

LON/00AD/LSC/2008/0387

**RENT ASSESSMENT COMMITTEE (ENGLAND AND WALES)
(LEASEHOLD VALUATION TRIBUNAL) REGULATIONS 1993**

Correction certificate under regulation 11(2) of the above Regulations.

Landlord and Tenant Act 1985 ss 27A and 20C

As Chairman of the Leasehold Valuation Tribunal which determined the above case I hereby correct a typographical error in the decision of the Tribunal dated 26 February 2009.

The following sentence was omitted at the end of Paragraph 29 of the Decision, immediately following the last sentence of that paragraph:

"However during the course of the hearing the Respondents' challenge to the s 20 procedures was conceded and the thrust of their case then directed towards the costs of the works so that the Tribunal was not required to make a determination in the former respect".

I hereby correct that omission and certify that the relevant sentence should be inserted after the last sentence of Paragraph 29, immediately following the words "...undesirable in the current economic climate".

Chairman: *Franca Burton* Date: 27.4.09

Chairman's name: Mrs F R Burton LLB LLM MA

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Chairman: Frances Burton Date: 27.4.09.

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Ref: LON/00AD/LSC/2008/0387

**LEASEHOLD VALUATION TRIBUNAL FOR THE LONDON RENT
ASSESSMENT PANEL**

**DECISION OF THE LEASEHOLD VALUATION TRIBUNAL ON
APPLICATION UNDER SECTION 27A AND 20C OF THE LANDLORD AND
TENANT ACT 1985**

Applicant: Orbit South Housing Association

Respondents: Various Lessees

Premises: Hurst Place Estate, Hurst Lane, Abbey Wood, London SE2 0QA

Hearing date: 5 and 6 January 2009

**Appearances: For the Applicant: Mr John Holbrook of Counsel
Instructed by Mr Ewan Wallace of
Trowers & Hamlins, Solicitors
Mr Richard Thomas, DipBS,
FBEng, RMaPS, FRICS
Mr L Constant Planned Maintenance
Manager
Mr S Kent, Leasehold Strategy Management**

**For the Respondents: Mr J Parsons, Chairman OBHA Independent
Leaseholders Group
Mr Vincent Young BSc, MSc, MBEng,
MIFire, MCIOB, TechRICS
Mr J Rogers & Ms J Harris - Flat 3
Mr B Clackett
Mr L Coulter - Flat 6**

**Members of the Leasehold Valuation Tribunal: Mrs F R Burton LLB LLM MA
Mr J M Power MSc FRICS FCI Arb
Mr O N Miller BSc**

Date of Tribunal's decision: 26 February 2009

LON/00AD/LSC/2008/0387

HURST PLACE ESTATE, HURST LANE, ABBEY WOOD, LONDON SE2 0QA

BACKGROUND

1. This is a Landlord's application, dated 8 August 2008, for determination of liability to pay service charges pursuant to s 27A(3) of the Landlord and Tenant Act 1985 in the service charge years 2008-2009 and 2009-2010, in respect of major works required to address defects in the gutters of the 19 three storey detached blocks comprising the estate. The gutters were causing damp, although of differing levels of severity depending on location, and it was intended to include some associated roof works in the contract. There was also an application by the Lessees for a s 20C order disallowing the Landlord's adding the costs of the application to the LVT to the service charge.

2. On 30 September 2008 the Tribunal had issued Directions following an oral Pre Trial Review attended on behalf of the Applicant Landlord by Mr Donnellan of Trowers & Hamlins, Solicitors, and seven Lessees on behalf of the Respondent Leaseholders named in the Schedule to the application. The Respondent Lessees included Mr Parsons, Chairman of the Orbit Housing Association (OBHA) Independent Leaseholders Group, representing 50% of the Applicant's Leaseholders, and a Mr Rogers and a Ms Harris who were representing themselves. Some 90 Lessees occupy the premises alongside a number of periodic tenants. Their Leases fell into two categories, those with an improvement clause and those without, although at the date of the PTR the LVT had been provided with a sample of neither. The costs of works in respect of the flats of the periodic tenants would be borne by the Landlord

3. At the PTR the Applicant Landlord identified three possible options for the

works, in respect of which the Landlords wished the LVT to determine whether, if the works were to be carried out in one of the formats identified, the expenditure could be recovered through the service charge. The options were as follows:

- Option 1 – to repair the existing concrete gutters and overhaul roof coverings
- Option 2 - to repair existing gutters and recover all roof slopes
- Option 3 - to overcover existing gutters and provide new sprocket eaves detail with plastic gutters and recover all roof slopes

The Applicant's preferred option was Option 3 but the Applicant Landlord nevertheless believed it reasonable to seek a declaration on all three options in case their view turned out to be wrong. Surveys of the property had taken place on 12 December 2007 and 3 March 2008. A detailed specification had been supplied to contractors and tenders, on a block by block basis, were expected to be returned by 20 October 2008. Eight contractors had expressed interest in tendering.

