

**THE RESIDENTIAL PROPERTY TRIBUNAL SERVICE  
SOUTHERN RENT ASSESSMENT PANEL  
LEASEHOLD VALUATION TRIBUNAL**



**S.27A & S20C Landlord & Tenant Act 1985(as amended)("the Act")**

<b>Case Number:</b>	<b>CHI/29UL/LSC/2008/0137</b>
<b>Property:</b>	<b>5 &amp; 7 Dennis Way Cheriton Folkestone Kent CT19 4NX</b>
<b>Applicant/Leaseholders:</b>	<b>Mr J Burns</b>
<b>Respondent/Landlord:</b>	<b>Shepway District Council</b>
<b>Appearances for the Respondent:</b>	<b>Estelle Culligan Solicitor &amp; Andrew Nicholls Surveyor</b>
<b>Date of Inspection /Hearing</b>	<b>11<sup>th</sup> March 2009</b>
<b>Tribunal:</b>	<b>Mr R T A Wilson LLB (Lawyer Chairman) Mr C C Harbridge FRICS (Valuer Member) Mr T J Wakelin (Lay Member)</b>
<b>Date of the Tribunal's Decision:</b>	<b>30<sup>th</sup> March 2009</b>

## THE APPLICATIONS

The applications made in this matter by the Applicant are as follows: -

1. for a determination pursuant to Section 27A of the Landlord and Tenant Act 1985 of his liability to pay service charge for flats 5 & 7 Dennis Way, Folkestone, Kent for the service charge year ending 2008 and
2. for an order pursuant to Section 20C of the Act that the Respondent's costs incurred in these proceedings are not relevant costs to be included in the service charge for the building in future years.
3. The tribunal is also required to consider, pursuant to regulation 9 of the Leasehold Valuation Tribunal (England) Regulations 2003 whether the Respondent should be required to reimburse the fees incurred by the Applicant in these proceedings.

## DECISION IN SUMMARY

4. The tribunal determines for the reasons set out below that the Applicant is entitled to an allowance / credit of £1,635 in respect of the service charges demanded by the Respondent for the year ending 2008.
5. No order is made in relation to the repayment of fees incurred by the Applicant in these proceedings.

## JURISDICTION

### Section 27A of the 1985 Act

6. The tribunal has power under Section 27A of the Landlord and Tenant Act 1985 to decide about all aspects of liability to pay service charges and can interpret the lease where necessary to resolve disputes or uncertainties. The tribunal can decide by whom, to whom, how much and when service charge is payable. A service charge is only payable in so far as it is reasonably incurred, or the works to which it related are of a reasonable standard. The tribunal therefore also determines the reasonableness of the charges.

## INSPECTION

7. The tribunal inspected the property before the hearing in the presence of the Applicant and representatives from the Respondent Council. 5/7 Dennis Way comprises 2 units in a block of 4 self-contained flats being a two storey structure of brick construction beneath a pitched hipped roof, clad in plain concrete tiles. The property was built approximately 50 years ago. At the time of the inspection the property appeared to be in good decorative order.

## PRELIMINARYS / ISSUES IN DISPUTE

8. Both parties had set out their respective positions in their statements of case and both parties had prepared and submitted a bundle of evidence.
9. At the hearing the tribunal established that the only matters in dispute related to the cost and extent of external re-pointing works carried out to the property in 2008 and also some minor repairs carried out to the property at the same time.

