the costs were reasonably incurred. There was no doubt that the Applicant had acted in accordance with the professional advice it had received from the structural engineers, who had advised the

Applicant that the staircases were too unsafe even to inspect. The Tribunal noted Mr Evans' submission that the Applicant had not even considered whether there was an alternative to renewing the fire escapes, by improving fire safety measures within the building, but accepted the evidence of the Applicant's surveyor on this point that the cost of doing so would be likely to exceed the fire escape costs as this was a listed building. On the evidence available, the Applicant's proposals were reasonable and the costs therefore were reasonably to be incurred.

17. The Tribunal considered the work to be done to the roofs. Relatively little of the existing roofs would remain once the defective parts were stripped away. The Tribunal had in mind the authorities referred to in _Minja Properties v Cussins Property Group_ *[1998] 2 EGLR 52* as to the meaning of repair and directed itself that *"repair always involves renewal; renewal of a part; of a subordinate part...Repair is restoration by renewal or replacement of subsidiary parts of a whole. Renewal, as distinguished from repair, is reconstruction of the entirety, meaning by the entirety not necessarily the whole but substantially the whole subject-matter under discussion."*

18. The Tribunal considered that the extent of the work here required did amount to a very large proportion of the roofs, and as a matter of fact and degree was tending towards a renewal rather than a repair. But in the light of the covenant under the Lease, the distinction was immaterial, as the tenant was required to contribute to renewal or to repair. The new parts of the roof could not in any sense be described as radical or extravagant, or which would have the effect of creating a new thing in place of what was there before, and as such could not be described as an improvement.

19. The evidence before the Tribunal clearly showed that the work needed to be done. On the evidence available, the Applicant's proposals were reasonable and the costs therefore were reasonably to be incurred. Mr Evans, Mrs Knight and Mr Howells each submitted that the need for work had arisen, or had become more expensive, due to lack of timely maintenance in the past. The Tribunal had no evidence on which to make such a finding, which was in any event not relevant to the question of whether the work now needed doing, and the question therefore remains open and may be the subject of a separate challenge if appropriate.

20. The Tribunal examined the documents and notices relied on by the Applicant to satisfy the consultation requirements. With the exception of the work to the fire escapes, the works proposed by

the Stage 2 notices were less extensive than those proposed by the Stage 1 initial consultation notice. However it appeared to the Tribunal that the nature of the work which was contemplated by both notices was essentially the same work. The statute should not be construed to mean that the description of the work, and the manner in which the objectives under the work are to be achieved, cannot vary between the initial and the subsequent consultation stages, or the process of consultation would itself be meaningless. As this was the only objection raised to the consultation process, the Tribunal determined that adequate consultation had taken place.

21. Mr Evans raised an argument concerning the date of the service charge invoice which he did not pursue at the hearing. The Tribunal in any case took the view that his argument had no bearing on the issues raised by the Application, which was confined to the costs of work that the Applicant proposed to incur.

22. The Tribunal considered Mr Evans' application for an order that the Applicant's costs were not to be regarded as relevant costs for the purposes of service charge demands. The Tribunal accepted Mr Evans' submission that he was entitled to challenge the costs of the work, but noted that such a challenge came at a price to the Applicant. The Applicant had not instructed solicitors or counsel until very shortly before the hearing day, and had done so primarily because of the objections raised by the three named Respondents. It had done so reasonably and had been wholly successful in its application. The Tribunal decided in all the circumstances that it would not make the order sought.

Signed Ms H Clarke

Dated 9/12/08