CHI/00HN/LSC/2007/0090

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

Address:	Surrey Lodge, 19 Surrey Road, Bournemouth, BH4 9HN
Applicant:	(1) Mr Leber (2) Mr Daisley
Respondent:	Surrey Lodge Residents Association
Application:	25 September 2007
Inspection:	14 March 2008
Hearing:	14 March 2008

Appearances:

Tenants

(1) Mr Leber	Leaseholder
(2) Mr Daisley	Leaseholder

For the Applicants

Landlord

Miss V Jones	Director
Mr M Strong	Managing Agent
Mr M Waugh	MRICS ABEng AMIAS, Chartered Building Surveyor

For the Respondent

Members of the Tribunal:

Mr I Mohabir LLB (Hons)
Mr M Ayres FRICS
Mr R Dumont

IN THE LEASEHOLD VALUATION TRIBUNAL

CHI/00HN/LSC/2007/0090

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

AND IN THE MATTER OF SURREY LODGE, 19 SURREY ROAD, BOURNEMOUTH, BH4 9HN

BETWEEN:

(1) MR DEAN LEBER
(2) MR KEN DAISLEY

Applicants

-and-

SURREY LODGE RESIDENTS ASSOCIAITON LIMITED

Respondent

THE TRIBUNAL'S DECISION

Introduction

1. This is an application made pursuant to section 27A of the Landlord and Tenant Act 1985 (as amended) ("the Act") by the Applicants for a determination of their liability to pay and/or the reasonableness of various service charges.

2. The First Applicant, Mr. Leber, is the leaseholder of Flats 5 and 7 and the Second Applicant, Mr. Daisley, is the leaseholder of Flats 12 in the subject property respectively. The Applicants hold their respective flats by virtue of long leases granted on various dates. The Tribunal was not provided with copies of their relevant leases. The Respondent company is the freeholder.

The Issues

3. The service charges in issue are:

Y/R: 2006/07	
Construction of rear retaining wall	£7,600 inc. VAT (actual)
Y/R: 2007/08	
Managing agent's fees	£130 per flat/year (actual)
Company secretarial costs	£275 per year (actual)
Roof repairs	£74,730 inc. VAT plus fees of £2,125 (estimated)
Header tank	£7,606 inc. VAT plus fees of £2,125 (estimated)
Legal costs	£250 plus VAT (actual)

4. Despite the Tribunal, at a pre-trial review held on 4 December 2007, giving a Direction to the Applicants to file and serve a statement of case, they failed to do so. Instead, the purported statement of case relied on by the Applicants was an undated letter addressed generally to the leaseholders in the subject property criticising the actions or otherwise of the Respondent and raised additional issues regarding works to maintain the subject property or a failure to carry out such works.

5. Nevertheless, at the hearing the Applicants confirmed to the Tribunal that their challenge in relation to the disputed service charge costs was limited to the costs being either unreasonably incurred and/or unreasonable and to quantum. The Applicants did not dispute their *contractual* liability to pay a service charge contribution under the terms of their leases. The Applicants also confirmed that the estimated header tank costs of £7,606 inc. VAT plus fees of £2,125 was agreed by them as being reasonable and payable. The remaining service charge costs in issue are considered in turn by the Tribunal below.

The Lease Terms

6. The only copy of a specimen lease provided to the Tribunal relates to Flat 2 in the subject property. This flat belongs to Miss Jones, a Director of the Applicant company. The lease is dated 24 June 1968 and was granted by Wessex Flat Maintenance Limited to Bramham Property Company Limited for a term of 99 years less 10 days from 25 March 1968 ("the lease"). By an undated Deed of Variation is appears that the term of the lease was extended to 999 years from 25 March 1968.

