RESIDENTIAL PROPERTY TRIBUNAL SERVICE

SOUTHERN RENT ASSESSMENT PANEL
& LEASEHOLD VALUATION TRIBUNAL

COMMONHOLD AND LEASEHOLD REFORM ACT 2002

DECISION OF THE LEASEHOLD VALUATION TRIBUNAL

Case No.	**CHI/29UL/LSC/2008/0065**
Property:	**7 Grimston Gardens** **Folkestone** **Kent** **CT20 2PT**
Applicants:	**Trustees of Viscount Folkestone (1963) Settlement** **c/o Smith Woolley & Perry**
Respondents:	**The Lessees of 7 Grimston Gardens**
Dates of Hearing:	**1st October 2008 and** **28th November 2008**
Members of the Tribunal:	**Mr. R. Norman** **Mr. R. Athow FRICS MIRPM** **Ms L. Farrier**
Date decision issued:	

RE: 7 GRIMSTON GARDENS, FOLKESTONE, KENT, CT20 2PT

Decision

1. The Tribunal made the following decision:

(a) The service charges demanded in respect of the works to deal with dry rot be reduced from £18,858.53 to £4,540.02; one third of that sum to be paid by the lessees of each of the three flats at the subject property. Any payments which have been made in excess of that share to be refunded in 28 days from the date this decision is sent to the parties and any balance which remains, to be paid within 3 months from the date this decision is sent to the parties. We make the distinction in the time allowed for payment because we recognise that in the present financial climate time may be needed to arrange finance.

(b) An order be made under Section 20C of the Landlord and Tenant Act 1985 ("the 1985 Act") that all or any of the costs incurred or to be incurred by the Applicants in connection with these proceedings are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the Respondents.

Background

2. An application was made by Smith Woolley & Perry ("the Managing Agents") on behalf of the Trustees of Viscount Folkestone (1963) Settlement ("the Applicants") for determination of the liability of the lessees ("the Respondents") of the three flats at 7 Grimston Gardens, Folkestone, Kent, CT20 2PT ("the subject property") to pay service charges amounting to £18,858.53 in respect of works to deal with dry rot.

Inspection

3. On 1st October 2008 the Tribunal inspected the subject property and saw the areas in Flat 1 and the cellar referred to in the documentary evidence as having been affected by dry rot.

The Hearing

4. On 1st October 2008 the hearing was attended by Mr. Mitchell of the Managing Agents with Mr. Evans of the Managing Agents observing. The Applicants were represented by Miss Fitzgerald of Counsel. The Respondents present were Mrs. Hawking of Flat 1, Mr. Barney of Flat 2 and Miss Coulson and Mr. Taylor of Flat 3. The hearing was adjourned and continued on the 28th November 2008. On that date the same persons attended except that the Applicants were not represented by Counsel and Mr. Mitchell represented the Applicants.

5. In advance of the first hearing we had considered bundles of documents prepared on behalf of the parties. Between the 1st October and the 28th November 2008 written questions were asked of Mr. McMillan FRICS ACIArb. He provided written answers to them and comments about those answers were made on behalf of the parties and some additional documents were supplied. Further comments and evidence were given at the hearing.

6. On both the 1st October and the 28th November 2008 we heard evidence and submissions on behalf of the Applicants and by the Respondents which we considered.

7. The £18,858.53 claimed by the Applicants was the sum of £19,084.57 paid to Gulliver Timber Treatments Limited, £251.45 paid to Homeguard (South East) Limited and £2,548.14 paid to John E. McMillan & Associates less an insurance payment of £3,025.63.

8. The parties agreed that the work carried out by Gulliver Timber Treatments Limited in 2006, the work carried out by Homeguard (South East) Limited in 2005 and the supervision of the work by John E. McMillan and Associates was necessary and was carried out to a reasonable standard. Also that in relation to the works in 2004 by Homeguard Building Protection Services Limited the guarantee was not taken up by the Managing Agents and was not offered to the Respondents.

9. The Managing Agents did not agree with the opinion of Mr. McMillan that the dry rot problem was caused by a water leak from renovations to Flat 2 in 2001 or that not enough work was done by Homeguard Building Protection Services Limited in 2004.

