

CHI/43UC/LSC/2009/0067

**DECISION OF THE LEASEHOLD VALUATION
TRIBUNAL ON APPLICATION UNDER SECTION 27A OF
THE LANDLORD & TENANT ACT 1985**

Address: Harvey Court, Sandy mead, Epsom, Surrey, KT19
7NH

Applicant: Peverel OM Ltd

Respondents: Mr Fuggle & Others

Application: 15 April 2009

Inspection: 30 September 2009

Hearing: 30 September 2009

Reconvene: 26 October 2009

Appearances:

Landlord

Miss A Meacher
Mr P Atkinson

Counsel
Regional Property Manager, Peverel OM Ltd, Managing
Agents

For the Applicant

Tenants

Mr Fuggle Leasholder
Mr Talley Leasholder
Dr Perumal Leasholder
Mr Thorn Leasholder

For the Respondents

Members of the Tribunal

Mr I Mohabir LLB (Hons)
Miss C Barton BSc MRICS
Ms J Dalal

IN THE LEASEHOLD VALUATION TRIBUNAL

CHI/43UC/LSC/2009/0067

**IN THE MATTER OF SECTION 27A OF THE LANDLORD & TENANT ACT
1985**

**AND IN THE MATTER OF HARVEY COURT, SANDY MEAD, EPSOM,
SURREY, KT19 7NH**

BETWEEN:

PEVEREL OM LTD

Applicant

-and-

MR FUGGLE & OTHERS

Respondents

THE TRIBUNAL'S DECISION

Introduction

1. This is an application by the Applicant made pursuant to s.27A of the Landlord and Tenant Act 1985 (as amended) ("the Act") for a determination of the Respondents' liability to pay and/or the reasonableness of the cost of major works. The Respondents' liability to pay a service charge contribution for the major works arises in the 2009 service charge year.
2. The costs in issue were incurred in the following way. On 7 May 2008, the First respondent, Mr Fuggle, noticed a failure to the suspended ceiling of one of the bedrooms in his flat at 17 Harvey Court. This had been caused by lumps of concrete detaching themselves from the hidden structural beams above. The following day he notified Taylor Wimpey, the developers, who carried out an inspection the same day. On 15 May 2008, Mr Fuggle notified

the Applicant of the events who, in turn, notified their insurers the same day.

3. On 16 May 2008, contractors instructed by the Applicant, Lynx Maintenance (“Lynx”) attended Mr Fuggle's flat and cut out sections from the affected ceiling to install props under the concrete roof beams above to make the property safe. In addition, inspection holes were cut elsewhere to view other areas of the roof structure.
4. Mr Fuggle also instructed his own surveyor, Mr Illott FRICS, to investigate and report on the problem. In his initial report dated 21 May 2008, Mr Illott concluded that there had been a partial structural failure of two concrete beams located in the roof void above the bedroom ceiling. These beams had suffered cracking of the concrete due to water penetration over a long period causing the reinforcing steel within to corrode which, in turn, had caused spalling of the concrete casing. Subsequently, pieces of detached concrete weighing approximately 3 or 4 pounds in weight had fallen through the bedroom ceiling. Mr Illott went on to state that the condition of the beams would have been obvious when the property had been re developed by Taylor Wimpey in the late 1990s, and concluded that they had either been ignored by Taylor Wimpey or deemed to be satisfactory and then covered up by the ceiling installed beneath.
5. On 28 May 2008, loss adjusters instructed by the Applicant's buildings insurer declined a claim for the cost of the required remedial work on the basis that it was not an insured peril. Instead, they stated that it had occurred as a result of maintenance issues within the structure of the building.
6. At some later point in time, a structural engineer from Lynx was instructed by the Applicant to attend Mr Fuggle's property to ascertain the exact reason for the structural failure. Essentially, he reached the same conclusion that Mr Illott had reached in his earlier report. The engineer also noted that a further in situ concrete beam approximately 250mm from the party wall on the opposite side of the bedroom was suffering from the same problem and there was a

likelihood of falling masonry from this beam. The engineer recommended that the defective beams should be cut away and removed. He also indicated that there were likely to be numerous other similar problems within the development.

