(2815)

RESIDENTIAL PROPERTY TRIBUNAL SERVICE

LEASEHOLD VALUATION TRIBUNAL FOR THE LONDON RENT ASSESSMENT PANEL

LANDLORD AND TENANT ACT 1985 (AS AMENDED) SECTIONS 20ZA, 27A & 20C

REFERENCE NUMBER: LON/00BE/LIS/2006/0075

In respect of		**Flats 3, 5, 10, 16, 27 and 30, Howard Court, Peckham Rye London SE15 3PH**
Parties	:	**Visible Information Packaged Systems Limited and VIP Number 2 Limited** — **Applicant**
		Marionette Limited — **Respondents**
Representations	:	**For the Applicant:** **Mr N Shepherd**
		For the Respondents: **Mr A J Cox**
Tribunal Members	:	**Mr A A Dutton Chair** **Mrs H C Bowers MRICS** **Mrs R Turner JP BA**
Application Date	:	**21st May 2006 and 31st August 2006**
Hearing Date	:	**2nd October 2006**
Date of Decision	:	**27th October 2006**

REASONS

A. BACKGROUND

1. Two applications had been made to the tribunal by the Applicants. The first in time sought a determination in respect of outstanding service charges for the years 1st April 2004 to 31st March 2005 and the following year. Somewhat later, following submissions from the Respondent, a further application under section 20ZA, seeking dispensation from the requirements of section 20 of the Act was made.
2. At the commencement of the hearing on 2nd October 2006, Mr Cox, a partner in Managers in Property, the agents for the Respondent, made an application for the hearing to be adjourned on the grounds that the Applicants had not complied with the provisions of section 21 and 21B of the Act. Following discussions between the parties and the tribunal, Mr Cox agreed to adopt a pragmatic approach to the proceedings and did not pursue his application any further.
3. As a result of further discussions between Mr Shepherd for the Applicants and Mr Cox this early show of pragmatism and common sense continued and the issues between the parties were considerably condensed to the following:
   (a) The apportionment of the insurance premium between the flats in the property
   (b) The recoverability of interest charges made by the Applicants
   (c) A claim for the refund of fees, costs pursuant to the Commonhold and Leasehold Reform Act 2002 Schedule 12 para 10 and the recoverability of costs under section 20C of the Act, a matter which Mr Cox raised at the hearing.

B. EVIDENCE

4. Insurance apportionment – The Applicants contention was that fire damage to three flats had been allowed to happen by the Respondent in that they, or their sub tenants Hyde Housing Association had failed to prevent squatters gaining access to a flat, or had not acted with sufficient alacrity to regain possession. It was alleged that as a result of this and the occupancy by the tenants of the Housing Association the insurance premium for the following years had been greatly increased. The Applicants relied on the terms of the leases which required the lessee to pay *"a fair proportion of the fire insurance premium payable by the landlord in respect of the Building"* or in the case of lease granted by VIP Number 2 Limited *"a fair proportion of the insurance premium payable by the Lessor in respect of the Building"*. Applying this wording the Applicants had concluded that the increased premium should be wholly borne by the Respondent company who was the lessee of the flats numbered 3, 5, 10, 16, 27 and 30. The fire had started in flat 5 and had damaged flats 3

and 7 as well. We were told that there had been problems obtaining insurance cover and that the eventual premium paid was more than £3,000 above the previous year's premium. As a result the Applicants had in effect surcharged the Respondent with the difference between what they calculated would have been the premium had the fire not occurred and the actual premium paid.

5. In response Mr Cox, for the Respondent, argued that all leases in the block were entitled to the benefit of the insurance and that there should be no differential treatment of the lessees. Further he was doubtful that the hypothetical insurance quotation in the "no fire world" from Zurich was on a like for like basis and nor indeed was the actual insurance cover obtained. He drew to our attention the increase in the sums insured for the following years which he felt, together with the general uplift in premiums during this time accounted for the rise, and not the fire alone. He also referred to the RICS management code and the ability to recover policy excesses from negligent tenants. In this case he noted that the insurers had not sought to avoid payment and that if negligence against a tenant could be shown the code only suggested that the policy excess should be recovered.

6. Interest charged – The Applicants relied on the terms of the two leases produced to us to support the claim made for interest on the service charge sums due. In the earlier lease at clause 2 C (6) and the later lease at clause 2(6) provision is made for the lessee to pay and contribute *"a rateable or due proportion of the expenses of making repairing maintaining rebuilding and cleansing and lighting the exterior of the Flat and the Building"* and in the case of the later lease the words *Lessors management expenses"* are included.

7. The Applicants had set up separate accounts in the Applicants' names for each flat. In the case of the Respondents flats, because the service charges had not been paid on time. The Applicants, it was asserted, had made payments to the managing agents on a regular monthly basis which they sought to recover from the Respondent and in addition charged interest at the bank's rate and passed on the setting up fee for each account of £200 per annum. We were told that 22 flats had leases which provided for the collection of service charges in advance of expenditure but it was common ground that none of the leases to the flats held by the Respondent contained an advance payment provision. It was also pointed out to us that this system has been place for some 4 years and that at a previous LVT hearing this issue was not raised.

8 Mr Cox simply stated that the leases did not provide for the recover of interest and the wording relied upon by the Applicants was not specific enough to enable this element to be recovered. Further, if there was the ability to charge interest the annual setting up fee of

£200 per account, which would create an annual charge to the Respondent of £1,200 was unreasonable and had not been notified to the Respondent.

