

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

**Case No. CHI/OOHN/LSC/2008/0023**

**REASONS**

**Application** : Sections 27A and 20C of the Landlord and Tenant Act 1985 as amended (“the 1985 Act”)

**Applicant/Leaseholders** : Mr Philip Shearing-Lynn and Mrs Clare Shearing-Lynn (Flat 1) and Mr Alan Atherton and Mrs Julie Atherton (Flat 2)

**Respondent/Landlord** : Bournemouth Borough Council

**Building** : Tuckton Branch Library, Broom Close, Wick Lane, Bournemouth, BH6 4LF

**Flats** : Flats 1 and 2 in the Building

**Date of Application** : 29 January 2008

**Date of Directions Hearing** : 9 April 2008

**Date of substantive hearing** : 29 and 30 September 2008

**Venue** : Bay View Suite , Royal Bath Hotel, Bath Road, Bournemouth

**Appearances for Applicant/Leaseholders**: Mr and Mrs Shearing-Lynn and Mr and Mrs Atherton

**Appearances for Respondent/Landlord** : Ms Z Bhaloo

**Also in attendance** : Mrs L Cole, Mrs M Bernard, and Mr P Freeman (29 September only) from the Respondent/Landlord, and Mr M Walker of AKS Ward (29 September only)

**Members of the Leasehold Valuation Tribunal** : Mr P R Boardman JP MA LLB (Chairman), Mr A J Mellery-Pratt FRICS, and Miss C A Rai LLB

**Date of Tribunal’s Directions** : 9 April 2008

**Date of Tribunal’s Reasons** : 14 October 2008

**Introduction**

1. This application by the Applicant/ Leaseholders comprises :
  - a. an application under Section 27A of the 1985 Act for the Tribunal to determine the payability of service charges

- b. an application under section 20C of the 1985 Act for an order that the costs incurred by the Respondent/Landlord are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the Applicant/Leaseholders
2. At a hearing on the 9 April 2008 the following matters were identified as issues for the Tribunal to determine at the substantive hearing of this application, namely :
- a. whether, in relation to the year 2003/4:
    - a service charge was in principle payable by the Applicant/Leaseholders in respect of the sum of £1,989.60 for the excavation and removal of tree roots and the resurfacing of the drive to include the area in front of the garage
    - if so :
      - whether the cost was reasonably incurred
      - whether the works were of a reasonable standard
      - whether the consultation requirements of section 20 of the 1985 Act had been either complied with or dispensed with
  - b. whether, in relation to the sum of £8,518.88 for external decoration included in the service charge for the year 2005/6 :
    - the cost was reasonably incurred
    - the works were of a reasonable standard
    - the consultation requirements of section 20 of the 1985 Act had been either complied with or dispensed with
    - the Respondent/Landlord should have carried out external decoration at an earlier date
    - if so, whether the Respondent/Landlord's failure to do so affects the payability by the Applicant/Leaseholders of the service charge in respect of that sum
    - if so, whether any case law, such as the Lands Tribunal decision in **Continental Property Ventures Inc v Jeremy White** LRX/60/2005, was of relevance to the issues in this application
  - c. whether, if the sum of £92,070 were incurred for re-roofing the Building :
    - a service charge would in principle be payable by the Applicant/Leaseholders in respect of that sum
    - if so, whether the Respondent/Landlord should have carried out re-roofing works at an earlier date
    - if so, whether the Respondent/Landlord's failure to do so affects the payability by the Applicant/Leaseholders of the service charge in respect of that sum
    - if so, whether any case law, such as the Lands Tribunal decision in **Continental Property Ventures Inc v Jeremy White** LRX/60/2005, was of relevance to the issues in this application
  - d. whether, and, if so, to what extent, the costs incurred by the Respondent/Landlord in relation to these proceedings should not be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the Applicant/Leaseholders
3. The Tribunal noted at the hearing on the 9 April 2008 that no dispute had been raised concerning the identity of the person by whom such a service charge would be payable, the person to whom it was payable or when or in what manner it was payable

4. At the substantive hearing the parties informed the Tribunal that the parties had reached agreement on the questions of the excavation and removal of tree roots, the resurfacing of the drive, and the external decoration, and that the only issues now before the Tribunal were in relation to the re-roofing and costs
5. In relation to the proposed re-roofing :
  - a. the Respondent/Landlord confirmed at the substantive hearing that the sum upon which the Respondent/Landlord proposed to base the service charge for payment by the Applicant/Leaseholders was £92,070 (plus VAT if applicable and if not already included in the sum of £92,070), rather than the higher figure of £94,894 referred to in the papers before the Tribunal
  - b. the Applicant/Leaseholders confirmed at the substantive hearing that there was no issue before the Tribunal about the necessity, nature or extent of the works included in the sum of £92,070, or about the reasonableness of the sum of £92,070 as such, and that the issues remained as set out in paragraph 2 c of these reasons
  - c. the parties agreed that the Applicant/Leaseholders service charge proportions were 25% for Flat 1 and 25% for Flat 2 respectively

#### **Statutory Provisions**

6. Section 19(1) of the 1985 Act provides as follows :

*19(1) Relevant costs shall be taken into account in determining the amount of a service charge payable for a period –*

- (a) *only to the extent that they are reasonably incurred, and*
- (b) *where they are incurred on the provision of services or the carrying out of works, only if the services or works are of a reasonable standard;*  
*and the amount payable shall be limited accordingly*

7. The material provisions of Part III of schedule 2 of the Housing Act 1980 as amended by section 7 of the Housing and Building Control Act 1984 are as follows :

*13(1) There shall be implied.....covenants by the landlord*

- (a) *to keep in repair the structure and exterior of the dwellinghouse and of the building in which it is situated.....*

*15 Any provision of the lease.....shall be void in so far as it purports-*

- (a).....
- (b) *to enable the landlord to recover from the tenant any part of the costs incurred by the landlord in discharging.....his obligations under paragraph 13(1)(a).....above..... but subject to .....paragraph 16.....*

*16 A provision is not void by virtue of paragraph 15.....in so far as it requires the tenant to bear a reasonable part of:*

- (a) *the costs of carrying out repairs not amounting to the making good of structural defects;*

*(b) the costs of making good any structural defects falling within paragraph 17.....*

*17 (1) .....*

*(2) A structural defect falls within this paragraph if the landlord does not become aware of its existence earlier than 10 years after the lease is granted*

