RESIDENTIAL PROPERTY TRIBUNAL SERVICE

SOUTHERN RENT ASSESSMENT PANEL & LEASEHOLD VALUATION TRIBUNAL

Case No.	**CHI/29UC/LSC/2010/0133**
Property:	**First Floor Flat 7 Belmont Road Whitstable Kent CT5 1QJ**
Applicant:	**Waterglen Limited.**
Respondent:	**Mr. T.L. Serginson**
Date of Hearing:	**17th November 2010**
Members of the Tribunal:	**Mr. R. Norman Mr. R. Athow FRICS MIRPM**
Date Decision Issued:	**14th December 2010**

FIRST FLOOR FLAT, 7 BELMONT ROAD, WHITSTABLE, KENT CT5 1QJ

Decision

1. In respect of the matters transferred from the County Court, the Tribunal determined that Mr. Serginson ("the Respondent") is not liable to pay any of the sums claimed.

2. There remain to be decided by the County Court claims for interest, court fee and solicitors costs. However, the Tribunal having had the advantage of considering the documentary evidence and hearing evidence and submissions at the hearing, makes the following observation. It was clear that the sums claimed were not claimed in accordance with the terms of the lease and that there was insufficient evidence on which to base the claim.

3. An order is made under Section 20C of the Landlord and Tenant Act 1985 ("the Act") that all or any of the costs incurred or to be incurred by the Applicant in connection with these proceedings are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the Respondent.

Background

4. Waterglen Limited ("the Applicant") is the freeholder of 7 Belmont Road, Whitstable, Kent CT5 1QJ ("the building") and the Respondent is the lessee of the First Floor Flat at that address ("the subject property").

5. This application arises from the commencement by the Applicant of proceedings against the Respondent in the County Court (Claim Number 0CT00605) claiming payment of service charges, administration fees, interest and costs. That matter was transferred to the Tribunal for determination of the matters the subject of the claim which are within the jurisdiction of the Tribunal.

Inspection

6. On 17th November 2010 the Tribunal inspected the exterior of the building and the common parts in the presence of Mr. Rhys Hadden of Counsel, representing the Applicant, Mr. Biley of Labyrinth Properties/Countrywide Estate Management the managing agents and the Respondent. The front of the building was visible from Belmont Road and the rear from a pathway round the end of and to the rear of the terrace.

7. The building is a middle terraced house which has been converted into two self contained flats: one on the ground floor and the other on the first floor. The common parts consist of just a front entrance door and a small hallway. The Respondent pointed out to us the guttering which he had renewed, the fascia and soffits which he told us he had painted, the window which he had repaired and the window which he had replaced at the rear of the subject property.

The Hearing

8. At the hearing the Applicant was represented by Mr. Hadden of Counsel. The Respondent had received assistance from Solicitors in preparing documentary evidence but was unrepresented at the hearing. Mr. Biley and the Respondent gave evidence and Mr. Hadden and the Respondent made submissions.

9. In advance of the hearing directions had been issued and the Tribunal had received the case papers from the County Court, a statement of case from Solicitors representing the Applicant, a statement from Mr. Biley with exhibits and a statement from the Respondent. All these documents were considered by the Tribunal. By a letter dated 15th November 2010 Solicitors representing the Applicant sent to the Tribunal a statement of their costs and copies of the following:

(a) A certificate of insurance for the period 24th December 2010 to 23rd December 2011.

(b) A certificate of insurance for the period 24th December 2008 to 23rd December 2009.
(c) A policy schedule indicating the effective date as 24th December 2007
(d) A Financial Services Authority Status Disclosure Document and Customer Terms of Business document from Cadogan Keelan Westall.
(e) An AXA insurance summary of cover.
(f) A terrorism insurance certificate for the period from 24th December 2007 to 23rd December 2008
(g) A certificate of insurance for the period 24th December 2009 to 23rd December 2010.

All these documents were also considered by the Tribunal although it was noted that they had been provided so late in the day that the Tribunal saw them for the first time on the day of the hearing.

