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**LEASEHOLD VALUATION TRIBUNAL**  
**FOR THE LONDON RENT ASSESSMENT PANEL**

LON/00AN/LSC/2010/0352  
LON/00AN/LSC/2010/0016

**Landlord & Tenant Act 1985 (as amended) Section 27A and 20C, also Section 35**  
**Landord & Tenant Act 1987**

**Property:** Flat 1A, Challoner Court, 4 Challoner Street, London W14  
9LB

**Applicant:** Mr R. de Vahl Rubin (Leaseholder)

**Represented by:** In person

**Respondents:** 4 Challoner Street Limited (Freeholder)

**Represented by:** Mr Carl Fain of Counsel

**Also Present:** Ms C. Tuplin; Solicitor, The Beavis Partnership, Solicitors  
Mr N. Cross; Managing Agent  
Mr A. Mofeez; Member of Respondent

**Hearing:** 8<sup>th</sup> September 2010

**Members of the Tribunal:**

**Mr L. W. G. Robson LLB(Hons) (Chairman)**

**Mr K. M. Cartwright JP FRICS**

**Mr J. E. Francis**

**Preliminary**

1. The Applicant leaseholder seeks a determination under Section 27A of the Landlord & Tenant Act 1985 (as amended) of reasonableness and liability to pay service charges under a lease dated 15<sup>th</sup> August 1988 (the Lease) for annual service charges commencing on 18<sup>th</sup> August 2003 and ending on 31<sup>st</sup> December 2003, and in the years ending on 31<sup>st</sup> December 2004, 2005, 2006, 2008, 2009, and 2010. Pursuant to a Direction of the Tribunal at the Pre-trial Review, the Applicant made a further application to vary the Lease under Section 35, and then the two applications were directed to be heard together. A copy of the Lease is attached to this decision as Appendix 1.

2. Pursuant to Pre Trial Directions given on 29<sup>th</sup> June 2010 and 12<sup>th</sup> July 2010 the case was heard on 8<sup>th</sup> September 2010. No inspection was deemed necessary, although the Tribunal had access to a number of photographs of the property in the hearing bundle. The property was agreed at the hearing to be a 1 bedroom basement flat in an Edwardian block on 5 floors, converted into 6 flats, for the period in question.

### **Hearing**

3. At the start of the hearing the Applicant objected to a fresh bundle being produced by the Respondents, on the grounds that he had not had a copy prior to the hearing. Mr Fain for the Respondent submitted that the Applicant had not agreed the bundle with the Respondent. The two bundles were much the same, with the addition of specific numbered pages which the Respondent considered should have been inserted in the bundle produced by the Applicant. All the new material was, in his view, relevant, and all had been seen by the Respondent at some point in the dispute. He agreed that Appendix C in the Applicant's bundle was not in the Respondent's bundle, but this had only been sent to the Respondent by the Applicant after the new bundle had been collated. He also agreed there was no index in the new bundle, but the bundle was numbered, which the original bundle was not. Broadly the new items contained the service charge accounts for the relevant years and related correspondence, the freehold and leasehold titles, and a number of invoices.
4. The Applicant submitted that he had seen none of the new documents before.
5. The Tribunal decided that the additional material was relevant, and sufficiently small to allow the Applicant to read it in the hearing. The Tribunal then waited for the Applicant to read the documents and make any notes he wished. The case then continued. The parties made oral submissions generally following their statements of case. Mr Cross had not provided a witness statement, however in view of the apparently imprecise nature of some of the Applicant's concerns, the Tribunal allowed him to give a modest amount of oral evidence and be cross-examined on matters within his knowledge, as the manager in day to day charge of the building.

### **Section 27A Application**

6. From the Applicant's statement of case and response, which was a little difficult to follow, and discussions with the parties, the Tribunal ascertained that the following matters were in dispute in the Section 27A application:

#### I. General items

- a) Pigeon netting erected in 2006, costing £1,457, necessity, cost and legal liability
- b) External painting
- c) Intercom renewal in 2005, costing £400 – reasonableness and legal liability
- d) Internal Common parts repairs, - reasonableness and legal liability
- e) General request for invoices for all years

II. Items ordered to be done by an agreed Court order dated 18<sup>th</sup> August 2003

- f) Door repairs £168.87, reasonableness and cost
- g) Kitchen repairs, £1,039.88, reasonableness and cost
- h) Roofing invoice (Belmont Roofing) in December 2004 for £550, reasonableness and cost
- i) Roofing invoice (Quill) in November 2003, £800, reasonableness and cost
- j) Resolution invoice, £55, 12<sup>th</sup> September 2003, Reasonableness and cost

7. The Tribunal informed the parties that in the light of the application which did not raise the matter, and the Directions after the Pre-Trial Review, it would not allow item 6e) to be proceeded with in this application, as the Respondent had had no reasonable opportunity to prepare for it. A copy of the Court Order dated 18<sup>th</sup> August 2003 is attached as Appendix 3.

