CHI/00ML/LSC/2009/0176

THE RESIDENTIAL PROPERTY TRIBUNAL SERVICE

DECISION OF THE SOUTHERN LEASEHOLD VALUATION TRIBUNAL

LANDLORD AND TENANT ACT 1985 S.27A

FLATS 2, 3 AND 4, No. 5 BRUNSWICK PLACE, HOVE BN3 1EA

Applicants:	(1)	Olufemi Bankole (flat 3)
	(2)	Elizabeth Mcowat (Flat 4)
	(3)	Mrs Manzoor (Flat 2)
Represented by:	Mr S Carrott of counsel	
Respondent:	(1)	Alexander John Mckay
	(2)	Glenn Alexandra Mishon (freeholders)
Represented by:	Mr RJ Austin FRICS of Austin Rees Ltd (surveyors)	
Date of Application:	18 December 2009	
Date of hearing:	26 May 2010	

Members of the Leasehold Valuation Tribunal:

MA Loveday BA Hons MCI Arb
Mr AO Mackay FRICS
Mr T Sennett MA MCIEH

INTRODUCTION

1. This is an application for a determination of liability to pay a service charge under s.27A of the Landlord and Tenant Act 1985 ("the Act") in respect of 5 Brunswick Place in Hove. The application dated 18 December 2009 was made by the first and second applicants who are respectively the lessees of Flat 4 (also described as Lower Ground Floor Flat, 5 Brunswick Place ("Flat 4") and Flat 3, First Floor, 5 Brunswick Place ("Flat 3"). Directions were given on 19 February 2010 at which stage the lessee of Flat 2, First Floor, 5 Brunswick Place ("Flat 2") was joined as third applicant. The respondents are the present freehold owners.

2. The parties identified the following issues:
   (a) Whether the works were carried out to a "reasonable standard" under s.19(1)(b) of the Act.
   (b) Whether the relevant cost of the works was "reasonably incurred" under s.19(1)(a) of the Act.
   (c) Whether the landlords have given an appropriate credit for the relevant costs of the works in the applicants' service charge accounts.
   (d) Whether the relevant cost of supervision of the works was "reasonably incurred" under s.19(1)(a) of the Act.
   (e) Whether the Tribunal should order reimbursement of any surplus service charges in respect of the works (as opposed to a credit to the service charge accounts).
   (f) Limitation of costs under s.20C of the Act.

3. In accordance with the directions, the experts in this case produced and signed a Statement of Agreed Facts dated 1 April 2010. Paragraphs 3(a) and (b) state as follows:

   *"**Matters agreed***
   1.2 The following agreement was reached
   3(a) Only the eastern elevation has been decorated. Not all the work in dispute was carried out e.g. works relating to the roof, northern elevation and the common ways.
   Matters in dispute
   3(b) Of the work completed, not all was carried out to a reasonable standard. Mr Austin contends that 33.7% of the astern elevation was unsatisfactorily decorated whilst Mr Aspey avers that 37% was unsatisfactory"

1.3 Mr Austin and Mr Aspey agree to disagree on the precise extent of the those areas unsatisfactorily decorated but feel the range of figures produced by either party gives an adequate estimate as to the extent of unsatisfactory work.".

INSPECTION

4. The Tribunal inspected the property before the hearing. The property comprises a pair of bay fronted houses c.1850 in a seafront square within the Brunswick Estate in central Hove, which is subject to a statutory painting scheme under the Hove Borough Council Act 1976. There is a commercial/retail use to part of the ground floor and residential accommodation in the basement and the three upper floors. The residential parts have been converted into flats. The property is on the north western side of the square and it is exposed to the sea. The external decorative condition is fair. The front (eastern) elevation was painted in a cream colour consistent with the local painting scheme. This elevation showed cracking, particularly at higher levels adjacent to the parapet wall and over the architectural cornicing and portico. At basement level, there were significant areas of flaking paintwork which revealed poor preparation. The rear (western) elevation had recently been painted in a white finish and was in good condition. The internal common parts were in mixed condition. The front hallway was in fair decorative order, but upper floors and landings were poor. New woodwork had not been painted, there were exposed cables, blown plaster and perished carpets.

THE LAW

5. The Tribunal's jurisdiction to determine liability for service charges is at s.27A of the Act:

27A Liability to pay service charges: jurisdiction
(1) 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.
(2) Subsection (1) applies whether or not any payment has been made.

