CHI/00LC/LSC/2009/0057

DECISION OF THE LEASEHOLD VALUATION TRIBUNAL ON APPLICATION UNDER SECTION 27A OF THE LANDLORD & TENANT ACT 1985

Address:	Samuels Towers, Longhill Avenue, Chatham, Kent, ME5 7AT
Applicant:	B. M. Samuels Finance Group Plc
Respondents:	(1) Mr and Mrs Noyes (2) Scammell Developments Ltd (3) Ms Arnold (4) Mr MacGregor (4) Mr Printer
Application:	18 February 2009
Inspection:	10 July 2009
Hearing:	10 July 2009
Reconvene:	21 July 2009

Appearances:

Landlord

Mr Thornton — Hurford Salvi Carr Property Management Ltd — For the Applicant

Tenants

Mr Noyes — Leaseholder
Ms Arnold — Leaseholder
Mr MacGregor — Leaseholder

For the Respondents

Members of the Tribunal
Mr I Mohabir LLB (Hons)
Mr C. White FRICS
Mr P A Gammon MBE BA

IN THE LEASEHOLD VALUATION TRIBUNAL

CHI/00LC/LSC/2009/0057

IN THE MATTER OF SECTION 27A OF THE LANDLORD & TENANT ACT 1985

AND IN THE MATTER OF SAMUELS TOWERS, CHATHAM, KENT, ME5 7AT

BETWEEN:

B. M. SAMUELS FINANCE GROUP PLC

Applicant

-and-

(1) MR AND MRS NOYES
(2) SCAMMELL DEVELOPMENTS LTD
(3) MS C. S. ARNOLD
(4) MR I. R. MACGREGOR
(5) MR J. PRINTER

Respondents

THE TRIBUNAL'S DECISION

Introduction

1. This is an application made by the Applicant under section 27A of the Landlord and Tenant Act 1985 (as amended) ("the Act") for the determination of the Respondents liability to pay and/or the reasonableness of various service charges for the years ending 31 December 2007, 2008 and 2009.

2. The subject property is comprised of two blocks of flats built by Scammell Developments Ltd ("Scammell") in the early 2000s. By an agreement dated 18 May 2005, the Applicant took a legal charge on the freehold interest having advanced a loan to Scammell. The legal charge extended also to the leasehold interest of Flats 1A and 3A held by Mr Jason Scammell and Mr Clive Scammell respectively.

3. From inception, Scammell managed and insured the development and collected the advanced service charge payments paid on completion. It seems that no invoices or any evidence of service charge expenditure incurred for the year ended 31 December 2006 are available.

4. In March 2006, Mr Clive Scammell, the principal director of Scammell, died. In 2007 or at the beginning of 2008, Scammell appointed Platinum Gold Maintenance Ltd ("Platinum") to manage the development. Mr Noyes is a Director of Platinum. It seems that Platinum issued the lessees with service charge demands for payments on account for the years ended 31 December 2007 and 2008. In February 2008, the Applicant instructed Hurford Salvi Carr Property Management Ltd ("HSC") to investigate taking over the management of the development following complaints from the lessees about the condition of the buildings. Apparently, this process also involved discussing the management with Mr Noyes. On 24 July 2008, an RICS management agreement was signed between the Applicant and HSC, formally appointing the latter as the managing agent.

5. On 2 May 2008, Scammell went into administration and the company was wound up. The Applicant, therefore, brings this application as the mortgagee in possession.

The Lease Terms

6. The Respondents the lessees of the following flats on the development.
   Mr Noyes: Flats 1, 2, 13, 21, 27 and 38
   Mrs Noyes: Flats 6A: 9, 10 and 21A
   Scammell Developments Ltd (in liquidation): Flats 1A and 3A
   Mr MacGregor: Flats 23 and 29
   Ms Arnold: Flats 15 and 24
   Mr Printer: Flats 35 and 37

7. The Tribunal was provided with a specimen lease relating to Flat 21. The Tribunal's understanding is that the leases granted in relation to the Respondents respective flats were on the same terms and the service charge

liability arises in the same way. The Respondents do not contend that the service charge costs in issue are not contractually recoverable as relevant service charge expenditure under the terms of their leases. It is, therefore, not necessary to set out the relevant covenants in the leases that gives rise to the liability to pay a service charge contribution. It is perhaps sufficient to note that the annual service charge period commences on 1 January and ends on 31 December in each year. At the hearing, the Respondents accepted that the service charge liability is to pay a contribution of 1/44 of the total service charge costs incurred in any given year for each flat.

