3106

Residential
Property
TRIBUNAL SERVICE

LONDON RENT ASSESSMENT PANEL
LEASEHOLD VALUATION TRIBUNAL

Case Reference: **LON/00AM/LSC/2006/0392**

DECISION OF THE LEASEHOLD VALUATION TRIBUNAL ON AN APPLICATION UNDER SECTIONS 27A AND 20C OF THE LANDLORD AND TENANT ACT 1985, AS AMENDED

Applicants:	Mr M Weiss, Mrs G M Weiss and Mr E Stern
Respondent:	Mr M Soffer
Premises:	125/127 Holmleigh Road, London, N16 5QG
Date of Application:	7 November 2006
Dates of Hearing:	5 and 7 February 2007
Appearances for Applicant:	Mr D King, Tech RICS MIMBM MAPS, Building Surveying Consultancy
Appearances for Respondent:	Mr R Clegg of Counsel
Leasehold Valuation Tribunal:	Mrs J S L Goulden JP Mr M Cairns MCIEH Mrs A B Moss

LON/00AM/LSC/2006/0392

PROPERTY: 125/127 HOLMLEIGH ROAD, LONDON, N16 5QG

TITLE?

1. The Tribunal was dealing with the following applications:-

   (a) An application dated 1 November 2006 and received on 7 November under Section 27A of the Landlord and Tenant Act 1985, as amended (hereinafter referred to as "the Act"), 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

   (b) An application made on behalf of the Respondent at the hearing on 5 February 2007 to limit landlords' costs of proceedings before the Tribunal under Section 20C of the Act.

2. The service charge year in dispute is for the period 1 January 2006 to 31 December 2006.

3. The Applicants are Mr M Weiss, Mrs G M Weiss and Mr E Stern. From Land Registry office copy entries of the freehold and leasehold title produced to the Tribunal at the hearing, it would appear that the freehold was purchased by the Applicants, and the registry indicates that they became the registered proprietors on 21 February 1991. It also appears from the leasehold title that by a lease dated 10 December 1990 the Applicants granted a long lease of the first floor flat to Mr M Weiss and Mrs G M Weiss (only) for a period of 99 years from 25 March 1990. It was not clarified at the hearing how the three Applicants were able to grant a lease of the first floor flat to two of the Applicants before they purchased the freehold interest, but for the purposes of proceedings before the Tribunal, the Applicants are properly registered as the freehold owners and are the landlords in respect of the ground floor flat.

4. The Respondent is Mr M Soffer, the owner of the lease of the ground floor flat. Although previously there had been some dispute as to whether Mr Soffer was the sole Respondent, this issue had been resolved at the Pre-Trial Review held on 30 November 2006 when Counsel for Mr Soffer confirmed that he alone was responsible for payment of the service charges. This was recorded in the Tribunal's Directions of the same date. Counsel for Mr Soffer at the substantive hearing on 5 February 2007 also confirmed that Mr Soffer accepted that he was the sole Respondent.

5. The lease of the ground floor flat is dated 1 May 1985 and made between Ilmaquil Investments Ltd (1) and P Berger (2) and is for a term of 99 years from 25 March 1978 at the rents and subject to the terms and conditions

therein contained. The lease is now vested in the Respondent by way of an Assignment dated 23 April 1986. The Tribunal was advised that the leases of the ground and first floor flats are in the same form.

6. The parties entered into arbitration in respect of with the Federation of Synagogues (Beth Din) and its Decision, a copy of which was provided to the Tribunal, is dated 11 October 2005. In respect of financial claims, the Beth Din made decisions in respect of ground rent, insurance, repairs and legal and personal expenses. The parties are bound by the arbitration decision under the terms of the Arbitration Act 1996.

INSPECTION

7. 125/127 Holmleigh Road, London, N16 5QG (hereinafter referred to as "the property") was inspected by the Tribunal on the morning of 5 February 2007 in the presence of Mr D King of Building Surveying Consultancy accompanied by his builder.

