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RESIDENTIAL PROPERTY TRIBUNAL SERVICE

LEASEHOLD VALUATION TRIBUNAL for the
LONDON RENT ASSESSMENT PANEL

LANDLORD AND TENANT ACT 1985, section 27A & 20C

LON/00BE/LSC/2007/0303

**Address: Flat 25 Market Yard Mews, 194-204 Bermondsey Street,
London SE1 3TJ**

Applicant(s): Mr I Lalbeharry Tenant/Applicant

Represented by:
**In person and with his son Mr Mark Lalbeharry
And his wife, Mrs Yvonne Lalbeharry**

Respondent(s): Galliard Homes Limited

**Represented by: Miss F Docherty
of F W Gapp Management Services Limited**

Date of hearing: 30 October 2007 & 5 February 2008

Tribunal:
Mr A A Dutton Chair
Mr D D Banfield FRICS
Mrs J Clark JP

Date of decision: 3 March 2008

DECISION ON AN APPLICATION UNDER SECTION 27A & 20C
OF THE LANDLORD AND TENANT ACT 1985

A. BACKGROUND

1. By an application dated 7 August 2007 the Applicant, Mr Lalbeharry applied to the Tribunal for a determination as to the liability to pay service charges under s27A of the Landlord and Tenant Act 1985 ("the Act") and also for an Order that costs should be disallowed by virtue of sections 20C of the Act.
2. At a pre-trial review held on the 5 September 2007 the following issues were highlighted for determination.
 - (a) Whether the Applicant is liable to pay the full amount demanded for items of service charge expenditure for the service charge years December 2001- December 2006 relating to communal areas and facilities share with adjacent buildings;
 - (b) Whether the charges to be made in respect of remedying rot in the basement are reasonable and payable under the terms of the lease under which the Applicant holds the property.
3. Mr Lalbeharry owns the flat on the third floor of a block comprising nine flats which share communal facilities including an entrance gate, car parking, bin store and a court yard. The lease which was included within the bundle before us, which does not appear to have a date, is for a term of 999 years from 24 March 2000 with a rising ground rent. Mr Lalbeharry told us he contributed 12.572% of service charges expenses under the terms of the lease. We will refer to the terms of the lease as and when necessary during the course of these Reasons.
4. The set up of the estate is somewhat complicated. It is essentially divided unequally into the ownership of three freeholders. The estate appeared to have been originally for commercial usage but subsequently converted to residential units whilst, in truth, retaining a commercial exterior. The front block is presently in the ownership of Michleham Property Investments Limited under title number SGL141053. This includes the Yard over which access to Mr Lalbeharry's block is gained. The block in which Mr. Lalbeharry's flat is to be found is owned by the Respondents, Galliard Homes

Limited, under title number TGL169391. In addition there are two properties somewhat poetically referred to as "the cottages" which appear to be in the ownership of Trademark Homes Limited. From the title documentation that was included within the papers, it appears the two cottages owned by Trademark Homes are obliged to contribute 5% of the cost of the upkeep of what is defined as "the yard" in the Transfer document to them. Galliard, in their Transfer, covenant to contribute 50% of the costs of the upkeep of the yard and the balance is the responsibility of the owners of the front building. The "Yard is defined as the forecourt coloured brown on a plan attached to the transfers to Galliard and Trademark. Under the terms of the transfer Galliard has the right to the passage etc of services, see para 12.1.(d) of the transfer dated 5th November 1999 between Abbotquest Limited (1) and Galliard Homes Limited (2). There is, however, no provision in the transfer as to contributions towards the upkeep of services, just an obligation to contribute 50% of the costs of maintaining the Yard. A major bone of contention in this case is that the owners of the front block and the cottages appear not to have contributed towards any works in respect of the Yard or to services which, it would appear, serve both the subject premises and other premises on the development. Nor indeed in the case of the owners of the front block has it instigated such works of repair and maintenance. Instead it appears that the upkeep of the yard and the maintenance of some services, particularly drainage, have been dealt with by Galliard. This formed a major part of Mr Lalbeharry's complaint.

5. We were provided with a substantial bundle of documents for the first hearing which included photographs of the estate. Following the adjournment of the first hearing and the reconvene on the 5 February 2008, we were provided with a further substantial bundle of documentation. We do not propose to go through the documents in detail but will refer to them as necessary during the course of these reasons.

