CHI-21UN-LSC-2006-0059

THE RESIDENTIAL PROPERTY TRIBUNAL SERVICE

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

FLAT 5, BEAUCROFT MANSIONS, 16 CANTERBURY ROAD, WESTBROOK, MARGATE, KENT CT9 5BP

Applicants:	Ms H Bird (Flat 5) Mr M Wilson (Flat 8)
Respondent:	Waterglen Ltd (freeholder)
Date of hearing:	28 November 2006 and 20 February 2007
Date of inspection:	28 November 2006
Attendances:	The first applicant in person (28 November only) The second applicant in person Mr Kilbane (solicitor of Juliet Bellis & Co) and Mr G Malloy BSc (Hons) FRICS FBEng for the respondent

Members of the Leasehold Valuation Tribunal:

Mr MA Loveday BA(Hons) MCIArb
Ms HC Bowers MRICS
Ms L Farrier

INTRODUCTION

1. These are applications for determinations in respect of service charges and administration charges for a block of flats in Margate. The first applicant is the leasehold owner of flat 5, Beaucroft Mansions 16 Canterbury Road Westbrook Margate. The respondent is the freehold owner. The applications dated 28 June 2006 and 13th July 2006 are for:

   (a) A determination of reasonableness and/or liability to pay service charges under Section 27A of the Landlord and Tenant Act 1985 (the Act").

   (b) Limitation of the landlord's costs in the proceedings under Section 20C of the Act.

   (c) A determination under paragraph 2 of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 in relation to liability to pay an administration charge.

   The issues in dispute relate to charges for the years 2004, 2005 and 2006. A pre-trial review took place on 23 August 2006 when the second applicant (who is the leasehold owner of flat 8 and secretary of the tenants' association) was joined to the application. A hearing took place on 28 November 2006 but it was necessary to adjourn part heard to 20 February 2007. The first applicant did not attend that hearing, but submitted written representations. After the hearing, the respondent submitted a written response to the first applicant's submissions dated 4 April 2007. The Tribunal has elsewhere explained the unfortunate sequence of events which has occurred since the hearing and no criticism can be made of any of the parties for the long delay in producing this written determination.

2. The Tribunal inspected the property before the hearing on 28 November. The block is located on a busy main road close to the sea front. Beaucroft Mansions is a purpose-built Victorian mansion block on 3 stories and lower ground level. The roof has tiled pitches to front and rear with a large flat roof between. The woodwork to the front elevation required painting and the front steps were cracked. To the rear is a somewhat unkempt garden and the rear elevation was in rather poorer condition than

the front. Internally, the common parts varied from fair to poor decorative condition. On the top floor landing were signs of historic water ingress with large area of detached plaster and paper.

3. The second applicant's lease is dated 22 October 1990 and the first applicant's lease is in similar form. By clause 4(b) and the fifth schedule the lessee must pay a service charge representing 9.56% of the landlord's expenditure on the building and 13.51% of its expenditure on the common parts serving floats 1-8. Flat 5 must pay 10.01% and 14.14% of these respective costs.

4. At the hearing, a number of items of cost were agreed. In particular, the second applicant withdrew allegations that the respondent had failed to comply with the consultation requirements of s.20 of the Landlord and Tenant Act 1985, that interim charges for major works were not payable and that certain repair costs and surveyors' fees incurred in 2005 were not recoverable. No suggestion was made that any costs were not recoverable under the terms of the leases. The remaining issues are dealt with below.

WORKS TO THE FLAT ROOF

5. The second applicant challenged the anticipated cost of major works to the flat roof to the property as being excessive. The landlord's proposals are set out in a Schedule of Works dated 17 August 2006. The successful tender for these works submitted by Warner Construction Ltd had been analysed at £25,989.10 plus VAT.

6. The Tribunal considers that the challenge falls within section 27A(3) and of the Landlord and Tenant Act 1985; namely whether, if such costs were incurred for repairs etc, they would be payable. The second applicant's main argument on this was that those relevant costs would not be payable because they would not be reasonably incurred under s.19(1) of the Act. The Tribunal invited the parties to reflect on this at the outset of the hearing, since the actual cost of works may not be the same as the costs in the tender documentation. At least some aspects of the same costs could

be subject to another application under s.27A(1) of the Act once the works are completed. Both parties invited the Tribunal to make a determination in any event (albeit that the respondent's solicitor submitted that the application was somewhat premature and the section 20 consultation procedure was not yet complete).

