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Residential
Property
TRIBUNAL SERVICE

DECISIONS OF THE LEASEHOLD VALUATION TRIBUNAL ON APPLICATIONS UNDER SECTIONS 20C AND 27A OF THE LANDLORD AND TENANT ACT 1985

Reference number:	LON/00BE/LIS/2006/0008
Property:	1/12 Windspoint Drive, London, SE15 1SD
Applicants:	Mrs H & Mr K Karaman (Tenants of Flat 7)
Respondent:	London Borough of Southwark (Landlord)
Appearances:	For the Applicants: Mr S Sayer and Mr N Isen of BPP Law School Ms A Karaman, the Applicants' daughter For the Respondent: Miss L Turff and Mr P Halpin, both of the Respondent's Home Ownership Unit Mr J Plant, MRICS, FCIOB, Chartered Surveyor with Brodie Plant Goddard
Tribunal Members:	Mr A J Andrew Mr C Kane FRICS Mrs M Colville LLb
Application Dated:	6 January 2006
Directions:	16 January 2006 and 15 May 2006
Date of Hearing:	7 & 8 January 2007
Decision:	5 February 2007

DECISION

1. A service charge is payable by the Applicants to the Respondent in respect of all the costs included in the draft final account with the exception of the following costs that were either conceded by the Respondent or which we considered to have been unreasonably incurred:-

   (a) £16,796.20 in respect of the cost of new entrance doors and screens

   (b) £2,157.92 in respect of part of the asphalt works

   (c) £288.00 in respect of the redecoration of the stair and landing risers

   (d) £3,500 in respect of a variation to the general building works relating to *"an extra skim and anti-carbonisation coating"*.

2. The final account would have to be re-cast with the above deductions and an appropriate pro-rata reduction made to those fees calculated as a percentage of the cost of the works. A service charge of 8/85th of the resultant total cost would be payable by the Applicants to the Respondent.

3. We made no order on the application under section 20C of the Landlord and Tenant Act 1985 ("the Act").

BACKGROUND

4. The Applicants purchased the leasehold interest in Flat 7 in 1989 under the Right to Buy legislation. Their landlord, the Respondent, decided to complete an extensive programme of major works both to the Property and the Estate of which it forms part. The total cost was originally estimated at just under £4 million and on 31 October 2005, the Respondent sent to the Applicants a demand for an interim on-account payment in the sum of £30,561.63. In consequence the Applicant made their applications to the Tribunal under sections 20C and 27A of the Act.

5. The applications first came before us on 25 April 2006 when we dealt with the consultation issues and found in the Respondent's favour. Both parties agreed that the substantive application relating to the reasonableness of the proposed costs should be left until after the completion of the works and the preparation of the final accounts which, it was said, would be available by the end of 2006. On that basis the substantive applications were adjourned to 8 January 2007 and issued further directions.

6. At the hearing the Respondent was only able to produce a draft of the final account. In essence and after some recalculations by Miss Turf, the total rechargeable block cost (upon which the Applicants' service charge would be calculated) was put at £243,576.00 of which the service charge payable by the Applicants would be £22,925.00. The total cost of £243,576 can be summarised as follows:-

   Cost of measured works incorporating
   omissions and additions to the original specification: £159,000

Final account preliminaries:	£43,280
General preliminaries:	£8,233
Offsite overheads:	£6,422
Profit:	£11,024
Subtotal:	£227,961
Management (4%) and Supervision (2.85%):	£15,615
	£243,576

7. The Applicants agreed to proceed on the basis of the draft final account on receiving an assurance from the Respondent that any adjustments would only reduce the total cost. With the agreement of the Respondent, given at the hearing on 25 April 2006, the Applicants had not paid the demand for an interim on-account payment pending the publication of this decision.

ISSUES IN DISPUTE

8. Mr Sayer and Mr Isen identified the following issues as being in dispute:-

   (a) Certain components of the measured works identified in a Scott Schedule handed in at the hearing and referred to below.

   (b) The cost of the preliminaries insofar as they related to scaffolding and a temporary roof structure.

   (c) The supervision fee of 2.85% of the cost of the measured works.

   (d) General claims by the Applicants to be set off against the service charge in respect of (i) the Respondent's failure to remedy past disrepair and (ii) the Respondent's failure to maintain a reserve fund from which the cost of the works could have been defrayed.

