2617

RESIDENTIAL PROPERTY TRIBUNAL SERVICE
SOUTHERN RENT ASSESSMENT PANEL &
LEASEHOLD VALUATION TRIBUNAL

S.27A of the Landlord & Tenant Act 1985

DECISION

Case Number:	CHI/21UD/LIS/2005/0063
Property:	The Ben Nevis Suite 6 Highland Gardens St Leonards-on-Sea East Sussex TN38 0HT
Applicant:	Stephen John Austin
Respondent:	Flathold Limited (Oakfield Property Management)
Date of Application:	7 December 2005
Date of Decision:	21 February 2006
Tribunal Members:	Mr T E Dickinson BSc FRICS IRRV (Chairman)

INTRODUCTION:

1. This is an application by Stephen John Austin the Leaseholder of The Ben Nevis Suite, 6 Highland Gardens, St Leonards-on-Sea under a) Section 20c of the Landlord & Tenant Act 1985 for an Order Limiting the inclusion of the Landlord's costs of the proceedings in the service charge and b) under Section 27A of the Landlord & Tenant Act 1985 for the determination of liability to pay service charges.

2. The application is dealt with on the fast track without a formal oral hearing. The case has been heard by a Chairman sitting alone having regard to written representations made by the parties.

3. Directions for the conduct of the case were issued dated 28 December 2006.

4. The Applicant provided a statement and various documents in support of his case, generally in accordance with the directions. The Respondents have also made a statement and referred to various documents, in accordance with the directions.

APPLICABLE LAW:

5. S. 20c of the Landlord & Tenant Act 1985 permits a Tenant to make an application for an order that all or any of the costs incurred, or to be incurred, by the Landlord in connection with proceedings before a Leasehold Valuation Tribunal and not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the Tenant or any other person or persons specified in the application.

6. S.27A of the Landlord & Tenant Act 1985 provides under Sub Section 3 "for an application to be made to a Leasehold Valuation Tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance, or management of any specified description, a service charge will be payable for the costs and, if it would, as to a) the person by whom it would be payable; b) the person to whom it would be payable; c) the amount which would be payable; d) the date at or by which it will be payable; and e) the manner in which it will be payable".

LEASE:

7. The lease of the property was made on 15 December 1995 between R P Beswick Esq (the original Lessor) and R Telford Esq (the original Lessee).

8. The covenants and provisions in the lease relevant to this application are as follows:

Clause 4 (4)

To pay the tenant's share of the interim charge and the service charge as hereinafter defined at the times and in the manner provided in the Fifth Schedule hereto. Both such charges to be recoverable in default as rent in arrears.

Clause 5 (g)

(i) To employ at the Lessor's discretion a firm of managing agents to manage the building and discharge all proper fees, salaries, charges and expenses payable to such agents or such other person who may be managing the building, including the cost of computing and collecting the rents in respect of the building or any parts hereof.

(ii) To employ all such surveyors, builders, architects, engineers, tradesmen, accountants or other professional persons as may be necessary or desirable for the proper maintenance safety and administration of the building.

Paragraph 1 Fifth Schedule

"Total expenditure" means the total expenditure by the Lessor in any accounting period in carrying out the obligations under Clause 5(5) of this lease and any other costs and expenses reasonably and properly incurred in connection with the building, including without prejudice to the generality of the foregoing:

a) The cost of employing managing agents

b) The cost of any accountant or surveyor employed to determine the total expenditure and the amount payable by the Lessee hereunder.

CONSIDERATION:

9. The question that the Tribunal has to decide as stated by Mr Austin in relation to the 2005/2006 accounting year for 6 Highfield Gardens is whether or not Oakfield Property Management's proposed fee as managing agent for major works i.e. £2,824.38 plus VAT is excessive, particularly in view of the fact that the Leaseholders are also paying a surveyor £2,567.62 plus VAT in relation to the supervision of the works.

10. Oakfield Property Management have referred to Mr Austin's lease and in particular page 10 of the lease and the items contained in Clauses 5 (g) (i) and (ii). The managing agents have also referred to the provisions of the Fifth Schedule of the clearly stating the managing agent's rights in charging the fee.

11. Oakfield Property Management have provided a detailed account of what a Section 20 Consultation may involve and have additionally provided a breakdown of their involvement throughout the three stage process, including details of meetings and correspondence.

12. Standon Associates Ltd, Chartered Building Surveyors, have been appointed by Oakfield Property Management Ltd and have, inter alia, prepared a general specification of works, including a redecoration specification for the building and schedule of repairs. As a result of their involvement Standon Associates levied a fee relating to 10% of the estimate received from SDS, the appointed contractor. Standon Associates fee amounts to a total of £2,567.62 plus VAT.

