IN THE LEASEHOLD VALUATION TRIBUNAL

CHI/43UF/LSC/2005/0080

IN THE MATTER OF 38 ST LEONARDS ROAD, EPSOM, SURREY, KT18 5RL

BETWEEN:

LOUISE RANKIN

Applicant

-and-

REIGATE & BANSTEAD HOUSING TRUST

Respondent

THE TRIBUNAL'S DECISION

Background

1. Unless stated otherwise, the page references in bold herein are to the pages within the Respondent's bundle of documents.

2. This is an application made by the Applicant pursuant to s.27A of the Landlord and Tenant Act 1985 (as amended) ("the Act") for a determination of her liability to pay by way of contribution and the reasonableness of those service charges in relation to the installation of double glazing to the block of flats in which she lives. Although in her application, the Applicant sought a determination for other service charges in relation to other service charge years, at the pre-trial review hearing on 28 September 2005, she confirmed

that her application was limited to the issue of the double glazing. On the originating application, the Applicant also made an application under s.20C of the Act seeking an order from the Tribunal disentitling the Respondent from recovering in whole or in part any costs it had incurred in these proceedings. However, at the hearing, it was helpfully conceded on behalf of the Respondent that it would not be seeking to recover any such costs against the Applicant.

3. The Applicant occupies the subject property by virtue of a lease dated 20 June 1988 granted by the Council Borough of Reigate and Banstead to Terry William Mears and Rosemary Jane Mears for a term of 125 years from the same date ("the lease"). The Applicant took an assignment of the lease on 10 January 2003. At the time the Applicant had taken the assignment of the lease, her predecessors in title, Mr and Mrs Mears, had replaced the windows in the subject property with double glazed windows during the 1990's. The transfer of the Council's housing stock to the Respondent, which included the subject property, took place on 25 March 2002.

4. In clause 3(A) of the lease, the lessee covenanted to:

> *"...pay to the Council such annual sum as may be notified to the Lessee by the Council from time to time as representing the due proportion of the reasonably estimated amount... to cover the costs and expenses incurred or to be incurred by the Council in carrying out the obligations or functions contained in or referred to in this Clause or clauses 5 6 and 7 hereof and in the covenants set out in the Ninth Schedule hereto... (such costs and expenses being hereinafter together called "the service charges")... to be payable half yearly in advance on the 24 June and the 25 December... ".*

Clause 3(A) goes on to provide that the total service charge amount demanded by the lessor may include a further amount to create a reserve fund to meet any future liability of carrying out major works to the property. It also provides that the service charges are to be paid by equal half yearly instalments on the dates set out above apportioned to the next rent day. Clause 1 of the lease provides that the ground rent shall be payable in advance on 24 day of June in each year. Although it is not expressly stated in the lease, it is clearly intended that each annual service charge period should commence on 24 June in each year to 23 June of the following year.

5. In clause 5 of the lease, the lessor covenanted to perform and observe the covenants and obligations set out in the Ninth Schedule. In that Schedule, the lessor covenanted to repair and maintain (including the renewal and replacement of all worn and damaged parts) the main structure of the property which included, *inter alia*, the windows in the property.

6. Having properly tendered and consulted, the Respondent replaced the existing single glazed windows in the Applicant's block of flats and the estate generally with double glazed units. However, the Applicant elected not to have her windows replaced because she already had double glazed windows. The installation of the double glazed windows generally was completed in November 2005. The Tribunal was told at the hearing that the final account for the installation of the windows was not as yet available but that the Applicant's estimated liability was approximately £4,500 and arose in the 2005/2006 service charge year.

7. On 14 March 2005, the Respondent served on the Applicant a Notice of Proposals to enter into a long term agreement regarding the windows of the leaseholders and invited written observations. In the ensuing correspondence between the parties, the Applicant maintained her pleaded case. Essentially, that was:

(a) that the Respondent's repairing obligation in the lease did not extend to the windows of her flat and, therefore, it was not entitled to recover any contribution from her through the service charge account for the installation of the double glazing.

(b) that leaseholders should not be required to subside the cost of the replacement windows for the premises occupied by secure tenants of the Respondent. Alternatively, the cost of replacing the windows was not reasonable.

The Respondent did not accept the Applicant's arguments and insisted that under the terms of her lease she remained liable to contribute 18.57% of the cost attributable to her block of flats. On 23 August 2005, the Applicant issued this application.

