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LON/00BK/LSC/2006/0201

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

Address:	26 Barnwood Close, Amberley Estate, London, W9 2RE
Applicant:	Mr Omar Mehanna & Others
Respondent:	Westminster City Council
Application:	15 June 2006
Inspection:	13 July 2007
Hearing:	12 July 2007

Appearances:

Tenant

Mr O Mehanna	Leaseholder

For the Applicants

Landlord

Mr Redpath-Stevens	Counsel
Mr P Gatrill	Project Manager
Mr D McCallion	Principal Leasehold Officer

For the Respondent

Members of the Tribunal: Mr I Mohabir LLB (Hons)
Mr C White FRICS
Mrs G Barrett JP

IN THE LEASEHOLD VALUATION TRIBUNAL

LON/00BK/LSC/2006/0201

IN THE MATTER OF SECTION 27A OF THE LANDLORD AND TENANT ACT 1985

AND IN THE MATTER OF 26 BARNWOOD CLOSE, AMBERELY ESTATE, LONDON, W9 2RE

BETWEEN:

MR OMAR MEHANNA & OTHERS

Applicants

-and-

THE LORD MAYOR & CITIZENS OF THE CITY OF WESTMINSTER

Respondent

THE TRIBUNAL'S DECISION

Introduction

1. This application is brought by the Applicant of Flat No 26 Barnwood Close pursuant to s.27A of the Landlord and Tenant Act 1985 (as amended) ("the Act") for a determination of their liability to pay and/or the reasonableness of various estimated service charges arising in the 2006 service charge year. The service charge costs challenged by the Applicants form part of the cost of major works to be carried out by the Respondent. The lessees of flats No 8, 20, 22, 30 & 38 were joined in the original application dated 15th June 2007 Following directions issued by the Tribunal and by the date of the hearing Flats 14,16, 18, 34 & 36 had joined.

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The original disputed costs as shown in the application are:

(a)	window replacement	£9,500
(b)	replacement of vinyl flooring	£2,196
(c)	electrical fittings	£627
(d)	cavity wall insulation	£250
(e)	fees generally	at 14%

Each of these is considered in turn below. It is perhaps convenient to note here that Counsel for the Respondent told the Tribunal that no interim demand had been served by the Respondent in relation to these costs. They were simply the estimated costs set out in the s.20 notice. In fact all of the tenders for the windows had now lapsed and no longer apply. No tenders had been obtained for the flooring and the lighting. Consequently, there were no figures upon which the Tribunal could reach a determination for the lighting and the flooring. In addition, a supplementary witness statement from Paul Gatrill for the respondent stated that a grant had been obtained for the cavity wall insulation so there would be no cost to the lessees other than making good. Therefore this item is no longer considered in this decision

2. Barnwood Close is one of six blocks that comprise the Amberely Estate. It seems that Phase 1 of a major works programme on the estate was carried out and completed in 2005. The disputed costs that form the subject matter of this application form part of the estimated costs of Phase 2 of the major works programme. On 30 March 2006, the Respondent commenced the statutory consultation process in relation to the proposed works served a s.20 notice on each of the leaseholders. That notice set out the proposed works and placed the total estimated costs at £1,664,793. The service charge contribution of each leaseholder was calculated to be approximately £12,618. On 15 June 2006, the Applicants issued this application.

3. Each of the Applicants occupy their respective premises by virtue of leases granted for a term of 125 years ("the leases"). The Tribunal was provided with copies of the leases granted in relation to Flats 8 and 26 Barnwood Close on 6 December 1985 and 13 September 1989. Although the leases vary

slightly in terms, the Applicants' service charge liability largely arises in the same way. In each of the leases, the lessee covenants, *inter alia*, to pay a due proportion of the estimated amount required to cover the costs and expenses incurred or to be incurred by the lessor in carrying out the obligations or functions in clauses 4 and 6 of the leases and in the performance of the lessor's covenants set out in the Ninth Schedule. The lessees of the leases granted in the same terms as the lease relating to Flat 26 Barnwood Close also further covenanted to pay a service charge contribution for the costs and expenses incurred or to be incurred in carrying out improvements and providing additional services to the demised property, at the lessor's absolute discretion.

4. By clauses 4 of the leases, the lessor covenanted to carry out the covenants and obligations set out in the Ninth Schedule. This Schedule includes, *inter alia*, the lessor's repairing obligation. Clause 6 of the leases deals with potential or actual costs incurred by the lessor in the proper management of the property or the delegation of its functions under clause 4 and the Ninth Schedule.

