SOUTHERN RENT ASSESSMENT PANEL AND LEASEHOLD VALUATION TRIBUNAL

Case No: CHI/43UH/LSC/2006/6

BETWEEN:

Ms M Breheny

Applicant

- and -

Fairview Court Residents Association Limited

Respondent

Premises: Flat 21, Fairview Court
Manor Road
Ashford
Middlesex
TW15 2SN ("the Premises")

INSPECTION AND DETERMINATION : 18th April 2006

TRIBUNAL : MR D AGNEW LLM (Chairman)
MRS H C BOWERS MRICS

1. Background

1.1 On 5th January 2006 the Applicant, Ms Breheny who is the tenant of the Premises, made an application to the Tribunal under Section 27A of the Landlord & Tenant Act 1985 for a determination as to whether certain requests for service charge payments from the Landlord were payable by her and, if so, whether they were reasonable. She also applied under Schedule 11 of the Commonhold and Leasehold Reform Act 2002 ("CLARA") for a determination as to whether certain administration charges which she was being asked to pay were payable and, if so, reasonable.

1.2 The Applicant had previously made a similar application in respect of the service charge payment but had withdrawn this on receiving certain assurances from the Respondent. In view of the fact that the Applicant felt she was not having her queries answered and at the same time was receiving letters from the newly appointed managing agents threatening legal action in respect of an unpaid contribution towards the cost of painting

the exterior of Fairview Court, the Applicant felt she had to make these fresh applications.

1.3 The freehold of Fairview Court is vested in the Respondent and all lease owners have one share in the Company.

2. The Premises

2.1 The Premises comprise one flat (No. 21) in Fairview Court which consists of three blocks of nine flats set in communal gardens. Each flat has a garage situated at the rear of the plot.

2.2 The blocks were built in the late 1960's and are of brick with some painted rendered areas under a pitched tile roof. There are balconies to the flats at the front with iron railings on concrete cantilevered plinths. The windows were originally single glazed and wooden framed but many of these have been replaced by the flat owners with upvc or aluminium double glazed units. Indeed some windows were being replaced at the time of the Tribunal's inspection.

2.3 There was some wooden cladding to the front of the blocks and this, together with soffits and eaves, was in need of repainting. Some of the wooden window frames showed signs of rot but others were in reasonable condition. All were in need of painting. The balconies were in need of re-decoration as were the garage doors and soffits and the external wooden doors to the flats.

2.4 Garden paths had recently had work done to them. The Tribunal was told that these had been taken up, washed down and re-laid. The Applicant questioned whether they had been re-laid or simply washed down. They now appeared to be in sound condition.

2.5 There was some evidence that ridge tiles on the roof of at least one of the blocks (the middle block) were in need of attention.

3. The Applications

3.1 The issues for determination by the Tribunal as raised by the Applicant were as follows:-

(a) Whether she was being asked to contribute £425 or £438.13 towards the cost of external painting.

(b) How much was intended to be paid out of the reserve fund towards external painting.

(c) Whether she was obliged to pay anything at all in respect of external painting in view of the fact that there had not been proper consultation, according to the Applicant.

(d) Is the Managing Agent entitled to charge 12.5% for overseeing the external painting contract and, if so, can VAT be charged on top?

(e) What is the Managing Agent's "hourly rate?"

(f) Whether the Managing Agents can charge the Applicant £88.13 for the cost of collecting her contribution to the external painting cost or at all.

4. The Lease

4.1 By Clause 2(e) of the lease, the tenant covenants:-
"To pay all costs charges and expenses (including solicitors costs and surveyors fees) incurred by the lessors for the purpose of or incidental to the preparation and service of a notice under Section 146 of the Law of Property Act 1925 notwithstanding forfeiture may be avoided otherwise than by relief granted by the Court."

4.2 By Clause 3(c) of the lease the lessee covenants:-
"To pay to the lessors on the thirty-first day of August in every year (or within twenty-eight days thereof) one twenty-seventh part of the sums which the lessors shall estimate that they require to expend in the next ensuing year in complying with the covenants on either part contained in Clause 5(c)(d) and (e) of these presents and such part if not so paid shall be forthwith recoverable by action and shall carry interest at a rate equal to one per centum per annum above Bank Rate from time to time until payment PROVIDED that if the sum spent in such next ensuing year (as certified by the lessor's auditors) shall exceed the sum so estimated as aforesaid the lessee shall pay one twenty-seventh part of the excess within twenty-eight days of the demand therefore (sic) by the lessors and if the certified sum shall be less than the estimated sum one twenty-seventh part of the

difference between the two sums shall be allowed as a deduction from the next following payment due from the lessee pursuant to this clause."

