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In the Leasehold Valuation Tribunal

LON/00AG/LSC/2006/0326

Applicants	Mr Paul Palley (27 Borrowdale and 69 Bucklebury)
	Ms Moni Sheehan (7 Pangbourne)
	Mr A Melikian (25 Borrowdale)
Respondents	The Mayor and Burgesses of the London Borough of Camden
Represented by	Ms E Howells
	Mr S Alum

Tribunal
Ms E Samupfonda LLB(Hons)
Mr F Coffey FRICS
Mr C Gowman BSC MCIEH MCMI

1. In accordance with section 27A Landlord and Tenant Act 1985, ("the Act") the Tribunal has determined for the reasons set out below, that all of the costs incurred (with the exception to those relating to the canopy works) were reasonably incurred and are therefore payable by the Applicants by way of service charge arising from the major work contracts carried out. We found that the costs incurred in respect of the Communal T.V were not reasonably incurred and therefore irrecoverable. The Tribunal determined that in accordance with the terms of their leases the Applicants are only liable to contribute at 10% the costs of the items within the re-occurring service charges. Whilst the Tribunal did not accept or find that the leases specifically permitted the Respondents to recover additional charges over and above the 10% in respect of any other costs including supervision and administration, it considered that such items may be incurred when carrying out major works.

2. Background

The Tribunal received an application from Mr Palley dated 10 September 2006. That application referred to 14 Patterdale, Robert Street but no further evidence was submitted. Ms Sheehan was subsequently joined as an applicant to the proceedings following an application to the Tribunal.

Consequently the Tribunal's determination is limited to the merits and facts of this case and the above named properties and applicants only. An oral pre trial

review was held on 3rd October 2006. The Tribunal and the parties agreed that the issues to be determined were:

The reasonableness and cost of the re-occurring service charges. The service charge years in question are 2000/2001 to 2006/7.

The reasonableness of the costs incurred during major works.

There was also an application under section 20C Landlord and Tenant Act 1985, requesting the Tribunal to make an order preventing the Respondents from recovering the costs incurred in connection with these proceedings through the service charge.

The Tribunal asked the parties to submit final written submissions within 14 days after the hearing.

3. The Hearing

The hearing took place on 12, 13 and 14th February 2007. The Tribunal inspected the estate on the morning of the hearing. It was found to be a 1960's /1970's municipal development comprising a range of point and slab blocks. The Applicants attended the hearing. Ms Howells, Project Officer and Mr Alum, Project manager represented the Respondents accompanied by a number of witnesses who gave evidence during the course of the hearing. The Tribunal received 3 lever arch files from the Respondents and 4 bundles of supporting documentation from the applicants. Given the volume of evidence and documents submitted and the fact that the Tribunal had read them prior to the hearing, the Tribunal will refer only to the salient points in its decision.

The Tribunal had before it copies of two leases; lease type 1 relevant for Buckleberry and lease type 2 relevant for Borrowdale.

4. Re-occurring Service Charges.

Mr Palley invited the Tribunal to determine that the costs incurred in respect of re-occurring service charges were unreasonably high. The items falling under this head included; insurance, heating and hot water, caretaking, communal T.V aerial, concierge CCTV, door entry phone ground maintenance communal electricity, lift maintenance, block over heads and refuse collection. In essence, Mr Palley's submissions were that the lease entitles the Respondent to charge an administration fee of 10% for management of the estate. He challenged the Respondent's right to charge additional fees for items such as supervision and administration. In his view this amounted to double charging as this element should be covered by the 10% fee. He referred the Tribunal to a number of invoices in which it was clear that an element for supervision or administration had been included over and above the 10% fee.

Ms Howell's view was that the lease allowed the Respondent to charge a 10% management fee plus the additional costs. She relied on the Fifth Schedule

(items of Expenditure) clause 14. This sets out the items of expenditure that the lessees are liable to contribute towards. Clause 14 provides:

"all costs charges and expenses together with all VAT and other taxes (if any) thereon incurred or to be incurred by the Landlord in observance and performance of all the landlords obligations and duties to be observed and performed under the terms of the lease."

She added that the management fee covered general management of the housing residential portfolio, general estate management and direct services to leaseholders. She did not believe that there was an element of double charging.

