Residential
Property
TRIBUNAL SERVICE

LONDON RENT ASSESSMENT PANEL
LEASEHOLD VALUATION TRIBUNAL

LON/00AKLSC/2006/0225

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

Applicants:	**Mr & Mrs Preedy**	**(5 Normandy House)**
	Mr John Gosling	**(28 Normandy House)**
	Mrs Eleanor Harris	**(33 Normandy House)**
	Mr Bernie Bell	**(58 Normandy House)**
	Mrs Lynne Kerswell	**(63 Normandy House)**
	Ms Sylvia Quinn	**(68 Normandy House)**
	Ms Margaret Roberts	**(117 Normandy House)**
	Ms Debbie Parker	**(107 Picardy House)**
Respondent:	**The Mayor and Burgesses of the London Borough of Enfield**	
Property:	**Normandy House and Picardy House, Four Hills Estate, Cedar Road, Enfield EN2 0PE**	
Date of Application:	**19th May 2006**	
Date of Hearing:	**17th November 2006**	
Venue:	**10 Alfred Place, London WC1E 7LR**	
Appearances for Applicant:	**Mrs E Harris** **Mrs L Kerswell**	

Appearances for Respondent:	**Ms P Etibet,**	**Counsel**
	Mrs J Middleton-Albouye,	**Solicitor**
	Mr S Davis	**Expert Witness**
	Mr P Dawson	**Witness**
	Mr A Key	**Witness**
Also in Attendance:	**Ms J Poole**	**Observer**
Members of The Tribunal	**Mr John Hewitt**	**Chairman**
	Mr Trevor Johnson	**FRICS**
	Mr Alan Ring	

Date of Decision: **12th December 2006**

Decision

1. The decision of the Tribunal is that:
   - 1.1 It is reasonable for the Council to carry out the proposed works to replace the concrete posts and balustrades on the balconies of the flats within Normandy House and Picardy House;
   - 1.2 The lessees of flats 63 and 68 Normandy House are not required to contribute to the costs of the proposed works because the Council was aware of the structural defects within 10 years of the date of the respective leases of those flats; and
   - 1.3 The Council shall by 4pm Friday 12th January 2007 reimburse the Applicants £325 fees paid by them to the Tribunal in connection with this application.

2. The findings if the Tribunal and the reasons for its decision are set out below.

NB Prior to the hearing we were provided with a trial bundle. Later reference in this decision to a number in square brackets ([ ]) is a reference to the page number of the trial bundle. During the hearing some additional documents were provided. Subsequent to the hearing and in accordance with further directions given some further documents have been provided which the Tribunal has paged numbered [843-886].

Background

The Parties

3. Between 1966 and 1968 the Respondent (the Council) developed a housing estate known as Four Hills Estate which comprises 4 tower blocks of flats. It was built by Wates. Over time a number of the flats have been sold on long leases, tenants having exercised the Right to Buy under the Housing Act 1985.

4. The Applicants are all long lessees either as original tenant or by assignment. As can be seen from their addresses, all but one live in Normandy House and one lives in Picardy House.

The Issue

5. Each of the flats has concrete balcony with pre-cast concrete balustrade panels. The panels are supported on in situ reinforced concrete posts. The panels rest on the posts by virtue of gravity and their own weight but restraint brackets have been fitted to provide added stability. The insertion of a handrail support through the panel reduces the prospect of adverse movement. Helpful drawings showing the set up are at [27C and 27D]. A defect in the design of the way in which the balustrade panels are supported has been detected. In essence the concrete support post is too narrow to provide a safe and stable base for the panel to hang on.
After a good deal of investigation and consideration of options a design solution has been worked up. That solution is currently being trialled in Picardy House. If successful it will be rolled out to the other three blocks within the estate. The Council says that the remedial works will be refined and adapted to take account of the experience and learning from the trial.

6. The Council will seek to recover contributions to the cost of the remedial works from those long lessees whose leases impose an obligation on them to make such a contribution. The contributions to be claimed could be in the order of £10,000 per flat. The Council will fund the cost of remedial works to those flats tenanted by Council tenants and those where the terms of the lease are such that it does not enable the Council to recover a contribution from the lessee.

