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Ref: LON/00AM/LSC/2009/0467

LEASEHOLD VALUATION TRIBUNAL FOR THE LONDON RENT ASSESSMENT PANEL

DECISION OF THE LEASEHOLD VALUATION TRIBUNAL ON AN APPLICATION UNDER ss 27 AND 20C OF THE LANDLORD AND TENANT ACT 1985

Applicant: Mr and Mrs A Brown and Mr P Brown

Represented by: Mr C Ring and Miss L Jago of BPP Advice Clinic

Respondent: London Borough of Hackney (Hackney Homes)

Represented by: Miss A Gourlay of Counsel

Premises: 128 Mount Pleasant Lane, London E5 9JG

Hearing date: 11 March 2010

Members of the Leasehold Valuation Tribunal: Mrs F R Burton LLB LLM MA
Mr W Richard Shaw FRICS
Mr D J Wills ACIB

Date of Tribunal's decision: 28 April 2010

LON/00AM/LSC/2009/0467

128 MOUNT PLEASANT LANE, LONDON E5 9JG

BACKGROUND

1. This was an application dated 24 July 2009, under ss 27A and 20C of the Landlord and Tenant Act 1985, for determination of liability to pay service charges in relation to two contracts for major works invoiced in the year 2009. The relevant Lease, dated 25 March 1991, is between the Applicants and the Mayor and Burgesses of the London Borough of Hackney. The LVT held an oral pre trial review on 8 September 2009 at which the two main issues were identified: (i) the cost of the works (a) to roof and windows (and associated works) invoiced on 12 February 2009 at a total of £17,641.98, and (b) to replacement of the door entry system invoiced on 6 May 2009 at a total of £1,303.65, which were considered to be excessive; (ii) the increase in the costs caused long delay in their execution by the Respondent Council. The case was set down for hearing and the original dates subsequently amended so that the ultimate hearing date was 11 March 2010. The subject property is a 4 bedroom first floor flat in a purpose built block of 20 flats.

2. There is no dispute that the works fall within the provisions of the Lease: clause 3, the Lessees' covenant to pay, clauses 6 and 8 and the Ninth Schedule, which impose on the Lessor the obligations to perform the covenants and obligations in the Ninth Schedule and to manage the Estate and Block "in a proper and reasonable manner" , and for the Lessee to pay for the Lessor's observance of the covenants. The facts of the works are not disputed either: in late 2004 and July 2005 the windows were replaced and building and waterproofing work effected, for which guarantees were supplied. The Block door entry system was replaced in 2008 and certified complete on 21 April 2008. The "crystallised" costs were respectively notified to the Lessees on 12 February 2009 and 6 May 2009. The dispute is entirely about the ultimate costs.

THE CASE FOR THE APPLICANT LESSEES

3. For the Applicants, Mr C Ring of the BPP Legal Advice Clinic submitted that the disputed costs were neither reasonable nor reasonably incurred within the meaning of s 19 of the Act. The costs were unreasonably high and the Applicants had objected to this from the earliest stage. The Applicants were fully aware of their obligation to contribute to the costs of the works but from July 2004 to April 2005 they had repeatedly asked for some justification for the costs proposed and when billed in 2009 they had again sought a breakdown. The only explanations they had received had been at the very late stage of the Respondent's Statement of Case. It was their contention that this should have been received much earlier but whenever they had asked for explanations they had been fobbed off with excuses, such as that the file was too large for convenient access for such explanations to be given. He said that it was the Applicants' case that the quotations had been unnecessarily high in the first place as they themselves had been able to obtain cheaper ones, for example for the scaffolding, which had in any case been up for an unnecessarily long period (3 months before the works and for 3 months after their completion). Their expert report indicated that the costs were unjustified. The Applicants also objected to the fact that there was a charge of 10% of the cost as an administration charge, on top of the 4% already charged for professional fees. They did not consider that this was offset by the 5% discount offered to Lessees if they paid their invoices within 6 weeks of their being rendered. They were also concerned that the bills were issued so long after the works, which had been completed in 2005 but the invoices had not come until 2009.