We rejected Ms Howells submission that clause 14 allowed the landlord to charge additional fees over and above the 10% management fee. The Respondent is entitled by clause 13 of the Fifth Schedule to charge a management fee of 10%. This provides " *The Landlord's management charges for the Estate in an amount equal to ten percent of all other items included in the service charge.*" It is our view that in order for costs to be recoverable there must be express provisions in the lease. In considering the lease as a whole, we consider that the effect of Clause 14 is to enable the Landlord to recover the costs incurred in carrying out major works. It does not make specific reference to supervision and administration fees. However, it is our view that the nature and extent of a major works contract differs substantially to the provision of day to day services.

As such, the Landlord will incur additional costs such as supervision or contract administration costs which arise as for example, a result of complying with the statutory consultation procedures. Therefore we find that it is reasonable for the landlord to regard these costs as part of the cost of the major works that can properly be regarded as recoverable through the service charge subject to the reasonableness test. We are not persuaded by Ms Howells submission that this clause entitles the Respondents to recover additional costs for work carried out as part of the re-occurring service charge.

Given that the basis of Mr Palley submissions applied to all the re-occurring items service charges, the Tribunal did not consider it necessary to set out in detail his submissions in respect of each item. Set out below is therefore a sample of the line that his submissions took together with the Council's responses and our determination.

(i) Insurance

Mr Palley queried the reasonableness of the insurance costs, initially suggesting that the leaseholders were paying the entire premium without contribution from the Respondents. He considered that the rebuilding costs as relied upon by the Respondent needed to be recalculated as the reinstatement value of his flat has been over assessed. He added that the templates used bear no relation to the accurate measurements. He assessed that the Respondent's insurance cover was more expensive than Westminster.

In response, Ms Howells submitted that the Respondent was entitled to recover such costs pursuant to clause 14 of the Fifth Schedule (items of expenditure.) She called Ms A Maynard, Valuer for Insurance and Ms Odusoga who gave detailed explanation of the valuation and tendering process.

We found that there was insufficient evidence produced for us to safely conclude that the insurance costs were unreasonably high. It is not sufficient for Mr Palley to simply rely on the fact that the insurance premium is cheaper in Westminster. The test to be applied in the circumstances is as set out in judicial guidelines in particular **Berrycroft Management Company v Sinclair Gardens Investment (Kensington) Limited [1977] 22** EG 141, where the Court of Appeal held that the right of a landlord to nominate the insurance company was unqualified and the landlord was not required to give reasons for the insurance chosen. The Lands Tribunal in **Forcelux v Sweetman [2001] 2 EGLR 173** held that the landlord did not have licence to charge a figure out of line with the market norm and that in determining whether the insurance premium is reasonable the question to be answered is not whether the expenditure was necessarily the cheapest available but whether the charge that was made was reasonably incurred. In this case there was no evidence to show that the Respondent Landlord, who has the obligation to insure has acted unreasonably and charged a premium that is out of line with the market norm. We are satisfied that the Respondent has gone out to tender and selected a reputable insurance firm and that the premium is reasonable, particularly in the light of Mr Palley's assertion that the Respondent's insurance company Zurich is the same insurer for Westminster.

(ii) Heating and hot water (Buckleberry)

This item was challenged on the basis that there is only background heating which is inefficient and not effective. The costs are said to be too high as they include additional costs over and above the 10% management fee. Mr Palley relied on the cost of heating in Westminster which he said was cheaper.

Ms Howells said that the heating cost element included associated overheads such as the cost of buying fuel and engaging experts in the procuring process. She added that fuel is a bulk contract tendered throughout Europe and Camden uses experts to identify the most economically advantageous.

In our view, the evidence that the service could be provided cheaper by Westminster does not sufficiently support the allegation that the Respondents costs are unreasonable. The Landlord is not required to provide the cheapest service. The costs incurred were not unreasonably high and we concluded that they were reasonably incurred. From our knowledge and experience, the cost of fuel has increased over the years.

(iii) Caretaking Services

Mr Palley said that the Respondent charges £20 per hour and this was excessive. A reasonable figure in his view was £8-10. He referred to a number

of invoices and relied on a catering company that charged £10 per hour in support of his claim. He challenged the Respondent's definition of the Estate as this is not clearly defined by the lease.

Ms Howells stated that the caretaking contract is in house. The cost to leaseholders in £23.51 per hour which is reasonable. Leaseholders are not paying for tenanted properties and are required to contribute to these costs by virtue of clause 5 Schedule 3 (items of expenditure.) Caretaking is apportioned in accordance with the number of units in the block and estate. She added that the work undertaken by caretakers is monitored frequently.

