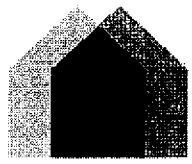

Residential
Property
TRIBUNAL SERVICE

RESIDENTIAL PROPERTY TRIBUNAL SERVICE
DECISION BY LEASEHOLD VALUATION TRIBUNAL for the
LONDON RENT ASSESSMENT PANEL

LANDLORD AND TENANT ACT 1985 ("the Act") : Section 27A

BIR/44UF/LSC/2005/0009

Property:	Raford House, 49 Kenilworth Road, Leamington Spa, CV32 6JJ
Applicants:	Mrs P Whiteley (Flat 2) Mr J C Westley (Flat 3) Mrs Z Hilton-Briggs (Flat 4) Mr R and Mrs V Burge (Flat 9) Mr A Maresco (Flat 10) (Tenants)
Respondent:	Slora Construction Company Limited (Landlord)
Dates of resumed hearing:	13 and 14 February 2006 at the Town Hall, Leamington Spa
Appearances:	Mrs S M Westley representing Mr J C Westley, Mrs Z Hilton-Briggs , Mr and Mrs Burge. Mr A Radford representing Mrs P Whiteley. Mr L D Jacobs CEng FIStructE Mr R Doble FRICS (for the Applicants) Mr A Young of Counsel Mr T Ollerenshaw of Ollerenshaw Solicitors Mr R C Starkey FRICS IACIRArb (for the Respondents)
Tribunal:	Mrs V T Barran BA (Oxon) Mr D D Banfield FRICS Mr O Miller BSc
Date of decision:	22 February 2006

Decision

1.Service Charge Years ended September 1998 and 1999

A. Service charge costs of £9,068 for major maintenance works and of £947.48 for repairs to Raford House were reasonably incurred by the Respondent in the Service Charge Year ended September 1998.

B. Service charge costs of £4,059 for major maintenance and £2,575 for repairs to Raford House were reasonably incurred by the Respondent in the Service Charge Year ended September 1999.

C. The Applicants were liable to pay for a percentage of these service charge costs, in accordance with their obligations under their leases. The Applicants were liable to pay 1/11 of most items, but 1/19 of some, where there is a shared responsibility with Nova Lodge.

2.Major Works

A. The items shown on the Scott Schedule are works which the Respondent proposes to carry out soon, in the service charge year ending 29 September 2006. A copy of the Scott Schedule reduced in complexity and extent is annexed.

B. The Tribunal determines that items 1-3, 5, 10-12, 14-23, 25-27 will be reasonable in scope and are specified to a reasonable standard, ie that they are necessary now and will adequately address the problems affecting Raford House.

C. The Tribunal further determines that the costs of these items as proposed/conceded by the Respondent at the hearing and shown in column of the reduced Scott Schedule annexed are reasonable (including 10% professional fees) Total £52,750.18 +VAT at appropriate rate.

D. The Tribunal did not find that the Applicants had proved that delay or past neglect by the Respondent had increased the cost of the proposed major works; however the Respondent had conceded some increase in cost for some items.

E.Given compliance with (or dispensation from) section 20 of the Act, the Tribunal determines that the Applicants will each be liable to pay 1/11 of the total cost of the service charge costs for those items referred to in para B above except for items 25-27 where the liability is 1/19 (shared with Nova Lodge) in accordance with the terms of their leases.

F. The Tribunal determines that each Applicant shall pay £5,109.12 in advance of the proposed works as soon as the Respondent re-requests payment. The Respondent shall provide detail of how and where the monies are to be held in trust in accordance with s.42 of the Landlord and Tenant Act 1987. Interest earned will belong to the fund collectively. (See also previous Decision of this Tribunal dated 25 November 2005: paras 14-19).

The balance shall be payable on demand in accordance with the terms of the leases.

G. For the avoidance of doubt Mr and Mrs Burge (Flat 9) are treated as a single Applicant. Apportioned payments of 1/11 or 1/19 are on a per flat basis.

3. **Standard of Management**

In the light of the Respondent's concession that there had been some mismanagement, the Tribunal makes no general determination as whether the Respondent or the managing agent has acted reasonably in the management of the property.

4. **Costs**

A. The Tribunal is of the view that the leases do not allow the Respondent to add their costs incurred in connection with these Tribunal proceedings to the service charge. However in the event that we are wrong, we do order under s.20C of the Act that any such costs are not to be added to the service charges payable by the Applicants.

B. The Tribunal makes no order for reimbursement of application/hearing fees paid by the Applicant.

C. The Tribunal makes no order for penal costs under para 10 to Schedule 12 of the Commonhold and Leasehold Reform Act 2002.

5. **Reasons**

Reasons for the Decision with copy of the full Scott Schedule, will be issued as soon as possible in accordance with Regulation 18 (5) of the Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003.

