RESIDENTIAL PROPERTY TRIBUNAL SERVICE
LEASEHOLD VALUATION TRIBUNAL

Hearing 28 June 2004
Ref: CHI/45UH/OCE/2003/00034
CHI/45UH/LSC/2004/0022

82 South Farm Road, Worthing, West Sussex BN14 7AL ("the Premises")

Leasehold Reform, Housing and Urban Development Act 1993 ("the 1993 Act")
S.27A Landlord and Tenant Act 1985 ("the 1985 Act")

Parties:

Shenmoor Ltd (1993 Act)
Mrs M Howarth & Mr J H Beckedahl (1985 Act)
Applicant (tenant)
C/o Griffith Smith

And

A I D Mackintosh, P A Mackintosh, R Mackintosh, H Mackintosh
Respondents (landlords)
In person

DECISION OF THE TRIBUNAL

Appearances

Mr S Wright, Counsel, for the Applicant
Mr A I Mackintosh and Mrs P Mackintosh in person for the Respondents

Hearing:	28 June 2004
Tribunal:	Ms J A Talbot MA Cantab. (Chairman) Mr D Nesbit FRICS Mr R A Wilkey FRICS
Date of Issue:	2 August 2004

Introduction

1. This matter concerned two separate but related applications:

   The first application, dated 29 September 2003, pursuant to S.24 of the 1993 Act, was for a determination of the purchase price to be paid by the nominee purchaser, Shenmoor Ltd, for the freehold interest in the premises. This price was eventually agreed between the parties at £4,500 so that aspect of the matter was not before the tribunal. There remained unresolved the question of the landlord's legal costs payable by the tenants under S.33 of the 1993 Act, and this was the only issue before the tribunal in relation to the collective enfranchisement.

   The second application, dated 23 April 2004, pursuant to S.27A of the 1985 Act, was for a determination of the payability and reasonableness of service charges payable by the tenants, so that the maintenance account can be finalised before the transfer of the freehold takes place.

2. Directions were given on 23 April 2004 requiring the parties to produce skeleton arguments dealing with the issues remaining in dispute. As a result we have seen the skeleton arguments helpfully produced by both parties.

The Law

3. In relation to the first application, the law is to be found in Section 33 of the 1993 Act:

   Costs of enfranchisement
   S.33(1) Where a notice is given under section 13, then (subject to the provisions of this section ...) the nominee purchaser shall be liable, to the extent that they have been incurred in pursuance of the notice by the reversioner ... for the reasonable costs of and incidental to any of the following matters, namely –
   (a) any investigation reasonably undertaken –
   (i) of the question whether any interest in the specified premises or other property is liable to acquisition in pursuance of the initial notice, or
   (ii) of any other question arising from the initial notice, or
   (b) deducing, evidencing and verifying the title to any such interest;
   (c) making out and furnishing such abstracts and copies as the nominee purchaser may require;
   (d) any valuation of any interest in the specified premises or other property;
   (e) any conveyance of any such interest; ...
   (2) For the purpose of subsection (1) any costs incurred by the reversioner ... in respect of professional services rendered by any person shall only be regarded as reasonable if and to the extent that costs in respect of such services might reasonably be expected to have been incurred by him if the circumstances had been such that he was personally liable for all such costs. ...
   (5) The nominee purchaser shall not be liable under this section for any costs which a party to any proceedings under this Chapter before a leasehold valuation tribunal incurs in connection with the proceedings.

4. In relation to the second application the law is to be found in Section 27A of the 1985 Act (as amended by Section 155 of the Commonhold and Leasehold Reform Act 2002) which provides:

   Liability to pay service charges: jurisdiction
   S.27A (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.

The Inspection

5. The members of the tribunal inspected the property before the hearing. We were accompanied by Mr and Mrs Mackintosh, the landlords. The property consisted of a substantial two storey Victorian house converted into four flats, each with its own garden area and garden shed accessed by communal paths. The property is of brick construction under a pitched tiled roof and bay windows. Several tiles were slipped. The wooden sash windows and external decorations generally were in poor condition.

