RESIDENTIAL PROPERTY TRIBUNAL SERVICE
SOUTHERN RENT ASSESSMENT PANEL
LEASEHOLD VALUATION TRIBUNAL

Residential Property
TRIBUNAL SERVICE

S.27A & S.20C Landlord & Tenant Act 1985 (as amended)
("the Act")

DECISION of the Leasehold Valuation Tribunal & ORDER

Case Number:	CHI/45UG/LSC/2006/0103
Date of Application:	4th October 2006
Property:	4 Stanford Terrace Station Approach West Hassocks West Sussex BN6 8JF
Applicants/Leaseholders:	Ms Lewis: Flat 4B Miss Cox: Flat 4A Mr Porterfield Flat 4B Mr Howe Flat 4A
Respondent/Freeholder:	Dean Golding
Dates of Hearing:	Day 1 13th December 2006 Day 2 7th February 2007
Venue:	Phoenix Room Martletts Hall, Civic Way Burgess Hill RH15 9NN
Appearances:	
For the Applicant:	The Applicants above appeared in person
For the Respondent:	Mr Barnes Solicitor of Messrs Osler Donegan Taylor & Mr Harrington of TPCM Limited Managing Agent of the Freeholder
Tribunal Members:	Mr R T A Wilson LLB (Lawyer Chairman) Mr R A Wilkey FRICS FICPD (Valuer Member) Ms J Morris (Lay Member)
Date of Decision:	13th March 2007

The Application

1. This is an application made by three lessees pursuant to Section 27A of The Landlord and Tenant Act 1985 for:-

   i) A determination of the payability of service charges for the years 2003 to 2004, 2004 to 2005, and 2005 to 2006.

   ii) An order pursuant to Section 20C of the Act that the landlord's costs in these proceedings are not relevant costs to be included in determining the service charge for future years.

   iii) The Tribunal is also required to consider, pursuant to regulation 9 of the Leasehold Valuation Tribunals (Fees) (England) Regulations 2003 whether the Respondent should be required to reimburse the fees incurred by the Applicants in these proceedings.

Inspection

2. The Tribunal inspected the property prior to the hearing and were accompanied by the parties and their representatives. The property comprises a complex corner building arranged as a shop on the ground floor and basement with two self-contained flats above. There is a further flat on the ground floor at the rear of the shop but the leaseholder is not a party to the application and no internal inspection was made. A plaque on the side wall of the building states that it was constructed in 1896. Access to the upper flat is by way of an unmade, shared drive leading from Stanford Avenue to the rear of the building.

3. The Tribunal examined the outside of the property and particularly noted the wooden staircase at rear, the condition of the roof coverings and the arrangements for parking. A brief internal inspection was made of the two upper flats but there were no particular points that the applicants wished to draw to the attention of the Tribunal.

Decision in Summary

4. The only sums payable in respect of service charge for the years 2003 to 2006 inclusive are those sums set out as payable in this decision. Amounts payable shall become due when lawfully demanded pursuant to the terms of the leases relating to the development. This should include the preparation of amended annual service charge accounts covering a twelve month period together with the issuing of service charge demands incorporating the relevant statutory information.

5. The Respondent is required to reimburse the fees incurred by the Applicants in these proceedings.

Preliminaries

6. The hearing took place on two days; 13th December 2006 and 7th February 2007. Two of the Applicants, Miss Cox of Flat A and Miss Lewis of Flat B appeared in person whilst the Respondent was represented at the hearing by Paul Barnes a solicitor from Osler Donegan and Taylor. Both parties had set out their respective positions in their 'Statements of Case' and both parties had prepared and submitted a large bundle of evidence. The Applicants' Statement of Case identified the issues in dispute and at the hearing the Tribunal dealt with the matter by reference to this. Each of the disputed items for the relevant service charge year is considered below.

Consideration

7. The Tribunal first asked Mr Barnes to outline in general terms how his client's managing agents went about the business of issuing demands and preparing service charge accounts for service on the lessees. The Tribunal also asked for clarification as to the financial year's end adopted by the Freeholder and also as to whether or not the Freeholder had carried out formal consultation in respect of some of the works, the costs of which was disputed.

8. Mr Barnes called Mark Harrington the Managing Agent to give evidence in respect of each of these matters. Although Mr Harrington addressed the Tribunal at some length he was unable to provide a coherent explanation as to the service regime adopted for the block. He confirmed that interim service charge demands were issued annually along with an excess service charge, which usually followed a few weeks later. This excess service charge sought to recover any unpaid interim charge from the previous year. Mr Harrington accepted that his firm had not produced audited accounts and also accepted that the accounts served on the lessees were not certified either by the Freeholder, or his firm or any accountant. The reason for this was to save costs. He had not heard of the RICS Code of Management.