10. Mr. Hadden opened the Applicant's case and called Mr. Biley to give evidence.

11. Mr. Biley confirmed the contents of his statement, which he had read, and stated that it was true to the best of his knowledge and belief. He gave the following evidence.

(a) Labyrinth Properties is part of Countrywide Estate Management ("Countrywide") and Mr. Biley is employed by Countrywide as a Senior Property Manager with responsibility for managing the building.

(b) Mr. Biley stated in his statement that he took over management of the building in or around November 2008 but at he hearing stated that Countrywide became the managing agents for the building from October 2008. Countrywide collect only service charges. Pier Management ("Pier") now collect the insurance and ground rent. The Respondent is up to date with insurance from December 2008 and he is also up to date with the ground rent.

(c) The sums claimed are in respect of insurance from March 2006 to December 2008 and service charges from March 2006 to the invoice dated September 2010 taking the service charges claimed to March 2011 as service charges are payable six monthly in advance.

(d) As to insurance, it was noted that in the Respondent's statement he had said that he had not seen any documentation confirming the actual sums expended upon insurance but that subject to checking that those accorded with the sums due under the lease he was prepared to agree that the sums in respect of insurance were outstanding and due to be paid by him. However, there was nothing more that Mr. Biley could produce to the Tribunal. The records of the previous managing agents were difficult to obtain. There were just the invoices, all in the name of Countrywide produced as exhibit JB5 to his statement. All except three of those invoices had an issue date of 1st October 2008 and described the sums claimed as service charges on account or insurance on account in respect of various periods. Of the remaining three invoices, two were in respect of administration fees and the third was in respect of an insurance credit. He said that the freeholder would have advised Countrywide of money owed and Countrywide would

charge it out with no documentation. Countrywide had tried to get information from the insurer at the time and would have gone back to Pier to contact the insurer through David Glass and Associates ("DGA"), the former managing agents. All that had been obtained had been supplied. As Mr. Biley had said in his statement, he did not have copies of invoices for charges raised on 26th March 2009, 26th September 2009, 26th March 2010 or copy invoices for charges raised since 26th March 2010 even though Countrywide was the managing agent on those dates.

(e) Mr. Biley was asked about the repair to the window carried out by the Respondent and whether he had obtained consent from the freeholder to carry out that work. Mr. Biley was not aware of any. Countrywide's client is Regis and Pier is the agent of the Applicant and Pier say no consent has been given. The Respondent has refurbished and decorated without consent but it is just the replacement of the window for which consent will now be required.

(f) As to the loft space, Mr. Biley understands from Pier that the loft space has not been demised and that the lease does not show it as demised and he was not aware of any request to purchase the loft space. The Respondent stated that when he purchased the subject property the loft was a bedroom and his solicitor has documents to show this. Mr. Hadden confirmed that the official copy of the register of title at the Land Registry shows that by a deed in 1994 the lease was varied to include the attic space above the first floor in the demise.

(g) As to the guttering replaced by the Respondent, Mr. Biley said that technically the Respondent needed consent to do the work. He could have contacted the agents but he had kindly attended to it at his own cost. Mr. Biley would like to know how much it cost so that half the cost could be recovered from the lessee of the ground floor flat as service charges. However, the Respondent said the work had been done nearly four years ago and he had no intention of claiming.

(h) Asked why the existing level of service charges had been set at £618.75 for six months in respect of each of the two flats, Mr. Biley did not know, but, asked for his opinion, he suggested that the reason could be collecting in anticipation of works to be done. He accepted the communal hall is small and he was not sure if the lease provided for a reserve. The Tribunal referred Mr. Biley to the lease and in particular clause 4 (ii) which provides:

"contribute and pay to the Lessor on the twenty-fifth day of March in every year of the said term such sum or sums equal to one half of the total costs expenses outgoings and matters mentioned in the Fourth Schedule hereto incurred by the Lessor as the Lessee's share of the said costs expenses and outgoings (the first payment being a proportion of the said contribution calculated from the date hereof PROVIDED ALWAYS that in ascertaining the amount of the aforesaid proportion in any year the Lessor shall previously deliver to the Lessee an account of the total of the said costs expenses outgoings and matters"