9. The Applicants did not challenge the service charge proportion of 8/85th of the cost of the works.

REASONS FOR OUR DECISIONS RELATING TO THE OUTSTANDING ISSUES IN DISPUTE

Our General Approach

10. The work had been completed under a major works partnering contract which had been let following a process of open competition. Public notice of the proposed partnering contract had been published in the Official Journal of the European Union pursuant to the European Union Procurement Regulations and contractors had been invited to tender for the contract. Save to the extent that dispensation had been granted by a differently constituted tribunal the Respondent had complied with the statutory consultation requirements set out in the Service Charges (Consultation Requirements) (England) Regulations 2003.

11. The Applicants asserted that the costs of some of the components of the measured works were inherently excessive. When a contract for a complex body of work, such as that under consideration, has been subject to a process

of open competition the burden of proof, when such an assertion is made, must rest with the tenant. In the absence of cogent expert evidence to the contrary, a reasonable starting point must be that the tendered cost is reasonable. Consequently, in the absence of such evidence, a tenant seeking a reduction in the service charge will generally have to establish either that the work was unnecessary or that it was not carried out to a reasonable standard. In this case, the Applicants offered no expert evidence to support their assertions that the costs of particular components of the measured work were inherently unreasonable.

Past Disrepair

12. Although pleaded in the Applicants' statement of case as a general issue, the Applicants did not quantify the extent of their claim which they suggested should be set off against the service charge found to be due from them. At the hearing, the issue was raised only in connection with the asphalt works and it is considered in more detail under that heading of the decision.

Repair and Overhaul Windows (£2,760)

13. The PVC double-glazed windows and patio doors were just over ten years old. They had been overhauled as part of the works. A full list of the window works actually undertaken was handed in at the hearing and included the replacement of hinges and handles etc. Although the Applicants suggested that the work had only been necessary because the windows and patio doors had not been correctly installed, they were unable to provide any evidence to support that suggestion. Although it was certainly the case that not all the work listed in the original specification had been completed, that was reflected by a reduction in the contract price from £7,872 to £2,760.

14. With windows and patio doors of this type and age, the work undertaken was of the order that we would expect and there was simply no evidence to support the Applicants' assertion that the cost was unreasonably.

Entrance Doors and Screens (£17,396)

15. The original flat doors and screens were of timber construction with single glazing. A decision was made to replace these doors and screens with steel-framed security doors. The Respondent accepted that the proposal amounted to an improvement. At the hearing Mr Sayer and Mr Isen conceded that the Applicants' lease permitted the Respondent to recover the cost of improvements through the service charge. Having read the lease it appears to us that the concession may have been somewhat premature. The definition of service charge is contained in paragraph 6(1) of part 1 of the Third Schedule where it is said to be *"a fair proportion of the cost and expenses set out in paragraph 7 of this Schedule incurred in the year"*. The only reference to improvements in paragraph 7 is that contained in subparagraph (9) which is restricted to two specific improvements: the installation of double-glazed windows and an entry-phone system. Nevertheless, for the reasons set out below we concluded that in any event that the costs incurred in replacing the original timber doors and screens had not been reasonably incurred.

16. The Respondent justified the decision on the basis of the Government's *"Decent Homes Initiative"*. Although no doubt a laudable initiative it did not override the service charge provisions contained in Sections 18 to 30 of the Act and in particular Section 19 which provides that *"relevant costs shall be taken into account ... only to the extent that they are reasonably incurred"*.

17. The Respondent did not suggest that the doors and screens were in a poor state of repair. Indeed in an initial survey report prepared by Brodie Plant Goddard, it was observed that *"in general terms the upper flat entrance doors are in reasonable condition and we recommend that in the tenanted flats they be subject to repair and maintenance work within this contract"*. Reference was only made to the upper floors because at that time a decision had been made to replace the ground floor doors and screens in any event. There was however no suggestion that those doors and screens were in any different condition.

18. The original doors and screens were of a type commonly, perhaps predominantly, found in the country and it was not suggested, by the Respondent, that they presented an unacceptable or increased security risk. Certainly no evidence of such a risk was adduced at the hearing. Miss Karaman, who lived in the flat with her parents and gave evidence on their behalf, did not consider that there was a security issue and her parents' flat was perhaps most at risk being situated next to the communal staircase. On the basis of our inspection, the Property appeared to be well-maintained and certainly did not form part of what might generally be termed a *"sink"* estate. In terms of security, no case had been made for the replacement of the doors and screens.

