

The 'service charge' demand was a FRAUD. The objective was to get the leaseholders to pay for the construction of a penthouse flat - and related works - as well as addition of three other flats to Jefferson House - see the home page for Major Works and Surveyors for the evidence

See also My Diary 22 November 2008 for the undeniable proof that the threat of forfeiture, bankruptcy proceedings and court claims are used as TOOLS FOR FRAUD

DECISION BY THE RESIDENTIAL PROPERTY TRIBUNAL
SERVICE
ON APPLICATION UNDER SECTION 19(2B) OF THE
LANDLORD AND TENANT ACT 1985, AS AMENDED

Applicant: Steel Services Limited

Respondent: Ms N K-Dit Rawé

Re: Flats 1-35 Jefferson House, 11 Basil Street, London, SW3 1AX.

Application date: 2nd September 2002

Hearing dates: 5th February, 13th and 14th March, and 28th April 2003

Appearances:

Mr M Warwick,	of Counsel
Ms J Hathaway BSc MRICS,	Martin Russell Jones
Mr B Gale MRICS,	Brian Gale Associates
Mr M Jones MCI Bsc CNG,	Michael Jones Associates
	For the Applicant
Mr P Staddon,	of Counsel
Mr T Brock MRICS,	LSM Partners
Ms K-Dit-Rawé,	Flat 3
Ms C Tuplin	Trainee Solicitor, Oliver Fisher
	For the Respondent

Members of the Residential Property Tribunal Service:

Mrs J Goulden JP
Mr J Humphrys FRICS
Dr A Fox BSc PhD MCI Arb

NB: the Tribunal chairs are appointed by the Lord Chancellor = at the time, Lord Falconer of Thoroton

WHAT??????

Who dictated this to the tribunal - including placing it prominently on the first page?

It writes this in spite of: (1) The fact the TRIBUNAL IS RESPONSIBLE for the "adjournment", as it ignored non-compliance with its 29 October 2002 directions by Martin Russell Jones - and consequently refused my request for a postponement of the 5 February 2003 hearing - not expecting that I would turn-up with an 'army' of advisers - forcing it to re-schedule *the first day of the substantive hearing to 13 March 2003*.

(2) its findings; (3) its subsequent statement (point 64) that I was "within my rights to challenge the application"

It also conveniently overlooks the fact that IT took nearly a year to get to this stage (it received the application early August 2002)

It waited more than two months to inform "some" leaseholders of the application - denying the statutory rights of others. After the last hearing, it took two months to issue its report

PROPERTY: FLATS 1-35 JEFFERSON HOUSE, 11 BASIL STREET, LONDON, SW3

1. The Tribunal was dealing with an application to determine the reasonableness of a service charge to be incurred under Section 19 (2B) of the Landlord and Tenant Act 1985 as amended (hereinafter called "the Act").

Photographs by
Brian Gale

Brian Gale's 13 Dec 02 "Expert Witness"
report to the LVT - and the lies

2. The application concerns major works set out in a specification prepared by Brian Gale Associates and priced by Killby & Gayford. Since the Hearing of the application has been delayed, due to the adjournment which had been requested by the Respondent, the price (originally £564,467) has been increased to £592,762.68 or £600,904.12 from 30 June 2003 to 30 September 2003.

HOW COME THAT THE TRIBUNAL MAKES THIS CATEGORICAL STATEMENT?
As can be seen from the following, it signed its report TWO WEEKS PREVIOUSLY on 17 June 2003.

3. The Respondent's lease of Flat 3 Jefferson House (hereinafter called "the lease") is dated 10 March 1986 and is made between Acrepost Limited of the one part and the Respondent of the other part and is for a term terminating on 1 September 2052 at the rents and subject to the conditions therein contained. The tenant's obligations to pay the service charge are contained in Clause 2(2), and the landlord's covenants are contained in Clause 5 of the lease. The landlord's expenses and outgoings and other heads of expenditure of which the tenant is to pay a proportionate part by way of service charge is set out in the Fourth Schedule to the lease.

INSPECTION

4. The Tribunal's inspection of Jefferson House, 11 Basil Street, London SW3 (hereinafter called "the subject property") took place on the morning of 5 February 2003 in the presence of Ms J Hathaway and Mr B Martin, both of Martin Russell Jones, the managing agents, Mr B Gayle and Mr P Moyle, both of Brian Gayle Associates, Chartered Surveyors and Mr A Ladsky, the owner of Flats 34 and 35.

5. The subject property was a six storey, including basement, terrace of converted houses c 1880 in a very busy and heavily parked road in Knightsbridge, opposite a hotel and very close to Harrods. Construction was of brick exterior with a mixture of casement and sash windows. There was a mansard roof on the fifth floor.

