

3459



Residential
Property
TRIBUNAL SERVICE

**RESIDENTIAL PROPERTY TRIBUNAL SERVICE
LEASEHOLD VALUATION TRIBUNAL for the
LONDON RENT ASSESSMENT PANEL
LANDLORD AND TENANT ACT 1985, AS AMENDED
SECTION 27A**

LON/OOAW/LSC/2007/0288

Premises: 34-36 Harcourt Terrace, London SW10 9JR

Applicant: 34-36 Harcourt Terrace Ltd.

Respondents: Various tenants of 34-36 Harcourt Terrace
London SW10 9JR

Appearances

Mr. A Banyard MRICS, Farrar Property
Management Ltd.
Mrs L A Mansen
Mrs K Howe
Ms A Cumming for the Applicant

Mr P Romain for the Respondents

Dates of hearing 4 October 2007

Date of Tribunal's decision 5 November 2007

Tribunal: Mrs J S L Goulden JP
Mr I Thompson BSc FRICS
Mrs J Clark JP

REFERENCE: LON/OOAW/LSC/2007/0288

PROPERTY: 32 – 36 HARCOURT TERRACE, LONDON, SW10 9JR

Background

1. The Tribunal was dealing with an application dated 19 July 2007 under S 27A of the Landlord and Tenant Act 1985, as amended ("the Act") for a determination whether a service charge is payable and, if it is, as to –

- (a) the person by whom it is payable
- (b) the person to whom it is payable
- (c) the amount which is payable
- (d) the date at or by which it is payable and
- (e) the manner in which it is payable

2. There was no cross application under S20C of the Act by the Respondents to limit landlord's costs of proceedings before the Tribunal, the Applicant having advised in its (undated) statement of case *"it is proposed to charge all the costs of the LVT application to all shareholders of the freehold management company as shareholder, rather than as leaseholders"*. In those circumstances, since the Tribunal only has a limited jurisdiction in respect of service charges, and it is not the intention of the Applicant to place costs of proceedings before the Tribunal on the service charge account, the Tribunal would have no jurisdiction to entertain an application from the Respondents, even if one were lodged.

3. The Tribunal was requested to deal with one issue only, and this was set out in the application as to *"whether the cost of installing a drinking quality water storage tank, stainless steel pumps and individual supply pipes in place of the one existing pipe is the lessor's responsibility and chargeable to all leaseholders"*.

4. The Applicant is 34-36 Harcourt Terrace Ltd., a company wholly owned by the residents of the flats. The Respondents are named in the application as the tenants of 34-36 Harcourt Terrace SW10 9JR ("the property"), but it was apparent that only some of the tenants were objecting to the application. The objecting tenants all reside in 36 Harcourt Terrace and are Mr P Romain and Mrs G Romain (Flat 10), Mr G Govi (Flat 8), Mr C Sofietti (Flat 6) and Mr B Patel (Flat 12).

5. The property is described as a lateral conversion of two terraced Victorian houses c 1870 which had been converted into twelve flats in 1985.

6. The Tribunal was provided with copies of the lease of the first floor and first floor mezzanine flat, Flat 7, which was made between the Applicant (1) and Dominique Levack and John Levack (2). The copy of this lease was undated but is for a term of 999 years from 1 April 1999 at a peppercorn rent and subject to the terms and conditions

therein contained. The Tribunal was advised that all the leases were in essentially the same form.

Hearing

7. The hearing took place on 4 October 2007.

8. The Applicant company was represented by a Building Surveyor, Mr A Banyard MRICS of Farrar Property Management Ltd., ("FPM") its managing agents. Mr Banyard confirmed that he had assumed responsibility for this matter within the firm since October 2004. He was supported by Mrs L A Mansen (Flat 2), Mrs K Howe (Flat 9) and Ms A Cumming (Flat 1). Mrs Mansen appeared on behalf of her mother, Lady Nicholson, and the Countess of Darnley, both of whom were the tenants of Flat 2. Ms Cumming had recently purchased her flat (Flat 1) from a previous tenant, Mr M J Chicken.

9. The Respondents were the tenants of the property. Those who objected to the application were represented by Mr P Romain, the tenant of Flat 10.

