LON/00AJ/NSI/2003/0043(CR)
LON/00AJ/NLC/2003/0040

DECISION OF LEASEHOLD VALUATION TRIBUNAL

ON AN APPLICATION UNDER SECTIONS 19(2A) AND 20C OF THE LANDLORD AND TENANT ACT 1985 (AS AMENDED)

Applicant: Parkside Hamilton Road (Ealing) Management Co Ltd

Respondent: Miss J Wyeth

RE: 16 Parkside, 17 Hamilton Road, London W5 2EG

Inspection date: 28 October 2003

Hearing dates: 28 and 29 October 2003

Appearances:
Mr R Duddridge of Counsel
Mr C D'Cruz – Secretary of Parkside Hamilton Road (Ealing)
Mr P Hodges – Block Management Co-ordinator
of Colin Bibra (Managing Agents)
Mrs E Lombard (19 Parkside)
For Applicant

Miss J Wyeth
For Respondent

Members of the Residential Property Tribunal Service:

Mrs M Auld LLB (Chairman)
Mr F Coffey FRICS
Mr T Sennett MA FCIEH

1. The Application

This case was transferred from Brentford County Court to the Leasehold Valuation Tribunal (the LVT) by Order of District Judge Plaskow made on 7 April 2003.

The Application is for the LVT to:-

(1) Determine the reasonableness of service charges under section 19(2A) of the Landlord and Tenant Act 1985 ("the Act") where service charge costs have already been incurred.
(2) Order that all or any of the costs incurred by the landlord in connection with these proceedings are not to be charged as part of a service charge under section 20C of the Act.

2. It may be useful here to summarise the relevant provisions of the Act and those under which the Tribunal has jurisdiction.

2.1 Section 18 – meaning of "service charge" and "relevant costs"

(1) the "service charge" means an amount payable by the tenant of a dwelling as part of or in addition to the rent –

(a) which is payable, directly or indirectly, for services, repairs, maintenance or insurance or the landlord's costs of management, and
(b) the whole or part of which varies or may vary according to the relevant costs.

(2) The relevant costs or the estimated costs incurred or to be incurred by or on behalf of the landlord, or a superior landlord, in connection with the matters for which the service charge is payable.

(3) For this purpose:

(a) "costs" includes overheads, and
(b) costs or relevant costs in relation to a service charge whether they are incurred, or to be incurred, in the period for which the service charge is payable or in an earlier or later period.

2.2 Section 19 – Limitation of service charges: Reasonableness

2(A) A tenant by whom, or a landlord to whom, a service charge is alleged to be payable may apply to a Leasehold Valuation Tribunal for a determination –

(a) whether costs incurred for services, repairs, maintenance, insurance or management were reasonably incurred.

(b) whether services or works for which costs were incurred are of a reasonable standard, or

(c) whether an amount payable before costs are incurred is reasonable.

2.3 Section 20C – Limitation of service charges: (Costs of Proceedings)

(1) A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with the proceedings before a Court or Leasehold Valuation Tribunal or the Lands Tribunal or in connection with arbitration proceedings are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application.

(2) The application should be made –

in the case of proceedings before a Leasehold Valuation Tribunal to the Tribunal before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to any Leasehold Valuation Tribunal.

(3) The Tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances.

3. The Lease and Management Structure

(1) Parkside Hamilton Road is a development consisting of 23 flats. The Land Registry Office copy relating to the Respondent's flat (flat 16) refers to the lease dated 28 August 1991 made between Parkside Hamilton Road/Ealing Management Co Ltd and Jean Wyeth for a term of 999 years from 1 January 1991 at a peppercorn rent. The term had been created by a Deed which operated to surrender an earlier lease dated 18 February 1966 made between (1) Kolsun Properties Ltd and (2) Patrick Charles Baille and as a new demise upon the same terms and conditions (save as varied).

(2) A sample lease (flat 3) was provided. The leases are all on substantially the same terms.

(a) The original landlord was Kolsun Properties Limited.

(b) The Applicant was the Management Company appointed under the Lease

(c) The original term was 120 years at an annual rent of £28.

(d) The lease of Flat 16 was assigned to the Respondent on 16th November 1976 and following the Applicant's acquisition of the Freehold the Leases were varied by surrender' and regrant.

(3) The Applicant is owned and run by the leaseholders each of whom holds shares in the company. Day to day decisions are made by a council consisting of four flat owners who report to the other members

at the AGM and other meetings.

