(2517)

Residential
Property
TRIBUNAL SERVICE

LONDON RENT ASSESSMENT PANEL
LEASHOLD VALUATION TRIBUNAL

LON/00BK/LIS/2006/0032

DECISION OF THE LEASEHOLD VALAUATION TRIBUNAL ON APPLICATIONS UNDER SECTION 27A and S20C of the LANDLORD AND TENANT ACT 1985.

Applicants:	**(1)**	**Mr J Nathan**	**(Flat 128)**
	(2)	**Ms L Farah**	**(Flat 167)**
	(3)	**Mr & Mrs S Idafar**	**(Flat 169)**
	(4)	**Mrs M Butler and Mr R Boyd**	**(Flat 184)**

Respondent:	**Bellnorth Limited**
Property:	**Dorset House, Gloucester Place London NW1**
Date of Application:	**9 March 2006**
Date of Hearing:	**27 June 2006**
Venue:	**10 Alfred Place, London WC1E 7LR**
Appearances for Applicants:	**Mr J Nathan** **Ms L Farah** **Mr & Mrs S Idafar** **Mrs M Butler** **Mr R Boyd**
Appearances for Respondent:	**Mr S Unsdorfer, Parkgate Aspen, Managing Agents**
Also in Attendance:	**Mr R Middleton, Observer**

Members of the Tribunal:	**Mr John Hewitt**	**Chairman**
	Mr Michael Mathews	**FRICS**
	Mrs Lianne Farrier	

Date of Decision: **31st August 2006**

Decision

1. The decision of the Tribunal is that:

1.1 The decision of the Respondent to draw down £750,000 from the Reserve in the 2003/4 accounts was not an unreasonable decision.

1.2 The management fees of £50,666 (incl VAT) for the years 2003/4 and 2004/5 were reasonably incurred, reasonable in amount for the level of service provided and are payable by the lessees.

1.3 No order shall be made on the Applicants' application made under s20C of the Landlord and Tenant Act 1985 (the Act).

1.4 The Applicants' application for an order that the Respondent reimburse them £500 in respect of fees paid by them in relation to these proceedings be refused.

2. The findings of the Tribunal and the reasons for its decision are set out below.

Background

3. The Applicants are some of the lessees of a substantial Grade II listed building known as Dorset House, Gloucester Place London NW1. The Respondent is the current landlord, having acquired its interest some two or three years ago.

4. Dorset House is a mixed-use development, built in the mid 1930s in art-deco style, and comprises some 196 self-contained flats laid out over 9 floors above commercial premises at basement and ground floor levels.

5. Water supply is not drawn from the mains but from artesian wells some 400 meters below ground. Water is first held in large tanks, filtered and then pumped to the roof of the building through a series of 'risers' before falling back down to basement level through a series of 'downers' during the course of which water is drawn off to individual flats for domestic use.

Hot water is provided for domestic use by means of a number of communal boilers. In general terms the M&E within Dorset House is complex to manage. It has suffered some years of neglect and a major overhaul of services is now required. Evidently in 1987 it was identified that much of the infrastructure within the building had come to the end of its useful life and would have to be renewed. The Respondent has put in place a programme to effect major works and it is planned to carry out these works over a number of years.

6. In September 2004 the Respondent made an application to a Leasehold Valuation Tribunal under s27A of the Act in relation to a proposal to replace hot and cold water pipes and the related system at an estimated cost of some £6m. The principal issue for that tribunal was the amount that it would be reasonable for the Respondent to allocate to the Reserve Fund for 2003/4 and subsequent years. That Tribunal issued its Decision on 12th April 2005 (Case Ref:LON/00BK/LSC/2004/0094). That tribunal concluded it would be sensible to build up a substantial sum in the Reserve Fund and that *'The ongoing costs could then be funded from future reserve fund contributions ... and from the general service charge account.'* [See para 31].

7. In essence the previous tribunal decided that reasonable sums to allocate to the Reserve Fund would be:

2003/4	£500,000
2004/5	£750,000
2005/6	£750,000
2006/7	£750,000

8. In essence there are two substantive issues before us raised by the Applicants are:-

   8.1 Whether it was reasonable for the Respondent, in the accounts for 2003/4, to draw down only £750,000 from the Reserve Fund by way of contribution to the £1.3m incurred on major works.

