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

Applicant: Mr Kaveh Bakhatiar

Respondent: Ziggurat Freeholders Limited

Re: Flat 24 The Ziggurat, 60-66 Saffron Hill EC1N 8QX

Application received: 5 April 2006

Hearing date: 17 & 18 July 2006

Appearances: Mr Kaveh Bakhatiar (Applicant)

Mr Paul Hnaituk (Respondent)
Mr Tim Polli Counsel (Tanfield Chambers)

Members of the Leasehold Valuation Tribunal:

Mr S E Carrott LLB
Mr T W Sennett MA FCIEH
Mrs S E Baum JP

1. **Background**

This is an application under section 27A of the Landlord and Tenant Act 1985 for the determination of the reasonableness and liability to pay service charges. The Applicant is Mr Kaveh Bakhtiar who is the lessee of Flat 2.4, the Ziggurat, 60-66 Saffron Hill, London EC1 8QX. The Respondent landlord is Ziggurat Freeholders Limited.

2. The Ziggurat is a former print works. The original building consisted of 6 stories and between 1996 and 1999 the building was converted into residential accommodation with car parking beneath. There are 63 flats in the block. Some of the lessees in the block also have one or more car parking spaces; some have no car parking space.

3. Part of the works carried out to the building during the conversion works included the provision of new roof. It is common ground between the parties that within a relatively short period of time, the roof began to fail as a result of which works to the roof were necessary. The extent of the works necessary however is a matter of dispute between the parties. The cause of the failure was the poor detailing at the base of the stanchions, which over the years had allowed water to penetrate and saturate the insulation. The extent to which the insulation was saturated was a matter in dispute. Another problem, again not in dispute was that asphalt upstands were starting to pull away from the parapet walls. Water was beginning to penetrate in various locations although the extent is again in dispute. However it appeared that water was penetrating into the communal areas serving Flat 8.1 and 8.2.

4. In any event the then freeholders, Long Term Reversions Limited decided that it was necessary for the roof to be replaced and in the event some two thirds of the existing roof was replaced.

5. Before the works to the roof were carried out the Applicant made an application to the Leasehold Valuation Tribunal for determination of his liability to make payment in respect of the estimated cost of those works.

The application was dealt with by way of a paper determination by a differently constituted Tribunal and on 4 April 2005 that Tribunal determined that it was unable to ascertain from the papers submitted that a case had been made out as to why the works should not be carried out and that under the terms of his lease, the Applicant was liable to make an advance payment. The Tribunal also concluded that the Respondent freeholder in those proceedings, Long Term Reversions Limited, had complied with section 20 of the Landlord and Tenant Act 1985 and that it had accepted the lowest tender for the works.

6. Following correspondence between the Applicant and the Tribunal, the Tribunal agreed to entertain a fresh application to be determined by way of an oral hearing. In the meantime, the majority of the lessees of the building purchased the freehold through a nominated purchaser, the present Respondent and the works, which are in dispute in this application, were carried out.

7. Accordingly this Tribunal has considered matters afresh, unconstrained by the findings of the previous Tribunal and the evidence which has been put before this Tribunal by both parties is more extensive than that which was placed before the previous Tribunal.

8. At the hearing of this application, the Applicant appeared in person and the Respondent was represented by Mr Tim Polli of Counsel.

9. **Issues**

At the pre-trial review, which was held on the 8 May 2006, the parties and the Tribunal identified the following issues -

(1) the cost and standard of the works carried out in 2005;
(2) the standard of supervision in respect of the works;
(3) the cost of supervision in respect of the roof works; and
(4) arrears of service charge of £528.33.

10. The last issue was resolved between the parties prior to the substantive hearing of this application.

11. Following an abortive hearing on 17 July 2006, the substantive hearing took place on 3 and 4 August 2006. The Applicant produced written submissions running to some 26 pages in which he set out some ten issues for determination by the Tribunal, of which, some had not previously been raised before the Tribunal or indeed with the Respondent. In particular, he put forward a positive case that some of the damage to the roof had been caused as a result of works carried out by the owner of Flat 8.1. (whereas previously this had merely been hinted at).

12. **Inspection**

The Tribunal inspected the roof of the Ziggurat on 17 July 2006. The main area roof was inspected in the presence of both parties. With regard to that part of the roof for which access to Flat 8.1 was necessary, the owner of Flat 8.1 allowed the Tribunal and the Respondent's representative access. He was not prepared to allow the Applicant access and both the Applicant and the Tribunal had been informed by the managing agents, prior to the inspection that this would be the case. The Applicant did not raise any objection to the Tribunal inspecting this area of the roof.

13. The Tribunal saw a central area to the roof (for which access through Flat 8.1 was not necessary), which gave access to the lift shaft and mechanical plant serving the building. Within this central area was a cosmetic metal screen attached to metal stanchions that enclosed part of the lift at roof level. This central area was complex with many joins and junctions meaning that the roof could not be simply covered with single strips of roofing membrane but recovering involved the formation of numerous joints, welts and covers to upstands. The original roof covering by flat 8.2 and the junction of new and old roof coverings was seen and noted to be in sound condition. A larger flat area of roof had

been recovered outside flat 8.1 and the Tribunal noted that this was a less complex roof which in their experience would have been relatively straightforward to recover. The Tribunal noted that there were two areas in Flat 8.1 where there was historical evidence of leaks.

14. No discussions took place with the Respondent when this area by flat 8.1 was inspected and the Applicant was informed by the Tribunal of what it observed immediately after the inspection.