(4) In 1999, the Applicant decided to contract out the day to day management of the flats. Following a tendering process, the contract was awarded to Colin Bibra who submitted the lowest quotation at £100 plus VAT per flat per annum. All the leaseholders were notified and Colin Bibra started with effect from 25 March 1999.

(5) In practice (though not as provided in the lease) each leaseholder is required to pay £225 per quarter in advance so that funds are available to carry out the required services. In years when major works are required, an additional sum based upon the cost of carrying out the works is required from each leaseholder. Before such an interim payment is requested, tenders would be sought and the issues discussed with the leaseholders at an AGM or, if necessary, an EGM. A section 20 Notice complying with the requirements under the Landlord and Tenant Act 1985 would be served on the leaseholders providing for consultation.

(6) The provisions in the Leases dealing with the tenants' obligations to pay service charges are rudimentary by modern standards. The covenant does not prove for advance payment of service charges or for a reserve fund. The tenants obligation to pay is set out at Clause 2(17). The contribution amounts to one twenty third of the total costs (the current obligation following variations – Clause 3(C)(iii) of the Lease).

The Applicants (landlords) obligations are set out in Part VI of the schedule to the Lease.

4. <u>The Issues</u>

A Pre-trial review attended by the Respondent was held on 7 August 2003 and Directions were issued. It was established that the following issues were in dispute with regard to service charges which end each September.

(1) Major/external works/decorations carried out in years 1996, 1997, 2001 and 2002
(2) Repairs/maintenance in the years 1997, 2001, 2002
(3) Depreciation costs in the years 1996, 1997, 2000, 2001 and 2002
(4) Works carried out to flat 17 in 2001 (including roof works)
(5) Audit and accountancy fees in the year 2001
(6) Surveyors fee in the years 2000, 2001 and 2002
(7) Management/Agents fees in the years 1999, 2000, 2001, and 2002 (including those of Mr Colin Bibra)
(8) Legal and professional fees in the years 2000, 2001 and 2002

The claim is in respect of non payment of demands for sums for service charges and major works at Parkside during the period March 1996 to May 2002 amounting to £4,127.66 (amended to £3,546,03 as a deduction for works

to the windows was agreed by the parties).

5. Inspection

The Tribunal made a site inspection on the morning of the 28 October 2003, visiting the Respondent's flat (no 16), the common ways to the block that contains the subject flat and viewing the gardens and garages within the curtilage of the block. The roof was also inspected. Present at the inspection were Mr C D'Cruz, secretary to the applicant company, Mr P Hodges, representative of the managing agents Messrs Colin Bibra and the Respondent Miss J Wyeth.

Hamilton Road is a pleasant tree lined avenue to the east of Ealing Broadway and its commercial centre and is situated close to Ealing Common. It is bounded to the north by the main and underground railways and is convenient for the major traffic routes of the Uxbridge Road and North Circular Road. The street has restricted parking and comprises in the main of substantial detached Edwardian villas.

Parkside is a small development comprising 23 flats arranged across linked blocks on four floors and constructed from the mid 1960's. The walls are of brick with concrete floors under asphalted flat roofs. The top floor has lead covered dormer windows in a mansard construction to the front elevation. Windows are mainly original being of single glazed softwood with painted frames and casements. Some leaseholders have chosen to replace the wooden windows with UPVC replacement windows.

The Tribunal accessed the commonways to the part of the block containing the Respondent's flat and found a pleasant, if basic, stairway with painted walls and uncarpeted stone stairs in good and clean order. The flat has the benefit of an entryphone system with remote door opening and the stairways and common areas of the block have good provision of artificial lighting.

The Respondent gave access to her flat to the members of the Tribunal and pointed out that one window to the living room could not be opened due to having been painted while closed and showed the Tribunal the standard of painting to the other windows. The Respondent accompanied one member of the Tribunal onto the flat roof. It was noted that the roof was covered with mastic asphalt with a finish of solar reflective paint and that the condition of the surface was reasonable. It was also noted that the dormers were covered with sheet leadwork and slating to the cheeks and again the condition was reasonable.

The Tribunal saw pleasant and well tended gardens comprising grassed areas, shrubs and trees to the front and rear of the block and an area to the rear set aside for garaging. This comprised single storey brick garages arranged around a circulation space and entered from a concrete driveway. The garages were seen to have built-up felt covered flat roofs, some of which had been recovered in recent years, and metal up and over doors. Well ordered rubbish

storage facilities were also seen off the driveway to the rear of the block.

