CHI/43UF/LIS/2009/0068

THE RESIDENTIAL PROPERTY TRIBUNAL SERVICE

DECISION OF THE SOUTHERN LEASEHOLD VALUATION TRIBUNAL

FLAT 7, 14 SMOKE LANE, REIGATE, SURREY RH2 7HJ

Applicant:	Graham Riley and Lien Ha (tenant)
Represented by:	In person
Respondent:	Fairfield Rents Ltd (landlord)
Represented by:	N Adnan and E Kelly of Urbanpoint Property Management Ltd
Date of Hearing:	15 December 2009
Date of application:	24 July 2009

Members of the Leasehold Valuation Tribunal:

Mr M Loveday BA(Hons) MCIArb
Mr RA Wilkey FRICS FICPD

INTRODUCTION

1. This is an application dated 24 July 2009in respect of liability for service charges under s.27A of the Landlord and Tenant Act 1985 ("LTA 1985") and a related application under paragraph 5 of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 in respect of administration charges. The two applications were issued by Mr Graham Riley and Ms Lien Ha, the tenants of Flat 7, 14 Smoke Lane, Reigate, Surrey RH2 7HJ. The applications originally named Urbanpoint Management Ltd (managing agents for the property) as respondent. However, directions given on 28 September 2009 substituted Fairfield Rents Ltd (the landlord) as respondent.

2. A hearing took place on 15 December 2009. The applicants appeared in person. The respondent landlord was represented by Mr N Adnan and Ms E Kelly of Urbanpoint. The parties identified the following issues:
    (a) Liability to pay an interim service charge of £2,343.49 demanded on 17 March 2009 which related to external decorative works carried out in 2009. This issue included consideration of the "timing" of the works.
    (b) Liability to pay administration charges for the costs of a letter dated 17 July 2009 (£50).
    (c) An application that costs incurred by the landlord in connection with the application should not be added to the service charges under section 20C of the 1985 Act.

3. The second application also sought a determination in respect of administration charges of £800. This figure was taken from a letter from Urbanpoint dated 17 July 2009 which stated that the managing agents anticipated that their "*costs [would] be in the region of £800 in connection with the recovery of over due sums.*" The parties agreed that these sums were only a general estimate and that on present evidence it was impossible for the Tribunal to determine a reasonable figure for the costs of recovery of arrears before those costs were incurred. The applicants therefore withdrew their application in respect of the £800 estimated charges, although they reserved their right to challenge any similar charges at a later date.

INSPECTION

4. The Tribunal inspected the property before the hearing. The property is located in a quiet residential area of Reigate and comprises a two storey house with mansard built in 1900 which has been converted into flats. The external decorative condition was good, with all woodwork and metalwork freshly painted and metal well maintained. The tile roof was in good condition. Internally, the common parts were in a similarly good condition and the carpets and walls in a good state of cleanliness.

THE APPLICANTS' CASE

5. The applicants relied on an amended statement of case which was clarified and expanded on with oral submissions at the hearing. The landlord's service charge year ran from 1 January to 31 December in each year. At the start of the 2009 service charge year, the landlord demanded an interim service charge on account of estimated regular expenditure for that year in the usual way. However, the applicants challenged a separate charge of £2,343.49 made on 17 March 2009 relating to external decorations to the property. The applicants referred to the demand which described the charge as *"Additional Interim S/Charge Major Works 17 Mar 2009 to 31 December 2009"*. The applicants referred to the lease of Flat 7 dated 2 July 1990 at clause 3(2)(f)which gave the landlord the right to make an interim service charge:

> *"(f) the Tenant shall if required by the Lessor pay to the Lessor such sum or sums in advance and on account of the service charge as shall represent to be a fair and reasonable interim payment having regard to past expenditure incurred and anticipated expenditure."*

The applicants also referred to clause 5(6) of the lease which set out the landlord's obligations to decorate the exterior:

> *"(6) That (subject as aforesaid) the Lessor will so often as reasonably required and in any event at least once in every four years decorate the exterior of the Building in the manner in which the same is at the time of this demise decorated or as near thereto as circumstances permit."*

The lessees accepted that the wording of clause 3(2)(f) was wide enough to enable the landlord to recover more than one interim service charge during the course of the service charge year. However, the charge had to be *"a fair and reasonable interim*

payment". Furthermore, under s.19(2) of the Landlord and Tenant Act 1985 the landlord could recover "*no greater amount than is reasonable*".