19. The only other justification for the decision, advanced at the hearing, was a ballot of all the residents undertaken prior to the letting of the contract. There is clearly an inherent danger in relying upon such a ballot when only a minority of the residents (that is the long leaseholders) will have to pay directly for the proposed work. In any event it was apparent from the relevant papers included in the hearing bundle that the residents had not been given the option of retaining the existing doors and screens. They had simply been offered two options: that of installing a door entry system on the upper floors and the cheaper option of replacing all the front doors. That only 33% of the residents had responded to the consultation might well be an indication that the majority were not enamoured of either option.

20. On the basis of the evidence adduced at the hearing, the Respondent had simply not made out a case justifying the replacement of the original serviceable front doors and screens and we therefore concluded that the replacement costs had been unreasonably incurred. We accepted however that if the doors and screens had not been replaced they would have had to have been repaired and maintained. Given the description contained in the initial survey report £50 per flat would have been sufficient to cover that cost and we therefore allowed £600 for the Property.

Landlord's lighting (£10,795)

21. The old communal lighting system had been replaced and upgraded. The Applicants suggested that if the old original lighting system had been repaired, replacement would have been unnecessary. It was however between 30 and 35 years old, the Property having been built in the early 1970s and we had no doubt that after such a period of time, the wiring would have been at the end of its useful life and the decision to replace and upgrade the communal lighting system was a reasonable one. Although there was evidence from Miss Karaman that the new lights occasionally malfunctioned, she accepted that responsive repairs were undertaken as necessary. The final cost came in under budget and there was no evidence that the cost of the work was inherently unreasonable. We concluded that the cost had been reasonably incurred.

Cleaning Brickwork and Stairways (£4,032)

22. The work had clearly been carried out as observed on our inspection. The Applicants said that it had not been completed to a sufficiently high standard. However, having considered the specification, it was clear that the intention had simply been to remove surface dirt with high pressure water and not to take the brickwork back to its original condition: if that had been done the cost would have been considerably increased. Of the total sum £540 had been spent in applying and acid wash to the stairs and Mr Plant accepted that it had not been entirely successful in removing all the staining. Nevertheless we considered that the attempt to clean the stairs and the method adopted were reasonable and that the cost had been reasonably incurred. The situation is analogous to that of a garment being sent to the dry cleaners: one still expects to pay the cleaning costs even if the staining is not entirely removed. Having inspected the work undertaken, we had no hesitation in concluding that the cost had been reasonably incurred.

Concrete Repairs (£26,562)

23. In the Scott Schedule, the Applicants had suggested that the standard of work was poor. At the hearing that argument was not advanced and they relied on the original estimated cost of £16,560 saying that there had been no justification for incurring additional costs of just over £10,000.

24. We accepted Mr Plant's evidence that prior to erecting scaffolding and carrying out appropriate tests, it is always difficult to estimate the cost of concrete repairs. His unchallenged evidence was that the estimate had been based on the costs actually incurred for concrete repairs to a similar block and that it was indicative only. Furthermore, the work had to be carried out in accordance with Sika's specification to obtain their 20 year insurance-backed guarantee. In accordance with their requirements, the work had been measured and inspected by independent structural engineers. Having heard Mr Plant's evidence, which was consistent with our own experience, we concluded that the cost had been reasonably incurred.

Protection and Cleaning/Making Good around Existing Windows etc (£1,416)

25. The Applicants objected to the cost on the basis that the work amounted to the simple protection of the windows, during the concrete repairs, and was either unnecessary or in the alternative was an excessive cost for what amounted to no more than *"some tape round the windows"*.

26. Having inspected the Property, we had no doubt that Miss Karaman's comments, recited above, was a considerable exaggeration. Protection would have had to have been afforded during the concrete repairs and we accepted Mr Plant's evidence that following those repairs, the windows and surrounds had been cleaned and made good. The work was necessary and we considered the modest cost to have been reasonably incurred.

Entrance Canopy and Fixings (£128)

27. The Applicants simply asserted that the cost was unreasonable, suggesting a reduced cost of £80. They produced no evidence to support that assertion. The work had included the replacement of two expansion bolts and the making up of new steel brackets that were welded to the security frames. The cost was within the original estimate and in our view had been reasonably incurred.