Chairman  V.T.Barran

22 February 2006

REDUCED SCOTT SCHEDULE FOR RAFORD HOUSE

Item No.	Item	Residents Value Reduction	Slora Value Reduction	Tribunal's Determination
1	Scaffold- All elevations	8,914.03	8,914.03	8,914.03
2	Remove existing slates and replace with second hand/fibre cement, including new felt, battens, flashings etc. to roof slopes B,C,D,E,F (refer to Sketch)	5,440.31	10,880.63	10,880.63
3	Supply and fix replacement Velux skylights (9no.) to roof slopes B-F	1,460.43	5,841.72	5,841.72
5	Replace existing guttering in plastic	NIL	3,578.98	3,578.98
10	Replacement of leadwork to gutters and junctions	1,000.00	2,000.00	2,000.00
11	Repair or replace structural timbers	NIL	NIL	NIL
12	Repair or replace gable timbers	NIL	NIL	NIL
14	Repair defective rendering	NIL	NIL	NIL
15	Repair specific rendered details	NIL	NIL	NIL
16	Repair or replace lintels behind rendering	NIL	NIL	NIL
17	Reconstruct bay window flat 9	NIL	NIL	NIL
18	Reconstruct dormer flat 9	NIL	NIL	NIL
19	Repair or replace windows to front elevation	NIL	NIL	NIL
20	Repair or replace windows to rear and side elevations	NIL	NIL	NIL
21	Redecorate timber and rendered surfaces, all elevations	6,819.67	13,639.35	13,639.35
22	Allowance for additional cost of extra costs to provide complete uniformity	250.00	250.00	250.00
23	Provision for some internal redecoration	NIL	NIL	NIL
25	Repair garden wall presently collapsed. Northern boundary	NIL	NIL	NIL
26	Remove and replace 1.00m high timber fence to front of premises abutting Kenilworth Road, stain to match existing	1,600.00	1,600.00	1,600.00
27	Make effective repairs, including buttressing to garden wall – Southern boundary, currently propped	1,250.00	1,250.00	1,250.00
	SUB-TOTAL			**47,954.71**
28	Professional Fees 10%			4,795.47
				£52,750.18

The total is exclusive of VAT.

4

Residential
Property
TRIBUNAL SERVICE

RESIDENTIAL PROPERTY TRIBUNAL SERVICE
REASONS FOR DECISION BY LEASEHOLD VALUATION TRIBUNAL for the LONDON RENT ASSESSMENT PANEL

LANDLORD AND TENANT ACT 1985 Section 27A

BIR/44UF/LSC/2005/0009

Property:	Raford House, 49 Kenilworth Road, Leamington Spa, CV32 6JJ
Applicants:	Mrs P Whiteley (Flat 2) Mr J C Westley (Flat 3) Mrs Z Hilton-Briggs (Flat 4) Mr R and Mrs V Burge (Flat 9) Mr A Maresca (Flat 10) (Tenants)
Respondent:	Slora Construction Company Limited (Landlord)
Dates of resumed hearing:	13 and 14 February 2006 at the Town Hall, Leamington Spa
Appearances:	Mrs S M Westley representing Mr J C Westley, Mrs Z Hilton-Briggs , Mr and Mrs Burge. Mr A Radford representing Mrs P Whiteley. Mr L D Jacobs CEng FIStructE Mr R Doble FRICS (for the Applicants) Mr A Young of Counsel Mr T Ollerenshaw of Ollerenshaw Solicitors Mr R C Starkey FRICS ACI Arb (for the Respondents)
Tribunal:	Mrs V T Barran BA (Oxon) Mr D D Banfield FRICS Mr O Miller BSc
Decision dated:	22 February 2006
Reasons dated:	3 March 2006

Reasons for the Decision issued 22 February 2006

Preliminary

1. The Tribunal had received an application dated 6 July 2005, from the tenants/leaseholders of five flats at Raford House, 49 Kenilworth Road, Leamington Spa (the Property) under Section 27A of the Landlord and Tenant Act 1985 ("the Act"), with an ancillary application for a determination under 20C of the Act.

2. A pre-trial review was held on 5 September 2005 at which the following **issues** were identified:

   (i) whether costs of £9,068 or thereabouts incurred in the service charge year 1998/1999 for major maintenance and repairs, and £955 or thereabouts incurred in that year for repairs, and other costs in other years incurred for patch or other repairs, to be identified by the applicants in their statement of case, were reasonably incurred and whether the applicants are liable to pay them as a service charge, given that, the applicants allege, the landlord has neglected the property and has failed to address serious structural and other problems;

   (ii) whether costs which the landlord proposes to incur in the service charge year 2004/2005 for major works to the property will be reasonably incurred in that they will adequately address the problems affecting the building and will be carried out at reasonable cost and to a reasonable standard;

   (iii) whether delay and past neglect has increased the cost of the remedial works and whether in consequence the applicants are liable to pay all or any of their costs;

   (iv) whether the applicants should pay the respondent in advance for the cost of the necessary remedial work or whether the respondent should pay the cost and recover from the applicants such sums as they are found liable to pay;

   (v) whether the landlord or its managing agent has acted reasonably in its management of the property and whether any mismanagement on behalf of the landlord or its managing agent has increased the service charges which the applicants are liable to pay.

3. A hearing was held on 23 November 2005 and reference should be made to the decision that followed, dated 25 November 2005. That hearing was adjourned until 13 and 14 February 2006. The issues remain the same (with the exception of 2 (iv) above which has been determined) and detailed Directions were issued and sent to Mrs Westley, Mr Radford, Mr Jacobs for the Applicants and Mr Ollerenshaw for the Respondents.