The Issues

8. In the Directions dated 24 April 2009, the Tribunal set out the issues to be determined in this application. However, at the hearing, the Tribunal was able to refine the issues further.

9. In relation to the year ended 31 December 2007, the Applicant conceded that no service charge expenditure had in fact been incurred in this year. Therefore, the Respondent and the lessees had no service charge liability and the application, in so far as it relates to this year, was withdrawn.

10. In relation to the year ended 31 December 2008, the Respondents conceded that the service charge costs had been reasonably incurred and were reasonable in amount. Therefore, it was not necessary for the Tribunal to make any determination for this year. These costs had been incurred during the tenure of Platinum. Mr Noyes told the Tribunal that his company had met the shortfall between the service charge contributions collected from the lessees and the actual expenditure incurred. This was approximately £20,000. He told the Tribunal that he was prepared to write off the sum. Consequently, the lessees who had not paid a service charge contribution had no further liability for these costs.

11. The only service charge year that fell to be considered by the Tribunal was the year ending 31 December 2009. As part of the challenge brought by the Respondents for this year, they contended that they were entitled to deduct an unpaid cash back (received at the time of purchase) from the amount payable

for their service charge contribution. However, the Tribunal ruled that it did not have jurisdiction to deal with this matter because, if the Respondents were so entitled, it was, in effect, a debt owed to them and recoverable separately as such.

12. As part of their case, the Respondents also contended that the roof and windows installed by Scammell were inherently defective and, therefore, the Applicant was not entitled in principle to recover a service charge contribution to remedy those defects. There was no evidence before the Tribunal that any costs to remedy inherent defects in the roof and/or windows had or were to be incurred and the issue was, at present, entirely academic. In any event, the Tribunal indicated that the Respondents may be able to pursue a separate claim, possibly in disrepair.

13. At the pre-trial review, Mr and Mrs Noyes alleged that they had made loans to the service charge fund and that these should be taken into account when the Tribunal made a finding as to the extent of their service charge liability. However, at the hearing, Mr Noyes told the Tribunal that this point was no longer being pursued by them.

14. The only issue that remained for the Tribunal to deal with was the reasonableness of the estimated service charges for the year ending 31 December 2009. The service charge account that had been prepared in relation to this year was an income and expenditure account setting out the budget figure and the actual expenditure incurred for the six-month period from January to June 2009. It was, therefore, necessary for the Tribunal to double the budget estimate for each head of expenditure and then made its determination on that figure. The individual heads the service charge expenditure challenged by the Respondents are dealt with below. The Tribunal dealt with each of these matters on the basis of the submissions made by the parties and the documentary evidence before it.

The Relevant Law

15. The substantive law in relation to the determination of this application can be set out as follows:

Section 27A of the Act provides, *inter alia*, that:

> *"(1) An application may be made to a leasehold valuation tribunal for a determination whether a service charge is payable and, if it is, as to-*
>
> *(a) the person by whom it is payable,*
> *(b) the person to whom it is payable,*
> *(c) the amount which is payable,*
> *(d) the date at or by which it is payable, and*
> *(e) the manner in which it is payable.*
>
> *(2) Subsection (1) applies whether or not any payment has been made."*

Subsection (3) of this section contains the same provisions as subsection (1) in relation to any future liability to pay service charges.

16. Any determination made under section 27A is subject to the statutory test of reasonableness implied by section 19 of the Act. This provides that:

> *"(1) Relevant costs shall be taken into account in determining the amount of a service charge payable for a period-*
>
> *(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 works, only if the services or works are of a reasonable standard;*
>
> *and the amount payable shall be limited accordingly."*

Inspection

17. The Tribunal inspected the subject property on 10 July 2009. The property comprises two six storied buildings + penthouse built about 5 or 6 years ago and set in undulating land with an adjacent car park. The property is at the end of road comprising mainly houses but this part of the road is undeveloped with areas scrub/woodland adjacent. The tribunal could see why this development and area had, and still does to some extent, attract undesirables' intent on criminal activities. The blocks originally comprised 38 flats but three flats have been divided into two and there are now 44 flats including a penthouse and with some accommodation in what is a semi-basement including a store room. Each block has a lift and the tribunal noted smoke alarms, emergency lighting, new letterboxes and entrance doors with entryphone and also some CCTV. The blocks have been designed for ease of maintenance and are of fairly basic design and fitting including steel staircases. The tribunal noted some new decoration to common parts with carpeting only to the top floor