4. The case was then set down for hearing at 1pm on 5 January 2009, continuing on 6 January 2009, was allocated to the Tribunal's Standard Track, and an inspection was arranged for 10am on 5 January 2009 prior to the hearing. The Directions provided that unless by 20 October 2008 other Leaseholders gave notice to the Tribunal to the contrary, Mr Parsons would be deemed to represent all Leaseholders other than Ms Harris and Mr Rogers who had already given notice that they wished to represent themselves. Directions were then made for disclosure of documents including of the specifications and tenders received, and for the Respondents to serve a reply setting out full grounds for opposing the application and attaching any relevant documentation. Each party was directed to serve on the other witness statements of any witnesses of fact to be relied on at the hearing. It was further directed that the respective experts should meet to narrow the issues between the parties and to provide a joint report setting out the matters still in dispute by 8 December 2008, and that by 22 December 2008 the Applicant should collate a hearing bundle, and provide one copy to the Respondents and four copies to the Tribunal. The Directions carried the usual warning of potential prejudice to a

party's case in the case of breach of the Directions, and the likelihood that failing to provide evidence as directed might result in the Tribunal deciding to debar the defaulter from relying on that evidence at the full hearing.

THE INSPECTION

5. The Tribunal inspected the subject property on the morning of 5 January 2009 in the company of Mr Parsons, Mr Clackett (Membership Secretary of OBHA Independent Leaseholders Group) Mr Rogers, Ms Harris and other Lessees. The representatives of the Applicant Landlord did not attend. After waiting for 15 minutes while the representatives of the Applicant Landlord were sought, the Tribunal conducted a walking tour of the exterior of 10 of the 19 blocks, observing numerous instances of water staining emanating from the gutters. The tour concluded with an inspection of the internal common parts of Colyer House, in order to assess the effect upon the interior of the one block to which they had internal access of the external water damage observed on the outside elevation, in respect of which they had noted comment and photographic evidence in the hearing bundle. They were unable to enter any of the individual flats where similar evidence in the hearing bundle indicated that there was further damage,

THE HEARING

6. At the hearing the Applicant Landlord was represented by Mr Jon Holbrook of Counsel, instructed by Mr Ewan Wallace of Trowers & Hamlins, Solicitors, and the Respondent Lessees by Mr Parsons, Chairman of OBHA Independent Leaseholders Group, and Mr Rogers and Ms Harris appeared in person.

THE CASE FOR THE APPLICANT LANDLORD

7. As the Directions had not been complied with, in that the hearing bundle

(which contained the experts' reports and supporting technical material) had not been supplied in accordance with the Directions (which had required sufficient copies to enable all members of the Tribunal to read the technical documents ahead of the hearing) the Tribunal was obliged to request Mr Holbrook, who had provided a helpful skeleton argument, to take them through the evidence in chief in detail before it was possible for the members to question the witnesses or for any cross examination to take place.

8. Mr Holbrook referred to the Applicant Landlord's Statement of Case, which identified the Landlord's obligation in the Leases to carry out works to the gutters and roofs of each block on the estate, and in addition stated that it was intended to repair the chimney stacks. He referred the Tribunal to clauses 4 and 5 of the second type of Lease, and more specifically to clauses 2(2)(f), 2(2)(i), 2(2)(h), 4(2) (A) (ii), 4(2) (B)(v) and clause 5(1) which, subject to the payment by the Lessees of the specified proportion of the service charge, together requires the Landlord to "repair, maintain and keep in good order and condition ... the whole of the structure" including the sections of the structure which were the subject of the specifications for the works to be carried out by means of one of the three alternative options. He added that some of the Leases of the alternative type contained a clause requiring contributions for the cost of improvements, although it was as a matter of fact not the Landlord's intention to differentiate between the two types of Lease and neither type of Lease would incur a cost for any item of improvement to any Lessee, regardless of the type of Lease held. Appendices to the Landlord's Statement of Case detailed the scope of the works for each Option.

9. Mr Holbrook said that the Landlord Housing Association had become the freeholder of the Estate in 1998 when it had been transferred from Bexley Council. He said that the Estate comprised a mixture of "long" and "short" blocks of respectively 12 and 6 flats, and of the 174 flats just over half (52%) were held by Lessees, and the remainder by weekly tenants. It was accepted by all the Lessees that remedial work needed to be done to address the defective gutters.

10. With the assistance of their surveyor, Mr Richard Thomas, FRICS, the Applicant Landlord had devised two schemes, alternatively either (i) to reline the existing gutters or (ii) to replace them with new PVCU gutters and fascia boards, and "oversailing" these with new roof coverings. The second alternative would cost 44% more than the relining option, but would (according to Mr Thomas) represent better value for money and lower future service charges for the Lessees. However not all Lessees agreed that this was so, as a result of which the application had been made to the LVT. Mr Holbrook summarized the extent of the water ingress, which significantly affected 12 of the 19 blocks, either through external water staining, defective guttering or internal staining. He said that since 1998 when they had acquired the Estate, the freeholder had doubted the effectiveness of the Finlock gutters installed on construction of the blocks in 1955, as maintenance had had to be undertaken in 1993 (relining and redecoration), 1998 (cleaning and redecoration) and 2003-4 (patch repairs, relining of 1,300 metres of guttering at a cost of £39,000 and further cleaning and redecoration), after which there had been accelerated leaking and declining effectiveness of the roofs.

