2639

LEASEHOLD VALUATION TRIBUNAL.

Ref: MAN/30UF/LIS/2006/0002.

Re: 67 Saltcotes Place. Lytham. Lancashire. FY8 4HP

Landlord & Tenant Act 1985 S27A & 20C.

Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003.

Applicant: Thomas Anthony O'Dea & Anne Douglas.

Respondent: New Fylde Housing Ltd.

3rd of July 2006.

UPON HEARING THE APPLICANTS IN PERSON, COUNSEL FOR THE RESPONDENTS AND CONSIDERING THE DOCUMENTATION SUBMITTED BY THE PARTIES.

Application.

Mr. O'Dea and Ms Douglas ("The Applicants"), by an application dated 27th Jan. 2006, apply for the LVT to determine what service charges are payable for the years 2001 – 2005 in respect of 67 Saltcotes Place, under S27A(i) of the Landlord and Tenant Act 1985 and also for a

determination for the year 2005/2006 under S27A(3). They also apply for an Order under S20C to prevent the Landlords' costs of the application being recovered by it, as part of the service charge.

It is said that this case has unusual and additional features. The Applicants were originally secure tenants of Fylde Borough Council. Consultation for the Stock Transfer to the Respondent took place in 1999 – 2000. The Stock Transfer Consultation Document was published in October 1999. The Transfer took place on 2 October 2000. During the same period the Applicants exercised their Right to Buy. The Councils' Offer Notice is dated 14 January 2000 and the lease was completed on 26 February 2001. The Applicants contend that the documents generated by these events create legally binding provisions which affect the level of service charge payable and hence affect the reasonableness of the service charge to be considered by the Tribunal.

The relevant chronology is :-

Stock Transfer Consultation Document	October 1999
RTB survey letter	2 December 1999
RTB offer (S125. Housing Act 1985)	14 January 2000
Stock Transfer.	2 October 2000.
Lease	26 February 2001.

The Tribunals' approach was to first consider if the services charges were reasonable and due and payable in themselves. If they were not, then the question of the impact of the Transfer and/or RTB documentation would not arise. To the extent that the service charges were in themselves reasonable the LVT would then consider if the Transfer/RTB documentation imposed any contractual or other limit (over and above the Lease) or in any other way impinged upon the charges or made them unreasonable.

The Lease.

The applicants own No. 67 by virtue of a lease dated 26 February 2001 ("the Lease"), between New Fylde Housing Association ("the Respondents") and the Applicants. Whatever draft lease documents were filed with the application, we record that we have relied only on the signed and dated copy counterpart lease at part 5 of the trial bundle as evidence of that Lease. The Applicants' obligation to pay is set out in paragraphs 1(c) and 5 (1). The service charge is defined in paragraph 5(2) and (3). The Respondent's obligations are set out in paragraph 4(2) – (7). The "Flat" and the "buildings" are defined in the recitals to the Lease, which also recites the Respondents' ownership of 56-67 Saltcotes Place. (A block of 12 flats).

The buildings are defined with reference to a plan on which they are edged blue. The plan (at page 22 of section 5 in the trial bundle) limits the

buildings to the block itself and the immediate surrounding. It does not extend to the wider estate of which there is no mention in the Lease. This is important because all of the Respondent's obligations and rights to raise a service charge are set out with reference to 'the buildings' in paragraphs 4 and 5 of the Lease. There is no provision for them to charge for services rendered to the wider estate even if those services are of benefit to the Applicants.

The Respondent's obligations include repair and maintenance of the exterior, which all parties agree includes the windows (frames at least – responsibility for glass is with the lessees under paragraph 3(3) of the Lease) and the balcony rail. The cost is recoverable from the lessees as part of the service charge. The Lease is not well drafted. It provides for the lessees to pay "a part" (Para. 5(1) of the Lease) without specifying how the part is to be defined, or nominating a proportion or percentage. It is accepted by the parties, and endorsed by the Tribunal, that one twelfth part is appropriate, there being 12 flats in 'the Building' as defined.

Inspection.

The LVT inspected the property and the Estate on Monday 3 July and found it to be a 2nd floor flat in a block of 12. (6 off each of 2 communal entrance ways, with landings and staircases). Built circa 1970 the flat had single glazed uPVC windows to all but one room, with wooden frames to the balcony window. They appeared to have been installed in the 1990's

and were there at the time the Applicants first occupied, in 1998. They are defective and in need of, at least, resealing. They were in that condition at the time of the RTB documentation and the date of the Lease. If it is said that the Work Order at page 64 of section 6 of the trial bundle indicates that matters have been attended to, then our inspection revealed that the work has not been carried out satisfactorily.