9. Costs – Fees. Mr Shepherd on behalf of the Applicant requested reimbursement of fees pursuant to paragraph 9 of the Leasehold Valuation Tribunals (Fees) (England) Regs. 2003 on the basis that it was only by bringing this application that matters could be resolved. He did however accept that the notices under section 20 of the Act were defective but nonetheless sought the costs of the section 20ZA application as well, together with the hearing fee. The total sum involved was £850. He also sought costs pursuant to the Comonhold and Leasehold Reform Act 2002 schedule 12 paragraph 10 which gives the tribunal, in certain circumstances, the ability to award costs up to a maximum amount of £500. He had nothing to say in respect of the section 20C matter.

10. Mr Cox, not unsurprisingly, argued that then fees should not be recoverable from the Respondent. In so far as the section 27A application was concerned he felt that the "usual rule" that costs follow the event should apply and that in respect of the section 20ZA application this was issued as a result of the Applicants errors and although the parties had compromised that application the Applicant should bear the cost of the fees. In respect of the costs under the 2002 Act he did not think that the Respondent had acted any more frivolously, vexatiously or otherwise than the Applicant. He did not think that the costs of the proceedings should be recoverable under the service charge regime and applied under section 20 C accordingly.

C. THE LAW:

11. Section 27A of the Landlord and Tenant Act 1985 requires us to determine whether a service charge is payable and if it is, by whom, to whom, the amount, the date upon which it is payable and the manner in which it is payable.

12. Section 20C of the Act enables the Tribunal on an application by a tenant to determine that costs incurred in connection with proceedings before the Tribunal should not 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 specified in the application. The Tribunal is required to make such order as it considers just and equitable in the circumstances.

13. As outlined above the Commonhold and Leasehold Reform Act 2002 gives the tribunal limited powers to award costs against a party who has acted in breach of the provisions set out at paragraph 10 (2) (a) and (b) of schedule 12

D. DECISION:

14. Dealing firstly with the insurance apportionment. We heard all that was said on behalf of the parties and had the opportunity of considering the paperwork contained in a voluminous

bundle. It was quite clear from the exchanges of correspondence that little love was lost between the parties. The question we need to consider it whether the Applicants apportionment reflect the terms of the lease and is "a fair proportion" of the insurance premium payable. It is not clear from the papers before us that the increase in the insurance premiums following from the fire in 2002 is wholly, or indeed in part due to that incident. The property had a claims history before the fire, although not of any great moment. The sums insured appeared to have been increased quite substantially from the sum of £3.1M used for the hypothetical quote in March 2003 to the sum insured on the AXA policy for the present year of £4.9M. Further, we are aware from our own knowledge and experience that insurance premiums have increased quite considerably over the recent years. However, we do not, we find, need to consider the level of premiums in this case. It is our finding that it is not reasonable to apportion the increase in the insurance premium, from a hypothetical and unreliable level to the premium actually payable, to the Respondents flats. There is, with respect, no logic to the arrangement. If the intention was to "punish" a leaseholder for causing the increase then one would expect that such an increase would be confined to the flat in question. Indeed, in answer to questions from the tribunal Mr Shepherd was frank enough to admit that if the fire had been in a flat not owned by the Respondent he would have reviewed the position and that one claim would probably not have caused him to recover the additional sum from the lessee. Mr Shepherd at the hearing told us that he was the owner of three flats in the block. Whether this has influenced his decision on the apportionment is not clear but it would obviously benefit him. Accordingly, we order that for the years in dispute, and henceforth, the insurance premium should be allocated on an equal basis between the 31 flats, as had previously been the case.

15. We turn now to the interest and bank charges. We can deal with this quite simply. We find that the lease does not contain provisions for the recoverability of these charges. There is no provision in the leases held by the Respondents, as was conceded by the Applicants, for the payment of advance service charges. The arrangements that the Applicants have reached with their managing agents that requires them to pay advance monies in respect of those lessees who do not do so, either voluntarily, or be virtue of the terms of their leases, is a matter for them. Whilst one can see the logic of creating separate accounts for each lessee it is unreasonable to do so on the basis that it costs the lessee £200 per annum per flat in bank charges, the more so as it appears that the Respondents had not been made aware of that fact. Accordingly, these charges should be expunged from the accounts and credit given to the Respondents in respect of same.

16. Finally the questions of costs and fees. Whilst we applaud both Mr Shepherd and Mr Cox for the compromise on so many issues that they managed to reach nonetheless there were two issues we had to consider. We have borne in mind the animosity that there appears to be between the parties, if not Mr Shepherd and Mr Cox personally. This we suspect led the Applicants to adopt the stance that has been taken in respect of the insurance and interest/bank charges claims. On the two matters we were asked to consider, the Applicants have lost. Accordingly we find that it would not be reasonable to order the Respondent to pay the application fees or the hearing fee, the more so as one application, under section 20ZA, was to correct an error made by the Applicants, which Mr Shepherd admitted. We find that it would be inappropriate to order any costs under the 2002 legislation. Although the Applicants lost on the substantive matters we had to deal with, the agreement reached, which we will record later, does require the Respondents to pay service charges but equally we cannot say that that either party has acted in breach of paragraph 10(2)(b) of the 2002 act. Finally, we are prepared to order that section 20C shall apply to the Applicants' costs of these proceedings and that they are not recoverable as service charges. Our reason for this is that both parties have had success and both have incurred costs. It is in our finding reasonable that each should, in effect, bear their own costs of these applications.

17. The terms that were agreed between the parties are as follows:
    (a) The costs of the roofing works are agreed at £681.93, as opposed to the sum of £737.63 claimed.
    (b) The section 20ZA application was dispensed with.
    (c) The retention was agreed at £368.50 per flat
    (d) The managing agent's fees of £200 per flat is agreed.

18. We do hope that the rapprochement achieved by Mr Shepherd and Mr Cox can continue in the dealings that the parties will have in the future.

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Chairman

Dated 27th October 2006