4.3 By Clause 5(c) of the lease the lessor covenants:-
"That (subject to contribution and payment as hereinbefore provided) the lessors will maintain in good and substantial repair and condition and renew (i) the main structure and in particular (but without prejudice to the generality of this covenant) the joists and the roof chimney stacks gutters and rainwater pipes of the building (ii) the gas water pipes and boilers drains and electric cables and wires in under and upon the building and enjoyed or used by the lessee in common with the lessees of the other flats (iii) the main entrances courtyards balconies passages landings and staircases lifts and interior walls so enjoyed or used by the lessee in common as aforesaid and the boundary walls and fences of the building (iv) the television aerial ….. "

4.4 Clause 3(e) states:-
"That (subject as aforesaid) the lessors will as often as reasonably required decorate the exterior of the building in such manner as shall be required by a majority of the lessees of the flats or failing that in the manner in which the same was previously decorated or as near thereto as circumstances permit and in particular (but without prejudice to the generality of this covenant) will paint oil varnish or distemper the exterior parts of the building usually painted oiled or varnished or distempered with two coats at least of good quality paint varnish or distemper at least once every three years."

4.5 However, by Clause 3(b) of the lease it is the tenant's obligation:-
"At all times hereafter to keep in good and substantial repair and properly cleansed maintained and amended the interior of the flats and .... to keep ..... the windows property cleansed repaired renewed and maintained"

5. The Law

5.1 Section 27A of the Landlord & Tenant Act1985 ("the 1985 Act") states as follows:-

The Leasehold Valuation Tribunal may determine whether a service charge is payable and, if it is, determine:

(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

(e) the manner in which it is payable.

5.2 By Section 19 of the 1985 Act service charges are only claimable to the extent that they are reasonably incurred and if the services or works for which the service charge is claimed are of a reasonable standard.

5.3 The consultation provisions are contained in The Service Charges (Consultation Requirements) (England) Regulations 2003. These are detailed and comprehensive and it is not proposed to reproduce them in these reasons.

5.4 By Paragraph 2 of Schedule 11 of CLARA "a variable administration charge is payable only to the extent that the amount of the charge is reasonable."

5.5 Paragraph 5 of the 11th Schedule gives jurisdiction to the Leasehold Valuation Tribunal to determine the reasonableness of administration charges in the same way as for service charges under Section 27A of the 1985 Act.

6. The parties' submissions

6.1 Consultation.

The Applicant contended that there had been no proper consultation prior to the contract for external decoration being placed with Mr Mitchell in the summer of 2005 at a price of £15,120 (no VAT payable).

The Respondents accept that the consultation procedure required under Section 20ZA of the Act had not strictly been complied with when Mr Mitchell's tender was accepted but it was pointed out that the work had been put out to tender by the former Managing Agent and the lowest tender accepted. The decision in principle to place the contract with Mr Mitchell was also ratified, it was claimed, at an EGM of the Management Company. The Respondent said that it was not possible to proceed with Mr Mitchell because, first, all contributions towards the cost had not been collected but also the contract with Mr

Mitchell had been terminated by mutual agreement. This was because Mr Mitchell required a substantial payment in advance of starting work which the Respondents were unwilling to agree, preferring to pay by stages during the course of the works and secondly because Mr Mitchell did not produce a copy of his public liability insurance cover. The new Managing Agents have now begun the consultation process afresh, to conform to the consultation procedures laid down in the Act. That process has not yet been completed but in a report to residents dated 13th March 2006 the Secretary to the Respondent Company, Miss Linda Wales, gave details of the estimates received for the painting ranging from £16,356.25 to £20,797.50. The preferred contractor's price is the lowest at £16,356.25 which although higher than Mr Mitchell's quotation of 2005 is still very much in line with it.

