RESIDENTIAL PROPERTY TRIBUNAL SERVICE
SOUTHERN LEASEHOLD VALUATION TRIBUNAL

Case No: CHI/00HN/LSC/2009/0108

Applications under Sections 20C and 27A of the Landlord and Tenant Act 1985 and
Schedules 11 and 12 to the Commonhold and Leasehold Reform Act 2002

Re: Flat 11A New Parade, Hill View Road, Bournemouth BH10 5BD

Applicant	Snaps Photo Services Limited
Respondent	Steven Angus Millar
Date matter referred to the Tribunal by the Bournemouth County Court	17th July 2009
Date of Inspection	17th November 2009
Date of Hearing	17th November and 4th December 2009
Venue	Royal Bath Hotel, Bournemouth
Representing the parties	Mr A Howard, solicitor, Coles Miller for the Applicant The Respondent in person
Also attending	Mr J Roberts, Director of the Applicant & Mr P W Mallorie, Property Management Solutions

Members of the Leasehold Valuation Tribunal:

M J Greenleaves	Lawyer Chairman
T E Dickinson BSc FRICS	Valuer Member

Date of Tribunal's Decision: 18th December 2009

Decision

1. The Tribunal determines in accordance with the provisions of Section 27A of the Landlord and Tenant Act 1985 (the Act) that for the

accounting year to 31st July 2009 the following budgeted sums are reasonable sums for service charges in respect of the premises known as 11a New Parade, Hill View Road, Bournemouth

a. management fees (including VAT) £293.75

b. repairs £150.00

2. The Tribunal determined that the charges referred to in paragraph 1 above were not payable by the Respondent to the Applicant until service of a demand by the Applicant on the Respondent dated 27th October 2009.

3. By reason of subsection 27A(4)(a) of the Act, the Tribunal does not have jurisdiction to determine under Section 27A of the Act whether a one half contribution by the Respondent by way of service charges of £750 in respect of the account of S Evans is reasonable or payable, the Tribunal having determined that the Respondent has agreed the same.

4. So far as the Tribunal has jurisdiction to determine the issue, the Tribunal determines that the Respondent is not entitled to any credit or allowance against liability for service charges in respect of costs incurred by him as set out in paragraph 5a of the directions dated 4th of September 2009.

5. The Tribunal determines in accordance with the provisions of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 (the 2002 Act) that the surcharges and administration costs of £80 referred to in an invoice dated 17th December 2008 are not payable

6. The Tribunal determines that neither party to the proceedings is liable to pay costs to the other under the provisions of paragraph 10 of Schedule 12 to 2002 Act.

7. Under Section 20C of the Act, the Tribunal makes an Order that the Applicant's costs incurred in connection with the Tribunal proceedings shall not be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the Respondent.

Reasons

Introduction

8. On 31st of March 2009, Mr J Roberts commenced proceedings in the Bournemouth County Court against the Respondent for (inter alia) service charges and administration costs on the grounds set out in the claim form. The Respondent made a counterclaim.

9. By Order of the Bournemouth County Court dated 17th of July 2009 the claim and counterclaim were stayed and transferred to the leasehold valuation Tribunal to be decided there.

10. On 4th September 2009 the Tribunal held a pre-trial review which was attended by Mr Mallorie on behalf of the Applicant, the Respondent attending in person. It was determined at that hearing that the issues to be determined between the parties by the Tribunal were as follows:

a. management fees of £293.75 and repairs of £150 shown in the budget for the year ended the 31 July 2009 prepared by Property Management Solutions;

b. surcharges and administration costs £80 set out in Invoice dated 17th December 2008

c. Whether an account for £1500 of S Evans paid by the Applicant in or about 2007, one half of which had been charged to service charge, is reasonable.

d. The above items of management fees, repairs, surcharges and administration costs and S Evans' account were the only matters now in dispute between the parties and the hearing of this matter would be limited to those items, taking such consideration of the Respondent's counterclaim (set out at 10e below) as is within the Tribunal's jurisdiction.

e. Respondents counterclaim. The Respondent considers that the Applicant has failed to carry out roof works so that he has incurred the following expenses:

   i. Sears re-pointing £220

   ii. Sears repainting £170

   iii. CK Roofing lead work £589

   iv. Queens Park Carpets carpeting £200.

   v. 2 weeks loss of rent £335

11. In the directions dated 4th September 2009 it was provided that the Respondent shall serve a full statement of his case on the Applicant by 30th September and the Applicant serve a reply on the Respondent by 14th October. It was further provided that the Applicant should prepare bundles of documents and send one copy to the Respondent and 4 copies to the Tribunal by 23rd October 2009.