9. Mr Harrington also confirmed that the first maintenance account prepared by his firm was for the period 27th June 2003 to 25th December 2004, a period of some eighteen months. Mr Harrington accepted that the leases provided for annual accounts but maintained that the Freeholder had agreed with the then lessees that an annual account would not be required for 2003. This was because the Freeholder had only purchased the freehold during 2003 and for a large part of the year the property remained unoccupied. In future years accounts have been prepared to the 25th December in each year.

10. Mr Harrington confirmed that neither the Freeholder nor his firm had carried out formal consultation in respect of any of the works.

11. Having heard from both parties in respect of these general points the Tribunal invited the Applicants to address them on each of the items in dispute. These are considered below.

Service Charge Period June 2003 – December 2004

A. Insurance £1,948.29

The Case for the Applicants

12. Miss Lewis opening her case stated that despite repeated requests the managing agents had failed to provide her with neither a copy of the insurance policy, nor summary nor indeed any information whatsoever in relation to the insurance. The first documentation of any kind that she had received in respect of the insurance was at the hearing, contained in the bundle that the Respondents had only produced on the day of the hearing. There still remained a number of questions about the insurance. Firstly, the amount claimed was for a two year period. Secondly, the cover notes supplied by the Respondents were for periods less than a year and in some cases seemed to overlap. Thirdly, she was not satisfied that the Freeholder had provided cover in accordance with the provisions in the lease. A block policy had been provided which showed this property insured with five other commercial properties. Furthermore the cover provided for a substantial amount in respect of loss of rent, which was appropriate for commercial property but not residential property. Whilst she had no issues over the cost of the cover it was her view that the cover related only to the commercial shop below and not to the flats above. In the absence of reliable information, together with absolute proof of payment, she was of the view that no amounts should be payable.

13. Miss Lewis referred the Tribunal to a letter she had received from the managing agents in August 2004. This letter confirmed that the Freeholder would accept responsibility for any excess service charge accruing prior to her ownership of the flat. This being the case the Freeholder was now estopped from claiming any excess service charge which accrued prior to her acquisition of the flat in June 2004.

The Case for the Respondent

14. Mr Barnes conceded that the insurance periods did not run annually, but maintained that there was continuity throughout and there had been no double charging. Mr Barnes contended that in each of the years in question the cost of £1,000 of cover was less that £2 which he maintained was the going rate for mixed use premises. Furthermore he refuted the Applicant's suggestion that she should not be liable for any insurance premiums which fell due prior to the Applicant's period of ownership. In his view this was a contractual matter, which did not concern the Tribunal. In short his clients had placed the

insurance, had paid the premium which was a reasonable one and, therefore, his clients were entitled to be reimbursed in full.

The Tribunals Deliberations

15. There were a number of issues in relation to insurance which troubled the Tribunal. Firstly, no coherent explanation was given as to why insurance cover was purportedly affected for periods of less than one year and in the name of different companies.

16. Secondly, Mr Harrington was unable to provide any documentary evidence showing that the cover provided included the flats as opposed to the shop on ground floor. Indeed the evidence supplied suggested that the block policy related predominantly to commercial properties.

17. Thirdly, the cover affected included a substantial amount for loss of rent which is inconsistent with a flat owner's policy.

18. Fourthly, although various copy premium receipts had been provided these receipts in themselves raised further issues as to the name of the insured and the type of cover.

19. Fifthly, although Mr Harrington provided a receipt for an insurance revaluation, Mr Harrington was not able to provide the revaluation which would have provided evidence as to the type of cover required. On this issue and on a number of others the Tribunal found Mr Harrington's evidence to be unhelpful and in some cases misleading.

20. That said, on the balance of probabilities the Tribunal considered that property insurance was in force for this period and that the cost amounting to less than £2 per £1000 of cover was in line with market rates for a building of this kind. It is our experience that the amount of premium attributable for loss of rent is likely to have been small and not significant in the context of the overall demand. In the circumstances the amount of £1,948.29 is allowed. The Tribunal has no jurisdiction to decide on the contractural arrangement described in paragraph 13 of this decision and therefore makes no finding on this particular point.

B. Chimney Repairs - £1,960

The Case for the Applicants

21. Miss Lewis' contention was that only minor repointing and capping off was carried out to the chimney and with no prior consultation. The chimney still presented a problem and when capped off it should have been ventilated which it was not. As a result damp had gone down as far as the shop and continued to this day. Repeated enquiries had been made to the managing agents but it was not until 2005 that the Applicant had received any information relating to the work, or invoices relating to the cost.

