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RESIDENTIAL PROPERTY TRIBUNAL SERVICE
LEASEHOLD VALUATION TRIBUNAL

LANDLORD AND TENANT ACT 1985 Section 27A

LON/00BK/LSC/2006/0197:

Property:	**94-100 Chepstow Road, W2**
Applicant:	**NOTTING HILL HOME OWNERSHIP LTD**
Represented by:	**Orrick, Herrington & Sutcliffe Solicitors**
Respondent:	**LEASEHOLDERS OF 94-100 CHEPSTOW ROAD**
Represented by:	**Hallam-Peel & Co Solicitors**
Application	**Application for a determination of liability to pay Service Charges**
Tribunal	**Ms M Daley (Chair)** **Ms M Krisko** **Mr C Gowman**
Date	**13 14 December 2006 & 1 February 2007**
Appearances	Mr Pryor counsel (for the Applicant) Mr Hutchings (For the Respondent)

The Application

The application was for a determination of the service charge year ending April 2005-31 March 2006, in which the landlord proposed a budget of £51,904, an increase from £20,173 in the preceding year. The main reason for the increase was a proposed increase in the amount to be transferred to the cyclical maintenance fund (reserve fund), which it was proposed to increase from £1,500 to £38,000. A similarly high increase was proposed for the reserve fund contribution for the service charges year ending 31 March 2007 and a determination was sought for that period.

The Question that the Applicant, posed by way of the application was whether the Landlord may require the proposed increase to the reserve fund, if not what other sum would be reasonable for the landlord to collect for the reserve fund.

1. Documents Received

4 lever arch files were provided to the Tribunal (where documents have been referred to they are identified in the decision)

2. Matters in Dispute

I. The Dispute concerns the Applicant's proposal to increase the Tenant's contribution to the reserve fund, and whether it was entitled to increase the contribution given the terms of the lease.

II. The Percentage contribution of each Tenant to the service charges.

III. The Tenant's entitlement to damages, which the Respondent considers, ought to be set off against the individual tenant's service charge contribution.

3. The Law

Section 27A Landlord and Tenant Act 1985

(i) An application may be made to a leasehold valuation Tribunal for a

(ii) Determination whether a service charge is payable.

(iii) Section 19 of Landlord and Tenant Act 1985

Limitation of service charges: reasonableness.

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 of works, only if the services or works are of a reasonable standard; and the amount payable shall be limited accordingly.

(2) Where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable, and after the relevant costs have been incurred any necessary adjustment shall be made by repayment, reduction or subsequent charges or otherwise.

(3) An agreement by the tenant of a flat (other than an arbitration agreement within the meaning of section 32 of the Arbitration Act 1950 is void in so far as it purports to provide for a determination in a particular manner, or on particular evidence, of any question—

(*a*) whether costs incurred for services, repairs, maintenance, insurance or management were reasonably incurred

(*b*) whether services or works for which costs were incurred are of a reasonable standard, or

(b) whether an amount payable before costs are incurred is reasonable.

Section 20 C

Section 11 of the Landlord and Tenant Act 1985

4. The Lease

Two standard leases were provided for flats no (1 and 18) 94-100 Chepstow House. The Relevant terms of the Lease are set out as follows-: 5 (3)*...the Landlord shall maintain repair redecorate and renew or procure the maintenance repair redecoration and renewal of (a) the roof foundations and main structure of the Building and all external and load-bearing walls the windows and door on the outside of the flats within the Buildings (save the glass in any such doors and windows and the moveable parts of the windows and the interior surfaces of walls) and all parts of the Building Provided always the Landlord shall redecorate or procure the redecoration as necessary of the outside doors of the Premises*

(b) the pipes sewers drains wires cisterns and tanks and other gas electrical drainage ventilation and water apparatus and machinery in under and upon the Building(except such as serve exclusively an individual flat in the Building) and except such as belong to British Telecom or any public utility supply authority

(c) the Common Parts

7(4)The Service Provision shall consist of a sum comprising

(a) The expenditure estimated by the Surveyor as likely to be incurred in the Account Year by the Landlord.

(b) an appropriate amount as a reserve for or towards such of the matters specified in sub-clause (5) as are likely to give rise to expenditure after such Account year being matters which are likely to arise either only once during the then unexpired term of this lease or at intervals of more than one year including(without prejudice to the generality of the foregoing) Such matters as the decoration of the exterior of the Building (The said amount to be computed in such manner as to ensure as far as is reasonably foreseeable that the Service Provision shall not fluctuate unduly from year to year)but
(c) reduced by any unexpended reserve already made pursuant to paragraph (b) of this sub-clause in respect of any such expenditure as aforesaid
(5)The relevant expenditure to be included in the Service Provision shall comprise all expenditure reasonably incurred by the Landlord in connection with the repair management maintenance and provision of services for the Building and shall include(without prejudice to the generality of the foregoing):-...(c) all reasonable fees charges and expenses payable to the Surveyor any solicitor accountant surveyor valuer architect or other person whom the Landlord may from time to time reasonably employ in connection with the management or maintenance of the Building including the computation and collection of rent the service charge...

5. Description of the Premises

25 flats in a six-storey terrace of four Victorian Houses, which were leased on the basis of a shared ownership lease with the Applicant's Notting Hill Home ownership Ltd.

6. The Hearing

7. The Applicant's Case

1) Opening Submission of the Applicant

(i) In opening the case for the Applicant's Mr. Pryor, submitted that The Tribunal was required to ascertain what would be a reasonable provision for a reserve fund.

(ii) That in approaching this task the Tribunal needed to consider clause 7 (4) b referred to above

(iii) And that the Tribunal needed to consider two particular factors: (a) What work it is reasonable to provide for over the period under consideration :-including whether the same

works are within the service charge provisions (b) what is a reasonable estimate of the likely cost of those works that should be provided for? In carrying out this exercise, Mr Pryor referred the Tribunal to guidance in Service charges and Management Law and Practice (2006), which suggested that there, would need to be an analysis involving considering the life expectancy of the item, the frequency of the expenditure, and the likely cost of the work. Mr Pryor stated that this analysis was to be found in the report of Mr. Iannaccone of Cyril Silver (dated 27/7/04), which was supported, by the independent report of Mr Simpson.

(iv) He submitted on behalf of the Applicants that it was not in the interest of either of the parties for there to be an over inflated reserve fund, or in their interest for there to be an inadequate fund. The sole purpose of the fund was to avoid fluctuating service charge bills when the need for anticipated major works became immediate.

(v) He stated that some of the work required scaffolding, which involved considering whether it was more cost effective to carry out all the works requiring scaffolding or to stretch the work out which would become uneconomical.

(vi) He submitted that it was in the interest of the Applicant to have a good reserve fund when it commenced work so that it could be confident of its ability to recover service charges, (subject to the statutory test of reasonableness).

(vii) Mr Pryor accepted that the Tribunal could set off any damages that were due to Tenants under section 11 of the Landlord and Tenant Act 1985, but stated in his view this was premature, as the time when it ought to be set off was when the works had been carried out and the tenants had been asked to contribute to the actual service charges, rather than before the tenant's had demands for service charges.

