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**HM COURTS & TRIBUNALS SERVICE**

**LEASEHOLD VALUATION TRIBUNAL**

In the matter of an application under
sections 27A and 20C of the Landlord and Tenant Act 1985

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| Case No. | CHI/29UL/LSC/2011/0172 |
| Property: | **Flat 2, First Floor,**<br>**5 West Cliff Gardens**<br>**Folkestone**<br>**Kent**<br>**CT20 1ST** |
| Between: | **Sarum Properties Limited**<br>**(the Applicant/Landlord)**<br><br>and<br><br>**Mr and Mrs Farrell**<br>**(the Respondents/Tenant)** |
| Date of hearing: | 20th March 2012 |
| Date of the decision: | 27th March 2012 |
| Members of the Tribunal: | Mr D. Dovar LLB (Hons)<br>Mr R Athow FRICS MIRPM |

## INTRODUCTION

1. This is an application under section 27A of the Landlord and Tenant Act 1985 ('the Act') for the purpose of determining the amount of service charge payable by the Respondents for the years ending March 2008 to 2011. Directions were given for this application on 29th December 2011.

2. The Applicant was represented at the hearing by Mrs Barnett MIRPM Asoc RICS for Remus Management Limited, the managing agents for the periods in question. She attended both the inspection and the hearing. The Respondents were present at the hearing. Both parties had complied with the directions and therefore the Tribunal had one bundle prepared by the Applicant setting out the year end accounts for each relevant year and some supporting vouchers. The Respondents had prepared a bundle which contained generalised complaints about the historic management as well as identifying some specific issues with the charges.

## THE PROPERTY

3. 5 Westcliffe Gardens ('the Property') is a residential property consisting of three flats. Flat 2 ('Flat 2'), which is owned on a long lease by the Respondents, is situated on the first floor of the Property.

4. The Tribunal attended the Property on the morning of the hearing but were only able to inspect the external parts as the Respondents were unable to attend and allow access. The Property was in a poor state of repair and appeared to have suffered from historic neglect: rotten window sills were visible, large parts of the external decoration was peeling and there was significant organic growth discernible in the guttering.

5. For the years in question the Property had been managed by the Applicant through Remus Management Limited. In about October 2011, the Respondents and the other long leaseholders in the Property exercised the

Right to Manage under the Commonhold and Leasehold Reform Act 2002 and took over the management of the Property.

**LEASE PROVISIONS**

6. By a lease dated 21st May 1982, East Cliff Estates (Folkestone) Limited demised the Flat to Stephen Charles Clare for a term of 99 years from 25th March 1982.

7. By clause 4 (6), the tenant covenanted to pay the maintenance charge on 25th March each year. The maintenance charge is defined by clause 4 (6) (a) as

> *'the greater of the following: (i) forty pounds (£40.00) or (ii) a sum equivalent to one-third of the actual cost (as certified by the Landlord's accountant) of performing the Landlord's Maintenance Covenants and all costs and expenses whatsoever incurred by the Landlord in connection with the management of the property in the year in question ...'*

8. Further it provided that the sum was to be paid *'as to forty pounds by equal half-yearly instalments in advance on the 29th day of September and 25th March in each year ... and as to the balance (if any) on the rent day next following the issue by the Landlord's accountant of such certificate as aforesaid.'*

9. At the hearing, Mrs Barnett conceded that the Applicant was restricted to demanding £80 per annum by way of service charge on account. In fact, in the Tribunal's view the limit is actually £40 payable in equal half yearly instalments, with a balancing payment after costs had been incurred.

10. Clause 5 (3) sets out the Landlord's repairing obligations, the costs of which they are entitled to recover by way of service charge. Clause 5 (6) permits the Landlord to set up a reserve fund.

## THE STATUTORY PROVISIONS

11. Section 18 of the Act defines service charges as those amounts payable by a tenant as part of or in addition to rent, which are payable directly, or indirectly for services, repairs, maintenance or insurance or the landlord's costs of management and the whole or part of which vary or may vary according to the relevant costs. Relevant costs are defined as the costs or estimated costs incurred or to be incurred by the landlord in connection with matters for which the service charge is payable.

12. Section 19 places a statutory limit on service charges by only allowing their recovery to the extent that they are reasonably incurred and where the service or work is to a reasonable standard.

