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HM Courts & Tribunals Service

Residential Property TRIBUNAL SERVICE

LONDON RENT ASSESSMENT PANEL

DECISION OF THE LEASEHOLD VALUATION TRIBUNAL ON APPLICATIONS UNDER SECTIONS 27A & 20ZA OF THE LANDLORD AND TENANT ACT 1985

Case Reference:	LON/00AN/LDC/2011/0106
Premises:	St Peter's Terrace, Fulham London, SW6 7JS
Applicants:	(1) Various Leaseholders as listed (S27A) (2)London Borough of Hammersmith & Fulham (S20ZA)
Representative:	(1) Ms Jeanette Repaci (2) Mr Ranjit Bhose
Respondents:	(1)London Borough of Hammersmith & Fulham (S27A) (2)All Leaseholders at St Peter's Terrace (S20ZA)
Representative:	(1) Mr Ranjit Bhose (2)Ms Jeanette Repaci
Date of hearing:	11 January 2012
Appearance for Lessees:	Mr Hankins (flat 44) Mr Finnegan (flat 55) Day 1 Mrs Richardson (flat 42) Day 2
Appearance for Landlord:	Mr Simpson, Consultant surveyor for Frankham Consultancy Group FCIOB MRICS, Mr Thompson Head of Planned Maintenance, Ms Du Preez Head of Leasehold Services, Mr Jolly Communications Manager
Leasehold Valuation Tribunal:	Ms E Samupfonda LLB (Hons) Mrs E Flint FRICS Mr A Ring
Date of decision:	22nd February 2012

Decisions of the Tribunal

(1) The Tribunal makes the determinations as set out under the various headings in this Decision

(2) There was no application made under section 20C of the Landlord and Tenant Act 1985. Therefore the Tribunal does not make an order under section 20C of the Act.

The application

1. There are two applications before the Tribunal. In application LON/00AG/LSC.2011/0251 ("the first application") the Applicant is Ms Jeanette Repaci and 5 other leaseholders of St Peter's Terrace. That application seeks a determination pursuant to s.27A of the Landlord and Tenant Act 1985 ("the 1985 Act") as to the amount of service charges payable by the Applicants in respect of major works. The Applicants' case includes the allegation that the Respondent Council is not entitled to recover the full costs incurred because it has failed to comply with the consultation requirements under section 20 of the Act and Schedule 3 to the Service Charges (England) Consultation Regulations 2003 ("the Regulations"). The Respondent Council denies that allegation and in consequence made a precautionary application LON/00AN/LDC/2011/0106 ("the second application") under section 20ZA of the Act for dispensation from those requirements. At the pre trial review on 22nd November 2011, it was decided that both applications should be heard together.

2. The relevant legal provisions are set out in the Appendix to this decision.

The hearing

The applications were heard on 11 and 12 January 2012. Ms Repaci (flat 48) also represented five other lessees; Mr R Leverton flat 37, Mr J Lynch flat 38, Mr M Hankins (flat 44), Mr C Lanceley (flat 49)and Mr G Finnegan(flat 55). Mr Bhose of Counsel represented the respondents. Mr Jolly, Mr Thompson, Mr Simpson and Ms Du Preez gave evidence on behalf of the respondents.

The background

The property which is the subject matter of these applications comprises 34 flats including 14 flats acquired by leaseholders under the "Right to Buy" provisions of the Housing Act 1985. Major works were carried out between January and July 2010. Neither party requested an inspection and the Tribunal did not consider that one was necessary. The Applicants hold long leases of flats within the property which require the Council to provide services and the lesseesto contribute towards their costs by way of a variable service

charge. The specific provisions of the leases will be referred to below, where appropriate.

Major works were carried out at St Peter's Terrace as part of the Council's Decent Homes programme. The Council entered into seven Partnering Framework Agreements and the works to St Peter's Terrace were carried under contract 5. The Council's view was that the contract was a qualifying long-term agreement and because of the value of the work, a public notice was required to be given. It therefore applied the consultation requirements as set out under Schedule 2 of the Regulations. A Notice of Intention was sent to the lessees dated 29 July 2004; tenders were issued on 29 November 2004 and returned on 14 February 2005. The Council gave notice of its intention to award the contract to Balfour Beatty on 6 July 2005. Contract 5 was entered into on 21 September 2006.