(3) An application may also be made to a leasehold valuation tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs and, if it would, as to—
(a) the person by whom it would be payable,
(b) the person to whom it would be payable,
(c) the amount which would be payable,
(d) the date at or by which it would be payable, and
(e) the manner in which it would be payable."

6. Section 19 of the Act sets out the general limitation on the relevant costs forming part of a lessee's service charges:

19 Limitation of service charges: reasonableness
(1) 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.
(2) 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.

7. Section 94 of the Commonhold and Leasehold Reform Act deals with uncommitted service charges during the course of the exercise of the Right to Manage by lessees:

94 Duty to pay accrued uncommitted service charges
(1) Where the right to manage premises is to be acquired by a RTM company, a person who is—
(a) landlord under a lease of the whole or any part of the premises,
(b) party to such a lease otherwise than as landlord or tenant, or
(c) a manager appointed under Part 2 of the 1987 Act to act in relation to the premises, or any premises containing or contained in the premises,
must make to the company a payment equal to the amount of any accrued uncommitted service charges held by him on the acquisition date.
(2) The amount of any accrued uncommitted service charges is the aggregate of—
(a) any sums which have been paid to the person by way of service charges in respect of the premises, and
(b) any investments which represent such sums (and any income which has accrued on them),
less so much (if any) of that amount as is required to meet the costs incurred before the acquisition date in connection with the matters for which the service charges were payable.

(3) He or the RTM company may make an application to a leasehold valuation tribunal to determine the amount of any payment which falls to be made under this section.
(4) The duty imposed by this section must be complied with on the acquisition date or as soon after that date as is reasonably practicable.

FACTS

8. There is no significant dispute about the basic facts. The leases of each flat are dated 10 March 1995 (Flat 3), 16 December 1994 (Flat 2) and 17 March 1995 (Flat 4). Each lease is for a term 99 Years. The leases include an obligation for the lessee to pay a Service Charge at clause 4(4). The Landlord's obligation to repair and redecorate is at clause 5(5):

> *"(a) to maintain and keep in good and substantial repair and condition:*
> *i) The main structure of the Building including the principal internal timbers and exterior walls and the foundations and the roof thereof with its main water tanks main drains gutter and rain water pipes (other than those included in this demise or in the demise of any other flat in the building.*
> *ii) To paint the whole of the outside wood iron and other work of the Building heretobefore or usually painted and grain and varnish such external parts as have been heretobefore or are usually grained and varnished."*

By the Fifth Schedule para 1(2) the Service Charge is defined as "such percentage of Total Expenditure as is specified in Paragraph 7 of the Particulars ..." Paragraph 1(3) provides for an "Interim Charge" to be paid "on account of the Service Charge in respect of each Accounting Period as the Landlord or their managing agents shall specify at their discretion to be a fair and reasonable interim payment". Paragraph 4 provides that:

> *"If the Interim Charge paid by the Tenant in respect of any Accounting Period exceeds the Service Charge for that period the surplus of the Interim Charge so paid over and above the Service Charge shall be carried forward by the Landlord and credited to the account of the Tenant in computing the Service Charge in succeeding Accounting Periods as hereinafter provided."*

Paragraph 5 states that:

> *"If the Service Charge in respect of any Accounting Period exceeds the Interim Charge paid by the Tenant in respect of that Accounting Period together with any surplus from previous years carried forward as aforesaid then the Tenant shall pay the excess to the landlord within twenty eight days of service upon the Tenant of the Certificate*

referred to in the following paragraph and in the case of default the same shall be recoverable from the Tenant as rent in arrear."

The leases specified that the respective contributions payable towards the landlord's relevant costs were 12% (Flats 3 and 4) or 10% (Flat 2).

9. The landlords acquired the building in 2004, initially employing PPS Management Ltd as managing agents. The Brunswick Estate Painting Scheme (under the Hove Borough Council Act 1976) specified the relevant repainting year as 2005. The landlord obtained a specification of works from Stuart Radley Associates (Chartered Surveyors) in March 2005 which included the external decorations and internal works to the common parts. Tenders were obtained in January 2006 from EDE (Building Contracts) Ltd, Smart Constructions (Sussex) ltd and Packham Construction Ltd. A fourth tender was obtained from Rikton Constructions in May 2006 which priced the work at £61,398.45. On 12 May 2006, the Council served a repainting notice requiring the external decorations to take effect on 1 June 2006. The landlords appealed against this notice. In July 2006, the landlord obtained a revised tender from Rikton which was priced at £39,658.25. PPS also estimated its "administration and supervision costs" for the whole project at £4,670.62. These figures were then used to issue the service charge demands set out below. Rikton was chosen as contractor and the decoration of the front elevation started in November 2006. The appeal against the painting notice was dismissed on 11 December 2006 and the painting of the front elevation w as completed at about the same time. Payments were made to Rikton on 18 January 2007 (£7,050) and 19 April 2007 (£6,168.75). In May 2008, PPS Management's retainer was terminated and Austin Rees Ltd became managing agents. PPS transferred the balance of the sums standing in the service charge accounts to the new agents, but retained from this the estimated management fee of £4,670.63. An RTM Company was formed and management transferred to the RTM Company in November 2008.

