7919

HM Courts & Tribunals Service

Residential Property
TRIBUNAL SERVICE

London Rent Assessment Panel

DECISION OF THE LEASEHOLD VALUATION TRIBUNAL ON AN APPLICATION UNDER SECTIONS 27A AND 20C OF THE LANDLORD AND TENANT ACT 1985 (the Act).

Case Reference: LON/00AH/LSC/2011/0699

Premises: 178 Melfort Road, Thornton Heath, London CR7 7RQ

Applicant	:	**Gala Properties Limited**	
Representative	:	**Mr S G Clacy FCCA**	**Director**
Respondents	:	**(1) Sharon Deleta Hobbs**	**GFF**
		(2) William Paul Scott	**FFF**
Representative	:	**Mr Malcolm Martin FRICS**	
Date of Hearings	:	**22 March and 18 May 2012**	
Leasehold Valuation Tribunal	:	**Mr John Hewitt**	**Chairman**
		Mrs Alison Flynn	**MA MRICS**
		Ms Sue Wilby	
Date of Decision	:	**29 May 2012**	

Decisions of the Tribunal

1. The Tribunal determines that:
   - 1.1 Its conclusions on the questions raised by the Applicant in these proceedings are set out in paragraphs 32 to 35 below;
   - 1.2 An order shall be made and is hereby pursuant to section 20C of the Act that no costs incurred or to be incurred by the Applicant in connection with these proceedings shall be regarded as relevant costs to be taken into account in determining the

amount of any service charge payable by the Respondents or either of them;

1.3 The First Respondent, Ms Hobbs, and the Second Respondent, Mr Scott shall each reimburse the Applicant the sum of £125 by way of contribution towards the fees paid by the Applicant to the Tribunal in connection with these proceedings; and

1.4 The Respondents' application for costs made pursuant to paragraph 10 of Schedule 12 to the Commonhold and Leasehold Reform Act 2002 is refused.

2. Reasons for our decisions are set out below.

NB Later reference in this Decision to a number in square brackets ([ ]) is a reference to the page number of the main hearing file provided to us for use at the hearing. Reference to a number in square brackets prefixed by the letters 'SB' is a reference to the supplemental hearing file provided to us for the resumed hearing on 18 May 2012.

The Application, Directions and Statements of Case

3. By an application received on 10 October 2011 made pursuant to section 27A of the Act the Applicant sought determinations in respect of the consultation exercise carried out by it in connection with major works proposed to be carried at the property [A1].

4. Revised Directions were given on 22 December 2011 [T2].

5. Further Directions were given on 22 March 2012 [SB1].

6. The Applicant's statement of case is fully set out in the documents [A9 – A81].

7. The First Respondent's statement of case is at [R1- R4]

8. The Applicant's Reply is at [S1 – S39].

9. The Second Respondent did not file and serve a statement of case of his own but associated himself with the First Respondent's case.

The hearings

10. The application first came on for hearing on 22 March 2012. On that occasion the Applicant was represented by Dr B MacEvoy MPM who was accompanied by Mr Clacy. The First Respondent was present and was represented by Ms Stephanie Smith of counsel The Second Respondent was also present for most of the hearing.

11. Shortly prior to the commencement of the hearing Ms Smith handed out copies of her skeleton argument. It raised points which evidently took the Applicant by surprise. The Applicant sought an adjournment and this was granted.

12. It also became apparent on this occasion that the Respondents had given notice to exercise the right of collective enfranchisement of the freehold interest and the Applicant had given counter-notice to the effect that the right to do so was admitted. If the prospective enfranchisement went to completion promptly and before the major works were carried out by the Applicant all of the issues raised in the application would fall away. The Respondents, in due course, as freeholders would then have total control over the manner in which necessary works would be carried out. The parties were thus urged to try and progress the enfranchisement claim as it was in their mutual interests to bring it to an early conclusion.

13. At the hearing on 18 May 2012 the Applicant was represented by Mr Clacy. The Respondents were represented by Mr M Martin, a chartered surveyor who is managing the enfranchisement claim for them.

