

**LEASEHOLD VALUATION TRIBUNAL**

Case number : CAM/33UE/LSC/2005/0057

**Property** : Flat 4, 46 King Street, King's Lynn, Norfolk PE30 1ES

**Application** : For determination of liability to pay service charges for the years 2003–2005 [LTA 1985, s.27A]

**Applicant** : Paul Nicholls, Flat 4, 46 Kings Street, King's Lynn

**Respondent** : G H Owen Property Ltd, of 2 Waldens Barns, Chapel Road, Dersingham, King's Lynn, Norfolk

**DECISION**


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 Handed down 10<sup>th</sup> March 2006
 

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**Hearing date** : Monday 27<sup>th</sup> February 2006, at Knight's Hill Hotel, King's Lynn

**Tribunal** : **G K Sinclair (Chairman), G J Dinwiddy FRICS, R S Rehahn**

**For Applicant** : Mr P Nicholls in person

**For Respondent** : Samantha Miers, solicitor (SJP Solicitors) & Mr George Owen

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**Introduction and decision**

1. In about March 2004 the freehold in 46 King Street, King's Lynn was sold by the owners, Barker Brothers. Although some documentation suggests that the sale was to Mapus-Smith & Lemmon, a firm of chartered accountants occupying the building immediately to the north of and the ground floor offices in the subject building, on 24<sup>th</sup> March title passed to the Respondent freeholder, a development company. Mr G Owen, its director and principal shareholder, is a builder and has no experience in the management of residential leasehold property. He buys, builds and sells. His only interest in the subject premises is the site to the rear which was then occupied by two redundant, roofless warehouses.

These he has since demolished in preparation for the construction of what he describes as 13 quality flats. For assistance in managing the subject premises he turned to the firm of solicitors he regularly used for buying and selling property, and in particular to one of the partners, Mr Staveley.

2. It is clear to the tribunal that :
  - a. The firm of SJP Solicitors also has very little grasp of the legislation which governs the management of residential leasehold property
  - b. On behalf of the current landlord it issued invalid service charge demands without properly considering the terms of the lease, or the law
  - c. It wholly ignored the statutory consultation procedure required for major works
  - d. It sought to recover from the Applicant a substantial legal bill incurred in chasing him for payment of these unwarranted demands
  - e. If aware of the purpose to which their accounts would be put, the landlord's accountants do not seem to appreciate the certification requirements of section 21 of the Landlord and Tenant Act 1985, nor the audit requirements of the lease.
3. After considering the evidence, including the year-end accounts produced by Mapus-Smith & Lemmon, the tribunal disallows the legal and accountancy costs sought, reduces the management fees, notes that a balance of £853 "held in hand for decorating" by the previous freeholder and taken into account in an apportionment to 24<sup>th</sup> March 2004 [at page 17] is not mentioned in the latest accounts (nor, the tribunal suspects, is it in the service charge bank account), and makes the adjustments to the figures appearing in the "King Street Rental Account" [at page 96] as shown in the Schedule to this Decision.
4. The landlord's costs of and incidental to these proceedings are also disallowed as relevant to this or any future year's service charge account because the Applicant had already paid the balance sought (except for legal costs) and has been entirely successful on the issues of legal costs and lack of consultation, the most substantial items in dispute.

#### **The lease**

5. The Applicant is assignee of a lease dated 21<sup>st</sup> February 1986 made between Barker Bros

Builders Ltd (as lessor) and Ivy Ellen Spence (as lessee) for a term of 99 years from 24<sup>th</sup> June 1985. The current ground rent is £75 per year, payable annually in advance by two equal half-yearly payments on 24<sup>th</sup> June and 25<sup>th</sup> December (the "payment days").

