

**SOUTHERN RENT ASSESSMENT PANEL**  
**LEASEHOLD VALUATION TRIBUNAL**

**Case No. CHI/00MR/LSC/2010/0039**

**REASONS**

**Application :** Section 27A of the Landlord and Tenant Act 1985 as amended (“the 1985 Act”)

**Applicant/Landlord :** Keystone Property Co Ltd

**Respondent/Leaseholders :** Mr S A Coxell and Mr J A Coxell (Flat A), Mr A G Race and Mrs K F Race (Flat B), Mr A D Scott (Flat C), and Mr D A Herbert (Flat D)

**Building :** 33 Shaftesbury Road, Southsea, PO5 3JP

**Flats :** The residential Flats in the Building

**Date of Application :** 22 March 2010

**Dates of Directions :** 29 March 2010

**Dates of Hearing :** 18 May 2010

**Venue :** First Floor, 1 Market Avenue, Chichester

**Appearances for Applicant/Landlord :** Mr J Nouch and Mr T Hillsdon, DMA Chartered Surveyors (“DMA”), and Mr P G Malin, Pearson Ellis Portsmouth, consulting and structural engineers (“PEP”)

**Appearances for Respondent/Landlord :** Mr Herbert, Mr and Mrs Herbert, Mr Coxell, and Mr and Mrs Coxell

**Members of the Tribunal :** Mr P R Boardman JP MA LLB (Chairman), Mr P D Turner-Powell FRICS, and Mr J Mills

**Date of Tribunal’s Reasons :** 21 May 2010

**1 Introduction**

1. This application by the Applicant/Landlord is, under Section 27A of the 1985 Act, for the Tribunal to determine the payability of the cost of proposed works to the front bay of the Building by way of service charge

## **Documents**

2. The documents before the Tribunal are :
  - a. the application
  - b. the Applicant/Landlord's bundle
  - c. the Respondent/Leaseholders' bundle

## **Expressions used in these reasons**

3. The following expressions in these reasons have the following meanings :
  - a. A1, A2 and so on : page numbers in the Applicant/Landlord's bundle
  - b. AA1, AB1 and so on : page numbers in the appendices to the Applicant/Landlord's bundle
  - c. R1, R2 and so on : page numbers in the Respondent/Leaseholders' bundle
  - d. Basement Flat : Flat A
  - e. Ground Floor Flat : Flat B
  - f. First Floor Flat : Flat C
  - g. Second Floor Flat : Flat D

## **Inspection**

4. The Tribunal inspected the Building, including the front rooms of the Basement Flat, the First Floor Flat, and the Second Floor Flat, on the morning of the hearing. Also present were Mr Nouch, Mr Hillsdon, Mr Malin, Mr Herbert, Mr Coxell, and, during the inspection of the First Floor Flat only, Mr Scott
5. A description of the Building is at paragraph 5 of the Applicant/Landlord's statement of case (A2)
6. A plan of the Basement Flat is at AA3
7. Photographs of the Building, and of the cracks referred to in evidence, are at AB2, AB10 to 18, AC7 to 9, and R39 to 40
8. The Tribunal noted that the bay extended from the Basement Flat to the top of the First Floor Flat, where the bay had a felt roof. The Second Floor Flat did not have a bay

## **The leases**

9. A copy of the lease of the Basement Flat is at AA1 to AA12. The parties agreed at the hearing that the leases of the other Flats were, except for the reference in the lease of the Basement Flat to the foundations of the Building being demised with that Flat, in materially similar terms

10. For the purposes of these proceedings the material parts of the lease of the Basement Flat are as follows :

***Recital (AA1)***

- (1) *The Lessor is seised in fee simple of the property situate and known as Numbers 31 [sic] and 33 Shaftesbury Road Southsea Portsmouth Hampshire comprising six [sic] flats (..... "the Estate")*

***Clause 1 : (AA1)***

- (1) *.....ALL THAT Flat.....numbered 33A and being on the basement floor of the Estate.....including one half part in depth of the structure between the ceilings of the Flat and floors of the flat above it and (subject to clause 7(1) hereof) the internal and external walls of the Flat up to the same level and the land and structure of the Estate below the Flat including the foundations supporting the internal and external walls.....*