The Respondent's Managing Agent also commenced the consultation procedure in respect of works to level the paths and "remove cobblestone detail" but the total expenditure resulted in a cost of less than £250 per flat. That work has been carried out and will no doubt be itemised on the next service charge account. (The Tribunal assumes that these repairs have been paid out of the moneys held on account of service charge and will therefore need to appear on a statement of account submitted to residents with the next service charge demand.) This is not an item that the Tribunal has jurisdiction to deal with at this stage and under the current application because the service charge including this item has not yet been demanded. However, as a guide to the parties and in order to perhaps avoid a further application being made to the Tribunal in the future on this item, it was the Tribunal's preliminary view (without having received representations of the matter) that if the paths had indeed been taken up and re-laid, the cost of £4,472.14 was likely to be held to be reasonable, but if the paths have only been cleaned then the price could appear to be high.

The Respondent intends to carry out works to some of the ridge tiles. The anticipated cost will exceed £250 per flat and therefore the Managing Agents will be required to undertake the consultation process in respect thereof. Again this is not a matter that the Tribunal can deal with at this stage and under the current application.

6.2 The new agent's administration charge.

The Applicant not only objected to the tone and content of the Agent's letters to her of 29th December 2005 and 13th January 2006 in which the outstanding contribution towards the painting costs was demanded and an administration charge of £88.13 was required to be paid but also questioned the agent's right to charge for such letters and

the hourly rate. Copies of the correspondence were included in the Applicant's bundle of documents.

The Respondents argued that the collection of unpaid service charges was not part of the Managing Agent's basic fee. It was claimed that the £88.13 charged was reasonable and in line with other agents' charges. It is provided for in Clause 2(e) of the lease, they say.

The Applicant also queried the Managing Agent's charge of 12.5% for supervision of major works, defined to be works costing over £999. The Respondent's response is that 12.5% is the "going rate" and, therefore, reasonable.

6.3 Liability to pay

The Applicant has a number of queries and points to make under this heading.

First, she questions how the figure of £438.13 is made up. Miss Whale explains in her evidence that the figure of £438.13 is made up as follows:-

	£425.00	Contribution to painting costs
	£ 88.13	for the agent's letter chasing payment
	£513.13	
_	£ 75.00	for refund due to the Applicant
	£438.13	

Miss Whale states, however, that as the £75 has already been refunded to the Applicant, the amount now required from her is £513.13.

Secondly, the Applicant asks how that figure is arrived at. Taking Mr Mitchell's estimate of £15,120, has she been asked to contribute towards the cost of repair and redecoration of the windows of flats which still have wooden windows whereas she had her wooden windows replaced with aluminium ones twenty years ago and others have replaced with upvc or other material. She says she should not have to contribute towards the cost of repair or painting of any windows.

The Respondent says that the £425 claimed did take into account the fact that those with aluminium or upvc windows, which did not require painting, would not have to pay a contribution towards the cost of painting the wooden windows.

The Applicant also challenged having to pay for the painting of wooden windows as well as the repair of such windows prior to painting but she also made the point that it would be futile to paint over rotten windows as the paint would peel off again very rapidly. The Applicant also queries whether she should be required to pay in advance of the works being carried out. What happens if there is insufficient moneys in the reserve fund? She also queries whether this cost can be required to be paid for if the demand is made more than 18 months after the work is carried out. She says that in her case the "costs were incurred in May 2004" – 22 months ago. Can the landlord now recover this "cost?"

6.4 The Applicant's case was supported by a witness statement from a resident at Fairview Court but their address was not given and the signature on the statement could not be deciphered, so the content of the statement was of little value. The Respondent produced letters from several residents who were perfectly happy with the way the management of the property and the company was being handled and, in particular, the matter of the painting.

7. The determination

7.1 The Tribunal determines that the amount payable by the Applicant to the Respondent by way of advance service charge (i.e. before the works are carried out) is £425. This is one twenty-seventh of the estimated cost of repainting the exterior of the three blocks of Fairview Court after having made an allowance for the fact that some work to some of the windows (i.e. the wooden ones) would need to be carried out which is not being sought from the Applicant or those who have replaced their windows with aluminium or upvc. The Tribunal determines that £425 was a reasonable sum for the Respondent to have sought from the Applicant. One twenty-seventh of Mr Mitchell's estimate would have been £560. Bearing in mind that only a few flats have not had their windows replaced the reduction from £560 to £425 for those who have seems reasonable.