The Application

7. An application dated 19 May 2006 was made pursuant to s27A of the Act. There is also a related application made pursuant to s20C of the Act relating to the Respondent's costs of these proceedings [1-8].

8. In the application the Applicants seek a determination whether the estimated costs of the proposed works are reasonable and whether the leases of the flats oblige the Applicants to make the contributions.

9. There is no dispute between the parties that the contributions to the costs of works that the Council will seek are service charges within the meaning of s18 of the Act, and so within the jurisdiction of the Tribunal. Similarly there is no dispute between the parties as to how the 'proper proportion' has been applied in order to ascertain the amount of the contributions of those lessees obliged to contribute.

10. Directions were given on 9th August 2006 when both parties were represented. They have been complied with.

11. The application came on for hearing on 17th November 2006. Both parties were represented as shown on the front sheet of this decision.

The Lease

12. Copies of the Applicants' leases are within the trial bundle. For material purposes they are in common form. For ease or reference at the hearing we referred to just one lease; that for flat 63 Normandy House [117-167].

13. So far as material to this case the lease provides as follows:

Definitions: Definitions of the Flat; the Block and the Estate are set out on [119].

Term: 125 years, generally from date of lease but there are some minor variations [123 and 165].

The demise: The balconies are within the premises demised under the lease [149 and 152].

Lessee's Covenants: Clause 3(2)(B) to pay a management charge in respect of services provided by the Council and provision for the calculation and payment of the proper proportion so payable

Clause 3(2)(C)

'Contributions to Structural Defects

To pay to the Council on demand the whole or such part as may be reasonably attributable to the Flat (as the case may be) of any costs reasonably incurred by the Council in making good or in insuring against:-

(a) any structural defect in or affecting the Flat notified in writing by the Council to the Lessee before the date hereof

(b) any such defect of which the Council do not become aware earlier than ten years after the date hereof

(c) ...'

Clause 4(2)(B) to keep the Flat (but excluding the exterior and the structure of the Flat) in good and substantial repair.

Landlord's Covenants: Clause 7(2)(a)

'At all times during the term to repair and keep in a reasonable state of repair the structure and exterior of the Block including the windows (both the window frames and the glass panes thereof) and the external doors of the Flat and all drains gutters external pipes roofs and foundations and to repoint all external brickwork and to make good any defects affecting the structure of the Block

14. It is common ground between the parties that if the Council become aware of a structural defect within 10 years of the date of the lease, the Council is precluded from recovering from the lessee a proper proportion of the costs incurred in putting it right.

The Case for the Respondent

Mr Steve Davis

15. Mr Steve Davis gave evidence as an expert witness. Mr Davis said that he was aware of his duty to the Tribunal and told us that he had complied fully with his relevant professional code of practice for expert witnesses.

16. Mr Davis produced his report [9-27D] which he said was and still is true. He explained the design of the balustrade panels and support posts to us. He said that over time corrosion and cracking of both the panels and posts has occurred. Moisture has penetrated the cracks and the deterioration has accelerated.

17. Mr Davis took us through the Norman Crossley & Partners reports dated January 2000 and subsequent updates and correspondence [643-708] and clarified issues for us.

18. In cross-examination Mr Davis explained that some work to add stability to the concrete posts was carried out in 1991. There was a dearth of detailed records of those works to explain why the works were carried out, but that from his investigations he was satisfied that the 1991 problem and the current problem were quite different. Mr Davis accepted that it was possible that drilling in the course of the 1991 works and the subsequent works to increase the height of the handrails which run above and parallel to the panels might have affected the looseness of the panels.

19. Mr Davis explained that the panels were extremely heavy and adequate in themselves. An angled hook and gravity keeps them in place. A second restraint was the cleat or tie shown in [27D]. Also the handrail dowel acts a measure of restraint. He said that there was immediate danger but some measures need to be put in place. A number of options were considered.

