Refs: LON/00AT/LSC/2004/0031

LEASEHOLD VALUATION TRIBUNAL

LONDON RENT ASSESSMENT PANEL

DETERMINATION

AS TO MATTER WITHIN SECTIONS 27A AND 31C OF LANDLORD AND TENANT ACT 1985 (as amended)

RE: 34 BRIDGE HOUSE SOUTH, BOSTON MANOR ROAD, BOSTON MANOR, BRENTFORD, LONDON TW8 9LJ

Claimants:	Mrs J E White, Miss S M Armstrong and Mr P K T Armstrong
Respondent:	Ms T Younger Represented by Messrs De Cruz Solicitors
Meeting:	30 September 2004
Appearances:	None: as agreed in writing by the parties the matter was determined without an oral Hearing (ie in accordance with reg.13 of the LVT (Procedure) (England) Regulations 2003).
Inspection	None

Members of the Leasehold Valuation Tribunal:

PROFESSOR J T FARRAND QC LLD FCIArb Solicitor (Chairman)

MR P A COPLAND BSc FRICS

MR F L COFFEY FRICS

1. The Claimants issued proceedings in the Brentford County Court against the Respondent in respect of "Outstanding Maintenance Charges For Additional Costs For Works Carried Out In 2002", the amount claimed being £801.88. On 25 March 2004, District Judge Jenkins ordered that the matter be transferred to this Tribunal (ie under s.31C of the 1985 Act).

2. Pre-Trial Review Directions and Further Directions as to the provision of documents by the parties were issued on 4 May and 22 July 2004. Accordingly, the Tribunal makes the present Determination on the basis of the evidence and submissions contained in the documents provided by the parties in pursuance of those Directions.

3. The matter to be determined is whether the sum claimed of £801.88 constitutes a service charge which is payable by the Respondent to the Claimant (ie under s.27A(1) of the 1985 Act as amended).

4. The Respondent is the Lessee of Flat 34 on the first floor of the Building known as Bridge House South which is understood to contain seventeen other flats of which three are also held under long leases. She holds the Demised Premises (ie the flat) under a Lease granted on 6 June 1984 for a term of 999 years from 25 March 1982 in consideration of a premium of £27,000 and at a peppercorn rent (see Clause 2). The Claimants are currently the freeholders of the Building and grounds and also the Lessor for the purposes of the Lease.

5. The Lease includes Lessee's covenants as to repairing and painting the Demised Premises, but expressly excluding the exterior of the front door and frame from painting (Clause 3(d) and (e)). The Demised Premises were shown on an annexed plan but defined as expressly including, so far as relevant to the present matter, "the internal plastered covering and plaster work of the walls bounding the flat and the doors and door frames and windows and window frames including all glass fitted in such walls" (First Schedule para. (i)). There is also a Lessee's covenant "in respect of every Maintenance Year to pay the Maintenance Contribution to the Lessor by four equal instalments" (Clause 4). The Maintenance Year begins on 25 March and the Maintenance Contribution means one-eighteenth ($1/18^{th}$) of the "annual maintenance provision" computed in accordance with the Fourth Schedule (Recitals (k) and (l)).

6. Under Part I of the Fourth Schedule to the Lease, the maintenance provision includes a payment to reserves (with reference in error to Clause 7) and a 10% management fee, but primarily comprises "expenditure...incurred...by the Lessor for any of the purposes mentioned in Part II of this Schedule". The machinery for collection requires two steps: First, an estimate of likely expenditure in the year has to be made before the year has begun to enable payment in instalments by the Lessee during the year. Second, as soon as practicable after the year ends, the Lessor has to notify the Lessee if actual expenditure exceeds the estimate and then the Lessee must pay the excess.

7. The first purpose mentioned in Part II of the Fourth Schedule is "the performance by the Lessor of its obligations in Clause 6 of this Lease". None of the other purposes mentioned is relevant to the present matter. Under Clause 6 the Lessor covenants not only to wash and paint but also to repair the exterior of the Building (para.s (a)(b) and

(c)) but, relevantly to the present matter, there is no mention of windows or window frames.

8. The Tribunal noted the Lessor's covenant that "every lease of a flat in the Building for a term of twenty-one years or more hereafter granted by the Lessor shall be substantially in the form of this Lease and contain covenants on the part of the tenant similar in all material respects to those contained in this Lease" (see Clause 5(b)). No information had been made available as to the provisions of any other Leases in the Building or as to the provisions applying to any other tenants or occupants of flats in the Building. However, it appears clear to the Tribunal that the Respondent's Lease must be construed on the assumption that this covenant has not been breached. Further, it would not be acceptable for the Lessor/Claimants to increase the Respondent's liability to contribute to the maintenance of the Building by making different arrangements with other lessees/tenants or occupiers of flats in the Building.