***Clause 3 : Tenant's covenants (AA2)***

- (1) *The Tenant..... will :*  
(a) *and (b).....*  
(c) *maintain and uphold and keep the Flat (other than the parts hereof comprised and referred to in paragraphs (4) and (6) of clause 5 hereof) and (subject to clause 7(1) hereof) all walls.....thereto belonging*

***Clause 4 : Tenant's covenants (AA6)***

- (2)(a) *To contribute and pay one-sixth [sic] part of the costs expenses and outgoings and matters mentioned in the fifth schedule hereto (hereinafter called " the annual maintenance charge")*  
(b) *[the Lessor to prepare audited accounts of the actual costs expenses and outgoings as soon as possible after the 24 June in each year and the Tenant to pay the contribution owing under clause 4(2) within 21 days of notification of the amount]*

***Clause 5 : Lessor's covenants (AA6 to 7)***

- (4) *.....the Lessor will maintain and keep in good and substantial repair and condition*  
(i) *the main structure of the Estate including the foundations and the roof thereof.....*

***Clause 7 : declarations (AA8)***

- (1) *That every wall separating the Flat from any adjoining flat shall be a party wall.....*

**Statement by Applicant/Landlord (A1 to 7) and documents in the Applicant/Landlord's bundle**

11. The Applicant/Landlord stated that a service charge budget was at A8. Works required over and above the budget would be invoiced separately during the year
12. DMA took over the management of the Building in 2006. The most urgent problem was defective lintels to the front bay. A report by Philip Sealey, chartered surveyors, dated 4 April 2007 (AB1 to 20), recommended demolition and reconstruction of the bay, providing new and adequate foundations
13. A report by Philip Goacher Associates, consulting civil and structural engineers, dated 8 October 2007 (AC1 to 15), instructed by insurance loss adjusters, concluded that the bulk of the cracking and movement to the bay had been caused by corrosion and expansion of the metal lintels, and recommended that the lintels should be replaced with new lintels
14. Following a period of monitoring, Philip Goacher Associates reported on 7 May 2008 (A16) that there was no evidence of further movement to the monitored cracks, and insurers had closed their file on the basis that there was no evidence that the lintel damage was due to subsidence
15. The Applicant/Landlord instructed PEP, who prepared a specification (A22 to 28) and obtained tenders from Southern Preservation Ltd for £22,570.25 including VAT (A42 to 49), and L J Sandalls & Son Ltd for £24,597.35 including VAT (A52 to 61)
16. The Applicant/Landlord served on the Respondent/Leaseholders (A17 to 21) :
  - a. notices under section 20 of the 1985 Act on 3 September 2009 of the Applicant/Landlord's intention to instruct Southern Preservation Ltd to carry out the works
  - b. an invoice [not before the Tribunal] for £6,504.44, representing an equal share divided by the 4 apartments of the total estimated costs of £29,017.75, made up as follows (with VAT in each case at 15%) :
  - c. estimated costs £22,570.25
  - d. DMA fees £750.00
  - e. VAT £112.50 £862.50
  - f. PEP fees £1,700.00
  - g. VAT £255.00 £1,955.00
  - h. Contingency @10% contract sum £2,250.00
  - i. CDM £600.00
  - j. VAT £90.00 £690.00
  - k. Total £29,017.75
17. The sum of £6,504.44 was owing by each of the Respondent/Leaseholders on 5 October 2009, but Mr Herbert had failed to pay

18. The Applicant/Landlord's bundle included the following correspondence about the proposed works between Mr Herbert and DMA :
- a. a letter from Mr Herbert 25 September 2009 (A29 to 31)
  - b. a letter from DMA 13 October 2009 (A32 to 34), including a statement in paragraph 7(2) (A33) that the cost of an application to the Tribunal would be up to £500 and would fall on all four Respondent/Leaseholders equally
  - c. a letter from Mr Herbert 14 March 2010 (A50)

