# Ian Mohabir

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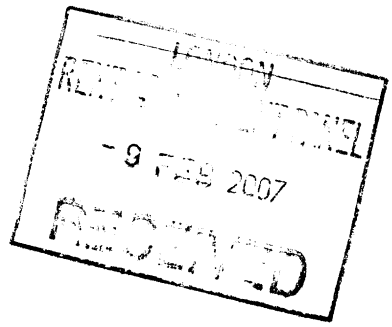


Mr E Ani
New LVT Section
London Rent Assessment Panel
10 Alfred Place
London
WC1E 7LR

8 February 2007

Dear Eze

Please find enclosed the reasons for Bew Court as promised. I have not been able to prepare a front sheet for the Decision because I did not want to delay the issuing of the reasons further. I would be grateful if you can prepare a front sheet before sending it out. Please accept my apologies for not sending these to you earlier, but this was due to a number of other circumstances.

I also enclose my claim form for drafting the reasons for your attention.

Kind regards

I. Mohabir

Ian Mohabir

**IN THE LEASEHOLD VALUATION TRIBUNAL**

**LON/00BE/LSC/2006/0235**

**IN THE MATTER OF BEW COURT, LORDSHIP LANE, LONDON, SE22 8NZ**

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

**BETWEEN:**

**(1) RICHARD O'SHEA (13 BEW COURT)**
**(2) XEUBIN DONG (21 BEW COURT)**
**(3) RUMAIN N ALIZAI (8 BEW COURT)**
**(4) F HARRINGTON (29 BEW COURT)**
**(5) ALFRED WRIGHT (18 BEW COURT)**
**(6) M R SEWELL (4 BEW COURT)**
**(7) A BARRETT (22 BEW COURT)**

**Applicants**

**-and-**

**LONDON BOROUGH OF SOUTHWARK**

**Respondent**

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**THE TRIBUNAL'S DECISION**

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**Background**

1. This joint application is made by the Applicants pursuant to s.27A of the Landlord and Tenant Act 1985 (as amended) ("the Act") for a determination of their liability to pay and/or the reasonableness of estimated service charges for major works arising in the 2005/2006 service charge year.

2. It appears that major external repairs and redecorations were last carried out to Bew Court in 1989/1999. Thereafter, day-to-day maintenance was carried out by the Respondent when required. Subsequently, in or about early 2004, the Respondent decided to carry out various major works to Bew Court. It seems that decision was based on the conclusions and recommendations of a survey carried out in October 2003 by Southwark Building & Design Services ('SBDS'), another internal department of the Respondent. A structural survey was also carried out in October 2003 by Sir Frederick Snow and Partners, a firm specialising in concrete repairs, that identified spalling to concrete posts and panels to the public balconies. It recommended the replacement of all balcony balustrading to Bew Court. It is accepted by the Respondent that part of the reason for the decision to undertake the major works was to comply with the Decent Homes Standard required by this government.

3. Subsequently, the Respondent informally consulted with the residents of Bew Court with a view to ascertaining their wants and wishes in relation to the proposed works. This resulted in a draft specification of works being prepared in or about October or November 2004. Statutory consultation by the Respondent, in accordance with s.20 of the Act, commenced by the issuing of a Notice of Intention to all leaseholders on 5 November 2004. Upon the conclusion of the tendering process, the firm of Jerram Falkus was nominated as the contractor to carry out the proposed works. On 23 June 2005, the Respondent served a Notice of Proposal on all leaseholders, which estimated their individual service charge contribution for the proposed works as being £25,438.61.

4. The major works were commenced in or about November 2005 and were scheduled to be completed at the end of November 2006. As at the date of the Tribunal's inspection of the property, the works were still ongoing. Of the major works carried out, the following items of works were disputed by the Applicants as either not being reasonably incurred and/or unreasonable in quantum. No challenge was made in relation to the standard of the works. The items of major works challenged by the Applicants were:

(a) Recovering of roof.

(b) Replacement of all windows with uPVC double glazed windows.

(c) Concrete repairs to soffits.

(d) Replacement of front doors.

Each of these matters is considered in turn below by the Tribunal.

5. Each of the Applicants are lessees of the Respondent and occupy their respective premises by virtue of long leases granted variously by the latter for a term of 125 years on similar terms ("the leases"). It is common ground that, under each lease, the lessee's contractual liability to pay an annual service charge contribution arises in the same way as follows.

