(2838)

LON/00AG/LIS/2006/0061

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

Applicant:	Mr Elyahou Jacob Mrs Sima Jacob, Mrs Lilian Turner
Respondent:	88 Fitzjohns Avenue (Flats) Ltd
Re:	Flat 88 Fitzjohns Avenue, Hampstead, London NW3 6NP
Application received:	25 April 2006
Hearing date:	16 October 2006
Appearances:	Mr E Jacob and Mrs S Jacob (Applicant) Mrs L Turner Ms V Harris Managing Agent Ms E Gibbons

Members of the Leasehold Valuation Tribunal:

Mr Adrian Jack
Mr Mr Frank Coffey FRICS
Mr Christopher Gowman

London Leasehold Valuation Tribunal File Ref No.	LON/00AG/LIS/2006/0061

Leasehold Valuation Tribunal: Full reasons for decision

Landlord and Tenant Act 1985 section 27A

Address of Premises	The Committee members were
88 Fitzjohns Avenue, Hampstead, London NW3 6NP	Mr Adrian Jack Mr Frank Coffey FRICS Mr Christopher Gowman

The Landlord: **88 Fitzjohns Avenue (Flats) Ltd**

The Tenants: **Elyahou Jacob and Sima Jacob (Flat 5) and Lillian Turner (Flat 7)**

Background

1. The landlord is the freeholder of 88 Fitzjohns Avenue, Hampstead. This is a very large, probably Edwardian, house with a basement, ground, first and second storeys. It has been converted into 12 flats, all held by tenants on long leases. The leases contain standard form terms for the recovery of service charges by the landlord. The service charge year is the calendar year. The percentage contribution of each tenant varies. Mr and Mrs Jacob pay 6.0 per cent of the total; Mrs. Turner pays 10.2 per cent.

2. Each flat-owner has a share in the freehold interest. The building is of brick construction, some areas of which have been painted. The original windows are wood, but some tenants have replaced these windows with modern PVC windows.

3. Under the landlord company's articles of association, the affairs of the company are managed by a 'committee', which is the description adopted in the articles for the board of directors. Each flat owner is elected as a director of the landlord and is entitled to sit on the committee.

4. In practice, however, the actual management of the company is entrusted to a smaller group of three of the directors. Confusingly this smaller group is also called the committee. The method of appointment to this smaller committee is obscure. Mrs. Turner, one of the applicants, had

been on this smaller committee and had acted as company secretary, but in circumstances, which were the subject of dispute she was removed from the smaller committee.

5. During the period with which this application is concerned, the other members of the smaller committee were Mr Menashe, Mr Zia Abdulrezaghi (usually known as Mr Zia) and Mr Shadulah Hassan (usually known as Mr Shadulah). Mr Shadulah has since disappeared in mysterious circumstances in Turkey and is believed dead.

6. Apart from Mrs. Turner, none of the flat-owners lives in the block. A number, including Mr and Mrs Jacob, live abroad.

7. It is clear that there have been tensions in the internal management of the block for a number of years. Many of the particular issues raised are not, however, within the Tribunal's jurisdiction. We address these issues below.

The hearing and inspection

8. The Tribunal held a hearing on 16th October 2006. Mr and Mrs. Jacob and Mrs. Turner appeared and represented themselves. The landlord appeared by Miss Ellodie Gibbons of counsel. Ms Vivian Harris, the managing agent, also attended on the landlord's behalf and she gave evidence.

9. The landlord had previously made a written application to dismiss the tenants' application under para 7 of Schedule 12 to the Commonhold and Leasehold Reform Act 2002 and regulation 11 of the Leasehold Valuation Tribunal (Procedure) (England) Regulations 2003. This was on the grounds that their application was frivolous vexation or otherwise an abuse of process. We indicated that we would consider this application as part of our substantive decision rather than as a preliminary point.