**Statement by Mr Herbert and documents in the Respondent/Leaseholders' bundle (R4 to 5)**

19. Mr Herbert stated that he had owned the Second Floor Flat since March 2005. The building was then under the control of Remus Management, who advised that there was extensive cracking to the front of the Building but that it was not structural (R12)
20. The ingress of water causing rust to the steel lintels was down to a lack of maintenance. If the work had been carried out in 2006, when DMA became aware of the defective lintels, the front elevation would not be in the poor state it was now in. The present proposals were not to rebuild, but simply to use 6mm steel cables to secure to the floor. The long term solution was to rebuild as Philip Sealey had advised 3 years ago
21. Mr Herbert's offers to meet to discuss had been declined
22. Two of the other Respondent/Leaseholders had signed forms expressing concerns (R6 to 9)
23. Mr Herbert had obtained two independent quotations to highlight both methods of repair and costings :
- a. Moore Property maintenance Ltd 7 April 2010 (R36), £16,000, plus VAT, including removing the entire bay, forming new foundations, and rebuilding the bay using blockwork and IG lintels
  - b. Southern Building Services 25 April 2010 (R37), £5,400, including cutting into cracks, removing blown render beads, fitting new stainless steel beads, and painting with stabilising solution

**The hearing 12 December 2007**

24. At the start of the hearing, the Tribunal identified the following issues arising from the Tribunal's preliminary consideration of the lease and other papers, in addition to any other issues which the parties themselves wished to raise :
- a. on what basis had the Applicant/Landlord chosen to do the works referred to in the section 20 notice dated 3 September 2009, bearing in mind the differing works referred to in the various reports
  - b. on what basis does the Applicant/Landlord say that the lease allows the Applicant/Landlord to carry out the proposed works and charge the lessees through the service charge, bearing in mind that clauses 1, 3(1)(i), and 5(4)(i) of the lease all appear

to make the Respondent/Leaseholders individually responsible for walls, and the Applicant/Landlord for foundations and roof, however difficult that might be to make work in practice

- c. did the section 20 notice dated 3 September 2009 comply with the Service Charges (Consultation Requirements) (England) Regulations 2003 (for example, were quotes attached, and was the time limit for observations set out correctly)
  - d. had there been a previous failure to comply with the Applicant/Landlord's repairing obligations as alleged by Mr Herbert, and, if so, does that provide a defence to the claim as in the Lands Tribunal decision in **Continental Property Ventures Inc v Jeremy White** LRX/60/2005 heard on the 10 February 2006
  - e. on what basis does the Applicant/Landlord say that the lease entitled the Applicant/Landlord to demand service charges on account or bill throughout the year, bearing in mind clause 4(2)(b)
  - f. on what basis does the Applicant/Landlord say that the lease entitles the Applicant/Landlord to include the costs of these Tribunal proceedings in any future service charge as suggested in point 7(2) of DMA's letter to Mr Herbert dated 13 October 2009 (A33)
25. Mr Malin indicated that he was ready to deal with the first of these points without requiring an adjournment to consider it. The Tribunal indicated that that part of the hearing would therefore be conducted before the lunch break, with an adjournment over lunch for Mr Nouch, Mr Hillsdon, and Mr Malin to have the opportunity of considering the remaining points before the resumption of the hearing after lunch

### **The proposed works**

26. Mr Malin stated that he had assessed what remedial works were required following inspection of the cracking of the walls, the damage to the render, and the rusting of the metal lintels supporting the arches over the windows. He had taken account of the location of the Building, and the fact that the right-hand side of the bay, looking from Shaftesbury Road, was exposed to south-west winds funnelling up Shaftesbury Road from the sea, which explained why there was more damage to the right-hand side of the bay than to the left-hand side. Any replacement materials had to be non-corrosive. He had assessed the amount of movement of the bay. In his view there had been slight extra movement since the monitoring carried out on behalf of the loss adjusters. His proposed method of remedying the problem was the strap method. Stainless steel wires would be cut into the perimeter render at each floor level and the ends would be tied in to the floor joists timbers in each case. The rusted lintels would be replaced by stainless steel metal flats
27. He did not agree with the recommendation in the Philip Sealey report that new foundations were needed. Although there had been some movement, including some slight recent movement, the movement was too small to warrant new foundations. If any work was necessary to foundations, underpinning would be sufficient. Mr Malin was satisfied that his proposed works would be a long-term solution
28. In answer to questions from the Tribunal Mr Malin said that the works would take about 10

weeks. The proposed CDM sum was required to comply with the Construction (Design and Management) Regulations 2007, because of the value of the works involved and the proximity of the works to the neighbouring building. A sum for additional precautions to deal with asbestos containing materials was also included. The contingency sum was because the building was 100 years old and there were cracks in the render and until repairs were started it was not possible to know what would be uncovered. Wall ties would be needed for each of the relevant floors. If not, the relevant sum in the tender could be negotiated out. Another possible reduction would be if there was in fact no asbestos in the bay, the fascias, or the soffit boards. Mr Malin had included in the specification consequential works to the inside of each of the Flats. The cost of the works could be reduced if any of the Respondent/Leaseholders wished to carry out that aspect of works themselves. However, Mr Malin had wanted to carry out a complete job. There might well be internal cracking during the building work and there might subsequently be shrinkage, requiring filling and decorating. He preferred to over-specify the works and contingencies and then, if appropriate, credit lessees with reductions, rather than to under-specify and then have to ask lessees for supplemental sums

