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HM Courts & Tribunals Service

Residential Property TRIBUNAL SERVICE

**LONDON RENT ASSESSMENT PANEL**

# DECISION OF THE LEASEHOLD VALUATION TRIBUNAL ON AN APPLICATION UNDER SECTIONS 27A & 20C OF THE LANDLORD AND TENANT ACT 1985

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| **Case Reference:** | LON/00BJ/LSC/2011/0449 |
| **Premises:** | 28 Jean House, Tooting Grove, London SW17 0QZ |
| **Applicant(s):** | The Mayor and Burgesses of the London Borough of Wandsworth |
| **Respondent(s):** | Joanna Poczynajlo |
| **Date of hearing:** | 17th April 2012 |
| **Appearance for Applicant(s):** | Mr J Holbrook, Counsel<br>Miss K Signi, Sharp Pritchard, Solicitor for the Council<br>Miss Elizabeth Parrette,<br>Mr Peter Dunston, both from the Council<br>Mr I Aleem, trainee solicitor with Sharp Pritchard |
| **Appearance for Respondent(s):** | Miss J Poczynajlo<br>Mr S Mirza |
| **Leasehold Valuation Tribunal:** | Mr A A Dutton – chair<br>Mr H Geddes JP RIBA MRTPI<br>Mr O Miller BSc |
| **Date of decision:** | 21st May 2012 |

## Decisions of the Tribunal

(1) The Tribunal finds that the Respondent should pay to the Applicant Council the sum of £3,367.95 (see para 28 below) being the balance of the amount due in respect of the major works, such payment to be made within 28 days or such period as may be determined between the parties or the Court.

(2) The Tribunal makes an order under section 20C of the Landlord and Tenant Act 1985 so that none of the landlord's costs of the Tribunal proceedings may be passed to the lessees through the service charge as has been agreed by the Council.

(3) Since the Tribunal has no jurisdiction over county court costs and fees, any claim in respect of those matters or interest is referred back to the county court.

## Background

1. This case involves a transfer from the Wandsworth County Court under an order dated 28th June 2011 requiring that we assess the reasonableness of service charges which were claimed by the Council arising from major works that were carried out to the block of flats in which the Respondent has a property at 28 Jean House, Tooting Grove. This was the third hearing to resolve the matters in dispute. There have already been hearings in October and in December of last year when we rejected the Respondent's arguments that an agreement had been reached with the Council that they would accept £250 in full and final settlement of the claim of £3,751 and also that the Council had failed to comply with the consultation procedures under section 20 of the Act, particularly that they had not served the Respondent with the relevant notices.

2. Subsequent to that the Respondent sought permission to appeal which was refused.

3. On 2nd December 2011 following the hearing to determine whether or not the provisions of section 20 of the Act had been complied with, the Tribunal issued directions requiring the Respondent to serve on the Council any expert's report she intended to rely upon by 3rd February 2012 and to complete and return to the Council a Scott schedule on or before 17th February 2012. Neither of these matters was dealt with. Instead some two months after the directions were issued the Respondent wrote to the Tribunal complaining that a final certificate had not been issued by the Council and that she was consequently not able to instruct an expert to consider the costs of the major works. A further letter making a complaint of a similar nature was purportedly sent to the Tribunal in March. We will return to this issue in due course.

## The Hearing on 17th April 2012

4. The hearing was scheduled to commence at 10.00am on 17th April 2012 but by 10.15am the Respondent had not arrived. Accordingly the hearing commenced in her absence but within 15 minutes she arrived and that which had been considered in her absence was repeated so that she was fully aware of what had been said. Mr Holbrook had opened the case for the Council by explaining that there had been a failure by the Respondent to comply with the directions issued in December and confirming that a new spreadsheet had been prepared and issued by the Council showing the costs associated with the works carried out to Jean House. We were also told that a final certificate had been issued by the contract administrator in June of 2010. This certified the final payment due under the contract to Apollo. Somewhat surprisingly this certificate had not been produced until the morning of the hearing on 17th April. It was at around this point that the Respondent arrived at the hearing. She immediately took issue with the new final costs schedule. She said that the figures had been changed and an adjournment was agreed to give her some time to look at the new final account document (notwithstanding that it appears this was sent to her in January of this year) and to compare it with the document which was in the bundle and had been before the hearing in October. It was clear from considering the two documents that the only change from the accounts issued in October was the transferring of the costs relating to the supply and erection of scaffolding to an apportionment column which had the net effect of slightly reducing the sum sought from the Respondent from the sum that was actually in issue to £3,617.95. The Respondent then proceeded to argue that she was not liable to settle these costs until a certified account had been produced under the terms of the lease. It was this missing certificate that she said meant that she was unable to instruct a surveyor to prepare a report which had been provided for in the December directions. On questioning from the Tribunal she confirmed she had not in fact spoken to a surveyor other than someone she had found in Yellow Pages in October of last year.