B. HEARING

6. At the hearing on 30 October 2007, Mr Lalbeharry outlined his concerns. After a morning of receiving evidence, it was agreed that the parties would meet with a view to further documentation being considered by Mr Lalbeharry and also to give him time to produce title documentation to clarify the extent of the property that we were dealing with so that we could be certain as to the

obligations that the Landlord may have had. Directions were given which the parties have adhered to and on the reconvene on 5 February 2008 we had before us schedules setting out the areas of complaint and a letter from Miss Docherty on behalf of the Respondents containing replies to those issues. In a schedule attached to the reasons, the parties will see the list of items that were in dispute, with their values and the sums that we have allowed in connection with each item.

7. One element of complaint related to the potential costs of dry rot eradication and we shall refer to that in the decision element of these reasons. There was a common thread in connection with a number of the other matters in dispute. Mr Lalbeharry had produced two schedules, one headed "Applicants Reasons for Disputing Invoices" and setting out invoices that were disputed and those that were not, for each of the year's in question. Of more help however was an analysis that Mr Lalbeharry had done of the accounts for each year and it is that document that we have utilised for the purposes of determining this dispute.
8. For each year there was a dispute as to the responsibility for settling the costs in connection with the electricity to the block, the cleaning of the yard and the refuse bins, and management fees and audit fees. That it to say Mr Lalbeharry in his submission to us felt that the occupiers of the front block and the two cottages should make a contribution towards these items of expenditure on the basis of what he believed was an agreement which is referred to in a letter from Wilks Head & Eve to London Electricity plc dated 24 April 2002. This letter said, in the first paragraph, *"Further to our telephone conversation we can confirm that we have now agreed the split of all expenditure on the common parts at the above property with the other two owners and have proposed that we use the same break down for the electricity charges for the period 1st February 2000 to 18th December 2000 at which time there was only one electricity meter for the entire site"*. That breakdown in the letter indicated that Trademark Homes, the owners of the cottages, would contribute 5%, Galliard Homes, the owners of the block in which Mr Lalbeharry has his flat 50% and Abbot Quest Limited, the then owners of the front block, the remaining 45%. This is consistent with the terms of the transfers which we have referred to above.

9. These expenses appeared each year but in addition in the year 2002 there was the costs for jetting clean the drains and in 2003 not only those additional costs but also some general external repairs. In addition to the argument as to the proportion of the costs attributable to Mr Lalbeharry, there were specific elements of the items charged in each service charge year which he disputed on a quantum basis. These related to the audit fees throughout, the management fees for each year, save for the year ending 2001 and 2002, and certain repair items which we will deal with in the Decision element.
10. On behalf of the Respondents, Miss Docherty indicated that she had found herself in a difficult position in the absence of response from the owners of the front block. It appears there was some concern that if the Respondents had pressed the owners of the front block, additional costs may have been payable and it was a question therefore of letting sleeping dogs lie. She accepted that items representing the jetting of the drains and the cleaning of the yard should have been the responsibility of the owners of the front block and not Galliard and indeed that she had now stopped carrying out such works. She maintained however that they needed to be done and if she had not done so then nobody would have done.
11. It also became apparent during the course of the hearing that there had been initial confusion as to who was the Landlord for Mr Lalbeharry's purposes. Initial demands had been made in the name of Abbotquest but it appears, had subsequently been corrected to Galliard. This error was however compounded by the fact that Miss Docherty has signed the accounts for each year in the name of Abbotquest Limited, a matter that she had not appreciated until the final day of the hearing. Mr Lalbeharry, to his credit, confirmed however that these mistakes had not prejudiced him and that he was clear in his own mind who was his Landlord. At the conclusion of the evidence, Mr Lalbeharry asked for an order that the costs of the application and the hearing should be refunded to him and he also requested that he receive costs under the provisions of the Commonhold and Leasehold Reform Act which totalled £377.76. The application fee and hearing fee totalled an additional £250.

12. On behalf of the Respondents Miss Docherty said that she would be seeking to recover the costs of the proceedings and that we should not therefore make an Order under s20C of the Act.
13. We did not believe that an inspection would be of assistance.

C. THE LAW

14. **Section 18(1)** of the Act provides that, for the purposes of the relevant parts of the Act, "service charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent –
 - (a) which is payable, directly or indirectly, for services, repairs, maintenance, improvements or insurance or the landlord's costs of management, and
 - (b) the whole or part of which varies or may vary according to the relevant costs.

Section 19(1) of the Act provides that relevant costs shall be taken into account in determining the amount of a service charge payable for a period –

- (a) only to the extent that they are reasonably incurred, and
- (b) 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.

Section 19(2) of the Act provides that, where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable, and after the relevant costs have been incurred any necessary adjustment shall be made by repayment, reduction or subsequent charges or otherwise.