   8.2 Whether the management fees charged by Parkgate Aspen of £50,666 for each of the years 2003/4 and 2004/5 were reasonably incurred, reasonable in amount and payable by the lessees.

The Lease and the Law

9. The Tribunal was told that the residential leases were in common form. We were provided with a sample lease, that relating to flat 61. It is dated 21st January 1977 and was granted by Buckingham Properties Limited to Maria Magdalena Weissmann and granted a term of 125 years from 24th June 1975. By clause 2(2)(a) the lessee covenants with the lessor to pay and contribute a proportionate part (.5309%) of costs incurred by the lessor in:

(i) insuring the building,

(ii) any water rates assessed on the building,

(iii) the cost of maintaining and repairing the building, including the artesian wells, pumps and related equipment, the lifts and the entrances, stairways and common parts

(iv) fuel for the boilers

(v) maintaining the heating system

(vi) providing porterage

(vii) tending the communal gardens

(viii) rent, rates and taxes attributable to the porter's accommodation

(ix) costs attributable to the private telephone system

(x) cleaning the exterior of the windows

(xi) other services provided by the lessor for the comfort and convenience of the lessees

(xii) such sums as the lessor shall reasonably consider necessary from time to time to put to reserve to meet the future liability of carrying out major works to the building with the object as far as possible of ensuring that the contribution shall not fluctuate substantially in amount from time to time

(xiii) the fees of the lessor's managing agents for the collection of rents of the flats and for the general management thereof.

10. Clause 2(2) (b) provides that the amount of the contribution shall be ascertained and certified by the lessor's managing agents once a year in respect of the year to 29th September. There are provisions for half yearly sums to be paid on account on 29th September and 25th March in each service

charge year and for a year end balance to be struck when the certificate is issued.

11. The contribution payable pursuant to clause 2(2) of the lease is a service charge within the meaning of s18 of the Act.

S19 of the Acts limits the amount of services charges to sums reasonably incurred in respect of services provided or works carried out to a reasonable standard.

S20C of the Act entitles a tenant to make an application that costs incurred by a landlord in connection with proceedings before a leasehold valuation tribunal are not to be regarded as relevant costs recoverable by the landlord through the service charge account. The tribunal may make such order as it considers just and equitable in the circumstances.

S27A of the Act entitles a party to a lease to apply to a leasehold valuation tribunal for a determination of the amount of service charges payable.

The statutory provisions referred to above are set out in full in the Appendix to this Decision.

The Drawdown from the Reserve Fund

12. The Applicants case, argued clearly by Mr Nathan on behalf of the Applicants was that the full cost of the major works should have been drawn down from the reserve. Evidently the full cost was some £1.3m. He said it was not appropriate to draw down only £750,000. His principal reason was that lessees were obliged to pay a substantial sum by way of service charges in 2003/4 and the amount payable should be evened out, as much as possible as provided for in clause 2(2)(xii) of the leases. Mr Nathan contended that all non-annual expenditure should be drawn down from the Reserve Fund. This, he said, enabled lessees to budget and not suffer unusually high service charge bills. Evidently this was the practice of the previous landlord and one with which he agreed.

13. Mr Unsdorfer, for the Respondent, explained to us that in 2003/4 the cost of major (non-annual) works was £1,384,914. The decision was taken to draw down £750,000 from the Reserve Fund in part payment and to recover the

balance of £634,914 through the general service charge account. Mr Unsdorfer accepted that this was change in practice but one which he said was prudent. He said that some 25 years of neglect had to be made good. A substantial Reserve Fund was required to enable a fund to be built up so that the Respondent could with confidence plan works and place contracts knowing that funds were available to pay the bills as they came in. Mr Unsdorfer explained that the Respondent had to reassess the Reserve Fund and future expenditure on it. He said that by drawing down £750,000 it left a balance in the account of about £1m. This was modest against the need for major works to the pipe work and water systems estimated at some £6m over 2/3 years. To have drawn down a further £634, 914 would have left only some £365,000 in the Reserve Fund, a sum considered inadequate in the circumstances.

Mr Unsdorfer also submitted that the decision to build up a substantial reserve fund was endorsed by the previous tribunal Decision which also endorsed major works being funded partly from the Reserve Fund and partly from the general service charge account. He said that if the whole cost of major works in 2003/4 had been drawn from the Reserve Fund it would have been depleted and the previous tribunal Decision frustrated.

