10219

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case Reference	:	LON/00BE/LSC/2014/0132
Property	:	Flat 79 Lupin Point Abbey Street London SE1 2DW
Applicant	:	Mr Benjamin Maugendre
Representative	:	In person
Appearances for Applicant:	:	Mr Benjamin Maugendre
Respondent	:	London Borough of Southwark
Representative	:	In house legal services
Appearances for Respondent	:	(1) Ms A Mills, Enforcement Officer (2) Mr J Ottley, Director of Blakeney Leigh Ltd (chartered surveyor) (3) Mr J Sheehy, Capital Works Officer (4) Mr K Orford, Project Manager
Type of Application	:	Liability to pay service charges

Tribunal Members	:	(1) Judge A Vance (2) Mr F Coffey, FRICS (3) Mrs J Hawkins, BSc MSc
Date and venue of Hearings	:	09.06.14 and 10.06.14 at 10 Alfred Place, London WC1E 7LR
Date of Decision	:	22.07.14

DECISION

Decision of the Tribunal

1. The tribunal determines that the sum of £3,468.84 demanded from the Applicant in respect of major works for the service charge year ending 31.03.14 are payable by him in full except as follows:

   (i) Works relating to overhauling rainwater goods, gutters and rainwater pipes were not carried out to a reasonable standard and that the cost that the Applicant is liable to pay for this head of expenditure should be limited to 50% of his apportioned share of the figure of £7,381.00 charged to lessees.

   (ii) The Respondent has conceded that the sum of £927.96 is not payable by the Applicant by virtue of the operation of s.20B Landlord and Tenant Act 1985 ("the 1985 Act")

2. The tribunal makes an order under section 20C of the 1985 Act so that none of the landlord's costs of the tribunal proceedings may be passed to the Applicant through any service charge

Introduction

3. The Applicant seeks a determination pursuant to s.27A of the 1985 Act as to the amount of service payable by him for major works demanded for the service charge year ending 31.03.14. The amount in dispute is £3,468.84 being his contribution towards the actual costs of the major works carried out by contractors Keetons & Arnold on behalf of the Respondent.

4. Although, in his statement of case, the Applicant made representations concerning the service charges demanded from him for the service charge years ending 2011; 2012 and 2013 these years were not included in his application and were not considered at the case management hearing. No application was made by him to amend his application and no representations were made by him at the hearing concerning those years. This tribunal's determination therefore only deals with the disputed major works which fall within the service charge year ending 31.03.14. The Respondent is entitled to make a separate application in respect of the additional service charge years if he so wishes.

5. The Applicant is the lessee of Flat 79 Lupin Point Abbey Street London SE1 2DW ("the Property"), a two-bedroom flat on the 20th floor of a purpose-built block of flats ("the Building"). A former council tenant, Mr Robert Brehmer, acquired the leasehold interest of the Property under the Right to Buy provisions of the Housing Act 1985 and the Applicant acquired that leasehold interest on 18.06.10. The Applicant's flat is located directly below the roof of the Building.

6. The freehold interest in the Building is vested in the Respondent local authority. The Building, together with a neighbouring tower block, Casby House are together referred to as the Two Towers and management of both blocks is carried out by a tenant management organisation, Two Towers Housing Co-Op Ltd.

7. An oral case management hearing took place on 01.04.14 and was attended by both parties. Directions were issued to the parties on the same day.

8. The relevant legal provisions are set out in the Appendix to this decision.

9. Numbers appearing in square brackets in this decision refer to pages in the hearing bundle

Inspection

10. The tribunal considered it necessary to inspect the Property and the Building and this inspection took place on the morning of 10.06.14. Details of that inspection appear below.

The Lease

11. The relevant lease is dated 18.04.04 and was entered into between the Respondent and Robert Brehmer for a term of 125 years. The Applicant has the benefit of the unexpired residue of that term. The lease provides for the tenant to pay service charge contributions (as set out in the Third Schedule to the lease) towards the costs and expenses incurred by the Respondent in complying with its obligations under the lease.

12. In its Statement of Case the Respondent set out the relevant provisions of the lease. The Applicant did not raise any issues relating to the terms of his lease and did not seek to argue that the sum in dispute was not payable by him under the lease provisions.

Background

13. On 16.10.07 the Respondent sent a Notice of Intention under s.20 of the 1985 Act to lessees concerning proposed major works **[540]**. The general outline of the works contained in that notice include roof renewal/repairs; window repairs/renewals; brickwork repairs and external and internal redecorations. It is stated in the Notice that the detailed scope of the works could be inspected in the Respondent's Home Ownership Unit. An explanation is given in the Notice as to why the Respondent believed that the works outlined in the notice were necessary. Written observations regarding the proposed works were invited from lessees as was the nomination of a contractor of the lessees' choice. Lessees were informed that if the contract proceeded they would receive a further section 20 notice which would contain a summary of leasehold's observations in response to the Notice of Intention and at least two independent quotes for the works along with details of their the estimated contribution to the cost of the works. There is no evidence that Mr Brehmer, who was the lessee of the Property at the time, made any observations.