The Tribunal scrutinised the invoices referred to and finds that the cost incurred is reasonable. Upon inspecting the estate it appeared reasonably tidy and caretakers were visible on site. The Tribunal observed from the photographs produced at the hearing that there were rubbish bags outside 7 Pangbourne but this was explained in evidence that the caretakers put the bins out on rubbish collection day.

(iv) Communal T.V

Mr Palley said that the on costs were too high. There were no certificates produced prior to 2000. £3.36 has been allocated per flat but the ad hoc costs have been added on.

Ms Howells did not strongly object to this claim.

The Tribunal was not satisfied that these costs had been reasonably incurred. The Respondent did not produce any documentary evidence to assist the Tribunal. Therefore the costs associated with the communal T.V are not recoverable.

(iv) Concierge CCTV

Mr Palley said that this service was not effective and duplicated caretaking.
The over heads are excessive as the maintenance cost is around £210 per camera.

Ms Howells explained that inspection and repairs are included in the tendered contract.
Ms Howells explained that this was part of the Respondent's overall management policy of dealing with anti social behaviour and that since installation the cameras have been instrumental in identifying the culprits of anti social behaviour. Evidence to this effect was given on behalf of the Respondents.

We considered the charges for CCTV and find that at £13.84 per unit the cost is reasonable.
The Tribunal does not accept Mr Palley's submission that this cost duplicates caretaking

Major works

Ms Sheehan challenged the reasonableness of the costs incurred as part of the Housing and Security and Repairs Project. Works to Pangbourne were carried out in the Phase 5 Community Safety Works. In summary, Ms Sheehan explained that part of the Phase 5 works involved improving the door entry system and security to the block. Initially the proposal was for a short staircase to be installed for every two tenants on the ground floor, thus rendering tha approach to the flats at this level, less communal, and she was in favour of this. She was unhappy with the Respondent's final decision to demolish the existing staircase and replace it with two new staircases thus creating shared access to her flat. As a result she felt that her quality of life has deteriorated because the erection of the common platform has created a gathering place for young people. Thus the Respondent had failed to achieve or deliver its objectives. She complained that rubbish is also left on the platform.

Ms Sheehan considered that the Respondent's change of plans amounted to a breach of the consultation procedure.

Ms Sheehan also objected to the relocation of the gas pipe which is now surrounding the external front of her flat as she said that it devalued her property. She was also concerned about health and safety as the pipe is loose.

She objected to the installation of a new higher brighter street light that shines through her bedroom. This was installed under the estate environmental and landscaping works contract. Ms Sheehan considered that it was unnecessary to install a new street lamp as new block lighting was installed a few years ago.

She was also concerned about the standard of works carried out during the external and redecoration scheme. She explained in some detail the extent of the problems that she encountered during the course of this work in her written submissions.

Ms Sheehan queried whether the Respondent is able to include the road in front of Pangbourne as part of the estate because she believes that, as it is and has always been known as William Road, it is a public thoroughfare and without a physical barrier, the public has open access.

She added that she had made an offer to settle which had been refused.

Ms Howells said that the Community works included improving lighting, door entry CCTV and mobile security with a view to improving security and tackling anti social behaviour.
Mr Alum explained that the pipe was relocated by Transco and that the Respondent had little control over this as Transco had ignored its written complaints. He confirmed that it had been brought to their attention that the pipe is loose but remedial work had not been carried out.

He added that the decision not to provide a staircase between two tenants for all the flats was taken for economic reasons. The Respondent did not accept that the works carried out have resulted in increased anti social behaviour.

In this case the relevant statutory provisions are contained in the unamended section 20 Landlord and Tenant Act 1985 provisions as the notice was served before 31st October 2003. The section sets out the procedural requirements that a Landlord must comply with in order to recover relevant costs. The purpose of section 20 is to provide leaseholders with an opportunity to challenge the costs and make any observations before any work is carried out. Section 20 (4) (c) provides that " *The landlord shall have regard to any observations received in pursuance of the notice.*" From the documentary evidence submitted, the Tribunal is satisfied that the Respondent complied with its statutory obligations under section 20. It is apparent that there was extensive consultation with the residents and that Ms Sheehan submitted her observations for consideration. Correspondence clearly sets out the Respondent's rationale for adopting the approach that was finally taken. Whilst Ms Sheehan may be correct in stating that the Respondent failed to achieve its aim of improving security, these are not matters for determination by the Tribunal. The Tribunal is limited to determining whether or not the Respondent has complied with the statutory requirements, whether the costs were reasonably incurred and where works have been carried out, whether they were of a reasonable standard. Costs are only recoverable to the extent that they have been reasonably incurred. See section 19 of the Act. From our observations during our inspection, we conclude that the Respondent could not be criticised for the work carried out; the external decorations and staircase were carried out to a reasonable standard. The positioning of the light and gas pipe whilst inconvenient, does not fall foul of section 19. These items fall outside the demised premises and the Tribunal does not have the power to compel the Respondent to remove them. Consequentially, Ms Sheehan is liable to contribute as demanded to the costs of these works.

