CHI/21UF/LSC/2009/0137

THE RESIDENTIAL PROPERTY TRIBUNAL SERVICE

CORRECTION CERTIFICATE UNDER REGUALTION 18(7) OF THE LEASEHOLD VALUATION TRIBUNAL (PROCEDURE) (ENGLAND) REGULATIONS 2003

FLAT 2, 1-8 MEECHING PLACE, CHURCH HILL, NEWHAVEN, BN9 9LP

Applicant: Ricky Harman (Landlord)

Represented by: Mr Matthew Cox BSc of Park Lane Residential Managing Agents

Respondents: Brian Hutchinson (Tenant)

Represented by: Claire Whiteman of Dean Wilson Laing, solicitors

Date of Applications: 18 September 2009

Date of hearing: 30 November 2009

Date of decision: 29 December 2009

Members of the Leasehold Valuation Tribunal:

Mr MA Loveday BA Hons MCI Arb

Mr BHR Simms FRICS MCIArb

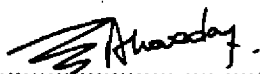
Mr J Cleverton FRICS

INTRODUCTION

1. The Tribunal's decision is dated 29 December 2009.

2. By a letter dated 28 January 2010, the respondent's solicitors requested that the Tribunal correct the spelling of the name of the solicitor for the respondent.

3. This is a certificate under section 18(7) of the Leasehold Valuation Tribunal (Procedure) (England) Regulations 2003 correcting the clerical mistakes in the above document or errors arising in it from an accidental slip or omission. The corrected version is attached.



Mark Loveday BA(Hons) MCIArb
Chairman
9 February 2010

CHI/21UF/LSC/2009/0137

THE RESIDENTIAL PROPERTY TRIBUNAL SERVICE

DECISION OF THE SOUTHERN LEASEHOLD VALUATION TRIBUNAL

LANDLORD AND TENANT ACT 1985 S.27A

FLAT 2, 1-8 MEECHING PLACE, CHURCH HILL, NEWHAVEN, BN9 9LP

Applicant: Ricky Harman (Landlord)

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Respondents: Brian Hutchinson (Tenant)

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Date of Applications: 18 September 2009

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Members of the Leasehold Valuation Tribunal:

MA Loveday BA Hons MCI Arb

Mr BHR Simms FRICS MCIArb

Mr J Cleverton FRICS

INTRODUCTION

1. This is an application relating to service charges payable under a lease of Flat 2, 1-8 Meeching Place, Church Hill, Newhaven BN9 9LP. The application dated 18 September 2009 seeks determinations of liability to pay the following sums under section 27A of the Landlord and tenant Act 1987:

    1 Fire precaution works carried out in 2007 £2,000.

    2 Proposed expenditure on fire precaution works £3,257.32.

2. Directions were given on 21 September 2009 and a hearing took place on 30 November 2009. The applicant landlord was represented by Mr Matthew Cox of the managing agents Park Lane RMA. The respondents tenant was represented Ms Claire Whiteman, a solicitor.

INSPECTION

3. The Tribunal inspected the property before the hearing.

4. The property comprises a three storey 19th century building close to the centre of Newhaven of brick construction with a flat roof. The premises have been converted into 8 flats, with Flats 1 and 2 on the ground floor, Flats 3, 4 and 5 on the first floor and Flats 6, 7 and 8 on the second floor. There are three metal fire escapes mounted on the external elevations. The largest comprises a spiral staircase at the south east corner of the building. This leads from the roof to a structure at first floor level and then down some steps to the ground. At second floor level this escape is connected to a metal balcony which runs along the length of the southern flank elevation to provide a fire exit from flats 6 and 7. The second fire escape comprises a spiral staircase attached to the north flank elevation at the north west corner of the property. This leads to the roof from the second floor where there is a short metal balcony providing a fire exit from Flat 8. The third fire escape is also at the north west corner but is attached to the rear elevation. This comprises a spiral staircase which leads to the ground from a short metal balcony at first floor level in order to provide a fire exit from Flat 5. There were some redundant metal brackets set into the wall at second

floor level suggesting that the configuration of the two fire escapes in the north west corner had been changed at some time in the past.

5. Internally, the building has been subject to fire precaution works which include an eight zone control panel in the hallway, smoke and heat detectors, break glass call points, fire doors, fire notices, extinguishers and emergency lighting. The Tribunal also inspected Flats 2, 5 and 8. Fire access to Flat 5 was through a window to the balcony on the rear elevation. Flat 8 comprises two bedrooms, two receptions, kitchen bathroom and WC. Fire access to Flat 8 was through a door from one bedroom to the balcony on the northern flank wall. The fire escape outside appeared rusty and generally in poor condition.

THE LEASE

6. The Tribunal was provided with a copy of a lease of Flat 2 dated 22 May 1981.

7. By recital 5 to the lease, the lessees' proportion of the service charge costs for the building is one eighth. By recital 5 and clause 4(B)(i) of the lease the lessees are required to *"pay and contribute ... [one eighth] of all moneys expended by the Lessor in complying with its covenants in relation to the Block as set forth in clauses 6(B) and (D) hereof."*

8. By clauses 4(B)(ii) and (iii) there are provisions for payment of interim and final service charges:

> *"(ii)Pay to the Lessor or its agents for the time being on both Payment Days in advance in every year ... [£35] or such sum as the Lessor or its agents shall in their absolute discretion deem appropriate (hereinafter called the "Estimated Sums") on account of Lessee's liability for the next half-year under sub-clause (i) hereof ... AND upon service on the Lessee of the documents referred to in Clause 6(D)(vi)(b) hereof the Lessee shall forthwith pay to or be entitled to receive from the Lessee the balance (if any) by which the actual amount of the Lessee's liability for the previous year falls short of or exceeds the Estimated Sums already paid by the Lessee...*
> *(iii) Pay to the Lessor or its agents within 21 days after the same shall have been demanded such amount as shall have been notified as being due from the Lessee under the provisions of clause 6(D)(vi)(b)(III)(iv)"*

The payment days are specified by recital (8) to be 25th March and 29th September in each year. The documents referred to in Clause 6(D)(vi)(b) are a certified summary of costs incurred in the relevant service charge year and notices of the lessees' liability for service charges. These are to be delivered to the lessees *"as soon as practicable after the 29th September in every year."*

9. The landlord's main repairing obligation is at clause 6(D)(i) of the lease:

   "(i) Remedy all defects in and keep in good and substantial repair and condition throughout the term hereby granted the parts of the Block not comprised in the Flat or any of the flats in the Block ..."

10. By clause 6(D)(x) the landlord is required to:

    "(a) Comply at all times with any requirements orders or regulations now or hereafter made by any local or other authority in relation to the Block or any part thereof pursuant to any statutory power or authority except in so far as the obligation of complying with the same falls on the Lessee under the Lessee's covenants herein contained."

2007 FIRE PRECAUTION WORKS AND RISK ASSESSMENT

11. Each party prepared a bundle of documents for the hearing. However, Mr Groves sought and was granted a short adjournment to obtain further accounting records for 2007. Ms Whiteman agreed to these additional documents being put before the Tribunal.