6. By clause 2(3)(a) of the leases, the lessee covenanted with the Respondent to:

> *"... pay the Service Charge... ... set out in Part I and Part II of the Third Schedule...."*

The Third Schedule provides, *inter alia*, that the annual service charge year shall commence on 1 April and end on 31 March of the following year. It also

provides that, before the commencement of each year, the Respondent shall prepare a reasonable estimate of the amount that will be payable by the lessee as a service charge contribution for that year and that the amount shall be payable in equal payments on 1 April, 1 July, 1 October and 1 January in each year. The service charge contribution payable shall be a fair proportion of the costs and expenses set out in paragraph 7 of the Third Schedule.

7. The service charge expenditure is defined in paragraph 7 of the Third Schedule as all costs and expenses of and incidental to the Respondent carrying out those works required by clause 4(2) to (4) of the leases. By the same clause, the Respondent covenanted, *inter alia*, to keep in repair the structure and exterior of the flat and the exterior and common parts of the building.

**Inspection**

8. The Tribunal externally inspected the subject property and also internally inspected Flats 13 and 22 on 27 November 2006. At the time of inspection, it was noted that all of the front doors, windows and balustrading had been replaced. All of the concrete and brick repairs had also been completed. The Tribunal also externally the adjacent block of flats known as Byron Court on the same occasion. This was by way of comparison to the former condition of the subject property. The Tribunal noted the relatively poor condition of the Crittal windows and general cracking to the concrete soffits. An inspection of the roof revealed the existence of some small blisters to the roof covering, which otherwise appeared to be in overall fair condition.

**Hearing**

9. The hearing in this matter also commenced on 27 November and continued on the following day. The Applicants were represented by Mr Wolfenden, a Chartered Surveyor and Principal in the firm of B Wolfenden (Surveying) Ltd. The Respondent was represented by Mr Joseph from the Respondent's Home Ownership Unit.

**(a) Roof Replacement**

10. The total cost of this work was placed at £136,862.62. Mr Wolfenden submitted that the asphalt roof could have been repaired rather than replaced. A new asphalt covering had been laid at the beginning of 1993 and should have had a minimum life span of 25 years if properly maintained. Furthermore, he submitted that the roof covering on the adjacent block, Byron Court, had been replaced at the same time as Bew Court in 1993 and was found to be in relatively good condition. The minor defects found could be repaired at a cost of approximately £4,000. If the condition of the roof covering was in a similar condition to that of Byron Court, then the relative cost would be £11,400 and this is the sum that should be allowed as reasonable. In addition, Mr Wolfenden submitted that the insulation installed to the new roof covering amounted to an improvement and was not recoverable under the lease terms.

11. The Respondent called Miss Blackburn, a Building Surveyor employed by it for the past 20 years and presently working in the Building and Design Services Department. Miss Blackburn was the Contract Administrator for the

major works and she gave evidence as to the requirement for a completely new roof covering. Her evidence was that she had personally inspected the roof in 2005 and that it was showing signs of deterioration. There was cracking around the tank roof and skirting. A number of tenants had experienced water penetration in earlier years. The roof was also not insulated and did not meet current regulations. Apparently, Miss Blackburn's inspection had been carried out without her knowledge that the roof covering had been replaced only 12 years previously. Nevertheless, she concluded that the entire roof covering need to be replaced and the lack of insulation meant that it did not meet Decent Homes criteria.

12. In cross-examination, Miss Blackburn said that she only knew of two residents who had complained of water ingress in preceding years. These were the occupant of No.38 Bew Court and 'one other'. She inspected Flat 38 but carried out no repair work at the time. She accepted that whilst the uninsulated roof did not comply with current Building Regulations, they did not apply retrospectively. Miss Blackburn said she was not aware of what routine maintenance had been carried out to the roof historically and had not been aware of any guarantee given in relation to the 1993 roof works. Materially, she accepted the average life span for an asphalt roof covering was 25 years and that this had been replaced well within this period. Moreover, upon questioning by the Tribunal, Miss Blackburn said that she had not carried out a detailed survey of the roof. She had simply prepared a summary of the roof condition that had been set out in an e-mail. That document was not before the Tribunal in evidence. Miss Blackburn also conceded that the

roof could have been repaired and that the cost of doing so would have been approximately £22,000, as only 25% of the roof needed repairing.