6. Flats 2 and 4 were situated on the first floor, and flats 1 and 3 on the ground floor. Flats 1 and 2 were accessed by the original front door to the house which opened onto a small carpeted lobby area. Flats 1 and 3 had their own separate access on the other side of the building. We were able to inspect the interior of flat 2 with the permission of the sub-tenant. This two-bedroomed flat was in good decorative order, having been well maintained and improved internally by the tenant, with a modern fitted kitchen, small internal bathroom, and good sized living room. There was no central heating. There was evidence of some damp around the bay window in the living room.

The Hearing

7. The hearing took place at Worthing Town Hall on 28 June 2004. It was attended by Mr Stewart Wright of Counsel on behalf of the applicant tenants, and Mr and Mrs Mackintosh in person on behalf of the landlords. Their solicitors did not attend even though the outstanding issues in dispute largely concerned the justification for and reasonableness of their costs.

The Issues

8. We first established that there were four separate issues in dispute, all relating to different aspects of the landlord's costs. The first two items were in connection with the collective enfranchisement, and the second two items were claimed from the lessees as service charges under the terms of the leases:

   (1) The landlords' legal costs of £500.00 plus VAT, as charged by their solicitors, Gates & Moloney. These were legal costs claimed to have been incurred under S.33(1)(a)(i), namely, costs incurred in relation to investigation of matters arising under the applicants' initial notice. The costs of valuation and conveyancing, under S.33(1)(d) and (e), had been agreed between the parties at £235.00 and £375.00 plus disbursements and VAT respectively.

   (2) The landlords' own costs of £1,392.50, claimed by the landlords for their own time spent in connection with the matter.

   (3) The landlords' legal costs of £1,500.00 plus VAT claimed to have been incurred in the running and management of the property, charged by their solicitors, Gates & Moloney.

   (4) The landlords' own costs of £225.00, claimed again for their own time spent in management of the property.

The Evidence

S.33 of the 1993 Act: Landlords' Legal Costs

9. We heard evidence and argument from the parties. Mr Wright made submissions on behalf of the applicants in accordance with his skeleton argument. In relation to the first disputed item, namely, the landlords' legal costs of £500.00 plus VAT, his argument was that the landlords were only entitled to the recovery of costs as provided for in S.33 of the 1993 Act. Under S.33(1)(a)(i), these were specified as the reasonable costs of and incidental to any investigation reasonably undertaken, of the question whether any interest in the specified premises is liable to acquisition in pursuance of the initial notice, or of any other question arising out of that notice.

10. Mr Wright referred to a letter dated 24 January 2004 from the landlords' solicitors, Gates & Moloney, to the tenants' solicitors, Griffith Smith, in which they refer to "the legal fees of investigation etc." The copy correspondence between solicitors at the time the notice was served showed that Gates & Moloney had not raised any points as to whether any interest in the specified premises was liable to acquisition, or of any question arising in pursuance of the notice. The initial notice was dated 21 January 2003. The solicitors had subsequently, in a letter dated 21 April 2004, stated that they "believe there have been fundamental errors in the procedure relating to the freehold acquisition by the lessees", but in Mr Wright's view, they did not see fit to challenge the initial notice at the time and were not now able to do so.

11. Mr Wright also drew our attention to Gates & Moloney's bill dated 14 June 2004, claiming £500.00 plus VAT and supplying a breakdown of those costs. He contended that there was nothing in that breakdown to show any costs incurred in the investigation of the initial notice. All the costs claimed related to the subsequent procedure – notification to the freeholders, preparing the counter notice, correspondence in relation to the counter notice, costs, and the application to the tribunal. There was no mention of any work in connection with any potential challenge to the initial notice.

