RESIDENTIAL PROPERTY TRIBUNAL SERVICE

LEASEHOLD VALUATION TRIBUNAL

Property	:	**Flat 4, Linda Court, 2 Cherry Garden Avenue, Folkestone, Kent CT19 5LB**
Applicant(s)	:	**Mr. Jimmie Stephens**
Respondent(s)	:	**Alphaware Ltd**
Case number	:	**CAM/22UH/LIS/2004/0003**
Tribunal	:	**Mr. Bruce Edgington, Chair** **Mr. David Brown FRICS** **Mr. Anthony Jackson JP**

DECISION OF THE TRIBUNAL WHICH MET ON THE 10TH AUGUST 2004 TO DETERMINE THE REASONABLENESS OF AND LIABILITY TO PAY SERVICE CHARGES (Section 27A Landlord & Tenant Act 1985)

Introduction

1. The Applicant, Mr. Jimmie Stephens wrote to the Tribunal office on 5th April 2004 and followed this with a formal application dated 8th April asking the Tribunal to determine his liability to pay service charges in respect of his flat ("the property" as described above) for ½ year of £450 in 2002, £800 in 2003 and £1,000 in 2004

2. The Tribunal contacted the other tenants in the building who are likely to be affected by this decision asking whether they wanted to be made parties but no response was received to this request.

3. The earlier letter from the Applicant makes it clear that he is complaining that he did not understand why he had received a bill for £2,423 from the

Respondent's managing agents Philip A. Chapman ("the managing agents"); that he had "a leak coming in where a few months before some contractors had done some repairs"; about the amount of the management fees and stating that he should have received some quotes for the insurance. He denied that he had received a notice purportedly served by the managing agents on 27th October 2003 under Section 20 of the Housing Act 1985.

The Lease

4. The Applicant attached a copy of his lease to the application. It is a lease dated 19.06.58 for a term of 999 years from 29.09.57. The clauses dealing with payment of maintenance charges are somewhat unusual.

5. In clause 3, the tenant covenants to pay the landlord "...for transmission to the managing agent...(or at the option of the tenant to pay to the managing agent) as a maintenance contribution one fifth of an annual sum of One hundred and thirty pounds..." which is said to be the estimated cost of the performing the landlord's obligations in Schedule 2. It then says that after 29th September in any year, the tenant must pay the difference between the true cost of these works and the payment on account.

6. Clause 5 requires the managing agent to keep proper accounts and after 29th September in each year to "...render to the tenant an account of his receipts and expenditure..."

7. Clause 6 states that the decision of the managing agent as to what expenditure is necessary shall be final "except that the remuneration of the Managing Agent which shall be fixed by the Landlord shall not exceed seven and one half per cent of the maintenance contributions paid by all of the tenants of the building". The lease says that any overpayment shall be carried forward and not refunded.

8. The 2nd schedule requires the landlord to maintain the structure, roof, foundations and common parts. In particular the wood and ironwork on the outside of the building shall be decorated every 5 years.

9. As far as insurance is concerned, the landlord is required to maintain a public liability insurance policy together with buildings insurance "...with the Eagle Star Insurance Company Ltd. or such first class insurance Company as the Landlord shall from time to time determine."

The Inspection

10. Members of the Tribunal inspected the property with the Applicant, Mr. Cutler and Mr. Hogben (tenants), Mr. Battersby (recent tenant) and Messrs. Athow, Bingley and Hammond from the managing agents. They found that it was a first floor flat in what was a substantial house built at the turn of the last century of brick under what is now a tiled roof. The house had been converted into 5 flats, presumably in 1958 or thereabouts. It is in a good residential area reasonably close to amenities but on the corner of a busy junction.

11. There are garages at the rear and grass to the front and the sides. The members of the Tribunal were able to inspect flat 4 and were asked to look at a part of the ceiling in the lounge which had come down due to water penetration and had been replaced by the Applicant. Although there had been heavy rain in the previous 24 hours there appeared to be no signs of damp penetration at the time of the inspection.

