

**THE RESIDENTIAL PROPERTY TRIBUNAL SERVICE****DECISION OF THE LONDON LEASEHOLD VALUATION TRIBUNAL ON  
APPLICATIONS UNDER SECTION 27A AND 20ZA OF THE LANDLORD  
AND TENANT ACT 1985**

**Property:** King's Court, Beddington Gardens, Wallington, Surrey SM6 0HR

**Applicant:** Baldry Son & Chandler Limited (landlord)

**Respondents:** Mrs and Mrs T J Wright (leaseholders, Flat 5)  
Mr S Wilkinson-Carr (leaseholder, Flat 11)  
Mr and Mrs A Holmes (attorneys for the leaseholder of Flat 13)  
Mr J Shannan (leaseholder, Flat 17)  
Mrs J S Neal (leaseholder, Flat 18)

**Date heard:** 7 August 2007

**Appearances:** Mr C Lindenberg (TWM LLP, solicitors)  
Mr C J B Battersby (Rayners, managing agent)  
Mr D C Weightman FRICS (Survez, chartered surveyors)  
for the landlord

Mr and Mrs T J Wright  
Mr S Wilkinson-Carr  
Mr and Mrs A Holmes and  
Mr J Shannan, leaseholders

**Members of the leasehold valuation tribunal:**

Lady Wilson  
Mrs S Redmond BSc (Econ) MRICS  
Mrs G Barrett JP

**Date of the tribunal's decision:** 11 August 2007

## **Background**

1. These are applications by a landlord under sections 27A and 20ZA of the Landlord and Tenant Act 1985 ("the Act") to determine the leaseholders' liability to pay service charges for the cost of proposed works and for dispensation from the statutory consultation requirements in relation to the works.
2. The property concerned is a five storey block of 18 flats built about 1968. All the flats are held on long leases. Flats 17 and 18 are on the top floor of the block and each is set back from the front elevation of the block behind a roof terrace, surrounded on three sides by railings and accessible solely from the flat. Rainwater has for some time been percolating through the terraces causing damage to the flats below and the landlord now seeks guidance as to what should be done and who should pay for it. The original respondents to the applications were the leaseholders of Flats 17 and 18; other leaseholders have been joined as respondents at their request.
3. The tribunal inspected the property in the morning of 7 August 2007 in the presence of Mr Lindenberg, the landlord's solicitor, Mr Weightman FRICS of Survez, chartered surveyors, the surveyor instructed by the landlord to specify the works and whom the landlord intends to administer the contract, and of a number of leaseholders. We were able to inspect both roof terraces and the interiors of Flats 13 and 16, which are immediately beneath Flats 17 and 18 respectively, and Flats 9 and 12, which are immediately beneath Flats 13 and 16. Parts of Flat 13 are very badly affected by damp penetration from above to the extent that the flat is largely uninhabitable. Flats 16, 9 and 12 are also affected by damp from above but to a lesser extent, the damp having penetrated through the ceilings and floors of the flats above. It is apparent that the damp penetration is continuing and that past patch repairs have not, as some leaseholders have suggested, been effective.
4. The evidence and our inspection showed that the roof terraces are of concrete slab construction with parapet walls formed by the external brick walls. The original asphalt, installed in 1968 or thereabouts, appears to have been overlaid with mineral surfaced felt in 1993, and the felt is dressed into the parapet walls with an apron flashing over the upstand, except under the tile hung elevations and patio doors.

There is a metal fence on three sides of each terrace, supported on stanchions mounted in the roof, some 300 mm within the parapet wall. Perspex-type screens, probably not original, have been fixed to the side fences with wooden battens. There is evidence of rust at the foot of some of the stanchions. There appear to have been patch repairs to the pointing of the flashing and there is loose gravel where the mineralised felt is exposed around the edges of the terraces. Heavy pre-cast concrete flags have been installed, apparently by the landlord in 1993, replacing the original lighter slabs. The leaseholders of Flat 17 have largely covered the flags with astroturf or a similar material. The main roof drains into gutters along the front elevation. There are two downpipes to Flat 17's terrace, one at each end of the roof, which discharge via loose runs of pipe to outlets to the front of the terraces. There is one downpipe to Flat 18's terrace which discharge into a water butt. Soil vent pipes pass through the terraces. The downpipes and soil vent pipes run through the flats below and are concealed in cupboards or boxed in.