10. As far as the service charges are concerned, demands were sent to the lessees for a contribution to the works on 25 September 2006. The demands were based on the estimated cost of the works and supervision at that stage (£45,326). In fact, the demand issued to Flat 3 was erroneously based on a percentage of 10% (as opposed to

12%) and the demand issued to Flat 4 was erroneously based on a percentage of 18% (as opposed to 12%). In fact, the lessees of Flat 3 paid the full amount demanded and the lessees of Flat 4 paid £3,439.23 (taking into account service charges paid by their predecessors of £2,000). Austin Rees issued a statement adjusting the balances for the service charge accounts in about January 2008, which reflected the proper contributions set out in the leases of each flat. It did not give any other credit for works not carried out or defective works.

THE CASE FOR THE APPLICANTS

11. The applicants relied on expert reports of Mr D Aspey FRICS dated February 2009 and 14 April 2010. Mr Aspey stated in his February 2009 report that on the front elevation at lower ground floor level there were areas where previous layers of paint had been removed and a thin coat of gloss had been applied. Hydroscopic salts had caused this to blister. Paint had blistered after water had penetrated behind the paint on the southern side of the south bow window at ground floor and lower ground floor. He concluded that the surfaces were not properly stabilised prior to painting. There were paint splashes, drips, flaking paint, rippling of the top coat and corrosion of metal surfaces. Large areas of paint were missing or were flaking. On the flank (northern) elevation, there was flaking and missing paint. Exposure of white paint on the woodwork indicated that only a single layer of topcoat had been applied on top of the undercoat. Properly applied paint should not be in this condition within two years of application. Mr Aspey calculated in his second report that 37% of the front elevation of the building was not satisfactorily decorated. At the start of the hearing, he agreed with the respondent's expert Mr Austin that this figure should be 35%.

12. Mr Aspey expanded on his report in his oral evidence to the Tribunal. The sums paid to Rikton (£13,218.75) were excessive. He referred to an estimate from C&G University Painters dated 20 June 2006 which had been prepared for the First Applicant. This estimated the cost at £9,450 plus a contingency of 10% for painting the front elevation + VAT which amounted to £12,214.12. He also referred to another estimate from John Elphick (a non-VAT registered decorator) dated 13 June 2006 which was also prepared for the First Applicant. This estimated the cost of work at £9,295. He had also had an

informal chat that morning with the contractor who had painted the rear elevation. He had estimated £9,500 for painting the front. When questioned by the respondent, he accepted that estimates had been obtained for more extensive works by the landlord before the works were started and that Rikton had been the lowest tender by 20%. It was hard to compare the costs derived from these estimates with the work which was completed. Mr Aspey also considered it was difficult to identify the elements of the Rikton estimate which had in fact been completed. When questioned by the Tribunal, Mr Aspey accepted that the oral estimate obtained that morning would be at 2010 prices. He accepted that the estimate from UCP was close to the sum paid to Rikton, and that one could properly take into account the fact that Mr Elphick was not a substantial business with a turnover above the VAT threshold.

13. The First and second applicants also gave oral evidence to the Tribunal (the respondents did not object to this despite the lack of any witness statements). The First applicant stated that she had complained about the standard of works and referred to emails dated 6 February 2007 and 5 June 2007 and a letter dated 18 February 2008. The second applicant had also sent a letter by email on 18 July 2007. The First Applicant was also questioned by Mr Austin about credits made to her service charge account in 2008. He suggested that the original erroneous percentage figures applied to the service charge demands by PPS had been corrected and a credit applied to the account. The First applicant accepted that but stated that she had already paid the sums demanded by PPS. The first applicant did not believe she had received any correspondence to suggest that only the works to the front elevation were being carried out. The Second Applicant also accepted she had had a credit applied to her service charge account, but stated that no credit had been applied to her service charge account for the main items in dispute, namely the works not undertaken, the defective works to the front elevation and the supervision fees of PPS Management.