(i) Mr. Biley had set out at paragraph 8 of his statement a summary of most of the contents of the Fourth Schedule but it was accepted that at paragraph 8 f "all other costs and expenses of any kind incurred by the lessor in complying with the covenants of the lease" was wider than the lease provided in that the lease provided "6. Generally all other costs and expenses of any kind incurred by the lessor in complying with the covenants contained in clause 5 of this Lease"

(j) The Tribunal asked Mr. Hadden for his interpretation of the lease as to payment of service charges. His interpretation was that there was no provision for a reserve fund. Mr. Biley's view was that the service charges would be assessed at £618.75 for six months in respect of each of the two flats so as to have a service charge fund in case anything was needed. He considered also that clause 4 (ii) provided for the collection of service charges in advance and Mr. Hadden at first agreed with that but on further consideration of the clause had to accept that they could be collected only in arrear.

(k) Mr. Hadden asked Mr. Biley if he anticipated that the service charges would remain at this level. Mr. Biley said it would need to be put to the client but that personally speaking the service charges needed to be reduced. Countrywide will only manage at a certain level; a certain fee per unit. The usual procedure is for the property manager to visit the property and estimate for repairs but that is irrelevant here and needs to be run in a different way. The property is in good repair.

(l) Mr. Biley has been managing property for about five years and had inspected the building early in 2009. No problems had been seen but he had not seen the rear of the building as he and his colleague could not work out which was the back of this building. It was pointed out by the Tribunal that it was a simple matter of counting from the end of the terrace.

(m) The Tribunal asked Mr. Biley if it would be possible to obtain instructions by telephone to see if consent for the replaced window would be given and the cost as he had seen the building and could tell Pier all about it. Mr. Biley agreed that the replaced window was the only matter requiring consent and he telephoned Pier. At that time he was unable to contact the person responsible but telephoned him later and informed the Tribunal that Pier will offer retrospective consent subject to the following conditions:
(i) A specification of the window.
(ii) If it was on a like for like basis. For example, if the original window frame had been painted white and had been replaced with a brown frame. That was not the case here.
(iii) That it was installed by a FENSA approved agent and a copy of the FENSA Certificate was produced.
(iv) A photograph of the building as it is now and if possible before the replacement.
The charge for consent would be £250 + VAT which includes £100 + VAT in legal fees for the freeholder's solicitors' costs for the preparation and issue of a licence. Cheques can be issued to Pier Management, 16-18 Warrior Square, Southend-on-Sea.

(n) The Respondent said he had no photographs of the building before the old sash window was replaced but that from the outside the new window looked like a sash

window. Mr. Biley said there was no need to worry about that. The Respondent said he had had to replace the window because it was dangerous, the cost was justified and he thought it was done in accordance with the lease.

(o) Mr. Hadden asked Mr. Biley about the copy invoices produced and sent by Countrywide to the Respondent. There is a description in each. For example the invoice with an issue date of 1st October 2008 in respect of service charges on account 26th September 2006 to 25th March 2007. Would it include a management fee as well as service charges in the £618.75? Mr. Biley said it would and that he could find out how much but in 2006 to 2007 it was the previous managing agents not Countrywide who were managing the building. He could not confirm what was included in the figure. It would be from DGA. Mr. Hadden referred to the debtor history produced as an exhibit to Mr. Biley's statement and an entry dated 26th March 2007 (invoice 4863) as an example of a claim for £363.75 and asked Mr. Biley if he had any comment on what that was for? He said it was before Countryside management and so he could not say.

12. As all the sums claimed were on account, the lease did not provide for that and therefore the sums were not chargeable, the Tribunal asked Mr. Hadden if he should withdraw the claim. Mr. Hadden said he would have to take instructions but tended to agree.

13. As to the debtor history, Mr. Hadden submitted that in respect of insurance the amounts are reasonable albeit there are no documents.

14. The Respondent stated that he would have paid if documents had been provided but they were not and Mr. Biley agreed none had been produced.

15. Mr. Biley also agreed that if the administration charges claimed were incurred because the Respondent was in arrears but there were no arrears he assumed those charges must go.

