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Residential
Property
TRIBUNAL SERVICE

LONDON RENT ASSESSMENT PANEL
LEASEHOLD VALUATION TRIBUNAL

Case Reference: LON/00AH/LSC/2009/0645

DECISION OF THE LEASEHOLD VALUATION TRIBUNAL ON AN APPLICATION UNDER S.27A LANDLORD AND TENANT ACT 1985

Applicant / Landlord:	STEPHEN GEOFFREY CLACY WENDY JEAN NUNN
Represented by:	DR B McEVOY AGENT AND PROJECT MANAGER
Respondent / Tenants:	JENNIFER JOHANNA BYRNE and Others
Premises:	39 CENTRAL HILL, LONDON SE19 1BW
Leasehold Valuation Tribunal:	Ms F Dickie, Barrister (Chairman) Ms M Krisko, FRICS Mr A Ring
Date of Hearings:	8th December 2009 7th February 2010
Date of Decision	22nd March 2010

Summary of Determination

The Tribunal finds the cost of the Phase 1 works is reasonable . The fire protection measures to non-demised parts of the building are in principle recoverable as service charges. The Application as it relates to the payability and reasonableness of Phase 2 costs is a nullity as the consultation process had begun again. No application was

before the Tribunal regarding the payability of Phase 1 costs, and so the Tribunal could make no determination on that matter.

Preliminary

1. By an application dated 1st October 2009 the Applicant freeholders of this Victorian house converted into 9 flats sought a determination of the payability of service charges. During the course of major refurbishment and redecoration works consulted upon (known during the course of the hearings as Phase 1), serious dry rot was discovered affecting the rear of the building. Without further consultation, the Landlords carried out additional works within Phase 1 to address this dry rot. On discovering yet more extensive dry rot requiring remedial action, and being asked by the London Borough of Croydon Building Control Department to carry out certain passive fire protection measures, the Landlords then consulted on these further works (known as Phase 2) by serving a Notice of Intention dated 26th August 2009.

2. The Landlords' application was properly construed to relate only to the payability and consultation process in respect of the Phase 2 works. Directions on the application were issued by the Tribunal on 15th October 2009, and specifically related only to proposed works, and did not refer to the works already carried out. The issues identified for determination were:

   (a) Whether statutory consultation has been correctly carried out in relation to proposed fire safety works and proposed works to remedy dry rot.

   (b) Whether the costs can be properly recovered from the leaseholders under the lease as a service charge.

3. In the application the Landlords confirmed they would not be seeking to recover the costs of these proceedings through the service charge account. An application by the Tenants under s.20C to prevent them from doing so was therefore not applicable.

4. The Tribunal has not carried out an inspection. The matter was listed for a hearing that took place on 8th December 2009. At that hearing the Tenants raised matters which included a challenge to the reasonableness of the service charges claimed in respect of both Phase 1 and Phase 2 works. However, this issue was

not at that time before the Tribunal on the Landlords' application, though Mr Clacy consented to the Tribunal considering this issue. At the conclusion of the evidence on 8th December 2009, the matter was adjourned upon further Directions from the Tribunal for the parties to prepare Statements of Case concerning the reasonableness of the service charges claimed. The adjourned hearing took place on 8th February 2010 where the Tribunal heard evidence on that additional issue.

5. In correspondence dated 3rd April 2009 to the Tenants Mr Clacy had acknowledged the need for "clearance" from the Tribunal in respect of the dry rot works carried out under Phase 1 (under s.20ZA of the Act, an order from the Tribunal dispensing with statutory consultation in order that these costs would not be subject to the statutory cap of £250 per leaseholder). He expressed his intention to apply for the same but did not do so. The Tribunal could not hear such an application at the 8th December 2009 hearing if made that day because not all of the Leaseholders were represented to consent to shortened notice of hearing. Whilst Mr Clacy was invited by the Tribunal at the 8th December 2009 hearing to make s.20ZA applications , which could be heard on the date of the adjourned hearing of his s.27A application, he did not do so. The Tribunal has no jurisdiction to determine the validity of the Phase 1 consultation process in the absence of an application as to the payability of those costs under s.27A. Nevertheless, the Landlords have effectively acknowledged the need for a s.20ZA application in respect of the additional Phase 1 works. For the benefit of the parties this Tribunal agrees such an application is required (those additional works not being covered by the statutory consultation undertaken in respect of "refurbishment and redecoration", being of a wholly different nature and increasing the costs substantially), and that unless dispensation is granted those additional costs are irrecoverable by statute.