Each of these disputed items is considered below:-

### Repointing: The Applicant's Case

10. Mr Burns confirmed that he had no issue over the quality of the works but he took issue over the cost of the works and the extent of work carried out. In essence his case was that the Council had re-pointed the entire building even though this was not necessary. If the Council had carried out patch re-pointing, in other words dealing only with the specific areas which needed work, then his service charge bill would have been much smaller. He accepted that certain elements of the re-pointing work were needed but he did not accept that the whole building needed re-pointing.
11. Mr Burns' evidence was that he had first learned of the works in March 2008 when he received a notice outlining the extent of work to be carried out and the cost. He had contacted the council to raise his concerns and then obtained what he considered was a comparable estimate from a specialist re-pointing firm called Pro Point UK Limited. That estimate priced up the job in two options. The first option was to re-point the whole of the property as per the Council specification and the amount charged would be £12,403.75 inclusive of vat. The second option priced up only the work Mr Burns considered was necessary and the amount came to £2,555.63 inc. vat.
12. In support of Mr Burns contention that the whole of the property did not need re-pointing. He had obtained a report from Paul Allen FRICS a partner in the firm of Godden Allen Lawn Chartered Building Surveyors. The report provided a summary in these terms
  - i) *It is not necessary to re-point the front elevation with only very small areas of filling to minor holes required as described. This work is of such a minor nature that it could possibly be considered to be work that could be carried out from a ladder in compliance with working at height regulations.*
  - ii) *The two side elevations do require re-pointing.*
  - iii) *The rear elevation does require some re-pointing perhaps up to 50% but it is not technically necessary to re-point the whole of this elevation at this time.*
  - iv) *The brick store requires re-pointing.*
13. The report was accompanied by a number of coloured photographs showing the elevations of the building. Mr Burns maintained that the pictures backed up the findings of his building surveyor and clearly showed that the front elevation and some of the rear and side

elevations did not require attention. The rear elevation needed at best only 50% re-pointing whilst the side right elevation required re-pointing to a maximum of 75% of the area. In these circumstances he invited the Tribunal to reduce the amount of service charge payable by him to reflect the fact that the Council had been unreasonable in having the entire building re-pointed.

#### **Repointing: The Respondent's Case**

14. Mr Nicholls commenced his evidence by stating that he was a surveyor for the Shepway District Housing Department and part of his job involved inspecting council owned properties and recommending those that needed repair. Mr Nicholls told the tribunal that his council had a housing stock of just over 3,400 properties managed by his own staff. Some of the properties are rented by council tenants and some have been sold under the 'right to buy' scheme. As part of its capital program every year the Council spent approximately £3 million on repairs and maintenance. Its repair program was driven initially by its decent home stock condition data base. This database showed which properties were likely to need external repair and renovation each year on a rolling 30-year program according to the age of the properties. When the database showed a property requiring renovation the Council carried out a thorough visual inspection to verify what was required. Mr Nicholls had inspected flats 5 & 7 Dennis Way and formed the view that the pointing to the property was in various states of disrepair and that it would be cost effective to have the entire block re-pointed.
15. The work carried out to numbers 5 & 7 Dennis Way formed part of a much larger contract for repairs to a number of council owned properties the contract value of which was just under £500,000. Under the councils procurement procedure the contract went out to tender and five firms tendered. In the event the council chose the contractor who had submitted the most competitive price, which resulted in Mr Burns's service charge contribution of £3,400 for each of his flats.
16. Mr Nicholls confirmed that his council had fully complied with the statutory consultation procedure with its lessees before executing the works. His council had sent to Mr Burns the two statutory notices informing of the work. In the first notice dated the 19<sup>th</sup> June 2007 Mr Burns was invited to put forward names of contractors to be included in the invitation to tender. The council had not received any suggestions from Mr Burns. The second notice was sent to Mr Burns in March 2008 and Mr Nicholls confirmed that Mr Burns had reacted to that notice by contacting the council. There had been a series of discussions as to the extent of work carried out and there had also been an on site meeting with the council and Mr Burns and his surveyor when the extent of work was considered.
17. Mr Nicholls confirmed that he had received Mr Burn's building surveyors' report and that he agreed with and accepted the report in its entirety. However, even though the report was accepted, his council decided to proceed with the full scope of the works as originally planned and duly notified this to Mr Burns. The reason for this decision was to comply with his council's obligations under the terms of the leases. The council concluded that it was necessary to bring the whole of the property into a good state of repair for the foreseeable future and that re-pointing the entire property would negate the necessity to revisit the block for partial uneconomic re-pointing within five to ten years.
18. Mr Nicholls asserted that economies of scale were achieved by programming the maintenance of this property with a much larger contract for works, and in his view partial

repointing of the property would necessitate further visits to the property over a period of five to ten years and this would involve an element of double charging. In these circumstances he felt that his council was justified in having the whole of the property re-pointed and not just the areas which needed immediate attention or attention within either a five or ten year period.

