LON/00AM/NSI/2003/0052

DECISION BY THE RESIDENTIAL PROPERTY TRIBUNAL SERVICE ON AN APPLICATION UNDER SECTION 19(2A) OF THE LANDLORD AND TENANT ACT 1985 (AS AMENDED)

Applicant: Mr T Fowkes

Respondent: Mr G Plenty

Re: Flat 6, 180 Dalston Lane, London E8 1NG

Application date: 23 May 2003

Hearing date: 6 August 2003

Appearances:
Mr T Fowkes
Mrs N Ash **For Applicant**
Mr D Landman

Respondent did not attend and was not represented

For Respondent

Members of the Residential Property Tribunal Service:

Mr A Andrew LLB
Mr M Mathews DMS FRICS MIMgt
Mr J Tomalin

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THE APPLICATION

1. This was an application by Mr T Fowkes pursuant to Section 19(2A) of the Landlord and Tenant Act 1985 ("the Act"). As landlord of 180 Dalston Lane, London E8 ("the Building") he sought a determination as to the reasonableness of the costs incurred by him and set out in a "statement of income and expenses for the period ended 28th February 2003" prepared by Lubbock Fine, Chartered Accountants. He excluded from his application Architects fees of £3,520 in respect of which he did not seek any contribution from the Respondent. The majority of the costs in issue related to major works carried out to the Building during 2002. The Respondent was Mr G E Plenty, the lessee of flat 6.

DESCRIPTION OF THE BUILDING

2. The Building was built as a public house in about 1880. It is situated at the corner of Dalston Lane and Greenwood Road. At some stage it was converted into 6 flats: certainly the conversion must have taken place before 1990 because the Respondent's lease was completed on 23rd February in that year. The Building consists of three storeys with a cellar.
3. A thin strip of land, to the front facing Dalston Road, is included in the Applicant's title. Within that strip were originally trap doors, to the cellar, through which barrels of beer and other supplies would have passed. As will be seen this strip was fenced with iron railings as part of the major works carried out in 2002.
4. To the rear of the Building what would have been a rear yard has been converted into three distinct spaces. A single gate from Greenwood Road leads to a courtyard which gives access to the main door, now situated to the rear of the Building. To the rear of the courtyard is a garden to flat 1.

Adjacent to the courtyard and garden are a forecourt and two parking spaces reserved for flats 1 and 2. The communal dustbin store is situated within the forecourt and can be accessed by a gate from the courtyard. Access to the forecourt and car parking spaces, from Greenwood Street, is gained through a double gate. Within the Building itself a communal hall and stairwell gives access to the six flats, two on each floor.

HISTORY

5. The Applicant first purchased a flat in 1998. In January 2001 he purchased the freehold reversion which seems to have included vacant possession of two further flats so that he then had control of three flats. Between January 2001 and November 2001 he purchased two more flats from the lessees so that by the date of the commencement of the major works he owned, either leasehold or as part of the freehold reversion, five of the six flats, leaving the Respondent as the only independent lessee in the Building.

6. During his purchase of the freehold reversion the Applicant had commissioned a structural survey from I C Thomas ARICS of "e.surv Ltd". This revealed a degree of structural movement in the Building which required further investigation. Acting on the recommendation of I C Thomas, the Applicant commissioned a full structural survey from Mr A Trueman Ceng, FIStructE, of Austin Truman Associates, Consulting Engineers. This recommended an inspection of the roof area which was hidden from view. It also made detailed recommendations to address the structural movement within the Building.

7. Following his purchase of the freehold reversion the Applicant, acting on the advice received from Mr Truman, instructed HornCastle & Sons (Roofing) Ltd to inspect the roof and provide an estimate for any necessary remedial work. In consequence of that report a new roof was installed in October 2001 at a cost of about £20,000. The Respondent paid his share of that cost which was not in issue before the Tribunal.

8. The Applicant then decided to embark upon a programme of major works the cost of which was central to the application before the Tribunal. These consisted, in essence, of the remedial works recommended by Mr Truman

and the redecoration and refurbishment of the exterior and the external and internal common parts of the Building. These works were the subject of four notices issued under Section 20 of the Landlord and Tenant act 1985. The Tribunal considers that it is worth recording those notices in detail, not just for the sake of completeness, but because such a record may prove helpful if, as seems likely, the issue of recoverability comes to be determined by the County Court.