15. **Reasonableness of the Works/Liability to Make Payment**
The core argument raised by the Appellant in his application (see page 96 of the Applicant's bundle) but not spelt out at the pre-trial review, was whether or not it was reasonable for the Applicant to have to contribute to the cost of works in circumstances where there was a possible cause of action against the architects/contractors in negligence owing to the alleged design defects and/or poor workmanship with regard to the original roof and the works were, in any event, within the latent defects period. According to the Applicant here was a roof that was some five or six years old having to be replaced or renewed well within its period of warranty/guarantee. As stated above, there is no dispute between the parties that whatever the precise extent of the problem the roof failed within a relatively short period of time.

16. The Applicant submitted at length (taking the Tribunal through various documents) that the managing agents and Long Term Reversions Limited did not do enough to ensure that action was taken against the architects/contractors to ensure that the matter could be resolved without cost to the lessees. He produced to the Tribunal a letter from Jason Farnell the Contract Manager for§ Bluestone dated 28 July 2006. Mr Farnell informed the Applicant as follows -

> *I have only received two letters from Simmonds and Partners now trading as Wood Management. The first dated 2 July 2004 advising that there were or had been a number of design defects*

particularly with the main roof and enquiring whether any guarantees or warranties were available. These letters did not specify the nature of the defects, only that they related to design. Bluestone has not been asked to inspect the alleged defects or to comment on whether these were due to any deficiencies in the design, workmanship or any other cause. It is usual and contractually correct for the original contractor to be given the opportunity to inspect any alleged latent defects and to be involved in their rectification if appropriate…

17. Moreover the Applicant told the Tribunal that the landlord as a third party to the JCT contract was entitled to take legal action. Instead the managing agents opted for a full scale renewal of the roof without recourse to the original contractor responsible for the design and build contract. It emerged during the course of the hearing that the Applicant is in fact a qualified architect hence he had some knowledge of some of the procedures that ought to have been followed.

18. Mr Hnatiuk of Wood Management, the managing agents, gave evidence on this issue. He told the Tribunal that he telephoned NHBC to enquire whether there was any cover in place in respect of the building. He was advised that there was not. The Tribunal was referred to pages 197 of the Applicant's bundle and 228 of the Respondent's bundle supporting this evidence.

19. In addition Mr Hnatiuk took advice from a firm of Solicitors, Messrs Hill Dickson who were the Solicitors acting for the then landlord Long Term Reversions Limited. Those Solicitors advised in a letter dated 1 September 2004 (page 197 of the Applicant's bundle) that Long Term Reversions Limited did not have any guarantee in respect of the conversion works and that they were deemed to have purchased the property with full knowledge of its state and condition. Messrs Dickson Hill advised that it was not for them to advise the tenants but that the tenants should make their own investigation of any guarantees

provided at the time of their purchase to ascertain whether they could recover costs incurred in carrying out roof repairs.

20. Moreover Mr Hnatiuk stated that he had been chasing the developers for details of the contractual documentation since July 2004 and had only recently received any sort of reply.

21. Mr Polli on behalf of the Respondent submitted that since there were two firms of architects involved together with the building contractor it was not clear where the fault for the defective roof lay. The Respondent was not a party to the contract and did not employ either architect and the terms of its acquisition of the freehold reversion will have to be considered to determine whether it acquired or was entitled to the benefit of its predecessor in titles right's under the construction/decision contract.

22. He further submitted that the existence of any right of legal action was irrelevant to the responsibility of Long Term Reversions Limited to repair the roof and that any cause of action which the tenants had would not have precluded Long Term Reversions Limited from proceeding with the roof renewal and that the quantum that would be claimed by those tenants would be the service charge contributions payable.

23. The Tribunal inquired of the Respondent as to what the views of the other lessees to the work was at the time and was provided with a witness statement of Richard Hopkin which was prepared overnight between 3 and 4 August 2006. With that witness statement was produced various minutes of residents meetings of which a meeting held on 29 November 2004 was instructive. The Applicant had attended that meeting and had made his views known. Under the heading 'Roof Problems' the minute records as follows -

"Mr Bakhtiar said that he felt strongly that the proposed roof works were completely out of proportion to the condition of the roof, that the

report of the surveyor was unreliable and that Simmonds and Partners had not dealt adequately with the concerns and questions raised by residents during the consultation process that took place in the summer. He was not prepared to pay his share of these costs and demanded that a meeting be held with Simmonds and Partners.

The Committee shared the concern of all residents at having to pay such a large amount for works to the roof seven or so years after it was originally installed. However Simmonds and Partners had held a lengthy consultation process over the summer. The matter had already been extensively discussed in several meetings of the management committee, including one in June 2004 attended by both Simmonds and Partners and their surveyor, which was attended by a number of concerned residents. Most recently, the matter had been discussed at the AGM in October, and residents had accepted, however reluctantly, that the only practical option remaining was to allow the works to proceed and pay for them ... and whilst there was some residual frustration about the matter many residents had already paid the sums demanded.

Mr Bakhtiar stated that he required the Association to fund an application to the Leasehold Valuation Tribunal to have the works stopped and the section 20 notice revoked.

The consensus of the meeting was that the points raised by Mr Bakhtiar were all issues that had been discussed extensively during the consultation process in the summer. There was little point in going over old ground".

24. Nevertheless, the minute went on to state that the Residents Association would consider the Applicant's request again if any new issues or facts came to light but that any further request should set out the grounds upon which he considered an application to the Leasehold Valuation Tribunal would be likely to succeed. The Association alsc noted that it was not in the interests of the Association to embark on litigation without a clear idea of the reasons for so doing and some reasonable certainty as to a successful outcome. From this the

Tribunal concludes that the Residents Association had in mind the possible costs that might be incurred should they be unsuccessful.

25. Looking at the evidence as a whole, Mr Hnatiuk had taken some steps in order to ascertain the position with regard to pursuing the developers, to obtain contractual documentation and had enquired into the possibility of taking legal action. The majority of the lessees, albeit with some reluctance, wanted the managing agents to proceed with the works; many of them having paid their share of the sums demanded. It appears from the minutes of 29 November 2004 that the only resident strongly in favour of some type of legal action and opposed to the carrying out the works was the Applicant.