12. At commencement of the hearing on 17th November 2009 the Respondent applied for an adjournment as he had only that day received a copy of the bundle; that it did not include all his documents; that he had not had time to consider the contents of that bundle; he wanted legal advice on it and had not had time to do so.

13. The Tribunal granted an adjournment until 4th December 2009 on the basis that the Respondent would provide copies of the missing documents for the Applicant by 20th November and the Applicant would post copies of the new bundle to the Respondent and the Tribunal by 25th November.

14. At the commencement of the hearing on 4th December, the Respondent said he had only received the new bundle on 30th November but accepted that on 27th November a notification had been received at his address of attempted recorded delivery. He had noted that the new bundle contains a reply from the Respondent which was much expanded from that contained in the original bundle and he had not had time to consider it all. Nevertheless he wanted

the matter dealt with that day. Having heard the representations also on behalf of the Applicant the Tribunal adjourned to consider the way forward.

15. The Tribunal determined that, in the interests of justice, it would not permit the Applicant to benefit from the adjournment (which was granted on 17th November by reason of the Applicant's default in compliance with the directions), so it would not accept or take into consideration the following from the Applicant's expanded reply so as to bring it into line, as nearly as may be, with the Applicant's original reply as at 17th of November:

    a. all paragraphs relating to management fees (thereby limiting the Applicant to paragraphs 9 and 10 of the original reply in that respect)

    b. paragraphs 19 and 20 of the expanded reply

    c. Page 103

16. The Tribunal was informed by the Applicant's solicitors that the Court proceedings had been commenced by Mr Roberts while the correct landlord is Snaps Photo Services Limited. They applied for the identity of the Applicant to be amended accordingly; the Tribunal agreed to do so.

Inspection

17. Prior to the hearing on 17th November the Tribunal inspected the premises in the presence of the parties and of Mr Mallorie.

18. The flat is situated at the right hand end of New Parade which comprises a block of lockup shops with flats over. The subject flat is situated above the Applicant's shop. The subject property is built of brick under a tiled roof surrounded by a brick parapet . We were unable to inspect the roof itself but from photographs noted in particular a lead lined parapet gutter, a row of new tiles roughly laid as the lowest course of tiles, with evidence of re-laying of sloping ridge tiles . All windows to the flat had been replaced with UPVC units, that on the right hand of the front elevation appearing to require re-fitting.

19. The access to the flat is by means of a staircase to the side of the property. The flat comprises 2 bedrooms, living room, kitchen and bathroom and appears to be in poor condition for its age and character.

Hearing 4th December

20. The Tribunal heard evidence from Mr Roberts, Mr Mallorie, and Mr Millar and also submissions on behalf of both parties in addition to the case papers limited as referred to above.

21. The Applicant's case - Summary

    a. The Respondent had replaced windows and carried out work to the roof neither of which were part of his demise and he had no authority to do that work. In any event the work he had done was defective.

b. The 2 photographs showing the roof repairs had been taken by Mr Roberts on 20 April, 2009.

c. The Applicant was not liable for any of the items for which the Respondent counterclaimed; that for some items there was no evidence of payment; work he had had done had been done badly; some was inappropriate and had been done on the cheap; some work charged for had not been done; there was no evidence that a tenant had moved out of the flat so that the Respondent had not lost rent. Mr Roberts said that the roof had not been an issue before: that he had always believed that it was the window which was at fault and he wanted to do that first.

d. In August 2008 Bournemouth Borough Council had required work to be done to the flat, particularly regarding windows and damp penetration. Section 20 procedure had been put in hand in November 2008 to carry out the work; the Respondent had not replied in any way concerning it and had not paid towards the cost; had he done so he would have had no reason at all to incur costs on his own, even if he had been entitled to. As the Respondent had not paid, the Applicant was not bound by covenant to carry out the work, the covenant being conditional upon prior payment.

e. Management fees. The budgeted charge of £250 plus VAT for 2008/09 was reasonable for this type of property and included charges for all types of management work so there was no additional charge, for instance, for major work. Enquiries of other managing agents showed it was very reasonable for basic charges but those agents would additionally charge 15% on major works plus administration costs.

f. Surcharge and administration charges. These arose because the Respondent had not paid service charges. The first 3 reminders were covered by the standard management fees, but these charges were for the 4th and 5th reminders and also collating papers to instruct solicitors. The 4th and 5th reminders may only have been copying and posting invoices. There had been no proper invoice issued for these until service of a demand by the Applicant on the Respondent dated 27th October 2009.

