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RESIDENTIAL PROPERTY TRIBUNAL SERVICE

LEASEHOLD VALUATION TRIBUNAL

Property:	144 Studley Knapp, Walnut Tree, Milton Keynes, Buckinghamshire MK7 7NE
Applicant:	Mr R Tanner
Respondent Landlord:	Solitaire Property Management Company Limited, Imperial House, St Nicholas Circle, Leicester LE1 4LF
Case number:	CAM/00MG/LSC/2006/0017
Application:	Application for a determination of the liability to pay Service charges including the reasonableness of service charge (Section 27A Landlord and Tenant Act 1985) An application for the limitation of service charge arising from the landlord's costs of proceedings (Section 20C Landlord and Tenant Act 1985)
Tribunal:	Mr JR Morris (Chairman) Mr GRC Petty FRICS Mr P Tunley
Hearing Date:	5th June 2006

Attending Hearing:

Applicants: Mr Tanner
Respondents: Mr AC Cummings
Mr Wheeler

STATEMENT OF REASONS

The Application

1. The Applicant applied to the Tribunal on the 6th March 2006 under section 27A of the Landlord and Tenant Act 1985 as amended by the Commonhold and Leasehold Reform Act 2002 for a determination as to whether costs to be incurred by way of service charge in respect of Service Charges for the year 1st January to 31st December 2006 are to be reasonably incurred and payable.

The Law

2. Landlord and Tenant Act 1985 as amended by the Housing Act 1996 and Commonhold and Leasehold Reform Act 2002

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, improvement 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 of 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 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 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.

Section 27A

- 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.

Description of the Building and Property

3. The Property is in a three storey Block of eight flats. The Property is one of four single storey units on the ground floor. On the first and second floors are four larger units with balconies. The Block is constructed of brick under a tile roof and was built circa 1989. The Block is surrounded by common grounds of grass with some shrubs. Each flat has a designated parking space. There are six similar Blocks on the Development.

Inspection

4. The Tribunal inspected the exterior of the Block only in the presence of the Applicant and Respondent's Representatives. None of the issues raised relate to the interior of the Property and therefore no inspection was made of this part of the Block.

5. Externally the Block and grounds surrounding it were in fair condition. The external woodwork would shortly require re-decoration. There were some slipped tiles on the roof. The Tribunal took particular note of the balconies, which had been fitted with new steel supports about two to three years ago.

The Lease

6. The Respondent is the freeholder and landlord of the Block. A copy of the Lease was provided. The Lease is for a term of one hundred and twenty five years from 24th June 1989 at a rent of £40 per annum for the first 25 years of the term and is then subject to review in accordance with Clause 7 of the Lease.

7. The Demise is described in the First Schedule to the Lease. The Demise includes the surface area of any balcony but not the railing surrounding the same. It also does not include any of the main timbers, joists or concrete or steel framework of the Block. The Demise does include the Parking Space allocated to the Flat.

8. Under Clause 1.7 the Service Charge is defined as "a sum equal to one eighth (or such other proportion as may be determined pursuant to Part I of the Fourth Schedule) of the aggregate Annual Maintenance Provision for the whole Block (other than the entrance hall stairs and landing of the Block giving access the first floor)". Therefore the Applicant is not liable for the maintenance, lighting or cleaning of the entrance hall, stairs and landing giving access to the first floor.

9. Under Clause 3.1 the Applicant is to pay the Service Charge in respect of every Maintenance Year by two equal instalments in advance on the half yearly days with a balancing payment in accordance with the Fourth Schedule. The Maintenance Year is the year ending on the 31st December.

10. The Fourth Schedule states that the Annual Maintenance provision shall consist of:
- The expenditure estimated as likely to be incurred
- An appropriate amount as a reserve
- A reasonable sum to remunerate the Respondent for its administrative and management expenses

11. The Fifth Schedule sets out the purposes of which the Service Charge is to be applied including:
- Decoration and repair of structure and maintenance of the grounds
- Decoration and repair of common parts
- Payment of staff
- Costs incurred in management
- Insurances

Documents

12. The Tribunal received:
- Application Form
- Lease
- Management Company handbook
- Correspondence
- Statements of case
- Invoices for advance payment of estimated Service Charges
- Accounts for years ending 31st December 2004 and 2005 received on 23rd June 2006

Matters in Dispute

13. The Application is for a determination in relation to estimated costs to be incurred in 2006 by way of Service Charge. The items identified by the Applicant, as being in dispute are:
- Repairs and maintenance
- Insurance
- Management Fees
- Reserves including the risk assessment
- Balcony repairs

In the initial Application the landscape maintenance was in issue but this was settled before the Hearing.