Pigeon netting

8. The Applicant submitted that the work was unnecessary. The pigeon problem was non-existent. He had not seen the netting but agreed it was there. It covered the whole of the back of the building. The work was an improvement to benefit the landlord and therefore outside the terms of the service charge. He had no access to consider a figure for doing the work using his alternative suggested method of using pigeon spikes on any landing spots. It cost £12 per metre. In answer to questions he conceded that scaffolding might have been needed to reach some areas of horizontal pipework to attach pigeon spikes.
9. Mr Cross was allowed to give factual evidence and be examined. He stated that there was a pigeon problem with fouling on the window sills and in the rear gardens. It was a health and safety problem. The residents had been consulted. The agents had obtained quotes before doing the work. It seemed a reasonable solution. Euroguard was an established contractor in this field. Mr Fain submitted that the work was not excessive or unreasonable, and it had been carried out to a reasonable standard. The Applicant had provided no true comparable evidence. The work had been charged in the 2006 accounts
10. The Tribunal considered the evidence. Shortly stated, the Lease requires the landlord in clause 5(2) to keep the building in good and substantial repair and condition. The Tribunal decided that erection of the pigeon netting was intended to protect the building and keep the exterior and structure in good condition. It did not seem to be an improvement in the proper sense of the word. The Tribunal accepted Mr Cross' evidence that there was a pigeon problem in that area of West London. The Applicant's evidence was very vague on the cost and methodology of his proposed alternative. In any event it is well settled law that within the bounds of reasonableness, the person obliged to do work has the choice of method. The use of netting was not unreasonable. Relying upon its experience, the Tribunal decided that the charge made for the work done also seemed reasonable. No complaint had been made about the standard of the work. The Tribunal decided that the cost of the pigeon netting was reasonable.

#### External Painting

11. The Applicant initially submitted that the work had been done 2-3 years ago. The decoration was now peeling. Cheap whitewash had been used. The work was substandard. In response to questions he conceded that the work had in fact been done in 2001, nevertheless it should not have deteriorated so badly. He produced photographs in support.
12. The Respondent submitted that the work had been done in 2001. There was no item in the service charge accounts for any later period. This work had thus been dealt with by the court order, and was outside the period in issue in this application.
13. In view of the Applicant's concession, the Tribunal decided that this item could not be decided in this application.

#### Intercom

14. The Applicant queried whether the Lease obliged him to pay for the intercom. He had no intercom system or even a door bell. Also the work done was an improvement.
15. The Respondent submitted that the charges for the intercom system fell within the Third Schedule paragraph 10(c). Mr Cross gave evidence that the cost had been incurred over two years, totalling £800 plus VAT approximately. He agreed this was comparatively expensive, but a number of visits had to be made to rectify the problem. The existing system had been repaired rather than improved, as repair was the cheaper option.
16. The Tribunal decided that the charges were covered by the Lease. The matter was very specifically dealt with in the Third Schedule paragraph 10(c). The tenant was obliged to contribute to the cost of "maintaining repairing and renewing... the door answering equipment...". While the Applicant might consider that the charge was unfair, he had accepted the terms of the Lease when he took it, and without a specific application to vary this item, the matter could not be dealt with in this application. The Tribunal accepted the Respondent's evidence that the work was not an improvement. The Tribunal therefore decided that the charges relating to the intercom system were reasonably incurred.

#### Internal common parts

17. The Applicant submitted that he had not had a key to the internal common parts since 2003 up to February 2010, despite numerous requests. He needed one as his post and electricity meter were there. The wiring was poor and he often had power cuts. To reach the meter to reset the circuit breakers he had to bother other residents to allow him in. He agreed in response to questions that he had had a key, and that he had lost it in 2003. He also agreed that his meter was a pre-pay meter. He did not know if any of the work in the common parts had been done badly. In any event the charge was unfair. He requested all the bills he had been charged for be sent to him. He stated that he had not received any of the annual accounts.