13. Section 27A confers jurisdiction on the Tribunal to determine whether a service charge is payable and if so, (amongst other matters) the amount which is payable and the date at or by which it is payable. The determination can be made whether or not any payment has been made and also in respect of anticipated expenditure.

## THE ISSUES

14. The issues before the Tribunal were the amounts that were payable by way of service charges for the years in question. Rather than deal with the items year by year, they are more easily grouped in terms of specific items of expenditure.

*Insurance*

15. For each year, a sum has been demanded for insurance which the Tribunal was informed had been obtained by the Applicant directly (i.e. not through Remus). The Tribunal was told at the hearing that Applicant had taken out block policy insurance which covered not only the Property but other properties in the Applicant's property portfolio. The Tribunal has also seen

correspondence passing between the parties in which the Respondents had requested evidence of payment of the insurance as well as details of the claim history for the Property.

16. Apart from general submissions on the nature of insurance premiums, and despite questions as to how the premiums had been computed, Mrs Barnett was unable to say how these particular premiums had been arrived at. Again despite a request for evidence, the Tribunal was not shown any invoice or payment receipt for either the block policy or for this individual Property. Further, the Tribunal was not told how the block policy had been apportioned. In short, the Tribunal was not provided with any information (other than the figure set out in the year end accounts) as to invoice, payment or calculation of the insurance. In those circumstances the Tribunal finds that the Applicant has failed to discharge the burden of proof in relation to the insurance premiums. There was insufficient evidence before it to establish that these particular charges had been paid for this Property by the Applicant. Further, even if the Tribunal were to find that these sums had been paid, there was no evidence as to how these particular sums had been arrived at. The Tribunal therefore finds that no sum is payable for insurance for each year in question.

17. The Tribunal also noted that the Respondents had repeatedly asked for details as to the level of insurance premium claimed and whilst they did on occasion receive a copy of the policy, they did not receive any information as to how the insurance had been placed or how the premium had been arrived at. The Applicant had raised with the Respondent the issue of the impact of the Property's claim history on the level of premium. However, there was no evidence to show, other than one claim for earthquake damage in April 2007, that this had been a material issue with this Property. The Tribunal was concerned that claims on other properties within the Applicant's portfolio may have had an impact on any premium for this Property. Furthermore, The Tribunal noted that the policy has an excess for

claims of £250, but there is no expenditure under this heading in either the 2007 or 2008 years. As a result this brings into question whether a claim had actually been made for earthquake damage.

*Managing Agents fees / Surveyors and Professional costs*

18. For all the years in question in addition to a set charge per flat for management, the managing agent charged for additional items, recorded as time costs under 'Surveyors and other professional costs'. Mrs Barnett was not able to provide much information on these sums for the first three years other than that they related to damp problems with the ground floor flat. The Tribunal noted that this was an issue that had been on-going since at least November 2004 (as the Respondents had exhibited a letter addressing those concerns with that date on it). For each of the first three years service charge accounts in question, the notes to the accounts simply stated that these were costs incurred in relation to major works that could not be proceeded with because of funding issues.

19. If, and there was little evidence as to what these costs were, these were costs in relation to Remus's work on the damp problem to the ground floor flat, the Tribunal does not consider that the Applicant has established that these sums are payable as:

    a. There was insufficient evidence as to what actual work was carried out at this time;

    b. In any event, the Tribunal does not consider that it was reasonable to incur costs on a project that was not going to be proceeded with year after year because of lack of funds. The Tribunal noted the limitation on the Applicant under the lease in obtaining funding in advance (see paragraph 9 above), but this was not a reason for not getting on with works; nor was any refusal by the tenants to provide funds on account.

The Applicant could have set up a reserve fund to deal with the works at a future date;

c. It was also not clear whether or not these works would have been service charge items. Mrs Barnett stated that, in the end, the owner of the ground floor flat carried out the work themselves. There is therefore a possibility that they were not works which fell within the landlord's obligations.

20. In relation to surveyor and professional fees for the year end 2011, the Applicant claimed £900 plus VAT for surveyors' fees as well as £500 plus VAT for their own set up fees. These related to major works to the Property. The Respondents objected to these fees on the basis that they did not see why they should pay for 'some photographs of the property' or Remus's project costs which were unnecessary. The Tribunal does not agree. The Tribunal considers that these fees were reasonably incurred. In fact, it is something that the Tribunal considers could have been put into place earlier in order to address the condition of the Property.