Not anymore

6. From the Tribunal's limited external inspection at ground level to the front and rear, the subject property was in a fair state of repair, but appeared to be progressively worse at the third, fourth and fifth floors.

Not anymore

7. There were 35 flats in the building. A small lift served the ground and upper floors. The entrance had an entryphone. There was a day porter.

8. The common parts were carpeted and heated. There were staircases at either end with links between the two on two of the floors. The common parts were tidy, but the decorations and fittings were tired and dated, particularly having regard to the high value of the flats in the building.

9. The Tribunal inspected the flat asphalt roof and noted that it was old, bubbling in parts, had been patch repaired in places and that some of the flashings were lifting.
10. The Tribunal was invited to inspect the interiors of Flats 34 and 35 and noted damp penetration in some rooms which appeared to come from defects in the roof. Wet rot was also noted in a number of windows.
11. The Tribunal inspected the motor room, electrics meter cupboard, pavement vaults and stores and the boiler rooms.

HEARINGS

12. The Hearing commenced on 5 February 2003. The Applicant, Steel Services Limited, was represented by Ms J Hathaway, BSc MRICS and Mr B Martin FRICS, both of Martin Russell Jones, managing agents, and Mr B Gayle and Mr P Moyle MRICS, both of Brian Gayle Associates. The Respondent, Ms N K Dit-Rawe, the lessee of Flat 3 Jefferson House, attended and was represented by Mr P Staddon of Counsel, Ms D Cowie, Solicitor, of Oliver Fisher, Solicitors and Mr T Brock MRICS of LSM Partners. Mr A Ladsky, the lessee of Flats 34 and 35 also attended.
13. At the commencement of the Hearing, Mr Staddon renewed Ms Dit-Raw's application for an adjournment (which had previously been refused by the Leasehold Valuation Tribunal before the Hearing by a letter dated 22 January 2003). Mr Staddon's application was based on his argument that Ms Dit-Rawe had not received relevant documentation, a priced specification or a breakdown of the tender.
14. Ms Hathaway, on behalf of the Applicant, resisted the application for an adjournment. She said that there had been a residents' meeting on 7 November 2003 to which Ms Dit-Rawe had been invited, but to which she did not come. She maintained that Ms Dit-Rawe had seen the specification in the porter's room, but was unsure as to whether this had been a priced version.
15. The Tribunal also heard from Mr Brock, Mr Gale and Mr Ladsky, after which a short adjournment was given to see whether the parties could agree on a way forward and for the Tribunal to decide on the arguments put before it.
16. Having considered carefully the arguments for and against the application for an adjournment, and in the interests of justice, the Tribunal agreed an adjournment and issued further directions. A further Hearing was fixed for 13 and 14 March 2003.
17. On 13 March 2003, the Applicant was represented by Mr M Warwick of Counsel and the Respondent by Mr P Staddon of Counsel.
18. Mr Warwick handed to the Tribunal a chronology of events and Mr Staddon handed to the Tribunal written submissions on behalf of the Respondent. A long discussion then took place with both sides as to the extent of the Tribunal's remit, after which short adjournments were allowed in order to see whether both sides' respective experts were able to narrow the issues by preparing a statement of agreed facts. This they were able to do.

19. The Tribunal agreed to permit Mr M Jones, C Eng MCI BSc of Michael Jones & Associates, Engineering Consultants, to give evidence first on the report prepared by his firm after a survey of the subject property. The report was dated February 2002. Mr Jones confirmed that he had revisited the subject property on 12 March 2003, in order to refresh his memory.

20. Mr Jones said that his instructions had been to inspect the subject property and prepare a report on the work which needed to be carried out. He said that a lift survey had been carried out by a specialist, John Bashford, He said that the report, on the condition at the time, had been "a wish list". He said it was "a stand alone thing...a shopping list but not necessarily for part of a bigger project". Mr Jones accepted that the subject property had no air conditioning at present, although it had an extract ventilation plant in the wheelhouse. He estimated that the cost of air conditioning would be in the region of £4,000. He also confirmed that the subject property had no fire alarm at present.

21. Mr Jones was cross examined on which aspects of the works he considered to be improvements, rather than repairs. He said that items such as air conditioning, lighting and the fire alarm system could possibly be improvements.

22. With regard to the proposed new light fittings and removal of the bulkhead fittings, in his view the existing lighting, although working, was "drab and not up to standard...they were part of making the common parts better". The running costs of the new fittings would probably be half the cost of the existing fittings. He said that the occupants would expect updated good quality fittings, and the present fittings were some 25 years old. In his view, there could be problems in taking out the old fittings. In respect of the provision of emergency lighting, whilst Mr Jones accepted that there was no provision at present, he thought it was now a legal requirement and a safety issue, since all the corridors in the block were internal.

