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LON/00BE/LSC/2006/0260

DECISION OF THE LEASEHOLD VALUATION TRIBUNAL ON APPLICATIONS UNDER THE LANDLORD AND TENANT ACT 1985: SECTION 27A, AS AMENDED

Address:	18 Royston House, Friary Estate, London, SE15 1SA
Applicant:	Southwark Council
Respondens:	(1) Rudolph Benton (2) Carol Benton
Application:	10 July 2006
Inspection:	16 January 2007
Hearing:	16 January 2007

Appearances:

Landlord

Southwark Council	
Miss C Loren	Home Ownership Unit
Ms R Murray	Home Ownership Unit
Mr J Plant MRICS, FCIOB	Brodie Plant & Goddard, Chartered Surveyors
Mr J Wallis	Appollo (London) Ltd
Mr Pawsey	Area Officer
Ms A Wallington	Area Officer

For the Applicant

Tenants

(1) Rudolph Benton	Leaseholder
(2) Carol Benton	Leaseholder

For the Respondent

Members of the Tribunal:	Mr I Mohabir LLB (Hons) Mr C Kane FRICS Mr A Ring

IN THE LEASEHOLD VALUATION TRIBUNAL

LON/00BE/LSC/2006/0260

IN THE MATTER OF 18 ROYSTON HOUSE, FRIARY ESTATE, LONDON, SE15 1SA

AND IN THE MATTER OF SECTION 27A OF THE LANDLORD AND TENANT ACT 1985

BETWEEN:

LONDON BOROUGH OF SOUTHWARK

Applicant

-and-

(1) RUDOLPH BENTON
(2) CARON BENTON

Respondents

THE TRIBUNAL'S DECISION

Background

1. This matter was commenced in the Lambeth County Court by the Applicant to recover service charge arrears in the sum of £21,664.01. The service charge costs being claimed are in relation to major works carried out to the subject property and demanded from the Respondents on 31 October 2005. On or about 31 May 2006, the Respondents filed a Defence admitting the sum of £3,500 and disputed the remainder of the sum claimed for various reasons. The Respondents also counterclaimed in the sum of £1,000 for stress and ill feeling. However, it should be made clear at this stage that the Tribunal does

not have jurisdiction in these proceedings to determine the counterclaim. For the same reason, neither can the Tribunal also entertain the Applicant's claim for statutory interest on the alleged arrears. In the event that either party wishes to pursue those respective claims, those matters will have to be remitted back to the County Court.

2. By an Order made by District Judge Zimmels dated 10 July 2006, judgement in the sum of £3,500 was entered for the Applicant and the remaining sum in dispute was transferred to this Tribunal for a determination of the Respondents' liability to pay and/or reasonableness of those costs to be made. The Tribunal's determination is made pursuant to s.27A of the Landlord and Tenant Act 1985 (as amended) ("the Act").

3. The Respondents are the lessees of the subject property having taken an assignment of a lease dated 12 November 1990 granted by the Applicant to John and Carol Vertannes for a term of 125 years from 12 November 1990 ("the lease"). By clause 2(3)(a) of the lease, the lessees covenanted with the Applicant to pay the service charge and the capital expenditure reserve charge contributions set out in Part 1 and Part 2 of the Third Schedule.

4. Paragraph 1(1) of the Third Schedule of the lease provides that each service charge year shall commence on 1 April and end on 31 March of the following year. The service charge costs in issue, therefore, fall within the year ending 31 March 2006. Paragraph 2(1) requires the Applicant, before the commencement of each service charge year, to make a reasonable estimate of

the service charge contribution that will be payable by the lessee in that year. The service charge contribution payable by the lessee shall be a fair proportion of the costs and expenses set out in paragraph 7 of the Third Schedule. This includes, *inter alia*, the costs incurred by the Applicant in the performance of its repairing obligations set out in clause 4(2) and (3) of the lease. Essentially, these covenants relate to the repair of the structure and exterior of the flat, the building and common parts. Pursuant to paragraph 2(2) of the same schedule, the lessee is required to pay on account the estimated service charge contribution by equal payments on 1 April, 1 July, 1 October and 1 January in each year.