6. The Hearing – Evidence Submissions and Decisions

6.1 The Applicant was represented by Mr R Duddridge of Counsel instructed by Messrs Montague Lambert & Company, solicitors and accompanied by Mr C D'Cruz, secretary to the Applicant management company, Mr P Hodges for Messrs Colin Bibra managing agents for the block and Mrs E Lombard lessee of flat 19 Parkside. They submitted witness statements which they expanded upon at the hearing. The Respondent Miss J Wyeth attended in person and presented her own case.

At the beginning of the hearing the Tribunal confirmed that the application related to Section 19(2A) and that it would consider issues raised against accounts for the years 1996 to 2002. Mr Duddridge of Counsel advised that although Miss Wyeth had paid sums to the Applicant during the course of the years under consideration, these had not been specifically attributable to individual items. It was agreed that the Tribunal should determine the application as a whole.

Counsel's opening submissions set out the background and clarified the issues to be considered at the hearing.

6.2 The Tribunal will deal with the issues listed in paragraph 4 in order:-

6.2(1) Major external works and decorations carried out in years 1996, 1997, 2001 and 2002.

(a) Major works 1996
Evidence and Submissions

The figure provided by the Applicant was £42,911 as shown in the Income and Expenditure Account for year ending 30 September 1996.

Mr Duddridge stated that the Respondent had been well aware of the works proposed and the fact that they would be supervised by surveyors. However, it became apparent to the Tribunal that evidence to substantiate the cost of works such as specification of works, contract details and final accounts were not available.

The Respondent stated that she had only recently had sight of the bundle from the Applicant which details the works. She had not received a demand for works and had not been issued with a section 20 notice prior to the works commencing. She believed that the figure of £331.38 which was the amount demanded from her comprised £260 for redecoration and £71.38 for window repairs which were not necessary.

Having taken instructions, Counsel stated that the Applicant would not make any further demand regarding the 1996 major works costs in the absence of documentation.

Decision

The tribunal noted that the Applicant conceded that the sum was not chargeable and determine, therefore, that the sum was not reasonably incurred in the absence of evidence to substantiate the demand.

(b) Major works 1977 (£87)

Evidence and Submissions

The figure provided by the Applicant was £87 as shown in the Income and Expenditure Account for the year ended 30 September 1997 under the heading "Decorations (block and tenants)". The Applicant could not direct the Tribunal to a specific invoice detailing this sum. Counsel stated that certain works were carried over from 1996 and it appeared likely that this was one such item. It would not be pursued by the Applicant.

Decision

The Tribunal therefore determine that this sum was not reasonably incurred, as there was no evidence to substantiate the costs demanded.

(c) Major works 2001 (£53,443)

Evidence and submissions

Mr Duddridge of Counsel referred the Tribunal to the table setting out the service charges levied and the amounts paid by the Respondent for the period March 1996 to May 2002. It showed that the Respondent's payment history had been irregular and she had not paid £225 per quarter. Miss Wyeth was the only leaseholder who did not pay her service charges regularly and in full.

In the Income and Expenditure Account for the year ended 30 September 2001 major works costs amounted to £53,433 for external works. Colin Bibra, as Managing Agents, had instructed Messrs Smith Baxter, Chartered Building Surveyors, to prepare specifications and subsequently invite quotations of costs in respect of major works which included the following:

(i) Repairs of the asphalt covering to the flat roof and (if recommended by the surveyor) to the garage block roofs.
(ii) Redecoration of all previously painted external surfaces.

However, as provided in the lease, each leaseholder was responsible for carrying out repairs to their own window frames. Leaseholders could choose to re-imburse the Applicant for carrying out such repairs on their behalf prior to painting.

The works were put out to tender and section 20 Notices dated 20 July 2000 were sent to the leaseholders. Three tenders were received, the lowest being submitted by Granley Project Management in the sum of £44,480 plus VAT.

On the basis that Granley Project Management was awarded the contract and allowing for surveyor's fees at 10% (plus VAT) the cost was as set out below:-

Contract sum	-	£44,480.00
Surveyors fees at 10%	-	£ 4,448.00
Total	-	£48,928.00
VAT at 17.50%	-	£ 8,562.40
Gross Total	-	£57,490.40

The Directors were holding a reserve fund of £23,000 so that the balance to be raised on the contract was £34,490. In accordance with the terms of the lease, the balance of £34,490.40 was apportioned equally between all 23 leaseholders so that each was liable to pay £1,500.

The lessees were invited to make observations to Colin Bibra by 21 August 2000.