23. Mr Jones confirmed that the boilers were also about 20/25 years old, were working, were being maintained, and were not defective at the moment, but were starting to fail more regularly

24. In answer to the suggestion made by Mr Staddon that each contractor could be employed directly, he said it would be "very messy and very difficult to administer. It just wouldn't be on, and co-ordination would be more important with people living in the block".

25. Expert evidence for the Respondent was given by Mr T Brock MRICS of LSM Partners, and he was questioned in detail on his report, which had been prepared following his only visit to the building on 17 February 2003, on which date he had also made an external inspection of the buildings on either side of the subject property. His external inspection of the subject property had been, in the main, from ground floor level and the roof. Mr Brock gave lengthy evidence, some of which is referred to below.

26. Mr Brock confirmed that he had had no previous dealings with the subject property. His instructions had been to prepare a report in respect of the proceedings before the Tribunal, and he confirmed that it was the first time he had prepared such a report. Although he accepted that certain matters, e.g. lift, were outside his areas of expertise, he felt that he could comment on the question of approach and reasonableness and did not need to be a service engineer.

27. It was accepted that Jefferson House was in a prestigious location and that the lessees would expect refurbishment to be commensurate with the area, although in Mr Brock's view, the use of Farrow and Ball paint was extravagant in that it was very costly and thin paint which would require more coats.

28. Mr Brock considered there were too many provisional sums in the tender for work which was defined, could have been costed, and therefore should have had a fixed price. In addition, the specification revealed a number of items of work which did not have prices allocated to them at all.

29. Mr Brock considered the replacement of lighting was an improvement, although he accepted that if the lighting were replaced, emergency lighting should be installed.

30. Mr Brock had not come across Killby & Gayford before, although he accepted that they were a well known and reputable firm. In his view, and because of the uncertainty in the specification, a tender comparison was not possible. This was also possibly the reason that a number of contractors felt unable to tender.

31. Expert evidence for the Applicant was given by Mr B Gale BSc MRICS of Brian Gale & Associates, and he was questioned in detail on his report. His evidence was lengthy, some of which is referred to below.

32. Mr Gale confirmed that his initial instructions had been to undertake a detailed condition survey/schedule of condition. His letter of 20 December 2001 to the Applicant's managing agents stated *"Our condition survey would be very detailed, this would include in a schedule format (inclusive of anticipated costings for each item) details of each item of dilapidation. Our inspection would include all external areas, roof and roof structure and internal common parts together with external areas, all areas that are maintained under the service charge provisions of the various leases.....our inspection and report would specifically exclude any comments on the condition of services to the subject block. On that matter we would recommend the engagement of services engineer consultants to report upon the condition of communal services throughout the building. Following our recommendation to you and as discussed we have approached a firm of engineering consultants Messrs Michael Jones & Associates ..."*. The inspection had been made over two days by both him and two chartered surveyors within his firm. In cross examination, Mr Gale said *"I had no specific instructions...trust was placed in us...I accept a JCT works contract was not acceptable here. It was an oversight on our behalf"*.

33. Mr Gale said that the specification had been prepared by a senior chartered building surveyor. The schedule of condition was some 248 pages, and the specification 60 pages. He said *"different projects have different known and unknown quantities"*

34. In respect of a criticism by Mr Brock that the presence of some fungal spores in one of the flats was nothing more than condensation, Mr Gale said that this had been *"misconstrued"* and in his opinion, the cause was through the roof and timbers and the plasterboard was also damp.

35. With regard to the provision for the use of Farrow and Ball paint, whilst he accepted that it would cost more and there was a lower coverage rate, it was available in tints and shades not

available elsewhere. Mr Gale had used this paint elsewhere in Knightsbridge at the lessees' request.

36. The original tender dated 2002 showed a fixed sum of £27,300 in respect of the lift installation. The tender stated "the Contractor is to (with full regard to J Bashford & Associates recommendations in the Service Engineer's report) allow to carry out a major refurbishment and replacement of the lift, shaft and all associated equipment, supplies and decorations". In answer to cross examination from Mr Staddon, Mr Gale conceded that there may have been an element of duplication in the specification for the lift, and "the specification for the lift car fell short of what we wanted provided".

37. In respect of the provision for downlighters, he said "I agree that there is latitude for contractors to fit 25 or 50 units. We may have to tighten it up".

38. Mr Gale also accepted that there was no boiler specification in the tender document, which merely stated "to remove and replace with new the boiler plant and all associated pipework".

39. Mr Gale said that the new proposed plant containers for the exterior of the subject property were not improvements since they replaced the present internal containers, which were to be disposed of.