7. The second applicant did not dispute that the flat roof needed repairs. However, he submitted that it would be reasonable to incur a cost of no more than £9,900. He stated he had raised the question of the decayed roof with the managing agents on 8 April 2004. Nothing was done, and there was severe water ingress in May 2005. On 22 June 2004 the second applicant obtained an estimate to repair the roof from JDP Roofing for £5,500 and he sent this to the agents. The landlord employed Southern Roofing Co Ltd to carry out patch repairs. On 22 June 2004 the second applicant obtained another estimate from Southern Roofing to complete the repairs for £3,750. However, he relied on an estimate from Anderson Roofing dated 28 July 2006 for £9,900. The second applicant submitted that the cost in the Schedule of Works was excessive because it was over three times that given by Anderson Roofing. He accepted that the Schedule of Works provided for other matters such as scaffolding security (costed at £3,500) but these were not necessary. It would have been cheaper to have employed a night watchman. He particularly objected to the landlord's specification providing for a Garland Roofing system to be employed. This narrowed down the range of options to replace the roof coverings and made them more expensive. In reply to questions from the respondent's solicitor he stated that Anderson roofing had tendered for the works but had been unable to obtain accreditation from Garland Roofing systems in time. In closing, the second applicant submitted that the works were unnecessary as a result of the landlord's default in recent years. Had the roof been repaired earlier the bill would have been much less. He accepted this argument had not been flagged up in the statements of case.

8. The respondent relied on evidence of Mr Gerard Malloy of the building surveyors Building Consultancy Bureau Ltd ("BCB"). He had 25 years experience and a degree in building surveying.

9. Mr Malloy had drawn up the specification of works for the flat roof. He had specified a Garland Roofing system because Garland was a good brand. He accepted there were cheaper and lower specification products available but these would require replacement more frequently. He had used this product before and knew that Garland offered a 20 year guarantee and that the felt coverings would last at least 15 years. The cost of installation would be the same, whichever brand of felt was used. The specification included a scaffold alarm and security lighting because there were concerns about the site being vulnerable on a main road. The specification was sent to six contractors and tenders were received from three. Most were on BCB's tender panel. Anderson Roofing was invited but on 31 August 2006 confirmed that it would not submit a tender. There was a note on file to say that Anderson Roofing considered they were too small and not really equipped to do the job. Mr Malloy prepared a written tender analysis dated 8 November 2006. He adopted the cheapest tender which came from the Garland approved firm of Warner Contracting Ltd. He had worked with Warners for 15 years and knew them to be a competent business with contracts for large entities such as BT.

10. In ***Forcelux v Sweetman*** [2001] 2 EGLR 173 and ***Veena SA v Cheong*** [2003] 1 EGLR 175, a two stage process for determining s.19 issues was developed. Whether a cost is "*reasonably incurred*" primarily involves consideration of the landlord's decision making process. However, if that process is considered to be a reasonable one, the Tribunal must then consider whether the costs are so out of line with the market norm so as not to be reasonable.

11. On issue of works to the flat roof, the Tribunal is satisfied that relevant cost of £25,989.10 plus VAT (£30,537.19) as set out in the Schedule of Works dated 17 August 2006 would be reasonably incurred and payable.

There is no dispute that these works are necessary. The Tribunal found Mr Malloy to be an experienced professional and a good witness. He drew up a specification and the works have been subjected to a proper tender process and analysis. The second applicant's nominated contractor was invited to tender and declined to do so. The process adopted by the landlord cannot be faulted. As to whether the sum is so out of line with the market norm, the other tenders were not significantly higher than the estimate given by Warner Contracting. It was not unreasonable to specify Garland roofing systems since this was the advice of a competent and experienced professional. There is always a trade off between the cost of roof coverings and the quality, and it is not unreasonable for the landlord to rely on independent professional advice in this respect. The alterative estimate by Anderson Roofing is plainly not comparable and does not cover the same works specified by Mr Malloy. Anderson Roofing was invited to tender at the time but declined to do. The Tribunal does not consider the proposed cost of scaffold security and lighting to be unreasonable; the inspection showed this to be a prominent site on a main road vulnerable to 'opportunity' crime. The suggestion that a night watchman could be employed at lower cost is not practicable given the need to provide 24 hour cover and accommodation on site in what is a residential property. The Tribunal rejects the second applicant's argument that neglect by the landlord exacerbated the damage to the roof and rendered the eventual bill for repairs unreasonable. Such an argument would require proper evidence and it was not specifically raised in the statements of case.