12. Mr Cox produced a copy of a demand dated 8 May 2007 which sought payment of £2,000. This was expressed to be demand for payment for *"Fire Precautions & Building Works Section 180 & 352 Housing Act 1985 Stage 1"*. Mr Cox explained that this was a contribution towards the cost of carrying out fire precaution works in 2007. He produced a copy of the applicant's balance sheet and income and expenditure account for the service charge year beginning on 25 March 2007. This referred to a figure of £8,753.75 for *"Section 20 notice - Fire Precaution Stage 1"*. Mr Cox stated that these accounts had been audited. The figure was broken down in a client account spreadsheet which included the following entries:

    "8 Oct 07   s20pmt   Fire Mgt Sol   -£293.75

17 Oct 07	s20pmt	Eastbourne F[i]re	-£4,230.00
26 Nov 07	s20pmt	Eastbourne Fire	-£4,230.00"

The first of these was a fire risk assessment and the others were fire precaution works. Mr Cox produced a copy of the fire risk assessment and an invoice from Fire Management Solutions Ltd dated 30 August 2007 and invoices from Eastbourne Fire & Security Ltd dated 3 October and 9 November 2007 in relation to the works. He relied on clauses 6(x)(a) and (b) of the lease. Mr Cox submitted that the landlord had complied with the consultation requirements in Appx 4 Part 1 of the Service Charges (Consultation Requirements)(England) Regulations 2003. He produced a copy of a Notice of Intention to carry out works under paragraph 1 of Part 1 dated 24 February 2007 and a Notice of Estimates under paragraph 4 dated 5 September 2007. No representations were received from lessees and the landlord had selected the cheapest estimate based on the works required. The works were as a result of 'Minded To' Notice served by Lewes DC on 17 July 2003. The Notice stated that the local authority was considering serving a notice under s.190 of the Housing Act 1985 in respect of a detailed schedule of fire precaution works. The risk assessment was as a result of a formal written SF21 note from East Sussex Fire & Rescue Services dated 1 August 2007. Item 1 of this note stated that the landlord should "*provide a risk assessment that is suitable and sufficient*" and specified a list of matters to be addressed.

13. Ms Whiteman relied on a statement of case dated 17 November 2009 which she expanded on in oral submissions at the hearing. Ms Whiteman submitted that the figure of £2,000 did not directly relate to any costs incurred. The demand dated 8 May 2007 was a claim for an interim charge (described in the lease as an "*Estimated Sum*"). The lease did not permit the landlord to demand *ad hoc* payments of service charge. The scheme of clause 4(B)(ii) of the lease required the landlord to estimate the totality of the interim charges for each half year and these are then payable on the two specified payment days.

14. Ms Whiteman submitted that the sum of £2,000 demanded by the landlord on 8 May 2007 (which was the subject of the application) was not recoverable as a service

charge by virtue of s.353 of the Housing Act 1985. She pointed out that the works were not just carried out pursuant to the "Minded To" notice referred to above. In fact, there had been another "Minded To" notice of the same date which stated that the local authority was considering serving a notice under s.352 of the Housing Act 1985. A copy of this second notice was produced at the hearing. Ms Whiteman contended that parliament had provided machinery for a landlord to recover the costs of complying with such notices and that this machinery replaced the service charge provisions in the lease. She relied on a passage from an earlier edition of ***Woodfall*** (release 25: 1 May 1992) 12.073 which dealt with the position before the coming into force of the Regulatory Reform (Fire Safety) Order 2005:

> ***Fire precautions***
> ***12-073*** *Many statutory provisions exist which impose duties about fire precautions, or means of escape in case of fire. The principal Act is now the Fire Precautions Act 1971. In general the duties under the Act are cast upon the accupiers of premises... Where a person having an interest in premises is involved in expense or increased expense in complying with fire safety requirements and he alleges that the whole or any part of the expense ought to be borne by some other persan having an interest in the premises, he may apply to the county court for an apportionment of the cost. The court will apportion the costs in such a manner as the court considers is just and equitable in the circumstances of the case.*
> ***Other statutory powers of apportionment***
> ***12.074*** *Many other statutes contain provisions enabling the county court to apportion expenses incurred in complying with the statutory requirements. Such provisions are contained in the Clean Air Act 1956; the factories act 1961; the Offices Shops and Railway Premises Act 1963, the Docks and harbours Act 1966, the Local Government (Miscellaneous Provisions) Act 1976 and the Food Act 1984.*
> ***Jurisdiction of High Court ousted***
> ***12.075*** *Where a statute provides machinery for apportioning the cost of work as between the persons having an interest in the premises in question, that machinery is the sole method by which liability under the statute may be transferred to another person. Thus the High Court has declined jurisdiction in an action on a tenant's covenant to pay, holding that the landlord's only remedy was to apply to the county court for an apportionment as contemplated by the statute. Thus, the expense of providing a fire escape, where the lessees had covenanted 'to pay all the existing and future taxes, etc, assessments and outgoings of every description for the time being payable by the landlord or tenant in respect of demised premises' could not be recovered in a High Court action."*

15. Ms Whitemore relied on the Court of Appeal decision in ***Horner v Franklin*** [1905] 1 KB 479 to support the proposition in the last sentence of paragraph 12.075. She submitted that the power for the court to apportion costs under s.353(2)(f) of the Housing Act 1985 was similar to that under s.28 of the Fire Precautions Act 1971. It followed that the applicant should have applied to the county court and could not rely on the service charge provisions of the lease.

16. Furthermore, the landlord expressly admitted that the £2,000 was not a sum payable under the service charge provisions. The payment request itself referred to costs incurred under *"section 180 and 352 of the Housing Act 1985"*. The Notice of Estimates dated 5 September 2007 attached a Schedule of Works *"as required by Lewes District Council"*. More significantly, there was a letter from the agents dated 19 November 2007 which stated that:

> *"The £2,000 arrears that you refer to relates not to Annual Service Charges for any of the previous or current years but to part of the £3,000 per flat funds to be raised to carry out the major works imposed by Lewes District Council."*

17. Subject to the above Ms Whitemore accepted at the hearing that (a) there was no argument that the works carried out in 2007 did not fall within the terms of the lease (b) these relevant costs were reasonably incurred under section 19 of the 1985 Act and (c) that the landlord had complied with the s.20 consultation requirements in respect of those works.

18. In response, Mr Cox accepted that the fire safety works were initially started because of local authority requirements under the Housing Act 1985. However, by the time the works were started in 2007, the relevant requirements were made under the Regulatory Reform (Fire Safety) Order 2005: see letter from Fire Safety Officer dated 10 August 2007. The current edition of ***Woodfall*** summarised the position:

> ***"Fire precautions***
> ***12.073*** *The Fire Precautions Act 1971 has been superseded by the Regulatory Reform (Fire Safety) Order 2005. This Order reforms the law relating to fire safety in non-domestic premises...*
> ***Recovery of costs***
> ***12.073.1*** *The Regulatory Reform (Fire Safety) Order 2005 [SI 2005/1541] in force from April 1, 2006 does not reproduce the former power of the court [Under Fire*

Precautions Act 1971 s.28] to apportion expenses incurred in carrying out fire precautions between different persons interested in property. It is considered, therefore, that where a lease contains a covenant by one party to comply with statutory obligations or to contribute towards expenses incurred in such compliance, that covenant will be enforceable according to its terms."