His post did not reach him as the post office would not deliver to his flat, but would only deliver his post to the common parts.

18. The Respondent submitted that it was difficult to decide what charges the Applicant was referring to. There had been a period when the Applicant had no key. One had now been supplied. Mr Cross stated that he was surprised that the period when the Applicant had no key was from 2003 – 2010, or that he had not received any of the annual service charge accounts. Mr Fain submitted that the mere fact that a charge was unfair was not relevant if the lessee was obliged to pay it under the terms of the Lease. In effect the Applicant was attempting to claim a set-off against the service charges for other matters, not part of the service charge. He referred to the Lands Tribunal decision in Continental Property Ventures Inc v White LRX/60/2005. He submitted that case was authority for the proposition that the Applicant was not entitled to set off unrelated items against the service charge.
19. The Tribunal considered the evidence and submissions. The Tribunal accepted the Respondent's submission that it was unable to decide to set off unrelated items against the service charge in this case. While having no key would have been frustrating, again the Third Schedule of the Lease was clear. Also, despite the lack of a key the Applicant was still able to gain some access to the internal common parts. The Applicant's submissions on the work disputed in the common parts were vague. The Tribunal noted that although the Applicant had requested all invoices relating to the service charges for a period of 6 years, in his statement of case, he could not point to any particular items of discontent relating to work done in the common parts at the hearing. He also had sufficient information to discuss other work and dispute other invoices very specifically. Statute gives specific powers for lessees to inspect accounts and request copies of invoices. No evidence of any attempt to exercise such powers prior to this application was before the Tribunal. A request for general discovery is usually inappropriate once an application has been made. The Tribunal concluded that the Applicant's request for invoices was in the nature of a fishing expedition, rather than an attempt to clarify genuine pre-existing concerns. The Tribunal decided that the issue over the key was not relevant to the reasonableness of the service charge, and no specific item had been challenged. The Tribunal decided that the charges made for items in the internal common parts were reasonable.

#### **Court Order Items**

20. At the hearing, the Applicant confirmed that items 3, 5, and 6 in the Order were not in issue, leaving items 1, 2, 4, and 7 outstanding
- Item 1 - Door repair (Tribunal's note; the Court order stated: "*.. make good woodwork to back door and redecorate frame of door or renew as necessary*")
21. The Applicant confirmed that the door concerned was his back door. He submitted that the work charged for was in breach of the court order. The "new" door was second hand. He referred to his recent photographs in the

bundle. The door frame and footplate were rotten. The invoice showed that work had been done on the new door, but not on the frame. His expert, Mr Reddin, in his report, had stated that the rotten frame should be cut out and pieced in at an estimated cost of £125. There was no date on the contractor's invoice. There was no office number or address. It used a free private email. He challenged the validity of the Wood Carpentry invoice for £164.87.

Item 2 – Hole in ceiling (Tribunal's note; the Court order stated: "*...make good hole in ceiling and redecorate part made good.*")

22. The Applicant submitted that the bill for £1,039.88 related to items 2 and 3 in the Court Order. His kitchen ceiling had collapsed due to a leaking roof. He submitted that his photographs in the bundle showed that some plywood had been "shoved up" to replace the rotten one. It had not been plastered or decorated. No attention had been paid to the timberwork above. He described the Cape Construction invoice as fraudulent. There was no company email.

Item 4 – Dip in the roof (Tribunal's note; the Court order stated: "*... remove the dip in the asphalt roof above the kitchen*")

23. The Applicant submitted that some work had been done to the flashing on the roof, but none to the roof itself. The repair had cost £550. The work was ineffective, if it had been done at all. The state of the roof was unchanged. It was a fake invoice from Belmont Roofing Services. A further invoice had been charged from Quill Roofing Services for £800. It was not clear if it referred to flat 1A. This invoice was more detailed, but the roof had not been removed, only badly patched. In 2007 his contractors stated that there were 7 points of water ingress. The roof should not have leaked. The contractor should have issued a guarantee.

Item 7 – Gap under Plinth (Tribunal's note; the Court order stated: "*Repair gap between plinth and upstand (with overflow just above)...*")

24. The Applicant referred to his photographs. There was a gap between the plinth holding the iron railings and the paving stones. His flat was directly below. The work had been done about 7 years ago. The bill was from Resolution for £55. The work done was to use bathroom mastic to seal the hole. The invoice was from a private address. There was no detail as to the work done. The mastic currently cost £3.99 at the local hardware store.