Decision

18. The hearing in this matter took place on 10 July 2009. The Applicant was represented by Mr Thornton of HSC, the managing agent. Of the Respondents, only Mr Noyes, Ms Arnold and Mr MacGregor appeared in person on their own behalf.

Management Fee

19. A half year budget estimate of £5,945.50 including VAT is claimed by the Applicant. Mr Thornton said that this figure had been arrived at by his firm charging a flat rate of £230 plus VAT per unit. He submitted that the management fee was reasonable because it was based on the going market rate and that this was not a straightforward property to manage.

20. Mr MacGregor referred the Tribunal to another block in Beckenham, Kent where he also owned a flat. He said that this was a comparable property where only a management fee of £100 per flat was charged by the managing agent. Mr Noyes said that he paid a management fee of £86 per annum for another flat he owned in the Chatham area. Therefore, they submitted that the management team was unreasonable and that the sum of £75 plus VAT per flat should be allowed.

21. The Tribunal considered that the management fee charged by HSC was high. It appeared to the Tribunal that the level of management provided was minimal. Mr Thornton's office was located some distance away from the subject property. Historically, it was clear that Mr Thornton relied on Mr Noyes to report to him any problems and to carry out the day-to-day management duties required. The Tribunal had not been provided with a copy of HSC's management agreement and it was not clear what duties Mr Thornton or his firm were contractually obliged to carry out. The comparable properties relied on by Mr MacGregor and Mr Noyes did have significantly lower management fees charged. However, it was common ground between the parties that the subject property required a degree of greater management because of the historic and ongoing criminal and antisocial activity that had taken place. Having regard to these matters and using its own expert

knowledge and experience, the Tribunal determined that a management fee of £175 plus VAT per flat per annum was reasonable.

Audit Fee

22. The sum of £324.98 was agreed by the parties as being reasonably incurred and reasonable in amount.

CCTV

23. A half year budget estimate of £750 is claimed by the Applicant. Mr Thornton contended that this was a reasonable estimate because the present system was not working and money would have to be spent to do so.

24. Mr Noyes submitted that the present system was largely installed and only a minimal sum was required to complete the installation. The maintenance contract for the CCTV system had been signed and was in place. Therefore, nothing should be allowed for this item.

25. The Tribunal allowed an annualised sum of £1,500 as being reasonable. In so doing, the Tribunal allowed for the cost of maintaining the CCTV system for the remainder of the year. It was clear that a provision should be made for the cost of completing the installation of the CCTV system and for it to be maintained. The Tribunal was reassured that if all or part of the cost allowed is not spent, then a credit will have to be applied to the service charge account. In any event, the cost per lessee is almost "*de minimis*".

Cleaning of Internal and External Common Parts

26. The half year budget estimates for the cleaning of the internal and external common parts is £4,500 and £1,374.98 respectively. Mr Thornton said that the cleaning of the internal common parts was presently being carried out by Mr Noyes' firm at a cost of £115 per week. He said that the estimate was based on this figure and his knowledge of the property, for example, the need to remove domestic rubbish on a regular basis. Mr Thornton said that the cost in relation to the external common parts included the cost of cleaning the bin store area and picking up litter on the estate. He submitted that these costs were reasonable.

27. Mr Noyes submitted that the sum of £5,980 should be allowed for the cleaning of the internal common parts. This figure was based on the present rate of £115 per week for 52 weeks of the year. He further submitted that no further costs should be allowed for the cleaning of the external common parts because this cost should form part of the overall cleaning contract.

28. The Tribunal accepted Mr Noyes submission that the cost of cleaning the internal and external common parts should form part of the same contract and considered together. Both parties were agreed that the present rate of £115 per week to clean the internal common parts was reasonable. The Tribunal concluded that this should be the total weekly sum allowed to clean the internal and external common parts. It accepted Mr Noyes figure of £5,980 as being reasonable and allowed a further sum of, say, £1,000 as a contingency figure for the cost of removing domestic rubbish dumped on the internal and external areas of the property. Accordingly, the sum of £7,000 was allowed as being reasonable.