16. The meaning of an order under Section 20C of the Act was explained by the Tribunal and the Respondent made an application for such an order.

17. Over the lunchtime adjournment Mr. Hadden obtained instructions that the Applicant would concede only the administration fees of £13.00, £28.75 and £115.00 (total £156.75).

18. Asked by the Tribunal about the list of sums claimed at paragraph 10 of his statement that showed two invoices (4871 for £618.75 and 4872 for £363.75) both dated 26th September 2008 and described as Service Charges on Account, Mr. Biley stated that came from Countrywide's accounts department; he is a senior property manager and manages the building but could not justify the cost. He was not sure how the figures were arrived at but they may have been installed on the computer system for historical purposes. They would include a management fee. In his opinion he thought that a likely fee for managing the building would be about £250 per lessee per year inclusive of VAT.

That would cover administration of the building, contact with clients, payments of bills for electricity for communal parts etc. and issuing service charges applications. In this case insurance is arranged by the Applicant or its agents.

19. The Respondent gave evidence.

(a) He had nothing to add to what he had said in his statement and what he had already said during the hearing.

(b) Mr. Hadden asked the Respondent if he had received demands for 2006 and was he aware of the bills escalating? He said he got the bills but his solicitor advised him that the Applicant or its agents could not charge. He had tried to contact the agents and had telephoned the Applicant but had had no response. He had also told them that his ex partner came off the lease but they still send bills in her name and his. Mr. Hadden suggested that the Respondent could have been a little more proactive to settle this but the Respondent did not think so as there was no justification for the amounts. He accepted the following:
(i) That he could have written to the managing agents expressing his concerns.
(ii) That in relation to the window replacement and perhaps the guttering repairs he needed consent. That was his mistake.
(iii) That there is a term in the lease that he has to pay insurance and that he makes payments to Pier.

(c) The Respondent was asked if he accepted that there is a term in lease that he has to pay the managing agents fee and reference was made to paragraph 4 of the Fourth Schedule to the lease. The Fourth Schedule is headed "Costs of expenses outgoings and matters in respect of which the Lessee is to contribute". Paragraph 4 reads as follows:

"4. The wages expenses and disbursements incurred from time to time by the Lessor or his Managing Agent in the administrative work involved in the maintenance of the building (in accordance with the Lessor's covenants herein contained) including the employment of office staff and other persons reasonably necessary to carry out such work"

20. It was pointed out by the Tribunal that this appeared to relate only to the maintenance of the building.

21. Mr. Hadden referred also to the first part of paragraph 5 of the Fourth Schedule to the lease. The whole paragraph reads as follows:

"5. The costs and expenses of employing the Managing Agent and such other persons as provided by Clause 7 of this Lease"

22. Mr. Hadden submitted that paragraph 4 should be construed in its widest sense so as to refer not just to repairs but arranging insurance.

23. Asked what maintenance had been carried out since taking over, Mr. Biley stated that there had been none but he did not know if the previous agents had done anything.

24. The Respondent continued with his evidence.

(a) Asked by the Tribunal if any maintenance had been carried out by managing agents since he bought the subject property in 2004, the Respondent stated that the only work not done by him as far as he knows is the new front door and the Respondent thinks the lessee of the ground floor flat arranged for a contractor to do that. The Respondent has never seen a bill for it.

(b) Asked by Mr. Hadden if he was disputing that the insurance from 2006 to 2008 had been paid, the Respondent stated that, as he had said, he would pay if he saw documents but they were not produced. Now documents are produced by Pier and now the sums are demanded and paid. He negotiated with Pier over the premium and is now paying about £250 to Pier. Mr. Biley stated that Countrywide has to take instructions from its client, the Applicant and do what the Applicant wants Countrywide to do.

(c) Mr. Hadden asked if the amounts claimed in the invoices for the dates 26th September 2006 for £111.25, 6th December 2006 for £220.95 and 26th March 2007 for £117.50 are roughly in line with what the Respondent is paying now? The Respondent stated that they are and that the amount he pays now is high but he has to pay it.