7. Thereafter, Mr Fuggle corresponded with NHBC with a view to having the necessary remedial work carried out under the guarantee issued by them. On 16 July 2008, this claim was rejected because the cost was below the minimum value claim of £808 per property.
8. On 5 August 2008, the Applicant obtained an estimate for the remedial work to Mr Fuggle's premises from a contractor, GPF Lewis in the sum of £11,370. On 11 and 15 August 2008, the other premises within Harvey Court were inspected by Lynx and deemed to be safe, save for No.27, where a similar structural defect was found. Lynx estimated cost of the remedial work for this property was £1,924 plus VAT. Lynx estimated the cost of the remedial work for this property to be £1,924 plus VAT.
9. Correspondence then ensued between the Applicant and Taylor Wimpey as to where liability for the cost of the remedial works should fall. Whilst this debate continued, it seems that no remedial works were carried out. In the interim, the Applicant commenced statutory consultation with the lessees in relation to the proposed remedial works by serving an initial s.20 notice on 22 January 2009.
10. On 15 April 2009, the Applicant issued this application seeking a determination regarding the lessees' liability to pay for the cost of the proposed remedial works set out in the s.20 notice. Eventually, on 29 April 2009, Taylor Wimpey agreed to pay a contribution towards the overall costs incurred of £14,007 including VAT, being the estimated cost of repair to No.17. By 2 July 2009, the repairs to No.27 had been completed and the works to No.17 commenced. These had been completed by the time of the hearing.

The Sums in Issue

11. The overall costs incurred and claimed by the Applicant by way of a service charge contribution from the lessees are all of the costs paid to Lynx in the sum of £20,155.21. These are:

(a) Structural reports & Emergency works

(i) £2,500 plus VAT for the cost of carrying out structural repairs to No.17 on 16 May 2008.

(ii) £720 plus VAT for the preparation of a structural engineer's report relating to No.17.

(iii) £1,944 plus VAT for the preparations of two structural reports.

Total £6,067.70

(iv) Additional Contractor attendance in the sum of £625 plus VAT for five visits by the Contracts Manager and an engineer to inspect all of the top floor flats and houses.

Total £734.38

(v) The hire cost of support equipment (props) from 25.05.08 to 31.07.09 at £150 plus VAT per week.

Total £11,092.43

(b) The cost of the structural works to 27 Harvey Court.

Total £2,260.70

Lease Terms

12. The Tribunal was provided with a copy of the lease made between (1) Bryant Holding Ltd and George Wimpey Southern Ltd (the Lessor) and (2) Peverel OM Ltd (the Manager) and (3) Thomas Fuggle and Alison Fuggle for a term of 999 years from 1 November 2000 ("the lease"). It is the Tribunal's understanding that the leases granted to the other Respondents and lessees are in the same terms.

13. By clause 6 of the lease, the Applicant mutually covenanted with the Lessor and the Lessee to perform the obligations set out in the Tenth Schedule. Paragraph 1 of the Tenth Schedule provides that the Manager shall carry out the obligations set out in the Sixth Schedule. Paragraph A of the Sixth Schedule sets out the maintenance expenses that are recoverable as relevant service charge expenditure in relation to the maintained property, namely, the estate and the block. The Second Schedule defines what comprises the maintained property and paragraph 1.3 expressly includes the structural parts of the building. Paragraph 6 of the Sixth Schedule includes the cost of carrying out all remedial work to the block.

14. By clause 4.1 of the lease, the lessee covenanted, *inter alia* to observe and perform the obligations set out in Part One of the Eighth Schedule. Paragraph 2 of the Schedule, the lessee covenanted to pay “the Lessee’s Proportion” of the maintenance expenses. The contractual figure in relation to block and estate costs and, therefore, the sums in issue is 3.18% of the overall expenditure.

The Relevant Law

15. The substantive law in relation to the determination of this application can be set out as follows:

Section 27A of the Act provides, *inter alia*, that:

"(1) An application may be made to a leasehold valuation tribunal for a determination whether a service charge is payable and, if it is, as to-

- (a) the person by whom it is payable,*
- (b) the person to whom it is payable,*
- (c) the amount which is payable,*
- (d) the date at or by which it is payable, and*
- (e) the manner in which it is payable.*

(2) Subsection (1) applies whether or not any payment has been made."

Subsection (3) of this section contains the same provisions as subsection (1) in relation to any future liability to pay service charges.

16. Any determination made under section 27A is subject to the statutory test of reasonableness implied by section 19 of the Act. This provides that:

"(1) Relevant costs shall be taken into account in determining the amount of a service charge payable for a period-

(a) only to the extent that they are reasonably incurred, and

(b) where they are incurred on the provision of services or the carrying out works, only if the services or works are of a reasonable standard;

and the amount payable shall be limited accordingly."

Inspection

17. The Tribunal inspected the subject property on 30 September 2009. The subject property is a split-level conversion maisonette formed out of a Victorian built two-storey building and arranged over ground and first floors comprising hallway, living room, kitchen, two bedrooms and a bathroom and en suite facilities. The building comprises brick walls and a slate covered roof. The development is gated and forms part of a much larger estate of conversion and a purpose built properties of varying styles and types built on the site of an old hospital on the northern outskirts of Epsom and served by a series of estate roads.