6. The applicants submitted that the charge of £2,343.49 was neither "*fair and reasonable*" under the covenant nor a "*reasonable*" amount under s.19(2). They principally relied on the timing of the works. The applicants stated that they had purchased their flat on 2 November 2007 and before buying the flat their solicitors had made enquiries from the vendors about liability for various costs. They produced a letter from Urbanpoint to Messrs. Heenans (solicitors to the vendors) dated 5 October 2007 which stated that "*the exterior of the property was redecorated in 2003 and the interior communal hallway is currently being redecorated and will be re-carpeted. Please refer to your own survey for information.*" This letter was passed on to the applicants' solicitors before they completed the purchase of the flat. The applicants were aware of clause 5(6) of the lease, and this information therefore suggested that external redecorations were due during the course of the 2007 service charge year. Instead, the landlord had delayed these works. This delay made the service charges unreasonable for the following reasons:

   (a) Urbanpoint had said that this delay occurred because in 2007 the lessees in the block had asked to defer the external redecorations - but there was no evidence of such a request.

   (b) The applicants had been misled by the vendors. They produced a copy of a Property Information Form dated 24 August 2007 which at paragraph 3.2 stated "*although redecoration works are taking place, no additional costs should be incurred. It has already been paid for from annual budget for this year.*"

   (c) On 30 August 2007, Heenans sent a managing agent questionnaire to Urbanpoint which asked at paragraph 2.2(c) whether "*any tenants had challenged the maintenance charges or any proposed expenses.*" Urbanpoint did not reply to the questionnaire directly, instead providing its own "standard pack" replies in the form of the letter of 5 October 2007. The reply to paragraph 2.2(c) and the letter was misleading – since the reply did not

mention any alleged agreement with lessees to defer the external redecorations.

(d) The applicants bought the flat on the assumption that there would be no liability for external decorations until 2011 and on the basis that the building would be in "good working order".

(e) Urbanpoint commissioned a Building Condition Survey from Mr Mark Dean BSc of Management Services Ltd in March 2007 (i.e. before the sale of the flat completed). The report stated under paragraph 5.0(e) "*external decoration*" that "*Painted timber and render surfaces [were] in good condition.*" It recommended that the landlord should "*redecorate all previously painted surfaces*" and gave the external decorations a "*Priority 2*" rating and a budget cost of £5,000. The report defined "*Priority 2*" works as those "*liable to cause further damage resulting in high cost for replacement and/or high consequential component damage.*" The applicants submitted that not only was the landlord aware of the need for external decorations in 2007, but the priority rating also suggested that the cost of the works eventually carried out in 2009 was increased by the landlord's "historical neglect" of the property.

(f) The applicants produced a copy of a certified summary of service charges under section 21(1) of the 1985 Act dated 9 January 2007 which related to the 2006 service charge year. They referred to section 21(1) of the 1985 Act which required the statement to include details of "*related matters*". They submitted that in 2007, the external decorations were overdue and that additional costs were anticipated for these works. This information should have appeared as a "related matter" in the summary of service charges.

(g) The landlord should not have agreed with the vendors to defer the external decorations in such a way as to pass liability to the applicants.

When asked by the Tribunal, the lessees stated that they had not had a full survey done in 2007 before purchasing the flat, but they had relied on the mortgagees' survey alone.

7. As far as the administration costs are concerned, clause 3(7)(c) of the lease required the lessees *"(c) to pay all costs charges and expenses which may be incurred by the lessor or his Managing Agents in connection with the recovery of arrears of the service charge."* A charge of £50 plus VAT had been demanded by Urbanpoint in respect of a letter dated 17 July 2009. This letter demanded payment of arrears of £3,299.91 within 14 days. It was accepted that clause 3(7)(c) permitted the landlord to recover the cost of a formal letter chasing the arrears, but the cost was unreasonable because the bulk of the arrears related to the disputed interim charge referred to above. At the time of the formal demand Urbanpoint was well aware that there was a genuine dispute about the interim charge. There was a letter from the applicants dated 2 June 2009 and an email dated 8 July 2009 to this effect, and indeed the former has asked the landlord not to incur any additional *"administration charges"* while they reviewed the decoration costs issue. Mr Adnan's witness statement also made it clear that he was well aware of the basis of the dispute. However, the applicants accepted that £50 plus VAT was a reasonable cost for drafting such a letter.

8. As far as section 20C is concerned, the applicants did not suggest that the landlord had acted unreasonably in meeting the two applications. However, they submitted that the landlord had persisted in pursuing a claim for interim charges which were not reasonably incurred.