6. The service charge provisions appear in clauses 4(B), 6(B) & (D), and in recital (5). By way of summary :
- a. The tenant's obligation is to pay 17% of the costs incurred by the landlord in complying with its obligations under clause 4(B)(1), except that in relation to those in clauses 6(B) (insurance), 6(D)(i)(a) (repairs to roofs, gutters, pipes and drains) and 6(D)(i)(b) (repairs to the main structure of the block, including foundations and main walls) the tenant must contribute only 15%
  - b. The tribunal deduces that this differential reflects the fact that buildings insurance and major repairs, etc affect the whole building, to which the commercial tenant of the ground floor also contributes, while the cleaning, decorating, electricity to common parts, etc affect only the residential tenants so they bear the whole cost
  - c. Payment is required in advance on each payment day of the sum of £170 or such greater sum (the "estimated sum") as the landlord in its absolute discretion deems appropriate on account of the tenant's liability for the next half-year
  - d. The landlord will employ a firm of chartered surveyors or other professional managers of properties to handle the management of the block
  - e. The landlord will employ a firm of qualified accountants to audit the books and records of account kept by it of all costs charges and expenses incurred in carrying out its obligations under the lease and of all contributions received from the tenants
  - f. As soon as practicable after 25<sup>th</sup> March in every year the landlord shall produce to the tenant a fair summary certified by a qualified accountant of the costs incurred and monies expended in the year up to 25<sup>th</sup> March, plus a notice in writing of the actual amount of the tenant's liability for the previous year and a notice of the amount due by way of any balancing payment (if any)
  - g. Upon service of the landlord's accountant's certificate of actual expenditure the tenant shall thereafter pay such balancing payment (if any), although any over-payment may be repaid or retained by the landlord and applied towards the next

estimated sum

- h. In an attempt to equalise the payments due from year to year the landlord may maintain a reserve or sinking fund.

### **Applicable law**

- 7. The tribunal's powers to determine whether an amount by way of service charges is payable and, if so, by whom, to whom, how much, when and the manner of payment are set out in section 27A of the Landlord and Tenant Act 1985.<sup>1</sup> Provided that the application is made to the tribunal after 30<sup>th</sup> September 2003 these powers apply irrespective of whether the costs were incurred before the coming into force of this new section.<sup>2</sup> Please note sub-sections (5) & (6), which provide that a tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment, and that an agreement by the tenant of a dwelling (other than a post-dispute arbitration agreement)<sup>3</sup> is void in so far as it purports to provide for a determination in a particular manner or on particular evidence of any question which may be the subject of an application to the tribunal under section 27A.
  
- 8. The overall amount payable as a service charge continues to be governed by section 19, which limits relevant costs<sup>4</sup> :
  - 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.
  
- 9. This is subject to a further limitation on costs incurred in respect of major works or long-term agreements, where the cost is an amount which results in the relevant contribution of any one or more tenants being more than £250 (for major works) or £100 in any one accounting period (for long-term agreements).<sup>5</sup> In such cases the relevant contributions

<sup>1</sup> As introduced by the Commonhold and Leasehold Reform Act 2002, section 155(1)

<sup>2</sup> See the Commonhold and Leasehold Reform Act 2002 (Commencement No 2 and Savings) (England) Order 2003 [S 2003/1986], Article 2© and Schedule 2, para 6

<sup>3</sup> Eg. provisions in a lease stating that the landlord's accountant's certificate shall be conclusive, or that any dispute shall be referred to arbitration

<sup>4</sup> Including the costs of insurance

<sup>5</sup> Service Charges (Consultation Requirements) (England) Regulations 2003, SI 2003/1987

of tenants are limited to that amount unless the consultation requirements have been either :

- a. complied with in relation to the works or agreement, or
- b. dispensed with in relation to the works or agreement by (or on appeal from) a leasehold valuation tribunal.<sup>6</sup>

### **Inspection and evidence**

10. The tribunal inspected the premises at just after 10:00 on the morning of Monday 27<sup>th</sup> February. Also present were Mr Nicholls and Mr George Owen. Mr Owen showed everyone round externally, including over the land acquired by his company and on which he had demolished two redundant warehouses with a view to the construction of a block of 13 flats. Mr Nicholls showed the tribunal round the common parts inside the building.
11. The premises comprise most of a three storey Grade II listed building on the east side and at the north end of King Street, King's Lynn, about 50 metres from Tuesday Market Place. The building is in fact L-shaped, with a two storey rear extension which formerly was physically attached to one of the warehouses. The building comprises offices at the ground floor front with four flats on the first and second storeys, and two flats in the ground and first floors of the rear extension. Flat 1, in the ground floor rear extension, is directly accessed by its own front door whilst the other five flats are approached via a supposedly access-controlled common entrance door and stairs at the rear corner of the main building. The north side of this rear extension is a blank wall which forms the boundary of the property. The tribunal was informed that prior to the demolition of the warehouses no access to this wall for maintenance purposes was possible through the ground floor offices in the adjoining building to the north because its internal layout makes the transit of ladders or scaffold poles through to the rear yard impossible.
12. The building is of red brick and slate tile construction, probably in the late 18<sup>th</sup> century. At the southern end at ground level is a large arch, over which the flats extend, giving vehicular access to a yard at the rear and to the south of the extension. At present this yard is used for the parking of six leaseholders' cars and two for the accountants who