14. The applicants' arguments on the five issues were as follows. First, Mr Carrott contended that the works to the front elevation were plainly not of a reasonable

standard in the light of the above reports. The relevant cost of those works should be limited by 35% to represent the poor standard.

15. Secondly, Mr Carrott he did not accept that the figure of £13,218.75 paid to Rikton for the works actually carried out was a figure which was "reasonably incurred". Had the works been satisfactorily carried out, a reasonable figure would have been £9,500 inclusive of VAT, and he relied on the evidence of Mr Aspey in this respect.

16. Thirdly, the landlord had demanded interim charges on account of the works to the whole property estimated at £45,326. In fact, only the works to the front elevation had been carried out and the landlord had not given credit for the cost of works which were not undertaken. Mr Carrott accepted that adjustments had been made in 2008 for the wrong calculation of the percentage contributions by each flat, but further adjustments still needed to be made to reflect the works which were not done.

17. Fourthly, the sum of £4,670.63 deducted by PPS in respect of its supervision costs was not "reasonably incurred". This sum had been based on supervision of all the works, but only part of those works was carried out. In any event, PPS did not supervise the works properly. He relied on photographs of the property taken on 12 August 2007 which showed extensive areas of peeling paint even at that stage (i.e. eight months after the painting of the front elevation was completed. Any reasonable managing agent would not have signed off the works as completed if the works were so obviously defective. Moreover, PPS allowed the works to proceed in the winter months when this was obviously a risk because of the weather. There was no evidence that PPS did any preparatory work or supervised at all. There had been a total failure of consideration.

18. To summarise the above arguments, the relevant costs which were "reasonably incurred" should therefore be limited to 65% of £9,500, which produced a figure of £6,175. Mr Carrott also observed that the landlord appeared to have failed to go through the consultation procedure under s.20 of the Act or to apply for dispensation

under s.20ZA. However, he did not rely on the statutory cap imposed by s.20 since the argument had not specifically been raised in the application or his statement of case.

19. Fifthly, the applicants submitted that an order should be made for repayment to the applicants of sums which they had overpaid. Mr Carrott accepted that in ***Warrior Quay Management v Joachim*** (LRX/42/2006) the Lands Tribunal had indicated that the LVT has no jurisdiction under s.27A of the Act to order repayment. However, s.19(2) of the Act did refer specifically to "repayment" and s.27(1)(c) permitted the Tribunal to determine what service charge was "payable". In the present case the lessees had formed an RTM company and the balance of sums in the service charge account had apparently been by the respondent to the RTM Company. The RTM company could not recover those sums from PPS or the landlord. Any limitation of service charges would therefore mean that the leaseholders themselves would have to make up the default from the sums held by the RTM company. This could not be equitable. The Tribunal had to look at matters in a broad and commonsense way. If a landlord's argument was that the lessee had not paid £100, but the lessee said that it had in fact paid £200, it would be wholly artificial to say that the Tribunal had no jurisdiction to say that there had been an overpayment – and this was what was included in the Tribunal's power to determine what was "payable". Mr Carrott sought a finding of fact that there had been such an overpayment.

20. As far as section 20C is concerned, the applicants submitted that one could take all factors into consideration. PPS had acted poorly. Things had to be resolved and there had been a great deal of correspondence with both PPS and Austin Rees to try to resolve the dispute. The only reasonable step the applicants could take was to go to the Tribunal. It was wrong to allow costs incurred by the landlord in connection with the dispute to be added to the service charge.

THE CASE FOR THE RESPONDENTS

21. The respondent relied on a report by Mr Austin dated 14 April 2010. Mr Austin referred to Mr Aspey's evidence. He calculated that the proportion of unsatisfactory paintwork to the front elevation was not more than 33.7%. Mr Austin stated that the

statutory repainting scheme required a nominated paint, namely Sandtex Classic Stone Gloss, and that Rikton Construction had confirmed to him that this paint had been used.