10. It was felt by both sides that an inspection of the property would not assist the Tribunal, and although the Tribunal reserved its position in respect of inspection, photographs were provided during the hearing which were of assistance. The Tribunal was advised that the building comprised two flats at basement level, each of which had its own separate mains water supplies, two flats on the ground floor (one of which had a separate front door entrance) and two flats on each of the first, second and third floors

11. The issues which required the determination of the Tribunal were as follows:-

Whether the proposed works and the proposed costs thereof are reasonable

Whether the proposed works are the responsibility of the landlord under the lease terms

12. The salient points of the evidence and the Tribunal's determination is given under each head.

Whether the proposed works and the proposed costs thereof are reasonable

13. Mr Banyard said that when the flat conversion had taken place in 1985, this had been on a cheap budget and with cheap plumbing. Although the flats had been refurbished and upgraded over the years, the plumbing needs had changed. The majority of tenants had mains powered hot water systems, but he said that the present position was that Flats, 1,2,3,4,5 and 6 were suffering from a severely disrupted water supply. He said "*the people in the top end of the building were last in the queue for water*".

14. Oral and written evidence was supplied from various tenants in respect of the problems with regard to disruption of the water supply on an apparently random basis,

which had started in 2003 with water supply problems to the two top floor flats, Flats 1 and 2, but which now affected four others, Flats 3,4,5 and 6.

Chronology as set out in the Applicant's statement of case

15. In his statement, Mr Banyard said that he had been instructed by the directors of the freehold company in July 2003 when he had been advised *"that there were water supply problems to the two top floor flats (1 & 2), as during peak supply period, there would be no water coming from the cold water taps in the kitchens which run direct off the mains, and the storage tanks for hot and cold washing water would soon run dry as the tanks would not fill up"*. From Mr Banyard's *"brief"* inspection, he said that the water supply problem to the two top floor flats was *"severe"* and the supply pressure to two flats on the third floor was *"poor"*. He wrote to the tenants on 7 July 2003 requesting information in respect of poor water supply and, in response, received a letter from the agents acting on behalf of the tenant of Flat 7. In his view the problems are increasing.

16. Mr Banyard, in his statement, set out the chronology. He said that enquiries had been made of various plumbing firms and, as there were discrepancies in respect of the extent of the remedial works, he recommended to the directors that Astec Consulting Services ("Astec") (a consultant firm who specialised in the solution of water supply problems), should be instructed to inspect the property and prepare an appropriate specification. In evidence, Mr Banyard said that this firm had been obtained through the internet.

17. On 14 October 2004, FPM served a Notice of Intention listing three contractors who were invited to estimate for the proposed works, which were limited to installing twelve new water mains pipes. A response was received from the tenant of the basement flat in No 36 (Mr Patel) stating that he did not have to contribute towards the cost of works and also suggesting alternative methods of supplying water to the upper flats. A response was also received from the tenant of the ground floor flat in No 36 (Mr Romain), with the suggestion that the placement of tanks on the roof would solve the problem and also that an engineer should be commissioned to carry out a report.

18. On 10 November 2004, after recommending to the directors that Astec be instructed, FPM requested the advice of Astec.

19. In January 2005, the tenant of Flat 1 wrote to FPM to indicate that the water supply problem had been getting worse and rendered the flats unsaleable. That tenant requested a full survey be carried out on all the flats.

20. On 14 March 2005 Astec wrote to FPM advising that they had visited the top two flats and proposed the preparation of a specification, obtaining of estimates and supervising works for a set fee of 15% of the contract price.

21. The specification was prepared in October 2005. This specification called for new water storage tanks to be installed within an enlarged excavated basement vault, together with pumps and new mains supplies to Flats 1 and 2. Equipment was also specified to

allow future connections to other flats, if required. A revised Notice of Intention with new details of the proposed works and new list of contractors was sent to the tenants on 14 October 2005. Astec submitted a tender report and copy estimates to FPM in November 2005.

22. On 1 December 2005, FPM sent out a second S20 Notice with the revised estimates. The letter also invited the tenants to a meeting at the managing agents' offices on 20 December 2005 to discuss the problems following which, due to further matters raised by the tenant of Flat 4, revised estimates were obtained and a revised second S20 Notice was served on 8 February 2006. The tenants of Flats 4 and 6 raised comments and/or objections.

