IN THE LEASEHOLD VALUATION TRIBUNAL
UNDER THE LANDLORD & TENANT ACT 1985

SOUTHERN PANEL

Case No	CHI/29UL/LSC/2008/090
Property	7 Darby Place Folkestone Kent
Applicant	Mercia Investment Properties Ltd c/o Circle Residential Management Ltd
Respondent	Mr J Landers, Upper Maisonette
Date of hearing	6 March 2009
Date of decision	30 March 2009
Tribunal members	Ms H Clarke (Chair) Mr R Athow FRICS MIRPM

1. APPLICATION
   The Applicant sought a determination by the Tribunal that the Respondent was liable to pay service charges for proposed works to the roof for the year ending September 2008.

2. The Respondent raised the question of interest on service charges in the course of the hearing but the Tribunal ruled that the question of interest or any similar objection to the service charge accounts fell outside the scope of the present application and would need to be the subject of a fresh application.

3. DECISION
   The Tribunal determined that the sum of £741.07 would be payable by the Respondent to the Applicant in respect of proposed roof repairs upon service of a properly completed service charge demand on the Respondent. This sum takes into account a set-off of £180 in respect of work done to the property in 2007 and a set-off of £580 for damages for breach of covenant. The Tribunal was unable to determine whether such a service charge demand had already been given.

4. The Tribunal did not have jurisdiction to order the Applicant to pay for the surveyor's report, as this did not form an item of service charge nor was it incurred by the landlord under the Lease.

5. The Tribunal decided that no order for costs should be made against the Respondent. This decision was made under Schedule 12 to the Commonhold & Leasehold Reform Act 2002.

6. The Tribunal decided that the Applicant shall reimburse the Respondent the sum of £150 for the hearing fee. This decision was made under the Leasehold Valuation Tribunals (Fees) (England) Regulations 2003.

7. The Tribunal made an order under s20C Landlord & Tenant Act 1985 that no costs of the Applicant in connection with the Application are to be taken into account in determining the amount of any service charge payable by the Respondent. In particular the Applicant shall credit the Respondent with the sum of £250 for the payment made by the Respondent on 21 April 2008 and debited by the Applicant as LVT Application Fee.

8. THE LAW
Under s27A Landlord & Tenant Act 1985:
"Liability to pay service charges: jurisdiction
(1) An application may be made to a leasehold valuation tribunal for a determination whether a service charge is payable and, if it is, as to
(a) the person by whom it is payable,
(b) the person to whom it is payable,
(c) the amount which is payable,
(d) the date at or by which it is payable, and
(e) the manner in which it is payable.."

9. The Leasehold Valuation Tribunals (Fees)(England) Regulations 2003 SI 2003 No. 2098 Regulation 9:
"(1) Subject to paragraph (2), in relation to any proceedings in respect of which a fee is payable under these Regulations a tribunal may require any party to the proceedings to reimburse any other party to the proceedings for the whole or part of any fees paid by him in respect of the proceedings"

10. s20C Landlord & Tenant Act 1985 provides:
"(1) A tenant may make an application for an order that all or any of the costs incurred,...by the landlord in connection with proceedings before a .. leasehold valuation tribunal, ... are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant
...
(3) The court or tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances".

11. Commonhold & Leasehold Reform Act 2002 Schedule 12 paragraph 10:
(1)A leasehold valuation tribunal may determine that a party to proceedings shall pay the costs incurred by another party in connection with the proceedings in any circumstances falling within sub-paragraph (2).
(2)The circumstances are where–
(a)he has made an application to the leasehold valuation tribunal which is dismissed in accordance with regulations made by virtue of paragraph 7, or
(b)he has, in the opinion of the leasehold valuation tribunal, acted frivolously, vexatiously, abusively, disruptively or otherwise unreasonably in connection with the proceedings.

12. THE LEASE
A copy of the Lease for the Upper Maisonette was produced. The relevant sections of the Lease provided for the tenant to pay service charges for the costs to the

landlord of complying with its covenants including the maintenance of the Building. The Lease also provided that the tenant shall make payments in advance by two installments annually upon the landlord's or managing agent's certification of the sums expected to be incurred, and an annual balancing payment in September of each year, and there was provision for a supplementary certificate of expenditure to be issued part-way through a year if required. Nothing turned on the construction of the Lease in this case.

13. **INSPECTION**

The Tribunal inspected the interior of the property accompanied by Mr and Mrs Landers and by Mr Paine. The property occupied the upper part of a converted terraced house. In the front top room the internal plaster had been stripped away and had been partially replaced by plasterboard into which new light fittings had been installed. The structural timbers remained partially visible. To the exterior it was possible to see lead flashings over a bay window which appeared to be relatively recently fitted, and the parties confirmed this was done in about 2003. The rear top room was storing many of the tenant's possessions but it was possible to see a discoloured patch on the junction of the ceiling and wall which was consistent with dampness entering the property from above.

14. **THE HEARING**

The Applicant was represented by Mr Martin Paine who gave evidence and made submissions. The Respondent attended the hearing and gave evidence as did his wife Mrs Jane Lander.