4. Direction number 6, which repeated an almost identical direction issued following the pre trial-review on 5 September 2005, stated:
   *"If any of the Applicants wish to dispute other costs in other service charge years incurred for patch or other repairs they shall **precisely** identify, by reference to the relevant service charge demands, all the costs which they challenge and why, and if it is their case that a lower cost would have been appropriate in relation to particular works, what that cost should have been and why. Any such statement shall be sent to the Respondent on or before **19 January 2006**."*

No such statement was sent by the Applicants. Accordingly as explained at the hearing, the Tribunal did not need to make a determination on past service charge costs other than for the years 1998/1999 (see 2(i) above).

5. The Tribunal wish to thank Ollerenshaws for numbering the previously provided bundles and additional information and for providing an index. This made the task of identifying particular documents during the hearing easier. Numbers in square brackets refer to pages in the bundle.

6. The case was transferred to the London Panel in order to avoid any perception of bias. because Mr D Satchwell FRICS, partner at Cartwright Marston, the Managing Agent, sits as a valuer chair on the Midland Panel.

The Lease

7. The first task of the Tribunal was to look to the service charge provisions in the lease. The Tribunal is grateful to Mr Young for his patient explanation of the obligations of both landlord and tenant. For the purposes of addressing liability to pay service charges, the following is a summary of the relevant provisions of the lease. The Tribunal was assured that all the leases are in similar terms. The lease uses the words lessor/lessee, but in this decision we use the more familiar terms landlord/tenant.

8. In the Seventh Schedule the landlord covenants to keep the property in a good and tenantable state of repair, decoration and condition including renewal and replacement of all worn or damaged parts. The landlord has no obligation to put the property into repair ie. to improve it. The landlord also covenants to keep the halls, stairs, landings etc properly cleaned and in good order. The landlord is also required to keep a proper account of all costs and charges at the end of each service charge year namely 29 September. An account should be prepared and audited by a competent Chartered Accountant who should certify the total and calculate any proportionate amount due from a Tenant after taking into account any payment in advance made.

9. In clause 11 to the Sixth Schedule the tenants covenant to keep the landlord indemnified from all costs, charges and expenses incurred by the landlord in carrying out its obligations under the Seventh Schedule including repairs together with the cost of employing agents and managers (such costs not to exceed 10% of the amount actually expended) and an amount not exceeding 5% of the amount actually expended for the landlord's administration expenses.

10. The percentage that each tenant pays the landlord varies depending on where the works are carried out. If the works are carried out to the grounds, drives car parking areas, forecourts and terraces used in common by the owners and occupiers of Raford House and the adjoining property Nova Lodge, the tenants of Raford House each contribute $1/19^{th}$ of the total costs incurred by the landlord. For works to the parts of Raford House used in common (ie. not individual flats) and also of repair to the main structural parts of Radford House including the roof, foundation, external parts and window frames, and sewers, drains, pipes etc, each tenant's contribution is $1/11^{th}$.

11. Put simply the landlord has an obligation to keep the property in a good state of repair and the tenants have an obligation to pay for those repairs.

12. The Tribunal considered the terms of the lease initially and concluded that Tenants do have liability to pay for the service charges disputed in this case.

13. In this case, other than the issue of advance payments previously determined, and the two different percentages of 1/11 and 1/19, there was no dispute between the parties over lease terms. The Tribunal has already given its decision on payment in advance and its view on the lack of provision in the lease for either a sinking fund or a reserve fund. Comments on the lack of an audit can be found below.

The Statute Law

14. The next step for the Tribunal is to consider the statutory scheme found mostly in sections 18 to 30 of the Act and in particular those sections headed "limitation of service charges".

S27A Liability to pay service charges: jurisdiction

(1) An application may be made to a leasehold valuation tribunal for a determination whether a service charge is payable and, if it is, as to—
(a) the person by whom it is payable,
(b) the person to whom it is payable,
(c) the amount which is payable,
(d) the date at or by which it is payable, and
(e) the manner in which it is payable.

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

(3) An application may also be made to a leasehold valuation 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.

15. Thus the Tribunal is required to make a determination on the service charge costs incurred in 1998/1999 in accordance with section 27A(1) ie. in the past, and on the major works to be incurred under section 27A(3) ie. for the future.

16. In addition the Tribunal is required to have regard to the more general section 19 of the Act:

S19 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.

17. In determining whether the Applicants are liable to pay for the major works the Tribunal also need to consider whether the consultation requirements of **section 20** of the Act have been complied with. It is noteworthy that the Respondent has made a separate application under section 20ZA of the Act for dispensation with all or part of the consultation requirements. That application has not yet been dealt with and is not the subject of this determination. Directions have been issued.