8. The material provisions of Part III of schedule 6 of the Housing Act 1985 are as follows :

*14 (1) .....*

*(2) There are implied covenants by the landlord-*

*(a) to keep in repair the structure and exterior of the dwellinghouse and of the building in which it is situated.....*

*16A (1) The lease may require the tenant to bear a reasonable part of the costs incurred by the landlord-*

*(a) in discharging.....the obligations imposed by the covenants implied by virtue of paragraph 14(2).....*

*16B (1) Where a lease of a flat requires the tenant to pay service charges in respect of repairs (including works for the making good of structural defects) his liability in respect of costs incurred in the initial period of the lease is limited as follows*

*(2).....*

*(3).....*

*(4) The initial period of the lease for the purposes of this paragraph begins with the grant of the lease and ends five years after the grant.....*

*18 Where the dwellinghouse is a flat, a provision of the lease.....is void in so far as it purports-*

*(a) to authorise the recovery of such a charge as is mentioned in paragraph 16A.....otherwise than in accordance with that paragraph and paragraph 16B.....*

## **Documents**

9. The documents before the Tribunal are :

- a. the Applicant/Leaseholders' bundle, pages 1 to 134
- b. the Respondent/Landlord's bundle, pages 1 to 699
- c. e-mails submitted at the substantive hearing

## **Expressions used in these reasons**

10. The following expressions in these reasons have the following meanings :

- a. A1, A2, and so on : page numbers in the Applicant/Leaseholders' bundle
- b. R1, R2, and so on : page numbers in the Respondent/Landlord's bundle

## **Inspection**

11. The Tribunal inspected the Building on the morning of the hearing on the 29 September 2008. Also present were Mr and Mrs Shearing-Lynn, Mr and Mrs Atherton, Mrs Cole, Mrs Bernard, Mr Freeman, Mr Walker, and Mr G Morgan from the Respondent/Landlord
12. The Building comprised an “L”-shaped block on 2 floors. The ground floor was occupied by Tuckton Branch Library. The Flats comprised the first floor. There are helpful :
  - a. descriptions at R157 to R159 and R260
  - b. plans at R172 to R173
  - c. photographs at R168 to R171, R253 to R257, and at R267 to R279
13. The Tribunal noted different coloured areas of tiling on the roof on the south, east and west elevations, which the parties identified as being where patch repairs had taken place. It appeared that at least 20 to 30 tiles had slipped or were missing on the south elevation. There were some tiles on the ground beside the south elevation. There were some slipped tiles on the east and west elevations. There was a wire mesh edge protection by the gutter on the west elevation. Grass was growing in some sections of the gutter. There was some discolouration on some of the walls and on some sections of the roof. On the east elevation a brick was missing on the chimney near the flashing
14. The Tribunal also inspected the interior of the Flats. By a window of Flat 1 the paint was lifting from the soffits. There was discolouration to the flat roof below. There was a small dark patch in the corner of the ceiling above the stairs in Flat 2, which Mr and Mrs Atherton identified as evidence of water ingress. One of the Tribunal members accessed the loft space from Flat 2. The roof was boarded. It was possible to see glimpses of daylight through some parts of the roof

**The leases**

15. The Respondent’s bundle contains copies of the leases of the Flats
16. For the purposes of these proceedings the material parts of the lease of Flat 1 dated the 22 July 1988 are as follows :

***Whereas***

*(1) The Landlord is the.....owner of the [Building] consisting of the structure .....erected thereon and divided into flats and public library.....*

***Clause 2 [Tenant’s covenants]***

*(4) To bear a reasonable part of the costs of carrying out repairs to the Building not amounting to the making good of structural defects in the Building and the making good of any structural defects falling within the paragraph numbered 18 of the sixth schedule to the Housing Act 1985 as amended*

*(22) To pay to the Landlord annually the Tenant’s expenses without any deduction subject to and upon the following terms and provisions :*

*(a) the Landlord's expenses shall be the expenses calculated in accordance with the sixth schedule hereto*

*(b) the Tenant's expenses shall be that proportion of the Landlord's expenses attributable to [Flat 1] .....*

*(24) To report in writing to the Landlord's County Architect forthwith any repair which the Landlord is liable to effect*

**Fifth schedule**

*Part I*

*(1) the covenants by the Landlord set forth in paragraph 14 of Part III of Schedule 6 of the Housing Act 1985 as amended.....are incorporated herein*

*(2) [to insure]*

*Part II*

*[Repairing maintaining and decorating]*

**Sixth schedule Landlord's expenses**

*The Landlord's expenses shall be the aggregate of*

*(1) [the costs of providing the services specified in the sixth [sic] schedule]*

*(2) such sum (if any) as.....may be estimated by the [Landlord's] Treasurer.....to be required to provide a reserve to meet part or all of the future cost of such repairs and services as the said treasurer anticipates will or may arise thereafter during the next following five years of the term*

*(3) the fees and costs incurred in the general management of the Landlord's property and the Building including the costs of any managing agents employed by the Landlord and also the cost incurred in respect of the Treasurer's certificate and of the accounts kept and audits made for the purpose thereof*

17. For the purposes of these proceedings the material parts of the lease of Flat 2 dated the 20 September 1985 are as follows :

**Whereas**

*(1) The Landlord is the.....owner of the [Building] consisting of the structure.....erected thereon and divided into flats and public library.....*

**Clause 2 [Tenant's covenants]**

*(4) To bear a reasonable part of the costs of carrying out repairs to the Building not amounting to the making good of structural defects in the Building and the making good of any structural defects falling within the paragraph numbered 17 of the second schedule to the Housing Act 1980 as amended by section 7 of the Housing and Building Control Act 1984*

*(22) To pay to the Landlord annually the Tenant's expenses without any deduction subject to and upon the following terms and provisions :*

*(a) the Landlord's expenses shall be the expenses calculated in accordance with the fifth schedule hereto*

*(b) the Tenant's expenses shall be that proportion of the Landlord's expenses attributable to [Flat 2].....*

*(24) To report in writing to the Landlord's County Architect forthwith any repair which the Landlord is liable to effect*

