LON/00AE/LIC/2004/0010
LON/00AE/LAC/2004/0001

THE LEASEHOLD VALUTION TRIBUNAL FOR THE LONDON RENT ASSESSMENT PANEL

DECISION OF THE LEASEHOLD VALUATION TRIBUNAL ON APPLICATIONS UNDER SECTIONS 27A AND 20C OF THE LANDLORD AND TENANT ACT 1985 AND SCHEDULE 11 OF THE COMMONHOLD AND LEASEHOLD REFORM ACT 2002

Premises:	5 & 8, Third Avenue, Wembley, Middlesex, HA9 8QE
Applicants:	Mr Khalid Hamid (No.5) Mr Dilip Manani (No.8)
Respondents:	The Halliard Property Company
Represented by:	Thomas Eggar Solicitors
Tribunal:	Miss. L. M. Tagliavini BA(Hons) Dip Law LLM Mr. M. A. Mathews DMS FRICS MIMgt Dr. A. M. Fox BSc PhD MCIArb

Date of the Tribunal' s Decision: 11th October 2004

Ref:LON/AE/LIC/2004/0010
LON/00AE/LAC/2004/0001

5 and 8 Third Avenue
Wembley
Middlesex HA9 8QE

THE TRIBUNAL'S DECISION

1. This is an application made pursuant to sections 27A and 20C of the Landlord and Tenant Act 1985 and Schedule 11 of the Commonhold and Leasehold reform Act 2002. The Applicants are Mr Hamid, the lessee of Flat 5 and Mr Manani, the long leaseholder of Flat 8. The freeholder and Respondent is The Halliard Property Company.

2. From photographs and plans shown to the Tribunal, the subject premises comprise three buildings on two floors situated on either side of Third Avenue around what is described as common gardens. The buildings are brick with sloping tiled roofs. There are common entrances to the flats, each entrance serving two flats on the ground floor, and two on the first floor. The ground floor flats also have separate rear entrances. Windows appear to be in PVCu double glazed units. There is an area of waste ground indicated on the plans, as well as areas previously occupied by garages. Both Flats 5 and 8 are ground floor flats.

3. The Applicants seek the Tribunal's determination on the following issues concerning variously the years ended 31/3/01; 31/3/02 and 31/3/03:

(i) What is the proper method of apportioning the cost of the 'major' works notified by letter dated 17/1/03 and carried out in April 2003 consisting of repairs and redecorations to the internal common parts and electrical works at a cost of £126,473.82 (inc. VAT) by Exelsior 4 Ltd.

(ii) Is the method used by the landlord to apportion the service charges within the terms of the lease and reasonable?

(iii) Are the electrical works repairs or improvements?

(iv) Who is liable to pay for the electrical works?

(v) Are the lessees liable to pay for the (temporary) replacement carpet in the hall, landing and stairs at a cost of 377 and was it necessary to effect a (temporary) replacement?

(vi) Was it reasonable to replace the temporary carpet with vinyl during the course of major works?

(vii) How should the cost of the replacement (temporary) carpet and vinyl be apportioned?

(viii) Was it reasonable for the landlord to install the entry-phone system and are the lessees liable to contribute towards the cost of the entry-phone system?

(ix) What areas constitute the communal gardens? Are the lessees liable for the cost of garden maintenance for the service charge years ended 31/3/01 and 31/3/02?

(x) Are administration charges recoverable?

(xi) Is a general management charge payable?

4. By an Amended Statement in Response dated 22/4/04 and during the course of the hearing the Respondent conceded that:

(i) Clauses 2(2)(A) and 2(211) of the leases will lead to some costs being apportioned as "estate" costs shared between all flats and some costs being apportioned as "hall" costs between those flats that share an entrance hall and staircase.

(ii) As a gesture of goodwill the Respondent will credit the Applicant Mr Hamid with one quarter of the cost (£30) of painting the front door to his flat.

(iii) The lessee of Flat 8 is not liable to contribute towards estimated/provisional costs under the particular terms of his lease.