9. How the £801.88 in issue had been computed by the Claimants and in respect of what works was not obvious and had to be ascertained. According to a 'Final Breakdown' supplied by them, which was in no sense an audited or certified account, expenditure totalling £43,755.44 was incurred on "Redecoration in Year 2002". This consisted of three payments to West London Scaffolding totalling £10,416.38 and two payments B L to Fidgen & Co Ltd totalling £33,339.06. The total was divided between 18 flats to produce a sum of £2,430.86 per flat from which was deducted £1,050.29, being maintenance collected in advance, to produce a balance per flat of £1,380.57. The Respondent has paid £578.69 in respect of that amount leaving outstanding the alleged liability to contribute £801.88. However, the Tribunal was concerned about the validity of this computation in two respects.

10. First, from the copy documents provided by the Claimants it appears that an inaccuracy has occurred with Fidgens. The two amounts shown as payments in the 'Final Breakdown' were, in fact, invoiced amounts. The first was for an interim payment-on-account of £12,000 plus VAT (making up the £14,100 shown) but a payment of £12,000 only was made by the Claimants. The second was the final invoice which deducts the £12,000 paid before calculating VAT on the balance to produce the second amount shown of £19,239.06. Apparently, the VAT of £2,100 on the interim £12,000 has not been (re)charged or paid. Further, copy documents from Fidgens suggest that the Claimants may only have paid an additional £16,325, leaving an outstanding balance due of £2,914.06 as at 15 January 2003, although a handwritten note indicates that this has been cleared. Similarly, the documents supplied include copy invoices from West London Scaffolding Ltd (somewhat confusing because works were being undertaken to two properties: Bridge House as well as Bridge House South) but with handwritten acknowledgements of payment. Nevertheless, despite the lack of clarity, the Tribunal is prepared to accept that the computation of costs incurred by the Claimants can be supported as to total amount.

11. Second, however, the Tribunal was more concerned about the works giving rise to the expenditure. Fidgens' final invoice states:

> "To carrying out external redecorations at [the Building] in accordance with our estimate no.2(i) dated 16.10.01

Replacing 12 no. windows in accordance with our estimate dated 25.02
Carrying out repairs: overhauling windows and frames, cutting-out defective sections and splicing-in new; constructing, fitting and glazing new sashes; replacing new entrance door to flat no. 36 *(see note below)*; cutting out defective sections of fascia and soffite boards and splicing-in new; replacing defective lengths of gutter and rainwater pipes and supplying and fixing additional gutter brackets as found necessary.
Our estimate no. 2(ii) dated 16.10.01 and letter dated 22.01.02 refer. *(Also estimate dated 28.05.02 for new rear door to flat no. 36, but costed in with general repairs)*"

The estimate referred to of 16 October 2001 specified the works as follows:

"**General Specification**
Decorations
Clean and rub down windows and frames, burn off and prime where necessary, replace loose or missing glazing putties, apply one undercoat and one gloss coat oil paint.
Clean and rub down fascias and soffites, scrape where peeling and prime, apply one undercoat and one gloss coat oil paint.
Clean and rub down gutters, rainwater and soil pipes, apply one undercoat and one gloss coat oil paint. Clean out gutters and apply one coat of bituminous paint internally. *Excluding entrance doors and any decorated wall areas.*
Repairs
Overhaul windows and frames, cut out rotten sections, splice-in new and prime. Overhaul gutters and rainwater pipes, replace broken sections, remake joints where necessary."

12. The difficulty perceived by the Tribunal is that these works primarily and mostly involve the decoration and repair of windows and window frames which, under the Respondent's Lease, are within covenants made by the Lessee and are not within the obligations of the Lessor (see para.s 5 and 7 above). It follows that the Claimants' expenditure on that substantial element of the works cannot properly be included in the maintenance provision or contribution payable by the Respondent and so must be excluded. However, neither the estimate nor the invoices from Fidgens embody any apportionment of costs between inadmissible works to windows and frames and the other admissible works. Similarly, the scaffolding costs would be partly attributable to inadmissible works to windows and frames but, not surprisingly, no apportionment has been attempted (although presumably it could have been done on a time-basis). It should also be added, although concerning, presumably, a comparatively minor item, that the Tribunal can see no basis on which the Respondent should be expected to contribute any proportion of the cost of repair/replacement of the rear door of flat 36. According to her Lease, such a door forms part of the Demised Premises and, therefore, comes within the Lessee's repairing covenant.