### Minor Repairs

19. Mr Burns identified the minor repairs as work to the shed doors and the redecoration of down pipes and the side rails. Mr Burns considered that he should not have to pay for the doors because they were not replaced. Furthermore he had carried out painting to the downpipes and therefore there was no necessity for the council to do this work again.
20. Mr Nicholls confirmed that although the tender documents had included an element to repair the doors he acknowledged that Mr Burn's doors had not been replaced and no charge has been made for this. As to the downpipes, in his view the downpipes did require decoration and he considered it would be cost effective to deal with this item whilst scaffolding was in place. Mr Nicholls pointed out that it was not Mr Burn's responsibility to paint the downpipes and the council had an obligation to do this.

### THE TRIBUNAL'S DELIBERATIONS

21. The leases relating to the properties place an obligation on the council to keep the exterior of the property in repair. Pointing is a fundamental part of a building and good pointing is critical to the stability of the walls and therefore the structure. The tribunal is therefore satisfied that the Respondent must keep the building properly pointed and the leases provide for the Applicant to contribute towards the cost.
22. The tribunal considered the building surveyors report dated 1<sup>st</sup> August 2008 from Messrs Godden Allen and Lawn adduced by Mr Burns ("the Report") and found this to be helpful on three accounts. Firstly, and most importantly, in written and oral evidence the Respondent took no issue with any element of it and indeed agreed with its content. Secondly, the Report provides a narrative as to the state of the pointing to each elevation to the property prior to the re-pointing work being carried out and thirdly, the Report contains a pictorial record of the building prior to the re-pointing being carried out.
23. The central issue for the tribunal to decide is was it reasonable for the council to re-point the whole of the block bearing in mind the state and condition of the re-pointing of the building last year. On the one hand the council asserts that it was reasonable because of the economies of scale that could be achieved by having the re-pointing to this building scheduled with a much larger contract of works placed by the council. On the other hand Mr Burns asserts that there was no necessity to re-point the whole of the building and that patch repairs could have been carried out at a much-reduced cost.
24. Having regard to the evidence the tribunal has concluded that it was not reasonable for the council to have gone to the considerable cost of re-pointing the entire building. Whilst the tribunal accepts the councils assertion that patch repairs can involve incurring the same expenditure such as preliminaries i.e. scaffolding more than once, there is clear and uncontested evidence in the form of the Report that parts of the building required no

pointing at all at least for a period of five years and in some cases for ten years and longer. This is the case in respect of the front elevation where only a small area required minor holes to be filled.