THE RESPONDENT'S CASE

9. The respondent relied on a statement of case dated 17 September 2009 which Mr Adnan expanded on with oral submissions at the hearing. He stated that when Urbanpoint took over the management of the property, the main concern among the lessees was an insurance claim for damage to a flank wall caused by a failing tree and for the decoration of internal common parts. The residents he spoke to included Kelly Stephens, the then lessee of flat 7 – indeed, she telephoned him regularly. They wanted these dealt with first. Furthermore, in 2007, he did not think the exterior was in bad condition. He therefore initiated formal consultation in relation to works to the interior common parts and the landlords carried out all priority 1 category works set out in the Survey in the first year.

10. As for the external decoration works, the surveyors considered that these could wait until the third year. Once the internal decorations were completed, Mr Adnan inspected the property and he then instructed the surveyor to produce a schedule of works for decoration of the exterior. Mr Adnan then followed the statutory consultation procedure under s.20 of the 1985 Act and Service Charges (Consultation Requirements) (England) Regulations 2003. A Specification of Works was drawn up in August 2008 followed by a Notice of Intention to Carry out Works dated 22 September 2008. The Statement of Estimates was dated 9 February 2009. The landlords chose the lowest estimate from Castlegate Design and Build Ltd which amounted to £11,093 + VAT (£1,663.95) together with fees of £1,712.65 + VAT (£1,969.55) and £277.33 + VAT (£318.93). The total cost was £15,045.43. In 2009, there was an accumulated balance of £2,026 in the reserve fund, which meant that a total sum of £13,019.43 was required from the lessees. The applicants' proportion of this was 18%, which amounted to £2,343.49. The landlord demanded this sum by way of an extra interim charge on 17 March 2009. The external decorative works had now been completed to a reasonable standard.

11. The respondent submitted that the obligation to decorate the exterior every four years in clause 5(6) of the lease was not absolute. The four year cycle was merely a recommendation and it was in any event qualified with the words *"or as near thereto as the circumstances permit"*. Time was not of the essence of the obligation. Furthermore, it was not wrong to have delayed the decoration works. Agreement had been reached with the previous lessees and it was not wrong to have done this. Indeed, the previous lessees had contributed to the reserve fund whilst the current lessees had received the benefit of the reserve. None of the other lessees had complained. When cross examined, Mr Adnan stated that he had assumed that the pre-sale questionnaire had been forwarded to the purchasers in 2007, but in any event the vendor and the applicants both used the same firm of solicitors (albeit different offices). The letter of 5 October 2007 ended with a suggestion that the managing agents were happy to answer any further questions, but the applicants had not asked anything more. The letter itself was not misleading. However, at the end of

the day, any remedy that the lessees had about being misled was against the applicants' previous solicitors or the vendors – not against the landlord.

12. In relation to the £50 + VAT administration fee, the respondent further submitted that the tenants were in serious arrears – not just in relation to the disputed further interim service charge. Mr Adnan took the Tribunal through the service charge history which showed that by 17 July 2009, the arrears of £3,242.41 comprised a sum of £2,343.49 in relation to the external works and the remainder being for "ordinary" service charges. The lessees had chosen to pay service charges by monthly instalments in arrears as opposed to every six months without the consent of the landlord. As a result at most times of the year there was a constant negative balance on the service charge account. The landlords had given the lessees ample warning (see for example email dated 17 June 2009) and had no choice but to escalate the recovery process by incurring the extra cost of the formal recovery letter dated 17 July 2009. There had been no offer from the applicants to pay anything towards the major works either.

13. As to the section 20C application, the respondent contended that it had not brought the matter before the Tribunal, and that the landlord had no choice but to employ someone to handle the application. No other leaseholders had any issue with the interim charge.

THE TRIBUNAL'S FINDINGS

14. The interim charge. The Tribunal's jurisdiction to decide interim service charges is under s.27A(3) of the 1985 Act.

> ***"27A Liability to pay service charges: jurisdiction***
> *...(3) An application may also be made to a leasehold valuation tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs and, if it would, as to—*
> *(a) the person by whom it would be payable,*
> *(b) the person to whom it would be payable,*
> *(c) the amount which would be payable,*
> *(d) the date at or by which it would be payable, and*
> *(e) the manner in which it would be payable."*

Furthermore, s.19(2) of the Act limits interim service charges.

