**SOUTHERN RENT ASSESSMENT PANEL AND LEASEHOLD VALUATION TRIBUNAL**

**CASE No: CHI/43UL/LSC/2007/0007**

**B E T W E E N :-**

SINCLAIR GARDENS INVESTMENTS (KENSINGTON) LTD

Applicant/Landlord

AND

MARY JACQUELINE MARTIN ST VALERY
and DAVID LESLIE FINCH

Respondents/Lessees

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| PREMISES: | 45 Chapelfields<br>Charterhouse Road<br>Godalming<br>Surrey<br>GU7 2BX ("the Premises") |
| TRIBUNAL: | Mr D Agnew LLB, LLM (Chairman)<br>Mr N I Robinson FRICS<br>Mr R T Dumont |
| HEARING: | 7th June 2007 |

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**DETERMINATION AND REASONS**

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1. Background

1.1 On 13th July 2006 the Applicant issued proceedings in the Kingston County Court claiming £914.23 against the Respondents plus the court fee and solicitors' costs. That sum was made up as follows:-

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| Arrears of ground rent | £100.00 |
| Insurance rent arrears | £640.66 |
| Administration service charge | £129.26 |
| Interest | £ 44.31 |

1.2 By an order of Deputy District Judge Tomlin of the 27th November 2006 the claim in respect of the insurance rent and Administration Charges was transferred to the Leasehold Valuation Tribunal for a determination as to the reasonableness of those items and for a determination as to the Respondents' liability to pay the same, under Section 174 and Paragraph 3 of Schedule 12 of the Commonhold & Leasehold Reform Act 2002 (hereinafter referred to as "CLARA").

1.3 On 11th April 2007 the Tribunal issued directions. The Respondents were ordered to send to the Applicant and the Tribunal by 2nd May 2007 a statement of case setting out in detail exactly which items of service charge and administration charge they agreed and which they did not

agree and why. The Respondents were required to submit to the Respondents and the Tribunal a written statement in reply by 23rd May 2007.

1.4 By letter of 24th April 2007 the Respondents stated that the matters in dispute were their contribution towards the insurance premium and administration charges. In their statement, dated prior to the Directions, they questioned the reasonableness of the insurance premiums because the Applicants "had failed to provide information about insurance purported to be effected by them" and they referred to various letters written by them to the Applicant. As far as administration charges were concerned their statement showed that their principal objection was that there is no provision for such a service charge in their lease and that consequently they are not liable to pay the same. Additionally or alternatively, if such charges are applicable, they were not reasonable. The Respondents' response was in the form of a witness statement of Stephen Goodman of Hurst Management, the Landlord's managing agents, dated 11th May 2007.

2. Inspection

2.1 The Tribunal inspected the premises immediately prior to the hearing on 7th June 2007. 45 Chapelfields is one of 66 flats built in the late 1970's/early 1980's. There is a similar development of a further 33 flats within the same complex. The 66 flats are in several blocks adjacent to one another, three or four storeys high. They all have flat roofs. There is some underground car parking and also some separate garages. The development is set within well maintained grounds close to the centre of Godalming.

3. The hearing

3.1 This took place at Guildford YMCA, Bridge Street, Guildford on 7th June 2007. Present were the Respondents, Mr Goodman from the Landlord's managing agents and Mr Mark Kelly from the same firm who attended as an observer.

4. The Respondents' case

4.1 Insurance

4.1.1 The Respondents were satisfied from the information provided by Mr Goodman in his witness statement and documents annexed thereto that flats 1 – 66 were covered by insurance and that the proportion of the premiums attributable to the Respondents in respect of the premiums actually paid is £310.60 for the year to 20th November 2005 and £332 for the year to 20th November 2006. Mr Finch did not challenge the extent and types of risk insured against by the Landlord, nor did he produce evidence of alternative quotations to demonstrate that these premiums were unreasonable. He said that it was difficult for a tenant to do so because that would necessitate providing the alternative insurer with information that only the Landlord had if a like for like comparison were to be made and which would have to have been done for the comparison to be valid. He accepted, therefore, that the only challenge he could make to the insurance charges was if the Tribunal found that the way that the Landlord went about selecting

and placing the insurance was unreasonable. In that regard he had a number of observations to make on the Applicant's evidence as given by Mr Goodman.