25. The Tribunal enquired whether the summary of tenants' rights had been included with the demands made after 1st October 2007. Mr. Biley assumed they would be on a separate page. Demands sent out by Labyrinth have the summary on the reverse of the demand but in this case the original demands were not from Labyrinth.

26. Mr. Hadden's submissions.

(a) The Applicant seeks recovery of service charges on the basis that they are a composite of a management fee and any maintenance. As no evidence of maintenance then a reasonable proportion of those service charges constitutes a management fee. It is a matter of construction, but the lease permits the freeholder to claim management fees. The Respondent conceded that in his statement. The freeholder should be entitled to reasonable fees that were incurred. The Respondent knew managing agents were employed.

(b) As to insurance, it was a reasonable amount in line with the current amount for insurance that the Respondent is paying. Notwithstanding the previous amounts for insurance were demanded on account, it is reasonable to assume that insurance was paid and therefore the Respondent should be expected to pay that insurance. Mr. Hadden pointed out that the papers supplied to the Tribunal with the letter dated 15th November 2010 include an AXA schedule dated 24th December 2007 which is relevant. It ties in with demands dated 26 March 2008 for £117.50 and 26th September 2008 for £117.50 which when added together come to a lower figure than the insurance cost. It is accepted

that the debtor history supplied with the statement of Mr. Biley shows some payments having been made. The debtor history shows a credit for insurance dated 19th December 2008. Mr. Hadden understood this to have been received on account by Pier to settle arrears.

(c) The Respondent has only ever written one letter to the freeholder and that was over a change of name. He says he has telephoned but there is no evidence of that in his statement. If he had written it is possible that the freeholder may have been able to deal with it properly. The Applicant will look into service charges going forward in accordance with the terms of lease.

(d) As to the application for an order under Section 20C of the Act, the Respondent should have contacted the Applicant a lot earlier rather than allow proceedings to continue as they have. He sat back and allowed it to happen. Proceedings could have been concluded earlier without so much expense. Under the provisions of Clause 4 (vi) of the lease the Respondent covenants:

"to keep the Lessor and any other Lessee occupier or user of the Building or any part of the Lessor's estate fully and effectually indemnified against all claims actions damages costs expenses and demands whatsoever arising out of or as a result of any act or default on the part of the Lessee unless such liability is admitted and paid under the terms of any insurance effected by the Lessor as hereinafter mentioned"

(e) Under this Clause the landlord has the right to recover. Fees are owing and the freeholder is obliged to take action. Until the Respondent admits liability he has to indemnify the lessor. Although the Tribunal pointed out that the Respondent had done nothing wrong because he had not been billed in the proper way, the Applicant says that the Respondent has been billed correctly.

(f) As the invoices were sent out by Countrywide on 1st October 2008 on taking over management and some were in respect of periods more than eighteen months before that date there is the possibility that the requirement to make demands within eighteen months has not been met. If the Respondent did receive bills before 2008 there may have been compliance with the requirement but there is no documentary evidence that invoices were sent out previously. Mr. Biley says it was difficult to obtain information from DGA.

Reasons

27. The Tribunal considered all the documentary and oral evidence and the submissions and made determinations on a balance of probabilities about the sums claimed.

28. The Tribunal was not satisfied that the lease allowed that service charges or charges for insurance could be demanded on account. It was clear from the lease that the Respondent was only liable to contribute to the total costs, expenses, outgoings and matters mentioned in the Fourth Schedule to the Lease once they had been incurred. Also

the lease provides that "...in ascertaining the amount of the aforesaid proportion in any year the Lessor shall previously deliver to the Lessee an account of the total of the said costs expenses outgoings and matters".

29. All the amounts claimed were said to have been demanded on account and therefore were not payable under the terms of the lease. In addition there was no evidence that an account of the total of the costs expenses outgoings and matters had been delivered.

30. In the absence of evidence as to when demands were originally made some of the amounts claimed may not be payable as they were not demanded within 18 months.

31. There was no evidence, other than Mr. Biley's suggestions, that the summary of tenants' rights was served as required with demands made after 1st October 2007 and before Countrywide became the managing agents.

32. The debtor history produced showed some payments made, presumably in respect of insurance but the position is not clear.