5. It appears that the last occasion when major works were carried out to Royston House was in 1998. Apparently, the Applicant has a seven year rolling program of works in relation to its housing stock. Therefore, having properly consulted in accordance with section 20 of the Act, in or about September 2004 the Applicant entered into a long-term part rate contract with Brodie Plant & Goddard to provide various consultancy services in relation to proposed major works to the Friary Estate, of which Royston House forms part. On or about the same time, the Applicant also entered into a major works partnering contract with contractors known as Apollo London Ltd. to carry out the proposed works.

6. In April 2005 an initial survey report of Royston House was prepared which made certain recommendations about repairs and improvements that were necessary to the roof, boiler and windows generally. In May 2005, Brodie

Plant & Goddard prepared a second and more detailed survey report on the Friary Estate, pursuant to a Project Brief, which recommended a wider range of works than was originally contemplated in the April 2005 report. The Brodie report formed the basis of a section 20 notice served on the lessees of the Friary Estate on 3 June 2005 as a precursor to the proposed major works commencing. The lessees were informed in the section 20 notice that their estimated service charge contribution would be £21,664. This sum formed the basis of the virtually identical amount demanded from the Respondents on 31 October 2005. The major works commenced shortly after the statutory consultation process had been concluded and the Tribunal was told that practical completion would take place at the end of January 2007.

Hearing & Decision

7. The hearing in this matter took place on 16 January 2007. The Applicant was represented by Mr. Joseph from its Home Ownership Unit. The Respondents appeared in person. It should be noted here that the Tribunal did not inspect the subject property. Its determination is based entirely on the evidence before it and the submissions made by both parties.

8. At the commencement of the hearing, the Respondents identified the following service charge costs, which formed part of the major works, as being in issue:

   (a) the cost of the replacement double glazed windows was excessive.

   (b) the installation of a door entry system was unnecessary and too expensive.

(c) the cost of decorating the common parts was excessive.

(d) the installation of new water tanks was unnecessary and too expensive.

(e) the cost of painting the front doors to each flat was excessive.

(f) the cost of electrical wiring was excessive.

(g) the roof repairs were unnecessary.

(h) the works to the paving and walkways was not carried out.

The Respondents stated that no challenge was being made in relation to the standard of the works. The Tribunal then proceeded to hear the evidence on each of the issues identified above.

9. The Applicant called as its first witness, Ms. Wallington, who is the Area Officer responsible for the capital works programme for Peckham. She did not give evidence on the specific issues before the Tribunal. Her evidence was on the Applicant's general approach to any major works programme it carried out. Ms. Wallington's evidence provided the Tribunal with little or no assistance and no great reliance was placed on it.

10. The second witness called on behalf of the Applicant was Mr. Plant. He confirmed to the Tribunal that he was a chartered surveyor and an architect and was also a Director in Brodie Plant & Goddard. He also confirmed that he was the author of the second survey report that had been prepared in May 2005. It was the Applicant's case that the conclusions and recommendations this report formed the basis of the subsequent statutory consultation that took place with the lessees in relation to the proposed major works. However, Mr. Plant's evidence to the Tribunal in relation to that report caused it some

concern. He confirmed to the Tribunal that his report was in fact concurrent with the estimates that had already been obtained for the proposed works. The extent of the works necessary had already been decided from a specification survey that had been carried out earlier that year by him. The report prepared by him in April 2005 summarised the specification survey. The Project Brief had already determined the specification and pricing prepared in April 2005 (see: pp 125 & 159). The Project Brief had in fact been prepared in January 2005 as a result of the "walk around" of the Friary Estate by him, a Director from Apollo London Ltd. and a residents' representative. When asked by the Tribunal, Mr. Plant accepted that the report prepared by him in May 2005 was irrelevant and that the decision about what major works were going to be carried out had already been taken before that report had been prepared. It follows from this that the Applicant had never intended to meaningfully consult with the lessees as was intended by section 20 of the Act. Moreover, having regard to the evidence given by Mr. Plant in this matter, it was clear to the Tribunal that his conduct fell short of the professional standards required from him.

(a) Windows

11. Mr. Plant's evidence was that the replacement of the existing windows in the subject property had been put out to sub-contract tender, which had been awarded to Symphony Windows.