With regards to the works, the Council followed the consultation requirements under Schedule 3 of the Regulations. The chronology of events was that on 8 September 2009, the Council notified its lessees about the proposed specification of works and set a date for residents to meet the contractor on 24 September 2009. On 13 November 2009, a Notice of Intention to undertake the work was served in compliance with paragraph 1 to Schedule 3 of the Regulations. A copy of that Notice was provided to the Tribunal. It set out a full description of the proposed work; it referred to the estimated cost of the work, invited its recipients to inspect the full description of the work by appointment and invited written observations to be submitted by 14 December 2009. Three leaseholders sent in written observations by the due date and the Council responded to them individually. The six lessees who are parties to these proceedings also submitted written representations both individually and, in the case of five of them, as a group. In response, the Council set up a meeting on 24 November 2009 at which all lessees were given the opportunity to express their concerns. Their concerns included works to the roof, the Garchey and drainage system and the tender works. Mr Richard Simpson, a Chartered Building Surveyor and the Council's Client Project Manager then wrote a letter to the leaseholders clarifying what he took to be the outstanding issues and enclosing an extract of the Bill of Quantities. The letter also dealt with concerns that had been raised about the roof.

Following the meeting of 27th November 2009, the group of five lessees wrote a letter to Mr Greg Hands MP in which they outlined their concerns. On receipt of this letter, the Council logged it and treated it as observations made under the Act. In response, a meeting was set up on 11 December 2009 at which four of the Applicants were present. Mr Sam During, Project Development Manager, addressed the matters raised at that meeting in a letter dated 24 December 2009. The Applicants were informed that the start of the work would be delayed from 4 January 2010 to 18 January 2010 in order to enable the Council to respond to the Applicants' observations. A further letter was sent out to the Applicants on 14 January 2010 in an attempt to address all the outstanding issues.

The Applicants produced a "gap analysis" which they said demonstrated the Council's failings. During the course of the hearing, Ms Repaci conceded that they had misunderstood the statutory procedures and accepted that the Council had followed the correct consultation requirements under Schedule 2 of the Regulations with regard to Contract 5 of the Partnering Framework Agreements. However the Applicants maintained that the consultation requirements under Schedule 3 in respect of the works had not been met. There was a severe lack of transparency in the process. The Council had acted unfairly in chosing to serve Notices so close to the Christmas holidays. The Council had not responded to observations within the required time limit of 21 days.

The issues

3. During the course of the hearing Ms Repaci confirmed that the applicants conceded that the Council had complied with Schedule 2 of the Service Charges (England)(Consultation) Regulations 2003 ("the Regulations.") The parties identified the remaining relevant issues for determination as follows:

(i) Were the consultation requirements under Schedule 3 of the Regulations fully satisfied?
(ii) Were the costs of the works reasonably incurred?
(iii) Whether any parts of the works that were carried out were "over specified and unnecessary."
(iv) Were the professional and Council's fees reasonable?

4. Having heard evidence and submissions from the parties and considered all of the documents provided, the Tribunal has made determinations on the various issues as follows.

The Tribunal's decision

5. The tribunal considered the consultation requirements and the chronology of events. It was satisfied that the Council had adopted the correct procedures. Furthermore it was satisfied that the Council had complied with the spirit of the requirements, as it was evident that attempts were made to keep the lessees informed and the Council did have some regard to the observations made. The Council agreed to delay the start of the work whilst discussions continued. It was accepted that there were instances where the Council failed to respond to observations made within 21 days. Nevertheless the Tribunal is satisfied that the lessees were given sufficient opportunity to raise their concerns. The council, whilst being fully aware of those concerns, decided to continue with the entire programme of works as it was entitled to do. The consultation process is exactly that and does not require the council to do other than consider the representations made by the lessees

Over Specification of the Work/or Unnecessary work.

6. Under this heading the Applicants asserted that the costs incurred in respect of roof works and scaffolding, drainage works and Garchey system were not recoverable because the costs were not reasonably incurred.