14. The second s.20 consultation notice was sent by the Respondent to lessees on 22.05.09 **[543]**. It is described as being a Notice of Proposal and records that its purpose was to provide estimates for the proposed works together with a summary of observations made at the first stage of consultation and to invite lessees to make observations in relation to any of the estimates. A summary of received observations and the Respondent's replies is included as are details of estimates from five contractors. It is stated that, subject to the consultation exercise, the Respondent

planned to appoint the contractor who had submitted the lowest quote, Diamond Build plc to carry out the works.

15. It is also recorded in the Notice of Proposal that upon payment of an administration fee a photocopy of the contractor's estimate can be posted to the lessee. Written observations were invited regarding the estimated cost of the proposed works and an estimate of the lessee's estimated contribution was provided. It is stated in the Notice that documents would be available for viewing in the Respondent's offices and that if a lessee wish to discuss the contract in detail or to arrange for a convenient time to inspect the detailed estimate it should contact the Respondent for an appointment.

16. In addition, the Notice of Proposal contains what is described as general outline of proposed works and includes roof renewal/repairs; window repairs/renewals; brickwork/concrete repairs and external redecorations. Specific reference to internal redecorations, included in the Notice of Intention, was omitted in the Notice of Proposal. However, an additional item, flooring repairs/renewals was included. The estimated total cost of works is identified as being £488,654.35 (£7,004.14 per lessee) but the Applicant's liability was limited to £3,737.09 due to the limitation on recovery imposed by virtue of Housing Act 1985 s.125.

17. Mr Sheehy's evidence, not contested by the Applicant, was that the Notice of Proposal was accompanied by a schedule that summarised the intended works and provided figures for the estimated cost of each head of expenditure as priced by the proposed contractor **[551]**. That schedule included replacement of the vinyl flooring in the internal communal corridors as one of the intended items of work.

18. On 16.07.09 a letter was sent by Shaun Nicholson in the Respondent's Capital Works Group **[143]** to the lessees in the Building in which the following was stated about the proposed major works:

> *"...it has transpired that due to the Bermondsey Spa Regeneration works the council has had to re-evaluate the works proposed to Lupin Point and Casby House.*
>
> *A decision has been made to omit all works except the required roofing works, the external decorations and repairs will be undertaken once the Bermondsey Spa Regeneration works are completed, we will do this via the new partnering arrangements that are being procured at present."*

19. Works started in September 2009 and contrary what was stated in the letter of 16.07.09 also included internal redecorations. Mr Sheehy confirmed the actual works carried out in the Building accorded with the schedule attached to the Notice of Proposal together with some additional works that had been identified as being required following the drafting of the original specification of works **[168]**. A schedule of all works carried out as part of this major works exercise and charged to lessees appears at pages **[581-582]** of the bundle. The Applicant does not argue that these works were not carried out. He does, however, contend that some were not carried out to a reasonable standard.

20. On 07.10.09 an invoice was sent to the former lessee of the Property, Mr Brehmer, demanding the sum of £880.17 as an estimated sum for the major works **[338]**. This sum related only to the roofing works.

21. The Applicant purchased the Property on 18.06.10 and the major works were completed on 09.08.10. The date of practical completion was 11.05.11 and the defects liability period expired on 11.05.12.

22. Over a year later, on 21.05.13, a letter (misdated 01.05.13) was sent by the Respondent to lessees. The bundle does not contain a copy of this letter but both parties agreed that its' contents are correctly reproduced in an email from Mr Sheehy to the Applicant dated 21.05.13 **[147]**. The writer stated that the Respondent had in fact carried out both roof repairs *and* internal communal decorations work and that there had been a miscommunication within the council when the estimated invoice had been sent on 07.10.09. In the letter it is stated that it had been incorrectly assumed by the writer of the letter of 16.07.09 that following the revision of the scope of the project that *all* decoration work was to be omitted. In fact, the project manager had, it is asserted, revised the scope to exclude only the external decoration works. This mistake had been identified when the Respondent was calculating the lessees' final accounts for these works which was included the cost of the internal communal redecorations as well as some additional works including works to the drainage down pipes and alterations to the roof level lift motor room that had been identified as being necessary once contractors were on site.

23. A final invoice for these works was received by the Applicant on 24.07.13 **[129]**. It was in the sum of £3,468.84 (having regard to a s.125 reduction of £868.00). Given the credit for the interim payment paid by the former lessee the balance payable by the Applicant was £2,588.67.

24. On 16.01.14 the Applicant sent an email to Mr Sheehy **[267]** in which he stated that another lessee had apparently received a substantial reduction in his service charge bill because the Respondent had admitted that it had not given proper notice under s.20B of the 1985 Act. In his email in response **[267]** Mr Sheehy conceded that some of the costs of these major works had been demanded later than 18 months after the date on which the costs had been incurred. As a result, the Applicant had a free choice as to whether to pay towards these costs. The position that the Respondent adopted was that it was entitled to demand these sums leaving it up to individual lessees to decline to pay sums that fell outside the 18 month period. It did not voluntarily credit the s.20B reduction to the service charge accounts of all affected lessees. Nor, it seems, did it take steps to notify the lessees of the mistake. The Applicant subsequently requested and received a credit in the sum of £927.96 to reflect the s.20B error made by the Respondent.

The Hearing, Decision and Reasons

25. The tribunal heard oral evidence from the Applicant (although no witness statement from him was included in the tribunal bundle) and from three witnesses for the Respondent all of whom had provided witness statements. These were Mr Kevin

Orford, project manager **[415]**; Mr John Ottley, chartered surveyor at Blakeney Leigh Ltd **[523]**; and Mr Joseph Sheehy, capital works officer **[589]**.