The first notice

9. The first Section 20 Notice was dated 20th February 2002 and related to the following works: -
   a. Exterior redecorations.
   b. Structural repairs to flank and rear walls.
   c. Redecoration of common parts.

10. The Applicant said that the following estimates were attached to the notice: -
   a. Three estimates from M & S Glynn ("Glynn") two dated 14th February 2002, and a third dated 22nd February 2002. Before the Tribunal the Applicant said that the notice had not been served until after 22nd February 2002. The estimates, which were accepted, encompassed the following work: -
      i. External redecoration including scaffolding: £16,500.
      ii. Repointing: £30 per square metre.
      iii. Provision of flank wall tie bars: £1,995
      iv. Restraint work to sidewall: £165 per elbow tie.
   b. Four estimates from Ash Construction ("Ash") dated 1st February 2002 which encompassed the following work: -
      i. External redecoration including scaffolding: £25,000
      ii. Provision of flank wall tie bars: £4,000
      iii. Restraint work to side wall: £3,500
      iv. Redecorating and recarpeting the common parts: £4,000

The second notice

11. The second Section 20 Notice was dated 24th June 2002 and related to fixing railings to the front of the Building at street level. The Applicant said that the following estimates were attached to the notice: -
    a. An estimate from Delta Security dated 12th June 2002, which was accepted, in the sum of £1,600.
    b. An estimate from Ash dated 10th June 2002 in the sum of £2,500.

The third notice

12. The third Section 20 Notice was dated 18th August 2002 and on the basis of the Applicant's evidence related to the installation of: -
    a. A keyed gate to the courtyard
    b. An entryphone system and
    c. A keyed gate between the courtyard and the forecourt to the parking spaces.
13. The Applicant said that the following estimates were attached to the notice: -
    a. An estimate from Delta Security dated 16th July 2002, which was accepted, in the sum of £1,675.
    b. An estimate from Ash in the sum of £2,000.

The fourth notice

14. The fourth Section 20 Notice was dated 25th September 2002 and related to the painting of the new railings and courtyard gates. On the basis of the Applicant's evidence only one estimate was attached to this notice: an estimate from Ash in the sum of £1,000. The Applicant said that he also obtained a verbal estimate from Glynn in the sum of £750, which was accepted.

15. Work commenced in June 2002 and seems to have been completed by the end of that year. Mr Truman supervised the structural remedial works and

he issued a completion certificate on 16th August 2002, expressing himself satisfied with quality of the work. As the works progressed further additional work, not the subject of any of the Section 20 Notices, was undertaken; this is referred to elsewhere in this decision.

16. At the beginning of 2003 the Applicant instructed his accountant, Mr Patterson of Lubbock Fine, to prepare a statement of income and expenses for the period ending 28th February 2003. Unfortunately the commencement date of that period is not stated: the date of the first item of expenditure appearing in the statement is 25th June 2002 although before the Tribunal the Applicant said that the statement related to the period from 1st January 2002 to 28th February 2003.

17. Excluding architects fees of £3,520 (in respect of which the Applicant did not seek a contribution from the Respondent) the statement recorded total expenditure of £52,947. Under the terms of his lease the Respondent would be responsible for 16% of that expenditure: £8,471.52. Various interim demands issued to the Respondent, during the course of the works, had not been paid, the Respondent having only paid £100 which was, apparently, a contribution to the buildings insurance premium.

18. At a pre-trial review on 11 June 2003 a differently constituted Tribunal issued directions which required the Respondent to make a full reply to the application and to provide the Applicant with copies of the documents upon which he intended to rely. The Respondent failed to comply with the directions. The directions stated that an inspection would not be necessary, a statement with which the Tribunal concurred. The Tribunal was authorised by the directions, to consider requiring the Respondent to reimburse the Applicant with the whole or part of his fees incurred in making his application.

THE LEASE

19. The lease of the Respondents flat is for a term of 99 years from 25th March 1989 at a rent of £100 per anum for the first 25 years.