5. The leases further provide that the estimated service charge contribution is to be paid in equal half yearly instalments on 1 April and 1 October in each year. The service charge year commences on 1 April and ends on 31 March of the following year. The leases granted in the same terms as Flat 26 provides that the lessee's service charge contribution shall be calculated at 3.401% of the lessor's total service charge expenditure. The leases granted in the same terms as Flat 8 appear to leave that calculation at the lessor's discretion. The Applicants do not dispute their *contractual* liability to pay the service charge contribution in this matter.

6. It seems that CityWest Homes Ltd ("CityWest") provide housing management and maintenance services to the occupiers of the Amberley Estate. It is an Arms Length Organisation (ALMO), that is, a company that is owned and controlled by the Respondent. Paddington Churches Housing Association ("PCHA") are the Respondent's managing agents in relation to the proposed Phase 2 major works. Wates Construction Ltd ("Wates") are the chosen

contractor in this instance. Pursuant to a Strategic Alliance Agreement dated 20 December 2002, both PCHA and Wates are at liberty to enter into a Partnering Contract with the Respondent, as is the case here. It appears that CityWest manages the Strategic Alliance Agreement on behalf of the Respondent and, therefore, PCHA, who in turn administers the implementation of the work by Wates.

Inspection

7. The Tribunal carried out an internal inspection of Flat 26 and flat 30 and made a general external inspection of the block of flats. It is a four storied fairly long block alongside the river built in the 1950's or sixties. Garage are on the ground floor. The elevation fronting the river has balconies so a number of the external windows and doors are weather protected. Note: the Tribunal assumed that the term 'windows' used throughout the case both verbally and written included balcony doors. The other long elevation was flat fronted and the windows and paintwork were noticeably worse on that side.

Decision

8. The hearing in this matter commenced on 12 July 2007. Mr Mehanna appeared in person on his own account and behalf of the other Applicants, who did not appear. The Respondent was represented by Mr Redpath-Stevens of Counsel.

(a) Window Replacement

9. Mr Mehanna made two submissions in relation to this issue. Firstly, that a proper construction of the leases reveals that the cost of replacing the windows could not be recovered as a service charge expenditure because it was the lessees' obligation to maintain them. The lessee's repairing obligation at paragraph 5 of the Seventh Schedule included the windows. The Fourth Schedule defining the demised premises also includes the glass in the windows of the flat. Moreover, the lessor's repairing obligation in the Ninth Schedule specifically excludes the windows in any individual flat.

10. Secondly, and in the alternative, Mr Mehanna contended that the windows overall were not in disrepair, as they had been maintained by the leaseholders.

This supported his earlier submission it was not the Respondent's obligation to maintain them. Those windows found to be in disrepair was a direct consequence of the Respondent's historic neglect by failing to carry out cyclical maintenance and both the extent of the proposed works and the estimated costs are greater than they otherwise would have been. He submitted, therefore, that this was unreasonable and the Applicants should not be liable for these costs.

11. As to the quantum of the costs, Mr Mehanna stated in his estimated service charge contribution was £9,574. He had obtained a quote from Everglaze Installations in April 2007 for the replacement of the windows in his flat at a cost of £3,809. The quote was based on the same specification provided to him by the Respondent, which included the cost of scaffolding. Subsequently, the Respondent sought a quote from Everglaze Installations was advised on 10 May 2007 that its bid had been unsuccessful on the basis that it was not as competitive as the other bids. He rejected the explanation given to him that the difference in the s.20 estimate and the final contractor's quote was partly accounted for by the cost of scaffolding and other on site costs because the Everglaze Installations quote included the cost of scaffolding.

12. Mr Mehanna further complained that there appeared to be no clarity about the overall estimated costs for replacing the windows. He pointed out[1] that the initial estimate was £280,622.87. Subsequently, this was revised downwards to £110,990[2]. However, in the supplemental witness statement prepared by Mr Gatrill, an employee of CityWest, a different figure of £144,815.25 is provided with preliminary costs being reduced from £94,024.22 to £30,840.21. The Respondent's own evidence would seem to suggest that the correct estimated costs should be approximately £140,000.

13. Mr Gatrill, who is employed of CityWest as a Chartered Civil Engineer and Building Surveyor, was called as a witness for the Respondent. His evidence regarding the proposed replacement of the windows was limited to the issue of disrepair and cost. He conceded, in chief, that the windows had not been

[1] at p. 154 of the bundle
[2] see. P. 99 of the bundle

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painted in the last 27 years. The cost of doing so for the leaseholders would have been significant and they had been save this expense. He said that the original windows had been made of softwood in the 1950 or 1960s and had now reached the end of their useful lives. Very few of the windows would not require some degree of repair, especially those to the rear of the block.