The Case for the Respondent

22. Mr Barnes states that there was no causal link between the defective chimney and damp to the flat. The purpose of the work was not to deal with the condensation but to prevent immediate water ingress. The work needed scaffolding and it was not the case that the works were cosmetic as contended by the Applicant. No evidence had been put forward to suggest that the work carried out to the chimney in 2003 was of poor quality.

23. Mr Barnes accepted that formal consultation had not been carried out but contended that the works were of an emergency nature and that his clients would have been entitled to an order dispensing with the requirements of consultations. In the circumstances he contended that the full amount was payable.

The Tribunals Deliberations

24. It is common ground that the cost of work was above the threshold requiring consultation which was not carried out. Whilst Mr Barnes contends that dispensation would have been granted the fact is that no application has been made to the Leasehold Valuation Tribunal to dispense with the consultation requirements. In the circumstances, as a matter of Law, the amount that the freeholder can recover for these works is £250.00 per lessee. The Tribunal is satisfied that some work was carried out and determines that the amount recoverable from each lessee to be £250.00.

C. Rear Yard Works - £750.00

The Case of the Applicant

25. Miss Lewis' case was that when she bought her flat the rear of the property was like a building site; completely derelict with building materials everywhere. Gradually the rear of the property was made good by the freeholder as part of his programme of redeveloping the property. The invoice for £770.00 was for work itemised as essentially the demolition of a coal bunker to the rear of the building and rebuilding the site to provide a bin store. In her opinion this work did not fall within the repairing covenants of the lease and, therefore, she contended that no part of this invoice should be payable.

The Tribunals Deliberation

26 The Tribunal accepted that the charge of £770.00 related to an invoice from J. Hall Building Contractors to Coastal Investments (SE) Limited headed Rear Yard. It was clear that the majority of work carried out did relate to the demolition of the old coal bunker and reinstating this structure with a bin store. In the opinion of the Tribunal the repairing

covenants in the lease for the property do not enable the freeholder to charge to the service charge account works amounting to the demolition of an existing structure and replacing it with something different. The Tribunal therefore disallows in full the figure of £770.00.

D. Minor Repairs - £106.42

The Case for the Applicant

27. The Applicant's case was simply that no detail has been provided as to what this invoice related to. In the circumstances the whole amount should be disallowed.

The Case for the Respondent

28. Mr Barnes, having consulted with Mr Harrington, stated that with the passage of time his clients no longer had a clear recollection of what work was done. In the Respondent's bundle there was an invoice from M G Mitchell Limited for £106.42 and this related to the clearing of doorbell terminals, the fitting of a draught excluder and the repairing of emergency lighting. When questioned by the Applicant Mr Harrington accepted that there was no emergency lighting at the premises and therefore offered to reduce the invoice to £30.00.

The Tribunals Deliberation

29 The Tribunal found Mr Harrington's evidence on this point unhelpful. He had no recollection of the work and then sought to defend charges in relation to work which clearly did not relate to the building. Although when pressed he offered to reduce the amount demanded to £30.00 this offer was only made when he had no alternative but to accept the Applicant's evidence. In the circumstances the Tribunal had no difficulty in deciding that no part of the £106.42 should be recoverable by way of service charge.

E. Hole in the Wall - £109.50

The Case for the Applicant

30. The Applicant's evidence was that no work had been carried out justifying a charge of £109.50.

The Case for the Respondent

31. Mr Harrington had no recollection of the work but maintained that if he had invoiced the lessees for this amount then he was satisfied that the work was carried out. He referred the Tribunal to an invoice again from M G Mitchell Limited covering the amount.

The Tribunals Deliberations

32. The Tribunal is not satisfied that any work was carried out and in the absence of adequate details of the work carried out, the Tribunal disallows the amount.

F. Leak to Shop - £70.33

The Case for the Applicant

33. Miss Lewis contended that the lessees should not have to be responsible for work carried out to the interior of the shop. Once again the invoice for £70.03 was from M G Mitchell Limited and contained inadequate detail. Miss Lewis contended that the shop was empty at the time and it was reasonable to assume that the work would have related to the interior. In the circumstances no amount should be recoverable by way of service charge.

The Case for the Respondent

34. Mr Harrington tendered no evidence on the point.

The Tribunals Deliberations

35. The Tribunal agrees with the Applicants that the likelihood is that this work related to the interior of the shop and is therefore irrecoverable as service charge.