7.2 The Tribunal also decided that under the lease a distinction was to be made between the repair of the windows and the decoration (painting) of them. The repair of the windows is a tenant's liability but the decoration of the exterior of the blocks is a landlord's responsibility for which it can seek reimbursement from the tenants as a whole. This would enable the landlord to control, for example, the colour and type of material used in the decoration of the exterior, including the windows. Thus, whether or not a tenant has wooden or upvc or aluminium windows, the lease obliges the tenant to pay one twenty-

seventh towards the cost of the painting of the windows (as opposed to their repair). Strictly speaking this applies to all tenants, whether or not they have had their windows replaced with material that does not need painting. Thus, the concessions made by the Respondent to those with upvc or aluminium windows was not, in the Tribunal's opinion, necessarily made, but as it has been, the Applicant has benefited from this approach.

7.3 The sum of £425 was due and payable according to the lease "on the thirty-first day of August" or "within 28 days thereof". In this case the sum was requested to be paid during the year to 31st August 2004 and so it should have been paid by 28th September 2004. Again according to the lease, if such a contribution is not paid by the due date, interest at 1% above Bank Rate may be charged, but the Respondent has not sought to do that in this case.

7.4 As far as consultation under Section 20ZA of the 1985 Act is concerned, the Tribunal found that it was not necessary for this procedure to be gone through before the sum on account of expenditure under Clause 3(c) of the lease can be sought. The amount claimed has to be a reasonable sum (Section 19(2) of the Act) and if the consultation procedure is not gone through before the works are started then under Section 20(7) of the Act the tenant's contribution is limited to the current prescribed amount – i.e. £250. However, it is not necessary for the landlord to carry out consultation before asking for a Clause 3(c) payment because Section 20 of the Act limits the amount of service charges that are payable without consultation where relevant costs are "incurred" i.e. where they have been paid (or perhaps where there is a contractual obligation to pay them). Here the painting costs have not yet been paid nor is there a contractual obligation to pay such costs yet on the part of the landlord. Consequently, the consultation requirements do not, in the Tribunal's judgment, apply to the payment sought under Clause 3(c) of the lease. They will apply, however, once the painting costs have been incurred by the landlord and it will only recover up to £250 per flat if it has not gone through the consultation process before placing the contract. The Tribunal considers that this interpretation of the legislation makes practical sense. It would be extremely onerous for any landlord to have to consult before seeking a payment on account for future works which might not be carried out for some considerable time before which the process would have to be gone through again due to the passage of time. This means that as far as the advance payment requested is concerned, it was not necessary for there to be prior consultation and the sum of £425 is therefore payable by the Applicant. If the Respondent does not follow the consultation procedure correctly, when it comes to a normal request for service charges incurred, or to a reconciliation between an amount

paid on account and the amount actually expended, the Respondent would be restricted to recovering a maximum of £250 from each tenant. As the Respondent is now following the consultation procedure this will hopefully not be an issue in the future.

7.5 As already observed, the consultation procedures are now being gone through afresh by the new Managing Agents in respect of the painting. Provided the sum requested as a result of that process is a reasonable one it will be in the interests of all the residents to pay the shortfall between what they have already paid and the new sum required as soon as possible after demanded so that the landlord can proceed to place the order for the work to be done. The landlord will be unable to place the contract until it knows that the contributions have been paid because it has not budgeted for a surplus. It also has to be recognised that the landlord is no one other than a collection of all the residents. It is not an entity with resources of its own. The painting work does need to be done in order for the value of the residents' assets to be preserved but this cannot be done without the co-operation of all the residents by payment of a reasonable sum promptly after being requested in order to get the works done. The cost of the work or the standard of the work can be challenged (if necessary through the Tribunal) once the work has been carried out, although it is to be hoped that this will not be necessary.

7.6 With regard to the Managing Agent's fee of 12.5% for supervising the works, the Tribunal finds that this is a reasonable figure and is in line with what may be expected for such work from other qualified professionals. The Tribunal regarded this as part of the cost of getting the necessary works done and done properly. VAT would be chargeable in addition.