22. Mr Austin expanded on this with oral evidence to the Tribunal. After the council issued the statutory notice on 12 May 2006, the landlords started the painting to the front elevation to avoid any penalties from the Council, aware that their appeal against the notice might fail. By the time that the appeal was dismissed on 11 December 2006 work had therefore already started. The specification from Stewart Radley Associates included works to the render woodwork and masonry as well as iron work. In his opinion, the painting carried out by Rikton complied with that specification in relation to the front elevation. The managing agent acting on behalf of the landlords had acted reasonably in complying with the painting notice. There had been a delay in starting the work because only three of the lessees had paid their contributions. Furthermore the landlords were required by clause 5(1)(5) of the lease to carry out maintenance and repairs. The works to the front elevation were carried out within the required time frame. Mr Austin did not disagree with Mr Aspey's findings when they carried out a joint inspection on 23 February 2009. However, if one compared the subject premises with other properties in the vicinity, there was evidence elsewhere of paint loss. Just because paint was peeling after 2 years did not mean that it had not been carried out correctly at the outset. He had been advised that the works had been supervised.

23. Mr Austin was cross-examined by Mr Carrot. He was referred to the photographs taken in August 2007. He was unable to say whether the sections of paint had peeled due to weather conditions at the time the paint was applied or whether it was down to poor preparation. However, the photographs were elective, and could be compared to Mr Austin's more recent photographs. It is true that sections or priable paint are now evident and that some making good is required. He had agreed with Mr Aspey that "35% of painting was unsatisfactory." As far as supervision fees were concerned, Mr Austin stated that a reasonable sum should be allowed for supervision fees, although he considered that a figure of 10% of the cost of the works which had been completed would be reasonable. Austin Rees had taken over in February 2007, but its

involvement was deferred for some time until it received all the paperwork from PPS Management. He had to fire off half a dozen letters to them to get the papers. As far as the sums paid to Rikton were concerned, he considered that the amount was not excessive since at least 20% was taken up with scaffolding costs. When asked by the Tribunal, Mr Austin stated that there was some value to the supervision works, since PPA Management would have had to deal with tenders specifications etc. However, he could not believe that a chartered surveyor would have signed off the works as completed. To reflect this, Mr Austin considered that perhaps 5% of the value of the works would be appropriate for supervision. He accepted that in a letter dated letter dated 16 November 2009 he had accepted that "should the work be deemed unsatisfactory, as set out by Mr Aspey in his report dated February 2009, which I do not dispute, then there should be recourse against the supervising officer".

24. The respondents' arguments on the five issues were as follows. First, Mr Austin stated that he did not dispute that the total cost of the works was not unreasonably incurred. However, on the first issue, one could not simply deduct 35% from the value of the works to reflect the standard of the works because the assessment of 35% was made three years after the event. The painting was to an exposed position and it is unreasonable to expect paint not to deteriorate in the mean time. He did not mean in his own report to say that historically 35% was unsatisfactory. He meant to say that this was the case at the date of the agreement with Mr Aspey. The words of paragraph 3(b) of the Statement of agreed Facts were an "error". He meant to say that the works were unsatisfactory at the date of inspection.

25. Secondly, once one deducted scaffolding costs from the amounts paid to Rikton, the real cost of the painting works was about £5,000. The other estimates obtained by the applicants did not take into account preparation, consequent repairs masonry and woodwork. The sum of £13,218.75 paid to Rikton was a reasonable one.

26. Thirdly, the landlord had not failed to account for the sums taken on account but not used for repainting. The landlord had of course demanded interim charges on account of the works to the whole property based on the anticipated cost of £45,326.

However, only three lessees had paid their contributions to this. PPS produced final management accounts up to 1 December 2007 which included credits to the service charge accounts for these figures. Mr Austin referred to figures of £5,186.91 and £3,439.23 shown in the cashbook to this effect. PPS also deducted the sums paid to the contractors and the cashbook showed a balance of £11,7476.36. The moneys paid on account had therefore not been expended and unused balances had been carried over to the following year.

27. Fourthly, the Mr Austin accepted that PPS should only have charged 10% of the cost of the works completed. Many of his colleagues charged 15% for smaller contracts so 10% was not unreasonable.

28. Finally, the Tribunal did not have jurisdiction to order repayment. The proper course might well be for the applicants to rely on s.94 of the Commonhold and Leasehold Reform Act 2002.

29. As far as section 20C is concerned, the respondent submitted that it was unlikely that the landlords could add the costs incurred to the service charge, given that the matter related to issues before the RTM was in place. However, the landlords had been pro-active through the new managing agents and Austin Rees had inherited the problems from the former agents.