G. Managing Agents' Fees - £1,101.60

The Case for the Applicant

36 The Applicant questioned how such a large figure had come about. Miss Lewis contended that TPCM had manifestly failed to carry out effective management of the

building in any of the years in question. They had failed to provide certified accounts and had failed to justify any of the expenditure allegedly incurred on the building. There had been no effective communication or attempts to deal with lessees issues in a straightforward manner. The accounting regime was chaotic, TPCM were in the habit of sending out annual demands and biannual demands stating that the account was in deficit without any justification for its spending and refuting at length there was any obligation to provide certified accounts. TPCM had failed to carry out statutory consultation and had failed to carry out proper maintenance to the building as a result of which the problems were accumulating.

The Case for the Respondent

37. The Barnes called Mr Harrington who gave evidence in relation to his firm's fees. He stated that he agreed a flat fee with the Freeholder each year, regardless of the time spent on each case. The fee for this property was £208.00 per flat which he considered to be reasonable and in line with industry rates. On being questioned by the Tribunal Mr Harrington confirmed that he had no contract with the Freeholder and no client care letters. Furthermore, there was no specification setting out what his fee would include and essentially he had no documentation whatsoever to support the charging arrangement outlined by him in oral evidence.

38. In summary, Mr Harrington confirmed that the charge of £208.00 per flat was a fixed amount which was reasonable.

The Tribunals Deliberations

39. Once again the Tribunal was troubled by Mr Harrington's evidence. Firstly, the Tribunal was concerned that there were no client care or engagement letters to support the fee charged.

40. Secondly, in the Tribunal's experience it is not normal for a managing agent to charge a fixed fee regardless of the situation of the property or the amount of work carried out.

41 Thirdly, Mr Harrington's oral evidence was inconsistent with his written evidence. In his oral evidence he was at pains to point out that he had agreed a flat fee with the freeholder for each unit of £208 per flat which included all work both routine and non routine. However, in his written statement made on the 11th December 2006, just one day before the hearing, he confirmed that it was his Company's policy to charge an excess charge in respect of non routine work at the rate of £70 plus vat per hour which he contended was reasonable. The Tribunal viewed this conflicting evidence with alarm as it cast doubts on the reliability of Mr Harrington's evidence in relation to this and indeed all other matters in dispute. In the Tribunal's experience, managing agents fees for the year in question would have been in the region of £115 -£125 plus vat to include all routine work. This figure would be recoverable in the event of a professional service being provided. In this

case a professional service has not been provided and we are of the view that the standard of care provided by TPCM Limited has fallen far below what the lessees could reasonably expect. In the circumstances we consider that a fee of no more than £50 plus vat per flat over a twelve month period for all work is reasonable and accordingly the total amount payable over eighteen months for managing agents fees for the three flats in total amounts to £264.37 vat inclusive.

1st January 2005 – 31 December 2005

A. Insurance £1,168.75

The Case for the Applicant

42. The Applicant's case is essentially the same as in the previous period. The property was included in a block policy, which seemed to relate exclusively to commercial property. A total of six properties were insured for some £2m and the subject property contributed about 26% of that value, although the premium payable was nearer to 33%. This suggested that there was overcharging. In addition no evidence had been produced that demonstrated that the cover related to a mixed use building. Miss Lewis contended that in the absence of documentary evidence confirming the type of cover or evidence of payment the amount demanded should not be recoverable.

The Case for the Respondent

43. In Mr Harrington's Statement of Case he stated that the cost was for the period 16th March – 31st December 2005. The insurance schedule was one of the documents that he had not been able to produce prior to the hearing, but to the best of his knowledge the level of insurance went up slightly as a result of the insurance revaluation. However, this increase was tempered by savings made because his client had included this property in a block policy which included five other properties. The cost of £1000 worth of cover was well within the industries parameters and therefore he contended that the whole amount should be recoverable by way of service charge.

The Tribunal's Deliberations

44 or the reasons given in paragraph 19 above, we consider that the cost of insurance was in line with market rates for the year in question and that the amount insured was also a reasonable figure. We therefore conclude that the whole amount of £1168.75 is recoverable.

B. Insurance Excess £250

The Case for the Applicant

45 iss Lewis did not understand how this had come about and concluded therefore that the sum should not be recoverable.

The Case for the Respondent

46 Mr Harrington confirmed that this figure was the policy excess payable by the insured in respect of each claim. The insurers had paid out nearly £10,000 in respect of the burst drains and therefore £250 was the entire extent of money payable by the lessees. All other amounts previously claimed for the drains included 5 accounts from M. G. Mitchell of just over £606 and 3 accounts from Sweeptech of just over £264 were now conceded.