8. The property was a two storey terraced house circa 1900 which contained two purpose-built self-contained flats, each with a separate street door. It was situated in a heavily parked residential road. External decorations were poor, with cracked and loose putties and flaking paintwork to the windows generally, and joinery exposed to weathering. The main roof was pitched and slate covered, with a two-storey back addition of like construction and with a slate covered lean-to roof. The main roof was in some disrepair with lifting ridge tiles abutting the fire break wall, old cement fillets, numerous slate hangers and some chipped and displaced slates. The back addition, lean-to roof had been coated with bitumen.

9. The front and rear gardens were neglected. There was broken timber fencing to the rear and wire fencing between the property and its neighbour. To the first floor back addition a metal fire escape with a staircase down to the rear garden had been constructed. The bottom two steps were concrete. In two places, the back addition flank wall from gutter level was moss stained indicating leakage. An external boiler housing had been fitted by the tenant of the ground floor flat to the outside wall of the kitchen, and it was noted that there was no insulation to the exposed pipework and the brickwork which had been holed for pipework had not been made good.

10. The members of the Tribunal were invited to inspect the ground floor flat by its occupant, Mrs P Kwadrat who, the Tribunal was advised, was the daughter of the Respondent. In the bathroom, a new ceiling had been constructed and new damp staining to the plasterwork was noted at the junction of the flank and front walls. In the rear back addition bedroom there was extensive damp and mould growth to the lower parts of the external walls.

11. The members of the Tribunal were invited to inspect the first floor flat which they were advised was empty, but which, on inspection, was occupied. There was evidence of damp staining and cracking to the kitchen ceiling. In the back addition bedroom, there was a patch of damp on the flank wall. The loft space was inspected in two places from the first floor flat. The first gave a

view of the back addition roof in which damp affected joinery was noted abutting the main house. The other gave a view of the main house roof void and daylight was noted in several places through the roof. The front and rear roofs were not braced.

HEARING

12. The hearing took place on 5 and 7 February 2007.

13. The Applicants, Mr M Weiss and Mrs G M Weiss and Mr E Stern were represented by Mr D King Tech RICS MIMBM MAPS of Building Surveying Consultancy. The Respondent, Mr M Soffer, was represented by Mr R Clegg of Counsel.

14. Several adjournments were given on 5 February 2007 in order that the parties could discuss and, if possible, narrow the issues and so that both Mr King and Mr Clegg could seek instructions from their respective Clients. On 7 February, the Tribunal was advised that the issues remained those at 5 February 2007.

15. The issues which required the determination of the Tribunal were as follows:-

(a) Insurance
(b) Management fees
(c) Major works
(d) Set off
(e) Limitation of landlords' costs of proceedings
(f) Penal costs

16. The salient points of the evidence and the Tribunal's determination is given under each head.

(a) Insurance

17. The insurance premium for the property for the service charge year 2006 was £472.52. The Tribunal was provided with a copy of the schedule from Norwich Union showing that both flats were insured for the period 23 January 2006 to 23 January 2007 under Policy Number PM007266CHC. On 7 February, Mr King provided a receipt from the brokers dated 6 February 2007 confirming payment of the premium.

18. Mr Clegg, for the Respondent, argued that the Respondent had specifically requested that his name be noted on the insurance policy as a condition precedent to his paying the premium and, in addition, since he had not received a copy of the policy at any time, he did not know that the property was, in fact, insured. In addition, and in respect of all the matters before the Tribunal, he wished the Tribunal to consider the question of equitable set off.

19. It was argued on behalf of the Applicants that the question of the insurance had already been dealt with at arbitration. In the Applicants' statement of case, it was said "*we have been notified by the broker that the interests of the*

lessees and mortgagees are automatically noted on the policy. However they could not include in this case a specific name as it is not clear who the actual owner is this flat [sic] *(for insurance purposes)*". In addition, Mr King, on behalf of the Applicants provided copies of letters written to the Respondent in 1991 indicating that the Respondent had made an insurance claim which had been settled and accordingly, it was suggested, that the Respondent must have had knowledge that the property was insured. In the Applicant's statement of case in this respect, it was alleged that the Respondent had obtained *"in the region of £6,000 even without his name noted on the policy"*. Mr King provided on 7 February 2007 an insurance schedule covering the period 23 January 2007 to 23 January 2008, showing the interests of the Respondent and Mr M Rappoport noted on the policy.