25. Mr Fain (in a general submission on the Court Order items) submitted that the work had been done in accordance with the terms of the Court order, and to a reasonable standard. He submitted that Mr Reddin's report, although prepared for another purpose, tended to support his view. Mr Cross was also examined on these items. He said he had been involved in the negotiations for the court order in 2003. He had instructed the contractors who had done the work. Some work had been done to the door, and to the frame. He had instructed the contractors to redecorate the ceiling and he believed they had done so. He could not recall seeing it. The dip in the roof was not necessarily a defect. He had checked the work to

the roof himself. The mastic used for repairing the gap between the pavement and the upstand was a waterproof mastic.

26. The Tribunal considered the evidence and the submissions. It noted the difficulty of trying to decide the original state of work done as long as 6 years ago. The Tribunal particularly noted that the Schedule to the Court Order of 18<sup>th</sup> August 2003 was extremely brief and open to multiple interpretations. On balance, the Tribunal concluded that the work done by the Respondent was within the (woefully vague) terms of the Schedule.
27. The Tribunal found the Applicant's submissions on the doubtful nature of the invoices unconvincing. He had agreed in most cases that some work had been done. The Tribunal considered that small contractors often produced very basic invoices. The Applicant's suggestions that the invoices were fabricated in some way amounted to little more than assertions. Without any specific evidence of wrongdoing, the Applicant had not discharged the burden of proof on that point. The invoices provided some evidence of the work done, although a number were rather basic and imprecise. Mr Cook's evidence in general corroborated the invoices. However three invoices concerned the Tribunal. The Resolution invoice had little detail. Nevertheless the Tribunal could see from the photographs that a mastic coat had been applied, but had apparently now perished. The Tribunal decided that the attendance cost plus the cost of the mastic for a total of £55 was reasonable. The Belmont Roofing invoice also had little detail, but it was clear from the evidence that some work had been done. The Tribunal accepted that invoice also should be taken at face value, because Mr Cross had confirmed that he had personally inspected the work when it was finished.
28. The Tribunal had particular concerns over the element of £590 plus VAT charged by Cape Construction for work on the kitchen ceiling. The photographs of the area were indistinct. What we could see suggested that there was some substance in the Applicant's submission on that point. Mr Cross' evidence on that point was quite vague, rather more vague than his usual clarity of expression. He could not recall inspecting the work. He only "believed" that it had been done. On this point the Tribunal preferred the Applicant's evidence. The Tribunal decided that this element in the Cape Construction invoice should be disallowed. Thus the Applicant's account should be credited with the sum of £138.65, i.e. one fifth of £693.25.
29. Thus the Tribunal upheld all the disputed invoices in the Court Order element of this application, save for £590 plus VAT on the Cape Construction invoice.

### **Section 35 Application**

30. The Applicant submitted that both parties agreed that the terms of the Lease should be varied to reflect the additional flat built in the basement

after the Lease had been granted and that Flat 1a should only bear 10% of the service charge cost. However he considered that the variation should be backdated to 18<sup>th</sup> August 2003, being the date of the court order made relating to the service charges prior to that date. For him this was the most important point in the case. If the lease was wrong it had always been wrong, and it was inequitable. He doubted that the Lease in fact provided for him to pay one fifth of the cost of the service charge. He maintained that Clause 10 only provided for him to pay one fifth if the service charge exceeded the sum paid on account. Further he got no benefit from the interior services provided in the common parts as his flat had a separate entrance. This item should be altered. He submitted that the variation should list the service charge percentage for each flat, however he felt unable to offer any wording for the changes he proposed.