40. Mr Gale was cross examined on the provision of £10,000 for damp proofing the store/vaulted area adjacent to the pavement, which had been originally allowed as a provisional sum of £1,800. Mr Gale said that although he did not know the store's original purpose, he considered that "possibly" it had been a coal cellar. It was now a storage facility with a door on it. He had no knowledge as to whether this area had been damp proofed before, but said that there was damp on the side walls, and a repair was necessary since the damp could permeate to the adjacent flat. The proposed increase was to cover any work which might be required to the adjacent flat, to which he had not had access.

41. Mr Gale accepted that the fire doors were not out of repair. He said "they are functional but insufficient for fire protection, unwieldy and difficult to operate". He accepted Mr Staddon's observation that he had been "upping the specification".

42. Mr Gale was questioned on the provision of £20,000 in the specification in respect of the porter's desk. Although he accepted that he did not know the history of the porter's accommodation, he accepted that there was a porter's flat which was sold at some point. The works were to create a proper location for the porter in the main entrance and "this was something new". He also accepted that there could have been a fixed, rather than a provisional sum for this within the specification and said "it was a time factor really". He acknowledged "there's no specification yet".

+ in her 7 Jun 01 letter Ms Hathaway had said that it WOULD be

43. The contingency fund was also a point in issue. The tribunal was advised that it contained £140,977, and the Respondent submitted that this should be utilised, certainly in part, for the proposed works. Mr Staddon argued "the money should not sit idly in some bank account.... what is the reserve fund for other than for major works of this kind?". In his view the Applicant's view that the existing contingency fund should be maintained, in part to cover any additional costs

It was in my case (the 17 July 02 demand was for £14,400) - but NOT for the majority of my fellow leaseholders - see My Diary 6 May 2008

should be rejected since there was no need for this if costing had been carried out properly in the first place. Mr Warwick argued "where a particular programme of works is contemplated it would be wrong to divest or reduce a contingency fund for such programmed work".

CONSIDERATIONS OF THE TRIBUNAL

44. The reports prepared on behalf of the Applicant and provided to the Tribunal were, in the words of Mr Jones, "a wish list" for refurbishment of the subject property to a high standard. They do not seem to have been prepared on behalf of the Applicant having regard to its rights and responsibilities under the lease, and appear contrary to the views as expressed by Mr Gale as set out in paragraph 32 above. The Tribunal would normally expect alternative proposals to be costed and produced, in order to make a proper and considered judgement of the best way forward to meet the obligations of both the landlord and the tenants (see the case of **Plough Investments Ltd v Manchester City Council (1989) 1 EGLR 244** referred to in paragraph 55 below).

45. The question for the Tribunal is not solely whether costs are reasonable, but whether they would be reasonably incurred, that is to say whether the action to be taken in incurring the costs and the amount of those costs would both be reasonable. Although statutory provisions override the lease, no guidance is given in the Act as to the meaning of the words "reasonably incurred".

46. In this case the Tribunal was frustrated by the lack of detail in the specification and in Mr Gayle's evidence. Works were not clearly identified, were not measured where they clearly could have been, and there was some element of duplication. Some items were not specified at all, eg the types and capacity of the boilers.

47. For the reasons above, Mr Staddon, for the Respondent, urged the Tribunal to make no determination at all, arguing that with insufficient detail in the specification, the Tribunal could not say that the specification was reasonable, because it was impossible to judge the standard to be achieved. The tenders could not be compared where there was no detailed specification and it followed that the Tribunal could not determine that costs were reasonable.

48. Mr Staddon's submission that the Tribunal should make no determination was resisted by Mr Warwick for the Applicant, who referred to it as "extraordinary". In closing submissions, he said "the Respondent conceded in argument that the more work that a building needed the more likely it would be that provisional sums would arise. The Respondent, by her counsel, accepted that if her submission was correct then the more that a building needs work the more likely it would be that the LVT should refuse to give a ruling on an application. This submission simply does not accord with common sense. Moreover the LVT is a specialist body, created by Parliament to deal with issues such as arise in the present case. The Respondent's submissions is a bad one and should be rejected....in the present case the LVT has now heard extensive evidence and is well equipped to deal with the application on its merits".

49. As indicated to the parties during the Hearing, the Tribunal is an expert body and would, if at all possible, make determinations as far as possible. Indeed, it is considered that to do otherwise would be detrimental to both sides. There is patently a need to carry out repairs and works of maintenance. Further delays would be unacceptable, and there would be further deterioration to parts of the subject property.

The works were started in Sep 2004 i.e. more than one year after the tribunal issued this report.. once Mr Ladsky et. al. had secured closure, in Wandsworth County Court, on the last valiant resident to fight the FRAUDULENT claim - and surprise, surprise: started with DEMOLISHING THE ROOF IN ORDER TO BUILD A PENTHOUSE FLAT- sold for £3.9 m

See My Diary 22 Nov 08 for undeniable proof that threat of forfeiture, of bankruptcy proceedings and court claims = FRAUD TOOLS

v. 14 flats on the 29 November 2002 claim in West London County Court - sure looks like they "all wished it!"