II. Opening Submission of the Respondent

(viii) The Respondent and the Applicant had prior to the hearing agreed that the percentage contribution payable by the Tenants set out in the lease was wrong, and that it should be 4% rather than 4.55% set out in the lease. Each of the 25 flats paying an equal percentage giving a total of 100 %.

(ix) The issue that they had been able to resolve was the steep increase that was being proposed to the service charges to meet an increase to the reserve fund contribution. Mr Hutchings in his submissions stated that the increase was in breach of clause 7(4) b of the lease.

(x) He stated that the Tribunal ought to consider that the properties were marketed as affordable housing for those in the lower income bracket, and the flats were also marketed as recently refurbished. The Tenants had placed reliance on this.

(xi) Mr Hutchings stated that although they were not bringing a claim for mis-selling the Tenants had a strong sense of grievance, as they had been informed that Ridgelake refurbished the roof. If the landlord had called Ridgelake back then the work could have been carried out in the 6 months defect liability period.

(xii) He stated that one of the issues was to what extend do the running repairs to the roof represent works that ought to have been done during the defects liability period?

(xiii) Counsel for the Respondent stated that the Tenants raised the issue of the defects liability, and the extent that there were works that had not been done during that period, which they were now being charged for as service charges. The Tenant's wished to claim an equitable set-off to the applicant's claim for service charges. Counsel sought to rely on *British Telcom-v-Sun Life Assurance soc ltd (1996)Ch 69 CA*

(xiv) This case was cited as an authority for the proposition that the terms of the lease meant that a breach of the lease could occur without the requirement to give notice of the defect, and also to establish that the Tenants had an equitable set off to the service charge claim.

(xv) He stated that a secondary issue was the counterclaims that the tenants had for disrepair under clause 5(3) of the lease.

(xvi) The Tribunal queried whether they had Jurisdiction to set off a section 11 Landlord and Tenant Act 1985 claim, when proceedings ought to be brought in the county court. Mr Hutchings sought to rely on *Continental Property Ventures-v- White,*

(xvii) Both Counsels agreed that the Tribunal had Jurisdiction to set off damages, for breach of the repairing covenant against the Landlord's claim for service charges (although Mr Pryor considered the claim to be premature).

The Evidence of Mr Iannaccone

(xviii) Mr Iannaccone, informed the Tribunal that he was employed as a Chartered Surveyor by Cyril Silver's Partnership and his

involvement with the properties dated back to 1999, when he had undertaken an inspection, prior to the purchase of the building. This was a partial inspection as he had been unable to gain access to the whole of the building. In his report at page 202 of the bundles Mr Iannaccone stated of the main roofs "*It would be desirable to recover all main roofs however I believe it essential that certain repairs and improvements are carried out to the main roofs and parapet gutters within the next one/two years to avoid water leakage.*

(xix) *...I would recommend that a budget of £20,000.00 is allowed for scaffolding, renewal of the parapet gutter linings, re-detailing the abutments and general repairs to the parapet walls all to avoid water ingress. Beyond five years complete recovering will be necessary and I would estimate the cost of such works for all four properties to be approximately £60,000.00 (exclusive of VAT and fees).*

(xx) The Applicant had then commissioned him in 2004, to provide a survey, which detailed the condition of the building and identified future work, which he set out in a report the '*Stock Condition Survey*'.

(xxi) He described how he had undertaken this exercise, he had sent access letters to the Tenants in April 2004 and had gained access to 9 out of 24 flats on 18/5/04 he had made a further attempt to obtain access to flat 18 and on 27/7/04 to flat 21.

(xxii) His evidence also dealt with on-going repairs issues that affected individual flats in the building and the cyclical maintenance work which would be needed at the building in the following periods (a) Immediate works, (b) year 1 works (c) year 5 works. (d) Year 10 works. He stated that his findings, in respect of the condition of the building.

(xxiii) Mr Iannaccone gave evidence to the Tribunal that he had inspected the Roof and that the condition was in keeping with matters he had identified in 1999 in particular the main crown of the flat mansard roof which was covered by asphalt was in a poor condition, although with maintenance in his view it could last up to 10 years before it required replacing.

(xxiv) Attached to the Report was a schedule of work with costing which had identified the immediate works, year 1 year 5 and year 10 works. In respect of the roof the following works had been proposed

Description	Immediate	Year 1	Year 5	Year 10

of Roof works	Works			
Repair to lift sharf area, clear & clean parapet guttering	£300.00 £200.00	£300	£1000	£1500
Reinstate defective smoke vents Reapply solar paint, clip loose cables, localised re-pointing to flashings	(1000)	£2750 £300 £500	£3000	£3500 £1000
Repairs to flank brickwork, leak affecting no 7,17, parapet walls, balcony railings	£375.00 (£300) &(£100)	£300 £300	£500	£1000
Localised repair to Asphalt		£500		
Laying of tiles to balcony and recovering balcony completely			£2000	
Recovering of main roof & rear addition				

(xxv) There was also detailed specification for works to the Rain water goods, the external elevation and the windows and external redecoration and the garden areas and boundaries

(xxvi) The Condition of the Roof was considered further in the report, for both 94, and 96, no specific defects were noted, although renewal was recommended. For both 98 Chepstow and 100 Chepstow the report described the condition as follows-:

98 Chepstow

Extending through the flat roof of this property there is a lift shaft constructed in brickwork and the roof to the lift shaft is of flat construction surfaced with mineralised felt. The lift shaft roof is in a fair condition but renewal of the felt is likely to be required between 5-10 years.

Further in the report it was stated that-; *the asphalt to the flat roof crown of 98 Chepstow Road is in fair condition but there is evidence of water ponding towards the rear, which is partly caused by cables laying over the roof and trapping water. At the time of the inspection there was no evidence of any splits or cracks to the asphalt.*

The Solar reflective paint to this roof has now worn.

The enclosed parapet walls were found to be in good condition and no works were required in the short term.

The coverings to the front mansard roof of this property were found to be in good condition. Only localised re-pointing required above the lead flashing to the parapet.

There is debris laying in the parapet gutter, which requires immediate removal.

100 Chepstow

The *asphalt coverings to the roof were found to be in a fair condition with no visible fissures or splits to the asphalt apparent at the time of the inspection. There is however evidence of water ponding towards the rear of the roof. Recovering is anticipated to be required within the next 5-10 years. The solar reflective paint to the surface has now worn and requires renewal. The Mortar fillet over the lead flashing dressed into 102 Chepstow Road is cracking for the length of 1m and requires renewal in the short term.*

(xxvii) The Report also dealt with the Rainwater goods, the external elevation and the windows and external redecoration and the garden areas and boundaries.