(iv) The lessee of Flat 8 is not liable to pay a management fee in respect of collecting the rent and other general management and maintenance matters.

(v) Costs of these proceedings are not recoverable through the service charges.

(vi) There is no provision in the lease for Flat 8 entitling the Respondent to charge the cost of installing the new entry phone system.

5. In addition the Tribunal noted that the Applicants accepted that there were differences in the leases for the two subject flats and conceded that:

(i) The provision of garden maintenance and its payment was provided for in the lease for Flat 5.

(ii) The lease for flat 5 provides for the collection of provisional costs in the service charge demand.

(iii) The cost and standard of the major works was not disputed per se as opposed to the apportionment of those costs that was in dispute and in some cases the necessity for those works of repair or improvement

6. At the hearing of this application the Applicants represented themselves. The Respondent was represented by Mr M Hutchins, counsel, instructed by Thomas Eggar solicitors. In attendance was Ms L Milner from the solicitors' office and Mr E Corrigan of the Respondent's Managing Agents, Freshwater Management Properties. In addition the parties relied upon an indexed and paginated bundle of documents and a number of photographs produced during the hearing.

The Applicant's Case

7. Oral evidence was mainly given by Mr Manani on behalf of both himself and Mr Hamid and adopted by Mr Hamid where relevant to his own circumstances.

Garden Maintenance

8. Mr Manani stated that he had not seen any proof of the existence of a contract for this item and asserted that the garden maintenance was not provided for in the

terms of his lease. He stated that the terms of his lease did not include the common garden areas and that he did not have access to driveways or back gardens. Mr Manani stated clause 1:4 in his lease made no reference to right of use of the communal gardens, or make clear, if it did, whether he was then entitled to use all the other garden areas? Mr Manani stated that in his view, it was not clear what the term "common garden" encompassed, since apart from the square of garden around which the blocks stood there were also strips of other garden areas in front of block Nos. 1 to 31 (odd) and where, it was said one leaseholder had erected fencing. Further, on the lease plan for Flat 5 the front garden area was showed as being demised to that flat. Areas marked garages/waste ground were said not to be available to the Applicants as the Respondent had demolished the garages and blocked off access.

9. It was said by the Applicants that the lease for Flat 5 expressly referred to the common gardens and payment of costs towards their maintenance, unlike the lease for Flat 8. Although there was some commonality in the terms of the two leases in making reference to easements and appurtenances the express reference to common gardens and their maintenance in Flat 5's lease supported the position that there had been no intention to make the lessee of Flat 8 liable for the costs of the garden maintenance.

Service Charges

10. Mr Manani disputed the cost of the service charges in so far as they purported to include charges for works done to the entrance hall of his block. He stated that the common parts included four areas, namely staircase, landing, under stairs area and entrance hall but that he should only be liable for the proportion of costs attributable to the entrance hall. Mr Manani stated that he had measured the areas in question and asserted that he should be paying only 9.2% of the costs (entrance hall only) and Flat 5 13.2% (entrance hall and staircase). He also asserted that it was beneficial for the freeholder to apportion the costs equally between the flats as it owned a flat on the first floor and therefore bore less costs than otherwise. Similarly, because the lease for Flat 5 referred only to the staircase and entrance hall the lessee was not liable to contribute to works affecting the landing and under stairs area.

11. The Applicants stated that the term "due proportion" of the cost of maintaining communal areas as defined in the respective leases did not necessarily mean an "equal" proportion. The Applicants asserted that three distinct areas were referred to in the lease namely (i) entrance hall; (ii) staircase and (iii) landing. However, the Respondent referred to a fourth are of the under stairs cupboard as being a distinct area on the specification of works. The Applicants asserted the Respondent had divided the costs of the works equally among the number of flats

in the respective block instead of a "due proportion" in accordance with the lease resulting in over-charging to some lessees and undercharging to others.