The balcony rail is metal with a ply-wood panel (replacing the former asbestos panel). It is in need of painting and shows signs of superficial rust. It is not in such a bad condition that replacement is the only satisfactory alternative. We examined it with care because it is a central issue in this case. Relying upon our own expertise and experience, and especially that of our valuer member we are satisfied that with proper treatment by a skilled decorator the rail is far from the end of its useable life. This is confirmed by the witness statement of Peter Kenworthy at pages 1-2 of section 3 of the trial bundle.

The common parts have modern external doors and an entry system but are internally in poor condition, undecorated and evidently infrequently cleaned and not maintained to a good standard.

Hearing.

A Hearing was held in Blackpool Town Hall immediately following the inspection at which representations were made by the Applicants in person (in part following the 'Summary and Opinion' filed under cover of

the letter of 22 June 2006), and by Mr. Butters on behalf of the Respondent (following the skeleton argument of the 27 June 2006 filed on behalf of the Respondent)

The Tribunal had previously considered in detail the statements of both parties (which stood as evidence in chief), the application and supporting documentation, the formal notices and correspondence, the Lease, the service charge accounts and the Formal Consultation Document. These were contained in the trial bundle. We additionally, and with equal diligence, considered the supplemental bundle, the Respondent's skeleton argument and the Applicants' supplementary references together with the Audit Commission Report of December 2005. We were guided by and had regard to the PTR Directions and documentation generated in response thereto. Both parties had sight of all of the above.

Each party had a full opportunity at the hearing to make further oral representations, to ask questions of witnesses and to answer the Tribunal's questions. Each party was given an opportunity to make closing comments. The conduct of the hearing had due regard to the fact that the Applicants were unrepresented.

Service Charges.

Despite the volume of documentation and the clear case management directions in regard to service charge documents, it is not easy to discern precisely what services charges have been levied and how they are

broken down on a year to year basis (to 31 March in each year). There had been 2 pre Trial hearings to give Directions re documents and statements and to identify the issues for determination by the LVT, which issues are set out in the Order of 16 June 2006 (Page 79 of Section 1 of the Trial Bundle).

Section 4 of the Trial bundle contains such documentation as was made available to the tribunal.

There is no issue as to the £5.33 for 26/2/01 to 31/3/01.

The breakdown of the £136.30 for **2001/2002** is not provided by the Respondent, except for a very basic schedule at page 9 of section 4, which justifies only £82.71 excluding ground rent. The management charge is broadly consistent with that shown in the RTB notice (page 10 section 1of the Trial bundle) and also that stated in the Respondents then solicitors' letter of 16 January 2001 (page 93 of section 6 of the Trial Bundle). We do not hold that this last document sets a contractual figure, despite its contents, but we hold that it is indicative of what the Respondents then averred was reasonable. It is their figure. We therefore find that the appropriate service charge for **2001/2002 is £82.71** exclusive of ground rent.

2002/2003. There is no evidence to suggest that the extent or quality of management had increased. To the contrary, in fact. £60 is not justified. The same figure as2001/2002 would be reasonable. The balance of the

claim is reasonable and consistent with previous indications and documents and is therefore adjudged reasonable in the sum of £112.14 exc. ground rent.

2003/2004.The management charge has increased without any good reason being articulated, - this time to £100. We hold that it should remain at £40.36.There is a schedule of items to support the figure claimed, but having regard to the standard of services and the inappropriate claim, beyond the provisions of the Lease, for services rendered to the wider estate, we find that only £45.16 of the amount set out at page 6 of section 4 is allowable. The £40.99 for lighting appears to cover 2 years It was not claimed in the previous year. The total is therefore £109.78 excluding ground rent.

2004/2005. Whilst these figures are the subject of an Accountants report they still include non-claimable items and continue to claim the unreasonable £100 management charge. Recasting the figures, allowing £40.36 for management, adjusting for non-lease items and allowing £20.00 for lighting we find the sum of £200.97 excluding ground rent to be payable.

All these figures are well within the estimates given to the Applicants at the time of the RTB, and on that basis, as well as based on our own views and the evidence, they are reasonable.