#### ***Fifth schedule Landlord's expenses***

*The Landlord's expenses shall be the aggregate of*

*(1) [the costs of providing the services specified in the sixth schedule]*

*(2) such sum (if any) as.....may be estimated by the {Landlord's} treasurer.....to be required to provide a reserve to meet part or all of the future cost of such repairs and services as the said treasurer anticipates will or may arise thereafter during the next following five years of the term*

*(3) the fees and costs incurred in the general management of the Landlord's property and the Building including the costs of any managing agents employed by the Landlord and also the cost incurred in respect of the Treasurer's certificate and of the accounts kept and audits made for the purpose thereof*

#### ***Sixth schedule***

##### ***Part I***

*(3) the covenants by the Landlord set forth in paragraph 13 of Part III of Schedule 2 of the Housing Act 1980*

*(4) [to insure]*

##### ***Part II***

*[Repairing maintaining and decorating]*

#### **Preliminary points**

18. Mr Shearing-Lynn renewed the Applicant/Leaseholders' application for an adjournment, or for a postponement of the Tribunal's decision, which had been made earlier in correspondence. The Respondent/Landlord had raised in the Respondent/Landlord's statement of case the issue whether the Applicant/Leaseholders could make a claim for any breach of covenant before the dates of the respective assignments to them. The Applicant/Leaseholders were accordingly arranging for the assignment of rights to them to enable them to rebut this
19. Ms Bhaloo opposed an adjournment or postponement

20. The Tribunal indicated that :
- a. the question of assignment of rights could impact only on the question of whether the Applicant/Leaseholders were legally able to pursue against the Respondent/Landlord a claim for breach of the landlord's repairing covenants under the leases
  - b. it did not impact on the question whether in principle the Respondent/Landlord was in breach of the landlord's repairing covenants, or, if so, whether in principle the Applicant/Leaseholders had suffered any loss as a result
  - c. the Tribunal was therefore not minded to grant an adjournment, but would consider at the end of the hearing further submissions about whether there should be a postponement of the Tribunal's decision
21. The Tribunal also indicated that the Applicant/Leaseholders, as unrepresented parties, would be offered time during the hearing to consider any authorities referred to during the hearing, and, in particular, those forming part of R555 to 696, some of which the Applicant/Leaseholders said had been served on them only one working day before the hearing

### **Documents in the Respondent/Landlord's bundle**

22. A building condition survey report by Dorset Building Design Practice dated May 1995 for Dorset County Council (R126 to R153; "**the 1995 DCC report**") stated that :
- a. the instructions were to produce a condition survey of the Building to identify maintenance requirements for the next 5 years, identifying recommendations as immediate, desirable, and long term
  - b. a few slipped and broken tiles were noted
  - c. past repairs could be seen at isolated positions
  - d. in general the tiles had good lines, but the quantity of tile replacement indicated a fixing problem
  - e. the wide soffit board and timber fascia appeared sound but the paintwork indicated a loss of adhesion
  - f. the recommendations were :
    - replace slipped and broken tiles (desirable - approximate cost £500)
    - allow for stripping entire roof and replacing with like material (long term - £14,000)
    - dress lead flashings and trays including pointing to poor mortar joints above lead (desirable - £350)
    - inspect lead work to the entire roof area (desirable £50)
    - decoration to soffit and fascia (immediate - £800)
23. A report by Symonds & Sampson dated December 1996 for Dorset County Council (R154 to R173; "**the 1996 Symonds & Sampson report**") stated that :
- a. the instructions were to :
    - give an estimate of the remaining life of the existing roof
    - undertake a survey of the roof and identify the works necessary to give it a long-term (not less than 30 years) maintenance-free period
  - b. the Building had been built in 1908
  - c. the Respondent/Landlord would want any replacement tiles to be of plain clay type to match the original as closely as possible
  - d. there was evidence that some rafters and purlins were undersized for the distance they spanned and had bowed inwards slightly as a result, with slight dipping or undulation in the



line of the roof slope on the main rear elevation, and, though not seriously defective, consideration had to be given, when carrying out any roof covering, to providing strengthening of the existing structure

- e. the original tiles were clay plain tiles without nibs as would normally be found nowadays, and relied on nails for fixing
- f. fixing nails were found to be rusting or broken, particularly along the southern elevation
- g. some tiles were found to be laminating where their surfaces were breaking up
- h. some battens were becoming soft where affected by dampness or decay
- i. many areas of tiling had been replaced in the past with more modern concrete tiles which were not a good match
- j. there were signs within the roof void of leaking in the past, with timber staining and decay
- k. further signs of leaking through coverings included dampness staining to pebbledash rendering, and repairs to soffits
- l. slipping tiles were a hazard and any short term remedial measures should include the provision of wire guards at eaves level
- m. *estimate of remaining life of the existing roof*
- n. a recent RICS survey had indicated that on average the life span for clay roof tiles was about 60 to 70 years
- o. although piecemeal repairs could be carried out for a number of years, this would eventually become uneconomic, and complete recovering had to be considered
- p. an attempt could be made to carry out further works now, which would cost about £2,500, but recovering had to be considered within the next 5 years
- q. if complete recovering was not carried out now then protection should be provided at eaves level to prevent any slipping tiles to fall to the ground below
- r. *identify the works necessary to give it a long-term (not less than 30 years) maintenance-free period*
- s. it would be necessary to strip completely the existing tiles, battens, counter battens and felt and also the lead-covered flat areas which would then be recovered using brand-new materials
- t. allowance should be made to carry out repair or renewal to timbers where they were decayed by reason of leaking
- u. allowance must also be made for strengthening timbers where undersized
- v. the cost would be £43,560 plus VAT, including £2,000 for salvaged tiles, but not including professional fees

24. A letter from the Respondent/Landlord to the then tenants of Flat 2 dated the 13 January 1998 (R326; “**the Respondent/Landlord’s 1998 letter**”) stated that :
- a. in the past it had been agreed that the 2 Flats would be responsible for 25% of maintenance costs of the Building, and that the Respondent/Landlord would be liable for the remaining 50%
  - b. recent building inspections had shown that the roof was in a very poor state of repair, showing extensive nail fever and degradation of the clay tiles
  - c. in the past patch repairs had been carried out, but that was no longer a viable process of repair
  - d. the estimated costs were in the region of £50,000, of which the tenants would each be liable of £12,500