13. Despite its Directions, the Tribunal has not been supplied with copies of any Specification or Contract for the works undertaken by Fidgens. Nor has any itemised costing been submitted. Accordingly, the Tribunal is only able to deduce a broad brush

apportionment between the inadmissible and the admissible works and costs from the invoices and estimates quoted (see para.10). On this basis, the Tribunal considers that at least one-third of the Claimants' total expenditure was incurred in respect of inadmissible works to windows and frames, for which the Respondent is not liable under her Lease to contribute. An adjustment of the Claimants' computation (see para.8) to reflect a one-third reduction in expenditure produces a per flat sum of £1,620.57, from which the £1,050.29 collected in advance must still be deducted, leaving the Respondent's potential liability to contribute at £570.28. However, since she has already paid £578.69 as representing costs reasonably incurred, the Tribunal is unable to determine that any amount, much less the £801.88 in issue, is now payable by her to the Claimants.

14. That finding would be sufficient to decide the matter referred to the Tribunal but additional aspects must be addressed.

15. The fundamental flaw in the claim is that the Claimants' have sought payments to which they were not entitled under the terms of the Lease granted to the Respondent. This flaw has been compounded by the Claimants' failure to comply with the twofold collection machinery provided by the Lease (see para.6). Instead, of a formal post-maintenance year notification to the Respondent of excess expenditure, sensibly authenticated by a surveyor's certificate (see Fourth Schedule Part I para.3), the Claimants saw fit to issue a series of informal interim demands. These were not within the provisions of the Lease and the Respondent was justified in withholding payments until properly satisfied as to the amount due.

16. Beyond the provisions of the Lease, there are statutory provisions to be complied with. In particular, under s.20 of the 1985 Act, there are specified requirements about obtaining at least two estimates for qualifying works (such as those here) and then consulting tenants (such as the Respondent). If these requirements were not complied with or else dispensed with by the County Court, the Respondent's maximum liability would be to pay her proportion ($1/18^{th}$) of £1,000 (ie £55.55). No documentary evidence of compliance with these requirements has been submitted to the Tribunal. However, the Claimants have asserted:

> "The estimates were supplied to all leaseholders before any works were carried out and all leaseholders agreed to final choice so no estimates now exist because they were disposed off [*sic*] after all leaseholders accepted them."

This assertion is difficult to understand since Fidgens' estimate, by reference to which the works were carried out, still exists and so could not have been one used for consultation purposes (unless, perhaps, the Claimants mean that they disposed of the rejected estimates). Further, what would need to be produced by the Claimants is a copy of the s.20 Notice served by them for the purposes of the required consultation: merely supplying estimates would not suffice.

17. On behalf of the Respondent it has been stated:

> "The [Claimants] claim to have sent 3 estimates of all works to be carried out in respect of the replacement of windows. The Respondent denies receiving

these estimates save for one estimate provided. The Respondent denies that the estimates were disposed of by her."

Implicit in this statement is the fact that the Respondent denies accepting any estimates for window replacement.

18. On the basis that the statutory consultation requirements have neither been complied with nor dispensed with by the County Court, the Respondent's maximum liability will be to pay her proportion (1/18th) of the £1,000 cap, which comes to £55.55. This would mean that the Respondent has substantially overpaid the Claimants: ie £1,050.29 plus £578.69 less £55.55 = £1,582.43. The overpayment may be recoverable from the Claimants by the Respondent but this was not the matter referred to the Tribunal for determination.

19. Another statutory provision which landlords/lessors must comply with in order for maintenance/service charges to be payable by tenants/lessees is that the relevant costs must be reasonably incurred and the services or works of reasonable standard (see s.19(1) of the 1985 Act). The Claimants have not supplied the Tribunal with any evidence that the works undertaken, particularly the replacement of windows, was reasonably necessary. The windows are described in Fidgens' estimate of 25 June 2002 as "defective timber windows" but there is no report by a surveyor or other expert as to condition and requisite remedy.

20. However, this general 'reasonableness' aspect has not been challenged on behalf of the Respondent. Instead, her Statement of Case essentially objected to paying 1/18th of the total cost of replacing windows (ie £7,552.90) since only one very small window in her living room had been replaced and she would be subsidising the replacement of much larger windows in other flats. She had obtained and exhibited a quotation for replacing her window at £341.92 whereas a 1/18th contribution would be £419.60. Her Statement included the following significant passage:

> "The costs are disputed because enclosed in the bill was the cost of replacing 12 defective windows with new UPVC double- glazed windows. The estimated cost came to a total of £6,428.00 + VAT@ 17.5% (see exhibit 3) which totals £7552.90. The Applicants did not inform the Respondents that one of the windows was in her living room. Some years prior to this, when the Respondent informed the Applicants that her kitchen window needed replacing, the Applicants claimed that as a leaseholder, the Respondent was responsible for the wear and tear of her own property. As a result the Respondent replaced the kitchen window at a cost of £450."

