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Residential Property
TRIBUNAL SERVICE

LONDON RENT ASSESSMENT PANEL
LEASEHOLD VALUATION TRIBUNAL

Case Reference: LON/00AX/LSC/2007/0002

Landlord and Tenant Act 1985 sections 19 and 27A

Applicants:	Mr R and Mrs B Eyre-Brook
Respondent:	Royal Borough of Kingston upon Thames
Premises:	Ground Floor Flat (Flat 2), Fishponds House, 219 Ewell Road, Surbiton, Surrey KT6 6BE
Appearance for Applicants:	Mr R and Mrs B Eyre-Brook
Appearance for Respondent:	Mr G van Tonder, counsel, Mr M Anderson, interim property services manager Mr D Fellowes, assistant in-house solicitor
Tribunal members:	Mr T J Powell LLB Mr M Taylor FRICS Ms S Wilby
Date of Application:	2 January 2007
Oral Pre-trial Review:	8 February 2007
Hearing:	8 May 2007
Decision:	31 May 2007

Decisions of the Tribunal

(1) The Tribunal is not in a position to make any decision in relation to possible future major works, which may or may not be required to deal with problems of subsidence;

(2) The Tribunal determines that the additional charge of £4,498.86 for the works started in the service charge year 1998/1999 is payable by the Applicants and reasonably incurred;

(3) Similarly, the charge of £3,616.21 for the works carried out in the service charge year 2001/2002 is payable by the Applicants and reasonably incurred;

(4) The Tribunal determines that it is just and equitable in the circumstances of this case to make an order under section 20C of the Act that none of the Respondent's costs should be passed through the service charge;

(5) The Tribunal requires the Respondent to refund to the Applicants the £350 paid in fees, within 28 days of the date of this Decision.

Background to application

1. The Applicants seek a determination under section 27A of the Landlord and Tenant Act 1985 as to whether certain service charges for works carried out in the service charge years 1998/1999 and 2001/2002 are payable and reasonably incurred, and what would be the reasonable sums to be recovered by way of service charges in respect of major works yet to be incurred.

The property

2. The property comprises the ground floor of a part-Georgian, part-Victorian detached house set in the middle of a public park owned by the Respondent council. The house was built in various stages between the mid-18th century and the early 20th century. The house is situated at the top of the slope above a pond from which the house takes its name. The house was divided into two flats in the 1950s. The first-floor flat is rented from the Respondent council, who are the freeholders and the Applicants are leaseholders of and occupy the ground floor flat.

3. The Tribunal did not consider that an inspection was necessary and neither party requested one.

The lease

4. The lease runs for a term of 125 years from the 23rd August 1982. Structural defects to the building are expressly set out in the seventh schedule as follows: "rising dampness in external walls, cracking in

area of rear window facing rear garden. Structural movement to external brickwork of circular bay window to bedroom."

5. By clause 2 of the lease the lessee covenants to pay the service charge as defined in the Fifth Schedule, under which the lessee shall pay 50% of the Lessor's expenses of carrying out the repairing obligations in the Sixth Schedule and a reasonable proportion of certain other expenses.

The law

6. Service charges and relevant costs are defined in Section 18 of the Landlord and Tenant Act 1985 (as amended). The amount of service charges which can be claimed against leaseholders is limited by a test of reasonableness which is set out in Section 19 of the Act. Under Section 27A (1) an application may be made to a Leasehold Valuation Tribunal for a determination whether a service charges is payable and, under subsection (3), whether an advance service charge is payable.

Background to the application

7. The Respondent underpinned the property in 1990, but the extent of the underpinning is not fully known, as the Respondent's records are incomplete. At the time that the Applicants purchased the property in 1997 it appears to have been in a stable condition. The Respondent undertook major external repairs and redecorations in 1998/1999 with remedial work due to faults in design and workmanship continuing until 2001/2002. Further repairs and remedial works were carried out in that year.

8. Unfortunately, in the years following the Applicants' purchase of the building they began to see signs of further subsidence. These became most severe in the summer and autumn of 2003. The bundle of documents prepared by the Applicants contained various reports about the structural movement, but at the current time only monitoring is being carried out and there is no final programme to address the problem.

9. The Applicants are very concerned indeed about the effects of the subsidence on their home. They considered that many of the other service charge issues arise from the movement of the building, but their greatest concern is that there is no current progress and no programme of remedial works to prevent further subsidence and put right the damage already caused.

10. Against this background, the Applicants received demands in early 2006 for the payment of works which had been undertaken in 1998/1999 and 2001/2002. The Applicants questioned whether the Respondent was entitled to raise these charges so long after the event and, if the Respondent was so entitled, whether such charges were

reasonable and/or whether the works to which they relate it were of a reasonable standard.

The hearing and the Tribunal's findings

Reasonable cost of future major works (subsidence)

11. As explained to the parties at the outset of the hearing, the Tribunal was unable to deal with this issue. There is no doubt that structural movement is affecting the property. This has been particularly severe since 2003. The movement appears to be seasonal, with the cracks enlarging during the summer and closing during the winter. The problem is currently being monitored. The council has obtained a survey report which recommends substantial underpinning on piles driven into the ground. The Applicants have obtained their own expert's report which disagrees with this proposed solution. There is no agreed programme of remedial works and no future costing available. There are only suggestions as to the appropriate investigations which should be carried out in order to identify the cause of the subsidence.