25. A similar letter to the then tenants of Flat 1 was at R328

26. Feasibility estimates prepared by the Respondent/Landlord's Buildings Maintenance Group dated the 15 February 1999, 9 November 1999, and 18 October 2000 (R174 to 176) :
  - a. bore in each case the sub-heading "estimate from 1996"
  - b. showed in each case a subtotal of £43,425 after deducting £2,000 for salvaged tiles
  - c. included in each case an adjustment from the 4<sup>th</sup> quarter in 1996
  - d. estimated the roofing works cost on the 18 October 2000 as £52,110 plus VAT, plus professional fees, plus additional work to replace rooflights
  
27. A letter from the Respondent/Landlord to the then tenants of Flat 1 dated the 2 March 2000 (R337) stating that :
  - a. a provisional service charge account would be sent shortly
  - b. it would not include any financial provision for re-roofing
  - c. however, it was the Respondent/Landlord's intention to carry out the re-roofing that financial year, subject to funding
  
28. A similar letter to the then tenants of Flat 2 was at R338
  
29. A "budget quotation" from Dawe Roofing Contractors dated the 1 March 2001 (R177) gave a price of £86,750 for re-roofing the main pitched roof and the lead flat roofs, but did not mention fees or VAT
  
30. Correspondence between the Respondent/Landlord and the solicitors acting for the then tenants of Flat 1 in July and August 2002 (R362 to R366) in which :
  - a. the Respondent/Landlord stated that the roof had been identified as needing replacement; there were no firm proposals or detailed timescales yet; the cost had been estimated at about £80,000, but it was suspected that that figure was now historic; and advised that they seek their own professional advice about the potential amount of any current liability
  - b. the solicitors acting for the then tenants of Flat 1 replied that :
    - there was a defect in the lease and the buyers solicitors were requesting a deed of variation
    - the tenants buyers solicitors considered that the tenant should not be responsible for contributing to the cost of repair if the roof was defective because clause 2(4) of the lease made the tenant responsible only for those repairs not amounting to the making good of a structural defect
  - c. the Respondent/Landlord replied that :
    - a draft deed of variation would be considered
    - the recovering of the roof was not a structural defect, but was maintenance and renewal only; a structural defect was something which affected the stability of the building, and the roof covering did not fall into that category
  
31. A letter from solicitors acting for Mr and Mrs Shearing-Lynn to the Respondent/Landlord dated the 18 September 2002 (R367) :
  - a. stated that Mr and Mrs Shearing-Lynn were the proposed buyers
  - b. referred to the Respondent/Landlord's letter to the solicitors acting for the then tenants of Flat 1 and enclosed a draft deed of rectification

32. A letter from Mrs Shearing-Lynn to the Respondent/Landlord dated the 4 September 2004 (R377) asked for details of the current balance of the sinking fund
33. A letter from the Respondent/Landlord to the solicitors acting for the then tenants of Flat 2 dated the 12 January 2005 (R382) enclosed a copy of the 1996 report on the condition of the roof which identified the need for roof replacement. The works were subject to a funding bid following which consultation would take place with the tenants
34. A letter from the Respondent/Landlord to Mr and Mrs Shearing-Lynn dated the 23 March 2005 (R388) stated that the roof works would be carried out in 2006/2007. The Flat owners would be liable for 50% of the cost
35. Documents referring to roof repairs included :
- a. correspondence between the Respondent/Landlord and Oscar Whittingham and Sons May 1996 to October 1996 on behalf of the then owner of Flat 1, including a letter from the Respondent/Landlord dated the 17 July 1996 (R304) stating that between the 1 April 1995 and the 31 March 1996 roof repairs had comprised renewing missing tiles (£207.23) and repairing roof covering over Flat 2 (£639.38)
  - b. an invoice for roof repairs from Dawe Roofing Contractors dated the 9 January 2001 (R120) for roof repairs amounting to £1,950.96 plus VAT including the application of elastomeric coating to defective lead slate to boiler flue, and to defective lead, slates and soil vent pipe on "table top" flat roof
  - c. a service charge account statement for April 2002 to March 2004 (R402) including a reference to roof repairs above entrance £52.76
  - d. a service charge statement for April 2006 to March 2007 (R114) including a reference to "25% Flat 2 only 389897 Dawe Roofing Contractors £174.50"
36. A letter from the Respondent/Landlord to Mr and Mrs Shearing-Lynn (undated at R116, but dated the 27 June 2006 at A23) stated that the Respondent/Landlord proposed to carry out works consisting of the following elements :
- a. install scaffolding
  - b. strip existing roof coverings
  - c. replace counter battens, underfelt and battens
  - d. cover roof with handmade plain tiles
  - e. renew lead work to flat roof areas and flashings to stacks
  - f. repair timbers and strengthen as necessary
37. A similar letter to Mr and Mrs Atherton was at R118
38. A specification by Building Services dated September 2006 for the new roof (R186 to R250) included (R248) :
- a. a contingency sum of £3,000 for unforeseen and additional roof repairs
  - b. day-work sums for labour (£250), materials and goods (£100), and plant (£100)
39. A roof inspection report by AKS Ward dated February 2007 (R258 to R280; "**the 2007 Ward report**"), signed by Mr Walker, stated that
- a. from ground level the roof coverings appeared to be in generally poor condition, with several missing, broken, dislodged and previously replaced tiles on all elevations

- b. very slight undulations in the roof were noticeable, indicating slight sagging in some areas, but not to such a degree as to cause concern
- c. from the photographs previously taken inside the roof void, some of the purlins did appear to be slightly curved, but the concerns structurally were negligible
- d. the tiling on the south and west elevations appeared to be in the worst condition
- e. the patches of concrete replacement tiles would be significantly heavier than existing, which could present loading issues
- f. there were no nibs on the backs of tiles as there would commonly be in tiles manufactured more recently
- g. nails were corroding
- h. timber battens were soft when probed with a screwdriver and appeared to have suffered prolonged exposure to dampness
- i. the sarking felt was at the end of its useful life
- j. the boarding beneath the sarking felt could not be closely inspected and the existence of rot could not be ruled out
- k. the Symonds & Sampson recommended 5-year replacement period had passed
- l. although the roof had not experienced significant leaks, it certainly appeared to be at the end of its serviceable life
- m. it could possibly be argued that it should have been replaced 5 years ago
- n. the Symonds & Sampson report referred to a 60-70 year lifespan, and, although it was commonly accepted that clay tiled roofs would last up to 100 years, that was very much the upper limit
- o. the most significant problem was the failure of the fixings
- p. nail sickness was common in the UK, and the nails appeared to be suffering from it
- q. a full strip and recovering must now be recommended
- r. it was likely that regular rainwater ingress was occurring, especially round the eaves, and it was possible that there could be widespread decay in the timbers, including tile battens, rafters, rafter boarding, and the eaves soffit boarding
- s. there were 2 elements of the Symonds & Sampson open to question :
  - there were no undulations in the roof adverse or extensive enough to suggest that replacement or strengthening of the existing purlins was required : the roof structure had performed well over the last 99 years and there was no evidence that further sagging would continue if the same tiles were used
  - the estimated tile salvage figure of £2,000 seemed low : perhaps 25 to 50% of the tiles could be salvaged, and either re-used (there were many arguments for re-using the existing tiles) or sold on