4.1.2 First, he submitted, the way the brokers tested the market each year was unsatisfactory. By selecting 9 or 10 properties most of which were not flats but single properties (or, if they were flats, they were considerably smaller than 1 – 66 Chapelfields, was hardly a true comparison. Further, Mr Goodman claimed that 1-66 Chapelfields) had a poor claims record but no evidence had been produced of the claims record of other properties in the portfolio covered by the policy to enable anyone to judge whether or not the claims record of Chapelfields was indeed poor. On the face of it there were not many claims each year. Over the past few years there were some years when no claims were made at all. In other years the claims have been up to four per year. The largest single claim was for £11,256 in 2007. This did not seem to Mr Finch to constitute a "bad" claims record. Finally, he observed that the brokers who are charged with the task of arranging the insurance are not wholly independent of the Landlord as the owner of Princess Insurance is the same as the owner of the Landlord company.

4.1.3 Mr Finch stated that had the information supplied by Mr Goodman in his witness statement been made available to him previously, it may have been the case that it would not have been necessary for matters to go as far as court and tribunal proceedings, or at least it would have enabled the Respondents "to provide specific comments on the insurance." He claimed that no certificate of insurance had been sent to him since November 2005 and prior to that, February 2003, but he accepted under questioning that the Landlord had always provided a copy of the certificate of insurance when asked.

4.2 With regard to administration costs, the primary argument of the Respondents was that the lease does not provide for the Landlord to be able to claim such costs from the Lessees unless they are "incidental to the preparation and service of a notice under Section 146 of the Law of Property Act 1925." (Clause 2(16) of the lease). The letters sent by the managing agent and instruction of solicitors was in relation to the non-payment of ground rent and non-payment of the contribution towards insurance which, in the lease, is payable "by way of further or additional rent." A Section 146 notice is not required prior to forfeiting for non-payment of rent or proceeding to recover rent and therefore the costs incurred were not incidental to the preparation of a Section 146 notice and therefore are not claimable by the Landlord. If he is wrong about that, he had no issue with the amount of the charges but challenged that they were reasonably incurred as far as collection of ground rent was concerned. The lease provided for this to be paid by Banker's Standing Order but despite a request for the Landlord to set this up in 2000, this had not been done. However, he had always had a concern that the Landlord might have been attributing payments of ground rent to other outstanding sums which were in dispute and that was the reason why he had not paid ground rent until after the issue of the County Court proceedings.

5. The Applicant's case

5.1 Insurance

5.1.1 Mr Goodman went to great lengths in his evidence to explain how the insurance is arranged and how the premiums have been arrived at. The brokers used by the Landlord are Princess Insurance Agencies. He is a Director of Callenglow Limited (of which Princess Insurance Agencies is the trading name) and he is also an employee of Hurst Management, the Landlord's managing agent. He explained that the Landlord owns 15,000 units in 2,500 properties and that insurance is arranged with one insurer for the whole of the landlord's property portfolio. It is not a block policy because each property has a separate insurance certificate and 1-66 Chapelfields is not affected by the claims records of other properties within the portfolio. Mr Goodman considered that 1-66 Chapelfields had a "bad" claims history. Indeed, in a letter to Ms St Valery dated 27th March 2000 he stated: "This property has a claims history beyond all belief and has the highest amount of claims within our whole portfolio of fifteen thousand flats." Under the portfolio policy, however, he said that premiums were based solely on postcode and not a claims record. Claims record would only be relevant if quotations were to be obtained from other insurers. The claims were generally related to water penetration through the flat roof and taps having been left running in individual flats.

