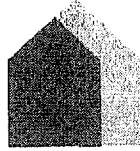


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Residential
Property
TRIBUNAL SERVICE

**LONDON RENT ASSESSMENT PANEL
LEASEHOLD VALUATION TRIBUNAL**

Case Reference: LON/00BE/LSC/2010/0235

**DECISION OF THE LEASEHOLD VALUATION TRIBUNAL ON
APPLICATION UNDER SECTION 27A OF THE LANDLORD & TENANT
ACT 1985**

Address: 26 Aylesbury House, Friary Estate, Peckham Park Road,
London, SE15 1RW

Applicant: London Borough of Southwark

Respondent: Ms Oluyemisi Adebayo

Date of Transfer: 16 July 2009

Inspection: 19 July 2010

Hearing: 19-20 July 2010

Reconvene: 10 September 2010

Appearances

Applicant

Ms E Sorbjam	Legal Officer)
Mr M Cremin	Contracts Manager)
Mr M Fang	Contracts Manager) London Borough of Southwark
Mr Z Nauman	Surveyor)
Ms J Dawn	Capital Works Manager)

Respondent

Mr M Ekoja	Leasehold Advisory Consultant
Ms Adebayo	Leaseholder
Mr M Orey	Witness

Members of the Tribunal

Mr I Mohabir LLB (Hons)
Mrs H C Bowers BSc (Econ) MSc MRICS
Mr O N Miller BSc

DECISION

Introduction

1. On 14 May 2009, the Applicant issued proceedings in the Lambeth County Court against the Respondent to recover service charge arrears of £13,192.77 claimed in respect of major works carried out by the Respondent between 2007 to 2009 ("the works").
2. By an order made by District Judge Zimmels dated 16 July 2009, the proceedings were transferred to the Tribunal.
3. The works to Aylesbury House were undertaken as part of a partnering agreement between the Applicant, Apollo London ("Apollo") and Brodie Plant Goddard ("Brodie") to refurbish the estate the subject property forms part. The works were being funded over a number of years under the Decent Homes Initiative. The partnering contract to carry out and provide consultancy services in relation to the works was competitively tendered and Brodie was appointed as the design consultants.
4. The works to the Friary Estate was initially spread over five phases. It seems that from time to time the programme was reviewed and altered as necessary to minimise inconvenience to the residents. The works to Aylesbury House formed part of Phase 4.
5. Brodie prepared a project specification in relation to Phase 4 of the works dated August 2006, which was revised on 25 September 2006. This was based on an undated survey report prepared from only a visual inspection of all elements¹. In addition, Brodie arranged for a limited number of electrical inspections and tests to ascertain the condition of domestic installations and sub-mains and laterals thereto. The specification was used as the basis for a tendering process with a number of contractors. Six tenders were returned and eventually Apollo was appointed to supervise and carry out the works as their tender was the lowest as well as meeting "quality assessments".

¹ see page 52 of the bundle

6. The Applicant then (validly) carried out statutory consultation under section 20 of the Landlord and Tenant Act 1985 (as amended) ("the Act") regarding the works. They were commenced on 30 April 2007 and were completed on 7 May 2009.

The Issues

7. The partnering agreement between the Applicant, Apollo and Brodie was the subject matter of an earlier application made by the former in 2004 for dispensation to be granted under section 20ZA of the Act to consult with the lessees of the Acorn and Rosemary Gardens neighbourhoods. By a decision dated 21 April 2004, the Tribunal granted the application to dispense ("the section 20ZA decision"). The partnering agreement was for a term of five years.
8. At the hearing, Mr Ekoja made two submissions in relation to the partnering agreement. Firstly, that the works had not been carried out during the five-year period of the agreement. Secondly, that the section 20ZA decision did not extend to the appointment of Brodie, as the landlord's agent, to discharge any of the landlord's obligations to the tenants which relate to the management (of the works) in relation to the premises. Mr Ekoja further submitted that the Applicant had failed to carry out statutory consultation under Schedule 2, paragraph 4(8) of the Service Charges (Consultation Requirements) (England) Regulations 2003 in this regard and, therefore, the Respondent's liability was limited to £250.
9. The Tribunal found that the works had been carried out during the term of the partnering agreement and dismissed Mr Ekoja's first submission. The Tribunal also found that Schedule 2, paragraph 4(8) of the service charge regulations had no application in this matter because it was only concerned with the appointment of an agent in relation to the management of premises. It was beyond doubt that Brodie had not been appointed by the Applicant to manage the premises nor did they act in this capacity. Mr Ekoja's second submission was wrong in law and was, therefore, rejected by the Tribunal.