11. As a result, the freeholder had appointed Mr Thomas as their independent surveyor, after a competitive tendering exercise. He had conducted an inspection of some blocks with a telescopic boom and others with binoculars in October and November 2007, and had also inspected some of the flats and roof spaces internally. Following Lessees' comments at a meeting with him in January 2008 that he had not inspected enough blocks, he had again inspected on 17-18 March 2008, again with a telescopic boom, and this time covered all blocks but one (Arras House) and in conjunction (on 17 March 2008) with the Lessees' own surveyor, Mr Vincent Young. On 17 November 2008 Mr Thomas had inspected all blocks again, this time with the benefit of the tenders from 6 of the 8 contractors who had been approached following the early stages of the statutory consultation, before preparing his final report (which was within our bundle). He had originally prepared 4 alternative schemes, which had then been reduced to 3, although now only 2 were retained: Option 1 (which the Lessees favoured) and Option 3 (which was the choice of the freeholder, the Applicant Landlord)

12. Mr Holbrook said that there were two issues in relation to Option 3 which needed to be addressed before he called any expert evidence: first, whether oversailing was within the Applicant Landlord's contractual obligations, and secondly whether oversailing would satisfy the "reasonably incurred" test. He said that, in relation to the first issue, the Leases (both the original Leases and the new version introduced in 1995) obliged the Landlord to go further than to maintain and repair, and required them to keep the premises "in good order". The question to ask was whether there was a breach of the covenant by the disrepair in the property not being kept in "good order" so as to require the Landlord to repair it. He contended that there was and relied on the authorities of *McDougall v Easington DC* (1989) 21 HLR 310, CA, at 315 (where it was held that work undertaken to prevent the recurrence of a previous deterioration amounted to repair) and *Welsh v Greenwich LBC* [2003] 3 EGLR 41, CA, at 43 and 44 (where good condition was interpreted as adding something more than repair)

13. Mr Holbrook continued that both experts agreed that work needed to be done to both the gutters and the roofs, due to the water ingress. However in the Scott Schedule recording their respective agreements and dissents Mr Vincent Young for the Lessees took the view that Option 3 was not necessary and that Option 1 would be preferable. Both also took the view that the works would be improvements rather than repairs (which was awkward in relation to the different types of Lease, some of which contained obligations to pay for improvements and some not) and in any case that the costs and extent of the work proposed were due to the freeholder's previous neglect. However Mr Holbrook contended that it was settled law that the Landlord had the choice of methods for resolving any such problem. For this he relied on the view of Lord Hoffman (then Hoffman J) in the case of *Post Office v Aquarius Properties* (1985) 176 EF 923 and Lord Mustill (then Mustill LJ) in *McDougall v Easington*. He submitted that there was no evidence to suggest that the Landlord did not have a contractual right to adopt Option 3. He also contended that the issue of whether the works went beyond the repairs required was not in practice relevant as the freeholder did not intend to charge any Lessees for any works that were in fact works of improvement, whichever form of Lease they held. Nevertheless it was contended that in all the circumstances the works were, on the

authority of both *McDougall v Easington* and *Wandsworth London Borough Council v Griffin* (2000) 26 EG 147 “repairs” as they did not change the character of the building and were appropriately costed in relation to the value of the building and the future value to be expected of the repairs.

14. In relation to the second issue Mr Holbrook submitted that Option 3 would be reasonably incurred because, first of all, it would create lower service charges, although Mr Young’s costings took no account of this, nor did he explain his reasoning, assumptions and methodology. However Mr Thomas, who knew the Estate well, having been previously involved since 2007, considered that there would be maintenance savings for 15 years and beyond, because of the reduced regular cleaning and maintenance, which would itself introduce savings in scaffolding costs now required to comply with Health and Safety Regulations. Also there would be a 20 year guarantee on new roofing and capital savings, as the present roof was now already over 50 years old (so that overhauling would have a limited life). As the new gutters would be laid to falls there would be less opportunity for blockages, another factor in reducing the need for cleaning and maintenance. Secondly, he said, the short term increased costs over Option 1 could be mitigated by arrangements to spread the payment of the costs by the Lessees: these could be further explained by Mr Kent, the Applicant Landlord’s Leasehold Strategy Manager, and included 24 month interest free payments, and/or payments over 5 years with interest charged. Thirdly the Lessees would have better flats, with significantly reduced water penetration and maintenance, and increased capital and amenity value and better design and appearance.

15. Mr Holbrook also told us that there were other issues raised by the Lessees, including their claim that the Landlord should bear the cost of making good after the works, which would otherwise create double charging, as the Lessees paid throughout the year for grounds maintenance, and secondly that they contended that there had been inadequate consultation. Mr Kent would be able to satisfy the Tribunal that consultation had been entirely compliant with the legislation. He added that the Applicant Landlord had no interest in incurring unnecessary costs but wanted a fully effective solution.

There was some urgency as they would like to commence work in April 2009 with setting up in March, and were anxious to avoid the extra expense of a temporary roof. He therefore sought a declaration that either Option 1 or Option 3 would be reasonably incurred and sought dismissal of the application for a s 20C order as he contended that the Applicant Landlord had been reasonable in bringing the matter to the LVT in view of the Lessees' resistance.

16. Mr Holbrook then called the Landlord's surveyor, Mr Richard Thomas, DipBS, FBEng, RMaPS, FRICS of Thomas & Cavalli, Chartered Surveyors, who said that he had been in private practice since 1978 largely working on repair and maintenance projects for Registered Social Landlords, and had set up his own practice in 1982. He had extensive experience of assessing the life expectancy of buildings. He had worked previously for Orbit Housing Association at another complex, Stream Way, Bexley, where similar concrete gutters to those on the present property had been relined. He had carried out all the surveys and reports in the present case himself.

