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RESIDENTIAL PROPERTY TRIBUNAL SERVICE
LEASEHOLD VALUATION TRIBUNAL

Property	:	**72B Shakespeare Drive, Westcliff-on-Sea, Essex SS0 9AB**
Applicant	:	**Andrew Daley**
Respondent	:	**Forcelux Ltd.**
Case number	:	**CAM/00KF/LSC/2009/0141**
Date of Applications	:	**3rd and 7th December 2009**
Type of Applications	:	**To determine reasonableness and payability of service charges and administration charges**
Tribunal	:	**Bruce Edgington (lawyer chair) Evelyn Flint DMS FRICS IRRV David Cox**
Date and place of Hearing	:	**23rd March 2010 at The Wellbeck Hotel 27 Palmerstone Road, Westcliff-on-Sea, Essex SS0 7TA**

DECISION

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1. The Tribunal has no jurisdiction to assess the reasonableness or payability of service charges and administration charges up to the 1st January 2005 as they were agreed and admitted by the Applicant.

2. Reasonable administration charges due and payable by the Applicant for the year 2004 are £50.00 and reasonable service charges payable by the Applicant are nil.

3. Reasonable service charges due and payable by the Applicant for the year 2005 are £120.62.

4. Reasonable service charges due and payable by the Applicant for the year 2006 are £126.44 and a reasonable administration charge is £25.00 making a total of £151.44 for that year.

5. For the avoidance of doubt the Tribunal makes an order preventing the Respondent from including any costs incurred in these proceedings as part of a future service charge demand.

6. The Tribunal refuses to make any costs order in favour of the Applicant.

Reasons

Introduction

7. In his 2 application forms the Applicant challenges a number of service charges and administration fees between 1996 and 2007. He bought the flat in 1994. Specifically, his challenge is to:-

Year	Description	Amount £
1996-2001	accountants' fees – 6 x £20.62	123.72
2002	accountants' fee	20.62
	interest - £133.66. + £45.78	179.44
	management fee	100.00
	administration fee	35.00
2003	accountants' fee	20.62
	management fee	100.00
	legal costs	88.13
2004	accountants' fee	20.62
	interest	48.54
	management fee	100.00
	administration cost	150.00
	legal costs	197.50
2005	accountants' fee	20.62
	management fee	100.00
2006	accountants' fee	26.44
	management fee	100.00
	administration cost	75.00
		1,506.25

8. In 2005, the Respondent issued proceedings in the Southend County Court under claim number 5SS04614 for the recovery of all the monies it said were due on the 1st January 2005 i.e. £799.49. It was agreed that this included a balance on the account from a previous year of £11.36. The Applicant had the opportunity to challenge both the liability to pay and the amount of these charges. He also had the opportunity to lodge a defence of set off challenging charges from previous years Instead, he chose to tick the box which says "*I admit the full amount claimed as shown on the claim form*". He then signed this admission form and returned it to the court.

9. For reasons which will become clear, the Tribunal is precluded from re-opening these matters and therefore must decline jurisdiction to determine any sums due prior to 1st January 2005.

10. The Applicant asks a number of questions which can, perhaps, be précised as follows:-

    - Are service charges payable in advance?

- Is there an accounting date in each year when service charges become due?
- Do service charge demands need to be certified?
- Can the Respondent recover management fees?
- What interest can be claimed on late payment of service charges?
- What legal costs can be claimed.

11. He also challenges the reasonableness of the charges actually levied and complains that he has been overcharged for ground rent. As he rightly says, this Tribunal has no jurisdiction to make a ruling on the issue of ground rent as such but it may be relevant to the question of administration charges. It is understood that there has been litigation about the overpaid ground rent which has been concluded in the Applicant's favour.

The Law

12. Section 18 of the **Landlord and Tenant Act 1985** ("the 1985 Act") defines service charges as being an amount payable by a tenant to a landlord as part of or in addition to rent for services, insurance or the landlord's costs of management which varies 'according to the relevant costs'.

