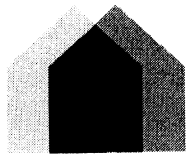

Residential
Property
TRIBUNAL SERVICE

LONDON RENT ASSESSMENT PANEL
LEASEHOLD VALUATION TRIBUNAL

Case Reference: LON/00AC/LSC/2006/0184

DECISION OF THE LEASEHOLD VALUATION TRIBUNAL ON AN APPLICATION UNDER SECTION 27A OF THE LANDLORD & TENANT ACT 1985

Applicant:	Pledream Properties Limited
Respondent:	The Lessees of Russell Court
Premises:	Russell Court, Station Approach, New Barnet, Herts EN5 1LW

Date Of Application: 03 July 2006

Date Of Oral Pre-Trial Review: 29 August 2006

Appearances for Applicant:
Mr R Jenkins of Pledream Properties Ltd
Mr T Rushton

Appearances for Respondent:
Mr B R Maunder Taylor
Mrs P O'Connor – Lessee of Russell Court

Members of Leasehold Valuation Tribunal:
Mr I Mohabir – Chairman
Mr L Jacobs
Mr D Wilson

Date of Tribunal's Decision: 15 January 2007

IN THE LEASEHOLD VALUATION TRIBUNAL

LON/00AC/LSC/2006/0184/01

IN THE MATTER OF RUSSELL COURT, STATION APPROACH, NEW BARNET, HERTS, EN5 1LW

AND IN THE MATTER OF SECTION 27A OF THE LANDLORD AND TENANT ACT 1985

BETWEEN:

PLEDREAM PROPERTIES LIMITED

Applicant

-and-

THE LESSEES OF RUSSELL COURT

Respondents

THE TRIBUNAL'S DECISION

Background

1. Unless stated otherwise, the page references herein are to the pages within the agreed trial bundle.

2. This is an application made by the Applicant, as freeholder, pursuant to s.27A of the Landlord and Tenant Act (as amended) ("the Act") for a determination of the Respondents liability to pay a proportion of service charges totalling £76,189.30 arising in the 2005 service charge year. It is accepted by the Respondents that neither the quantum of the disputed service charges or the

standard of the works to which they relate are in issue. The only issue before the Tribunal is whether the disputed sums are payable by the Respondents under the terms of their respective lease.

3. As to the leases, the Tribunal was provided with a copy of the lease relating to Flat 8 in the building. It is common ground between the parties that the relevant service charges provisions are the same for each of the Respondents' leases. There was also no dispute between the parties as to how the contractual liability of the lessee to pay service charges arose under the terms of the leases. It is, therefore, not necessary to set out here the details of the relevant terms, save as follows.

4. Clause 3(1) contains the lessee's covenant to pay the service charge. Clause 3(2) requires the lessee to contribute 1/18th of the Annual Service Cost. Clause 3(3) provides that the lessee shall pay the sum of £60 on account and in advance on 25 March and 29 September in each year. Clause 3(4) requires the lessee to pay any shortfall, if any, between the interim service charges paid by the lessee and the actual expenditure incurred by the lessor.

5. Clause 3(5) set out the costs that can form part of the annual service charge expenditure, which includes both direct and incidental costs incurred by the lessor in the performance of the covenants contained in clause 5. One of the covenants given by the lessor, at clause 5(4), requires it to:

> *"... maintain the exterior of the flat and the Building including the roof walls timbers sewers drains pipes watercourses cisterns gutters gas*

water and electric pipes or installations ... ... and the tank in the loft or other conveniences which shall belong to or serve or be used for the flat and the Building in good repair and condition and properly maintained...."

6. The factual background that gave rise to this application is as follows. On 29 January 2003 a fire broke out in one of the top floor flats that completely destroyed the roof and the entire top floor of the building apart from the external load bearing brick walls. The building was insured with Norwich Union and it accepted liability to reinstate the building to its former condition. The firm of surveyors appointed by Norwich Union were Watts and Partners ("Watts"). One of the contracts they were instructed to prepare was for the specification of works necessary to reinstate the building. Eventually, the contract for the works was awarded to W. T. Cuffe (Construction) plc and work commenced in November 2003 with a scheduled completion date of 28 June 2004.