12. The Respondents accepted that the windows needed replacing, but submitted that the cost incurred by the Applicant was unreasonable. In support of this

submission, the Respondents relied on an alternative statement provided by Mr. Banton's sister dated 1 September 2005 showing that Anglian Windows Ltd. had installed double-glazing to her home at a cost of £4,550. In cross-examination, Mr. Plant did not accept that this was a valid comparison. He said that the contractors employed by the Respondent had to be of a sufficient size to undertake the work that was necessary. One could not compare the prices provided by smaller companies because a domestic installer was not subject to the same requirements as a commercial installer, for example, the extensive use of scaffolding, health and safety and public liability insurance. Nevertheless, the Respondents submitted that a sum of £2,500 was reasonable.

13. The total cost of installed double glazed windows to the subject property, as stated in the draft final accounts, is placed at £117,240.61, of which the Respondents' approximate service charge contribution is £4,865. The only evidence adduced by the Respondents in support of their submission that these costs were unreasonable was the statement from Anglian Windows Ltd., which related to the property owned by Mr. Banton's sister. This evidence did not provide the Tribunal with any assistance for a number of reasons. The statement from Anglian Windows Ltd. related to a completely different property and provided no details about the work that was undertaken. It was also clear that the work had been carried out by a domestic installer as opposed to a commercial installation as was the case here. The Tribunal accepted Mr. Plant's explanation that the cost of a commercial installation would be higher for the reasons given by him including the absence of a need to prepare a specification for a domestic installation. The Tribunal concluded

that it was neither safe nor reliable to rely on the Respondents' evidence on this matter. Moreover, the estimated final cost to the Respondents was not very dissimilar to the cost stated in the Anglian Windows Ltd. statement. The Tribunal was satisfied that the Applicant had properly tendered the sub-contract and had consulted in accordance with section 20 of the Act. Whilst it is always possible to obtain cheaper quotes by carrying out more extensive tendering, to insist that the Applicant do so would impose too onerous a duty on it. The Tribunal considered that the duties already imposed on the Applicant, as a public landlord, were sufficiently onerous. Accordingly, the Tribunal found that these costs to be reasonable.

(b) Security Entrance/Entryphone

14. Mr. Plant's evidence was simply that a ballot of the tenants was taken and it seems that they wanted this work carried out. In cross-examination, he said that the work had been tendered as a sub-contract to contractors on the Applicant's approved list. The cost at present was for all of Royston House. Until the final account had been prepared, the cost could not be individually apportioned. The Respondents submitted that £250 was reasonable.

15. It was not necessary for the Tribunal to consider whether these costs had reasonably been incurred because paragraph 7(9)(ii) of the Third Schedule of the lease gave the Applicant answer discretion to install an entry phone system by way of an improvement. As to the cost of this work, the total block cost was £13,212.05. The Respondents' approximate service charge contribution is £548. They had adduced no evidence that this cost was unreasonable. The

Tribunal accepted Mr. Plant's evidence that the contract for this work had been properly tendered and, therefore, it found that the cost was reasonable.

(c) Decorating Common Parts

16. Mr. Plant accepted that the requirement for this work had not been mentioned in his April 2005 report and that it should have done so. He also accepted that any properly prepared report should comment on all matters contained in the brief. He had simply told the Applicant that this work was necessary. In cross-examination, he said that this work was required because it had last been done approximately seven years before. There were a number of defects, for example, graffiti and other marks. In addition, flame retardant paint had to be used. The Respondents produced a section 20 statement of estimates prepared by Thurrock Council dated 2 May 2006 in relation to another property owned by them, where the service charge contribution varied between £270 and £352.