6. During the first hearing Mr Clacy acknowledged that the Phase 2 consultation process was defective (there had been only a 1 stage consultation procedure and the Notice was not restricted to works to the common parts recoverable as service charges but included also works to demised flats). However, during the period of the adjournment, he recommenced Phase 2 consultation with a Notice of Intention dated 24th December 2009. So far as his application sought from the

Tribunal a determination as to the validity of the Phase 2 consultation process, that issue is now a nullity.

7. Mr Clacy's position by the time of the second hearing was that he would not commence Phase 2 and spend any further money at the property until the conclusion of the Tribunal proceedings when the issue of costs has been resolved. The Tribunal was perplexed by this position, since he chose not to apply for dispensation from the consultation procedure in respect of those works, though the Tribunal had advised him at the hearing of 8th December of his right to do so and he had acknowledged the urgency of these works as early as April 2009 when he said he would be applying to the Tribunal for dispensation from consultation.

8. Ms A Lewis, the leaseholder of Flat 8 attended the hearing on 7th December 2009 and her father Mr R Lewis represented her as well as Ms Clark of Flat 5, Ms Byrne of Flat 6 and Ms Banfield of Flat 9. At the hearing on 8th February 2010 Mr R Lewis again presented the case on behalf of the Respondents, now representing 6 of the 9 leaseholders (Ms Lewis and Flats B, 4, 5, 6, 8 and 9). Mr S Clacy appeared at both hearings, presenting his case jointly with his property manager Mr B McEvoy.

The Lease

9. Under the Paragraph (5) of the Sixth Schedule of the sample lease provided for Flat 6 the Landlord covenants that:

   (a) In every fourth year of the term to paint all the outside wood and metal work of the demised premises usually or requiring to be painted with two coats of good quality paint in a proper and workmanlike manner

   (b) from time to time and at all times during the said term the Lessor will well and substantially repair up hold decorate support cleanse maintain drain amend and keep the structure of the Building and in particular the roof and foundations thereof and all new buildings which may at any time during the said term be erected on all additions made to the demised premises and the fixtures therein and all party and other walls and sewers drains pathways passageways easements and appurtenances thereof with all necessary reparations cleansings and amendments whatsoever

   And Paragraph (4) of the Seventh Schedule provides:

The demise shall include one half part in width of all the internal walls of the demised premises and including all windows and the glass therein of those parts of the walls of the demised premises which at the date hereof do not adjoin any other building or premises.....

Applicants' Case

10. During a review of the property the Property Manager Dr MacEvoy noted that the building was in need of some refurbishment and decoration. A letter advising the Tenants that works were proposed (external refurbishment, redecoration and fire safety) was issued to them dated 17th April 2006. This letter advised of the statutory consultation process that Mr Clacy intended to follow. No responses were received. Mr Clacy considered that he had complied with the statutory consultation procedure firstly by issuing a Notice of Intention dated 2nd January 2007 which referred to and thus incorporated the contents of the letter of 17th April 2006, and enclosed a draft specification of works and invited the nomination of contractors by 2nd February 2007. He said he received 3 written submissions in this period – 2 of a general nature from Tenants who had since sold their flats and 1 from a Tenant who expressed full support for the works, and did not receive a letter from Ms Daniels dated 8th January 2007 for which there was no proof of posting. The second consultation notice was dated 6th November 2007 which set out the results of the tender process and enclosed copies of the 2 cheapest tenders and invited comments and requests for further tenders within 31 days, by 7th December 2007. Mr Clacy advised of his intention to proceed with the quote from Inside Out in the sum of £80,595.00 excluding VAT, surveyor's and management fees.

11. Mr Clacy wrote again to all the Tenants on 28th December 2007, responding to email observations received from Ms Lewis outside of the statutory consultation periods and referring to the appointment by a number of the Tenants of Mr Banfield, a surveyor and the father of Miss Banfield (Flat 9), to represent their interests. In response to representations by Mr Banfield, Mr Clacy wrote again to all the Tenants on 25th March 2008 agreeing to some adjustments to the specification and reducing the cost of the works to £77,795 (excluding VAT, management and surveyor's fees). It was intended that scaffolding would be erected in the week beginning 19th May. Work thereafter commenced.

