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Ref: LON/00BE/LIS/2006/0035

**LEASEHOLD VALUATION TRIBUNAL**

LONDON RENT ASSESSMENT PANEL

**DETERMINATION**

RE APPLICATION UNDER SECTION 27A OF LANDLORD AND TENANT ACT 1985 (as amended)

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| **PREMISES:** | **Flat No.s 31, 37, 39, 41, 43, 49, 53, 57, 63, 64, 69, 71, 77, 89, 91, 95 & 97 Cooks Road, London SE17**<br>**Flat No.s 18, 22, 24, 26, 28 & 32 Maddock Way, London SE 17** |
| **Applicants**: | Leaseholders of the Premises (Members of the Cooks Road & Maddock Way Leaseholders' Action Group) |
| **Representative** | Mr Stephen Marsh of Counsel with Miss S Hughes of Anthony Gold Solicitors |
| **Respondent**: | London Borough of Southwark (Landlord) |
| **Representative**: | Mr Jeffrey Joseph and Miss Julia Wood of the Respondent's Home Ownership Unit |
| **Hearing**: | 2-4 October 2006 |
| **Inspection** | 2 October 2006 |
| **Tribunal:** | Professor J T Farrand QC LLD FCIArb Solicitor<br>Mrs E Flint DMS FRICS IRRV<br>Mr D Wilson JP |

1. The Application to the Tribunal under s.27A of the 1985 Act, dated 10 March 2006, referred to "Major Works Redevelopment" and stated that a determination was sought in respect of:

> "Cooks Road/Maddock Way External Refurbishment 03/04. All those items set out in the section 20 Notice dated 20/08/04 and demanded 11/02/04. Note payment demand was made before any work had been started."

2. In addition, the Application confirmed that the Applicants wished to apply under s.20C of the 1985 Act for an order preventing the Respondent from recovering costs incurred in these proceedings because: "Would cause financial hardship to Leaseholders."

3. The Premises were briefly described in the Application:

> "Two blocks of accommodation adjacent to each other constructed in the early 60's."

4. The Applicants were Leaseholders of flats in the two blocks in respect of which the statutory 'right to buy' had been exercised and long leases granted. There were other flats occupied by council tenants as well as units in the Maddock Way block with commercial tenants.

5. On Inspection before the Hearing the Tribunal saw two 1960's blocks with brick elevations and pitched tiled roofs forming two sides of a quadrangle. The Maddock Way block comprised two storey maisonettes above commercial premises at ground floor level. The residential premises were accessed via a walkway at first floor level which was also the roof to part of the commercial premises. The block fronting Cooks Road is of four storeys with ground floor entrance doors to the street and upper floor entrances off balconies to the rear of the block, approached via communal staircases. A number of the ground floor entrance areas had been enclosed to form porches.

6. At the Hearing, after adjournments to enable discussions between the parties' experts, the items in dispute and requiring determination were identified as:

- Windows replacement (both Cooks Road and Maddock Way)
- Walkway maintenance (Maddock Way)
- Door (re)design (Maddock Way)

- Scaffolding provision (Maddock Way)
- Entrance upgrading (Cooks Road)
- Historic neglect (both Cooks Road and Maddock Way)

7. Having considered all the written and oral submissions and evidence received as to the reasonableness or otherwise of the costs incurred by the Respondent, the Tribunal will set out its conclusions with reasons in respect of each of these disputed items. However, the Application related to demands for payment of sums as service charges before the relevant costs had actually been incurred. This means that the question for the Tribunal is, strictly, whether, on the basis of estimates, "no greater amount than is reasonable" has been made payable (ie under s.19(2) of the 1985 Act). Since the work giving rise to the costs has been completed and final accounts made available, this question will for practical purposes be superseded by the notification of the actual amounts of service charge payable for the years concerned which the Respondent is obliged to ascertain and communicate to individual Leaseholders as soon as practicable (ie under para.4 of Schedule 3 to the Leases). So far as the Tribunal is aware no such notifications of Final Service Charges Accounts (as opposed the final accounts in relation to the major works) have yet been issued. It follows that it is not practicable for the conclusions of the Tribunal to determine the precise amounts of service charges payable by any of the Applicants.

***Windows replacement***

8. As part of the major works undertaken by the Respondent, almost all of the existing windows in the two blocks were replaced.

