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

Residential Property
TRIBUNAL SERVICE

**S.27A & S.20C Landlord & Tenant Act 1985 (as amended)("the 1985 Act")**

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| **Case Number:** | **CHI/21UD/LSC/2009/0146** |
| **Property:** | **Adelaide House<br>23 Grand Parade<br>St Leonards-on-Sea<br>East Sussex<br>TN37 6DN** |
| **Applicant:** | **Puran Limited** |
| **Respondents:** | **Mr & Mrs B & M Cheetham<br>Mr C Sweeting** |
| **Appearances for the Applicant:** | **Andrew Wagstaff of Counsel<br>Edward Sheppard Chartered Civil Engineer** |
| **Appearances for the Respondents:** | **Cheryl Reid of Counsel for Mr & Mrs Cheetham<br>P McLoughlin speaking for Mr Sweeting** |
| **Date of Inspection / Hearing** | **26th January 2010** |
| **Tribunal:** | **Mr R T A Wilson LLB (Lawyer Chairman)<br>Mr N Cleverton FRICS (Valuer Member)<br>Mr Trevor Sennett (Professional Member)** |
| **Date of the Tribunal's Decision:** | **22nd February 2010** |

**THE APPLICATIONS**.

1) This was an application made by the applicants under section 27A (3) of the 1985 Act for a determination whether if costs were incurred for a major programme of works to be carried out to the building in accordance with a specification prepared by E.A.R. Sheppard Consulting Civil & Structural Engineers ("Sheppards"), a service charge would be payable for the costs and if so the amount which would be payable.

2) The respondents sought an order pursuant to section 20C of the 1985 Act that the applicant's costs incurred in these proceedings not be relevant costs to be included in the service charge for the property in future years.

3) The tribunal is also required to consider pursuant to regulation 9 of the Leasehold Valuation Tribunals (Fees)(England) Regulations 2003 whether the respondents should be required to reimburse the tribunal fees incurred by the applicants in these proceedings.

**THE DECISION in SUMMARY**

4) The tribunal determines that if the phase I works are carried out to the building substantially in accordance with a specification prepared by Sheppard's and dated February 2008, then a service charge would be payable and the estimated figure of £46,500 appears reasonable, subject to the comments set out in this decision.

5) No order is made under section 20C of the 1985 Act.

6) No order is made in relation to the repayment of the tribunal fees.

**JURISDICTION**.

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

**THE LEASE**

8) The tribunal was provided with a copy of the lease relating to flat 4 and was told that the lease of flat 9 was on the same terms (save for the service charge percentage) and the service charge liability arose in the same way. As the respondents do not contend that the service charge costs in issue are not contractually recoverable as relevant service charge expenditure under the terms of their leases, it is not necessary to set out the relevant covenants in the leases that give rise to liability to pay a service charge contribution.

**INSPECTION**

9) The tribunal inspected the property prior to the hearing in the presence of the parties and their representatives. Adelaide House is a terraced building constructed around 1835 on seven floors including a basement. The property is a bow fronted Grade II listed building on the sea front constructed of brick walls fully rendered on the two principal elevations under a flat roof renewed we understand in 2007. There is a private car park within the curtilage of the property for a number of flats within the building, which leads directly onto Saxon Street. Including in this land to the rear of the property is an area for the placement of lessees' dustbins and incorporates the existing fire escape which the tribunal noticed was in urgent need of attention or replacement.

10) The tribunal initially inspected the Basement Flat and the applicants explained that they used this area for their sole use and had converted the area into a games room, office, laundry and wash room for use by flats 1 and 3 together with a small kitchenette and wc.

11) The tribunal then inspected the two flats owned and occupied by the applicants namely flats 1 and 3 on the fourth and fifth floors and subsequently inspected flat 4 with particular reference to the works carried out in 2007 and finally inspected flat 9 with particular reference to the front windows.

## THE ISSUES IN DISPUTE AND PRELIMINARY MATTERS

12) Ms Reid and Mr McLoughlin for the respondents both indicated that a major part of their clients' cases related to a claim that the applicants had neglected the building for many years. This neglect had caused damage to the building with the result that the service charge was now higher than it would have been had the applicants carried out timely repairs. Accordingly a set off was due to the respondents.