7. At the commencement of the works, it was discovered that they were several defects to the building that were previously unknown and were not caused as a result of the fire. These defects mainly related to timber decay to the floor structure of the lower ground floor and the ingress of surface water to the sub floor void. In addition, Norwich Union stipulated as a "risk improvement" that all communal lead pipe work be replaced as a condition of the continuation of insurance cover in the future because of the alleged claims history for water damage caused by the ageing original lead pipes. This

involved the installation of new water mains and down feeds. The cost of the works required to remedy the timber decay and the installation of the new water mains and associated pipe work was not covered under the terms of the Norwich Union buildings insurance policy. These costs are the subject matter of this application, which the Applicant seeks to recover from the Respondents by way of the service charge. It is also common ground between the parties that the Applicant had not consulted the Respondents in accordance with s.20 of the Act. No application had been made by the Applicant to dispense with the consultation requirements imposed by the Act nor has such an application been made in these proceedings.

8. The cost of installing the new water mains and associated pipe work was £39,317.84. Of that sum, the Respondents contend that the Applicant is not entitled to recover any of this amount or, alternatively, that if the Applicant does have such an entitlement, it ought to be limited to the statutory sum of £250 per lessee as the Applicant had not consulted in accordance with the requirements of s.20 of the Act.

9. The cost of the repairs for the timber decay was £7,545.64. Of that sum, the Respondents contend that £6,771.70 is irrecoverable by the Applicant because these costs are not properly service charge costs recoverable under the terms of the leases. In the alternative, the Respondents contend that the statutory cap should also be applied in relation to these costs, again, because of the Applicant's failure to consult in accordance with s.20 of the Act.

Inspection

10. The Tribunal inspected the building on 20 November 2006 and found it to be a four storey high block of 22 (?) flats with brick elevations, and a concrete tiled pitched roof accessed by two entrances leading to communal uncarpeted timber staircases and inter-connecting corridors constructed circa 1960. The fourth storey accommodation in the roof space was the result of works undertaken at the same time as the fire reinstatement contract.

Decision

11. The hearing in this matter commenced on 20 November 2006. The Applicant was represented by Mr. Jenkins. The Respondents were represented by Mr. Maunder-Taylor, a Chartered Surveyor.

(a) New Water Mains and Associated Pipework

12. Mr Rushton, a Partner in the firm of Watts & Partners, was called by the Applicant to give evidence in relation to the matters in issue. Mr Rushton candidly admitted that he did not have any personal knowledge of this matter. He was giving evidence on behalf of the Applicant because the surveyor who had conduct of this matter had in fact left the firm. His evidence was, therefore, hearsay and the Tribunal attached less weight to it than if the matters upon which he gave evidence were within his personal knowledge.

13. In the Applicant's statement of case, which appears to have been prepared by Mr Rushton, it is stated that once the work of stripping out the lead pipework

commenced, it was discovered that there were not five separate connections to the mains water supply, as had been assumed. It was established that there was only one connection to the mains water supply below the building supplying five lead rising mains to five water tanks in the destroyed roof space. Consequently, Gifford & Partners, building services engineers, were commissioned by Watts to revise the plumbing installation design in order to achieve an adequate water supply to all of the flats in the building. This involved the installation of new cold water storage tanks in the roof space and the installation of new down feeds in addition to the new rising mains.

14. In cross-examination by Mr Maunder-Taylor as to the necessity to replace the water mains and associated pipework, Mr Rushton reiterated that it was done at the insistence of Norwich Union. He referred the Tribunal to a letter written in those terms by Norwich Union to the insurance brokers dated 30 December 2003 (V3/Tab 9). He said that the Applicant was required to do so to comply with the insuring obligation imposed by clause 5(3) of the leases. Otherwise, Norwich Union would not renew the policy of insurance.

15. It appears that the decision to replace the water mains and other pipework was taken as a result of a review undertaken on 23 October 2003 by a Mr Wayne Morris, who is the senior property underwriter for Norwich Union. His decision was based on the claims history of water leaks in the property and on a survey report. Norwich Union were not prepared to release a copy of this survey report on the basis that it was confidential nor would they divulge any

of its findings. Mr Rushton conceded that he had not inspected the water mains and could not comment on its condition prior to replacement.

16. As to the claims history of water damage provided by the Applicant's insurance broker (V1/60), Mr Rushton asserted that the claims recorded were as a result of defects in the rising mains but later conceded that there was no *prima facie* or other evidence that the leaks had in fact been caused by defects in the rising mains or associated pipework. He further conceded that he could not personally comment on the condition of the lead pipework generally in the building.