14. We were told that an application in respect of the enfranchisement claim had been made to the Leasehold Valuation Tribunal and that directions had been issued. In connection with those directions the parties' respective representatives were required to meet and a meeting had been scheduled for 22 May 2012.

15. There was something of an acrimonious exchange between the representatives as to delay in the progress of the enfranchisement process and the reasons for it. What did emerge during the exchange was that the price proposed by the Respondents was in the order of £6,000 and the price counter-proposed by the Applicant was in the order of £11,000 and that in the interim the Applicant had made a without prejudice offer lower than £11,000. Mr Martin was thus satisfied that the transaction would proceed to conclusion. He said that the Respondents had commenced arrangements to fund the purchase price and costs of acquisition and said that if they could not do so he would personally loan the funds to them and gave his guarantee to do so. This offer which evidently had not been made previously took Mr Clacy by (pleasant) surprise and appeared to give him some encouragement that the transaction would proceed and complete.

16. Despite the foregoing Mr Clacy wished to proceed with the hearing of his application.

The background

17. The subject property appears to have been originally constructed as a house and subsequently converted into two self-contained flats. Both flats have been sold on long leases,

18. The lease of the ground floor flat is dated 25 May 2001 [L1 – L15] and was varied by a deed dated 9 October 2007 [L16].

19. The lease of the first floor flat is dated 20 December 2000 [L17 – L32].

20. So far as material the leases are in common form.

21. The leases oblige the landlord to insure the property and to carry out repairs and maintenance services as set out in the First Schedule. The leases oblige the tenant to contribute to the costs incurred by the landlord in complying with its obligations. Those contributions are as follows:

	Ground Floor Flat	First Floor Flat
Insurance	Two thirds	One third
The Services	66.6%	33.3%

22. The service charge regime is that the financial year is the calendar year. Prior to each year the landlord's surveyor is to estimate the annual expenditure and the lessees' respective service charges and the sums so ascertained are payable by four equal instalments on the usual quarter days.
At year end when the actual amount of the service charge has been ascertained any balancing debit is payable on demand and any balancing credit is to be credited to the account towards the next quarterly payment due.

23. There were no significant issues between the parties as to the leases or the service charge regime provided for.

The proposed works and the consultation exercise

24. The specification for the proposed works is set out in [A16 – A32] and costed copies are [A45 – A75]. In essence the proposed works comprise repairs to the roof, chimney, fascia boards, gutters and downpipes, the rear flat roof, the front porch roof, to brick work, the the front garden (to include tree felling), to eradicate damp in certain ground floor rooms and to redecorate the exterior and interior common parts.

25. By notices dated 27 September 2010 [A37] the Applicant gave to the Respondents notice of the intention to carry out proposed works and provided a draft specification of works.

The notices invited comments and observations on the proposed works and the putting forward of nominated contractors and stated that the deadline for doing so was 5pm Friday 29 October 2010.

No observations or nominations were received by the specified date.

26. The Applicant obtained estimates from three contractors. By notices dated 23 March 2011 [A42] the Applicant gave to the Respondents

notice that three estimates had been obtained and gave details of each. The range in contractors' bids was £51,000 to £62,475, exclusive of VAT and professional fees. The notice invited written observations on the estimates by 5pm Monday 25 April 2011.

By email dated 31 March 2011 the First Respondent purported to nominate a contractor from whom the Applicant should try and obtain an estimate. That contractor was Sustainable Design and Energy Consultants Limited (SDC). Although that nomination was out of time the Applicant instructed its Contract Administrator, Dr MacEvoy, to try and obtain an estimate from SDC. He did so and met with Mr Ubaka of SDC on site on 19 April 2011. An estimate was submitted by SDC on 3 May 2011 [A60 – A75].

No observations on the three estimates mentioned in the 23 March 2011 notice were received by the specified date of 25 April 2011.

27. By letter dated 17 May 2011 [A76] the Applicant wrote to Respondents discussing the rival estimates:

Belsham Builders	£51,000
SDC	£49,205 (adjusted to include a provisional sum of £1,850 for works to the first floor flat which may have been omitted in error – sum a provisional sum had been included by Belsham)

The letter went on to explain why the Applicant preferred to place the contract with Belsham.