7.7 The Applicant is quite entitled to know what the Managing Agent's hourly charge is for works not covered by its standard fee. This is information which the Managing Agents ought to supply to the Applicant. Other than the charge of £88.13 for a letter chasing payment of the outstanding service charge provision this is not a matter currently for the Tribunal to decide upon. As far as the £88.13 charged to the Applicant is concerned, if it had been legitimately charged under the lease the Tribunal would have considered it to be unreasonable. It should not, in the Tribunal's view, cost more than £25 plus VAT for a Managing Agent to send a routine letter chasing an outstanding service charge. However, the only clause under the lease by which the landlord can recover such a charge from the leaseholder is Clause 2(c) of the lease. This refers to "all costs charges and expenses (including solicitors costs and surveyors fees) incurred "for the purpose of or incidental to the preparation and service of a notice under Section 146 of the Law of

Property Act 1925 ..." A Section 146 notice is a preliminary to forfeiture. The question is was the letter of 29th December 2005 incidental to a Section 146 notice as a preliminary step to forfeiture of the lease. The Tribunal does not consider it so. The letter is a general one sent to "enforce payment" of the outstanding service charge. There are several ways of "enforcing payment" without necessarily servicing a Section 146 notice and proceeding to try to forfeit a lease, including simply suing for the money as a debt. The Tribunal therefore determines that the letter does not come within a description of a cost charge or expense "for the purpose of or incidental to the preparation of a Section 146 notice." No such notice has been prepared and might never be. This cost is not therefore considered reasonable by the Tribunal, and consequently it is not recoverable from the Applicant.

7.8 If, as seems likely, there will be a shortfall in the painting fund, (even with the £425 that the Tribunal finds that the Applicant is liable to pay into it,) between the amount required to pay for the painting and the amount in the fund, it is clear that the whole of the present fund will be paid out, supplemented by further payments that will be required once the consultation period is complete.

7.9 The Tribunal does not consider the Applicant's query about the validity of the request for payment, it being over 18 months since the expenditure was incurred, is a valid point. Section 20B of the 1985 Act would only apply and the 18 months start to run once the service charge had been incurred. This will not be until the contract for the work is placed, at the earliest.

7.10 The Tribunal does not make any order under Section 20C of the Act. The Respondent's costs are likely to be modest as they have not had a hearing to pay for, but in any event on the main thrust of the Applicant's applications the Tribunal has found that the sum of £425 was a reasonable sum to demand of the Applicant in 2004 and whatever costs have been incurred by the Respondent in dealing with the Applications should be capable in principle of being added to the service charge account, subject always to the proviso that they be reasonable. As every leaseholder is a member of the landlord company they each have an interest in keeping the service charges to as reasonable level as possible.

7.11 Finally, the Tribunal would like to mention that many issues were raised by the Applicant and responded to by the Respondent which were not relevant to the Tribunal's jurisdiction or the applications made under the respective Acts. Many of these issues

and, indeed, some of the issues with which the Tribunal did have jurisdiction, could have been resolved by better communication between the parties. The Respondent quite properly pointed out that in respect of certain matters no issue was raised by the Applicant with the Directors before she made her application to the Tribunal. There were letters in the bundle inviting the Applicant to discuss matters with the Directors. It was also pointed out that the Applicant had not attended meetings of the Respondent company at least in recent years. As a shareholder she is entitled to attend meetings and raise issues there. If, for some reason, it is not possible for her to attend she can send a proxy or write to the Chairman of the meeting asking him to read the letter to the meeting so that the matter can be raised and discussed. The Respondents can reasonably expect the Applicant to do this before applying to the Tribunal which does not necessarily have the jurisdiction to deal with the particular matter in question.

On the other hand it is not helpful for the Managing Agent to have ignored letters from the Applicant's solicitors. Further, if the letter of 29th December 2005 was the first communication received by the Applicant from the newly appointed Managing Agents and was her first contact with them (the Tribunal having seen no previous correspondence) then its tone was perhaps unfortunate.

The Tribunal hopes that in future there will be better communication between the parties before the Tribunal procedures are invoked.

SUMMARY : The amount of £425 is a reasonable sum for the Applicant to pay in advance and on account of her contribution towards the cost of external painting and this was due for payment as at 28th September 2004. The Applicant is not liable to pay the sum of £88.13 demanded in respect of the letter of 29th December 2005.

Dated this 15th day of May 2006

Signed: .....

D. Agnew
Chairman