40. A letter from the Respondent/Landlord to John James Roofing Ltd dated the 17 September 2007 (R281) accepted their tender dated the 26 July 2007 (of which no direct evidence was before the Tribunal) for a corrected figure of £94,984

41. Documents referring to water ingress include :
 

- a. correspondence with Mr Williams of Flat 2 January to May 1995 (R283 to 293)
- b. e-mails between the parties in November 2006 (submitted at the hearing before the Tribunal) about water coming through Mr and Mrs Atherton's ceiling

42. A statement of estimates dated the 3 November 2006 (R437) addressed to Mr and Mrs Atherton set out 4 estimates for the works, of which the cheapest was from Malone Roofing (Newbury) - £83,675, and stated that total fees would be £8,395
43. A similar statement of estimates addressed to Mr and Mrs Shearing-Lynn was at R442
44. A letter from the Respondent/Landlord to Mr and Mrs Shearing-Lynn dated the 10 August 2007 (R512) stated that
  - a. the period for acceptance of the tenders had expired
  - b. the Respondent/Landlord had accordingly asked the tenderers to confirm or revise their estimates
  - c. there was an increase in the cost of the lowest tender
  - d. there was no financial detriment to the lessees because the Respondent/Landlord intended to bear the increase
  - e. the scope of the works had not changed
  - f. the Respondent/Landlord now proposed to employ John James Roofing instead of Marine Roofing, as John James Roofing's estimate was now the lowest
45. A similar letter to Mr and Mrs Atherton was at R514

#### **The issues**

46. The parties respective cases in relation to point in issue in relation to the cost of re-roofing, and the Tribunal's findings in each case, are as set out in the following paragraphs of these reasons

#### ***Whether the Applicant/Leaseholders' are liable in principle to pay a service charge***

47. At the hearing Ms Bhaloo submitted that :
  - a. clause 2(4) of each lease should be read as meaning that the lessees were liable to pay by way of service charge a reasonable proportion of :
    - repairs not amounting to the making good of structural defects, and
    - the cost of making good structural defects within the Housing Act 1980 and Housing Act 1985 respectively
  - b. the primary submission on behalf of the Respondent/Landlord was that the re-roofing works did not amount to the making good of structural defects
  - c. decided cases, such as **Payne v Barnett** 76 P & CR 293 CA, at R641, drew a distinction between "inherent defects" and "ordinary repairs"
  - d. the words "structural defects" in the Housing Acts meant "inherent defects", and had the same meaning in the leases
  - e. in this case the repairs to the roof were ordinary repairs, caused by a deterioration in the roof's condition, and not caused by a structural defect
  - f. the roof had been structurally sound when built, but its condition had now deteriorated
  - g. there was no bar in the leases to the Respondent/Landlord recovering the cost of the repairs by way of service charge
48. Mr Shearing-Lynn's submissions in reply were that :
  - a. the Ward report referred to nail sickness and stated that it was unusual for so many nails to have failed, which implied that their failure was an inherent defect

- b. the tiles were not nibbed, which was an inherent defect
  - c. the Oxford English Dictionary defined “structure” as a whole constructed unit, especially a building, and “structural” was defined as concerning, or having, a structure
  - d. the preamble to the leases defined “structure” as the Building
  - e. the structure comprised the walls, the internal load-bearing partitions, the foundations, and the roof
  - f. the roof was part of the structure of the Building
  - g. if it was taken off the Building would fall down
  - h. the Oxford English Dictionary defined “defect” as the lack of something essential or required; an imperfection; a shortening; a failing; or a blemish
  - i. the roof had deteriorated to the extent that it was defective
  - j. its current condition accordingly amounted to a structural defect within clause 2(4) of the leases, and its replacement went beyond ordinary repairs
  - k. the fact that the landlord was obliged to carry out the repairs did not mean that the lessees were obliged to contribute to the cost
49. The Tribunal invited submissions from the Applicant/Leaseholders about the following matters :
- a. whether the roof itself had a structure
  - b. whether the proposed work to the roof comprised replacing battens, lead work, fixings and roof tiles
  - c. whether any of those items were structural
50. The Tribunal adjourned the hearing for 10 minutes to enable the Applicant/Leaseholders to consider their response
51. On the resumption of the hearing Mr Shearing-Lynn submitted that :
- a. it was accepted that the roof itself had a structure
  - b. the tiles and nails were structural, in that they covered the roof and affected the structure
  - c. the roof timbers, such as purlins, were structural, but Mr Shearing-Lynn, who was himself an engineer, agreed with the Ward report, rather than the Symonds & Sampson report, that they were not defective
  - d. it was not accepted that a structural defect was necessarily a defect from when a property was built; for example, a structural defect such as differential settlement might well not come to light for many years
  - e. in answers to questions from the Tribunal, Mr Shearing-Lynn said that it was accepted that the roof tiles would normally have an expected life of about 60 to 70 years, that the Building had been built in 1908, that the tiles and nails were original, except for those which had been replaced, which were of a different colour, and that the majority of tiles and nails had accordingly lasted for 100 years, which was longer than the norm; however, they were still structurally defective in that they should have been replaced earlier
52. Ms Bhaloo submitted that :
- a. the expert evidence was that the tiles and nails needed replacing, but that water was not penetrating into the Flats (R263 paragraph 6.4), which showed that the tiles were not structurally defective and that they were still functioning even after having been in situ for 100 years
  - b. the question whether or not something was structurally defective did not depend on knowledge of the defect; it was either structurally defective or it was not