Inspection

8. The Tribunal inspected the subject property on 6 January 2005. The property comprises a ground floor purpose built flat in brickwork elevations under a

tiled roof. No internal inspection was made as the Tribunal were informed that there were no issues between the parties concerning the interior.

Hearing

9. The hearing in this matter also took place on 6 January 2005. The Applicant was represented by Miss Cox. The Respondent was represented by Mr Parsons, a solicitor.

10. At the commencement of the hearing, Miss Cox conceded that the replacement of the existing windows in the Applicant's block of flats and the estate generally had reasonably been incurred and that the works formed part of the Respondent's repairing obligations under the lease. Miss Cox then proceeded to advance a different case than the one pleaded by the Applicant. No objection was made on behalf of the Respondent. Miss Cox made 3 broad submissions. They were:

(a) that the replacement of the existing single glazed windows with double glazed windows amounted to an improvement. It was not necessary or desirable and, therefore, limited by the effect of clause 7(B) of the lease.

(b) that clause 7(A) imposed an obligation on the Respondent to manage the property in a proper of reasonable manner. The Respondent had breached that obligation by failing to establish a sinking fund to afford the Applicant and other leaseholders some financial protection.

(c) clause 3(A) of the lease stated that the Applicant's liability for service charges was a "due proportion" and that 18.57% was not a due proportion because she had received no direct benefit.

Each of these submissions is considered in turn below.

Repair/Improvement

11. Miss Cox submitted that the Respondent's obligation set out in paragraph 1 of the Ninth Schedule of the lease in relation to the windows was limited to their repair and renewal. They must be returned to their original state. The Tribunal was referred to Dowding on Dilapidations (pp. 193-194) where the distinction between repair and improvement was considered in detail. Miss Cox further submitted that the word repair should be given its ordinary meaning (see: ***Post Office v Aquarius Properties Ltd*** [1985] EG 107 at C) and in this instance the installation of double glazing amounted to an improvement. Both the Respondent's surveyors and its Deputy Director of Operations (Technical), Mr Cogbill, accepted that it probably was an improvement **[p. 33 para. 18 & p. 65 para. 6.3]**.

12. Miss Cox accepted that clause 7(B) and paragraph 6 of the Ninth Schedule of the lease allowed the Respondent to carry out improvements which it *"reasonably considers necessary and/or desirable"*. She submitted that it was not strictly necessary to install double glazing. Paragraph 5 of the Ninth Schedule required the Respondent to keep the property in a condition to its present state and condition. In other words, the Respondent was expected to

repair not improve the property by installing double glazing. It was further submitted on behalf of the Applicant that the improvement made by the double glazing was not desirable. The reversionary interest was not due until 2113, a long time. In the interim, the property had been improved at the expense of the tenant. In addition, there was no evidence to suggest that it would be easier to maintain the double glazed windows. No other options had been considered by the Respondent in relation to the windows.

13. Mr Parsons, for the Respondent, submitted that the test to be applied when considering whether something amounted to a repair or improvement was the one set out by Mr Justice Forbes in ***Ravenseft Properties Ltd v Davstone (Holdings) Ltd*** [1979] 37 P & CR 502. In that case it was held that:

> *"The true test is, as the cases show, that it is always a question of degree whether that which the tenant is being asked to do can properly be described as repair, or whether on the contrary it would involve giving back to the landlord a wholly different thing from that which he demised."*

Mr Parsons contended that the windows needed replacing and to do so would not take it out of the ambit of what amounted to repair. It was a question of fact and degree. Even if the works were wholly improvements, the Respondent considered them to be wholly necessary and desirable. The Respondent was entitled to rely on the advice of its expert report, which recommended that as the windows were 37 years old, they should be replaced in the first year **[p.97]**. The Respondent had acted reasonably by replacing the existing windows to take account of the changed in modern building standards. In reply, Miss Cox submitted that ***Ravenseft*** simply imported a

stricter standard on repair. The repair and improvement clauses in the lease were mutually exclusive.

14. Mr Parsons distinguished the ***Post Office*** case on the basis that it involved large structural changes. In the present case, the changes were limited replacing one set of windows with another.