17. Mr Thomas told us that the meeting called with the Lessees in January 2008 had been in response to claims by them that he had not made sufficiently detailed inspections of the Estate, and in particular had not inspected all the blocks, whereas he had considered that he had made a sufficient inspection of a few blocks to see what needed to be done. A second inspection had then been arranged to which the Lessees' own surveyor, Mr Vincent Young, had been invited, as already described by Mr Holbrook. Mr Young had brought another surveyor, a Mr John Bordley, and two contractors to their joint inspection on 17 March 2008, when they had inspected the roofs and gutters of Marconi, Fleming, Watt, Huxley, Dixon and De-Luci Houses and the interiors of Flat 6, Marconi House (water ingress in the living room), Flat 5 (top floor) Abbey House (damp plaster around an electrical socket and aerial point in the living room), and Flat 1 Dixon House (ground floor) (damp and stained plaster in the living room).

18. Mr Thomas had detailed in his report all the information he had considered

in preparing it, including past maintenance records of the Applicant Landlord. He had also had discussions with Mr Les Constant, the present Maintenance Manager, whose recollections of work carried out to the properties went back to the 1990s, and who was available to give evidence. He had also consulted Mr L Coulter, the former Chairman of the OBHA Independent Leaseholders Group, who still resided in Abbey House, and had made all his records from 2000 available.

19. Mr Thomas had contacted the following materials manufacturers and suppliers: Sandtoft (clay tiles), (Swish (PVCU fascias and soffits), Hunter Plastics (plastic gutters) and Liquid Plastics Ltd (Decothane). He gave us technical details of the construction of the blocks, including of the present cast iron rainwater pipes and the concrete Finlock gutters integral to each block, which are in need of repair or replacement. He confirmed that these gutters were originally lined with bitumen but later with a brush applied waterproofing product. However they attracted leaves and silt as they had no fall and the size of the pipes carrying away the water might also be too small to discharge sufficient water in those circumstances, since water was found lying in the gutters and encouraging overflow, staining the external walls of the building: sometimes this standing water was driven back by windy conditions, particularly at high levels of the gutters, and thus entering into the internal walls of the block causing water damage inside. Joints had also opened within in the gutters. There were also defective, missing and damaged roof tiles letting in water, and missing bedding to the ridge and hip tiles, defective valley tiles and linings, missing chimney pointing and flashing and defects in the roof void, including the presence of asbestos and lack of insulation and fire separation.

20. The report provided the history of past repairs, and the extensive lists of defects, block by block, and broke down the costs of the Options and of future maintenance over 15 years. Appendices provided us with site and block plans, a diagrammatic drawing of the Finlock Gutter, and analyses of the tenders.

21. Mr Thomas explained to us that he preferred Option 3 because it offered

better long term value and a more trouble free solution with practical options for meeting the extra initial outlay for Lessees, although if the Landlord preferred they could still consider Option 1. He thought the key advantage was dispensing with the concrete gutters of which he had seen only one in sound condition (at Marconi House). He did not want to keep the Finlock gutters, because successive linings inevitably built up, reducing capacity for water. There were all the various disadvantages of keeping them which had already been enumerated, although he had researched various maintenance options (and handed us copies of the relevant technical material that he had accumulated which ranged from brush applied solutions to aluminium lining). He pointed out that the cost of labour was expensive so that retaining a system requiring more maintenance was not cost effective.

22. On the other hand, Mr Thomas told us, the oversailing solution overcame all known problems, would provide all the traditional eaves detailing and be indistinguishable from the present appearance from the ground. He said that this solution had been his idea in the present case but that it had been done elsewhere. He wanted to discourage water from entering the buildings, and instead to throw it off away from the elevations, particularly as a number of top floor flats and even others at lower levels suffered from water seepage. He also felt that this was a good opportunity to tackle the ongoing problems with the roofs which were clearly disintegrating in places as cement had been found in the gutters. A new roof would also have a 60 year life, whereas the most for a repair would be 20 years. Any guarantees in respect of previous work on the gutters would already have expired as would any guarantee in respect of the original roof construction.

23. In answer to questions from the Tribunal and the Respondents, Mr Thomas said that he emphasized that there was much uncertainty about the effectiveness of roof repairs and with gutter relining, and in any case that if the gutters were not replaced there would be the ongoing cost of labour to maintain them besides scaffolding, moveable tower or cherry picker costs as no work could now be done off ladders. He suggested that the cost of cleaning could be about £3,950 plus a substantial amount for scaffolding, per

block, and that this would have to be done at regular intervals though not every year. In summary Option 1 would be adequate but Option 3 was infinitely superior.

24. Mr Holbrook then called Mr Constant who had provided us with two witness statements and was able to give us a breakdown of call outs to leaks, although it was pointed out that Mr Thomas had already to some extent provided this in his breakdown of repair records which were allocated on a block by block basis. Mr Constant told us that he had been employed by the Landlord since 1998. He was able to say that there had been problems with the 2003-4 repairs which had been capped at £250 per flat due to non compliant s 20 consultation procedures (and not due to faulty work) but this had never in fact been charged to the Lessees as there had then been so many problems that the Landlords had decided not to charge the Lessees at all. He said that the 2003 repairs had been bona fide but with the benefit of hindsight they had not been successful.

