UPPER TRIBUNAL (LANDS CHAMBER)

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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – variation of leases - dwelling house converted to three flats – application by freeholder and two leaseholders for variation of all leases to allow full recovery of costs incurred by freeholder in running block – requested variation order made by LVT – whether object of variation could be satisfactorily achieved if one lease was not varied – held it could not - whether variations would prejudice the remaining leaseholder – held they would not – whether variations were reasonable – held they were - appeal dismissed – Landlord and Tenant Act, 1987 ss 37 and 38

IN THE MATTER OF AN APPEAL AGAINST A DECISION OF THE LEASEHOLD VALUATION TRIBUNAL FOR THE LONDON RENT ASSESSMENT PANEL

BETWEEN **MARTIN THIRLAWAY** **Appellant**

and

(1) TROY AND JORDI FORES MASCULET
(2) JAMIE GLOVER
(3) ADVANCED ENTERPRISE LIMITED **Respondents**

Re: 5 Amor Road
London
W6 OAN

Determination on written representations
by N J Rose FRICS

No cases are referred to in this decision.

DECISION

Introduction

1. This is an appeal from a decision of the Leasehold Valuation Tribunal for the London Rent Assessment Panel dated 30 January 2012, in which the LVT made an order pursuant to s38 of the Landlord and Tenant Act 1987, varying the leases of the three flats in a converted Victorian terraced house known as 5 Amor Road, London, W6 OAN. The appellant is Mr Martin Thirlaway, the leaseholder of the basement flat A. The respondents are Messrs Troy and Jordi Fores Masculet, the leaseholders of the ground floor flat B, Mr Jamie Glover, the leaseholder of the first floor flat C, and Advanced Enterprise Ltd, the freeholder. I shall in future refer to the freeholder as AEL. The shares in AEL are owned by the leaseholders of each of the three flats.

2. The LVT hearing was conducted by written representations. On 23 February 2012 the LVT granted Mr Thirlaway permission to appeal by way of rehearing. Permission was granted because of a procedural irregularity, namely the LVT's failure to draw Mr Thirlaway's submissions to the attention of the panel considering the application.

3. On 28 July 2012 the parties were informed that the appeal to this Tribunal would also be conducted under the written representations procedure. I have duly considered the representations made by the appellant and the respondents.

The leases

4. The leases of each of the three flats contain similar provisions. They are for terms of 99 years from 25 March 1981 at an annual rent of £50 for the first 33 years, £100 for the next 33 years and £150 for the last 33 years. The leases refer to the three flats as "the Building" and the three flats together with the garden and grounds as "the Mansion".

5. By clause 2(xix) of each lease the lessee covenants

> "To pay to the Lessors without any deduction by way of further rent an annual sum equal to one third of the costs expenses and outgoings and matters mentioned in the Fourth Schedule."

The costs itemised in the Fourth Schedule are as follows:-

> "1. The expense of maintaining repairing redecorating and renewing:-
>
> (a) The main structure and in particular the roof chimney stacks gutters rain water pipes and foundations of the Building and Mansion.

(b) The gas and water pipes communal water tanks drains sewers and electric cables and wires and other conduits in under or upon the Mansion and enjoyed or used by the Lessee in common with the owners and Lessees of the other flats.

2. The cost of keeping the forecourt porch paths stairways and other common parts of the Mansion in good repair.

3. The cost of repairing maintaining and decorating the exterior of the Building and Mansion and the internal common parts of the Building and Mansion.

4. The cost of lighting the common parts of the Mansion.

5. The costs of maintaining all electrical equipment and replacing the same used or enjoyed by the Lessee in common with all others entitled thereto.

6. All rates taxes and outgoings (if any) payable in respect of the forecourt garden way and other parts of the Mansion other than those parts of the Building or Mansion hereby demised or demised by other Leases.

7. The cost of insurance against third party risks in respect of the Mansion.

8. The water rates assessed on the Mansion but not if any flat is separately assessed.

9. The cost of fire fighting equipment (if any) including the costs of repair and maintenance of the fire fighting equipment in the Building.