INTERNAL/EXTERNAL DECORATION

12. The main item in issue was the cost of internal and external decoration. The landlord's proposals are set out in a Schedule of Works dated 18 August 2006. The successful tender from Sandells Maintenance Ltd had been analysed as £52,866.65 plus VAT. Again, the works have not yet been carried out and the challenge falls within sections 27A(3)(c) and 19(1)(a) of the Landlord and Tenant Act 1985.

13. The second applicant is a residential landlord who owns the freeholds of other properties. He has 30 years experience of working with Victorian Buildings and runs a contracting firm called Chargeguard Ltd. The second applicant accepted that the flat roof needed to be completely re-covered. Although he originally sought to rely on arguments that the landlord had not complied with s.20 Landlord and Tenant Act 1985, this complaint was withdrawn at the hearing. Generally, the second applicant submitted that the works should not be let as a single contract since this prevented cheaper local contractors from bidding for parts of the project. When cross examined, the he accepted that Chargeguard had been included in the tender list for the external and internal works but had declined to submit a tender. At the time, he had not looked at the specification but had spoken to BCB and he had decided the conditions for inclusion on the list of BCB's approved contractors were too onerous.

14. The second applicant made a number of detailed criticisms of the specification and the individual items in the tender analysis. These can be summarised as follows:

(a) Subcontractors. Paragraph 1.23 of the specification required no part of the contract could be sublet. This meant that no contractor could use subcontractors, thus increasing the price.

(b) Preliminaries. The cost of £5,460 plus VAT for these was excessive.

(c) Pitched roofs. The cost of £990 plus VAT for repairs to the pitched roofs included replacement of loose and missing tiles to the rear pitch. There were no loose or missing tiles. The cost of rendering the upper bays also seemed excessive. Chargeguard would have charged about £170 for each bay.

(d) Rainwater goods. The cost of £804 plus VAT for rainwater goods seemed odd. Another contractor had estimated these costs to be over £5,000; suggesting that Sandells was not quoting for the full amount of these works.

(e) Door locks. £135 plus VAT for external door locks was excessive. These had already been replaced.

(f) Clearing up. The cost of £303 plus VAT for removal of debris from the rear of the building and removal of loose cables was excessive. There was no debris to the rear.

(g) External joinery. The cost for repairs to external woodwork painting with Dulux undercoat and gloss finish was given as £2,505 plus VAT. This was a lot of money, and Dulux was too expensive.

(h) Doors. £3,480 plus VAT had been provided for the installation of 6 fire safety doors and £750 plus VAT allowed as a provisional cost sum for works to the door frame. These were too expensive.

(i) Meter cupboard. The cost of £957 plus VAT for works to the meter cupboard was excessive.

(j) Soffits. Sandells gave a cost for internal stair soffits at £3,123 plus VAT. Other contractors had priced this as £285 plus VAT.

(k) Joinery. £204 for one spindle seemed excessive.

(l) Glass. A provisional cost sum of £150 was allowed for safety film to be applied to all glass. This was unnecessary. All clear glass was already laminated.

(m) Decoration. The tender analysis allowed a sum of £2,340 plus VAT for decorating the internal ceilings and £2,955 for the walls. In fact, these areas were limited.

(n) Joinery. The cost of £1,920 plus VAT for joinery. Chargeguard would have done this work for £250.

(o) Floor coverings. The existing floor coverings to the common parts were largely vinyl. The original specification suggested that the common parts should be carpeted. Sandells initially estimated this cost at £1,884 plus VAT together with £372 plus VAT for underlay and gripper rods. There was a tender variation which sought a price for simply replacing the existing vinyl and nosings. Sandells estimated this would cost an additional £1,448 plus VAT and this figure was included in the tender analysis. The second applicant suggested that carpets would have been adequate.

(p) Stonework. The specification provided for a specialist to clean and polish all stonework to the common parts. The tender analysis gave a figure of £630 plus VAT for this. The second applicant submitted that all that was required was cleaning with proprietary cleaner.

(q) Fire precautions. (included in (h) above). A provisional sum of £7,518. These were too expensive. Furthermore, any such works should only be carried out in conjunction with Thanet DC and the local fire officer.

15. The second applicant submitted that Mr Malloy was a competent building surveyor but one had to ask oneself why his estimates were so big. He proposed a Rolls Royce job on a Ford Escort. It was not in his interest to reduce the cost of works since he was paid on a percentage basis.