<sup>6</sup> Landlord and Tenant Act 1985, s.20 (as amended by the Commonhold and Leasehold Reform Act 2002)

occupy offices on the ground floor in the main part of the building. It is also subject to a right of way on foot from King Street to the rear door of McDonalds in the High Street, for purposes of delivering stock and emptying bins. The yard will also be needed for construction vehicles for the landlord's new flats (although Mr Owen later told the tribunal that one of the conditions for the grant of planning permission is that no parking is to be provided for them).

13. Upon inspecting the condition of the building the tribunal was primarily concerned to note that despite having demolished the warehouse tied into the eastern wall of the rear extension no steps had been taken to protect the now exposed wall from the weather save for the provision of some scaffolding which was still in place. As owner of the former warehouse site the freeholder owes the building a duty of support and shelter. The tribunal was informed by Mr Nicholls, and is not surprised to hear, that the tenants of flats 1 and 2 have noticed some problems with damp to their end wall and have had its cause investigated.
14. So far as the rest of the building is concerned the tenants' principal concern is that since the demolition of the warehouses their roofs have become a resting spot for pigeons, with the consequent deposit of large quantities of pigeon droppings which have blocked the gutters and made a mess on the ground just outside the entrance door. This mess has been walked into the building, and the carpets to the common parts, on the soles of people's shoes. Mr Owen confirmed that on one occasion he had personally counted some 200 pigeons on the roof. The tribunal observed that the gutter on the south side of the rear extension was indeed clogged near the down pipe but within reasonable reach of a landing window. With a little ingenuity and a long pole this could probably be cleared.
15. Much more difficult to access for maintenance purposes is the southern gable wall and the gutter running just below a small half-hipped roof. This part of the building is attached to the building to the south, the rear of which comprises a sloping glass roof to what the tribunal presumes is some sort of conservatory structure. As a result, access to the subject premises for maintenance purposes could only be obtained by use of a

very large "cherry picker" parked in the street at the front of the building.

16. At the hearing the question of what was owed for the service charge year 2003–04 was quickly disposed of. Although Mr Nicholls had enjoyed a good relationship with the former freeholder, Barker Brothers, and had paid regular contributions by direct debit, the figures produced prior to the sale to Mapus-Smith & Lemmon (which immediately preceded the sale on to G H Owen Property Ltd) showed that there was a sum of £348.55 outstanding from Mr Nicholls. He delayed paying this sum when demanded by the current freeholder's solicitors while this could be checked, but finally he paid it. As he trusted Barker Brothers and had not produced any evidence, in the form of bank statements or otherwise, showing what he had paid Mr Nicholls was prepared to drop his challenge to the service charges due to the former freeholder and concentrated instead on the demands made for 2004–05, and in particular the demands made by SJP Solicitors for payment of legal fees.
17. Amongst the documentation disclosed was an interim service charge demand from SJP served under cover of a letter dated 29<sup>th</sup> June 2004 [page 59]. The demand itself [page 60] is undated, refers to flat 4 and states :
- |  |     |          |
|--|-----|----------|
| Building Insurance & Painting Estimate |     | £3353.25 |
| Percentage Portion                     | 17% | £570.00  |
- Not only is the document undated but it fails to disclose how much is due for insurance and how much for the painting. The tenant's proportion of the insurance is only 15%, not 17%. No consultation exercise was ever undertaken. The demand appears to be for a whole year in advance, not just for the next 6 months.
18. On 5<sup>th</sup> August 2005 Mr Staveley of SJP served on the Applicant a copy of the accounts for the period ending 24<sup>th</sup> March 2005, estimates in respect of decorating the outside of the building "served in accordance with the Housing Act", and a demand for ground rent and interim service charge. The demand appears at page 24 in the hearing bundle. It purports to add VAT at 17.5% to the maintenance charge for the year 2004–05. It alleges that the tenant's portion of the whole is 17%. The estimates for decoration are £2,735 plus VAT and £3,290 respectively. Both exceed the consultation threshold, yet

none was undertaken in accordance with the 2003 Regulations.