5. At the hearing in the afternoon of 7 August the landlord was represented by Mr Lindenberg, and Mr Weightman and Mr Battersby of Rayners, the managing agent, gave evidence. Mr and Mrs Wright, the leaseholders of Flat 5, Mr Wilkinson-Carr, the leaseholder of Flat 11, Mr and Mrs Holmes, who hold a power of attorney for the leaseholder of Flat 13, and Mr J Shannan, the leaseholder of Flat 18, appeared and gave evidence. Mr Shannan produced a written report from Mr David Ashworth BSc (Hons) MRICS of Ash, chartered building surveyors, and written representations had been submitted by or on behalf of Mr and Mrs Wright, Mr Wilkinson-Carr, Mr and Mrs Holmes, and by Mr Ian Maggs, the leaseholder of Flat 14 Kings Court. All these submissions we took into account, giving them appropriate weight where the writer did not appear to give evidence.

6. The issues for determination are (i) who is liable to pay for the proposed works, (ii) what works are required, at what cost, and when, and (iii) whether the consultation requirements should be dispensed with.

7. The relevant statutory framework to the application under section 27A of the Act is mainly contained in sections 19 and 27A. By section 19(1), relevant costs shall be taken into account only to the extent that they are reasonably incurred, and where the

costs are incurred on the provision of services or the carrying out of works, only if the services or works are of a reasonable standard. By section 19(2), where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable. By section 27A, an application may be made to the tribunal for a determination whether a service charge is payable and, if it is, as to the person by whom it is payable, the person to whom it is payable, the amount which is payable, the date at or by which it is payable, and the manner in which it is payable. The charges which the landlord is entitled to recover as service charges are governed by the lease, but subject to the provisions of section 19. Only service charges are subject to the jurisdiction of the tribunal under section 27A; the enforcement of covenants by or against the landlord or individual tenants is not.

## **The issues**

### **1. Application under section 27A**

#### **i. Liability**

8. The only leases put before us were the leases of Flats 13, 17 and 18. Mr Lindenberg told us, and we have assumed it to be the case, that the leases of all the flats are, save for the property demised, in the same terms as each other in essential respects.

9. Clause 1 of the leases of Flats 17 and 18 defines the demised premises by reference to a plan which shows the terrace of each flat as part of the property demised, and expressly includes within the demise “such of the external parts of the ... Flat and the terraces thereof of which the Lessee shall have the exclusive use”. By clause 2(i) the leaseholder covenants to “repair uphold support cleanse maintain drain amend and keep the demised premises ... and all additions made to the ... demised premises and the fixtures therein and appurtenances thereof ...”.

10. By clause 2(j) of all the leases we have seen, the leaseholder covenants to pay a “rateable or due proportion” of the expenses of “repairing, maintaining supporting

rebuilding and cleansing all sewers drains pipes watercourses water pipes cisterns gutters party walls party structures easements and appurtenances belonging to or used or capable of being used by the Lessee in common with the Lessors or the lessees of other Flats in the Court such proportion in the case of dispute to be settled by the Surveyor for the time being of the Lessors whose decision shall be binding ...”.

11. By clause 2(l) the leaseholder covenants “... when required by the Lessors ... to pay to the Lessors ... one eighteenth part of the sums which the Lessors shall expend or incur in cleansing repairing renewing maintaining painting decorating glazing lighting and cultivating ... the main structural parts of the Court including the roofs foundations and external parts thereof (but not the glass in the windows of any of the Flats nor the interior faces of such of the external walls as bound the Flats) and all cisterns tanks sewers drains watercourses water pipes meters wires gutters ducts and conduits not used solely for the purpose of any one flat and the joists or beams to which are attached to any ceiling except where such joists also support the floor of any Flat”.

12. It is apparent, and is not disputed, that works are required to address the rainwater penetration, and the question for determination is whether the necessary works, or some of them, fall with the repairing covenants of the leaseholders of Flats 17 and 18 because they are works to the terraces, which are demised, or whether they fall within the landlord’s repairing covenant because they are works to the “main structural parts ... roofs ... and external parts” of the block. In the latter case each of the leaseholders will be liable to pay an equal one eighteenth share of the reasonable cost. It was not contended, and rightly in our view, that any of the proposed works were works to party walls or party structures falling within clause 2(j) of the lease and thus subject to equitable apportionment rather than equal division between the leaseholders..