13. Section 19 of the 1985 Act states that 'relevant costs', i.e. service charges, are payable 'only to the extent that they are reasonably incurred'. A Leasehold Valuation Tribunal has jurisdiction to make a determination as to whether such a charge is reasonable.

14. If it is reasonable then section 27A of the 1985 Act gives this Tribunal the jurisdiction to decide whether service charges are payable. However, Section 27A also says that no application can be made to a Leasehold Valuation Tribunal for a determination as to payability where a matter "*has been agreed or admitted by the tenant*".

15. Section 153 of the **Commonhold and Leasehold Reform Act 2002** ("the 2002 Act") was brought into effect and applies to all service charge demands sent after 1st October 2007. It says that *"A demand for the payment of a service charge must be accompanied by a summary of the rights and obligations of tenants of dwellings in relation to service charges"*. However, none of the service charges or administration charges being dealt with in this application were incurred after 1st October 2007 and these provisions are not relevant to this decision.

16. Schedule 11 of the 2002 Act provides for the same conditions and jurisdiction with regard to administration charges which are defined as including payments demanded in addition to rent "*...in respect of a failure by the tenant to make a payment by the due date to the landlord...*". A variable administration charge is defined as "*neither specified in the lease nor calculated in accordance with a formula specified in the lease.*" This Tribunal has the power to say whether such a variable administration charge is reasonable.

17. Section 20C of the 1985 Act allows the Tribunal to make an order preventing a landlord recovering any cost incurred in proceedings before a Tribunal from a tenant as part of any future service charge demand.

18. Schedule 12, paragraph 10 of the 2002 Act allows a Tribunal to make what is sometimes called a wasted costs order against a party up to a limit of £500 in circumstances where, in its opinion, that party has acted "*frivolously, vexatiously, abusively, disruptively or otherwise unreasonably* ***in connection with the proceedings***" (emphasis added).

The *Contra Preferentem* Rule

19. It is being argued by the Applicant that the lease is ambiguous in that it is unclear as to what can or cannot be included in the service charge provisions. He has referred to the *contra preferentem* rule.

20. In order to assist courts (and Tribunals) in difficult matters of interpretation, the *contra preferentem* rule was devised many years ago. It is not, of course, the only rule of interpretation but it is, perhaps, relevant to this problem. It translates from the Latin literally to mean "against (*contra*) the one bringing forth (the *proferens*)".

21. The principle derives from the court's inherent dislike of what may be described as 'take it or leave it' contracts such as residential leases which are the product of bargaining between parties in unfair or uneven positions. To mitigate this perceived unfairness, this doctrine was devised to give the benefit of any doubt to the party upon whom the contract was 'foisted'.

22. In the case of **Granada Theatres Ltd v. Freehold Investments (Leytonstone) Ltd** [1958] 1 WLR 845, Mr. Justice Vaisey said, at page 851, that "a lease is normally liable to be construed contra preferentem, that is to say, against the lessor by whom it was granted".

23. The question for this Tribunal, therefore, is whether the provisions for the recovery of management fees, administration fees and interest are clear enough or whether resort has to be had to this rule of interpretation.

The Lease

24. The Tribunal was provided with a copy of a stamped copy of the lease which is for a term of 199 years from the 1st January 1980. There is also produced a copy of a Land Registry Official Copy of a Deed of Variation dated 14th December 1994 which has no relevance to this application.

25. The lease is very short and, as has been observed in documents provided to the Tribunal, it is not as thorough as most such leases.

26. Clause 4 is the tenant's covenant to pay service charges which simply says that the tenant shall "*contribute and pay one half part of the costs expenses outgoings and matters mentioned in the Third Schedule*".

27. Sub-clauses 5(2), (4) and (5) require the landlord to insure, maintain and decorate the building which includes this flat.

28. The Third Schedule simply contains a list of those items of expenditure which the landlord can collect from the tenant including "*all other expenses (if any) reasonably incurred by the landlords in and about the maintenance and proper and convenient management and running of the building*".

The Inspection

29. The Tribunal inspected the outside of the property in the presence of the Applicant and Mr. Eric Jakob from Forcelux Ltd and his representative Mr. Christopher Gibb BSc (Econ) MRICS. It is part of an end terraced house built in the early part of the 20th century with at least 2 extensions at the rear, in a residential area.