33. Mr. Biley's evidence was that it was difficult to obtain information from DGA, who apparently were the former managing agents, but Countrywide issued demands relying on such limited information as had been received from DGA. Mr. Biley in his statement says that he took over management of the building in or around November 2008. The Tribunal would have expected him to know exactly when he took over management. At the hearing he stated that Countrywide became the managing agents from October 2008 and that the freeholder (the Applicant) would have advised Countrywide of money owed and Countrywide would have charged it out with no documentation. Invoices dated 1st October 2008 were issued by Countrywide claiming sums alleged to be due from the Respondent without reliable documentary evidence and proceedings were commenced in the County Court, again without reliable documentation.

34. Mr. Biley could not explain how the service charge came to be calculated before Countrywide took over. Copies of the invoices issued by Countrywide on 1st October 2008 were produced but he was unable to produce Countrywide's own invoices for charges raised on 26th March 2009, 26th September 2009, 26th March 2010 or for charges raised since 26th March 2010. No explanation was given for that. There is no evidence of anything being spent in relation to maintenance of the building. Therefore on the evidence provided £618.75 for 6 months for each of two flats produces a total management charge of £2,475 per annum for the building. Mr. Biley thought that the figure needed to be revised down to about £250 per flat per annum but that the figure of £618.75 per flat per six months had continued for historical reasons. Since Countrywide took over management the insurance has been dealt with by Pier. On Mr. Biley's evidence, Countrywide has carried out one incomplete inspection of the building and had sent out demands which were not in accordance with the terms of the lease. Had such demands been properly made, the Tribunal would have found them to be unreasonably incurred.

35. The Tribunal considered the AXA insurance schedule referred to by Mr. Hadden. It was produced very late in the day; so late that it was only on the day of the hearing that the Tribunal had sight of it. The Respondent received his copy about the same time. This was in breach of the directions issued and no explanation was provided for the very late submission. As a result, the Tribunal determined not to accept the schedule or the other documents produced with the letter dated 15th November 2010. But in any event the sums claimed on account did not appear to tie in with the insurance premiums and there were unexplained credits. There was a general lack of clarity.

36. For these reasons the Tribunal came to the conclusion that the amounts claimed were not properly demanded and are not payable.

37. There is an application for an order under Section 20C of the Act. It was submitted that the Respondent had not been proactive enough in dealing with the demands made of him. There would have been more force in that argument had the demands been made in accordance with the terms of the lease. As they were not, the criticism of the Respondent is unjustified.

38. We find that it is just and equitable in the circumstances to make such an order because the proceedings were commenced without a proper basis and the Respondent was justified in contesting these proceedings to clarify the position. In addition documents which were produced just before the hearing should have been produced earlier and in compliance with the Directions. We therefore make an order that all or any of the costs incurred or to be incurred by the Applicant in connection with these proceedings are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the Respondent.

39. As the Respondent now accepts, he carried out work on the building which he should not have done without consent. However, there is no complaint from Mr. Biley on behalf of the Applicant as to the standard of work and the Respondent is not intending to claim for any of the work done. Mr. Biley on behalf of the Applicant and having for the second time inspected the front of the building and for the first time on the day of the hearing having inspected the internal common parts of the building and the rear of the building, confirmed that the building was in good repair and acknowledged that the Respondent had kindly attended to repairs. The Tribunal did not accept that Mr. Biley, a Senior Property Manager, and his colleague were unable to work out which was the rear of the building. There was a pathway at the end of and to the rear of the terrace and by walking probably no more than one hundred yards from the front of the building to the rear of it and counting the number of houses from the end of the terrace it was clear which was No. 7 Belmont Road. Had a proper inspection been carried out earlier it should have been apparent that a window had been replaced and any possibility of consent could have been dealt with. However, the Tribunal was pleased to note that Mr. Biley confirmed on behalf of the Applicant that the only matter requiring consent was the replacement of the window and that the Respondent should not worry about the style of window as from the outside it had the appearance of a sash window. The Tribunal thanks

Mr. Biley for his assistance in connection with the question of retrospective consent for the replacement of the window.

(Signed) R. Norman

R. Norman
Chairman