29. In answer to questions from Mr Herbert and Mr Coxell Mr Malin said that his proposed solution was not the first time that he had used it to remedy problems with bays in the area. In the late 1980s he had carried out similar works to address similar problems at numbers 366, 368, 370, and 372 London Road, North End, Portsmouth, following which those properties had had no further problems with their bays. He was confident that his solution would work with the Building as well. The cost of the steel wires was £400 plus VAT for each floor level. New lintels were needed too. He did not agree that demolishing the bay was a good solution. The property was in a conservation area and the problems with the bay did not warrant the amount of disruption to the Respondent/Leaseholders which would be caused by demolishing the bay, which would require each Flat to be blocked off with varying degrees of exposure. His solution was structurally sound. When it was put to him that the specification did not make it clear what the final cost would be for each Flat, he said that the specification included detailed quantities and prices and it would be easy to make any adjustments. When asked about the quality and soundness of the timber joists into which the steel wires would have to be secured, he said that this could not be answered until the joists were exposed, but he did not expect there to be any problems provided that the timbers were dry and that there was no woodworm. The securing of the cables would require lifting three or four floorboards to secure the wires to the joists. If there were problems then the existing timbers would have to be treated or new timbers spliced in. This might involve extra cost, but it would not be significant. When asked why the Southern Preservation Ltd quotation was double the price quoted in the DMA letter dated 13 May 2007 (R21), namely £11,592.55, Mr Nouch responded that that letter was headed "external decorations" and appeared to have related to different works. Mr Malin said that his specification did not include underpinning. He had not seen the trial holes dug on behalf of the insurers. He did not know how much extra cost of underpinning would be

#### **The basis of the Applicant/Landlord's claim under the lease**

30. After the lunch adjournment Mr Nouch confirmed that he had had sufficient time to consider the terms of the lease

31. Having done so, Mr Nouch conceded that :

- a. the responsibility for carrying out works to the internal and external walls of each Flat was that of each individual Respondent/Leaseholder, and that the lease neither empowered or required the Applicant/Landlord to do so nor entitled the Applicant/Landlord to include the cost of so doing in the service charge
- b. in any event, there was no power in the lease for the Applicant/Landlord to demand a payment on account of service charge
- c. there was also a discrepancy between, on the one hand, the fact that there were only four Flats, and, on the other hand, the reference in the lease to there being six Flats, and the fact that the lease permitted the Applicant/Landlord to charge each of the Respondent/Leaseholders only one sixth, rather than one quarter, of the Applicant/Landlord's expenditure by way of service charge
- d. as the cost of the proposed works could not be included in a service charge, the Tribunal accordingly had no jurisdiction to make a decision about the proposed works or their cost

32. The Tribunal recommended to the parties that, in the light of the fact that it would no doubt be beneficial to have a co-ordinated approach to the carrying out of works to the bay, the parties should meet in order to try to reach agreement, and that they might consider whether deeds of variation of the leases would also be beneficial

### **The Tribunal's findings**

33. Reluctantly, the Tribunal finds that it has no jurisdiction to make any decisions about the proposed works as the lease does not allow the cost of the proposed works to be included in the service charge, for the reasons set out in Mr Nouch's concessions in that respect as set out in paragraph 31 of these reasons. This Application asked the Tribunal to determine the payability and reasonableness of costs to be incurred for proposed major works to be included in service charges to be paid by the Respondent/Leaseholders to the Applicant/Landlord. The lease as written does not allow those costs to be included as a service charge item at all, and so the Tribunal has no power to determine their payability or reasonableness

Dated 21 May 2010



.....  
P R Boardman  
(Chairman)

A Member of the Tribunal  
appointed by the Lord Chancellor