Section 20C(1) the tenant may make an application for an Order that all of any of the costs incurred, or to be incurred, by the Landlord in connection with proceedings before a court, Residential Property Tribunal or Leasehold Valuation Tribunal or the Lands Tribunal or in connection with arbitration proceedings, are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or person specified in the application.

- (2) the application shall be made –
- (a) in the case of court proceedings, to the court before which the proceedings are taking place or, if the application is made after proceedings are concluded, to the County Court;
 - (aa) in the case of proceedings for Residential Property Tribunal to a Leasehold Valuation Tribunal;
 - (b) in the case of proceedings for a Leasehold Valuation Tribunal, to the Tribunal before which the proceedings are taken place or, if the application is made after the proceedings are concluded, to any Leasehold Valuation Tribunal;
 - (c) in the case of proceedings before the Lands Tribunal, to the Tribunal;
 - (d) in the case of arbitration proceedings, to the Arbitral Tribunal or, if the application is made after the proceedings are concluded, to a County Court.
- (3) The court or Tribunal to which the application is made may make such Order on the application as it considers just and equitable in the circumstances.

Section 27A(1) of the Act provides that that an application may be made to a leasehold valuation tribunal for a determination whether a service charge is payable and, if it is, as to –

- (a) the person by whom it is payable,
- (b) the person to whom it is payable,
- (c) the amount which is payable,
- (d) the date at or by which it is payable, and
- (e) the manner in which it is payable.

D. DECISION

15. One matter raised by Mr Lalbeharry was the apparent need to correct dry rot in the property. His argument in this regard was that this appears to have been an inherent defect and that the works to correct the dry rot were not a service charge. Some estimates had been obtained for the works which varied quite considerably in quantum. We were told by Miss Docherty that if we indicated that the recovery of monies expended in connection with the correction of dry rot was a matter covered by the Lease, that she would then

proceed to obtain up-to-date estimates and deal with the matter pursuant to s20 of the Act giving the tenants of course the opportunity to comment and ultimately to challenge the costs incurred.

16. Dealing solely with this issue, we note that the landlord's obligations contained in the Fourth Schedule to the lease at paragraph 4 are as follows: *"to manage maintain and keep in good repair and condition the estate and the building including but not limited to the service media and common parts, lifts and all fixtures and fittings therein"*. This seems to us therefore to show that the landlord has an obligation to deal with matters such as the eradication of dry rot. We believe it is accepted law that there is no doctrine which operates to excuse respondents from having to contribute to the costs of remedying something which can be described as an inherent defect. Accordingly the fact that there may have been a problem lurking prior to Mr Lalbeharry's acquisition of his leasehold interest does not in our finding mean that he can avoid making a contribution towards same although it may be an issue that will be raised as to the quantum of any contribution. In those circumstances therefore we find that the works necessary to eradicate the dry rot as a matter of principle are recoverable under the terms of Mr Lalbeharry's lease. However we can make no comment as to the standard of works, as of course they have yet to be undertaken, nor as to the cost of such works, both of which would be the subject of review if Mr Lalbeharry thought that was appropriate.
17. We now turn to the proportion argument that Mr Lalbeharry's put forward in his evidence to us. The transfer to Galliard of the freehold title reserved the right to use and maintain the services but does not contain any right to recover contributions from other users. The lease of Mr Lalbeharry's property requires the Landlord to maintain the services to the building (see para 4 of the Fourth Schedule, as set out above), and for Mr Lalbeharry to contribute towards those costs. Mr Lalbeharry sought to argue that the definition of "estate" contained in the lease which uses the following wording *"the Estate shall mean the building including (but not by way of limitation) all external grounds, roadways, access, amenity areas or other appurtenances being all of the land comprised within title number TGL169391"* included the Yard. It is our finding that this does not include the Yard but is limited to the property within the recited title number. Following a subsequent transfer relating to the

freehold it would appear also to exclude some car parking spaces. Equally it does not include the area in which the bin store is to be found. The transfer to Galliard of course puts the onus on the owners of the front block to carry out the repair works to the yard, which they have not done. Whilst we accept Miss Docherty's assertion that there had been no assistance from the owners of the front block in connection with the cleaning and maintenance of the yard, in reality there had been little attempt by the Managing Agents, or indeed Galliard, to hold the front block owners to their responsibilities.