13. The Tribunal also heard evidence from Mr Balfour, an Investment Programme Manager also employed by the Respondent in its Dulwich Housing Area office. Mr Balfour has had responsibility for the day-to-day repairs and major works contracts, including this one, since January 2004. His evidence simply was that the guarantee for 1993 roof works was only for 10 years and that had expired in January 2004. He had included the replacement of the roof covering in the specification upon the recommendations of the Building and Design Services Department. As far as he was aware, there had been no rolling programme for routine maintenance of the roof since the 1993 works had been completed. Any such repairs would have been carried out on an ad hoc basis.

14. The Tribunal should make it clear, both in relation to this issue and the other issues raised in this matter, that its determination can only be based on the evidence adduced by the parties. Neither this Tribunal nor any other Tribunal adopts a general approach in relation to certain types or groups of cases. Each matter is decided entirely on the basis of the issues raised in the proceedings and the evidence adduced in relation to those issues.

15. As a general approach to the issues in this matter, the Tribunal considered it necessary to set out its analysis of the contractual relationship between the

Respondent, as lessor, and the Applicants, as lessees, under the lease terms in relation to the service charge generally.

16. As stated earlier, clause 4(2) of the leases imposes a repairing obligation on the Respondent to repair the exterior structure of the flats and the building. For that obligation to arise, it must be demonstrated by way of evidence that something must, firstly, be in disrepair. It is the converse of repair. Otherwise, the Respondent is obliged to do nothing and a tenant cannot enforce that obligation against it. Indeed, the Act only implies a repairing obligation on a landlord where a tenant can demonstrate that something is in disrepair and it falls within that obligation. In the event that the Respondent's repairing obligation properly arises, then the tenant becomes liable to contribute towards the cost of any work carried by way of a service charge. Unless and until then, the tenant has no contractual liability to pay any service charge contribution. If a landlord chooses to carry out works that fall outside the repairing obligation under a lease, it is not entitled, as a matter of contract, to recover any such costs against a tenant. It would be completely illogical to argue that a landlord, by carrying out unnecessary preventative or anticipated repairs, was complying with its repairing obligation by keeping a property 'in repair'. This would, in effect, provide the landlord with an almost unfettered discretion to carry out wholly unnecessary works during the term of a lease for which a tenant would be liable. That could not have been the intention of the contracting parties under the terms of the leases in this instance.

17. Applying this analysis to the roof works carried out, the first question that must be asked is, was the roof in a sufficient state of disrepair as to require the Respondent to replace the entire roof covering? The answer must unequivocally be no. It is clear that no proper survey or condition report had been carried out on behalf of the Respondent, whether by Miss Blackburn or anyone else. Her assessment of the condition of the roof covering was no more than a summary in an e-mail that was not adduced in evidence. Miss Blackburn's evidence, taken at its highest, was that no more than 25% of the roof needed repairing and that could have been achieved at a cost of approximately £22,000. This is entirely consistent with her evidence that any evidence of historic water ingress was limited to no more than two flats. Having inspected one of those flats, she concluded that no repairs were necessary.

18. The Tribunal also concluded, on balance, that the decision to renew the roof covering had been taken some time earlier than Miss Blackburn's recommendation to do so. From the documentary evidence, it appears that in or about 2000 proposals for a new roof was being contemplated. At the end of 2003 a bill of quantities had been prepared by the Respondent that specified a new roof (see: V1 p.507). Tenders for the major works had been invited in January 2005 and the contract entered into with the main contractor in January 2005. This pre-dated Miss Blackburn's inspection and was accepted by her in evidence. Further, she conceded that no consideration had been given to repairing the roof even though this was perfectly feasible. No cost/benefit analysis had been carried out by the Respondent. The Tribunal was in no

doubt that the main imperative for replacing the roof was to meet the government's Decent Homes Standard that, unfortunately, has led to unintended consequences for local authorities. The Tribunal, therefore, concluded that the cost of replacing the entire roof covering had not been reasonably incurred. In view of the Tribunal's finding, it follows that the cost of insulating the roof is disallowed because Miss Blackburn also accepted that the Buildings Regulation requirement to do so was not retrospective.

