RESIDENTIAL PROPERTY TRIBUNAL SERVICE

LEASEHOLD VALUATION TRIBUNAL FOR THE LONDON RENT ASSESSMENT COMMITTEE

Case No. LON/00AW/LSL/2004/0033

In the matter of 5 Apollo House London SW10 0DW

Landlord and Tenant Act 1985 section 27a and section 20C(as amended)

Parties

Mr and Mrs W Kunicki **Applicants**

The Royal Borough of Kensington and Chelsea
Respondents

Appearances

For the Applicant

Mr and Mrs Kunicki
Mr N Hayday and Miss C Jones **College of Law**

For the Respondent

Mr R Bhose	**Counsel**
Ms C Vachino	**RBKC**
Mr M Peach	**RBKC**
Mr C Haughton MRICS	**J Shreeves**

Application date 8th March 2004

Hearing date 27th and 28th July 2004

Committee

Mr A A Dutton (Chair)
Mr M Mathews
Dr. A Fox

Decision date 7 **September 2004**

A. Background

1. This application was made by Mr and Mrs Kunicki ("the Applicants") under section 27A Landlord and Tenant Act 1985 ("the Act")in respect of major works ("the Works") carried out under the terms of a specification prepared on behalf of the Royal Borough of Kensington and Chelsea ("the Respondents") by John Shreeves and Partners in June 2002 ("the Specification").

2. The Works to the block known as Apollo House included the replacement of the windows, repair to concrete walkways, replacement of the balustrading and the installation of a door entry phone system.

3. The Applicants occupy under the terms of a lease dated 16th October 1989 made between themselves and the Respondents following the exercise of their right to buy. We shall refer to those terms of the lease, which are relevant to these proceedings in due course. At the time of their purchase the Applicants were served with a notice under s125 of the Housing Act dated 23rd February 1989 recording certain structural defects, including the need for concrete repairs.

4. Apollo House comprises some 42 one-bedroom flats in two interlinking blocks of 3 and 4 storeys. It forms part of the Cremone Estate of which there are, in total, 9 low-rise blocks, which have, or will, undergo major works.

5. It is helpful to set out some of the chronology relevant to this matter.
   - In 1997 the Applicants were served with a section 20 notice setting out certain works, which included window repair and replacement works which appear from the papers before us to have been concluded sometime on 1998.

- In October 2000 the Respondents instructed John Shreeves and Partners to prepare a feasibility study based upon a brief prepared by the Respondents. The briefs aims were, amongst other matters, to consider repairs to the concrete and the associated renewal or alteration of the balustrading to access decks and advise on window refurbishment to provide a 30-year life span with low cost maintenance. This feasibility report was prepared and is dated May 2001. As to the windows the report identified early signs of timber decay to the windows in Apollo House. It concluded with a strong recommendation to install aluminium double glazed windows. As to concrete repairs a specialist contractor was called in and the recommendations set out in the report. These included a detailed survey and the carrying out of all necessary repairs. The report recommended the enclosure of the ground floor walkway not only for security purposes but to improve the overall appearance. This work was not only as a result of the concrete repairs but as part of the improvement of security to the block.

- Following approval of the scheme planning permission was obtained for the works and after a second public exhibition in May 2002 tenders were sent out. Six contractors returned them to the Council and in October 2002, after the section 20 procedures had been complied with the contact was awarded to Apollo (London) Ltd with an estimated liability to the Applicants of £22915.84.

- It appears that the works commenced sometime in February 2003 and, subject to snagging, a certificate of practical completion was issued towards the end of April 2004, a total sum of £2,037,577.72 having been paid.

B. The issues

6. The Applicant raises the following issues:

- Whether the replacement of the windows was an improvement, which as conceded by the Respondent would not be within the terms of the repairing covenants contained in the lease.
- Whether the replacement of the windows was necessary and reasonable
- Whether the installation was to a reasonable standard and at a reasonable cost
- Whether the replacement of the balustrading was an improvement and whether the costs were reasonable
- Whether the resurfacing of the walkways was an improvement and whether the work was to a reasonable standard
- Whether the application should be under s27A(3) rather than s27A(1) as the costs demanded of the Applicants are estimated only, in the absence of completion of the works pending snagging.

7. The issue concerning the door entry telephone system initially raised by the Applicant as it had not been installed was not pursued although complaint as to the standard of work was raised at the hearing by the Applicants.

