



Residential
Property
TRIBUNAL SERVICE

**SOUTHERN RENT ASSESSMENT PANEL
LEASEHOLD VALUATION TRIBUNAL**

Case Reference: CHI/29UL/LSC/2010/0048

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

Address: Pavilion Court, Marine Terrace, Folkestone, Kent, CT20 1QB
Applicant: Pavilion Court RTM Co. Ltd.
Respondent: The Lessees
Application: 13 April 2010
Inspection: 6 July 2010
Hearing: 6 July 2010

Appearances

Applicant

Dr. Price Director
Mr McCallion Caretaker
Mrs McCallion) Observers
Mrs Pulling)
Mrs Fitzpatrick)

Respondent

Mr & Mrs Webber Lessees
Mrs Lippiett Representative for Mr Fisher
Mr Hansard Observer

Members of the Tribunal

Mr I Mohabir LLB (Hons)
Mr R Athow FRICS MIRPM
Mr N Cleverton FRICS

DECISION

Introduction

1. This is an application made by the Applicant company under section 27A of the Landlord and Tenant Act 1985 (as amended) (“the Act”) for a determination of the Respondents liability to pay and/or the reasonableness of the estimated service charge budget for the year 2010/11. The lessees who are the Respondents to this application are set out in the schedule annexed to this decision.
2. This application is preceded by a number of earlier contentious applications made variously by either party under section 27A of the Act in relation to previous service charge years.
3. It is not necessary for the Tribunal to set out the relevant lease terms that give rise to the Respondents contractual liability to pay the estimated service charges that form the subject matter of this application. The Respondents did not deny the liability to do so. Their challenge was based on the reasonableness of the service charges in issue. For the avoidance of doubt, the relevant service charge provisions in the leases are set out in the Tribunal’s recent decisions dated 9 September 2009 and 4 February 2010.
4. The heads of service charge expenditure and the anticipated expenditure under each head is set out in document “Annex 2E” appearing at page 29 of the Applicant’s hearing bundle. The total estimated expenditure claimed for 2010/11 is £109,609.27. This has been calculated by reference to the expenditure incurred in the previous service charge year and then indexing the cost by 5% as an inflationary increase. An additional sum of £10,000 is claimed for the roof sinking fund and a further sum of £30,390.73 for urgent capital expenditure to lower the car park and carry out damp proofing works.

The Relevant Law

5. 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.

6. 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

7. The Tribunal inspected the subject property on 6 July 2010. The premises comprise a substantial block of purpose built flats erected about 30 years ago to a very basic construction standard as well as low quality flats and bed sits. The structure of the building is suffering from wind erosion because of its situation on the seafront, as well as lack of a properly structured maintenance programme.

Decision

8. The hearing in this matter also took place on 6 July 2010. The Applicant was represented by Dr Price and Mr McCallion. The Respondents were represented by Mrs Lippiett and Mr Webber.

9. The Tribunal began to hear evidence in relation to various heads of service charge expenditure in issue. Given the history of the litigation between the parties, the Tribunal was of the view that, whatever was outcome of this application, almost inevitably one or other party would make a further application at a later stage under section 27A of the Act for a determination regarding the actual expenditure that had been incurred. The Tribunal pointed out to the Respondents that this would represent a duplication of time and costs and it might make greater sense if they reserved their position until such time as the actual expenditure incurred was known. Having considered the matter, the Respondents withdrew their challenge in relation to the estimated budget for 2010/11 including the reserve fund provision of £10,000, save for the urgent capital expenditure provision of £30,390.73. This is considered below. The Tribunal made it clear to the Applicant that, no point could later be taken against the Respondents regarding the withdrawal of their challenges in relation to the estimated budget, in the event that they subsequently sought to do so for the actual expenditure incurred.

Urgent Capital Expenditure

10. The estimated expenditure claimed under this head is claimed by the Applicant in the following way:

(a) Car park lowering	£5,622.62
(b) Cavity tray replacement and cavity inspection	£1,562.75
(c) Cleaning cavities	£51,782.25
(d) Ceramic DPC	£26,149.04

11. The total expenditure is based on 3 estimates dated 6 May 2010 from a firm of contractors known as Uptonwood Building & Property Services for items (a) to (c) and 2 further undated estimates from a damp proofing firm known as Frank Schrijver UK Ltd for item (d). The total expenditure based on these estimates totals £85,116.66. However, the estimated sum claimed by the

Applicant is limited to £30,390.73 in total. It appears that the remaining balance is to be met from funds held in a damp sinking fund.

12. In its statement of case, the Applicant asserts that the subject property has been plagued with rising, falling and penetrating damp for the last 20 years. Many attempts have been made to eradicate the damp with limited success. Some flats are uninhabitable during the winter months. The Directors, following professional advice, are of the view that there are four main causes of the damp. These are:

- (a) Rising damp caused by high ground levels around the building.
- (b) Rising damp caused by a poor damp course or debris or the complete absence of a cavity. Limited success in the past has been obtained by injecting into the mortar and the brick.
- (c) Penetrating damp caused in part by poor pointing and, in some instances, the pointing has eroded to the extent that bricks are in danger of falling out.
- (d) Damp around the windows caused by failing cavity trays made from roofing felt. In addition, there are no weep holes above the lintels.

13. It is proposed to deal with the damp problem by digging out the eastern perimeter of the North Block to lower the ground by 225 mm below the damp proof course and then allow the wall to dry which may or may not cure the problem. It is also proposed to expose one cavity tray above a window and replace it with a modern cavity tray and to expose a small area of cavity immediately above the damp course to determine the extent of the debris in the cavity or to establish that there is no cavity. After the initial investigations and the removal of extraneous earth around the building it would then be possible to decide on what appropriate steps should be taken next to combat the rising damp. If present, the cavities would be cleaned or if not an alternative form of damp control would be installed. It is hoped that these actions would be mutually exclusive but it is by no means certain.