5.1.2 Mr Goodman said that each year Princess Insurance Agencies would go out into the market to obtain quotations on a sample of properties to test the results against the current insurer's renewal terms. Each year the sum insured is reviewed in accordance with the ABI/BCI House Rebuilding Cost Index prepared by the RICS for the Association of British Insurers. The rate per £1,000 insured obtained by Princess Insurance Agencies for 1-66 Chapelfields has not increased over the period 2003-2006. He also explained how from 2002 to 2005 the property was insured by ACE. At the last minute towards the end of the insurance year to November 2005 ACE stated that they could not offer cover in the favourable terms previously provisionally indicated and Princess were compelled to go back into the market. The only company willing to insure the whole portfolio was Endurance Worldwide Insurance Limited. The premiums paid in this case were below the tariff rate for this insurer.

5.1.3 The main advantages of one insurer for the portfolio are that:-

a) cover is guaranteed at renewal irrespective of whether the premium has been paid

b) claims settlement authority without reference to loss adjusters

c) a panel of building contractors is on hand to attend promptly when required

d) a separate insurance certificate is issued for each building

e) all properties are insured irrespective of post code

5.1.4 Mr Goodman stated that no commission was received by the Landlord company. It was Princess which received the commission. As a separate company from the Landlord company it is required to stand on its own feet financially.

5.2 Administration charges

5.2.1 Mr Goodman said that if it had not been for the non-payment of insurance rent the Applicant would not have gone to the trouble of pursuing matters through the tribunal simply for

Administration charges. However, with regard to those charges he had been advised that in order to forfeit a lease it was necessary to serve a Section 146 notice where the breach was for non-payment of insurance even if it was reserved as rent in the lease. Section 146 in any event was relevant where the breach was for non-payment of rent. Consequently he believed that the letters written and instructions to solicitors did come within Section 146 and therefore were claimable under the lease. He was not aware of any request from Mr Finch for the Landlord to set up a Banker's Standing Order for the ground rent. He asked the tribunal to consider what would happen if the Landlord were held not to be able to reclaim such administration costs from these lessees. He speculated that in future they would simply run up costs for the Landlord knowing full well that the Landlord would be unable to recover them.

5.2.2 Mr Goodman asked the Tribunal to make an order that the Respondents pay the Applicant a sum representing the fee that the Landlord had had to pay to the Tribunal and a contribution towards the Landlord's costs of the tribunal of the maximum the Tribunal could order (£500) on the basis that the Respondents had been vexatious or frivolous in their defence to the claim and their representations to the Tribunal.

6. The Respondents' response to the application for costs.

6.1 Mr Finch pointed out that unless the Respondents' conduct amounted to being vexatious or frivolous the Tribunal had no power to award costs against them. He claimed that the complexity of the issues concerning insurance showed that their case was not frivolous or vexatious and that the Respondents were entitled to have their case in respect of insurance and administration charges determined by the Tribunal. The Landlord had never proposed mediation or arbitration. The Respondents should not be required to pay the Applicant's costs.

7. The Law

7.1 Section 27A of the Landlord & Tenant Act 1985 ("the 1985 Act") states as follows:-
The Leasehold Valuation Tribunal may determine whether a service charge is payable and, if it is, determine:

(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
(e) the manner in which it is payable.

7.2 By Section 19 of the 1985 Act service charges are only claimable to the extent that they are reasonably incurred and if the services or works for which the service charge is claimed are of a reasonable standard.

7.3 By Paragraph 2 of Schedule 11 of CLARA "a variable administration charge is payable only to the extent that the amount of the charge is reasonable."

7.4 Paragraph 5 of the 11th Schedule gives jurisdiction to the Leasehold Valuation Tribunal to determine the reasonableness of administration charges in the same way as for service charges under Section 27A of the 1985 Act.