(xxviii) The report stated of the Rainwater goods -: within *some of papapet gutters there is materials and debris, which do restrict the flow of rainwater and could result in blockages and water ingress internally. All materials and debris should be removed form the parapet gutters immediately and the gutters should generally be cleaned removing any silt, leaves and the like.*

(xxix) *Generally the enclosed flashings were found to be in a good condition but some of the pointing along the top of the flashing is beginning to crack and will require repointing to prevent water ingress in the short term.... Once Scaffolding is provided for the purpose of cyclical maintenance would recommend that the rainwater pipes are checked and any leakage that is apparent should be addressed by way of reforming and sealing any loose joints.*

Generally the external walls were considered to be in good condition and it was noted that -: *"Pointing to the brickwork to the front and rear elevations generally in a good condition only localised repairs likely to be required in the short term but full repointing is unlikely to be required for at least 10 years...*
We have established that the most recent redecoration of the *premises was undertaken approximately 6-7 years ago. Whilst the majority of the stone and rendered surfaces remain in fair decorative order there are localised areas where the paintwork is beginning to blister and flake".*
The report at page 843 of the bundle 3, stated-:
"To all the flats to which access was obtained generally all windows were tested.
The majority of windows were found to be in good working order and were found to be free of rot or timber decay. Generally all windows will require overhauling and localised repair works as part of the future cyclical works."
The Joinery was considered to be in fair condition save that the report stated-:
"...many joinery surfaces, particularly in exposed locations, where the paintwork is now flaking and blistering and unless redecoration is attended to in the short term much of the joinery will suffer from rot.
We would recommend that a complete redecoration be undertaken to the premises within one year."

(xxx) The Report also dealt with defects in individual flats and repairs and further investigation that were required. He stated in his evidence that he had inspected flat 25 which was suffering from water penetration, he informed the Tribunal that when he had inspected the premises the flashing over the roof had been in good condition, the only item of disrepair that he could see, which would cause water penetration was the flank wall at the lower level which had poor pointing the likely cause of ingression of water was set out at Para. 6 page 334 of the third bundle, which stated that 92 Chepstow was at a lower level with a pitched roof with a central valley with flashings to the adjoining roof dressed into the flank elevation enclosing flat 25.

(xxxi) Page 837 of the bundle detailed Mr Iannaccone's inspection of Flat 21.He stated that the small terraced roof had an area of approximately 300mm x 300mm had been the subject of a temporary repair. He stated that the most likely cause was defective insulation & decking. He stated that the asphalt to this roof was in poor condition, being indented, which he attributed to a large number of plants, pots and foot traffic. In his report he advised the Applicants that the pots and plants be removed immediately and that the renewal of the asphalt and the decking should be undertaken immediately, with the possibility of protective tiles being placed over the asphalt.

*(xxxii)*He reported that repairs appeared to have been carried out successfully to flat no 17.Recent repairs had also been undertaken to the roof above flat 5 and 7 which appeared to have been carried out successfully. The interior of Flat 13 had signs of water staining to the front wall at a low level, which may have been caused by a rainwater pipe, although there were no signs of the water penetration when he visited the premises, as a result he recommended investigation which was included in the costing in his schedule.

(xxxiii) At the hearing, The Tribunal and Counsel for the Respondents was provided with a Table which set out the Figures from the 10 year plan for the total work which gave the following totals-:

(xxxiv) Immediate £16241, Year 1 £117399
Year 5 £200855, Year 10 £253148

(xxxv) In the course of cross –examination, Mr Iannaccone was asked about his relationship with the Applicant. He stated that they Cyril Silvers Partnership (CSP) had been

consulted on each scheme, and that although CSP had carried out work for over 17 years every scheme was a separate appointment and there was no guarantee that they would be subsequently re-appointed.

(xxxvi) Mr Hutchings queried why Mr Iannaccone had only inspected 9 out of the 25 flats, Mr Iannaccone stated that he had written to the tenant's to ask for access, and had indicated that he would be available both early in the morning and evening, but the majority of tenants had failed to respond to his invitation.

(xxxvii) He was asked why the repairs of the roof had not been picked up in his earlier report, he stated that the Roof was in accordance with the assessment he had made when he inspected in 1999, and that the condition of the roof had lasted in line with his 1999 report, if he had been asked to predict the likely future condition of the roof in 1999 his prediction would have been similar to what he had found and set out in his *Stock Condition Survey* 2004.

(xxxviii) In response to a question about whether the work could be pushed back he stated that there was every likihood that the life of the Asphalt could be prolonged if it was well maintained. Mr Iannaccone was asked by Mr Hutchings about the re-decorations of the building and stated that as there had been no redecorations for five years, As he would expect, whilst the decoration of the building was in poor condition, the fabric of the building was in most areas in good condition save for localised problems which required maintenance.

Mr Stimpson- Chartered Building Surveyor

(xxxix) Mr. Stimpson was instructed by the Applicant as an independent expert. He was specifically asked to consider the following matters in his report-: (a) the need for the works as specified in the October 2004 schedule of works. (b)Comment on the areas where the condition of the building appeared to differ, from the proposed works, (c) Consider the price schedules and (d) Comment on the desirability of a reserve fund.

(xl) He had carried out an inspection of the Buildings on 21st September and Thursday 7th December 2006 and had also been given a copy of the survey report and specification prepared by Cyril Silver & Partners in October 1999 and

also the later report prepared in July 2004 together with and the service charge proposal. His evidence was set out in a reported dated 11.12.06 copies of which were provided to the Respondent and the Tribunal

(xli) The report, commented on each of the major items of work, of the Main Roof and Front Mansard his report stated-: "*The need for taking out and remaking the asphalt to the edges of the main roof was mentioned in the 1999 building survey and specification but apparently not undertaken at that time and, in my opinion, this is not an urgent requirement at this time but is recommended as explained in the Cyril Silver report. It would be wise to undertake this work for the reasons as mentioned by Cyril Silvers.*" He agreed that the External Elevation including the flank of 94 required repointing.

(xlii) Of the external joinery, the tabulation attached to his report set out the flats which he considered in need of joinery replacement which was flats no 23, 24, 20 and 18 and he noted the need for new door and side lights to flats 5 &18, but stated *In my view not all the windows specified for replacement are in fact defective and may require simply minor repair and decoration.*

(xliii) Of the External Decoration, his report stated that *"I note that the specification calls for completely burning off all surfaces. In my opinion this may not be entirely necessary as it should be possible to thoroughly prepare the joinery and treat all bare timber before the application of a quality paint system... Burning off is time consuming and expensive...some limited burning off may be necessary in areas, which are heavily congested with paint...*

(xliv) *The general condition of the external decorations is very poor, there is much bare timber visible, some carpentry repairs will be required, most of the timber I have seen would be capable of redecoration following only minor repair other than where specified..*

(xlv) In the course of his evidence Mr Stimpson dealt with the proposed schedule for the services charges, which would be necessary to fund the work, which was set out in the proposed service charges schedule, which he had seen. He noted that the proposal was that a fund of £200,000 would be required by 2010. Which was to be collected over the 05/06, 06/07, 07/08, 08/09 and 09/10.