4. The report referred to had been prepared by Paul Anderson (a Chartered Building Surveyor, a member of the RICS and Chartered Institute of Builders) of Anderson Associates, who had been asked to address 3 questions: (1) the quality and finish of the works; (2) whether the works and costs represented value for money; (3) whether the costs could have been less. He was not however available to be called for examination or cross examination on the Report, which in summary concluded that reactive rather than pre planned preventative maintenance always kept costs down and that it was likely that such a programme had not been in place in the present case, well in advance of the Decent Homes Programme. He identified a delay of 18 months between the original and second tender figures which he considered the Council needed to explain and justify, in particular as there had been an increase in the cost of the roof works of £58,548.10 equating to an increase in the Applicants' bill of

£2,027.55, and had a number of other questions in relation to the delay and provision of capital funding for the works. With regard to the condition of the property and quality of the works Mr Anderson had noted that the precast balcony slabs were in poor decorative order with "peeling flaking paint and algae growth to the face and underside" and the asphalt surfaces were showing signs of deterioration which would allow water ingress. He had supplied some photographs, which indicated that some repairs and redecoration had been undertaken by the Applicants themselves as they had waited so long for the work to be done. He said that the work to the windows had been done to a generally acceptable standard though there were some defects such as open sections and poor mastic pointing which would lead to water ingress and suggested poor inspection and monitoring, as this should have been picked up in final snagging. He was similarly generally satisfied with the roofing although had noted some ponding, which should have been picked up during snagging or at the end of the Defects Period. He had also picked up blocked roof outlets, a gap between the soil vent pipes and asphalt sleeves which would allow water ingress and promenade tiles sunk into the asphalt potentially compromising the water tightness of the asphalt. He reported no repairs to the landing ceilings the poor condition of which was due to leaks from the roof.

5. In conclusion Mr Anderson had said that it was clear that the property was still suffering from lack of maintenance, that significant delays had increased the scope of repairs that would otherwise not have been needed, thus increasing the cost of the work. He considered that the Council had known for some time that work was needed but had not put in place a programme of pre-planned preventative maintenance, and that they were still in breach of their obligations under the Lease. He proposed that the Applicants should offer £8,473.44 in place of the sum invoiced of £17,641.98.

6. Mr Ring continued that the photographs in the file alongside Mr Anderson's report showed the lack of maintenance, which substantiated the neglect to maintain, and breached the covenant to maintain the property to a reasonable standard so that the damage caused should be compensated by the Council. The fact was that there had been no substantial works in years: the Applicants had purchased their flat in 1991 since when there had been no works until 2004. Inevitably properties did

deteriorate over time and he relied on the case of *Continental Property Ventures Inc v White,* LRX/60/2005 in the Lands Tribunal, for the proposition that historic breach did increase the cost of repair and such excess should not be recoverable pursuant to the covenant to pay service charges. He added that the leaking roofs had indubitably caused internal damage evidenced in the photographs and the Respondent Council had conceded that there had been such water ingress, although it was not known how long this water ingress had been occurring. It was also established that the Landlord had breached the painting and decorating covenant as there was evidence from long standing residents that there had been no exterior decorations since 1975.

7. It was also Mr Ring's submission that the works were not of a reasonable standard. The scaffolding had now been taken down but work to the windows and balconies was not of a reasonable standard, a submission that was supported by the Applicants' expert report. The finish was simply not good, and the damp proof course was admitted not to be of a reasonable standard as admitted by the Council's expert. He added that the Applicants had attempted to follow the Council's complaints procedure but had been unable to do so as the Council did not address their concerns but, for example, persisted in suggesting that they did not understand their obligation to pay for the works and that this was a common failing of tenants. In the light of the poor complaints procedure as well as of the unsatisfactory works the Applicants had made a s20C application, i.e. that the costs of the LVT hearing should not be charged to the service charge since it was not the Applicants' fault that recourse had had to be taken to the Tribunal.