26. The Tribunal was of the view that in those circumstances, the then landlord, Long Term Reversions Limited, acted reasonably in proceeding to carry out works to ensure that the water penetration through the roof should be remedied. Litigation with the developers, builders or architects, in this Tribunal's experience, may have taken years to resolve and the outcome was by no means certain. It was reasonable therefore in the circumstances to undertake work to prevent further water penetration and possible damage to the fabric of the building caused by the defective roof. The Tribunal agreed with Mr Polli's submission that this would not preclude the Applicant from issuing proceedings against the persons whom he considered to be responsible for the defective state of the roof. His compensation if he was successful would be equivalent to the service charge contribution that he was liable to pay in respect of the roof repairs.

27. Under this head, the Applicant also put forward the argument that because the cause of the problem was an inherent defect (the metal stanchions embedded in concrete that allowed water to penetrate the structure) then the lessees were not in any event liable to contribute to cost. The Tribunal's view was that even if this could be termed an inherent defect, the works carried out in order to remedy the problem,

as a matter of fact and degree, constituted a repair as opposed to an improvement.

28. **Roof Extension to Flat 8.1 - Cause of the Damage to the Roof**
In his application to the Tribunal the Applicant mentioned that some of the difficulties to the roof ***might*** have been contributed to by the work, which had been undertaken by the lessee of Flat 8.1 who had constructed an upper floor to his flat. By the date of the hearing of the application, the Applicant was putting forward a positive case that in fact the lessee of Flat 8.1 was responsible for damage to the roof.

29. In support of this contention, the Applicant relied upon a series of photographs taken by Bauder (roof material manufacturers) during the course of a survey, the fact that the works were undertaken in wet weather, correspondence from Christel Wanton Architects, correspondence from Mr Finley of ARH Associates and the fact that original promenade tiles had been removed whilst works were ongoing. According to the Applicant it was the lessee of Flat 8.1 who under the terms of his lease would be responsible for payment in full for that part of the roof which was adjacent to his flat and which was affected by the works, which he carried out.

30. The Applicant placed great emphasis on the observations of Christel Wanton Architects. Their address noted on their letter dated 9 August 2004 at page 229 of the Applicant's bundle was Flat 6.6 Ziggurat. However the relevant part of this letter did not in fact allege that the lessee of Flat 8.1 had caused damage to the roof even though the Applicant sought to read the letter in that way. The relevant part of the letter stated -
"The Freeholder inexplicably, did not deem it necessary to have a conditional survey carried out before commencement of the extensive building works to both top flats. These building works ***could have*** *(Tribunal's emphasis), damaged the roof. We have seen one of the contractors land steel beams straight onto the roof without any*

protection of the roof surface. The responsibility for repairs would lie with the contractors responsible for these works."

31. The Christel Wanton letter was the high point of the Applicant's case, that Flat 8.1 had caused damage to the roof.

32. In the evidence that the Applicant presented to the Tribunal, that letter came the closest to alleging any actual damage caused by Flat 8.1 and even the report of ARH Associates relied upon (at pages 202 and 207 of the Applicant's bundle) did not categorically allege actual damage (despite a reference to solar gain).

33. This particular allegation was made without proper notice to the Respondent. Whilst the Applicant might be able to reasonably assert that there was a possibility, no matter how remote, that damage might have been caused by the works carried out by the lessee of Flat 8.1, there was simply no evidence before the Tribunal upon which it could reasonably conclude that the damage was in fact caused by the works undertaken by the lessee of Flat 8.1. It was difficulty to see how the Tribunal could have accepted the Applicant's argument on this point based as it was on the reading of historic documentation, which was taken out of context.

34. Moreover, the Tribunal accepts the evidence of the Respondent that during the preparation of the specification, the owner of Flat 8.1 was in the process of making arrangements to lay timber decking as a replacement to existing promenade tiles. Included in the tender was an instruction to relay any timber decking which may have since been put down by the lessee in order to ensure no additional costs on site. The Tribunal was told and accepts that the cost of this work was not included in the final contract sum and was in any event paid directly by the lessee of Flat 8.1.

35. Accordingly, the Tribunal determined that this head of challenge failed.

36. **Section 20 Consultation**

A preliminary point taken by the Applicant on the issue of consultation was that the managing agents failed to inform new leaseholders of the impending charges on the purchase of their flat. The Applicant referred to correspondence from Messrs Beaumont and Cole at page 190 of the Applicant's bundle. However the lessee of Flat 4.1 did not join in this application. Accordingly it would be wrong for the Tribunal to make any determination on this issue save to say that this does not provide any remedy for the Applicant in any event because he was not affected by this correspondence.

37. The points relied upon by the Applicant as a failure to comply with the consultation procedure were as follows -

(1) The notice of intent (stage 1) dated 6 April 2004 failed to provide notification of a time and place to inspect and obtain a copy of the proposals;

(2) under the stage 2 procedure only tender estimates were provided;

(3) the tendering procedure was defective for a number of reasons including non-compliance with the code of practice, not allowing the contractors to tender on a like for like basis, not receiving priced schedules from all of the contractors, the tender report not addressing the specification, late receipt of tenders, and the abandonment of the tapered insulation system.

38. In support of his challenge under this head the Applicant relied upon an internal Camden document (pages 238-241 of the Applicant's bundle) and a newspaper article (page 274 of the Applicant's bundle) as well as the code of practice. The Applicant subjected the consultation and tender procedure to a detailed forensic and legal analysis in order to persuade the Tribunal that consultation procedure had not been complied with.