20. The principles in respect of the insurance had already been dealt with at arbitration and the Tribunal has no jurisdiction, under Section 19(2C)(c) in respect of any matter "**which has been the subject of determination by a court or arbitral tribunal**". In that arbitration, the Respondent had argued that it had not been demonstrated that his interest had been covered. This point was rejected by the arbitrators and is rejected again by this Tribunal. It was further argued by Mr Clegg that "*at some time*" there had been an oral agreement between the parties that unless and until evidence was provided that the Respondent was named on the insurance policy, the premium would not be paid. This argument is considered by this Tribunal to be without merit. It is clear that a claim was made for which the Respondent had been paid. The property had therefore clearly been covered.

21. The property is insured by the Applicants under the lease terms. A schedule issued on behalf of the insurers has been provided showing that the property is covered for the service charge year 2006. No challenge has been made as to the level of cover either at the arbitration or before this Tribunal. The premium appears to be modest. The Respondent has not provided any alternative quotations.

22. The Tribunal determines that the sum of £472.52 for the insurance premium for the service charge year 2006 is relevant and reasonably incurred and properly chargeable to the service charge account. The Respondent's proportion of the insurance premium under the terms of his lease is £236.26.

(b) <u>Management fees</u>

23. The management fees for the service charge year 2006 were £300.

24. Mr King said that he relied on Clause 3(b)(ii) in the lease. On questioning from the Tribunal, he confirmed that the managing agent, Mr J Weiss, was the father of Mr M Weiss, one of the Applicants. Mr J Weiss did manage properties outside his family but Mr King said that this was for other people within the religious community. The Tribunal was provided with a list headed "*Services to be provided by the Agent using reasonable skill, care and diligence ...*". Mr King did not know if there was a management agreement in force but argued that using Mr J Weiss was "*a cheaper option*". Mr King said

that the fee was reasonable and, with regard to the management of major works, it was normal to require a percentage of the cost of the works.

25. Mr Clegg referred to paragraph 1 of the Tribunal's Directions of 30 November 2006, in which the Applicants were directed to provide details of the management fee claimed, the name of the manager and the services provided. Mr Clegg said that this Direction had not been complied with. He said that the Tribunal has to consider whether the lease permitted management fees to be charged and in his view, it did not. In addition, the Applicants would have to show that there was a genuine agency relationship and a genuine expense had been incurred in this respect by the Applicants. In this case, Mr Clegg argued that no management agreement had been provided and since Mr J Weiss was the father of Mr M Weiss (one of the Applicants), there was no genuine agency relationship.

26. Clause 3(b)(ii) of the lease (which is also referred to under the head relating to the Section 20C application) states:-

> **"To pay one half share of the due expenses incurred by the Lessors in respect of the management of the Building and maintaining repairing redecorating and renewing the roof and foundations and any parts of the Building common to all the lessees and any common ways and common gutters rainwater pipes drains gas pipes electric cables and wires in under or upon the Building used in common and any common internal lobbies in the ground floor of the Building and enjoyed or used by the Lessees in common with the owners and lessees of the other flat in the Building And also to pay the insurance premium payable by the Lessors in accordance with Clause 5(e) of this Lease."**

27. No management agreement has been provided to the Tribunal, and the list of services produced carries no heading or indicate in any way that Mr J Weiss is a managing agent or carried out the duties set out therein as the managing agent for this particular property. It merely sets out what duties a managing agent should perform.

28. In a letter to Mr Soffer dated 16 March 2006, Mr J Weiss writes, inter alia, "*I am the freehold owner of both these properties and you are the lessee of the ground floor flat ... I consider it appropriate to renew the roof covering to all slopes ...*".

29. Mr King could not explain why Mr J Weiss should be stating that he was the landlord, and said it must have been an error, but this was an important letter being the first Notice under the Section 20 consultation requirements. This letter carried Mr J Weiss' name and address at the head and was signed by him at the foot.

