5792

RESIDENTIAL PROPERTY TRIBUNAL SERVICE

LEASEHOLD VALUATION TRIBUNAL

Property:	**175-189, 175a-189a, 191-201, 191a-201a (odd numbers only), Carlton Avenue, Westcliffe-on-Sea, Essex SS0 0QH**
Landlord:	**RMB Trading Ltd**
Tenant:	**Mr O I Odeniran**
Case number:	CAM/00KF/LSC/2010/0046
Tribunal:	**Mr Adrian Jack (chairman), Mr Richard Marshall FRICS FAAV, Ms Cheryl St Clair MBE BA**

DECISION

Procedural

1. The tenant by application dated 26th March 2010 applied for the determination of his liability for final service charges in the calendar years 2008 and 2009. (The service charge year is the calendar year.)

2. The current case follows a similar case brought by the landlord in 2009 (under case number CAM/00KF/LSC/2009/0015) in respect of the estimated service charges due on account in respect of 2008 and 2009. The final accounts for those two years are as follows:

	2009	2008
Accountancy	£387.75	nil
Building insurance	4006.80	2,671.89
Terrorism insurance	296.80	173.67
Interest payable	608.79	121.29
Management fees	3,080.00	1,400.00
	£8,380.14	£4,366.85

3. The Tribunal gave directions on 12th April 2010 and these were substantially complied with.

4. On 28th September 2010 the Tribunal held a hearing. The landlord was represented by Mr Boon of Eyre & Johnson, the landlord's legal advisors. The tenant was represented by Ms Elizabeth Joseph of counsel.

5. Prior to the hearing the Tribunal inspected the property in the absence of the parties.

Inspection

6. The property comprises two terraces, side by side, probably dating from the late 1940's or 1950's (although there was some suggestion that it might be earlier). Each terrace house is comprised of a ground and first floor divided into flats. There was a large garden at the back. There were small front gardens to each house in need of some gardening work. Both the front and back gardens were roughly mown. In the back of the back garden there were some small allotments used by the shorthold tenants to grow vegetables. There were a few mature trees and a little shrubbery. Otherwise the back garden was maintained to a fairly basic level. There was a large hole which appeared to have been used for lighting fires.

7. The terraces were in a generally shabby condition. The windows and front doors had recently been replaced with PVC windows and doors. The roof seemed in reasonable condition for a property of this one's age, but had deteriorated slightly since the Tribunal's last inspection in 2009. Ivy which had been on the walls had been removed, but some dead ivy remained on one of the roofs

The law and the lease

8. The Landlord and Tenant Act 1985 as amended by the Housing Act 1996 and the Commonhold and Leasehold Reform Act 2002 provides as follows:

> Section 18
>
> (1) In the following provisions of this Act "service charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent-
>
> > (a) which is payable directly or indirectly for services, repairs, maintenance, improvement or insurance or the landlord's costs of management, and
> >
> > (b) the whole or part of which varies or may vary according to the relevant costs
>
> (2) The relevant costs are the costs or estimated costs incurred or to be incurred by or on behalf of the landlord or a superior landlord in connection with the matters of which the service charge is payable.
>
> (3) for this purpose
>
> > (a) costs includes overheads and
> >
> > (b) costs are relevant costs in relation to a service charge whether they are incurred or to be incurred in the period for which the service charge is payable or in an earlier period
>
> Section 19
>
> (1) Relevant costs shall be taken into account in determining the amount of a service charge payable for a period-

(a) only to the extent that they are reasonably incurred; and

(b) where they are incurred on the provision of services or the carrying out of works, only if the services or works are of a reasonable standard; and the amount payable shall be limited accordingly.

(2) Where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable, and after the relevant costs have been incurred any necessary adjustment shall be made by repayment, reduction or subsequent charges or otherwise.

Section 27A

(1) An application may be made to a leasehold valuation tribunal for a determination whether a service charge is payable and, if it is, as to-

(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, and

(e) the manner in which it is payable.

(2) Subsection (1) applies whether or not any payment has been made.