25. Mr Thomas had made a second witness statement to address the questions from Mr Rogers in a letter dated 18 December 2008 about the 2003 works. He did not know who the contractor had been on that occasion but as the repairs were ad hoc, and not planned as in 1993, there would not have been a guarantee. He considered that a cherry picker or scaffolding would have been used, whichever would have been cheapest. There were still call outs to leaks and the call centres would have been instructed not to refer such calls to any repairer but specifically to the Planned Maintenance Department who would know if there was any guarantee in force and relay the job to a specific contractor. A great advantage of Option 3 was the fact that maintenance costs would be significantly reduced..

26 In answer to questions from the Tribunal and the Respondents, Mr Constant said that if patching of the roofs was done either modern tiles which were a good match, or reclaimed tiles, would be used. Like Mr Thomas he was able to answer questions about the likely cost of a cherry picker or alternatives but in answer to Mr Parsons he conceded that cherry pickers did damage grass as they were tracked vehicles (although

there was a version which was not). He agreed that most of the Estate was accessible by cherry picker but that towers and scaffolding would have to be used in some locations. He estimated that access to roofs and gutters for maintenance would be likely to cost a substantial sum in each year when this was necessary.

27. Mr Holbrook then called Mr Stephen Kent, the Applicant Landlord's Leasehold Strategy Manager. Mr Kent said that he had worked for the freeholder since 1983 and in his current post since 2006. He managed all Leaseholder services in the South East. He was able to confirm that the appropriate statutory s 20 consultation procedures had been observed but that in fact his employers considered it important to keep their Lessees fully informed and so called meetings and issued Newsletters as required. Six Newsletters had been issued in connection with the proposed major works. He confirmed that his employers were aware of the difficulties the Lessees might have in paying for them and reiterated the arrangements that had already been proposed. However he also added that any other financial solutions would be sympathetically considered.

28 In answer to questions from the Tribunal and the Respondents Mr Kent agreed that his job had been created for liaison with the Lessees in the present case although his expertise was not in s 20 matters. He agreed that the original costs had been overestimated at £12,000-£15,000 on the basis of Mr Thomas' first report, and that this had caused alarm. However he said that he had investigated various methods of assistance for those on benefits. He had had 2 responses to s 20 consultation documentation, as had Mr Constant, and that they had said substantially much the same, namely that the works were either not necessary or in any case too expensive. He said that he had discussed the payment issues with 2 elderly Lessees and had had various informal discussions in July 2008. However after Mr Thomas' second report, which had more accurately estimated the costs of both Option 1 and Option 3 there had been less response. In re-examination by Mr Holbrook Mr Kent agreed that although Mr Parsons represented 57 Lessees on the Estate out of the 90 Lessees that meant that 33 had not responded to letters or Newsletters or contacted him.

THE CASE FOR THE RESPONDENTS

29 The case for the Respondents was conducted by Mr Parsons, on behalf of the majority of the Lessees, and by Ms Harris, for herself and Mr Rogers. Much of the Respondents' case had emerged during the evidence given by the witnesses for the Applicant Landlord and the questions asked of them. Also, the Tribunal had already had the opportunity to study the Respondents' relatively concise written statements in response to the Applicant Landlord's. From their perusal of these documents the Tribunal had been able to establish that, in summary, the Respondents' Statements of Case together addressed a number of points. Significant concern was generated by the lack of provision in the Leases for payments to be made in respect of Estate as opposed to individual block charges. It was also clear that the Lessees in general preferred economical repairs to replacement of either roofs or gutters. Many Lessees were concerned that money was to be spent when the current roofs still had a remaining life expectancy of 15 years, that there was duplication between the proposed works and the routine annual service charges which they had to pay in any case, that the works constituted betterment for which some Leases contained no obligation to pay, that there had been historic neglect of the repairing obligation which had inflated the present proposed costs, that the statutory s 20 procedures had not been duly carried out and that such extensive works were unnecessary and undesirable in the current economic climate.

30. Having established their significant financial concerns, the Respondents were therefore able to proceed directly to calling their expert witness, Mr Vincent Young, BSc (Hons), MSc(Dist), MBEng, MIFireE, MCIQB, TechRICS. In his report Mr Young reiterated Mr Thomas' account of the inspections of the Estate and told us that "the tiles although approximately 50 years old are considered to be in reasonable condition", although it was clear that at present some individual tiles were damaged. He considered that only after a roof was 45% damaged was it appropriate to conclude that the lifespan was exhausted and to re-roof. His calculations supported the conclusion that it was more economical to repair the roof for the next 12 years, so that to reroof now was unjustified.

With regard to the gutters he concluded that the water egress and staining to elevations was caused by defective joints not by the gutters themselves, although the defective linings had also trapped water between the linings and the Finlock gutters, letting water into the building.

31. He said that the overall condition of the gutters was good to satisfactory, although he concluded that the downpipes needed to be assessed for adequacy to discharge the water flow from above and his internal investigations had confirmed his suspicion that these problems were causing the water ingress. He considered that the chimneys were in good condition although when the scaffolding was erected it would be advisable to check all brickwork and chimneys and to do minor repairs and maintenance at that time. He added that there was no statutory requirement for the roof void works in an existing building.

32. Mr Young confirmed that he much preferred Option 1 to Option 3 and if there was concern about maintenance of the gutters they could be protected from debris by chicken wire. There should also be planned rather than reactive maintenance after overhauling the roofs. If on the other hand there was to be serious consideration of Option 3, this should be piloted on one building before committing to doing the whole estate.