THE CASE FOR THE RESPONDENT LANDLORD

8. Miss Amanda Gourlay of Counsel appeared for the Landlord Council and had supplied a helpful skeleton argument. Miss Gourlay said that she was not clear why the Applicants' expert had proposed that only 45% of the invoice should be paid by the Applicants. The Applicants' flat was on the first floor of a block of 22 flats, of which 3 were leasehold. The Lease was quite clear as to liability to pay. She quoted from the Lands Tribunal decision of HH Judge Rich QC in *Continental Property Ventures Inc v White* : "the question of what the cost of repairs is does not depend on whether the repairs should have been allowed to accrue. The reasonableness of

incurring costs for their remedy cannot, as a matter of natural meaning, depend on how the need for remedy arose". She therefore submitted that the delay in carrying out the works is not a factor to be taken into account in determining whether a cost has been reasonably incurred.

9. With regard to the selection of the contractor, Miss Gourlay submitted that contracts had been carried out under a qualifying long term agreement and the resulting fact that the tenants could therefore not nominate their own contractor was explained in the "Major Works Frequently Asked Questions" leaflet. She submitted that a breakdown of the costs *had* in fact been submitted and that this tallied with the final account. In relation to the allegation that the costs were too high as the Applicants were able to obtain cheaper quotations, she relied on the Lands Tribunal case of *Forcelux v Sweetman,* [2001] 2 EGLR, 8 May 2001, for the proposition that a cost may be reasonably incurred even where it is not the cheapest option. It was further clear from the Frequently Asked Questions leaflet that the Lessees were at liberty to arrange their own window replacements and that the estimated cost of the Applicants' replacement was £6,054.42 set out in the Notice of Intention of 8 April 2004. The Applicants had taken no steps to effect this themselves at that time. She said that neither the Applicants nor Mr Anderson had adduced any evidence that the costs were excessive, the application for a reduction for delay was inappropriate, and the costs of management and administration was covered by clause 3 and paragraphs 5 and 6 of the Ninth Schedule as the Respondent Council had covenanted to manage the Block and to recover the cost. Moreover professional fees (found at clause 8(a)(iii)) were fixed at 4%. She added that Mr Anderson, the Applicants' own expert, confirmed that the works were of a satisfactory standard as he clearly states that the "window installation has been undertaken to a generally satisfactory standard" and that "the main roof covering has been undertaken to a generally satisfactory standard" and although he mentions some questions as to the potential for water ingress she submitted that these were not "direct evidence of substandard work". She concluded that the door entryphone system had a certificate of completion.

10. Miss Gourlay then called Mr C Levoir, the Respondent's Project Manager

(Electrical Department) who had provided a witness statement and in summary gave evidence that the replacement of the entryphone was occasioned because it was at the end of its life.

11. Next Miss Gourlay called Mr P Mellor, the Respondent's Project Manager (Asset Management Section), a qualified Surveyor on the capital works side of the Respondent's staffing, who had also provided a witness statement. In summary and in relation to the window works, he explained that the flashing above one of the windows (which had been criticised by the Applicants' expert) had not been removed as when it had been inspected it was found that there was no lintel above the windows. To remove the flashing would disturb the bricks, dislodging them, so that it would be more costly to remove the flashing, which was therefore left in place, although they did intend to trim it back once the freezing weather had abated. He added that the associated works had included fitting fans (6" in kitchens and 4" in bathrooms), a gas test and repairing roofs and gutters. He said that the original roof was now 40 years old, the skirtings were defective and although the pitched roof had been repaired as it might have had another 10 years of life the opportunity was taken to instal an independent guard rail (as no one could be allowed up there to effect repairs without this as the parapet was below the minimum height unless there was such a guard rail). The roof hatch had also been replaced.