(xlvi) He set out in his report, that he had tried to undertake some analysis of the figures, which did not reach £200, 000 but stated "*...It may be that some further information is available which would clarify this but the information provided to me is unclear. I have assumed that the figure of £200,000 is a best estimate.*"

(xlvii) *I have had an opportunity to review the 10 year plan in general and compare this with the condition of the building as I found it. The items they have identified appear reasonable however it is, of course impossible to predict failure and deterioration and future costs. Some of the items they have listed may in fact not be necessary whilst other matters may become apparent in the intervening years.... A major item in year 5 and in year 10 is the recovering of the main roofs and associated thermal insulation. At the time of my inspection the upper asphalt roofs appear to be reasonably serviceable and, providing it is properly maintained, asphalt can last for many years. It is impossible to predict but I would say that the prospect of needing to completely strip and recover the upper asphalt roofs in year 5 is unlikely...Cyril Silvers say that recovering the roofs is likely to be required in 5 to 10 years time and this would provide an opportunity to improve insulation but we have no idea what insulation was installed when the work was originally carried out.... Replacement of the rainwater goods at year 5 and year 10 is once again, in out opinion , precautionary rather than likely to be entirely necessary, but it is wise to allow for it as there may well be damage when the asphalt roofs are re-covered and repaired.*

(xlviii) In his report Mr Stimpson considered the desirability of the reserve fund, he stated "*The collection of the service charges is a desirable and appropriate way to address maintenance of the building as a whole, which is at the end of the day an expense to be paid by the leaseholders for the ongoing maintenance and upkeep of the premises.*".

(xlix) In cross-examination, Mr Hutchings asked about the 5 year works, concerning the roof, whether they could be pushed back to year 7 or year 10, Mr Stimpson stated that he had said in his report that with good maintenance it may be possible to prolong the life of the asphalt, and there may be works that could be pushed back but this might have the effect of making the repairs more expensive.

Evidence of Evelyn Thomas (Project Manager)

(l) Evelyn Thomas informed the Tribunal that she was employed by the Applicant's as a project manager and managed specific projects on their behalf, including the shared ownership scheme for 94 -100 Chepstow. Evelyn Thomas gave evidence that the Building was purchased on 21 June 1999. Before purchase a survey report was prepared by Cyril Silver and Partners, which identified refurbishment work which needed to be carried out to the building, This work had then been carried out in batches by the building contractors A R Connelly, who undertook work on the Interior of flats 2,4,7,8 and 18 and external works had been undertaken by Ridgelake Builders.

(li) The contract for this was issued on 5/1/2000 the work was undertaken between January and June 2000. The final account in the sum of £198,251 for this work was received from Cyril Silver and Partners in August 2000. Ridge lake Builders continued to be responsible for works that arose under the defects liability guarantee.

(lii) Evelyn Thomas had been responsible for dealing with any defects that were reported under the defects liability period.

(liii) This report was set out at page 63 of the bundle, schedule 1 set out the defects which were to be covered which included Mechanical and Electrical, such as Boiler, Boiler overflows & header tanks, pipework leaks etc, Radiators Drains, & "Damp (*If any measurable damp becomes apparent) Roof All roofs, whether tiled or flat will be guaranteed from leaks."*

(liv) She informed the Tribunal that during this period, she had dealt with a complaint from Norma Dove- Edwin. In her evidence Evelyn Thomas referred to an email sent to Norma Dove-Edwin at page 1021 of the bundle that stated Evelyn Thomas had referred the complaint to the maintenance department (and they had not passed it back to her). As far as Evelyn Thomas was aware the complaint had been dealt with as a result of the Defects Liability Inspection, which was

carried out, by Cyril Silver and Partner at pages 823, which would have been referred back to Ridgelake for the work to be undertaken (although she had no direct evidence confirming that this had been done).

(lv) The Tribunal asked Evelyn Thomas about the estimates of service charges which had been prepared as part of the sales information at page 64 of the bundle. This gave a list of suggested outgoing. An estimate of £88 was given for a one bedroom property and £109 for a two bedroom flat. Evelyn Thomas was unable to help the Tribunal as to how the Applicant had arrived at this figure, which had been prepared on the Applicants' behalf by Maxine Gordon (A former colleague who was no longer in the Applicant's employment).

(lvi) The Tribunal asked her whether there was any information that she had, or any other officer of the Applicant's who might be able to explain the Maxine Gordon figures. Evelyn Thomas stated that this was unlikely.

(lvii) Evelyn Thomas, in her witness statement gave details concerning the service charges budget and the total expenditure during the periods 2001 to 2006 which were as follows-: (a) year ending 31 March 2001- £22,890 with an actual spend of £12,646 of which £556 was on general repairs. (b) Year ending 31 March 2002 -£22,890 with an actual spend of £22,000 including £2,245 on general repairs. (c) Year ending 31 March 2003- £24,398 (6.5% increases) with an actual expenditure increase to £46,301 because of a proposed transfer to the cyclical maintenance fund. (d) Year ending 31 March 2004 -£23,125 with an actual spend of £27,944 with £1,102 on general repairs. (e) Year ending 31 March 2005-£20,173 including general repairs of £2,200.

(lviii) On 22 April 2004, Evelyn Thomas colleague Pamela Nolan had written to the Tenants advising them that Cyril Silvers and partners would be carrying out a stock condition survey this was produced on 27th July 2004. (Which are dealt with in the evidence of Mr Iannaccone.)

(lix) Evelyn Thomas gave some limited evidence as to the meeting which was held between the Applicants representative and the Tenants on 2/12/04 which she did not attend. She had been informed that the Tenants objected to the charges set out in the report and the proposed service charges for 2005/2006.

(lx) As a result of this meeting the Applicant's had decided to make an Application to the LVT. She had no knowledge of the Applicant agreeing to indemnify the Tenants against the legal cost of the Tribunal, at this or any meeting, and stated that Stephen McVeigh was unlikely to have been able to authorise this.

(lxi) Based on the information that she had received about the meeting, she was aware that one of the objections to the proposed increase was that the properties had been advertised on the basis that they were refurbished. In her witness statement she dealt with the sales information sheet which stated that *"The dwellings have been refurbished to the Association specification"* Her statement said *It was obvious from the sales information sheet that the refurbishment carried out by the Applicant in 2000 was limited in scope and of course the Lessees had the right, prior to purchase to instruct their own surveyors."*

(lxii) Evelyn Thomas stated that the Applicant's had accepted the advice of Cyril Silver's in coming to the conclusion that they needed to increase the service charge budget to contribute to the cyclical work identified in years 5 and 10 of the Cyril Silver's report.

(lxiii) Evelyn Thomas was asked about the defects in the individual flats, she stated that she was aware of the complaints made by Norma Dove Edwin which had been forwarded for David Lingeman, who dealt with repairs and that Norma Dove-Edwin was aware of the follow-up action that would be taken as an email had been sent to her which was at page 1021 of the bundle. She stated that all disrepair that had been reported to her in the defects liability period, had been passed to Mr Iannaccone who had carried out a defects liability inspection, on receipt of his report she had passed the report to the Maintenance Department, she believed that the defect had been remedied as she had not had information passed back to her.

8. The Respondent's Case

I. Evidence of Mr Richard Cherry

(i) Richard Cherry was Chair of the Residents Association and lived at flat 12 94-100 Chepstow, In his witness statement he stated that considerable pressure was put on the buyer's as first-time purchasers, for example he stated that he was told that if he did not complete the purchase quickly it would be sold to another purchaser, he stated that he had been informed that extensive work to the roof had been carried out and that the premises were fully refurbished, he was later told by Steve Coleman (an employee of the Applicant) that it was a partial or limited refurbishment, and he referred to a letter dated 15th November 2000 at page 1063 of the bundle.