19. The Tribunal's decision. The first issue is whether the Tribunal has jurisdiction to determine liability or whether this is ousted by the court's jurisdiction under the Housing Act 1985. In this respect, there are two material provisions of the Act:

191.— Appeals against repair notices.
(1) A person aggrieved by a repair notice may within 21 days after the date of service of the notice, appeal to the county court.
(1A) Without prejudice to the generality of subsection (1), it shall be a ground of appeal that some person other than the appellant, being a person who is an owner in relation to the dwelling-house house in multiple occupation or part of the building concerned, ought to execute the works or pay the whole or part of the cost of executing them.
***353.** Appeal against notice under s.352.*
— (1) A person on whom a notice is served under section 352 (notice requiring works to render premises fit for number of occupants), or any other person who is an owner, lessee or mortgagee of the premises to which the notice relates, may, within 21 days from the service of the notice or such longer period as the local housing authority may in writing allow, appeal to the county court.
(2) The appeal may be on any of the following grounds—
...(f) that some other person is wholly or partly responsible for the state of affairs calling for the execution of the works, or will as holder of an estate or interest in the premises derive a benefit from their execution, and ought to pay the whole or a part of the expenses of executing them.

20. The Tribunal accepts that a landlord who has a right of appeal under either section cannot maintain a claim to recover a contribution from a lessee under the service charge provisions of a lease. So much is clear from the Court of Appeal decision in ***Horner v Franklin*** (supra) and the passages from ***Woodfall*** referred to by Ms Whitemore. However, the issue is whether the costs were incurred pursuant to any notice which was susceptible to an appeal under s.191 or s.353 of the Act. It is true that the landlord considered that the works were required by the local authority and it did refer to s.190 and 352 of the Housing Act: see demand dated 8 May 2007. However, this is not conclusive. In this instance, there is no evidence that notices under s.190 or s.352 were ever served by the local authority. The two notices dated 17

July 2003 were not notices under s.190 or s.352 of the Act. They were "Minded to" notices under the Housing (Enforcement Procedures for Houses in Multiple Occupation) Order 2007 and the Housing (Fitness Enforcement Procedures) Order 1996. Neither of these notices included any requirement to carry out works or carried with them any statutory right of appeal under the Housing Act 1985. There is therefore no statutory provision which ousts the Tribunal's jurisdiction in this case or which prevents the landlord recovering a contribution by way of the service charge. In any event, both s.191 and s.353 were repealed with effect from 6 April 2006 before the demand was made and the costs were incurred. Although the landlord's submission that the works were carried out under the Regulatory Reform (Fire Safety) Order 2005 is incorrect, the Tribunal accepts that the appeal provisions do not prevent the landlord from recovering the relevant costs of the 2007 fire precaution works from the lessees.

21. The second issue is whether the lease permits the landlord to recover the sum of £2,000. The Tribunal accepts Ms Whitemore's arguments on this. The letter of 19 November 2007 is clear that the sum was not an interim service charge. Clause 4(B)(ii) of the lease does not permit the landlord to recover such *ad hoc* interim payments. In any event, the sum was not a proper interim payment under Clause 4(B)(ii). It was not demanded for either of payment days specified by recital (8) to the lease. It was not made in respect of any liability which was incurred in the following half year period There is no evidence that the landlord ever applied his mind to what that liability would be – the letter referred to above suggests that it was a one eighth contribution towards the estimated costs of works (£24,000) which were to take place over a much longer period. The sum of £2,000 is not therefore payable under the terms of the lease.

22. The respondents accepts that the costs incurred in respect of the 2007 works and the report (£8,753.75) are recoverable under the terms of the lease, that these costs were reasonably incurred under s.19 of the Landlord and Tenant Act 1985 and that the landlord has complied with his statutory consultation obligations. The lease provides for the respondents to pay one eighth of these costs (£1,094.22) and *prima facie* the

respondents are liable to pay this by way of the service charge. However, it is unclear whether these sums have ever been included in the certified accounts and notices required by clause 6(D)(vi)(b) of the lease and it may be that there are other arguments about liability for these sums. The respondents have indicated that there will be an application to determine liability for service charges under s.27A in respect of the 2007/08 service charge year. The issue of whether the landlord can recover the actual cost of the 2007 fire precaution works may therefore be determined at a future date in the light of evidence of the certified accounts etc. For present purposes, however, the Tribunal finds that the sum of £2,000 demanded in 2007 is not payable by the respondent.

PROPOSED EXPENDITURE ON FIRE PRECAUTION WORKS

23. The landlord proposes to incur relevant costs charge of £26,058.54 to provide a new Fire Escape to Flat 8. The issue arises whether these proposed costs would be payable under s.27A(3) of the Landlord and Tenant Act 1985.

24. Mr Cox stated that the works were essentially the installation of a new fire escape to serve Flat 8. He referred the Tribunal to a letter from Lewes DC dated 14 March 2008 which was headed *"Housing Act 2004"*. The council was concerned about the poor condition of the spiral stair from Flat 8 to the roof. A permanent solution to this was eventually agreed with the council which involved the re-routing of the fire escape from Flat 8. The intention was to reach the ground via the existing spiral staircase to Flat 5 on the floor below rather than over the roof. This work would involve the removal of the existing metal spiral staircase from the northern flank wall to the roof and the construction of a new metal balcony along the flank wall and around the corner to the western rear elevation. At that point, a new spiral staircase would be provided downwards to join the balcony outside flat 5. Mr Cox explained that this solution avoided expensive works to the roof perimeter which the council would otherwise require if the roof was to continue to be used as a fire exit. The new fire escape would serve both bedrooms in Flat 8 and it would largely reinstate an earlier fire escape which could be seen from the redundant brackets in the wall.

25. Planning applications were made on 20 May 2008. A Notice of Intention to carry out works was served on 12 December 2008 and no written representations were received. A formal specification was then drawn up by Mr Richard Blake of Clifford Dann Chartered Surveyors. Tenders were submitted by three contractors, of which the lowest was Packham Construction Ltd in the sum of £19,704 + VAT. With estimated supervision costs, this came to £26,058.54. A tender assessment was prepared on 26 March 2009 and a statement of estimates served on 22 April 2009. A demand for payment of £3,257.32 had been made on 22 June 2009, which was one eighth of the figure given in the statement of estimates.