10. The cost of services works and equipment reasonably provided by the Lessors from time to time for the better enjoyment and use of the flat or the Building.

11. The cost of any sums payable under maintenance contracts covering any machinery and equipment to be fitted or installed in or upon the Building.

12. The costs of the employment of staff by the Lessors which the Lessors in their absolute discretion may consider desirable in the interests of good management in connection with the provision of services to the Building and all other incidental expenditure in relation to such employment.

13. The cost of effecting and maintaining an Insurance Policy or Policies against such liability or liabilities of the Lessors (including negligence) in connection with or arising out of the Building or the occupation and maintenance or the management thereof or any part thereof or any plant equipment or machinery therein as the Lessors in their absolute discretion shall think fit.

14. The proper fees charges expenses and commissions payable to any solicitors accountant surveyors valuer architect engineer and managing agent who the Lessors may from time to time employ in connection with the management repair and maintenance of the Building including (but without prejudice to the generality of the foregoing) the cost of causing to be prepared the Certificate referred to in clause 2 (xix) of this Lease and causing to be calculated the service charge.

15. The costs of the Lessors and expenses incurred by them in complying with their insurance and other obligations mentioned in clause 4 hereof."

6. In summary, the Lessors' obligations mentioned in clause 4 are the insurance of the Building against fire and such other risks as the Lessors think fit; repairing and decorating the structure and exterior, common parts and gas and waterpipes and other conduits used in common with the owner and Lessees of the other flats; and water rates and general rates assessed on the Mansion (but not any flat in the Building).

History

7. The following summary of the relevant history is based upon information submitted by the appellant. Between 1983 and 2003 the appellant was company secretary of AEL and undertook most of the management of the building. The management was conducted informally and lessee involvement was purely verbal. Legislative requirements were not always followed. The only annual service charge was in respect of the insurance premium. Generally, all lessees were given copies of the insurance premium demands before they were paid. Occasionally competitive quotes were obtained. The appellant paid the insurance premium personally and the other lessees reimbursed him for their shares.

8. For periodic repair and maintenance works requirements were agreed by the lessees in advance, a contractor selected by mutual agreement, and payment arranged. All such matters were dealt with informally. The provisions of section 20 of the Landlord and Tenant Act 1985 as amended from time to time were not followed, but all leaseholders were involved in the decision making process.

9. The appellant resigned as company secretary in July 2003, following failure by the then lessees of the ground and first floor flats to pay their shares of the insurance premium promptly.

10. The current lessees of the ground floor and first floor flats both acquired their interests in 2004. Mr Troy and Mr Glover were appointed directors of AEL and they have remained in office ever since. In September 2005 they offered the appellant an annual fee of £300 (payable by the shareholders) to undertake the role of company secretary. The appellant agreed and the informal conduct of the management of the building resumed. It came to an end in June 2007 at the request of the other directors. The appellant resigned as director and company secretary at a board meeting on 5 August 2007. Since then the remaining directors have made all decisions concerning the company and the building.

11. In a letter addressed to the company secretary dated 14 April 2008, after recounting certain previous incidents about which he was unhappy, the appellant concluded:

"I now pursue my interests only.

As a lessee of Advanced Enterprises Ltd I have rights and obligations contained in the lease and in the law.

As a shareholder of Advanced Enterprises Ltd I have rights but very little obligation.

In both cases I shall expect formal and legal requirements to be adhered to.

There is no informal arrangement or mutual co-operation and has not been since 4 June 2007."

12. The minutes of an extraordinary general meeting of AEL on 26 February 2009 included the following:

"*Members' right for the accounts to be audited*

MT (the appellant) advised that he intended to exercise his right as a Member of the Company to require the accounts for the year ending 31 March 2009 to be audited.

MT rejected the Chair's assertion that this was a disproportionate response given the size and nature of the Company and its sole reason for existing which is to manage its freehold interest in 5 Amor Road.

Other matters raised by MT

MT expressed concern that the Company was trading whilst insolvent. The Chair stated that the Directors had agreed personally to underwrite the excess of expenditure over income in the year ended 31 March 2008. MT considered that this needed to be stated in the 'Going Concern' note to the accounts."