25. The Report concludes that the two side elevations did require re-pointing and the tribunal accepts the approach of the council not to carry out patch repairs to this area. As to the rear elevation the evidence is not entirely clear. The Report estimates that 50% required re-pointing whilst the Respondent suggests that the area was closer to 75%.
26. As to the chimney stack, Mr Burns asserts that it did not require re-pointing but neither he nor his surveyor were able to inspect this part of the property. The tribunal noted a schedule of condition attached to one of the leases which highlighted some disrepair to the chimney stack in 1986 and bearing in mind the passage of time the tribunal has no reason to disbelieve Mr Nicholls evidence that the chimney stack needed repair. It is therefore accepted that it was reasonable for repointing work to be carried out to the chimney.
27. The tribunal consider that the reasonable course of action to take bearing in mind the condition of the property was to have placed a contract for all the elevations of the building to be re-pointed "in toto" save for the front elevation where the very minor work identified could have been carried out either at that time or at a later stage. Whilst we understand the councils approach to undertake their repair work by reference to a rolling 30 year programme involving the placing of large scale contracts to save money in the long run, nonetheless the council is subject to the same statutory law that governs the reasonableness of work carried out by any other landlord and is not subject to any special dispensation because it is a local authority council with a large housing stock. The tribunal can only apply the same test of reasonableness that it would to a landlord with only one property. Applying that test of reasonableness we do not consider it a reasonable approach to have repointed the entire building when, on the evidence before us, a material part of that building required no work. We believe this is a case where the Respondent made repairing decisions based on ease of management rather than by reference to its repairing obligations set out in the relevant leases.
28. In examining the repairing obligations in the leases the tribunal noted that there are provisions enabling the council to build up a sinking fund for large capital works. The tribunal is aware landlords often use these provisions to smooth out the peaks and troughs of service charge expenditure so that the cost of non-recurring expenditure can be spread over a number of years and shared between successive owners of a flat. Bearing in mind the councils rolling 30-year programme we are surprised that the council have not availed themselves of these provisions in this case. Having said that the council is perfectly within its rights not to maintain a reserve fund.
29. The consequence of the conclusions reached in paragraph 27 above, is that the Applicant should not have to pay for that element of the cost of the re-pointing which related to the front elevation. It is not possible for the tribunal to determine with any accuracy what that element of the cost is, but doing the best that it can with the figures, the lease plan, photos and other documents before it, we calculate the front elevation area amounts to approximately one third of the total area re-pointed. A fair deduction is therefore 50% of 33% of the total cost since the Applicant owns two flats in the block of four. We calculate the reduced figure to be £1,500 which includes a deduction in the supervision fees, preliminaries and the contingency allowance.

30. The tribunal also disallows a provisional sum in the contract for window-tie removal in the sum of £125 plus an element of the supervision fee relating thereto in the sum of £ 10 on the grounds that this work would or should have formed part of the previous window contract. For the avoidance of doubt the cost of work to the doors is also disallowed although the tribunal heard evidence that the Respondent has not claimed such a sum from the Applicant.
31. The tribunal also upholds the charge of £495 for the painting /repair of the downpipes and side rails. Under the terms of the leases relating to the property, it is the council's obligation to attend to these matters and the tribunal considers that it was a reasonable course of action to paint these whilst scaffolding was in place even if the Applicant had ignored the lease provisions and had sometime earlier painted these himself.
32. The tribunal also considered if the Respondent had complied with the consultation regime imposed by the Commonhold and Leasehold Reform Act 2002. It did so because the Applicant alleged that he had only found out about the re-pointing works in March 2008 when he had received the second of the two notices that the consultation regime provides for. However the Respondent's evidence was that Mr Burns was served with the two statutory notices informing him of the work and they exhibited copies of the notices in their evidence. On the balance of probabilities the tribunal accept the evidence of the Respondent namely that the two statutory notices were duly served. It is common ground that Mr Burns received the 'Paragraph B' statement and there was no evidence before the tribunal to rebut the statutory presumption that Mr Burns also received the first notice. We therefore conclude that consultation procedure was complied with in respect of the service charge for 2008.

#### SECTION 20C AND REIMBURSEMENT OF FEES

33. Mr Burns made an application under Section 20C of the Act for an order that any costs incurred by the Respondent in connection with these proceedings should not be regarded as relevant costs to be included in any future service charges payable by him. At the hearing, Ms Culligan confirmed that it was not her councils' intention to charge any costs to the service charge account and accordingly it was not necessary for the tribunal to make an order under section 20C.
34. The tribunal makes no order in relation to the reimbursement of fees. Although the tribunal has reduced the service charge payable by the Applicant in respect of the contested matters, there was a triable issue and the Respondent has put forward a reasoned case to justify the management decisions taken by it. In these circumstances it would not be just and equitable for the council to have to reimburse the application/hearing fee incurred by the Applicant.

Chairman

  
R.T.A. Wilson

Dated 30<sup>th</sup> March 2009