After that date, and depending upon any observations received, the Management Company would send out a request for payment of the contributions. On receipt of all payments they would ask the Building Surveyor to give Granley Project Management the order to commence the contract.

The Respondent had paid neither the sum of £1500 which had been requested on 21 August 2001 nor the sum of £581.63 requested on 26 January 2001 for work to the window (later refunded).

Mr Duddridge stated that the accounts had been audited and it was for the Respondent to show that the costs had been incurred unreasonably.

The determination of final costs had been complicated by the Contractor going into liquidation on about 9 March 2001. The sum of £6,251.22 was paid by Colin Bibra to the receivers for Granley Project Management.

The amount claimed by Granley Project Management Ltd was £10,222.01 but £3,970 was deducted as a result of the Applicants counterclaim (costs for stolen items, consequential damage from leaking roof and work to windows).

Mr Duddridge of Counsel stated that the contract had started around 2 October 2000 with a contract period of 10 weeks so that the probable completion was

January as the final valuation was 19 January 2001. There was no certificate of completion which may have been because Granley went into liquidation.

He stated that the final account amounted to £41,097.50. It was possible to demonstrate that the solar paint had not been done and that another company had carried out the work at a later date. Toweridge Construction Ltd had been paid £4776.38 (inclusive VAT) on 22 January 2002, for works instructed by Smith Baxter.

Mr Duddridge of Counsel stated that the Respondent's payment history had been irregular and she had not paid £225 per quarter in advance. In answer to the Tribunal and having taken instructions he accepted that the Lease did not provide for advance payments. Miss Wyeth had insisted upon payment in accordance with the lease.

He stated that the sums incurred had been agreed by the Council of the Applicant democratically and approved by the occupiers at meetings. The major works had been overseen by a surveyor and the accounts had been audited each year as a further level of accountability as to how the sums had been spent. They were, therefore, reasonable.

Over the years, the Respondent had frequently exercised her right to query entries in the accounts, and works being done and the Applicant and its advisers had made efforts to assist her.

Miss Wyeth stated that since the acquisition of the freehold all decorations, maintenance works, and handling of Leaseholders monies or property had been faulty including under the management of Colin Bibra and & Co who had been appointed in March 1999.

She challenged the service charge of £225 per quarter as it was made up of £50 per month service charge, £15 per month to build up reserves and £10 per month managing agents fee.

She stated that although payment was required under the terms of the leasehold (dated 1965) and an acquired freehold on the production of a statement of expenses drawn up by a qualified Accountant, the Applicant was oblivious to the fact that a lessee had the right to question such charges in accordance with the Housing Act 1996.

She had had no notification of ten Council Meetings held between 6 February 2001 and 13 March 2003 which had referred to action that the Council intended to take against her. Had these come to her attention she could have responded. The sum of £3,323.87 was demanded as payable for expenses for year ending September 2001. She responded promptly with some queries. However, she received a letter in reply informing her that solicitors had been instructed to commence legal proceedings in order to recover monies owning and a claim was filed in the Brentford County Court.

No further answers to her queries had ever been supplied and she disputed the allegation that she had unreasonably turned down mediation services.

She voted that the demands for 1996 and 1997 had been withdrawn at the hearing.

She had voted against the major external works being carried out in October 2002 so close to winter. The standard of work was very poor. She produced photographs she had taken in the Autumn showing that masonry work to the tank housing and solar painting had not been done. The photographs showed temporary patches on the roof which she did not understand. She had engaged a surveyor to examine her windows and his opinion was that her wood work was sound.

She had sought independent advice from Anthony Fieldhouse and Co Chartered Building Surveyors in July 1996 regarding the condition of the flat roof of the building. In answer to the Tribunal she confirmed that she had not brought their report to the landlord's notice but had included some of their comments in a letter to the Management Company. It was her opinion that Smith Baxter should have made a more thorough inspection and should have noticed what was faulty. The work was overpriced and should only have taken 5 to 6 weeks because of the size of works. She was also of the opinion that the scaffolding erection took too long and its cost at ¼ of the contract price was excessive.

When questioned by the Tribunal she was unable to substantial these opinions. She maintained that the value she would place on the works undertaken on this contract was £40,000. Under cross examination by the Applicant she revised this figure to £25,000. She did acknowledge that she did not have relevant experience in the building or surveying field but based her figures on what she thought it would be reasonable for a builder to charge for the works carried out.

Scaffolding should be included in the price.

The determination of final costs had been complicated by the contractor going into liquidation at some point in early 2001.

Decision

There had been a number of omissions from the contract works, notably the requirement that the Contractor paint the repaired asphalt roof covering with a solar reflective paint.