26. The following additional documents were provided by the Applicant shortly before the hearing date and were added to the tribunal bundle as follows:

(i) Copy letter from the Applicant to the tribunal dated 04.06.14 relating to on-going water penetration problems from the roof into the Property **[336-1]**.

(ii) Copy email exchange between the Applicant and the Respondent relating to this issue **[336-2]** to **[336-8]**.

27. The following additional document was provided by the Applicant during the course of the hearing and was added to the tribunal bundle:

(i) A copy of the first page of a letter dated 05.02.10 from the Respondent to Fridays, the solicitors to his vendor, Mr Robert Brehmer, containing answers to pre-sale enquiries made prior to the Applicant's purchase of the Property.

28. The following additional document was provided by the Respondent during the course of the hearing and was added to the tribunal bundle:

(i) Copy contract instructions relating to the major works exercise **[592-601]**

29. Neither party objected to the tribunal having regard to these documents except that the Applicant objected to the Respondent being able to rely on the contract instructions. He conceded that he had been sent this document prior to the hearing and that there was no prejudice caused to him if this were to be admitted in evidence. His argument was that the Respondent had chosen not to include it in the tribunal bundle and therefore should not be allowed to rely upon it. The tribunal allowed the Respondent to rely upon it despite its late admission. It considered it appropriate to do so having regard to the relevance of the document to the issues in dispute and given the lack of prejudice to the Applicant. The tribunal indicated that it was willing to adjourn for a short while for the Applicant to consider the document further if he thought this necessary but no request to do so was made.

30. The Applicant's asserted case comprised three elements:

(i) That the Respondent's consultation procedure under s.20 of the 1985 Act was flawed.

(ii) That the Respondent made misrepresentations of fact to his conveyancing solicitors prior to his purchase of the Property concerning the major works. As a result of these misrepresentations the Respondent was prevented from recovering the cost of internal decoration works to the communal areas through the service charge.

(iii) That the repairs to the roof were not carried out to a reasonable standard and that as a result the costs incurred were not reasonable in amount.

31. Both at the case management hearing and before the tribunal the Applicant confirmed that he was not pursuing the argument identified in his application relating s.20B of the 1985 Act. This was because of the credit received from the

Respondent of £927.96 on 30.01.14. However, he maintained that the Respondent had been deceptive in not informing him of its error at an earlier date.

Was the s.20 Consultation Procedure flawed?

The Applicant's Case

32. In his Statement of Case the Applicant contended that the Respondent's consultation was flawed because of the contents of the letter of 16.07.09 from Mr Nicholson. His case was that if the Respondent had decided to omit works it should have started the consultation procedure anew and that it should not have carried out the works until the partnering arrangements referred to in that letter were in place.

33. A further potential issue was identified during the course of the hearing namely whether or not the omission of the words "internal redecorations" from the Notice of Proposal rendered the consultation procedure defective. This point was identified by a member of the tribunal and the Applicant confirmed that he wished to rely on that omission in support of his contention that the consultation was defective. As this issue was only identified at the hearing the tribunal directed that both parties provide written representations after the hearing before making its decision.

34. The Applicant's subsequent written representations are lengthy but the following appear to be his arguments as to why the consultation process was flawed:

(i) The Respondent intentionally omitted internal redecoration works from the Notice of Proposal and provided inadequate information in that Notice as to the proposed works.

(ii) None of the works listed in the schedule attached to the Notice of Proposal explicitly related to internal decorations, the costs of which had been charged to lessees as part of this major works exercise. Attached to his supplemental statement of case was a witness statement from an architect, Katarzyna Andrzejak in which she concludes, following a visual inspection of the Building, that all of the works listed in the schedule related to external parts of the Building and not to the internal decoration of the staircase.

(iii) Even if (as was the Respondent's case at the hearing), the works described in the schedule included internal decorations it would have been impossible for an average lessee to understand this as the schedule was *"buried in jargon and technical terms..."* thereby defeating the purpose of the notice.

The Respondent's Case

35. The Respondent's case, as set out in its written supplemental statement of case was that:

(i) It had complied with the statutory consultation procedure under section 20 of the 1985 Act and the omission of the words "internal redecorations" from

the Notice of Proposal did not render the consultation defective. Even if (which was not accepted) the description of works stated in the Notices was inadequate, sufficient information was available in the Respondent's offices should a lessee choose to inspect that information. Whilst the previous lessee of the Property did not elect to view further documentation, one lessee in the Building chose to do so and went on to make representations in respect of choice of paint colour for redecorations.

(ii) Reference to external redecorations in the Notices includes both decorations external to the applicant's property and also external to the building.

(iii) As stated at the hearing, the items of work described in the schedule attached to the Notice of Proposal included both internal and external items of work. It would have been difficult and potentially misleading to separate out items of "mixed works".

(iv) In response to the point raised by the Applicant, decorations to the internal staircase were included within the second item listed in the schedule namely, "decorations and associated works" which included works external to the Property and the Building.

(v) All the works identified in the schedule originated from the original specification of works **[168]** which clearly indicates that decoration was to be undertaken to internal communal areas, including the communal staircase.