- c. there was a difference between a structural defect and a structural repair
- d. the lack of nibs on the tiles did not amount to a structural defect : the tiles had been effective for 100 years
- e. the tiles were not being replaced because they had no nibs, but because their condition had deteriorated

53. Mr Shearing-Lynn's final submissions on this issue were that :

- a. there had been water ingress to the Flats
- b. it was clear that the roof should have been replaced in 1996, which was only 88 years after the construction of the Building
- c. the construction of clause 2(4) of the leases was ambiguous
- d. as such it should be construed against the Respondent/Landlord : **Gilje v Charlgrove** (R596), although Mr Shearing-Lynn was aware that tribunals might adopt a purposive approach
- e. the construction of clause 2(4) put forward by Ms Bhaloo at this hearing was the first time that this construction had been suggested by the Respondent/Landlord, who had previously referred to a "box within a box" (R425)

*The Tribunal's findings*

54. The Tribunal finds that :

- a. the Applicant/Leaseholders are liable under clause 2(4) of the leases to pay a contribution to the cost of the proposed works by way of service charge to the extent that the works do not amount to structural defects
- b. for the purposes of this case, a structural defect means a defect in the structure of the Building
- c. the roof is part of the Building, but only the structural parts of the roof, rather than the roof as a whole, are parts of the structure of the Building
- d. the structural parts of the roof are the main timbers, namely the rafters, joists and purlins
- e. the proposed works comprise the following elements :
  - install scaffolding
  - strip existing roof coverings
  - replace counter battens, underfelt and battens
  - cover roof with handmade plain tiles
  - renew lead work to flat roof areas and flashings to stacks
  - repair timbers and strengthen as necessary
- f. battens, underfelt, tiles, tile fixings, lead work and flashings are not part of the structure of the roof, or of the Building
- g. defects in those items accordingly do not amount to structural defects
- h. the evidence of slippage of tiles and leakage is accordingly evidence of deterioration, not evidence of structural defects
- i. the Symonds & Sampson report suggests that there might be a structural defect in the purlins, but the Ward report disagrees with that suggestion, and, very fairly, so does Mr Shearing-Lynn, and the Tribunal finds that there is no evidence that there is such a defect
- j. there is no evidence before the Tribunal of any defect in the other timbers forming part of the structure of the roof, although the Tribunal has noted the suggestion in the Ward report that the question of whether or not there are in fact any defects cannot be resolved until the timbers are uncovered during the course of the proposed works

- k. there is no evidence before the Tribunal that the absence of nibs on the backs of the existing tiles amounts to a “structural defect”; on the contrary the evidence in the Ward report is that the failure is not so much a failure of the tiles, as such, but of the fixings, and that an estimated 25 to 50% of the existing tiles could, and should, be re-used
- l. there is no evidence that the failure of the nail fixings amounts to a “structural defect”; the Tribunal has noted the description of the failure as “nail sickness”, but finds that the nail fixings which have now failed are probably originals, and have lasted for 100 years, and that the failure has accordingly been caused by deterioration over time, rather than by a structural defect as such

55. Having considered all the evidence and submissions in the round, the Tribunal finds that the proposed works do not amount to the making good of structural defects for the purposes of clause 2(4) of the leases, and that the Applicant/Leaseholders are liable in principle to pay a contribution to the cost of the works by way of service charge

***Whether the Respondent/Landlord should have carried out re-roofing works at an earlier date***

56. Mr Shearing-Lynn submitted that :

- a. the Respondent/Landlord was responsible for repairing the roof under the fifth and sixth schedules of the leases respectively
- b. re-roofing should have been carried out earlier :
  - the roof had passed its expected life span
  - replacement had been recommended in the 1995 DCC report
  - it had been recommended within 5 years in the 1996 Symonds & Sampson report with good repairs in the meantime
  - few repairs had actually been carried out despite the recommendation in the 1996 Symonds & Sampson report
  - the Respondent/Landlord’s 1998 letter made it clear that the Respondent/Landlord considered that re-roofing had to be carried out at that stage
  - the installation of the wire mesh edge protection to protect the public from falling tiles was evidence of the recognition that re-roofing was necessary
  - the 2007 Ward report stated that it should have been carried out during the previous 5 years
  - the photographs attached to the 1996 Symonds & Sampson report and the 2007 Ward report showed the extent of the failure of the roof
  - the delay in re-roofing had resulted in water penetration in the meantime through :
    - the tiles, causing rot to the timbers of the roof, the full extent of which would not be known until the timbers were uncovered during the re-roofing works
    - the ceilings of the Flats
    - the soffits, causing cracking and lifting of paint, the painting having been carried out only recently
  - the delay in re-roofing had been caused by the delay in the obtaining of funding by the Respondent/Landlord

57. Ms Bhaloo submitted that :

- a. there was no evidence of a breach of the Respondent/Landlord’ repairing covenant



- b. the Respondent/Landlord had carried out the patch repairs identified in the documents at R304, R120, R402, and R114 referred to earlier in these reasons as such, which had been an effective way of performing its repairing covenant until now
- c. the roof had now deteriorated to the point where replacement was necessary, and that was what the Respondent/Landlord was proposing to do
- d. the brief for the 1995 DCC report made it clear that the purpose of the report was to identify maintenance requirements for the next 5 years, identifying recommendations as immediate, desirable, and long term, and identified replacement as long-term, and was not a disrepair report as such
- e. the brief for the 1996 Symonds & Sampson report was to identify works needed to give a 30-year maintenance-free period, and was not a disrepair report as such either
- f. it stated that patch repairs were appropriate for the time being, but that replacement *had to be considered* within 5 years
- g. it did not state that the roof had yet fallen into such a state that replacement *had to take place* within 5 years
- h. the 2007 Ward report stated that the roof was *now* beyond repair, and that *it could possibly be argued* that it should have been replaced 5 years ago
- i. the Respondent/Landlord's 1998 letter was merely the writer's interpretation of a report, which must have been the 1996 Symonds & Sampson report, and was not itself evidence of the condition of the roof at that time