Remove Incinerator Flue and Housing (£202)

28. The Applicants withdrew their objection to the cost on receiving Mr Plant's assurance that the floor would be made good at no additional expense to the lessees, during the defects liability period.

Making Good the Roof Slab (£48)

29. The Applicants withdrew their objection to this cost.

Renew Refuse Hoppers and Clean Hopper and Chamber (£765)

30. Mr Plant agreed that the chamber had not been cleaned and accepted a reduction of £365. The balance of £400 related to the replacement of one hopper which was not challenged by the Applicants. Although the Applicants had suggested that £46 of that sum related to the cleaning of a second hopper, it was apparent from the draft final account that no charge had been made for that item.

Asphalt Works (£55,656)

31. The Applicants suggested that no more than £30,000 should be allowed for the cost of the asphalt works. Their case was however largely based on a misunderstanding. They assumed that the cost included only the replacement of the asphalt roof, the cost of which was originally estimated at £35,444. However, the total cost of £54,656 included not only the replacement of the roof by a felt based system, but also the cost of re-asphalting the balconies. In fact the replacement of the roof had come in under budget at a cost of £28,849.

32. The Applicants also asserted that the new roof had failed. That assertion was founded on mould to the corners of two rooms observed on inspection. It was apparent that the mould was caused by condensation and not by any failure of the new roof. Although it was suggested at the hearing that there had been some leaking in the rooms adjacent to the re-asphalted balconies, none was observed on our inspection. The Applicants' suggestion that the balcony floor was uneven was again not supported by our inspection. There had been heavy rain on the previous day and on inspection there was no evidence of any *"puddling"*.

33. Although the balcony floors were clearly stained, they had been subject to continual foot traffic for some six months and the staining did not indicate, as suggested by the Applicants, that the work had not been completed to a satisfactory standard.

34. Mr Plant agreed that one item *("asphalt over curbs")* had been duplicated in the final account and agreed to a reduction of £2,157.92. That apart, the cost had been reasonably incurred.

35. The Applicants' suggestion, that if the roof had been repaired at regular intervals replacement would not have been necessary, was undermined by Miss Karaman's acceptance, in answer to our questions, that patch repairs had been completed. On the basis of our experience, we had no hesitation in endorsing Mr Plant's observation that the roof, as originally constructed, would have had a life expectancy of little more than 20 years and replacement at this time was the only viable option.

Redecoration (£5,650)

36. Mr Plant conceded a reduction of £288 in respect of the stair and landing risers that had not been redecorated. That apart, the Applicants contended that the work had been undertaken to a poor standard and suggested that only £1,500 should be allowed. This was not borne out by our inspection. There was no evidence either that the specified work had not been carried out or that the cost was inherently unreasonable. We concluded that the cost had been reasonably incurred.

Cavity Wall Insulation (£2,367)

37. At the hearing the Applicants withdrew their objection to this cost.

Asbestos Removal (£883)

38. At the hearing the Applicants withdrew their objection to this cost on the basis of Mr Plant's assurance that it related to asbestos removed from the common parts and not from any of the tenanted flats.

General Building Works (£9,956)

39. This consisted of a number of additional items, some but not all of which were authorised as the work commenced. Of this sum £3,500 related to an extra skim of anti-carbonisation coating. Mr Plant said that that sum was subject to

negotiation with the contractors because he considered that it was not justified and he believed that it would be omitted from the final account. On the basis of that clear evidence, we had no hesitation in concluding that the cost had not been unreasonably incurred and should in any event be disallowed. That apart, the Applicants made no coherent objection to the other component costs comprised in this item.

Estate Costs (£10,472)

40. The Applicants withdrew their objection to this item after hearing a detailed explanation from Mr Plant and upon the production of a missing page from the final accounts.

Final Account Preliminaries (£43,280)

41. At the hearing the Applicants objected only to the scaffolding costs of £19,697.70 and the cost of erecting a temporary roof (£12,493.80).

42. Although the Applicants took the point that the cost of scaffolding the property was greater than that for other blocks on the estate, we accepted Mr Plant's unchallenged evidence that the cost was calculated by reference to block size. The Applicants also suggested that the scaffolding cost should be discounted by approximately £2,000 to reflect the fact that work had not commenced until some six weeks after it had been erected. However, we again accepted Mr Plant's evidence when he said that during that time preliminary investigative work had been undertaken. Again that was consistent with our own experience and we could appreciate that the extent of such work might not have been apparent to the Applicants.