33. In answer to questions from the Tribunal and Mr Holbrook, Mr Young said that he had not attended the second day of the March inspections as he had seen what he needed to view on the first day. He had brought 2 contractors who were experienced in the type of work under consideration. He had seen 5 or 6 of the worst roofs. He said that the 45% "rule of thumb" was applied by most of the Housing Associations he had worked for. He added that the staining coincided with the defective joints he had noted in the gutters and downpipes.

34. Mr Holbrook asked Mr Young about his qualifications and to what extent they were relevant to the problems under discussion. Mr Young replied that he had two

building degrees, both with high level grades, and had set up his own business 8 years previously. Before doing so, he had been at Lewisham Council and Greenwich Council since 1988, where he had been a maintenance surveyor. He had given evidence for the councils in disrepair cases. He insisted that he had not completed the column of the Scott Schedule indicating that he agreed with Option 3 as a suitable option for the proposed works as he had not believed it to be so. He conceded that it was one option that would no doubt work but had preferred Option 1 for the reasons that he had explained including that the other Option was unnecessary, although clearly both would make the buildings watertight. He agreed that there would be no redecoration with Option 3 which would afford a cost saving in some respects but obviously at additional initial cost.

FINAL SUBMISSIONS

35. We indicated to the parties that owing to the late receipt of the hearing bundles we would need to spend some time following the hearing to study the bulky technical reports and supporting documents in order to absorb the detail, but that we would be glad if they would address us in turn to summarise their cases.

FINAL SUBMISSIONS FOR THE RESPONDENTS

36. Mr Parsons said that the Respondents were present before the LVT because of the exaggerated estimates of £12,000-£15,000 per flat which had at first been suggested by the Landlord when the works were first mooted. He submitted that the s 20 procedure should have presented a more accurate and detailed estimate of the costs before alarming everyone with these inflated figures. He submitted that there should have been much greater regard for the Lessees and that more of a pastoral approach should have been adopted, since the Lessees are the Leaseholders of a social landlord and their financial position should have been more sensitively considered. It was not sufficient simply to expect Lessees to take out or increase mortgages, many were pensioners who might not have that capability in any case. Moreover the gutters had not been properly maintained, since it was conceded that they had not been cleaned since

2003 and then the work had been defective. The entire episode had caused problems for Lessees trying to sell their flats.

37. Ms Harris submitted that there were 2 issues: (i) whether either or both Options were works of which the costs were “reasonably incurred” and (ii) which was best value. Both experts agreed that work was necessary but she submitted that the costs were not automatically reasonable because the work was. She wondered whether if they were only expecting to recover 52% of the costs the Landlord would still go for the more expensive option. She relied on *McDougall v Easington* for the distinction between an improvement and a repair and the *Wandsworth v Griffin* decision to support her contention that, while a repair might still be a repair if it incidentally effected an improvement, this would not be so if there was a history of neglect, which seemed to the Lessees to be the case on the Estate.

FINAL SUBMISSIONS ON BEHALF OF THE APPLICANT LANDLORD

38. Mr Holbrook submitted that while all the roofs and gutters might not be defective, a prophylactic solution had been proposed for a universal underlying problem. He submitted that *McDougall v Easington* was a case with wholly different facts from the present situation. The Landlord was putting only two alternative Options to the LVT. No doubt there were others but the Landlord preferred Option 3 for all the reasons explained by Mr Thomas. Mr Young had finally agreed, when pressed, that Option 3 was acceptable, including Mr Thomas’ costs and methodology, even though he personally preferred Option 1. He submitted that it could not be argued that the Landlord had made assumptions that were unreasonable, and the reasonableness of the works now being done, despite past unsatisfactory works, was not affected in any way by the previous works. He contended that there had not been a history of neglect as works had been done. The fact that they had not been entirely satisfactory was a separate point and did not point to neglect.

THE s20C APPLICATION

39. The case for the Respondents on this issue was that they should not have been put to the trouble and expense of coming to the Tribunal if the Landlord had given the Lessees accurate information earlier. He said that the Lessees would not have objected if Option 1 had been selected, as was clear from all their representations and their Statement of Case.

40. Mr Holbrook submitted that the Landlord had dealt transparently, on an open and honest basis, with the Lessees at every stage. He reminded us of the consultation work done with Lessees by Mr Kent and the series of Newsletters keeping them informed, together with the suggestions for addressing the financial issues. It appeared that Ms Harris had looked at the tenders but there had otherwise been little response from Lessees. There had been an onus on the Respondents to narrow the issues but it had only emerged at the hearing that Mr Young could have conceded on the Scott Schedule that Option 3 was viable even if he did not want that Option to be selected. In summary, in view of the opposition from the Lessees, it was appropriate for the Landlord to go to the LVT for clarification of what would be reasonably incurred rather than to risk that they could not recover the costs. In answer to the Tribunal's suggestion that the Landlord could nevertheless have gone ahead if sure that Option 3 was appropriate, Mr Holbrook said that on the contrary he was of the view that s 27A(3) had been enacted for precisely the type of case before the Tribunal. The Landlord could clearly have gone ahead with Option 1 but preferred to have approval for Option 3.