Scope of the major works

12. The Applicants stated that they had been wrongly charged for the removal of wallpaper in the common parts that had not in fact been present. Mr Manani stated that the walls previously had only been painted and therefore the cost of £420 per common part was unwarranted. The Applicants also asserted that the covering of the walls with wallpaper instead of simply repainting was also unnecessary and the cost of £880 should be not charged to the lessees, being neither works of repair or maintenance in accordance with the terms of the lease.

13. The replacement of the old window in the common parts with PVCu was said to be both unnecessary and an improvement and therefore not a cost that was recoverable.

14. The Applicants asserted that as the under stairs cupboard was the Respondent's property and kept locked there should be no charge to the lessees for any works of redecoration. Additionally, the Applicants asserted that there was no clause in the

leases that allowed for the recovery of costs pertaining to the electricity and electric cabling.

15. The Applicants asserted that there was no evidence to show that the electrical works were required as part of the major refurbishments. It was stated that the Respondents had needlessly duplicated the electrical works by the replacement of the lateral main which had in the recent past been renewed by the occupier of Flat 9 and which had received a Certificate of Approval even though the work was said by the Respondent to have been dangerous and unsatisfactory.

16. The Applicants stated that the additional costs of £695 to replace wiring and conduits should have been done at the carried out at the same time as the previous electrical works, thereby avoiding the duplicated expense. The Applicants stated that the electrical specification of works identified both a landlords' and a separate tenant's supply and distribution system and a separate tenant's supply and distribution system and this was an issue which needed to be addressed if electrical costs were deemed to be recoverable from the leaseholders.

17. The Applicants asserted that the key operated electrical socket installed in the common parts was for the benefit of the landlord alone and an improvement as

there was no requirement in the cleaning contract for the use of any electrical equipment by the cleaner.

18. The Applicants objected the installation of new numerical signage to the exterior of the buildings as being unnecessary and an improvement.

19. The Applicants objected to the installation of the entry phone system and Mr Manani stated that there had been no adequate consultation before these works went ahead. Consequently, Mr Manani had denied the Respondent entry to carry out these works although the cost had been included in the service charge demand for the year ended 31/3/03. Mr Manani stated that the terms of the lease did not permit the Respondent to install or recover the cost of the entry-phone system.

20. Mr Manani also stated that as a result of the entry-phone system being installed to all other flats he was left without any means of effective communication with his visitors who were otherwise forced to knock on his flat window to attract his attention. As a consequence, his right to quiet enjoyment and his safety had been compromised. In any event, it was said that system was not required for security reasons as there had only been one known burglary in the past.

21. The Applicants objected both to the temporary replacement of the carpet in the common parts of flats 5-11 and the manner in which the costs were apportioned. The replacement carpet at a cost of £377 was said to have been unnecessary as this carpet was itself replaced with vinyl during the course of major works only some six months later. The Applicants objected to the cost of the carpet/vinyl being included as an estate cost and further stated that no floor covering costs were recoverable from 8 Third Avenue and only proportionate costs were recoverable for Flat 5.

22. The Applicants objected to the manner in which the Respondents sought to charge for works in the specifications and the incorrect entry relating to the cost of the carpet and the alternative cost for vinyl. The Applicants stated that the errors and mistakes made by the Respondents gave the lessees no faith in the accuracy of the records and accounts generally.

23. Mr Manani stated that there was no clause in his lease permitting the recovery of an administration fee unlike that of Flat 5 which allowed for such charges to be made. In any event, the Applicants stated that the Respondent's costs in respect of the administration of the major works, was unjustified.

24. The Applicants expressed their unhappiness in the way in which the Respondent had conducted its correspondence, (or lack of it), with the Applicants and the delay in producing documents for the hearing of this application.