17. The total estimated cost of decorating the Common parts was £40,559.21, of which the Respondents approximate service charge contribution is £1,683. The Tribunal did not accept the Respondents' submission that the overall cost was unreasonable. In support of that submission, the Respondents relied on the statement of estimates provided by Thurrock Council. However, this did not provide the Tribunal with any assistance, as it contained no detail of the work to which it related. There was no evidence of any specification of the works Thurrock Council propose to carry out. In the present case, the Tribunal had been provided, in the trial bundle, with a specification of the works carried out to the common parts. Whilst the Applicant's documentary

evidence lacked transparency, and the Tribunal had some difficulty following this, it was nevertheless satisfied, on balance, that these costs had been reasonably incurred. As to the cost, the Respondents had adduced no clear evidence that it was unreasonable. The Tribunal considered, for example, that the use of flame retardant paint was entirely proper on the grounds of health and safety and that the additional costs incurred thereby were reasonable. Given the number of properties within the Applicant's housing stock and also having regard to the higher duty of care placed on it as a public landlord, it was entitled to have regard to these additional matters, which inevitably would result in higher costs than would otherwise be the case in the discharge of that duty of care. Accordingly, the Tribunal found these costs to be reasonable.

(d) Water Tanks

18. Again, Mr. Plant conceded that he had not commented on the necessity to replace the two water tanks and Royston House nor was this mentioned in the specification. He said that he had initially inspected the tanks in November 2004. Nevertheless, he asserted that they dated from the 1950s and he had subsequently received instructions to replace them. The cost of replacing the water tanks had been priced by Apollo London Ltd. and a sub-contractor had carried out the work. When it was put to him by the Tribunal, he accepted that despite his assertion otherwise, there was no documentary evidence before it that the water tanks needed to be replaced.

19. In cross-examination, Mr. Plant said that pigeons had been getting into the loft space where the water tanks are located through the access doors to the roof.

He repeated his assertion that the water tanks did not comply with modern standards and needed replacing. It was not possible to upgrade the tanks. His assessment to replace them was based on their condition. Again, the Respondents produced a letter from Thurrock Council addressed to them dated 11 December 2006, wherein it was proposed to renew the water main riser and communal storage tank of the additional property owned by them at approximate cost of £210. However, Mr. Plant said that he was not in a position to comment on this estimate.

20. The total block cost of replacing the water tanks was approximately £17,638, of which the Respondents approximate service charge contribution is £2,329. It was beyond doubt, even on the Applicant's own case, that there was no evidence before the Tribunal that the water tanks were in disrepair. Materially, Mr. Plant conceded this. His assertion that the water tanks needed to be replaced was completely unsupportable. Accordingly, the Tribunal found that these costs had not been reasonably incurred and disallowed them completely.

(e) Front Doors

21. Mr. Plant's evidence was that the front doors in the block had been repaired as necessary and repainted. The Respondents simply submitted that all this work was unnecessary and that the cost should be disallowed.

22. From the documentary evidence before it, the Tribunal could not identify the actual costs of this work. There was no evidence from the Applicant that this

work was necessary, even upon Mr. Plant's evidence. As stated earlier, the Tribunal had some reservations about his evidence generally and, therefore, in the absence of any other corroborating evidence, treated it with some caution. In this instance, there was no other such evidence to corroborate Mr. Plant's evidence that this work was necessary and, accordingly, the Tribunal found that it had not been reasonably incurred and disallowed these costs.

(f) Electrical Wiring

23. In chief, Mr. Plant said that all of the electrical supply and wiring had been carried out by a sub-contractor. He qualified his evidence by stating that he was not an electrical expert but he believed that the electrical wiring to Royston House was the original. He said that an NEICC test had been carried out in or about March 2005, which involved one or two sample tests. Final tests had been carried out after estimates had been obtained in the summer of 2005. Mr. Plant's view was that the electrical installation needed upgrading because of the age of the wiring and the fact that it was undersized. When asked, he said that copies of the relevant reports on the tests referred to by him in his evidence were not in the trial bundle. It cross-examination, he clarified that the cost of the wiring for the entry phone system was not included in these costs.

24. The total block costs for upgrading the electrical supply was approximately £58, 000, of which the Respondents approximate service charge contribution is £7,707. Mr. Plant's evidence of this matter was qualified. He accepted that he could not properly comment on the necessity for the work as he was not an

expert on this matter nor did he personally inspect the works that had been carried out. He, therefore, could not speak from his own personal knowledge. Again, Mr. Plant's assertion that various electrical tests had been carried out was not supported by any relevant documentary evidence. *Prima facie*, there appeared to be little evidence before the Tribunal to support the requirement for these works. Nevertheless, the Respondents had accepted that the works were necessary. Therefore, it was not open to the Tribunal to take or consider this point further. Otherwise, the Tribunal may have found against the Applicant that these costs had reasonably been incurred. Reluctantly, the Tribunal has to accept Mr. Plant's evidence that the costs incurred were reasonable because the Respondents had adduced no evidence that they were not reasonable.