17. There was no evidence that either the water main, rising mains or other associated pipework in the property was in disrepair. Mr Rushton could give no evidence that they were. The Tribunal found no assistance from the other documentary evidence before it to make a finding that those items were in disrepair.. Included in the original tender document prepared by Watts was a provisional sum "to strip out the existing lead water main to each flat including new meters to the gas cupboard within each hall, leave ready to connect to internal distribution". The Tribunal heard evidence from Mr Rushton that this was included in the original specification because an assumption that the water mains and/or rising mains would need to be replaced. No actual investigation was made by Watts about whether these works were actually required. It was, mistakenly, thought that there were five connections to the mains water supply. Subsequently, the loss adjusters,

Crawford & Co, decided that this work should be omitted from the original scope of works required.

18. Gifford & Partners were then instructed at the end of October or early November 2003 by Watts. On 28 November 2003, they produced a technical specification that excluded any work to replace the rising mains. The decision taken by Mr Morris at Norwich Union requiring the works to be carried out was apparently verbally conveyed to the Applicant in or about October 2003. However, this was not confirmed in writing until December 2003. This decision was based on commercial reasons of "risk improvement" and was in effect a preventative measure against the possibility of future leaks occurring. None of these decisions, whether taken by Watts, Gifford & Partners, the loss adjusters or Norwich Union was based on the fact that either the water mains, rising mains and associated pipework were in disrepair. The decision to include or omit these works appears to have been variously taken for other reasons based on mistaken assumptions and commercial considerations.

19. As to the claims history of water leaks in the property, this does not provide any explanation about the case of leaks that occurred. The explanation for those leaks may have been as a result of other occurrences. No conclusive evidence was adduced by the Applicant that they were a consequence of disrepair to the internal lead pipes. The evidence provided only shows evidence of leaks from Flats 6 and 11. The survey report undertaken by Mr Morris may have provided evidence of disrepair, but this was not disclosed by Norwich Union. The only evidence, at its highest, is contained in a file note

prepared by the managing agent (V1/79) referring to a leak to either Flats 11 or 16 allegedly caused by a leaking rising main. This occurred on 20 December 2003. However, it appears that on 2 January 2003, it had been repaired (V1/87). Materially, Mr Jenkins conceded that there was no evidence of disrepair to the mains generally.

20. The Tribunal agreed with the submission made by Mr Maunder Taylor, in closing, that the obligation on the Applicant to carry out the works did not arise under clause 5(3) of the leases as propounded by Mr Rushton. A proper reading of this clause reveals that the only obligation imposed on the Applicant is to insure the building and nothing else. The performance of that obligation is not dependant on carrying out any necessary works of repair. The Tribunal also agreed with Mr Maunder Taylor's further submission that the relevant clause in the leases that imposed a repairing obligation on the Applicant was clause 5(4). Specifically, that obligation in relation to the mains and other pipework was for the Applicant to keep them in repair. The inference to be drawn is that is that, firstly, they must be shown to be in disrepair. On any view, there was no evidence of this here and this was conceded by Mr Jenkins. There was, therefore, no obligation on the Applicant to do anything. It follows that these costs are not recoverable as a service charge under clause 3 of the leases and the Respondents have no liability to pay any of these costs under the terms of the lease. In view, of the Tribunal's findings, it was no necessary for it to go on to consider the s.20 point raised by Mr Maunder Taylor.

(b) Timber Repairs & Damp Proofing

21. The costs claimed by the Applicant are £7,545.64. They were incurred by having to carry out repairs to the floor structure of the main bedroom and part of the hallway of Flat 1, which is located on the ground floor of the property. In addition, there was ponding beneath the floor joists. Watts concluded that these matters predated the fire and was caused by the ingress of rainwater on the external rear path, seeping through the airbricks on the rear elevation. This necessitated the entire floor structure of the main bedroom and part of the hallway being stripped out, because it was affected by dry rot, along with the timber sole plate supporting the partition wall between the two bedrooms. The floor structure was reinstated in timber and a new concrete slab with an integral damp proof membrane installed in the sub-floor void. Similar works were carried out to the meter cupboards to the entrances of Flats 1 and 1A on the lower ground floor and the joists of Flats 2 and 3.

