

LONDON RENT ASSESSMENT PANEL

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

**Case Reference:** LON/00BE/LSC/2012/0126

**Premises:** 6, 12, 14, 18, 22 Cragie House, Balaclava Road,  
London SE1 5PR

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**Applicants (Tenants):** Mr Lionel and Mrs Barbara Farlam (18 Cragie House)  
Mrs Doreen Knight (6 Cragie House)  
Mr and Mrs Peek (14 Cragie House)  
Ms Brenda Renshaw (22 Cragie House)  
Ms Margaret Wilton (12 Cragie House)

**Respondent (Landlord):** London Borough of Southwark

**Date of hearing:** 21 June 2012

**Appearance for Applicant(s):** Mr and Mrs Farlam

**Appearance for Respondent(s):** Mr Strauss, In House Legal Officer

**Also in Attendance** Margaret Wilton flat 12  
Doreen Knight flat 6  
Ms E Bean – Council's Capital Collection  
Manager  
Ms S Armstrong – observing.

**Leasehold Valuation Tribunal:** Ms F Dickie, Chairman  
Mr P Tobin, FRICS  
Mr C Simons

**Date of decision:** 17 July 2012

**Decisions of the Tribunal**

All disputed service charge contributions are payable by the Applicant lessees. An order is made under section 20C. No order is made for reimbursement of fees.

## The application

1. The Applicant leaseholders seek a determination pursuant to s.27A of the Landlord and Tenant Act 1985 ("the Act") as to the amount of service charges payable. The relevant legal provisions are set out in the Appendix to this decision. The tribunal issued directions at an oral pre trial review that took place on 13 March 2012. The subject premises are self contained 2 and 3 bedroom maisonettes within a purpose built block comprising 24 maisonettes in total, of which 17 are let on long leases and 7 are let on secure tenancies. The landlord is the London Borough of Southwark.
2. The service charges disputed are the cost of major works carried out in 2007 (Contract XR/3 05/077) and forming part of the Council's Bermondsey External Redecorations Contract. No challenge was brought to the reasonableness of the costs. The only dispute was whether they were payable by the leaseholders.
3. The works have been completed and the defects liability period has expired. The final account was for £186,385.40 of which each Applicant's share is in the region of £8,500.

## The Leases

4. For all purposes relevant to this application, the leases of the subject premises were in identical terms (though clause numbering is not necessarily consistent between all the leases).

"The building" is defined in Clause A as "the freehold property comprised in the title or titles above referred to and known as Cragie House including any grounds outbuildings gardens yards or other property appertaining exclusively thereto"

The demised premises as defined in Clause 1 exclude "all windows and doors and door frames exterior walls roof foundations and other main structural parts of the building"

5. By Clause 2(3)(a) the tenant covenants "To pay the Service Charge ... set out in Part 1 .. of the Third Schedule hereto..."
6. By Clause 4 the Council covenants with the Lessee:
  - (2) To keep in repair the structure and exterior of the building (including drains gutters and external pipes) and to make good any defect affecting that structure
  - (3) To keep in repair any other property over or in respect of which the Lessee has any rights under the First Schedule hereto
  - (4) As often as may be reasonably necessary to paint in a good workmanlike manner with two coats of good quality paint all outside parts of

the building usually painted and also all internal common part of the building usually painted”

7. Part 1 of the Third Schedule provides:

6. (1) The Service Charge payable by the Lessee shall be a fair proportion of the costs and expenses set out in paragraph 7 of this Schedule incurred in the year.

(2) The Council may adopt any reasonable method of ascertaining the said proportion and may adopt different methods in relation to different items of costs and expenses.”

7. The said costs and expenses are all costs and expenses of or incidental to

(1) The carrying out of all works required by sub-clause (2) to (4) inclusive of Clause 4 of this lease.

(6) The maintenance and management of the building and the estate ...

(7) The employment of any managing agents appointed by the Council in respect of the building or the estate or any part thereof PROVIDED that if no managing agents are so employed then the Council may add the sum of 10% to any of the above items for administration.

### **The Hearing**

8. The Applicants accept that part of the amount sought by the Respondent is payable but submitted that it is not payable in full for the following reasons:

- a. The Respondent has wrongly calculated the service charge for the windows / doors/ coal chutes. The figures should be adjusted to exclude the renewed of elements of the Council's 7 tenanted properties.
- b. Works to the roof void are an improvement and not a repair, and therefore the responsibility of the Council and not the lessees under the terms of the leases.
- c. The specification for the windows was changed from aluminium units to uPVC ones without consultation with the leaseholders.

### **Window Replacement**

9. The reasonableness of the cost or standard of work was not in dispute. The principal issue for the determination by the tribunal was whether there had been proper apportionment of the cost to the long lessees.