16. The respondent relied on evidence from Mr Malloy who had prepared the specification of works and supervised the tender process. Mr Malloy considered it was not appropriate to break down the works into subsidiary contracts. There were health and safety issues and management of the project would be more difficult. As part of the section 20 consultation, the second applicant nominated Chargeguard as a contractor and it was invited to apply to join BCB's list of approved contractors on 28 July 2006. On 23 August 2006, six contractors were invited to tender including Sandells. He had not used Sandells before, but they had been placed on the list of approved contractors earlier in 2006. Chargeguard was invited to tender even though it had not responded to the request to apply to be on the list. It wrote on 1 September 2006 to say it would not be tendering. Three tenders were received, the lowest being from Sandells. Once the tenders were analysed, he wrote to Sandells on 8 November 2006 stating that there would be a delay in placing any contract. They had agreed the tender analysis price.

17. Mr Malloy dealt with the individual items of cost as follows.

(a) Subcontractors. Paragraph 1.23 of the specification had been misconstrued. Subcontractors were expressly permitted by paragraph 1.11 of the specification. What paragraph 1.23 dealt with was an assignment of the contract.

(b) Preliminaries. Almost all contractors take these as a percentage of the total contract price. It was far less than the alternative figures given by the two other tenders.

(c) Pitched roofs. The cost covered a lot more than tiles or render. Again, this was the lowest tender figure.

(d) Rainwater goods. This was the lowest tender figure. He considered the other contractor had grossly overestimated the cost.

(e) Door locks. It was accepted that this work had now been done, and the contract instruction would omit the item (£135 plus VAT).

(f) Clearing up. When he inspected, there had been a lot of debris on the canopy roof. Mr Malloy accepted this had now gone and the contract instruction would omit part of this item. He allowed a 50% reduction in this cost (£151.50 plus VAT).

(g) External Joinery. This was the lowest tender price for the work. Most specifications require a proprietary brand of paint and this brand was not unusual.

(h) Doors. Door replacement was a provisional cost sum. If any of the 6 doors did not need replacement or the door frames did not require repairs, an adjustment could be made.

(i) Meter cupboard. The repairs were necessary and the cost was reasonable.

(j) Soffits. This was a higher price than either of the other tenders. These soffits are to the underside of the stairs and it is harder to work there. He considered this was a reasonable allowance for the work and the tender analysis reflected his own inspection.

(k) Joinery. The cost involved the fabrication of the spindle and labour.

(l) Glass. The safety film was a provisional cost sum and an allowance would be made if the work proved unnecessary.

(m) Decoration. The ceilings and walls of the common parts and staircases were large areas and the costs were in line with the other tenders.

(n) Joinery. There was a lot of internal woodwork to be repaired and decorated. Sandells were broadly in line with the other tenders.

(o) Floor coverings. Having had some greater experience of the property, it was clear that the stairs and common parts had heavy usage. Vinyl floor coverings were in his opinion a better option. Although more expensive, it was better to invest a little more to get greater utility. When cross examined, he did not consider that using vinyl was a "battleship quality solution" to the wear and tear on the stairs. The existing vinyl was near the end of its useful life.

(p) Stonework. This was the lowest of the three tenders and the stone needed proper attention.

(q) Fire precautions. Mr Malloy accepted that a fire risk assessment was to take place, but the items which dealt with fire precautions were only included where repairs were otherwise necessary.

Mr Molloy's adjusted figure for the cost of the internal and external decorations was therefore £52,580.15 plus VAT (i.e. £52,866.65 less the two concessions of £135 and £151.50).

18. The respondent submitted that Mr. Malloy's evidence should be accepted as a professional. The respondent had adopted a proper process of specification and tender and Sandells had given the lowest quotation. BCB operated a proper list of approved contractors and the requirements for its contractors in the letter of 28 July 2006 were entirely proper. Sandells had satisfied these requirements. Chargeguard had decided that it didn't want to go through the procedure. It was entirely appropriate to use a single contractor. There was no need to go into individual items because Sandells had given a global tender figure. The second applicant had not expert and had not really challenged most of the proposed costs.