23. FPM wrote to the tenants on 12 May 2006 setting out the current situation and asking them for their observations by 15 June 2006. In response, it is stated *"some leaseholders disputed the necessity for the extent of the proposed remedial works and asked that FPM arrange for a second inspection of the entire plumbing supply pipe system to establish how many supply pipes there were to the property, which flats were supplied by those pipes, and whether the other incoming supply pipes could be used to increase the supply to the flats and eliminate the supply problem. One leaseholder nominated their own contractor...to provide an estimate for the proposed works, but despite reminders, no estimate was submitted"*

24. FPM was in due course instructed by the directors to inspect every flat to determine the water storage in each flat, the type of hot water system, the number and type of water using appliances and the level of main water demand during peak usage periods. This inspection, by Mr Banyard and a firm appointed by him, ATP Maintenance, took place during September 2006 when access to ten of the twelve flats was obtained. The remaining two flats were inspected on 28 March 2007. ATP Maintenance prepared a report on 4 April 2007.

25. As set out in the Applicant's statement of case, the argument from those Respondents who object to the work being carried out was said to be *"some leaseholders still believe that there is a cheaper solution to resolve this problem, and that the cost of this work should be paid for by those leaseholders who were suffering from this problem and not by those leaseholders who did not suffer....."* In answer to these objections, the Applicant states *"FPM have explained to the leaseholders of the lower flats that although they are not suffering from a water supply problem, by drawing water from the communal supply pipe, they were contributing to the problem by drawing off the water and stopping it reaching the upper levels as water would naturally reach the lower level before the upper level as the supply was piped rising up through the building"*.

26. The Respondents' view, as expressed in their statement of case was, inter alia *"we...maintain that the case for the proposed technical solution has not been made, and the process of arriving at the proposed solution has been unprofessional and biased.....the current proposal is expensive and has very significant additional costs for the flats which do not participate from the outset.....the proposal ignores alternative and*

more sensible and cost effective ways for dealing with this problem...there has been a surprising unwillingness by the management company to seriously explore any alternatives....the management company is not acting in the best interest of the leaseholders, and is arguably grossly negligent of their duties to advise in an impartial manner.....the proposed solution requires pipe work to run through the common parts, the installation of big tanks in the vaults and the installation of a battery of pumps just outside of flat 12 and 10...the technical solution proposed was arrived at long before any due diligence and detailed survey had taken place...the subsequent survey was grossly negligent....the process of trying to force the leaseholders to adopt the proposed solution had been biased, poorly governed, and laced with strong inherent conflicts of interest by the management company and some of the directors....there is no precedent of other Harcourt Terrace properties having had to undertake similar work programmes to solve their problems....."

27. In oral evidence, Mr Romain was critical of FPM's approach and said that he would have expected a more "rigorous" process to establish the facts, to consider available options and make a considered recommendation as to the way forward. He thought that the anticipated cost of works was excessive and that there must be a cheaper solution such as that suggested by the tenant of Flat 6. All other possible solutions had been dismissed by FPM as not viable, but Mr Romain remained unconvinced and said that alternative solutions had not been explored. Mr Romain complained that S20 Notices had been served before thorough due diligence. The first S20 Notice had been superceded and the second had been suspended pending the determination of the Tribunal. Information supplied was still insufficient and there had been no technical report, merely assertions.

28. In written representations, the tenant of Flat 6, Mr Soffiatti said, inter alia "*our involvement in this dispute was from the beginning of the appearance of evidence of random water flow interruptions during the day. We contacted (FPM) ..at the end of June 2004...we are now in September 2007 and nothing has happened in 3 years.....no independent plumbing surveys were done before a solution was proposed by the end 2005.....only one plumbing survey dated 4 April 2007 has been carried out on the premises and it is incomplete....common sense would suggest that surveys come first and then, on the basis of facts, solutions are proposed but FPM inverted this order and added confusion.....further independent investigation needs to be undertaken...."*

29. Neither side provided live expert evidence which could be tested by the Tribunal.

30. The Tribunal finds it difficult to believe that, although problems with regard to the water supply (in some cases severe) were known in July 2003 which must have caused considerable disruption and inconvenience to the tenants affected, over four years later, these problems have still not been resolved. In the view of this Tribunal the reason for this is, in no small measure, due to the inadequacy of the managing agents in understanding, and coming to grips with, the problem in an appropriate manner. Letters written to the tenants from FPM were not authoritative (although they purported to be so) but were merely regurgitating views of various contractors. No proper research had been carried out as to the validity of the comments made in those letters. There were

considerable, and unacceptable, delays throughout, although it is acknowledged that this was, on occasions, due to difficulty in accessing all the flats. A revealing letter to FPM from Astec dated 20 July 2006 in response to a request for references, stated "*references, suitability and capability to carry out the works should have been requested right from the outset..... we were actually appointed and received instructions to proceed back in November 2004! It is now 2006!*" Notices under the S20 consultation requirements were served before a survey was carried and before expert consultants were instructed. A letter from Mr Romain of 16 October 2004 stated "*I think you have jumped the gun*". There was a failure to identify the full extent of the works required and even the number of flats involved. Whilst the Tribunal has no doubt of Mr Bayard's wish to seek a satisfactory solution for the benefit of all the tenants, his reactive approach must have increased doubts in the minds of the tenants as to the quality of the decision making process.