13. Mr Lindenberg submitted that the necessary works fell within the landlord’s repairing covenant because they were essentially works to the main structural parts of the building. Relying on a judgment of Rimer J on appeal from the County Court in *Ibrahim v Dovecorn Reversions Limited* [2001] 2EGLR 46, Mr Lindenberg submitted that only the surfaces of the terraces were demised to the leaseholders of Flats 17 and 18 respectively, and the works required were to the roof beneath which was part of the

structure and thus retained by the landlord. Both Mr Lindenberg and Mr Battersby were unsure whether the railings surrounding the terraces were or were not demised. All the leaseholders present at the hearing were inclined to agree that it was fair to categorise the proposed works as works to the structure rather than to the terrace.

14. We are satisfied that the works which the landlord proposes fall within its repairing covenant. Like many leases, the leases of Flats 17 and 18 are not well drafted, but, taken as a whole, we have no doubt that only the surface of the terraces is demised, and the works required are to the structure of the roof which lies beneath the surface. Much clearer words would have been required in those leases if the roof structure beneath the tiles was demised and thus the responsibility of the individual leaseholder. We have considered and taken into account the judgment in *Ibrahim v Dovecorn*, although each lease must be considered individually, and it has to be said that the present case differs to some extent from that case in that included within the demise in that case was “any balcony outside of and forming part of the Demised Premises and for its sole and exclusive use (*but expressly excepting and excluding the main walls and structure of the Building*)” [emphasis added].

15. We accept that the status of the railings is more dubious than that of the roof. It is arguable that the railings, which are inside the parapet walls, are there only because of the user of the roof terraces and that they are thus part of the demised terraces and not the structure of the block. It is also arguable that the railings, which were installed when the block was built and are attached to the substructure of the roof, are part of the structure. On balance we consider that they should be regarded as part of the structure, and not demised, because they are fixed to the roof below the surface of the terraces. Thus the work which has been specified as an “extra-over” item on page 7 of the specification, namely to temporarily remove and adapt the railings, in our view falls within the landlord’s covenant. That is the only practical solution to the present problems although we have not taken this decision on that account.

16. The works as presently specified do not include replacement of the railings. Mr Weightman said in his oral evidence that he would much prefer to have the existing railings, which penetrate the roof, removed and replaced by entirely new railings fixed to the parapet walls rather than to the roof surface, because in his opinion the places

where the railings penetrate the roof are very likely to be weak points where rainwater enters the substructure. He said that he had not specified the removal and replacement of the railings only because he had been instructed not to do so in view of doubts about whether such works might amount to improvements for which the landlord might be unable to cover the cost as a service charge. Because the replacement of the railings is not presently proposed, recovery of the cost of so doing does not directly arise, nor, we think, would our views on whether the cost of works to them would be recoverable as a service charge bind a future tribunal. Nevertheless, for what it is worth, it would be likely to be our view, if the question arose before us, that reasonable works to replace the railings with others, differently sited, would, if that was necessary to secure the water-tightness of the roof, be a reasonable method of performing the landlord's covenant to repair and renew the external parts of the block, rather than an improvement. As such work is not presently proposed, however, that does not form part of our decision, but if Mr Weightman takes the view, on reflection, that the relocation of the railings is the only feasible method of achieving a good result, this question will have to be considered.

## **ii. The works**

17. Mr Weightman's specification contains a number of "extra-over" items which were to be priced, but not carried out unless the contract administrator authorised them when the roof had been opened up. The total price of £44,637.28 plus VAT quoted by Survey Roofing and included in the application (plus, it is assumed, supervision fees) is, according to Mr Weightman, probably more than the works will cost in reality because a number of options are included in his specification which, he hopes, will prove unnecessary. He said, however, that he was quite sure that the roof needed to be opened up and decisions taken on site in the light of what was then revealed rather than, as Mr Ashworth had proposed in his careful written report, further patch repairs. Mr Weightman said that he could not at this stage be certain why or where the rainwater was penetrating, and there were a number of possible sources. He assured us that he would not permit works to be done unless he was convinced, on inspecting the substructure, they were absolutely necessary, but that the leaseholders had to be given the assurance that the works would be effective and

guaranteed, and, in his opinion, Mr Ashworth's approach would not achieve that result.