7. The Applicants did not assert that their leases had been granted in terms other than the lease relating to Flat 2. The Tribunal assumed, therefore, that the Applicants lease terms were the same, including the service charge provisions. Given that the Applicants were not challenging their contractual liability to pay a service charge contribution under the terms of their leases, it is not necessary for the Tribunal to set out here details of the relevant service charge provisions. It is sufficient to state that in paragraph 21 of the Sixth Schedule of the lease, the lessee covenanted with the lessor to indemnify the latter for all costs, charges and expenses incurred in carrying out its obligations under the Seventh Schedule by paying a service charge contribution of two twenty-fifths of the total expenditure so incurred. The Seventh Schedule of the lease simply sets out the covenants given by the lessor.

Inspection

8. The Tribunal inspected the subject property on 14 March 2008 in the presence of Mr Leber, Mr Daisey, Mrs Jones and Mr Strong. It consisted of two three-storey blocks of twelve flats possible erected circa 1930 of rendered brick under flat roofs. Mr Ayres of the tribunal was shown the flat roof by the applicants and noted the areas where the roof appeared to be defective and ponding had occurred. At the rear of the block the land falls away to the upper part of Bournemouth gardens and the Bourne. The tribunal noted the new retaining wall to support the bank together with the existing decking. To the front of the property is a grassed area, which appeared to have once formed part of a driveway to the property.

Decision

9. The hearing in this matter also took place on 14 March 2008. Both of the Applicants appeared in person. The Respondent was represented by Miss Jones, a Director, and Mr. Strong, the managing agent of Rebbeck Brothers. In the main, the Tribunal dealt with this matter on the basis of the submissions made by the parties.

Y/R: 2006/07

Construction of Rear Retaining Wall- £7,600 inc. VAT (actual)

10. It seems that in 2004 decking at the rear of the building was constructed by the Second Applicant at a cost of £4,600 using service charge monies. It was asserted by the Respondent that it was the decking that subsequently caused a landslip that necessitated the construction of a rear retaining wall. Whilst the Applicants did not accept this assertion, they did accept that a rear retaining wall was necessary.

11. It was the Applicants' case that a double skin retaining wall should have been erected instead of the retaining wall consisting of stone gabions. They submitted that the costs incurred were, therefore, too high. When asked by the Tribunal, the Applicants were unable to propose a figure they considered reasonable in relation to the works that had been carried out. The Applicants also complained that the specification for the retaining wall had been changed without further consultation with the lessees and that the job had not been finished properly. In addition, they had been promised a refund by the Respondent and this had not been received as yet.

12. On behalf of the Respondent, Mr. Strong told to the Tribunal that the erection of the rear retaining wall was necessary to stabilise the rear of the building. The works were the subject matter of an insurance claim with regard to the defective drains. The original specification, on which section 20 consultation had taken place, included trench fill foundations. However, when the ground was opened up, this was found to be unsuitable for this type of construction. These findings were set out in a letter dated 6 July 2007 from B E Willis, Consulting Civil and Structural Engineers, to Miss Jones. On the basis of this

advice it was considered necessary to amend the original specification and this was approved by the insurers. This amendment was communicated to the leaseholders by Mr. Strong in a letter dated 9 July 2007.

13. Mr. Strong went on to inform the Tribunal that the length of the retaining wall that had been built was the same length as the original specification. The Council's Building Control Department had issued a practical completion certificate on 30 August 2007. The contractor's certificate of practical completion is dated 15 November 2007. A surplus of £1,200 was to be credited to the service charge account. However, Mr. Strong said that he was going to have the land at the rear of the property surveyed for further possible movement and this was likely to incur further costs. It was for this reason that the surplus had not been paid to the lessees.

14. It was a matter of common ground between the parties that it was necessary to erect a retaining wall at the rear of the property to prevent any or further landslip occurring. This work was to be funded partly by a buildings insurance claim with the remaining costs funded from the service charge account. The insurers had instructed the firm of B. E. Willis, Consulting Civil and Structural Engineers, to prepare a specification and supervise the works generally. It was also a matter of common ground that the lessees had been properly consulted in accordance with section 20 of the Act by the Respondent in relation to the proposed works. However, upon the advice of B. E. Willis, it became necessary to amend the specification of the retaining wall as a result of the prevailing ground conditions, which were not known at the time the original specification was prepared.