9. For the Applicants, relying particularly upon the expert evidence of Mr Julian R Davies BSc (Building Surveyor) FRICS who had inspected the Premises and made a report before the works programme, it was accepted that, because joinery was in poor condition, most of the replacement work carried out was necessary at Maddock Way. However, this acceptance did not extend to the rear balcony screens at that block where "there was little or no decay to the screens and routine repairs and maintenance is possible". Further, the replacement of windows at Cooks Road was not accepted as reasonable: those windows had been in considerably better condition and could have been retained, repaired and redecorated.

10. In addition, it was contended that, since some of the windows in each block had already been replaced with PVCu by the Leaseholders or tenants of individual flats, it was not reasonable for the Respondent to incur costs on

another replacement. The nine flats concerned were No.s 20, 26, 32 and 34 Maddock Way and Nos 41, 49, 59, 65 and 95 Cooks Road.

11. It was also submitted that the necessity for replacement windows at all was due to 'historic neglect' by the Respondent.

12. For the Respondent, in respect of Maddock Way it was noted that Mr Davies had agreed that window replacement was generally required and that the balcony screens constitute approximately 15-20% of the windows in the block. Consequently, it was submitted that "as all the other windows in the block were being renewed it made economic sense that the screens were renewed at the same time for maintenance purposes and block uniformity". In respect of Cooks Road, it was asserted that the windows had been "in an average to poor condition ... suffered from defects such as rotten or missing beading, cracked glazing, defective ironmongery, rotten openers, rotten frames, rotten top, side and bottom bars, rotten cills, rotten drips, missing putties, poorly fitted metal fanlights, open joints and flaking paintwork" (reference was made to the evidence of Mr Paul Smith MRICS of Mouchel Parkman Surveyors).

13. As to the windows in the two blocks already replaced with PVCu, these had been inspected by Mr Smith who found that approximately 50% of them had failed to comply with one or more of the following

A. The Southwark Design Guide in terms of easy cleaning, security, thermal glazing and kitemarks.
B. Part B of the Building Regulations in terms of means of escape.
C. Part F of the Building Regulations in terms of Ventilation.
D. Part L of the Building Regulations in terms of Thermal Requirements.
E. Part N of the Regulations in terms of Glazing.

The Tribunal was told, but without details, that any replaced windows which did comply would not have been replaced again and many had been replaced originally by residents without the Respondent's written consent.

14. It was confirmed that a number of these windows had been replaced as part of the works by windows with an extractor fan as an integral part and asserted that this was required by building regulations and that no windows had been replaced solely because they lacked an extractor fan.

15. For the Respondent it was also pointed out that many of the Applicants' Leases contained a covenant to pay, as a Service Charge, "a fair proportion of the costs and expenses set out in paragraph 7" of the Third

Schedule and that paragraph 7 included all costs and expenses of or incidental to -

> "(9) The installation (by way of improvement) of:
>
> (i) double-glazed windows (including associated frames and sills) in replacement of any or all of the existing windows of the flat and of the other flats and premises in the building and in common areas of the building; and
>
> (ii) an entry-phone system ...
>
> should the Council in its absolute discretion (and without being under any obligation) decide to install the same or either of them"

The information supplied to the Tribunal (by the Respondent), which included copies of the Leases for Flat No.s 18 and 32 Maddock Way and Flat No.31 Cooks Road, indicated that sub-para.(9), about double-glazed windows, was included in all the Applicants' Leases *except* those for Flat No.s 31 and 77 Cooks Road and Flat No.32 Maddock Way. However, no other copy Leases were seen by the Tribunal and the information did not indicate whether or not sub-para.(9) was included in the Leases of Flat No.s 37, 39, 64 and 91 Cooks Road.

16. For the Applicants, the following observations were made:

a) The Respondents agree that building regulations are not retrospective. As such, the fact that the windows do not meet current building regulations does not mean that it is reasonable for them to be replaced.

b) The first item on their list of items not complied with is the 'Southwark Design Guide'. Residents are not legally obliged to comply with this guide by statute or contract term.

c) The Applicants were not provided with any information about the proportion of windows which failed to comply with each item until after the hearing. As such, it was not possible for the Respondent's expert to be cross examined on his analysis. It is submitted the information provided belatedly by the respondent should be given little weight as it has not been possible for the applicant to properly analyse this information in cross examination or the tribunal members to ask any questions regarding this.

d) It emerged in the tribunal that a number of windows had been replaced because they did not have an extractor fan. It is not disputed that these windows did have trickle vents which Julian Davies maintains provide adequate ventilation for rooms of this type. In addition to this there is no requirement in the building regulations to provide an extractor fan in

such rooms. It is submitted that such an improvement is not justified in these circumstances.