(vi) The Applicants contention that internal redecoration had been intentionally omitted from the Notice of Proposal was incorrect. The writer of the letter of 16.07.09 had simply been mistaken on one point namely that internal communal decoration was be omitted from the work to the block. This was following a decision by a housing association, independent of the Respondent, not allow the Respondent to erect scaffolding on land belonging to them adjacent to the Building.

Decision and Reasons

36. The tribunal considers that the Respondent complied with the requirements of s.20 of the 1985 Act.

37. The relevant regulations are set out at **Part 2 of schedule 4(2) of the Service Charges (Consultation Requirements) (England) Regulations 2003** ("the 2003 Regulations"), details of which are set in the appendix to this decision.

38. The Applicant does not assert that the Notice of Intention was defective and the tribunal sees no basis on which this could properly be argued.

39. Nor does the tribunal consider the Notice of Proposal to be defective. Part 2 of schedule 4(2) required the Respondent to include the following information in the Notice:

(i) A statement detailing estimates obtained;

(ii) A summary of any observations received following the Notice of Intention and its responses to such observations;

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

(iv) An invitation to make observations in writing regarding the estimates and the address and the date by which observations must be sent; and

(v) If facilities to provide copies of the estimates are not available at the place specified there, then copies must be provided to any tenant free on request.

40. That is all that the Respondent was required to do at that stage of the consultation process and the evidence indicates that it complied with these obligations. The Respondent was not obliged to include a description of the works to be carried out and therefore the omission of the words "internal redecorations" from the description included in the Notice cannot render the consultation procedure flawed. Such a description was included in the Notice of Intention as required.

41. The tribunal does not accept that the Respondent decided to omit internal works as suggested by the Applicant. Even if it had, this would not require starting the consultation procedure anew as he suggests. Contrary, to the Applicant's assertion, the evidence indicates that the Respondent always intended to carry out internal works to the Building. Internal works were referred to in the Notice of Intention; they were included in the original specification of works sent to contractors **[165]**; and the schedule attached to the Notice of Proposal specifically refers to replacing floor tiling in internal communal corridors.

42. The tribunal accepts the evidence of Mr Sheehy **[534]** that the writer of the letter of 16.07.09 misunderstood the reduced scope of the works and incorrectly omitted internal redecorations from the works set out in his letter along with external redecorations. The tribunal found Mr Sheehy to be a credible witness and that the explanation was plausible. It strikes the tribunal as extremely unlikely that the Respondent would notify lessees, in a statutory consultation notice, that internal redecorations were to be carried out, decide not to carry out that work and yet allow contractors to proceed to do the work anyway.

43. Nor does the tribunal accept the Applicant's submission that the works listed in the schedule do not include internal decorations. Replacement of internal floor tiles is clearly specified. At the hearing Mr Sheehy stated that some of the works listed in that schedule included both internal and external works (primarily works to windows). The tribunal accepts that it is not entirely clear from the schedule that this was the case. However, if a lessee receiving the Notice of Proposal was in any doubt as to whether or not internal redecoration works were to be carried out he or she could have accepted the Respondent's invitation to inspect the relevant documentation in the Respondent's offices or to discuss the contract in detail at an appointment. In the tribunal's view this would render the consultation process effective even if the Notice of Proposal was defective by omission of the words "internal redecoration".

44. The tribunal attached no significant evidential weight to the witness statement from Ms Andrzejak produced by the Applicant after the hearing given the limited amount of documentation that she appears to have considered before preparing her statement and given that she was not present at the tribunal hearing for cross-examination.

Misrepresentation

The Applicant's Case

45. The Applicant's case is that the Respondent led his solicitors to believe that the final costs of the major works would include only the roof works. He says that if the Respondent had correctly identified that he would be liable to pay towards both the costs of roof works and internal decorations to the communal parts that he would have sought to secure a larger retention from Mr Brehmer prior to purchasing the Property.

46. The Applicant referred to a letter sent by his conveyancing solicitors to the former lessee's solicitors, Fridays, dated 08.04.10 **[145]**. In that letter his solicitor asks his vendors' solicitor to:

> *"obtain information from Southwark or the property managers that in respect of major works there are no works actually carried out that have not yet been disclosed, We say this as the invoice for £880.17 refers to both communal areas and roof repairs and therefore strikes us as being a relatively low figure".*

47. Fridays appear to have written to the Respondent on the same date. The Applicant has now provided a complete copy of the letter from the Respondent to Fridays dated 13.04.10 **[590]**. That letter contains replies to queries apparently raised by Fridays in a letter of 08.04.10. However the tribunal has not seen the letter of 08.04.10 from Fridays.

48. The letter of 13.04.10 includes the following replies in respect of unknown points raised by Fridays:

1. *"Please refer to my replies dated 5/2/10, 2nd page under **Major works/ Repairs**. Information supplied in the Leasehold pack are complete and up to date.*

2. *Estimated invoice £880.17 issued 7/10/2009 relating to **contract 07/74-internal decoration to communal areas & Roof repairs**. This invoice has been paid in full. There are no other major works invoices issued."*

49. It is the Applicant's position during sale negotiations the Respondent made incorrect representations concerning the final cost of the works under this contract (paragraph 13 of his Statement of Case). He indicated that prior to his purchase of

the Property Mr Brehmer had disclosed a copy of the letter of 16.07.09 and that this, together with his conversations with other residents in the Building and the previous TMO manager had contributed to the impression that only the works he would be liable to pay towards would be the roof works.

