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LON/00AL/LSC/2007/0205

THE RESIDENTIAL PROPERTY TRIBUNAL SERVICE

**DECISION OF THE LONDON LEASEHOLD VALUATION TRIBUNAL ON
AN APPLICATION UNDER SECTION 27A OF THE LANDLORD AND
TENANT ACT 1985**

Property: 44 Eglinton Hill, Shooters Hill, London SE18 3NR

Applicants: Ms Lisa McGilben (Flat D)
Mr Paul Peskett (Flat B)
Ms Grace Mboto (Flat A) (leaseholders)

Respondent: The Common Estate Limited (landlord)

Date heard: 24 and 25 September 2007

Appearances: Miss A Cutfield and Miss M George (BPP Legal Advice)
The applicants

Miss T Soleimani and Mr B Burlikowski BSc Hons MRICS MBEng,
Willmotts, chartered surveyors
Mr C Speight, director, and Mr P Lewis, secretary, The Common
Estate Limited

Members of the leasehold valuation tribunal:

Lady Wilson
Mr W J Reed FRICS
Mrs R J Turner JP

Date of the tribunal's decision: 11 October 2007

Background

1. This is an application under section 27A of the Landlord and Tenant Act 1985 (“the Act”) by three of the four leaseholders of flats in 44 Eglinton House, Shooters Hill, a converted semi-detached property on semi-basement, ground and two upper floors, built about 1900 and converted in about 1975. The respondent to the application is the freeholder. Willmotts, chartered surveyors, are the landlord’s managing agents. The applicants, who will be called “the tenants” in this decision, each hold a long lease of a flat in the building under which they agree to pay a service charge to the landlord and the landlord agrees to maintain and provide services to the building. The leases are in common form. The tenants’ covenant to pay service charges is contained in clause 2, and the landlord’s covenant to maintain the building and provide services is in clause 4.

2. The issues raised by the tenants are their liability to contribute to the cost of major works carried out to the roof and exterior of the building in 2005; insuring the building from 1999 to 2007 inclusive; and managing agents’ fees for the year 2005.

3. The application was heard on 24 and 25 September 2007. The tenants, each of whom appeared and gave evidence, were represented by Miss A Cutfield and Miss M George of BPP Legal Advice. The landlord was represented by Miss T Soleimani and Mr B Burlikowski BSc Hons MRICS MBEng of Willmotts and by Mr C Speight, a director of the landlord and Mr P Lewis, its secretary. All the landlord’s representatives gave evidence. In the morning of 25 September the tribunal inspected the property in the presence of the tenants and Mr Burlikowski.

4. References in this decision are to the agreed bundle.

The statutory framework

5. Section 27A of the Act, as far as it is relevant, provides that an application may be made to the tribunal for a determination whether a service charge is payable and, if it is, the amount which is payable. By section 19(1), relevant costs shall be taken into

account in determining the amount of a service charge only to the extent that they are reasonably incurred and, where they are incurred on the provision of services or the carrying out of works, only if the services or works are of a reasonable standard, and the amount payable shall be limited accordingly.

The issues

1. Major works

6. These works comprised, broadly, repairs to the roof and chimney stack, repairs to rainwater goods, brickwork and timber repairs and miscellaneous works to the exterior. They were carried out in 2005 by a firm called DFM Solutions at a total cost, including supervision fees of 12.5% and VAT on the supervision fees, of £20,898.78 according to the statement of service charge expenditure at page 7.1, although the final account at page 3.63 suggests a total of £20,582.12. The issues which arise are whether the landlord properly complied with the statutory consultation requirements and, if not, whether the requirements not complied with should be dispensed; whether the standard of the works was satisfactory; and the reasonable cost of the works, given the standard.