28. There then followed correspondence between the First Respondent and the Applicant concerning the rival estimates. The detail is not relevant for present purposes.

29. Evidently the Applicant proposed to carry out the works in mid to late 2011 and sought on account payments from the Respondents. However the cost of the proposed works was not included in the budgets for 2011 or 2012 and it is those budgets which inform the amount of the quarterly payments on account which the Respondents are obliged to pay. It appears that the Applicant may have been under the impression that major works are outside the scope of the service charge regime in the leases relating to routine service charges and that major works can be dealt with separately. However, there is nothing in the leases which suggests that major works repairs are to be dealt with in a different way to routine repairs and maintenance.

30. As yet a contract for the works not been placed. At the hearing on 22 March 2012 Mr Clacy stated that he was anxious to get on with the works as he did not want to be at risk of a claim by either of the Respondents for breach of his covenant to repair the property. On that occasion Mr Clacy said he understood that the Applicant would have to pre-fund the cost of the works which would be included in the accounts

for 2012 and the Respondents' contributions would be ascertained when the year-end accounts were signed off and the amount of the balancing debits calculated.

The questions for the Tribunal to determine

31. In its Supplementary statement of case [SB4] the Applicant posed four questions for the Tribunal to determine.
For ease of reference the questions are set out below together with our comments/findings on them

32. **Q1**
The Applicant seeks confirmation that the consultation process undertaken by the Applicant is in accordance with the requirements of section 20 of the Landlord and Tenant Act as amended by Section 151 of the Commonhold and leasehold Reform Act 2002

Comment/Determination
Section 20 of the Landlord and tenant Act 1985, as amended is set out in the Appendix to this Decision. We have also summarised the consultation requirements imposed by the Regulations made. In essence it is a three stage process: notice of intention to carry out proposed works, notice of the estimates of costs of carrying those works and notice that a contract has been entered into.

In the First Respondent's statement of case it was accepted that so far as she was concerned the Applicant had consulted her in accordance with section 20. We infer this acceptance was intended to relate only to the first and second stages of the process because the third has not yet occurred.

The Second Respondent adopts the First Respondent's statement of case.

At both hearings both Respondents made it plain that they accepted that the first and second stages of the consultation process had been properly carried out.

We need say no more.

33. **Q2**
The Applicant seeks clarification that, on the basis the proposed works are necessary, the costs of carrying out the works are recoverable from the lessees under the terms of the two leases granted at the property.

Comment/Determination
At the second hearing Mr Martin adopted the skeleton argument prepared by Ms Smith for the first hearing. In part Ms Smith submitted that the Tribunal did not have jurisdiction to make such a determination. Mr Martin developed a separate argument that it would not be reasonable for the landlord to carry out the works at this time in

view of the current collective enfranchisement process. Both arguments are connected.

The Tribunal consider it is reasonable and within the ambit of section 27A(3) of the Landlord and Tenant Act 1985 that a landlord is entitled to ask a Tribunal to determine whether it has correctly carried out the first and second stages of the consultation process. The financial consequences for the landlord if it has not can be severe. However, where such a determination is made it is only that the consultation has been properly carried out and does not in any way relieve a landlord of the effects of section 19 of the Act. Thus where consulted upon works are carried out it remains open to a lessee to make challenges to the question whether the works fall within the repairing obligation set out in the lease, the reasonableness of the decision to incur the costs of the works, the nature and scope of the works, the standard of the works and the cost of the works. Some of these issues can only be determined once the works have been carried out.

Whether a lessee does or does not participate in the consultation process does not deprive him of her of the protection of section 19 of the Act or the ability to challenge the amount payable, although, it must be said that the extent to which lessees do or do not participate in the consultation process may be a factor to weigh in the balance when considering the reasonableness of the landlord's decisions.

In the context of the present case the question posed or rather the clarification sought by the Applicant asks the Tribunal to pre-suppose a number of key factors on which no evidence has been submitted to us and we are not prepared to do so.