Accordingly, the submission was made that "each flat should be responsible for the costs of replacing their own windows as previously advised". It is most unfortunate that the Claimants had proceeded to have the works to windows carried out in 2002, not only without proper consultations, but also in disregard of the proper position under the provisions of the Respondent's Lease. However, in the Tribunal's opinion, it is only right that they rather than the Respondent should bear any disadvantageous consequences.

21. Finally, as requested on behalf of the Respondent, consideration must be given to the costs of these proceedings. There are two available powers. Firstly, the Tribunal has power to make an order that the costs, if any, incurred by the Claimants in connection with its proceedings should not be included in any future maintenance/service charges account (ie under s.20C of the 1985 Act). In making such an order, the only applicable principle is what would be just and equitable in the circumstances (ie in accordance with s.20C(3)). In *Langford Tenants v Doren Ltd* 2001, at para.23, (LRX/37/2000), HH Judge Rich QC observed:

> "Section 20C is a power to deprive a landlord of a property right. If the landlord has abused its rights or used them oppressively that is a salutary power, which may be used with justice and equity..."

In the circumstances of this case, the Tribunal has found that the Claimants have demanded payments from the Respondent without any regard to the relevant provisions either of her Lease or of statute law and sought to enforce these unjustifiable payments by issuing proceedings in the County Court. The Tribunal considers that there is ample basis on which to consider it just and equitable to make a s.20C order. Accordingly, it is now determined that any costs incurred by the Claimants in connection with these proceedings shall not be included in any future maintenance/service charges payable by any tenants/lessees in the Building.

22. The second power available to the Tribunal is to determine that a party to the proceedings should pay another party's costs incurred in connection with the proceedings, not exceeding £500 each, on the ground that "he has, in the opinion of the leasehold valuation tribunal, acted frivolously, vexatiously, abusively, disruptively or otherwise unreasonably in connection with the proceedings" (ie under para.s 10(1)-(3) of Sched.12 to the Commonhold and Leasehold Reform Act 2002). The Tribunal does not consider that the initial issuing of proceedings in the County Court, leading to the reference of the matter to the Tribunal, even though seeking to enforce unjustifiable payments, can properly be treated as coming within the quoted ground. However, in the Further Directions dated 26 July 2004, the Tribunal explicitly explained the apparent flaws in the Claimants' case, which would mean that their claim was bound to fail in the absence of curative evidence. Since the Claimants were manifestly unable to supply any such evidence, their sensible course of action would have been to withdraw their claim. Instead, the Claimants persisted by providing documentation adding nothing material to their case and putting the Respondent to the expense of submitting a Further Statement in Reply. In the judgment of the Tribunal, the Claimants have, in this respect, acted unreasonably in connection with the proceedings. It should be noted that a warning about the present power was appended to the Directions in heavy type. Accordingly, the Tribunal determines that the Claimants shall pay to the Respondent the costs incurred in the preparation by her Solicitors of her Further Statement in Reply (dated 18 August), but not exceeding £500.

23. By way of concluding summary, the Tribunal has determined: -

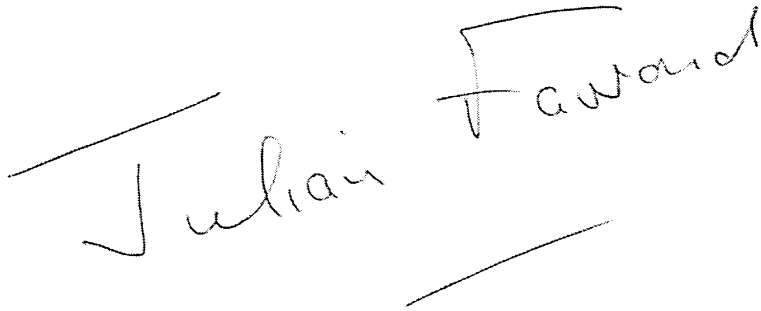
i. *The sum of £801.88 is* ***not*** *payable by the Respondent to the Claimants.*

ii. *No costs of these proceedings shall be included by the Claimants as a future maintenance/service charge.*

iii. *The Respondent's Solicitors' costs of her Further Statement in Reply, not exceeding £500, shall be payable by the Claimants.*

The reasons for these three determinations are explained in the text of this Determination.

CHAIRMAN



DATE 5 October 2004