Decision

18. As a general point, the Respondents contended that the Applicant should seek to recover all of the costs in issue from Taylor Wimpey as the developer and not from the lessees through the service charge account. Therefore, they submitted that the effect of paragraph 15 of the Sixth Schedule meant that the disputed costs cannot form part of the maintenance expenses recoverable through the service charge account.
19. However, in the Tribunal's judgement, any claims that may lie against Taylor Wimpey are not actionable by the Applicant. By clause 6 of the lease, the Applicant only covenants to perform those obligations set out in the Tenth Schedule. There is no covenant in the Tenth Schedule requiring the Applicant to seek to recover costs such as these in the manner suggested by the Respondents. It is for the same reason that any costs so incurred are not recoverable under the Sixth Schedule as maintenance expenses, for which the

lessees are liable to pay a service charge contribution. Therefore, it was not open to the Respondents to argue that any failure on the part of Applicant to seek to recover the disputed costs from Taylor Wimpey other than through the service charge account would, as a consequence, mean that the costs had not been reasonably incurred. To the extent that the Respondents/lessees may have a claim against either the Applicant and/or Taylor Wimpey, they will have to seek independent legal advice. If any litigation against either party is successful then the damages recovered will be by way of a full or partial indemnity for their liability in this matter. The Tribunal then turned to consider the costs themselves.

(a) Structural Report & Emergency Works

(i) Cost of Temporary Structural Works to No.17

20. The Respondents did not contend that the cost of £2,500 plus VAT for the cost of carrying out temporary structural repairs to No.17 had not been reasonably incurred. It is not entirely clear from their statement of case if they were challenging the reasonableness of this item of cost. For the avoidance of doubt, the Tribunal considered that the Respondents had made a general challenge in relation to all of the structural report and emergency work costs. The Applicant submitted that it had acted promptly when put on notice by Mr Fuggle about the structural problem in his premises and, therefore, these costs were reasonable.

21. The Tribunal determined that the sum of £2,500 plus VAT was entirely reasonable given the urgent nature of the works that were necessary to ensure that Mr Fuggle's premises were made safe from further falling masonry. In any event, the Respondents had not adduced any evidence to demonstrate that the cost of carrying out these works was excessive. Accordingly, the Tribunal allowed this sum as claimed.

(ii) Cost of Structural Estimate

22. The sum of £720 plus VAT is for the cost of a structural engineer from Lynx attending Mr Fuggle's premises in or about May 2008 to ascertain the reason

for the masonry falling through his bedroom ceiling. The report consists of two pages, to which a number of photographs are annexed.

23. Again, the Respondents did not contend that this cost had not been reasonably incurred. They submitted that the cost was excessive and unreasonable because the report prepared by Mr Ilott was far more detailed and was obtained at a fraction of the cost paid to Lynx. The Applicant simply submitted that, having regard to the contents of the report, the cost was reasonable.
24. The Tribunal accepted the Respondents' submission that the cost of the engineer's report was excessive. The "report" was not signed and the qualifications of the author are not known. The report itself is a bare report. Using its own expert knowledge and experience, the Tribunal allowed the sum of £500 plus VAT as being reasonable.

(iii) Two Further Structural Reports

25. The sum of £1,944 plus Vat is claimed by the Applicant for the cost of preparing two further structural reports. They appear to have been carried out by (external) structural engineers. However, it was not made clear if these were as a result of the inspections of the building carried out on 11 and 15 August 2008, to ascertain whether there had been any similar structural failures in any of the other properties, or whether they related to further investigations of Nos. 5 and 27 required by those earlier inspections.
26. The relevant reports had not been produced by the Applicant. The Tribunal, therefore, assumed that one report was produced as a result of the visits to the property on 11 and 15 August 2008 and that the second report arose from the subsequent investigations carried out to Nos. 5 and 27 on some unknown date.
27. The Tribunal did not consider that the second structural report was necessary because all of the necessary parts of the building had been inspected over two days on 11 and 15 August 2008. It was not made clear to the Tribunal for the necessity of carrying out further investigations to Nos. 5 and 27. Indeed, No.5

was later deemed to be safe. In the Tribunal's judgement, there had been sufficient time during the inspections carried out on 11 and 15 August to ascertain the existence of any structural problems that may have existed in either property. Accordingly, the Tribunal found that this cost had not been reasonably incurred and allowed the sum of £1,000 plus VAT (2 days x £500 per day) as being reasonable.