15. It is clear from the authorities to which the Tribunal was referred by the parties that to distinguish between what amounts to a repair as to an improvement, where possible, the word "repair" should be given its ordinary meaning. That is, *"would an ordinary speaker of English... consider that the word repair... to describe the work which has to be done"*. It is also a question of fact and degree in each particular case. It was submitted by Mr Parsons that by installing double glazing, the Respondent did not materially change or alter the property, as was the position in the ***Post Office*** case and could not amount to an improvement. However, the Tribunal did not accept that submission. It was material that both the Respondent's expert surveyor and its Deputy Director of Operations (Technical), Mr Cogbill, accepted that the installation of double glazing was an improvement. In the Tribunal's judgement, the ordinary meaning of repair in this instance would not involve the complete replacement of the existing single glazed windows with double glazed units. The installation of double glazing to a property was generally considered to be an improvement and provided advantages in relation to sound proofing and thermal insulation. The Tribunal, therefore, found that the installation of double glazing to be an improvement.

16. The Tribunal then considered whether the installation of double glazing was both necessary and/or desirable. On balance, the Tribunal's judgement it was. It found that the Respondent was entitled to rely on the expert advice given by FPD Savills given in its report dated November 2001. At paragraph 11 of the report, they concluded that the Respondent's housing stock had suffered from a lack of planned maintenance over a number of years and recommended that the existing windows be replaced with PVCu **[p.72]** and that as they were 37 years old, they should be replaced in the first year of the planned works. The Tribunal's did not accept the Submission made by Miss Cox that the installation of double glazing was not strictly necessary and that repairs should have been effected to the existing Crittal windows. In the Tribunal's expert opinion, the cost of repairs would have been disproportionate having regard to any increase gained in the lifetime of the existing windows.

17. It was also perhaps material that the Applicant's predecessors in title had felt it was a necessary and desirable improvement to install double glazed windows instead of replacing the existing windows with further single glazed ones. Undoubtedly, in doing so, they had in mind the advantages provided by installing double glazing rather than continuing to retain single glazed windows. It may well be that the presence of double glazed windows had been a factor that influenced the Applicant to purchase the property.

18. It is also clear that by installing double glazed windows the Respondent, as a social landlord, was bound by the Decent Homes Initiative ("DHI"). The

Tribunal accepted the evidence of Mr Cogbill that to replace the existing windows with single glazed windows would have failed the DHI criteria relating to the thermal comfort of tenants. The existing windows were in fact 7 years older than the life expectancy of 30 years set out in the DHI guidance. Although it was accepted by Mr Cogbill in cross-examination that the DHI criteria did not specifically mention the installation of double glazing, it would be difficult, in the Tribunal's view, to imagine how the thermal criteria would have been met otherwise than by installing double glazing.

19. It was suggested by Miss Cox that it was not cheaper or easier to maintain double glazed windows and that no other options had been considered by the Respondent. However, the Applicant adduced no evidence to support these propositions. There was no evidence before the Tribunal that it would be more expensive to maintain the double glazing and that cheaper options had been available to the Respondent. As to the improvement of the property at the expense of the tenants, the Tribunal did not consider this to be relevant. Both under clause 7(B) and paragraph 6 of the Ninth Schedule, the Applicant is required as a matter of contract to contribute towards the cost of any improvements made by the Respondent and that obligation in not qualified. Accordingly, the Tribunal found that the installation of double glazing amounted to an improvement and that it was both desirable and/or necessary for the reasons set out above.

Failure to Establish a Sinking Fund

20. Miss Cox submitted that clause 3A of the lease gave the Respondent a discretion to establish a sinking fund to protect tenants, especially those on a low income, from large service charge bills. The Respondent had known of the proposed major works to the estate for some time. By failing to establish a sinking fund, the trust had acted unreasonably and outside the terms of the lease. The Respondent was, therefore, not entitled to recover the contribution from the Applicant for the cost of the double glazing.

21. Mr Parsons submitted that under clause 3(A) of the lease, the Respondent had an absolute discretion as to whether or not it established a sinking fund. The Applicant had been aware prior to her purchase of the property that the window replacement was being proposed and that there were no monies in the sinking fund. Mr Parsons further submitted that the Respondent had acted reasonably in relation to the cost of the work. It had properly tendered for the work and had accepted the cheapest tender.