Inspection

18. The Tribunal inspected the property on the morning of 23 November 2005 in the company of representatives of the parties. They found it to be a substantial period detached house on ground, first and attic floors with an unused basement beneath, in a style popular in this attractive area of Leamington Spa. The property was constructed of brick walls under a slated roof. To the side was a single storied section under a flat roof. The front, sides and part of the rear elevations had been rendered and generally painted. The front elevation was somewhat ornate with decorative mouldings highlighting the eaves and windows. The property has now been converted into eleven flats. On walking around the exterior we noted the section of collapsed boundary wall between the parking area and No. 51 adjoining, the poor state of areas of the rendering, poor paintwork and deteriorating window joinery. We saw the replacement artificial slates covering the front slope of the main roof and mono pitch roof at the rear. We were assisted by being allowed to view the roof from a flat in the block at No. 51 from where we were able to see the poor state of the dormer window and roof light to the roof slope above the main entrance. We were also assisted by viewing the interiors of Flats 6, 9 and 10 from where we were able to obtain closer views of the exterior roof surfaces and noted the areas of water penetration as evidenced by stained plasterwork.

19. The Tribunal was then shown the substantial basement areas which are largely unused except for the running of service pipes. We noted the disused boiler and associated pipe work which we understand to be asbestos lagged. We also saw the rust covered supporting steels and the remains of the dry rot outbreak.

20. The photographs attached to the report of Mr L D Jacobs [233 to 248 in the bundle] provide a fair picture of its current condition.

Future Major Works: Issues (ii) and (iii)

21. Following the directions dated 25 November 2005, Mr Jacobs, Structural Engineer instructed by the Applicants and Mr Starkey, Quantity Surveyor instructed by the Respondent, jointly prepared a Scott Schedule with 27 items of detailed maintenance/repairs. The final version of this is annexed, as amended at the hearing, and showing the Tribunal's determination in column 13. The Tribunal was initially under the impression that all items had been agreed by both experts as being necessary and reasonable, in that they would adequately address the problems affecting the building. During the course of the hearing it emerged that some items, namely numbers 6, 7, 8,9 and 24, 25, 26 and 27 were not considered necessary by the Respondent at present, but had been included in the Scott Schedule at the request of the Applicants who, being as advised by Mr Jacobs, considered they should be done. It is worth emphasizing that all parties agreed that the main roof, some 150 years old, needs replacement.

22. Negotiations had taken place since the November hearing, culminating in a meeting between Mr Jacobs, Mr Radford and Mr Starkey one week before the resumed hearing. The full cost of the major repairs, including 10% management fee and VAT

was agreed to be in the region of £122,000. Of this the Respondents considered some £83,000 represented costs the tenants should fully meet, leaving a balance of some £39,000 where they conceded some element of mismanagement. At the start of the hearing Mr Young informed the Tribunal that his clients were prepared to offer a reduction of 50% of the conceded cost of mismanagement. ie. £19,000 from the total cost of major works.

23. The Tribunal was informed, at the beginning of the resumed hearing, that the "residents" (presumably the 11 flat owners, not the five Applicants) advised by Mr Jacobs, had offered to pay a total of £44,000 for the major works ie. £4,000 each. It was not clear to the Tribunal whether all of the residents had in fact agreed to this, nor on what basis. The Tribunal noted in particular that the tenant of Flat 4, who is an Applicant, was in August 2003 willing to pay £4,234 [601] (later in two installments) and tenants of six flats at that time were willing to pay their total share [641] upfront.

24. The Tribunal had directed that the Scott Schedule have a column indicating whether and by how much the cost of specific items had increased due to any historic neglect/delay. Mr Jacobs for the Applicants did not give any value reduction for any specific item, he only made a general point:

> *"The residents are not prepared, at the compilation of this schedule, to accept any value reduction costs. The residents believe this to be unfair, and are willing to discuss it further with the Tribunal".*

The Applicants were, or should have been aware of their need to prove their point on historic neglect/delay. They had taken legal advice on more than one occasion, which they showed to the Tribunal and this advice spelt out clearly that they would need to prove their case by way of expert evidence from a surveyor or other expert. The advice from the Leasehold Advisory Service cited the Lands Tribunal Case *Rafat Roohanna v Regis Group Plc LRX/30/2002* where the surveyor member had said:

> *"It is a matter of evidence, particularly expert evidence, as to whether the disrepair in the building, whether roof or elsewhere increased the scope and cost of the roof repair, the subject of this appeal".*

25. This Tribunal had also highlighted the need for the Applicants to prove their case. By Direction 3 the Tribunal required the Scott Schedule to have a column indicating whether and by how much the costs of specific items had increased due to any historic neglect/delay. There should have been no doubt in the minds of the professional advisers to the Applicants of their task and that they had the burden of proving causal connection between the alleged historic disrepair and the present extent and cause of the present repairs. Mr Jacobs and Mr Doble, when initially giving evidence as experts, on more than one occasion sought either to take instruction from one of their clients or to confer with each other before answering questions.

26. The Tribunal considered that they were in effect attempting to continue the negotiations that the parties had engaged in prior to the hearing. It is regrettable that neither Mr Jacobs nor Mr Doble, faced with questioning from the Respondent and from the Tribunal, considered that they were able to continue to give their evidence as experts. With some leniency, and against the wishes of Mr Young, the Tribunal allowed both professionals to speak as advocates. The value reductions they eventually suggested are shown in column 10 of the Scott Schedule. T he a mount totalled £34,683.50 (including VAT) as per total shown in column 10. This amount was considerably lower than the offer of £44,000 made by residents (see above para 23) for whom Mr Jacobs acted. Their evidence was opinion based and in the case of Mr

Doble was not based on a survey carried out by himself, but based on consultation with Mr Jacobs. The Tribunal therefore was unable to give much weight , if any, to their views. The Applicants had in effect not been able to produce expert evidence.