20. The tenant's obligations are set out in the fifth schedule. The tenant is responsible for keeping the flat, as defined in the second schedule, in good and substantial repair and condition. In addition the tenant is required to redecorate the interior of the flat in every seventh year of the term. For the purpose of this decision it should be noted that the definition of the flat includes "The frames and glass of the windows and the doors and door frames".

21. The landlord's obligations are to be found in the sixth schedule. In particular part I of the sixth schedule requires the landlord to: -

    a. Insure the Building
    b. Keep the roof, main structures and common parts of the Building in good and substantial repair and condition.
    c. Redecorate the exterior and common parts not less frequently than every four years.
    d. To keep clean and reasonably lighted the common entrance hall and landings and staircase of the Building. It should be noted that there is no obligation to carpet these common parts.

22. Part II of the sixth schedule contains further obligations on the part of the landlord. In particular sub-clause (2) requires the landlord to ensure that every future lease of other flats in the Building contains obligations on the part of the tenant similar to those contained in the fifth schedule and itself to observe such obligations pending the grant of such a lease. It therefore follows that the obligation to repair the window frames of the other flats must fall either upon the tenants of those flats or upon the landlord in the event that any of the other flats have not been demised.

23. The landlord recovers the costs incurred in fulfilling its obligations through the service charge. The lease makes the following provisions for the calculation and payment of the service charge: -

a. Clause (xiv) of the first schedule defines the "Service Year" as being coterminous with the calendar year.
b. Clause (xi) of the first schedule defines the "Service Charge", in essence, as being the cost incurred by the landlord during the Service Year in fulfilling its obligations set out in the part I of the sixth schedule together with a provision for future anticipated expenditure, management and accountancy fees and interest on borrowed money.
c. The tenant is required to pay 16% of the Service Charge. This is defined as the "Tenant's Contribution" and is payable upon demand. There is also provision for payment of an interim charge on account of the Tenant's Contribution but that is not material to this decision.

24. Taking these provisions into account the following points can be made: -
a. Save as specifically set out in clause (xi) of the first schedule the landlord can only recover the costs incurred in fulfilling its obligations set out in part I of the sixth schedule. Unusually the lease does not contain a further schedule setting out the heads of expenditure that can be brought into account in calculating the Service Charge. To put it another way, if the landlord is not obliged to do something he cannot charge for doing it.
b. The Service Charge is calculated by reference to the Service Year which is coterminous with the calendar year. This clearly calls into question the validity of any demand based upon the statement of income and expenses for the period ending 28th February 2003.
c. There is no obvious provision which would entitle the landlord to recover its legal costs save in connection with an application for consent made under the Lease.
d. The landlord is not entitled to recover the cost of improvements as opposed to the cost of repairs and renewals.

THE HEARING

25. The hearing took place on 6th August 2003. The Applicant represented himself and gave evidence to the Tribunal. Mrs Ash assisted him and a Mr

Landman was also present. The Respondent was not present and was not represented.

THE EVIDENCE

26. In giving evidence the Applicant explained the history of the major works and took the Tribunal through the documents that he had previously submitted, which included copies of invoices or vouchers for all the expenditure listed in the statement of income and expenditure referred to.

27. The Tribunal had some concerns about both the extent of the work which was the subject of the Section 20 Notices and the legitimacy of the tender process supporting those notices.

28. The first and fourth Section 20 Notices related to work that was ultimately undertaken by Glynn. Their estimates for the work had amounted to £19,245, exclusive of VAT plus piecework for repointing and the provision of elbow ties. On the basis of the Applicant's evidence £3,090, exclusive of VAT had been charged for the provision of the elbow ties and associated work and no charge had been made for the repointing. Thus the cost of the work encompassed by the first and fourth Section 20 Notices amounted to £25,425, exclusive of VAT.

29. Glynn's final itemised account, dated 22nd November 2002, was however in the sum of £32,577, exclusive of VAT. Thus work to the value of £7,152, exclusive of VAT had been carried out to the Building which had not been the subject of either a Section 20 Notice or a process of competitive tendering. Some of this work was in itself substantial, including for example the installation of new windows.