30. The original house and what appears to the first extension are built of rendered brick/block under a tiled roof and there is what appears to be a second extension of brick/block under a flat roof. Some of the window sills are in need of some decorative attention but, overall, the property appears to be in reasonable condition.

The Hearing

31. The hearing was attended by the same people and the Applicant was assisted by his mother. The Applicant acknowledged that the items of claim included in the 2005 Southend County Court proceedings cannot be assessed by this Tribunal in view of the admission. However, he said that the items claimed in those proceedings only went back to 2003 and he still wanted to challenge the claims for service charges and administration fees before then.

32. Mr. Gibb asserted that the claim included £11.36 as a balance from previous years and the admission ought therefore to extend to all service charges and administration charges relating to the period before 2005.

33. Upon further investigation by the Tribunal it seems that of the claims being challenged by the Applicant, the only ones relating to the period after the 1st January 2005 are:

Year	Description	Amount £
2004	interest	48.54
	administration cost	150.00
	legal costs	197.50
2005	accountant's fee	20.62
	management fee	100.00
2006	accountant's fee	26.44
	management fee	100.00
	administration cost	75.00

34. The Tribunal went through those claims in as much detail as it could and obtained the parties' comments and submissions on each.

Conclusions

35. Of the various questions asked by the Applicant, the Tribunal can only say as follows:-

- There is no provision in the lease to enable the landlord to collect service charges in advance. However, if a landlord has to pay for projects such as exterior decoration, the money has to come from someone. If monies cannot be collected in advance, it seems to this Tribunal that a landlord would not be unreasonable in paying for the works and then charging the tenant any identifiable interest charged to the landlord for this advance. A voluntary payment in advance would prevent this.
- There is no accounting date in the lease. The date in the year when charges can be collected would be a matter entirely in the discretion of the landlord.
- There is no requirement to have service charge demands certified in properties of this size yet. The provision in the 2002 Act requiring certification in all cases has not yet been brought into effect. However, that is not to say that it would necessarily be unreasonable for a landlord to have the service charge accounts certified. Parliament clearly thinks it is reasonable.
- There is no specific provision in the lease allowing the landlord to recover management fees. However, the general sweeping up clause in the Third Schedule allows the landlord to collect expenses incurred in the proper and convenient management and running of the building. It is this Tribunal's view that this would include a reasonable management fee and a reasonable cost to have service charge accounts certified.
- There is no provision for the landlord to charge interest for late payment of service charges. However, such a charge would be included within the definition of an administration fee and a reasonable figure would therefore be recoverable.
- There is no provision for the recovery of legal charges as part of a service charge save for charges incurred "*for the purpose of or incidental to the preparation and service of a notice under Section 146 of the Law of Property Act 1925*". However, this would not stop a landlord asking a judge in a court to order that a tenant shall pay the costs of a particular claim. This would not be relevant to a Tribunal which has very limited powers to award costs.

36. As to whether the Applicant can re-open the issue of service charges and administration fees incurred before those referred to in the 2005 court case, the Tribunal finds that they were admitted and agreed by the Applicant. He took no opportunity during those court proceedings to challenge the charges claimed or any previous charges. It would have been perfectly possible for him to lodge a defence of set off by saying, in effect, 'I admit the claim but I say that previous service charges and administration fees were unreasonable.' He chose not to

and the Tribunal is satisfied that he admitted and agreed those previous charges at the time.

37. Of the remaining charges as set out above the Tribunal concludes as follows.

38. Interest – according to page 223 in the bundle, this appears to have been added to the service charge account after the 2005 court proceedings. However, it is very difficult to see exactly what it relates to or the rate charged. Furthermore, the Respondent admits that it was overcharging for ground rent. In the circumstances, the Tribunal has not been satisfied that the amount is reasonable.