27. Mr Starkey for the Respondent, had made a number of value reductions with brief reasons given on a per item basis. His general comment was:

"*Slora Construction has, over the years, met the residents in order to resolve the maintenance problem, but without success. Whilst we now find the lack of sufficient maintenance has increased the problem in some areas, the total extra costs should not be laid solely on the shoulders of Slora construction, the residents having contributed in no small measure to the problem.*"

28. In column 12 to the Scott Schedule giving his value reductions due to any mismanagement or historic delay/neglect, Mr Starkey made allowance for items 14, 15, 16, 17, 18, 19, 20 and 23; at the hearing he revised his opinion and also made allowance for items 11 and 12, so that in his expert opinion the landlord should be responsible for the total costs of those specific items. The net total amount he therefore conceded, following the evidence he gave to the Tribunal as an expert witness, was £33,911.46.

29. The Scott Schedule gave agreed costs for items of work so that there was no dispute as to quantum. Mr Starkey explained the basis upon which the costs had been quantified as set out in the introduction to the Scott Schedule attached. It was also agreed by both parties that the roof (with the exception of slope A and slope G which had been reroofed using artificial slates probably in 1990,) needs replacement and that it should be done this Spring. Mr Starkey acknowledged that the roof, some 150 years old now, could perhaps continue to function with patch repairs for a few more years. His view was that there was no present need to recover roof slopes A and G (see footnote 2 of the Scott Schedule attached). Mr Doble expected slopes A and G to last for at least 50 years and made the point that the tenants had already paid for the recovering of these slopes. No evidence of any pending enforcement action by the Local Authority was produced to the Tribunal, who accepted Mr Starkey's view on this point, supported by the Doble, and determined that it was not reasonable to include items 6-9 in the scope of the present works. The Tribunal considered that risk of enforcement too remote to justify present replacement and it was unreasonable to replace simply for esthetic reasons, even though the property is in a conservation area.

30. Mr Young contended that items 13 (down pipe) and 24 (cellar work) should also fall out of the Scott Schedule, as being outside the scope of the Landlord's repairing covenants as they included an element of improvement. The Tribunal accepted item 13 whilst desirable was strictly an improvement. The Tribunal did not fully accept Mr Young's argument with regard to the cellar works. It is possible that the cleaning and painting of the steels is necessary ie. is repair. It is also possible that there may be health and safety implications in requiring the contractor to carry out works in the cellar without the removal of the asbestos lagging. The Landlord may be well advised to carry out an asbestos survey, which in the view of this Tribunal could properly be charged to the service charge, in order to clarify the position. Without concrete evidence, the Tribunal determined the works presently did not fall into the category of essential repair. The Tribunal did not accept the Applicants' argument, which they kept reiterating, that certain works should have been done at the time of the conversion. As the original Directions had made clear that was not a question that is

within the jurisdiction of this Tribunal and was not an issue that had been identified for determination.

31. Mr Starkey gave evidence as an expert, in accordance with the RICS practice statement and in the light of rule 35.10 of the Civil Procedure Rules, albeit not applicable to these Tribunal proceedings. He understood his duty to the Tribunal to be paramount, overriding his duty to the Respondent, who had instructed him. The Tribunal therefore placed considerable weight on his evidence which was given in a considered and balanced manner. The Applicants have benefited from the expert status of Mr Starkey, because he recommended a number of concessions, as shown in the Scott Schedule, and which the Landlord accepted, thereby considerably reducing their share of the costs of the major works. It is also noteworthy that the Respondent at the hearing, in the spirit of reconciliation, acceded that it would not seek to impose the additional administration charge, which under the terms of the lease they would be entitled to impose, up to a maximum of 5% of the amount actually expended. At Mr Young's request we record that this concession was in relation only to the major works proposed during the service charge year ending 29 September 2006. The Tribunal considered the landlord's concessions generous and indicative of the "sea change" referred to by Mr Young at the start of the first hearing. The Respondent indicated they were likely to engage the services of Mr Starkey for the major works.

32. In support of his contention regarding past neglect Mr Jacobs considered that the property should have been decorated externally every six years, although Mr Doble thought that a 2-3 years external painting cycle would be appropriate. Mr Young argued that the fact that no such external decorating cycle had been adhered to, meant that the Applicants had been saved money. He relied on Mr Starkey's expert opinion that it was cheaper to be reactive than proactive with regard to such works. After giving evidence at the hearing Mr Starkey produced a hand written schedule of the savings he calculated were due to a lack of planned maintenance at the property. On Mr Doble's suggested painting recycle, Mr Starkey calculated that the costs would have increased to some £138,000 with a figure of £106,000 for Mr Jacob's six year cycle. Mr Jacobs accepted this when questioned by the Tribunal.