(ii) The letter stated that Mr Cherry would receive 50% rebate on three months rent. (Which was a figure of £350, or £116.87 per month. The letter also stated-: *The flats at Chepstow Road were only partially refurbished, as we had a limited budget. We chose to do works-roof and soundproofing- that are important for the building (and residents) in the long term rather than internal decoration and fittings.*

(iii) Soon after he moved into the premises, there was a leak in his kitchen, which he stated was as a result of a failure to plumb in an overflow pipe in the flat above, he stated that this defect had been reported in the defects liability period. He had received a compensation payment in the sum of £1242, (He was not seeking compensation for the disrepair that he had suffered between; 2000-2004) however he continued to experience problems.

(iv) His premises had also be subject to periodic flooding as the sump pumps in the basement would periodically go wrong which meant that the basement and lower ground floor flats experienced problems with flooding. He had made a second complaint that was dealt with by way of an internal hearing in July 2004; he had been told that his particular problems that caused would only be completed as part of the cyclical maintenance. Richard Cherry had refused compensation for these problems as they were still on going.

(v) He stated that there had been many problems with the way in which the service charge account had been administered and cited problems with items being wrongly charged to the service charge account; in particular, in his witness statement he cited

problems with invoices being produced which related to different properties owned by the Applicant.

(vi) He stated that he had identified items that had been wrongly charged but he had not been shown how these items were re-credited. He also stated that the percentage charged to each flat was wrong as they had been charged services at 4.55%, which with 25 flats added up to more than 100%. Richard Cherry stated that 5 of the flats in the building were owned by Finchley Investment Ltd and before those Grove lettings, who were formally the marketing wing of Notting Hill Housing Association. He did not believe that service charges had been collected for these five flats for at least three years. In his evidence he relied on a discussion that he had had with an employee of the Applicant Mr David Lingeman, who confirmed that the Applicant's had not being collecting service charges for these flats. Mr Cherry cited this as part of the reason why the reserve funds were short.

(vii) Richard Cherry stated that he had brought the property as it had been marketed as an affordable dwelling and that if the service charges went up to the proposed level he could not afford to live at his premises and along with other Tenants he would have to consider selling the property.

(viii) He informed the Tribunal that he had attended two meetings with the applicant at which the proposed increase in the service charges had been discussed. The first was on 2/12/04, although there were minutes prepared by the Applicant, Richard Cherry did not consider that these were accurate, and instead sought to rely on minutes prepared by the Respondents.

(ix) The second meeting took place on 10/10/05 and the Tenants had been informed that the Applicants had decided to take the dispute to the Leasehold Valuation Tribunal. He clearly recalled Stephen McVeigh saying that the Applicant's would pay the fee for the application to the Tribunal, and that they would not seek their legal cost.

(x) In the course of cross-examination Mr Pryor asked him whether he had copy of his own survey report, as he stated that he had instructed a surveyor. Richard Cherry stated that this had only been a partial report as work had still been on-going to the building, he did not now have a copy to hand. Mr Pryor asked

him about the possibility of obtaining a loan for the cost of the work. Richard Cherry stated that he had investigated a loan, as had other Tenants, and whilst a loan was possible, he did not think he could afford to pay it.

(xi) He was then asked why he considered the position to be different, than if had been asked to pay the contribution, after the work was carried out rather than to contribute to a reserve fund. Richard Cherry stated that in his view, the Applicant's had received grant funding for many of the works that the tenants were now being asked to contribute to, and that some of the work should have been undertaken as part of the refurbishment or at least under the defects liability period.

(xii) Mr Pryor then asked him about the conversation with Stephen McVeigh, as it was not in the minutes made by the Applicant that they had agreed that they would not seek their legal cost. Mr Pryor queried whether Stephen McVeigh had merely stated they would pay the Leasehold Valuation Tribunal fee. Richard Cherry denied that the agreement had been limited to the fee, and stated that it had included the legal cost.

II. Evidence of Caroline Loftus

(xiii) Caroline Loftus lived at flat 25, In the course of her evidence, Caroline Loftus referred to the witness statement dated 13/12/06, She recalled that when she had purchased the premises along with her partner Flavio, she had felt as if they were being rushed into things, she stated that although there was a six months defect liability period, she had immediately experienced problems with the boiler which had worked intermittently. This had been reported from the outset well within the guarantee period, despite this, the boiler had not been repaired and she stated that when Mr Iannaccone had attended, (when he had prepared the defects liability report), she considered that he was intimidating and unhelpful and nothing was done to the boiler before the defects liability expired. She stated that they had eventually had to replace the boiler themselves, when it caught fire. This had cost £1400-£1500.No compensation was ever offered.

(xiv) She recalled that when she moved in there were problems with the lift working and also damp, which was still on going. These issues had particularly affected her as she had been pregnant at

the time of moving in, and had been concerned about the matters being resolved prior to her having the baby.

(xv) She stated that she simply could not afford to pay the proposed service charges and that if she was required to she could not afford to live in the flat. In order to pay the increase, they had had to re-mortgage.

III. Evidence of Norma Dove-Edwin

(xvi) Norma Dove- Edwin was the Tenants of flat 7, she stated that she had had a survey carried out on her behalf, and this had identified damp in the property, as a result she had written to the Applicant, about the disrepair problems and had been assured that the work would be carried out. When she moved in, in December 2000 she experienced problems with damp and water ingress into the property (via a light socket) she stated that she had reported the matter again during the defects liability period.

(xvii) Through out the first year she had visits from contractors who had unblocked drains but this had failed to alleviate the problem, as within a year the problem had returned, she stated that works were carried out in 2005/06 but she had not been advised about what exactly was done.

(xviii) Norma Dove-Edwin had then left her flat (sometime in 2003) and rented out the property. The problems with the disrepair had continued, and in August 2006 her tenant had indicated that she would be looking for a rent reduction as a result of the on-going repairs. Ms Dove-Edwin stated that she had not been offered any compensation from the Applicant, save for Marks and Spencer vouchers, which she did not accept.

(xix) Her statement informed the Tribunal that the proposed service charges would increase her payments from £56.00 per month to £208.00

IV. Evidence of Abbi Clarke

(xx) Abbi Clarke was the occupier of flat 14, she referred to her witness statement dated 11.12.06. She had moved into her flat in August 2000, her survey had identified damp in the second bedroom, and this had not been resolved, she stated that she had been informed that it was due to blocked guttering despite scaffolding which was put up by Ridgelake the work was not undertaken.

(xxi) On 18/3/02 she had made a formal complaint to the Applicant's who agreed to undertake remedial work, which they agreed, should not be charged to the service charge accounts. In the

course of the complaints the Applicant was informed that although the flats had been refurbished using a social grant, which provided £10,000 per unit, the bulk of this had been spent on the roof.

(xxii) She stated that she had been unhappy with the proposed compensation, and had withheld rent and service charges during the period of the disrepair. And these had eventually been written off.

IV. Witness Statement of Clare Eltis

(xxiii) Clare Eltis did not give Evidence, however a statement had been prepared on her behalf which was tendered to the Tribunal, she lived at flat no17. She too had experienced water penetration problems, which she had been advised was because the area above her kitchen was being used as a balcony/Terrace garden and that there were heavy pot plants above her premises that had affected the roof of her balcony and kitchen. This accorded with the evidence given by both Mr. Stimpson and Mr Iannaccone.