We had no information to make any determination for **2005/2006** as we understand the service charge demand has not yet been raised. Our observations above may assist in the production of a suitable figure. We record that we were informed by Mr. Houston that the asbestos removal was a gesture of goodwill for which it was unlikely that any charge would be raised to the Applicants. Without cogent justification we would not regard any increase in the management fee as reasonable. Even at £40.36 it represents 25% approx. of the highest of any of the previous 5 years charges.

Transfer Consultation Document.

The Applicants' view of the effect of this document is misconceived in both fact and Law.

The terms 'tenant' and 'Leaseholder' may be interchangeable to describe a party to a particular type of tenancy or lease, but are not interchangeable to make provisions that apply to, for example, assured tenants also applicable to a Leasehold owner who has exercised a Right to Buy. The exercise of the RTB and the execution of a lease, changes the relationship between occupier and freehold owner. Many of the statements contained in this document do in fact specifically refer to 'assured tenant' (eg.Pg.37

of the document, Appendix A 'Provision of information and Consultation')

The paragraphs re the 'cost floor' do not relate to services. The 'cost floor' is to do with the valuation of the property in the event that the assured (formerly secure) tenant of the Respondents exercised the RTB (as explained in detail at Pg. 16 'Maximum Discount and Cost Floor'). There is no indication in the Offer Letter that the cost floor had been applied and the cost floor concept is irrelevant to these service charge proceedings. The paragraph at page 16 of the Consultation Document which it is said, along with its reference to page 11, is the crux of the Applicants' case, gives the Respondent the right to include 'catch up works' in any assessment of the cost floor (whether incurred or not at the time of the application to buy). It is a right given to the Respondents to include costs in the calculation of the costs floor. It is not a binding obligation to carry out the works in any event, and certainly not in a case where calculation of the cost floor has not come into play.

Further, the reference to page 11 is in the context of 'catch up works'. There is no mention on page 16 of improvements. Page 11 gives examples of catch up works. They do not include windows or balcony rails.

The entirety of these paragraphs dealing with RTB relate to preserving, after the Stock Transfer, on a contractual or statutory basis, the previously

statutory RTB. They do not modify the extent to which a tenant has a different relationship with the freeholder once that tenant becomes owner of his or her flat under RTB. It is the lease that changes that relationship.

The Applicants make the point that the terms 'Tenant' and 'Leaseholder' are expressed to be interchangeable in the Landlord and Tenant Act 1985. For the purposes of applying that Act it is of no consequence whether a party is described as one or the other. The Act applies to tenants and it applies to leaseholders. It does not mean that the whole of the Transfer Consultation Document applies to both, equally and interchangeably. The defined scope of a particular Act of Parliament does not, without more, permit the importation of that section into all other documents. The different status of the Assured tenants and the RTB leaseholders is evident on many occasions in the Consultation Document. The Tribunal carefully considered all the references made by Mr. O'Dea to the document, including, but not limited to, pages10,11,14,15,16,32 and 77. Even relying on the 'Plain Language' seal of approval to interpret the document in laymans, as opposed to lawyers, terms, we could find no support for Mr. O'Dea's interpretation.

The Applicants point to the 'Contract with the Council' on page 10 of the Consultation Document. It is not part of the documentation produced or

required by either party in this case. In any event it appears intended to implement, rather than modify the 'promises', which we have held do not provide an enhancement to the Lease for the benefit of the Applicants. We cannot comment whether the Contract is one to which the Contracts (3rd Party Rights) Act 1999 applies.

If the Applicants wished to have the benefit of binding arrangements other than those in the standard lease, or by statute, they were free to negotiate them. There was correspondence. The lease was completed after the Stock Transfer. The Applicants were legally advised.

In any event the so called 'promises' set out at page 6 of the document – "Key Benefit" – relate to many issues that the applicants do not seek to enforce eg. Central heating, Kitchen and Bathrooms, loft insulation etc. They say that they do not pursue these items because the lease has made them (the Applicants) responsible for internal items. It also makes them responsible, via the service charge, for paying for the window repairs or replacement, if that is the only economic way of proceeding.