33. However the Tribunal considered that there were some flaws in the schedule of savings. The property had been last repainted some ten years ago, whereas the schedule envisaged some 20-24 years of lack of external decoration. The Tribunal also considered that the savings schedule was somewhat ad hoc and had not been the subject of Mr Starkey's expert evidence and could not be tested either by the Tribunal or by the Applicants. The Tribunal preferred to accept Mr Young's submission, that the question of possible set off for any savings due to lack of planned maintenance would be an alternative available to the Tribunal only if they accepted the Applicants value reductions.

34. The Tribunal was persuaded by Mr Starkey's evidence that reductions should be made from the estimated costs of the major works for historic neglect/delay. There was clear evidence in the bundle of a responsive approach of management and a lack of planned management. No expert evidence was put forward by the Applicants for the difference between costs of works done in previous years and the present estimates. The Tribunal could not plough through the bundles and rely on non-expert views. The Tribunal considered that the concessions from Mr Starkey, made at the early stages of the Scott Schedule negotiations and then repeated at the hearing, with two additional concessions totalling £6,000, could not be overlooked. The Landlord was in effect putting its hands up and admitting some historic neglect/delay. The Tribunal accepted

that their was some, and in the absence of expert evidence from the Applicants, accepted the quantum advanced by Mr Starkey. The Tribunal additionally reduced the scope of the works as explained above.

35. There are **two caveats** to the above. Firstly, the Respondent has not submitted an insurance claim for the collapsed garden wall and was not sure whether the damage was covered by the buildings insurance policy. However Mr Ollerenshaw gave an assurance that if any insurance payment was received, it would be set off against the service charge costs ie. the amount payable by the Applicants for item 27 could be reduced. Secondly, in order for the Tribunal to make a conclusive determination on liability, it must be satisfied that the Respondent has complied with the consultation requirements under the section 20 of the Act, or that it is reasonable to dispense with those requirements. In view of the reduced scope of the works and the fact that the overall cost of the proposed major works is not so very different from that given in the original section 20 notices, it may well be that the Respondent has so complied. However the Tribunal has not delved into this matter at this stage in view of the pending section 20ZA application for dispensation.

Decision on Major Works

A. The items shown on the Scott Schedule are works which the Respondent proposes to carry out soon, in the service charge year ending 29 September 2006.

B. The Tribunal determines that items 1-3, 5, 10-12, 14-23, 25-27 will be reasonable in scope and are specified to a reasonable standard, ie that they are necessary now and will adequately address the problems affecting Raford House.

C. The Tribunal further determines that the costs proposed/conceded by the Respondent at the hearing and shown in the right hand column of the Scott Schedule annexed are reasonable (including 10% professional fees): Total £52,750.18 +VAT at the appropriate rate.

D. The Tribunal did not find that the Applicants had proved that delay or past neglect by the Respondent had increased the cost of the proposed major works; however the Respondent had conceded some increase in cost for some items.

E. Subject to the caveat re section 20 above, the Tribunal determines that the Applicants will each be liable to pay 1/11th of the total costs of the service charge costs for those items listed in para B, above except for items 25-27 where liability is 1/19th (shared with Nova Lodge) in accordance with the terms of their leases.

F. Again subject to the caveat re section 20 above, the Tribunal determines that each applicant shall pay £5,109.12 in advance of the works as soon as the Respondent re-requests payment. The Respondent shall provide detail of how and where the monies are to be held in trust in accordance with s.42 of the Landlord and Tenant Act 1987. Interest earned will belong to the fund collectively. (See previous Decision of this Tribunal dated 25 November 2005: paras 14-19).

The balance shall be payable on demand in accordance with the terms of the leases.

G. For the avoidance of doubt Mr and Mrs Burge (Flat 9) are treated as a single applicant. Apportioned payments of 1/11 or 1/19 are on a per flat basis.

Service charge costs in years ended 30 September 1998 and 30 September 1999 for major maintenance and repairs: Issue (i)

36. There was some confusion as to which years were in dispute. The Tribunal took the view at the hearing that it should consider both years in order to ensure that the Applicants were able to put their case.

37. Mrs Barbara Cocks, MNAEA currently Property Manager at Cartwright Marston Managing Agents, provided a witness statement covering the service charge expenditure for both these years [752-759]. She enclosed copies of income and expenditure accounts, summary of the works done and copies of the actual expenditure schedule for these and other years. She also enclosed the summary of the annual balances. [Bundle 761-807]. She pointed to an unaccountable £7 shortfall.

38. Mrs Westley had made written comments on the witness statement of Barbara Cocks. [Bundle 743-745]. Mrs Cocks was unfortunately not able to attend the hearing due to personal circumstances. Mr Young informed us that Mrs Cocks had also been instructed by her employers not to attend, following advice from their Professional indemnity insurers. Both parties were unhappy that they could not question someone from the Managing Agents. The Tribunal was however assured that the contents of her witness statement, which contained a statement of truth, could be relied on.