5. In response to this Mr Holbrook reminded us that the directions had first been issued in July of 2011 and that the certificate in relation to the final payment which was from the summer of 2010 is different to the final certificate due under the terms of the lease. He confirmed that the certified final accounts have not been sent to the leaseholders and would not be due under the terms of the lease until 1st October 2012. At present the sum in dispute was the estimated amount in respect of the works, although he confirmed that the figures included in a letter from Wandsworth Council to the Respondent on 29th February 2012 were correct and Miss Parrette confirmed they would not be departed from. This confirmed the contribution of £3,617.95, credit having been given for the figures that were amended as a result of the movement of the scaffolding from one column to another which gave rise to a reduction of £132.91. Mr Holbrook said there was no reason why the Respondent could not have obtained expert evidence to deal with these figures as they had not in terms changed since the schedule prepared for the hearing in October last year.

6. The Respondent was not content with this explanation and asked for an adjournment again to be given time to instruct a surveyor.

7. We were told by Mr Holbrook that the final service charge figure was known by the Respondent at the end of February 2012 at the latest. The schedule which was produced to us at the hearing on 17th April 2012 had in fact been sent to the Respondent on 12th January 2012. He said it was simply not proportionate to adjourn the hearing yet again.

8. We adjourned to give the matter some consideration. Our finding was that we were not prepared to adjourn the hearing so that we had a fourth meeting to discuss a claim worth less than £4,000. In December when directions were issued relating to experts the Respondent raised no query with regard to the instructing of an independent expert to assist with the presentation of her case. It was not until some two months later, after it appears she had been served with the new schedule, that she decided to raise an argument that because the final certificate had not been produced she was precluded from instructing an expert. There seems to have been some confusion in her mind as to what constitutes the final certificate. The certificate that was produced on the day of the hearing was merely a document between the contract manager and the client authorising the final payment to the contractor under the terms of the agreement. This is not a matter that is necessarily produced in proceedings of this nature and has no bearing on the Respondent's position. What she seems to argue is that she has no liability to make any payment under the terms of her lease until the certificate provided for in the lease has been produced and, or in the alternative, that she was not able to challenge the sums claimed because a final certificate had not been issued.

9. The provisions relating to the certificates and accounting issues are contained at clause 5 of the lease. The certificate is defined as is the estimated charge. Under clause 5(v)(b) the lease states as follows: *"On the first day of October next following the date of this lease the Council shall send to the lessee a written statement setting out therein the amount of the estimated charge for the then current financial year and shall (if the council notice of estimates was given more than six months before that date) send also to the lessee the certificate of the financial year during which the said notice of estimates was given with the service charge apportioned for the period from the date on which the notice of estimates was given to the end of that financial year, and the Council shall on each succeeding first day of October send to the lessee a written statement setting out therein the amount of the estimated charge for the then current financial year together with a certificate for the preceding financial year."*

10. The position seems to be this. The Respondent was served with final figures in advance of the hearing in October of 2011. Those figures have not changed and therefore she had ample opportunity in our finding to have instructed an expert to challenge those final figures. In addition, the nature and extent of the work undertaken in respect of the external decorations and associated repairs remained constant as did the specified tender

documentation all of which could have been provided to an expert for the purposes of providing any challenge that she wished to undertake. It is clear to us that under the terms of her lease the Respondent is obliged to pay an estimated sum even if a final demand has not yet been issued. We were told that a final demand will be issued later this year and will be in the sum set out in the letter from Wandsworth Council to the Respondent dated 29th February 2012. We therefore concluded that it would be inappropriate to adjourn the matter again to have a fourth hearing bearing in mind the value of the claim and the fact that the Respondent has had since October to instruct an expert to assist her in this matter, yet has failed, without reasonable excuse, to do so.