13. Since 2003 the appellant has on four occasions instituted proceedings in respect of what he considered to be AEL's failure to carry out necessary repairs to the building.

The proposed lease variations

14. The respondents' application to the LVT was for variations to clause 2 and the Fourth Schedule of each lease. These variations were all ordered by the LVT. They were:

(a) *Add the following clauses after clause 15 of the Fourth Schedule*

"16. The expenses of the Lessor incurred in managing the property and conducting its own business in accordance with the provisions of its Memorandum and Articles of Association and any statutes for the time being in force and for that purpose or for any of the foregoing purposes to employ such servants, agents, surveyors, solicitors, accountants and others as may be appropriate. These expenses shall include, but shall not be limited to the filing of Annual Returns and the filing of Company Accounts.

17. The costs of the Lessor incurred in any LVT or third party dispute or adjudication that are brought against it in relation to 5 Amor Road.

18. The expenses of the Lessor incurred in acquiring sufficient Directors and Officers insurance for the Freehold Company provided that the Freehold Company's activities include only the management of 5 Amor Road."

(b) *Add the following sub-clauses after sub-clause 2(xix):-*

"(xx). To indemnify the Lessor against all costs incurred directly or indirectly from any breach by the Lessee of any of the obligations in this Lease.

(xxi). To pay to the Lessor interest on any sum due under this lease that is unpaid for 14 days after it is due. Such interest shall be payable on demand at the rate of 4% per annum above the base rate of National Westminster Bank Plc from when any such sum was due until actual payment."

15. In addition the LVT ordered:

"1. That subject only to the variations expressed in this Order all the clauses, covenants, conditions and provisions of each Lease (as varied if applicable) shall continue in full force and effect and the Lease shall henceforth be construed as if such amendments were originally contained therein.

2. That the Chief Land Registrar shall make such entries in the registers relating to the titles hereby affected or to open a new title or titles as shall be deemed appropriate for the purposes of recording and giving effect to the terms of this Order."

The statutory provisions

16. So far as relevant sections 37 and 38 of the Landlord and Tenant Act 1987, as amended, provide as follows:

"**37 Application by majority of parties for variation of leases**

(1) Subject to the following provisions of this section, an application may be made to a leasehold valuation tribunal in respect of two or more leases for an order varying each of those leases in such manner as is specified in the application.

(2) Those leases must be long leases of flats under which the landlord is the same person, but they need not be leases of flats which are in the same building, nor leases which are drafted in identical terms.

(3) The grounds on which an application may be made under this section are that the object to be achieved by the variation cannot be satisfactorily achieved unless all the leases are varied to the same effect.

(4) An application under this section in respect of any leases may be made by the landlord or any of the tenants under the leases.

(5) Any such application shall only be made if –

(a) in a case where the application is in respect of less than nine leases, all, or all but one, of the parties concerned consent to it; …

(6) For the purposes of subsection (5) –

(a) in the case of each lease in respect of which the application is made, the tenant under the lease shall constitute one of the parties concerned (so that in determining the total number of the parties concerned a person who is the tenant under a number of such leases shall be regarded as constituting a corresponding number of parties concerned); and

(b) the landlord shall also constitute one of the parties concerned.

38 Orders … varying leases

…(3) If, on an application under section 37, the grounds set out in subsection (3) of that section are established to the satisfaction of the tribunal with respect to the leases specified in the application, the tribunal may (subject to subsections (6) and (7)) make an order varying each of those leases in such manner as is specified in the order …

(5) If the grounds referred to in subsection (3) … are established to the satisfaction of the tribunal with respect to some but not all of the leases specified in the application, the power to make an order under that subsection shall extend to those leases only.

(6) A tribunal shall not make an order under this section effecting any variation of a lease if it appears to the tribunal–

(a) that the variation would be likely substantially to prejudice –

(i) any respondent to the application, or

(ii) any person who is not a party to the application,

and that an award under subsection (10) would not afford him adequate compensation.

or

(b) that for any other reason it would not be reasonable in the circumstances for the variation to be effected …

(10) Where a tribunal makes an order under this section varying a lease the tribunal may, if it thinks fit, make an order providing for any party to the lease to pay, to any other party to the lease or to any other person, compensation in respect of any loss or disadvantage that the tribunal considers he is likely to suffer as a result of the variation."