The Respondent's Case

50. The Respondent contends that neither the letter of 16.07.09 nor the pre-sale correspondence refer to the final account charge payable by the Applicant. As such it did not misrepresent the Applicant's final liability.

51. Nor had the Applicant shown that his solicitor was in receipt of the letter of 16.07.09 or that the Applicant had demonstrated that he had relied on that letter to his detriment. It submitted that the Applicant would probably have bought the Property anyway and that he had suffered no prejudice.

52. It also contended that the tribunal did not have before it all the relevant pre-sale correspondence and therefore it was not, in any event, in a position to identify if there had been a misrepresentation.

Decision and Reasons

53. Firstly, the tribunal considers it has jurisdiction to determine whether or not there has been a misrepresentation by the Respondent in respect of the costs of these major works. That is because the issue is relevant to the question of whether or not the costs in question are payable by the Applicant.

54. In order to establish misrepresentation the Applicant would need to establish that he was induced to purchase the Property, or suffered loss, by being induced to enter into the contract to purchase the Property entirely or partly by a false representation of fact made by the Respondent.

55. The tribunal concludes that there is no evidence before it sufficient to establish misrepresentation. Firstly, whilst it is common ground that the letter of 16.07.09 mistakenly stated that the Respondent had decided to omit all works except the roofing works, the Applicant cannot rely upon that letter to establish a claim for misrepresentation. That is because a claim in misrepresentation can only be brought by the person to whom the alleged misrepresentation was made (subject to some exceptions that do not seem to apply in t his case). Here, the letter was addressed to Mr Brehmer and not the Applicant.

56. Nor does the pre-sale correspondence available to the tribunal contain evidence of a misrepresentation of fact. The letter of 13.04.10 was sent to the Applicant's vendor's solicitors and not to him. It is arguable that the representations in that letter were made with the intention that the information would be passed on to the Applicant. However, even if the Applicant was able to prove that he relied on the contents of that letter when deciding whether or not to purchase the Property, there is no

evidence that the letter contains a material misrepresentation of fact. The only representations in respect of the major works made in that letter are that an estimated invoice in the sum of £880.17 had been raised and paid in full and that no other major works invoices had been issued. That was correct as a matter of fact.

57. As to his alleged loss, the Applicant has not argued that he would not have purchased the Property but for the alleged misrepresentation. Rather, he argues that he would have sought a greater retention. The amount of the retention to seek was a matter for him and his solicitor following pre-sale enquiries. The tribunal notes that in the letter of 13.04.10 the Respondent refers to the contract for these major works being for both roof repairs *and* internal decoration to communal areas. If, as he asserts, the Applicant was, at that time, confused about whether or not the works only related to roof works, his solicitors could, and perhaps should, have made further enquiries before exchange of contracts. As the Applicant conceded at the hearing, there is no evidence before the tribunal that any further enquiries were made. The Applicant has not, in the tribunal's view demonstrated that he has suffered loss as a consequence of a misrepresentation by the Respondent.

Were the repairs to the roof carried out to a reasonable standard and were they reasonable in amount?

The Applicant's Case

58. The Applicant argued that the original specification of works to the roof was insufficiently detailed as it was subsequently identified that additional repairs were required.

59. Further, from August 2010 onwards there have, he says, been ongoing problems of water penetration into his flat and the communal area on his floor. This, he says, is evidence that the roof works were not carried out to a proper standard.

60. He stated that he had been informed by Mr Brehmer before buying the Property that there was a problem with water penetration affecting the living room and first bedroom but that he had been reassured by the contents of a letter from the Respondent to Mr Brehmer dated 11.05.10 **[185]** in which John Westray, Lead Designer, states

> *"I can confirm that the roof to Lupin Point has been recovered and has a 30 year guarantee".*

61. Despite this, he has experienced ongoing problems as indicated in the correspondence and copy photographs annexed to his statement of case. The leaks in August 2010 occurred during a period of heavy rainfall, lasted several weeks and resulted in him having to empty buckets every eight hours. Leaks to his ceiling then reoccurred in late November/early December and February 2011 and the problem was not resolved until April 2013.

62. In an email from the Applicant to the TMO dated 22.11.12 **[237]** the Applicant states that he had managed to identify that a drainage pipe in the lift engine room

located on the roof and above the Applicant's bedroom had leaked. He refers to this being the cause of the leaks that he had experienced in February 2010; August 2010; February 2010; May 2012 and September 2012.

63. After April 2013 he had no further leaks into the Property but there were still problems with water penetrating into the communal area on his floor. Then, in May 2014, he experienced further problems with damp staining to his ceiling.

64. These ongoing problems necessitated five insurance claims on the Respondent's buildings insurance policy that were dealt with by a claims company called Acumen. The Applicant argued that the contents of reports by Acumen supported his contention that the roof repairs were defective. One report **[220]** details problems that the Applicant had been experiencing since June 2012 with the writer concluding that delays in repairing the cause had led to additional damage.

65. He also believed, from walking on the roof, that rainwater had infiltrated the roof covering as it felt spongy underfoot. As the felt comprised many patchwork pieces he thought that water may have penetrated through the joins of those pieces.