14. The decision to replace the existing windows with powder coated double glazed aluminium windows was as a result of a survey carried out by a Mr Eddie Robinson, Chartered Surveyor, in the Spring/Summer of 2006[3]. He concluded overall that the windows needed replacing.

15. In cross-examination, Mr Gatrill was shown photographs taken by Mr Mehanna of various windows in the block. He accepted in principle that they visually appeared to be in good order. However, he pointed out that they were all internal views only. He maintained his position that a lot of the windows were in disrepair. He could not offer any explanation as to why the windows had not been decorated in the last 27 years but said that this would not prevented the cills from rotting. It would only have deferred the process. He could not say what the condition of the windows would have been had they been decorated in the intervening period.

16. As to the estimated cost, Mr Gatrill said that lifestyle costing had been done before the choice to use powder coated aluminium windows was made. It was the next cheapest option. The cheapest was uPVC windows, but these could not be used as they emitted toxic fumes in the event of a fire. Tenders had been sought from 6 contractors[4] and the lowest quote provided by Marsland had been adopted. Separate tenders had been obtained for the scaffolding. The total estimated cost included the cost of the windows, scaffolding, preliminary and disposal costs. The final revised costs were £175,655.46[5].

17. The Tribunal dealt firstly with the construction of the lease terms about where the repairing obligation concerning the windows lay. The drafting of the leases in relation to this matter is both clumsy and ambiguous. The literal

[3] see p. 54 of the bundle
[4] see p.99 of the bundle
[5] see para. 8 of his witness statement

construction adopted by Mr Mehanna does appear to support his submission that the obligation to repair and maintain the windows is placed upon the leaseholders. However, it is clear that this was not the intention of the draftsman of the leases. The Third, Fourth, Seventh and Ninth Schedules have to be read together. This reveals that it was clearly intended to reserve all external parts of the property to the Respondent and to demise the internal parts of each flat to the respective leaseholder. This is consistent with the repairing obligations of the lessee and the lessor set out in the Seventh and Ninth Schedules. It was intended that the lessee's repairing obligations were limited generally to matters within the internal parts of the demised premises whereas the lessor's repairing obligation is limited to the external parts of the property. Indeed, the internal qualification of the lessee's repairing obligation is repeated in the Ninth Schedule[6]. The Tribunal, therefore, accepted the submission made on behalf of the Respondent that the repairing obligation for the windows in the property lay with it and not the Applicants.

18. Turning to the issue about the necessity to replace the windows, the Tribunal did not accept the assertion made by Mr Mehanna that they were overall in good condition. The Applicants had adduced no expert evidence in this regard. Their evidence was limited to the photographs provided, but these were of little or no evidential value because, as Mr Gatrill pointed out, these only provided internal views of a number of windows and did not inform as to the external condition of the windows of the block overall. The Tribunal accepted that some of the leaseholders may have maintained their individual windows well, but the Respondent was entitled to have regard to the overall condition of the windows in the block as a whole when making the decision to replace or not[7]. It was not the Applicants' case that the windows found to be in disrepair should be replaced in a piecemeal fashion. The Respondent had commissioned a report prepared by Mr Robinson about the condition of the windows. He concluded that overall 55% of the windows required repair. Whilst it is open to argue that short term repairs could have been effected, Mr Gatrill's evidence was that the Respondent took a decision to replace the

[6] see para. 1(i)
[7] see Reston v Hudson [1990] 2 EGLR 51

windows in the long term. The Tribunal accepted that evidence and concluded that the decision to replace the windows had been reasonable.

19. Similarly, as to the cost of the windows, the Applicants had adduced no evidence to support the submission that the extent and cost of the windows had been increased as a result of historic neglect on the part of the Respondent. Save for that assertion, there was simply no evidence of this. Even, if there had been historic neglect, there was no evidence that it had resulted in the scope and cost of the work was greater than it otherwise would have been. As a matter of causation, one does not necessarily follow the other.

20. As to the estimated cost of the windows themselves, the Tribunal found these to be reasonable. The Respondent had sought and obtained a revised estimate from Marsland, the contractor that provided the cheapest quote. Its estimate was significantly cheaper than the estimate provided by the Applicants' proposed contractor, Everglaze. The revised estimated cost for replacing the windows is now £144,845.25 inclusive of scaffolding costs. To this sum is added preliminary costs of £30,840.21 thereby resulting in a total estimated cost of £175,655.46. Mr Gatrill said that this figure also included management fees. The Respondent cannot be criticised for having properly tendered and accepted the lowest (revised) tender.