17. According to revised Scott Schedules supplied to the Tribunal as agreed, the Respondent's costs of new windows were £38,784.70 for the Maddock Way block and £227,165.82 for the Cooks Road block. The Applicants estimates of reasonable costs were, respectively, £24,192.05 and £523.00.

18. The Tribunal has concluded that the Applicants have failed to establish generally that it was unreasonable on the part of the Respondent to incur costs on window replacement. In this respect, the particularised evidence of Mr Smith appears the more cogent and reliable as to the practical necessity for overall replacement rather than mere repair and patchwork.

19. However, the Tribunal has not been persuaded that it was reasonable for the Respondent to incur the cost of replacing windows already replaced with PVCu. In this respect, the Tribunal prefers and adopts the submissions and observations made on behalf of the Applicants. In addition, the Tribunal notes that certain of the Applicants are not liable to pay service charges which include the costs of improvements consisting of the installation of double-glazed windows and that none of the Applicants appears to be liable to pay for the costs of installing extractor fans. An incidental observation is that, if this aspect is not taken into account, particular sympathy might be felt for the Applicants who are the Leaseholders of Flat No.s 32 and 49 Cooks Road who have not only suffered the replacement of windows they had already replaced but also do not or may not hold under Leases which include the provision as to the costs of double-glazing, even though an improvement, being a service charge.

20. Consequently, the total costs incurred by the Respondent for windows replacement will have to be appropriately reduced for service charge purposes to take account of the matters referred to in the previous paragraph. However, reduction to the figures proposed by Mr Davies would not be appropriate because he would, in effect, also have disallowed the cost of replacement of the screens at the Maddock Way block and of any windows at the Cooks Road block but allowed the cost of repairs instead. The Tribunal has no evidential basis on which to calculate appropriate lesser reductions and anyway, as explained above (para.7), this would be premature.

***Walkway maintenance***

21. The works undertaken by the Respondent included repairs, mainly to the asphalt, of a first floor exterior walkway behind the Maddock Road block with ground floor commercial units extending underneath. The issue arising was what, if any, proportion of the costs was recoverable from Leaseholders.

22. For the Respondent, the position had been taken that the walkway is part of "the building" for the purposes of the Leases and within its repairing obligations so that the costs and expenses are recoverable from the Leaseholders. As to the proportion, the relevant provision was para.6 of the Third Schedule to the Lease:

> 6(1) The Service Charge payable by the Lessee shall be a fair proportion of the costs and expenses set out in paragraph 7 of this Schedule incurred in the year
>
> (2) The Council may adopt any reasonable method of ascertaining the said proportion and may adopt different methods in relation to different items of costs and expenses

23. Evidence was given at the Hearing (by Mrs L Turf of the Home Ownership Unit) that, following measurements of the commercial units, the apportionment of the costs of the works had been to attribute 70% to the residential Flats and 30% to the commercial units, although the cost of works to doors and windows had been wholly apportioned to the Flats. It was submitted that this was a reasonable method of apportioning the costs of maintaining the building as a whole. According to the agreed Scott Schedule, the Respondent's cost for this item (ie walkway maintenance) was £8,127.28, presumably after apportionment although this is not clear.

24. For the Applicants, it was submitted in closing:

> "The walkway at Maddock Way has a dual purpose in that it also provides roofing for the commercial properties below. The repairs to the 'walkway' were necessary to waterproof the roof for the benefit of the commercial properties downstairs. The Applicants 'maintain that the "walkway" was not in need of repair as a walkway and the repairs were only necessary as it was not functioning effectively as the roof of the commercial properties. As such, it is submitted that the cost of the repairs should be apportioned to the commercial properties in their entirety."

However, according to the Scott Schedule the Leaseholders' estimated cost is inexplicably entered as £82.

25. The Tribunal accepted the Applicants' submission. The flaw in the Respondent's submission is that, to comply with the provision in the Lease, what had to be adopted was a reasonable method of ascertaining a *fair* proportion of costs and expenses payable by the Leaseholders. In the circumstances of these walkway repairs, the Tribunal does not consider that apportionment by measurement has produced a fair result. Just as none of the costs and expenses or works to windows and doors in the building is apparently attributed to commercial units, so none of the cost and expenses of the walkway repairs in question should be apportioned to the Leaseholders.

***Door (re)design***

26. For the Respondent, it was submitted that redesign of the entry door at the Maddock Road block had been required and that the cost formed part of the door renewal costs and were reasonably incurred. According to the Scott Schedule, the cost was £793.