66. The Applicant referred to an email dated 13.02.13 to Mr Orford in which an independent surveyor, Mr Coke, had made a number of recommendations **[241]** relating to advanced decay to the threshold of the tank room door. In his view, these problems should have been identified earlier and should have been included in the major works.

67. He also pointed out that in the Notice of Intention the Respondent had stated that some of the rainwater outlets to the roof were blocked and that the entire rainwater disposal should be unblocked and rodded through. It was also stated that several doors at roof level were damaged or rotten and required replacement. In its Statement of Case, paragraph 32, the Respondent stated that the major works did not cover clearing blockages to the gutter and rainwater pipes. If correct, the failure to carry out rodding of drainage pipes this amounted to evidence of negligence. If the works had, in fact, taken place then he argued that they not carried been out properly.

The Respondent's Case

68. The Respondent conceded that the Applicant had experienced several problems with water penetration into his Property and that water has also penetrated into the communal area on the 20th floor but asserted that these problems were unconnected to the major works. **[415]**.

69. Mr Orford stated that four separate issues had arisen:

(i) The August 2010 leak was caused by a broken section of rainwater pipe. This was referred to in the repairs summary of the Building **[392]** where an entry dated 13.08.10 reads *"Please make safe faulty drainage pipe causing flooding..."* He stated that as this leak occurred during the defects liability period the costs were included in the original contract sum.

(ii) On one occasion (in June 2012 he believed) doors to the lift engine room had been left open allowing rainwater to fall onto the plant room floor and into the Building.

(iii) A drainage pipe in the lift engine room located on the roof and above the Applicant's bedroom had leaked. This was referred to in an email from the Applicant dated 22.11.12 **[237]**. The Applicant attributes this to be the cause of the leaks that he had experienced in August 2010; February 2011; May 2012 and September 2012

(iv) Somebody (probably a contractor) had damaged an access hatch to the roof and the adjacent felt upstand by using excessive force when opening the hatch. The hatch was replaced in March 2013**[426]**. At around the same time works were carried out to the tank room door on the roof that had been identified as being rotten but which was not thought to be contributing to the problems being experienced by the Applicant.

70. The Respondent's position was that none of these problems related to the major works in dispute. It relied on the contents of the email of 13.02.13 to from Mr Coke to Kevin Orford, in which Mr Coke states that following his inspection *"...detailed examination of the roofing revealed no defects to the covering or detailing to the waterproofing.*

71. It had partly upheld a complaint made by the Applicant **[243]** in which the Respondent concluded that there was a delay between 28.11.12 until 18.01.13 in addressing his complaints. It was accepted that the Applicant had been put to inconvenience by rainwater leaks since 23.09.12 and that a scheduled appointment had been missed and had awarded him £200 compensation.

72. However, its position was that there was no problem with the roof covering itself and that there was no evidence of any water being trapped in between the roof felt and the concrete. As there is a felt membrane Mr Orford did not consider this could occur.

Decision and Reasons

73. On inspecting the Property, the tribunal identified that minor damp staining was evident to the bedroom ceiling consistent with the problem that the Applicant indicated had started a few days earlier. This staining was located below the tank room doors on the roof and is likely to be due to a defect with the threshold to the tank room door as identified by the Respondent at the time of the inspection.

74. The tribunal also noted from its inspection that the felt roof covering was made up of a considerable number of separate pieces. This was, no doubt, largely necessitated by the split-level, complex layout of the roof. There was not, however, any evidence of current major water penetration issues. Nor was there any indication that rainwater was present between the covering and the concrete floor. The tribunal does not accept the Applicant's submission that this was a possible source of water penetration or that it was evidence of poor workmanship. Nor does the tribunal

consider that there is sufficient evidence to counter the conclusion reached by Mr Coke that there were no defects to the roof covering, detailing or waterproofing.

75. Instead, the evidence indicates that there have been several problems that have led to water penetration problems affecting the Property, none of which relate to the roof covering. To a large extent both parties appear to agree as to the likely cause of these problems.

76. Both parties agree that August 2010 leak was caused by a broken section of rainwater pipe. Both also agree that there was a problem with the defective drainage pipe in the lift engine room with the Applicant stating that he believed that this was the cause of the leaks that he had experienced in August 2010; February 2011; May 2012 and September 2012. Both also appear to agree that problems with the access hatch and the engine room doors being left open have also led to water penetration problems.

77. It is clear that the Applicant has had the misfortune to experience several separate incidents of water penetration into the Property. However, the question that the tribunal has to determine is not what caused these leaks but whether or not the major works carried out were of a reasonable standard and if not whether the amount payable by the Applicant should be limited. The works in question are listed in the Respondent's schedule **[581-582]**.

78. The only substantive issue that the Applicant raised concerning the standard of the works actually carried out was that the Respondent had failed to ensure that the drainage pipes were properly inspected and in working order as part of the major works exercise. He challenged the cost of £7,381.00 charged to lessees in connection with overhauling rainwater goods, gutters and rainwater pipes.

79. The Respondent identified, in its Notice of Intention, that some of the rainwater outlets to the roof were blocked and that the entire rainwater disposal needed to be unblocked and rodded through. The Respondent's schedule at **[581-582]** indicates that the Respondent originally provided for an estimated sum of £259.12 in respect of overhauling rainwater goods, gutters and rainwater pipes. However, additional work was clearly required as the final cost incurred in respect of downpipe repairs was £7,381.00. This was the sum charged to lessees.