19. As to the cost of the repairs that should have been carried out, the Applicants submit that they would have been £11,400. The Respondent submits that a figure of £22,000 is appropriate. Neither figure was supported by any evidence. However, the Tribunal had the advantage of having inspected the roof on Byron Court, the adjacent block, which we were told was in a similar condition to the roof on the subject property. Having regard to this and the Tribunal's own expert knowledge and experience, it concluded that the cost of the roof repairs would, on balance, be in the region of £11,400 and this is the total sum allowed as reasonable.

**(b) Window Replacement**

20. Mr Wolfenden submitted that there was no justification to replace the former Crittall windows with uPVC double glazed units. Any warping to the frames of the Crittal windows could have been repaired and the windows overhauled generally. However, he stated that he had not had an opportunity to inspect the windows before they had been replaced. In cross-examination he said that he had experience of repairing Crittall windows on behalf of other local

authorities and that the cost of doing so in this instance would not have been expensive.

21. In chief, Miss Blackburn said the condition of the windows varied from good to not so good. There was some cracked glazing. She accepted that whilst it would have been possible to repair the windows where needed, it would have been expensive to do so and that replacing them with double glazed units was the best option. However, she accepted that no cost in use analysis had been carried out and, therefore, she did not know if it had been cost effective to replace the windows. When questioned by the Tribunal, Miss Blackburn said that the specification to replace the windows had been prepared in 2004 but not confirmed until 2005. The initial survey had been carried out in 2003. In cross-examination, she said that she had surveyed 30 flats in total, of which 60% needed their windows replaced.

22. Mr Balfour's evidence supported this conclusion that the windows needed to be replaced. He said that the Crittall windows had been refurbished in 1998/1999. The problem with warping to the frames had been solved by applying Mastic. In 1999/2000, a programme was devised to replace the windows. In reaching this decision, regard was paid to the overall level of disrepair to the windows and the wish of a number of tenants to have replacement double glazed windows installed.

23. The Tribunal did not accept the submission made by Mr Joseph, in his closing, that paragraph 7(9)(i) of the Third Schedule of the leases gave the Respondent

an absolute discretion to replace the windows regardless of the condition of the Crittall windows. The discretion to do so only arises where it, firstly, can be demonstrated by the Respondent that the existing windows are sufficiently in an overall state of disrepair to require replacement. If so, then the discretion afforded by paragraph 7(9)(i) arises and the Respondent can install double glazed windows, as opposed to any other type of windows that the tenants may insist on being installed.

24. The Tribunal's difficulty on this issue was the paucity of evidence adduced by either party as to the condition of the former Crittall windows before they were replaced. No material evidence was adduced on behalf of the Respondent to show that the windows had been in significant disrepair. The evidence, such as it was, was limited to the assertions made by Miss Blackburn and Mr Balfour. Equally, Mr Wolfenden had not had an opportunity to inspect the Crittall windows and had no personal knowledge of their condition. He simply made a bare assertion that they should have been repaired and redecorated instead of being replaced and that this could have done at a cost of £1,000 per flat.

25. The Tribunal had externally inspected the adjoining block, Byron Court, which had still retained the original Crittall windows. It had also internally inspected Flat 22 in that building. The Tribunal concluded that Mr Wolfenden's figure of £1,000 to repair and redecorate the windows of each flat in the subject property appeared to be high. The inference to be drawn from this is that the former Crittall windows must have been in significant

disrepair to attract this level of cost and would have made it uneconomic for the Respondent to attempt to carry out the repairs and redecoration advocated by the Applicants. On balance, the Tribunal concluded that even if the Respondent had acceded to the Applicants wishes, the task of further maintaining the Crittall windows or replacing them would have arisen again in the foreseeable future, thereby involving the Applicants in further service charge costs. The Tribunal was also satisfied that that there would be savings in decorations internally and externally, and in heating costs, and noise reduction and that the value of their properties would be enhanced. It seems, that by installing double glazed windows, there has been an overall future cost saving to the Applicants. Having found that the former Crittall windows were sufficiently in an overall state of disrepair to warrant their replacement, the discretion provided by paragraph 7(9)(i) of the Third Schedule arose and the Respondent was entitled to replace the windows with double glazed units. The Applicants' challenge was brought on the basis that only the estimated cost of repairing and redecorating the former Crittall windows should be allowed as reasonable. The estimated final cost of the double glazed windows was not challenged as being unreasonable. Having already found for the Respondent, the Tribunal therefore allowed the estimated cost of the double glazed windows as being reasonable.