27. For the Applicants, it was stated that, in Mr Davies' opinion, the design change was required because of a mistake in the original design and submitted that, as such, the cost should not be passed on to the Leaseholders. The Scott Schedule, therefore, showed 'Nil' for this item.

28. The Tribunal considers that the cost of this item could not properly be included as a service charge. Under the Leases (ie para.s 6 and 7 of Third Schedule), the Respondent is entitled to recover from Leaseholder a fair proportion of the costs and expenses of "carrying out all works required by sub-clause (2) to (4) inclusive of Clause 4 of this lease". Those sub-clauses only refer to repairing and painting the building (without mentioning but presumably including doors). Improvements are not included and there is no provision relating to doors equivalent to that relating to windows whereby costs are recoverable for installations by way of improvement (cp para.7(9) of Third Schedule). Since the installation of a redesigned door cannot properly be regarded as merely a repair, the appropriate service charge figure is 'Nil'.

***Scaffolding provision***

29. The 'breakdown' sum of £9,476 was included as the cost of providing scaffolding at the Maddock Way block. However, towers were used instead of scaffolding the cost of which, as estimated by Mr Davies, should only have been £3,000. Accordingly, it was submitted on behalf of the Applicants, that a reduction to the lower figure would be appropriate. The Scott Schedule accordingly showed the two competing figures mentioned.

30. For the Respondent, it had been stated at the Hearing that the contract did not specify full scaffold access and that access was a contractor's risk item, so that the cost would be reasonable whatever method of access was actually used.

31. The Tribunal has seen the documents supplied relating to the tender and the estimate for the works to both blocks. The Preliminaries are estimated at the sum of £237,516 including an item for 'Scaffolding & Access' totalling £114,479. The Tribunal has also seen Final Accounts for the works which do not refer separately to access and show the sum of £37,306 as both estimated and final for scaffolding for the Cooks Road block and similarly the sum of £9,746 as both estimated and final for scaffolding for the Maddock Way block. These are difficult to reconcile with the original estimate. However, since the original estimate lumped access together with scaffolding and since the final total for scaffolding is significantly less than the estimate, the Tribunal does not find itself able to deduct or reduce the sum of £9,746 as an unreasonably incurred cost in the overall accounts for the major works.

***Entrance upgrading***

32. As part of the works programme, work was carried out at the Cooks Road block which was described in the Scott Schedule as "Upgrading front entrance porches to meet fire regulations". The Respondent's figure was entered as £2,573.97. According to Mr Davies, "these porches were originally constructed incorporating galvanised steel framework glazing and was painted", being intended as a storage area and without doors although these have been fitted over time by residents.

33. For the Applicants, it was submitted that as building regulations are not retrospective there was "no need to replace the doors or to provide fire rated partitions or any other safety features". Therefore, the service charges cost should be nil.

34. In support of the charge, it was stated in written closing submissions:

> "The LVT heard evidence from Mr Smith that the fire separation works were required as most of the tenants and residents had extended the entrances to their properties outwards. The Respondent had the option of either pushing the entrances back to their original positions or to leave the entrances in their new position and carry out fire separation works in order to comply with building regulations."

Accordingly, it was submitted for the Respondent that it was reasonable to carry out the fire separation works.

35. The Tribunal accepts that it was, in all probability, reasonable to carry out these particular works but nevertheless agrees with the Applicants' submission that the service charges cost should be nil. However, the Tribunal's reason for this conclusion is different. It is, as with 'Door (re)design' above (see para.28), that the recoverable costs and expenses under the Leases must (except for double-glazing) arise from repairs or painting whereas upgrading the porches obviously constitutes improvement.

***Historic neglect***

36. On behalf of the Applicants a case was also made that "the repairs in the programme in question were necessary to the extent they were because of historic neglect by the Respondent" and reliance was placed on a previous decision where an LVT had made a deduction from service charges on this basis which had been upheld on appeal to the Lands Tribunal: *Continental Property Ventures Inc v White & White* (20060) LRX/60/2005. Essentially, this deduction would be achieved by assessing damages for breaches of covenant on the part of the Respondent and then setting off the sums involved when determining the amounts of service charges payable by individual Leaseholders. Reference was made to a tariff for the assessment of damages for loss of amenity ranging from £1,000 to £2,750 per annum but with recognition that an award here would be at the lower end (citing *Wallace v Manchester CC* (1998) 30 HLR 1111). Attention was also drawn to a recent decision supporting the proposition that, with long leases of residential property, "a notional judgment of the resulting reduction in the rental value is likely to be the most appropriate starting point for assessment of damages" (per Carnwath LJ in *Earle v Charalambous* [2006] EWCA Civ 1090 para.32).