An invoice issued by the Contractor on 19 December 2001 reflected the "postponement" of this element of the works and acknowledged an associated reduction in the contract sum of £3,500 exclusive of VAT. The invoice stated that the gross valuation of the works carried out as at the due date was £53,705

less the apparently agreed reduction of £3,500 in respect of the solar reflective painting.

Thus the amended Gross Valuation amounted to £50,205.50; an increase over the initial, Contract sum of £5,725.50. This sum is arrived at as follows:

Contract Sum			44,480.00
Less	Contingencies	3,000.00	
Less	Net Omissions from the Contract Works	382.50	
Less	Reduction in respect of Solar reflective paint	3,500.00	
Add	Additional Works the Subject of Contract Instructions		10,008.00
Add	Additional Preliminaries Pursuant on the Extension of Time granted		2,600.00
		6,882.50	57,088.00
			6,882.50
		Total	50,205.50

However, included in the 'Additional Works' sum of £10008.00 is an amount of £5,990.50 in respect of repairs to windows and other joinery for which the landlord is not responsible. The landlord acknowledges that this amount should properly be apportioned between and charged to the individual Lessees and not charged to the service charge account.

Thus, the amount properly charged to the account in respect of the contract works should not exceed £50,205.50 - £5,990.50) £44,215.00, plus VAT making a total of £51,953.00.

The Tribunal notes from the evidence that matters were further complicated by the fact that a 'claim' was made by the landlord against the contractor in liquidation in the sum of £3,970.00 in respect of loss and expense incurred by a number of Lessees in respect of theft during the course of the contract. This is not strictly a matter for the Tribunal though no doubt should be reflected in the service charge account.

On the basis of the Tribunal's inspection and noting the evidence the paintwork was in good condition. The windows in Ms Wyeth's flat had been

painted closed but this was because she had wanted 7 days notice which the Tribunal consider unreasonable in the circumstances.

The Tribunal feel that competitive quotations were obtained for the contract ranging from £44½ thousand to £50 thousand so indicating that the specification was fairly well written. The lowest tender had been accepted. The Respondent had claimed that the roof works, scaffolding costs and decorating costs were too high but she had no evidence to support her view.

Therefore, the Tribunal determine that the costs of £51,953 (including VAT) were reasonably incurred.

(d) Major Works 2002 (£4,776 – solar paint)

Evidence and Submissions

The figure provided by the Applicant was £4,776 as shown in the Income and Expenditure Account for the year ended 30 September 2002 under the heading 'External Works'. The Applicant explained that this related to the application of solar reflective coatings to the flat roof of the block which had been not carried out during the course of major works charged in 2001.

The Tribunal questioned the estimate for the works which was for £3,100 plus Vat. This was a significantly lower figure than the final invoice, which was also furnished by different company from that which provided the estimate. The Applicant explained that Toweridge Construction Ltd and Ground Control (UK) Ltd operated from the same address, had the same principal and that the work was undertaken under the control of Smith Baxter. The Applicant suggested and it was accepted by the Respondent that although not specified in the invoice for works it is probable that it included an element for repairs to the flat roof.

The Respondent advised the Tribunal that since she now understood what works has been referred to in the account, she was now ready to accept the cost of £4,776 as reasonable.

Decision

The Tribunal take the view that it is highly likely that the difference in costs is accounted for by repairs carried out to the asphalt covering prior to painting. Certainly the Tribunal's inspection of the roof covering revealed it to be in a satisfactory condition and not as recorded in the Respondent's photographs. The Respondent had accepted the sum having now understood what the invoices referred to. They, therefore, determine that costs amounting to £4,776 were reasonably incurred.

7. Repairs and Maintenance in the year 1997, 2001 and 2002

7.1 Repairs and Maintenance 1997 (£2,360 year ending 30 September 1997)

Evidence and Submissions

The figure provided by the Applicant was £2,360 referring to the Income and Expenditure Account for the year ended 30 September 1997 which showed this figure under the heading 'Repairs and Replacements'.

The Applicant identified two invoices in the total sum of £1,927 from Allen Holmes & Son dated 7 and 28 July 1997. The first dealt with roofing work and the Respondent accepts that this work was done in the sum of £1,339.50. However, she did not accept the other invoice as the works undertaken were not specified. The Applicant was unable to point to other invoices under this head but advised that in the course of routine audit all invoices, vouchers etc would have been examined by the accountants.