It appears to be the case that because the Respondents have elected to replace the balcony rails of the tenants (assured) the Applicants expect the Respondents to replace the Leaseholder's balcony rails. They accept that nominally under the terms of the Lease the cost of so replacing would ultimately fall on the lessees via the service charge, but aver that

the terms of the RTB Offer Letter of 14 Jan. 2000 would, if the works were carried out within 5 years of completion of the Lease, exclude the lessees liability by virtue of Parag. 16C of Schedule 6 of the Housing Act 1985, and further that, for that reason, the Respondents have deliberately deferred the work, despite carrying it out on their own tenanted properties.

RTB Notice.

This is in the usual form required by S125. of the 1985 Housing Act. The landlord at the time was the Local Authority.

It estimates a service charge of, on average £287.41 p.a. It itemised pointing as a prospective work of repair. This has not been undertaken or charged for.

It estimates the cost of other works of repair at £120 p.a. on average.

It does not provide for any works of improvement. None have been charged for. None have been carried out except for the door entry system.

It is unclear whether the decision not to charge the Applicants was based on the provisions of the S 125 Notice or because the Lease did not provide for improvements or for a charge to be made therefore. The case for the latter premise is made out in a letter from the solicitor of another leaseholder to the Respondents of 24 June 2004 (Pg. 54 Supplemental bundle), by reference to the Lease. (Although it appears that their client – Mr Downie at No.49 – is a lessee under a differently worded lease as it

refers eg. to a Schedule 6 and to clauses numbered differently from those of the Applicants' Lease). The same logic, however, applies to the Applicants' case. The Respondents are only obliged to do that which is set out in the lease. There is no obligation to 'improve' except and to the extent that, as part of the 'repair and maintain' obligation it becomes necessary to 'replace', - with the consequent inevitable element of 'improvement'.

Any improvements as such (as opposed to arising by virtue of 'repair and maintain') are not chargeable under the Lease to the lessees.

In any event improvements, which have not been included in the S. 125 Notice, are not generally chargeable for the initial period (5 years to 26 Feb. 2006). None have been carried out. There is no obligation to carry them out. For the reasons stated, the Consultation Document does not impose such an obligation.

If the balcony rails and windows were so defective as to not be able to be kept in 'repair' and 'maintained' then replacement, even if providing fortuitous and consequential improvement, may have been the only option.

Audit Report.

We have read and considered this Report, upon which the applicants heavily rely. It provides a general analysis of the failings of the respondent as a Housing Association and adds credence to the

Applicants' complaints of poor management. It is not, however, specific to this property or the issues in this case. The LVT has ample specific evidence relating to the service charge claim for No. 67 upon which it places greater reliance.

Decision on Issues.

The LVT's decision in respect of the issues recorded in the Order on PTR dated 19 June 2006 are:-

1. The RTB formal documentation and pre-lease correspondence do not contractually or otherwise limit the level of management charge of the type actually levied by the Respondent, save to the extent that the estimates included give an indication as to what is a reasonable level. In any event the reasonable management charge is as we have set out above.
2. The RTB documentation does not contractually or otherwise limit the service charge in respect of works of repair of the type levied by the Respondents , save for the indication that such estimates give, as to what is a reasonable level of cost of such cyclical and day to day repairs. In any event the amount for these items is set out above .
3. The Voluntary Transfer Documentation does not contractually or otherwise limit the service charge having regard to the sums that we have found to be payable. It does not place a contractual

obligation on the Respondents over and above the terms of the lease. The 'promises' relate to secure/assured tenants and not Leaseholders (except for preserving the prospective leaseholders' Right to Buy)

4. There is no need to replace the balcony rails. They require professional treatment and painting. The windows are in need of repair which, if successful, will obviate replacement. If not successfully repaired they may need to be replaced at the ultimate expense of the Applicants. This would require statutory consultation.
5. We have set out above our decision on the amount of reasonable service charge and the appropriate method of apportionment.

Costs.

We order that all of the costs incurred by the Respondent are not to be regarded as relevant costs to be taken into account when determining any service charge payable.

We find it just and equitable to so order because the issues are of limited application and of no relevance to assured tenants; the Applicants have succeeded on the issue of the level of service charge; the correspondence (especially that in the supplemental bundle re; balcony replacement) evidences vacillation and poor communication skills on the part of the

Respondents; to some extent the management failings whilst doubtless now being addressed, have made the Respondents the authors of their own misfortune. We recognise that we have not found in favour of the Applicants on the issue of the balcony or obligatory replacement of windows, but we do not find that that changes our opinion as to what is just and equitable regarding costs.

Martin J Simpson.

Chairman

13 July 2006.