DETERMINATION

30. The standard of the works. The first issue is whether the works were carried out to a "reasonable standard" under s.19(1)(b) of the Act. The Tribunal considers that they were not. On inspection, it was clear that areas of the paintwork which had come away appeared to involve only a single top coat. The Tribunal was unable to examine less accessible areas, but there was no obvious reason why more accessible areas would have single top coat whereas areas which could have only have been accessible with scaffolding would not. In addition, the Tribunal notes the photographs taken in August 2007, which suggest that significant areas of paintwork had begun to fail only a few months after they were applied. To this, we find support from the professional opinion of both experts as follows:

(a) The report of Mr Austin dated 14 April 2010 "para 4.03 ""it was agreed that a major proportion of the paint surface to the east elevation applied in 2007 was satisfactory. I calculate that 33.7% of the painting was unsatisfactory resulting in 66.7% of the paint surface being unsatisfactory."

(b) The report of Mr Aspey dated February 2009 where he concludes:

"In view of the condition of the paintwork, as detailed above, it is a reasonable to conclude that the original works were not carried out in a good and workmanlike manner in accordance with sound practice and by time served apprentices. Despite the relatively exposed nature of the building, particularly the eastern elevation, and the proximity of the seafront, in our experience properly applied paint on properly prepared surfaces should not be showing signs of bubbling, flaking and peeling as detailed above within two years of its application."

(c) The report of Mr Aspey dated February 2009 where he concludes that "it can be demonstrated that 37% of the eastern elevation of the building was not satisfactorily decorated"

31. In his evidence, Mr Austin sought to suggest that his professional opinion expressed in his written report and in the Statement of Agreed Facts had both been in error, and that they had been intended to refer to current failures of the paint system, rather than suggesting that the painting had not been carried out properly in 2006. However, this is inconsistent with the directions issued in made on 19 February 2010 which at paragraph 4 states that the respondents "accept the finding of the applicants report on the Work Carried out by D Aspey dated February 2009" and the letter of 16 November 2009 referred to above in similar vein.

32. Given the agreement between the parties that 35% of the paint work was unsatisfactory, the Tribunal limits the recoverable relevant costs by 35%.

33. <u>The value of the works</u>. The Tribunal finds that the sums paid to Rikton were "reasonably incurred" under s.19(1)(a) of the Act. There was a tendering process undertaken by the landlords before the works commenced, albeit in respect of a much larger works contract. The decision to proceed with part of those works was reasonable, in that it was in response to a statutory notice, and this is also a reasonable explanation. However, the lessees contend that the sums paid to Rikton exceeded a reasonable figure for the painting (had it been carried out

properly). The Tribunal does not find much assistance from the alternative estimate provided to the applicants by Mr Elphick, which was not based on the specification prepared by Stuart Radley Associates and which was not provided by a VAT registered contractor. The oral estimate provided to Mr Aspey was given several years after the event. The most comparable estimate from C&G University Painters dated 20 June 2006 in fact supports the sums paid to Rikton, in that it amounts to £12,214.12 – not that far below the sums actually paid over. In short, the Tribunal finds that it was reasonable to incur a cost of £13,218.75 subject to the other matters in this decision.

34. Have the respondents given adequate credit? The first point to make here is that the parties and the Tribunal are bound by the terms of the lease (Mr Carrott, who is experienced specialist counsel in these matters, did not at any stage suggest that the interim charges made by the landlords on 25 September 2006 were not properly recoverable under the lease: His case was put on the basis of s.19 of the 1985 Act). Here the service charges paid to the landlords were not used for the purpose for which they were demanded, namely the carrying out of the works. In such a situation, the lease provides for what should be done with this additional money at paragraph 4 of the Fifth Schedule. The "surplus shall be carried forward by the Landlord and credited to the account of the Tenant in computing the Service Charge in succeeding Accounting Periods". To this extent, the evidence and submissions of Mr Austin are correct. The landlord has indeed given credit for the overpaid sums received by way of the cash book and the sums transferred from PPA to Austin Rees. The applicants are entitled to a finding that relevant costs of £39,658.25 were not reasonably incurred, but that finding is reflected in the cashbook produced to the Tribunal.

35. Supervision. As for supervision, neither party sought to support the charge of £4,670.63 deducted by PPS Management from the service charge accounts in 2008. Mr Austin's primary position was that a reasonable fee would have been 10% of the cost of the works in fact carried out (£1,321.98) although his fallback position in evidence was that 5% would reflect the lack of supervision by PPS Management. The applicants contended that the value of the services provided were zero. The Tribunal finds that the service provided by PPS Management was significantly deficient in relation to the supervision of the works, although some value was provided in return for its

supervision fee. Most of the painting works were satisfactory, and some pre-contract service was provided without any criticism of it being developed. Doing the best it can, the Tribunal adopts to 5% figure suggested by Mr Austin as his fallback position. Furthermore, we apply this figure to the gross value of the works rather than the works reasonably carried out to avoid a double deduction for the poor supervision services provided by PPS Management.