C. The hearing

8. Miss Jones, on behalf of the Applicants opened their case addressing us on the financial and welfare impact that the demand for payment of the monies had on the Applicants. She confirmed that the issues related in the main to the windows and the balustrading. She argued that the works to both were improvements and that the lease did not provide for the Respondents to replace the glazing in the windows. She relied on the case of Mullaney v Maybourne Grange (Croydon) Management Co Ltd.

9. She told us that the Respondents had already replaced the windows to the bedroom and the living room in 2000 and that the costs of the

replacement windows, at over £8000, were too high. We were referred to a report prepared by Mr S P Cockram FRICS dated 7th May 2004. We were told that he would not be attending to give evidence to the Tribunal, as his report had been prepared on a pro bono basis. We had read the report as we had also read the Applicants statement of case and will refer to these documents in due course.

10. Mrs Kunicki gave evidence to the Tribunal. She addressed us on the effect that the demand for payment of over £22000 had on Mr Kunicki's health. They were not happy with the new windows. They were difficult to operate and did not provide the same level of security which the old windows had done. In addition the changes to the living room window had removed what she considered to be a means of escape and the ability to keep a window box. The interior works had not been completed. She was adamant that the windows to the living room and bedroom had been replaced in 2000 and not in 1997/8 as was alleged by the Respondent.

11. As to the balustrading she was unhappy with the replacement to a full depth that still allowed the wind to blow through and was now difficult to clean, more because of the change in the walkway surface. She also complained that the noise was increased because of the enclosure and that the alleged enhanced security was "false security"

12. For the Respondent Mr Bhose had helpfully prepared a skeleton argument. He took us through this and we noted all that was said.

13. Mr Martin Peach, the Project Manager for the works was called. He had prepared a written statement dated 9th July 2004, which we had read and added to that statement at the hearing. We do not propose to set out in detail the contents of the statement or the evidence he gave to us at the hearing. We shall refer to the relevant matters in

due course. He did confirm that the problems with the concrete were more extensive that originally thought and that the works to the balustrading and the walkways were largely as a consequence of the concrete repairs. On the question of the security at Apollo House he told us that the residents appeared to want the security works to be done sooner rather than later.

14. Mr Chris Haughton MRICS from John Shreeves and Partners was also called to give evidence. Like Mr Peach he had prepared a witness statement dated 12th July 2004 and had exhibited to it a report made in July 2004 for the purposes of these proceedings which we read. It contained a "cost in use matrix" which had been prepared after the event, but which was designed to show that the works undertaken by the Respondents had a proper cost benefit to the residents. We noted all that was said and will refer to the evidence given as necessary in due course. Mr Haughton told us he was not with James Shreeves at the time of the feasibility study but had a working knowledge of the site since May 2002 and was satisfied that the Works were properly required.

15. Submissions were made to us by Mr Bhose and Miss Jones and Mr Hayday.

16. Mr Bhose relied on his skeleton argument, which included submissions on the law.

17. In respect of the construction of the Lease he cited the Respondents Council's repair obligations which were set out at clause 4 (ii)(b). This indicated that the Council's obligations were to maintain in good and substantial repair and condition the subject matter of the covenants which was in effect the building, Apollo House. It was conceded that the Council had not reserved rights to carry out improvements. He

indicated that it had not been asserted by the Applicant that the Council was not obliged to maintain in good and substantial care and condition the walkways, the windows or the balustrading. The Respondent submitted that the concept of repair is the converse of disrepair and cited a passage from Woodfall and from a number of cases which were as follows:

(a) McDougall v. Easington D.C.

(b) Holding and Management Limited v. Property Holding & Investment Trust plc

(c) Stent v. Monmouth D.C.

(d) Minja Properties Limited v. Cussins Property Group plc

(e) Postel Properties Limited v. Boots the Chemist

(f) Wandsworth LBV v. Griffin

(g) Reston v. Hudson

In relation to the matters in issue, Mr Bhose submitted there was clear evidence showing the reasons behind the replacement of all the windows in the buildings and that not only were the windows in a poor state of repair but the continued obligation to maintain would be better met by providing the aluminium windows. It was submitted that as the Leases had some 103 years to run, bearing in mind the case law that had been cited, the Council had acted reasonably in renewing all the windows and that it was a work of repair only. We were asked to also bear in mind that the property was situated in a sought after area of London close to the River Thames. We were also asked to bear in mind that the identity of the parties, namely that the Respondent was a local authority and the Claimant was a retired person, was irrelevant. Insofar as the balustrading and walkways were concerned he reminded us that the need to replace appeared to stem from the extensive concrete repairs and that the Applicant had not taken issue with the need for those concrete repairs.