12. They were also able to inspect flat 5 where there was obvious evidence of water penetration at the bottom of the window in the bathroom. Although there was some evidence to suggest that the source of the penetration was from around the window frame, it was impossible to undertake a full and detailed inspection and neither party should rely on this as a diagnosis.

The Hearing

13. The Applicant attended the hearing and confirmed that his letter of the 5th April 2004 and subsequent application were correct. In addition he said that when he purchased the property in July 2000, the previous tenant told him that the external decoration had to be done but that there was a "slush fund" to pay

for this. When asked whether he had checked with his conveyancer to find out whether the documents sent by the managing agents had arrived he said that he had not. He agreed that in view of the documents provided now by the managing agents, the Tribunal would have to accept that his conveyancer had knowledge of the true position i.e. that there was no fund to pay for decoration and monies expended would have to be collected from the tenants.

14. He then referred to the meeting which was called in January 2004 with the managing agents to discuss the demand he had received for £2,423. It was made clear to the managing agents that 4 out of the 5 tenants had not received the letter of 27th October 2003 enclosing the notice of proposed works and estimates ("the Section 20 notice"). The response of the managing agents was to give them all further copies of the Section 20 notice. When asked by Mr. Stephens whether the tenants could get their own quotations, he was told that the managing agents would have to speak to the landlord about this. Mr. Hammond from the managing agents said that all they were asked was whether the tenants could get quotes from subcontractors because this would be cheaper.

15. Mr. Stephens went on to explain that he had had great difficulty with his post. Up to Christmas 2003, the front door wasn't 'latching' properly but he mended this himself. Even recently, letters from his solicitor and a cheque had not arrived. Mr. Battersby and Mr. Hogben attended and agreed that there were difficulties. Mr. Cuttler does not live at the property but he did attend the hearing and said that he had received his notice which had been sent to his home address.

16. Mr. Battersby, Mr. Hogben and Mr. Cuttler then told the Tribunal about what they perceived as being shortcomings on the part of the managing agents although Mr. Battersby did concede that until about 18 months/2 years ago "most" of their service was reasonable. Mr. Athow and his colleagues told the Tribunal that, in their view, the service they provided was good.

17. As far as the meeting in January 2004 was concerned, Mr. Athow said that he subsequently received instructions that the landlord was insisting that the Section 20 notice was valid and no further quotes would be looked at.

18. It was put to Mr. Athow that if one looked at the terms of clauses 3 and 6 of the Lease strictly, there was no power to demand the proposed decoration charges in advance and the managing agent's charges were limited to 7½ % of the maintenance contributions paid by the tenants. He agreed but said that his firm was simply adopting good practice recommended by the RICS Codes of Practice and 7½ % was not enough to cover the cost of this.

19. On the question of insurance, Mr. Athow was asked to consider the insurance quotation from Alan Boswell to Mr. Hogben dated 02/08/04 which was in the bundle and to comment. He said that there were a number of reasons why he could not really make any comment. Firstly he said that the landlord is not a member of the Southern Private Landlords' Association which is a condition of the quotation. He then pointed out (a) that there had been a claim in the last 5 years (contrary to the terms of the quotation) (b) that he did not know whether the cover was index linked (c) that he did not know whether there was cover for terrorism and (d) there was no mention of the name of the insurance company.

Decision

20. The Tribunal found that whilst there was some dissatisfaction amongst the tenants with the service provided by the managing agents, this was not really relevant to the issues for this Tribunal to consider.

21. The main 'trigger' for the application was the demand for £2,423. There is then complaint about the water leak, the level of management fees and the amount of the buildings insurance premium. It was therefore necessary for the Tribunal to consider the validity of the Section 20 notice. It is as well just to consider the wording of the relevant sub-section of the **Landlord and Tenant Act 1985** applicable at the time:-

> *"(b) A notice accompanied by a copy of the estimates shall*

be given to (the) *tenants...or shall be displayed in the one or more places where it is likely to come to the notice of* (the) *tenants"*

22. This wording is unusual in the sense that it is not simply saying that notice has to be served. If it had done so, then one could certainly say that service by 1st class pre-paid post at the last known address of the tenant would be sufficient service in accordance with all civil procedure rules. It actually says that a notice accompanied by estimates shall be given to each tenant or shall be displayed so that the tenants would see it. In other words there is an emphasis on the tenants having actual knowledge of the notice.