12. Mr Wright explained that Mr Mackintosh had raised an issue in relation to a body of correspondence where he (Mr Mackintosh) had contacted the tenants and their solicitors direct, raising concerns about the initial notice that remained unanswered. Mr Wright contended that as solicitors were on record as acting for the tenants it was inappropriate for Mr Mackintosh to deal direct, but in any event, those costs had not been claimed as legal costs of investigation, and were thus not recoverable.

13. In response to questioning from the tribunal, Mr Wright confirmed his view that there was no statutory provision or general intention that the tenants should bear all the landlords' costs of the enfranchisement. If the legal costs claimed did not fall within the meaning of S.33, then they were not recoverable at all. The wording of S.33(1)(a)(ii), "any other question arising out of the notice", was qualified by the previous reference to "any investigation reasonably undertaken" in that regard.

14. Mr Mackintosh gave evidence in support of the landlords' legal costs. As his solicitors were not present, and indeed had advised him that they lacked the expertise to appear before the tribunal, he had to speak for them. Mr Mackintosh had tried to ascertain whether any provisions of the Commonhold and Leasehold Reform Act 2002 applied to the initial notice. His solicitors did not seem to be aware of the Act, and were unable to advise, but following his own research, Gates & Moloney had written on 15 May 2003 to Griffith Smith asking for "a copy of the 'invitation to participate'" and confirmation "that the nominee purchaser was an RTE company as required by the 2002 Act". Mr Mackintosh thus contended that there had been a challenge to the notice.

15. In response Mr Wright submitted that Griffith Smith had replied on 19 May 2003 to state that the relevant provisions of the Act were not yet in force, and this had been the extent of the correspondence. In any event, the representations were made too late, being after the service of the landlords' counter notice. The question arose because the co-freeholders and

tenants of Flat 2, Richard and Hazel Mackintosh, were not party to the notice. In terms of justifying the fees charged, Gates & Moloney had referred, in their letter of 21 June 2004 to the tribunal office, to "a little research into the position and correctness of the notice", but this was not mentioned in the breakdown to the bill and did not justify the amount claimed.

16. Turning to the second item in dispute, the landlords' own costs of £1,392.50, Mr Wright submitted that these were not payable by the tenants because there was simply no statutory provision which entitled the landlords to recover their personal costs, as opposed legal costs charged by their solicitors. They were not covered by S.33. If any of the claimed costs arose pre-notice, or in relation to time spent by Mr Mackintosh in addition to instructing his solicitors, they were not recoverable.

17. Mr Mackintosh explained that he had charged his own time at a rate of £20.00 per hour, including expenses, and that much of these costs had arisen in the time preceding the service of the notice. He had been dealing direct with the tenants, and later their solicitors, since August 2000, in an attempt to resolve the purchase of the freehold by negotiation. However, having heard the legal argument about the legal costs recoverable under S.33 of the 1993 Act, he had no alternative but to concede that his own costs were not covered, and he withdrew this claim for £1,392.50.

S.27A of the 1985 Act: Service Charges: Landlords' Legal Costs

18. The third item in dispute arose under S.27A of the 1985 Act and concerned the charge to the maintenance account of the landlord's legal costs. Again these were costs charged by solicitors Gates & Moloney, at £1,500 plus VAT. Mr Wright accepted that legal costs incurred by the lessor were included in the maintenance fund under paragraph 11 of the Eighth Schedule to the leases, but he submitted that the costs charged were not reasonably incurred, and therefore not payable by the tenants as part of their service charges.

19. Mr Wright said it was unclear as to what period the claimed costs of £1,500.00 related. The tenants' solicitors, Griffith Smith, had been involved since July 2002. The costs appeared to relate to those incurred since November 2002, since a demand dated 21 November 2002 to the tenant of Flat 4 contained an item for "legal expenses – debt collection" in the sum of £52.88 which had been charged separately. A reference to the sum of £1,500.00 first appeared in a Maintenance Account prepare by the landlords and sent by Gates & Moloney to Griffith Smith on 7 January 2004. Griffith Smith asked for some justification of this item. Gates & Moloney referred to "a considerable volume of correspondence" on the maintenance fund. However, there was no specific breakdown of this figure, until a letter dated 2 March 2004 from Gates & Moloney referred to "67 letters written, 61 letters received and 8 telephone calls" charged at an hourly rate of £150.00.