39. The Tribunal found that in May 1998 the bay window to flat 6 had been replaced. Work was carried out at a cost of £4,202.86. Mrs Westley had no doubt that the works had been carried out, that they were reasonable in scope but neither she nor Mr Radford could comment as to the reasonableness of the amount. She considered that the cost of repair to the bay window had been increased by delay by the Respondent as no work had been done on the bay window since conversion of the property into flats in the 1970s but did not quantify the extra cost. It emerged that the principal concern of the Applicants was that nine Tenants had paid £600 by way of an advance "levy" and that two tenants therefore may not have paid. Neither she nor Mr Radford had any concerns about the other items of major maintenance and repair charged in this service charge year.

40. The Tribunal studied the accounts and noted balances carried forward (including arrears.) It did not appear to the Tribunal that there had been any misappropriation of service charge fund from those who contributed and Mrs Westley accepted this.

41. With regard to the year ended September 1999, the main item of concern for the Applicants was work carried out due to dry rot in the cellar beneath Flat 3. Repairs were carried out in flat 3 by Dampco in February 1999 at a cost of £2,718.96. Consequent redecoration work had been necessary to Flat 3 and this had been carried out by P Chambers in February 1999 at a cost of £1,340. Mrs Westley appeared to contend that the Respondent had not reacted quickly enough when she had informed them of the rot. It emerged however that they had arranged inspection within 48 hours of the initial complaint, and work had been carried out some two months later, after the Christmas period.

42. Mrs Westley then rephrased her concern which was that the landlord should have checked regularly for the dry rot in the cellar. She considered had they done so there would have been no spread of dry rot to her flat and no need to carry out the works to her flat at all.

43. The Tribunal did not find that the Applicants had discharged the necessary burden of proof with regard to historic neglect in this instance. As Mr Young pointed out there was no expert report and indeed no evidence of a causal link between lack of inspection of the cellar and the outbreak of dry rot in Flat 3. It is perhaps noteworthy that the Managing Agents wrote that Dampco had reported that the outbreak of dry rot was localized and that detailed inspection could only be carried out by stripping the ceiling to the cellar. This would involve considerable expense which in the opinion of Dampco was not appropriate. [155]. It is also perhaps noteworthy that Mrs Westley's claim damages for breach of the repairing covenants in her lease in this respect was not pursued [170].

44. The Tribunal is of the view that there is no effective inspection regime in a property such as Raford House that could guarantee prevention of an outbreak of dry rot such as this one. No other items of repair in this service charge year were at issue as Mrs Westley accepted the reasonableness of all items shown in the left hand column of the summary of repairs [786].

Decision on Service Charge Years ended September 1998 and 1999

A. Service charge costs of £9,068 for major maintenance works and of £947.48 for repairs to Raford House were reasonably incurred by the Respondent in the Service Charge Year ended September 1988.

B. Service charge costs of £4,059 for major maintenance and £2,575 for repairs to Raford House were reasonably incurred by the Respondent in the Service Charge Year ended September 1999.

C. The Applicants were liable to pay the Respondent for these service charge costs, in accordance with the obligations under their leases. The Applicants were liable to pay 1/11 of most items, but 1/19 of some, where there is a shared responsibility with Nova Lodge.

Standard of Management and ancillary points: issue(v)

45. The Tribunal was aware from the evidence that there was a level of dissatisfaction with the service provided by the managing agents in recent years. The Applicants' case was not sufficiently focused to enable the Respondent or the Tribunal to test the evidence. Crucially however the Respondent had conceded that there had been some historic mismanagement on the issue of the major works and therefore the Tribunal did not need to make any determination on this the main issue. Whilst it is clear that the standard of management was not high the Tribunal was also aware that the costs of management were low in recent years (under £100 per flat per year) and generally less than the 10% the lease allows.

46. The Tribunal took the view that the fact that some tenants had not paid service charges did not alter the Landlord's obligations to comply with its repairing covenants. The parties agreed that until 2003 the relationship between tenants and the managing agents was relatively effective. After that the relationship broke down and there have been difficulties collecting arrears.

47. The Tribunal determined that the failure to have the accounts audited (as required by the lease) did not prevent the Respondent from recovering the service charges costs. The Tribunal accepted Mr Young's argument that the lease did not make certification a

condition precedent to payment. The Tribunal was further persuaded by the fact that although the accounts had not been audited, they had been certified by an independent accountant, Messrs Tricker and Co, who stated that they had examined the books, records and vouchers. The lack of audit is perhaps one example of low level management. It is noteworthy that the RICS Code at para 12.1 recommends that service charge accounts should be audited.

48. As with the service charge years ended September 1998 and 1999 and the proposed major works, the Tribunal did not find that the Applicants had proved that delay or past neglect had increased the service charge costs in general.

Decision

49. In the light of the Respondent's concession that there had been some mismanagement, the Tribunal makes no determination on whether the Respondent or the managing agent has acted reasonably in the management of the property.

Costs

Application under Section 20C of the Act

50. Some leases allow a landlord to recover costs incurred in connection with proceedings before the Tribunal as part of the service charge. Section 20C of the Act gives the Tribunal power on application by a Tenant only, to make an Order preventing a landlord from taking this step. The Tribunal may make such Order as it considers just and equitable in the circumstances.