Findings and Reasons

14. There no issues of fact between the parties. The Respondent considered it reasonable to drawn down only £750,000 and the applicants considered that unreasonable.

15. We prefer the arguments submitted on behalf of the Respondent. In the circumstances of this building and the size and scale of major works now required to make good 25 years of neglect, we find it is not unreasonable for the Respondent to determine that a sizeable Reserve Fund should be built up. This involves two elements. First the sum to apply to the Reserve Fund each year. The previous tribunal gave guidance on this. Secondly the amount to draw from the Reserve Fund each year. Inevitably if £500,000 is paid in and £1.384m drawn down the balance in the fund will go down not up. In these circumstances we cannot fault the Respondent and we cannot find that the decision to draw down only £750,000 was an unreasonable one.

16. The Tribunal recognises that the Respondent has major task on its hands to manage a substantial works programme over the next three or four years. It will need to place contracts, involving quite large sums of money. It has to have confidence that funds will be available to meet bills. We sympathise with the lessees. Whilst they may have had the benefit of many years of relatively soft service charge bills it is now catch up time. Inevitably the service charge bills for the next few years will be higher than what lessees became used to. Also inevitably some lessees, especially those on modest fixed incomes will be in some difficulty in finding funds. In these circumstances we would encourage the Respondent and its agents and advisers to be open and clear on future intentions o the programme of works and the cost implications for lessees so that they might have the maximum notice of potential liabilities and time to arrange their affairs.

The Management Fees

17. In each of the years 2003/4 and 2004/5 the Respondent's managing agents, Parkgate Aspen, claimed fees of £43,120 plus VAT, a total of £50,666. The Applicants challenge the amount of the fees and say the sum claimed is not reasonable. They contend that Parkgate Aspen do not deserve more than £30,000 plus VAT. Mr Nathan submitted this was because of poor service. He highlighted a number of examples which included sending him a fee note for work to his flat which he had not authorised; he wanted a credit note and apology but got neither but the invoice was withdrawn, an issue as to VAT pre-2001, issues over alleged errors in service charge accounts in previous years and some delays in correcting some errors and some mismanagement of the building in respect of pipe work and asbestos issues. Mr Nathan summarised his complaints as sloppy accounting, inattention to correspondence and lack of openness and frankness.

18. Mr Unsdorfer told that his company, Parkgate Aspen, were appointed in 2002 and took over from Gross Fine. The building and the service charge accounts were complex to take on and a bedding in period was required. He said that management fees of £43,120 were based on a unit charge of £220 each. This

charge has been static over the last 5 years and compares well to the charge of £56,925 levied by Gross Fine in their last year of stewardship. Mr Unsdorfer explained that generally speaking Parkgate Aspen sought a unit fee of £250 per flat for central London but has maintained the fee at £220 due partly to economy of scale. He rejected the sweeping criticisms made by Mr Nathan and gave examples of communications, newsletters and of projects which he claimed was well managed. Mr Unsdorfer accepted that some errors were made and some correspondence did go out with some typing errors and he apologised for this but said errors were corrected and were due to clerical error and nothing more sinister.

19. Mr Nathan accepted none of what Mr Unsdorfer said he challenges everything Mr Unsdorfer says.

Findings and Reasons

20. Mr Nathan plainly pays great attention to the detail of the running of the building and the service charge accounts. Not unnaturally he gets irritated when things go wrong or documents contain errors which are not corrected promptly when pointed out by him. The fact is, we find, that we do not live in a perfect world and errors, including typing errors, do from time to time occur, even in the best of regulated organisations. As frustrating as this is we do not find that it generally is a sound reason for making a reduction in what might otherwise be a reasonable price for a service provided or work carried out. We do not consider that some form of penalty should applied errors occur from time to time, especially errors which are relatively minor in the scheme of things. We thus conclude that we do not need to make a finding on each individual complaint raised by Mr Nathan. We find that that rather we should look at the service provided in the round.

21. We have therefore looked at the overall level of service provided by Parkgate Aspen over the two years in question, 2003/4 and 2004/5 and the fees charged. We accept Mr Unsdorfer's evidence that the fees charged are lower than those charged previously by Gross Fine and that there has not been an increase in the unit charge since 2002.