80. In the tribunal's view the evidence indicates that works to the rainwater downpipes were not carried out to a reasonable standard. It does not accept, as stated in paragraph 32 of the Respondent's Statement of Case that the major works did not cover clearing blockages to the gutter and rainwater pipes as the schedule at **[581-582]** refers to overhauling rainwater goods, gutters and rainwater pipes.

81. In the tribunal's view such work should encompass proper inspection and testing. This does not appear to have occurred given that very shortly after the works were complete the August 2010 leak occurred, which the Respondent has acknowledged was due to a broken section of rainwater pipe.

82. The tribunal considered whether proper inspection and testing should also have revealed problems with the drainage pipe in the lift engine room. However, on the available evidence the tribunal cannot be certain when this problem first occurred

and cannot be confident that it was an issue that should have been identified when the major works were carried out. Whilst it is possible that the pipe was defective prior to these major works commencing it is also possible that the problem arose after they had been completed.

83. The tribunal determines that the works relating to overhauling rainwater goods, gutters and rainwater pipes was not carried out to a reasonable standard and that the cost that the Applicant is liable to pay for this head of expenditure should be limited to 50% of his apportioned share of the figure of £7,381.00 charged to lessees.

84. In his statement of case the Applicant also argued that the cost of the major works was unreasonable given the increase in cost from the estimated demand to the actual demand and because the original specification of works to the roof was insufficiently detailed as additional repairs were subsequently identified as being required.

85. In the tribunal's view neither of these are tenable arguments. Works often change in scope and extent after an initial survey (as they did in this case) and there is no evidence to indicate that the costs had increased unreasonably. The evidence from Mr Sheehy **[530]** was that these major works were the subject of a competitive tendering exercise using sealed bids and that the lowest tendered price had been accepted. There is no evidence before the tribunal that this exercise did not secure value for money.

Application under Section 20C

86. The Applicant sought an order that the costs incurred by the Respondent in connection with these proceedings should not be regarded as relevant costs when determining the amount of service charge payable by him.

87. When exercising its discretion as to whether or not to make a s.20C order the tribunal has to have regard to what is just and equitable in all the circumstances. The circumstances include the conduct and circumstances of all parties as well as the degree to which the Applicant has succeeded in this application.

88. The Respondent did not oppose the making of a s.20C order and the tribunal considers it is just and equitable to make the order sought.

Reimbursement of Fees

89. Having heard the submissions from the parties and taking into account the determinations above, the tribunal does not order the Respondent to refund any fees paid by the Applicant.

Name: Amran Vance Date: 22nd July 2014

Annex

Appendix of relevant legislation

Landlord and Tenant Act 1985

Section 18 - Meaning of "service charge" and "relevant costs"

(1) In the following provisions of this Act "service charge" means an amount payable by a Tenant of a dwelling as part of or in addition to the rent –

(a) which is payable, directly or indirectly, for services, repairs, maintenance, improvements or insurance or the Landlord's costs of management, and

(b) the whole or part of which varies or may vary according to the relevant costs.

(2) The relevant costs are the costs or estimated costs incurred or to be incurred by or on behalf of the Landlord, or a superior Landlord, in connection with the matters for which the service charge is payable

.

(3) For this purpose -

(a) "costs" includes overheads, and

(b) costs are relevant costs in relation to a service charge whether they are incurred, or to be incurred, in the period for which the service charge is payable or in an earlier or later period.

Section 19 – 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 provisions 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.

Section 27A – Liability to pay service charges: jurisdiction

(1) An application may be made to the appropriate tribunal for a determination whether a service charge is payable and, if it is, as to –

(a) the person by whom it is payable,

(b) the person to whom it is payable,

(c) the amount which is payable,

(d) the date at or by which it is payable, and

(e) the manner in which it is payable.

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

(3) An application may also be made to the appropriate tribunal tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs and, if it would, as to -

(a) the person by whom it would be payable,

(b) the person to whom it would be payable,

(c) the amount which would be payable,

(d) the date at or by which it would be payable, and

(e) the manner in which it would be payable.

(4) No application under subsection (1) or (3) may be made in respect of a matter which -

(a) has been agreed or admitted by the Tenant,

(b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the Tenant is a party,

(c) has been the subject of determination by a court, or

(d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.

(5) But the Tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.

[.....]

Commonhold and Leasehold Reform Act 2002

Leasehold Valuation Tribunals (Fees)(England) Regulations 2003

Regulation 9

(1) Subject to paragraph (2), in relation to any proceedings in respect of which a fee is payable under these Regulations a tribunal may require any party to the proceedings to reimburse any other party to the proceedings for the whole or part of any fees paid by him in respect of the proceedings.

(2) A tribunal shall not require a party to make such reimbursement if, at the time the tribunal is considering whether or not to do so, the tribunal is satisfied that the party is in receipt of any of the benefits, the allowance or a certificate mentioned in regulation 8(1).

Service Charges (Consultation Requirements) (England) Regulations 2003

Part 2

Consultation Requirements for Qualifying Works for Which Public Notice is Not Required

Notice of intention

8

(1) The landlord shall give notice in writing of his intention to carry out qualifying works--

(a) to each tenant; and

(b) where a recognised tenants' association represents some or all of the tenants, to the association.