12. The Tribunal is therefore unable to make any kind of decision in relation to the probable future major works. It may well be that the cost of any future works are covered by the Respondent's buildings insurance, in which case the Applicants may only be liable to pay half of the excess of that policy. The Applicants have received an insurance claim form and the Tribunal would encourage them to submit that to the insurers without delay.

Additional charge for the service charge year 1998/1999

13. In September 1998 the Respondent sent the Applicants a formal notice giving details of proposed external repairs and redecorations. The documents estimated that the Applicants' contribution to the works would total £18,441.10.

14. The Applicants gave evidence, which the Tribunal accepted, that there were major problems with the work carried out by the contractors Hastain Special Maintenance Works & Building Development Ltd ("Hastains"), under supervision by the project managers Serco Property & Design ("Serco"). Mr Eyre-Brook said that the Respondent eventually dismissed Hastains and Serco and appointed new contractors under the supervision of Grove and Millican chartered surveyors.

15. In October 1999 the Applicants received a statement which showed that they had to contribute £17,658.50 for the contractual payments made in 1998/1999 (which the Applicants paid off over 3 years). The statement also informed the Applicant that they would be advised of their contributions towards further contractual payments in the following

summary of costs, which they would receive by the end of 2000. However, it was only in February 2006 that the Applicants received a statement showing their final contribution towards the contractual payments in relation to those works as £4,498.86. It appeared that the Respondent had only made those payments in 2004/2005.

16. The Applicants had no complaints about the consultation procedure under section 20 of the 1985 Act. However, they did complain about the delay in billing them for the cost of works and questioned whether they were liable to pay this further charge, so long after the end of the year in which the work was actually carried out.

17. The Applicants also complained about the quality and effectiveness of the work. Even when it had been completed, there was still water penetration into the conservatory, damp staining in the kitchen, windows which did not function properly and a leaking down pipe near the kitchen. Most of these items were rectified by 2001 or 2002 at the latest. However, water which still apparently penetrates into the kitchen fireplace remains an ongoing problem.

18. The Applicants considered that they should be entitled to compensation for the upheaval caused by the works. They also felt that the delay in invoicing them with the final cost of works pointed to poor management by the Respondent.

19. The Applicants relied heavily on the fact that the contractors Hastains and the project managers Serco were "dismissed" from the project: their work was so ineffective that much of what they did had to be redone.

20. For the Respondent, the witness statement of Mark Anderson gave a detailed explanation of the course of the works and, by reference to copy documents, gave reasons for the delay in demanding the final payment from the Applicants. Mr Anderson also gave live evidence at the hearing. He confirmed that actual completion of the works is recorded as having occurred in mid-April 1999. He accepted that there were a number of defects, which were communicated to Serco, which in turn issued a definitive schedule of defects to Hastains, to be completed by 31 January 2001. Since that deadline was not met the Respondent decided to conclude the contract with Serco and Hastains and to incorporate any outstanding works into a subsequent contract.

21. There was no final certificate of practical completion at that stage. Counsel for the Respondent said that the contractors Hastains were not entitled to payment until that certificate was signed, as it was only the certificate that gave rise to a demand for payment. According to Mr Anderson's evidence, the Respondent ended its professional services contract with Serco in March 2003, at which point all contract material in Serco's possession was delivered to the borough, in two phases in August and October 2003. Thereafter the Respondent employed a consultant to go through the contract materials and eventually agree a

final account with Hastains. A final certificate was therefore issued in April 2004 and paid by the Respondent. The Respondent then wrote to the Applicants on 4 September 2004, advising them that this further (final) contract payment had been made and that details of the amount would follow. It was after this that the Applicants learned of the final payment of £4,498.86 for which they were liable.

Findings of the Tribunal

22. From a review of the documentation, the Tribunal accepts that Serco wrote to Hastains on 12th December 2000 enclosing a certificate of practical completion and a draft final account for agreement, signature and return. That draft account was for £44,548. The Tribunal accepts that the draft final account was not signed by Hastains and returned, possibly because of the schedule of defects which had to be completed by the 31 January 2001.

23. The Tribunal also accepts that the Respondent issued a final certificate in relation to the works on 7 April 2004 for the total sum of £39,548, which is the earlier figure from December 2000 less £5,000 withheld by the Respondent because of remedial works, which were not completed.

24. The Tribunal determines that there was no liability upon the Respondent to pay Hastains the balance of the contract price until the final account was agreed with them. If Hastains had thought that money was due to them earlier, they would have issued an invoice. However, they did not do so prior to April 2004, because they would not have been able to do so without the final certificate of completion.