g. Budgeted Repairs £150. This was a reasonable provision for unexpected repairs in the year.

h. Mr Evans account. It was accepted that the required consultation procedure had not been carried out but 3 estimates had been obtained and Mr Evans' price was the middle of the 3. The work was finished in July 2007. Mr Roberts had met the Respondent in June or July 2008 to discuss the position. Mr Millar had given him a cheque for £1,121.40 which included some arrears and his half of the Evans invoice, but the following day contacted him as a result of which the cheque was not presented and the Respondent agreed to pay by

instalments. On this evidence, the Respondent had agreed the item so the Tribunal did not have jurisdiction to make any decision upon it.

i. 2002 Act costs. The Applicant's conduct in the proceedings was simply mistake and did not fall within any of the adjectives in paragraph 10 of Schedule 12 to the Act. The amount of a claim would be limited to the photocopying costs of £8 and costs relating to the last hearing day. However the paragraph refers to costs incurred and not loss of profit for a self-employed person.

j. Section 20 C costs. If there is no provision in the lease enabling the Applicant claimed his costs, the claim would not be made.

22. The Respondent's case - summary.

a. He accepted he should not have done the windows at his own expense;

b. He does not consider the management fees to be reasonable: the great he had obtained were much lower; when getting his own quotes he had not given those potential agents a copy of the lease.

c. He did not think that it was reasonable to charge £80 largely for photocopying invoices.

d. He wants to pay reasonable charges: it is not a money issue but just the principle.

e. He had received the Section 20 consultation notices in respect of the work required by the Council but he did not reply; he has lost all trust in the Applicant and decided to get work done himself, as referred to in his counterclaim, which he considers the Applicant should pay for.

f. His roofer has still got the lead that he paid for.

g. In respect of his claim for 2 weeks loss of rent, his tenant had not vacated the flat: he had waived the rent for 2 weeks

h. Concerning the Evans invoice, he was not sure if his cheque for £1,121.40 had included £750 for that invoice; that the cheque was for arrears; he paid £1000 or so to keep the peace. He had not agreed the Evans invoice.

i. He agreed £150 per year for the sinking fund and also £150 per year for repairs in principle: it is realistic for emergency repairs

j. He referred to the various points he had written set out at pages 30 and 31 of the hearing bundle.

k. Costs. He claimed £150 per day for his own lost time and that he was going to have to provide an expensive meal for his barrister friend who had advised him concerning the case. He had spent £8 on photocopying.

Consideration

23. The Tribunal took into account all the evidence given at the hearing and subsequently (as to service of a demand on 27th October 2009), the documents to which it had been referred, limited as above, and its inspection.

24. Other than in respect of costs, there is not an issue between the parties that the terms of the lease enable the Applicant to recover service charges and administration costs (which would include surcharges).

25. The lessee is liable to pay one half of the costs incurred or to be incurred by the landlord in respect of common parts of the building including all thase parts with which this application is concerned and including also management fees and administration costs.

26. The landlord's repairing covenant in Schedule 3, paragraph 2 states "that (subject to contribution and payment as hereinbefore provided) the lessors will maintain repair redecorate and renew ...". In schedule 2, paragraph 1 the lessee covenants "to pay ... the service charge during the term at the times and in manner aforesaid without any deduction". At clause 6.5 there is provision for the lessee to pay the estimated contribution on a date which is not specified but which we found to mean on a date in advance.. We further decided that the accounting year should be regarded as that chosen by the managing agents i.e. to 31st July each year. At clause 6.6 there is provision for adjustment either way depending on the amounts found to be overpaid or underpaid in the year end service charge accounts.

27. The effect of the provisions set out briefly in the preceding paragraph appear to us to be that provided that the lessee has paid the estimated service charge in advance, the landlord is required to repair, irrespective of the actual cost of repair even if it is not fully reflected in the advance estimates. There seems to be no provision enabling a demand for a supplementary payment to carry out unexpected works.

