2925

RESIDENTIAL PROPERTY TRIBUNAL SERVICE

LEASEHOLD VALUATION TRIBUNAL

Case number : CAM/22UG/LIS/2006/0014

Property		:	**28–35 Kingfisher Close, Colchester, Essex CO4 3FY**
Application		1	For determination of liability to pay service charges for the years 1999–2005 [LTA 1985, s.27A]
		2	For determination of the amount of accrued uncommitted service charges to be paid by the landlord/managing agents to the RTM Company [CLRA 2002, s.94]
		3	For disregard of landlord's costs as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant [LTA 1985, s.20C]
Applicants	1	28	Colin Cooper, Schiessgartenstr. 3, D-64839 Münster, Germany
		29	Judie Marie & Simon Noel Bowie-Britten, Woodlands, 9b Great Oaks, Hutton, Brentwood, Essex CM13 1AZ
		31	Michael Roy Wood, 31 Kingfisher Close
		32	Leon Stacey Jennings, 383 Quayside, Hythe, Colchester CO2 8GT
		33	Sophie Monique Cariou Lordon, 23 rue de la Celle, F-78150 Le Chesnay, France
		34	Nichola Lorraine McIntosh, 34 Kingfisher Close
		35	Leon Stacey Jennings, as above
		33	*Denise Porteous, 80 Bignell Croft, Colchester CO4 9TY 10.iii.07*
		32/35	*Fiona Sutton, of Newholme, Halstead Rd, Aldham, Colchester CO6 3PP 26.iii.07*
	2		28–35 Kingfisher CO4 RTM Company Ltd (Co. No. 05439147), r/o Woodlands, 9b Great Oaks, Hutton, Brentwood, Essex CM13 1AZ
represented by		:	Colin Cooper, Simon Bowie-Britten, Mike Wood
Respondents		a.	Lakeside Developments Ltd (Co. No. 01446485), c/o Westbury, 2nd floor, 145–157 St John Street, London EC1V 4PY
		b.	Vincent Whitefoord, of the same address
represented by		:	Martin Comport, solicitor, Dale & Dale, 3 Threshers Yard, West Street, Kingham, Oxon OX7 6YF

DECISION

(Handed down 2nd May 2007)

Hearing date : 26th March 2007 at the Wivenhoe House Hotel, Colchester

Tribunal : G K Sinclair, E A Pennington FRICS, R S Rehahn

Decision

1. For the reasons which follow the tribunal determines that :
   a. The cost of gutter repairs, appearing in an invoice dated 30th September 2002
   b. The insurance valuation fee
   c. The cost of the emergency repairs service claimed as part of the insurance policy (conceded by the Applicants during the course of the hearing), and
   d. The insurance premiums paid for the buildings insurance policies in force

   are all recoverable by the freeholder under the terms of the relevant leases.

2. Upon the Respondent expressly conceding the same at the start of the hearing, the tribunal determines that the amounts paid by the Applicant leaseholders (or any of them) on or after 1st December 2000 or claimed by the Respondent freeholder or its then managing agents to be payable in respect of :
   a. The managing agents fees
   b. The accountants' fees, and
   c. All administration/recovery charges claimed by BLR

   are not payable by the Applicants.

3. On the second application (by the RTM company) the tribunal determines that :
   a. All amounts deducted by BLR as management fees during the service charge year in question
   b. The alleged arrears of service charge payable by Mr Cooper
   c. The sum of £627.87 deducted from the service charge account and wrongly paid by BLR directly to Lynda Gwendoline Guglielmi (otherwise McFaull), the lessee of 30 Kingfisher Close, instead of to the RTM company

   are to be treated as accrued uncommitted service charges to be paid by the landlord to the RTM company forthwith. Any arrears recoverable from individual lessees should be sought from them directly, not by way of deduction from sums due to the RTM company.

4. The Respondent having conceded that the lease does not provide for the recovery by the freeholder of any legal costs as part of the service charge, the tribunal need make no determination on the applications under section 20C of the 1985 Act.