12. Cross examined by Mr Ring, Mr Mellor said that the reason that the flashing mentioned had not been attended to in the last 4-5 years was because the problem had only just been drawn to his attention. His essential remit was to ensure a wind and weather tight condition for the building. He added that funding was now in place to ensure planned preventative maintenance, which he agreed was a better system, but this had only been put in place in the last 2 years or so. He said he did not have records so could not give "chapter and verse" but the system in the 1960s and 1970s was that Councils borrowed money at low interest to build and repair, but in the 1980s interest rates has risen dramatically, in effect doubling, so that the Council was paying back more than had been budgeted for, hence the 1990s issues about funding works.

13. Next Miss Gourlay called Mr S Costello, MRICS, the Respondent

Council's expert cost consultant, a Quantity Surveyor with 30 years experience. He also had provided a witness statement and in summary explained how the Council's procurement systems functioned. There was in effect a bulk quotation system involving 200 local authorities which operated an open tendering process that achieved the best prices available and kept the preliminary costs down. These were often as much as 10-15% of works but in the present case had only been 9%. With regard to removal of the satellite dishes from the roof prior to those works, he said that as they had to be resited, and were there illegally in the first place as no one obtained planning permission for them so it was impossible to discover to whom they belonged, everyone then paid towards this removal which was required for access to the roof. He said that professional fees at 4% was very reasonable for the work involved, especially owing to the scale of what had to be done and all the different disciplines involved. He estimated that if each had been procured separately this figure would have jumped to 10%.

14. Questioned by Mr Ring, Mr Costello said that he had actually tried to ring the Applicants to meet them, but had not been able to meet as the Applicants were not responding. He added that the delays had caused no extra cost, but it was a fact that the Lessees had been sometimes disruptive, for example not cooperating in, or not allowing, fans to be installed: also that the scaffolding had been up for a defined period, incurring no extra cost over that budgeted for. He was not able to say when the capital funding had been applied for. He said that the balcony works complained of had in fact not been charged for as works there had not been done, and he did not agree that ponding on the roof was evidence of poor workmanship as the roof was designed to pond: in any case he said there was a 20 year guarantee in respect of the roof works which should address that matter. Asked why he had not met Mr Anderson, as it was understood this was to have taken place on the previous day, and earlier on 14 February 2010, Mr Costello replied that Mr Anderson had said that he was not able to meet in view of the cost implications. He was however able to give a breakdown of the scaffolding costs, which had been charged proportionately on the basis of the number of rooms in a flat: the Applicants paid 5/94ths of the cost. He said he could not say why this breakdown had not been supplied before, adding that as far as he knew such detail had not been deliberately withheld as there was no reason not to reveal it. He was unable to say how the administration fees were constituted as

he was only responsible for works costs. As to when it had become known that major works would be required, Mr Costello was unable to say as he personally had not been involved at that time, but said that the freeholder would be aware of this as the building was 42 years old in 2004 and would clearly need major repairs. For example the typical life of an asphalt roof was 20 years so that the roof would definitely need attention.

15. Mr Costello was actually able to correct the earlier information given by Miss Gourlay as to the numbers of leasehold flats in the block that there were 3 such flats, as the correct number was in fact 5. However Number 102 had not been billed as this Lessee was within his 5 year Right to Buy period where he was not charged for works not previously notified. 116 and 126 had paid in full, but 138 had not yet paid as help was being sought due to hardship since the Lessee's mother was disabled. 102's invoice would be paid out of general funds which was the appropriate arrangement in that case.