> ***"19 Limitation of service charges: reasonableness***
> *...(2) Where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable, and after the relevant costs have been incurred any necessary adjustment shall be made by repayment, reduction or subsequent charges or otherwise."*

15. It is not disputed that the landlord was entitled to make the supplementary interim service charge of £2,343.49 on 17 March 2009. Furthermore, the Tribunal does not consider that clause 5(6) of the lease in any way affects this – the requirement to decorate in every fourth year is not of the essence of the lease and failure to carry out those works every four years does not debar the landlord from recovering service charges for those works. The issue is whether the sum of £2,343.49 is a *"fair and reasonable"* interim sum under clause 3(2)(f) of the lease and/or *"reasonable"* under s.19(2) of the 1985 Act and the applicants' case was directed to these arguments.

16. A specific point of law was raised by the applicants, namely whether the landlord's service charge statement was in breach of section 21(1) of the 1985 because it failed to give details of potential future liability for external decorations. Although the only summaries referred to by the applicants related to the 2006 service charge year, the point presumably applies to any subsequent summaries for the 2007 and 2008 service charge years. Section 21(1) of the 1985 Act reads as follows:

> ***21.*** *Request for summary of relevant costs.*
> *(1) A tenant may require the landlord in writing to supply him with a written summary of the costs incurred—*
> *(a) if the relevant accounts are made up for periods of twelve months, in the last such period ending not later than the date of the request, or*
> *(b) if the accounts are not so made up, in the period of twelve months ending with the date of the request,*
> *and which are relevant costs in relation to the service charges payable or demanded as payable in that or any other period.*
> ...
> *(4) The landlord shall comply with the request within one month of the request or within six months of the end of the period referred to in subsection (1)(a) or (b) whichever is the later.*
> *(5) The summary shall state whether any of the costs relate to works in respect of which a grant has been or is to be paid under Part XV of the Housing Act 1985 or Part VIII of the Local Government and Housing Act 1989*

(grants for works of improvement, repair or conversion) and set out the costs in a way showing how they have been or will be reflected in demands for service charges and, in addition, shall summarise each of the following items, namely—
(a) any of the costs in respect of which no demand for payment was received by the landlord within the period referred to in subsection (1)(a) or (b),
(b) any of the costs in respect of which—
(i) a demand for payment was so received, but
(ii) no payment was made by the landlord within that period, and
(c) any of the costs in respect of which—
(i) a demand for payment was so received, and
(ii) payment was made by the landlord within that period,
and specify the aggregate of any amounts received by the landlord down to the end of that period on account of service charges in respect of relevant dwellings and still standing to the credit of the tenants of those dwellings at the end of that period
...
(5B) The summary shall state whether any of the costs relate to works which are included in the external works specified in a group repair scheme, within the meaning of Part VIII of the Local Government and Housing Act 1989, in which the landlord participated or is participating as an assisted participant.
..."

17. The above provisions have been in effect for some time, and they contain no requirement for the landlord actively to provide annual service charge statements. The only requirement is to provide a summary of service charges if a request is made by a lessee or a recognised tenants' association. Section 152 of the Commonhold and Leasehold Reform Act 2002 proposed a new s.21 which would have imposed an obligation for the landlord actively to provide an annual statement of account. Section 21(1)(d) of the new provision required the statement to include certain "related matters" in any such statement. However, section 152 was never fully brought into force, and was repealed by the Housing and Regeneration Act 2008. At the date of the statements from the landlord, and at the date of the Tribunal hearing, the original requirements of section 21 are still largely in force. Under these provisions, there is no requirement for a summary of service charges to give information about "*related matters*" or indeed any details about prospective expenditure at all. The Tribunal therefore rejects the applicants' submissions that the summaries of service charge provided by the landlord failed to comply with s.21(1) of the Act in this respect.

18. The Tribunal further rejects the argument that the relevant cost of external decorations was exacerbated by the landlord's decision not to carry out decorations in 2007. The applicants provided no expert or other evidence that the present costs were increased as a result of any previous default by the landlord. Furthermore, the report of Mr Dean was unequivocal that painted timber and render surfaces were "*in good condition*" in 2007, evidence which was corroborated by Mr Adnan.

19. The Tribunal also finds that there was no breach of clause 5(6) of the lease. Although it does not accept that the words "*or as near thereto as circumstances permit*" qualify the obligation (these words merely deal with the standard of decoration required), the provision does not require decoration at any time when it is not required. Furthermore, the time limit is not expressed in sufficiently mandatory words to be of the essence of the lease – and there is no suggestion that the lessees have at any stage served notice making time of the essence of this provision. It follows that the landlord was not in breach of clause 5(6) merely by failing to carry out decorative works in 2007.