18. As to the resurfacing of the walkways, again it was submitted that these were required as a result of the concrete repairs and that the

walkways were not recovered simply for cosmetic purposes. The criticism of the walkways by the Applicant was rejected and that although the surface may have been harder to clean with a mop, it was slip resistant and durable. In submission Mr Bhose asked us to accept that the works carried out by the Council were works they were entitled to do and that the amounts sought were reasonable.

19. On behalf of the Applicants, Miss Jones submitted that Mr Houghton had in his evidence accepted that the works were an improvement and that in fact the feasibility study stated that was the case. She submitted that the Mullaney case which we have referred to was authority that we could rely upon and that we must also look at the tenants abilities to pay in one go. She submitted that the Respondent had not proved that the windows were replaced in 1998 and the windows were not in disrepair and did not need replacement. She accepted on behalf of the Applicant that snagging was to take place but did request that a letter of comfort to confirm when this was to be done was made available to the Applicant. She also contended that the £8000.00 sought in respect of four double windows, was an extortionate sum. On the question of balustrading again she argued that this was an improvement and not a replacement as was the security system.

20. Finally on the question of s20(C) the Applicant asked us to bear this in mind and to consider making a declaration if we found in their favour. The Respondent submitted through Mr Bhose that the power vested in the Tribunal should only be used in cases where it would be shown to be unjust for the Respondent Landlord to recover the costs and that it would only be fair and reasonable if we found in favour of the Respondent for the Respondent to be entitled to recover their costs from the tenants.

D. Inspection:

21. We inspected the property on the 28 July 2004. We were in the company of Mr & Mrs Kunicki who kindly allowed us access to their flat and also with Mr Peach, Mr Houghton and Miss Vachino from the local authority.

22. Apollo House is a three/four storey interlinked block with walkways to the front at each floor level served by communal staircases at each end and one in the middle. The ground floor walkway has now been enclosed but the upper walkways were fronted by glazed balustrading. There is no doubt from having seen photographs of the block in its original form and now, that the installation of these balustrades is an improvement both visually and we suspect from a security point of view for the ground floor at least. We were able to inspect internally Mr & Mrs Kunicki's flat and saw the double glazing work that had been installed. It seemed to us that the double glazed units were of a good quality although the opening mechanism was perhaps slightly complicated and may have needed some adjustment. The fitting of same appeared to have been carried out in a professional manner although there were some minor works required to complete the installation.

22. We also had the opportunity of inspecting adjacent blocks at Bowling Green, Jean Darling and Chelsea Farmhouse. This gave us an idea as to the condition of the windows and the balustrading together with the concrete and walkways prior to works having been carried out.

E. Decision:

23. The first matter we need to consider is whether the Applicants case, that the works, in part at least, constituted improvements which would not therefore be recoverable by the Landlords. The Landlords have conceded that the Lease does not provide for improvements. The Lease term is as follows. *4 (.ii)(.b.) The Lessors will at all times during the said term keep and maintain (and wherever necessary rebuild,*

reinstate, renew and replace all worn and damaged parts) the external main walls and windows and window frames (excluding glazing) foundations and the structural divisions between the flats and the balconies (if any) together with the balcony doors and frames (but excluding glazing) and any services' areas or housings at the building and the roof of the Building and the pipes (including the gas supply pipes from the rising main to the meter) cables (including the electric supply cables from the rising main from the Electricity Board's fuses to the input side of the meters) and wires (excluding meters) and the water, drainage, gas and electricity services and refuse chutes (if any) serving the building and used in common with the lessees tenants, owners or occupiers of the other flats in the building (but not the pipes, cables, wires, services and apparatus (except drains, gutters and external pipes) serving the demised premises alone) the main entrance passages, landings, staircases, access, balconies and lifts (including the motor-room and apparatus thereof)(if any) enjoyed or used by the lessee in common with the lessees tenants or occupiers of the other flats of the building and the private roads, access ways, paths, forecourts and the Outside Areas of the Estate (as hereinafter defined) used in common with other lessees, tenants, owners or occupiers of any premises forming part of the Estate and the boundary fences and walls of the Estate in good and substantial repair and condition except as regards damage caused by or resulting from any act or default of the Lessee or the occupiers of the premises..."