26. Mr Cox also referred to a prohibition order made by Lewes DC on 28 August 2009 under s.20 of the Housing Act 2004. The Council identified Category 1 fire hazards in Flat 8, namely that the two bedrooms had inadequate means of escape. The order prohibited the owner of Flat 8 from using the rooms as bedrooms. Schedule 3 set out a number of remedial actions which could be taken by the applicant:

    1 *The provision of an external fire escape to provide a safe means of escape from both bedrooms.*
    2 *The reinstatement of the existing fire escape, repaired or replaced and extended to serve both bedrooms, with associated works to enable safe use of the roof escape route including safety barriers, improving roof surfacing, lighting etc as necessary.*
    3 *The provision of such internal re-arrangement as necessary, for example the construction of an internal corridor or through such other alternative means [sic] as may be appropriate and agreed with Lewes District Council.*
    4 *The sealing off of the two bedrooms so that the flat is used as a bedsitting/studio type flat.*
    5 *Any other works that will provide a safe means of escape in case of fire from the flat (to be discussed and agreed with Lewes District Council).*

27. For the respondents, Ms Whitemore contended that the cost of the new fire escape was not payable:

    (a) It was accepted that the fire escapes were part of the "Block" within the repairing obligation in clause 6(D)(i) to the lease. However, the proposed works were not works to the fire escape, they were to deal with problems within the flat. Furthermore, clause 6(D)(i) of the lease was an ordinary covenant to repair

the building and it did not allow the landlord to carry out improvements by providing an entirely new fire escape.

(b) Similarly, the proposed works did not fall within clause 6(D)(x)(a) of the lease. There was no requirement in any statutory notice for the landlord to provide a new fire escape for Flat 8. After the involvement of East Sussex Fire and Rescue Service in August 2007 (see above), the landlord continued a dialogue with the Fire Brigade and it was understood that only a *"couple of minor items"* were now outstanding. There was nothing in the fire risk assessment to require a new fire escape. The prohibition order of 28 August 2009 did not require the landlord to comply by providing a new fire escape. This was only the first of five alternative options suggested by the Council in Schedule 3. In any event the prohibition order dated 28 August 2008 was served on the applicant in his capacity as the owner of Flat 8, not as the freeholder.

(c) The true motivation of the landlord was to prepare for the development of the flats on the roof of the building by moving fire access to the elevations. Planning consent for this development was applied for in 2008.

(d) There were more cost effective means of dealing with the problem. The landlord failed to consider the other alternative remedies in the Housing Act 2004 notice, in particular repairs and modifications to the existing fire escape and roof (option 2) and reconfiguration of the flat (options 3 and 4).

28. In response, Mr Cox stating that the applicant had considered other options for repairs set out in Schedule 3 to the prohibition order. He had chosen the first option. The second option was unrealistic since the existing fire escape was beyond repair. Mr Cox accepted he had no notes of the present condition of the fire escape but it had always been recognised it was beyond repair. The building surveyor was of the view that repairs were uneconomic and in any event additional works would be needed to the roof parapets. The third and fourth options were unfair to the landlord. The fact that the landlord was the owner of flat 8 was not relevant. Had the owner been a third party lessee it would be wholly unreasonable to expect that person to reconfigure the internal layout of the flat and lose usable internal space. No-one had made any suggestion of alternative options during the s.20 consultation process.

29. The Tribunal's decision. The respondent accepts that repairs to the fire escape would fall within clause 6(D)(i) of the lease. The Tribunal has no hesitation in finding that the landlord is obliged to repair the fire escape. On inspection, there was evidence of rust and this is supported by the 2007 risk assessment which included photographs of the affected parts. The Tribunal also rejects the contention that the provision of a new fire escape would amount to an improvement rather than repair. Almost every repair involves an element of improvement and this is very much a matter of degree. In this instance, the landlord simply proposes to replace one metal fire escape with another metal fire escape along a different route.

30. As far as clause 6(D)(x)(a) of the lease is concerned, the obligation deals with local authority requirements in relation *"to the Block or any part thereof"*. The fire escape is mounted externally, and the Housing Act 2004 prohibition order can therefore be said to apply to *"the Block"*. In any event, Flat 8 is plainly *"part"* of the Block. There is nothing in clause 6(D)(x)(a) which limits the landlord's obligations to a situation where he must act in relation to notices etc which affect the common parts. Clause 6(D)(x)(a) specifically excludes liability where the obligation in any notice etc falls on the lessee of Flat 2 under the terms of the lease of Flat 2. The clause does not make any similar exclusion of liability where the obligation to comply falls on the occupiers of other flats. The second consideration under clause 6(D)(x) is whether a new fire escape would be required to *"comply"* with any notice etc. In this case, the only notice which refers to the provision of a new fire escape is the prohibition order. The Tribunal concludes that the provision of a new fire escape to Flat 8 would be undertaken to *"comply"* with the order – albeit that the local authority suggests other means of complying in Schedule 3 to the Notice.

31. It follows from the above that the cost of the proposed new Fire Escape to Flat 8 is recoverable under the service charge provisions of the lease. Furthermore, there is no dispute that the landlord has complied with the requirements of section 20 of the Landlord and Tenant Act 1985 and the Service Charges (Consultation Requirements) (England) Regulations 2003.

32. The remaining two issues raised by the respondents go to reasonableness under s.19(2B) of the Landlord and Tenant Act 1985. This states that:

> *"(2B) An application may also be made to a leasehold valuation tribunal by a tenant by whom, or landlord to whom, a service charge may be payable for a determination –*
> *(a)whether if costs were incurred for services, repairs, maintenance, insurance or management of any specified description they would be reasonable"*

33. In this instance, there is no evidence to support the contention by the respondents that the landlord has some ulterior motive for proposing the works. However, there is more substance to the second argument. The question of reasonableness under s.19 of the 1985 Act involves consideration of the landlord's process. In particular, section 19(1) requires the Tribunal to consider the process adopted by the landlord for assessing any relevant costs: ***Forcelux v Sweetman*** [2001] 2 EGLR 173. The Tribunal is mindful of the wide scope afforded to landlords to choose from a range of "*reasonable*" options when it comes to works. A landlord is not always bound to choose the cheapest option in every case. However, in this instance, it appears from Schedule 3 to the prohibition order that the landlord has a range of options in meeting the defects in the fire escape to Flat 8. The landlord appears to have selected the option of a new fire escape over a year ago, when it applied for planning consent. It does not appear to have given detailed consideration to the other alternatives given by the local authority. The Tribunal does not consider it unreasonable to have rejected the third and fourth options of reconfiguring the internal layout of Flat 8 – Mr Cox's submissions that the landlord cannot be expected to lose the use of part of its flat to meet disrepair to the exterior of the Block have force. However, there is no evidence that the landlord has given any detailed consideration to the option of repairing the existing fire escape and making the other alterations suggested by the local authority in paragraph 2 of Schedule 3 to the prohibition order. Indeed, Mr Cox admitted he had not written details of the current condition of the fire escape and that the landlord had proceeded on the basis that a new one was required. The Tribunal also takes into account the substantial sums involved for the lessees in the landlord's current proposals and the relatively small benefit that they will obtain in return for a

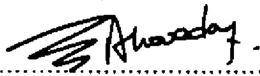
contribution of over £3,000 to these costs. In such a situation, the landlord has an even heavier burden to ensure that most cost effective alternatives to these works have been properly considered.