Hearing

14. The Hearing took place on the 5th June 2006 and was attended by the Applicants and the Respondent's Representatives. The Service Charge account from the previous year was not available at the Hearing and therefore a determination was postponed to give an opportunity for the Respondents to send a copy to the Applicant and for the Applicant to reply. The Respondent sent the accounts as requested on the 23rd June

2006 and a reply was received from the Applicant on 7th July 2006. In addition to the full accounts for the year ending 31st December 2004 the Respondent also included a copy of the draft accounts for the year ending 31st December 2005.

Applicant's Case

15. The Applicant in written representations, which were confirmed at the Hearing, referred to the invoices for advance payment of estimated Service Charges that he had been sent as follows.

Repairs and Maintenance

16. A charge had been made in the anticipated expenditure of £250.00 of which he was to pay a share of £31.25 for maintenance and repairs. He said this was excessive. He stated that he could not see what repairs and maintenance there could be. There are no internal communal areas in relation to his flat and the only external area is the garden for which there is a separate charge. The Council looks after the pavement and paths, access road etc. He stated that he should only be charged when a repair had actually been carried out. In spite of a number of letters the Respondent had not been able to tell him what repairs were likely to be done. Whereas he appreciated that they could not predict what maintenance would be carried out nevertheless they might have some idea based on past experience. So far the Applicant had only noted the changing of light bulbs in the common areas of the stairs and landing for which he was not responsible.

Insurance

17. The Applicant stated that he was able to get cheaper buildings insurance than £159.75 which he had been charged and he had not been given a choice of insurer. He stated that reviewing the insurance policy every 3 years, as the Respondent has said that it had done, was not acceptable as insurance quotations may vary from year to year. Also the Applicant said that he could not understand why there should be a charge for repairs and maintenance when he was also paying for insurance as he was under the impression that a claim could be made under the insurance if items were damaged.

Management Fees

18. The Applicant stated that he had no objection to paying a Management Fee but did not know for what he was paying.

Reserve

19. The Applicant stated that he could not see why there should be a reserve fund at all much less two reserve funds. He considered that to charge for repairs and maintenance and a reserve fund appeared to be double charging. He argued that as with the estimated charge for repairs and maintenance, he felt he should only be charged when work had actually been carried out. He said that external decorating was shortly to be undertaken but he had not known about the consultation process that should have taken place prior to it as he had only moved into the flat after the procedure had been completed. He therefore could not have made any comment on the work. He felt that

the whole matter of the reserve fund and the procedure prior to the decorating works being carried out had not been properly explained to him when he bought the flat.

Risk Assessment

20. The Applicant objected to the levying of a charge for a risk assessment. He had been told by the Respondent that this was a legal requirement however he had asked the Principal Health and Safety Officer at the Health and Safety Executive at Basingstoke as to whether there was an obligation for a general risk assessment to be done and had been told that an assessment is only required when a job needs doing. He had also asked the Milton Keynes Fire Safety Officer whether a fire risk assessment had to be done and had been told that the Regulatory Reform (Fire Safety) Order 2005 which would require premises to be assessed for Fire Safety had not yet come into force and that when it is, it will not apply to private dwellings.

Balconies

21. The Applicant stated that he had received notification that work was to be carried out on the balconies. He did not see why he should pay for this as he derived no benefit from the balconies and argued that the balconies were part of the demise of the upper two storey flats and that therefore they alone should pay for their re-decoration and repair. He said he could not see how they could be a part of the structure of the Block as they were only bolted on to the building. It was a luxury item for the flats that had them. The flats that had balconies would achieve a higher price when sold therefore compensating the tenant for the additional costs of maintaining the balconies. In addition the Applicant considered there to be double charging because he was paying a charge for maintenance and repair and a separate charge for repair to the balconies.