The parties' submissions

17. The appellant's case is as follows. The first variation proposed seeks to add the costs of the management of AEL to the service charge. These costs are usually met from the landlord's resources, and in particular the ground rent that has never been charged by the current landlord since

acquiring the freehold in 1983. It is not the lessees' concern whether such resources are adequate. The net costs incurred by AEL in 2010 were £1,796. No information about these costs has been provided despite a request from the appellant. A series of inaccuracies in AEL's accounts demonstrates the inadequacies of the directors and their breaches of the Companies Act.

18. The second proposal seeks to add AEL's costs in any legal proceedings brought against it in respect of 5 Amor Road to the service charge. These costs are in the control of the courts. Legislation exists to prevent a lessee being deterred from taking legal action. The proposed variations would pre-empt the court's decision on costs.

19. The third proposal seeks to add the cost of directors' and officers' insurance to the service charge. This is intended to cover costs in the event that their conduct is legally challenged. It is a cost that, if incurred at all, would be included in the management costs of a company as in the first proposal. The directors are able to take out their own insurance if they believe their conduct is liable to be challenged. They are already in breach of their duties under the Companies Act relating to accounts. AEL is also liable to action under Part 30 of the Companies Act 2006 relating to unfair prejudice against members. Any premium is likely to be excessive as a result of the directors' previous conduct.

20. The fourth proposal seeks to add a new covenant to the leases, indemnifying AEL against any breach by a lessee of its obligations. The law already provides procedures and remedies for such breaches and any costs will be determined by the courts. The existing leases (clause 2 (xv)) require the lessees to repay to the lessor all costs incurred by the lessor in repairing any part of the building other than the demised premises so far as such repair is necessitated or contributed to by any act, negligence or default on the part of the lessee. Clause 2 (vi) requires the lessee to pay all costs incurred by the lessor associated with proceedings under section 146 or 147 of the Law of Property Act 1925. Clause 5 entitles the lessor to forfeit the lease if the rent or service charge is in arrears and unpaid for 21 days after the due date. Procedures in these cases are subject to legislation. The proposed variation would make such legislation ineffective.

21. The fifth proposal seeks to add a new covenant by lessees to pay interest on overdue balances. Again, clause 5 provides a remedy in the case of a lessee's failure to pay amounts due. Procedures in such cases are subject to legislation. The proposed variation would make such legislation ineffective.

22. The respondents have failed to explain how any of the proposed variations would contribute to the originally stated ground for the application, that is "to ensure the fair running of the block." However, their statement of case for the present appeal says that the ground is "to ensure that the costs of the freehold company can be met." The respondents also claim that AEL is involved in no other business than the management of 5 Amor Road. The appellant disagrees with this claim.

23. The variations sought are designed to prejudice the appellant. Costs for which the appellant is currently not responsible, and are excessive, will become payable by him. The other lessees will also become responsible. However, it is those lessees when acting as the landlord who have been responsible for the excessive costs and for incurring costs without the necessary funds. During 2012 there have been several incidents concerning flower pots placed outside the flats of the lessee/directors. Overwatering and falling pots adversely affected the appellant. The appellant therefore required the regulations in the leases forbidding plant pots to be enforced. The directors waived this regulation in respect of themselves but not the appellant. The proposals are not reasonable. The history of the premises since the leases were granted shows that the current directors of AEL are responsible for the incompetent management of the property and the company.

24. All three leases had been granted by November 1982. The original lessees, including the appellant, acquired AEL, incorporated on 3 December 1982, "off the shelf". The company then bought the freehold on 2 March 1983. The purchase was not a collective enfranchisement under the Leasehold Reform, Housing and Urban Development Act 1993. Its purpose was to enable the lessees to control the lessor's costs that would form the basis of the service charges under the leases. The leases did not contain provisions concerning shares or ownership of AEL, because all leases had been granted before that company was incorporated. There was no provision in AEL's memorandum and articles relating to the leases or lessees. The leases and shares in the freehold company are transferable separately. Article 9 of AEL's articles of association provides that a member wishing to transfer shares must first appoint the directors as agents to arrange a sale to existing members. The roles of the lessee and of shareholders were kept separate deliberately in order to ensure the limited liability of shareholders. The proposed variation would remove that safeguard. AEL may engage in many activities, as the objects in the Memorandum of Association are wide.