The Council received two reports from roofing specialists in 2009. Neither report expressly stated that the roof had failed. A schedule of photographs was produced. The lessees' position was that the works to the roof were not necessary. There were no complaints of water penetration into any flat, and although there was some deterioration to parts of the roof, remedial work was not immediately necessary. The Council's position was that the existing weathering system to the flat roof had reached the end of its useful life and was showing signs of defects. It was accepted that the roof did not require full renewal. Indeed Mr Simpson, in evidence accepted that it would have been possible for the Council to carry out patch repairs to the roof coverings. The experts instructed by the Council recommended an overlay of high performance mineral felt on the basis that it would prolong its integrity and the work is subject to a 20-year guarantee.

The final cost of the roofing work was £67,110.31. Whilst the Tribunal had some sympathy with the lessees' position, there was insufficient evidence upon which it could find that the Council had acted unreasonably in carrying out the roof work. The reports identified some defects, patch repairs had been carried out previously and the roof was nearing the end of its economic life. The Tribunal was not entirely convinced from the reports and photographs that the roof was in need of immediate repair as there were no reported leaks, but the Tribunal' judgement was that the Council had not acted unreasonably in carrying out the works which had resulted in a better quality roof covering with the benefit of a 20 year guarantee. The Tribunal has taken into account in reaching its decision that the Council is entitled under the terms of the lease to carry out not only repairs but also improvements.

The Applicants also challenged the reasonableness of these costs on the basis that the final cost was £11,406.22 more than the contract sum proposed. The Tribunal accepted the Council's argument that this was due to the re-measuring of the work that is ordinarily carried out upon completion. The fact that the estimate was under measured has no effect on the final cost which reflects the actual cost of the work done.

With regard to the scaffolding, the lessees' argument was twofold; firstly that the cost increased because there was some delay in completing the work and secondly that the amount of scaffolding was excessive..

The Tribunal found that the Council accepted the lowest tender from BCM for the scaffolding, that the price was fixed regardless of the delay and that the final account was £28,037.26 some £339.39 less than the estimate. It was explained that St Peter's Terrace is made up of four roof areas. Only one building was redbrick which required rendering and full scaffolding in order to carry out that work. The other blocks did not require rendering and therefore did not require full scaffolding for that purpose. Consequently the scaffolding

was erected in order to carry out the roof work. It was therefore misleading for the Council to assert that by carrying out the roof repairs at that stage, savings had been made by utilising the scaffolding already erected. However, since we have found that it was reasonable for the Council to carry out the roof works in accordance with the landlord's right to carry out improvements under the terms of the lease , and the cost of the scaffolding has not been shown to be excessive we find that the cost was reasonably incurred.

Garchey system and drainage work

7. The Applicants argued that these works were over specified, excessive and that the Garchey works, which were undertaken at the same time as the drainage works, were consequential to the 2009 works to the kitchens of the tenanted flats under the Decent Homes programme, but fell outside the scope of that programme. They added that in their view the health and safety reasons given for undertaking the work were not justified. Furthermore they queried the extent of the work done as they stated that they were only aware of 4 pits which were filled in whereas they had been charged for 6. They said that the extent of the work done did not justify the expenditure incurred. Mr Simpson gave detailed evidence about the history of the Garchey drainage system and the work that was carried out. He presented plans showing the layout and extent of the system which identified the locations of 6 pits. He said that the waste macerators within each kitchen of the tenanted dwellings were removed under the internal works programme in 2009. In 2010, the work undertaken comprised the decommissioning of the existing Garchey drainage system, the decommissioning of all 6 pits and their back filling/reconfiguration together with the decommissioning of the associated siphon runs, pit and excavation and repairs to existing drainage and new drainage works. The final accounts included a cost of £154,684.57 for these works. The cost of the Garchey works alone was ££90,714.69 and drainage was £63,969.88. The Council argued that the work was necessary because, although the system had ceased to be used for solid waste, grey wastewater from the kitchen sinks continued to fill the waste pits thus creating a health hazard. It was asserted that defects to the drainage system and collapse of drains led to blockages. Ms Repaci said that she was only aware of one incident of blockage over four years. Mr Simpson explained that concerns were also expressed about the methods used by contractors to clear out the blockages. He added that the residents or the Council would not have noticed defects to the drainage because the Garchey pits were pumped out on a regular basis.