30. The Applicant provided three explanations for his failure to follow the statutory consultation process, in respect of this additional work. He said firstly that, although the total cost of the additional work had exceeded £1,000, each of the individual items cost less than that sum and that consequently he did not consider it necessary to serve further Section 20 Notices. Secondly he said that the need for the additional work had only become apparent once work had commenced and that it had to be undertaken whilst the contractors were on site and the scaffolding in place

to avoid the increased cost that would result from the inevitable delay which would follow the service of a further section 20 Notice. Thirdly he said that the nature and extent of the additional work had been explained to the Respondent as the work progressed.

31. The Tribunal considered that there was an inherent contradiction in these explanations in that the first assumed that the statutory consultation process was unnecessary whilst the second and third were excuses for not having followed it. The Tribunal also had some difficulty with the third explanation given that there had, at that time, been a complete breakdown in communications between the parties to the extent that the Applicant had resorted to communicating with the Respondent through his solicitors.

32. Turning to the integrity of the consultation process the Applicant had explained to the Tribunal that Ash, the under bidder in respect of all four section 20 Notices, was an unincorporated firm of which he was the sole proprietor. The Applicant said that he used Ash to renovate his investment properties and that it had an annual turnover of about £30,000. This begged the question: why had he not used Ash to renovate the Building.

33. In answer to this question the Applicant said that he had not used Ash because he had been advised that had he done so he would not be able to recover the cost of the work. When asked to explain why that was, he said that he had been advised that he would not be able to set off the cost of the work for tax purposes if he had used Ash. When asked to explain why this project was any different from the development of his other investment properties he changed tack and said that he had not used Ash simply because the other contractors were cheaper.

34. Although Section 20 of the Act requires the landlord to obtain two estimates it only requires one estimate to be obtained from "a person wholly unconnected with the landlord". To that extent the Applicant was entitled to estimate for the work through Ash. However it seems self evident that both estimates must be genuine. The Tribunal found the Applicant's evidence, in this respect, disconcerting implying as it did initially, that he had never intended to use Ash to undertake the work.

35. Nevertheless as the law now stands these are not issues for the Tribunal and it would consider the reasonableness of the costs in issue leaving it to others to determine their recoverability.

36. The Applicant also gave evidence in respect of the Solicitors costs amounting to £2,289 inclusive of VAT. The Respondent had initially declined to provide access to the Applicant and his professional advisors and contractors to enable the major works to be completed. At his request the Applicant's solicitors had entered into correspondence with the Respondent as a result of which access had been afforded and the works completed. The Applicant described the work undertaken by his solicitors as "mediation services" although that does not seem an entirely accurate description.

37. The Applicant, during his description of the major works, explained that a new window had been fitted to one of the other flats. The cost of that window had not been separated out from the total cost of the window replacement but the applicant estimated that the cost would have been about £1,000 plus VAT, an estimate with which the Tribunal agreed. The applicant accepted that, under the terms of the Lease previously described, that cost should not be included in the service charge accounts in that the cost should be born by either the lessee of that flat or the landlord as the reversioner.

DECISIONS

38. The Tribunal first had to decide if the work and services had been carried out to a reasonable standard. It had no hesitation in concluding that they had. The Respondent had not suggested otherwise: indeed he had offered no evidence to the Tribunal either in writing or orally. Competent and experienced contractors had carried out the major works and the structural consultants had issued a completion certificate and had expressed themselves satisfied with the structural works.

39. Turning to the reasonableness of the cost of the work and services, no evidence having been offered by the Respondent, the Tribunal would have to rely upon its own skill and judgement. The Tribunal considered the

reasonableness of these costs under the following heads, all figures being inclusive of VAT: -

The major works

40. Glynn's costs totalled £38,277.97. From this should be deducted £1,175 in respect of the replacement flat window referred to above, leaving a balance of £37,102.96. For the work undertaken, which consisted of the refurbishment and redecoration of an ageing building including substantial structural work, the Tribunal considered the cost to be reasonable.