25. The respondents' contentions are these. The proposed variations are necessary to ensure that the costs incurred by AEL can be met. AEL is owned by the leaseholders of all three flats. It is involved in no other business than the management of 5 Amor Road. The directors would be happy to have this fact included in AEL's articles of association if the Tribunal considers it necessary to do so. If the variations were made the appellant would always have the right to challenge any service charges which he claimed to be unreasonable at the LVT. AEL would not be able to make the leaseholders pay for any excessive or unreasonable costs which it had incurred. The LVT was right to conclude that the nature of the variations was such that all leases needed to be varied in order that the costs incurred by the landlord company in running the block could be met. The proposed variations would cause no substantial prejudice to the appellant. They would affect all three leaseholders equally, making them all liable under the service charge provisions for costs for which they were not currently liable. None of the variations singled out the appellant.

Conclusions

26. The application the subject of this appeal was made in respect of three leases and all but one of the parties concerned (including the freeholder) have consented to it. The application to the LVT was therefore validly made and the questions to be determined in this appeal are as follows:

1. Can the object of the variation be satisfactorily achieved if the lease of flat A is not varied to the same effect as the remaining leases? (s.37(3)).

2. Would the variation be likely substantially to prejudice the appellant and, if so, would an award of compensation for any loss or disadvantage that he is likely to suffer afford him adequate compensation? (s38(6)(a)).

3. Is there any other reason why it would not be reasonable in the circumstances for the variation to be effected? (s38(6)(b)).

27. I consider each of these questions in turn. Firstly, can the object of the variation be satisfactorily achieved if the lease of flat A is not varied to the same effect as the remaining leases? In my opinion the objects of the proposed variations are these:

(i) to ensure that certain items of expenditure which do not presently form part of the service charge can be recovered in full by AEL from the three leaseholders.

(ii) to encourage all three lessees to comply with their lease obligations generally and in particular to pay any sums due under the leases on time.

In my judgment both objects will be achieved if the lease of flat A is varied in the same way as the leases of flats B and C, but they will not be achieved if it is not. The answer to question 1 is therefore No.

28. I turn to the issue of prejudice. The appellant contends that the proposed variations would mean that he would become liable to contribute towards costs which AEL has incurred in excessive amounts and without the necessary funds. I am not persuaded by that objection. If a service charge is demanded which is excessive, the appellant will be protected by s19 of the Landlord and Tenant Act 1985, which provides that relevant costs shall be taken into account in determining the amount of a service charge payable only to the extent that they are reasonably incurred and, where they are incurred on the provision of services or the carrying out of works, only if the services or works are of a reasonable standard. It follows that if excessive sums are spent by AEL, whether as a result of directors' incompetence or otherwise, or if the directors fail to explain when asked why particular items of expenditure were incurred, the excess will not be recoverable from the leaseholders. The appellant's second objection, that is to contributing towards costs which have been incurred by the freeholder while it was insolvent is rather surprising, given that the appellant was informed that the directors of AEL had agreed personally to underwrite the excess of expenditure over income in the year ending 31 March 2008 and there has been no suggestion that the position had changed in subsequent years. In any event the proposed variations, if ordered, would increase AEL's income and thus reduce the risk of a shortfall in the future. I find that the appellant would not be prejudiced by the proposed variations and the answer to question 2 is No. The question of compensation therefore does not arise.

