Residential
Property
TRIBUNAL SERVICE

SOUTHERN RENT ASSESSMENT PANEL
LEASEHOLD VALUATION TRIBUNAL

Case Reference: CHI/21UD/LIS/2010/0006

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

Address:	Marina Heights, 63 West Hill Road, St Leonards, East Sussex, TN38 0NF
Applicant:	Mrs Rita Akorita
Respondent:	Marina Heights (St Leonards) Ltd
Application:	12 January 2010
Inspection:	21 July 2010
Hearing:	21 July 2010

Appearances
Applicant

Mrs R Akorita	Leaseholder
Mr John Nyss BSc MRICS MFPWS	Chartered Building Surveyor, Clarion Building Consultants Ltd

Respondent

Mr Ross	Solicitor, Horwich Cohen Coghlan
Mr Clarke	Managing Agent, Parsons Son & Basley LLP
Mr Andrews	

Members of the Tribunal
Mr I Mohabir LLB (Hons)
Mr N. Robinson FRICS
Mr P. Gammon MBE BA

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 a determination of her liability to pay and/or the reasonableness of various actual service charges claimed by the Respondent in relation to the 2009 and 2010 service charge years.

2. The Applicant is the present lessee of the property known as Flat 4, Marina Heights, 63 West Hill Road, St Leonards on Sea, TN38 0NF ("the property") by virtue of a lease dated 15 September 1992 made between Blackberry Homes Ltd and Gertrude Jean Rose for a term of 125 years from 25 March 1988 ("the lease"). The Respondent is the freeholder.

3. The Applicant does not deny that the service charges in issue are contractually recoverable as relevant service charge expenditure under the terms of her lease. It is common ground that the Applicant is contractually required to pay a service charge contribution calculated at 14.2857% of the overall expenditure incurred in any given year. For these reasons, it is not necessary to set out the relevant terms of the Applicant's lease that gives rise to this liability. It is sufficient to note that each service charge year commences on 25 December in each year and ends on 24 December in the following year.

The Issues

4. A pre-trial review was held on 26 March 2010 at which the Tribunal identified the service charges being challenged by the Applicant. However, at the hearing the parties were able to narrow the issues by agreeing the following service charges in relation to 2009:

Public way electricity	£75.10
Postage and stationery	£60.43
Repairs and maintenance	£539.97

Management fees	£1256.54 including VAT
Professional fees	£409.16

5. The service charges that fell to be determined by the Tribunal were:

Buildings insurance premiums	£1,194.38 (2009) and £2,696.24 (2010)
Accountancy fees	£587.50 (2009 only)

6. It should be noted that the Respondent had included the sum of £7,332.99 in the 2009 service charge account as a refund to leaseholders. Mr Clarke, told the Tribunal that this represented a reserve fund contribution but it had not as yet been demanded from the lessees. The Tribunal ruled that unless and until it had been demanded from the lessees, they had no liability to pay this contribution and, therefore, it could not form part of any amount claimed for 2009. Mr Clarke agreed with this ruling and informed the Tribunal that the reserve fund contribution would form part of the budget estimate for 2010 and would formally be demanded from the lessees for that year.

The Relevant Law

7. 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.

8. 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

9. The Tribunal externally inspected the building and carried out an internal inspection of the common parts. The property comprised a detached purpose built block of seven flats constructed approximately 20 years ago with brick elevations, tiled at second floor level, under tiled and flat roof sections. Most of the flats had replaced the original timber windows with PVCu double glazed units. Original windows were noted to remain to Flats 2 & 4 and to the common parts. Car parking on a concrete slab cantilevered out over steeply sloping ground is available at the rear of the property via an access way through the building at ground level. The common parts were inspected and were of a design in keeping with the age of the property with carpeted concrete floors and stairs, metal balusters, timber stair rails and painted walls.

Decision

10. The hearing in this matter also took place on 21 July 2010. The Applicant appeared in person. The Respondent was represented by Mr Ross, a Solicitor from the firm of Horwich Cohen Coghlan.