5. However, it does order that the application and hearing fees[1] paid by the Applicants be reimbursed in full by the Respondent together with their costs, assessed in the sum of £100 for actual and reasonable disbursements,[2] on the grounds that the Applicants had to bring these proceedings mainly because of the Respondent's unreasonable attitude in not responding to their legitimate concerns and then, until Mr Comport's advice was obtained, raising spurious defences seeking to justify their stance on every issue raised by the Applicants.[3]

Background

6. This small block of eight purpose-built flats was constructed in about 1983. Initially the managing agents were David Glass Associates, and then Basicland Registrars Ltd. The leaseholders complained that no work was carried out, yet service charge demands were issued for sums which they considered unjustifiable. A particular cause for complaint was the size of the insurance premium. Upon studying the lease, Mr Cooper argued that it made no provision for the recovery of any management fees. BLR appears to have agreed, as it rapidly decided to cease acting and invited the leaseholders to do the job themselves. The leaseholders resolved to assume the responsibility of management and set up their own RTM company for that purpose. However, before handing over to the new RTM company the accrued uncommitted service charges for the year in question, BLR purported to deduct alleged arrears (including supposed legal charges levied against Mr Cooper) and that proportion of the unspent service charge contribution paid by the leaseholder of the flat numbered 30 Kingfisher Close. This BLR repaid to her direct, even though she retained the obligation under her lease to pay service charge contributions in advance.

Relevant lease provisions

7. The lease provisions concerning buildings insurance are fairly straightforward, enabling the landlord to insure against loss or damage by fire and such other risks as he thinks fit with an insurance office or underwriters of repute and then to collect the premiums from the leaseholders by way of additional rent. Where it deals with repair and maintenance of the building, however, the lease adopts an unusual approach. Instead of requiring the landlord to carry out structural repairs and the tenants to pay their fair share towards the annual service charge account the leases for the flats in this building impose mutual covenants on each tenant with themselves and with the landlord, in clause 3(4) requiring him or her also to "contribute and pay to such one or more of the covenantees as shall incur the costs and expenses" of cleaning, repairs, etc to the common parts a one eighth share. The obligation is to contribute financially; not actually to do the work.

8. There is no provision entitling any managing agent appointed by the landlord to recover payment for any tasks carried out in connection with the building. As no service charge may be levied under the lease then neither can the costs of employing an accountant to

1 Leasehold Valuation Tribunal (England)(Fees) Regulations 2003, reg 9

2 The Litigants in Person (Costs and Expenses) Act 1975, which enables unrepresented parties to charge a reasonable amount for time spent in preparation for and conduct of a hearing, does not apply to the Leasehold Valuation Tribunal

3 Commonhold and Leasehold Reform Act 2002, Sch 12, para 10

certify what is due, even though with this number of tenants the certification of service charge accounts by an accountant independent of landlord and managing agents would be a statutory requirement.

Applicable law

9. The tribunal's powers to determine whether an amount by way of service charges is payable and, if so, by whom, to whom, how much, when and the manner of payment are set out in section 27A of the Landlord and Tenant Act 1985.[4] Please note sub-sections (5) & (6), which provide that a tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment, and that an agreement by the tenant of a dwelling (other than a post-dispute arbitration agreement)[5] is void in so far as it purports to provide for a determination in a particular manner or on particular evidence of any question which may be the subject of an application to the Tribunal under section 27A.

10. The overall amount payable as a service charge continues to be governed by section 19, which limits relevant costs :
    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.

11. Insofar as the second application (by the RTM company) is concerned, section 94 of the Commonhold and Leasehold Reform Act 2002 provides :

    (1) Where the right to manage premises is to be acquired by a RTM company, a person who is –
        (a) landlord under a lease of the whole or any part of the premises,
        (b) party to such a lease otherwise than as landlord or tenant, or
        (c) a manager appointed under Part 2 of the 1987 Act to act in relation to the premises, or any premises containing or contained in the premises,

    must make to the company a payment equal to the amount of any accrued uncommitted service charges held by him on the acquisition date.