22. We accept that some errors did occur from time to time. Indeed with a building as large and complex as Dorset House we would, in our experience, be surprised if this did not happen occasionally. We find that where appropriate accounting errors were corrected reasonably promptly and that errors were not due to any ill-intent or improper motive.

23. Mr Nathan did not have any particular basis on which to set his suggested fee of £30,000. This would have equated to a unit fee of £153. In our experience such a fee is unrealistically low for a building of the size, complexity and prestige as Dorset House. In our experience a unit cost of £220 is within the range of fees commonly charged for buildings such as Dorset House. In these circumstances we have no hesitation in finding that the fees of £50,666 claimed for each of the years 2003/4 and 2004/5 were reasonably incurred, are reasonable in amount and are payable by the Applicants as part of their service charges.

The S20C Application

24. The Applicants have made an application under s20C of the Act and seek an order that the costs of the Respondent in dealing with these proceedings should not be regarded as relevant costs to be taken into account in determining service charges payable by the Applicants. In effect that the Respondent should bear the costs incurred itself and not pass them through the service charge account.

25. Mr Unsdorfer told us that the Respondent's costs amounted to about £1,800 plus VAT and included some legal advice from a solicitor and his own time in preparing the case and attending the hearing. Mr Unsdorfer relied upon clause 2(2)(a)(xii) of the lease for the proposition that costs of collecting rent were service charges payable by lessees.

26. Mr Nathan submitted that the sum claimed should be disallowed completely. He complained of mismanagement in the accounts, failure to admit to mistakes and that the lessees have been put through years of misery and sometimes heating has been cut off. He submitted that the proceedings could

have been avoided if the Respondent or its agents had given the correct answers to his questions. He says the Applicants were forced to come to the Tribunal to get redress. He said that he had written letters to try and get matters resolved. Mr Nathan suggested that each party should pay their own costs.

27. In arriving at our decision we have to have regard to what is just and equitable in the circumstances. We prefer the submissions made on behalf of the Respondent. In essence we find that the substantive case for the Applicants is without merit and they have lost their case.

28. We find that the Respondent was required to come to the Tribunal to explain its position. It did so reasonably and in a proportionate way by asking Mr Unsdorfer to attend the hearing. It seems to us unjust if the Respondent was not able to recover the reasonable costs. It is not for us, on this application, to take a view on the amount of costs claimed, namely £1800 plus VAT, but it seems to us that the sum claimed is modest in all of the circumstances.

29. For the above reasons we decline to make an order under s20C as requested by the Applicants.

Reimbursement of Fees

30. The Applicants seek reimbursement of fees of £500 paid by them in connection with these proceedings. Mr Nathan did not press the application too hard. His overall position was that each side should pay its own costs and as a matter of goodwill the Applicants would bear the £500 fees paid.

31. Mr Unsdorfer opposed the application. He said that he had tried to resolve matters after the pre-trial review but Mr Nathan was not receptive. He suggested that Mt Nathan was adamant he wanted the opportunity to air his views and that nothing was going to stop him. He asserted an abuse of the process.

32. We refuse the application for reimbursement of fees. We prefer the submissions made by Mr Unsdorfer. For much the same reasons as given above in connection with the s20C application we find that the application and the case for the Applicants was without merit and that it would be unjust and inequitable to require the Respondent to reimburse fees freely incurred by the Applicants on an application devoid of merit.

John Hewitt
Chairman
31st August 2006

The Appendix

Statutory Requirements

Landlord and Tenant Act 1985

Section 18: **Meaning of 'service charge' and 'relevant costs'**

'(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: **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.

Section 20C: **Limitation of service charges: costs of proceedings**

'(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 or leasehold valuation tribunal, or in connection with arbitration proceedings, are not to 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) The application shall be made:-

(a) in the case of court proceedings, to the court before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to a county court;

(b) in the case of proceedings before a leasehold valuation tribunal, to the tribunal before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to any leasehold valuation tribunal;

(c) in the case of proceedings before the Lands Tribunal, to the tribunal;

(d) in the case of arbitration proceedings, to the arbitral tribunal or, if the application is made after the proceedings are concluded, to a county court.

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

Section 27A: **Liability to pay service charges: jurisdiction**

'(1) Where an amount is alleged to be payable by way of service charge, an application may be made to a leasehold valuation tribunal for a determination whether or not any amount is so 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 on 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 paid the whole or any part of an amount alleged to be payable by way of service charge.

(6) ...

(7) ...'