19. On issue of the internal and external decorations, the Tribunal is satisfied that relevant cost of £52,580.15 plus VAT (£61,781.68) as set out in the Schedule of Works dated 18 August 2006 are reasonable and payable. There is no dispute that most of these works are necessary, and insofar as this is in dispute the Tribunal prefers the evidence of Mr Malloy. The second applicant has a long involvement in the property business and has the advantages of owning a flat at the property and his involvement in the residents' association. However, the Tribunal prefers the evidence of Mr Malloy as an experienced and qualified building surveyor on each of the individual items in issue. We do not accept the allegation made against Mr Malloy that he is influenced by his fees. Nor do we accept that the schedule of works was over specified, whether deliberately or accidentally. The landlord employed an independent professional and subjected the works to a proper tender process and analysis. The Tribunal considers it is reasonable for the landlord to rely on the advice of the building surveyor to consider a single contract rather than dividing it up (indeed, it have been criticised for having done otherwise). Furthermore, the Tribunal accepts that it is somewhat artificial to cherry pick individual items from a long list of individual items in the tender analysis. A contractor and landlord will to a great extent treat a tender as a single price. Within reason, the parties to the tender will not generally challenge individual items. In this instance, Sandells gave the overall lowest price for the works. The Tribunal does not find BCB's approved contractor scheme or any of the conditions in the letter of 28 July 2006 render the process unreasonable. This is a substantial contract for works and it is important for both landlord and the lessees to ensure that quality and price are both considered at the tender stage. In any event, Chargeguard was still invited to tender and declined to do so.

BUILDING SURVEYORS FEES

20. Both the tender analysis for the flat roof works and the internal and external decorations included fees for BCB estimated at £3,248.64 and £6,608.33 plus VAT respectively. BCB has rendered a fee note for 50%

of the latter on 2 November 2006. Insofar as these fees have been incurred (i.e. that they are payable in respect of work already carried out by the surveyor for which the landlord has a contractual liability), they fall for consideration under s.27A(1) and 19(1)(a) of the Landlord and Tenant Act 1985. Otherwise they fall for consideration under s.27A(3)(c) and 19(1)(a) of the 1985 Act. The Tribunal makes no distinction between the two.

21. Mr Malloy stated that the 12.5% was an 'industry standard' based on what is charged by other surveyors. It was not so long ago that the RICS scale fees provided a fee of 15%. The fee covered preparation of the schedule of works, tender analysis and project management and supervision. It was submitted that 12.5% was reasonable. The second applicant submitted these costs were not reasonable.

22. The Tribunal faces a particular difficulty in reaching any determination in respect of these fees. There is no evidence of the fees charged by others or indeed the terms of BCB's retainer. More significantly, the Tribunal is effectively not being invited to determine a sum payable, but rather a percentage figure of the cost of works. It may well be that may be that a fee of £3,248.64 or £6,608.33 plus VAT would be reasonable in respect of the currently estimated costs, but not of the costs eventually incurred. We cannot of course determine whether the services to be provided will be of a reasonable standard under s.19(1)(b). If these matters are disputed, they will have to be determined by a future Tribunal.

23. On the limited information available, and using its experience of the fees charged by Chartered building surveyors in the region, the Tribunal finds that a fee of 12.5% would be reasonable. Furthermore, in respect of the services already provided by BCB (i.e. the specification and tender process) they are of a reasonable standard. However, for the reasons given above, the Tribunal cannot at this stage determine the sum payable for these fees.

MANAGEMENT FEES

24. During the relevant period the property has been managed by various companies within the Dunlop Haywards group. The accounts for the 2004, 2005 and 2006 service charge years include relevant costs for management fees of £569.08, £753.35 and £940 respectively (inclusive of VAT). The arguments here are that the relevant costs are not reasonably incurred under s.19 of the 1985 Act.

25. The second applicant accepted that the above fees would be reasonable for managing the property had it been managed properly. However, he submitted the services were not of a reasonable standard because the agents had not managed the property properly. The agents did not answer letters. When asked to give examples, he relied on copies of letters from him to the agents dated 8 April, 8 May, 24 June, 7 July and 9 July 2004 about roof leaks. The second applicant accepted that not all the correspondence passing between him and the agents was in the bundle and that he was a very prolific writer. It also provided information late and with little detail. The 2004 estimated expenditure was sent to the lessees only on 18 March 2004. The 2003 accounts were received on 23 July 2004. When cross examined the second applicant accepted the landlord had put in place insurance cover and carried out interim repairs. There had also been a lot of correspondence which was not before the Tribunal. He considered the replies from the agents either skirted around the issues or no replies were given at all. He withdrew the allegation made in his statement of case that the agents were harassing lessees. The certified accounts were very sparse and what the applicants wanted were more detailed figures for expenditure. He had never seen anyone inspecting the property. It was submitted that a fee of £100 would cover the agents' postage and other legitimate overheads but no more.