51. The Applicants had no opinion as to whether or not their leases allow the landlord to recover such costs. Mrs Westley however asked the Tribunal to make an Order because she considered it would be unfair for the Applicants to pick up the Respondent's litigation costs. She explained that the Applicants were forced to make an application to the Tribunal because they were desperate to get the works done to the property. It was only after the application that the Respondent had commissioned Mr Starkey's report, commenting on the structural report prepared by their surveyor Mr Jacobs. As a result progress had been achieved. Mr Radford also pointed out that the Applicants have their own costs to bear.

52. Mr Young accepted that there was no specific provision for the recovery of legal costs in the lease other than with regard to section 146 notices (solicitor's costs). He argued that these litigation costs do fall under clause 4 to the Seventh Schedule to the lease, whereby the landlord covenants to keep the property in a good and tenantable state of repair. He also pointed to clause 11 of the Sixth Schedule to the lease whereby tenants covenant to keep the landlord indemnified in respect of costs in the Seventh Schedule and whereby the landlord is entitled to add the costs of employing agents and managers (not to exceed 10%). If he was wrong on that he relied further on clause 2 to the Sixth Schedule of the lease whereby the tenants covenant to pay all rates taxes assessments charges impositions and outgoings.

53. The Tribunal was not persuaded by Mr Young's arguments. It is our view that in the absence of specific reference to legal costs incurred in "litigation", in the lease (in contrast in clause 4 to the Seventh Schedule with regard to s.146 notices) such costs are not recoverable. Even if it could be argued that legal costs incurred as "management" tools, might be recoverable, (such as for enforcing tenant's covenants),

in this case the litigation costs had been incurred in **responding** to an application from tenants ie. not a proactive step taken with regard to management. We did not find the terms of this lease to be clear and unambiguous, and so they are to be construed against the landlord (the "contra proferentem" rule).

We took heed of the view of Taylor LJ in *Sella House Ltd v Mears* [1989] 1EGLR 65:

"For my part I should require to see a clause in clear and unambiguous terms before being persuaded that that result [charging legal fees as part of the service charge] was intended by the parties"

54. However if we are wrong in our construction of the lease, we do not think it is just and equitable for the Applicants to pay the litigation costs of the Respondent in this instance. We accept Mrs Westley's argument that the Applicants were forced to make an application and whilst is not true to say they have substantially won their case, the landlord's concessions have led to a workable solution. In any event there is no principle by which costs follow the event under section 20C of the Act. The Tribunal additionally considers that it would not be in the interest of future landlord/tenant relationship if, when facing large bills for major works, the Applicants and other tenants, were additionally presented with bills for the Respondent's litigation costs in this matter.

S.20C Costs - Decision

The Tribunal is of the view that the leases do not allow the Respondent to add their costs incurred in connection with these Tribunal proceedings to the service charge. However in the event that we are wrong, we order under s.20C of the Act that any such costs are not to be added to the service charges payable by the Applicants.

Reimbursement of Fees

55. The Applicants had not requested this, but as a matter of course, the Tribunal had, in both sets of Directions pointed out that there was power for the Tribunal under the Leasehold Valuation Tribunal (Fees) (England) Regulations 2003 to order reimbursement of application/hearing fees. The Tribunal determined not to exercise its discretion in this matter. As Mr Young pointed out the Respondent had contributed £1,000 to Mr Jacobs fees in connection with the Scott Schedule.

Decision

56. The Tribunal makes no order for reimbursement of application/hearing fees paid by the Applicant.

Penal Costs under paragraph 10 to schedule 12, of the Commonhold and Leasehold Reform Act 2002

57. Again in directions dated 25 November 2005 the Tribunal highlighted its discretion to make a limited award of penal costs up to £500. This discretion could only be exercised if a party to proceedings had either been guilty of abuse of process or vexatious or frivolous behaviour or had behaved unreasonably in connection with the proceedings. In a spirit of reconciliation both parties stated at the end of the hearing

that it would not be appropriate for the Tribunal to make any Order for penal costs. The Tribunal agrees.

Decision

58. The Tribunal makes no order for penal costs under para 10 to Schedule 12 of the Commonhold and Leasehold Reform Act 2002.

Chairman:  Mrs V.T.Barran BA (Oxon)

Date 3 March 2006

ANNEX

1. INTRODUCTION

1.01 The preparation and form of the Scott Schedule is required and explained by "Decisions and Directions by Leasehold Valuation Tribunal for the London Rent Assessment Panel dated 25 November 2005".

1.02 The Scott Schedule has been priced as follows:-

a. In respect of items 1, 2, 3, 4, 5, 18 & 21 by reference to CUC Clifford quotation dated 11/2/2004, notification of increased cost as Cartwright Marston letter dated 18/6/2004 and further advancement to a start of 1 March 2006 by use of the BCIS General Building Cost Index. Reference was also made to CUC Clifford letter to Martin Ryan dated 21/9/2004 which amongst other things, identifies the cost of scaffolding. See Appendix A for these quotations.

b. In respect of items 6,7,8,9 and 17, by rates analogous to the those contained in the documents above.

c. In respect of items 10, 11, 12, 13, 15, 16, 19, 20, 22, 23, 24 and 27 by assessment.

d. In respect of items 14 & 26 by rates similar to Spons Architects and Builders price Book 2006 Edition.

e. In respect of item 25, by quotations contained in Appendix B.