29. The final question is whether there is any other reason why it would be unreasonable for the variation to be affected. On the proposal to add AEL's costs of managing the property and conducting its business to the service charge, the appellant accepts that the absence of such a provision in the existing leases means that such costs may not be recoverable. He suggests, however, that it is not the lessees' concern whether the freeholder has sufficient resources to meet the costs in question. That argument is rather surprising. Each of the leaseholders has an obvious interest in ensuring that the building is properly managed. The appellant himself refers to alleged failures by the freeholder to comply with its repairing obligations under the lease. In the absence of adequate funds the freeholder will be unable to comply with its obligations, to the detriment of all leaseholders. In my judgment the reasonableness of the proposed variation is manifest.

30. The appellant's objection to the inclusion in the service charge of the freeholder's costs of defending any action brought against it in the LVT or in a third party dispute or adjudication is that it would pre-empt the court's power to limit the amount of costs awarded. That is presumably a reference to the fact that proceedings in the LVT are subject, with only minor exceptions, to a costs free regime. There is in my judgment nothing in this objection. In the course of his submissions the appellant asked the Tribunal to make an order under section 20C of the Landlord and Tenant Act 1985, to prevent any costs of this application from being included in a service charge. The appellant therefore recognises that Parliament has accepted the principle of the recovery of the landlords' costs in the LVT by way of service charge. Section 20C empowers the LVT to make an exception to this general principle, where it considers it just and equitable to do so. The proposed variation would not fetter the LVT's power to make an order under section 20C, or to exclude from the service charge the landlords' costs of defending proceedings in any other forum if it considered that such costs had not been reasonably incurred.

31. The third proposed variation is objected to on the grounds that the directors can obtain insurance at their own expense if they consider it necessary and that the premium for such insurance would be very high because of the directors' previous conduct. As I have said, it is in the interests of all leaseholders to ensure that the building in which their flats are situated is properly managed by the freeholders. Any properly advised company director would wish to ensure that he is protected by insurance cover in the event of a claim being made against him personally. Since the directors provide their services to the company for the benefit of all three leaseholders, it is patently reasonable that all the leaseholders should share the cost of the insurance. If any of the leaseholders considers that the premium is excessive, it will be open to him to contest the matter in the LVT under s19.

32. The appellant also alleges that the directors of AEL have been in breach of the Companies Acts. Apart from the allegation of trading while insolvent, to which I have referred above, the appellant suggests that the directors have been treating him differently from the other shareholders, and he refers to the lease prohibition against plant pots. If this allegation is justified, it will be open to the appellant to seek a remedy through action in the courts to enforce the relevant covenant. It would not render unjustifiable a variation to the lease, which is otherwise justified.

33. Finally, the appellant alleges that the directors have failed to explain the net costs figure they incurred in 2010. This should only be of concern to the appellant if AEL sought to include it as part

of the service charge, in which case the question of the reasonableness of the item would be a matter for the LVT under s.19.

34. The fourth proposed variation is to introduce a covenant by each lessee to indemnify the lessor against any costs resulting from any breach by the lessee of any of its lease obligations. The appellant objects to this on two grounds. Firstly, he says that there are provisions in the existing leases which require the lessees to repay any repairing costs incurred by the lessor as a result of an act or default of the lessee and to pay all costs incurred by the lessor in connection with section 146 or 147 of the Law of Property Act 1925. Secondly, he notes that the lessor can forfeit the lease if the rent or service charge is in arrears. He points out that forfeiture proceedings are subject to legislation and suggests that the proposed variation would make such legislation ineffective.

35. It is true that the existing leases contain provisions which afford the landlord certain protection if a lessee is in breach of its repairing obligations. In my view that does not mean that the proposal to extend the landlord's protection to cover any breach of covenant by the leaseholders is unreasonable. Nor is it unreasonable for the landlord to be given the right to seek compensation for losses resulting from any breach of covenant by a tenant, as an alternative to the existing right to forfeit the lease in the event of non-payment of rent or service charge.

36. The appellant objects to the final variation, which would enable the lessor to charge interest on late payments of rent, on the grounds that the landlord has an existing right under clause 5 to forfeit the lease under such circumstances. I reject that contention. The proposed clause is commonly found in modern leases. It is in the interests of all leaseholders that payments due to the lessor are made promptly. The proposed variation is likely to encourage such prompt payment and is in my view reasonable.