Insurance Premiums (2009 & 2010)

11. The gross buildings insurance premiums claimed by the Respondent for 2009 and 2010 are £ 1,194.38 and £2,696.24 respectively. Included within these figures is an element of commission paid to the insurance brokers of £398.13 and £974.64 respectively. The Applicant made two submissions in relation to this matter.

12. Firstly, the Applicant submitted that the commission element of the buildings insurance premiums was not recoverable because it did not form part of the premium itself and was not contractually recoverable under clause 6.2 of the First Schedule of the lease. There was no express provision in the clause that allowed for commission to be recovered as part of the buildings insurance premium. The Respondent simply submitted that the commission formed part of the buildings insurance premium and, as such, was recoverable under clause 6.2 of the First Schedule.

13. The Tribunal found that the total buildings insurance premiums claimed by the Respondent for both years, including the element for commission, was recoverable under clause 6.2 of the First Schedule of the lease. The nature and extent of the cost recoverable under this clause is a question of considering the lease. As a general rule, the lease will not be construed so as to enable a landlord to make a profit from service charges. The purpose of a service charge is to enable the landlord to recover the costs of services supplied. In ***Havenridge v Boston Dyers*** [1994] 2 EGLR 73, the Court of Appeal held that the landlord was not entitled to recover from the lessees more than the premium he had paid and agreed to pay in the ordinary course of business. In the present case, and by placing the buildings insurance through brokers, the commission paid to the brokers, inevitably, formed part of the overall premium as part of the ordinary course of business and for which and represented the actual premium paid by the Respondent. There was no question here of commission sharing with the Respondent or any profit having been made by it when the insurance was placed. Accordingly, the Tribunal determined that the totality of the premiums paid by the Respondent for 2009 and 2010 were recoverable as relevant service charge expenditure.

14. The second submission made by the Applicant was that the buildings insurance premiums were excessive and, therefore, unreasonable. In support of this submission, she relied on the expert report prepared by Mr Nyss dated 13 March 2010. Mr Nyss is a Chartered Building Surveyor by profession. His instructions were to calculate the rebuild cost for the building for each of the years from 2002 to 2008. Having done so, he was to express an opinion as to

what would have been a reasonable market insurance based on the rebuild costs. The methodology he adopted was by reference to the document entitled ' Guide to Rebuilding Costs of Flats' 2008 edition, published by the BCIS (Building Cost Information Service). This involved measuring the gross external floor area of the building and by reference to the appropriate base cost in the guide, including ancillary costs, he calculated that the rebuild cost in 2008 was £813,000. Using the same methodology, he calculated that the rebuild cost for 2010 would be £837,000.

15. Based on Mr Nyss's calculations, the Applicant obtained alternative insurance quotations from A One Property Insurance on 5 March 2010. For 2008, this produced a range of premium is from £692.86 to £1,303.78. In the alternative, quotations based on the landlord's rebuild value taken from the insurance schedule produced a range of premiums for 2008/09 from £1,078.28 to £1,995.26 and £1,013.51 to £1,875.82 for 2009/10. The Applicant contended for these figures and submitted that the Respondent's buildings insurance premiums were unreasonable.

16. The Tribunal heard evidence on this issue from Mr Clarke, the managing agent, on behalf of the Respondent. By a letter dated the 24 July 2009, his firm recommended that the building be insured for the sum of £1,500,000. He said that the insurance valuation was undertaken by one of the valuers at his firm, which was then checked by one of the Partners. The site was visited and measured. As part of the valuation exercise, it was necessary to take into consideration the history of the car park which had collapsed in 1990 and had been subject to a complete rebuild. The relevant measurements and calculations appear at page A25 of the Applicant's bundle.

17. Mr Clark said that the valuation prepared by Mr Nyss was not complete. For example, he had only allowed for one retaining wall when in fact there are two. Furthermore, he had failed to take into account problems with site access, which would have an impact on the rebuild costs. The same applied to the balconies, which would include the cost of replacing the glass, railings and

any waterproofing. He confirmed that his firm's valuation had been carried out by reference to the BCIS suggested rates.