9. The closing Submissions

The Applicant and the Respondent were asked to provide written submissions which were provided by Counsel for the Respondent undercover of a letter from the solicitor to the Respondent dated 22 December 2006, and by letter dated 12.1.07; from the Solicitor to the Applicant these were considered by the Tribunal on 1st February 2007.

10. The Respondent's closing Submissions

'Undue fluctuation' contrary to clause 7 (4) b of the Lease

a) The Respondent's content in their closing arguments, that the steep increase in reserve fund contributions imposed by the

Applicant's with effect from1 April 2005 constituted a breach of clause 7 (4) b of the lease and a greater amount that is reasonable within the meaning of section 19(2) of the 1985 Act, and that by imposing such a hike the Applicant's were not ensuring that the *'service charge shall not fluctuate unduly from year to year'*,

b) Counsel Mr Hutchings, in his arguments states that whether there was undue fluctuation, must be judged against all the circumstances. Which include-: the fact that the leases were marketed as affordable housing for those in a lower income bracket, and that they were marketed as refurbished. He also sought to place reliance on the estimate of service charge prepared by Maxine Gordon.(based on her figure the reserve fund was £12,000 a year, £480 per flat.) He criticised this figure as being too low as this would have resulted in a budget of £60,000 for 5 years cyclical work... Mr Hutchings considered that the Applicant had no basis on which to justify this figure, as Evelyn Thomas was unable to explain where this figure had come from. Further Mr Hutchings, considered that the Applicant had been furnished with enough information, based on Mr Iannaccone's report in April 1999, to make reasonable enquires and forecast the estimate for future works.

c) Mr Hutchings in Paragraph 9 also cited the under collection in the year ending 31 March 2002, as due to the fact that the applicant's failed to collect contributions to the service charge fund from the flats (3,4,8,11,16,) owed by Grove Lettings.

d) Counsel also considered the practical effect of the increase in contribution from £40 per month to £127 per month, which he stated amounted to over half of the tenant's total service charge bill. The fact that the Applicant proposed a charge of £144 based on the 4.5% apportionment, (which has now been conceded by the Applicant's as being incorrect) was in his view a hike.

e) Mr Hutching considered that given the reports of Mr Iannaccone and Mr Stimpson, the contribution could be spread over a longer period, by attending to the immediate work and the year 1, and thus prolonging the life of the asphalt. He suggested that it is reasonable to postpone the projected date for the year 5 works from 2010 until 2012.

f) Counsel, in his closing submissions, considers that there was an element of 'unreasonable overestimation' in the schedule, and asks the Tribunal to apply its expertise and experience to reduce the overall figure of £200,855.

g) Damages under the Defects liability period

The Respondent's claims were framed as arising out of a breach of the defects liability period. Each Tenant was granted 6-month defects guarantee. This covered defects, notified within 6 months. In particular any defects to boilers, any measurable damp, and any defect to roofs whether tiled or flat. If works fell within the terms of the guarantee, they were not chargeable to the service charge. Counsel cited repairs to rainwater goods in y/e 31.3.01, gutters and roofs y/e 31.3.02, and rainwater goods y/e 31.3.03 and rainwater goods y/e 31.3.04 as falling within the defects liability clause.

h) Counterclaim for Disrepair
Counsel cites clause 5(3) of the Lease and seeks to rely on *BTplc-v-Sun life Assurance Society Ltd (1996) Ch 69 CA,*
In relation to all of the Leaseholders who complained of disrepair, Counsel states that the Applicant called no evidence to refute these matters. Counsel considered the cases raised by the individual Respondents. He considered, Norma Dove-Edwin, and stated that she was entitled to damages at the rate of £2000 per annum, and that given this her entitlement to damages exceeded her liability to pay service charges during the disputed period.
He considers that Richard Cherry was, along with others on the ground floor and basement, entitled to a reduction in respect of the failure of the sump pumps, although there was no evidence of recent problems, (which caused flooding from time to time,) assessed at £250 per annum.

i) Counsel considered that the appropriate tariff for damages for Ms Clarke was £1,500 per annum in total a sum of £3000. As Ms Clarke withheld rent and service charges, the Respondent's sought confirmation that this had indeed been written off.
j) Counsel accepted that Clare Eltis did not give evidence, however he considered that as her witness statement was unopposed her statement was sufficient for the Tribunal to be satisfied that her complaints are genuine. He considered her damages entitlement as being in the sum of £1075.
k) Of Caroline Loftus, Counsel considered special damages of £1,400-£1,500 for the boiler and £2000 per annum which would exceed her liability to pay service charges for 2005/06 and 2006/07. Accordingly counsel stated that no service charges would be payable by her.

The Application under section 20 C of the Landlord and Tenant Act 1985

l) Clause 7(5) C permitted the Applicant to recover via the service charges the fees of professional persons, including solicitors, whom the applicant may reasonably employ in connection with the management or maintenance of the building. Counsel considered that this clause dealt with the management of the building, rather than created an entitlement to claim for the cost of legal proceedings. He relies on *Sella House Ltd-v- Mears (1989) 1 EGLR,* as requiring the clause allowing the legal cost to be charged as service charges to be clear and unambiguous. Counsel submitted that this did not apply to clause 7(5) C.

m) Alternatively Mr Hutchings framed his application on the basis that it would be unjust for the Respondent's to pay the cost. He sought to rely on *Schilling v- Canary Riverside Development LRX/26/2005.* He stated that a relevant issue was the meeting with Mr McVeigh, where Mr McVeigh is alleged to have agreed not to add the cost of defending the claim to the service charges. Counsel states that the Respondent's placed reliance on this agreement in defending the claim, and that the claimants were estopped from claiming the cost of these proceedings.

11. The Applicant's Closing Submission

Undue fluctuation and Damages

a. Mr Pryor on the applicant's behalf stated that the principle to be applied by the Tribunal was that the Tribunal should assess the works needed, what the costs of the work were, and the provision that needed to be made over the material period.

b. Insofar as the Tribunal might decide that the tenant's were entitled to a counterclaim, he invited the Tribunal to adopt the following approach. The Tribunal should consider that the contributions were not themselves the final word as to the state of account between the parties, and that the tenants had an opportunity to set out their detailed case when the landlord sought to seek to recover the actual cost.

c. Counsel referred the Tribunal to the dicta of HHJ Rose QC in *Continental Property Ventures v White* were he spoke of

the importance of Tribunals exercising their Jurisdiction carefully, he submitted that the Tribunal "could only come to a final view of the size of the counterclaim if it is of the view that the counterclaim is less than or equal in size to whatever sum it finds is the appropriate charge for an contribution to the reserve fund.".
Mr Pryor illustrated how this might work, when considering Norma Dove-Edwin counterclaim, the Respondent stated that she should not be required to make any contribution to the reserve fund for 2005-2007. However as Ms Dove-Edwin claim was likely to be larger than the service charges claimed, Mr Pryor submitted that such a finding would step outside the Tribunal's Jurisdiction, as it would be awarding section 11 damages, rather than merely setting off, against the service charges claim (as was the case in Continental Property Ventures-v- White)

d. He also considered that the Respondent's suggestion that all leaseholders affected by the defect in the basement should receive a reduction of £250 per annum was not the right approach, as the Tenants were not identified and their evidence was not tested by the Tribunal.