31. The Tribunal does not accept Mr Romain's complaint that alternative solutions were not explored. It would appear that they were explored but were not considered viable. This was explained to the tenants in a letter from FPM of 12 May 2006 which set out the problems in detail, the possible solutions and why, in the opinion of Mr Banyard, they would not work. It is noted that emails were sent by Mr Banyard to Mr Romain in respect of these issues, one of which, dated 4 July 2007, stated "*I have explained the facts countless times. We have received professional advice from two separate sources, a water supply specialist company ASTEC whose entire business is based on supplying such advice and implementing the solutions, and a plumbing company ATP. I have spoken to several other plumbing companies and they are all of the opinion that pumping stored drinking quality water down separate pipes is the only solution which works. We have found no other solutions which work. If there were, ASTEC would have told us of an alternative*".

32. After the hearing, and as agreed at the hearing, Mr Banyard supplied a breakdown of costs. This was received by the Tribunal in an email dated 19 October 2007. In order to assist the Respondents, the breakdown was stated to be as follows:

<i>1. Prelims and setup up site welfare facilities</i>	<i>£2,500</i>
<i>2. Excavate vault and lay concrete</i>	<i>£4,500</i>
<i>3. Supply and fit tank</i>	<i>£3,750</i>
<i>4. Connect incoming mains to tank</i>	<i>£500</i>
<i>5. Supply and fix 10x22mm rising mains pipes</i>	<i>£10,500</i>
<i>6. Insulate pipework</i>	<i>£1,000</i>
<i>7. Supply and fit ply enclosure to pipework</i>	<i>£3,500</i>
<i>8. 6 flat connections at £3,500 per flat</i>	<i>£21,000</i>
<i>9. Pressure testing and commissioning</i>	<i>£1,000</i>
<i>10. Provisional sum for electrical connections in 6 flats</i>	<i>£3,500</i>
<i>11. General contingency</i>	<i>£1,500</i>
<i>Total</i>	<i>£53,250 + VAT</i>

Uplift on estimated price since estimate 12/5/2006 7.5% mainly due to increase in price of copper and other raw materials."

33. The Tribunal requested further clarification upon receipt of this email and, again in order to assist the Respondents, Mr Banyard's further reply was as follows:-

"The original estimate of £38,250 included for two flat connections and included a provisional sum of £3,500 for repairing any work disturbed in the top floor flats, where the connection to the water system is more awkward.

The estimate referred to in our section 20 letter of 12 May 2007 of £45,750 includes for 4 flat connections in total, and the estimate of £53,250 includes for 6 flat connections in total. You are correct that this equates to £3,750 per flat connection, not £3,500 as previously stated.

The flats 3,4,5 and 6 will be much easier to connect, as all the supplies are close to the entrance doors to the flats, so the disturbed parts of the flat in making the connections will be far less.

Item 8 includes for pressure testing the 6 new pipe connections when the pumped system is up and running, checking for leaks on the new pipework, and also checking that all the plumbing equipment in the flat is not adversely affected by the new supply pressure ie ball valves leaking due to higher pressure at the cistern.

Item 10 in fact was the provisional sum for the first two flat connections mentioned above, it included connecting to the electrical supplies in the flats for the pump supplies. If the electrician is running 6 wires down the ducting instead of two, the cost would not be much greater in labour, so the provision was not increased for 6 flats.

The increased cost (+7.5%) would hold for 90 days"

34. The Tribunal has been critical of the passive (rather than proactive) role undertaken by Mr Maynard and accepts as justified some of the criticisms put forward by Mr Romain but notes that FPM obtained competitive quotations, and proposed the appointment of the contractor with the lowest tender. The Tribunal has adopted a pragmatic and broad brush approach in the interests of all the tenants of the property. In making its determination, the Tribunal has taken into account the fact that the Applicant is a tenant led company with no assets of its own. Mr Romain's suggestion of going back to square one would, in the view of this Tribunal, only involve the Applicant company, and therefore directly the tenants, in additional costs but with no guaranteed benefit. It is noted that those Respondents who objected to the proposed works either have no problems with regard to water supply or have dealt with their problems independently.