    (2) The amount of any accrued uncommitted service charges is the aggregate of –
        (a) any sums which have been paid to the person by way of service charges in respect of the premises, and
        (b) any investments which represent such sums (and any income which has accrued on them),

    less so much (if any) of that amount as is required to meet the costs incurred before the acquisition date in connection with the matters for which the service charges were payable.

    (3) He or the RTM company may make an application to a leasehold valuation tribunal to determine the amount of any payment which falls to be made under this section.

    (4) The duty imposed by this section must be complied with on the acquisition date

4 As introduced by the Commonhold and Leasehold Reform Act 2002, section 155(1)

5 Eg. provisions in a lease stating that the landlord's accountant's certificate shall be conclusive, or that any dispute shall be referred to arbitration

or as soon after that date as is reasonably practicable.

Inspection and evidence

12. Accompanied by Mr Cooper and Mr Bowie-Britten, but not by any representative of the landlord, the tribunal inspected the entrance, stairwell and exterior of the building at 10:00 on the morning of the hearing. At the time the weather was warm, dry and sunny. The building was constructed in about 1983 of brick, with timber single-glazed windows and an interlocking tile roof. A two-storey detached building, it comprises four flats on each floor arranged around a common entrance or landing. The communal electricity supply powers one light in the entrance hall, but each flat also has its own exterior light near its own front door, controlled from inside the flat. Residents expecting to return home after dark may then leave on their own light illuminating the entrance, in case the communal one is not working. The walls to the entrance and landing, in which may be found the utility meters for each flat, are painted plaster. Ceilings are textured, but not of an age suggesting the likely presence of any asbestos. Nevertheless, this is a matter upon which the RTM company must satisfy itself. Outside the front entrance an insecure section of plastic gutter was observed. This was part of the guttering featuring in one of the disputed invoices.

13. Externally, to the front is a tarmacadam car park with brick boundary walls. A number of formed concrete capstones showed evidence of recent repair, apparently by the RTM company. The tarmac surface, however, shows signs of crazing and will require repair in order to protect cracks from being opened up by frost and ice. Around the walls of the building runs a narrow path which also shows signs of cracking. The boundary to the freehold title is both unmarked and indistinct, with the surrounding area, part owned by the council or other third parties, all laid to grass. Two car parking spaces to the rear of the building may belong with it, but the leaseholders present were unsure.

14. The hearing commenced at 11:15. The first point to be dealt with was an application dated 25th March 2007 by Fiona Sutton, of Newholme, Halstead Rd, Aldham, Colchester CO6 3PP, to join in as an additional Applicant. Her standing to do so was founded upon her leasehold ownership of Flat 32 (until March 2004) and flat 35 (until February 2002). Subject to no additional points in dispute or fresh evidence being advanced on her behalf, and to proof being provided as soon as possible after the hearing to confirm her above interest in these flats, then permission was granted.[6]

15. With a view to shortening the hearing and focussing minds only on those matters still in dispute, Mr Comport (on behalf of the freeholder) opened by conceding – subject to a limitation point – the managing agents' and accountants' fees, plus all administration or recovery charges deducted by BLR, totalling £393.75. As the amounts properly due are due as rent then no section 146 notice costs are recoverable. The only outstanding issues were, he submitted : the General Works invoice for guttering (£152.75), the cost of the emergency repairs service (claimed as part of the insurance premium), a property valuation fee, and the size of the annual insurance premiums. He also conceded another

6 Since the hearing copy correspondence from this Applicant's solicitors has been provided. This confirms that she purchased flat 32 on 29th February 1996 and sold it on 17th March 2004. Flat 35 was bought by her on 25th June 1990 and sold on 1st February 2002.

£200 invoice which BLR had misapplied to this property instead of to another Kingfisher Court owned by the same freeholder in Kent. Insofar as the application under section 20C was concerned, as there was no basis for recovery of such costs under the lease the application was of academic interest only.

16. Mr Cooper challenged the cost of the gutter repairs. The RTM company had been able to have the gutters inspected at much lower cost. He conceded, however, that repairs were likely to be more expensive than a mere inspection..