11. We therefore indicated that we intended to proceed to deal with the matter on 17th April. Although criticism had been made of the Respondent for not dealing with the response to the Scott schedule this was not wholly fair because in her letter of 27th October 2010 she had produced a response dealing with those matters that she wished to challenge. This was under the heading 'summary of the final account' prepared by the Respondent 27th October 2011. The Respondent confirmed that all the items listed below are disputed by her:

- General preliminaries
- Scaffolding
- Roof
- External Walls
- Rainwater goods
- Windows
- Communal doors
- External decorations
- Internal decorations
- Professional fees

Attached to the letter of 27th October was the Respondent's answers to the Applicant's letter dated 14th October 2011 which we noted and the Respondent's answer to the Applicant's letter of 21st October 2011, again the contents of which were noted. Such was the detailed response given in this document and in subsequent correspondence that it supported our view that the Respondent was able to fully challenge the costs of the major works.

12. One issue that she raised was the question of the tender which resulted in the appointment of Apollo as the main contractor. As with a number of issues in this case she thought there was some collusion and indeed she alleged the whole contracting process was a fraudulent conspiracy and that the tender documents were fraudulent. This is based upon the notice given by the Council in November 2008 which initially indicated that Durkan was the cheapest tenderer and omitted any reference to Apollo. This was corrected by a letter dated 12th December 2008 when it was made clear that Apollo were the successful tenderer. She sought to argue that as Apollo had been involved in alleged illegal activities in relation to other contracts such behaviour had also pervaded this arrangement. However, this did not sit with

the evidence before us, in particular a tender report dated October 2008 a month before the notice setting out the details of the contractor, named as Apollo, was sent to the leaseholders. It is quite clear that recommendation was being made for the appointment of Apollo at this time. In those circumstances there appears to be no evidence of any such fraudulent behaviour on the papers before us.

13. We then turned to some of the specifics. We will list those separately starting with the windows. The Respondent thought that some of the windows could have been replaced and it would have been cheaper than repair. She felt that the window replacement work was included within a feasibility study carried out earlier and that Apollo should not have done the works but instead a specific contractor should have been appointed. She thought that much of the work was unnecessary and little had been done to her windows other than she said to make matters worse. She did not think the windows had been cleaned but she was not sure what had been done for the whole of the block and had not inspected the whole of the block. She drew our attention to a feasibility report undertaken in February in 2006 when the state of the PVC windows was described as "fairly aged throughout, however some elements remain in reasonable condition whilst others have become defective." She also referred to a housing department major works section brief, dated it would seem March 2006, where under the heading "General Headings" reference is made to the windows being fully inspected to ascertain any defects which does not give any indication as the replacement of the windows. It refers to overhaul and repair.

14. Under the heading "Preliminaries" she thought that the amount allocated to the residential leaseholder was too high at 86.74% but could not really say what it was she thought it should be, perhaps 50% but no evidence was produced to support that figure.

15. Under the heading "scaffolding" we were told that there was a breakdown of the costings showing that the liability to Dewer House was just over £25,000, to Robertson House some £49,000 and the sum attributable to Jean House was £54,291.25. She thought that the scaffolding was expensive and had been unused for a large part of the time. She thought that the sum of £25,000 would be an appropriate figure based on her observing the working practices of the contractors. She told us that she had no challenge to the roof repairs.

16. In respect of external decorations she thought that the photographs included in the bundle showed that there was limited external decorations and that the sum of £15,530 was too much. She had no alternative to put forward but thought that half that amount would be reasonable. She said that she had seen no repair work done to the brickwork but when it was pointed out to her by a member of the Tribunal that the works appeared to be measured works by a surveyor who gave the figures that were included in the account, she was not able to challenge that fact, other than to say the works were not of a suitable standard and that she did not think they had been properly measured. She could not see works that could justify the expense claimed.

17. Under the "rain water" goods she thought the replacement was unnecessary. She did not think that the contractor needed to do this and had only done so because he did not have sufficient work. It was a cost solely created to increase the overall bill. She thought that the sum of nearly £5,000 was too expensive but had no idea what the extent of the work was. She thought that £2,000 would be appropriate figure for the replacement of the rainwater goods although she had not measured the extent of the guttering.

18. Turning then to the question of windows, she thought the charges were unreasonable and that she had very little done to the windows to her flat. She thought that the costs involved should be reduced as she thought only 45% was reasonable. On the question of the communal doors, she thought no works had been done to justify any charge. We then considered the complaints in respect of internal decorations. She thought that the costs were too high and that the standard was not good. She produced some photographs which we noted and also a document showing the costs of paint. She confirmed that she had not measured the areas involved. She gave an estimate that the costs to the internal decorative works could be £6,000 or £1,000 for each common part area of which there were ten which would seem therefore to have given a price of £10,000. She thought in any event that the work was of a poor standard. We then turned to the management and consultancy charges. She thought that the consultant had generated additional works to boost the fee charged as was also the case with regard to the management fees. She also raised an issue that the doormats to her property appeared to have been removed and that she had problems with the boiler flue following the attendance of the contractor.