9. The leases of the flats in question in the current case contain standard provisions for the payment of a service charge on account with adjustment once the service charge year concludes. The landlord had the obligation to insure the premises and there were provisions permitting the employment of managing agents. These costs fell to be paid by the tenant under the service charge. We deal with interest separately below.

The facts

10. The current landlord purchased the property in 2008 with completion on about 10th July 2008. It is common ground in the current application that the former landlord had very little involvement in the management of the property. Since the tenant owned all but four of the flats at the property, he in practice had to organise the management himself. As such he paid for a limited amount of gardening and maintenance and, importantly, the insurance, even though these matters were the responsibility of the landlord under the lease. The former landlord did not employ a managing agent. The former landlord has confirmed these facts in the current application.

11. Mr Boon accepted that in the course of pre-contract enquiries for the purchase of the freehold (which was effected by private treaty) the current landlord learnt that the former landlord had not insured the property, that he had not raised any service charge demands and that Mr Odeniran owned 24 of the 28 flats at the block. We infer that the current landlord was on notice that Mr Odeniran was likely to be insuring the property. It is in these circumstances surprising that the current landlord made no attempt to meet the tenant to discuss sensible hand-over arrangements.

12. The actual occupation of the tenant's 24 flats is effected by a housing association, the Abundant Life Housing Association, which is a registered charity. Abundant Life was set up, the tenant told us, by himself and he is its chief executive officer. He told us that Abundant Life actually granted the sub-tenancies to the

occupiers (all or at least most of whom were homeless peope who were being housed on the nomination of the local authority). Abundant Life collected the rent in its own name through housing benefit.

13. The actual title of Abundant Life, such as it is, is contained in what purports to be a management agreement dated 30th June 2005. By this in clause 1 Mr Odeniran agreed "with the association as managing agent:

> "(a) to pay management fees of 10% of the rent income plus value added tax...
>
> (b) to keep the... the premises in good repair... before the property is handed over to the Housing Association for management
>
> (c) to be responsible for the cost of repairs...
>
> (d) not to visit the property without the express written consent of the Association whilst the property is in management and to refrain from causing nuisance or annoyance... to any occupier... to give the Association notice of any intended visit such notice shall be a minimum of one week prior to any visit...

The association agreed in clause 2

> "(a) to keep the exterior and structure of the premises in good repair and to keep in good repair and working order the installations for water, gas, electricity and sanitation
>
> (b) shall have sole responsibility for the collection of rent on the property, such rent to be passed to the Property Owner after all disbursement[s] and fees have been deducted... [grammar as in the original]
>
> (e) by special arrangement to insure and keep insured during the currency of this agreement the premises against all risk normally covered... on the Property Owners' behalf and to make such claims as may be necessary under this insurance..."

There were special provisions in clause 3 that:

> "(e) at any time after the expiry of this contract and for so long as the property is still under the Housing Association's management (i.e. the Housing Associations' tenants still live in this property...) the terms and conditions of this contract will continue to apply
>
> (f) in the event of a termination of the management agreement... the property will be handed over to the property owner in vacant possession. The property owner will give the Association adequate time either to rehouse the tenants or evict them whichever is appropriate."

14. On 23rd July 2008 the landlord instructed Mr Jenner and his company, Hillcrest, to take over the management of the property. The landlord told the tenant by letter that it (the landlord) intended to insure the property itself. In the previous application it was common ground between the tenant and the landlord that the landlord had not produced evidence from which the tenant could satisfy himself that the landlord had effected insurance.

15. In the current application, however, the landlord challenged that proposition. The landlord relied on a letter dated 10th September 2008 from Eyre & Johnson Ltd to Jacob Forbes, the tenant's solicitors, which purported to enclose a summary of insurance issued by Jardine Lloyd Thompson, the brokers. The tenant disputed that the insurance summary had in fact been enclosed with that letter. Neither party

produced any subsequent correspondence. If the insurance had not been sent under cover of the September letter, one would have expected the solicitors to complain of the missing summary.