**(c) Concrete Soffits**

26. Mr Wolfenden submitted that the extent of these works was excessive, as no tests had been carried out by the Respondent to demonstrate that they were needed. There appeared to be no reason why all of the existing coatings had to

be removed from the soffits so that a full concrete repair system could be applied. He further submitted that a 'cross hatch' test had not been carried out to show the level of adhesion of the coatings. The concrete should not have been brick blasted to reveal the defects. Furthermore, the Respondent's own expert report revealed that the concrete covering was overall in a satisfactory condition and only minimal repairs were needed. Of the amount claimed by the Respondent, the sum of £51,600 should be disallowed for the unnecessary work carried out.

27. In chief, Miss Blackburn said that the concrete repairs were necessary because they had not been carried out in the previous major works because the scope of the works was not as extensive as it should have been then. In cross-examination, she conceded that tests had only been carried out to the stairwells only and not the soffits themselves. Only some of the repairs needed were visible through the concrete coating. This was the reason why it had to be removed by blasting. No hammer test had been carried out because it could not properly identify the repairs that were required. This could only be done by removing the concrete coating completely.

28. The Respondent had commissioned and obtained a report dated October 2003 from Sir Frederick Snow and Partners Ltd, Structural Engineers, about the condition of the concrete generally in Bew Court (V1/77). This report was a specialist report and included tests to the concrete soffits (V1/81). The report noted cracks to the underside of the communal balconies generally and these continued through the slab and waterproofing above. Some of the cracks

showed staining and water penetration from above. The report concluded that the cracks to the communal balconies were significant. It also recommended that the water proofing to the communal balconies should be repaired/replaced to prevent further water ingress and corrosion of the balcony reinforcement. New and damaged cracks to the concrete soffits should be repaired appropriately.

29. The Applicants had adduced no evidence as to the condition of the concrete soffits and the extent of any necessary repairs. The submissions made by Mr Wolfenden in this regard were, at best, speculative. From the conclusions of the report prepared by Sir Frederick Snow and Partners Ltd, the Tribunal accepted that both the concrete repairs and their extent were reasonable. The report's conclusions were only based on sample testing carried out. Nevertheless, it revealed that the cracking found to the balconies generally, included the concrete soffits and were significant (V1/85). The Respondent was entitled to rely on the findings of this report. Had it limited the concrete repairs to the areas tested, it may have left other areas untreated. In the Tribunal's view, the Respondent had acted reasonably by removing all of the concrete coating on the soffits to reveal the full extent of the repairs necessary. However, the specification for the concrete repairs (V1/237 at B-E) appears to include the cost of hammer testing and sampling at 10%. In evidence, Miss Blackburn conceded that this testing and sampling had not in fact been carried out. These costs also appear to have been included in the breakdown sent to the Applicants (V2/143). Therefore, the Tribunal disallows this sum, which approximates to £2,500 of the overall cost. Save for this, the Tribunal allows

the remainder of the costs as both reasonably incurred and reasonable as to quantum.

**(d) Doors**

30. This matter was taken shortly by the Tribunal. Miss Blackburn accepted in evidence that the front doors of the various flats were not in disrepair and that the tenants should not be required to pay for the cost of installing new doors. It seems that the only reason for replacing them was to improve security as a result of previous burglaries of other flats. However, she could provide any details about when and how these burglaries took place. Mr Balfour also accepted that if the Tribunal found that the front doors were not in disrepair, then the Applicants should not be liable for these costs.

31. There was clearly no evidence before the Tribunal that the front doors were in disrepair and needed replacing. Miss Blackburn accepted this and stated that the Applicants should not liable for these costs. Applying the analysis set out at paragraph 16 above, in the absence of any such evidence, the Tribunal must conclude that the applicants have no liability for these costs under the terms of the lease. The requirement for greater security, whilst desirable, does not allow the Respondent, as a matter of contract, to recover these costs. Accordingly, they are disallowed in full.

**Section 20C – Costs**

32. Mr Joseph informed the Tribunal that none of the Respondent's costs incurred in these proceedings were being sought against the Applicants. The Tribunal, therefore, did not have to consider making any order under s.20C of the Act.

Dated the 8 day of February 2007

CHAIRMAN..... I. Mohabir .....

Mr I Mohabir LLB (Hons)