(g) Roof Repairs

25. The extent of the proposed roof works was communicated to the Respondents by a letter from the Council's Capital Works Group dated 23 June 2005. Mr. Plant said that the roof of Royston House had been replaced in 1996. The only work that had been carried out to the roof, as part of the major works, was the installation of ventilation and insulation to the roof void. In addition, minor repairs to the front elevation had been carried out. He accepted that it would have been possible to repair the roof hatches. However, the access ladders to these were not to modern standards. He said, in cross-examination, that the installation of guard rails was necessary for health and safety reasons. The roof insulation had been installed by the Applicant as part of the requirement of the Decent Homes Standard. He accepted that this amounted to an

improvement, as there was no roof insulation before. The Respondents primary submission was that the roof works carried out were not necessary because the previous works had only been completed in 1997. In the alternative, they submitted that of the total approximate cost of £1,100, only half had reasonably been incurred.

26. The Respondents had accepted that only the parapet repairs were necessary. From the draft final account, it appears that the approximate total cost of the roof works was £25,000. The Tribunal was not taken through the relevant documents by either Mr. Joseph or Mr. Plant to demonstrate what roof works had in fact been carried out. The Tribunal found it very difficult on the documents to understand the true position. However, the Tribunal was satisfied, on balance, that several items of work carried out amounted to improvements per se and were not recoverable under the terms of the lease. These included the added roof insulation, the installation of loft ladders and upgrading of the roof hatches and the installation of safety railings. These works amounted to improvements, as they did not exist prior to the commencement of the major works. This was accepted by Mr. Plant. The cost of these works itemised in the specification to be found at page 149 of the trial bundle and amounts to £1,772 and this is the sum disallowed by the Tribunal as not recoverable by the Applicant. It is for the Applicant to recalculate the Respondents' service charge contribution in the light of this finding

(h) Paving & Walkways

27. By way of explanation, Mr. Plant said that the slabs to the front of Royston House had been re-laid and the balconies asphalted. In cross-examination, he explained that the slabs that were in good condition had been re-laid and the broken slabs have been replaced, which were approximately 60 slabs in total. The Respondents submitted that their balcony had not been asphalted.

28. The Respondents did not specifically challenge that these works had been unnecessary or the cost unreasonable. They had simply submitted that because their balcony had not been asphalted, their liability for these costs should be limited to £100. However, the Tribunal rejected the submission because under the relevant service charge provisions in the lease, the Respondents have a service charge liability for the cost of these works, whether or not they received a direct benefit. The draft final account stated that the total cost of these works was £6,641. As the Respondents did not challenge either the necessity of the quantum of these works, they were allowed by the Tribunal as being reasonable.

Section 20C – Costs

29. Mr. Joseph submitted that the Applicant was entitled, under paragraph 7(6) of the Third Schedule, to recover the costs it had incurred in these proceedings as a service charge expenditure. This paragraph allowed the Applicant to recover the costs incurred in relation to the maintenance and management of the building and the estate. Mr. Joseph further submitted that these proceedings directly touched on the management of the building and the estate.

30. The Tribunal did not accept Mr. Joseph's submission that paragraph 7(6) of the Third Schedule of the lease allowed for the recovery of the costs incurred by the Applicant as a service charge expenditure. It is now settled law that, for a landlord to be able to do so, the relevant lease must contain an express provision in these terms, see: ***Sella House Ltd v Mears***[1989] 12 EG 67. The Tribunal was satisfied that paragraph 7(6) of the lease was not sufficiently express to allow the Applicant to recover its costs. It was, therefore, not necessary for the Tribunal to go on to consider whether it was just and equitable to do so. Accordingly, the Tribunal makes an order under section 20C of the Act that the costs incurred by the Applicant in these proceedings are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the Respondents.

Dated the 26 day of March 2007

CHAIRMAN..... I. Mohabir .....

Mr. I. Mohabir LLB (Hons)