20. Mr Davis was quite clear that it was not viable to repair each panel as and when necessary. Constant monitoring would be required. The costs implications were considerable. The concrete posts and panels are deteriorating and will get worse. He had no doubt that total replacement was the most cost effective solution in the long run. Another advantage of replacement was that the work has been planned to be executed externally thus avoiding the need for each occupier to provide access and materials being carried through their homes.

Mr Paul Dawson

21. Mr Dawson gave evidence. He is a chartered building surveyor employed by the Council as Housing Professional Services Manager. In effect he is the representative of the client side.

22. Mr Dawson explained that in May 1999 a clerk of works noticed that a panel in one of the flats was wobbly or had moved. This alerted the Council to a potential defect in the stability of the panels. The Council commissioned an internal report from D&M Consultancy which reported in September 1999 [635-642]. Paragraph 2.2 records:

'The defects were first discovered by Design and Maintenance officers following Phase 1 drilling works in May 199, which revealed a balcony panel was showing signs of movement. The Project Management Client responded positively by issuing a commission to the Design and Maintenance Consultancy for structural surveys of all similar balcony panels and subsequently to undertake destructive opening up works on a ground floor flat. These were carried out in August 1999, when the deficiency in fixings was exposed.'

The report went on to consider options, for action, both short term and long term and considered cost implications.

23. An external report was then commissioned from Norman Crossley and Partners. The first report is dated January 2000 and there was subsequent correspondence and updates [643-708].
The Council took the view that wholesale replacement was the most effective and appropriate solution. Funds were not then available to proceed but the issue was kept under review.

24. Mr Dawson said that the decision to proceed with wholesale replacement was taken by the Cabinet Member for Housing on 5th September 2005. The trial bundle did not contain a copy of the delegated authority report on how that decision was arrived at or an analysis of the options available and the reasons why wholesale replacement was the preferred option. Directions were given for the Council to provide further documents. It has done so and further documents and representations are at [843-886]. These have been copied to Mrs Harris on behalf of the Applicants who did not wish to submit any further submissions. The Tribunal can now see from the report that at para 5.1 the reasons for the recommendation to proceed are given and the financial effect on leaseholders is set out at length in para 6.3.

25. In cross-examination Mr Dawson was not able to explain why the resin Injection option was not pursued, but surmised that it was ruled out as not feasible. At [683] Norman Crossley & Partners had mentioned resin injection as one of three options.

26. Mr Dawson also recounted the learning to date on the programme or remedial works currently being undertaken in Picardy

House. He said the work has taken longer than envisaged. This has centred on demolition of the existing balconies, the management of labour and the extent of repair needed.

Mr Andrew Key

27. Mr Key gave evidence. He is employed by the Council as Leasehold Services Manager.

28. Mr Key explained that when the works had been completed on each block and the costs ascertained, lessees would be notified of the proper proportion payable by them. Lessees will then have 30 days to comment. Invoices will then be issued and lessees will be given a 24 month interest free period to make payment.

29. Mr Key also outlined the Council's policy under the Decent Homes Programme and the circumstances in which further financial assistance may be available to qualifying lessees.

The Case for the Applicants

30. Mrs Harris said that the Applicants did not wish to call evidence, but wished to make submissions.

31. Mrs Harris said that the Applicants wished to rely upon the points made in their statement of case [709-714]. Mrs Harris complained about the delay in carrying out the remedial works and said that she was not convinced that lack of funds was an acceptable excuse. Also she was not convinced that the 1991 works to fit the brackets did not introduce some instability into the posts.

32. Further Mrs Harris submitted that the Council knew prior to September 1999 that the posts and panels were defective and relied upon [655] paragraph 7.3 in support of her argument. She also drew attention to [57D] paragraph 17 and asserted that the remedy referred to did involve the posts on which the panels rest.

33. Mrs Harris also asserted that the 1991 and 1999 works involved drilling into the posts or panels and those works may well have contributed to the present problem/ She drew attention to [655] paragraph 74 for support.

34. Finally Mrs Harris urged us to conclude that the Council were 'aware' of the defects in May 1999, rather than September 1999. She said that if we came to this conclusion two of the Applicants, 63 Normandy and 68 Normandy would not be liable to contribute the cost of the remedial works because the date of 'awareness' was (just) within the 10 year period provided by clause 3(2)(C)(b) of their leases.