15. In the Tribunal's view, the Respondent cannot be criticised for following this professional advice. The Applicants assertion that a double skin retaining wall should have been erected, whether in accordance with the original specification or not, seems to be unfounded. If that assertion was based on the original retaining wall that was specified, then it is clear that the specification, having regard to the prevailing ground conditions, was inadequate. If the

Applicants assertion was not based on the original specification then, in the absence of any other expert evidence, it had no basis at all.

16. The Tribunal also concluded that it was not necessary for the Respondent to formally or informally consult the leaseholders in relation to the amendment of the original specification. It seems that the only amendment to the works originally specified was the installation of stone gabions to take account of the ground conditions which actually reduced costs and B. E. Willis was satisfied that this had been carried out to their satisfaction. To the extent that any formal consultation may have been required, it seems that in any event, an earlier Tribunal in the decision dated 6 March 2007 dispensed with that requirement.

17. As to the cost itself, apart from the Applicants assertion otherwise, they adduced no evidence to demonstrate that the costs incurred were unreasonable. The burden of proof was on the Applicants to do so and they failed to discharge this burden. The Applicants concerns about the making good of the decking and the refund, if any, to be applied to the service charge account had been met by the explanations given by Strong.

18. Accordingly, the Tribunal determined that the rear retaining wall that had been erected was reasonable both as to specification and cost and that it was not necessary for the Respondent to further consult the leaseholders in relation to the amend its specification. The costs incurred were, therefore, recoverable by the Respondent in full.

Y/R: 2007/08

(a) Managing Agent's Fees - £130 per flat/year (actual)

19. These were the fees charged by Rebbeck Brothers. The Applicants accepted that the unit cost per flat was reasonable. The challenge was twofold. Firstly, that Rebbeck Brothers were not entitled to charge, in addition, a percentage of the cost of additional works carried out. They submitted that Rebbeck Brothers should be paid an annual fee instead for supervising this work. Secondly, that the leaseholders had not been consulted by the Respondent

before they had been appointed. Although not relevant, the Applicants were concerned about an existing commercial relationship between Miss Jones and Rebbeck Brothers.

20. Miss Jones explained that the three directors of the Respondent company had researched several local managing agents before limiting their selection to three firms including their charges. Miss Jones candidly admitted that Rebbeck Brothers already manage one other flat for her in another block of flats. However, Mr. Strong had been interviewed by the two other directors of the Respondent and not her. She stated that Rebbeck Brothers had offered three months management free of charge. All the other agents, as a matter of standard practice, charge a percentage of the cost for supervising additional works. Mr. Strong confirmed this and said that the additional fees were only charged as a percentage that had been agreed in advance with the Respondent.

21. The Tribunal concluded that the existing business relationship between Miss Jones and Rebbeck Brothers gave no cause for concern nor did influence their appointment as the managing agent. This had taken place without the participation of Miss Jones. The Tribunal was also satisfied that the practice of Rebbeck Brothers to charge a percentage of the cost of additional works was entirely in accordance with industry practice and that any percentage was agreed in advance. In addition, there was no contractual or statutory duty on the Respondent to consult with the lessees prior to appointing a managing agent. Paragraph 24 of the Sixth Schedule of the lease gave the Respondent an absolute discretion to do so. Accordingly, the Tribunal determined that the fees charged by Rebbeck Brothers were reasonable and recoverable by the Respondent.

(b) Company Secretarial Costs - £275 per year (actual)

22. This cost related to the additional fees paid to Rebbeck Brothers to act as Company Secretary for the Respondent. The Applicants accepted that a Company Secretary was necessary and that the cost was reasonable. They simply contended that there had been no discussion with the leaseholders prior to the appointment of Rebbeck Brothers.

23. The Tribunal agreed fully with the Respondent's submission that it was standard practice for the managing agent to also be appointed as the Company Secretary and it was entitled to charge separately for this. The Tribunal also agreed with the Respondent's submission that that it was not obliged to consult the leaseholders before making this appointment. In the circumstances, the Tribunal determined that this cost was reasonably incurred, was reasonable as to quantum and was recoverable in full by the Respondent.