The Tribunal hereby formally records that Mr Melikian and the Respondent agreed a settlement in the sum of £8.000 as full and final settlement in respect of the demand for £11,140.09 for the refurbishment works pursuant to contract numbers 99/143 CH 1342 invoice number 343094002.

Mr Palley considered that this invoice was not payable as it was statute barred. His invoice is dated 11 October 2000. Ms Howells submitted that the limitation period to be applied is 12 years for leases executed under a seal. She did not provide further information.

He challenged the reasonableness of the costs incurred in respect of the estate fencing, lighting, roads and paving, bin store and canopy, drains repair and redecoration.

He challenged the validity of the section 20 notice served but addressed to the previous owner.

He relied on Spons Architects' and Builders' Price Book to challenge the reasonableness of the costs incurred in carrying out these works under various contracts including; the Environmental and Security works, Environmental and Landscaping works and Environmental and Estate works- Phase B. He acknowledged that he had not had sight of the contracts or specifications. He also confirmed that he had not made any observations under section 20 of the Act. He objected to some of the work carried out by the Respondent on the basis that it provided no useful purpose for leaseholders such as the playgrounds with rubber playing surfaces which attract loiters and anti social behaviour. He added that Leaseholders should not be liable for the cost of erecting a new canopy at Buckleberry and then removing it because it did not comply with the smaller structure that had been agreed following consultation with the residents. He was concerned about non residential buildings which are near or adjacent to Buckleberry and Borrowdale such as the Samuel Lithgow Youth Centre, a bakery, fishmonger and supermarket which he felt were chargeable parties that should contribute to estate and block costs both in the annual service charge and major works. He invited the Tribunal to make recommendations for the leases to be varied in accordance with private contractual law because in his view "leaseholders need protection from excessive overhead charges and from bearing charges and from bearing costs which maybe properly funded by a public Housing Authority but not under a private commercial contract between Landlord and Tenant."

In response, Mr Bodhania, the Respondent's quantity surveyor explained in some detail the contract tendering process that was undertaken in respect of each contract. His evidence was clear, succinct and extremely helpful. Mr Palley acknowledged that the tendering process worked well but said that it produced costs that were too high.

He objected to the Respondent's application to recover the cost of the professional witnesses from applicants because the issues concern all leaseholders and the costs should be borne accordingly. He added that these costs should be absorbed within the 10% administrative fee as provided for under the lease.

Mr Palley applied for the reimbursement of his fees of £500 and costs of £100.

Ms Howells said that the lease allowed the Respondent to recover legal costs through the service charge account but the Respondent's intention is to recharge the cost of the professional witnesses to the applicants only.

The items for which leaseholders are obliged to contribute towards the cost of are clearly set out in the Fifth Schedule of the lease. The relevant sections for the purposes of this determination are clauses 1 (the expense of maintaining repairing redecorating and renewing amending cleaning repointing...of the Estate,) 4 (the cost of insuring the building,) 5 (the cost of employing caretakers) 9 (the cost of the expenses of making repairing maintaining rebuilding and lighting all ways roads) 10(the cost of installing maintaining repairing and renewing any television and radio receiving aerials and 11 (the upkeep of the gardens forecourts road ways pathways used in connection with

the Estate or adjoining or adjacent thereto. The Lease defines the meaning of the Estate as "The property in respect of which the Landlord is or was the registered proprietor under the Title Numbers to the building or conveyed by deed in respect of unregistered land set out above and the Managed Buildings thereon and thereover and including the Common Parts." From the above it is clear that the leaseholder is bound to contribute to the landlord's costs irrespective of whether he makes use of the services or derive any benefit directly. Effectively, Mr Palley questioned the Respondent's judgement or wisdom in deciding to carry out certain works for example installing fancy door entry system and lighting which will have negligible effect on anti social behaviour. As the Freeholder, it is matter for the Landlord to decide what works it will carry out in observance and performance of all the landlord's obligations and duties under the terms of the lease. Leaseholders have a right to challenge the work carried out but only to the extent that the work has not been carried out to a reasonable standard or that the costs incurred have not been reasonably incurred. We rely on **Plough Investments Ltd v Manchester City Council [1989] 1 EGLR 244** which set out the proper approach and practical test to be applied in assessing reasonableness. The test was summarised as follows