35. Mrs Harris said that the Applicants wished to rely upon their written statement of case. She had read the Respondent's case carefully. Mrs

Harris said that she was not a lawyer and was unable to make any comments on the legal submissions made as to seeking redress through Wates or through insurance.

Respondent's Final Submissions

36. Ms Etibet submitted that the manifestation of defects became apparent in May 1999 when signs of movement were noted. This was, she said, a manifestation only. The movement could have been caused by any number of factors. The wobbly panel was a symptom of a defect but not notice of it. She submitted that the Council only became aware of the defect in September 1999 when it received the D&M Consultancy report [635-642].

37. Ms Etibet said that the defect was the design defect and the way in which the panel rested on an inadequate width of post. She said that the 10 year period did not run until it was aware of the defect. She said that suspicion was not good enough and that having been alerted to a problem the Council was entitled to a reasonable period of time to investigate it. It was the outcome of those investigations which fixed the Council with knowledge and thus the commencement of the 10 year period referred to in clause 3(2)(C)(b) of the leases. Ms Etibet drew to our attention *Payne and Woodward v London Borough of Barnet* [1998] 76 P.& C.R. 293 in support of her proposition

38. Ms Etibet submitted that there was no evidence that the 1991 works caused or exacerbated the current problem. She accepted that there was little contemporaneous documents dealing with those works but said the absence of such records can be taken to support the view there was no serious concern. She said that if there had been a serious concern it would have been well documented.

39. Ms Etibet also submitted that there has been no undue delay in effecting the remedial works and no evidence that such delay as there has been has increased the nature, scope of cost of the works (other than routine inflation). Me Etibet also noted that the Applicants have known of their liability to contribute to the cost of works for some 4 years and that it will be sometime yet before they will be asked to pay their contributions. They will therefore have ample time to make financial arrangements.

The s20C Application

40. Ms Etibet conceded that the leases do not allow the Council to recover its costs of proceedings such as these through the service charge. She assured the Tribunal that the Council will not therefore impose any charge on the service charge account in respect of its costs.

41. The Tribunal accept the assurance of the Council given through Ms Etibet and thus we find it unnecessary to make a formal order on the s20C application.

Reimbursement of Fees

42. Mrs Harris said that the Applicants had between them incurred fees of £325 in respect of these proceedings and sought an order that the Council reimburse them.

43. Ms Etibet said that in the event the Applicants were to succeed in their application the Council would not oppose an order to reimburse fees. She sad that the Council was content to leave the matter to the discretion of the Tribunal.

Findings and Reasons

44. The Tribunal is grateful to the parties, their representatives and the witnesses for their assistance and good humour at the hearing which was conducted in a very open and civil manner.

45. The Tribunal found the witnesses to have been honest and reliable doing their best to assist us without favour or exaggeration. We accept the evidence they gave to us.

46. We find that the current problem with the balconies is a structural design defect and that remedial works to put it right are works which fall within the Council's repairing obligation in clause 7(2)(a) of the lease and the lessees obligation to contribute to the cost as set out in clause 3(2)(C) subject to the 10 year awareness point in sub paragraph (b) to which we shall return shortly.

47. On the evidence presented to us, particularly that of Mr Davis and the Norman Crossley & Partners reports we find that the 1991 works were a quite separate matter which did not cause or exacerbate the current problem. We find that there is no other technical evidence before us that would justify any other conclusion. Equally we were not persuaded that the 1999 works and the associated drilling have in any material way caused or exacerbated the current works.

48. We have given great care to the scope of the remedial works and the decision of the Council to go for the wholesale replacement option, which is one of the more expensive options. We have considered carefully the further materials disclosed by the Council after the hearing which have given us a greater insight into the decision making process. We were impressed with the care with which the Council approached this matter. Four options were reviewed and a detailed analysis undertaken of each one, including costings. The four options were:

    1. Additional brackets to panels [861]
    2. Provide external restraint posts to panels (Temporary) [862]
    3. Replace panels/posts with steel balustrading [864]
    4. Replace panels/posts with steel balustrading and extend slab [863].