The works have not yet been undertaken. In some areas the precise works to be carried out can only be determined when opening up works have been carried out. The precise cost of the works is not yet known and the specification contains a number of provisional sums. It is simply premature to make any determination on what costs (yet to be incurred) might be payable by the Respondents.

If and when the works are carried out the reasonableness to have undertaken them will be judged on the relevant factors then prevailing.

We can see some merit in Mr Martin's submission that if there is a genuine prospect of the enfranchisement project completing shortly then it might be said it would unreasonable for the Applicant to carry out the works now. That said we note Mr Clacy's submission that he has a substantial portfolio of residential ground rent investments and he has seen many a collective enfranchisement or lease extension project fall to the way side. That strikes a chord with the experience of the members of the Tribunal.

We do therefore again urge the parties to try and conclude the enfranchisement project shortly so that both sides may move on in a purposeful way with their respective interests.

We do not consider that we can usefully add any more.

34. **Q3**
The Applicant has rejected a tender put forward by a contractor nominated by a lessee and has given reasons for so doing. The Applicant seeks confirmation that the grounds for rejection are reasonable and furthermore, that if the works carried out by the Applicant's contractor are performed in a timely fashion and to a satisfactory standard, the Applicant can recover the full costs from the lessees.

Comment/Determination
There is some overlap in this point with Q2.
As regards the rejection by the Applicant of the SDC tender, Mr Martin stated that the Applicant was perfectly entitled to reject the SDC tender and to reject it was within the range of what a reasonable landlord might do. Thus the Respondents do not challenge the rejection of the SDC tender.

35. **Q4**
The Applicant seeks confirmation that the Statement of Estimates and accompanying paperwork presented to the lessees on 23 March 2011 is sufficient for the Applicant to include in his budget figure for service charges for the year to 31 December 2012 as required under the terms of the Lease.

Comment/Determination
At both hearings it was clear that the estimated costs of the proposed major works had not been included in the 2012 budget to inform the amount of the quarterly on account sums payable by the Respondents. At the hearing on 18 May 2012 Mr Clacy withdrew this question.

The section 20C Application – limitation of landlord's costs of the proceedings

36. At the conclusion of the substantive hearing submissions were made on the application under s20C of the Act with regard to the landlord's costs incurred or to be incurred in connection with these proceedings and an order was sought that those costs ought not be regarded as relevant costs in determining the amount of any service charge payable by the Respondents.

37. The application was initially opposed by Mr Clacy. Mr Clacy accepted that costs of proceedings such as these were not mentioned in the First Schedule in the leases, which Schedule governs the nature of the services to which the lessees must contribute.
Mr Clacy said that costs had been incurred with Dr MacEvoy assisting him but he did not know what they amounted to. He said that he had not yet charged the Applicant for his own time (but considered he might do so) and he was unaware of what his travel costs amounted to, although he appeared to dismiss them as being of little consequence.

38. We have decided to make an order under section 20C because we consider it just and equitable to do so in all of the circumstances. It was never in issue by the First Respondent that the first two stages on the consultation process were correctly followed. The Applicant failed on Q2 and withdrew Q4.
Whilst we find it unfortunate that the Respondents did not make their position clear on Q3 until part way through the second hearing we do not consider that that alone should justify the costs passing through the service charge account – even if the lease allows it, which we rather think it does not.
In some cases a landlord is justified in making an application such as this where there is or might be a genuine and important issue arising out of the adequacy or not of the consultation process. In the present case we find that the Applicant has rather overreacted. Whilst we recognise that the Applicant sought assurances for its own peace of mind we consider that the cost of that peace of mind should not be passed on to the Respondents.

Reimbursement of fees

39. The Applicant incurred £500 in fees paid to the Tribunal in connection with these proceedings. The Applicant sought reimbursement. The application was opposed. We heard rival submissions.

40. In submissions both parties blamed the other for failure to make progress in the enfranchisement project. Mr Clacy was critical that Mr Martin's offer to stand guarantor for the payment of the cost of purchase of the freehold interest was only made partway through the hearing on 18 May 2012. He appeared to suggest that if made earlier matters would have progressed in a different way.

