RESIDENTIAL PROPERTY TRIBUNAL SERVICE
SOUTHERN RENT ASSESSMENT PANEL
LEASEHOLD VALUATION TRIBUNAL

S.27A Landlord &Tenant Act 1985 as amended

DIRECTIONS

Case Number: CHI/21UD/LIS/2009/0026

In the matter of Marina Heights, 63 West Hill Road, St. Leonards on Sea, East Sussex, TN38 0NF

Date of Hearing: 28th July 2009

Date of Decision:16th August 2009

Tribunal: **Mr. S. Lal LLM (Barrister)**
Mr.N. Robinson FRICS
Mr. T.W Sennett MA FCIEH

Applicant:

Ms. R. Akorita (Flat 4)

Mr. R and Mrs. J. Cooper (Flat 2)

Mr. M. Davies and Mr.J. Benjamin (Flat 1)

Mr. D. Helsdon (Flat 6)

Respondent:

Marina Heights (St. Leonards Ltd) represented by Leasehold Legal Services

DECISION

Application

1. The matter comes before the Tribunal to determine the reasonableness or otherwise of insurance premiums demanded in respect of the service charge component for the years 2002/03, 2003/04, 2004/05, 2005/06, 2007/08.

2. Furthermore the Applicant seeks to challenge in addition service charges in respect of building works in 2007/08 and all aspects of the service charge for the current year (2008/09) minus the insurance premium. No dispute has been raised concerning the identity of the person by whom such a service charge would be payable.

3. Directions were issued on the 12th May 2009. Both parties to the proceedings were invited to send to the Tribunal written representations which include a Statement of Case which they have both done. These are referred to below.

4. Mrs. Akorita, Mrs. Jean Cooper and Mr. Helsdon appeared for the Applicants. Mrs. Akorita was the spokesperson for the Applicant and it was she who made all submissions on behalf of the Applicant group.

5. The Respondent was represented by Mrs. Sophie Wisdom, solicitor who informed the Tribunal that she was a Legal Officer for Leasehold Legal Services who now acted for the Respondent Company and its individual directors who were also present. She was assisted by Isobel Barthropp for Labyrinth Property Management, the property management company that had until recently managed the subject property.

The Inspection

6. The members of the Tribunal inspected the property on the 28th July 2009 in the presence of all parties. It is a residential block built circa 1989 and divided into 7 flats each of which are similar in size and proportion. Each flat has a designated parking area to the rear of the property and the property itself is situated on raised ground which at one point would have been part of the cliff top overlooking the sea front area. The Tribunal were able to observe the remnants of structural repair work that had taken place in 1990 when the car parking area to the rear of the property had slipped down following winter storms in 1990. The property was a mixture of owner occupied and rented flats.

The Law

7. The statutory provisions primarily relevant to applications of this nature are to be found in section 18, 19 and 27A of the Act. The Tribunal has of course had regard in making its decision to the whole of the relevant sections as they are set out in the Act, but here sets out what it intends shall be a sufficient extract from each to assist the parties in reading this decision. Section 18 provides that the expression "service charge" for these purposes means:

"an amount payable by a tenant of a dwelling as part of or in addition to the rent-

a. which is payable directly or indirectly for services, repairs, maintenance, improvements or insurance or the landlord's costs of management, and
b. the whole or part of which varies or may vary according to relevant costs."

"Relevant costs" are the cost or estimated costs incurred or to be incurred by the landlord in connection with the matters for which the service charge is payable and the expression "costs" includes overheads.

8. Section 19 provides that :

"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 of works only if the services or works are of reasonable standard

and the amount payable shall be limited accordingly."

9. Subsections (1) and (2) of section 27A of the Act provide 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 to whom it is payable
b. the person by 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.

The Issues

10. The Applicant and Respondent had both complied with Directions and had set out detailed written submissions accompanied by supporting documentation. The Tribunal have had regard to the totality of the material before it, however both parties were invited to expand and augment their written submissions with oral submissions. The respective submissions are recorded below, although the Tribunal have considered all of the material before it and reference will be made to it as and when appropriate.

Liability under the Lease to pay anything

11. The starting point for the Applicant was that the Lease (the leases for the flats are by agreement identical, hereinafter reference will be made to that Lease which appears at A001 of the Applicant Bundle) required that all service charge accounts to be "ascertained and certified" by a surveyor acting as an expert. The Applicant sought to argue that Clause 4.21 was absolutely clear in this regard and that this was a condition precedent in respect of any service charge liability. She argued that the service charge accounts in the instant case had always been an amalgam of company and service charge accounts and had been certified by an accountant in breach of a fundamental provision of the Lease. She drew the Tribunal's attention to the case of BIR/44UC/LAM2006/0001, a copy of a decision of the LVT sitting in the Midlands in which liability under that lease was never incurred because the particular method of service charge certification had been held invalid, thereby breaching the condition precedent for any liability to be incurred.