(c) Roof Repairs - £74,730 inc. VAT plus fees of £2,125 (estimated)

24. Following the appointment of Rebbeck Brothers on 14 May 2007, it was intended to appoint a building surveyor to prepare a specification of roof repairs that were necessary. However, it seems that this course of action was opposed by the Applicants who were of the view that the expense of a full roof survey and specification was not necessary. The Second Applicant's stance was that one of the three estimates he had obtained, as a former Director of the Respondent company, for the proposed roof works should be accepted.

25. Consequently, the Respondent decided to obtain a specification from Soprema UK Ltd. ("Soprema") free of charge and would form the basis of obtaining comparable estimates. The specification prepared by Soprema is dated 31 July 2007.

26. On 11 September 2007, Mr. Strong, on behalf of the Respondent, began formal consultation with the lessees by serving a Notice of Intention to carry out the proposed roof works. The notice contained five estimates obtained from various contractors based on the Soprema specification. There was also one estimates based on a Polyglass specification dated 4 September 2007 (not before the Tribunal) and the three former estimates obtained by the Second Applicant. The notice recommended that the contractor, Hardie Roofing Ltd., be instructed to carry out the work at an estimated cost of £74,730 including VAT. This estimate was based on the Soprema specification.

27. It appears that, subsequently, the Second Applicant obtained an alternative estimate dated 27 February 2008 of £61,600 including VAT from a contractor, Byron Spillard, after the Respondent had commenced statutory consultation and this estimate was not based on the Soprema specification.

28. The Respondent, with the permission of the Tribunal, commissioned an expert (undated) report prepared by Mr. Waugh MRICS ABEng AMIAS, Chartered Building Surveyor of Bennington Green Associates to comment on the relative merits of the two estimates. In response, the Applicants obtained what purported to be an undated report prepared by Bradbury Roofing Supplies, which amounted to no more than a letter comprised of three lines supported by the Byron Spillard estimate and various products guarantees and data sheets. The author of this "report" is unknown.

29. The Applicants accepted that the proposed roof works when necessary and that the Soprema specification was adequate. They simply submitted that the estimated costs of Hardie Roofing Ltd. were too high and that the estimate of Byron Spillard should be preferred.

30. The Tribunal heard evidence from Mr. Waugh who highlighted his concerns about the Byron Spillard estimate. These included the fact that the felt proposed was cheaper than the felt specified by Soprema and there was no mention of insulation. Mr. Waugh concluded overall that the Soprema specification was higher than the Byron Spillard estimate and was broadly correct.

31. The Tribunal had little difficulty in concluding that the Hardie Roofing Ltd. estimate was to be preferred. It was based on the Soprema specification, which was far more comprehensive than the rather bare estimate prepared by Byron Spillard. Inevitably, this would have resulted in the Hardie Roofing Ltd. estimate being higher than the Byron Spillard estimate. Importantly, the independent expert evidence of Mr. Waugh raised serious concerns about the Byron Spillard estimate in his report and he concluded that it was technically incorrect and likely to lead to problems of interstitial condensation within the

roof void. Mr. Waugh recommended that the Hardie Roofing Ltd. estimate be adopted. The Tribunal placed no emphasis on the "report" prepared by Bradbury Roofing Supplies because of its complete failure to comment at all on the adequacy of the Byron Spillard estimate, it somewhat sparse nature and alarming grammatical shortcomings. In the circumstances, the Tribunal determined that the estimated costs of the proposed roof works were reasonably incurred and reasonable as to the amount. In reaching this conclusion, the Tribunal should make it clear that it does not make a finding that the final costs incurred are also reasonable. In the event that either the Applicants or other leaseholders consider the actual costs to be unreasonable, they may make a fresh application to the Tribunal for a determination in relation to those costs.

(d) Legal Costs - £250 plus VAT (actual)

32. This cost was incurred by the Respondent in obtaining legal advice concerning whether or not the lessees were entitled to park their vehicles at the front of the property. The Applicant's case simply amounted to an enquiry about if there had been a duplication of this cost given that the former Directors had sought similar advice before.