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See also Priddle Brewster # 18

50. It is noted that, apparently, the majority of the tenants wish all the works to be carried out. A letter from Mr Ladsky, the lessee of Flats 34 and 35 Jefferson House dated 28 April 2003 stated: "31 or 32 of the 35 tenants have paid their contribution towards the major works. They are, therefore, in agreement with both the scope and cost of the proposed refurbishment. Whilst I accept that the Tribunal is to rule on the reasonableness of the proposed works, it must surely follow that if the overwhelming majority of lessees in the building are ad idem, some considerable weight must be given to their collective view. It seems to me that it would be wholly inequitable for one lone tenant acting entirely unilaterally to be able to frustrate and delay the building works desired by the many". On the last day of the Hearing, a legal representative for another lessee in the subject property attended to say that her client was also unhappy about the service charges demanded for the proposed works.

What an evil, greed-ridden, thief, fraudster, scum and pathological liar!

CASE LAW

See Lisa McLean letter of 9 Apr 03 to my then solicitors - demonstrating collusion between the tribunal and Andrew Ladsky and his mob

51. The question of whether works are repairs or improvements is a common issue of liability, and depends not only on a proper construction of the lease, but also on the facts in any particular case. The Tribunal has sought assistance from some relevant case law which is considered helpful.

52. Nicholls L.J. said in the case of **Holdings & Management Limited v Property Holdings Investment Trust PLC (1990) 1 EGLR 65** "...the exercise involves considering the context in which the word 'repair' appears in a particular lease and also the defect and remedial works proposed. Accordingly, the circumstances to be taken into account in a particular case under one or other of these heads will include some or all of the following: the nature of the building, the terms of the lease, the state of the building at the date of the lease, the nature and extent of the defect sought to be remedied, the nature, extent, and cost of the proposed remedial works, at whose expense the proposed remedial works are to be done, the value of the building and its expected lifespan, the effect of the works on such value and lifespan, current building practice, the likelihood of a recurrence if one remedy rather than another is adopted, the comparative cost of alternative remedial works and their impact on the use and enjoyment of the building by the occupants. The weight to be attached to these circumstances will vary from case to case".

53. In the case of **Wates v Rowland (1952) 2 QB 12**, Evershed L.J. referred to the distinction between repairs and improvements as follows:-

"In the course of the argument examples were given showing that what was undoubtedly repair might yet involve some degree of improvement, in the sense of the modern substitute being better than that which had gone before. At the other end of the scale, it was also clear that work done to satisfy modern standards, although it might involve restoration, and might be said to be restoration.... yet clearly would be an improvement. Between the two extremes, it seems to me to be largely a matter of degree, which in the ordinary case the county court judge could decide as a matter of fact, applying a common-sense man-of-the-world view".

54. Assuming that, on a proper construction of the lease, the services in issue are covered by the charging clause, this does not mean that the landlord enjoys carte blanche to incur costs. In the Court of Appeal case of **Finchbourne Ltd v Rodrigues (1976) 3 All ER 581**, it was held that a term should be implied that the recoverable costs were to be "fair and reasonable". In rejecting a

submission that business efficacy did not require such an implication, Cairns LJ stated "it cannot be supposed that the (landlords) were entitled to be as extravagant as they chose in the standards of repair, ...in my opinion, the parties cannot have intended that the landlord should have an unfettered discretion to adopt the highest conceivable standard and to charge the tenant with it".

55. On the other hand, the lowest conceivable standard cannot be insisted upon by the paying tenants. The proper approach and a practical test were indicated in **Plough Investments Ltd v Manchester City Council (1989) 1 EGLR 244** as follows "First, as a general rule, where there is more than one way of executing repairs, the choice of the method of repair rests with the party under the obligation to repair. Second, provided the works of repair are reasonable, a tenant under an obligation to reimburse the cost to the landlord cannot insist upon cheaper or more limited remedial works or a minimum standard of repair. Third, a test as to whether works carried out by a landlord and reimbursed by a tenant are reasonable is whether the landlord would have chosen that method of repair if he had to bear the cost himself". It does not follow that a landlord must accept the lowest estimate or necessarily limit expenditure to temporary patching up as opposed to a more expensive solution eliminating the problem.

DETERMINATIONS

56. The Tribunal has heard evidence from some witnesses as to their opinion on whether works amounted to repairs or improvements. the difference between repairs and improvements is most important, since the Tribunal has, at present, no jurisdiction to deal with improvements and the cost thereof. The Tribunal then had to consider whether the works proposed amounted to repairs, renewals or improvements and in this connection considered the lease, and in particular the clauses referred to in paragraph 3 above.