13) The tribunal indicated that a claim for set-off would be more conveniently and satisfactorily dealt with in the County Court who had the primary jurisdiction in respect of these matters. The bundles contained no pleadings effectively dealing with the quantum of damages arising from the alleged set-off and accordingly the tribunal was not equipped to determine this issue. The parties agreed to reserve their rights in this respect and the set-off claims were not progressed at the hearing.

14) At the hearing the parties were able to further refine the issues and following negotiations it was agreed by the parties that the questions for the tribunal to determine were with regard to the major works listed in the schedule of works dated February 2008 prepared by Sheppards. These were:-

a) Are the major works essential on the grounds of performance by the applicant of its repairs and maintenance obligations?

b) Are the relevant costs of the works to be reasonably incurred?

c) Has the applicant taken all reasonable steps to obtain funding or grants to mitigate the lessees' liability?

15) All parties had set out their respective positions in their statements of case and the parties had prepared and submitted a joint bundle of evidence supplemented by further papers filed immediately prior to the hearing.

## THE HEARING

16) The hearing took place on the 26th January 2010. Mr. Wagstaff of Counsel represented the applicants, Ms Reid of Counsel represented Mr & Mrs Cheetham and Mr McLoughlin spoke for Mr Sweeting who attended the hearing and gave evidence.

## THE APPLICANT'S CASE.

17) Mr Wagstaff began by referring the tribunal to the repairing obligations set out in the two leases. The leases placed the applicants under a duty to maintain the structure of the building and the schedule of works was intended to ensure that the applicants complied with this obligation. He contended that the repairing obligations contained in the leases were wide enough to include all the works to be carried out in the schedule of works prepared by Sheppards.

18) He reminded the tribunal of what could be seen during the inspection of the building and submitted that it was quite obvious that work was needed to the exterior.

19) Mr Wagstaff called Mr Sheppard, a chartered civil engineer, who testified that all of the work set out in the schedule prepared by his firm was necessary and came within the ambit of the repairing obligations set out in the lease. Mr Sheppard stated that he was familiar with the statutory consultation process and confirmed that his firm had prepared the tender documents and oversaw the tender process. Four firms responded and the lowest tender was accepted by his clients. Mr Sheppard said that neither of the respondents had contacted him during the consultation process and he had received no

observations on the notice of intended works and no observations on the estimates obtained.

20) Mr Sheppard confirmed that he had carried out a thorough inspection of the bay windows to the building and in particular the bay windows to Flat 9. He concluded that the glazing bars were quite definitely defective and had rotted away and needed to be repaired. The design and construction of the windows was such that originally both the upper and lower parts would have opened. At some stage the sashes to the upper parts of the windows had been fixed in the box frames and this is why they were no longer movable. However, in his opinion, they would have moved at one stage and that being the case responsibility for them rested with the individual lessees by virtue of the repairing covenants set out in the leases. He had included in the works schedule an item for the repair of the windows because it made sense for these repairs to be carried out at the same time as the other major work. Once the contract had been placed it would be his intention to correspond with the lessees to see if they wanted to commission the contractor to carry out the window repairs at the same time as the other works to the building. This would keep the costs down.

21) Mr Sheppard confirmed that in his opinion all the schedule works were necessary to comply with the applicants repairing responsibilities and he further confirmed that in his opinion the lowest tender of £61,200 submitted by Hills and Pollington was reasonable. That said he warned the tribunal that this figure could rise depending on a number of factors, which would only become apparent once the scaffolding was erected and the job under way.

22) Mr. Sheppard confirmed that the schedule of works included a substantial allowance for remedial work to the fire escape at the rear of the property. It was clear that urgent works were necessary and in a perfect world these works would be carried out immediately after the works had been carried out to the front and sides of the building.

23) On being questioned by the respondents, Mr Sheppard confirmed that it was not immediately clear whether or not the fire escape needed to be repaired or replaced. It was for this reason that he had decided to break the schedule of works up into two phases. There was no doubt that phase 1, which included works to the front and side elevations, needed to be carried out as a matter of urgency and that the scope and method of work was clear. However he accepted that the scope of work to be carried out in phase 2, which would include works to the fire escape, was not so clear and would depend on further investigation which had not yet been carried out.

24) Mrs Narup the secretary of the applicant was called to give evidence and she confirmed that the following advance service charge amounts were outstanding; £6,350 from Mr & Mrs Cheetham and £5,620 from Mr Sweeting. All other lessees in the building had paid their share.