39. Administration costs – there are two such charges totalling £225.00. Mr. Jakob says that there were three instances where letters had to be written to either the Applicant or his building society. There was a fee of £75.00 on each occasion to cover a consideration of the lease and the file, writing the letter and dealing with any subsequent correspondence. This Tribunal concludes (a) that the relevant terms of the lease should have been known to the Respondent (b) the fact that there are arrears should not mean much looking at the file and (c) a template letter would normally be charged at one unit or 6 minutes of time.

40. The Tribunal concludes that £25.00 for each event is reasonable to include dealing with subsequent correspondence. It splits those as to £50.00 for 2004 and £25 for 2005.

41. Legal costs – the evidence was that the sum of £197.50 was the bill sent by the solicitors in the 2005 court case for the cost of bringing those proceedings. This was £80 court fee plus £70 fixed costs on the summons and a balance of £47.50 charged by the solicitors. There can be no doubt that the ability to charge legal fees is not sanctioned by the lease unless such costs are incurred in the preparation of a Section 146 notice or anything incidental thereto.

42. The *contra preferentem* rule does apply here. The Tribunal cannot infer that the lease provisions include costs incurred in legal proceedings for the recovery of service charge arrears. Having said that, the Tribunal is surprised that the fixed costs of £150.00 were not paid at the time. If they were not, it is still open to the Respondent to apply for judgment in respect of such costs in view of the admission made.

43. Accountants' fees – the charges of just over £20 per year are, to say the least, modest. The Respondent is allowed to charge these fees as has been mentioned above. It is sensible and reasonable to have service charge demands checked and the fees are reasonable and payable.

44. Management fees – the lease clearly allows the Respondent to charge expenses for the management of the building. The Respondent sought to suggest that the management was actually carried out by an

independent company, Empire Financial Services Ltd. which has the same address, directors and shareholders as Forcelux Ltd. The fact of the matter is that the vast majority of the correspondence in the bundle emanates from the Respondent and not Empire Financial Services Ltd. The Tribunal concludes from the evidence before it that Empire Financial Services Ltd. is simply a 'shell' company and the management is actually carried out by the Respondent.

45. Having said that, a lease with very similar terms came before the Lands Tribunal on the 27th April 2001 where the Respondent was involved. In that case, **Forcelux v Sweetman** LRX/14/2000, the Respondent claimed a management fee of £100.00 per annum. The facts were remarkably similar to this case with a small property and accusations of very little 'management' being needed. The Lands Tribunal upheld this claim.

46. It is of note that in this Tribunal's experience, local independent managing agents charge in the region of £125-£175 per annum per flat in the Southend area which would put £100.00 per annum in its context. In the circumstances, the Tribunal finds that £100.00 per annum is reasonable and payable.

47. As far as costs incurred in these proceedings are concerned, the landlord does not have the power under the terms of the lease to recover costs incurred in connection with tribunal proceedings but an order is made preventing this so that the position is very clear to both parties.

48. The Tribunal makes no order requiring the Respondent to pay any of the Applicant's expenses because the Tribunal cannot see that the Respondent has behaved in such a way in connection with the proceedings as is set out in the 2002 Act. It is a very high threshold to cross and the Applicant seems to think that simple unreasonable behaviour generally can satisfy the threshold criteria, which is not the case – even if the Tribunal were to have found that there had been unreasonable behaviour.

49. The only comment which this Tribunal would wish to make is that apart from the Respondent overcharging for ground rent, is seems that it is the Applicant who has behaved unreasonably. There was no explanation from the Applicant as to why the Respondent had to resort to approaching the Applicant's building society for payment of previous claims or why there now seem to be further substantial unpaid charges.

50. A company charged with the management and maintenance of a building cannot be expected to undertake substantial expense when the person who must contribute towards these costs simply refuses to pay. Even if costs are disputed, some effort must be made to pay promptly what the lessee considers to be a reasonable amount.

51. Finally, the Applicant has referred to a number of previous Leasehold Valuation Tribunal decisions and other cases. The Tribunal has considered those cases. It is not obliged to follow any Tribunal

decision. It has judged this case on its merits and on its particular facts. If it has not 'followed' any particular decision, that is because it either did not agree with that decision or it has distinguished such decision on its facts.

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Bruce Edgington
Chair
23rd March 2010