The Respondent's Case

25. Mr Corrigan gave evidence on behalf of the Respondent. He told the Tribunal that there was a gardening contract with RCG Services which covered the maintenance of the main square around which the blocks were situated, the area in front of the even numbered flats and the long narrow strip of grassed area to the side where the odd numbered flats were situated. Mr Corrigan assumed the area on the left hand side was also cut. The annual contract at a price of £1,916 per annum (exc.of VAT) as at the end of 2002. Mr Corrigan stated that once a fortnight between March – October the grassed areas are cut and once a year there is additional work to the shrubs. In addition the gardener should pick up litter left lying around. No charge was made to the lessees in respect of the waste ground of garage driveway. Mr Corrigan stated that he had not been aware of any issues arising over the lessee's rights to use the communal garden areas.

26. Mr Corrigan stated that there had been numerous complaints about the electrical services which were considered not to comply with current regulations. On one

occasion when the lights had not worked a postman visiting the block had fallen down the stairs and broken his leg leading to legal action. Mr Corrigan stated that the managing agent had only been involved in the section 20 notice procedure but not the drawing up of the specification of works as this was a matter supervised by the Respondent's head office. In cross-examination Mr Corrigan stated that the works carried out by the lessee of Flat 9 to the lateral main, the cost of which had been reimbursed, had not been charged to the other lessees because of having fallen outside 18 months period allowed. On cross-examination Mr Corrigan referred to minutes of meetings held on 9/5/03 and 23/5/05 where the safety of the electrical installations had been raised and a letter dated 15/4/04 also addressing this issue. Mr Corrigan stated that there would have been a report prepared on the state of the existing electrics but that he was not aware of any testing done and had not seen any such report himself.

27. Mr Corrigan stated that he had no personal knowledge as to whether there had been wallpaper on the walls in the blocks making up the subject premises but simply relied on what he had been told by others. Mr Corrigan stated that the condition of the windows varied from block to block and although internally in an adequate condition were rotten externally but was unaware when last redecorated externally but likely to be before 2001. Mr Corrigan admitted that he had no personal knowledge of this as he had not inspected them himself but accepted what the consultants, who did inspect on the freeholder's behalf, had

recommended. Mr Corrigan stated that the major works which had started in April 2003 and completed in July 2003 were still subject to snagging. As a consequence final bills to the lessees were being delayed in being sent out.

28. Mr Corrigan stated that the locked electrical socket was to ensure the cleaner was able to use a vacuum cleaner thereby improving the quality of the cleaning which previously had been done by brushing the carpeted/covered common parts. It was locked in order to avoid improper use.

29. Mr Corrigan told the Tribunal that the entry-phone system was installed because of a number of incidents where strangers had entered the blocks. He stated that letters querying the installation of the intercom had been passed onto the consultant and should have been answered by them or the Respondent's solicitors. As access was not provided by Mr Manani, the contractor was advised not to install the system in this flat.

30. Mr Corrigan stated that carpet had been installed in the block with Flats 5 – 11 six months prior to the major works starting because of the dangerous condition of the old one. He stated that he had nothing to do with the interpretation of the

leases or the apportionment of the service charges but dealt only with day to day issues arising.

31. Mr Corrigan explained that the signage to the blocks was not in generally good repair and to improve the external image of the blocks the signs been replaced.

Submissions

32. It was submitted by Mr Hutchings that the Tribunal was not entitled to look at the terms of the later lease of Flat 5 in order to construe the intention of parties in the earlier lease for Flat 8. In any event, the later lease of Flat 5 could shed no light on the intention of the parties when entering into the earlier lease. It was submitted on behalf of the Respondent that the lease of Flat 8 at clause 2(9) allowed for payment of garden maintenance as the communal gardens formed part of the "easements and appurtenances belonging to or capable of being used by the Lessee...." In support of this argument Mr Hutchings referred the Tribunal to the case of *Trin v Sturminster [1938] 2 KB 508 CA,* where it was held appurtenances included outhouses, yards and gardens. In *Re Ellenborough Park [1956] CH 131 CA* it was held that the right to use a private garden is an easement and in any event the lease for flat 8 shows a common intention that the communal gardens would be used by all lessees including Mr Manani.