25) In conclusion Mr Wagstaff contended that all work to be carried out in the schedule was the applicants' responsibility under the lease and that there was clear evidence from a structural engineer that the work was essential. The applicants had gone out to tender in respect of the work and had fully complied with the consultation process required by legislation. In addition, they had accepted the lowest tender and had now collected payment from 10 out of the 12 lessees. It was only the respondents who had failed to pay their share.

26) On the issue of grants Mr Wagstaff contended that his clients had taken all reasonable steps to obtain funding but had not received any co-operation from Hastings Borough Council. Whilst the applicants had not submitted a formal application they had contacted the Council on a number of occasions to speak with the grants officer. Despite a number of telephone conversations the grant officer was never available for a meeting. Mr Wagstaff contended that his clients had taken all reasonable steps and there was nothing in the lease which required the lessors to obtain or make a grant application before carrying out repair work which was their responsibility. In these

circumstances he invited the tribunal to accept that all the work set out in the schedule from Sheppards was necessary; that the estimated costs were reasonable, and that his clients had taken all reasonable steps to obtain a grant which was ultimately not forthcoming. In these circumstances the tribunal should order that the outstanding service charges of £6,350 from Mr & Mrs Cheetham and £5,620 from Mr Sweeting should be paid forthwith.

**THE RESPONDENTS' CASES.**

Mr. & Mrs. Cheethams' case

27) Ms Reid informed the tribunal that her clients' primary case related to the set-off issues arising out of the historic neglect. She accepted that the tribunal would not deal with these issues as that jurisdiction lay with the County Court. She also accepted that her clients' issues about the unfairness of the lease terms would have to form a separate application to the tribunal as it involved a different jurisdiction. She confirmed that her clients agreed the general maintenance works carried out to the building last year and therefore this left just one issue, namely that her clients had carried out substantial interior works to their flat (flat 4) and that it had been agreed by the applicants that part of the costs of these works should be deducted from their service charge liability. This work was carried out in the summer of 2007 and was necessary because the applicants had failed to repair the building over the years. The work included replacing skirting boards, rewiring sockets, repairing ceiling damage, replacing carpets damaged by water leakage, the replacing of rotten wooden batons and arranging for the removal of all rubble and other items. A letter dated 20th December 2009 itemised and costed the work at £5,050. Ms Reid's skeleton argument states that the applicants were aware of the work being carried out to Flat 4 and had agreed to reimburse her clients.

28) In cross examination Mrs Narup consistently denied that the applicant had given permission for this work to be carried out and she denied the existence of any contract between the applicant and Mr. and Mrs. Cheetham for the cost of the work to be reimbursed. She maintained that she would not have had the authority to agree such an arrangement, as all work would have to have been verified by Mr Sheppard beforehand. Furthermore she told the tribunal she had received no bill from Mr Cheetham until one had arrived out of the blue on the 20th December 2009 some two years after the work was carried out. She also contended that most of the work related to the interior of the flat, which was the lessees' responsibility. She posed the question why would the applicant agree to pay for it?

Mr Sweetings case

29) Mr Sweeting's first concern centred on the windows and who was responsible for repairing them. He contended that the upper parts of the windows were not movable which meant that it was the applicants who were responsible for their repair and not him. He referred the tribunal to the flat description contained in his lease, which made it clear that only the movable parts of the window were the lessees' responsibility.

30) Under cross examination, Mr Sweeting confirmed that he had no issue with the way in which the applicants had gone about the consultation procedure. He also confirmed that if the contractor carried out the work to a reasonable standard at the price quoted, then he would accept that that quote was reasonable.

31) Mr Sweeting said that his second concern related to the quality of work from the contractor chosen by the applicant on the basis that the cheapest quotation had been accepted. At one point in his evidence he suggested that he would be happier if the highest quote were accepted although the tribunal was not satisfied that he really meant what he said in this respect.

32) Mr Sweeting confirmed in cross-examination that he did not disagree with the schedule provided by Sheppards and accepted that work needed to be carried out to the building.

33) He also contended that the applicants had not done enough to obtain a grant and that they had allowed the building to fall into disrepair and that is why the amount now required to repair the building was so high.