19. Mr Holbrook told us that there were 60 flats, 31 of which were held under a long lease and the Respondent was the only person to dispute the service charge. He relied on the evidence previously tendered which was the statement of case and reply, and the witness statements in the bundle, in particular a statement from Mr Dunston all of which were tendered in evidence. We had read these documents. The Respondent did not raise any challenge to these papers/statements. Both parties were invited to make short submissions

20. Mr Holbrook told us that competitive tendering had been undertaken and that the cheapest contractual price had been obtained which indicated good value for money. The work had been supervised and signed off by professionals and there should be no doubt as to the correctness of the sums being claimed. Whilst he accepted that things could go wrong, so much of the Respondent's evidence was incredible and unreliable, for example the internal decoration where he said it appeared that the Respondent was picking figures out of the air.

21. He confirmed that there would be no claim for costs.

22. The Respondent apologised for not having been able to call an expert witness. She said there had been some confusion over the meaning of the final

accounts and was convinced until today that she had not received a final certified account. She said that she had received so many reports with varying figures that she was convinced that without a final certified account she would not be able to make her case. She said that she was waiting for the certified final account either from the builder or the accounts department and only at this hearing did she get a final certificate. She said that she had wished it to be cleared up before now and regretted that she was not able to put forward better evidence.

**The Law**

23. The law appropriate to this case is set out on the attached document.

**Findings**

24. The Respondent has had three bites at the cherry in respect of seeking to avoid responsibility for payment of the costs due in respect of the major works undertaken by the Council in 2010. The first two attempts have been rejected by us for reasons stated previously. We therefore concentrate our findings in this case on the final challenge made by the Respondent to the actual costs of the works involved.

25. As we have already indicated, in our view the Respondent has had ample time in which to have instructed an expert to advise her on the costs involved. The financial efficacy of instructing an expert where the sum claimed is under £4,000 is of course a matter for her. However, she has not done so and the attempt to seek a further adjournment today seemed to us to be inappropriate. She has had the final figures since October of last year and ample opportunity to have sought advice to challenge the costings. We therefore make our findings on the basis of the evidence we heard at the hearing, including the various Respondent's replies and her submission of 27th October 2011.

26. By and large we are satisfied that the Council has undertaken these works properly, has proceeded through the tendering process correctly and has employed proper professionals to certify the works as they progressed and to certify the final payment. The sum involved of some £3,617.95 does not seem to us at first sight as being unreasonable when one considers the works that were undertaken. These are set out in the final account and with the additions and omissions it would seem to us that the costs are reasonable. Her challenges were in truth without any merit. She had no comparable figures to put forward but the lack of the expert evidence is not something we are prepared to accept was critical. Her suggestion, for example, that the replacement of the rainwater goods was unreasonable but to not know the extent of such replacement works or the costs did not help her case; this was repeated in the assertions in her written statements that the internal decorations could have been dealt with by the provision of a few pots of paint and was not improved upon at the hearing when the costs varied from £1,000 to £6,000 and then to £10,000. This was without any attempt to measure the

common parts areas. We found her challenges unrealistic and without any substance.

27. Her obligations under her lease of course require her to contribute to parts of the property from which she may have no benefit and certainly that would include works to neighbouring windows. We are satisfied on the papers produced to us by the Council and the evidence before us at the hearing that there has been a proper apportionment between the leaseholders and tenants, that the work is to a reasonable standard and that the costs associated with the works are also reasonable and payable.

28. In the circumstances, therefore, we find that the sums demanded by the Council as estimated charges and as set out in the final letter of 29th February 2012 are payable. The amount due is £3,617.95 from which should be deducted the £250 that was paid by Miss Poczynajlo some time ago. This therefore leaves the sum of £3,367.95 as being due and owing which we conclude should be settled within the next 28 days or such other period as the parties may agree or may be ordered by the court.

29. The council at the pre-trial review confirmed that there would be no costs claimed in respect of these proceedings and Mr Holbrook confirmed that that remained the position. Accordingly we make an order under section 20C of the Act that the costs of these proceedings should not be recovered as a service charge from the leaseholders.

30. It does seem to us that there is little to be referred back to the County Court other than the Court costs and any interest and we will leave the Council to decide whether that is a matter that is to be pursued further.

..... 21st May 2012

Andrew Dutton - chair

# 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) where 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 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.