Decision

The Tribunal accepted that the sum of £1927 was reasonably incurred but there was no evidence to substantiate that the costs of £2,360 had been incurred. There appears to be no differentiation between accounts for the management company and those for the service charge accounts. The Tribunal accepts that the accounts for the Management Company have been duly audited. However, they are not satisfied that adequate invoices were presented to them. The landlord had been unable to demonstrate what the expenditure related to and therefore, the Tribunal were unable to determine that the costs were reasonably incurred.

The Tribunal determines that the relevant recoverable costs incurred amount to £1,927.

Repairs and Maintenance 2001 (£6, 062 - year ending 30 September 2001)

7.2 Evidence and Submissions

The figure provided by the Applicant was £6,062 referred to in the Income and Expenditure Account for the year ended 30 September 2001 under the heading 'Repairs and Replacements'.

The Applicant advised that invoices under this head dealt with a communal satellite dish, flat roof covering of garages, roof repairs and internal painting. The Tribunal were directed to invoices in the total sum of £4,057.50 which were stated to have been reasonably incurred. The Applicant was unable to point to other invoices under this head but advised that in the course of routine audit all invoices, vouchers etc would have been examined by the accountants.

The Respondent accepted all these invoices except the invoice for internal painting in the sum of £75 which she thought was within flat 9.

Decision

Because of the lack of evidence the Tribunal do not consider that costs were incurred for communal repairs and replacements. They do not accept that the sum of £6062 was reasonably incurred and the same applies to the cost of £75 for painting. The Tribunal determine that the reasonable sum incurred is £3,982.50 (ie £4057.50 less £75).

7.3 Repairs and Maintenance(2002) (£5965).

Evidence and Submissions

The figure provided by the Applicant was £5,965 referred to in the Income and Expenditure Account for the year ended 30 September 2002 under the heading 'Repairs and Replacements'.

The Applicant advised that invoices under this head dealt with communal aerial repairs, flat roof covering of garages, and internal redecoration related to an insurance claim. The Tribunal were directed to invoices amounting to £4,397 which were stated to have been reasonably incurred. The total number of invoices were in respect of roofing (£3,850), aerials (£450), decorating work (£280), removal of satellite dish (£47) and came to the sum of £4,627. The Tribunal deducted £230 as an insurance payment resulting in £4,397 as the total sum due. The Respondent accepted the figures for the roof repairs and aerials but did not accept the total shown in the accounts since items were missing.

Decision

The Tribunal have only seen invoices for £4,397 which they can relate to repairs and maintenance for 2002. In each of the years (1997, 2001 and 2002) regarding repairs and maintenance the Respondent did not produce any compelling argument that the sums were unreasonably incurred. The Tribunal determine that the costs reasonably incurred amount to £4,397.

8. Depreciation Costs

Evidence and submissions

The Respondent questioned the item for depreciation included in the income and expenditure accounts of:

1996	£1,062
1997	£996
2000	£850
2001	£816
2002	£781

The Respondent stated that the freehold had been purchased in 1991 for £6,200 and she could not understand why it continued to be cited in the accounts and a recharge made to lessees.

Mr Duddridge of Counsel stated that since 1991 the Applicant's accountants had allowed for depreciation on the Freehold and the Fixtures and Fittings (£5,268) separately. They had applied different conventions to each. The Freehold was depreciated at 10% per annum on a straight line basis, that is at a rate of £620 every year. The Fixtures and Fittings were depreciated at 15% per annum on a reducing balance basis – that is, the actual sum allowed was less in each subsequent year. That is why the sums shown above reduced from year to year.

This accounting convention benefited the Applicant since it reduced the surplus shown in the accounts for tax purposes.

The Respondent queried where the sums shown as depreciation had gone to. Mr Duddridge stated that to the extent that depreciation represented an actual charge to each tenant it simply formed part of the funds available to the Applicant to carry out the management of the premises. In the event that this created a surplus of income over expenditure it formed part of the reserves carried over from year to year.

Decision

The Tribunal does not regard these sums as service charges. It may well be desirable for the landlord to have a reserve fund but this is not a method of creating such a fund. As already noted by the Tribunal the lease does not provide for a reserve fund.

The Tribunal determine that the items for depreciation shown above have not been reasonably incurred and are not chargeable as service charges.

9. Works carried out in Flat 17 in 2001

Evidence and submissions

It appeared that Flat 17 was flooded and consequential damage had occurred. The cost of remedial works was the subject of a claim against the contractor in liquidation and the associated cost deducted from the final payment due to the receiver under the contract for works.