34) In concluding his evidence Mr Sweeting told the tribunal that he had no problem with paying for the work but he was concerned about signing a blank cheque in favour of the applicant. He wanted assurance that there would not be overruns on cost and he wanted assurances that the work would be of good quality. If these concerns were met then he was happy to pay.

**THE TRIBUNAL'S DELIBERATIONS**

35) The tribunal first considered the repairing obligations contained in the lease and formed the conclusion that the covenants were wide enough to encompass the works to be carried out under the schedule prepared by Mr Sheppard. That is to say that the applicants are responsible for carrying out the works set out in the schedule save for the window repairs which are addressed below. At the hearing neither of the respondents led any evidence in which they challenged the scope of work although such a challenge can be seen from Mr & Mrs Cheethams written statements in relation to the basement area of the building and the car parking area. The tribunal rejects these challenges which require perceived unfair clauses in their leases to be deleted. There was no application before the tribunal for an amendment to the leases and therefore it is not a defence which can be successfully maintained in the context of this application which is for a declaration as to the reasonableness of service charges.

36) The tribunal had carried out an external and internal inspection of the building prior to the hearing and formed the view that the exterior of the building needs attention. It is situated in an exposed position right on the seafront at Hastings and is subjected to the full force of the prevailing winds.

37) The tribunal reviewed the evidence of Mr Sheppard and could find no fault with his findings and in particular his assessment of the work which needs to be carried out to the building. The tribunal concludes that the scope of work set out in the schedule is appropriate and reasonable.

38) The tribunal was also satisfied that the applicants have carried out the consultation process in the correct way and in particular have complied with the consultation requirements set out in the 1985 Act. The respondents made observations during the consultation process and the applicants responded to them. The legislation requires the applicants to have regard to these observations and the evidence before the tribunal suggests that they have done so even if they have not accepted all the points made to them.

39) It is accepted by the parties that the applicants have gone out to competitive tender in respect of the necessary works and intend to accept the lowest tender.

40) The tribunal places particular importance on a statement made by Mr Sweeting in cross examination. He confirmed that if the chosen contractor carried out the scheduled work to a reasonable standard then he would consider the scheduled costs to be reasonable. We think this is significant.

41) Mr Sweeting's main concern appears to be the windows and who is responsible for repairing them. The tribunal considers that the repairing obligations in the leases are quite clear namely that both the upper and lower parts of the sash windows fall to be repaired by the lessees since we accept Mr Sheppard's evidence that at one time the upper parts of the windows would have moved just as the lower parts do now. The fact

that they have subsequently been altered so that they have become fixed is not enough in the tribunal's opinion to transfer responsibility for their repair from the lessees to the applicants.

42) The tribunal is also satisfied that the applicants have taken reasonable steps to obtain grant funding. Drawing on its collective experience, the tribunal is well aware that the grant system for Grade II listed buildings is not easy to access and that money is not easily available. The tribunal therefore rejects the submissions of both the respondents that insufficient attempts have been made by the applicants to obtain grant funding. Furthermore Mr Sweeting did not present evidence which suggested that a grant application would have been successful if made. Furthermore we accept the applicant's contention that there is nothing in the lease which requires them to make and exhaust all avenues for obtaining grants before carrying out any work and recovering the cost by way of service charge. On the evidence before it the tribunal is satisfied that the applicants have taken reasonable steps to obtain a grant, it is after all in their interest to do so bearing in mind that the director and secretary of the applicant Company own two flats in the building and will therefore be responsible for a significant part of the service charge attributable to the works to be carried out.

43) Taking all the evidence as a whole the tribunal is satisfied that the works are essential and constitute maintenance and repair, which under the terms of the leases fall upon the applicant to carry out. The tribunal is also satisfied that the consultation procedure has been carried out properly and that a competitive price is available for the work.

44) One issue of concern to the tribunal is the scope of work to be carried out to the rear fire escape and the tribunal is not satisfied that the applicants have given sufficient thought as to what needs to be done to rectify the problems. In particular it is not clear whether the fire escape needs to be replaced in its entirety or simply repaired. The tribunal is of the view that further investigations and costings should be carried out in respect of this work and that it should be carried out separately from the phase 1 works which relate to the front of the building and side elevations.