In the Tribunal's view, the reasons given by the Council for undertaking the Garchey work at this particular point in time were not compelling. The Council asserted that the maintenance to clear out blockages required a contractor to gain access to the foul chamber and whilst in the chamber stand on the greasy wet floor and rod or jet the pipe work. This was viewed as a health and safety hazard but there was no evidence that blockages occurred regularly nor was it clear to the Tribunal that there would be any major problem if the chambers were simply left in situ collecting grey wastewater. The Bill of Quantities separated the works to the Garchey system and the drainage. This indicated that they were regarded as two distinct separate jobs. The Tribunal considered

that given the reports of collapsed drain runs, it was reasonable for the Council to carry out drainage works.
The Applicants accepted that the Garchey system would need to be removed at some stage but argued that it was not reasonable to carry out the work at the same time as other expensive major works were being undertaken. The Tribunal has some sympathy with this given the size of bill they are facing.

Having considered all the evidence the Tribunal concluded that the works to the Garchey system were a separate self-contained area of work which could have been delayed so as not to overload the Applicants with additional expenditure. However the Tribunal also has to conclude that the Council was entitled to undertake the improvement work at the date and time of its choosing, there was no suggestion that the work had not been carried out to a reasonable standard or evidence that the cost was excessive. Consequently the cost of it was recoverable under the terms of the lease. The question of hardship was not a matter that was argued in detail before the Tribunal and did not appear to have been raised during the consultation period. In the circumstances the Tribunal decided that, notwithstanding the additional financial consequences for the lessees, the costs incurred in respect of the Garchey system have been reasonably incurred and are therefore payable.

Professional fees

8. The contract sum included a 7% fee for Balfour Beatty on each sub contractor's tender to cover overheads and profits. The Applicants challenged the reasonableness of this cost on the basis that the management was poor because they failed to resolve complaints made by the lessee of flat 42 about damage to that flat and because the final cost of the roof work increased due to incorrect initial measurements.
The Tribunal accepts that the management of the major works was not of the highest standard. However since 7% is below the industry norm for this type of project it is satisfied that the fees were reasonably incurred and notes that the Council was able to achieve a significantly lower figure than the norm because the fees were part of the main framework agreement of 2005.

Section 20ZA

9. In the light of the Tribunal's decision that the statutory consultation procedure undertaken by the council was in compliance with the Regulations, the application for dispensation under S20ZA does not proceed any further. However, for the avoidance of doubt, if the Tribunal were found to be wrong in its view on compliance, it would have been satisfied that it would have been reasonable in the circumstances of this case to grant dispensation.

Section 20C

10. As there was no application under section 20C the Tribunal did not consider this.

Chairman Evis Samupfonda

Dated 22nd February 2012

Appendix of relevant legislation

Landlord and Tenant Act 1985

Section 18

(1) In the following provisions of this Act "service charge" means an amount payable by a Tenant of a dwelling as part of or in addition to the rent -
   (a) which is payable, directly or indirectly, for services, repairs, maintenance, improvements or insurance or the Landlord's costs of management, and
   (b) the whole or part of which varies or may vary according to the relevant costs.

(2) The relevant costs are the costs or estimated costs incurred or to be incurred by or on behalf of the Landlord, or a superior Landlord, in connection with the matters for which the service charge is payable.

(3) For this purpose -
   (a) "costs" includes overheads, and
   (b) costs are relevant costs in relation to a service charge whether they are incurred, or to be incurred, in the period for which the service charge is payable or in an earlier or later period.

Section 19

(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 provisions of services or the carrying out of works, only if the services or works are of a reasonable standard;
   and the amount payable shall be limited accordingly.

(2) Where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable, and after the relevant costs have been incurred any necessary adjustment shall be made by repayment, reduction or subsequent charges or otherwise.

Section 27A

(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.