8. The Lease

8.1 The habendum of the lease which is dated 11th March 1983 and made between Algrey Homes (Southern) Limited (1) Nicholas Anthony Munns and Rebecca Louise Barker (2) and Southern Managing Agents Limited (3) states " ..... and also paying by way of further or additional rent from time to time a sum or sums of money equal to one-sixty-sixth of the amount which the Lessor may expend in effecting or maintaining the insurance of the building ..... "

8.2 By Clause 2(16) of the lease the lessees covenant "to pay all expenses including Solicitors' costs and Surveyors' fees incurred by the Lessor incidental to the preparation and service of a notice under Section 146 of the Law of Property Act 1925 notwithstanding that forfeiture is avoided other than by relief granted by the court."

9. The determination

9.1 Insurance

9.1.1 This case was, perhaps, somewhat unusual in that the Respondents did not try to challenge the reasonableness of the contribution towards insurance premiums by producing alternative quotations from other insurers. Mr Finch no doubt recognised that such challenges often fail because the alternative quotations obtained are seldom on a like-for-like basis with the insurance arranged by the Landlord. Mr Finch realised the difficulties faced by lessees in obtaining the necessary information to enable an exact comparison to be made. He had tried to obtain more information from the Landlord but the Landlord is not obliged to furnish a tenant with all the information sought by Mr Finch and, indeed, there may, as Mr Goodman pointed out, be problems with providing some of that information because of the Data Protection Act. Some more information was obtained by Mr Finch as a result of the Landlord's evidence to the Tribunal but there remained obstacles in the way of him being able to obtain alternative quotations to enable a comparison to be made. Consequently, Mr Finch was constrained to argue that if the Tribunal found that the Landlord had acted unreasonably in the way it set about placing the insurance then he would challenge the amount sought from him but that if the Tribunal found that the Landlord had adopted a reasonable procedure with regard to the insurance then he would accept the figures that were being sought from him. Mr Finch's problem, however, was that even if the Tribunal found that the procedure was unreasonable or unsatisfactory the Tribunal had no other figure to go on as to what would have been a reasonable sum for the insurance premium. The Respondents evidently had had the benefit of insurance cover and the Tribunal had no evidence before it as to what a reasonable amount was payable for that cover if it was not the sum actually demanded.

9.1.2 In considering the Landlord's practice and procedure with regard to insurance, this was effected through a brokerage which was connected with the Landlord and the Landlord's managing agent. This is not prohibited by the lease and there is no reason why the Landlord should not have made this arrangement although if the brokers were wholly independent of the Landlord there would be less cause for suspicion on the part of the lessee that the insurance might be arranged more in the Landlord's interest than that of the lessee. The Tribunal had some concerns as to whether the method adopted for testing the market by Princess was of any merit or benefit as it did not seem to be of much use to ask for quotations from alternative insurers on the basis of nine or ten properties when the intention was to ask them to cover 15,000 units. If it meant that a decision of such magnitude had to be referred up to the insurer's head office then it seemed to the Tribunal that this was what was needed to be done.

9.1.3 The Tribunal was satisfied that there were advantages in having the Landlord's portfolio of properties insured by one insurer even if this meant that it was more difficult for the Lessee to obtain alternative quotes. It is the Landlord's duty to insure and he is entitled to have the cover organised in a way which suits him provided that this does not produce an unreasonable charge to the lessee. Where 15,000 units are involved the organisation involved in ensuring that different renewal dates are catered for so that no building is overlooked and becomes uninsured is a very strong reason for adopting a system where a premium is paid once per year to one insurer and that cover is maintained even if a premium payment is delayed for any reason.

9.1.4 On the whole and with some reservations the Tribunal considered that the Landlord had adopted a reasonable procedure for effecting insurance in respect of 1 – 66 Chapelfields and that, although the insurance premiums sought were on the high side, they were not sufficiently high to take them out of the range of reasonableness. In any event, the Tribunal had no evidence before it as to what alternative figure before it and it would not be appropriate to pluck another figure out of the air. The Tribunal also took into account the decision in Forcelux v Sweetman where the Lands Tribunal held that the expenditure on insurance does not have to be the cheapest available. In all the circumstances the Tribunal decided that the contribution sought from the Respondents of £310.60 for the year to November 2005 and £332 for the year to November 2006 were reasonably incurred and were of a reasonable amount.