31. Mr Fain submitted that his client agreed that there was an arithmetical error resulting in 110% of the annual service charge being collected. It appeared that the excess had been held over for the next service charge year. His client proposed that Clause 10 be varied by substituting the word "tenth" for "fifth" in the first line of page 15 of the Lease. Nothing further was required. The Tribunal's jurisdiction did not give it power to backdate the variation, merely to alter the words and "make an order" varying the lease. Section 38 gave no power to deal with the effect of a variation. In answer to questions, it was established that the lease of the other basement flat also provided for an advance payment of £100 per year in accordance with Clause 2(6). He agreed that this figure was arithmetically incorrect, but he submitted that this was merely an overpayment of advance service charge, which was then taken into account when the final service charge was prepared. The Respondent did not pocket the difference.
32. The Tribunal considered the evidence and submissions. It decided that the terms of the Lease were very clear, despite the Applicant's doubts. The Tribunal decided that he did obtain some use from the common parts, if only to check the flat's electricity distribution board. Altering the liability to pay for the common parts as he also suggested, would leave the landlord out of pocket, or cast extra expense on the other lessees. He had made no specific submissions as to how the Lease should be altered. Unless this point had been fully argued, with the other lessees having had the opportunity to be present, the Tribunal should not make such a significant change to the existing liability. It also accepted Mr Fain's submission on the backdating point. Backdating in this case would again prejudice the other lessees who contributed to the service charge and it might prove difficult to recover any underpayments. The Tribunal also accepted that it did not have power to backdate the variation. The wording of Section 38 is not particularly clear, but only Mr Fain's interpretation produced a result which would protect other lessees. While an anomaly would remain in the lease of the other basement flat, neither the terms of that lease, nor any other lease in the block were subject to this application.
33. The Tribunal decided that the terms of Section 35 and 38 were satisfied and it made an order varying the Lease by substituting "tenth" for "fifth"



in the first line of Clause 10. There was no need to go further in Clause 10. However the Tribunal decided that it would also alter the wording of Clause 2(6) so that the Applicant's flat would only pay one tenth of the advance service charge demand payable under Clause 2(6) by substituting the words "fifty pounds" for "one hundred pounds." This produced a fair result for the Applicant without prejudicing other lessees.

### Section 20C Application

34. Mr Fain conceded that the Lease gave no specific power to add the landlord's costs of these applications to the service charge. However he wished to make it clear that his clients reserved the right to consider treating the costs as a variable administration charge. It might be possible to argue that the Third Schedule paragraph 10 gave power to charge the costs to the service charge. His clients considered that an order under Section 20C should not be made.
35. The Applicant stated that he had been advised by his solicitor to make the application. The Landlord was the only person who could manage the property. He inferred that the cost of that management was being subsidised by his flat.
36. While the Tribunal did not agree with Mr Fain's submission relating to the Third Schedule of the Lease, the Tribunal decided that it would make an order under Section 20C in case the matter became a live issue. The Tribunal is essentially required to decide if the Applicant acted reasonably in making and pursuing the application, and whether there was any other reasonable course of action open to him. As noted above, many of the main issues in this case stemmed from the extremely brief schedule to the court order, negotiated by the parties in August 2003. That schedule was open to multiple interpretations, and appears to have been the cause of much disagreement. The Respondent appeared to have substantially done the minimum required to comply with the schedule. In the light of this fundamental problem it was reasonable for the Applicant to make and pursue this application. The main thrust of the application to vary the Lease had been substantially agreed by the Respondent, although the Applicant had lost on some points of detail. While the Respondent had had much success in the Section 27A application, the Applicant had had some limited success. The Applicant had also employed an expert witness, whose evidence was of assistance to both parties.
37. On balance, the Tribunal decided that it should limit the Respondent's costs chargeable to the service charge to Nil. The Applicant had not been unreasonable in making and pursuing either application.

Signed:  .....

Chairman

Date: *6th October 2010* .....

## Appendix 1

Lease dated 15<sup>th</sup> August 1988, - see attached

## Appendix 2

### Section 20C Landlord & Tenant Act 1985

*"(1) A tenant may make an application for an order that all or 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 persons specified in the application."*

*(2).....*

*(3) The court or tribunal to which application is made may make such order on the application as it considers just and equitable in the circumstances."*

### Section 27A(1) Landlord & Tenant Act 1985

*"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"*

### Section 35 and 38 Landlord & Tenant Act 1987

*"35(1) Any party to a long lease of a flat may make an application to a [leasehold valuation tribunal] for an order varying the lease in such manner as is specified in the application.*

*(2) The grounds on which any such application may be made are that the lease fails to make satisfactory provision with respect to one or more of the following matters, namely –*

*(a)-(e)...*

*(f) the computation of a service charge payable under the lease;*

*(g) .....*

*38(1) If, on an application under Section 35, the grounds on which the application was made are established to the satisfaction of the [tribunal], the [tribunal] may ... make an order varying the lease specified in the application in such manner as is specified in the order.*


*(2) – (3).....*

(4) *The variation specified in an order under subsection (1) or (2) may be either the variation specified in the relevant application under Section 35 ... or such other variation as the [tribunal] thinks fit.*

(5)-(10).....

### **Appendix 3**

Court Order dated 18<sup>th</sup> August 2003 – see attached

Signed: Lancelot Robson   
Chairman

Dated: 6th October 2010