37. The appellant also suggests that the proposed variations would remove the limited liability of the shareholders in AEL. That suggestion is simply wrong. None of the proposed variations would increase the personal liability of any of the shareholders in their capacity of shareholders.

38. I therefore conclude that the answer to question 3 is No.

39. The appellant points out, correctly, that AEL's Memorandum and Articles of Association would entitle the directors to extend the company's activities beyond the management of 5 Amor Road. The respondents have stated that the directors would be happy to amend the Memorandum and Articles to restrict the company's permitted activities to the management of the one property. Accordingly, I order that the following proviso should be added immediately after clause 2(xix)(h) of the lease:

> "PROVIDED that the expenses mentioned in clause 16 of the Fourth Schedule, so far as they relate to the costs of conducting the lessor's business as a limited company, shall only be recoverable by way of service charge if the company's Memorandum and Articles of Association restrict its activities to the management of 5 Amor Road only."

Subject to that qualification the appeal is dismissed.

Section 20C Order

40. As I have said, the appellant asks the Tribunal to make an order under section 20C. In my judgment it would not be just or equitable to prevent the respondents from recovering their reasonable costs of successfully resisting this appeal through the service charge. I therefore decline to make the order requested.

Costs

41. The respondents submit that the appellant has pursued the appeal against the advice of the LVT. On the assumption that they are successful, they ask the Tribunal to consider granting an order for costs in their favour.

42. The Upper Tribunal's power to award costs on appeals from the LVT is limited. The Tribunal may not order a party to the appeal to pay costs incurred by another party in connection with the appeal unless he has, in the opinion of the Tribunal, acted frivolously, vexatiously, abusively, disruptively or otherwise unreasonably in connection with the appeal. In such a case the amount he may be ordered to pay shall not exceed £500.

43. By the time it granted permission to appeal the LVT had seen the appellant's submissions, which had been filed but were not before it at the time of the original decision. It expressed the view that the appeal did not have a reasonable prospect of success, but nevertheless granted permission to appeal because of the serious procedural error which had occurred. Permission to appeal is often granted by the Upper Tribunal after the LVT has refused to grant such permission on the grounds that the appeal has no reasonable prospect of success. In some cases the appeal is allowed. Against that background I do not consider that an award of costs against the appellant would be justified by the mere fact that he has pursued the appeal.

44. Nevertheless, I am at present minded to make an award of costs in the respondents' favour. This is because it seems to me that the appellant's objections to the proposed variations to the lease have not been based on a genuine consideration of the merits of those variations. Rather, it appears that they have been pursued as part of the appellant's campaign of non-co-operation with AEL, to which he referred in his letter dated 14 April 2008. The pursuit of an appeal for these reasons would be unreasonable. The appellant is invited to submit representations as to why a costs order should not be made against him. Such submissions must be filed not later than 14 days after the date of the letter accompanying this decision. The decision will take effect when the decision on costs has been finalised.

Dated 29 August 2012

N J Rose FRICS

Addendum on costs

45. The appellant has submitted written representations on costs and the respondents have replied. The appellant points out that he appealed to the Tribunal because the LVT failed to consider his response to the application before it issued its decision and it granted permission to appeal in the interests of natural justice. He denies that he has engaged in a campaign of non-cooperation with the landlord and says that he merely sought in his letter dated 14 April 2008 to make clear the distinct roles of leaseholder, shareholder and director. In stating that he would now pursue his interests only he meant that he would no longer be responsible for any part of the landlord's functions or the conduct of the landlord company. He was and is fully aware that his interests included the proper management of the building and the success of the landlord company. He has assisted the directors on several occasions, providing accounts of similar companies, and arranging access for and assistance with repairs. After written representations had been submitted in connection with this appeal he received two proposals for the extension of Mr Glover's lease. He pointed out that both alternatives would have tax implications, but he declined to be a party to discussions which were the responsibility of the directors of AEL.

46. I have carefully considered the appellant's submissions, but none of them have persuaded me to alter my provisional conclusion that the appeal has been pursued unreasonably. The appellant must pay the respondent's costs in the claimed sum of £267.20, which do not appear to me to be excessive.

Dated 29 October 2012

N J Rose FRICS