41. One of the substantive issues before us was the Respondents' position on the SDC tender. We consider that should have been clarified by the Respondents at an earlier stage.

42. We find that criticism can be levied at both parties such that the fees incurred should be borne equally; that it is to say 50% as to the Applicant and 25% to each of the two Respondents. We have thus required the Respondents to reimburse part of the fees.

Application for costs

43. Mr Martin made an application for costs pursuant to paragraph 10 of Schedule 12 to the Commonhold and Leasehold Reform Act 2002. He sought to recover £500. He said that his fee for attending the hearing was £500 + VAT at 20%.The gist of Mr Martin's submissions were that the Applicant was put on notice by letter dated 24 April 2012 [SB8] that costs would be claimed if the Applicant insisted on going to a second hearing. He also submitted that it was both well beyond unreasonable and was vexatious to drag out the enfranchisement negotiations and fail to be available for a meeting as a result of which the second hearing was necessary.

44. Mr Clacy opposed the application and made rival submissions. He said that past experience led him to conclude that enfranchisement matters should go by the book. He denied undue delay in making arrangements for the proposed meeting and asserted unreasonableness on the part of Mr Martin in being slow to give his guarantee for the costs of acquisition of the freehold.

45. We have considered the rival submissions carefully. In large part the conduct complained of arose in the enfranchisement project and not directly in connection with the present proceedings, although we do see an element of overlap.

46. Again we find that criticism can be levied at both parties. The threshold imposed by paragraph 10 is a high one and caution is required before a punitive order should be made. We find that in this case the threshold has not been met. We decline to make an order for costs and therefore refuse the application.

John Hewitt
Chairman
29 May 2012

Appendix of relevant legislation

Landlord and Tenant Act 1985

Section 18

(1) In the following provisions of this Act "service charge" means an amount payable by a Tenant of a dwelling as part of or in addition to the rent -

(a) which is payable, directly or indirectly, for services, repairs, maintenance, improvements or insurance or the Landlord's costs of management, and
(b) the whole or part of which varies or may vary according to the relevant costs.

(2) The relevant costs are the costs or estimated costs incurred or to be incurred by or on behalf of the Landlord, or a superior Landlord, in connection with the matters for which the service charge is payable.

(3) For this purpose -
(a) "costs" includes overheads, and
(b) costs are relevant costs in relation to a service charge whether they are incurred, or to be incurred, in the period for which the service charge is payable or in an earlier or later period.

Section 19

(1) Relevant costs shall be taken into account in determining the amount of a service charge payable for a period -
(a) only to the extent that they are reasonably incurred, and
(b) there they are incurred on the provisions of services or the carrying out of works, only if the services or works are of a reasonable standard;
and the amount payable shall be limited accordingly.

(2) Where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable, and after the relevant costs have been incurred any necessary adjustment shall be made by repayment, reduction or subsequent charges or otherwise.

Section 20

Limitation of service charges: consultation requirements
(1) Where this section applies to any qualifying works or qualifying long term agreement, the relevant contributions of tenants are limited in accordance with subsection (6) or (7) (or both) unless the consultation requirements have been either—
(a) complied with in relation to the works or agreement, or
(b) dispensed with in relation to the works or agreement by (or on appeal from) a leasehold valuation tribunal.

(2) In this section "relevant contribution", in relation to a tenant and any works or agreement, is the amount which he may be required under the terms of his lease to contribute (by the payment of

service charges) to relevant costs incurred on carrying out the works or under the agreement.

(3) This section applies to qualifying works if relevant costs incurred on carrying out the works exceed an appropriate amount.

(4) The Secretary of State may by regulations provide that this section applies to a qualifying long term agreement—
  (a) if relevant costs incurred under the agreement exceed an appropriate amount, or
  (b) if relevant costs incurred under the agreement during a period prescribed by the regulations exceed an appropriate amount.