41. Delta Security's costs totalled £4,200.63. As described above the work related to the fixing of railings to the front of the Building and the installation of security gates and an entryphone. The actual cost had exceeded the estimate by £352.50 as a result of the Applicant's decision to top the railings with arrow head spikes. The Tribunal considered that the installation of railings to the front of the Building amounted to an improvement the cost of which should not be visited upon the Respondent under the terms of the Lease. The Tribunal considered it unlikely that the area enclosed would originally have been railed off, enclosing as it did the trap door to the callers. Even if it had been railed off the railings would almost certainly have been removed during the Second World War and their replacement now did not seem reasonable. Nevertheless the Tribunal accepted that this was an issue of recoverability. As to the reasonableness of the cost the Tribunal did not consider that it could be faulted.

42. The cost of redecorating and recarpetting the internal common parts which amounted to £2,096. Although the work had been included in the scope of the first Section 20 Notice the cost had not been included in Glynn's estimate and had not been carried out by them. The redecorations had in fact been undertaken by an acquaintance of the Applicant on the basis of a day rate with the Applicant providing the materials. Although the Tribunal had reservations concerning the Applicant's failure to obtain competitive estimates for this work it nevertheless concluded that the cost was reasonable.

43. The Tribunal had a residual concern that, although the cost of the major works was in the main reasonable, the Applicant's ownership of five of the six flats had resulted in the works having been carried out to a higher standard and to a shorter timetable than would normally have been the case. The resulting service charge would almost certainly cause financial hardship to the Respondent and this no doubt accounted for his uncooperative behaviour. The Tribunal welcomed the Applicant's offer, made to the Tribunal, to accept payment of the service charge by instalments The Tribunal hoped that the offer would not be withdrawn.

Insurance premium

44. The Building was insured in the sum of £408,000 at a premium of £1,256.21. Again the Respondent had not put the premium in issue. The Applicant said that it had been placed through a broker and on the basis of the Tribunal's own knowledge the premium fell within the industry norm for buildings insurance. The premium was reasonable.

Solicitor's costs

45. The Applicant's solicitors fees amounted to £2,289. No narrative of the work or breakdown of the fees had been provided. On the basis of prevailing hourly rates it seemed that the Applicant's solicitors must have undertaken about 15 hours work. The Tribunal doubted that the fees were recoverable under the terms of the Lease but to the extent that they were recoverable the fees charged seemed wholly disproportionate to the work stated by the Applicant to have been undertaken. On the basis of the Applicant's evidence the Tribunal considered that no more than £587.50 could be justified for the work undertaken and it would substitute that figure for the sum claimed.

Consulting engineers' fees

46. The fees of Austin Truman Associates, Consulting Engineers amounted to £2,577.17 and related to the inspection of the Building and the supervision

of the structural works. Given the extent of the structural works the Tribunal considered the fees to be reasonable.

Aerial replacement

47. The Applicant had paid £550 to an unidentified aerial company for removing a number of obsolete aerials and replacing them with new ones. The Applicant said that the contractors had spent half a day on site. On the basis of the Applicant's evidence the Tribunal accepted that the cost was reasonable.

Minor items of expenditure

48. The balance of the items of expenditure listed in the statement of income and expenses were of a relatively minor nature and included utility costs, accountants fees for the preparation of the accounts, decorating materials, refuse removal and pest control. The Applicant had accepted that the utility bills amounted to £90.88 rather than the £117 claimed: the discrepancy apparently resulting from a misreading of a credit balance as a debit balance. In other respects the cost of all these items had been vouched and the Respondent had not challenged them. The Tribunal considered the costs to be reasonable.

Application fees

49. Finally the Tribunal had to consider whether the Respondent should be required to reimburse the Applicant with the whole or part of his fees incurred in making this application. The Applicant had acted prudently in making the application. He had done so as a precursor to taking action to recover the service charge from the Respondent. However the Tribunal had considerable concerns, expressed elsewhere in this decision, about both the extent of the work which was the subject of the Section 20 Notices and the legitimacy of the tender process supporting those notices. It also considered that the Applicant had used his dominant position, as the

owner of 5 of the 6 flats, to push through a programme of work which, although necessary, might otherwise have been carried out with greater regard to the Respondent's ability to pay. In such circumstances it would not make the order sought. At the end of the day it was reasonable that the Applicant should rely upon the service charge provisions of the lease to seek to recover an appropriate proportion of those fees.

CHAIRMAN.....

DATED..... 15th September 2005.....