The Scott Schedule

57. A Scott Schedule was produced on behalf of the Applicant, updated at the last day's Hearing, and this was most helpful to the Tribunal.

58. Although the Respondent was invited to do so, no specific comments on the Schedule were made on her behalf. The Tribunal has made its determinations as shown in the last column of the Scott Schedule annexed to this Decision. In order to assist the parties, and where considered appropriate, further amplification is given below by reference to the page number of the Schedule and the Killby & Gayford tender reference:-

Page 1 - 3.01 - 3.03. In view of the Tribunal's determination noted on the Scott Schedule, an appropriate adjustment to the preliminaries was justified.

Page 6 - 14.06. The Tribunal considers the specification poor in this respect, in that it does not define where damp is penetrating and what areas are to be replastered and/or tanked. During the Hearing, the evidence suggested that the replastering was to an adjacent lower ground floor flat, and that the tanking was to the old coal store/under step storage cupboard. The adjacent flat, which may or may not have damp, had not been inspected. Tanking of a coal store would, in the view of the Tribunal, be an improvement and therefore beyond the remit of the Tribunal.

Page 7 - 14.12. In the Tribunal's view, this item clearly could be measured and should therefore

be a fixed sum. The Tribunal does not consider that all of the carpeting in the common parts had reached the end of its useful life. However, the Tribunal has, in these particular circumstances, had regard to the nature and quality of the building, the tenants' expectations and the works to be carried out, and considers that it would be reasonable to replace the carpeting in its entirety.

Page 7 - 14.14. Having regard to the rewiring of the common parts, the Tribunal is satisfied that the replacement of the light fittings in the common areas is in accordance with normal practice. According to the evidence, the proposed new fittings will lead to savings in future running costs. However, Mr Gale admitted that the specification was imprecise and required further detail.

Page 8- 14.23. In the view of the Tribunal, this should be a fixed sum.

Page 9 - 16.07. It was noted that the report by Michael Jones Associates, Engineering Consultants, following the inspection carried out in February 2002 under a heading "Scope of Inspection" stated:

"The inspection of the Mechanical, Electrical and Lift Services Installations was of a non-destructive and non-intrusive nature, was a visual inspection only and was requested in order to advise the client (Steel Services Ltd), who it is understood have recently acquired the freehold interest in the property....."

The visual inspection included accessible internal and external areas within the site boundary, and services installations associated. No services installations beyond the site boundary have been checked or inspected, other than those immediately relating to the incoming services.....

The plant and systems were generally fully operational at the time of the inspection and the building was in occupational use"

Under a heading "Clients specific requirements" it was stated:-

"The client has requested that the survey and reporting exercise be carried out for the purposes of identifying the extent, arrangement and condition of the Mechanical, Electrical and Lift Services installations and that any recommended works of a repair, upgrade, maintenance or replacement nature to be identified, together with associated budget estimate costs, that should be undertaken as a part of a general building overhaul intended to raise the condition of the building to one commensurate with its age, style and location. It is the clients opinion that the building and its services are reaching a point at which their respective condition requires improvement - the report is therefore to address any issues in this respect".

It would appear to the Tribunal from the above, and the evidence given by Mr Jones, that his instructions were obviously client lead rather than an independent opinion and, as stated above "part of a general building overhaul intended to raise the condition of the building to one commensurate with its age, style and location." There was no evidence, save for the complaints from the owner of the top floor flats, Flats 34 and 35, that the boilers were failing regularly. Indeed, in evidence, Mr Jones confirmed that they were working, were being maintained and were not defective at present. The expenditure on the accounts as requested by the Tribunal, year on year, in respect of boiler repairs and maintenance was as follows:-

Up to 31 December 2001

£1,700

Up to 31 December 2000	£1,100
Up to 31 December 1999	£1,500
Up to 31 December 1998	£6,700
Up to 31 December 1997	£4,900

In **Fluor Daniel Properties Ltd v Shortlands Investments Ltd (2001)** it was held that lifespan tables were only a starting point, and that the best indicator that plant is coming to the end of its economic life was an increase in the frequency of breakdowns. A frequency of breakdowns is not borne out by the accounts, and the Tribunal is not persuaded that the cost of repairs and maintenance of the boilers were of such a magnitude on their own so as to indicate that replacement was the only option.

The specification is considered inadequate in that it is vague and lacked specific detail, e.g. the provision to "remove and replace with new the boiler plant and all associated pipework". It is noted that initially, there was no breakdown of the specification until 7 March 2003, when Mr Gale responded to Mr Brock's report of 24 February 2003. Mr Gale accepted during the Hearing that there had been no boiler specification in the tender document.