17. The cost of an insurance-backed emergency call-out service was initially contested. The freeholder countered that this was a regular feature of buildings insurance policies and was of great use, as the majority of claims arose from leakage of water. After a brief discussion on the merits, and as the amount at stake was relatively trivial, Mr Cooper abandoned this point to concentrate on larger matters.

18. The undertaking of a property valuation was not something which, in principle, he would regard as unreasonable, although he was concerned that it had been conducted (perhaps for an inflated fee) by Simmonds & Partners, which he believed was a sister company of the then agents, DGA. By contrast, Mr Cooper sought to rely for valuation purposes upon a copy of the BCIS guidelines which he had been able to download from the internet. As a result of its valuation the freeholder had reduced the rebuild cost and consequently the insurance premiums in succeeding years were lower than might otherwise have been the case. However laudable this might be, Mr Cooper queried under which provision in the lease this expense could be recovered.

19. Apart from the management fees and charges, the repayment of which had largely been conceded, the major item in dispute was the cost of the insurance premiums. Mr Cooper had gone to two separate brokers and, although he was unable to provide them with a claims history, he obtained insurance quotes for the building. The cost differential was quite staggering, he said. The quotes he had received were for £1,087.41 including IPT and £1,252.46. By contrast, the premium that the leaseholders were charged was £2,771.73 including IPT. Excluding terrorism cover and an emergency repairs service that produced a difference of 155% between the actual cost and Mr Cooper's lower quote, viz a sum of £1,684.32..

20. Mr Cooper's next point was that he had written to the managing agents on two occasions in 2004 because he was unhappy with the level of premiums and asked for an explanation why they were so high. He also asked whether they could achieve any reduction and, if not, why not? One letter included the quotes which he had been able opt obtain, but neither was ever replied to. He therefore felt obliged to bring the matter to the tribunal.

21. In response Mr Comport relied upon the evidence of the freeholder's insurance broker, Mr Carlo Marelli, a director of Towergate GHBC. He explained that this landlord's estate is around 1000 units, mainly residential (95%), ie flats above shops, etc. All the policies are the same. He stated that when acting for a freeholder he regarded is duty as to protect its interest. He would want to ensure the widest possible cover for all the properties in the estate, to include subsidence, occupancy, the availability of contract works cover (ie works being carried out to a building without the landlord's knowledge),

and that unoccupancy conditions were reasonable. He said that most policies for flats or private dwellings will allow for families or for professional lets. If the lettings are of another nature, eg DSS, asylum seekers, etc then no cover would be afforded and claims would be repudiated.

22. His evidence can be summarised thus :

a. *Subsidence*. Virtually all policies will have a pre-existing subsidence exclusion. If broking 1000 units and 2 or 3 have subsidence you are jeopardising those other claims. Our policy allows for that. We have another claim where it is going to cost our client £75,000 because there was no cover, is it is a very real threat.

b. *Availability of contract works*. People will do works to their properties without notification. Most policies will exclude everything except minor works. Many claims (eg for fires, etc) arise from unauthorised works.

c. *Unoccupancy*. Most policies will exclude cover when a property is not occupied. The Norwich Union policy does that. That is something our freeholder could not accept. We have no such restriction on the current landlord's policy. We have arranged an overriding clause which changes the terms and conditions.

d. *Claims*. Since 2002 there have been three claims for this building : an average record. The vast majority of claims are for escape of water and break-ins.

e. *Remuneration*. His company was instructed by the landlord and the contractual arrangement is between those parties alone. He confirmed that he earned his money from the commission but that, as an approved person under the FSA, the size of commission did not (and was not allowed to) influence his choice of which insurer to recommend.

23. In submissions on the first application Mr Comport argued that, insofar as sums had already been paid as service charge, they could only be recovered as far back as six years from the date of the application, as the sums reclaimed were recoverable under statute[7] rather than being claimed under the lease as a specialty[8].

24. On the issue of the landlord's choice of insurer he relied not only upon the evidence of Mr Marelli but also on the well-known authority of *Berrycroft Management Co Ltd and others v Sinclair Gardens Investments (Kensington) Ltd*[9], at pages 48F, 49A, and 51A.