Conclusion

22. In conclusion the Applicant stated that he had not received any indication of what the Service Charges would be when he purchased the Lease and he had not been given a breakdown or itemised account, other than the invoice for his service charge, when he took up residence. He recalled his solicitor having charged him for obtaining an account of the Service Charge but he had not received a copy in spite of asking for one from the solicitor and the Respondent on receipt of the invoice for estimated service charges.

23. In reply to having been sent a copy of the full accounts for year ending 31st December 2004 and draft accounts for year ending 31st December 2005 the Applicant pointed out that the amounts of cleaning and electricity did not relate to his flat. He also stated that he considered the amount of £3,105.30 together with the Survey fees of £300.00 in relation to the external decoration for which a section 20 consultation procedure had been carried out distorted the figures as these only occur every 3 years.

Respondent's Case

Repairs and Maintenance

24. With regard to the Repairs and Maintenance item of the Service Charge Account the Respondent stated in written representations which were confirmed at the Hearing that

the charge of £250 was an amount set aside for the year for gutter clearance, paving repairs and other minor repairs such as replacing roof tiles and cracked down pipes. It had also been used for the clearing of items, which did not constitute normal domestic refuse for collection by the local authority. The amount was based on past experience. In the year ending 31st December 2004 an estimated charge of £250.00 was made but during that year gutter repairs had to be carried out costing over £500.00.

Insurance

25. The Respondent's Representatives stated that the Applicant was under a misapprehension that many repairs fall under the insurance policy, in fact this rarely happens. Many repairs are due to wear and tear, which are not covered. Even when it is possible to make a claim there is an excess and will often make it uneconomical to make a claim. Also many small claims will lead to a poor insurance record and may lead to an increase in premium. The Respondent also provided the Buildings insurance schedule, which gives an insured value of £640,000, which is based on the actual cost of a similar Block that was recently significantly damaged by a gas explosion during March 2005. The Respondent's Representatives informed the Tribunal that the insurance is reviewed every three years when it looks in the market for the most expansive cover at a competitive premium through its brokers, Willimason and Moore who approached Zurich, Norwich Union, Allianz Cornhill, Axa Insurance and NIG and Brit Insurance. Zurich was found to be the most competitive for the cover provided.

Management Fees

26. The Respondent's Representatives stated that the Management Fees included regular visits, which averaged once a month, the sending out of invoices and collection of Service Charges and ground rent, the making of arrangements for day to day repairs and maintenance, insurance, cleaning, gardening and the payment of bills. Additional work relating to section 20 notices was invoiced separately.

Reserve

27. In relation to the External and General Works Reserve Funds the Respondent's Representatives stated that the proposed works for which a consultation procedure had just been undertaken demonstrated the need for a reserve. Copies of the notices served under section 20 Landlord and Tenant Act 1985 as amended were produced. The intended works were external redecoration at an estimated cost of £4,420.35, which will be met out of the accrued reserve fund entirely, and repair of the balconies at a cost of £3,774.10 for which £869.83 will come from the reserve and the shortfall of £2,904.27 will be charged at a rate of £363.03 per flat.

Risk Assessment

28. The Respondent's Representatives submitted that there was a legal requirement to undertake a risk assessment under the Management of Health and Safety at Work Regulations 1999 every three to four years and that that it was prudent to undertake a risk assessment in accordance with the Regulatory Reform (Fire Safety) Order 2005 even if it was not mandatory to do so. It was stated in oral evidence that the Respondent's personnel would undertake the assessment and it would be an

assessment of all the accessible areas within the Respondent's control. The charge had been place under the reserve, as the assessment may not take place for some time, as there were a lot of properties to visit. The charge also may not be as much as stated.

Balconies

29. The Respondent had a liability for repair and maintenance of the balconies under the Lease as the demise expressly excluded the railing surrounding the balcony and the main timbers and joists by virtue of the First Schedule. The Respondent was entitled to charge for the cost of maintaining and repairing the balcony, as part of the Service Charge under Clause 1.7 and such repair and maintenance was a legitimate Service Charge cost under the Fifth Schedule. This point had been explained to the tenants as part of the consultation procedure.