36. Conclusions regarding relevant costs. The Tribunal therefore finds that relevant costs of £8,592.19 (i.e. £13,218.75 x 65%) were payable for painting in the 2006 and 2007 service charge years together with £660.93 (i.e. £13,218.75 x 5%) for supervision. The total figure is therefore £9,253.12.

37. The contributions to be made by each of the three applicants depend on the percentage contributions set out in their respective leases. Both payments to Rikton were made in the 2007 service charge year. The recoverable service charges for the 2007 accounting period for painting works in respect of flats 3 and 4 is therefore £1,110.37 (i.e. £9,253.12 x 12%) and or in respect of flat 2 is £925.31 (i.e. £9,253.12 x 12%). The Tribunal's determination is that these sums are payable in the 2007 service charge year.

38. Restitution. In respect of the final point, the Tribunal has no hesitation in rejecting the landlord's application for a restitutionary order. In the case of ***Warrior Quay v Joachim*** (supra), referred to by Mr Carrott, the Lands Tribunal stated as follows:

> *"28. I can deal with these points comparatively briefly as I reach the following conclusions thereon, substantially for the reasons advance in argument by [the landlord's counsel] Mr Bayne:*
> *(1) The terms of the lease do not make provision for re-payment to a leaseholder of the amount by which the payment on account made by that leaseholder for a relevant service charge year exceeds the amount finally decided by the LVT to be payable for that year. Instead the provisions of the Fourth Schedule paragraph 2(b), albeit strangely worded (indeed it seems something has gone wrong with the text), make provision for credit to be made in [the landlord's] WQMC's books of account in respect of the overpayment. Thus the leases themselves make provision for how the overpayment is to be dealt with and do not contemplate a re-payment. Instead credit is available against the leaseholder's obligations to make future payments to WQMC.*

(2) Even if the foregoing were wrong, I conclude that the LVT did not have jurisdiction to order the Appellants to make restitutionary payments to the leaseholders. The jurisdiction of the LVT is set forth in the 1985 Act and in particular in section 27A. The LVT has power to determine whether a service charge is payable and if so to whom, by whom, the amount, the date by which it is to be paid and the manner of payment. It does not have jurisdiction to go on and order an overpaid landlord to repay an overpaying tenant (even if the lease made provision for such re-payment – which the present lease does not)."

39. This Tribunal adopts the reasoning in that passage. Mr Carrott advanced the proposition in argument that the LVT had jurisdiction under s.19(2) and/or s s.27(1)(c) to make a restitutionary order. We reject that submission. Section 19(2) does of course refer to "any necessary adjustment" being made "by repayment, reduction or subsequent charges". However, s.19(2) is not a provision which deals with the powers of the Tribunal. It is a provision which deals with the conduct of the landlord and any adjustments which the landlord must make consequent on the limitation of service charges contained in s.19(1). The LVT's powers are dealt with in s.27A(1) and (3), which limit the LVT's powers to one remedy only – namely the making of a "determination". No express power is given to make any order for repayment. It is true that where an RTM company is involved, the RTM company may well incur the burden of a finding that some relevant costs were not payable. However, as Mr Austin points out, the RTM Company of the landlord has a remedy under s.94 of the 2002 Act should it choose to rely on it. There may also be remedies available in trust law to require PPA Management to return the sums it has deducted from the service charge accounts for its supervision fees. Finally, as noted above, the leases specifically provide that surplus service charges should be applied to subsequent service charge years and not repaid to the lessees. For this reason as well, no restitutionary order is made.

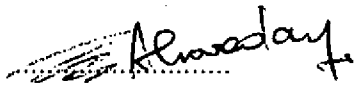
40. Section 20C. Having regard to the guidance given by the Lands Tribunal in ***Tenants of Langford Court v Doren*** LRX/37/2000 the Tribunal does not consider it just and equitable to make any order under s.20C of the 1985 Act. Each party has succeeded in part. The respondent landlord has reasonably incurred costs in resisting the application, which involved arguments of law and fact advanced by experienced

counsel. There is nothing about the respondent's conduct during the course of the application which makes it just and equitable to make a s.20C order.