10. The case for the Applicants in the documents produced and at the hearing was in summary that the Managing Agents had done all they reasonably could do to deal with the problem of dry rot and that the Respondents were liable for the full cost claimed.

11. The case for the Respondents in the documents produced and at the hearing put by Miss Coulson with the help of the other Respondents present was in summary that the dry rot could be traced back to the leak in 2001, when, as in the opinion of Mr. McMillan, the balance of the subject property changed as a result, that the conditions for dry rot were set up by the leak and that there had been inadequate eradication of the problem. Miss Coulson properly drew our attention to the three estimates obtained in 2004. She described them as being the only guide available but not like for like. One was from Eradicure Property Care and Protection and was in the sum of £12,521.97 including VAT. This seemed to be the most comprehensive. A second estimate was from Homeguard Building Protection Services Limited and was much lower but was for less work and there was a third estimate from JCK Renovations in the sum of £814. The Respondents' case was that they should not be responsible for any part of the sum claimed as the expense had been created by the failure of the Managing Agents and contractors instructed by them to deal properly with the original 2004 contract.

12. The parties are fully aware of the details of the evidence and arguments advanced and we considered all that was put before us.

Reasons for decision

13. The Tribunal was in the difficult position of having to make decisions about matters which had occurred from 2001 onwards. In connection with another application, two members of the present Tribunal had seen the subject property in 2006 at a time when the dry rot problem was at its height but that did not assist the present Tribunal in coming to conclusions about what had happened previously. The member of the Managing Agents' firm who dealt with the subject property between 2001 and 2003 was no longer with the firm and we received no evidence from him. The Managing Agents had very little evidence of having supervised the works in 2004. Mr. McMillan was not involved with the subject property until after the second outbreak of dry rot had been detected. He could provide expert opinion but had no personal experience of the subject property at the time which was of most concern to us – i.e. 2004. Mr. Higman the

insurance assessor had dealt with the property throughout and therefore did have personal experience of it but his concern as an insurance assessor would not be identical to the concerns of the Managing Agents or the Respondents.

14. The Managing Agents accepted that the guarantee offered by Homeguard Building Protection Services Limited had not been taken up by them and had not been offered to the Respondents. Had that guarantee been taken up then it is possible that the necessary remedial works could have been dealt with under that guarantee.

15. We received evidence of a number of possible causes of the reappearance of the dry rot and appreciate why Mr. Higman came to the conclusion that he could not advise the insurers to foot the whole of the cost of the works in 2006. However, there was agreement by Mr. McMillan and Mr. Higman that part of the cause of the reappearance of dry rot was the inadequate eradication of it in 2004. There is also the letter dated 3rd September 2004 from Homeguard Building Protection Services Limited about additional work required and not done and the Managing Agents could not explain why it had not been done. The insurers did pay £5,030.35 in respect of the works in 2004 carried out by Homeguard Building Protection Services Limited and we had no reason to suppose that had the work been carried out by Eradicure Property Care and Protection the insurers would not have contributed at least that sum towards that work.

16. We heard evidence from Mr. Mitchell that the work carried out by Homeguard Building Protection Services Limited was not on the basis of a fixed price contract, that Homeguard Building Protection Services Limited knew that insurers were paying and therefore that if more work was needed it could be done and that therefore there was no incentive to do less work than required. If we had accepted that evidence at face value then the position would have been that any work done in 2004 in respect of the dry rot would have been paid for by the insurers, that had the estimate from Eradicure Property Care and Protection been accepted all the work would have been carried out at no cost to the lessees and if there had been a further outbreak of dry rot then any remedial work would have been covered by Eradicure Property Care and Protection's guarantee. It would have followed that the lessees would have nothing to pay now. However, we were not satisfied that the insurers would have paid for all the work which should have been undertaken and we bear in mind that the Eradicure Property Care and Protection estimate was more extensive than the other estimates. When the dry rot reappeared the insurers found that some of the work was too remote from the earlier claim but were prepared to contribute £3,025.63 towards the work done by Gulliver Timber Treatments Limited. That leads us to believe on a balance of probabilities that as the insurers were prepared to pay £5,030.35 on one occasion and then £3,025.63 on a later occasion when it was found that there had been inadequate eradication of the problem, the insurers would have been prepared to pay more than £5,030.35 had the more extensive works suggested by Eradicure Property Care and Protection been carried out. On the basis of the evidence presented to us, the only reliable way we can find to quantify the additional amount is by reference to the £3,025.63 paid by the insurers in respect of the later works.