34. In the circumstances, the Tribunal finds that on present evidence the proposed cost of £26,058.54 to provide a new Fire Escape to Flat 8 is not reasonable under s.19(2B) of the Landlord and Tenant Act 1985. However, it is open to the landlord to carry out a proper consideration of the second option in Schedule 3 to the prohibition order dated 28 August 2009. In the light of such a review it may well be that a future Tribunal would reach a different conclusion to the determination in this case.

CONCLUSIONS

35. The sum of £2,000 demanded on 8 May 2007 is not payable by the respondents.

36. The cost of a new fire escape serving flat 8 would be recoverable under the service charge provisions of the lease of flat 2. However, on present evidence, if relevant costs of £26,058.54 were incurred for the provision of a new Fire Escape to Flat 8, such costs would not be reasonable under s.19(2B) of the Landlord and Tenant Act 1985.



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Respondents: Brian Hutchinson (Tenant)

Represented by: Claire Whiteman of Dean Wilson Laing, solicitors

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MA Loveday BA Hons MCI Arb

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Mr J Cleverton FRICS

INTRODUCTION

1. This is an application relating to service charges payable under a lease of Flat 2, 1-8 Meeching Place, Church Hill, Newhaven BN9 9LP. The application dated 18 September 2009 seeks determinations of liability to pay the following sums under section 27A of the Landlord and tenant Act 1987:

   1 Fire precaution works carried out in 2007 £2,000.

   2 Proposed expenditure on fire precaution works £3,257.32.

2. Directions were given on 21 September 2009 and a hearing took place on 30 November 2009. The applicant landlord was represented by Mr Matthew Cox of the managing agents Park Lane RMA. The respondents tenant was represented Ms Claire Whiteman, a solicitor.

INSPECTION

3. The Tribunal inspected the property before the hearing.

4. The property comprises a three storey 19th century building close to the centre of Newhaven of brick construction with a flat roof. The premises have been converted into 8 flats, with Flats 1 and 2 on the ground floor, Flats 3, 4 and 5 on the first floor and Flats 6, 7 and 8 on the second floor. There are three metal fire escapes mounted on the external elevations. The largest comprises a spiral staircase at the south east corner of the building. This leads from the roof to a structure at first floor level and then down some steps to the ground. At second floor level this escape is connected to a metal balcony which runs along the length of the southern flank elevation to provide a fire exit from flats 6 and 7. The second fire escape comprises a spiral staircase attached to the north flank elevation at the north west corner of the property. This leads to the roof from the second floor where there is a short metal balcony providing a fire exit from Flat 8. The third fire escape is also at the north west corner but is attached to the rear elevation. This comprises a spiral staircase which leads to the ground from a short metal balcony at first floor level in order to provide a fire exit from Flat 5. There were some redundant metal brackets set into the wall at second

floor level suggesting that the configuration of the two fire escapes in the north west corner had been changed at some time in the past.

5. Internally, the building has been subject to fire precaution works which include an eight zone control panel in the hallway, smoke and heat detectors, break glass call points, fire doors, fire notices, extinguishers and emergency lighting. The Tribunal also inspected Flats 2, 5 and 8. Fire access to Flat 5 was through a window to the balcony on the rear elevation. Flat 8 comprises two bedrooms, two receptions, kitchen bathroom and WC. Fire access to Flat 8 was through a door from one bedroom to the balcony on the northern flank wall. The fire escape outside appeared rusty and generally in poor condition.

THE LEASE

6. The Tribunal was provided with a copy of a lease of Flat 2 dated 22 May 1981.

7. By recital 5 to the lease, the lessees' proportion of the service charge costs for the building is one eighth. By recital 5 and clause 4(B)(i) of the lease the lessees are required to *"pay and contribute ... [one eighth] of all moneys expended by the Lessor in complying with its covenants in relation to the Block as set forth in clauses 6(B) and (D) hereof."*

8. By clauses 4(B)(ii) and (iii) there are provisions for payment of interim and final service charges:

> *"(ii)Pay to the Lessor or its agents for the time being on both Payment Days in advance in every year ... [£35] or such sum as the Lessor or its agents shall in their absolute discretion deem appropriate (hereinafter called the "Estimated Sums") on account of Lessee's liability for the next half-year under sub-clause (i) hereof ... AND upon service on the Lessee of the documents referred to in Clause 6(D)(vi)(b) hereof the Lessee shall forthwith pay to or be entitled to receive from the Lessee the balance (if any) by which the actual amount of the Lessee's liability for the previous year falls short of or exceeds the Estimated Sums already paid by the Lessee...*
>
> *(iii) Pay to the Lessor or its agents within 21 days after the same shall have been demanded such amount as shall have been notified as being due from the Lessee under the provisions of clause 6(D)(vi)(b)(III)(iv)"*

The payment days are specified by recital (8) to be 25th March and 29th September in each year. The documents referred to in Clause 6(D)(vi)(b) are a certified summary of costs incurred in the relevant service charge year and notices of the lessees' liability for service charges. These are to be delivered to the lessees *"as soon as practicable after the 29th September in every year."*

9. The landlord's main repairing obligation is at clause 6(D)(i) of the lease:

   "(i) Remedy all defects in and keep in good and substantial repair and condition throughout the term hereby granted the parts of the Block not comprised in the Flat or any of the flats in the Block ..."

10. By clause 6(D)(x) the landlord is required to:

    "(a) Comply at all times with any requirements orders or regulations now or hereafter made by any local or other authority in relation to the Block or any part thereof pursuant to any statutory power or authority except in so far as the obligation of complying with the same falls on the Lessee under the Lessee's covenants herein contained."

2007 FIRE PRECAUTION WORKS AND RISK ASSESSMENT

11. Each party prepared a bundle of documents for the hearing. However, Mr Groves sought and was granted a short adjournment to obtain further accounting records for 2007. Ms Whiteman agreed to these additional documents being put before the Tribunal.