26. The respondent stated that managing agents' fees amounted to between £56 and £94 per flat over the three years. Although it provided comparisons for managing agents' fees, the second applicant conceded this cost was not excessive compared to other agents. In respect of the

standard of service, the agents instructed and consulted with surveyors and contractors, arranged insurance and electricity, collected service charges and supervised the annual accounting. It was wrong to suggest it had not replied to letters from lessees. The examples given by the second applicant did not give a full picture of the correspondence. The respondent stated that an exchange of several letters between the second applicant and the agents between 7 February and 8 March 2005 was more representative. The standard of service provided had to be considered in the light of the fees charged.

27. The Tribunal considers that the services provided by the managing agents were of a reasonable standard. These are modest charges and a modest fee involves only a basic service. The fee of only £10 per flat suggested by the second applicant is wholly unrealistic since the agents provided services such as insurance and accounting. The accounts were not obviously provided late. As far as correspondence is concerned, both parties rely on different sequences of letters. Without having sight of all the correspondence the Tribunal cannot find that the agents systematically refused to deal with lessees. The Tribunal therefore finds that the relevant costs of £569.08, £753.35 and £940 may be taken into account in the 2004, 2005 and 2006 service charge years.

2005: HEALTH AND SAFETY INSPECTIONS

28. The certified accounts for 2005 include £575 for "health and safety". This apparently represented the cost of asbestos surveys and health and safety inspections. The issue here was whether the cost was "*incurred*" under s.19 of the 1985 Act.

29. The second applicant submitted that no surveys had been carried out in 2005 or at all.

30. The respondent stated that BCB did not do this kind of work and other contractors were needed. It accepted that no inspections took place in 2005. However, the cost was incurred pursuant to a retainer and the

accountants had certified this expenditure. The work was to be carried out in 2007 and the respondent intended to give credit to the lessees for this cost in the 2007 service charge accounts. The second applicant nevertheless wished the Tribunal to make a determination.

31. No receipts for this expenditure were provided and no copy of the retainer was produced. The Tribunal finds the alleged arrangement whereby the landlord can be contractually liable to pay this kind of fee two years before the work is carried out to be so unusual that further supporting documentation would be expected. The Tribunal is not satisfied that this relevant cost was "*incurred*" in 2005 and determines that no service charge is payable for health and safety in that year.

LEGAL FEES: THE SECOND APPLICANT

32. On 16 October 2006, the second applicant's service charge account was debited with £454.74 for legal fees incurred by a firm of solicitors called Brethertons. This is an administration charge under paragraph 1 of Schedule 11 to the Commonhold and Leasehold Reform Act 2002. The second applicant seeks a determination that this cost is not reasonable under paragraph 2 of Schedule 11. The respondent contended that no application had been made to the Tribunal under paragraph 5 of Schedule 11 and that the Tribunal had no jurisdiction. The Tribunal agrees with this submission.

33. Paragraph 5 of Schedule 11 to the 2002 requires an application to be made to a Tribunal. Paragraphs 3(1) and (3) of the Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003 (as amended) requires applications to contain various particulars. By regulation 6 of the Leasehold Valuation Tribunals (Fees) (England) Regulations 2003 a fee must accompany an application to the Tribunal. It is plain that an application is required and a fee must be paid. Neither has been done here. The Tribunal therefore has no jurisdiction to deal with the second applicant's application.

THE FIRST APPLICANT'S CHARGES 2004-06

34. The original application by the first applicant was for a determination in respect of her liability for service charges for the period between her purchase of flat 5 on 9 December 2004 and the sale of the flat on 31 May 2006. This issue was largely dealt with by way of written submissions. The first applicant's submissions are in her statement of case dated 16 September 2006 and her letter of 9 February 2007. The respondent's written submissions are dated 4 April 2007 which incorporate the statement of case dated 22 November 2006.

35. The application to the Tribunal dated 28 June 2006 sought a determination in relation to the following sums:

    (a) Legal fees £80.56.

    (b) Interim service charges (major works) 25 March 2005-24 March 2006: £1,501.50.

    (c) Interim service charges 25 March 2005-24 March 2006: £525.54.

    (d) Interim service charges 25 March 2006-28 September 2006: £104.11.

    (e) Balancing charge for 2004: £156.73.

    The applicant submitted that these sums had been paid to the landlord under protest at the time of the sale of the lease. Her submission was that she was not liable to pay the sums demanded.