13. In a letter dated 11 October 2005 Ryan O'Reilly Estate Manager for Oakfield Property Management Ltd explains that Oakfield's fees are as agreed as per the Terms of Engagement which in this case are 10% of outgoings. Regarding the calculation, Mr O'Reilly refers Mr Austin to the Part 2 Notice dated 22 September 2005.

14. In the Part 2 Notice Oakfield Property Management have stated in paragraph 3 that in connection with the works it will be necessary to pay professional fees, which in this case will include the fees of Standon Associates at 10% of the contract sum plus VAT together with the fees of Oakfield Property Management representing 10% of the combined contractor and building surveyor's fees excluding VAT.

15. In a letter dated 19 October 2005 A F Harvey of BGW McDaniel Chartered Surveyors states to Mr O'Reilly of Oakfield that whilst he accepts that the proposed administration charge at 10% is in line with normal practice, he wishes to question the proposed Oakfield project management charge of 11% and asked for an explanation of what works Oakfield propose to project manage and the justification of the expense. In that letter Mr Harvey goes on to state that in essence the proposed contract is for external redecoration and attendant repairs and from his own experience of such work, the contract administrator should be able to deal with all aspects of the contract within the fee of 10%.

16. In a response to BGW McDaniel Chartered Surveyors dated 24 October 2005, Mr O'Reilly for Oakfield, explains that the professional fee is for overseeing and arranging the works on behalf of the Freeholder or Residents Association, which includes the serving of notices for the Section 20 Consultation process, dealing with observations from leaseholders etc. Mr O'Reilly does however go on to state that unfortunately these works are not within the Terms of Engagement between the Freeholders and themselves and thus a fee is charged.

17. In a letter to Mr O'Reilly dated 5 November 2005 Mr Austin makes reference to the Estate Management Agreement between Oakfield PM Ltd & Flathold Ltd. The agreement is dated 1 February 2005 for a minimum period of 15 months. In that letter Mr Austin states that he has no problem with the surveyor's fee, as he has undertaken the inspection of the building, drawn up the specification for works, corresponded with potential contractors etc. Mr Austin however contests Oakfield's charges until he can see some justification for them, i.e. hours worked, correspondence entered into etc.

18. In a response to Mr Austin dated 21 November 2005, Mr O'Reilly sets out in detail the responsibilities of the estates department and accounts department of Oakfield in relation to the Section 20 Consultation process.

DETERMINATION:

19. The Estate Management Agreement between Oakfield Property Management Ltd and Flathold Ltd dated 1 February 2005 provides details of the bases of remuneration at Section 5, although in the annex to the agreement there are a number of items not forming part of the estate management service described in the Terms of Appointment. These include, inter alia, preparing specifications and tenders for supervising and measuring works, the cost of which exceeds the specified expenditure limits and for non-routine matters and where expenditure is in excess of the limits contained in the Landlord and Tenant Acts 1985 and 1987 or as subsequently amended. The agreement provides for a management fee of £800 per annum plus 10% on all outgoings including major works. All fees are subject to VAT at the current rate.

20. A Service Charge Residential Management Code has been approved by the Secretaries of State for England and Wales under the terms of Section 87 of the Leasehold Reform, Housing and Urban Development Act 1993. This Code of Practice has been prepared in the hope that it will promote desirable practices in respect of the management of residential property. The Code refers to terms of engagement, appointment and charges of a managing agent and describes the management functions that should normally be included within the basic fee. Under Section 2.6 of the Code, reference is made to a menu of charges for duties outside the scope of the basic fee including preparing specifications, obtaining tenders and supervising substantial repairs or alterations, together with the preparation of statutory notices and dealing with consultations where the Landlord & Tenant Act Expenditure Limits are to be exceeded.

21. The managing agents have conceded that no provision has been made as part of the Terms of Engagement for expenses involved in the Section 20 Consultation process. The agreement does however refer to a basis of remuneration, which provides for a management fee of £800 per annum plus 10% on all outgoings including major works.

22. It is the Tribunal's view that the fee levied by Standon Associates comprising 10% of the contract sum plus VAT should be the only professional fee allowable in respect of the major works. This Tribunal has found that the additional fee proposed by Oakfield at approximately 11% of the cost of works is therefore not justifiable in the circumstances.

23. With regard to the application under Section 20c of the Landlord & Tenant Act 1985, this Tribunal hereby orders that all of the costs incurred by the Landlord in connection with these proceedings shall not be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the Tenant.

Dated: 21 February 2006

T E Dickinson BSc FRICS IRRV
Chairman

A Member of the Panel appointed by the Lord Chancellor