SOUTHERN RENT ASSESSMENT PANEL

LEASEHOLD VALUATION TRIBUNAL

Case No: CHI/24UC/LSC/2009/0047

Application under Section 27A of the Landlord and Tenant Act 1985

Re: Flat 10, Lavender Villas, Waterford Road, Highcliffe, Dorset

Applicant	Mr J C Ball
Respondent	Mr J A Woodhouse
Date of Application	20th March 2009
Date of Inspection	none
Date of Hearing	none

Member of the Leasehold Valuation Tribunal:

M J Greenleaves Lawyer Chairman

Date of Tribunal's Decision: 13th July 2009

Decision

1. The Tribunal determines that Mr. J.A. Woodhouse is the correct Respondent to this application being the freeholder liable for performance of the landlord's covenants set out in the lease of Flat 10 Lavender Villas, Waterford Road, Highcliffe, Dorset.
2. The Tribunal determines in accordance with the provisions of Section 27A of the Landlord and Tenant Act 1985 (the Act) that for the service charge year 2008 the sum of £1,361.07 in respect of buildings insurance is a reasonable sum for the full premium and that the Applicant is liable to pay 1/10 of that sum. Further that any additional sum on account of insurance premium for that year paid by the Applicant to the Respondent is not payable.

3. Application under Section 20C of the Landlord and Tenant Act 1985. The Tribunal orders that all or any costs incurred by the Respondent in connection with this application are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the Applicant..

4. The Tribunal makes no order for reimbursement by the Respondent of fees paid by the Applicant to the Tribunal in respect of this application under Regulation 9 of the Leasehold Valuation Tribunals [Fees] [England] Regulations 2003

5. The Tribunal makes no order for the Applicant to pay the Respondent's costs of or incidental to this application.

Reasons

Introduction

6. This was an application made by Mr. J C Ball (the Applicant) for determination by the Tribunal under Section 27A of the Landlord and Tenant Act 1985 (the Act) of the reasonable sum payable in respect of buildings insurance premium by way of service charges for the accounting year to 29th September 2008. The Applicant also made two further applications: under Section 20C of the Act and under Regulation 9 of the Leasehold Valuation Tribunals [Fees] [England] Regulations 2003 (the Fees Regulations).

7. The Respondent applied for this application to be dismissed and for an order to be made against the Applicant for his costs for the time that has been necessary in responding to the application, statement of case and other administrative costs brought about by the Applicant.

8. The parties having been given due notice by the Tribunal pursuant to Regulation 13 of the Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003 (the Procedure Regulations) and neither party having requested a hearing, the matter was determined without an oral hearing but on the basis of the written representations received from both parties. Further, pursuant to Regulation 13 (5) of the Procedure Regulations the functions of the Tribunal were exercised by Mr. M J Greenleaves, he having been appointed by the Lord Chancellor to the panel referred to in that Regulation.

Inspection

9. Because of the nature of the substantive application, the Tribunal decided that an inspection of the premises was unnecessary.

10. From the papers before the Tribunal, the property appears to be one flat of 10 flats constructed in a purpose built block in the 1980s. The plan attached to the lease of flat 10 (which the Tribunal takes to be a lease in standard form for this block) shows that there are 10 garages, one allocated to each flat.

Representations

11. The central issues of Applicant's case:

    a. At the The AGM of the flat owners with the Respondent on 24th October 2007, the Respondent indicated he anticipated £3,110 for building

insurance premiums. The flat owners considered this to be excessive but the Respondent had justified it as the likely cost in view of the number of insurance claims made.

b. By letter dated 26 November, 2007 from the Respondent to the Applicant, the Respondent said that he may have misled the Applicant concerning claims record and that in fact he had been able to find insurance cover for £1,361 07.

c. That the AGM had been misled into agreeing the budget, resulting in the lessees request for a recalculation of the 2008 service charge to obviate the levying of unjustified and incorrect charges.

d. The Respondent has instead proposed that the balance of £1,748.93 (3,110 – 1,361.07) spent on insurance premium should go towards funding repairs in the future but those had not been agreed by the AGM.