23. The Lease also provided at paragraph 4(ii).(f.) that they should maintain and repair any entry phone system and further at clause 6 of the Third Schedule, a right to install at any time during the said time an entry phone system at the building.

24. It is right to say that the Lease does not contain specific permission for the Landlords to improve the building. We need therefore to consider

the facts of this particular case and the authorities insofar as they are of assistance to us. The evidence we have received is that a number of windows were showing signs of disrepair. Indeed that must be case because whether Mr & Mrs Kunicki replaced their windows in 1998 or 2000, it is clear they needed replacing, presumably as a result of disrepair. A number of windows have already been replaced. Having had the opportunity of inspecting other properties on the estate built at a similar time but which have not undergone improvements, it is clear that the state of the windows were, in many case, quite poor and that works of repair would be required. Was it reasonable for the windows to be replaced with aluminium double-glazed units? It is quite clear from the documentation we have that UPVC windows would not be allowed by the local authority's planning department. Although we were unimpressed with the cost matrix prepared by Mr Houghton, which had been brought together after the event and was therefore subject to input on that basis, there are, we accept, cogent reasons for replacing the windows. It is not open to the Applicant in this case to say that because their windows had been replaced whether four years or six years ago, that they should not contribute towards the costs of the other windows in the block. They would have been obliged to do so whether their windows had been replaced or not and accordingly that is not an argument with which we would find favour. Although there may be some teething problems with the units, there is no doubt that there will be a saving in the future on repair obligations and the personal status of the Applicant is not something we can consider. The fact of the matter is that the Lease under which the Applicant occupies has more than 100 years left to run and the replacement of the windows will undoubtedly be a benefit if not perhaps so greatly to Mr Kunicki, but certainly to his successors in title. Taking these matters into account and considering the various authorities, we have come to the conclusion that the replacement of the windows was not an improvement but was a repair and is allowed for under the terms of

the Lease. Further as no less than six contractors had provided tender documents we find that the costings are reasonable. In addition also, we accept that the standard of works is also satisfactory and accordingly dismiss any complaints in regard thereto.

25. We turn now to the question of the balustrading. It seems to us from the information we have received that the replacement of the balustrading and also the resurfacing of the walkway stems from the problems with the concrete. It seems quite clear from the documentation provided and from our inspection that concrete areas were in need of reasonably urgent attention and of course this was something that had been flagged up for the Applicants when they acquired their Lease. In accepting that the concrete works needed attention we also accept that it was reasonable and a repair, not an improvement, to replace the balustrading throughout. However we do take the view that the installation of the balustrading to a full height at ground floor level is an improvement. This is the more so because the Lease enables the Landlord to put in a door entry phone system. Without the enclosure of the ground floor walkway the installation of a door entry phone system would have been unnecessary. It seems to us therefore that the local authority in installing the entry phone system as they were entitled to do under the terms of their Lease, have instigated works to the balustrading which become an improvement and not merely a repair. Accordingly as we allow the costs of the installation of the door entry phone as being reasonable in amount and not something the Lessee can object to as it is provided for under the terms of the Lease, we do find that the improvement to the ground floor balustrading is not allowable under the terms of the Lease.

26. Mr Bhose in his submission to us had perhaps foreshadowed the position in that he had indicated that the difference between the

balustrading of a full height and that which was installed on the upper levels would perhaps be something in the region of £20,000.00. He had referred us to a document amongst the papers which showed a breakdown of the balustrading works. We have calculated that the allowance that should be made to the Applicants in respect of this matter is £532.00. That has been achieved by taking the figures allowed for the upper walkways and applying those to the ground floor levels, noting there is a different length because of entry doors and applying the same rate per square metre.

27. Accordingly the only area where we find that the Applicant is successful relates to the balustrading and we would make a reduction therefore in respect of those costs of the figure of £532.00 as referred to above.

28. Insofar as the s20(C) application is concerned as we have found in the main in favour of the Respondents we would not make a declaration under that section. We are satisfied for the purposes of this matter that the 5th Schedule of the lease includes the ability to recover costs incurred in these proceedings as in our finding the "cost of management" would include the cost of recovering unpaid service charge sums.

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Chairman

7 SEPTEMBER 2004

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Date