12. Mrs. Wisdom for the Respondent argued that although the service charge accounts had been certified by an accountant, the statement of account had in fact been prepared by the previous managing agents (Ross and Co) who were surveyors and latterly by Labyrinth who were professional managing agents who adopted the RICS code in any event. She tried to distinguish the cited case by saying that it was not binding (merely persuasive) and that in any event the Lessor in that case had done nothing at all and produced no figures whatsoever. In the instant case, the Respondent had complied with all legal and statutory requirements as far the service charge demands were concerned.

Insurance

13. The Applicant then advanced the suggestion that the insurance premiums that had been paid for the 6 years up to 2008 were unreasonable in the sense that they were too high when one compared them to the premium for 2009. The Applicant says that £14,529.24 had been paid for the years in question when it should be based on no more than £4135.08. This is based on a backwards extrapolation using the substantially discounted premium obtained for 2009. The Applicant relied on similar lower premiums in respect of another property 81 Marina Heights which is actually on the sea front. The Applicant did not dispute the need for directors and officers and legal liability insurance but said that this should be lower than what was charged. She did dispute the need for terrorism cover.

14. The Respondent argued in counter submission that the insurance premium for 2009 was a reflection of a reduction obtained in a tough economic climate and a reflection of the insurance company wishing to retain business. She disputed that the previous years were unreasonable but were a reflection of location and previous claims history. She pointed out that the insurance had been obtained through the services of reputable brokers who had tested the market and were reasonable in the circumstances.

Service Charge Years 2007, 2008

15. In respect of the above years the Applicant argued that the sums charged for general repairs (£2183 for 2007 and £3500 for 2008) were effectively limited to £250 per flat because the Respondents had not complied with s.20 consultation requirements of the Landlord and Tenant Act 1985. She highlighted that "qualifying works" under the Act means any works on a building or any other premises and that no such consultation took place during the service charge years.

16. The Tribunal noted and it was agreed at the hearing that service charge amounts for 2009 were no longer in dispute as between the parties.

17. The Respondent submitted that the Applicant had misunderstood the nature of s.20 consultation. She argued that the sums were budgeted amounts in respect of general expenditure and that no single expenditure approached the £250 statutory limit. This was prudent management and none of the individual works were qualifying works under the legislation and indeed no major works were carried out. Mrs. Wisdom indicated that any surplus would have been returned to the individual leaseholders in any event.

Other Matters

18. The Applicant raised before the Tribunal that the accounting period was in breach of the lease conditions of a period up to the end of 30th June of each year rather than the year end currently employed.

19. The Respondent replied that the current year end approach had been used for the last 11 years and that no prejudice had been caused to any party and that to re-do the accounts for a mid year period would incur an unreasonable cost to the leaseholders in any event. She pointed to the Freeholder Company being formed in December so this was the accounting period used.

20. The Applicant also raised the issue of what had happened to the reserve fund and wanted the Tribunal to rule on this. The Respondent submitted that this was outside the Tribunal's jurisdiction and in any event that monies had been refunded for 2007 and the prior years and would be for 2008.

The Tribunals Decision

Liability under the Lease to pay anything

21. The Tribunal are not satisfied that the all the service charge accounts are invalid per se because they fall foul of Clause 4.21 of the Lease on the basis that they have not been ascertained and certified by a surveyor.

22. This is because the Tribunal find that the service charge component would have been prepared by Ross & Co who are surveyors and latterly by Labyrinth who are subject to the RICS Code prior to being passed to an accountant. It accepts the proposition that the purpose envisaged by the Lease for a surveyors involvement in the ascertaining of service charge amounts is to have sufficient relevant technical expertise in the preparation of the same. It finds that the actual facts before the Tribunal support this view, that prior to the matters being passed to the accountant, the statement of account (page 58 of the Respondent's bundle as one example of the same) was ascertained and certified by the relevant professional surveyor as envisaged by the Lease. The case cited by the Applicant is of little value other than establishing the generally accepted nature of a condition precedent and the Tribunal is minded to agree with the Respondent that in that case there had been a complete failure to produce any proper service charge account.

Insurance

23. The notion of something being reasonable has been held to mean that the landlord does not have an unfettered discretion to adopt the highest standard and to charge the tenant that amount; neither does it mean that the tenant can insist on the cheapest amount. The proper approach and practical test were indicated in **Plough Investments Ltds v Manchester City Council [1989] 1 EGLR 244** that as a general rule where there may be more than one method of executing in that case, repairs, the choice of method rests with the party with the obligation under the terms of the lease.