45) Late in the hearing the applicants confirmed that the works to be carried out to the fire escape will form a separate contract and will be subject to a further process of consultation. Accordingly they simply required the tribunal to make a determination in respect of the Phase 1 works excluding the costs built in for the fire escape. The applicants also accepted that the costs associated with the repair to the windows cannot form part of the service charge, as these costs must be billed to the lessees individually.

46) The tribunal considered that neither of the respondents had led credible evidence challenging either the scope of the works or the costings. The tribunal noted that Mr Sheppard was satisfied that the costings were competitive and that the applicants intended to accept the lowest tender. The tribunal could find no fault with Mr. Sheppard's opinion that the costs were reasonable subject to the appropriate adjustments being made. Firstly the costs associated with the repair of the fire escape need to be removed. Secondly the cost of repairing the windows also need to be removed as the cost of these repairs will be billed to the individual lessees. That said the tribunal accepts that the final figure will be subject to adjustment (probably upwards) in the light of the actual work to be carried out once the scaffolding has been erected and the contract started. This is normal practice.

47) On the issue of the alleged contract between Mr & Mrs Cheetham and the applicants relating to interior work to Flat 4, the tribunal finds in favour of the applicants. The tribunal is not persuaded that any binding contract exists. The respondents were not able to file a written contract and instead rely upon a thread of correspondence some of which has taken place some two years after the work was carried out. Most of the work carried out related to the interior of the flat and would therefore have been the respondents' responsibility and not the applicants. In the alternative it should have formed the subject of an insurance claim instigated by the respondents. Had there been

a contract the tribunal considers that there would have been some measure of agreement over the scope of work forming the contract and the price. No such consensus appears from the evidence. Furthermore it is surprising that the respondents should have delayed submitting their bill for nearly two years. The tribunal considers that had such a contract been in existence then the respondents would have billed the applicants for the agreed costs within a reasonable period following completion of the work, not some two years later and just before the hearing of this application. Whilst it might be the case that Mr & Mrs Cheetham believed that the applicants would in due course reimburse them for the work, there is insufficient evidence for the tribunal to hold that there is a contract in place.

48) Accordingly for the reasons stated above the tribunal determines that the outstanding on account service charge demands of £6,350 owed by Mr & Mrs Cheetham and £5,620 owed by Mr Sweeting should be paid to the applicants in full within 21 days from the date of this decision. If these amounts subsequently prove to be too high the leases provide for the excess amounts to be carried forward as credit to a future years service charge liability.

49) The tribunal makes it clear that this decision relates only to the applicant's application for a determination that if costs were incurred in carrying out the schedule of works then costs would be payable as a service charge. This decision does not prevent an application being made by the respondents under section 27A of the 1985 Act after the works have been completed to determine the reasonableness of the resultant service charges.

**SECTION 20C APPLICATION AND REIMBURSEMENT OF FEES.**

50) Both of these matters can be taken together as the tribunal's considerations in relation to both are largely the same. The legislation gives the tribunal discretion to disallow in whole or in part the costs incurred by a landlord in proceedings before it being treated as relevant costs to be taken into account when determining the amount of service charge is payable. The tribunal has a wide discretion to make an order that is, just and equitable, in all the circumstances.

51) The tribunal is of the view that the applicants were justified in bringing this application as it is clear that work of an extensive nature needs to be carried out to the building. In the light of this and bearing in mind the correspondence that has passed between the applicants and respondents over the last two years it is understandable that the applicants wish to bring these proceedings to obtain a determination of the tribunal. The tribunal considers that the applicants have gone about the matter in the correct way; they have commissioned a structural engineer to assess the work required, they have prepared the tender documents setting out the exact work to be completed and they have gone out to competitive tender. The respondents have not been able to successfully challenge either the scope of the work or the estimated cost of it. Furthermore they have raised a number of issues which are not open for determination by the tribunal.

52) The tribunal is satisfied that there is no justification to make an order under section 20C of the 1985 Act. If an order were made then the costs of the hearing would fall, in the view of the tribunal, unfairly on the applicants rather than being shared between all 12 lessees.

53) The tribunal considers that all parties have cooperated with the tribunal and in the circumstances do not consider that it would be just and equitable for the respondents to have to repay the applicant's tribunal fees in this matter. Accordingly, no such order is made.

Chairman _____

R.T.A.Wilson Date 22nd February 2010