37. For the Respondent it was primarily objected that, in the absence of express words, the Tribunal lacked jurisdiction under s.27A of the 1985 Act to set-off damages for breach of covenant against service charge demands (citing *Southend-on-Sea BC v Skiggs* (2006) LRX/110/2005). It was also objected that the Leaseholders' counter-claims for damages were not closely enough connected with the Respondent's current claims for service charges to allow 'set-off' as equitable (citing *Hanak v Green* [1958] 2 QB 9). It was further submitted that "damages claimed by by the Applicants are not a matter for expert evidence but a matter to be determined by a Judge after he or she has heard all the evidence." As it was, evidence had only been heard from two of the Applicants (Mrs Frampton and Mr Barnett of, respectively, Flat No.63 Cooks Road and Flat No.18 Maddock Way) and this "did not

establish that any damages for distress, stress and inconvenience should be awarded in these circumstances."

38. The Tribunal does not accept that the decision in *Skiggs* means that it lacks jurisdiction to consider 'set-off' claims when determining amounts payable as service charges by tenants: that case concerned the exercise of a discretion which had not been expressly conferred rather than the ascertainment of rights and liabilities between the parties. However, the Tribunal also does not consider that the decision in *Continental Properties* means that the Tribunal must exercise that jurisdiction. For the Applicants a passage from the judgment of HH Michael Rich QC was quoted in which he accepted that the LVT had jurisdiction in such a case as this but the quotation did not continue with the observations he also expressed "as to the desirability of LVT's exercising restraint in the exercise of the extended jurisdiction given to it by the Commonhold and Leasehold Reform Act 2002." He proceeded to quote lengthy passages from one of his own decisions (concerning the application of the Unfair Terms in Consumer Contracts Regulations) and then concluded:

> "Although the LVT's jurisdiction has been vastly extended, it does not follow that the matters in respect of which the LVT ought to determine to exercise such jurisdiction have been equally extended. As I pointed out in the *Canary Riverside* Case the LVT may, as a matter of its discretion, think it inappropriate to exercise its jurisdiction, which it holds concurrently with the County Court, at least where one party asks it not to do so, in a matter where the LVT accepts that the nature of the issues makes a court procedure more appropriate."

39. In all the circumstances of the present case, the Tribunal has decided to exercise restraint on the basis not just that the Respondent has opposed any 'set-off' of damages but also that the complex legal and evidential issues involved appear more appropriately determined in Court.

***Costs***

40. As noted (in para.2), the Application also sought an order under s.20C of the 1985 Act to limit future service charges by excluding costs of the proceedings incurred by the Respondent.

41. In additional written closing submissions for the Applicant, it was first contended that the Leases did not contain any clear and unambiguous terms whereby such legal costs could be recovered from the Leaseholders (citing *Stella House Ltd v Mears* [1989] 12 EG 67).

42. That submission does not require determination by the Tribunal unless and until the Respondent actually seeks to recover such costs as a service charge. Nevertheless, it appears arguable that costs and expenses incurred in connection with of Tribunal proceedings concerning the reasonableness of major works should be recoverable as being clearly enough "incidental to management of the building" within para.7(6) of the Third Schedule of the Lease. It should be appreciated that no outside lawyers were employed by the Respondent, representation being provided by personnel of its own Home Ownership Unit.

43. Alternatively, it was submitted that a s.20C order should be made, not simply on the ground of hardship indicated in the Application, but for the following reasons:

a) The Respondent has never been willing to enter into negotiations to settle this claim before the proceedings commenced;

b) The Respondent has never been willing to engage in alternative dispute resolution;

c) The Respondent was unwilling to engage in discussions about limiting the issues in the case until the first day of the hearing. This delayed the start of the tribunal hearing for two days;

d) In the absence of any agreement between the parties, the Applicants have a right to have the fairness of their service charges assessed by the LVT. Any costs order would deter potential applicants of the LVT;

e) The application was in no way frivolous, vexatious or otherwise an abuse of process.

44. No response contradicting these submissions has been received from the Respondent.

45. In all the circumstances of the case, the Tribunal is sufficiently satisfied that it would be just and equitable to make the order sought for the Applicants under s.20C of the 1985 Act. Accordingly, it is hereby ordered that none of the costs incurred by the Respondent in connection with the present proceedings should be included in any service charges payable by the Applicants.

Julian Faraud

**CHAIRMAN** **3 January 2007**