12. Mr Cox produced a copy of a demand dated 8 May 2007 which sought payment of £2,000. This was expressed to be demand for payment for *"Fire Precautions & Building Works Section 180 & 352 Housing Act 1985 Stage 1"*. Mr Cox explained that this was a contribution towards the cost of carrying out fire precaution works in 2007. He produced a copy of the applicant's balance sheet and income and expenditure account for the service charge year beginning on 25 March 2007. This referred to a figure of £8,753.75 for *"Section 20 notice - Fire Precaution Stage 1"*. Mr Cox stated that these accounts had been audited. The figure was broken down in a client account spreadsheet which included the following entries:

    "8 Oct 07   s20pmt   Fire Mgt Sol   -£293.75

17 Oct 07	s20pmt	Eastbourne F[i]re	-£4,230.00
26 Nov 07	s20pmt	Eastbourne Fire	-£4,230.00"

The first of these was a fire risk assessment and the others were fire precaution works. Mr Cox produced a copy of the fire risk assessment and an invoice from Fire Management Solutions Ltd dated 30 August 2007 and invoices from Eastbourne Fire & Security Ltd dated 3 October and 9 November 2007 in relation to the works. He relied on clauses 6(x)(a) and (b) of the lease. Mr Cox submitted that the landlord had complied with the consultation requirements in Appx 4 Part 1 of the Service Charges (Consultation Requirements)(England) Regulations 2003. He produced a copy of a Notice of Intention to carry out works under paragraph 1 of Part 1 dated 24 February 2007 and a Notice of Estimates under paragraph 4 dated 5 September 2007. No representations were received from lessees and the landlord had selected the cheapest estimate based on the works required. The works were as a result of 'Minded To' Notice served by Lewes DC on 17 July 2003. The Notice stated that the local authority was considering serving a notice under s.190 of the Housing Act 1985 in respect of a detailed schedule of fire precaution works. The risk assessment was as a result of a formal written SF21 note from East Sussex Fire & Rescue Services dated 1 August 2007. Item 1 of this note stated that the landlord should *"provide a risk assessment that is suitable and sufficient"* and specified a list of matters to be addressed.

13. Ms Whiteman relied on a statement of case dated 17 November 2009 which she expanded on in oral submissions at the hearing. Ms Whiteman submitted that the figure of £2,000 did not directly relate to any costs incurred. The demand dated 8 May 2007 was a claim for an interim charge (described in the lease as an *"Estimated Sum"*). The lease did not permit the landlord to demand *ad hoc* payments of service charge. The scheme of clause 4(B)(ii) of the lease required the landlord to estimate the totality of the interim charges for each half year and these are then payable on the two specified payment days.

14. Ms Whiteman submitted that the sum of £2,000 demanded by the landlord on 8 May 2007 (which was the subject of the application) was not recoverable as a service

charge by virtue of s.353 of the Housing Act 1985. She pointed out that the works were not just carried out pursuant to the "Minded To" notice referred to above. In fact, there had been another "Minded To" notice of the same date which stated that the local authority was considering serving a notice under s.352 of the Housing Act 1985. A copy of this second notice was produced at the hearing. Ms Whiteman contended that parliament had provided machinery for a landlord to recover the costs of complying with such notices and that this machinery replaced the service charge provisions in the lease. She relied on a passage from an earlier edition of ***Woodfall*** (release 25: 1 May 1992) 12.073 which dealt with the position before the coming into force of the Regulatory Reform (Fire Safety) Order 2005:

> ***Fire precautions***
> ***12-073*** *Many statutory provisions exist which impose duties about fire precautions, or means of escape in case of fire. The principal Act is now the Fire Precautions Act 1971. In general the duties under the Act are cast upon the occupiers of premises... Where a person having an interest in premises is involved in expense or increased expense in complying with fire safety requirements and he alleges that the whole or any part of the expense ought to be borne by some other person having an interest in the premises, he may apply to the county court for an apportionment of the cost. The court will apportion the costs in such a manner as the court considers is just and equitable in the circumstances of the case.*
> ***Other statutory powers of apportionment***
> ***12.074*** *Many other statutes contain provisions enabling the county court to apportion expenses incurred in complying with the statutory requirements. Such provisions are contained in the Clean Air Act 1956; the factories act 1961; the Offices Shops and Railway Premises Act 1963, the Docks and harbours Act 1966, the Local Government (Miscellaneous Provisions) Act 1976 and the Food Act 1984.*
> ***Jurisdiction of High Court ousted***
> ***12.075*** *Where a statute provides machinery for apportioning the cost of work as between the persons having an interest in the premises in question, that machinery is the sole method by which liability under the statute may be transferred to another person. Thus the High Court has declined jurisdiction in an action on a tenant's covenant to pay, holding that the landlord's only remedy was to apply to the county court for an apportionment as contemplated by the statute. Thus, the expense of providing a fire escape, where the lessees had covenanted 'to pay all the existing and future taxes, etc, assessments and outgoings of every description for the time being payable by the landlord or tenant in respect of demised premises' could not be recovered in a High Court action."*

15. Ms Whiteman relied on the Court of Appeal decision in ***Horner v Franklin*** [1905] 1 KB 479 to support the proposition in the last sentence of paragraph 12.075. She submitted that the power for the court to apportion costs under s.353(2)(f) of the Housing Act 1985 was similar to that under s.28 of the Fire Precautions Act 1971. It followed that the applicant should have applied to the county court and could not rely on the service charge provisions of the lease.

16. Furthermore, the landlord expressly admitted that the £2,000 was not a sum payable under the service charge provisions. The payment request itself referred to costs incurred under *"section 180 and 352 of the Housing Act 1985"*. The Notice of Estimates dated 5 September 2007 attached a Schedule of Works *"as required by Lewes District Council"*. More significantly, there was a letter from the agents dated 19 November 2007 which stated that:

    "The £2,000 arrears that you refer to relates not to Annual Service Charges for any of the previous or current years but to part of the £3,000 per flat funds to be raised to carry out the major works imposed by Lewes District Council."

17. Subject to the above Ms Whiteman accepted at the hearing that (a) there was no argument that the works carried out in 2007 did not fall within the terms of the lease (b) these relevant costs were reasonably incurred under section 19 of the 1985 Act and (c) that the landlord had complied with the s.20 consultation requirements in respect of those works.

18. In response, Mr Cox accepted that the fire safety works were initially started because of local authority requirements under the Housing Act 1985. However, by the time the works were started in 2007, the relevant requirements were made under the Regulatory Reform (Fire Safety) Order 2005: see letter from Fire Safety Officer dated 10 August 2007. The current edition of ***Woodfall*** summarised the position:

    "Fire precautions
    12.073 *The Fire Precautions Act 1971 has been superseded by the Regulatory Reform (Fire Safety) Order 2005. This Order reforms the law relating to fire safety in non-domestic premises...*
    Recovery of costs
    12.073.1 *The Regulatory Reform (Fire Safety) Order 2005 [SI 2005/1541] in force from April 1, 2006 does not reproduce the former power of the court [Under Fire*

Precautions Act 1971 s.28] to apportion expenses incurred in carrying out fire precautions between different persons interested in property. It is considered, therefore, that where a lease contains a covenant by one party to comply with statutory obligations or to contribute towards expenses incurred in such compliance, that covenant will be enforceable according to its terms."