CONCLUSIONS

41. The Tribunal determines that the sum payable by each of the applicants in respect of painting works in the 2007 accounting period is £1,110.37 (Flats 3 and 4) and £925.31 (Flat 2).

42. The Tribunal makes no order under section 20C of the 1985 Act.



Mark Loveday BA(Hons) MCIArb
Chairman
25 June 2010

CHI/00ML/LSC/2009/0176

THE RESIDENTIAL PROPERTY TRIBUNAL SERVICE

DECISION OF THE SOUTHERN LEASEHOLD VALUATION TRIBUNAL

LANDLORD AND TENANT ACT 1985 S.27A

FLATS 2, 3 AND 4, No. 5 BRUNSWICK PLACE, HOVE BN3 1EA

Decision on application for permission to appeal

Applicants:	(1)	Olufemi Bankole (flat 3)
	(2)	Elizabeth Mcowat (Flat 4)
	(3)	Mrs Manzoor (Flat 2)
Represented by:	Mr S Carrott of counsel	
Respondent:	(1)	Alexander John Mckay
	(2)	Glenn Alexandra Mishon (freeholders)
Represented by:	Mr RJ Austin FRICS of Austin Rees Ltd (surveyors)	
Date of Application:	18 December 2009	
Date of hearing:	26 May 2010	
Date of decision:	25 June 2010	

Members of the Leasehold Valuation Tribunal:

MA Loveday BA Hons MCI Arb
Mr AO Mackay FRICS
Mr T Sennett MA MCIEH

Permission to appeal is refused for the reasons given below.

1. Ground 1(a). The Tribunal accepted the factual evidence of Mr Austin that (i) a surplus arose from the lessees paying interim charges in the 2006 service charge year which were not expended on painting in the 2007 service charge year (ii) that surplus was carried over by the respondent into the following service charge year. This was a finding open to the Tribunal on the facts. The Tribunal did not suggest these sums were allocated to the Applicants' accounts individually.

2. Ground 1(b). The reference to the "cashbook" in paragraph 34 of the Tribunal's determination was in the context of an application by the Applicants for repayment of all or part of the interim service charges demanded in 2006. The Tribunal found in the first part of paragraph 34 that the service charge provisions of the lease did not entitle the applicants to repayment of "surplus" interim service charges paid on account. In this context, the Tribunal found in paragraph 34 that the cashbook supported the Respondents' contentions that they carried over those surplus sums into the following service charge years. The cashbook is indeed merely "a vehicle whereby payments and receipts made into [a] bank account are recorded" but the Tribunal was entitled to rely on the cashbook to this limited extent to support the finding that no repayment was due to the respondents.

3. Grounds 1(c) and (d). The Tribunal did not suggest in paragraph 34 of its determination that the entries in the cashbook were in themselves "compliance with paragraph 4 of the Fifth Schedule to the Lease. For the reasons given above the entries in the cashbook merely supported the contention that interim service charges which were not spent in the 2007 service charge year were carried over by the Respondents into the following service charge year. Furthermore, the extensive discussion in ground 1(c) relating to "credits" to the Applicants confuses a credit to the individual service charge account of one lessee with the carrying over of cash balances from one year to another in the service charge accounts for the building.

4. Ground 1(e). This is the key ground, and it suggests that an appeal would be a challenge to the reasons for the determination rather than the determination itself. The Tribunal made specific

findings in paragraph 37 which should entitle individual applicants to pursue any "civil" remedies for recovery" that they may choose to pursue.

5. Ground 1(f). The Respondents specifically submitted that the surplus sums had properly been carried over and that there was no jurisdiction to order reimbursement. The Applicants' case was to the contrary.

6. Ground 2: The Tribunal did not limit its consideration to "the conduct of the parties during the course of the application". The Tribunal expressly took into account the fact that each party had succeeded in part and that it was reasonable for the landlord to have resisted the application. The submissions by each party in respect of s.20C were relatively brief at the hearing, and it was unnecessary for the Tribunal to explain every potential factor which might have been relevant on s.20C but which the Tribunal did not consider material to its determination. There was nothing in the conduct of the Respondents before the hearing which rendered it just and equitable to make any order under s.20C. The statutory provision is not a general discretion to award costs – the Tribunal expressly referred to the guidance given by the Lands Tribunal in ***Tenants of Langford Court v Doren*** LRX/37/2000.

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Mark Loveday BA(Hons) MCIArb
Chairman
5 August 2010