16. On this somewhat unsatisfactory evidence, the Tribunal finds on balance of probabilities that the summary of insurance was sent, but only in September 2008.

Insurance

17. The landlord claimed the premiums for both 2008-09 (10th July 2008 to 24th March 2009) and 2009-10 (25th March 2009 to 24th March 2010). The tenant's position was that since Abundant Life had insured on his behalf, he gained no benefit from the landlord's insurance and should not have to pay it. Moreover the landlord had not satisfied him that the landlord had adequately insured the buildings. In any event the cost was excessive, not least because the landlord received a 20 per cent commission on the premiums.

18. The landlord's case was that Abundant Life never had any insurable interest in the property, because Mr Odeniran had never granted Abundant Life a sub-lease. Thus the insurance obtained by Abundant Life was null and void. The tenant did thus benefit from the landlord's insurance. Moreover in any event by the time the landlord renewed its insurance in 2009 the tenant was on notice that the landlord was taking out insurance.

19. Some of these points we can deal with quite shortly. Under the management agreement, Abundant Life were obliged to take out insurance on behalf of the tenant. There is no doubt that he at least had an insurable interest in the property. We therefore consider that the Abundant Life policy would have been valid because it was taken out for the benefit of someone with an insurable interest.

20. In any event, it is likely and we find as a fact that there was a tenancy by estoppel between Abundant Life and the individuals whom it found to occupy the individual flats. (A tenancy by estoppel exists, because a tenant is estopped prevented in Norman French, the former language of the courts – from denying his landlord's title.) Thus Abundant Life would have been in possession of the flats by virtue of the occupancy of its own sub-tenants. That possession is probably sufficient to give some (however limited or transitory) insurable interest in the property. Insurance taken out by anyone with an insurable interest in the property protects the interests of all the holders of interests in the property: Fires Prevention (Metropolis) Act 1774 section 83. (Despite its title, the Act extends to the whole of England and Wales and indeed a number of former British colonies. New Zealand, for example, only repealed the Act in 2007.)

21. In relation to 2008-09, it was, we have found, only in September 2008 that the insurer gave Mr Odeniran even limited evidence that insurance was in place. By that time, Abundant Life, acting on the tenant's behalf, had already insured the property for the year ending May 2009. Although no doubt the tenant or Abundant Life could have cancelled the policy, in July 2008 the landlord had failed to demonstrate that it had taken out insurance at all and a cancellation would no doubt have incurred

cancellation charges. By September 2008 the tenant's policy had been running six months and the benefit of cancelling the charges is likely to have been small.

22. In our previous decision, we noted that the tenant might have a good defence on the merits to any claim by the landlord for insurance premiums based on waiver. The previous landlord was obviously happy (and indeed expressly agreed) to allow the tenant to buy insurance himself. This was a clear waiver of the terms of the lease. A party who waives a right and then changes his mind so as to rely on his strict legal rights, must give the other party a reasonable opportunity to rearrange his affairs.

23. We did not in our earlier decision give a concluded view on that argument. Mr Boon before us renewed the argument that any waiver given by the previous landlord could not bind the current landlord. He further submitted that the letter obtained by the tenant in the current proceedings from the previous landlord showed that the waiver only existed whilst the former landlord still held the freehold. We disagree on both points. A waiver in respect of an interest in land such as a lease runs with the land in our judgment. The letter from the former landlord does not show that there was an express agreement that the concession should only apply whilst the former landlord owned the freehold.

24. We consider below what a reasonable period for terminating the waiver granted by the previous landlord would be.

25. There is a separate reason for refusing the claim to insurance in this early period. The insurance premium is only recoverable if it is "reasonably incurred." As we have found above, the landlord was on notice that the tenant might well have taken out insurance. A reasonable landlord would have contacted the single holder of leases over 24 of the 28 flats which it was buying and discussed the hand-over arrangements. Instead the communications from the landlord were peremptory and showed the arrogance which we noted in our previous decision when the landlord refused to comply with the Tribunal's directions.