a. The consultation requirements

7. A notice under section 20 of the Act (page 11.2) dated November 2000 was given to the leaseholders by the managing agent (Ms Mbotto did not receive it but she was in the course of purchasing her flat at the time the notice was given and we are satisfied that the agents gave notice to her predecessor, if not to her). The notice described the works by reference to a schedule, the relevant parts of which were enclosed with the notice but which has not been put before us. Three contractors were named as having been invited to tender and two as having tendered, and the anticipated total cost, including fees and VAT, based on the lower tender, was £16,051.91. We are satisfied that the notice complied with the statutory consultation requirements then in force. However, the landlord did not carry out the works specified in the notice because it

did not succeed in raising the money from the then leaseholders in advance. In 2005 it instructed DFM Solutions, which was not one of the contractors named in the section 20 notice, to carry out the works listed in a new schedule of works dated May 2005 (page 3.11). In September 2004 the managing agents served notices of intention to carry out the works (produced at the hearing), the first stage of the consultation procedures required by Part 2 of Schedule 4 to the Service Charges (Consultation Requirements) (England) Regulations 2003 which were by then in force, but it appears that the subsequent consultation procedures which the Regulations required were not carried out. In these circumstances Miss Soleimani and Mr Burlikowski for the landlord accepted that the landlord had not fully complied with the relevant consultation requirements and asked for them to be dispensed with under section 20ZA of the Act, which provides that the tribunal may dispense with all or any of the consultation requirements if satisfied that it is reasonable to do so. The tenants agreed that the landlord's request should be considered at the present hearing.

8. In support of the landlord's request for dispensation Mr Burlikowski said that the failure to complete the consultation process appeared to have been an oversight by the surveyor then employed by the managing agents who supervised the works. He said that the leaseholders were in fact fully aware that the work was to be carried out and, indeed, were pressing for it to be done. He believed that the specification for the present works was similar to the earlier specification, and the projected cost of the works carried out in 2005 was less than set out in the notice given under section 20 of the Act in November 2000, although, due to variations, the eventual cost was more.

9. The tenants' representatives argued that the requirements should not be dispensed with. They said that professional managing agents should be expected to be aware of the consultation requirements, that the work, though urgently required because of a long period of neglect, was clearly not emergency work, and that there was no reason why the tenants should not have been fully engaged in the consultation process as compliance with the Regulations would have achieved.

10. On balance and with some reluctance we have come to the conclusion that it is reasonable to dispense with those parts of the Regulations with which the landlord has failed to comply. The first and, in our view, most important notice (the notice of

intention) was given, and we accept Mr Burlikowski's evidence that informal discussions then took place with the leaseholders so that they were aware of what was proposed. We also accept that if they had proposed a contractor it is likely that the landlord would have taken notice of the proposal. We have borne in mind that this was a professional managing agent who should have been aware of the consultation requirements. Nevertheless we accept that the failure fully to follow the correct procedure was a genuine oversight and that the balance of fairness requires dispensation.

b. The cost and standard of the works

11. The total tender price was £14,100. It appears that DFM Solutions did not charge VAT. The final cost, after variations, was £17,760 plus professional fees for supervision by Willmotts at 12.5% plus disbursements and VAT.

12. The tenants said that the standard of work was shoddy. The preparation had, they said, evidently been very poor, judging from the rapid deterioration of the decoration, and the scope and standard of the works to the roof had been so grossly inadequate as to have been a complete waste of money. They had recently obtained a report from a roofing contractor, Mr Samuel McMath of Topsure Roofing who had inspected the roof on 21 September 2007 and had concluded that the works carried out had been of such a poor standard as now to require the total replacement of the roof at a cost of £21,500. Mr Peskett, one of the tenants, said that he considered that all the works done to the building in the course of the major works contract had been so poorly executed as to amount to a complete waste of money, and more than half the work will need to be re-done. He said that he was upset that the tenants might have to pay twice for work which should have been done properly. Ms McGilben agreed that the work had been extremely poorly done and tentatively suggested that the reasonable cost of what was done would be one half of its cost, although in the written response to the landlord's comments on the major works (pages 4.3 and 4.4) the tenants proposed deductions totalling £18484.76, adjusted at the hearing to take account of the tenants' concession in relation to the Velux window (see paragraph 13 below). The landlord produced a snagging list incorporated in a letter dated 30 May 2006 but

the tenants said that it was far from clear that any of the snagging items had been carried out.