19. The Tribunal's decision. The first issue is whether the Tribunal has jurisdiction to determine liability or whether this is ousted by the court's jurisdiction under the Housing Act 1985. In this respect, there are two material provisions of the Act:

> ***191.— Appeals against repair notices.***
> *(1) A person aggrieved by a repair notice may within 21 days after the date of service of the notice, appeal to the county court.*
> *(1A) Without prejudice to the generality of subsection (1), it shall be a ground of appeal that some person other than the appellant, being a person who is an owner in relation to the dwelling-house house in multiple occupation or part of the building concerned, ought to execute the works or pay the whole or part of the cost of executing them.*
> ***353.*** *Appeal against notice under s.352.*
> *— (1) A person on whom a notice is served under section 352 (notice requiring works to render premises fit for number of occupants), or any other person who is an owner, lessee or mortgagee of the premises to which the notice relates, may, within 21 days from the service of the notice or such longer period as the local housing authority may in writing allow, appeal to the county court.*
> *(2) The appeal may be on any of the following grounds—*
> *...(f) that some other person is wholly or partly responsible for the state of affairs calling for the execution of the works, or will as holder of an estate or interest in the premises derive a benefit from their execution, and ought to pay the whole or a part of the expenses of executing them.*

20. The Tribunal accepts that a landlord who has a right of appeal under either section cannot maintain a claim to recover a contribution from a lessee under the service charge provisions of a lease. So much is clear from the Court of Appeal decision in ***Horner v Franklin*** (supra) and the passages from ***Woodfall*** referred to by Ms Whiteman. However, the issue is whether the costs were incurred pursuant to any notice which was susceptible to an appeal under s.191 or s.353 of the Act. It is true that the landlord considered that the works were required by the local authority and it did refer to s.190 and 352 of the Housing Act: see demand dated 8 May 2007. However, this is not conclusive. In this instance, there is no evidence that notices under s.190 or s.352 were ever served by the local authority. The two notices dated 17

July 2003 were not notices under s.190 or s.352 of the Act. They were "Minded to" notices under the Housing (Enforcement Procedures for Houses in Multiple Occupation) Order 2007 and the Housing (Fitness Enforcement Procedures) Order 1996. Neither of these notices included any requirement to carry out works or carried with them any statutory right of appeal under the Housing Act 1985. There is therefore no statutory provision which ousts the Tribunal's jurisdiction in this case or which prevents the landlord recovering a contribution by way of the service charge. In any event, both s.191 and s.353 were repealed with effect from 6 April 2006 before the demand was made and the costs were incurred. Although the landlord's submission that the works were carried out under the Regulatory Reform (Fire Safety) Order 2005 is incorrect, the Tribunal accepts that the appeal provisions do not prevent the landlord from recovering the relevant costs of the 2007 fire precaution works from the lessees.

21. The second issue is whether the lease permits the landlord to recover the sum of £2,000. The Tribunal accepts Ms Whiteman's arguments on this. The letter of 19 November 2007 is clear that the sum was not an interim service charge. Clause 4(B)(ii) of the lease does not permit the landlord to recover such *ad hoc* interim payments. In any event, the sum was not a proper interim payment under Clause 4(B)(ii). It was not demanded for either of payment days specified by recital (8) to the lease. It was not made in respect of any liability which was incurred in the following half year period There is no evidence that the landlord ever applied his mind to what that liability would be – the letter referred to above suggests that it was a one eighth contribution towards the estimated costs of works (£24,000) which were to take place over a much longer period. The sum of £2,000 is not therefore payable under the terms of the lease.

22. The respondents accepts that the costs incurred in respect of the 2007 works and the report (£8,753.75) are recoverable under the terms of the lease, that these costs were reasonably incurred under s.19 of the Landlord and Tenant Act 1985 and that the landlord has complied with his statutory consultation obligations. The lease provides for the respondents to pay one eighth of these costs (£1,094.22) and *prima facie* the

respondents are liable to pay this by way of the service charge. However, it is unclear whether these sums have ever been included in the certified accounts and notices required by clause 6(D)(vi)(b) of the lease and it may be that there are other arguments about liability for these sums. The respondents have indicated that there will be an application to determine liability for service charges under s.27A in respect of the 2007/08 service charge year. The issue of whether the landlord can recover the actual cost of the 2007 fire precaution works may therefore be determined at a future date in the light of evidence of the certified accounts etc. For present purposes, however, the Tribunal finds that the sum of £2,000 demanded in 2007 is not payable by the respondent.

PROPOSED EXPENDITURE ON FIRE PRECAUTION WORKS

23. The landlord proposes to incur relevant costs charge of £26,058.54 to provide a new Fire Escape to Flat 8. The issue arises whether these proposed costs would be payable under s.27A(3) of the Landlord and Tenant Act 1985.

24. Mr Cox stated that the works were essentially the installation of a new fire escape to serve Flat 8. He referred the Tribunal to a letter from Lewes DC dated 14 March 2008 which was headed *"Housing Act 2004"*. The council was concerned about the poor condition of the spiral stair from Flat 8 to the roof. A permanent solution to this was eventually agreed with the council which involved the re-routing of the fire escape from Flat 8. The intention was to reach the ground via the existing spiral staircase to Flat 5 on the floor below rather than over the roof. This work would involve the removal of the existing metal spiral staircase from the northern flank wall to the roof and the construction of a new metal balcony along the flank wall and around the corner to the western rear elevation. At that point, a new spiral staircase would be provided downwards to join the balcony outside flat 5. Mr Cox explained that this solution avoided expensive works to the roof perimeter which the council would otherwise require if the roof was to continue to be used as a fire exit. The new fire escape would serve both bedrooms in Flat 8 and it would largely reinstate an earlier fire escape which could be seen from the redundant brackets in the wall.

25. Planning applications were made on 20 May 2008. A Notice of Intention to carry out works was served on 12 December 2008 and no written representations were received. A formal specification was then drawn up by Mr Richard Blake of Clifford Dann Chartered Surveyors. Tenders were submitted by three contractors, of which the lowest was Packham Construction Ltd in the sum of £19,704 + VAT. With estimated supervision costs, this came to £26,058.54. A tender assessment was prepared on 26 March 2009 and a statement of estimates served on 22 April 2009. A demand for payment of £3,257.32 had been made on 22 June 2009, which was one eighth of the figure given in the statement of estimates.

26. Mr Cox also referred to a prohibition order made by Lewes DC on 28 August 2009 under s.20 of the Housing Act 2004. The Council identified Category 1 fire hazards in Flat 8, namely that the two bedrooms had inadequate means of escape. The order prohibited the owner of Flat 8 from using the rooms as bedrooms. Schedule 3 set out a number of remedial actions which could be taken by the applicant:

    1 *The provision of an external fire escape to provide a safe means of escape from both bedrooms.*
    2 *The reinstatement of the existing fire escape, repaired or replaced and extended to serve both bedrooms, with associated works to enable safe use of the roof escape route including safety barriers, improving roof surfacing, lighting etc as necessary.*
    3 *The provision of such internal re-arrangement as necessary, for example the construction of an internal corridor or through such other alternative means [sic] as may be appropriate and agreed with Lewes District Council.*
    4 *The sealing off of the two bedrooms so that the flat is used as a bedsitting/studio type flat.*
    5 *Any other works that will provide a safe means of escape in case of fire from the flat (to be discussed and agreed with Lewes District Council).*

27. For the respondents, Ms Whiteman contended that the cost of the new fire escape was not payable:

    (a) It was accepted that the fire escapes were part of the "Block" within the repairing obligation in clause 6(D)(i) to the lease. However, the proposed works were not works to the fire escape, they were to deal with problems within the flat. Furthermore, clause 6(D)(i) of the lease was an ordinary covenant to repair

the building and it did not allow the landlord to carry out improvements by providing an entirely new fire escape.