22. Again, Mr Rushton was unable to give any substantive evidence of this matter, as he could not speak from personal knowledge. Mr Maunder-Taylor, perhaps unfairly, asked him if this disrepair could have been discovered if the managing agent had properly discharged its duties by carrying out annual inspections. Rightly, Mr Rushton said that he could not comment on the alleged failings or otherwise of the managing agent.

23. Mr Maunder-Taylor submitted that the repairing obligation imposed on the lessor by clause 5(4) in relation to "timbers" did not extend to the flooring or joists of the affected flats. The timber repairs and damp proofing carried out

fell within the demise of each of the premises and the repairing obligation was, therefore, on the lessees to carry out those repairs and not the Applicant. This was consistent with the advice given by the managing agent to the lessee of Flat 1 on 1 November 2004 (V1/58). Accordingly, these costs were not recoverable by the Applicant as a service charge. The legal advice received by the Applicant from its solicitors dated 24 October 2006 (V1/88) largely contradicts this submission. However, in accordance with that advice, the Applicant conceded that the floorboards fell within the demise of each flat and the cost of these repairs was not recoverable. The original sum of £9,460.64 claimed was, therefore, reduced to £7,545.64.

24. The Tribunal did not accept the submission made by Mr Maunder Taylor. The lease (at V1/22) demises the flat together with "such easements of support as are appurtenant to the flat". In the Tribunal's view this included the structural timbers of which the joists form part. The lease also grants the tenant the right to use those matters set out at the bottom of page 2 of the lease. Clause 1 specifically reserves the right to the landlord to maintain them. These would include such things as wiring, pipework and conduits that would pass through the various joists in the building. Reserving these matters to the landlord is consistent with the repairing obligation imposed by clause 5(4) and fell within the generic description of "timbers". Otherwise, if Mr Maunder Taylor's construction of clause 5(4) was correct, the landlord's repairing obligation in relation to the wiring, pipework and conduits passing through the joists would be to be unmanageable. When required, the landlord on each occasion would need the licence or consent of the tenant of each flat. This clearly could not

have been the intention when the leases were granted by the then freeholder. As neither the quantum of the costs nor the standard of the works carried out was challenged as being unreasonable, the Tribunal allows the sum of £7,545.64 as being reasonable. However, the amount of those costs for which the Respondents are presently liable is subject to s.20 considerations dealt with below.

(c) Preliminary Costs

25. At page 7 of the Applicant's statement of case it was stated that the cost of works (which were originally sought) as recoverable by way of service charges represents slightly less than 6% (5.97988%) of the total cost of the (uninsured) works. The total cost of the Preliminaries was placed at £184,344.19 and the pro-rata amount sought to be recovered on page 43A is £10,607.08. This method of doing so was not challenged by Mr Maunder Taylor as being incorrect. However, the original specification upon which the successful tender was based did not include the additional timber and damp proofing works. Nevertheless, in the final account, which included all of the additional works, the preliminary costs did not vary. Therefore, no preliminary costs could have been incurred in relation to the additional works carried out. Only the water main was specified and these costs have been disallowed by the Tribunal. It follows that if the sums allowed by the Tribunal did not attract preliminary costs then they are not recoverable against the Respondents. The Tribunal, however, considered that the method applied to recover Preliminaries costs by way of Service Charges is not unreasonable. Accordingly, the Tribunal applied the same method in apportioning the sum

allowed for the cost of Preliminaries for those works, which are chargeable as Service Charges being £2,075.20

Section 20

26. The amounts allowed by the Tribunal form part of the total cost of the works carried out by the Applicant. Those costs amount to "relevant costs" within the meaning of s.20 of the Act. It was common ground that the Applicant had not consulted the leaseholders in accordance with the requirements of s.20 in relation to those works. Therefore at the present time, of the sums allowed by the Tribunal, only a maximum contribution of £250 per lessee is recoverable against each of the Respondents because no application had been made under s.20ZA of the Act by the Applicant to dispense with the consultation requirements. At the outset of the hearing, the Tribunal had raised the matter of the application to dispense. Mr Jenkins, for the Applicant, agreed to stay any such application until the Tribunal's decision had been handed down. Both parties indicated that if and when such an application is made by the Applicant, they were content for that to be dealt with entirely on the basis of written representations and that Directions be given without the need for a pre-trial review hearing. Given that this Tribunal is already familiar with the facts of this case, it directs that if an application is made to dispense by the Applicant, that application is to reserved to this Tribunal.

Dated the 15 day of January 2007

CHAIRMAN.....

Mr I Mohabir LLB (Hons)