(b) Vinyl Flooring

21. The initial estimated cost of replacing the existing vinyl flooring was placed at £64,559.26 per block. However, the Respondent no longer placed any reliance on this figure because the original tenders had now expired and it was in the process of re-tendering the cost.

22. It was not the Applicants case that it was not necessary to replace the flooring. Instead, their challenge was limited to the reasonableness of the initial estimated cost. Mr Mehanna contended that the cost equated to approximately £190 per sq. metre. The Applicants had obtained an alternative estimate[8], which equated to £45 per sq.metre. However, Mr Mehanna accepted that this

[8] at p. 114 of the bundle

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estimate did not allow for the cost asbestos removal. The Tribunal, therefore, placed no reliance on it, as it did not provide a true cost comparison.

23. Despite the absence of any evidence of what the likely estimated cost of this work might eventually be, nevertheless, Mr Mehanna wanted the Tribunal to make some determination in relation to this matter on the basis that when the final account was prepared, he wanted the Respondent to be accountable for any increased costs.

24. The evidence given by Mr Gatrill on this matter was highly qualified because the tendering process was far from complete. Only two tenders had been received so far and these did not include the specialist costs of removing and disposing of the old flooring, which contains asbestos. The current lowest tender was £10,000 exclusive of the additional specialist costs. In his opinion, the approximate cost was going to be in the region of £15,000 per block plus preliminary costs.

25. In the light of the highly speculative evidence about the estimated cost of replacing the flooring, the Tribunal concluded that it would be unsafe for it to make any finding on the available figures, as they provided no accuracy about what the real estimated costs might be. To make any finding on this basis would be acting in an entirely arbitrary manner and the Tribunal was not prepared to do so. The safest way to proceed was for the Respondent to complete the tendering process and to further consult with the Applicants when the total estimated cost of this work was known. In the event that they remained unhappy about the revised cost, the Applicants could make a further application to the LVT for a determination as to their reasonableness.

(c) Electrical Fittings

26. The Tribunal found itself in the same position here, as was the case for the replacement of the vinyl flooring. Again, the Applicants challenge was limited to reasonableness of the estimated cost of the work and not the necessity for it. The cost of this work was in the process of being re-tendered. For the same reasons set out above, the Tribunal also concluded that it could not safely make any determination about the estimated costs.

(d) Insulation

Not now an issue.

(e) Management Fees

27. The Respondent's s.20 notice dated 30 March 2006 proposed to charge professional fees and management costs totalling 14% of the total apportioned block costs for the proposed works. Mr Mehanna contended that this figure was excessive and placed great reliance on the finding of 12% made by an earlier Tribunal in another application (LON/00BK/LSC/2004/0097)[9] when the same point had been considered. He submitted that even if an inflationary increase was made, it would not result in a figure of 14%.

28. The Tribunal heard evidence from Mr McCallion, an employee of CityWest, as to how the management rate had been arrived at. His evidence largely repeated those matters set out in his witness statement[10]. He said that 14% had been adopted as a worst case scenario and allowed for thing that might go wrong on the project and was only an estimated figure. In fact, the Phase 1 management and professional fees had in fact been reduced to 11.36%.

29. On the basis of the evidence given by Mr McCallion, that, in all probability, the rate for the management and professional fees would eventually be lower than the estimated rate claimed and also having regard to the relatively contemporaneous of 11.36% for the Phase 1 works, the Tribunal concluded that the rate should remain at 12% for the present time. The parties are reminded that this is a finding on an estimated rate and may be subject to an adjustment upwards or downwards once the final account has been prepared. In the event that the Applicants also challenge the final amount charged, it is open to them to seek a fresh determination in relation to these costs.

Section 20C

30. The Tribunal was told that the Respondent would not seek to recover any costs it had incurred in these proceedings, whether through the service charge

[9] see p. 131 para, 56
[10] see p. 120 of the bundle

account or otherwise. Accordingly, it was not necessary for the Tribunal to consider this application or to make any order.

Fees

31. In this application, the Applicants have not succeeded on any of the substantive points. In addition, the Respondent was not seeking to recover its costs from the Applicants. Costs and fees should "follow the event". In the circumstances, it would be inequitable for the Respondent to be ordered to reimburse the Applicants any fees incurred and, therefore, it makes no such order.

Dated the 11 day of October 2007

CHAIRMAN..... I. Mohabir .....

Mr I Mohabir LLB (Hons)

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