e. Mr Pryor in his submissions, rejected the notion of there being a duty on the applicant to build up an adequate reserve fund so as to avoid a hike in the contributions, his analysis of the clause was that the load of the service charge debt would be spread by the creation of a reserve fund, rather than the tenant's being faced with substantial one off charges.

f. He criticised the remedies that the Respondent invited the Tribunal to apply. Firstly of the Respondents not being obliged to pay the hike and to make contributions to the reserve fund, or alternatively to spread the payments by delaying the work.

g. He considered the issue of the individuals claim for damages; In relation to Norma Dove-Edwin, he considered that post- the letting of her property, no loss has been proven. He also invited the Tribunal to consider whether the Respondent has proved that the water penetration was attributable to the same repair. He also repeats the arguments already rehearsed.

h. Of Ms Eltis, he noted the lack of oral evidence, and suggested that if the Tribunal were minded to give damages, it is very much at the bottom end.

i. Mr Pryor stated that Mr. Cherry's complaints were in their nature a general list of complaints rather than a claim for damages and also cited the compensation already paid.

j. Insofar as Ms Loftus claim was concerned, he simply stated that she had failed to prove that her claim in relation to the boiler fell within the defects liability guarantee. He stated that all the Tribunal had was her assertion, which on its own was insufficient.

k. Counsel made the general point of Ms Loftus, which applied to the entire Respondents'; that although Ms Loftus complains about the affordability of the service charges, "*whether or not a tenant can afford a charge that is otherwise recoverable or reasonable, cannot regrettably be a consideration for the Tribunal.*"

i. Application under section 20 C of the Landlord and Tenant Act 1985

l. In relation to the Application made under section 20c of the Landlord and Tenant Act 1985. Counsel in his submission has three central arguments

m. He stated-: "*In my Judgement the primary consideration that the LVT should keep in mind is that the power to make an order under section 20Cshould be used only in order to ensure that the right to claim costs as part of the service charge is not used in circumstances that make its use unjust.*"

n. He stated that the Applicant had to go to Tribunal to get recovery, and that in so doing it faced a 'Mountain' of points from the respondent, In so stating he invites the Tribunal to consider the dicta in *Tenants of Langford Court-v-Doren Limited(5th March 2001)* Which states-:

Where, as in the case of the LVT, there is no power to award costs, there is no automatic expectation of an Order under s20 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.

o. Insofar as the Respondent's sought to rely on equitable estoppel, arising from the meeting with Mr McVeigh. Counsel's argument, was that there was a difference of view on the interpretation of the conversation between the Tenants and Mr McVeigh, with the Applicant denying this agreement on Mr McVeigh's behalf. Alternatively that if he is wrong

about events and Mr McVeigh agreed to waive the cost, there was simply, no estoppel. The tenants had not acted to their detriment and the Applicant, in their Statement of claim, claimed the cost, given this, by the very least, at the stage the statement of case was served, the Respondent's knew that cost could be incurred by defending the proceedings in the LVT.

13. The Decision of the Tribunal

I. The Percentage contributions for the tenant's under the lease Prior to the Hearing-

(i) The Applicant accepted that the percentage contribution for the Respondent should be 4% instead of 4.55% set out in the lease. The Tribunal find that this is correct and that the lease should be construed accordingly

II. Hike Clause of the Lease

1) The Tribunal consider that the effect of this clause was to protect the Tenants from substantial one off payments for major works, carried out to the building. However because the Applicant had not uniformly throughout the period of the lease collected sums under this provision. The proposed increase in the contribution from £40 to £127 per month was in the view of the Tribunal a Hike in the contribution. The Tribunal considered that this was not reasonable within the meaning of section 19 (2) of the Landlord and Tenant Act 1985, and was contrary to clause 7 of the lease.

2)The Tribunal considered that both the wording of Section 19 (2) of the Landlord and Tenant Act 1985 and the wording of the lease, *which states-:b) an appropriate amount as a reserve for or towards such of the matters specified in sub-clause (5) as are likely to give rise to expenditure after such Account year being matters which are likely to arise either only once during the then unexpired term of this lease or at intervals of more than one year ...: The said amount to be computed in such manner as to ensure as far as is reasonably foreseeable that the Service Provision shall not fluctuate unduly from year to year...* required the Tribunal to

consider, whether the proposed contribution to the reserve fund was reasonable

3) The Applicant submitted that the approach to be adopted was to consider whether the amount suggested for the reserve fund was reasonable. The applicant submitted that it was, because it had been based on the Report of Mr Iannaccone, (which was supported by Mr Stimpson.) and the fact that the amount suggested as a provisional estimate for the work was not considered to be unreasonable by either expert.
4)The Tribunal consider that if Mr Pryor's helpful analysis was carried out, that is that the Tribunal should consider, "... the life expectancy of the item, the frequency of the expenditure, and the likely cost of the work ..." The Tribunal considered that this analysis, required the Tribunal to consider all of the circumstances, including the background, The Tribunal was of the view that on the evidence, there had been misrepresentation by the Applicant in the initial sale of the flats, in particular by referring to them as refurbished. This would have led the leaseholders to consider, that the premises were in good repair.
5) The Tribunal also consider that part of the background that the Tribunal needed to consider, (in forming a view about the reasonableness of the charges,) was the failure of the Applicant to remedy defects when notified by the Respondents within the defects guarantee period. This applied particularly to complaints, as early as July 2000, regarding repairs to the roof. The Tribunal considered that all of these factors, as well as the view of the experts, and the cost of the work needed to be considered, as relevant when deciding on the Reasonableness of the reserve fund contribution.

6) The Tribunal considered that there was an obligation on the Applicant (as a social provider of housing,) who had marketed the properties as affordable housing, which had been refurbished. This obligation was expressed, in clause 7 of the lease, which the Tribunal considered was worded in such a way as to required the Applicant to ensure that they had properly considered the future maintenance of the building, The clause required *The said amount to be computed in such manner as to ensure as far as is reasonably foreseeable that the Service Provision shall not fluctuate unduly from year to year...*

7)The Normal ordinary meaning of "*reasonably foreseeable*" included an obligation to look ahead, and base the service charges, (including the reserve fund contribution) on such a consideration.

8) The wording of the lease in clause 7 (a) also suggested that the normal year-to-year expenditure should be estimated by a surveyor. Given this, it would not have been unreasonable for the initial estimate, including the Reserve Fund contribution to have been prepared by a surveyor.
There was (by the wording of the clause,) a positive duty on the Applicant to actively manage and maintain the service charge provision, to ensure the future upkeep of the building.