39. On this issue Mr Polli reminded the Tribunal that the present Respondent was not the freeholder at the time that the consultation process took place. Nevertheless he relied upon the evidence of the supervisor surveyor Mr Finley. The Tribunal was shown the addendum tender document, which specified the change from the liquid plastic Triflex system to the Pluvitec felt overlay system and a letter which extended the time for return of the tender documents. Mr Finley in the addendum referred to Pluvitec's instructions and recommendations, which provided at number 6 for standard 91 mm ply-plus insulation panels, rather than taper insulation (a point which the Applicant had particularised as being a deviation from the original specification). Mr Polli submitted that both the consultation and tender processes had been carried out fairly. Further both Mr Finley and Mr Hniatuk gave evidence about the meetings that they had with the lessees, keeping the lessees informed as to developments.

40. The Tribunal accepted that the works in respect of the roof constituted qualifying works within the meaning of sections 20 and 20ZA of the Landlord and Tenant Act 1985 and that accordingly Long Term Reversions Limited as landlord had to comply with the provisions of Part 2 of Schedule 4 to the Service Charges (Consultation Requirements) (England) Regulations 2003.

41. On the evidence before it, the Tribunal found the following facts -

(1) Notice of intention was served on the lessees on 6 April 2004. That notice informed the lessees of the proposal to renew the roof.

(2) A tender process was conducted and various estimates were received. By a letter dated 15 July 2004 the landlord sent a paragraph (b) statement to each of the lessees.

(3) On 24 September 2004 notice was given to all lessees of the observations on the estimates, the landlord's response to those observations and the fact that the landlord had placed instructions with A&E Elkins Limited.

(4) The tender process was carried out by Mr Finley who is a director of ARH Associates and is a building surveyor. He prepared a specification using a liquid plastic system which he considered to be more suitable to form detailing around the stanchions, smoke vents and other areas of details as opposed to the Erisco Bauder felt system. The original specification made provision for the replacement of the existing insulation with new tapered insulation to comply with current U value requirements. The specification was issued to five contractors together with a list of specialist sub-contractors who install the Triflex system. However the main contractors were having difficulty obtaining prices from the approved Triflex sub-contractors in all probability due to the peculiar detailing of the roof.

(5) Mr Finley issued an addendum to provide an alternative Pluvitec system. The Pluvitec system was cheaper. All of the tenders were received with all contractors basing their tender sum on the addendum and revised Pluvitec specification.

(6) The lowest contractor A and E Elkins achieved competitiveness by having its own internal Pluvitec in-house installation team to avoid subcontracting costs and also submitted the lowest cost for preliminaries. The next three contractors were all within £6500.

(7) There was a meeting on 28 June 2004 where the finer details of the project was discussed with the lessees where both Mr Hnatiuk and Mr Finley were present and the consultation continued thereafter.

42. The Applicant's insistence that the consultation and tender procedures were not carried out fairly ran contrary to the evidence that was before the Tribunal. This was a case where the lessees were naturally reluctant to embark on renewal of the roof without proper explanation. Mr Finley and Mr Hniatuk supplemented the written information provided to the lessees with at least one letter to explain the position and had secured the agreement of the majority of the lessees not only

regarding the work but also the manner in which it should be carried out.

43. The stage 1 notice complied with the Service Charges (Consultation Requirements)(England Regulations) 2003 in that it described in general terms the works proposed to be carried out to the roof. The notice of intention served on the lessees made it perfectly clear that it was proposed that the roof was to be replaced. There was no necessity therefore for the notice to go on and specify a place and time for an inspection of documents.

44. Moreover the provision of the two estimates complied with paragraph 11(5)(b)(i) of Schedule 4 to the regulations. There was no need to go on to provide a summary of the estimates. In London Borough of Haringey v Ball and Others (6 December 2004) His Honour Judge Cooke considered comprehensively and at some length the provisions of section 20 of the Landlord and Tenant Act 1985. In that decision the learned Judge emphasised that an estimate was just that. He opined that even if it was provided on the back of an envelope it would still constitute an estimate and thus comply with the legislation.

45. Looked at in the round it is clear that between them Mr Hniatuk and Mr Finley worked together with the lessees to ensure that the lessees were fully involved in the consultation process. Indeed, judging by the minutes of meetings that were shown to the Tribunal and given the involvement and interest shown by the lessees, it is clear that the consultation and tender process was carried out fairly. Much of the Applicant's legal arguments were based not on the terms of the Regulations but on an internal Camden document and referable to it's own housing stock.

46. Accordingly the Tribunal determined that the consultation and the tender process were carried out properly.

47. **Necessity for, Cost of and Standard of the Roof Works**
It was the Applicant's case that it was not necessary to renew the roof and that patch repairs could be carried out. He also stated that the works of roof renewal had not been carried out properly and that in any event the work could have been carried out at a much cheaper cost.

48. The Applicant informed the Tribunal that there were two small leaks in the building resulting from the poor detailing at the base of the metal stanchions. He stated that the managing agents had refused to consider the question of patch repairs even though the problem was a localised one. He said that instead of considering alternative options such as remedial works, or undertaking a thermo-graphic survey which could have specifically indicated the spread of water within the roofing, only two core samples were taken. The Applicant accepted that one of the two core samples did show that the roof was wet but that this was taken less than half a metre from the stanchion. He also referred to the damage, which had been caused to the roof adjacent to flat 8.1, and the fact that a part of the original roof was retained (which according to him invalidated the guarantee). According to the Applicant the decision to renew the roof was taken without any significant investigations.