10. It should be noted that, by an earlier decision in these proceedings dated 5 October 2009, the Tribunal determined, as a preliminary issue, that a section 125 notice was valid and had been properly served on the Respondent and she was *prima facie* liable for the service charge is demanded for the works.
11. The remaining challenges made by the Respondent were limited to a liability, scope and reasonableness of various items of work. These are particularised below along with the Tribunal's decision regarding each of these matters.

The Relevant Law

12. The substantive law in relation to the determination of this application can be set out as follows:

Section 27A of the Act provides, *inter alia*, that:

"(1) An application may be made to a leasehold valuation tribunal for a determination whether a service charge is payable and, if it is, as to-

- (a) the person by whom it is payable,*
- (b) the person to whom it is payable,*
- (c) the amount which is payable,*
- (d) the date at or by which it is payable, and*
- (e) the manner in which it is payable.*

(2) Subsection (1) applies whether or not any payment has been made."

Subsection (3) of this section contains the same provisions as subsection (1) in relation to any future liability to pay service charges.

13. Any determination made under section 27A is subject to the statutory test of reasonableness implied by section 19 of the Act. This provides that:

"(1) Relevant costs shall be taken into account in determining the amount of a service charge payable for a period-

- (a) only to the extent that they are reasonably incurred, and*
 - (b) where they are incurred on the provision of services or the carrying out works, only if the services or works are of a reasonable standard;*
- and the amount payable shall be limited accordingly."*

Inspection

14. The Tribunal internally inspected the Respondent's premises and carried out a general external inspection of parts of the building on 19 July 2010.
15. Aylesbury House is a large, purpose built residential block comprising part of the Friary Estate. The block is of brick and pitched tiled construction with accommodation on the ground to fourth floors. There are open balcony areas on the upper floors. In general the block appears to be in good decorative order and there are no indications of any disrepair to the block. It was noted that there is an entry phone system to the block and replacement UPVc windows and replacement doors.
16. We made a brief inspection to the interior of the subject flat. This is located on the ground floor of the block and has direct access from the forecourt of the development. We noted the replacement security door to flat. There was some evidence of surface re-wiring in conduits to the main fuse board. The door to the fuse board cupboard was poorly fitted. We inspected a window in a rear bedroom that had a missing sealant strip.

Decision

17. The hearing in this matter also commenced on 19 July 2010 and continued on the following day. The Applicant was represented by Ms Sorbjan, a Litigation Officer. Mr Ekoja, a Leasehold Advisory Consultant, represented the Respondent.
18. At the commencement of the hearing, Mr Ekoja made an application to adjourn the proceedings on the basis that earlier requests for specific disclosure made to the Applicant had not been complied with. Therefore, the Respondent had been prejudiced by not being able to prepare her case properly. The Tribunal dismissed this application because it did not consider that the requests were either relevant or proportionate to the issues in this case.

Liability

19. As a general point, Mr Ekoja contended that the contract between the Applicant and Brodie had not been properly executed and, consequently, the Applicant had no liability for the cost of the works. The Tribunal did not accept the submission for two reasons. Firstly, there was no evidence that the contract between the Applicant and Brodie had not been properly executed. Secondly, the Tribunal found this was irrelevant because it had no bearing on the contractual liability between the Applicant and the Respondent under the terms of the lease.