18. Mr Ashworth was not available to give oral evidence, but his report is detailed and deserves respect. Nevertheless we are quite satisfied that Mr Weightman, whose competence no-one questioned, is right to say that an informed decision about what is required cannot be taken until the roof is opened up. At that point, delay will not be wise, and it is therefore necessary in our view to trust Mr Weightman to take the right decision, on the basis of his assurance that whatever is done will cost no more than the amount given in the application plus reasonable supervision fees. We would be doing a disservice to the leaseholders if the close to minimum works which Mr Ashworth recommends were carried out, rather than a long-term solution, backed by a guarantee, which we expect the works which Mr Weightman will recommend to provide. If the landlord decides, as Mr Weightman may advise, that a report from a structural engineer on the load-bearing capacity of the terraces is necessary, the question may arise as to whether the cost of such a report will be recoverable as a service charge. Whether or not that is so, however, it is clear that consideration should be given to whether the terraces have been overloaded in the past by the installation of heavy tiles (installed by the landlord) and the presence of heavy plant pots (permitted by the landlord). If there has been overloading, it should obviously be avoided in future.

19. We therefore determine that the cost of the works specified by Mr Weightman, up to a maximum of £44,637.28 plus VAT, together with reasonable supervision fees, will be reasonably incurred and recoverable from the leaseholders in equal shares. We have given some consideration to the meaning of the requirement in the lease as to the payment of the service charges as rent "to be paid without deduction on the quarterly day for the payment of rent next ensuing after the expenditure [on the works] or sooner if required by the Lessors". Does that mean that service charges are payable, if demanded, before the works are carried out as Mr Lindenberg submitted, or only after the expenditure has been incurred but earlier than the next quarter day if demanded? Again, the lease could be better drafted and is ambiguous, but, construing it *contra proferentem*, we conclude that payment cannot be required until after the



sums are expended by the landlord although it may, if required, be demanded and payable before the next following quarter day after the expenditure has been incurred.

## **2. Application under section 20ZA**

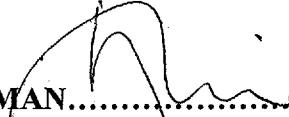
20. Section 20ZA of the Act provides that where an application is made to the tribunal for a determination to dispense with any or all of the consultation requirements in relation to qualifying works, the tribunal may make the determination if satisfied that it is reasonable to dispense with the requirements. The relevant requirements are contained in Part 2 of Schedule 4 to the Service Charges (Consultation Requirements) (England) Regulations 2003 (“the consultation regulations”) and they apply to the presently proposed works because the works will result in a contribution from each leaseholder of more than £250. The landlord accepts that, having given a notice of intention under paragraph 6 of Schedule 4 (which was not before us and so the validity of which we cannot assess), it did not seek further to comply with the consultation regulations because of the difficult questions of liability which it wished to have clarified by the tribunal.

21. The leaseholders present at the hearing asked us not to dispense with the consultation requirements because they considered that there was no good reason why the landlord had not complied with them and, some of them, because they considered that the matter was not urgent and that further consultation was sensible. We consider that the matter is urgent. The roof is leaking and affecting the use of the flats beneath it, and, if the work is not started soon, the winter will arrive and the work is likely to be delayed for many months. We accept that the landlord could have complied with the consultation requirements, but we accept that its decision not to do so was influenced by the pending application. It would of course be open to the landlord to proceed with the works if we refused to dispense with the consultation requirements, but we suspect that, in that event, it would consult, and the works would inevitably be delayed. As it happens, the present applications have given the leaseholders a forum to express their views just as, if not more, effectively than compliance with the consultation requirements. In these circumstances we have decided that no real purpose, and probably only substantial delay, would be achieved by refusal of

dispensation. Mr Weightman said, and we accept, that he has tried to obtain alternative quotations and that he is reasonably satisfied with the one he has obtained. We do not consider that the leaseholders have been prejudiced by the failure to comply with the regulations. We do consider that they may be prejudiced if the works are delayed. Accordingly we dispense with compliance with the consultation requirements.

**Section 20C**

22. The leaseholders asked for an order under section 20C of the Act to prevent the landlord from placing its costs in connection with these proceedings on any service charge. Mr Lindenberg was unable to draw our attention to any provision in any lease we saw which might enable the landlord to place such costs on a service charge, and in our view there is no such provision in those leases. Accordingly an order under section 20C is not required.

**CHAIRMAN**.....

**DATE**..... 2007