25. On 1 October 1999 the Respondent had sent the Applicants a statement of leasehold service charges in respect of the major works costs. This statement clearly states in two places that the demand for £17,658.50 was a "part payment". Although it also said that the Applicants would be advised of their contribution towards further contractual payments by the end of September 2000, the evidence was that by June 2000 the need for further remedial works had already been identified. Mr Eyre-Brook was present at a meeting on 22 June 2000 when the defects were agreed and additional costs were indicated as a result of an increase in scope of the original works, later estimated at £4,610.

26. The Respondent issued a section 20 notice in relation to the additional works in September 2000 and again (in relation to a second set of works) in June 2001.

27. The Tribunal accepted the Respondent's explanation for the delays in certifying practical completion of the works and in agreeing the final demand. Mr Eyre-Brook knew from documents he had received and from his meetings with the Respondents and their contractors, that he would have to pay additional sums in respect of the 1998/1999 works.

He was under no illusions that the payment he had made in the sum of £17,658.50 was only a part payment.

28. Until the certificate of practical completion was signed, the local authority had not "incurred" the costs for the purposes of the limitation of service charges under section 20B of the 1985 Act. However, the Tribunal does accept that this is a very long time after the service charge year in which the works were completed and considers that the Respondent should have revealed more information about the reasons for the delay, and should have provided documents which the Applicants requested, earlier than it did.

29. However, having incurred the final costs of the works in April 2004, the Tribunal accepts that the Respondent wrote to the Applicant on 4 September 2004 advising them that a further contract payment had been made and that although the amount is not yet available, details of the Applicants' liability would follow. This letter satisfies the requirements of section 20B of the Act in that, within the period of 18 months from the date when the costs were incurred the tenant was notified in writing of them and that he would subsequently be required to contribute to them through the service charge.

30. With regard to the standard of work carried out by Hastains and the Applicants' claim for compensation, the Tribunal accepted the Respondent's evidence that the Applicants had already received recompense in two ways. First of all there was a £5,000 reduction in the contract price paid to Hastains, with the associated 11.8% reduction in Serco's professional fees (another £590). Secondly, a similar deduction of £6,538 in respect of a "Serco recharge" was deducted from the cost of the second set of works in 2001/2002, which had been notified to the leaseholders in the June 2001 section 20 notice. According to Mr Anderson the Applicants had already received a reduction in their liability for the service charges of about £6,000.

31. The Tribunal was not able to take the question of compensation any further, particularly in the absence of sufficient evidence from the Applicant either in relation to the periods when they had partial or no use of the conservatory, or in relation to the valuation of their loss.

32. Accordingly, the Tribunal determines that the additional charge of £4,498.86 for the works started in the service charge year 1998/1999 is payable by the Applicants and reasonably incurred.

Cost of repairs and remedial works: service charge year 2001/2002.

33. After evidence had been given by Mr Anderson in relation to the late charge of £3,616.21 for the works carried out in the service charge year 2001/2002, Mr Eyre-Brook accepted that he had received notification of the likely costs within 18 months of the final account being paid (the letter dated 4 September 2004) and he therefore conceded that the £3,616.25 was payable by him.

34. In any event, the Tribunal would have found this to be the case for the reasons set out above, if the concession had not been made.

Applications for a refund of fees and costs

35. Regulation 9 of the Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003 allows a Tribunal to order a party to reimburse the whole or part of any fees paid by another party.

36. Section 20C of the Landlord and Tenant Act 1985 Act provides that a Tribunal can make an order preventing the Lessor recovering its costs of proceedings through the service charge, if the Tribunal considers it to be just and equitable.

37. Both parties addressed the Tribunal in relation to this issue. Counsel for the Respondent stated that the application was an entirely misconceived attempt to have the issue of underpinning dealt with by the Tribunal, when it plainly had no jurisdiction. If the Tribunal found against the Applicant, he confirmed that the Respondents would seek to recover its costs through the service charge.

38. For his part, Mr Eyre-Brook complained of poor communication by the Respondent. He had tried to resolve these issues in the past including utilising the Respondent's formal complaints procedure, with no success. There was a history of maladministration of the past works and the appointment of poor contractors and project managers. He said that he had brought the case to the Tribunal to resolve the issues in relation to the late bills. He felt that he did not have any option but to bring the application before the Tribunal. He had attended the pre-trial review and had not been advised that his application was "entirely misconceived" and should be withdrawn.

Decision of the Tribunal as to fees and costs

39. The Tribunal determined that in the past the Applicants had attempted communication with the Respondents, who had not always provided the appropriate answers to their questions. It was only by bringing the application to the Tribunal that they managed to secure the production of relevant documents by the Respondent. They had also managed to open up a line of communication with the Respondent, which had not existed before.

40. The Tribunal agreed with the Applicants that some of the documents which had been produced by the Respondent council were unclear and could have been phrased more helpfully.

41. Although the Tribunal found against the Applicants on the issues, nonetheless it found it just and equitable in the circumstances to make an order under section 20C of the Act that none of the Respondent's costs should be passed through the service charge.

42. In addition, the Tribunal requires the Respondent to refund to the Applicants the £350 paid in fees, within 28 days of the date of this decision.

Chairman: T. Powell
Timothy Powell

Dated: 31st May 2007