DECISION

41. It is common ground between the parties that the concrete Finlock parapet gutters had in part failed resulting in water seepage to some of the top floor flats. The extent of the water seepage is not known, but the Landlord suggests that out of around 50 flats the problem affects at least 20% and possibly more. The Lessees contend that this is an overstatement.

42. The expert members of the Tribunal are well aware that Finlock precast concrete gutters have a range of problems which are unique to their design. Over time the mortar joints located between the units break down due to the gradual deterioration of the joints and the concrete, aided by a build up of moss and lichen, vegetation and tree leaves which are blown into the gutter by wind. Natural settlement also occurs between the concrete and the supporting brickwork below. All this can lead to water entering the joints and the concrete units themselves, and as the gutter is positioned immediately above the wall (and not projecting beyond the face of the building as with a normal eaves gutter) water can then saturate the brickwork and cause severe damage within the residential accommodation. This is what the Landlord contends has occurred on this estate.

43. This is not a new problem. Finlock gutters were in popular use in the post World War II period, in the 1950s and afterwards, for various reasons. However when the problems mentioned above occurred some 20 or so years later, their use was significantly reduced. The Tribunal was therefore surprised to hear that Finlock gutters were still in production and appearing in building specifications. To overcome the problems specialist firms have developed systems and materials to meet the defects. Two systems are in common use: (i) a brush applied solution to coat the concrete, or (ii) an aluminium overtray fixed to the concrete so as to afford protection. Unlike eaves gutters, Finlock concrete components are laid level and horizontal and thus without falls. They are not therefore self cleaning, and if leaves and vegetation are not cleared regularly there is a build up of vegetation and water ponding and this can lead to overflowing. Sometimes the overflow will cascade to the front resulting in staining brickwork, and sometimes wind driven water will enter the interior of the building, being forced upwards above the back gutter line.

44. In the present case both Landlord and Lessees are agreed that the above defects exist on the estate and remedial works are required. Two proposals are put forward by the Landlord: (i) what might be described as the normal solution, ie to waterproof the concrete gutter with proprietary materials specifically developed

to meet this situation; or alternatively (ii) a somewhat novel approach whereby the existing eaves are altered by sprocketing to provide an eaves gutter and thus eliminating the Finlock unit and substituting it with a traditional system. Option 1 comprises applying a liquid membrane to the Finlock gutter and overhauling and repairing the clay roof tiles in the conventional manner. Option 3 comprises dispensing with the Finlock unit, providing the sprocket eaves and replacing and renewing the roof tiling. The renewal proposal comes about because the roof slope measured from the eaves to the ridge is circa 4.70m and to provide sprocketed eaves a circa 2m strip of the existing roof tiles is required to be removed and renewed. The Landlord's surveyor, Mr Thomas, argues that with the roof tiling now some 50 years old (and thus of limited future useful life) the opportunity should be taken to carry out a complete renewal. His reasoning is based on economies of scale, standing scaffold, reduced maintenance costs in the future and anticipated future inflation. The Landlord, having obtained competitive quotations from contractors, advises that the additional costs of Option 3 over Option 1 is about £284,000. There are 174 flats and thus the extra cost averages out at around £1,632 per flat. The Lessees' contribution for Option 1 is around £3,700 per flat and for Option 3 around £5,700 per flat. Actual amounts vary dependant upon flat areas and locations, whether in long or short block.

THE LANDLORD'S CASE FOR OPTION 3

45. This is summarized in the hearing bundle attached to Orbit's letter to the Lessees dated 1 December 2008 (page 331j-k).

THE LESSEES' CASE

46. This is summarized by Mr Young on pages 239-244 of the hearing bundle and amplified by his evidence given at the hearing. His principal points are as follows:

- (i) The conventional and traditional repair method used to overcome the Finlock problem should be employed because this conforms to normal

- and established practice, ie Option 1
- (ii) Option 3 is *novel* and because of this at minimum a prototype/sample should be carried out initially as opposed to wholesale replacement.
 - (iii) The Finlock concrete is in good condition; it is only the joints between the units which have failed. Option 1 will solve this problem.
 - (iv) Chicken wire gratings if fixed to the top of the Finlock gutters will substantially reduce vegetation and leaves, and thus the gutter will remain free flowing, without water ponding or seeping into the brickwork below.
 - (v) A guarantee is available for Option 1 at circa 15 years.
 - (vi) Eaves gutters (Option 3) can cause problems in the future, and thus maintenance costs will be incurred whatever option is selected.
 - (vii) The clay tiling has a future life and only 10% of the area now requires repair or maintenance.
 - (viii) It would be false economy to carry out complete re-roofing at this stage.
 - (ix) Option 3 may be an improvement/betterment and for which the Landlord may be responsible pursuant to the provisions of the Lease.

THE QUESTION FOR THE LVT

47. The Landlord seeks a determination that the costs incurred by carrying out either Option 1 or Option 3 would be reasonably incurred as defined by s 19 of the Landlord and Tenant Act 1985. Option 1 is estimated at circa £646,000 + 15% fees + VAT. Option 3 is estimated at circa £940,000 + fees + VAT. The Lessees accept that Option 1 costs would be reasonably incurred but submit that Option 3 costs would not necessarily be reasonably incurred and thus could contravene s 19.