The Tribunal does not consider that Mr Jones' report is sufficient, having regard to the reason why it was commissioned. In evidence, Mr Gale said "Michael Jones will be asked to provide specifics on design where unclear now and ensure they are fit for the purpose", which indicates that Mr Gale accepts that there is some lack of clarity on this issue.

In the circumstances, the Tribunal does not consider that it has sufficient information in order to make a proper judgement and therefore makes no determination in respect of the boilers. This is clearly unsatisfactory, particularly since it is clear that works are required to be carried out in respect of the problems relating to Flats 34 and 35. This is an area which, in the Tribunal's view, alternatives and costings should have been explored. However, in the future, when costs are actually incurred to an appropriate specification, they may well be reasonably incurred (under Section 19(2A) of the Act). The application before the Tribunal is, of course, under Section 19(2B) of the Act.

Page 10 - 16.18 to 16.21. The landlord's covenant in the lease in this respect is "to keep clean and reasonably lighted the passages landings staircases and other parts of the Building enjoyed or used by the Lessee in common with others".

In the view of the Tribunal, the specific items challenged were works to the cupboards, low voltage downlighters and their specification or lack of specification and the provision of an emergency lighting (which the Respondent considered to be an improvement).

Having inspected the subject property, the Tribunal considers that the proposed works to the cupboards are reasonable, the downlighters have been dealt with under Page 6 - 14.4 above, and the emergency lighting system is a service and permitted under the lease.

Page 11 - 16.23. The Tribunal's determination relates to the fire alarm only. The specification is inadequate and appears to duplicate a provision for emergency lighting already dealt with under 16.21 (viii). However, although the fire alarm is considered an improvement, it makes common sense to carry out these works, and this has been acknowledged by the Respondent's expert.

Page 11 - 16.25 and 16.26.

J Bashford & Associates report on the existing lift installation was dated February 2002. Their instructions were:-

"The main purpose of the inspection was to check the general condition of the lift, anticipated operational life-span of the existing equipment and recommendations for future capital expenditure....

Reason for all their fabrications: as they were going to build a penthouse flat - which they "vehemently denied", they had to change the lift

No copies of the current insurance company reports were available. There was no documentation for tests and examinations to comply with the (now superceded) Health and Safety Executive Guidance Note PM7 1982. Although the on-site log card advises of the annual tests to comply with the current Safety Assessment Federation Guidelines on the Thorough Examination and Testing of Lifts 1998 during June 2001, there was no documentation available. Therefore we recommend that the lift be subject to a full series of 10 yearly tests and examinations to meet the new guidelines.

No copies of the lift maintenance contractors service reports were available. The lift maintenance contractors on-site log card was available indicating preventative maintenance visits during the proceeding 12 month period."

Under the heading "maintenance" it was stated:-

"We are given to understand that the current lift maintenance agreement includes 12 visits per annum. The last recorded maintenance detailed within the on-site log was 11 October 2001, consequently the routine visits for November, December 2001 and January 2002 appear to have been missed. The incumbent maintenance contractor should be approached to explain this oversight and advise on any financial recompense due to the client".

The view expressed in the report was that refurbishment of the lift would cost £60,000 to £65,000. It was also stated:-

"J Bashford and Associates are able to assist with the carrying into effect the recommendations made within this report, including the preparation of specifications, drawings and the tender documentation, advise on the tendering procedures and administering and overseeing the ensuing works. J Bashford and Associates would be pleased to receive your further instructions in these respects.

The recommendation of J Bashford and Associates as set out above to prepare a specification and drawings appeared to have been ignored by Mr Gale in his own specification since it refers in 16.26 to "the contractor is to (with full regard to J Bashford & Associates recommendation in the service engineer's report) allow to carry out a major refurbishment and replacement of the lift shaft and all associated equipment, supplies and decorations. The specification prepared by Mr Gale is therefore insufficiently detailed to allow for a quotation for this work, and he conceded during the Hearing that there may have been an element of duplication. Further, no proper explanation has been given for the increase from £27,300 to £60,000 over a matter of months.

Expenditure on the accounts as requested by the Tribunal, year on year, in respect of lift repairs and maintenance was as follows:-

Up to 31 December 2001	£ 900
Up to 31 December 2000	£ 700
Up to 31 December 1999	£2,000
Up to 31 December 1998	£ 500
Up to 31 December 1997	£2,000

It does not appear to the Tribunal that these costs in respect of repairs and maintenance were of such magnitude on their own so as to indicate that replacement was the only option. Further the comment from J Bashford & Associates that the maintenance contractor had failed to attend to check the lift for three months appears to indicate that there was not a failure of the lift during that period, since otherwise, presumably, complaints would have been received from the tenants on an ongoing basis, and no firm evidence as to this was produced.