10. The Council produced a plan of the building which was marked to show the windows which had been replaced and the tenants agreed this was accurate.

From this the tribunal was able to determine that the final calculation of the costs of windows and patio door replacement, as set out in a schedule accompanying the amended final estimate sent to the leaseholders on 26 February 2008, was correct. It is not necessary to set out those costs in this decision.

11. The leaseholders' argument was that the Council should be responsible for the costs to their tenanted properties and that the total contribution from leaseholders (equating to roughly 75% of the expenditure) was unreasonable as it was the landlord's building. Mr Farlam said it would be fair for the costs to be apportioned 50/50 between the Council and the leaseholders.
12. A similar challenge arose in the correspondence to the cost of the coal chute doors and frames. In relation to other contract costs in the Council's final calculation, Mr Farlam sought the removal of all costs that related to the 7 flats not let on long leases.
13. Mr Farham also complained that the Council had installed UPVC windows instead of aluminium ones as specified, and had not consulted with the tenants about this change. He acknowledged that the cost was less but said the material was inferior. He did not produce expert evidence.
14. The Council's case was that non-rechargeable works (such as those carried out to the interior of the tenanted properties) were not included in the contract costs apportioned to the leaseholders. The rechargeable works were in general works to the exterior, structure and common parts of the block and estate.
15. The tribunal heard evidence from Ms J Dawn, Final Accounts Manager for the Council. She explained that the Council used a bed-weighting method of apportionment, whereby each property is assigned a weighting of 4 units with an additional unit for each bedroom. Flats 6, 12, 14 and 18 are all 2 bedroom properties and attract a bed weighting of 6, and 22 Cragie House has 3 bedrooms and attracts a bed weighting of 7. The 24 maisonettes in the building have a total bed weighting of 148. The apportionment of the total expenditure on the building for the subject premises is therefore 6/148 for the 2 bedroom flats and 7/148 for the 3 bedroom ones.
16. The tribunal also heard evidence from Mr Kevin Orford, Projects Manager for the Council responsible for overseeing major works contracts such as the Bermondsey External Decorations contract. He said that the contractor had offered the opportunity of a saving from changing the window specification from aluminium to UPVC which was approved by the building surveyor and quantity surveyor. He did not believe aluminium to be superior to UPVC, both being maintenance free with guarantees and an expected lifecycle of the same duration. The choice of window type is left to the surveyor responsible for works on any individual block but in Cragie House he could see no reason for aluminium to be used.
17. The Notice of Intention to carry out the works, served under section 20 of the Landlord and Tenant Act 1985, notified the leaseholders of a summary of the works which included "some window replacement where required" and "Access to the roof void for the water tanks".

### **Tribunal's Determination – Window Replacement**

18. According to the lease the Applicants are liable to pay a fair proportion of the expenditure on "the building". This means that in calculating the sum to be apportioned the landlord must include all expenditure on the structure and exterior building as a whole. This would exclude internal work to any of the flats, but must include all of the costs of window replacement in the building. As the tribunal understands it, the Applicants are of the view that the expenditure on the windows to the leasehold flats only should be apportioned between them. However, this is not the mechanism by which service charges are to be apportioned under the clear terms of the lease. The landlord has correctly apportioned all of the expenditure on the whole building and has no option but to do this.
19. According to the leases, that apportionment must be "fair". The landlord has adopted a method which allocates a number of units to each flat depending on how many bedrooms it has. Cragie House has only 2 or 3 bedroom maisonettes within it, which each have 6 or 7 units respectively. Adding up the units for all of the 24 flats in the block gives 148 units. By dividing the total expenditure on the whole block between the combined units of all of the flats within the block, the Council has apportioned that expenditure between all of the 24 flats. The Council is liable to pay the share apportioned to the 7 flats it lets, and under the leases each leaseholder is liable to pay the apportioned share for their own flat. The tribunal concludes that this is a fair and reasonable approach to the apportionment of expenditure. The Applicants' argument that they are somehow subsidising the Council's tenanted flats is unsustainable. They are each paying a fair proportion of the expenditure on the whole building, which is precisely what the lease terms require them to do. There is no reasonable justification for suggesting a 50/50 split, which would place on the Council a wholly disproportionate financial liability.