Decision

As the costs were not charged in the accounts the matter was not dealt with by the Tribunal

10. Audit and Accountancy fees (2001) (£1,410)

Evidence and Submissions

A sum of £1,410 for the year 2001 for accountancy services was identified. The Respondent accepted during the course of the hearing that the sum was both reasonable and reasonably incurred.

Decision

Not in issue and not dealt with by the Tribunal.

11. Surveyors fees (2000 - £1,727; 2001 - £5,347; 2000 none shown)

Evidence and submissions

The Respondent questioned the surveyors fees for 2000 of £1,727 and 2001 of £5,347 which were incurred in respect of major works in 2000/01. None was shown for 2002. In her evidence to the Tribunal the Respondent indicated that it was her view that works of redecoration and roofing as included in the major works project would have been better dealt with by a builder supervising. A surveyor was not necessary. She would have been more confident in the surveyor if all the works had been completed. She gave examples of the cracking to the asphalt on the roof, cracked masonry and absence of paint to masonry. She considered that the works were not properly done and that the surveyor should have been more thorough. When questioned by the Applicant she thought 10% was a reasonable sum for the surveyor to be paid but later decided that 5% of the value of the works, which she put at £25,000 would be more appropriate and therefore indicated that the total fee across the two years should be no more than £1250.

The Applicant detailed the process that the surveyor undertook in terms of specification of works, seeking tenders, analysis and contract management. The works were supervised in respect of compliance with health and safety, payments authorised and accounts checked. The later works to apply solar reflective coatings were undertaken without fees and the Respondent accepted that this had occurred. The total fees, based on 10% of the contract plus associated correspondence and costs, was a reasonable sum for a contract of £53,705.

Decision

The Tribunal has invoices to substantiate the figures of £1,727.25 and £5,347. Whether this sum was reasonably incurred is the issue. The Respondent had pointed out faulty work to the roof and a payment had been certified before the window work was done. Her photographs had shown the poor condition of the roof after contract work was completed. In the view of the Tribunal the level of fee for such works would ordinarily be assessed at 10% of the final cost of works. This is in line with Fee Scale 4 of the Royal Institution of Chartered Surveyors which is deemed appropriate by the Institution for works of repair such as the subject. The scale is based upon the surveyor inspecting

the property, taking notes, schedules etc, subsequently preparing specifications, inviting quotations of costs and administrating the contract for works.

The Tribunal is of the opinion that the works undertaken at the property are such that it would be both reasonable and prudent to appoint surveyors to both specify and administer the contract of works. It does not accept Miss Wyeth's arguments in this regard.

The Tribunal is however concerned about the standard of contract administration in this case. There is, in particular, a lack of adequate contract documentation as far as can be seen and as a consequence it is not possible to clearly follow how the contract was administered, with particular reference to matters leading to the granting of an extension of time, the issue of contract instructions, and the preparation of the final account.

In these circumstances the Tribunal determine that the appropriate rate should not exceed 5% as the percentage applied to that sum for works of £44,215 as the final cost of works. In addition VAT on the resultant fee would be properly chargeable to the service charge account.

The Tribunal determine that the reasonable sum incurred is £2597.63.

12. Managing Agents Fees (1999 - £1351; 2000 - £2703; 2001 - £2703; £2002 - £2703)

Evidence and Submissions

The Applicant advised the Tribunal that the management was put out to tender in 1999 and that all lessees were aware of the process and outcome. Colin Bibra provided the lowest tender at £100 per flat (plus VAT) per annum. The charges had remained at this level since 1999 (total of £1,351 for 1999 which was a part year, and £2,703 (incl VAT) in subsequent years). The costs were both reasonable and reasonably incurred.

The Respondent indicated that she had never disputed the amount but had queried the application of VAT. She was now satisfied and accepted that the charge of £100 plus VAT per flat per annum was reasonable.

Decision

The Tribunal determine that these sums are reasonable and reasonably incurred.

13. Legal and Professional fees (2000-£705; 2001 – Nil; 2002 - £115)

Evidence and Submissions

Mr Duddridge of Counsel stated that the fees related to work carried out by solicitors in connection with the collection of service charges from the

Respondent. He referred the Tribunal to an invoice for £705 dated 8 December 1999 which stated that the fee was for advising and assisting the Management Company in respect of their dispute with Miss Wyeth "concerning outstanding service charges, including preparing and serving a Section 146 Notice".

The fees also related to the issue fee for the proceedings in the County Court amounting to £115 paid on 28 June 2002. He submitted that these fees were reasonably and properly incurred and were properly shown in the accounts.