The Tribunal's Deliberations

47 In our expert opinion a policy excess of £250 per claim is quite common, and having regard to the terms of the lease for this development is properly payable by the lessees as service charge.

C. Bank Charges

48 Various bank charges have been claimed by the Respondents for the years in question. However, the Tribunal concludes that no bank charges are recoverable as a service charge as the charging provisions in the leases are not sufficiently explicit to enable recovery of bank interest/ charges as service charge.

D. Managing Agents Fees £882.52

The Tribunal's Deliberations

49 The evidence presented to us for the period show that there were still significant shortcomings in the service provided by TPCM. However, they did pursue a successful insurance claim for the broken drains and in recognition of this work we allow £75 per flat plus vat for the year, making a total of £264.39 (vat inclusive).

E. Others sums demanded as service charge for periods 2003-2006

50 All sums other than referred to above were conceded by the Respondents and are therefore found to be irrecoverable as service charge.

Section 20C and reimbursement of fees

51 Both of these matters can be taken together as the Tribunal's considerations in relation to both are largely the same. This Section gives the Tribunal discretion to allow in whole or in part the cost incurred by a landlord in proceedings before it. The Tribunal has a very wide discretion to make an order that is 'just and equitable' in the circumstances.

52 As stated in the early paragraphs of this decision the Tribunal found that the preparation and presentation of the service charge accounts to be haphazard with the result that they were largely incoherent and required a great deal of clarification at the hearing. It is the opinion of the Tribunal that the accounts have not been prepared neither in accordance with the requirements of the leases nor in accordance with generally accepted accounting principles. As a result it is hardly surprising that the Applicants found the accounts to be unhelpful and failed to provide an accurate indication of amounts paid and amounts owing. At the end of the first day of the hearing the managing agents agreed that they would have time before the next hearing day to prepare the service charge accounts for 2006. In the event some two months later accounts were produced once again to the wrong dates with a number of other material inaccuracies. Added to this was Mr Harrington's evidence which proved inconsistent and unreliable in a number of key arrears.

53 The Tribunal noted that a significant number of service charge costs initially raised by the Respondents were largely agreed by the time of the hearing. At the hearing the Respondents made further concessions on a number of items running to several thousands of pounds. The Applicants bundle contained a number of letters in which the Applicants had offered to meet with the Respondent to resolve outstanding matters and clarify disputed items. It appears that no adequate response was received from the Respondents. In the Tribunal's view had such a meeting taken place it may well have resulted in a narrowing of the issues. By refusing to meet with the Applicants, the Respondents left the Applicants with no choice other than to pursue this application regardless. Indeed the Respondents application for costs would have found greater favour with the Tribunal if a meeting had taken place with the Applicants in advance of the two hearing dates.

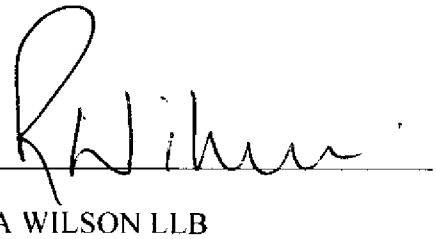
54 Mr Barnes for the Respondent contends that the Applicant negligently or recklessly failed to take note of the correct address for service given to them under section 48 of the Landlord and Tenant Act 1987. This meant that the Respondent could not reply with directions by the deadlines given, that the Respondents preparations for the first hearing were necessarily rushed and panicked and thirdly that no meaningful dialogue could take place with a view to settlement.

55 The Tribunal does not accept that the Applicants negligently or recklessly failed to take account of the correct address. The Tribunal rejects this analysis of the facts and is of the view that the managing agents should have been more pro active in ascertaining LVT procedure when it became apparent that a Leasehold Valuation Tribunal application had been made against their client.

56 Mr Barnes eloquently and skilfully argued that much of the Applicants' case had either been misguided or ill advised but we also reject this analysis. Bearing in mind the chaotic state of the service charge accounts we find it hardly surprising that this case should end up before the Leasehold Valuation Tribunal and in our opinion the Applicants were left with no alternative other than to present their case before us.

57 Taken as a whole the Tribunal considers that the Respondent has acted unreasonably and bearing in mind the Applicants have been largely successful we consider that it is just and equitable to make an order under section 20C.

58 For the same reasons we also make an order under regulation 9 of the Leasehold Valuation Tribunal (England)(Regulations) 2003 that the Respondent reimburse the fees incurred by the Applicants in these proceedings.

CHAIRMAN 

RTA WILSON LLB

DATE 13th March 2007