30. In relation to the consultation procedure pursuant to section 20 Landlord and Tenant Act 1985 the Respondent's Representatives stated that a notice of intention and estimates obtained for new balconies to be fitted both of which were served on the tenants with an opportunity given for observations to be made. However it was subsequently though that it may be feasible and more cost effective to repair the balconies. Further estimates were obtained for repair only and these were also served on the tenants with a proposal to select the lowest tender and an opportunity was given for observations to be made. The Respondent's Representatives therefore submitted that they had acted in accordance with the legislation.

31. The Tribunal noted that there was a considerable difference between the two estimates for repair. The Respondent's Representatives stated that they could not explain the difference. The contractors were sent the same specification for works to be carried out and the matter was followed up in that the contractors were asked about the discrepancy. In particular the work that the cheaper contractor was going to undertake seemed appropriate and it was not apparent what additional works the more expensive contractor was going to carry out that justified the higher cost.

Conclusion

32. The Respondent's Representatives said that the usual practice in relation to the Service Charge was to send out the invoices requesting payment in advance, as permitted by the Lease, and in June of the following year a full account was sent to all tenants recording the advance payments made based on the estimated account, together with a statement of the actual costs and a reconciliation which would include a balancing payment either to be made or to be credited. The Respondent would pay a credit to any tenant who requested it rather than it being held to the tenant's account. The Respondent's Representatives were surprised that the Applicant did not know about the Service Charge liability as they had a record of sending a copy of the full statement of accounts for the year ending 31st December 2004 to his solicitor when he purchased the Property in 2005. Normally a charge is made for the provision of information, including the account, together with the answer to any other requisitions raised. There was a record of a request for the accounts from the Applicant's solicitor having been received and of a charge having been demanded. Although the Applicant's solicitor had not paid the charge a copy of the accounts for the year ending 31st December 2004 was sent.

Determination

33. The Tribunal considered the evidence presented and make the following determination:

Repairs and Maintenance

34. The Tribunal found that an estimated charge for Repairs and Maintenance was both permitted in the Lease and reasonable. The Tribunal considered the accounts submitted after the Hearing and make the following observations. The Tribunal noted that £250.00 had been estimated for the year ending 31st December 2004 and that due to repairs to the guttering the total actual cost of this item had been £590.95. It was further noted that £300.00 had been estimated for the year ending 31st December 2005 and that the total actual cost of this item recorded in the draft accounts had been £338.25. It was therefore determined that the estimated charge for Repairs and Maintenance of £250 (Applicant's share being £31.25) for the year ending 31st December 2006 is reasonable and payable by the Applicant.

Insurance

35. The Tribunal found that the Applicant was under a misapprehension as to the effect of the Insurance policy in relation to repairs. In relation to the Respondent's evidence the Tribunal accepted that the insurance policy had been obtained at arms' length in the market place in accordance with *Berrycroft Management Co Ltd v Sinclair Gardens Investments (Kensington) Ltd* (1996) 29 HLR 444 CA. In that case it was held that a landlord is not obliged to obtain the lowest premium but must agree the premium at the market rate or negotiate the insurance contract at arms' length in the market place. The Tribunal also referred to *Forcelux Ltd v Sweetman and another* [2001] 2 EGLR 173 (LT) where it was held that a direct comparison cannot be drawn between a commercial landlord and an individual leaseholder. Commercial landlords have access to a limited pool of insurers prepared to provide commercial cover for individual properties. The Tribunal also noted that the courts accepted the practice of commercial landlords with a portfolio of properties insuring a block of properties as a single entity. It was therefore determined that the charge for Insurance of £1,278 (Applicant's share being £159.75) for the year ending 31st December 2006 is reasonable and payable.

Management Fees

36. The Tribunal noted that a unit fee of £202.00 per flat per annum was charged for management. In the experience of the Tribunal members this was a reasonable charge for the work undertaken and therefore it was determined that the Management Fees of £1,616.00 (Applicant's share being £202.00) for the year ending 31st December 2006 were reasonable and payable.

Reserve

37. The Tribunal found that the reserve was permitted under the Lease and prudent as was shown by the recent works that were required. It was therefore determined that the charge for the Reserve Fund for external work of £9,000.00 (Applicant's share being £112.50) for the Reserve Fund for general work of £6,000.00 (Applicant's share being £75.00) for the year ending 31st December 2006 is reasonable and payable.