23. In this case, the Tribunal accepted that 4 out of the 5 tenants did not actually receive their notices. It also accepted that the managing agents gave those tenants copies of the Section 20 notice at the meeting in January because they had been told that those 4 tenants had not received their copies. One could say that the Section 20 notice then became valid because it had been *"given to"* the tenants. However, by that time Section 151 of the **Commonhold and Leasehold Reform Act 2002** ("CLARA") was in effect and the notice does not comply with the new provisions. In any event, the Tribunal accepts the evidence of Mr. Stephens that the managing agents said that they did not know whether the landlord would look at other estimates, partly because of Mr. Athow's comment that he was in fact subsequently instructed not to look at any other estimates. Thus the handing of the Section 20 notices to the 4 tenants in January was conditional and could not validate them even if CLARA was not in effect.

24. The Tribunal concludes that although the managing agents acted perfectly reasonably and in accordance with normal good practice up to the meeting in January, they were then made specifically aware that 4 out of the 5 tenants did not actually received their Section 20 notices. Therefore, the strict requirements of Section 20 had probably not been complied with. That having been said, it is irrelevant for this determination because the Tribunal is

not being asked to determine the cost of actually carrying out those works which is when the service of the notice becomes relevant.

25. The two practical points which seemed to the Tribunal to dictate that a notice under the new Section 20 provisions must be served are (a) the existing estimates are now 10 months' old and must be out of date and (b) there is no provision in the lease for the landlord to claim monies in advance of works being undertaken save for the £130 referred to in clause 3. Thus the provision in the notice of 27th October 2003 that 'no works will start until all monies are to hand' is clearly wrong.

26. On the issue of the water leak into flats 4 and 5, the Tribunal came to the conclusion that the managing agents had instigated considerable investigations to try to locate the source of any leak. It also considered that one real possibility was that the water was coming in around a window in flat 5, which could mean that Mr. Cuttler may be liable for rectification works rather than the landlord. In any event, if the specification for the external works remains the same, this matter will be investigated further when the scaffolding is in place.

27. As to the managing agent's fees, these are limited by the lease to 7½ % of the maintenance contributions paid by all the tenants including insurance. Thus the charges for the years in question i.e. 2002, 2003 and 2004 will be limited to that amount. As the Tribunal is not absolutely sure of the amount paid by the tenants for these years, it will leave the arithmetic to the parties.

28. As to the insurance, the Tribunal concluded that the only obligation on the landlord under the terms of the lease is to insure with 'such first class insurance Company as the landlord shall from time to time determine' (clause 7 of the 2nd Schedule). The landlord must act reasonably and the procedures outlined by Mr. Athow seemed to the Tribunal to be reasonable. In other words, there is no obligation on the managing agent to go trawling through the insurance market every year to get the cheapest possible quotation. The present insurer is Allianz Cornhill, a well known and substantial company.

29. The managing agents then asked the Tribunal to consider the amount of time and effort they had put into the preparation for this hearing. The Tribunal was grateful to them for this but as there is no application by the tenant under Section 20C of the **Landlord and Tenant Act 1985**, these costs can be recovered from the tenants as part of the managing agents' fees provided that the total fees do not exceed 7½ % of the maintenance contributions paid by all the tenants.

30. By way of comment only, the Tribunal has some sympathy with the landlord's position in this case, particularly with regard to clauses 3 and 6 in the Lease. Despite the comments of the tenants, the managing agents provide as good a service as managing agents this Tribunal sees from time to time and better than many. They seem to be acting in accordance with best practice guidance from the RICS Codes of Practice. However a lease is a binding contract and neither a Court nor a Tribunal can simply ignore its terms. Since the implementation of CLARA, LVT's will be looking at the issue of who is liable to pay and what that person is liable to pay under the terms of the lease. Leases which are out of date – as this one undoubtedly is – can be the subject of an application to the LVT for variation.

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Bruce Edgington
Chair
16/08/04