e. By letter dated 28 March, 2008 from the Respondent to the Applicant, the Respondent said he had an obligation to carry out various surveys and assessments as indicated in the budget plan and he anticipated these would cost in the region of £1,000 which could now be carried out as a result of the insurance saving.

f. That at the AGM in 2006 the Respondent had referred to having to carry out various assessments and reports. They had not apparently been carried out although provided for in the 2006 budget; the Respondent was now proposing to make provision again for the same work instead of returning the money to the lessees.

g. the lease does not allowed for pre-charging by the lessor.

12. The central issues of the Respondent's case:

a. In the year 2002 the insurance premium had been £765 and as a result of a claim, renewal premium increased to £1,694 and the following year to £2,439. Finally in the year to December 2007 the premium was £2,881.

b. At the AGM in October 2007 his budget for the year ended 30 September, 2008 showed anticipated insurance premium totalling £3,110. By the time of that AGM he had not obtained alternative quotations, but in view of the claims history he had anticipated an increase over the previous year.

c. As a result of the reduced premium, he had not said he would make an adjustment but he did not implement a 10% increase which had been agreed at the 2007 AGM.

d. In the budget for the year ending 30 September, 2006 he had provided for asbestos survey and the risk assessment but these reports "are still to be actioned". He had not obtained the Fire Risk assessment and the periodic electrical test which had been mentioned in the budget plan but not included in the budgeted figures.

e. In the past it had been necessary to raise special levies. While the lease does not insist on a reserve, it does not prohibit such a fund; that in view of the wishes of the majority of lessees it is prudent to maintain a reasonable sum and it is in line with the majority view.

f. He applied for an order to be made that the Applicant pay his costs.

Consideration

13. The Tribunal considered all the papers and representations submitted by both parties in this case.

14. The terms of the lease so far as material to the issues in this case may be summarised as follows:

    a. The lessee covenants to pay (inter alia) 1/10 of the landlord's costs expenses and matters mentioned in the 4th schedule, those costs including the cost of insurance.

    b. There is no provision for any such service charge payment to be made in advance or "pre-charging" of the incurring of expenditure

    c. There is no provision for a reserve or sinking fund and no provision for contribution towards any such fund.

15.

    a. The function of the Tribunal is to determine this application according to law. In doing so, the Tribunal has to take into account the terms of the lease as being the terms agreed between the lessor and the lessee.

    b. It seems to the Tribunal in this case that there is a significant history at least over a number of years where the lessees in this building have agreed that the service charge provisions of the lease are to be treated as varied. For instance, it is evident on the papers that lessees have made payments to the landlord, or his management company, before items of expenditure have been incurred. If one considered the lease in isolation, the lessor would not be entitled to any advance payment whatever and would have to pay, out of his own pocket, the insurance premium and the cost of repairs and then, *after* the expenditure had been incurred, recover the relevant sums by service charge payments from the lessees. It appears to the Tribunal that the lessees and the Respondent have recognized the problems associated with managing the property in that way and have therefore agreed to discuss and agree the service charge budget at annual general meetings and to make advance payments.

    c. It appears to the Tribunal that this course of conduct of lessees and the Respondent has, until further notice, varied the lease provisions and, as a matter of law, must be taken into account.

    d. However, it is not impossible that this arrangement could be brought an end by any party and the consequences outlined above could ensue. It seems to the Tribunal therefore that it is for the benefit of all concerned,

that the present arrangements continue until further notice but that depends on the goodwill of all parties being preserved.

16. The Tribunal fully accepts that there is no provision for a reserve fund or sinking fund as the Applicant submits. Equally, as the Respondent submits, there is nothing in the lease to prohibit the creation of a sinking fund. However, there is also nothing in the lease requiring the lessee to contribute to a sinking fund and, taking the lease in isolation, the lessor could not require payments by a lessee towards such a fund.