13. Mr Burlikowski, who had not been involved in the supervision of the contract but did his best to help the tribunal, said that it was clear that not all the specified work had been done. He agreed that the paint was flaking in parts and that it was clear that, by and large, the preparation had not been adequately carried out and he accepted that the decorations had not lasted as long as they would have done if the preparation had been of a reasonable standard. He considered that some of the work, such as re-asphalting the front steps, had been carried out to a reasonable standard and he did not agree that all the work had been a complete waste of money.

14. We were able to conduct a detailed inspection of all the relevant parts of the building. We have borne in mind that it is about two years since the works were completed and that some deterioration is to be expected in that period. However, making full allowance for that, we are very far from satisfied that the work was carried out to a reasonable standard or that all the specified works were done. In our view virtually every one of the specific complaints which the tenants made (pages 4.1 – 4.5), save for the installation of a new Velux window in the roof which the tenants agreed had been carried out, is justified. In particular, the works to the roof were clearly not properly done. Lead flashings were fixed to the ridges instead of ridge tiles and, predictably, had to be replaced after storm damage. The painting was of a quite unacceptably poor quality mainly because, as Mr Burlikowski acknowledged, of wholly inadequate preparation. A new window on the staircase installed at a charge of £550 (final account at page 3.63) was ill-fitting and badly made, if it was new at all. The repointing which we saw was very clumsily done and it appeared that the joints had not been raked. A new boundary fence was flimsy in the extreme. Clay tiles which had been fixed to a rear extension to mask asbestos were falling off because they had not been adequately fixed. We are not satisfied that the snagging items were attended to at all.

15. All in all we agree with the tenants that this was a really shoddy job. We have some sympathy with the case which the tenants advanced that virtually all the money was wasted. However, we cannot be satisfied that the infestation of pigeons which

followed a subsequent storm would have been avoided if the roof works had been better done. A few of the works, such as the re-asphalting of the front steps, were adequately done but very little was of any value and we are surprised that it was passed by the contract administrator.

16. Accordingly, we are satisfied that the cost of the works was significantly too high, given their standard. In our judgement no more than one third of the total cost of the works, excluding supervision fees, namely £5919.94, say £6000, was justified, and the balance was not reasonably incurred. It is clear to us that the supervision of the contract was inadequate, although some work must have been done by the contract administrator, including the preparation of the specification. We have decided to reflect this conclusion by allowing for supervision 12.5% of what we have held to be the reasonable cost of the works, which produces a fee of £750 plus VAT and disbursements of £181, a total of £1063.05.

ii. The cost of insurance

17. The landlord's covenant to insure is at clause 4(4) of the lease. It appears that the building was insured with Norwich Union until January 2005 and thereafter with Royal and Sun Alliance. The premiums for the years 1999 to 2006, in each case to 6 or 7 January in the following year, appear from the service charge accounts to have been, respectively, £1464.17 (page 7.17), £1522.59 (7.15), £1568.28 (page 7.14), £1565.82 (page 7.9), £1949.44 (page 7.6), £1969.53 (page 7.4), £2088.60 (page 7.1) and £2472 (given at the hearing).

18. The tenants said that the premiums were excessive. They said that the premiums had increased by an average of £130 each year and that they were not satisfied that the landlord had regularly tested the market to obtain the best quotations. They had obtained an alternative quotation (page 12.4) from an insurance broker dated 4 September 2007 who had quoted £1253.44 plus £55.15 for terrorism cover, including tax, although the quotation was subject to a satisfactory proposal form and they agreed that they had not provided the broker with the claims history.