30. If a lease expressly provides, the costs of management fees of a managing agent employed by the landlord are recoverable providing, as held in the case of **Finchbourne Ltd v Rodrigues (1976) 3 All E.R.581**, that the managing agent is not the alter ego of the landlord or a mere nominee of the landlord. In

the view of this Tribunal, the interest of Mr J Weiss and his father are inextricably entwined, and there is no plausible explanation for Mr J Weiss writing to Mr Soffer in 2006 holding himself out as the freeholder of the property. No persuasive evidence has been provided of other persons for whom he acts as a managing agents.

31. The Tribunal determines that the management fees of £300 although relevant have not been reasonably incurred and are therefore not properly chargeable to the service charge account.

32. In order to assist the parties, it is the view of the Tribunal that if the Applicants employ independent managing agents, the fees of those agents would be recoverable under the lease terms and the present level is not considered unreasonable (and indeed could be higher for management of a small property). With regard to management fees of an independent managing agent in respect of major works, again it is considered that they would be recoverable under the lease terms and the percentage under that head is not considered unreasonable.

(c) <u>Major works</u>

33. The major works in the service charge year 2006 were set out in an invoice dated 4 September 2006 sent by Mr J Weiss to the Respondent. The cost of such works was said to be £11,786.87 inclusive of VAT being the contractors' costs of £9,987.50 (£8,500 plus VAT), surveyors' fees of £1,300 (15% of the cost of works plus disbursements) and management fees (at 5% of the cost of works plus VAT) of £499.37.

34. The Applicants in their statement of case said, inter alia:-

> *"1. The freeholder instructed 2 different Surveyors on 2 different occasions and both were of the opinion that the rear roof and roof light have come to the end of their useful life and require replacement ...*
>
> *2. It appears quite conclusive from the various reports from the professionals that there is no real question over the need to replace the rear mono pitched roof; the main stumbling point is the question over works to the main front roof.*
>
> *3. The roof light which forms part of the main roof and valley, despite many repairs is still leaking and does require replacement. This form of leak is a common problem in buildings of this construction where roof pitches of a different angle meet.*
>
> *4. In order to install a replacement roof light it will be necessary to strip the valley gutter and to install new weathering. Works of this nature will inevitably cause damage to the existing old and brittle slates which will prevent them from being re-used due to there age.*

5. *The poor condition of the slates on the main roof can be further noted by the amount of broken and dislodged slates and in addition the amount of replacement slates that have been fitted over the years are held in place with lead tingles.*

6. *To the front elevation you are able to note the movement that has taken place at the top left hand ridge where a large gap has been formed between the ridge and tiles; this is also evident on the rear elevation adjacent to the party wall.*

7. *We take note of the comments made by the respondents Surveyor but question the stated additional 20 year life cycle given for the existing slates and the estimated costs for the replacement of the mono pitched roof.*

8. *Firstly we only have to look at other similar properties within the road constructed at the same time where you will find that replacement roof slates have already been fitted, the existing slates having come to the end of their useful life. To expect the existing slates on this property to remain in position for a further 20 years cannot be seen as a true and realistic option given the current condition and age of the slates.*

9. *It is stated within the report from DMC that there is no requirement for the fitting of new timber to the roof (noted as strengthening) You will note that due to the problems around the roof light it will be necessary to install replacement timbers and to possibly adjust the rafters of the main roof at the ridge.*

10. *We do not consider that provision has been made within the estimate for a replacement roof light and replacement of defective timbers. In addition to the estimated costs given as £3,750 management, professional fees and VAT should be added which then bring the estimated costs to at least £6,000.*

11. *When taking all these points into consideration, it will be more viable, economical and long term solution for the protection of the internal elements of the property to replace the old ageing original slates with new 'Eternite' imitation slates rather than recovering using the more costly natural slates.*

12. *The use of imitation slates will fall in line with the generally adopted practice for recovering slated roofs and will fall into the general street line.*

13. *The freeholder has invited tenders in accordance with the specification provided by BSC and as such have selected the lowest contractor.*

14. *Minor works to the roof were carried out during the last few years when it was required."*

35. The Respondent's case was that the Section 20 consultation had not complied with in that it had been based on a report by Ord, Carmell & Kritzler of 25 November 2005 which had been superseded by a report from Building Surveying Consultancy dated 26 May 2006, the works had not been properly specified either as to detail or cost, the Respondent's observations had not been addressed and time limits not complied with. Mr Clegg said that the Notices were invalid.