15. The Tribunal allowed the parties to rely on their respective bundles of documents, each of which had been filed later than provided for in Directions, having had regard to the provisions of Regulation 16 Leasehold Valuation Tribunal (Procedure) Regulations 2003. The Tribunal noted that the Respondent had not been able to make a response earlier because the Applicant's bundle had not been filed as directed.

16. **EVIDENCE AND REASONS FOR DECISION**

It was common ground between the parties that work to repair the roof needed to be done, and that the property had been affected by dampness. The Respondent had nominated the contractor whose estimate had been accepted by the landlord. He did not challenge the consultation procedure. The work fell within the scope of the landlord's obligation to maintain and the tenant's obligation to pay for that maintenance under the lease. The Tribunal's first conclusion therefore was that the cost of the work would reasonably be incurred.

17. The reason given by the Respondent for objecting to payment was that the present leak was "the same leak" that had given rise to work in 2003 and 2007 for which the Respondent had already paid his share of the cost. The previous work, said the Respondent, had not fixed the problem and instead he and Mrs Lander had suffered considerable inconvenience and discomfort in their home. The

Tribunal therefore considered whether any set-off against the cost of the proposed work should be made.

18. The first question was whether the water penetration which had occurred in 2003 was caused by the same defect as the leaks which occurred thereafter, ie whether the landlord had failed to maintain the roof in good repair and condition by not carrying out suitable or sufficient repairs. The evidence showed that in March 2003 a charge of £800 plus VAT was made for roof work including lead renewal, but the invoice did not specify where the flashing was located. The evidence of tenant's notification to the former managing agents Webber Steinbeck & Co showed that there was a leak from the bay window, and the parties agreed that an effective repair had been made to the bay window flashing at that time.

19. In January 2007 it was clear on the documents that the Respondent notified the Applicant's agent that the roof was leaking and a maintenance request form was issued and sent to him. Within a relatively short period builders were instructed who carried out a patch repair by applying a coating to the base of the chimney stack at a cost of £360. Less than a week later the Respondent complained again about a leak, and the coating clearly had not remedied the problem.

20. A survey report dated 4 January 2008 identified the cause of the problem on inspection in December 2007 as defects to flashing between the chimney stack and the roof tiles, loose pointing and poor bonding at that area, and a hole in a proprietary coating. This report also identified defects to the internal flue brickwork.

21. The survey report had been paid for by the Respondent, and the Applicant had agreed to refund the cost. However, the Tribunal did not have any jurisdiction over this payment unless or until the landlord sought to recover this item as a service charge.

22. The Tribunal considered the evidence covering the period from 2003, when work was done, to January 2007, when there was a notification of a leak. There was no documentary evidence of any complaint or notice of disrepair during the relevant period; Mr Paine for the Applicant stated that no such record was to be found on the agent's file, which he had reviewed personally before preparing his statement, and the Tribunal accepted his evidence that the procedure in his office was that a maintenance request form would be issued and a copy sent to a tenant upon any complaint of disrepair. Although the Respondent estimated that a leak recurred some 8 months after work was done in 2003, the Tribunal found this evidence to be relatively vague and unsupported. The Respondent said that he had stripped away the lath and plaster to the front bedroom in about summer 2006 with a view to renovating the room, and had at that stage exposed the rafters along which water ran. However, none of the correspondence shown to the Tribunal dating from 2007 referred to any earlier leak between 2003 and 2007. A letter dated 22 October 2007 from Mrs Lander referred to the repair work in 2003 which it was "our understanding that M C Shields had repaired"... and said, "the same leak began leaking again in February this year...". This was said again in her email to the agent dated 13 November 2007. On the evidence put before it, the Tribunal concluded on a balance of probability that there had been no recurrence of the leak between 2003 and 2007, and in particular, that the tenant had not

made the landlord aware of any such recurrence during that period.

23. It could not be inferred from the fact that the flashings were defective in 2007 that the work done in 2003 was of such a low standard as to make it unreasonable that it should be paid for by service charges. There was nothing further which indicated that the landlord ought to have taken any particular action between 2003 and 2007. In the circumstances the Tribunal did not find on the evidence that the landlord had failed to discharge its duty to maintain the property during this period, and no amount ought to be set-off against the service charge.

24. The Tribunal next considered the landlord's response to the complaint of a leak in 2007. It decided that it was not unreasonable for the landlord, acting through the agent, to attempt to deal with the problem in the short term by an inexpensive patch repair. There was no evidence before the Tribunal to suggest that the landlord ought to have known that it would be ineffective, and relying on its expert knowledge and skill the Tribunal considered it to have been an appropriate step to take. However, the remedy had failed almost immediately. It had been wholly ineffective, and as such, the Tribunal took the view that the cost of the work could not reasonably be taken into account in determining the service charge. The tribunal therefore decided that the share paid by the Respondent (£180) for the cost of such work should be set off against the sum now claimed. The Applicant in fact offered to deduct this sum at an early stage of the hearing.