35. The Tribunal determines that the sum of £53,250 plus VAT and plus an uplift of no more than 7.5% plus VAT if incurred would be reasonable and properly chargeable to the service charge account. With regard to ancillary fees, Astec's fees of 15% plus VAT and Condam Health and Safety Compliance fees at 1.5% plus VAT if incurred would be reasonable and properly chargeable to the service charge account.

36. The Tribunal has considered Astec's letter to FPM of 14 March 2005 (also referred to in paragraph 20 above) which states, inter alia *"we would recommend that a specification*

and sketches complete with supporting documentation is produced to seek competitive tenders on the open market. The tender return document would, as discussed, include a summary of items so specific costs can be identified. Upon their return, we would submit a tender opening report and recommendation to the next stage. Once the contractor has received his instruction to proceed we would normally supervise the work and produce financial valuation reports... ..In view of the low contract value, we consider a fee of 15% on the lowest accepted return tender would be appropriate". On this basis, the Tribunal disallows the contract administration fees of FPM at 3% since it considers that Astec's role includes contract administration. Although the Tribunal accepts that Mr Banyard's fees if calculated on a time spent basis would cost the tenants much more, it is felt that some of the time spent was wholly due to FPM's shortcomings for which the tenants should not be liable.

37. This Tribunal considers that remedial works must be carried out as a matter of urgency. The provisional sums are a cause of concern, and the contract administrator should keep a close eye on items 8 and 10 (as referred to in paragraph 33 above) to ensure that they are adjusted appropriately once the actual scope of works are known.

38. In making its determination, the Tribunal wishes to make it clear that any party would be free to challenge the costs actually incurred and the standard of works actually carried out.

Whether the proposed works are the responsibility of the landlord under the lease terms

39. The Applicant's view was that the repair or renewal of a water pipe system servicing the flats was a landlord's repairing obligation within the terms of the lease and, in the Applicant's statement of case, the clauses on which it intended to rely were referred to in support of this contention.

40. The Respondents in their statement said *"we understand that the landlord's/management company's obligation is to provide pipes in good working order – which the company does. As far as precedence is an indicator of the landlord's obligation, there is no evidence of any other property in Harcourt Terrace having pursued a communal solution to their water issues"*.

41. The Tribunal considered the lease terms, Clause 5 of which sets out the landlord's repairing covenants and Clause 4 of which sets out the tenant's liability for payment within the service charges.

42. The Second Schedule to the lease sets out the easements rights and privileges granted to the tenant of that flat, and the Third Schedule excepts and reserves to the landlord and the tenants of the other flats in the building similar easements rights and privileges.

43. Clause 3 of the Second Schedule provides for **"the free and uninterrupted passage and running of water and soil gas and electricity from and to the demised premises**

through the sewers drains watercourses cables pipes and wires which now are or may at any time during the said term be in under or passing through the Building or any part thereof"

44. Clause 5 of the lease sets out the landlord's covenants with the tenant throughout the term (to include its successors in title and subject to the tenant's contribution to the service charge account). Clause 5.2 (2) provides that the landlord must **"maintain and keep in good and substantial repair and condition and/or where appropriate rebuild.....all such gas and water mains and pipes drains waste water and sewage ducts and electric cables and wires in under and upon the Building as are enjoyed or used by the Lessee in common with the owners or lessees of the other flats"**

45. Clause 4 of the lease sets out the tenant's covenant with the landlord **"and with and for the benefit of the owners and lessees from time to time during the said term of the other flats comprised in the Building.....throughout the term, one of which is to pay the maintenance charge which is defined in Clause 4.2(b) as "...10 per centum of the costs and outgoings incurred by the Lessor during the relevant accounting year or any part thereof in carrying out the Lessor's obligations under Clause 5 hereof....."**

46. From the terms of the lease, it is clear that the tenants have the right to free and uninterrupted passage and running of water (Second Schedule), it is the responsibility of the landlord to provide the same (Clause 5), and the cost thereof must be borne by the tenants within the service charge (Clause 4). Some tenants patently do not have this service, the landlord is obliged to provide this service and the cost of its so doing is a relevant cost within the Act and therefore permissible to be placed on the service charge account. Those Respondents who object to the proposed works did not have any concrete challenge to this interpretation of the lease.

The Tribunal's determinations as to service charges are binding on the parties and may be enforced through the county courts if service charges determined as payable remain unpaid.

CHAIRMAN.....

DATE..... 5 November 2007