36. In support of his arguments, Mr Clegg referred to the surveyors' reports and took the Tribunal through the chronology. He said that the survey report on which the Section 20 consultation procedure had been based was that of Mr D Kritzler of Ord, Carmell & Kritzler dated 25 November 2005 following an inspection of the property from ground floor level. Mr Clegg said that the report set out three options to be considered by the landlords but it did not state which option should be preferred.

37. On 8 February 2006, a further report was carried out by Mr D Kritzler of the same firm in which further options were proposed. Queries were raised by the Respondent following the re-inspection which were not addressed. Mr Clegg said that the Applicant had a duty to show that they were acting on reliance of competent reports following proper investigation.

38. The Respondent had instructed DMC Consulting Engineers ("DMC") to prepare a report on the property, which Mr R J Timson of that firm produced on 5 April 2006 following his inspection on the same date. Mr Clegg accepted that although Mr Timson had prepared a witness statement dated 18 January 2007, he had not appeared before the Tribunal to be questioned on either 5 or 7 February 2007.

39. The Notice of Intention was dated 22 May 2006. Mr Clegg maintained that this was defective under the regulations since it did not record observations made by the Respondent. The landlords had been requested to investigate all options, but there had been no reference to the report carried out for the Respondent by DMC and that the report had not been considered by the Applicants.

40. The survey report provided by Mr King was dated 26 May 2006, and therefore Mr Clegg said it could not be considered a response to the Respondent's queries which were raised in a later letter dated 29 June 2006. In his report, Mr King had said "*in my mind it would make economical sense to replace all the roof slopes to the property at the same time rather than just that of the rear addition*". Mr Clegg said that that report therefore did not indicate any necessity in replacing both slopes.

41. Mr Clegg argued that the works must be necessary and any economic argument should not succeed. Mr Clegg took the Tribunal through relevant correspondence and passages from the Lands Tribunal case of **Hyde Housing Association Ltd v Williams (2000)** in support.

42. The second Notice under the legislation was dated 2 August 2006. Mr Clegg said that the option chosen was the most expensive, with no explanation or

costings of the other options. Mr Clegg said that if he was unsuccessful in his argument that the Section 20 consultation procedure was invalid, although there was no challenge on quantum there was a challenge to the extent of works. The costings were not broken down into elements.

43. Mr King said that he would leave the question of validity of the consultation requirements to the Tribunal. With regard to the surveyors involved, all members of RICS were independent and he had never worked for the Applicants before. He said that information and documents supplied a fair reflection of the works required. The DMC costs were acceptable in respect of the rear roof, and therefore the costings for both roofs were reasonable. He agreed that the estimates in respect of the roof works would require *"splitting"* depending on which option was adopted.

Statutory requirements

44. Regulation 7(4) of the Service Charges (Consultation Requirements) (England) Regulations 2003 sets out the qualifying works for which public notice is not required, and, in order to assist the parties, these can be summarised as follows:-

Notice of intention

45. A notice of the landlord's intention to carry out qualifying works (i.e. works on a building or any other premises) must be sent to each leaseholder and to any recognised tenants' association (RTA) (if any). This notice must, inter alia,

(a) Describe in general terms the works proposed to be carried out or specify a place and hours where the proposals can be inspected;

(b) State the landlord's reasons for considering it necessary to carry out the proposed works;

(c) Invite observations in writing;

(d) Specify:

- the address to which such observations must be sent;
- the date on which the consultation period ends (30 days);
- nominate a person from whom the landlord should try to obtain an estimate for carrying out the works (again within 30 days).