10. At the conclusion of the hearing the Tribunal considered that an inspection of the property was desirable and an inspection took place on 19th October 2006. Mr and Mrs. Jacob, Mrs. Turner and Ms Harris were present during the inspection. Mr Menashe appeared briefly. The Tribunal inspected the exterior and parts of the interior, including the common parts and flats 5 and 7. They were invited to look at the basement, but due to defective lighting, it was in fact not possible to see the water ingress of which the applicants complained.

Car parking

11. At the back of the building there has always been an area for residents' car parking. On the south side of the original parking area there was a small

area of garden with shrubbery on it. In 2003 the company decided to convert this area of shrubbery into an additional parking area. The parking spaces thus created would then be rented to local commercial enterprises. This is what occurred.

12. The tenants' complaint concerns the treatment of the monies received from the commercial parking spaces. Mr and Mrs. Jacob say that the company should pay them their one twelfth share of this income direct. Instead the company has given each of the tenants a credit against their service charge account for one twelfth of the income. In other words the service charge has been reduced by the income from car parking.

13. In our judgment the Leasehold Valuation Tribunal has no jurisdiction to direct that the company pay the monies from the car parking direct to the tenants. It must be remembered that the landlord company has a separate legal personality from the long leaseholders who are merely shareholders in it. Any income which the company derives from sources such as car parking fees, is money belonging to the company. It is a matter for the company what it does with the money.

Other complaints about the company

14. Mr and Mrs. Jacob complain that they have not been able to inspect the books of the company. They raise issues about the appointment of the directors to the smaller committee. They argue that insufficient notice of meetings of the company has been given. They complain that the company has paid fees or costs to directors sitting on the smaller committee without proper authority. Again these are all matters of the internal management of the company. Any disputes are for the Companies Court, not for this Tribunal. Any issues as to the flooding of the basement are not matters before the Tribunal on this application.

Building a further flat on the roof

15. The directors on the smaller committee, Mr Menashe, Mr Zia and Mr Shadulah, investigated the possibility of erecting a further flat on part of the roof of the property. They instructed an architect to advise at a cost of £2,500 plus VAT. They agreed to pay this cost themselves, on the basis that if the company decided to go ahead with the building operation, the company would reimburse them. To date the plan has not proceeded and no attempt has been made to raise the £2,500 plus VAT by way of service charge. At the hearing Miss Gibbons accepted on the landlord's behalf that these monies could not be recharged through the service charge. Accordingly there is nothing on which the Tribunal needs to adjudicate.

Redecoration

16. In late 2004 the then managing agents of the block, Defries, resigned. In January 2005 Heathgate were appointed as managing agents. Ms Harris was Heathgate's representative with responsibility for this block. She has no surveying qualifications. One of the early matters for her to arrange was the redecoration of the exterior of the building.

17. Mr Zia obtained two quotations, one from M Haugh dated 6th June 2005 for £30,430 (with no VAT, Mr Haugh not being VAT registered) and another from First Call Estates Ltd dated 20th May 2005 for £28,900 plus VAT of £5,057.50. First Call were a company owned or at any rate associated with Mr Shadulah. No proper specification had been drawn up, so it was unclear precisely what the contractors were quoting for.

18. There was some internal discussion in the company about how the works should proceed. Mrs. Turner put forward a company she knew, called S & A Builders and they quoted £26,700 (including VAT). C White gave an undated quote for £27,300. It transpired, however, that he was VAT registered, so that VAT needed to be added to this.

19. After all the quotes had been received, Ms Harris contacted the contractors to clarify the quotes and the contractors' suitability. She established that S & A Builders had only worked on houses previously and that their quote did not include replacing gutters as required (potentially £300 to £400), nor re-pointing of brickwork (at an additional cost of £900). She considered them unsuitable because of their lack of experience.

20. Ms Harris concluded that M Haugh was the cheapest of the contractors she considered suitable and advised his appointment.

21. At no point did the company carry out a statutory consultation in accordance with section 20 of the Landlord and Tenant Act 1985. Ms Harris' explanation for this was that she "was not aware the section 20 procedure was so important then."