20. On the issue of liability, the Respondent relied on the witness evidence of Mr Orey. He was called as a witness on the second day of the hearing and the Applicant did not object to his witness statement being tendered in evidence that morning. Mr Orey is a leaseholder and the Chair of the Unwin and Friary Tenants Management Organisation. The thrust of his evidence related to a lack of transparency and unfair distribution of costs for the works. For example, the stated head office overheads and profit element in the Apollo tender of 4% and 5% respectively were not correct. He had calculated that the profit element for Apollo was 10.6% and, including this amount, the total overcharge for the works was £6,690.53.

21. The Applicant called Miss Dawn to give evidence regarding the apportionment of the costs for the works as between individual blocks and lessees. Miss Dawn is employed by the Applicant as the Final Accounts Manager in its Home Ownership Unit, Capital Works Group. Her witness statement dated 15 June 2010 sets out how the costs have been apportioned. By the time of the hearing, the draft final account had been prepared. By reference to this document, Miss Dawn explained that the profit element for the measured works had remained at 5% and save for the "section 125 cap", the Respondent's total liability would have been £22,232.05. She confirmed that for each item of the measured works, the lowest figure had been recharged to the lessees. She also confirmed that no costs had been recharged for the entryphone and remaining works.

22. The Tribunal accepted the evidence of Miss Dawn that the lowest figure for each item of the measured works had been recharged to the lessees and had been correctly apportioned as between individual blocks and lessees. The Tribunal also accepted her evidence that the overrun in time for the works from 60 to 105 weeks had not incurred any additional costs for the measured works. Accordingly, the Tribunal found that the Respondent had not been overcharged for the works as Mr Orey had asserted. It was clear to the Tribunal that he had misunderstood how the costs had been recharged. His calculation was based on the estimated cost of the works taking 60 weeks to complete whereas it had taken 105 weeks in total. This had, therefore, inevitably led to the overcharge figure he contended for, which was incorrect.

External Decorations

23. Mr Ekoja argued that the requirement for these works had been based simply on a visual inspection carried out by Brodie. Furthermore, there was no evidence of any external decorations having been carried out because no breakdown or report confirming this had been provided by the Applicant. He was only prepared to concede that brick cleaning and "patch up painting" had been done.
24. As to the nature and scope of the works carried out, the Applicant relied on the evidence of Mr Fang (the Contract Manager), Mr Robinson (the Contracts Manager at Apollo) and Mr Nuaman (an Associate Director at Brodie). Mr Fang and Mr Robinson did not attend the hearing to give oral evidence and be cross-examined. Nevertheless, their witness statements (and supported by a statement of truth) dated 14 June 2010 and 21 June 2010 respectively have been served in the course of these proceedings and the Tribunal is entitled to have regard to their evidence although less weight is placed on it given their non-attendance at the hearing.
25. Mr Nuauman was called as a witness for the Applicant. His witness statement is dated 14 June 2010. In chief and in cross examination, he gave a further and detailed explanation about various elements of work carried out. In particular, Mr Nuauman drew the Tribunal's attention to the draft account that

had been prepared regarding the Phase 4 works carried out to Aylesbury House² which sets out each element of work and the cost incurred ("the draft account").

26. Having regard to the external redecorations set out in the draft account and at the totality of the evidence given by Mr Nuauman, Mr Fanning and Mr Robinson and upon having carried out a physical inspection of the building, the Tribunal found that the scope of the works had been reasonably incurred and had in fact been carried out by the Applicant. No challenge was made by the Respondent as to the standard cost of the works. Accordingly, they were allowed as claimed.

Drainage

27. Mr Ekoja asserted that the Respondent continued to suffer a back surge in the drains to her flat. He contended that a CCTV report should have been undertaken before and after the work to the drains had been carried out. He submitted, therefore, that this work was not done.
28. The Respondent had adduced no evidence to support the case she advanced on this issue. A mere assertion is not evidence. The Tribunal accepted the evidence of Mr Nuauman that a CCTV inspection had been carried out and, accordingly, it found in those terms. If correct, the back surge the Respondent presently suffers from may be due to some other reason. The cost relating to this element of work was allowed as claimed.