Electricity

29. A half year estimate of £3,000 is claimed by the Applicant for the cost of supplying electricity to the common parts. Mr Thornton said that this figure was based on historic bills and had been extrapolated over the year. However, he said that he was prepared to accept a lower annual figure of £5,000 as being reasonable.

30. Mr MacGregor submitted that the budget estimate was not reasonable. He relied, again, on his flat in Beckenham as a relevant comparable cost. He said that the cost of supplying electricity to the common parts there was £2,000. Mr Noyes said that he was paying £1,500 for his flat in Chatham and they both contended for this figure.

31. Having regard to the actual cost incurred over the first six months of the year, the Tribunal saw no basis for allowing the greater sum of £5,000 contended for by Mr Thornton. It, therefore, allowed the estimated sum of £3,000 as being reasonable.

Fire Alarm Maintenance

32. Mr Thornton said that a half year budget estimate of £750 had been provided for because of historic acts of vandalism. This related to the cost of call outs to repair any such damage caused to the fire alarm system. He submitted that it was reasonable because it was also important for the buildings insurance policy.

33. The Respondents submitted that the sum of £339 was spent in 2008 and that any provision for the current year should be for the same amount. They contended that there had been no vandalism this year and, in the alternative, if there is, then a budget provision limited to £500 was reasonable.

34. The Tribunal allowed the sum of £750 for the entire year as being reasonable. It accepted Mr Thornton's contention that a provision should be made for the cost of maintaining the system. The Tribunal considered the possibility of further acts of vandalism to be highly likely, especially having regard to the recent antisocial and criminal activity carried out on the estate.

Garden Maintenance

35. Mr Thornton said that the half year budget figure of £750 related to the cost of mowing the lawns and maintaining the planted areas on the estate. He submitted that this cost was eminently reasonable.

36. The Respondents argued that there was no garden or plants on the estate to be maintained. In particular, Mr MacGregor said that he was not content to effectively pay for the cost of creating a garden where none existed. This should have been done from the outset by Scammell. However, Mr Noyes accepted that the overgrown areas on the estate should be "strimmed" at a cost of £800 per annum, which he considered to be reasonable.

37. On inspection, the Tribunal found that the garden areas on the estate were in a particularly overgrown condition and had not been tended to for some considerable time. Therefore, the Tribunal considered that an annual budget figure of £1,500 was entirely reasonable to get the garden into good order and.

Once this had been achieved, the Tribunal considered that Mr Noyes figure of £800 per annum was reasonable to maintain this area.

Mechanical & Plant Maintenance

38. Mr Thornton said that a half year budget figure of £500.00 was provided for in the service charge account based on anticipated expenditure. The Respondents submitted that no such provision was required because there was no mechanical or plant machinery on the estate. The Tribunal accepted the Respondents submission and disallowed this item on that basis.

Refuse Collection

39. Mr Thornton said that a half year budget figure of £500.00 was provided for to allow for the cost of removing bulk items from the estate.

40. The Respondents contended that this provision was unnecessary. Mr Noyes said that he had an agreement with the Council that if fly tipping occurred on the estate, it would remove this at no cost to the lessees. Moreover, if any such dumping had been caused by one or more of the tenants, they should be required to individually bear the cost of removing it and that it would not be difficult to find out which tenant should be liable. He submitted, therefore, that no provision should be allowed for this item.

41. On inspection, the Tribunal noted that dumping of domestic rubbish had in fact taken place in the car park. Although the Tribunal did not dispute Mr Noyes assertion that the Council would deal with the removal of fly tipping, it was clear that this facility did not extend to domestic rubbish, possibly dumped by one of the other tenants. It was also clear that, historically, this activity has taken place on a regular basis. Accordingly, the Tribunal allowed a provision of £1,000 as being necessary and reasonable.

Repairs & Maintenance

42. A half yearly budget estimate of £3,500.00 had been included in the service charge account. Annualised, this equated to a budget estimate of £7,000 to carry out response repairs and maintenance to the buildings. Mr Thornton said that it was difficult to provide an accurate budget estimate and that the current

figure had been based on the previous year's figure. He contended that the common parts required a lot of repairs and maintenance and, therefore, the budget figure was not unreasonable.