The Tribunal's comments following the principles laid down in **Fluor Daniel Properties Ltd v. Shortlands Investments Ltd (2001)** referred to above above are repeated.

In view of the Tribunal's comments above, the Tribunal is unable to make a determination on the specification, since it is considered inadequate. It follows that the Tribunal cannot make a determination on the figure of £60,000. However, the Respondent has agreed £27,300, and this sum is therefore allowed.

Page 12 - 17.01. The Tribunal considers that tests should have been carried out so work could have been measured and a fixed price given.

Page 12 - 17.03. In the view of the Tribunal, the specification was vague and too great a provisional sum included.

Page 13- Appendix F. The Tribunal accepts the percentage increase which should be applied to sums determined. Clearly S 19(2B) envisages landlord proceeding in this way, and increased costs due to this process, where reasonable, are appropriate.

The Reserve Fund

59. With regard to the contingency or reserve fund, this is covered in Clause 2(2) (e) of the lease, as follows:-

"For the purposes hereof the costs expenses and outgoings incurred by the Lessor as aforesaid during the relevant financial year of the Lessor shall be deemed to include not only the costs expenses and outgoings which have been actually disbursed incurred or made by the Lessor during the relevant financial year in respect of the Fourth Schedule Expenditure but also sum or sums (hereinafter called "the Contingency Payment") on account of any other costs expenses and outgoings (not being of an annually recurring nature) which the Lessor shall have incurred at any time prior to the commencement of the relevant financial year or shall expect to incur at any time after the end of the relevant financial year in respect of the said Fourth Schedule Expenditure as the Accountant may in his reasonable discretion consider it reasonable to include (whether by way of amortization of costs expenses and outgoings already incurred or by way of provision for expected future costs expenses and outgoings) in the amount of the Service

Charge for the relevant financial year".

60. The Tribunal was advised that the contingency fund contains at present some £141,977. The amounts in the contingency fund for previous years were as follows:-

2001	£120,000
2000	£105,000
1999	£ 97,000
1998	£ 96,000
1997	£ 80,000

61. Mr Staddon argued "what is the reserve fund for other than for major works of this kind....the LVT is entitled to look at the position of the sinking fund in order to make a determination under Section 19(2B)(c)". Mr Warwick argued that the point in issue was not the amount of the sinking fund but "it was the reasonableness of the amount of the contribution to the sinking fund". In his closing submission, and as stated above, he maintained "in the present case where a particular programme of works is contemplated it would be wrong to divest or reduce a contingency fund for such programmed work"

62. The Tribunal draws the parties attention to the RICS Code to which property managers should subscribe and abide by, as a matter of good practice. Section 10 of the Code covers reserve funds. A reserve fund is referred to as "a pool of money created to build up sums which can be used to pay for large items of infrequent expenditure (such as the replacement of a lift or the recovering of a roof) and for major items which arise regularly (such as redecoration). A reserve fund also helps to spread costs between successive Leaseholders/Tenants and can, if the leases/tenancy agreements allow, be used to fund the cost of routine services, avoiding the need to borrow money. Legislation ensures that the money in a reserve fund is held on trust (S42 of the Landlord and Tenant Act 1987).....Although some Leaseholders/Tenants may be able to achieve better returns on money they retain and invest themselves, one of the purposes of reserves is to facilitate the carrying out of expensive non-annual items of work. Unless money is accumulated collectively there is always the likelihood of work not been carried out due to lack of funds".


63 The wording of the clause relating to the contingency or reserve fund in the lease is unambiguous. It refers to costs expenses and outgoings "not being of an annually recurring nature", and as such surely envisages the type of works proposed at the subject property. Although the Tribunal has no power to order the Applicant to make payments from the contingency fund, the Tribunal considers it inequitable that this fund should not be used in part to fund the works, and cannot accept Mr Warwick's contention that to divest or reduce the contingency fund would be "wrong".

And in her 7 June 2001 letter Ms Hathaway said that it would be used

64. It should be make clear that there is nothing in this determination which will prevent all the proposed works being carried out. Even if they are deemed to be improvements by this Tribunal, there would be nothing to prevent the tenants deciding that they want them carried out, and in this

See Pridie Brewster # 18 for the ICAEW excuse

respect, the Tribunal has sympathy with the view that the flats need updating in keeping with the quality and value of the subject property and its highly sought after location. The only caveat in this respect is that the Respondent and other tenants could not be forced to contribute in the case of improvements and/or works not determined as reasonable by the Tribunal since, as explained in paragraph 56 above, the Tribunal has no jurisdiction as at the date of the Hearing and this Decision to make a determination on reasonableness of the cost of improvements. Although she is in the minority, the Respondent's legal right to challenge the Applicant's proposal, as she has done, cannot be fettered.

CHAIRMAN 

DATE 17 JUNE 2003