12. Some works were completed, but major additional items were identified whilst the builders were on site:

    (a) Works to front entrance area

    (b) Fire safety

    (c) Drainage

    (d) Dry rot identified found in around August 2008 affecting flats 4 and 6 (though various items of correspondence refer to this rot having been found first in flats 4 and B).

13. Mr Clacy wrote to the Tenants on 14th September 2008 advising them of the current position and the need for the work to remedy the dry rot. He decided not to put the work out to tender but to engage the same contractors on a day rate to carry it out. He provided an estimate that the total costs would be £12,000 to £15,000 more than the original tender figure, exclusive of VAT. There was no statutory consultation. In correspondence to the building insurance company Mr Clacy referred to having pressed on with the works due to the personal circumstances of the lessees (one was expecting a baby and one had been left without a roof), though an insurance claim was rejected.

14. Unfortunately, during the progress of these additional works more extensive dry rot was found at the rear of the building when the bedroom of Flat 6 was opened up. On 3rd April 2009 Mr Clacy wrote to the Tenants to advise that a specification of works had been put to tender, the lowest price being from Inside Out for £36,520.50. He also referred to fire protection measures requested by Building Control. He confirmed his belief that the circumstances applied for dispensation under s.20ZA from the consultation procedure, and that he intended to seek such dispensation from the Leasehold Valuation Tribunal in relation to this further dry rot work and "clearance" for the additional works already carried out in Flat 4 and Flat B (Phase 1). He never did, though he repeatedly referred to his intention in correspondence. When his Application was finally made it was under s.27A of the Act, not for dispensation under s.20ZA.

15. Mr Clacy issued a Notice of Intention to the Tenants dated 26th August 2009 in respect of the fire protection measures, which had been required owing to the removal of the exterior fire escape stairs. He sought from the Tribunal a

determination that these costs were recoverable under the lease. However, as set out in paragraph 6 above, he conceded at the hearing that this notice was not compliant with the statutory consultation requirements. In a letter to the Tenants of Flat 6 dated 1st October 2009 Mr Clacy states that he has been advised by his solicitor to safeguard his interests by applying to the LVT in respect of the fire measures and additional dry rot works.

16. Mr Clacy observed that all of the timbers affected by dry rot and the roof coverings had been replaced nearly 18 months previously, before the Respondents had raised arguments over historical neglect, and that he was now prejudiced in answering their complaints. He no longer had physical evidence of the allegedly negligent repairs previously carried out, and for this reason and because of the delay he could have no remedy against the builders. The Tenants had been in agreement with the works until the issue of dry rot arose, and had not disputed them owing to the alleged historical neglect. Until the Applicants' submission to the LVT dated 1st October 2009, he argued, there had been no indication from any of the lessees that they considered the dry rot to be the result of the Landlords' negligence. His case was that the only works not tendered for were those covered in his letter of 14th September 2008, when the leaseholders were fully informed on quantum and offered the opportunity to appoint their own surveyor.

Respondents' Case

17. Ms Lewis contended that her father, on making enquiries of the Applicant prior to her purchasing the flat, was advised by Mr Clacy that the proposed major works were for outside decoration, including the fire escape, repointing etc., and that the cost to each leaseholder could be £3000 each (£27,000 in total). The estimated costs were now running at £22,000 per lessee (£197,000 in total). Had Mr Clacy said that it was possible for significant additional expense to arise from the exercise, Mr Lewis would not have recommended that she purchase the flat. Mr Lewis believed Mr Clacy had completely understated the extent of both repair and decoration work due. Ms Lewis impressed upon the Tribunal the excessive delay in completing these works, and the ongoing stress and inconvenience being caused to the Tenants. Ms Byrne of Flat 7 had been forced to live in a single room since February 2009.