THE TRIBUNAL'S VIEW

48. The Decision for the Tribunal to make is one to a question which is not easy to answer. While it may be *novel* to correct problems created by a Finlock gutter with a new sprocketed eaves detail (since the suggestion comes from Mr Thomas and

neither Mr Young nor the Tribunal has seen this scheme used elsewhere) sprocketed eaves as such are standard building construction which has been used for centuries, albeit generally on new build rather than on conversion work. Thus there is nothing intrinsically *novel or new*. Mr Thomas' detailed drawing of the proposed sprocketed eaves will, if carried out with good workmanship, be satisfactory in all respects, and will fulfill its intended purpose, in order to eradicate dampness entering into the flats. Further if more money is spent on repairs the less is likely to be spent on future maintenance. For example replacing old timber frames with PVC materials is the classic example, which precludes future repairs and repainting. However most owners repair their timber windows and do not replace with PVC. There are numerous other examples: clay tiles last longer than concrete, but because the latter is cheaper concrete is more often used; good quality facing bricks will last longer than cheaper ones; three coats of paint to woodwork is better than two coats.

49. In the present case, a new roof covering will last longer than patching the existing until renewal is essential. Simply dispensing with a maintenance requiring Finlock gutter, and replacing this with a relatively maintenance free eaves gutter, will of course reduce future maintenance costs. For these reasons, the Tribunal does not give a great deal of weight to Mr Thomas' estimate as to future maintenance costs: of course these will be lower if more is spent at the outset. In practice the Tribunal doubts whether the Landlord of this estate will spend significant sums on roof repairs, cleaning out gutters (be they Finlock units or PVC) or regularly erect expensive scaffold and repaint the exposed underside of the Finlock concrete.

50. Turning to the other side of the coin, if the Tribunal were themselves faced as property owners with Finlock gutters and a 50 year old tiled roof, and both these items were giving trouble (as is the case here) the likely decision would be to adopt Option 3. The difference in price is the £2,000 between Option 1 and Option 3 and Option 3 will save money, trouble and inconvenience in the future. This is relevant where there is an intention to remain in the property for the foreseeable future. It is to be noted that there is no challenge as to price: the Lessees accept that both *prices* are reasonable under s 19.

51. A more difficult question is what should be done about the roofing. Option 1 is simply repair and obviously sensible. In relation to Option 3 if it can be said that it is reasonable to strip the bottom half of the roof pitch and recover with new material (so as to permit the sprocketed construction) can it also be said that it is equally reasonable to strip the top half of the roof and replace this also with new material. It would be in very rare circumstances that a property owner would renew the bottom pitch to a roof and at the same time retain the existing pitch above.

52. In the present case it appears that the roofing defects are much more restricted to ridges, hips and valleys and not the general roof covering. The clay tile appears to be reasonably sound. Clay tiles have a life of 100 years and hence the resale value of second hand clay roofing tiles is at a good price, and this is because they are in general used for repairs to existing roofs. The issue of a complete roof strip under Option 3 is finely balanced. The alternative is to part strip just the lower section and to retain the upper part is not before the Tribunal for determination. Complete renewal under Option 3 might therefore be preferred to part renewal, based on future maintenance, costs and economy of scale. It is of course relevant that only small number of flats is affected by the Finlock gutters and such a situation favours Option 1. The financial position of the Lessees may also be a relevant factor when deciding on reasonableness.

53. Contractually the Landlord has the right under the Lease to select the type of repair undertaken provided it is a reasonable decision and the cost to be applied to the service charge is reasonably incurred. Option 3 is certainly a reasonable option in that it eliminates the problems and reduces future maintenance costs. The proposed construction is reasonable in that it conforms with the text books and is a well tried and tested method. Its one and only drawback is that it costs more initially than the conventional approach as proposed under Option 1. Option 3 kills three birds with one stone: damp eradication, new long lasting roofs, reduced future maintenance costs.

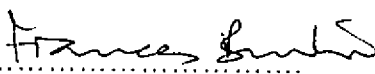
54. Option 1 involves gutter linings and this may not achieve the desired

effect. There may be more movement and settlement in the future which can result in the opening of bed joints and allowing water to enter. In any event, future long term maintenance is required. It is unlikely that leaves and vegetation will be removed regularly and this will result in ponding water which, to say the least, is not good. This failure to clean can lead to cascading to the front and staining to the brickwork, with wind swept rain water lying in the gutter and overflowing at the back causing internal dampness. Any guarantees that may be offered are unlikely to be of great value.

55. Option 3 is only £2,000 extra per flat. In all the circumstances this does appear to be the preferred option. Nevertheless the Tribunal is of the view that the cost of either Option would be reasonably incurred in the context of s 19 of the Act for the respective reasons attaching to each, and the Landlord has the right to choose.

THE s20C APPLICATION

56. The Tribunal is of the view that it was reasonable in all the circumstances for the Landlord to bring the issues before the Tribunal to the LVT in that there is a substantial sum of money involved and there has been significant opposition from the Lessees. However the prime reasons for the Lessees' opposition was because of the Landlord's careless misinformation at an early stage which caused the Lessees to panic because of the high cost suggested, because the first estimate was over double what the actual properly investigated estimates now are. Consequently the Tribunal does not consider that the Landlord should charge the Lessees for the costs of the Tribunal hearing which could have been avoided if the Landlord had acted in a more responsible and methodical manner in the first place. Accordingly the Tribunal determines that the Landlord shall not apply the costs of the application and hearing before the Tribunal to any service charge.

Chairman..... 
Date 26.2.09