Water Tank

29. Paragraph 2.4 of the Brodie survey report set out the works required in the roof voids, which included the water tanks. The only elements of work challenged by the Respondent were the upgrading of the power and lighting provisions in the roof voids to comply with health and safety requirements and the replacement of the water tanks.

² See page 225-229 of the bundle

30. Mr Ekoja asserted that this work had not been carried out because no report had been done to confirm this. In the alternative, he submitted that the cost of replacing the water tanks had not been reasonably incurred because the Brodie survey report had concluded that they were in a reasonable and serviceable condition. In the alternative, he submitted that the cost of £28,000 for these elements of the work was excessive and, therefore, unreasonable.
31. The Tribunal accepted the evidence of Mr Nuauman that the water tanks had been replaced and the power and lighting provisions in the roof voids upgraded. His evidence was corroborated by the draft final account which includes these elements of work. Therefore, the Tribunal found that this work had in fact been carried out. As to the replacement of the water tanks, the Tribunal also accepted his evidence that this was necessary in order to keep abreast of legislative changes and it found in these terms. As to the cost of this work, the Tribunal found it to be reasonable because the Respondent had adduced no evidence to demonstrate otherwise.

Rewiring

32. Mr Ekoja asserted that the Applicant had not carried out a test to the level means to ensure that its replacement was necessary. Mr Ekoja appeared to submit, in terms, that this work had not been reasonably incurred.
33. In cross examination, Mr Nuauman said that a test of the electrical installation had been carried out but had been omitted from the Brodie survey report because of a clerical error.
34. Again, the Tribunal accepted the evidence of Mr Nuauman that at the electrical installation had been tested and it was on this basis that the recommendation in the Brodie survey report that the sub-mains and lateral mains be renewed. The Tribunal was satisfied that the inspection had been carried out before the specification had been prepared and that the electrical installation at the time was approximately 30 years old. Accordingly, the Tribunal found that this work had been reasonably incurred. No challenge was

made by the Respondent as to the cost of the work and, therefore, it was allowed as claimed.

Windows

35. Mr Ekoja simply submitted that the replacement of the windows had been unnecessary because the former windows had been in a reasonable condition.
36. The Brodie survey report concluded at paragraph 2.9 that the existing single glazed timber sash windows were well beyond their anticipated lifespan and economic repair. On this basis, it was decided to replace the existing windows and balcony doors with double glazed uPVC units. No advantage can be found in the use of timber or timber composite windows.
37. From the reference in the Brodie survey report to the windows being beyond economic repair, the Tribunal inferred that a proportion of the windows were in disrepair. Even if the Respondent's windows had not been in disrepair, it is now the accepted practice in a block such as this to replace all of the windows and not just those that fall into disrepair on an ad hoc basis. This point has been raised in many other cases involving local authority blocks of flats and on our extensive authorities to support the approach taken by the Applicant in this instance. Therefore, the Tribunal found that the cost of replacing the Respondent's windows had been reasonably incurred. No challenge had been made as to the reasonableness of the cost incurred and it was allowed as claimed.

Roof Repairs

38. Mr Ekoja referred the Tribunal to the recommendation made in the Brodie survey report that the tiled roof of Aylesbury House had recently been recovered and little work was necessary, other than minor repair and upgrading roof ventilation. Nevertheless, he noted that the cost of this work amounted to £80,000. He did not accept that the work had been carried out in the absence of confirmation from the Applicant. In the alternative, he submitted that the cost was excessive, especially having regard to the cost of roof renewal/repairs carried out to other blocks.

39. The Tribunal accepted the evidence of Mr Nuauman and found that the work had been carried out as specified in the draft final account. As to the cost of the work, Mr Nuauman said in evidence that this had largely been incurred because of the increased number of ventilation points installed in the roof which required the removal of the ends of the roof and associated work. In cross examination, he explained that the difference in overall cost of the roof work as between the various blocks was because of the different elements of cost required in each case.
40. On the issue of cost, the Tribunal also accepted the evidence of Mr Nuauman as to the difference in cost of the roof works between the various blocks and also as to how the cost of the roof works to Aylesbury House had been incurred. Whilst the Tribunal found that the number of roof vents installed was perhaps surprising, the Respondent had not produced any evidence to rebut Mr Nuauman's evidence that the roof work it had been reasonably incurred and was reasonable in overall cost. In any event, there was no evidence from the Respondent on which the Tribunal could have made a finding for a lower figure. Accordingly, it was allowed as claimed.