33. In respect of cost apportionment, it was submitted that Mr Hamid of Flat 5 was liable to make a reasonable contribution towards anticipated expenditure. In accordance with clauses 2(11) and 12(2)(A)(a)(ii),(b) and (f) which were calculated by Mr Corrigan to be £5,168.39 (having made a correction to an earlier calculation resulting in a difference of £80 in favour of the Applicant). The scope of the works, it was submitted, was covered by express provisions of the lease which included an express easement of passage of electricity.

34. Mr Hutchings submitted that the Tribunal did not have any jurisdiction where it was argued and accepted that works were of improvement rather than repair because the work concerned did not fall within the amendments made by the Commonhold and Leasehold Reform Act 2002.

35. In respect of administration charges it was submitted by Mr Hutchings that these covered the cost of the preparation and service of specification and tender documents and advice and therefore a necessary part of the cost of the major works programme. He relied on the case of *Lloyds Bank PLC v Bowker Orford [1992] 2 EGLR 44* to support this assertion.

The Applicants' Submission

36. Mr Manani stated that the common gardens did not from part of his demised premises, as by having reference to the lease and plan there is no definition of the boundaries of Third Avenue. Consequently, Mr Manani stated that he should not be liable for the garden maintenance costs. Mr Manani stated that the garage drive and waste areas are not demised to the lessee or expressly referred to for the use of the leaseholder in the lease agreement and plan. Furthermore, the Respondent had unilaterally demolished the garages and blocked access to all but the lessees directly requiring access to their flats in that area.

37. Mr Manani stated that it was the express wording and terms of the lease that must be considered and although there were similar clauses in the leases for both Flats 5 and 8, the former lease had express terms relating to the lessees' liability to pay for garden maintenance and therefore reference to easements and appurtenances in both leases did not include the communal gardens.

38. In respect of the apportionment of the costs of the works, the Applicants' submitted that the express terms of the lease should be followed and where reference was made to entrance hall it was the entrance hall only that the lessee was liable for and not, in addition liable for a proportion of the costs pertaining to

the stairs, landing and under stairs cupboard. Similarly, Flat 5 was liable for the entrance hall and staircase.

39. In respect of the major works it was submitted that the Respondent had failed to show any evidence of the walls being wallpapered previously and that the replacement window in the common parts was an improvement as was the installation of a locked socket for the landlord/cleaner's use. The Applicants submitted that there was no express provision for the cost of the recovery of electrical costs pertaining to the passage of electricity and electric wires. In any event, the Respondent had failed to show that electrical works were required in the common parts as well as in Flats 5, 7, 9 and 11.

40. The Applicants submitted that the cost of the carpet installed six months prior to the major works and then replaced with vinyl was both unnecessary and in excess of what was permitted by the terms of the lease.

41. The Applicants stated that there was no clause in the lease for Flat 8 permitting the recovery of the cost of an administration fee in respect of major works. In any event, it was submitted that in light of Mr Corrigan's limited ability to give

evidence about these charges the Respondent had not shown they were reasonably incurred.

The Tribunal's Decision

Garden Maintenance.

42. The Tribunal finds that the lessee of Flat 8 is entitled to use and liable to pay for the costs of garden maintenance to the communal gardens. Having regard to the terms of the lease, the Tribunal accepts the Respondent's argument that "appurtenances and easements" include and were intended to include the communal gardens to which Mr Manani has access, in common with the other leaseholders. Mr Manani's evidence that he never uses the communal gardens and has now removed his rubbish bin from the central communal garden is not, in the Tribunal's opinion, relevant.

43. .However, the Tribunal interprets the communal garden areas as amounting to the central square and the area in the left hand part of the plan also depicted. The Tribunal finds that the grassed area(s) in front of odd numbered flats are, having regard to the evidence, on the balance of probabilities demised to the individual ground floor flats concerned, and do not form part of the communal gardens. Similarly, the area of waste ground and the drive way leading to the now

demolished garages does not form part of the communal areas. Consequently, it is the Tribunal's opinion that the cost of garden maintenance is limited to those two areas only identified above.