FINAL SUBMISSIONS

16. In final submissions Miss Gourlay said that the s 20 process had been properly followed and Mr Costello had given evidence of the benefit of the procurement scheme used to keep process down. She said that the Lessees might feel aggrieved that there had been no breakdown at the time of the estimates but more than one breakdown had been provided since, showing how the costs related to the final invoice and a whole trail could be followed to the final figures, and these breakdowns had been provided before the hearing. On the other hand there was no challenge except in a different quotation for the window work. The Applicants had the usual opportunity to respond to the s 20 process but did not do so at that time. She submitted that the Anderson report should be ignored as it was completely inappropriate to deduct either 55% or at all from the figure invoiced. Mr Costello had explained that the scaffolding was also procured on a fixed price for a fixed period. As far as fees were concerned the Applicants had covenanted to pay these, and she stressed that although the RICS preferred fixed fees the percentage charge alternative had not been found to be unreasonable per se. The fee for administration work reflected a very high level of work. She said there was no evidence of sub-standard

work, despite the fact that some years had passed since the works, and the issues which had emerged had been addressed by Mr Costello and his associated witnesses. She concluded that there was simply no basis on which a reduction should be made.

17. Mr Ring submitted that while the breakdowns had been produced at the hearing they had *not* been supplied earlier and the Applicants had even been told to "go to the LVT"! Mr Costello's reasons for the difference between the estimates and the ultimate actual costs did not address the delay which had produced extra 10% charges. He said that the 10% administration must be overstated as a 5% reduction was offered for early settlement.

18. The Tribunal requested that a copy of the long term qualifying agreement of March 2003 be produced by the Respondent Council and also the scaffolding contract. However these were not able to be found. Written submissions were also requested on costs.

COSTS

19. The Respondent Council sent written submissions on 17 March 2010 in which Miss Gourlay stated that the Lease (clauses 3 and 9) permitted the Landlord's costs of the LVT application to be applied to the service charge, and she relied on the case of *Iperion Investments v Broadwalk House Residents Ltd* [1995] 2 EGLR 47. The Lease covered such costs expressly and it was in any case appropriate where response to an LVT application was required. She opposed the s 20C application made by the Applicants: she said their preparation of their case was inadequate, there was only one comparable quotation, a limited expert report and much irrelevant material. Moreover the main concern had been to have a breakdown which had been provided, together with an opportunity for the Applicants to inspect the documentation at the Council's offices.

20. The Applicants' representative responded on 30 March 2010. Mr Ring and Miss Jago said that they did not agree with the Respondent's interpretation of the Lease but even if the Lease did permit costs of the hearing to be recovered by the Landlord it was unreasonable for them to be recovered in total as it had been

unreasonable that the Applicants had to go to the LVT when they had repeatedly asked for a breakdown of the major works bill and had attempted to avoid having to go to the LVT. They also considered that the Respondent had not needed to be legally represented when the Applicants were not so to charge the legal costs to the service charge was inequitable and oppressive. They requested a s 20C order.

DECISION

21. It appears to the Tribunal that the Respondent Landlord has followed due process and that the decision must be broadly in their favour. While a breakdown at an early stage would have been good practice and would have saved some administration costs – to start with, all the costs of the correspondence, some of which was not responsive to the *actual* questions asked by the Applicants - it was also clear that the snagging was not done properly, and the invoices presented very late, ie 5 years after the works. However this does not mean that the Applicants should automatically receive a reduction. Nevertheless the Tribunal cannot ignore the impact of the long delays in effecting the works and indeed in invoicing for them and the very poor quality of the administration which was ponderous, often ineffective, slow and on occasion not at all responsive to Lessees' concerns. The Tribunal therefore determines that the sums charged are reasonably incurred and duly payable, save for the administration ie overall management charges, which should be reduced from 10% to 5% in order to reflect the very poor standard of this service.

22. The Tribunal declines to make a s 20C Order. The Lease permits the costs of the LVT hearing to be applied to the service charge and as a result the costs will be borne by the service charge account and reimbursed by service charge payments as permitted by the Lease.

Chairman.....

Date.....20.....4.....2010.