(2) The notice shall--

(a) describe, in general terms, the works proposed to be carried out or specify the place and hours at which a description of the proposed works may be inspected;

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

(c) invite the making, in writing, of observations in relation to the proposed works; and

(d) specify--

(i) the address to which such observations may be sent;

(ii) that they must be delivered within the relevant period; and

(iii) the date on which the relevant period ends.

(3) The notice shall also invite each tenant and the association (if any) to propose, within the relevant period, the name of a person from whom the landlord should try to obtain an estimate for the carrying out of the proposed works.

Inspection of description of proposed works

9

(1) Where a notice under paragraph 1 specifies a place and hours for inspection--

(a) the place and hours so specified must be reasonable; and

(b) a description of the proposed works must be available for inspection, free of charge, at that place and during those hours.

(2) If facilities to enable copies to be taken are not made available at the times at which the description may be inspected, the landlord shall provide to any tenant, on request and free of charge, a copy of the description.

Duty to have regard to observations in relation to proposed works

10

Where, within the relevant period, observations are made, in relation to the proposed works by any tenant or recognised tenants' association, the landlord shall have regard to those observations.

Estimates and response to observations

11

(1) Where, within the relevant period, a nomination is made by a recognised tenants' association (whether or not a nomination is made by any tenant), the landlord shall try to obtain an estimate from the nominated person.

(2) Where, within the relevant period, a nomination is made by only one of the tenants (whether or not a nomination is made by a recognised tenants' association), the landlord shall try to obtain an estimate from the nominated person.

(3) Where, within the relevant period, a single nomination is made by more than one tenant (whether or not a nomination is made by a recognised tenants' association), the landlord shall try to obtain an estimate--

(a) from the person who received the most nominations; or

(b) if there is no such person, but two (or more) persons received the same number of nominations, being a number in excess of the nominations received by any other person, from one of those two (or more) persons; or

(c) in any other case, from any nominated person.

(4) Where, within the relevant period, more than one nomination is made by any tenant and more than one nomination is made by a recognised tenants' association, the landlord shall try to obtain an estimate--

(a) from at least one person nominated by a tenant; and

(b) from at least one person nominated by the association, other than a person from whom an estimate is sought as mentioned in paragraph (a).

(5) The landlord shall, in accordance with this sub-paragraph and sub-paragraphs (6) to (9)--

(a) obtain estimates for the carrying out of the proposed works;

(b) supply, free of charge, a statement ("the paragraph (b) statement") setting out--

(i) as regards at least two of the estimates, the amount specified in the estimate as the estimated cost of the proposed works; and

(ii) where the landlord has received observations to which (in accordance with paragraph 3) he is required to have regard, a summary of the observations and his response to them; and

(c) make all of the estimates available for inspection.

(6) At least one of the estimates must be that of a person wholly unconnected with the landlord.

(7) For the purpose of paragraph (6), it shall be assumed that there is a connection between a person and the landlord--

(a) where the landlord is a company, if the person is, or is to be, a director or manager of the company or is a close relative of any such director or manager;

(b) where the landlord is a company, and the person is a partner in a partnership, if any partner in that partnership is, or is to be, a director or manager of the company or is a close relative of any such director or manager;

(c) where both the landlord and the person are companies, if any director or manager of one company is, or is to be, a director or manager of the other company;

(d) where the person is a company, if the landlord is a director or manager of the company or is a close relative of any such director or manager; or

(e) where the person is a company and the landlord is a partner in a partnership, if any partner in that partnership is a director or manager of the company or is a close relative of any such director or manager.

(8) Where the landlord has obtained an estimate from a nominated person, that estimate must be one of those to which the paragraph (b) statement relates.

(9) The paragraph (b) statement shall be supplied to, and the estimates made available for inspection by--

(a) each tenant; and

(b) the secretary of the recognised tenants' association (if any).

(10) The landlord shall, by notice in writing to each tenant and the association (if any)--

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

(b) invite the making, in writing, of observations in relation to those estimates;

(c) specify--

(i) the address to which such observations may be sent;

(ii) that they must be delivered within the relevant period; and

(iii) the date on which the relevant period ends.

(11) Paragraph 2 shall apply to estimates made available for inspection under this paragraph as it applies to a description of proposed works made available for inspection under that paragraph.

Duty to have regard to observations in relation to estimates

12

Where, within the relevant period, observations are made in relation to the estimates by a recognised tenants' association or, as the case may be, any tenant, the landlord shall have regard to those observations.

Duty on entering into contract

13

(1) Subject to sub-paragraph (2), where the landlord enters into a contract for the carrying out of qualifying works, he shall, within 21 days of entering into the contract, by notice in writing to each tenant and the recognised tenants' association (if any)--

(a) state his reasons for awarding the contract or specify the place and hours at which a statement of those reasons may be inspected; and

(b) where he received observations to which (in accordance with paragraph 5) he was required to have regard, summarise the observations and set out his response to them.

(2) The requirements of sub-paragraph (1) do not apply where the person with whom the contract is made is a nominated person or submitted the lowest estimate.

(3) Paragraph 2 shall apply to a statement made available for inspection under this paragraph as it applies to a description of proposed works made available for inspection under that paragraph.