19. The landlord said that there had been a significant claims history and, if it was not taken into account, the quotation obtained by the tenants could not be relied on. Mr Speight and Mr Lewis said that the landlord, which placed the insurance, received no commission and they were not aware of the commission received by the brokers and had not enquired what it was. They said that the property was insured under a block policy which covered the landlord's portfolio of some 350 flats with only an insignificant commercial element. They said that at each renewal of the policy the insurance was discussed to ensure that it represented good value for money, and that the portfolio had been revalued two years ago. Apart, they said, from rises due to normal indexation and a 10% increase two years ago in line with the insurance market, the premium had been constant throughout and in fact the claims history had had no adverse effect on the premiums, although this would not necessarily be so with a new insurer. The landlord believed that, where possible and in principle, continuity of insurer produced a better response to claims. Mr Speight said that the landlord was happy to discuss the tenants' quotation with its own broker in order to see if the premiums could be reduced in the future.

20. We are satisfied that the cost of insurance was reasonable throughout. We accept the landlord's evidence that it took reasonable steps to ensure that this cost was reconsidered each year and we are not satisfied that the alternative quotation obtained by the tenants would have been maintained if the claims history had been disclosed. Moreover it is on the face of it surprising that the premium quoted to them for cover by Norwich Union was less than the premium paid for cover by the same insurer in 2003. There is no evidence that excessive commission was paid to the broker and we accept that no commission was received by the landlord or managing agent. The amount of cover is not disputed. We accept the landlord's assurance that it will with an open mind investigate the quotation which the tenants have obtained.

iii. Managing agents' fees in 2005

21. The fees of Willmotts for managing the building in 2005 were £1175 including VAT, equivalent to £1000 exclusive of VAT, or £250 per flat, together with £688.55 including disbursements and VAT, or £586 excluding VAT, for dealing with a

boundary dispute with the occupant of the ground floor flat at the neighbouring property, 42 Eglinton Hill. Although they did not disagree that the fees would have been reasonable if the standard of management had been reasonable, the tenants said that its cost was excessive, given the level of service, and that the cost of dealing with the boundary dispute was not recoverable as a service charge but was the landlord's own responsibility.

22. Dealing first with the fee for routine management, the tenants listed the following alleged failures on the part of the managing agents:

- i. although the managing agent had by 2003 collected 75% of the cost of the proposed major works, each of the three leaseholders who had paid paying £4013, the works were not carried out, the defaulting tenant was not put under sufficient pressure to pay his share. Furthermore, as emerged at the hearing, the managing agent placed the service charges collected for the major works in their clients' account, earning no interest for the tenants;
- ii. some of the electrical wiring in the common parts of the building was unsafe or otherwise unsatisfactory: for example, live wires had been plastered into the ceiling, and the ground floor hall had been without electric light for over a year;
- iii. the managing agents had failed for a long period to deal effectively with a persistent water leak from Flat C;
- iv. loose floorboards in the hall had not been attended to from March 2007, when the managing agents were notified of the problem, until August 2007;
- v. the front door lock was insecure and had not been effectively repaired;
- vi. an infestation of pigeons in the loft space had not been effectively dealt with;
- vii. the appropriate certificates testifying to the safety of the electrical installations in the common parts had not been provided on request.