26. We have little doubt that the reason the landlord was so keen to ignore the insurance arrangements which had been previously made was in order to obtain the 20 per cent commission on the insurance. With that goal in mind it was happy to ignore the position of the tenant and disregard any detriment to him. For these reasons too we consider that the landlord did not incur the 2008-09 insurance premium reasonably.

27. By March 2009, however, the position had changed. As we have found above, the landlord had sent some details of the insurance to the tenant. The tenant in his turn had adopted an entrenched position. He wanted to continue the arrangement which he had had with the former landlord, however, as a long-term position this insistence was not tenable in law. The new landlord had shown that it wished to insure itself. The owner of three of the other four flats had previously agreed that Mr Odeniran could insure the block on his behalf as well. However, those flats were repossessed by that lessees' mortgagee. There was no evidence that the mortgagee or the subsequent purchasers of those flats wanted Mr Odeniran to continue to insure on their behalves.

28. Moreover, Mr Odeniran had not sent the landlord details of the insurance which he had taken out. Dialogue is a two way process. Although the landlord can be criticised for its failures shortly after purchasing the freehold, the tenant is to be criticised by not being pro-active subsequently.

29. A reasonable period for giving notice ending the waiver granted by the previous landlord would normally have been the end of the period of the insurance taken out by Abundant Life, in other words May 2009. However, because Mr Odeniran did not tell the new landlord the details of the insurance, it seems to us that a shorter period is appropriate. Mr Odeniran should have known from the summary of insurance sent to his solicitors in September 2008 that the landlord's insurance year ran from 25th March. He should thus have known that the landlord was likely to renew the insurance on 25th March 2009. Unless Mr Odeniran informed the landlord of the true position regarding the Abundant Life policy, a reasonable period of notice in these circumstances would in our judgment expire on 24th March 2009, so that the effect of the waiver ends on that date. The landlord is thus entitled in principle to claim the 2009-10 insurance premium under the lease.

30. 25th March 2009 is for these reasons too the date from which insurance premiums in our judgment became reasonably incurred by the landlord.

31. This leaves the question of the amount recoverable under the service charge for insurance. The landlord receives a 20 per cent commission on the insurance. The broker and the introducer to the broker also receive commission. Mr Boon accepted that , if the landlord were not receiving that 20 per cent commission, a cheaper premium might be obtained. Indeed the broker's report on its attempts to arrange insurance showed that at least two insurers, QBE and London Markets, were excluded from consideration expressly because they were "unable to compete due to existing commission level." Many other insurers were described in the broker's report as "unable to complete", but whether this related to the 20 per cent commission was unclear and Mr Boon did not know.

32. In our judgment the premium recoverable stands to be reduced by 20 per cent. The evidence is strong that the premium is increased by the need for the insurer to pay that fairly high commission. It may be that with better evidence, the reduction would be less (because the insurer would not have given the assured the full benefit of the reduction in commission) or more (because more companies would willing to quote). In the absence of any other evidence, a 20 per cent reduction is justified.

33. Accordingly we allow nothing in respect of insurance in 2008 and £3,442.88 in 2009.

Management fees

34. In the Tribunal's previous decision, we held that in 2008 the managing agents did very little at all. There was no gardening or repairs. The managing agents did not even have any involvement in the obtaining of insurance. In those circumstances we considered that a figure of £50 per flat would be reasonable for the five and a half months remaining in that year. There are 28 flats, so the total budgeted figure should be £1,400.

35. For 2009 we considered that a figure £110 per flat would be sufficient for the small amount which needed doing. This figure was (the Tribunal could say from its own knowledge) at the cheaper end of managing agents fees for the area, but we found that a figure at the lower end was appropriate for this type of property with the limited amount of work which needed doing. The total for 2009 was therefore £3,080.

36. In the current application we have reconsidered these conclusions. The tenant submitted that, since the managing agent did nothing, it deserved to be paid nothing. The Tribunal does not accept that. The landlord was entitled to appoint a managing agent. The managing agent was there and was entitled to be paid for being available. Moreover it is not true that the managing agent did nothing. They had to invoice the tenants and answer correspondence. The figures found by the previous Tribunal were at the bottom end of the scale of charges reasonably charged by managing agents in the area. In these circumstances we adhere to the views expressed by the Tribunal in its previous decision and disallow nothing.