33. Mr. Strong explained that there is an ongoing problem about the lessees' entitlement to park their vehicles at the front of the property. Some of the lessees have asserted this entitlement. He, therefore, sought independent legal advice, having firstly discussed this course of action with the Directors of the Respondent. The firm of Rawlins Davy, solicitors, where instructed to provide this advice. They advised that there is a right of ingress and egress if the driveway at the front of the property existed at the time the 1968 leases were granted. If the driveway was subsequently grassed over, then the lessees did not have a right of ingress and egress. In any event, the lessees did not have a right to park or stop at the front of the property. The advice was set out in a letter dated 12 September 2007 to Mr. Strong. He said that he had met the solicitor who had provided this advice about two weeks previously and the position had been confirmed to him. He considered the cost of obtaining this advice reasonable.

34. The Tribunal determined that the cost of obtaining further legal advice from Rawlins Davy was reasonably incurred and reasonable as to the amount. Whilst it seems that similar advice had been sought by the previous Directors, nevertheless, the matter remained unresolved. Contrary assertions were still being made by various lessees about the entitlement to park at the front of the property. This was against a background of two unsuccessful planning applications. Indeed, a letter from the local Council to the Second Applicant dated 7 August 2007 highlights the far from clear position. In the circumstance, the Respondent was perfectly entitled to seek to clarify the issue regarding the entitlement to park at the front of the property by way of further independent lead advice.

Section 20C & Fees

35. The Applicants made a further application under section 20C of the Act that the Respondent should be *disentitled* from being able to recover any costs is had incurred in these proceedings through the service charge account. This section provides the Tribunal with a very wide discretion to make such an order were in the circumstances it is just and equitable to do so.

36. The Tribunal was satisfied, on balance, that paragraphs 18 and 19 of the Sixth Schedule of the lease provided the Respondent with a contractual entitlement to recover the costs it had incurred in these proceedings. Having regard to the fact that the Applicants had not succeeded at all on any of the issues brought in this application and the Respondent was obliged to defend these proceedings, the Tribunal considered that it would not be just and equitable to make an order against the Respondent. Accordingly, it should be entitled to recover its costs incurred in these proceedings. However, in not making an order against the Respondent, the Tribunal makes it clear that it does not make finding that any such costs so incurred are also reasonable. Again, in the event that either the Applicants or one or more of the other lessees consider those costs, when known, to be a reasonable, they may apply to the Tribunal for a determination in relation to these.

Dated the 9 day of May 2008

CHAIRMAN.....

Mr. I. Mohabir LLB (Hons)

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Applicant:	(1) Mr Leber (2) Mr Daisley
Respondent:	Surrey Lodge Residents Association
Application:	25 September 2007
Inspection:	14 March 2008
Hearing:	14 March 2008
Initial Decision:	9 May 2008
Supplemental Decision:	29 July 2008

Appearances:

Tenants

(1) Mr Leber	Leaseholder
(2) Mr Daisley	Leaseholder

For the Applicants

Landlord

Miss V Jones	Director
Mr M Strong	Managing Agent
Mr M Waugh	MRICS ABEng AMIAS, Chartered Building Surveyor

For the Respondent

Members of the Tribunal:

Mr I Mohabir LLB (Hons)
Mr M Ayres FRICS
Mr R Dumont

IN THE LEASEHOLD VALUATION TRIBUNAL

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

AND IN THE MATTER OF SURREY LODGE, 19 SURREY ROAD, BOURNEMOUTH, BH4 9HN

BETWEEN:

(1) MR DEAN LEBER
(2) MR KEN DAISLEY

Applicants

-and-

SURREY LODGE RESIDENTS ASSOCIAITON LIMITED

Respondent

THE TRIBUNAL'S SUPPLEMENTAL DECISION

Introduction

1. This Decision is supplemental to the Tribunal's substantive Decision in this matter dated 9 May 2008 and should be read together with that document, as it already sets out all of the salient facts and the Tribunal's findings.