46. The place and hours for inspection must be reasonable and a description of the relevant matters must be available for inspection free of charge. If copies cannot be made on inspection, the landlord must provide a copy, on request by the tenant, and again free of charge.

47. Where observations are made within 30 days the landlord must have regard to them.

Obtaining estimates

48. At least two estimates must be obtained and where a contractor is nominated by the leaseholders, the regulations provide that if only one leaseholder nominates a contractor, the landlord must try and obtain an estimate from that contractor. There are further provisions where nominations are made by more than one leaseholder.

49. Following the receipt of tenders, a further notice must be sent.

Notification of the estimates

This notice must be sent to each leaseholder and the RTA (if any).

It must include a statement containing:-

(i) for at least two for the estimates, the amount specified in the estimate as the estimated cost of the proposed works (one of which must be from a contractor wholly unconnected with the landlord. In addition, one of them must be from a nominated contractor, if an estimate was obtained);

(ii) where leaseholders have made observations by the due date, the landlord must provide a summary of them and his responses to them;

(iii) specify a (reasonable) place and hours at which all the estimates may be inspected;

(iv) invite observations in writing regarding the estimates;

(v) give the address and the date by which (30 days) observations must be sent;

(vi) state that they must be delivered by the due date;

(vii) if facilities to provide copies of the documents referred to in 3(i) are not available at the place specified, then copies must be provided free on request.

50. The landlord must have regard to any observations received by the due date.

Award of contract

Notification of the award of contract

51. This notice is not required if a tender from a nominated contractor or the lower tender is accepted. Otherwise within 21 days the landlord must send a notice to each leaseholder and the RTA (if any) –

(a) stating the reasons for awarding the contract, or giving the place and hours where those reasons may be inspected; and

(b) giving a summary of leaseholders' observations on the estimates and the responses to them on a place and hours where they may be inspected;

52. The Tribunal has considered the Notices and the correspondence.

53. The initial report was prepared by Mr Kritzler of Ord Carmel & Kritzler on 25 November 2005 who had carried out an inspection of the roofs from ground level and a "*head and shoulders*" inspection of the roofs internally. In that report, he set out defects to the main roof and set out three options for the landlord to consider. No suggestion was made in that report of which option was preferred.

54. A second report by Mr Kritzler was dated 8 February 2006, in which it was stated that his instructions were "*specifically to view the main rear slope. Unfortunately the ladder was not sufficiently long and I was not able to properly access and fully inspect the roof but understand from the contractor that the area around the skylight is painted with 'black jack' and the skylight itself has been taped with 'Denzo' or similar tape*". This report stated "*the balance now tips towards renewing the covering to the main rear slope and if this is to be done then it would be more sensible to renew the covering to the front slope as well although this is not absolutely necessary at present*".

55. Mr Clegg argued that 2(a) of the Regulations was not complied with since the works were not sufficiently described. Mr Clegg also said that the Notice only referred to the two reports prepared by Mr Kritzler and failed to state which was to be relied upon. Mr King had made no comment on the Respondent's surveyor's report. The Tribunal is persuaded by this argument.

56. Mr Clegg also argued that 2(b) of the Regulations had not been complied with since, at the time the first Notice was issued, namely 22 May 2006, no decision had been made. Mr King's report was dated 26 May 2006 i.e. four days after the issue of the Notice. This report referred to the economic sense in replacing all roof slopes to the property at the same time, rather than just that to the rear addition. The Tribunal accepts Mr Clegg's argument that the Tribunal must consider whether the repairs were necessary, rather than economically expeditious.

57. Mr Soffer had written to the Applicants on 20 June 2006 which states, inter alia, "*you have not indicated which of the options suggested by Ord Carmell & Kritzler you are intending to follow ... I note from the second letter of Ord, Carmell & Kritzler that they do not believe it is necessary, at present, for the front slope to be renewed ... I do not believe that you have complied with your requirements with regard to the proposed works ...*".

58. A reply from one of the Applicants, Mr M Weiss, to Mr Soffer was sent on 30 June 2006, together with a specification of works and Mr King's report of 26 May 2006. This letter requested a response within seven days. The Tribunal accepts Mr Clegg's argument that this breached Regulation 2(c) and (d).