17. Insurance premium.

    a. It appears that the minutes of meeting are prepared by the Respondent. To the 2007 AGM he presented a budget plan which shows insurance premiums totalling £3,110. At that time he had not obtained any renewal quotations, basing those figures on past claims experience and offered to the let the Applicant inspect those claims at the Respondents office. The Respondent also anticipated increased premium because of nationwide flooding and storm damage. The outcome of that discussion at the AGM was a resolution that the service charge be increased by 10% from April 2008.

    b. That budget plan showed estimated expenditure for the year ending 2008 of £8,717 including the anticipated insurance premium. Although the items are shown separately, there is also provision for asbestos survey, Fire Assessment and electrical testing totalling £1,026. The document ends with the recommended 10% increase in charges to produce an annual income of £8,906. That appears to be the sum which that meeting resolved should be paid by the lessees in their proportions.

    c. It is plain to the Tribunal that had the lessees known at that meeting what the actual premium was going to be, they would not have approved the increase.

    d. When the reduced premium was known to the Respondent, he said that he would in effect use the difference to carry out surveys and reports. The Respondent does not explain to the Tribunal why reports, etc were not carried out in accordance with the 2006 budget nor how the increased service charges for 2006 were actually used. He simply says that, as a result of the reduced insurance premium, he can afford to carry out those reports now.

    e. The Tribunal is not provided with any management accounts and is unable to see how service charge contributions have been spent or accumulated since 2006. The Tribunal does bear in mind the figures, which have not been refuted by the Respondent, which are set out in the Applicant's letter to the Respondent of 9 October, 2008 which show a bank balance of £2,201 at the time of the 2007 AGM. The Tribunal is therefore not satisfied that the Respondent gave a reasonable explanation for retaining the overpaid insurance premium for other

purposes. Even if his explanation had been reasonable, for the reasons set out below, the Tribunal would not have come to a different decision.

f. As noted above, the actual means of management and funding of services is carried out by agreement of the Respondent and the lessees notwithstanding the terms of the leases. What the Respondent has done in the case of the unused part of budgeted premium is unilaterally to try to alter that agreement. In the Tribunal's view, he is not able to change it unilaterally for, if he does, the agreement as it now stands is ended and the service charge provisions of the lease have to be adhered to in isolation, with the consequences mentioned above.

g. For those reasons the Tribunal found that so far as the 2008 service charges relate to insurance premium, the Respondent was only entitled to demand the premium actually payable and the balance, so far as paid in respect of insurance premium, is refundable to the Applicant.

18. Section 20C. For costs to be recoverable by the lessor under the lease, there must be clear provisions in the lease covering the particular cost. The Tribunal found no such provision in the lease which would enable the lessor to recover his costs of and incidental to these proceedings from the Applicant. However, if the Tribunal happens to be wrong on that point, it found that these proceedings were reasonably commenced and prosecuted by the Applicant and that it would be wrong to enable the Respondent to recover his costs in connection with it by way of service charge. It accordingly made the order under Section 20 C.

19. Tribunal fees. While the Tribunal has power to make such an order, it would do so very rarely such as where a Respondent plainly had no arguable case. The Tribunal did not consider this to be such a case and accordingly did not make the order sought by the Applicant.

20. Respondent's costs. Apart from the provisions of section 20C as mentioned above, the Tribunal does have power under the Commonhold and Leasehold Reform Act 2002 Schedule 12 paragraph 10 to order one party to pay the other's costs up to a maximum of £500, if the application to the Tribunal was dismissed and if in the opinion of the Tribunal the Applicant has acted frivolously, vexatiously, abusively, disruptively or otherwise unreasonably in connection with proceedings. The Respondent's application in this respect therefore fails because the Tribunal did not dismiss the Applicant's application. Further, although it did not have to make a decision on the point, the Tribunal considered that the Applicant/application was not frivolous, abusive or disruptive and that the Applicant has not acted unreasonably.

21. The Tribunal made its decisions accordingly.

Chairman

A member of the Leasehold Valuation Tribunal
appointed by the Lord Chancellor