49. As to the cost of the roof the Applicant relied upon an estimate provided by Structural Water Proofing Systems the suppliers of Pluvitec. A cold roof overlay was £55 per square metre and a warm roof overlay with 90mm insulation was £75 per square metre. Stripping up the existing roof surface was £7 to £15 per square metre. Thus according to these figures the cost of replacing the roof according to these figures would be approximately £40,000. The Applicant conceded that Structural Water Proofing Systems gave their pricing without having had the benefit of inspecting the roof or having knowledge of the peculiar detailing on this particular roof.

50. The Applicant also pointed out the confusion caused by Mr Finley's drawings and the specification for the roof works all contributing to the

poor quality of the works. He also highlighted the apparently contradictory information that was given to the lessees by Mr Hniatuk and Mr Finley on various matters. He complained about particular aspects of the work including the manner in which the work was actually carried out and the detailing of the work, that some insulation had not been removed and replaced and that there was a lip or difference between that part of the roof which had been replaced and that part which was not.

51. It should perhaps be mentioned at this juncture that at the hearing on17 July 2006 the Tribunal gave the Applicant permission to call expert evidence on the above issues provided that he served any expert reports on the Respondent at least 7 days before the next hearing. On the morning of 3 August 2006 the Applicant informed the Tribunal that he proposed to call two experts on that day but that they could not attend until 2.30 pm. He indicated that their reports had been served and so the Tribunal agreed to this course.

52. The first expert who the Applicant called was Mr Andrew McKenzie, the managing director of Erisco Bauder, manufacturers of roofing material. Erisco Bauder had originally been consulted by the previous landlords with a view to making recommendations as to whether or not the roof should be replaced. The report is dated 19 March 2004 and begins at page 212 of the Applicant's bundle. Although Mr McKenzie did not prepare that report he had subsequently inspected the central area of the roof at the request of the Applicant. He had inspected the central area of the roof previously and so was able to speak to his colleagues report. The Tribunal accordingly admitted his oral evidence.

53. Mr McKenzie told the Tribunal that the cost of the material to cover the roof was approximately £8000 although the cost of the works themselves would be between £60,000 to £100,000. He conceded however that this range of figures would not possibly cover all of the contractor's costs and that in any event it was difficult to price

considering all of the detailing involved with this particular roof. He told the Tribunal that he would not advise on patch repairs in this case because it would probably invalidate any guarantee. He said that the two core samples taken on his colleague's inspection did indicate that the roof was saturated and that it therefore needed to be renewed. He did not feel that thermographic imaging was necessary or practical having regard to the specific arrangement of the roof, plant etc and that it would be expensive. As to the standard of the work, he considered that the contractors had carried out a satisfactory job and emphasised the complexity of the detailing to the roof, agreeing with the 32 points of detailing identified in the Erisco Bauder report. He described the felt work as being quite good and emphasised that it was not 'just slapped down'. Mr McKenzie also confirmed that it would be inappropriate to lay new felt over saturated insulation. As regards the upstands, he commented that if the removal of the asphalt damages the block work behind then he would leave it. E stated that the asphalt provided a satisfactory base for the roofing system used at this building.

54. This evidence was in contrast to correspondence received from Mr Hayden Davies, the area technical manager for Bauder. In his letter dated 13 April 2006 Mr Davies he had outlined some shortcomings in the standard of workmanship to the roof but had concluded that the roof was performing to date but that the potential shortcomings might lead to water bypassing the water proofing and entering the building.

55. The Applicant then proposed to call as a witness a Mr Stark who is a qualified surveyor. It then transpired that Mr Stark had not prepared a report, contrary to the earlier indication given by the Applicant. The Applicant had not given any advance notice to the Respondent of what Mr Stark was going to say and in those circumstances the Tribunal considered that it would be unfair to the Respondent to allow such evidence to be admitted when the Applicant had not complied with the direction to serve a report or at the very least had given some kind of indication to the Respondent as to what his witness proposed to say.

56. For the Respondent, Htnatiuk told the Tribunal that he had initially consulted a roofer who recommended that the roof needed to be replaced. That was not necessarily a method that he wanted to adopt in order to remedy the problem and so he consulted Mr Finley who thought that the roof was saturated and therefore needed to be replaced. This view was based partly upon seeing a cross section of the roof and the insulation created during the extension works to Flat 8.1. However he sought the specialist advice of the engineer from Erisco Bauder who confirmed that the roof needed to be replaced. Mr Finley was also present when the insulation was removed from the roof and confirmed in his evidence that it was saturated (although the Applicant doubted the truthfulness of his evidence).

57. As to the standard of the roof works. Both Mr Finley and Mr Htnatiuk confirmed that in the year since the works had been completed there had been no further leaks. The only ingress of water, which had occurred, was in consequence of one of the lessees removing a seal around a doorframe. Mr Finley gave detailed evidence about individual aspects of the roof, which the Applicant had criticised. In particular he confirmed that all of the insulation was in fact removed and replaced and that the new insulation was feathered to ensure that the new roof was at the same level as the old and that the joint between the old roof and new roof took place following technical advice from the Pluvitec agent.

58. As to the cost of the works, Mr Polli emphasised that the previous landlord had carried out a competitive tendering process and that all of the contractors tendering for the job inspected the roof and carried out their own measurements. He submitted that in the circumstances it was far more likely that by this process the previous landlord had obtained the true market rate for the job as opposed to the basic budget figures suggested 'blind' by Structural Water Proofings Systems. He told the Tribunal that the previous landlord had accepted the lowest tender and

there was no evidence to suggest that the cost of the roof was unreasonable in the circumstances.

59. The Tribunal taking into account all of the evidence and the submissions made by the parties determined that the work was necessary. The Applicant's own witness, Mr McKenzie did not consider that it was possible to patch repair the roof and was of the view that if the insulation was saturated the roof would have to be renewed. Mr Finley was present when the roof covering was removed. His evidence to the Tribunal was that the underlay was saturated to such extent that it was necessary to renew approximately two thirds of the roof. There was no evidence by the Applicant to contradict the evidence of Mr Finley. The Applicant was not present when the roof covering was removed and although the Applicant doubted the truthfulness of Mr Finley, the Tribunal accepted Mr Finley's evidence in its entirety.