22. The Tribunal did not consider there was any merit in the submission made by Miss Cox on this point. To seek to imply that there was a duty of care on the part of the Respondent to establish a sinking fund is to read too much into clause 3(A) of the lease. The Tribunal agreed with Mr Parson's submission that the clause provided the Respondent with an absolute discretion, which it could exercise unconditionally. In the exercise of that discretion, it was not necessary for the Respondent to have regard to the financial constraints or otherwise of any one or more tenants. Miss Cox conceded that there were no

decided cases on this point. The Tribunal was satisfied that the Respondent had acted reasonably by properly tendering for the work and acceping the cheapest estimate.

Due Proportion

23. It was common ground that clause 3(A) of the lease provided that the Applicant's service charge contribution should be a "due proportion" of the total service charge expenditure incurred by the Respondent in any given year. It was also common ground that both the Applicant had her predecessors in title had always paid a contribution of 18.75%.

24. Miss Cox submitted that in the absence of the Applicant's service charge contribution being expressly stated in the lease, "due proportion" needed to be construed by looking at the benefit gained by her. Although not directly on the point, Miss Cox referred the Tribunal to the High Court case of ***Scottish Mutual Assurance plc v Jardine Public Relations Ltd*** [1999], where the term "fair proportion" was considered in the service charge clause of a commercial lease. In his judgement, Mr D Blunt QC (sitting as a Deputy High Court Judge) construed "fair proportion" should reflect the short term of the lease and other considerations referred to in the judgement. By analogy, Miss Cox submitted that as the Applicant already had double glazed windows, she had received no direct benefit from the work and, therefore, her liability should be nil.

25. Mr Parsons submitted that both parties had always acted on the basis that the Applicant's liability was 18.75% and that figure should be upheld by the Tribunal. Apparently, that figure had been calculated by reference to the rateable value of the property. Mr Parsons relied on the case of ***Broomleigh Housing Association Ltd v Hughes*** [1999] where the Defendant contended that she should not have to contribute to the cost of carrying out the work to other flats in the block because no work had been carried out to the windows in her flat. That argument was rejected by the Judge who effectively held that, the fact that a particular tenant did not receive any direct benefit from works carried out to a property, did not vary the obligation to contribute nevertheless to the total service charges incurred. Miss Cox contended that ***Broomleigh*** was not relevant because the lease in that case specified the tenant's service charge contribution.

26. Although the lease in the instant case does not expressly state as a figure the Applicant's service charge liability, it is clear that the Applicant has a liability to pay a "due proportion" in any given service charge year. The service charge clause is silent as to whether or not the Applicant's liability to pay is consequential upon any benefit gained by her. In other words, the lease envisages that the Applicant has to pay something rather than nothing by way of a service charge contribution. Indeed, that is what was decided in ***Scottish Mutual***. The Tribunal was also assisted by the dictum of the Learned Judge in ***Broomleigh*** when he said:

> *"... the position will often happen that a tenant is being called upon to contribute to costs which are attributable to the landlord's work being done to other flats and in such a situation all have to contribute. The same would happen if in fact in a few years or so Miss Hughes' (the*

Defendant) windows were the only windows requiring replacing. This is a consequence of the standard service charge provision which relates to a block of flats."

In the Tribunal's view, this dictum applies with equal force in this matter and for the same reasons it did not accept that the argument that the Applicant's liability should be nil because she had received no direct benefit because her windows had not been replaced. This did not vary her contractual position under the terms of her lease. The issue was, therefore, what amount was a "due proportion" under the lease? In the Tribunal's judgement, this was clearly 18.57%. This was the amount paid by the Applicant's predecessors in title and the Applicant when she took an assignment of the lease. The Applicant had not complained about the level of her contribution before now and had historically paid her service charges calculated in this way. Indeed in her originally pleaded case, the Applicant only complained about the lack of benefit gained by her and the element of subsidy to the other tenants. The Tribunal considered that the figure of 18.75% calculated by reference to the rateable value of the Applicant's premises was both rational and equitable. The Tribunal, therefore, found that an estoppel by convention arose and that the Applicant could not now seek to argue that the figure of 18.75% was now unreasonable.

Reimbursement of Fees

27. It is not known if the Applicant had incurred any fees in bringing this application. In the event that she did, the Tribunal makes no order under Regulation 9 of the Leasehold Valuation Tribunals (Fees) (England)

Regulations 2003 because the Applicant has not succeeded on any of the issues brought in this application.

Dated the 22nd day of February 2006

CHAIRMAN.....
Mr I Mohabir LLB (Hons)