14. In reply, the Respondents said that it was not certain that the lowering of the car park was necessary to deal with the damp problem. They believed that the damp may be caused by a water leak at the property which has resulted in the large water bills received. The location of this leak may be under the ground floor. They accepted that there is a damp problem at the property but, they submitted, it was first of all necessary to carry out a proper investigation to establish the cause of the damp and what appropriate remedial work should be carried out to deal with it. Further they submitted that an estimated budget of £10,000 was sufficient to carry out this investigation.
15. From the evidence before the Tribunal, it was clear that the professional advice on which the Applicant based its proposals to carry out the investigation and treatment of the damp were the survey reports that had been obtained some years earlier.
16. The first report is dated 19 May 2004 and was prepared by a Mr Way BSc MRICS from the firm of Collier Stevens, Chartered Building Surveyors. This report was based only on an external visual inspection of the property. A full structural survey was not undertaken and the inspection was only from either the accessible areas of scaffolding or the best vantage points. The report makes no specific finding about the existence of damp apart from some internal dampness that had occurred around a number of the windows to the flats. This appeared to be due primarily to the deterioration of the original timber windows and the breakdown of any seal between the windows and masonry. The replacement windows (since installed) would largely resolve this problem. It was clear to the Tribunal that the damp referred to in this report and the recommended remedial work was entirely different in nature to the damp problem identified by the Applicant in these proceedings.
17. The second report is dated 13 June 2008 and was prepared by a Mr Fletcher from the firm known as the Doyle Partnership, Consulting Structural and Civil Engineers. Again, the inspection upon which this report is based was limited to an examination of immediately visible and accessible areas only and was restricted to a general walk round externally and a cursory view of a typical

apartment layout to each block. The report simply concludes, *inter alia*, that the evidence of rising damp would require immediate attention. However, the report does not identify the nature, source and location of the damp nor is any recommendation made as to what remedial work should be carried out to deal with the problem.

18. In the Tribunal judgement, the highly qualified nature of both reports did not provide a sufficient basis for the investigations and/or remedial work proposed by the Applicant. There was no expert evidence to support the proposed works and they appear to be largely speculative. It could not, therefore, be said that the estimated costs of carrying out this work would be reasonably incurred. Accordingly, the Tribunal found that the estimated cost, whether £85,116.66 or £30,390.73 was not reasonable.
19. It was common ground between the parties that there is a damp problem at the property which requires proper investigation and treatment. In the Tribunal's view, but this should be dealt with by the Applicant appointing a competent and experienced chartered building surveyor to carry out the necessary investigations as to the cause, location and extent of the damp problem and to prepare a specification for the remedial work that will be necessary. The Respondents proposed a budget of £10,000 for this investigation to be carried out and the Tribunal agreed that this provisional sum was reasonable. Any specification prepared should then be properly tendered with at least three tenders being provided by suitably qualified contractors. If necessary, statutory consultation with the lessees would have to be carried out before any such works were commenced.

Other Matters

20. The Tribunal were concerned that the managing agent was unable to clearly define what funds were held and under what title. At various times during the hearing Mr Price referred to reserves when, after several attempts to obtain a clarification on this point, he explained that what had earlier referred to as a Reserve Fund which held between £11,000 and £12,000 was in fact the item in his budget entitled 'Essential Building Maintenance'. He also referred to a

'Sinking Fund' with a value of about £20,000, which transpired to be the arrears owed by various lessees. Upon questioning by the Tribunal, he confirmed that the only reserve or Sinking Fund was the £10,000 shown in the accounts to 29 September 2009 and that this was ring fenced for the renewal of the main flat roof. The Tribunal is very concerned that the managing agent is charging a fee commensurate with a fully qualified Chartered surveyor as managing agent, but lacks the skills and knowledge that are required to run a block of this size and complexity. It would appear from the accounts for the past financial year that the interest earned on the Reserve fund is not retained in that account as is required.

21. The lack of accessibility to an active managing agent during normal office hours, the lack the managing agent's required knowledge, together with the unwillingness to provide true open management is the main cause of distrust between the applicant and the respondents. A fully open management role is expected in compliance with the RICS Code of Management Practice. This Tribunal confirms the view of the previous Tribunal that the managing agent's role is not being fully served and as a result could leave the RTM company open to a challenge of the reasonableness of the service charge expenditure at the end of the financial year when the final costs are published.

Section 20C Costs & Fees

22. The Tribunal determined that the Respondents should not reimburse the Applicant the fees of £500 it had paid to the Tribunal to have this application issued and heard. In so doing, the Tribunal had regard to the sensible conduct on the part of the Respondents by withdrawing the majority of the challenges they had made thereby resulting in less costs and time incurred by the parties at the hearing. The Tribunal also had regard to the fact that the Applicant had effectively "lost" on the only substantive issue that failed to be determined. Moreover, the criticism made by the Tribunal in relation to the present management regime at the property was properly reflected in this way.
23. For the same reasons the Tribunal makes an order under section 20C of the Act preventing the Applicant from being able to recover any of the costs it

may have incurred in these proceedings through the service charge account.
The Tribunal did not consider that it would be just or equitable to do so.

Dated the 13 day of September 2010

CHAIRMAN.....*J. Mohabir*
Mr I Mohabir LLB (Hons) 