18. The Tribunal found that the insurance valuation for the building of £1,500,000 had been properly undertaken by the managing agent. It was clear that the valuation prepared by Mr Nyss had omitted a number of relevant ancillary costs, referred to by Mr Clarke, that would apply to the rebuilding of the property. These included a number of site factors such as poor access, a steeply sloping site and the history of subsidence. The risk of accepting the valuation prepared by Mr Nyss was that there was a possibility the building would be underinsured. Whilst the figure of £1,500,000 appears to be on the high side, the Tribunal erred on the side of caution and did not interfere with the valuation.

19. The submission made by the Applicant about the reasonableness of the buildings insurance premiums could only succeed if the Tribunal accepted the evidence of Mr Nyss. Given that it did not do so, it follows that it found the buildings insurance premiums claimed by the Respondent for 2009 and 2010 to be reasonable. Moreover, the Respondent was not obliged to seek and accept the cheapest quote obtainable[1]. The only obligation is to obtain a premium that was within a reasonable range. Having regard to the alternative quotes obtained by the Applicant, the Tribunal was satisfied that the premiums paid by the Respondent were reasonable.

20. The Applicant had raised a collateral issue about whether or not the element of the premium for the provision of terrorism cover should be included in the stated overall premium, as her quote had done. However, the Tribunal agreed with the Respondent's submission that it was an entirely semantic exercise and a matter of style as to how the breakdown of costs was shown.

[1] see ***Berrycroft Management Co. Ltd. v Sinclair Gardens Investments (Kensington) Ltd.*** [1997] 22 EG 141

Accountancy Fees (2009 only)

21. The amount claimed by the Respondent was £587.50. Again, the Applicant made two submissions in relation to this issue. Firstly, that this cost was not contractually recoverable because the word "accountant" was not expressly mentioned in the lease. In the alternative, she submitted that the cost was unreasonable because the accounts prepared were straightforward and that she contended for a figure of £100 plus VAT.

22. Mr Ross, for the Respondent, accepted that the lease made no express reference to an accountant but submitted that this cost was recoverable as a matter of construction. If the Applicant's submission was correct then the company costs could not be recovered and it would become insolvent. Therefore, there must be an implied covenant to do so.

23. The Tribunal had little difficulty in concluding that, in the absence of any express provision in the First Schedule of the lease, this cost was not recoverable by the Respondent. The Respondent's submission that there is an implied covenant to do so is simply wrong in law. Therefore, it was not necessary for the Tribunal to go on to consider the reasonableness of this expenditure.

Section 20C & Fees

24. The Applicant had also made an application under section 20C of the Act for an order that the Respondent be disentitled from recovering, through the service charge account, all or part of any costs it may have incurred in the proceedings before the Tribunal. The Tribunal has a discretion to make an order when it is just and equitable to do so.

25. Mr Ross submitted that the Respondent had a contractual entitlement to recover the costs it had incurred in these proceedings under paragraph 6 of the First Schedule of the lease. In the Tribunal's judgement, this submission was not correct because paragraph 6 is only concerned with the fees of the managing agents and for the general management of the building. It is now settled law that, for a landlord to be able to recover any costs incurred in

proceedings such as these, there must be an express provision in the lease giving this entitlement[2]. It was beyond doubt that paragraph 6 did not satisfy this requirement and, therefore, the Respondent is not entitled to recover any costs it may have incurred in these proceedings. It follows, it was not necessary for the Tribunal to make any order under section 20C of the Act.

26. The Applicant confirmed to the Tribunal that she was not seeking to be reimbursed for any fees she had paid to have this application issued and heard. Accordingly, the Tribunal makes no order in this regard.

Signed
Mr I Mohabir LLB (Hons)
Chairman
Dated the 14th day of September 2010

[2] see *Sella House Ltd v Mears* [1989] 12 EG 67