18. Ms Lewis complained that Mr Clacy had not had regard to email communication, had ignored requests to meet and written observations. In particular, she argued for a set off against the service charges owing to the Landlords' breach of their obligations under the terms of the lease. Ms Lewis observed that the total Phase 1 costs up to and including the first dry rot works were £135,894. The original contract, after some adjustments made upon the Tenants' observations, had been for £77,795. When she had purchased her flat the final price had been agreed with the vendor on the basis of the forthcoming redecoration and refurbishment work. That far more work was required was in her view because Mr Clacy had not maintained the property in anything like a decent condition and there had been virtually no preventative maintenance work carried out since 1993 (when damp was identified but ignored). The Tenants accepted that the passive fire measures do need to go ahead. They thought the Landlords should contribute to the dry rot works owing to their failure to maintain.

19. The Respondents did not dispute the extent and cost of the major works now proposed, other than in certain respects addressed below in paragraph 24. Their supplementary statement of case expressly confirmed "We are not stating that the work was/is unnecessary or that the costs of the work, with a few exceptions, are unreasonable".

20. Mr Lewis argued that the cost of the works was not a reasonable charge to the tenants since they were required as a result of historic neglect of the building and the Landlords' breach of covenant to repair. Had earlier steps been taken to remedy damp, particularly to the flat roof, he submitted that these large scale repairs now being undertaken would not be required. He referred to the Landlords' obligations under Clause 5(a) and (b) of the lease. In particular, he relied on (1) the Applicants' failure to maintain the external decoration of the woodwork in accordance with the terms of the lease and (2) the failure much earlier to address the condition of the flat roof, which the Respondents contended was the likely source of the dry rot. Mr Lewis referred to a 1993 surveyor's report obtained by the Applicants which stated "The builder has been told by the owner of the flat under this roof that there is evidence of damp which could be caused by the condition of the roof or coping", and recommended consideration of relaying the roof etc. as ponding was observed which would "eventually lead

to deterioration of roof finish with resultant leaking." Mr Lewis gave an account of the history of neglect and lack of preventative maintenance since that report.

21. Mr Lewis argued that, though prior to purchasing their flat each Respondent had had the opportunity to obtain their own survey, many of the defects could not reasonably have been identified by them since they were internal to other flats or not visible on inspection (such as the dampness under the flat roof). He acknowledged that other defects, such as the condition of the pointing and South Vale wall could have been identified on inspection.

22. It was also argued for the Respondents that the delay in ensuring final and effective treatment of the dry rot since first confirmed in August 2008 would have increased the scope of such works now necessary, since the dry rot would have had time to spread further. However, the Respondents produced no expert evidence in support of this contention. The Respondents observed that the tender process began in April 2006, yet nearly 4 years later the process was not complete. Indeed, a letter from Ms Byrne was produced in which she confirmed she had complained to Mr Clacy about damp patches in her ceiling from late 2004, and only a temporary roof repair was carried out in November 2006. Colin Hutton, surveyor from Renlon, carried out site inspections in respect of dry rot outbreaks in August 2008 and February 2009, and he believed "the outbreaks were a result of water ingress via defective flat roof coverings. However, any source of moisture which may raise the moisture content of timbers in excess of 20-22% must be considered. This may include cracks in external render, defective rainwater goods, porous pointing, as well as internal plumbing or services leaks, spillage, flooding etc."

23. Whilst Mr Clacy understood Inside Out would not increase their quotation since the abandoned consultation process in 2009, Mr Lewis argued that the VAT increase owing to the delay (from 15% to 17.5% on 1st January 2010) should not be borne by the Respondents. At the hearing Mr Clacy conceded this point.

24. The Respondents raised the following discrete charges as unreasonable or unnecessary. The Applicants' position is recorded in the second column and the Tribunal's determination in the third:

	Applicants' challenge to reasonableness of charges	Respondents' response	Tribunal's determination
i.	Flat 8 charged £245 to repair a toilet leak	Works within demise of Flat 8 charged to service charge account in error. Contractors to refund Landlord sum of £245 plus VAT and to pursue payment from Tenant who instructed them.	Item agreed to be irrecoverable as service charge. Tribunal has no jurisdiction
ii.	an item allowed for work on window in Flat 8, when contract specification included work on "all timber windows" (total cost £592). Some leaseholders had relatively new windows, requiring a reduction in overall contract cost.	Bathroom sash in flat 8. Tenant had requested work to this window which had no weights or pulleys. Specification did not include work to sash boxes, and provision of new weights and pulleys. At hearing provided written estimate from independent contractor Vidette £520 plus VAT. Window and timber repairs should be allocated between lessees in accordance with lease. Revised spreadsheet of adjusted costs produced.	Para 4 of 7th Schedule – all windows and glass therein demised to the leaseholders. This is not therefore a service charge item and is not payable as such.
iii.	Furniture removal costs excessive	Tenant to remove furniture themselves, who must accept financial responsibility for any delays arising due to failure	Item agreed

		to do so.	
iv.	Surveyor /advisers and management fees unreasonable. Rates of 10% and 5% respectively agreed, but should be applied to final costs determined as reasonable by Tribunal.	Management charges waived on works over and above those agreed in original specification as per letter 16th November 2009.	Percentages not in dispute.
v.	Some leaseholders have been paying service charges by direct debit	Any surpluses will be set against payment for works for lessees concerned.	Item agreed
vi.	reason for additional passive fire protection measures is requested	This is subject to the restarted consultation. Works required under The Regulatory Reform (Fire Safety) Order 2005 and specification agreed by the District Surveyor for LB Croydon.	Statutory consultation process pending. See Preliminary above
vii.	Project cost as per notice 25th March 2008 disputed as it does not include reductions for Profit and Attendance elements of item 41 which was excluded from the major works.	Landlord conceded. Calculations revised.	Item not in dispute
viii.	Cost of item A46 too high in schedule of works accompanying invoice of Inside Out for works 05/08 to 02/09. Flat 5 recently received a (verbal) estimate	Landlord considered cost reasonable, as supported by report from Range Property Consultants and quotation from Andy's Property Maintenance.	The oral evidence of the Tenants did not persuade the Tribunal that the cost of this item was unreasonable. It found the Landlords' case,

of £350 plus VAT for this work charged at £600 plus VAT.		supported by documentary evidence, more persuasive

25. The Tenants raised further costs as unreasonably incurred as the work was unnecessary and/or irrecoverable under the terms of the lease. The issue of recoverability of the cost of the Phase 1 works was not before the Tribunal upon the Landlords' application or the Tribunal's directions to determine issues of reasonableness. Those further costs were:

ix. Dig out and replace front parking area not necessary	Existing tarmac had reached end of its life. Recoverable under 5(b) Sixth Schedule.	There is no evidence that the Tenants raised objections to this item of the specification during the consultation process or until these proceedings were issued. They produced no evidence to demonstrate that the work was unnecessary or unreasonable. Whilst the issue of recoverability of Phase 1 works was not strictly before the Tribunal, it notes that these items are recoverable under Para 5(b) of the Sixth Schedule as long as not part of the demised properties.
x. Replace front path not necessary	Slabs cracked and uneven. Height of risers constituted a trip hazard. Recoverable under 5(b) Sixth Schedule.	Ditto
xi. New railings not necessary	Installed on safety grounds to prevent 3 metre fall into	Ditto

		light well. Recoverable under 5(b) Sixth Schedule.	
ix.	New base for bins not necessary	Solid base required for recycling boxes and wheelie bins. Recoverable under 5(b) Sixth Schedule.	Ditto

Determination

Recoverability of costs of fire protection works

26. The Landlords have no right under the lease to recover as service charges the cost of carrying out fire protection measures within the demised flats. The Landlords relied on the covenants in the lease as requiring the Lessee to carry out these works, and on the Landlords' own purported powers to carry out such works in default. Such costs to the demised premises must be identified as separate from the service charges and from statutory consultation procedure.

27. The Landlords did not produce evidence that the local authority had required these works to be carried out. For instance, no Improvement Notice was produced. The Tribunal was not asked to determine, and could not determine on the available evidence, whether all the proposed fire protection works to the common parts were necessary or reasonable. However, the Tribunal is satisfied that, having removed the fire escape, the introduction of new fire protection measures to the common parts of the building required by the local authority would, in principle, be recoverable as a service charge item under paragraph 5(b) of the Sixth Schedule to the Lease as repairs and amendments. However, to any extent that those works were to exceed local authority requirements they could be classified as improvements and therefore not recoverable under the lease.