23. Miss Soleimani said that she had been personally responsible for the management of the property since 2003. She said that it had been difficult to manage because of arrears of service charges, particularly for the major works. She said that as soon as the funds had been received from the leaseholders the works were proceeded with. She said that the leaseholder of Flat B had paid in full for the major works in 2002, the leaseholder of Flat A had paid in full in 2003 and the leaseholder of Flat C had paid in 2003 or 2004, and she agreed that she had kept the money in a non-interest bearing client account. She said that there had been considerable problems with the leaseholder of Flat C, which was eventually repossessed. These problems had made it difficult to deal with the leak from the flat, and the leak had affected a light fitting. She agreed that there was no NIC certificate, but she had sent an electrician to the property and he had established that there was no landlord's electricity supply. She said that she thought that she had not been made aware until August 2007 that the floorboards in the entrance hall were loose, although she accepted that she could have been told in March. She was not aware of and did not accept that the front door lock was insecure. She agreed that pigeons had infested the loft through a hole in the roof caused by storm damage in December 2006, but said that the necessary repairs required an insurance claim which took time and that there was little point in eradicating the pigeons until the hole was repaired. She agreed that it was difficult to manage a property located so far away from her office in Hammersmith and that she had not always been able to visit the property as frequently as she would have liked. She said that £1000 per annum plus VAT was her firm's minimum fee for management. She said that as far as she knew there was no written contract in respect of this management, although new clients now always received a written contract. Mr Speight said that it was not clear that the lease made the landlord responsible for the safety of the electrical installations in the common parts.

24. In relation to the fee charged for dealing with a boundary dispute, Mr Burlikowski said that in 2004 he had been asked by the landlord to visit the property because a brick wall separating the rear garden of Flat A and the neighbouring property had moved and was dangerous. Having seen it and considered the lease plans it was not clear to whom the wall belonged or whether it was a party wall. Accordingly he negotiated with the owner of the neighbouring property and achieved

a settlement. For the work involved, six hours' work at £95 per hour was charged and he produced the invoice.

25. The tenants' representatives argued that the cost of this work was not recoverable as a service charge and related solely to protecting the proprietary interests of the landlord.

26. Turning first to the charges for routine services, we accept that the management fee was low by comparison with that of most London managing agents, and that, in particular, £1000 plus VAT is a relatively low minimum fee. However, it appears from the statement of service charge expenditure for the disputed year (page 7.1) that very few services were provided by the managing agents at the relevant time. According to the statement of account there were no repairs, gardening, cleaning or lighting. Accountancy was charged separately and Miss Soleimani agreed that she visited the property infrequently. The landlord arranged the insurance. We do accept, nevertheless, that the managing agents provided some service and were available if other services had been required. On the whole, we consider that the managing agents performed the few tasks they were given to an adequate standard save that they did not deal properly with the advance service charges paid for the major works which should have been held as an identifiable fund in trust for the leaseholders. On balance we accept that £1000 plus VAT is within the band of reasonable charges for the service provided and that no qualified managing agent would have done the job for less.

27. As for the fees for settling the boundary dispute, the only service charge recovery provision in the lease which might be said to cover this charge is at clause 2(v) by which the tenant covenants to pay *the reasonable fees of the Lessor's Managing Agents for the collection of rents of the flats in the building and for the general management thereof*. Does the disputed charge fall within the "general management" of the building?

28. In our view it does. Each of the leaseholders, as well as the landlord, has a proprietary interest in the building, and while the leases subsist, theirs is more immediate than the landlord's. In our view "general management" is a wide concept

and is apt to cover the resolution of disputes such as this. It is not suggested that the cost of doing so was itself unreasonable. We accept that this cost, if recoverable as a service charge and reasonable in amount as we have concluded that it is, could not be expected to be covered by the basic management fee, although this would have been clearer if there had been a written contract, as there should have been. In the circumstances we allow this charge.

Section 20C

29. Miss Soleimani said that the landlord did not propose to place its costs of the proceedings on any service charge, and no order under section 20C of the Act is therefore required.

Reimbursement of fees

30. The tenants applied for reimbursement of the fees of £500 which they had paid for the application and hearing, and both parties agreed to leave the matter to the tribunal's discretion in the light of its findings. The tenants have been broadly successful in relation to the main issue before us, namely the cost of the major works, and in our view it is reasonable to require the landlord to reimburse the full fees which the tenants have paid. We therefore so order in accordance with paragraph 9 of the Leasehold Valuation Tribunals (Fees) (England) Regulations 2003.

CHAIRMAN.....

DATE: 11 October 2007