59. In the view of the Tribunal, this legislation was enacted for a purpose which included a greater involvement in the consultation process by those who ultimately will be paying the bill. Because of this, greater transparency must be shown by those incurring the costs in the first instance.

60. The Tribunal determines that the Section 20 consultation procedure followed in this case is flawed and therefore invalid.

61. It is the Tribunal's view that there was no survey report prepared on behalf of the Applicants which indicated, at the time of the service of the Notices, that the front and rear roofs must be replaced as a matter of urgency. It was unfortunate that the Respondent's expert did not appear on either hearing day in order to substantiate his report following an inspection which was, it is noted, "*carried out from external ground level and from within the first floor flat areas*". However, in order to assist the parties, it was clear to the Tribunal, an expert Tribunal, that both front and rear roof slopes had reached the end of their serviceable life and needed replacement – not piecemeal repair. In particular the roof coverings appear to be suffering "nail sickness" and recurring problems of rain ingress could be anticipated and consequent structural damage.

62. Again in order to assist the parties, if the Tribunal had found that the Section 20 consultation procedure had been complied with and using its own knowledge and experience and taking into account the costings for the rear slope prepared by the Respondent's surveyor, it would have found the proposed costs relevant and reasonably incurred and properly chargeable to the service charge account. Surveyor's fees at 15% plus VAT and disbursements is within an acceptable range and a management fee (subject to the Tribunal's comments on management of 5% plus VAT) is also acceptable.

(d) <u>Set off</u>

63. Mr Clegg argued that the Respondent was entitled to equitable set off in the sum of £4,838.60 including interest up to 7 February 2007.

64. In support he referred the Tribunal to two invoices relating to repairs to the ground floor flat. Both invoices had been issued by Pascal Enterprises, one dated 22 November 2000 in the sum of £1,980 and the other dated 23 October 2001 in the sum of £1,140. These totalled £3,120 and the remaining £1,718.60 comprised interest.

65. Mr King's view was that the Respondent should have made an insurance claim, as he had done on another occasion.

66. The Tribunal rejects Mr Clegg's arguments, in respect of equitable set off. The Tribunal has not been persuaded that repairs carried out to the ground floor flat were as a direct result of negligence and/or disrepair by the Applicants.

67. Mr Clegg, in rebuttal of the Applicants' allegation that the Respondent had paid nothing since he purchased the ground floor flat, drew the Tribunal's attention to a letter written by Mr Soffer's then solicitors of 10 October 1996, but failed to refer to any subsequent correspondence indicating that his client had paid any further sums. In any event, the letter of 10 October 2006 referred to payment of ground rent only. There is no evidence before the Tribunal that any service charges were paid by the Respondent. He who seeks an equitable remedy must come with clean hands.

(e) Limitation of landlords' costs of proceedings

68. Mr King confirmed that it was intended to place the costs of his preparation of the case before the Tribunal and attendance at the Tribunal on the service charge account. He placed his costs at £1,600 plus VAT (being £800 plus VAT for each day of the hearing).

69. Mr Clegg said that the lease provisions did not permit the landlords to place such costs on the service charge account.

70. Under Section 20C of the Act –

"(1) A tenant may make an application for an order that all or any of the costs incurred or to be incurred, by the landlord in connection with proceedings before a court or leasehold valuation tribunal, or the Lands Tribunal, or in connection with arbitration proceedings, are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application.

(2) The application shall be made –

(a) in the case of court proceedings, to the court before the proceedings are taking place or, if the application is made after the proceedings are concluded, to a county court;

(b) in the case of proceedings before a leasehold valuation tribunal, to the tribunal before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to any leasehold valuation tribunal;

(c) in the case of proceedings before the Lands Tribunal, to the tribunal;

(d) in the case of arbitration proceedings, to the arbitral tribunal or, if the application is made after the proceedings are concluded, to a county court.

(3) The court or tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances."