(3) An application may also be made to a Leasehold valuation tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs and, if it would, as to -
(a) the person by whom it would be payable,
(b) the person to whom it would be payable,
(c) the amount which would be payable,
(d) the date at or by which it would be payable, and
(e) the manner in which it would be payable.

(4) No application under subsection (1) or (3) may be made in respect of a matter which -
(a) has been agreed or admitted by the Tenant,
(b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the Tenant is a party,
(c) has been the subject of determination by a court, or
(d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.

(5) But the Tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.

Section 20C

(1) A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a court, residential property tribunal or leasehold valuation tribunal, or the Upper Tribunal, or in connection with arbitration proceedings, are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application.

(2) The application shall be made—
(a) in the case of court proceedings, to the court before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to a county court;
(aa) in the case of proceedings before a residential property tribunal, to a leasehold valuation tribunal;
(b) in the case of proceedings before a leasehold valuation tribunal, to the tribunal before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to any leasehold valuation tribunal;
(c) in the case of proceedings before the Upper Tribunal, to the tribunal;

(d) in the case of arbitration proceedings, to the arbitral tribunal or, if the application is made after the proceedings are concluded, to a county court.

(3) The court or tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances.

Commonhold and Leasehold Reform Act 2002

Schedule 11, paragraph 1

(1) In this Part of this Schedule "administration charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent which is payable, directly or indirectly—
(a) for or in connection with the grant of approvals under his lease, or applications for such approvals,
(b) for or in connection with the provision of information or documents by or on behalf of the landlord or a person who is party to his lease otherwise than as landlord or tenant,
(c) in respect of a failure by the tenant to make a payment by the due date to the landlord or a person who is party to his lease otherwise than as landlord or tenant, or
(d) in connection with a breach (or alleged breach) of a covenant or condition in his lease.

(2) But an amount payable by the tenant of a dwelling the rent of which is registered under Part 4 of the Rent Act 1977 (c. 42) is not an administration charge, unless the amount registered is entered as a variable amount in pursuance of section 71(4) of that Act.

(3) In this Part of this Schedule "variable administration charge" means an administration charge payable by a tenant which is neither—
(a) specified in his lease, nor
(b) calculated in accordance with a formula specified in his lease.

(4) An order amending sub-paragraph (1) may be made by the appropriate national authority.

Schedule 11, paragraph 2

A variable administration charge is payable only to the extent that the amount of the charge is reasonable.

Schedule 11, paragraph 5

(1) An application may be made to a leasehold valuation tribunal for a determination whether an administration 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) Sub-paragraph (1) applies whether or not any payment has been made.

(3) The jurisdiction conferred on a leasehold valuation tribunal in respect of any matter by virtue of sub-paragraph (1) is in addition to any jurisdiction of a court in respect of the matter.

(4) No application under sub-paragraph (1) may be made in respect of a matter which—
(a) has been agreed or admitted by the tenant,
(b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,
(c) has been the subject of determination by a court, or
(d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.

(5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.

(6) An agreement by the tenant of a dwelling (other than a post-dispute arbitration agreement) is void in so far as it purports to provide for a determination—
(a) in a particular manner, or
(b) on particular evidence,
of any question which may be the subject matter of an application under sub-paragraph (1).

Schedule 12, paragraph 10

(1) A leasehold valuation tribunal may determine that a party to proceedings shall pay the costs incurred by another party in connection with the proceedings in any circumstances falling within sub-paragraph (2).

(2) The circumstances are where—
(a) he has made an application to the leasehold valuation tribunal which is dismissed in accordance with regulations made by virtue of paragraph 7, or
(b) he has, in the opinion of the leasehold valuation tribunal, acted frivolously, vexatiously, abusively, disruptively or otherwise unreasonably in connection with the proceedings.

(3) The amount which a party to proceedings may be ordered to pay in the proceedings by a determination under this paragraph shall not exceed—
(a) £500, or
(b) such other amount as may be specified in procedure regulations.

(4) A person shall not be required to pay costs incurred by another person in connection with proceedings before a leasehold valuation tribunal except by a determination under this paragraph or in accordance with provision made by any enactment other than this paragraph.