28. Counterclaim.

    a. In relation to the Council works, the Applicant says that it was not carried out because the Respondent did not and still has not contributed towards it so that it is the fault of the Respondent rather than the Applicant if the Respondent has incurred costs of his own. The last budget was prepared for the year commencing 1 August, 2008 and so far as we know the Respondent has made no payment on account of it.

    b. However, we have to consider the condition precedent to the landlord's repairing covenant at Schedule 3 paragraph 2. We found that there had been no relevant valid service charge demand from the Applicant itself to the Respondent until that dated 27th October 2009. It follows that until then it would not have been possible, in law, for the Respondent to fail to meet the condition precedent so that we must take it that the Applicant's obligation to repair was actually absolute and not subject to a prior payment which had not been duly demanded.

c. For that reason, on the basis of the 2 preceding paragraphs, the Applicant was required to carry out the council works and his failure to do so does not, in itself, absolve the Applicant from liability for the costs counterclaimed by the Respondent.

d. However, we do not consider the Respondent was therefore entitled to carry out work on parts of the property which were not demised to him. He told us that he did so because he had no trust in the Applicant doing the necessary work. That is not, in our view, a sufficient excuse. We also take into account that

   i. in our opinion the work done by the Respondent was of a very poor standard;

   ii. Costs he has incurred are probably anyway not within the jurisdiction of the Tribunal to take into account: we are only able to determine whether charges incurred are reasonable, not whether cost incurred by a tenant can be claimed against a landlord: that is a matter for the Court.

e. Accordingly we found that the applicant was under no liability, in our jurisdiction, for the Respondent's counterclaim.

29. Repairs £150. The Respondent agreed both this item and the sinking fund item of £150 in his evidence as being reasonable. Certainly from our own knowledge and experience, both of these items are entirely reasonable.

30. Evans account. Mr Roberts told us that in about June 2008 he went to see the Respondent about payment; that the Respondent gave him a cheque for £1,121.40 to include some arrears and for his contribution towards Evans' account. On the other hand, we found the Respondent's evidence was vague (see above). At that time, it appears from the charges and payments analysis for the period 21st July 2004 to 1 February, 2009, the Respondent owed the Applicant not more than £704.85. That suggests to us that it is highly unlikely that the Respondent would have written a cheque in favour of Mr Roberts for a higher sum that he owed unless it had actually included contribution to Mr Evans' account. Even though the cheque was not presented, the fact that the Respondent provided the cheque (which is undisputed) corroborates Mr Roberts' evidence that the Respondent agreed Mr Evans' account and his contribution of £750. We therefore found that the issue concerning Mr Evans' account had been agreed by the Respondent and that we had no further jurisdiction to deal with it by reason of the terms of section 27A (4)(a) of the Act .

31. Management fees. The evidence given by and on behalf of the Applicant is entirely consistent with our own knowledge and experience. For larger blocks one might expect a maintenance charge per unit of under £200 plus VAT but for small blocks, particularly where there are only 2 units as in this case, we would expect not only a basic charge of £250 plus VAT per unit, but in addition other management charges in relation to, for instance, major works. We note that the quotes the Respondent has obtained had been given

without any knowledge of the lease and there is no evidence any of those giving quotations has inspected the property. They are therefore unreliable and completely inconsistent with our own knowledge and experience. Accordingly we found that the charge made by Property Management Solutions, of £250 plus VAT per unit to be entirely reasonable. Furthermore it would be entirely reasonable even if the managing agent made additional charges for matters such as major works.

32. Surcharges and administration costs £80.

    a. We are satisfied that the work done in issuing 2 invoices and also instructing solicitors would cost more than perhaps seems likely on first consideration. Any business has overheads, establishment costs and wages etc, which have to be funded and any work done has to bear its share of those costs. From our own knowledge and experience we are satisfied that the costs incurred would be reasonable.

    b. However, because no proper invoice for service charges had been issued by the Applicant until 27th October 2009, there was no failure by the Respondent to pay service charges and so no valid reason to incur administration costs and surcharges.

33. 2002 Act costs. We consider the Applicant has been dilatory by not complying with the timescale of the directions as referred to above. Paragraph 10 of schedule 12 to the 2002 Act deals with costs incurred. We accept the Applicant's submission that "costs incurred" does not include loss of profit; we also accept that there is no satisfactory evidence that the Respondent will or has to give his barrister friend an expensive meal for services rendered. The only expense which would potentially be covered is the photocopying charge of £8 but we cannot regard dilatoriness as being frivolous, vexatious, abusive, disruptive or otherwise unreasonable, so we made no order.

34. Section 20C costs. There does not appear to be any provision in the lease which clearly provides for the Applicant's costs in relation to Tribunal proceedings being recoverable as service charge. However, in case we are wrong about that, we considered that in all the circumstances of the case an order should be made under Section 20C.

35. We made our decisions accordingly.

M J Greenleaves

Chairman

A member of the Leasehold Valuation Tribunal
appointed by the Lord Chancellor