(b) Similarly, the proposed works did not fall within clause 6(D)(x)(a) of the lease. There was no requirement in any statutory notice for the landlord to provide a new fire escape for Flat 8. After the involvement of East Sussex Fire and Rescue Service in August 2007 (see above), the landlord continued a dialogue with the Fire Brigade and it was understood that only a *"couple of minor items"* were now outstanding. There was nothing in the fire risk assessment to require a new fire escape. The prohibition order of 28 August 2009 did not require the landlord to comply by providing a new fire escape. This was only the first of five alternative options suggested by the Council in Schedule 3. In any event the prohibition order dated 28 August 2008 was served on the applicant in his capacity as the owner of Flat 8, not as the freeholder.

(c) The true motivation of the landlord was to prepare for the development of the flats on the roof of the building by moving fire access to the elevations. Planning consent for this development was applied for in 2008.

(d) There were more cost effective means of dealing with the problem. The landlord failed to consider the other alternative remedies in the Housing Act 2004 notice, in particular repairs and modifications to the existing fire escape and roof (option 2) and reconfiguration of the flat (options 3 and 4).

28. In response, Mr Cox stating that the applicant had considered other options for repairs set out in Schedule 3 to the prohibition order. He had chosen the first option. The second option was unrealistic since the existing fire escape was beyond repair. Mr Cox accepted he had no notes of the present condition of the fire escape but it had always been recognised it was beyond repair. The building surveyor was of the view that repairs were uneconomic and in any event additional works would be needed to the roof parapets. The third and fourth options were unfair to the landlord. The fact that the landlord was the owner of flat 8 was not relevant. Had the owner been a third party lessee it would be wholly unreasonable to expect that person to reconfigure the internal layout of the flat and lose usable internal space. No-one had made any suggestion of alternative options during the s.20 consultation process.

29. <u>The Tribunal's decision</u>. The respondent accepts that repairs to the fire escape would fall within clause 6(D)(i) of the lease. The Tribunal has no hesitation in finding that the landlord is obliged to repair the fire escape. On inspection, there was evidence of rust and this is supported by the 2007 risk assessment which included photographs of the affected parts. The Tribunal also rejects the contention that the provision of a new fire escape would amount to an improvement rather than repair. Almost every repair involves an element of improvement and this is very much a matter of degree. In this instance, the landlord simply proposes to replace one metal fire escape with another metal fire escape along a different route.

30. As far as clause 6(D)(x)(a) of the lease is concerned, the obligation deals with local authority requirements in relation *"to the Block or any part thereof"*. The fire escape is mounted externally, and the Housing Act 2004 prohibition order can therefore be said to apply to *"the Block"*. In any event, Flat 8 is plainly *"part"* of the Block. There is nothing in clause 6(D)(x)(a) which limits the landlord's obligations to a situation where he must act in relation to notices etc which affect the common parts. Clause 6(D)(x)(a) specifically excludes liability where the obligation in any notice etc falls on the lessee of Flat 2 under the terms of the lease of Flat 2. The clause does not make any similar exclusion of liability where the obligation to comply falls on the occupiers of other flats. The second consideration under clause 6(D)(x) is whether a new fire escape would be required to *"comply"* with any notice etc. In this case, the only notice which refers to the provision of a new fire escape is the prohibition order. The Tribunal concludes that the provision of a new fire escape to Flat 8 would be undertaken to *"comply"* with the order – albeit that the local authority suggests other means of complying in Schedule 3 to the Notice.

31. It follows from the above that the cost of the proposed new Fire Escape to Flat 8 is recoverable under the service charge provisions of the lease. Furthermore, there is no dispute that the landlord has complied with the requirements of section 20 of the Landlord and Tenant Act 1985 and the Service Charges (Consultation Requirements) (England) Regulations 2003.

32. The remaining two issues raised by the respondents go to reasonableness under s.19(2B) of the Landlord and Tenant Act 1985. This states that:

> *"(2B) An application may also be made to a leasehold valuation tribunal by a tenant by whom, or landlord to whom, a service charge may be payable for a determination –*
> *(a)whether if costs were incurred for services, repairs, maintenance, insurance or management of any specified description they would be reasonable"*

33. In this instance, there is no evidence to support the contention by the respondents that the landlord has some ulterior motive for proposing the works. However, there is more substance to the second argument. The question of reasonableness under s.19 of the 1985 Act involves consideration of the landlord's process. In particular, section 19(1) requires the Tribunal to consider the process adopted by the landlord for assessing any relevant costs: ***Forcelux v Sweetman*** [2001] 2 EGLR 173. The Tribunal is mindful of the wide scope afforded to landlords to choose from a range of "*reasonable*" options when it comes to works. A landlord is not always bound to choose the cheapest option in every case. However, in this instance, it appears from Schedule 3 to the prohibition order that the landlord has a range of options in meeting the defects in the fire escape to Flat 8. The landlord appears to have selected the option of a new fire escape over a year ago, when it applied for planning consent. It does not appear to have given detailed consideration to the other alternatives given by the local authority. The Tribunal does not consider it unreasonable to have rejected the third and fourth options of reconfiguring the internal layout of Flat 8 – Mr Cox's submissions that the landlord cannot be expected to lose the use of part of its flat to meet disrepair to the exterior of the Block have force. However, there is no evidence that the landlord has given any detailed consideration to the option of repairing the existing fire escape and making the other alterations suggested by the local authority in paragraph 2 of Schedule 3 to the prohibition order. Indeed, Mr Cox admitted he had not written details of the current condition of the fire escape and that the landlord had proceeded on the basis that a new one was required. The Tribunal also takes into account the substantial sums involved for the lessees in the landlord's current proposals and the relatively small benefit that they will obtain in return for a

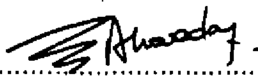
contribution of over £3,000 to these costs. In such a situation, the landlord has an even heavier burden to ensure that most cost effective alternatives to these works have been properly considered.

34. In the circumstances, the Tribunal finds that on present evidence the proposed cost of £26,058.54 to provide a new Fire Escape to Flat 8 is not reasonable under s.19(2B) of the Landlord and Tenant Act 1985. However, it is open to the landlord to carry out a proper consideration of the second option in Schedule 3 to the prohibition order dated 28 August 2009. In the light of such a review it may well be that a future Tribunal would reach a different conclusion to the determination in this case.

CONCLUSIONS

35. The sum of £2,000 demanded on 8 May 2007 is not payable by the respondents.

36. The cost of a new fire escape serving flat 8 would be recoverable under the service charge provisions of the lease of flat 2. However, on present evidence, if relevant costs of £26,058.54 were incurred for the provision of a new Fire Escape to Flat 8, such costs would not be reasonable under s.19(2B) of the Landlord and Tenant Act 1985.



Mark Loveday BA(Hons) MCIArb
Chairman
29 December 2009