Risk Assessment

38. No evidence was adduced or arguments presented to show that there was a statutory obligation to undertake a risk assessment every 3 years in blocks of flats under the Management of Health and Safety at Work Regulations 1999 or the Regulatory Reform (Fire Safety) Order 2005. The risk assessment survey described by the Respondent's Representatives, which the respondent intended to carry out, was a matter which should be included in the Management Fees. Therefore the Tribunal did not consider the charge of £272.00 (Applicant's share being £34.00) to be reasonable or payable.

Balconies

39. The Tribunal found that the Respondent was liable for repair and maintenance of the balconies under the Lease as the demise expressly excluded the railing surrounding the balcony and the main timbers and joists in the First Schedule. The Tribunal further agreed that the Respondent was entitled to charge for the cost of maintaining and repairing the balcony, as part of the Service Charge under Clause 1.7 and such repair and maintenance was a legitimate Service Charge cost under the Fifth Schedule. The Tribunal also found that so far as the documentation that had been presented to the Tribunal the consultation procedure pursuant to section 20 Landlord and Tenant Act 1985 had been correctly carried out. It was therefore determined that the estimated charge for the repair and maintenance of the balcony was reasonable and payable.

Conclusion

40. The Tribunal considered the comments by the Applicant following his receipt of the full accounts for the year ending 31st December 2004 and the draft accounts for the year ending 31st December 2005. He stated that the amounts for cleaning and electricity did not relate to him. From both the Service Charge Accounts on the front page it is clear that as a ground floor flat he only pays the Group 1 costs which exclude cleaning, electricity and internal decorate reserve as these only apply to the internal common parts. This list of costs in Note 3 of the accounts on the last page are for accountancy purposes only and list all the expenditure from both Group1 and 2 without allocation.

41. In addition the Applicant stated that he thought the inclusion of the external decoration distorted the accounts. The Tribunal found that these were full accounts recording all expenditure and income and therefore the inclusion of the external decoration is appropriate and correct. Although it may appear to be a separate charge that only occurs every 3 years to the tenants it is nevertheless a part of the Service Charge under the Lease.

Summary

42. The Tribunal noted the accounts for the year ending 31st December 2004 and the draft accounts for the year ending 31st December 2005 and found the estimates for which the Applicant had been invoiced which were the subject of the Application to be reasonable except in relation to the Risk Assessment for which the total charge was

£272.00 the Applicant's share being £34.00 this amount is determined not to be reasonable or payable.

Application under 20C Landlord and Tenant Act 1985

43. An application was made by the Applicant for the limitation of service charge arising from the landlord's costs of proceedings. The Applicant stated that he had repeatedly asked for a copy of an itemised account but had not received one. The Respondent's Representatives stated that a copy of the full account for the year ending 31st December 2004 had been sent to the Applicant's solicitor when the Property was purchased in 2005. The Respondent did not understand what the Applicant meant by an itemised statement when the invoice setting out the estimated charges had been sent. The Respondent further stated that a cost had been incurred in travelling expenses and time beyond normal management duties and therefore they looked to the Applicant to recover those costs. At the Hearing in an oral statement the Respondent's Representatives conceded that in the event they would not pursue a claim for their costs through the Service Charge even if the Lease allowed it.

44. The Tribunal make an Order under section 20C of the 1985 Act that the Respondent's costs in connection with these proceedings should not be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the Applicant for the following reasons:

- The Tribunal accepts the declaration by the Respondent's Representatives that a charge would not be made even if there is such a provision.
- The Tribunal found that the proceedings arose from a lack of communication that began with the Applicant's solicitor apparently not providing an adequate explanation of the terms and effect of the Lease generally and the obligations in respect of the Service Charge in particular. In addition it would appear that the Applicant was not given a copy of the full accounts for the year ending 31st December 2004.
- The tribunal also found that the Respondent relied too much upon the Welcome Pack. The proceedings might have been avoided if a copy of the accounts had been sent to the Applicant and explanation had been given at a meeting with the Applicant in addition to the correspondence.

J Rhys Morris

JR Morris Chairman

22nd July 2006