19. The tribunal took the Respondent through the items of expenditure listed on page 96. Under management charges of £300 Mr Owen admitted that there were no invoices to back this up; he could not say what hourly rate was applied or the number of hours claimed for; but he said he spent a lot of time and money (perhaps more than £1,000 in agents' fees) sorting out the mess caused by bins wrongfully placed by McDonalds in the yard. He stated :

I instructed Russen & Turner to negotiate : bear in mind I am building quality flats.

20. On the subject of insurance, Mr Owen explained that he used his normal insurance broker to arrange cover but was then told by him that if he joined an organisation known as the Eastern Landlords' Association he would qualify for cheaper and better cover arranged with Norwich Union. He duly did so, arranged better cover (to include flood damage and a higher insurance valuation), and after paying the joining fee and subscription still achieved a net saving for the tenants.
21. Much of Mr Nicholls' submissions concerned the lack of consultation (which the landlord admitted) and the claims against him for legal costs, which he regarded as unjustified. He argued that he was entitled to challenge unjustified demands, and that legitimate queries (for example about why the landlord's interim demands included decorating costs in two consecutive years) [at page 21] were simply ignored [see page 20].

#### **Discussion and findings**

22. Contrary to the requirement in the lease, the accountants have not audited the accounts. Neither have they properly certified the costs incurred and monies expended by the landlord in complying with its covenants. The condition precedent to the demand for any balancing payment has not been met. Further, the accounts do not comply with the provisions of section 21(5) of the Landlord and Tenant Act 1985.
23. The accountants had two attempts at producing what they describe as the "King Street Rental Account". The first is for the period ended 1<sup>st</sup> January 2005 [pages 89-93], while

the second, correctly, is for the period ending 24<sup>th</sup> March [pages 94–98]. The tribunal notes that this second set of accounts correctly excludes the ground rent due to the landlord, but records a sum of £335 as maintenance fees received relating to a previous period. The tribunal was, however, also referred to a document prepared by Barker Bros in connection with the sale [at page 17]. This shows a balance of £853 “held in hand for decorating” by the previous freeholder and taken into account in an apportionment to 24<sup>th</sup> March 2004. This sum is not mentioned in the latest accounts and the tribunal suspects that it has been overlooked, and that no such amount (which is, after all, the tenants’ money) has been placed by the new owner in the service charge bank account.

24. Neither the accountants nor the landlord and SJP, its agent, have attempted to apportion liability for service charge expenditure in accordance with the lease, instead treating the tenant’s proportion of all service charge expenditure as 17%, when works to the roof, gutters, etc should be apportioned at only 15%. For the sake of simplicity the tenants of the flats were each overcharged.
25. The accountants have included as an item of expense management charges of £300 which are not supported by any documentation. A “maintenance charge” of £575 is supported by one invoice from SJP [page 131] for work done “to include all correspondence, telephone calls, photocopying and postage not specifically referred to above” [nothing is specifically referred to in the document]. Ms Miers admitted that the correspondence on file was mainly for Mr Nicholls, but that there were also standard letters demanding monies, and chasing letters, etc. The tribunal queries whether a firm of solicitors that is unskilled in property management can come within the landlord’s obligation in clause 6(D)(v)(b) to employ “a firm of chartered surveyors or other professional managers of properties”. Nevertheless, some work was undertaken by Mr Owen and his solicitors, and the tribunal is prepared to treat as reasonable a management charge of £50 per flat.
26. Under “repairs and maintenance to property” the accountants have allowed the sum of £770, in support of which are three invoices from the landlord company to itself [pages 127–129] and one from an independent electrical contractor. The landlord’s internal invoices include an element for VAT. Referring to VAT Notice 742 (issued December

1995) at paragraph 5.7,<sup>7</sup> the tribunal reminded Ms Miers that where a landlord leases domestic property the management charge element of the total service charge will be exempt from VAT.