*Accountancy fees*

21. In each year £135 was claimed in accountancy fees. However, the Applicant only provided documentary evidence of expenditure of £88.13 per annum. Mrs Barnett stated that the additional amount was for the chartered accountants, Fawcett, signing off the accounts. No vouchers, invoices or receipts were produced. Further, Mrs Barnett stated that Remus sent many accounts over to Fawcett to deal with in batches. The Tribunal does not consider that the Applicant has made out its case on the additional amount. It is concerned about the way in which charges are levied by the chartered accountants and apportioned to tenants. Without evidence of invoicing and payment for this particular Property (or a proper explanation of how a batch sum is apportioned) the Tribunal cannot be satisfied that these sums have

been incurred and therefore the additional amount is disallowed and for each year only £88.13 is payable.

*Managing Agent fee*

22. The Respondents complained that there was no active management of the Property and that every time Remus was involved the cost was too high. However, the Tribunal noted that Remus did send out representatives on a bi annual basis to inspect the Property and that save for some correspondence over the insurance and a soffit (in 2004) there were no written complaints about work that was carried out. Given that the Tribunal has disallowed the time costs as set out above, the Tribunal considers that the managing agent fees were reasonably incurred and therefore allows them in full.

*Other items*

23. The first item of minor works challenged by the Respondents was in relation to the front door which appears in the year end 2008 accounts. £669.75 was incurred in order to repair and re-paint a door. The Tribunal considers that this cost is excessive and therefore not reasonably incurred under section 19 of the Act. Instead the Tribunal considers that the sum of £300 plus VAT is a more reasonable sum.

24. The Tribunal considers that the fire assessment and asbestos assessment were both items that were reasonably incurred as part of the normal assessments undertaken by a managing agent.

25. For the year end 2011, the Tribunal considers that the replacement costs of a smoke alarm are not recoverable as the Applicant had only fitted the alarm the year before and should have had recourse to the contractor and therefore this sum was not reasonably incurred. Further, the Tribunal does not consider that the cost of £180 for repairing floorboards was reasonably incurred or carried out to a reasonable standard. The Respondents stated

that this work did not remedy the problems with the floorboards in the entrance hall and no one was aware that the work had been carried out. The Tribunal noted however, that apart from correspondence relating to insurance and the soffit, the Respondents did not raise complaints with the Applicant about the quality of any work that had been carried out. Therefore apart from the items set out above, the Tribunal allows the other items of general maintenance claimed as given the lack of any contemporaneous complaint the Tribunal infers that the remaining work was to a reasonable standard.

**CONCLUSION**

26. The Tribunal therefore makes the following determination in respect of what is payable for the years in question:

27. Year end 2008

| | | |
|---|---|---|
| a. | Insurance | £0 |
| b. | General Repairs | £574.59 |
| c. | Professional fees | £0 |
| d. | Accountancy | £88.13 |
| e. | Managing Agent | £532.50 plus VAT of £93.19 |

**Total payable for year-end 2008 £1,288.41**

28. Year end 2009

| | | |
|---|---|---|
| a. | General | £143.47 |
| b. | Health & Safety | £250.67 |
| c. | Management fees | £652.97 |

d. Accountancy £88.13

e. Surveyor and other professional £0

f. Insurance £0

**Total payable for year-end 2009, £1,135.24**

29. Year end 2010

a. General £510.42

b. Health & Safety £0

c. Management Fees £663.47

d. Accountancy £88.13

e. Surveyors and other professional £0

f. Insurance £0

**Total payable for year-end 2010, £1,262.02**

30. Year end 2011

a. General £426.90

b. Out of Hours £29.96

c. Management fees £691.78

d. Accountancy £88.13

e. Surveyors and other professional fees £1,815.75

f. Insurance £0

**Total payable for year-end 2011, £3,052.52**

**Section 20C**

31. The Respondents made an application to limit the Applicant recovering their costs of this matter through the service charge. The main area of concern raised by the Respondent had been in respect of the insurance demands over the years. The Tribunal has found that none of the insurance fees are payable and on that basis alone makes an order under Section 20C preventing the Applicant from seeking to recover their costs of these proceedings through the service charge. The Respondents have also succeeded in reducing a number of the other items claimed. It follows that the Tribunal refuses to refund the application and hearing fee.

D Dovar LLB (Hons)
Chairman