### **Loft Works**

20. Mr Farlam argued that the leaseholders should not be liable to pay for the improvements to the loft, and that this was the freeholder's responsibility. His case was that the leases only allowed for the Council to recover the cost of repairs, not improvements. There are 3 domestic water tanks in the loft that had been accessed only via some of the top floor flats. Ms Wilton of flat 12 said hers had been one of these flats and when the Council would notify her that it required access she would give it. Each tank supplied 8 flats and there were fire break walls so there was no access between tanks through the roof space.
21. Mr Orford said that the scope of the works was recommended after a condition survey had been obtained, and the Council's engineering team (who are responsible for the upkeep of the water tanks) asked for external access to be installed as part of the rest of the package of major works. Therefore, on one flank of the building a new high level doorway had been installed to access the loft space directly, reached by a large steel ladder descending about  $\frac{3}{4}$  of the way down the block, reached using a ladder brought to site. Furthermore, a walkway has been created all the way through the loft space, using fire rated doors in the existing walls, and fixed power and lighting has been installed to create a safe working environment for operatives maintaining the tanks.

22. Mr Orford said that the new arrangement provided added security as flats with loft access cannot now be reached from each other. The hatches had been screwed down with plywood and covered with insulation (as had the rest of the loft). Formerly access to 3 flats was required to reach all of the tanks, and in the event that one or more of the tenants was not at home, a repeat visit would be required at an additional cost to the service charge. He observed that forced entry might be required in the event of an emergency. The roof space was not safe without lighting and safe access. He said maintenance visits are made to the tanks twice a year – these being a full clean and recharge annually and a mid-year check to sample and test the water.
23. Mr Orford emphasised that the Council has a responsibility for the health and safety of operatives working in the roof space and that without light and power it was a dangerous place to work, and there was a raft of Health and Safety Executive guidance regarding safe access that a large authority such as Southwark needed to work to meet. He said contractors would charge a premium on their rates for maintaining tanks in such a location.
24. Mr Strauss argued that the cost of the loft works was recoverable under Paragraph 7 of the Third Schedule as a cost “incidental to” the “maintenance and management of the building”.

### **Tribunal’s Decision on Loft Works**

25. Mr Strauss did not refer the tribunal to any of the line of decided authorities regarding the distinction between an improvement and a repair. The tribunal agrees with his view that in this particular case those authorities would not be of assistance, though in general it can be understood that it is a question of degree whether the remedying of an inherent defect is work of repair. The roof space, tanks and associated communal distribution plumbing are not demised to the tenants and the landlord needs safe access to them. In the present case the works to create external access to the loft are works which are related to the safe and efficient execution of the landlord’s obligations to maintain the domestic water supply. In the opinion of the tribunal the works in question do not change the character of the building so as to take the ambit of the work outside of the covenant to repair.
26. Where a landlord has a repairing covenant and can demonstrate, as in the present case, that its works in performance of that covenant cannot be carried out safely, it is perfectly entitled to make arrangement to ensure such safety and to recharge the cost to the tenants. In the opinion of the tribunal, the fact that these works were preparatory to regular maintenance and repair does not exclude them from the covenant to repair.
27. The tribunal was not asked to determine whether the cost of the work was reasonable and no evidence was produced that would indicate otherwise. The tribunal is satisfied that the sum in dispute is payable by the Applicants.

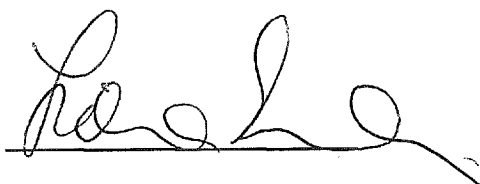
### **Costs and fees**

28. The leaseholders made an application under s.20C of the Act in respect of all the landlord’s costs of the proceedings, preventing their recovery through the service

charge account. The Council said it would not charge costs to the service charge account and was therefore content for tribunal to make the order sought under s.20C, and accordingly the tribunal does so.

29. Under Regulation 9 of the Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003 the tribunal has the power to refund the fees paid. In all the circumstances and in light of the tribunal's decision, no order is made for reimbursement of fees.

Chairman

A handwritten signature in black ink, appearing to be 'R. H. H.', written over a horizontal line.

Date:

17 July 2012

## Appendix of relevant legislation

### Landlord and Tenant Act 1985

#### Section 18

- (1) In the following provisions of this 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.
- (2) The relevant costs are the costs or estimated costs incurred or to be incurred by or on behalf of the Landlord, or a superior Landlord, in connection with the matters for which the service charge is payable.
- (3) For this purpose -
  - (a) "costs" includes overheads, and
  - (b) costs are relevant costs in relation to a service charge whether they are incurred, or to be incurred, in the period for which the service charge is payable or in an earlier or later period.

#### Section 19

- (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 provisions 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.

#### Section 27A

- (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.
- (4) No application under subsection (1) or (3) may be made in respect of a matter which -
- (a) has been agreed or admitted by the Tenant,
  - (b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the Tenant is a party,
  - (c) has been the subject of determination by a court, or
  - (d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.
- (5) But the Tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.