36. The respondent stated that it had not had the opportunity to cross-examine the first applicant. On the substantive issue of the first applicant's liability to pay the charges, the respondent contended that the relevant costs were incurred whilst the first applicant was lessee of her flat, that the charges were properly demanded and that they were recoverable under the terms of the first applicant's lease. On this last

point, the respondent relied on clause 5 and Part I of the 5th Schedule to the lease.

37. Apart from the small item of legal costs, the individual items are dealt with above. However, the gist of the first applicant's argument is that the above charges were not payable under the terms of the lease of flat 5. The matter does not turn on any issues of credit or Mr Malloy's evidence. It is essentially a question of construction of the lease.

38. The lease of flat 5 is dated 5 July 1990. Clause 4 provides as follows:

> *THE lessee HEREBY COVENANTS with the Lessor and with the owners and lessees of the other flats comprised in the Property that the Lessee will at all times hereafter ...*
>
> *(b)(i) Contribute and pay the proportion attributable to the demised premises ... of the costs expenses outgoings and matters mentioned in Parts II and III of the Fifth Schedule..."*
>
> *(ii) The contribution under paragraph (i) of this clause for each year shall be estimated by the managing agents for the time being of the Lessor ... as soon as practicable after the beginning of the year and the Lessee shall pay by two equal quarterly instalments on 25th March and 29th September in that year...*
>
> *(iii) As soon as reasonably may be after the end of ... each ... year when the actual amount of the said costs expenses outgoings and matters for ... each succeeding year ... has been ascertained the Lessee shall forthwith pay the balance due to the Lessor or be credited in the books of the managing agents ... with any amount overpaid.*
>
> *(iv) The certificate of the managing agents or (at the option of the Lessor) the auditors for the time being of the Lessor as to any amount due to the Lessor under paragraph (iii) of this clause shall be final and binding on the parties."*

39. Under clause 4(ii) of the lease interim service charges are payable by two equal instalments on the March and September quarter days. The only contractual requirement is that "*The contribution ... shall be estimated by the managing agents ... as soon as practicable after the beginning of the year*". In this case, the general interim for 2005 was estimated at £525.53 and a copy of the agent's "*statement of anticipated service charge*

expenditure" is included in the bundle. There is also a copy of a similar "*statement of anticipated service charge expenditure*" dealing with the separate estimated £1,501.50 contribution to major works. Neither is dated, but it is clear from a letter from Chargeguard to the agents dated 6 May 2005 that the agents estimated these interim sums in the early part of 2005. It therefore appears that the landlord's agents calculated the 2005 interim contribution in accordance with clause 4(ii) of the lease. In the event, no costs were incurred for major works in 2005 and this is reflected in the 2005 service charge accounts certified on 22 September 2006. Any excess contribution made by the first applicant should, under clause 4(iii) of the lease, have been credited to the service charge account for flat 5 on that date. By the time the landlord credited (or should have credited) the service charge account for flat 5 in September 2006, the first applicant had already assigned her lease. It follows that she was liable to pay the respondent the interim charges of £525.53 and £1,501.50 for 2005. Whether she can recover the excess from the present lessees of flat 5 is not a matter for the Tribunal.

40. Similar principles apply to the interim service charges of £104.11 due on 25 March 2006. There is no statement of anticipated expenditure in the bundle for this period, although the agents prepared a budget for 2006. The budget estimated expenditure of £4,530 of which £2,450 was for insurance. The £104.11 equates to one half of flat 5's liability (10.01%) for the estimated costs net of insurance for the whole of 2006. It follows that there is evidence the agents properly estimated this interim charge in and the first applicant became liable for the interim charge on 25 March 2006.

41. The costs giving rise to the balancing charge of £156.73 for 2004 were certified by the accountants NR Pulver & Co on 7 March 2006. This was a cost "*ascertained*" and payable forthwith under clause 4(iii) of the lease. At that stage the first applicant was liable under the covenants in the lease.

42. Finally, there are the legal fees of £80.56. Virtually no information is provided apart from a letter from Audu & Co solicitors dated 30 March 2006. This suggests the charge relates to legal fees incurred before the first applicant purchased her lease and which appear on her service charge account as "*7 Jul 2004 Legal fees b/f*". This is not described as service charges and it appears to have been some kind of cost incurred by the previous lessee. This predated the first applicant acquiring Flat 5, and the Tribunal finds that this was not payable by the first applicant.