25. The Tribunal then considered how matters had progressed between February 2007 and October 2007 when a Notice of Intention to do works was served on the Respondent in compliance with the consultation requirements of s20 Landlord and Tenant Act 1985 ("the consultation procedure"). There was a letter from another of the proposed contractors which showed they were contacted on 20 September 2007 for an estimate. There was no documentary evidence of any steps taken between February and 20 September 2007, although Mrs Landers' letter referred to several telephone calls passing between herself and the Applicant's office.

26. There was no explanation for this period offered by the Applicant. Mr Paine submitted that the patch repair had been effective to the end of 2007. This was not supported by the evidence that the tenant had reported the leak again within a week of it being applied.

27. After the consultation procedure got underway, there was no evidence of any delay on the part of the landlord or the managing agent. The time scales for responding are set out in the Act and the Respondent did not challenge the procedure used. The Tribunal asked the Applicant why no application had been made to the Tribunal to dispense with consultation under s20ZA of the 1985 Act. The Applicant responded that it had not appeared that the water penetration was so severe as the Respondent was now saying. This submission however was contradicted by the expert survey report dated January 2008 which reported dampness "necessitating the use of containers in order to catch resultant water".

28. By February 2008 the contractor's quote was available and the Applicant asked the Respondent to pay. The Tribunal notes that the lease at clause 11.1(iv) places an obligation on the landlord to carry out the works of maintenance subject to

the tenant having paid the service charges due on account. The landlord was therefore entitled to be put in funds before commencing work. It would have been open to the Respondent to pay the sum demanded and then challenge it in the Tribunal, although this may not have been clear to the Respondent at the time.

29. The Tribunal determined that the period between February to September 2007 represented unwarranted and unexplained delay on the part of the landlord, in respect of which damages for breach of covenant ought to be assessed and set off against the service charge demand. However, the period subsequent to that did not show any breach of covenant.

30. The Respondent and Mrs Landers gave very expressive evidence about how their occupation of the property had been affected by the water leaks, and the consequential problems for both of them and their daughter. Mr Landers described how at the worst times enough water would come through the ceiling to fill a jug within a matter of hours. At other times the signs of water penetration comprised damp discoloured patches on the walls, similar to that which the Tribunal had observed on inspection. Mr Landers had started to renovate the front room. He had not been able to progress the work, and the second room was also unusable because it had to store all the contents of the front room. It had become intolerable for the family to live and sleep downstairs. Mrs Landers and their daughter had moved out from the property and now lived with her parents-in-law. The Tribunal accepted this evidence. The Applicant suggested that the tenant had failed to mitigate his loss, because the second room was not so badly affected by dampness and because it was the tenant's doing that the plaster had all been stripped away. However the Tribunal took the view that the time which the renovation work ought to have taken had been prolonged unnecessarily by the period of 7 months between February to September 2007. The inconvenience caused by the renovation work had been initiated by the tenant, and the Tribunal took this into account in assessing damages.

31. The Tribunal assessed damages for this period on the basis of loss of value at £1,000 per annum but assessed over a 7 month period, giving the sum of £580, which fell to be set off against the service charge along with the £180 for the patch repair work. The cost of the proposed roof work was to be £3002.13 of which the Respondent's share would be £1501.07. The sum payable by the Respondent to the Applicant in respect of proposed roof repairs would therefore be £741.07.

32. The Tribunal was asked to determine when the service charge for the proposed work would be payable. However neither party was able to provide the Tribunal with a record of service charge demands and accounts for the relevant period. The Applicant's representative was initially unable to state whether the sum had been demanded, although he later clarified that it had been demanded in February 2008. He asserted that all the statutory formalities required of a service charge demand had been met although he did not provide documentary evidence to the Tribunal.

33. The Applicant sought costs against the Respondent on the grounds that he had

unreasonably failed to negotiate. However, the Applicant had not replied to the Respondent's proposal set out by email and in his letter dated 15 May 2008. There was no evidence that the Respondent had behaved unreasonably in any other respect.

34. The Applicant did not dispute that the hearing fee ought to have been paid by itself, and agreed to refund the sum of £150 to the Respondent.

35. The Tribunal made an order under s20C Landlord & Tenant Act 1985 that no costs of the Applicant in connection with the Application are to be taken into account in determining the amount of any service charge payable by the Respondent. The Applicant's agent's letter of 29 January 2008 was misleading in that it stated that the landlord could apply to the LVT, thereby giving the impression to the Respondent and his wife that they could not make an application and that the landlord had to have conduct and control of the matter. That had led the Respondent to think that the Applicant was applying on his behalf and to pay a fee of £250 plus VAT when the application fee to the Tribunal was only £100 and was not subject to VAT. The Applicant had been dilatory in pursuing the application, its representative had been repeatedly unavailable for proposed hearing dates after the first hearing date had been adjourned for his convenience, and it had made things harder for the Respondent by not complying with directions or paying the hearing fee. The hearing had come very close to being vacated as a direct result. It was poor practice not to have replied to the Respondent's letter and email offering settlement terms.

Signed..... Chair

Dated 30-3-09