71. In applications of this nature, the Tribunal endeavours to view the matter as a whole including, but not limited to, the degree of success, the conduct of the parties and as to whether, in the Tribunal's opinion, resolution could or might have been possible with goodwill on both sides.

72. In the judgement of His Honour Judge Rich in a Lands Tribunal Decision dated 5 March 2001 (**The Tenants of Langford Court v Doren Ltd**), it was stated, inter alia, *"where, as in the case of the LVT, there is no power to award costs, there is no automatic expectation of an order under Section 20C in favour of a successful tenant, although a landlord who has behaved improperly or unreasonably cannot normally expect to recover his costs of defending such conduct. In my judgement the primary consideration that the LVT should keep in mind is that the power to make an order under Section 20C should be used only in order to ensure that the right to claim costs as part of the service charge is not to be used in circumstances that makes its use unjust".*

73. Under new legislation, there is now a limited power for the Tribunal to order costs, but Judge Rich's comments are still valid.

74. In accordance with Section 20C(3), the applicable principle is to be the consideration of what is just and equitable in the circumstances. Of course, excessive costs unreasonably incurred would not be recoverable by the landlord in any event (because of Section 19 of the 1985 Act) so the Section 20C power should be used only to avoid the unjust payment of otherwise recoverable costs.

75. In his judgement Judge Rich indicated an extra restrictive factor as follows:-

> *"Oppressive and, even more, unreasonable behaviour however is not found solely amongst landlords. Section 20C is of a power to deprive a landlord of a property right. If the landlord has abused his rights or used them oppressively that is a salutary power, which may be used with justice and equity; but those entrusted with the discretion given by Section 20C should be cautious to ensure that it is not itself turned into an instrument of oppression".*

76. In the view of the Tribunal, there would have been no resolution of the dispute between the parties without recourse to the Tribunal.

77. Although Mr Clegg argued that there was no provision in the lease which would allow Section 20C costs, in the view of the Tribunal, Clause 3(b)(ii) of the lease is wide enough to encompass the costs incurred by Mr King since this case is directly related to management of the building (but this clause would not have been wide enough to encompass legal costs). The question for the Tribunal is therefore whether it is reasonable for the Tribunal to exercise its discretion and permit the same.

78. The relevant clause in the lease is contained in Clause 3(b)(ii) and is repeated. It states:-

"To pay one half share of the due expenses incurred by the Lessors in respect of the management of the Building and maintaining repairing redecorating and renewing the roof and foundations and any parts of the Building common gutters rainwater pipes drains gas pipes electric cables and wires in under or upon the Building used in common and any common internal lobbies in the ground floor of the Building and enjoyed or used by the Lessee in common with the owners and lessees of the other flat in the Building And also to pay the insurance premium payable by the Lessors in accordance with Clause 5(e) of this Lease."

79. As stated in paragraph 77 above, in the view of the Tribunal this clause is wide enough to permit the landlords' costs of proceedings to be placed to the service charge account. The question for the Tribunal is whether it is reasonable to do so, this being a discretionary power.

80. The Respondent has made no real effort to settle this dispute. There are substantial service charge arrears. Mr King indicated at the end of the first day's hearing that if settlement between the parties could not be achieved he would be content for the Tribunal to make a determination on the papers. Mr Clegg said a further oral hearing was required. In the event none of the issues were narrowed.

81. In view of the Tribunal's observations as to the conduct of both sides and taking into account the limited success of the Respondent, the Tribunal determines that it is just and equitable that the costs incurred by the Applicants in connection with proceedings before this Tribunal are to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable, but limited to the sum of £800 plus VAT.

(f) Penal costs

82. This issue was raised in Directions of the Tribunal dated 30 November 2006 as a matter which may be considered by the Tribunal at the substantive hearing.

83. At the substantive hearing, both sides indicated that they would not be seeking an order for penal costs against the other and the Tribunal, having considered this issue, decided that a consideration of an order for penal costs would not, in the circumstances of this case, be appropriate.

The Tribunal's determinations as to service charge are binding on the parties and may be enforced through the County Courts if service charges determines as payable remain unpaid.

CHAIRMAN .....

DATE ..... 19 March 2007 .....