In this light of this careful analysis we cannot find that it was unreasonable for the Council to select Option 3. It seems to us that there were good estate management reasons for doing so and we find that it was not unreasonable of the Council to opt for a longer term solution.

49. For these reasons we find that if the Council carries out the proposed remedial works to each block as described to us it will be reasonable for it to do so.

50. Whilst some information on costings was made available to us for the purposes of the hearing we were not asked to make any determination on the question of reasonableness of the cost likely to be incurred in respect of Picardy House, or indeed any other block. We understand that whilst the Council hope to carry out the remedial works to the three remaining blocks shortly there is not absolute certainty that its budget will allow it to do so.

51. In these circumstances we make no determination on the reasonableness of the likely cost of the works because such a determination can only be made when works to each block have been carried out and a review of the management of the project undertaken.

52. We come finally to the date when the Council was aware of the design defect we have found. This is critical to two of the Applicants.

53. The relevant terms of the lease are in reasonably clear English. The lessee is obliged to contribute to the costs of making good a structural '*defect of which the Council do not become aware earlier than ten years after the date [of the lease].*'
We find the words 'become aware' to mean having the knowledge of the structural defect. In our view this means that the Council must be fixed with the knowledge of a structural defect, not the symptom of the defect, nor the design solution to make it good, but simple knowledge of a defect. It was not essential that the Council knew the full nature and extent of the defect.

54. The Council were alerted to the problem of movement in a panel in May 1999. The Council commissioned a report to investigate the cause. The Council took the matter very seriously and, we find must have been on notice of a potentially serious situation. We find support for this in the D&M report at paragraph 2.2 [637] where it expressly states that the defects were first discovered in May 1999. We find that this is to be construed as meaning that the effect of the defect was found, that is to say the movement of the panel, was found in May 1999. The precise nature of the defect giving rise to the movement was discovered in August 1999 when the deficiency in the fixings was exposed.

55. The *Payne v Barnet LBC* case cited by Ms Etibet is not directly on point but it is helpful as a guide to what 'aware' means in the context of structural defects under the Right to Buy scheme. That case concerned 'structural defects known to the landlord' which the council was obliged to specify in a landlord's notice given under s124 Housing Act 1985. The facts are complex but it appears that in September 1987 the council appointed structural engineers to investigate problems (visible external defects) encountered on an estate to ascertain whether they were merely maintenance items or indicative of a deep-seated design defect. The engineers reported in June 1988. Meanwhile a tenant has given notice exercising the Right to Buy. In its response notice the council listed certain structural defects of which it was aware. Mr Payne contended that the list ought to have been more comprehensive. The Court found that there was no clear evidence in the case that the council did in fact know of any the additional defects. The Court said:

'It is, of course knowledge, not suspicion about a possibility, that is required before the obligation of disclosure under s125(4A) of the Act can have any effect.'

In our view the *Payne v Barnet* case can be distinguished because it relates to a positive duty to specify a known defect and give an estimate of the cost of making it good. That requires a deal of knowledge about the nature and extent of the defect and a remedial solution to put it right. It seems to us that compliance with the duty to disclose comprises four elements or stages:

1. Becoming aware of the defect;
2. Ascertaining the nature and extent of the defect;
3. Devising a design solution to make good the defect; and
4. Obtaining a cost estimate for the implementation of the design solution.

Inevitably, as the judge said, it would require a reasonable period of time to go through the four stages.

56. Accordingly, for the reasons we find that the Council was aware of the structural defect within 10 years of the date of the leases of flats 63 and 68 Normandy House and thus the lessees of those flats are not obliged to contribute a proper proportion to the costs of making good the defect.

57. In these circumstances whilst the Applicants have not succeeded on all of the arguments put forward they have achieved a measure of success and have shown that they were justified in making the application. Accordingly we find that it would be fair and just for the Council to reimburse the Applicants the fees of £325 paid by them and we require that they do so by 4pm Friday 12th January 2007.

John Hewitt
12th December 2006