43. The Tribunal therefore determines that the sum of £2,286.68 was payable by the first applicant at the date of the transfer of her lease on 31 May 2006.

THE FIRST APPLICANT'S ADMINISTRATION CHARGE

44. The first applicant has sold her flat. On 15 March 2006 her solicitors first approached the managing agents seeking information in connection with the sale. On 17 March 2006, the agents informed them that the fixed fee for providing this information was £215 plus VAT (the letter itself said £220 but it was conceded that this was an error, and on 10 August 2006 a credit note was raised for the balance of £5.88). On 15 March the solicitors paid the sum required. The information was given on 23 March 2006. The issue is whether this charge is reasonable under paragraph 2 of Schedule 11 of the 2002 Act. A separate application was made on 13 July 2006. The first applicant seeks a determination whether this sum is payable.

45. The respondent contended that the fees were very modest for the amount of work carried out. The first applicant's enquiries ran to 24 paragraphs. The reply was three pages long with 54 pages of attachments. There was then a further exchange of correspondence about planning consent. It further argued that the fee had been "*agreed or admitted by the tenant*" within the meaning of paragraph 4(4)(a) of Schedule 11.

46. The Tribunal is satisfied that for the amount of work involved, the scale fee charged by the agent is reasonable and payable. However, the Tribunal rejects the alterative submission made in respect of paragraph 4(4)(a). There is no correspondence agreeing to pay the sum claimed. The only 'admission' is the payment itself, and by paragraph 4(5) this is not to be taken as any agreement or admission.

COSTS BEFORE THE TRIBUNAL

47. The applicants applied under s.20C of the 1985 Act for the landlord's costs before the Tribunal not to be added to the service charges. The second applicant contended that it was not necessary for the respondent to be represented by a solicitor. He also queried whether the expense of a surveyor was necessary. The bundle was twice as thick as was necessary. He anticipated success in the application.

48. The respondent submitted that it was reasonable for it to be represented before the Tribunal and that the surveyor was vital to explain the issues. The allegations were complex and many arguments were raised, often in an uncoordinated manner. It also anticipated success in the application.

49. Having regard to the guidance given by the Lands Tribunal in ***Tenants of Langford Court v Doren*** LRX/37/2000 the Tribunal considers it just and equitable to make some order under s.20C of the 1985 Act. The applicants have succeeded in relation to one limited issue, namely the asbestos and health and safety costs, and it doubtful this concession would have been made by the landlord had the application not been made. However, the amount of costs involved in this one issue is minimal compared to the overall costs of the application. It was clearly necessary for the respondent to be represented and the respondent's conduct of the application has been quite proper. Mr Malloy was of great assistance to the Tribunal and his attendance was reasonable. The Tribunal therefore determines that 10% of the landlord's relevant costs incurred in the application shall not be added to the service charges.

CONCLUSIONS

50. If the relevant costs of £25,989.10 plus VAT (£30,537.19) for works to the flat roof set out in the Schedule of Works dated 17 August 2006 were incurred, a service charge would be payable for those costs.

51. If the relevant costs of £52,580.15 plus VAT (£61,781.68) for internal and external decorations as set out in the Schedule of Works dated 18 August 2006 were incurred, a service charge would be payable for those costs.

52. In respect of building surveyor's fees for the major works, the Tribunal finds that if relevant costs were incurred for surveyor's fees, they would be payable and that a fee of 12.5% would be reasonable. In respect of services already provided by the surveyors BCB (i.e. the specification and tender process) they are of a reasonable standard. However, the Tribunal cannot at this stage determine the sum payable for these fees.

53. The relevant cost of managing agents' fees of £569.08, £753.35 and £940 may be taken into account for the 2004, 2005 and 2006 service charge years.

54. The relevant cost of £575 for health and safety and asbestos inspections in 2005 was not "*incurred*" within the meaning of section s.19 of the 1985 Act and no service charge is payable in respect of those costs.

55. The Tribunal has no jurisdiction to deal with the second applicant's application in respect of legal fees of £454.74.

56. The sum of £2,286.68 was payable by the first applicant to the respondent at the date of the transfer of her lease on 31 May 2006.

57. The fee of £215 plus VAT for providing information to the agents in 2006 was also payable by the first applicant.

58. In accordance with section 20C of the Landlord and Tenant Act 1985 10% of the landlord's relevant costs incurred in respect of the application shall not be added to the service charges.

Mark Loveday BA(Hons) MCI Arb
Chairman
Dated: 5 May 2007