25. On the second application Mr Comport considered himself unable intellectually to justify the managing agents' deduction from the sums remitted to the RTM company as accrued uncommitted service charges that proportion deemed to be the contribution to the total made by the leaseholder of flat 30. Instead that money was paid direct to her, even though her obligation to pay that contribution towards her service charge to her landlord had already fallen due and, since it had assumed responsibility for management, such liability was now due to the RTM company.

7 Limitation Act 1980, s.9

8 See s.8, which provides a 12 year limitation period

9 [1997] 1 EGLR 47

Discussion and findings

26. The tribunal is satisfied that the cost of gutter repairs is both reasonable and payable by the leaseholders.

27. On the subject of recovery of the fee for the insurance valuation the tribunal is satisfied that this is an aspect of the freeholder's obligation to insure and falls within the definition in clause 1 : "expend in effecting and maintaining the insurance". It is allowed.

28. The cost of insurance is always frustrating for leaseholders in a relatively good building who are seemingly expected to subsidise those with a worse claims history. However, the law is quite clear, and a landlord of a portfolio of properties is entitled to simplify his administration by maintaining a single block policy with the same renewal date and terms of cover. Knowing that this was an issue regularly raised before the Leasehold Valuation Tribunal Mr Marelli was anxious to use this opportunity to explain in detail why, acting for a landlord, it was in his interests to secure cover which a leaseholder, going to the market alone, would not consider necessary. This additional cover comes at a cost. As Mr Marelli acknowledged, however, an RTM company taking over management of (and the duty to insure) a single building has no such concerns. It can look for the best cover to suit the needs of its own leaseholders and will have greater hands-on knowledge of any unapproved building works, periods of unoccupancy, etc. At Kingfisher Close this alleged problem should not now recur.

29. The tribunal agrees with Mr Comport on the issue of limitation. Sums already paid by leaseholders by way of service charge prior to 30th November 2000 are recoverable. After that date, sums wrongfully deducted by the then managing agents are recoverable from the freeholder only by those who have been accepted as Applicants within these proceedings, and then only in respect of periods when they were actually leaseholders of relevant flats.

30. Insofar as the second application is concerned, the tribunal appreciates Mr Comport's speedy concession that charges for alleged arrears should not have been deducted and are therefore remittable to the RTM company by the freeholder. It also records with thanks his very professional response to Mr Cooper's bewilderment about whether the moneys wrongly paid to the leaseholder of flat 30 were recoverable. The tribunal is satisfied that no amount of accrued service charge should have been repaid to individual leaseholders, and this sum is properly due to the RTM company. Whether, as between the freeholder and the wrongful recipient, this money is recoverable by it as a payment by mistake is not a matter which falls within the tribunal's jurisdiction.

31. On the subject of tribunal fees payable by the Applicants the tribunal accepts that the concession made by Mr Comport was rightly made. Those fees shall be repayable by the freeholder to the Applicants.

32. The remaining issue is whether to award costs in favour of the Applicant, which is limited to actual disbursements to a maximum of £500. This can only be done if the tribunal is satisfied that a party has acted frivolously, vexatiously, abusively, disruptively or otherwise unreasonably in connection with the proceedings.

33. Although the tribunal accepts Mr Comport's point that the issue of insurance was likely to prove a serious bone of contention, it considers that if issues properly conceded on the day had been conceded much earlier, and the matters explained by Mr Marelli had been disclosed when originally asked, then the pragmatic approach adopted by both parties on the day is likely to have resolved matters without the need for a hearing, and for Mr Cooper to incur the costs (and irrecoverable time) of travelling from Germany to attend on the day. Instead, Mr Glass sought foolishly to justify every single point which was under challenge, giving not a hint of any the concessions made on the day. This was unreasonable, and arguably vexatious. Doing the best it can on the basis of Mr Cooper's explanations of his expenditure, the tribunal is prepared to assess the Applicants' disbursements at a total of £100. This shall be paid by the freeholder.

Dated 2nd May 2007

Graham Sinclair – Chairman
for the Leasehold Valuation Tribunal