22. Mr and Mrs. Jacob sought to suggest that Mr Haugh was "Mr Shadulah's builder". They suggested that his quotation was therefore not independent. The evidence adduced to support this was that Mr Shadulah had introduced Mr Haugh to one of the tenants as a builder who had done work for him. This does not in our judgment begin to show that Mr Haugh was not an independent contractor. We find that he was independent.

23. The applicants also suggested that the work carried out by Mr Haugh was deficient. Mrs Turner explained that she had had to have him back in order to ease her wooden windows and fix some snags.

24. We inspected the building and in our judgment the work carried out by Mr Haugh was of an adequate standard. The landlord in fact kept back some monies owed to Mr Haugh until he had remedied all outstanding matters.

25. After adjustments were made to the S & A Builders quote, Mr Haugh's quote was the cheapest for the work. In our judgment the work done was of reasonable standard at a reasonable price. Accordingly, were it not for the section 20 issue, the landlord would succeed in establishing its entitlement to raise these costs under the service charge.

Section 20

26. Section 20 of the Landlord and Tenant Act 1985 (as substituted by the Commonhold and Leasehold Reform Act 2002) and regulation 6 of the Service Charges (Consultation etc) (England) Regulations 2003 limit the recoverability of service charges in respect of "qualifying works" to £250.00 per flat unless the landlord complies with the "consultation requirements" (as defined) or this Tribunal dispenses with the consultation requirements.

27. The consultation requirements for "qualifying works for which public notice is not required" are set out in Part 2 of Schedule 4 to the 2003 Regulations. These provide for a two stage procedure before the award of works. The landlord must first send to each tenant a general description of the works to be done and must then take the tenants' observations into account in deciding what works are to be done. The landlord must then take at least two quotations from contractors, one of whom must be "wholly unconnected with the landlord": see para 11(6). The second stage of the procedure is giving notice to the tenants of the estimates and the giving to them of an opportunity to inspect the estimates and make observations. Once the landlord has awarded the contract, it is obliged to report further to the tenants, in the event that the contract is not awarded to the lowest tender.

28. In this case the landlord made no attempt to comply with its duties under section 20. The Tribunal considers it unacceptable that Ms Harris, acting as a professional managing agent, should be able to say that she "was not aware the section 20 procedure was so important then." Further, her lack of awareness is in our judgment to be imputed to the landlord.

29. Miss Gibbons submitted that, even if the precise section 20 provisions had not been complied with, there had still been a good opportunity for the

tenants to make their views known and to participate as a result of their being able to participate in the annual general meetings and the extraordinary general meetings of the landlord company.

30. The Tribunal accepts that in certain circumstances the ability to participate in the management of the landlord company is a good substitute for the section 20 procedure. In a small block where all the tenants live in the property and hold regular meetings, the Tribunal may well be willing to grant a dispensation from the consultation requirements.

31. That, however, is not this case. Although all the leaseholders were directors of the company, in practice the management of the block was dealt with by the three directors on the smaller committee. Many of the leaseholders live abroad and thus have difficulty attending meetings of the company. There has been a history of tensions in the internal management of the company.

32. In these circumstances, compliance with section 20 gives the tenants in our judgment an important protection. The landlord's failure to comply with the section 20 procedure is in our judgment inexcusable. We have considered whether in our discretion we should nonetheless dispense with the procedures, but in our judgment this is a bad case of non-compliance. In our discretion we therefore refuse to dispense with the requirements of section 20.

33. It follows that the recoverability of the redecoration costs by way of the service charge is limited to £250 per flat.

34. Some of the sums paid to Mr Haugh were paid in 2006. The 2006 service charge year is not before the Tribunal. If the landlord seeks to recover the monies paid to Mr Haugh in 2006, then the tenants will be entitled to rely on this judgment as establishing their rights under the doctrine of *estoppel per rem judicatem.*

Application to dismiss

35. Miss Gibbons submitted that the applicants' case was doomed to failure and that therefore the application should be struck out a "frivolous, vexatious or otherwise an abuse of process."