2. The sole issue to be considered by the Tribunal in this Decision is the Respondent's application that an award of costs limited to £500 be made personally against the Applicants pursuant to Schedule 12 paragraph 10 of the Commonhold and Leasehold Reform Act 2002 ("the Act") ("the application"). It seems that the application was not expressly considered by the Tribunal in the substantive Decision.

The Submissions

3. The submissions made by the parties in support and against the application were the same as those made in relation to the Applicants s.20C application that was determined by the Tribunal in the substantive Decision.

4. Essentially, the Applicants submitted that the s.27A application made by them would not have been necessary had the Respondent complied with the conditions on which the Tribunal, in its Decision dated 6 March 2007, had granted dispensation to consult the lessees in relation to the header tanks on the roof and obtaining a report on the condition of the roof.

5. The Respondent submitted that by their actions, the Applicants sought to frustrate the repair of the building generally and on that basis an award of costs should be made against them under Schedule 12 paragraph 10 of the Act.

The Law

6. Schedule 12 paragraph 10 of the Act provides, *inter alia*, that:

> *"(1) A leasehold valuation tribunal may determine that a party to proceedings shall pay the costs incurred by another party in connection with the proceedings in any circumstances falling within sub-paragraph (2).*
>
> *(2) The circumstances are where....*
>
> *(b) he has, in the opinion of the leasehold valuation tribunal, acted frivolously, vexatiously, abusively, disruptively or otherwise unreasonably in connection with the proceedings.*
>
> *(3) The amount which a party to proceedings may be ordered to pay in the proceedings by a determination under this paragraph shall not exceed....*
>
> *(a) £500."*

Decision

7. Schedule 12 paragraph 10 of the Act gives the Tribunal a discretion to made an *inter partes* award of costs, limited to a maximum of £500, against any party to proceedings who has acted frivolously, vexatiously, abusively, disruptively or otherwise unreasonably. The Tribunal must, therefore, have regard to the conduct of the offending party before making any award of costs. For the purpose of this

application, the Applicants are to be regarded as "a party" within the meaning of Schedule 12 paragraph 10, as the s.27A application was made jointly by them.

8. In the present case, the Tribunal had little difficulty in concluding that an award of costs should rightly be made against the Applicants under Schedule 12 paragraph 10 of the Act. By their actions, the Applicants had certainly, at the very least, acted unreasonably in these proceedings. In reaching this finding, the Tribunal had regard to the Applicants following conduct:

(a) that this was their s.27A application and the evidential burden was upon them to prove their case on a balance of probabilities. The Applicants had failed to discharge that evidential burden because their case was almost exclusively unsupported by any evidence. The Applicants simply relied on mere assertions made by them. In the circumstances, their application was bound to fail but, nevertheless, the Applicants put the Respondent to the time and expense of having to defend the application and, ultimately, succeeding. In other words, their application was wholly without merit.

(b) that the Applicants had failed to comply with the Tribunal's Directions dated 5 December 2007 in any significant way or at all without good reason. This was despite the fact that an oral pre-trial review was held where it was impressed on them the need to comply with those Directions.

9. The only mitigating factor in the Applicants favour was that they were lay persons acting in person. However, this was not a sufficient reason to overcome their conduct in this matter. The Applicants could not be said to be without understanding of these proceedings or the issues. Mr Daisley had appeared at the last hearing on 23 February 2007 when a number of the same issues had been considered as part of the application to dispense in those proceedings.

10. The Tribunal also did not consider it just and equitable that the Applicants should be able to bring an application that was wholly without merit and that the cost of doing so was effectively subsidised by the other lessees through the service charge account when it did not appear to be supported by any of them. Accordingly, having regard to

all of these circumstances, the Tribunal was of the view that the Applicants conduct was at the more serious end of the scale and was properly reflected in an award of £500 costs against them in total, for which they are jointly and severally liable.

Dated the 29 day of July 2008

CHAIRMAN.....

Mr I Mohabir LLB (Hons)