18. Mr Lalbeharry, on the Schedule listed a number of items that he said in each year in question should be dealt with as apportioned between his building, the front property and the two cottages to the rear. He had concluded that where an item of expenditure benefited both the building and the estate, 25% should be allocated to the building and 75% to the estate and where it was solely an estate element then the 50/45/5% split should apply. We cannot agree with him in this regard. Neither the lease nor the Transfer to the freeholder contains any provisions for the recovery of contributions from third parties. The tenant is obliged to comply with the terms of the lease. Putting aside for the moment therefore the question of the cleaning of the common parts we find as a general proposition that the costs of electricity and the jetting of the drains, which serve the subject premises, is not an expense which is subject to any apportionment and the total sum claimed by the Landlord is due and owing by Mr Lalbeharry and the other residents of the building.
19. Insofar as the cleaning is concerned Mr Lalbeharry had extrapolated from earlier invoices a percentage which he said related to the cleaning of the communal area, that is to say, the yard. The percentage split that he utilised was not challenged by Miss Docherty although in fact it appeared to be somewhat generous towards the Respondent Landlord. However we have accepted Mr Lalbeharry's splitting of costs between the building and the communal areas and have, in each case, accepted the sums which he, on his Schedule, indicated were disputed. These costs should of course have been incurred by the owner of the front building and Galliards would then have contributed 50% of those costs. Accordingly we allow only 50% of these communal costs to be recoverable from the Lessees as being fair and reasonable. It is for Galliard to press the owners of the front block to adhere to their repairing obligations and we believe they have fallen short in that

regard. It is for that reason that we therefore allow Mr Lalbeharry a 50% reduction in respect of cleaning to the yard area. We should perhaps, in passing, mention the question of the refuse bins. These are not included within the yard and it seems to us that there was no obligation on the Landlord to clean them or to contribute towards the costs associated with same. As they do not form part of the estate and there is no liability on Galliard to carry out these works, we find that any cost associated with the maintenance of the bin areas is irrecoverable from the lessees. The Schedule attached sets out the items that have been claimed by the Landlord and those we have allowed. Insofar as management is concerned we reject Mr Lalbeharry's argument that there was an element of apportionment between the blocks. There was no evidence before us to indicate that FW Gapp had carried out management functions on behalf of anybody other than Galliard. We say no evidence, aware of course, that there was initial confusion as to who was the Landlord which we understand has been corrected, and of course somewhat carelessly, Miss Docherty has apparently been signing accounts in the name of Abbotquest Limited when of course they should have been Galliard Limited. However as we have indicated above Mr Lalbeharry freely accepted that the incorrect title of the Landlord to the annual accounts had not prejudiced him and in those circumstances whilst we direct that the Managing Agents should correct the accounts, and issue those in the name of the correct Landlord, which is Galliard Limited, we do not propose to make any further findings in that regard. We do however feel that the amount of the management fees is on the high side, given these mistakes, the lack of effort to get the front block to contribute or indeed to fulfil their repairing obligations and other matters that are referred to in correspondence, for example, difficulties with the cleaners and an admission that the accounts were not very clear. We accept those claimed for the year 2001 & 2002. For the years 2003 onwards we limit the management fee to £250 per unit plus VAT which gives an annual figure of £2,643.75.

20. Insofar as the auditors fees are concerned we accept that in the first year those are on the high side but not so high as to warrant a reduction and thereafter they have been pegged at £588 for each year in question and we find this to be reasonable.

21. In addition to these annual items, which were of a recurring nature, there were certain items of expenditure in each year to which Mr Lalbeharry objected. By reference to the Schedule we would by way of explanation comment upon the sums that we have allowed so that we hope the matter is clear for the parties. In the years 2001 through to 2006, as we have indicated the cleaning has been reduced by 50% of the amount that Mr Lalbeharry has apportioned towards the upkeep of the yard. We have applied that provision to each year. In the year 2001 a claim was made for the repair of the refuse bins which for the reasons stated above, we disallow in full.
22. Turning to the year ending December 2002 we have disallowed the provision of keys to the entrance to the development and also the repairs to the communal bin allowing the sum that Mr Lalbeharry accepted as being due, of £310. We have already indicated why we would not allow any costs in respect of the bin store. Insofar as the keys are concerned we understand that part of the development required security gates to be installed and it follows from that that Galliard should supply the keys free of charge.
23. In the year to December 2003 we do not believe it is appropriate for the clamping fee incurred by Miss Docherty's to be passed on as a service charge to the residents. That is an expense that the management company will have to bear. Insofar as the general repairs are concerned, Mr Lalbeharry included a sum of £175 plus VAT for jet cleaning the tarmac, gully and other areas. This we believe should be reduced by 50%, hence the figure of £308 against a general repair figure of £411.
24. In the year 2004 we agreed with Mr Lalbeharry's argument that the annual subscription for a weather report of £32 is inappropriate and is not an expense that the residents should settle. This is a subscription paid for by the managing agents and not a service charge. Insofar as the insurance claim is concerned this again is not a service charge. It is either recoverable from the lessee in question or, as we understand in this case, via an insurance claim. It should not, in truth, appear in the accounts as it does and we have therefore deducted same on the understanding that this will be recovered from the insurers in due course. The policy excess of £100 however will be recoverable. Insofar as the dry rot is concerned we make no allowance for

the amounts in the year in question but those will have to be dealt with in due course.