60. With regard to the standard of the work, having regard to the evidence of the parties and the Tribunal's own visual inspection of the roof, the Tribunal determined that the works were carried out to an appropriate standard. The Tribunal noted in particular the evidence of the Applicant's witness Mr McKenzie. Mr McKenzie was of the view that the felt work was quite good.

61. Mr Hayden Davies was not available to be cross-examined at the hearing. The Tribunal determined that the weight to be attached to his correspondence was not such as to displace the cogent oral evidence given by Mr McKenzie particularly in light of the fact that the roof was performing satisfactorily at this point in time.

62. Even if the Applicant was correct in one of more of the complaints that he raised, the Tribunal did not consider that this meant that he was not liable to make any contribution whatsoever to the service charge in respect of the roof works as he contended. Moreover, the Applicant did not suggest that there should otherwise be some form of reduction in

his contribution. Even if he had made such contention, the matters which he complained of were in any event in the nature of snagging items which, if correct, could be put right. The works had to be viewed realistically in the context of this particular roof with its peculiar and complex detailing and in the context of his own witness's evidence (Mr McKenzie) that the contractors had carried out a 'good' job.

63. So far as the cost of the work is concerned, the Tribunal noted the considerable effort that Mr Finley had gone to in order to save costs. The contract sum was awarded at £115,750.00 and the final account was calculated in the sum of £100,204.00 which represents the fact that only approximately two thirds of the roof needed to be replaced once the contractors were on site. The Applicant had challenged the method of scaffolding the building proposing that a cheaper system involving a hoist should have been used. The Respondent's evidence in this regard was unequivocal and the Tribunal accept that the method used was appropriate for the building and declines to apply any reduction to the total cost of works.

64. The cost put forward by the Applicant on the basis of the Structural Water Proofing Systems quotation was unrealistic. It was not based upon an inspection of the premises and did not take into account the particular detailing on this particular roof. It could not be said that this quotation was like for like. It conflicted with the estimate of costs given by his own witness Mr McKenzie who had estimated the total costs would be between £60,000 and £100,000 and even then this figure as Mr McKenzie noted did not take into account all of the contractors' costs. Mr McKenzie had recognised that the costs in this job were all in the detailing.

65. The actual cost of the works was £130,691.07 which comprised £100,204.00 for the cost of the works including scaffold, access and preliminaries, surveying fees at 10% (£10,020.40), planning supervisory fees at 1% (1,002.04) and VAT at 17.5%. The Tribunal

determines that this cost was reasonable. The issue of cost of the surveyor's fees is dealt with below.

66. **Supervision**

The Applicant challenged both the standard and costs of supervision. As to the standard of supervision he relied upon the following -

(a) The failure to carry out a thermo-graphic survey or alternative options for carrying out the roof works;

(b) The failure to carry out flood testing once the works were complete;

(c) The matters raised in the letter dated 13 April 2006 by Mr Hayden Davies of Erisco Bauder;

(d) signs of residual standing water by abandoning the tapered insulation;

(e) the stanchion detailing;

(f) the fact that the old roof and the new roof were of the same height;

(g) recent works (page 186 - 'inspect condition of felt overlay roofs, upstands. `Make temporary repairs to lifting laps');

(h) the gulley works should have been carried out as per specification;

(i) the drawings; and

(j) costs supplied to Pluvitec

67. As to the cost, the Applicant contended that the surveyor's job ought to have gone out to tender as constituting a qualifying work under section 20. That the RICS had abandoned fee scales and that in any event the sum of 10% was too high.

68. All of the criticisms as to the standard of works were comprehensively replied to by Mr Finley in his written evidence (paragraphs 6 to 9) and in his oral evidence. The fact remains that even the Claimant's own witness Mr McKenzie found no problems with the works themselves and by inference the standard of supervision of those works. The

Tribunal accepted the evidence of Mr Finley in its entirety on these issues. Even if it could be said that the works were not perfect or that the standard of supervision was not perfect this did not in the instant case mean that there should be a reduction of costs. In an ideal world it is always possible to state that more could have been done. On the evidence before it the Tribunal concluded that the supervision was of to a reasonable standard.

69. With regard to the costs, even though the Applicant was correct in saying that the RICS had abandoned fee scales, the sum of 10% was not to high. Mr Finely had given evidence to the Tribunal that in his 25 years of experience he had never known works of this scale to be charged at less than 10%. The usual rate was 12.5%. He had originally requested 11.5% but the managing agents had refused and negotiated 10%. From his evidence it was clear that Mr Finley had taken a hands on approach with regard to supervision, visiting the site often and ensuring that the works were carried out to a reasonable standard. Indeed given the interest that the lessees had taken in regard to the work, this was hardly surprising. Taking into account the entirety of the evidence put forward by the Applicant and by the Respondent and the Tribunal's own knowledge and experience in such matters, the Tribunal concluded that the cost of supervision was reasonable and from the evidence before the Tribunal, the lessees did achieve value for money.

70. The Tribunal also accepted the submissions of Mr Polli that there was in truth no need to engage in either the consultation or tender process with regard to the supervising surveyors role. The consultation process extended to the qualifying works which were the roof works and not the role of the surveyor who in the first instance would have to recommend the nature of the works.

71. **Apportionment of the Service Charges**

The Applicant contended that the costs for the roof should have been apportioned as between the Flat Owners and Car Park owners and in

order to demonstrate this he referred in detail to the provisions of the lease and historical correspondence from the managing agents.