(5) An appropriate amount is an amount set by regulations made by the Secretary of State; and the regulations may make provision for either or both of the following to be an appropriate amount—
  (a) an amount prescribed by, or determined in accordance with, the regulations, and
  (b) an amount which results in the relevant contribution of any one or more tenants being an amount prescribed by, or determined in accordance with, the regulations.

(6) Where an appropriate amount is set by virtue of paragraph (a) of subsection (5), the amount of the relevant costs incurred on carrying out the works or under the agreement which may be taken into account in determining the relevant contributions of tenants is limited to the appropriate amount.

(7) Where an appropriate amount is set by virtue of paragraph (b) of that subsection, the amount of the relevant contribution of the tenant, or each of the tenants, whose relevant contribution would otherwise exceed the amount prescribed by, or determined in accordance with, the regulations is limited to the amount so prescribed or determined.

NB The relevant regulations are:
The Service Charges (Consultation Requirements) (England) Regulations 2003 SI 2003 No. 1987, as amended.

The relevant requirements are set out in Schedule 4 Part 2.

In essence there is a three part process:

Paragraph 8	The giving of a notice of intention to carry out proposed works;
Paragraph 11	The provision of estimates of the cost of carrying out the proposed works; and
Paragraph 13	The giving of a notice that a contract for works has been entered into.

There is a provision in paragraph 8 which enables a tenant to nominate a contractor from whom the landlord should try and obtain an estimate for the works. Such nomination is required to be made within the relevant period, which is 30 days.

Section 27A

(1) An application may be made to a Leasehold valuation tribunal for a determination whether a service charge is payable and, if it is, as to -
   (a) the person by whom it is payable,
   (b) the person to whom it is payable,
   (c) the amount which is payable,
   (d) the date at or by which it is payable, and
   (e) the manner in which it is payable.

(2) Subsection (1) applies whether or not any payment has been made.

(3) An application may also be made to a Leasehold valuation tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs and, if it would, as to -
   (a) the person by whom it would be payable,
   (b) the person to whom it would be payable,
   (c) the amount which would be payable,
   (d) the date at or by which it would be payable, and
   (e) the manner in which it would be payable.

(4) No application under subsection (1) or (3) may be made in respect of a matter which -
   (a) has been agreed or admitted by the Tenant,
   (b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the Tenant is a party,
   (c) has been the subject of determination by a court, or
   (d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.

(5) But the Tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.

Section 20C

(1) A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a court, residential property tribunal or

leasehold valuation tribunal, or the Upper Tribunal, or in connection with arbitration 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 tenant or any other person or persons specified in the application.

(2) The application shall be made—
  (a) in the case of court proceedings, to the court before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to a county court;
  (aa) in the case of proceedings before a residential property tribunal, to a leasehold valuation tribunal;
  (b) in the case of proceedings before a leasehold valuation tribunal, to the tribunal before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to any leasehold valuation tribunal;
  (c) in the case of proceedings before the Upper Tribunal, to the tribunal;
  (d) in the case of arbitration proceedings, to the arbitral tribunal or, if the application is made after the proceedings are concluded, to a county court.

(3) The court or tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances.

Leasehold Valuation Tribunals (Fees)(England) Regulations 2003

Regulation 9

(1) Subject to paragraph (2), in relation to any proceedings in respect of which a fee is payable under these Regulations a tribunal may require any party to the proceedings to reimburse any other party to the proceedings for the whole or part of any fees paid by him in respect of the proceedings.

(2) A tribunal shall not require a party to make such reimbursement if, at the time the tribunal is considering whether or not to do so, the tribunal is satisfied that the party is in receipt of any of the benefits, the allowance or a certificate mentioned in regulation 8(1).

Commonhold and Leasehold Reform Act 2002

Schedule 12, paragraph 10

(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—

(a) he has made an application to the leasehold valuation tribunal which is dismissed in accordance with regulations made by virtue of paragraph 7, or

(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, or

(b) such other amount as may be specified in procedure regulations.

(4) A person shall not be required to pay costs incurred by another person in connection with proceedings before a leasehold valuation tribunal except by a determination under this paragraph or in accordance with provision made by any enactment other than this paragraph.