25. Insofar as the year ending December 2005 is concerned, again we have disallowed the subscription for the weather report and the comments we have previously made in respect of other items, stand. Finally for the year 2006 in respect of the general repairs of £399 we will allow the £103 for the gate clickers on the clear understanding that in the following year the service charge shows a credit in respect of monies received from those who requested the gate clickers be purchased. The repairs to the communal bin store are not in our view recoverable as there is no responsibility on the landlord to carry out this work and accordingly no right to recover it from the tenant. Insofar as the insurance is concerned, again as we indicated in the previous year, this should not appear as a service charge but we will allow the policy excess of £100.
27. We hope the Schedule clarifies matters and turn then to the question of fees and costs. We bear in mind all that was said. The Managing Agents have been put in a somewhat difficult position as a result of the complicated inter-relationship between various owners of the development. However they were not terribly pro-active in seeking to resolve the repairing/maintenance issues with regard to the Yard and instead tended to opt for a quiet life and to deal with the joint repairing issues by passing the whole of the expense to the Lessees. We would have hoped that a more pro-active response would have elicited a clear agreement with the other occupiers. On that point we are not satisfied that the letter referred to at paragraph 8 above is a binding agreement. Indeed Mr Lalbeharry's solicitors asked for sight of a formal agreement which was not forthcoming. Hopefully, as we understand that the residents are to take over the management of the front block, matters can be resolved. Taking the matter in the round therefore we order that the Respondent should reimburse Mr Lalbeharry half the fees he paid the Tribunal which will be in the sum of £125. We are not prepared to order that Mr Lalbeharry should recover his costs under the Commonhold and Leasehold Reform legislation. The Landlord has not behaved in such a way as to warrant that penalty. Equally however we make an Order under s20C that the Respondents are not entitled to recover their costs associated with these proceedings as we consider it just and equitable so to do.

CHAIRMAN. Munster

DATE. 3rd March 2008

Market Yard Mews – Rear Block
Items in dispute

Y/E 31/12/01	CLAIMED	ALLOWED
Electricity, bulbs etc	849	849
Cleaning	1,755	1,473
Refuse bins	196	0.0
Management fees	1,410	1,410
Audit fees	999	999
Total:	5,209	4,731

Y/E 31/12/02	CLAIMED	ALLOWED
Electricity, bulbs etc	1,031	1,031
Cleaning	3,708	3,285
Jetting drains	579	579
Repairs (898-500)	898	310
Management fees	2,115	2,115
Audit fees	588	588
Communal lighting	300	300
Total:	9,219	8,208

Y/E 31/12/03	CLAIMED	ALLOWED
Electricity, bulbs etc	1,102	1,102
Legal & Professional	93	0.0
Cleaning	2,767	2,358.50
Jetting drains	723	723.00
General repairs	411	308
External repairs	1,146	1,146
Management fees	2,650	2,643.75
Audit fees	588	588
Communal lighting	300	300
Total:	9,780	9,169.25

Y/E 31/12/04	CLAIMED	ALLOWED
Electricity, bulbs etc	1,103	1,103
Cleaning	2,424	2,088
Electricity repairs	486	486
Jetting drains	1,304	1,304
General repairs	152	120
Management fees	2,714	2,643.75
Insurance claim	3,419	100
Audit fees	588	588
Dry rot	7,500	0
Total:	19,690	8,432.75

Y/E 31/12/05	CLAIMED	ALLOWED
Electricity, bulbs etc	1,135	1,135
Cleaning	2,628	2,292
Jetting drains	1,346	1,346
General repairs	626	588
Management fees	2,990	2,643.75
Audit fees	588	588
Total:	9,313	8,592.75

Y/E 31/12/06	CLAIMED	ALLOWED
Electricity, bulbs etc	917	917
Cleaning	2,062	1,804.50
Electric repairs	636	636
Jetting drains	1,235	1,235
General Repairs	399	103
Management fees	3,384	2,643.75
Insurance charge	582	100
Audit fees	588	588
Total:	9,803	8,027.50