72. Mr Polli contended that the Applicant's submissions in this regard were misconceived and based upon a misunderstanding of the terms of the lease and that the works were chargeable solely to the Flat owners.

73. The Tribunal determined that the Applicant had misinterpreted the terms of the lease.

74. The starting point is paragraph 1.3 of the Fifth Schedule to the Lease makes provision to charge, through the Block Service Charge, the costs, charges and expenses incurred by the landlord and incidental to the landlord complying with Part I of Schedule 6 to the Lease. Similarly through the same provision, the landlord is also entitled to charge through the Car Park Service Charge the costs, charges and expenses incurred by the landlord and incidental to the landlord complying with Part 2 of Schedule 6 to the Lease. The relevant provisions in the stand alone car park leases are the same.

75. Paragraph 1 of Part 1 of Schedule 6 of the Lease (which relates to the block) provides for the landlord 'to maintain and keep in good condition and substantial repair and condition (including renewal) all parts of the Block as are not intended to be the responsibility of the Tenant or any other Tenant ... including ... the roof.'

76. The obligations set out in Part 2 of Schedule to the Lease which relates to the Car Park does not include an obligation to keep the roof of the block in good condition.

77. Apportionment only arises where an item of landlord's expenditure relates to both the block and the car park i.e. falls within both Parts 1 and 2 of Schedule 6 to the Lease.

78. In the present case the works to the roof fell within Part 1 only and thus there was no need to apportion the costs as between the Flat owners and car park owners.

79. **Limitation of Costs - Section 20C Landlord and Tenant Act 1985**
The Respondent contended that if the Applicant failed in his application then there should be no question but that the section 20C application should follow the event. That however is not the test under section 20C of the 1985 Act. The Tribunal must necessarily consider what is just and equitable in the circumstances.

80. This was a difficult decision for the Tribunal in as much as a decision either way was bound to cause some prejudice to the majority of the lessees who neither took part in nor supported the Applicant's application. The Respondent was a vehicle incorporated specifically for the purpose of acquiring the freehold for the benefit of the lessees. The Tribunal accepted that a section 20C order would jeopardise the financial security of the Respondent and would therefore indirectly cause substantial prejudice to the lessees. Indeed it may well be that in those circumstances some of the lessees would in any event feel duty bound to bail the Respondent out and so incur costs. On the other hand if the order were refused, the lessees would in effect be footing the bill for the Applicant's application in circumstances where they neither agreed with or indeed joined in the action or worse, the freehold ownership would simply be placed in jeopardy.

81. The Tribunal considered that it would neither be just nor equitable to grant an order under section 20C of the Landlord and Tenant Act 1985 because this would have the possible outcome of placing the freehold in jeopardy in circumstances where it had been acquired for the benefit of the lessees. The Applicant had chosen to bring this application notwithstanding that his fellow lessees had made the implications as to costs clear to him as long ago as 2004. He had challenged the minutiae of every possible aspect of the roof works in a way, which was

wholly disproportionate to the sum in issue including attributing part of the blame for the defective state of the roof to Flat 8.1 when there was no reliable or independent evidence to support this. Indeed even if he was correct in his alternative contention that all that was required was patch repairs, he still would have had to pay something. It was only fair in those circumstances that part of the costs of defending the application should be passed on to him. That would at the very least obviate the need for those who wished to preserve the current freehold ownership from making a financial contribution, which would have the effect of paying that share of the costs which were the Applicant's responsibility.

82. **Application for Costs under Paragraph 10(2)(b) of Schedule 12 to the Commonhold and Leasehold Reform Act 2002.**
This application was due to be heard on 17 July 2006. On the morning of the hearing the Tribunal carried out an inspection of the building. The hearing was originally due to commence at 1.30pm but because the inspection had been completed earlier than expected the parties agreed on site to the hearing taking place at 1pm.

83. Following the inspection, at 12.46pm the Tribunal received a facsimile transmission from the Respondent requesting an adjournment, the basis for which was that the Applicant had only received the Respondent's bundle on the previous Friday and had not had sufficient time in order to consider the documents in detail. The letter was addressed as follows -
I outlined my concerns to you on Friday in my fax that the managing agents in delaying providing the bundle of relevant documents to me were putting myself at a severe disadvantage. To compound this after the visit, their barrister wanted to give me a resume as he said he had been directed to do this by the Chair. I refused to take them as I felt that once more I am being placed in a very vulnerable position not having time to consider their documentation. I have adhered to the conditions which were set by the Tribunal but they have not. They have

persistently delayed in giving access to information and further more in the bundle that finally arrived on Friday evening they introduced several new documents, which I had not seen before. In view of the above I would like to request an adjournment so that I can have the time to view their documents as they have had access to mine for considerably longer.

84. What the Applicant termed as being a resume was in fact Mr Polli's outline submissions, which dealt with only the four issues that had been identified at the pre-trial review. It was both lucid and concise and said in substance no more than what the Respondent had stated in its Statement in Reply albeit in a more elegant manner.

85. When the hearing commenced on 17 July 2006 the first thing that the Tribunal dealt with was admission of Mr Polli's outline submissions. It did this because the Applicant raised the point immediately. The Tribunal admitted the document but in so doing explained to the Applicant that it was common to receive such documents on the day of the hearing and that it would be of advantage to the Applicant because he would be able to understand the nature of the Respondent's case from that document. The Tribunal then went on to consider the application for an adjournment.

86. The Applicant drew the Tribunal's specific attention to two documents in the bundle which required him to give further consideration to the case. The first document was a sample flat lease and the second document was a sample car park lease. The Tribunal acceded to the Applicant's application for an adjournment but specifically reserved the question of costs under paragraph 10(2)(b) of Schedule 12 to the Commonhold and Leasehold Reform Act 2002 on the basis that the Respondent's application under this head could be better dealt with at the conclusion of the case when all of the facts were known to the Tribunal.