Decision

The lessee is contractually bound to pay legal costs reasonably incurred by the lessor in or in contemplation of any proceedings under sections 146 and 147 of the Law of Property Act 1925 notwithstanding that forfeiture is avoided otherwise than his relief granted by the Court (Clause 2(15) of the Lease. The Tribunal do not regard this as a service charge matter and cannot deal with issues of recoverability.

14. Limitation of Service Charges: Cost of these proceedings: Section 20C of the Act

Evidence and Submissions

At the hearing Mr Duddridge of Counsel stated that it was difficult to encapsulate this provision under the Lease. His view was that unless the Tribunal found all the service charges unreasonable the Landlord should not be prevented from including the costs in these proceedings as part of the service charge. He accepted that there were gaps in the landlord's evidence, but maintained that the landlord had had to come to the LVT to determine the matter.

By way of written submissions the Applicant's solicitors stated that it would be manifestly unfair for the rest of the owners if the costs of the proceedings were not included in Miss Wyeth's service charges. Miss Wyeth had had the opportunity to attend mediation to resolve this dispute long before it went to the LVT. Attempts to settle the matter out of court had been met with a non-response from Miss Wyeth. The legal and associated costs were, in effect, covered by monies taken from the reserve fund which is needed for emergencies and as a contribution to the next major works due in 2004. A short fall in the funds would mean flat owners having to make extra contributions.

At the hearing Miss Wyeth stated that the dispute "could have been sorted out ages ago" had the Applicant not issued proceedings in the County Court.

In written submissions following the hearing, Miss Wyeth's Solicitors referred to the Lease and pointed out that there is no express provision entitling the landlord to recoup as part of the service charge its legal costs incurred in

proceedings to recover outstanding service charges. Moreover, there was no express provision entitling the company to recover the general costs of management, as distinct from the costs of discharging the specific obligations specified in Part VI of the Schedule. In this connection they referred to the cases of Sella House Ltd v Mears (1989) (CA), Iperion Investments Corporation v Broadwalk House Residents Ltd (1995)(CA) and St Mary's Mansions Ltd v Limegate Investment Co Ltd and Others (2002) (CA).

The solicitors also stated that the present proceedings are not proceedings under section 146 of the Law of Property Act 1925. If the landlord considered that the costs were recoverable under Clause 2(15) of the lease then they must be administrative charges and subject to statutory moderation by the LVT under Section 158 of and Schedule 11 to the Commonhold and Leasehold Reform Act 2002.

Decision

The Tribunal notes the submissions of both parties. It is fundamental that a debarring order made under section 20C only operates to relieve or moderate a contractual entitlement to include the costs of proceedings in the service charge. The provision does not empower the LVT to impose a liability on tenants to pay as service charges the landlord's costs of proceedings where none exist as a matter of contract.

There appears to be no provision in Miss Wyeth's lease which provides that the landlord has a contractual right to include its costs of these proceedings as part of the service charges.

The Tribunal, therefore, does not exercise its discretion to make an Order under Section 20C of the Act as the provision does not "bite" unless the landlord is entitled under the lease to include costs of the proceedings as part of the service charges.

Appendix attached.

CHAIRMAN ..... Mrs M. Awd .....

DATE ..... 15th January 2004 .....

APPENDIX A

Summary of the Service costs chargeable to the service charge account as determined by the Tribunal

1.	Major works (1996)	-	Conceded/Nil
2.	Major works (1997)	-	Conceded/Nil
3.	Major works (2001)	-	£51,953 (incl VAT)(£44,215 excl VAT)
4.	Major works (2002)	-	£4,776
5.	Repairs and Maintenance (1997)	-	£1,927
6.	Repairs and Maintenance (2001)	-	£3,982.50
7.	Repairs and Maintenance (2002)	-	£4,397
8.	Depreciation costs for the years 1996, 1997, 2000, 2001 and 2002	-	Nil; not chargeable as service charges
9.	Works carried out in Flat 17	-	Nil; not Charged to the accounts by landlord
10.	Audit and Accountancy fees in 2001	-	Conceded by Respondent
11.	Surveyors fees in respect of major works in 2001	-	£2210.75 + VAT = £2,597.63
12.	Managing agents fees in the years 1999, 2000, 2001 and 2002	-	£9,460; conceded by Respondent
13.	Legal and Professional fees in the years 2000, 2001 and 2002	-	Nil
14.	Application for a Section 20C Order	-	The Tribunal did not make a Section 20C Order