Concrete and Brick Repairs

41. Essentially, the Respondent put the Applicant to proof that the scope of this work was reasonably incurred.
42. The scope of the measured works carried out fully particularised in the draft final account³. This work was carried out on the basis of the conclusions reached at paragraph 2.14 of the Brodie survey report. It was stated that the condition of the concrete could not be properly assessed until access scaffolds were erected. However, there was visible damage to many of the window surrounds. Remedial work was therefore required to prevent further deterioration and to prepare surfaces for redecoration. The brick walls to the ground floor were painted and although the coatings were in a reasonable

³ see page 226 of the bundle

condition it was advised that they be redone so that future cyclical redecoration could be carried out at the same time in the future. Elsewhere, the brickwork was found to be badly stained and would benefit from cleaning and hatching pointing, although the extent could not be accurately assessed until access scaffolds were erected.

43. There was no evidence put before the Tribunal by the Applicant as to what subsequent recommendations were made as to the scope of the concrete and brick repairs that needed to be carried out once the access scaffolds had been erected. The Tribunal found this to be unsatisfactory. However, the Respondent had adduced no evidence on which the Tribunal could make an alternative finding in her favour on this issue. On the basis of the limited evidence before the Tribunal, it found that the Applicant had established a *prima facie* case that the scope of these works has been reasonably incurred. The Respondents did not challenge the reasonableness of the cost of these works and, accordingly, they were allowed as claimed.

Remaining Work

44. It was clear from the draft final account that the Respondent and other leaseholders were not being charged for any remaining work and, therefore, the Tribunal was not required to make a determination in this regard.

Overspend Caused by Delay

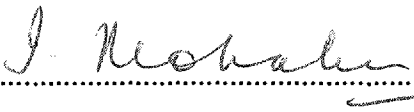
45. The Tribunal heard evidence from Mr Nuauman that the contract had taken 105 weeks to complete instead of the estimated 60 weeks because various elements of the work including parts of the roof, windows and entrances had to comply with Building Regulations and planning consent had to be obtained during the course of the work. This had taken additional time to obtain. In addition, the Applicant then had to ballot the residents for approval. Some of them had raised objections which required a second ballot and thereafter a further application for planning consent had to be made. The effect of this was to increase the site preliminary costs by £110,000. In contrast, the cost of the measured works had in fact decreased.

46. The Respondent relied on the evidence of Mr Orey to support the submission that the increase in the site preliminary costs had not been reasonably incurred. The Tribunal accepted this submission as being essentially correct for the following reasons. It was clear that the delay had been caused largely because of the requirement to obtain planning consent for parts of the roof works and replacement of the windows. In the Tribunal's judgement, any planning consents and consultation with the leaseholders and/or residents should have been carried out before the work was commenced. Therefore, the Tribunal found that the site preliminary costs had not been reasonably incurred. The Respondent's liability for this item of cost was placed at £1,399.61 of her overall liability before the section 125 discount was applied. However, the sum disallowed for the site preliminary costs is not exceed the amount of section 125 discount and has no practical effect on the Respondent's overall liability. Therefore, the Respondent's liability remains unaltered.

Costs & Fees

47. The Applicant told the Tribunal that it was not seeking to recover any costs it had incurred in these proceedings from the Respondent save for the hearing fee of £150. Given that the Applicant had almost entirely succeeded on all of the issues, the Tribunal made an order that the Respondent reimburse the Applicant the hearing fee of £150 on the basis that "costs should follow the event".

Dated the 27 day of October 2010

CHAIRMAN.....
Mr I Mohabir LLB (Hons)