9.2 Administration charges

9.2.1 The Tribunal agreed with the Respondents that unless there was a specific provision in the lease enabling the Landlord to recover administration charges from the lessee they could not be recovered. The only provision in the lease which would enable administration charges to be recovered is Clause 2(16) which relates to the service of a notice under Section 146 of the Law of Property Act 1925 and matters incidental thereto. A Section 146 notice is not required to be served before action is taken for recovery of rent or even for forfeiture for non payment of rent. (Law of Property Act 1925 Section 146 (11). The insurance premium is expressed to be recovered as "further or additional rent " in the habendum to the lease. Consequently no

Section 146 notice was required in this case. It follows therefore that the Landlord is unable to recover any of the Administration charges amounting to £129.26 from the Respondents.

9.2.2 The Tribunal recognises that this is a most unsatisfactory state of affairs from the Landlord's perspective but unfortunately for the Landlord this particular lease is defective in that regard. The lease in question has the advantage of brevity and clarity but this is at the expense of more extensive provisions that are commonly found in leases which are more favourable to the Landlord or its managing agents. It is, however, the lease that the Landlord acquired and it is bound by its terms.

10. Costs

10.1 Under paragraph 10 of Schedule 12 of CLARA the tribunal has power to order a party to pay up to £500.00 of another party's costs where a party has acted frivolously, vexatiously, abusively, disruptively or otherwise unreasonably in connection with the proceedings.

10.2 As the Respondents have succeeded in their arguments that administration charges of the type concerned with in this case are not recoverable by the Landlord it cannot be said that they have acted frivolously or vexatiously. There was nothing abusive or disruptive about the way they conducted their case and although the amount of administration charges in this instance was small, the Respondents have now set a precedent for the future and although this decision is not binding on any future tribunal the parties are now aware as to the likely outcome of any future dispute about administration charges. In the circumstances, therefore, the tribunal does not consider that the Respondents have acted in such a way as to justify an order for costs being made against them.

10.3 Re-imbursement of fees is possible under Regulation 9 of the Leasehold Valuation Tribunal (procedure)(England) Regulations 2003. The tribunal is there given discretion to order a party to reimburse another party the whole or part of their fees. No guidance is given in the Regulation as to the basis upon which such an order should be made but the Tribunal considers that a similar requirement to that for the order for payment of costs should apply and for the same reasons, therefore, the Tribunal refuses the Applicant's application in that regard.

11. Comment

11.1 It might be said with some justification that, upon receipt of the Applicant's witness statement, it would have been reasonable for the Respondents to have offered, without prejudice, to drop their challenge to insurance contributions in return for the Applicants waiving their claim to administration charges so that the time involved and costs of pursing the matter to a hearing before the Tribunal could have been avoided. On the other hand, it would seem that at no time did the Applicant offer to drop their claim to administration charge if the respondents accepted and paid the insurance contributions. The Tribunal would like to think that improved communication on both sides in the future would hopefully avoid a repetition of costly recourse to the Court and/or the Tribunal.

12. Summary of the Tribunal's determination

12.1 The Respondents are liable to pay to the Applicant the sums of £310.60 and £332.00 (total £642.60) by way of contributions towards the costs of the insurance premium in respect of the Premises for the years to November 2005 and November 2006 respectively.

12.2 The respondents are not liable to pay any of the administrative charges claimed by the Applicant totalling £129.26.

12.3 There will be no order for costs of the tribunal proceedings nor any refund of Tribunal fees ordered.

Dated this 27th day of June 2007

Signed

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D Agnew LLB, LLM
Chairman