43. The Respondents contended that a great deal of money had been spent in the preceding service charge year on repairs and maintenance to bring the property up to a reasonable standard. Consequently, it was not necessary to repeat this level of expenditure in the present year because there was simply no necessity to carry out repairs and maintenance to the same extent. They submitted that a budget estimate of £1,000 for each of the two blocks was reasonable.

44. When considering this issue, the Tribunal also considered the nature of the tenants who largely occupied the various flats. They had mostly been sublet by the lessees and a significant number of the subtenants had been rehoused there by the local authority. Inevitably, this transient population had resulted in more wear and tear to the fabric of the buildings. In addition, both parties accepted that the property had suffered from frequent acts of vandalism by trespassers, which had led to a decline in the condition of the internal common parts. Mr Noyes accepted that these areas required a high degree of maintenance. Moreover, it was clear that Scammell had generally failed to carry out responsive repairs and maintenance. Having regard to all of these matters, the Tribunal concluded that a budget estimate of £7,000 was reasonable.

Security

45. A half year budget provision of £500.00 had been allowed for in the service charge account. Mr Thornton said that this provision was required because of the number of burglaries that had taken place in recent years. Although no burglaries had occurred this year so far, he contended that it may be necessary from time to time to incur the cost of, for example, employing a security guard to patrol the estate on an ad hoc basis.

46. The Respondents complained that the communal front doors of both blocks have been broken since the property was built. Neither the entry phone system

or security fobs worked and to their knowledge no security guards had ever been employed to improve security on the estate.

47. There was no evidence before the Tribunal that there was a requirement to include a budget provision for the cost of either providing or improving security on the estate. Indeed, it can be seen from the service charge account that no such costs had in fact been incurred up to June 2009. Therefore, the Tribunal disallowed this item is not been reasonably incurred. If it proves necessary, then provision can be made for this head of expenditure in the following year.

Reserve Fund

48. Mr Thornton said that the reserve fund provision of £7,500 was based on a calculation of the cost of replacing major items such as the roof, windows, drainage generally, external doors and decorations, re-pointing, external boundaries, lifts, communal doors and internal decorations. This had been costed over a 30 year cycle. The calculation is to be found at page 327 of the bundle.

49. The Respondents submitted that there should not be any reserve fund provision at all because the property was only four and a half years old and would not require any major works to be carried out for the foreseeable future. The Tribunal accepted that submission as being correct. For a property of this young age, it was too soon to create a shoestring reserve fund. It was more appropriate for the blocks to be, firstly, brought up to a reasonable condition by carrying out the necessary repairs and maintenance before the tenants can be expected to contribute to a reserve fund. In any event, the major works calculation relied on by Mr Thornton anticipated the commencement of any such works in 25 years at the very earliest. Accordingly, the Tribunal disallowed the reserve fund provision as not been reasonably incurred.

Section 20C & Costs

50. At the pre-trial review, the Respondents made an application under section 20C of the Act. In broad terms, when such an application is made, the Tribunal has the discretion to make an order preventing a landlord from being

able to recover all or part of his costs where it is just and equitable to do so having regard to all the circumstances of the case.

51. In the present matter, the Tribunal concluded that it was not just or equitable to make an order preventing the Applicant from being able to recover any costs it had incurred in these proceedings. The Tribunal considered that the application was necessary given the history of the property and the impasse that had been reached with the Respondents. However, the Tribunal makes it clear that by making their order, it does not make a finding that the Applicant's costs are reasonable. If and when the Applicant seeks to recover those costs through the service charge account and one or more of the Respondents or other lessees consider those costs to be excessive, they can make a separate application under section 27A of the Act for the Tribunal to determine the reasonableness of those costs.

52. As to the fees paid by the Applicant to the Tribunal to bring this application, there is no equivalent statutory test to be applied as there is under section 20C of the Act. Nevertheless, by extension the same considerations must also apply when the reimbursement of fees falls to be considered by the Tribunal. Accordingly, for the same reasons set out above, the Tribunal directs the Respondents to reimburse the Applicant the total fees of £500 paid by it to have this application issued and heard.

Dated the 21 day of September 2009
Signed
Chairman
Mr I Mohabir LLB (Hons)