27. According to *Hill & Redman*, Chapter 16, when dealing with residential premises at paragraphs HR A[10289] & [10291] :

Fundamentally, subject to certain exceptions, the grant of any interest or right over land, or of any licence to occupy land is an exempt supply. This statement of principle extends to service charges on domestic accommodation relating to the common areas of an estate of dwellings or to a multi-occupied domestic dwelling provided the service charges are paid under the terms of the lease by the lessees or by persons renting property to the lessor.....

Included in the above exemption relating to the common areas maintenance will be the provision of a caretaker, security guards, upkeep of landscaped general areas, the paths, driveways and the common parts within the block of flats and costs incurred in the general maintenance of the exterior parts of the building.

28. This attempt by the landlord to levy VAT was therefore incorrect and, while no doubt entirely innocent, is unlawful. Without considering any further aspects of the service charge account it therefore falls to be reduced at least by that element. Quite how Mapus-Smith & Lemmon, a firm of chartered accountants, overlooked this error remains a mystery to the tribunal.

29. On the subject of insurance, the tribunal notes Mr Owen's evidence and observes that it would be most unusual for the tenants to pay the landlord's subscription to any organisation. However, it is satisfied that the landlord joined for one reason only, namely on the advice of its broker to ensure that better and cheaper cover could be obtained. As Mr Nicholls regards this as wholly beneficial to him the tribunal is prepared to treat the ELA subscription as an acceptable management expense.

30. The "legal and professional expenses" concern Mr Staveley's pursuit of Mr Nicholls for payment of sums demanded. Save initially for the moneys apparently owed to Barker Bros Mr Staveley's attempts were to chase non-payment of moneys demanded by him for service charges and legal fees. As the service charge demands in June 2004 and

<sup>7</sup> Having investigated this point of law the Tribunal is satisfied that this VAT Notice is the most current edition and remains in force

August 2005 were not valid and legitimate queries were ignored the tribunal is not prepared to accept these legal fees as recoverable. (In fact Mr Nicholls had made an offer to pay £500 in respect of legal fees, after paying all other sums demanded in March 2005, but SJP rejected this.)

31. In accordance with the schedule attached the amount which Mr Nicholls is liable to pay to his landlord in respect of the service charge year 2004–2005 is determined at £478.82.

### **Section 20C**

32. Mr Nicholls has succeeded on the principal issues in dispute, namely liability to pay legal fees and non-consultation about the external decorating, the cost of which places them in the category of “major works”. Apart for the legal fees which SJP sought to recover he had long ago paid everything else demanded for the year 2004–05, although legitimate questions were again asked by him about SJP’s demand in August 2005 for an estimated amount in respect of the whole of this year’s service charge. In the circumstances the tribunal is prepared to disallow the landlord’s costs of these proceedings as relevant to this or any future year’s service charge account.

Dated 10<sup>th</sup> March 2006



Graham Sinclair – Chairman  
for the Leasehold Valuation Tribunal

## SCHEDULE

**46 King Street, King's Lynn Service Charge Account — year ending 24<sup>th</sup> March 2005**

Item			Allowed	
<i>Internal Repairs and Maintenance</i>				
28-Jul-04	G H Owen Ppty	net of VAT	£107.00	
13-Sep-04	Bailey		£56.40	
25-Nov-04	G H Owen Ppty	net of VAT	£59.81	
 <i>Electricity</i>				
12-Aug-04	Powergen		£94.91	
 <i>Cleaning</i>				
	per month	no. payments		
	£73.40	11	£807.40	
 <i>Bank charges</i>				
			£31.00	
 <i>Accountancy</i>				
			nil	
 <i>Subscriptions</i>				
	Eastern L'lords	y/e 31.xii.04	£51.00	
		y/e 31.xii.05	£60.00	
<b>Sub-total</b>			£1,267.52	flat 4 x 17% £215.48
 <i>External Repairs and Maintenance</i>				
15-Mar-05	G H Owen Ppty	net of VAT	£440.66	
 <i>Insurance</i>				
	Premium		£1,188.79	
	Refund		(£207.20)	
<b>Sub-total</b>			£1,422.25	flat 4 x 15% £213.34
 <i>Management fee per flat</i>				
				£50.00
<b>Total Service Charge</b>				£478.82