Audit

37. The audit fee for two years of accounts is very reasonable. The item was conceded by the tenant. We disallow nothing.

Interest

38. The landlord sought to recover interest of £121.29 in 2008 and £608.79 in 2009. Clause 9(h) of the lease provides that:

> "The landlord is entitled and authorised (but not obliged) to borrow money in order to comply with its obligations under the Sixth Schedule as and when it considers necessary provided that any such borrowing is on terms reasonably available in the open market from time to time at that time"

The clause continues and provides for such sums to be recoverable under the service charge.

39. Mr Boon was unable to provide any details of how the sums were calculated. He said that the landlord, as a commercial enterprise buying freehold reversions did borrow money on mortgage, but he was unable to give any details of the interest rates payable on such mortgages. He accepted that there was no evidence that there had been any specific sums borrowed to pay for the various outgoings.

40. In our judgment the lease contemplates the landlord borrowing expressly for the purpose of paying these particular service charges. In the current case, it may well be that the landlord has long term mortgages, so that it can enhance its leverage when buying properties. Those borrowed funds would not, however, be borrowings in connection with the payment of outgoings under these leases in question in this case. It may be (although we make no determination as to this) that an overdraft would qualify, but we were given no evidence about the existence of an overdraft.

41. The amount of interest would need to be adjusted to take into account the insurance premiums which were disallowed or reduced. We do not have the evidence

to do that, even if we held that on the facts of this case interest was in principle recoverable. However, since we find that the landlord has failed to demonstrate any borrowings which fall within the relevant part of the lease, we disallow the claim for interest completely.

Conclusion

42. Accordingly we find the following sums are properly in the service charge accounts as follows:

	2009	2008
Accountancy	£387.75	nil
Building insurance)	3,442.88	nil
Terrorism insurance)		nil
Interest payable	nil	nil
Management fees	3,080.00	1,400.00
	£6,910.63	£1,400.00

43. Each flat is liable to pay one twenty-eighth.

Charity Commission

44. The Tribunal had some concern about the arrangements between Mr Odeniran and Abundant Life. There seemed an obvious conflict of interest between Mr Odeniran's role of chief executive officer and his position as the long lessee of the flats which the housing association tenants for him. It may well be that this is a matter which can be sorted out fairly simply, but we have directed that this decision be sent to the Charity Commission so that they can advise the housing association on the legal position.

Costs

45. In relation to the fees payable to the Tribunal, we have a discretion as to who should pay them. Since the landlord in our judgment has in large measure lost, we consider that he should reimburse the tenant those costs totalling £350.

46. The landlord indicated that it did not intend to recover its costs of the current Tribunal proceedings through the service charge. Accordingly we do not need to make any order under section 20C of the Landlord and Tenant Act 1985.

47. The tenant also asked us to make an order for costs under paragraph 10 of Schedule 12 to the Commonhold and Leasehold Reform Act 2002. We can only make such an order if the party against whom we make the order has "acted frivolously, vexatiously, abusively, disruptively or otherwise unreasonably in connection with the proceedings." Miss Joseph relied on the head of acting "otherwise unreasonably."

48. To obtain an order under paragraph 10 a party must show that the other party has behaved with a high degree of unreasonableness. It is a high threshold. In the current case, we do not consider it has been reached. The examples of unreasonable behaviour are in our judgment trivial. Accordingly we refuse such an order.

DECISION

(a) The amount payable by each flat in respect of the final accounts for the calendar year 2008 is one twenty-eighth of £1,400.00.
(b) The amount payable by each flat in respect of the final accounts for the calendar year 2009 is one twenty-eighth of £6,910.63.
(c) The Tribunal orders the landlord to pay the tenant £350.00 in respect of the fees payable to the Tribunal.
(d) The Tribunal otherwise makes no orders for costs.

Adrian Jack

Chairman Adrian Jack 7th October 2010