43. Both the scaffolding and temporary roof were erected on 12 September 2005: the temporary roof was struck on 20 October 2005 and scaffolding on 27 January 2006. Those were fairly tight timelines for work of this nature and we were not persuaded that any deduction should be allowed.

44. The Applicants' suggestion that a deduction should be made to reflect the inadequate nature of the temporary roof was simply not credible. The suggestion was based wholly on the mould growth referred to above (which we considered to result from condensation) and in answer to our questions Miss Karaman accepted that there had been no actual leakage when the temporary roof was in place.

45. There was no evidence before us to suggest that these disputed costs were inherently unreasonable and we concluded that they had been reasonably incurred.

Offsite overheads (£6,422), profit (£11,024) and management (4%)

46. At the hearing and having heard Mr Plant's explanations the Applicants confirmed that they had no objection to these costs.

Supervision Fee of 2.85%

47. This actually comprised a supervision fee of 2.75% and an additional planning supervisor fee of .10%. The whole basis of the Applicants' objection was that they had to complain on two occasions about loud music played by some workmen. This they considered to be evidence of inadequate supervision. Such complaints would have been matters for the contractors and did not indicate inadequate supervision. The case was simply not made out. We considered the supervision fee to be extremely competitive.

Reserve Fund

48. Part 2 of the Third Schedule to the Applicants' lease incorporates provisions for the creation and maintenance of a reserve fund. The operation of such a fund is entirely sensible because it enables the lessees to set aside the cost of future major works over a period of years. Those who purchase flats that once formed part of local authority housing stock are often of modest means. Far too frequently this tribunal finds itself dealing with cases, such as this, where the lessees simply do not have the means to pay substantial service charges that are levied following major works projects. The loans and instalment options offered by the Respondent and other local authorities are no substitute for a reserve fund which allows the cost to be spread over many years.

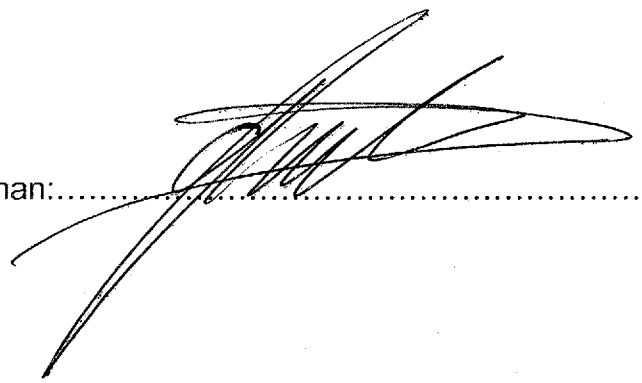
49. Regrettably the Respondent refuses to operate a reserve fund. In this refusal it is not alone because, on the basis of our experience, the majority if not all London local authorities adopt a similar policy. The argument always advanced is that local authorities cannot fund the reserve fund contributions that would be due from the tenanted flats. It is not an argument that we find credible. Having read the lease, we can see no reason why a reserve fund could not be limited to receiving contributions only from long leaseholders with the fund being applied accordingly when the expenditure is incurred.

50. In essence the Applicants' representatives argued that the Respondent's failure to operate a reserve fund gave rise to a claim in negligence that should be set off against any service charge found to be payable. The argument was fatally flawed for two reasons. Firstly, the Applicants were unable to quantify the extent of any such claim. Secondly and more fundamentally, the lease does not require the Respondent, as lessor, to operate a reserve fund. The provisions contained in part 2 of the Third Schedule are permissive. In particular at subparagraph 9(2), it is stated that *"the Council may require the lessee to pay a reasonable contribution ..."* towards the reserve fund. There is no obligation upon the Respondent to operate a reserve fund or to require the Applicants and other long leaseholders to contribute to it. Thus no duty exists the breach of which would found a claim in negligence.

Section 20C application and reimbursement of fees

51. On the basis of an assurance, given by Mr Halpin, that the Respondent would not seek to recover any of the costs incurred in these proceedings through the service charge, it was agreed that there was no need to consider the

application under Section 20C of the Act. Furthermore, the Applicants were exempt from paying the tribunal fees and there was therefore no need to consider ordering the Respondent to reimburse those fees in accordance with the previous directions.

Chairman:  .....(A J Andrew)

JG