17. On the basis of the evidence before us and on a balance of probabilities we made the following findings of fact:

(a) The leak in 2001 was dealt with to a reasonable standard by the Managing Agents. It may well be that with the benefit of hindsight it is possible to say that as a result of the leak in 2001 the balance of the subject property changed and we accept this could well have been the time when there was some water ingress which allowed the conditions for dry rot to flourish. However, that leak from the bathroom in Flat 2 which caused flooding to Flat 1 and the cellar was dealt with as a leak and that was the correct procedure at the time.

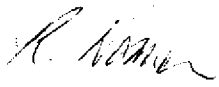
(b) Dry rot was discovered in the second half of 2003 and Homeguard Building Protection Services Limited carried out an inspection in January 2004. In the same month that company provided an estimate for the work in the sum of £2,056.25 including VAT. In April 2004 Eradicure Property Care and Protection produced an estimate of £12,521.98 including VAT. That report was far more detailed. Homeguard Building Protection Services Limited carried out the work in June 2004. We find that Homeguard Building Protection Services Limited grossly understated the seriousness of the problem and we note that in a letter dated 3rd September 2004 Homeguard Building Protection Services Limited recommended further repairs should be carried out as soon as possible. Whatever those repairs were they were not carried out and the Managing Agents could not explain to us the reason for that. Although more expensive, the estimate from Eradicure Property Care and Protection was more comprehensive. By comparing the plans produced by the two companies it can be seen that Eradicure Property Care and Protection were quoting for more work. Perhaps the dry rot in the kitchen was not spotted by Homeguard Building Protection Services Limited and therefore the Homeguard Building Protection Services Limited estimate was substantially less. Both estimates were provided within three months of each other and show a different approach to the problem. The estimate from JCK Renovations is so low that it should be disregarded. The Managing Agents did not deal with the works in 2004 to a reasonable standard. They chose to proceed with the Homeguard Building Protection Services Limited estimate which grossly understated the seriousness of the problem. They should have proceeded with the Eradicure Property Care and Protection estimate which although more expensive was more comprehensive. As professional Managing Agents they should have realised this and had they done so they should then have taken up the guarantee offered by Eradicure Property Care and Protection. Not to do so in respect of such work and for so small an outlay (£74.03) would have been reckless.

(c) Had that course been taken we find it probable that the dry rot would not have reappeared in 2006 but that if it had, the work probably would have been dealt with under the guarantee. There would have been no need to employ Gulliver Timber Treatments Limited or Mr. McMillan and their costs would have been avoided.

(d) There was inadequate supervision by the Managing Agents of the work in 2004.

(e) Having decided to proceed with the original 2004 Homeguard Building Protection Services Limited estimate, the Managing Agents should have taken up the Homeguard Building Protection Services Limited guarantee or at least offered it to the Respondents but they did not do so.

18. On considering all the evidence presented to us and all the submissions made we came to the conclusion that a reasonable course of action for the Managing Agents to take in 2004 would have been to accept the Eradicure Property Care and Protection estimate and to take out the guarantee for that work. This would have been at a total cost of £12,596. We were satisfied on a balance of probabilities that the insurers would have contributed a total of £8,055.98 (the total of the contributions of £5,030.35 and £3,025.63 which the insurers in fact made) and that that sum should therefore be deducted leaving a total of £4,540.02 to be paid by the Respondents. We had no evidence before us about any payments which have been made by the Respondents towards the £18,858.53 claimed and we therefore made the order as to payment in paragraph 1(a) above.



R. Norman
Chairman