Reasonableness

28. The Tribunal's jurisdiction in determining the reasonableness of the costs of the Phase 1 works is limited to the items disputed. Its determination regarding the discrete items challenged is contained in the table above. The Tribunal is unable to determine the reasonableness of the cost of the proposed Phase 2 work in the

absence of relevant evidence since up to date estimates are not available, the Landlords having recommenced the consultation procedure for these urgent works. In particular, there is no dispute that the works now proposed are necessary given the facts as they are today. The only other issue advanced for the Tribunal's determination therefore is the question of historic neglect.

Historic Neglect

29. The Land's Tribunal decision in Continental Property Ventures Inc –v- White (Decision number LRX 60 2005) confirmed the LVT's power to determine a set off. From paragraph 15 of his decision, dealing with the issue of jurisdiction, His Honour Judge Rich QC confirmed:

> *"I accept that the LVT has jurisdiction to determine claims for damages for breach of covenant only in so far as they constitute a defence to a service charge in respect of which the LVT's jurisdiction under s.27A has been invoked... damages for breach of covenant other than the covenant to repair. Those are not matters within the jurisdiction of the LVT even as extended under the Act of 2002, unless breach of covenant can be pleaded as an equitable set-off.... Although the LVT's jurisdiction has been vastly extended, it does not follow that the matters in respect of which the LVT ought to determine to exercise such jurisdiction have been equally extended... the LVT may, as a matter of its discretion, think it inappropriate to exercise its jurisdiction, which it holds concurrently with the County Court, at least where one party asks it not to do so, in a matter where the LVT accepts that the nature of the issues makes a court procedure more appropriate."*

30. Any action by a Tenant in respect of the additional cost of these major works against the vendor, in particular for the dry rot, would be subject to the principle of caveat emptor ("buyer beware"). As purchaser, each assumed the risk that the property may have defects, though fraud and bad faith are not protected by the doctrine. Tenants had the opportunity to make enquiries from the Landlords and scrutinise any responses and reports obtained. To the extent that the Tenants seek to rely on the Landlords' purported misrepresentation in response to enquiries to the freeholder, the Tribunal has not exercised jurisdiction to determine the matter.

31. His Honour Judge Rich QC in *Canary Riverside Pte v Schilling* (LRX/65/2005), in making comment regarding examples of the types of set off which a Leasehold Valuation Tribunal ought not to accept jurisdiction to consider said at para 43:

"... voidability for mistake, forgery or misrepresentation, I do not doubt. Such matters are better determined under Court procedures and by judges, rather than by specialist tribunals, encouraged to adopt comparatively informal procedures. I should take the same view where the LVT has jurisdiction to determine only one aspect of a matter better determined as a whole. "

32. There has been no application to adjourn these proceedings to the County Court, and indeed the Tenants have framed their arguments on historic neglect as ones affecting the reasonableness of the service charges. Their case preparation and lack of expert evidence could not support a claim for breach of covenant resulting in quantifiable financial loss. There was nothing but broad observation that the cost of the repairs must have increased owing to neglect, and that the current costs were therefore unreasonable. However, whilst there was evidence that the work had been required for some time, and the Tribunal was concerned about the delay in completing this work, there was insufficient evidence, and no expert evidence, of any extent to which it had escalated as a direct result or that a financial value could be placed on the consequences of neglect. Thus the Tenants' general arguments about reasonableness failed to make out what is more properly considered as a quantifiable set off against service charges owed. In the Tribunal's determination they have not established that the works are unreasonable or the costs unreasonably incurred. Whilst the Tribunal has significant concerns about the Landlords' decision to treat the dry rot in Phase 1 by paying contractors an open-ended day rate without further consultation, the Tenants expressly did not challenge that these works were unnecessary or the costs unreasonable.

33. This Tribunal has not determined the payability of the Phase 1 costs. payability. Expert evidence would be required and a more formal approach to proof taken to make out the alleged breach of contract (and misrepresentation). The Tribunal considers these issues are better determined in the County Court. However, the Tribunal is mindful of the argument in any such claim based on Mr Clacy's observation that these complaints have first been raised at a time when certain

evidence of the condition of the building at the relevant time no longer exists, and that he would therefore be prejudiced.

Signed .....

22nd March 2010