24. Further the tenant cannot insist on the cheapest method and a workable test is whether the landlord himself would have chosen the method of repair if he had to bear the costs himself. Ultimately it is for the court or tribunal to so decide on the basis of the evidence before it and exercising its own expertise. In that regard the LVT is an expert tribunal and is able to bring its own expertise and experience in assessing the evidence before it. In effect the notion of "reasonableness" has within it a scale and something may still be viewed as "reasonable" even though it may be at different points within that scale.

25. The Tribunal are unable to accept the backwards reducing extrapolation as advocated by the Applicant on the basis that the latest insurance premium for 2009 is cheaper. The Tribunal accepts that the 2009 reduction is a reflection of a highly competitive market where insurers may well offer reductions on the basis of retaining business. It is difficult to determine whether the same could have been obtained in previous years and accordingly reduce the amount that was charged on the basis that it was unreasonable. The Tribunal is satisfied that the Applicant has conflated "reasonable" with "cheapest" when the evidence before the Tribunal was that the various insurances were obtained via the service of reputable insurance brokers and in good faith.

26. One example of this is the discussion surrounding the need for terrorism cover which appears to have been a properly thought out consideration. The Tribunal are not satisfied that the need for terrorism cover is not relevant in Hastings, unfortunately this is a standard type of cover since 2001 and would cover not only the building or area being a target but also what potential tenants maybe engaged in prior to an attack, for example the use of a flat as bomb factory. The Tribunal are unable to accept the evidence of 81 Marina as being of assistance. This is clearly a different type of property in a different location and does not take into account the unfortunate claims history of the subject property which had a major structural collapse of the rear car parking area in 1990. The Tribunal accept the proposition as advanced by the Respondent that the historically higher premiums compared to 2009 have to be seen in the context of the claims history and although higher cannot in themselves be described as unreasonable in the context of this Tribunal's jurisdiction.

27. The Tribunal does however decide that the directors and officers' liability insurance and the legal protection insurance component of the insurance premium are both unrecoverable and in any event unreasonable. The Lease itself does not allow for such cover nor does it envisage such cover as being part of the service charge expenditure. Mrs. Wisdom was unable to assist the Tribunal from where in the Lease this sum was being charged as part of the service charge amount. In the Tribunal's view this aspect of the premium was not for the benefit of the leaseholders but rather to provide indemnification for company officers and to protect company and shareholders. In this regard the Tribunal does decide that the sums paid between 2003 and 2009 in respect of directors and officers as well as legal protection insurance are unrecoverable as part of the service charge element and should be properly refunded as between the various leaseholders bar any other agreement (the Applicant advocated the paying of something and the Tribunal have gone further than perhaps she did in her submission).

Service Charge Years 2007, 2008

28. The Tribunal are unable to accept the argument that the budget sum for general works amount can only be limited to £250 per flat as the statutory maximum in the absence of s.20 consultation or dispensation of the same by the LVT. The Applicant has a fundamental misunderstanding of the s.20 procedure. Parliament has enacted the duty to consult to protect tenants from potentially unscrupulous landlords carrying out works that are not competitively priced and or maybe being done for more nefarious purposes such as adding value to the property or to provide work for contractors linked to the landlord. In the instant case, no individual item of work amounted to a qualifying work under the Act. They were all small items of expenditure that were to do with routine repair and maintenance matters that arose over the course of the years in question and the sums asked for were part of an anticipated budget rather than qualifying works expenditure. In any event any surplus had been or was proposed to be refunded.

Other Matters

29. The Tribunal accepts that the accounting period as described in the Lease is a mid-year period upon a true construction of the Lease but does not accept that the Applicant has been caused any prejudice because of the year end period used in respect of the subject property for the last 11 years. The Respondent will no doubt take notice of the observations made in this regard.

30. The Tribunal notes that in respect of the reserve fund, the statement made by Mrs. Wisdom in open session that those monies in respect of 2007 and prior had been paid back and in respect of 2008 would be paid back. In the light of that the Tribunal need not consider the matter further.

Costs

31. Having regard to the guidance given by the **Land Tribunal in the Tenants of Langford Court v Doren LRX/37/2000**, the Tribunal considers it just and equitable to make no order under s.20C of the Landlord and Tenant Act 1985. The Respondent indicated that this was not in issue as the costs of defending the application had been covered by legal insurance. In the light of that observation the Tribunal need not consider this matter any further.

32. The Applicants have not succeeded in respect of the majority of their submissions save for that element which relates to legal and directors and officers insurance and in those circumstances the Tribunal directs that no order be made in respect of the Applicant's application and hearing fee in what essentially a no costs jurisdiction.

Chairman.....

Date.....16/8/08.....