(iv) Additional Contractor Attendance

28. From a Lynx invoice dated 23 September 2008, the cost of £625 plus VAT was as a result of five further visits by its Contracts Manager, Mr Read, and an engineer to inspect all top floor flats and houses on unknown dates.

29. Again, the Tribunal was not told of the necessity for carrying out these further inspections. In the absence of any such evidence, the Tribunal found that this cost had not been reasonably incurred, especially having regard to the fact that the properties had already been inspected on three earlier occasions by various structural engineers. Accordingly this sum was entirely disallowed.

(v) Hire of Temporary Support Equipment

30. The highest element of cost was the sum of £11,092.43 and related to the cost of hiring props from Lynx at a cost of £150 plus VAT from 26 May 2008 until the completion of works on 31 July 2009.

31. The Respondents submitted that the cost was excessive because the same props could have been purchased outright for approximately £200 and this equated to just over a week's hire charge. The equipment consisted of 6 Acrow props and 20 feet in length of 6 inch x 1 inch boards. The Respondents further submitted that the cost of hire had been increased because of the delay on the part of the Applicant in dealing with the situation.

32. The Applicant simply submitted that the cost had been reasonably incurred and was reasonable in amount. The evidence of Mr Atkinson, the Applicant's Regional Property Manager, was that it was not considered sensible to proceed

with the remedial works due to the number of objections raised by the lessees to pay for the works.

33. It was common ground that the requirement for props, mainly in relation to No.27, was essential. The props were hired for over 14 months. The main reason for the delay in carrying out the remedial work was that the Applicant had attempted to ascertain how the cost of the repairs was to be met. Claims made to the buildings insurer and NHBC were declined. Eventually, on 30 March 2009, Taylor Wimpey agreed to pay a contribution of £14,007 for the repairs to No. 17 without any admission of liability.
34. The Tribunal accepted that the Applicant had made genuine attempts to defray the cost of the remedial works. However, it appeared to the Tribunal that the Applicant could have acted in a more proactive manner to try and resolve this issue. Moreover, paragraph 6 of the Sixth Schedule imposed a repairing obligation on the Applicant and/or the freeholder to carry out the remedial works. It is not a condition precedent of that obligation that they must first of all ascertain from whom they may later seek an indemnity for the cost of the work. Certainly, by 16 July 2008, the Applicant knew that the cost was not going to be met either under the buildings insurance policy of any NHBC guarantee. It should have been obvious to the Applicant at that time that the cost of the works could only be met by the freeholder or through the service charge account. The delay that subsequently incurred must, therefore, must be laid at the door of the Applicant. Accordingly, the Tribunal found that the period for the cost of hiring the props was excessive and had not been reasonably incurred.
35. As to the cost of hire, the Tribunal found a hire charge of £150 plus VAT per week for 6 props was excessive and unreasonable, as this type of equipment would normally form part of a contractor's stock of equipment which had been purchased for a modest sum of £300 for 6 props. Therefore, a hire charge of £150 per week was considered to be excessive and not reasonably incurred.

36. Using its own expert knowledge and experience, the Tribunal determined that the remedial works should have been completed within 5 months (including 2 months for statutory consultation) of the original report having been made by Mr Fuggle to the Applicant on 15 May 2008. The Tribunal allowed a hire charge of £60 per week for the props as being reasonable for this period of time. Accordingly, the sum of £1,200 plus VAT was allowed for the cost of hiring the props.

Cost of Repairs to No.27

37. The Respondents submitted that these costs should be recovered by the Applicant from Taylor Wimpey. However, for the reasons set out at paragraphs 18 and 19 above, this submission does not succeed and the cost of £2,260.70 is recoverable as relevant service charge expenditure under the terms of the lease. The Respondents did not challenge the quantum of these costs as being unreasonable and so they were allowed by the Tribunal, as claimed by the Applicant.

Section 20C – Costs

38. At the hearing, the Respondents made an oral application under s.20C of the Act seeking an order that the Applicant be *disentitled* from being to recover all or part of the costs it had incurred in these proceedings.
39. Section 20C of the Act provides the Tribunal with a discretion to make an order preventing a landlord from being able to recover costs it had incurred in proceedings such as these when it is just and equitable to do so having regard to all the circumstances of the case.
40. In the present case, the Respondents had substantially succeeded on the other issues. Having done so, in the Tribunal's view, it would be in equitable and unjust to allow the Applicant to be able to recover its costs of having to unsuccessfully prosecute the application. Accordingly, the Tribunal does make an order preventing the Respondent from being able to recover all of the costs it has incurred in these proceedings.

Dated the 30 day of December 2009

CHAIRMAN.....I. Mohabir

Mr I Mohabir LLB (Hons)