Scope of Works

44. The Tribunal finds that the major works as carried out were necessary and reasonable. Although, there is some inadequacy in respect of the lack of reports and specifications relating to the electrical works specifically, the Tribunal finds that there is some evidence to substantiate the Respondent's claims that the electrical works were necessary as set out in the letters from the electrical consultants and minutes of meetings produced to the Tribunal. It is noted that although in effect there was some duplication of works to the lateral main, the cost of this work was not duplicated to the lessees. The Tribunal finds that there were continuing faults in the electrical wiring which led to breakdowns in supply including to the common parts and required repair.

45. The Tribunal finds that the electrical cupboard forms part of the entrance hall and houses the electrical supply which benefits the common parts of the block and which for safety is reasonably kept locked by the Respondent and access limited. Similarly the installation of the (locked) electrical socket(s) are for the benefit of the lessees as they enable cleaning and work to be carried out for their benefit

without recourse to individual lessee's power supply. The Tribunal rejects the Applicant's argument that because it is not a term of the cleaner's contract that a vacuum cleaner should be used only a brush may be employed for sweeping. Although the Tribunal has not seen a copy of the cleaning contract, it accepts the Respondent's evidence that it does not dictate the method of cleaning, and in any event that it is common practice for a vacuum cleaner to be used in these circumstances.

46. The Tribunal finds that the cost of the (temporary) replacement of the carpet before the major works was a reasonable expense in the circumstances. Where holes and tears occur on stairs and halls it is not uncommon for the repairs effected to cause another trip hazard. The Tribunal finds that the replacement was both necessary and the cost modest. Similarly, the Tribunal finds the replacement of carpet to the common areas to the subject premises with vinyl during the course of major works was, in the circumstances reasonable. The temporary replacement might reasonably not be expected to have a long life, having regard to its modest cost, and would, in all probability have required replacement at an earlier date than otherwise. The cost of the vinyl floor covering is to be apportioned in accordance with the terms of the lease as found by the Tribunal.

Apportionment

47. Having regard to the express terms of the leases, the Tribunal accepts the Applicants' argument that "entrance hall" in the lease for Flat 8 means the entrance hall (of which the electrical cupboard forms part) and does not include the stairs or landing, and accepts that the term "entrance hall and staircase" for Flat 5 does not include the landing. The Tribunal accepts that although the manner of calculating the apportionment maybe more involved than the method previously used by the Respondent, it nevertheless finds, and has been demonstrated by the Applicants, that it can be put into effect.

Repair or Renewal.

48. The Tribunal accepts the Applicant's evidence that previously the walls of the subject blocks had not been wallpapered and therefore the cost of stripping these walls should be disallowed. However, the further costs of redecoration including the provision of wallpaper are allowable costs and do not constitute works of improvement but rather renewal and redecoration as provided for in the lease.

49. Similarly, the Tribunal finds that the installation of PVCu windows and numerical signs in the common parts are works of repair and renewal rather than improvements. The Tribunal accepts the evidence of Mr Corrigan that windows

in the common parts had deteriorated to the extent that a replacement was both necessary and reasonable.

Entry-Phone

50. The Tribunal finds that the works of the installation of the entry- phone system are works of improvement and therefore outside the jurisdiction of this Tribunal.

Administration Costs

51. The Tribunal finds that these costs are allowable and reasonable. The Tribunal finds that the works have been carried out and no issue has been taken by the Applicants as to the standard of the works or their costs save as rehearsed above. The Tribunal accepts the Respondent's argument that these charges are in two parts. One part is for the general management for which Mr Hamid is liable, and in the opinion of the Tribunal reasonable and therefore allowable, and for which Mr Manani is not liable in accordance with the terms of his lease. The second part is in respect of the administration costs of the major works programme. The Tribunal considers these costs reasonable and are payable by both Applicants.

Chairman:.....

Dated:.....