9) Prior to 2004, there was little evidence that the Applicant had exercised the requirement of future planning or indeed active management of issues, such as monitoring how the repairs under the defects liability period were carried out. Such monitoring would have ensured that work which should have been undertaken by the contractors did not become work which needed to be undertaken and charged for under the service charge provision.
In considering the question of what sums were necessary for the provision for future upkeep of the building, the Tribunal considered the evidence of Mr Iannaccone concerning his survey in April 1999 (where he had suggested repairs to the roof and the Asphalt). This report was in the possession of the Applicant. Mr Iannaccone had stated, that had he been asked to, he could have predicted the repairs to the roof that were set out in his Condition Survey of 2004.
10) This indicated to The Tribunal, that had the Applicant's asked about the items that ought to have been budgeted for as part of cyclical maintenance, the Applicant could have had an answer which would have assisted in the proper contribution to the reserve fund.
11)Somewhat surprisingly Abbi Clarke in her evidence stated that in response to her complaints, she was informed that the premises had been refurbished at a cost of £10,000 per unit, the bulk of which had been spent on roof repairs. This was confirmed in the documentary evidence before the Tribunal. If refurbished in 1999, a properly maintained roof should not require major expense for many years; given this the Tribunal considered that the onus was on the Applicant to carry out earlier repairs to the roof which may have prolonged the life of the roof.

12) The Tribunal considered that given the fact that the building had not had external decoration as part of the refurbishment, it was entirely foreseeable that this work should have been planned for, as part of the cyclical maintenance program at an earlier stage even without the benefit of Mr Iannaccone's report.

13) Given this decision, the Tribunal have had to consider, how the planned works could be carried out, without undue fluctuation in the service charge contribution. The Tribunal have determined that, The Applicant should adjust the Program of work, to allow for collection to the reserve fund over a longer period to time.

1I) The maintenance works required in years 1, 5, and 10

14) The Tribunal consider that the window repairs as set out on pages 843-844, would in all probability need to be carried out in year 1 and Mr Stimpson suggested, in his report that some minor redecoration was possible.

15) The Tribunal considered both the evidence of Mr Iannaccone and Mr Stimpson and from their evidence, considered that the redecoration, (subject to the repairs to repoint the building) could be undertaken in year 5. Both, Mr Iannaccone and Mr Stimpson suggest that the life of the Asphalt roof could be prolonged with proper maintenance.
16) Given this, the Tribunal consider that the scheme of works could be redrawn so as to provide for the running repairs to be undertaken to the roof with no major repairs until 2012, and that the front balcony roof may be prolonged by normal maintenance from year to year.

17) In collecting the Reserve Fund, the Tribunal have determined that there is an obligation on the Applicant to obtain a better interest rate, than the figure presented to the Tribunal, and that the Reserve fund should be invested so as to ensure that such funds should be able to obtain interest at least ½ above the bank of England base rate. The Tribunal also consider that the contributions from the respondent could be increased in line with the building cost index over the period, 2007-2012.

18) The Tribunal noted that one of the complaints of the Respondent's was a lack of transparency concerning the management of the service charge funds. No evidence was presented to the Tribunal concerning the contributions made to the service charges by Grove Lettings. The Tribunal consider, that a proper account should be produced, which set out the past contributions of Grove Lettings. This should include contributions to the reserve funds. (It is the opinion of the Tribunal that if there is a shortfall in the contribution made by Grove Letting, that action should be taken to recover the shortfall.)

III. The Set off of Damages for disrepairs against liability to pay service charges

19) The Tribunal, have been helped in considering the issue of damages by the helpful authorities referred to by counsel, such as, Continental Property Ventures-v- White (on the issue of a set off against an obligation to pay service charges and British Anzani-v International Marine Management 1977, and (on the question of the defects liability,) and the decision of Wallace – v- Manchester City Council (1998) 3 EGLR 38. (On the question of quantum).
The Tribunal consider that in respect of the Respondent, the position of the various claims for damages is as follows-:

Caroline Loftus

The Tribunal consider that the defects liabilities warrant at page 63 of the bundle should have covered the defective boiler. The Tribunal were not presented with any receipts of the replacement of the Boiler, but were able to consider the evidence of Caroline Loftus, and found her to be a credible witness, and accordingly consider, on a balance of probabilities, that the boiler ought to have been replaced under the defect liability warrant given that this did not occur, she was entitled to a set off against the service charge demand in the sum of £1450.
Insofar as her premises are still, damp the Tribunal consider that the Respondent has a claim for damages under section 11, subject to proof of causation. As this is on going, (until such time as the repairs are carried out to her property) the Tribunal consider that such an assessment of damages was premature at

this stage. The Tribunal consider that the proper approach was that suggested by Mr Pryor in his opening submission, that such sums could be set off against actual service charge demands as are found to be due, and that in the event that this cannot be agreed between the parties, the Respondent, Caroline Loftus, may apply for a set off to the LVT, or by way of a section 11, breach of covenant claim in the county court. Given this the Tribunal make no finding on a sum to be set off and specifically leave the question of a set off open.

Mr Cherry

Insofar as Mr Cherry has an on-going claim for damages, this issue was not directly addressed in his witness statement as there was little evidence of on-going nuisance and annoyance, or inconvenience caused by the disrepair.

Norma Dove-Edwin

The Tribunal accept that Norma Dove-Edwin is entitled to damages under section 11 of the Landlord and Tenant Act 1985, and that from the evidence the repairs are serious and substantial, which may on further computation be a complete set off of her service charges. However, the Tribunal consider it inappropriate to quantify her damages at this stage. The Tribunal consider that the proper approach is that such sums may be set off against actual service charge demands as are found to be due . The Tribunal were informed that Norma Dove-Edwin lived at the premises until 2003, and would be entitled to general damages up until that stage, since 2003, (subject to proof of loss), Norma Dove-Edwin would be entitled to diminution in value.

Clare Eltis

No oral evidence was considered by the Tribunal, and unlike the other witnesses the Tribunal had no opportunity to ask questions or assess credibility. There may be on –going repairs, which can form the basis of a set off once the work, is carried out.

Ms Clarke

Ms Clarke was in a different position in that she withheld rent and service charges, which the Applicant set off against damages. subject to proof that this was set off and the period it covered. The Respondent is not entitled to further damages. Save for any entitlement that she may have as a result of on-going disrepair.

IV. The application for cost under section 20 (C) of the Landlord and Tenant Act 1985

The Tribunal consider that the provisions of clause of 7(5) of the lease and have determined that the wording is insufficiently clear to be read as providing a contractual entitlement for cost under the lease and accordingly should be construed against the Leasor. Given this, The Tribunal determine that there is no automatic right to charge the legal cost to the tenants by way of service charges.

The Tribunal considered section 20c of the Landlord and Tenant Act 1987, in particular subsection 3 which stated "the *court or Tribunal to which this application is made may make such order on the application as it considers just and equitable in the circumstances*" Guidance to the approach adopted by the Land Tribunal is given in the case of-:
Schilling and Canary Riverside Development LRX/26/2005
In paragraph 31 of the decision His Honour Judge Rich stated...
"*in my judgement the primary consideration that the LVT should keep in mind is that the power to make an order under s20c should be used only in order to ensure that the right to claim costs as part of the service charge is not used in circumstances that makes it use unjust..*"

In considering this question of cost, the Tribunal have considered the circumstances, in which this claim was brought, and the conduct of both parties. And in particular, given the findings of the

Tribunal, the Tribunal determine that in all of the circumstances of the case, it is just and equitable, to grant to Respondents the order sought under section 20(C)

CHAIRMAN...Mackey.....

DATE ...10-4-07....