58. In response, Mr Shearing-Lynn submitted, on the second day of the hearing, that :

- a. the Respondent/Landlord's 1998 letter was not merely an interpretation of the 1996 Symonds & Sampson report, as it had been written by a qualified surveyor
- b. it confirmed that the condition of the roof had deteriorated in the year or so which had passed since the 1996 Symonds & Sampson report
- c. the 1996 Symonds & Sampson report confirmed that the roof had already exceeded its estimated life span of 60 to 70 years and recommended considering replacement within 5 years
- d. the word "considered" should be taken in the context of the recommendations as a whole, particularly in the context of the recommendation that it had to be considered within 5 years
- e. the fact that the Respondent/Landlord did not replace the roof within 5 years amounted to a breach of the Respondent/Landlord's repairing covenant
- f. the report had recommended patch repairs in the meantime, which the Respondent/Landlord had not carried out either
- g. the wording in the 2007 Ward report, namely that it could possibly be argued that the roof should have been replaced 5 years ago, had to be read in the context of the fact that the report, like the 1996 Symonds & Sampson report, had been commissioned by the Respondent/Landlord, and so was unlikely to be more critical of the Respondent/Landlord's failure
- h. the Applicant/Leaseholders had been unable to appoint their own expert in these proceedings because of the delay in disclosure of documents by the Respondent/Landlord
- i. there had been few patch repairs since 1996, and none since Mr and Mrs Shearing-Lynn had been living there
- j. e-mails between Mr and Mrs Atherton and the Respondent/Landlord in November 2006 were evidence of water penetration to their Flat and of the Respondent/Landlord arranging repairs [the Tribunal adjourned the hearing twice to allow the parties time to consider the e-

mails which they respectively wished to adduce, and, on the parties respectively consenting, admitted them in evidence]

- k. there was water ingress through the eaves as well
- l. clause 2(24) indicated that the County Architect was to manage the Building, whereas now it was managed by Library Services, which was a breach of the Landlord's covenants in the leases

### *The Tribunal's findings*

59. The Tribunal finds that :

- a. there is no expert evidence to indicate that the Respondent/Landlord is or was in breach of the Respondent/Landlord's repairing covenant in the leases in not replacing the roof earlier, in that :
  - the 1995 DCC report described the replacement recommendation as "long-term"
  - the 1996 Symonds & Sampson report, in its estimate of the remaining life of the existing roof recommended that replacement had to be *considered* within the next 5 years, which the Tribunal finds to fall considerably short of recommending that the replacement be *started* within the next 5 years
  - in any event, the Respondent/Landlord did consider the replacement within the following 5 years, as is evident from the Respondent/Landlord's 1998 letter, the feasibility estimates in 1999 and 2000, the letters from the Respondent/Landlord to the then tenants dated the 2 March 2000, and the "budget quotation" from Dawe Roofing Contractors dated the 1 March 2001
  - the 2007 Ward report's comment that *it could possibly be argued* that the roof should have been replaced 5 years ago falls considerably short of opining that the Respondent/Landlord, in not having done so, had been in breach of the Respondent/Landlord's repairing covenants in the leases
- b. there is insufficient practical evidence before the Tribunal to indicate that the Respondent/Landlord is or was in breach of the Respondent/Landlord's repairing covenant in the leases in not replacing the roof earlier, in that there is little evidence of leaks, apart from :
  - the correspondence with Mr Williams of Flat 2 between January to May 1995 (R283 to 293), which the Tribunal finds to have been before the 1996 Symonds & Sampson report
  - the e-mails between the parties in November 2006 about water coming through Mr and Mrs Atherton's ceiling, which the Tribunal finds to have been after the consultation letters from the Respondent/Landlord to the Applicant/Leaseholders dated the 27 June 2006
  - Mr Shearing-Lynn's submissions about water ingress through the soffits
- c. the fact that the roof is still substantially watertight, as the Tribunal finds, 100 years after its original construction is an indication that :
  - the Respondent/Landlord is not, and was not in breach of the Respondent/Landlord's repairing covenant in the leases in not replacing the roof earlier, despite the evidence in the 2006 Symonds & Sampson report and the 2007 Ward report that the estimated life span of a tiled roof is normally about 60 to 70 years
  - the patch repairs actually carried out were, on the other hand, a proper and effective way of complying with the Respondent/Landlord's repairing covenants in the leases in the meantime, as recommended in the 1996 Symonds & Sampson report

60. Having considered all the evidence and submissions in the round, the Tribunal finds that the Respondent/Landlord was not in breach of the Respondent/Landlord's repairing covenants in the leases in not replacing the roof earlier

***Whether the Respondent/Landlord's failure to repair earlier affects the payability by the Applicant/Leaseholders of the service charge in respect of the proposed works***

61. The Tribunal heard submissions from both parties about :
- a. whether costs would have been less if the work had been carried out earlier, in respect of which the Tribunal was referred to :
- the re-roofing costs estimate of £14,000 in the 1995 DCC report
  - the re-roofing costs estimate of £43,560 plus fees in the 1996 Symonds & Sampson report
  - the re-roofing costs estimate of about £50,000 in the Respondent/Landlord's 1998 letter
  - the re-roofing costs estimates of (ultimately) £52,110 plus fees in the Respondent/Landlord's feasibility estimates dated the 15 February 1999, 9 November 1999, and 18 October 2000
  - comparisons between the figure of £86,750 (which did not refer to fees) in the "budget quotation" from Dawe Roofing Contractors dated the 1 March 2001 (which Mr Shearing-Lynn accepted was within the 5-year re-roofing recommendation period referred to in the 1996 Symonds & Sampson report) and the figure of £92,070 (which included fees of £8,395) upon which the Respondent/Landlord now proposed to base the service charge payable by the Applicant/Leaseholders
  - the reference in the correspondence (in anticipation of the sale to Mr and Mrs Shearing-Lynn) between the Respondent/Landlord and the solicitors acting for the then tenants of Flat 1 in July and August 2002 to the proposed re-roofing works costing about £80,000, and to the fact that that figure was now suspected to be historic
  - the Applicant/Leaseholders' concern that the proposed costs would increase at the day-work rate of £450 a day (which Mr Shearing-Lynn agreed was a reasonable rate) according to the extent of damage to the roof timbers, which would inevitably be greater now than it would have been if the work had been carried out earlier
  - the Applicant/Leaseholders' concern that there would be fewer salvageable tiles now that there would have been if the re-roofing had been carried out earlier
  - the Applicant/Leaseholders' concern that past patch repairs had contributed to the deterioration in the roof because of the use of :
    - concrete tiles with a higher loading (2007 Ward report paragraph 5.1.2 at R261 and paragraph 7.3 at R264)
    - incorrect materials such as elastomeric coating instead of lead (Dawe Roofing Contractors invoice dated the 9 January 2001 at R120 to 121)
- b. whether additional work was now necessary as a result of the work not having been carried out earlier, in respect of which the Tribunal was referred to :
- the fact that roof lights were originally to have been re-used, whereas now they were to be replaced, although Mr Shearing-Lynn accepted that there was no evidence before the Tribunal that the change had been caused by the delay in re-roofing
  - the fact that, according to the 2007 Ward report, further battens had become rotten since the date of the 1996 Symonds & Sampson report, although Mr Shearing-Lynn accepted

that the proposed works in the 1996 Symonds & Sampson report had included the replacement of all the battens in any event