20. We now turn to the two main points made by the applicants. First, it is said that in 2007 they were misled about the need for external decorations. The Tribunal considers that this argument can be best characterised as a misrepresentation claim. However, the difficulties with a misrepresentation claim in this case are twofold. First, there is no evidence that any false statement was made. The principle representation relied on is contained in paragraph 9 of the letter of 5 October 2007. However, this statement is entirely accurate. The last time the property was decorated was in 2003 and there is no statement that it will or will not be decorated in 2007. Secondly, there is no evidence that this or any other statement was made to the applicants by or on behalf of the respondent; the only statements made to the applicants were made by the vendors. In particular, the Property Information Form dated 24 August 2007 was a document sent by the vendors' solicitors to the applicants' solicitors. It may well be that the applicants have remedies against their former solicitors and/or the vendors. However, this does not mean that the applicants have any remedy against the landlords.

21. The other main thrust of the applicants' argument is that the decision to defer decorative works in 2007 was unreasonable. On this, the Tribunal prefers the submissions of the respondent. There is evidence that other lessees (including the applicants' predecessors in title) supported this move. Furthermore, the landlord acted on expert advice that external decorative works were not necessary in 2007. Indeed, had the landlord carried out external decorations in 2007 against Mr Dean's advice, it is probable that such expenditure would not have been *"reasonably incurred"* under section 19 of the 1985 Act.

22. In any event, even if the respondent was at fault in what was said and done in 2007, this does not thereby render the 2009 supplementary interim service charge unreasonable. Had external decorations been carried out in 2007, the applicants have had some (unquantifiable) benefit from these works. For example, the cost of works in 2007 would presumably have depleted the reserve fund and required an increased future contribution by the applicants to the reserve. Furthermore, the value of decorative works in 2009 is not zero – they have been carried out to a proper standard and it is likely that the property will not now require a full external decoration in 2011.

23. Finally, the Tribunal takes into account that:
    (a) The landlord acted at all times on professional advice.
    (b) The agents followed the procedures in section 20 of the Landlord and Tenant Act 1985 in relation to the works.
    (c) On inspection, the Tribunal found that the external decorations were carried out to a reasonable standard.
    (d) There is no suggestion that the estimated cost of the works was excessive.
    (e) The landlord's agents assessed the interim charge having regard to anticipated expenditure as required by clause 3(2)(f) of the lease.

24. In all the circumstances, the Tribunal finds that the interim charge of £2,343.49 was a *"fair and reasonable"* interim sum under clause 3(2)(f) of the lease and *"reasonable"* under s.19(2) of the 1985 Act.

25. Administration charge. The Tribunal's jurisdiction to decide a variable administration charge is under paragraph 5 of Schedule 12 to the Commonhold and Leasehold Reform Act 2002.

> ***"5 Liability to pay Administration Charges***
> *(1) An application may be made to a leasehold valuation tribunal for a determination whether an administration 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."*

Furthermore, paragraph 2 of Schedule 12 limits variable administration charges.

> ***"2 Reasonableness of Administration Charges***
> *A variable administration charge is payable only to the extent that the amount of the charge is reasonable."*

26. The applicants did not challenge the landlord's evidence that there were arrears of service charge other than the interim charge relating to the external decorations. The Tribunal considers that despite the fact that the landlord knew of the dispute about the decorations, it was not unreasonable for it to move to a more formal recovery demand. The cost of the letter itself is not excessive when compared to the charge which would have been made by a solicitor and it is not disproportionate to the sums in dispute. The Tribunal therefore finds that the charge of £50 plus VAT demanded by Urbanpoint in respect of the letter dated 17 July 2009 is reasonable under paragraph 2 of Schedule 12 and that it is payable under paragraph 5 of Schedule 12.

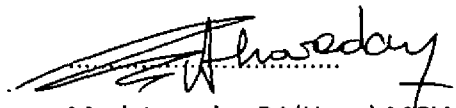
27. Section 20C. Having regard to the guidance given by the Lands Tribunal in ***Tenants of Langford Court v Doren*** LRX/37/2000 the Tribunal considers that it is not just and equitable to make an order under s.20C of the 1985 Act. The applicants have failed in relation to each issue. Furthermore, there is no suggestion that the landlord has acted improperly in connection with matters before the Tribunal. It is the respondent and it has had to incur costs in meeting a claim. There is no reason to displace any contractual right under the lease to add these costs to the service charges.

CONCLUSIONS

28. The interim charge of £2,343.49 demanded on 17 March 2009 is payable.

29. The administration charge of £50 plus VAT relating to the letter dated 17 July 2009 is payable.

30. It is not just and equitable to make an order under s.20C of the 1985 Act.



Mark Loveday BA(Hons) MCIArb
Chairman
27 December 2009