36. In the light of our findings above, this is obviously a difficult submission to sustain. Her argument turned on the effect of the order made on the pre-trial review. The order recited that the issue to be determined at the trial was "service charges relating to years 2003 to 2005 in the sum of £4,404." Miss Gibbons argued that these sums were the car parking monies. Since the issues in relation to the car parking monies were not

within the Tribunal's jurisdiction, there was nothing left of the applicant's claim and it should be dismissed.

37. In our judgment this is too legalistic an approach to the matter. It is plain from the written submissions attached to the application that the tenants sought determination of a number of different matters. As we have held above, some were outside the Tribunal's jurisdiction but the redecoration issue was certainly within the Tribunal's jurisdiction.

38. It is of course possible at a pre-trial review for parties to abandon various of their claims. Indeed one of the principal purposes of a pre-trial review is to narrow the issues. However, if an important head of claim, such as the redecoration costs here, is to be completely abandoned, that fact must be recited in the order made on the pre-trial review: see regulation 12(2)(c) of the 2003 procedure regulations.

39. That was not done here. It was not done, in our judgment, for a simple reason: the applicants were not in fact abandoning any part of their claim. A pre-trial review is usually held by a chairman sitting on his or her own. The chairman has no power finally to determine issues at a pre-trial review. The recital in the order made on the pre-trial review in our judgment was merely a shorthand used by the chairman to summarise the issues. It was not intended to record an abandonment of parts of the applicants' claim.

40. Accordingly, we find that the applicants did have reasonable grounds for bringing their application and the respondent's application to dismiss the application as frivolous vexation or otherwise an abuse of the process of the Tribunal fails. .

Costs

41. Mr and Mrs Jacob sought to recover their costs of flying to England from Israel. These costs are in the Tribunal's judgment not recoverable. The general rule is that the Tribunal makes no order for the party's costs unless one of the parties had acted "frivolously vexatiously abusively disruptively or otherwise unreasonaby in connection with the proceedings": see para 10 of Schedule 12 to the 2002 Act. We do not consider that the landlord in this matter has acted unreasonably in defending the applicants' application.

42. In relation to the fees payable to the Tribunal, the Tribunal has a discretion. The starting point is, however, that the loser should pay the fees. In this case, although there were a number of issues which were outside of our jurisdiction, the resolution of these did not take very much time. The hearing was primarily concerned with the substantive issue of

the redecoration and on this the applicants have won. In our judgment, therefore, the landlord should pay the applicants the application fee of £100 and the hearing fee of £150.

43. We were asked to make an order under section 20C of the 1985 Act, so as to prevent the landlord recovering its costs of these proceedings from the applicants as part of the service charge. If we made such an order, then the landlord would have pay the costs from the car parking fees. This would leave Mr and Mrs Jacob worse off than if the costs were recoverable under the service charge. Mrs Turner would be slightly better off, but in our judgment on balance no section 20C order should be made.

DECISION

The Tribunal accordingly determines:

a. **that the total sum which the respondent landlord may lawfully demand from the twelve long leaseholders of the premises in the service charge year 1st January 2005 to 31st December 2005 in respect of building works is limited to a total of £250 per flat (instead of the £28,000 claimed);**

b. **that by the applicants, Mr and Mrs Jacob, are obliged to pay £250 in respect of the building works and the applicant, Mrs Turner, is obliged to pay £250;**

c. **that the respondent's application to dismiss the applicants' application as frivolous vexation or otherwise an abuse of the process of the Tribunal be dismissed;**

d. **that the respondent landlord should pay the applicants the application fee and the hearing fee in the total sum of £250, but that no order be made under section 20C of the Landlord and Tenant Act 1985.**

Adrian Jack

Adrian Jack, chairman 30th November 2006