87. The Applicant then asked the Tribunal to make an order requiring the Respondent to expose parts of the roof covering so that the Applicant could see what was underneath and asked the Tribunal to carry out a further inspection of the roof. When the Tribunal refused, notwithstanding that the Tribunal had acceded to his request for an adjournment, he accused the Tribunal of having already formed a conclusion about the case. He later apologised for this. The Tribunal then went on to make further directions including those relating to the service of expert reports by the Applicant.

88. The basis of the Respondent's application for costs is that in making an application for an adjournment the Applicant's conduct according to the Respondent was either vexatious disruptive or unreasonable and that the late service of the bundle was entirely of his own making. Under the terms of the directions as varied it was his responsibility to provide the bundle for the Tribunal by 5 July 2006. He had failed to do so.

89. The Applicant stated that he was only two days late in serving the bundle. He had served the bundle at the offices of Wood Management on the 7 July 2006 admittedly after the close of business. That office was situated down the road from the subject property. He accepted that was not the office at which Mr Hniatuk was situated and neither was it the address for service given by the Respondent to the Tribunal. Although he appeared to depart from this in his written closing submissions.

90. The Tribunal's master file reveals that the Tribunal did not receive the Applicant's bundle until 10 July 2006.

91. Mr Polli stated that it was not until 11 July 2006 that the Respondent received the Applicant's bundle because the Applicant had knowingly served it at the wrong address. It was also late so the Respondent had already prepared a bundle in the absence of the Applicant's bundle.

92. The Applicant made the following points -

(a) He did not have time to familiarise himself with the Respondents bundle because he did not receive it until the Friday evening and he was too busy over the weekend to give it consideration;

(b) Part of the responsibility for the adjournment lay with a misunderstanding between himself and the clerk to the Tribunal. The clerk should have necessarily drawn the lateness of bundle to the chair of the Tribunal. The clerk failed to do so.

(c) The Respondent's large legal bill was entirely of its own making for consulting Solicitors who were so expensive. The Respondent could and should have consulted cheaper solicitors.

(d) There were documents in the bundle which he had not seen before although he accepts the sample Flat lease was identical to his but he had not seen the garage lease before.

93. The Tribunal reminds itself that an order under paragraph 10(2)(b) of Schedule to the Commonhold Leasehold Reform Act 2002 is in many respects a draconian order and should not readily be made unless the conduct of a party falls fairly and squarely within conduct stipulated by the paragraph. When the Tribunal granted the adjournment it had in mind the fact that the Applicant was a litigant in person and therefore might possibly be at a disadvantage in having to deal with a bundle served at late notice. However the Defendant is both a professional man and articulate both in writing and orally and was well able to conduct his case before the Tribunal even to the point of refusing to be guided by the Tribunal on issues of procedure or relevance.

94. His conduct in requesting the adjournment at such short notice was unreasonable. It was symptomatic of his conduct towards the Respondent. For example on 1 August 2006 the Respondent wrote to the Applicant noting that he had entered on the roof in the previous week with two gentlemen, enquiring whether or not he intended to call expert evidence and reminding him of the directions that were given on 17 July 2006. He simply did not respond but instead purported to call

his evidence without advance notice to the Respondent. The Tribunal declined to hear from one of his witnesses for this very reason.

95. That the Respondent had served a bundle at all was of the Applicant's own making. It was the Applicant's responsibility to prepare the trial bundle. He was late in serving his bundle on the Tribunal and on the Respondent and even when he served it he did so knowingly at the wrong office of the Respondent by leaving outside their local office after the close of business at the end of the working week and knowing that the Respondent would not receive it until possibly the following week. The Respondent therefore acted entirely properly in preparing a bundle. It did not receive the Applicant's bundle until 11 July 2006 by which time it had already prepared its bundle. The clerk to the Tribunal could not be blamed for the lateness of the Applicant's or the Respondent's bundle or indeed the application for an adjournment and there was no misunderstanding between the Applicant and the clerk since the directions (as varied) were clear. The Applicant should have lodged the bundle by 5 July 2006. It was wrong for the Applicant to seek to persuade the Tribunal that the clerk had somehow contributed to this state of affairs by not communicating matters to the Chair or Wing Members.

96. The Applicant could not escape the consequences of the wasted costs by simply asserting that it was the Respondent's fault for engaging expensive Solicitors. The basis of the Applicant's challenge was such as to render the Respondent liable for the entire cost of the roof works and if the Respondent did not take the challenge seriously there was a possibility that if the Applicant was successful, other lessees, perhaps encouraged by the Applicant, might follow suit. It was therefore proper for the Respondent to have engaged legal representation. The costs lost by the Respondent far exceeded the £500 limit set out in paragraph 10(2)(b) of Schedule 12 to the 2002 Act through no fault of the Respondent but through the unreasonable conduct of the Applicant.

97. Accordingly the Tribunal would accede to the Respondent's application and direct that the Applicant should pay the sum of £500 in respect of the costs wasted by the Respondent and that this sum should be paid within 28 days.

98. **Decision**

Accordingly the Tribunal determines

(a) the works to the roof of the subject property were necessary and were carried out to a reasonable standard.

(b) the supervision of the works was carried out to a reasonable standard;

(c) the total cost of the works was reasonable and that the Applicant is liable to make payment in the sum of £2266.

(d) The Applicants application under section 20C of the Landlord and Tenant Act 1985 is refused;

(e) The Applicant shall within 28 days pay to the Respondent the sum of £500 pursuant to paragraph 10(2)(b) of Schedule 12 of the Commonhold and Leasehold Reform Act 2002 in respect of the costs incurred by the Respondent on 17 July 2006.

Signed ..... S E Cawcutt .....

Dated ..... 9/11/06 .....