"Firstly, as a general rule, where there is more than one way of executing repairs, the choice of method of repair rests with the party under the obligation to repair. Second provided the works of repair are reasonable, the tenant under an obligation to reimburse the cost to the landlord cannot insist upon cheaper or more limited remedial works or a minimum standard of repair. Third a test as to whether works carried out by a landlord and reimbursed by a tenant are responsible is whether the landlord would have chosen that method of repair if he had to bear the cost himself."

We found no basis for Mr Palley's assertion "that the lease has been interpreted in a way which facilitates charging for the costs of vandalism, public disorder and maintaining of public spaces and roads"

The Respondents produced a copy of the Estate plan setting out how it has construed the Buildings which form part of the Estate. It is not for the Tribunal to determine whether or not the Respondent has acted reasonably in so doing. Furthermore, it is not within our jurisdiction to recommend that the leases should be varied in accordance with contractual law. A party to a long lease can make an application for an order varying the lease in such manner as is specified in the application under section 35 Landlord and Tenant Act 1987.

The totality of the evidence given by Mr Palley was the industry guidelines produced in Spons Architects' and Builders Price Book. In cross examination he was taken by way of example to the items that contractors must take into consideration when tendering for work which he had not taken account of in his reading of Spons. It was clear that his understanding of how costs were quantified was both very limited and superficial. Furthermore, he did not have the expertise to interpret the information provided constructively. He had not taken the opportunity to inspect the tender documents that the Respondent had made available as part of the consultation procedure. Consequentially, he had

no idea what was being charged and how it was quantified. His only assertion was that the cost was too high. His evidence, therefore, provided the Tribunal with little assistance. The most relevant evidence concerning the nature of the major works came from Mr Bodhania. His evidence largely concerned procurement, tendering and consultation process undertaken for major works programmes. From this, the Tribunal is satisfied that the Respondent undertook a rigorous tender process and selected the most suitable contractor. There was no evidence before the Tribunal that this work had not been reasonably incurred or the cost unreasonable.

The Tribunal determined that it is unreasonable to recharge the leaseholders the costs incurred in respect of the removal of the canopy as the Respondent failed to comply with the agreed specifications.

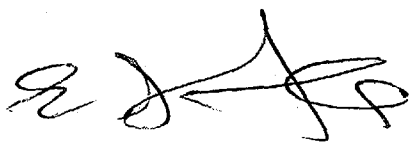
Throughout the course of the hearing, we were referred to a number of previous Tribunal decisions. Whilst at best persuasive, we are not bound to follow leasehold valuation tribunal decisions.

We are not persuaded by Mr Palley's submission that the section 20 notice served was defective because it named the incorrect leaseholder. It is our view that the requirements of section 20 are complied with once the notice has been correctly addressed. In the opinion of the Tribunal, he was in no way prejudiced by this error. The purpose of serving such a notice was met as Mr Palley received it and was able to make observations if he wished to do so.

By virtue of section 5 Limitation Act 1980, the limitation period for actions founded on simple contracts is 6 years from the date of the breach. For actions on contract under seal, the limitation period is 12 years. Although Ms Howells submitted that this applied to the leases in question, there was no evidence produced. Under section 19 and 20, the limitation period for the recovery of arrears of rent and arrears of mortgage interest is 6 years. It is our view that as the Respondent would not now be entitled to sue for recovery in the County Court, there is no merit in this Tribunal determining the reasonableness of the said invoice.

Turning to section 20C provides that a tribunal may "make such order on an application as it considers just and equitable in the circumstances." We consider that the wording of this section permits us to take into account the conduct of the parties in deciding whether or not to make the order. We find on balance that the issues arose due to the failure to communicate adequately with the parties. Particularly if detailed and accurate financial information had been provided and questions answered it may not have been necessary for the applications to be made. In such circumstances we consider it just and equitable to make the order.

For the same reasons, we order that the Respondent reimburse Mr Palley the fees of £500 and cost incurred of £100.

Chairman  30/3/07