- c. whether, if in principle the Applicant/Leaseholders had suffered a loss as a result of the Respondent/Landlord being in breach of the Respondent/Landlord's repairing covenant by not re-roofing earlier, any benefits gained by the Applicant/Leaseholders in not having to contribute to the cost at an earlier date should be offset against any such loss
- d. whether the Respondent/Landlord's failure to establish a sinking fund affected the Applicant/Leaseholders' liability for payment of the service charge, in respect of which Mr Shearing-Lynn :
  - initially submitted that paragraph 2 of the fifth and sixth schedules of the leases respectively imposed a liability on the Respondent/Landlord to establish a sinking fund
  - subsequently accepted, after questions from the Tribunal, that paragraph 2 was permissive, in that it allowed the Respondent/Landlord to include in the service charge contributions to a sinking fund, rather than mandatory
  - nevertheless submitted that it would have been good practice by the Respondent/Landlord to have established a sinking fund, particularly as the original tenants had purchased under the "right to buy" scheme
- e. whether it was fair that the Applicant/Leaseholders should be required to contribute to 100% of the costs of the roof when :
  - the roof was 100 years old
  - the landlord had had the benefit of the roof for the whole of that time
  - the first of the Flat leases had been granted only 23 years ago in 1985
  - the Applicant/Leaseholders had purchased their leases only in 2002 and 2005 respectively
- f. whether the Applicant/Leaseholders had the legal power to make a claim for any breaches of covenant occurring before they had become tenants, namely 2002 and 2005 respectively, in respect of which the Applicant/Leaseholders had put in hand the assignment of rights to them from previous owners

62. However, in the light of the Tribunal's finding that there was no duty under the Respondent/Landlord's repairing covenant to carry out re-roofing at an earlier date, the Tribunal finds that it is unnecessary for the Tribunal to make findings in any of these respects

***Applicant/Leaseholders' application for the Tribunal to postpone its decision***

63. In the light of the Tribunal's decisions on the substantive issues in this case, the Tribunal refuses the Applicant/Leaseholders's application to postpone the Tribunal's decision pending the assignment of rights to the Applicant/Leaseholders

***Section 20C application***

64. The Applicant/Leaseholders have applied to limit the amount of any costs sought to be charged by the Respondent/Landlord as a consequence of this application

65. The Tribunal invited submissions about whether there was any provision in the leases allowing the Respondent/Landlord to include the costs of these proceedings in a service charge

66. Ms Bhaloo submitted that the wording in paragraphs 3 of the fifth and sixth schedule to the leases respectively was wide enough to be so interpreted
67. The Tribunal indicated that, subject to any further submissions, the Tribunal's initial view was that paragraphs 3 of the fifth and sixth schedule to the leases respectively, although not identical to the wording of the equivalent clauses in the lease in the case of **Sella House v Mears** [1989] 1 EGLR 65, were nevertheless sufficiently similar for the decision in that case to be persuasive guidance that the Respondent/Landlord was not entitled to include the costs of these proceedings in a service charge
68. Ms Bhaloo made no further submissions in that respect

*The Tribunal's findings*

69. The Tribunal finds that :
- a. the Respondent/Landlord is entitled to include in a service charge the Respondent/Landlord's costs of the proceedings before the Tribunal only if the leases so allow
  - b. the only provisions in the Leases to which the Tribunal has been referred in this respect are paragraphs 3 of the fifth and sixth schedule to the leases respectively
  - c. the wording of paragraphs 3 of the fifth and sixth schedule to the leases respectively do not expressly allow the Respondent/Landlord to include in a service charge the Respondent/Landlord's costs of the proceedings before the Tribunal, nor do they expressly allow the Respondent/Landlord to include lawyers' costs in a service charge at all
  - d. in relation to a lease clause with materially similar wording, the court in **Sella House v Mears** held that legal expenses incurred in recovering rent and service charges from defaulting tenants were not recoverable
  - e. the Tribunal is not persuaded that there is a material distinction between the costs of proceedings for recovering rent and service charges from defaulting tenants on the one hand, and the costs of proceedings about statutory procedures for the assessment of works and service charges on the other, because the Tribunal finds that both types of proceedings are to enable landlords to recover sums from tenants, and that neither type of proceedings is necessary except in cases of default or dispute
  - f. the Tribunal finds that the Respondent/Landlord's costs of the proceedings before the Tribunal are not payable by way of service charge, accordingly

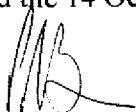
*The service charge payable*

70. As already noted, the parties have agreed that the sum upon which the Respondent/Landlord proposes to base the service charge for payment by the Applicant/Leaseholders is £92,070 (plus VAT if applicable and if not already included in the sum of £92,070), rather than the higher figure of £94,894 referred to in the papers before the Tribunal
71. Again, as already noted, the Applicant/Leaseholders' are naturally concerned that the proposed costs will increase at the day-work rate of £450 a day (which, as already noted, the

Applicant/Leaseholders agree is a reasonable rate) according to the extent of damage to the roof timbers

72. Ms Bhaloo has submitted that the Respondent/Landlord have a similar concern, particularly as the Respondent/Landlord would be liable to contribute 50% of the cost
73. However, the Tribunal is unable, in the absence of any evidence in that respect, to make any finding at this stage about whether or not any subsequent works would be reasonable, or about the extent of those subsequent works, or about whether they would amount to the making good of structural defects

Dated the 14 October 2008



.....  
P R Boardman  
(Chairman)

A Member of the Tribunal  
appointed by the Lord Chancellor