20. Mr Wright said that the correspondence concerning the maintenance account started with Griffith Smith's letter of 20 December 2002. There followed an exchange of letters about whether or not interim service charges were being properly demanded in accordance with the terms of the lease. It was the tenants' case that an interim payment could only be made once a year on 1 April, so the demand made in December was invalid. Other correspondence arose when Gates & Moloney wrongly approached the tenants' mortgage lenders for payment of service charges, leading to a complaint, so it would be unreasonable to charge this to the maintenance account. Overall, Mr Wright submitted that although the correspondence between solicitors raised some legitimate concerns, these were not properly addressed by the landlords' solicitors. Their replies did not move the matter forward – the work charged for was non-progressive, so it was not reasonable for the tenants to incur the charges.

21. There was a breakdown attached to Gates & Moloney's bill for the work, which was not forthcoming until 14 June 2004. The narrative was sparse and could not be reconciled with the assertion that over 120 items of correspondence had been dealt with. For example, the first 3 items referred to 3 letters to the tenant of Flat 4. There was a relatively small amount of work correspondence detailed, none that could justify the level of charges claimed.

22. Mr Mackintosh gave evidence that there had been a lot of correspondence between himself as landlord, his own solicitors, and the lessees. He thought many of the 67 letters and 8 telephone calls referred to, must have been to him, though he did not have access to his solicitors' files. He had not received a bill for the £1,500.00 from Gates & Moloney until June 2004. He had included this sum in the January 2004 accounts because his solicitor had verbally informed him that this would be their charge. He stressed that correspondence to individual lessees had been necessary because they had not paid up the service charges and ground rent, despite his attempts to build up a maintenance fund.

23. The fourth item in dispute concerned the landlords' own costs of his own time spent on management of the property, which he sought to charge to the maintenance fund in the sum of £225.00, calculated at £20.00 per hour plus VAT. Mr Wright contended that there was no provision in the lease to entitle the landlord to charge for his own time at all. Under the terms of the leases, the landlord was entitled to charge only the costs he has "incurred", meaning, costs invoiced to him. Paragraph 5 of the Recitals specified the proportion to be paid by each tenant to one quarter of "the monies expended by the lessor in complying with its obligations in the Sixth Schedule". The key word was "expended", meaning externally incurred. The term "incurred" appeared in the Fifth Schedule as part of the definition of the maintenance fund and the lessees' obligation to pay.

24. Essentially, therefore, the landlord had a choice: he could either manage the property himself, but without being entitled to make a charge for his time, or, he could appoint a managing agent, in which case he would be entitled to charge the maintenance account for the costs so incurred or expended. If the landlord chose the latter, then the tenants would have to bear those costs as service charges, to the extent that they were reasonable. If there was an expense element to the landlords' own costs, these would have to be justified. Finally Mr Wright submitted that that as a matter of general law, the landlord was not entitled make a profit from his own work.

25. Mr Mackintosh gave evidence in support of the work he had done. He conceded that the lease terms did not entitle him to charge for his time. That was why, historically, he had put to the tenants the option of whether to appoint professional managing agents or not. He said that the tenants had not responded one way or the other. His view was that the costs of professional management and of auditing the accounts, were disproportionate to the size and nature of the building. He had tried to act in a practical way for the benefit of the property, and had spent much time trying to build up a fund to cover the cost of repair works, but the tenants had not co-operated. Rolled up in the £20.00 per hour were expenses such as stationery, printing cartridges, lighting, and telephone calls, but he was unable to specify a figure for such disbursements.

26. In answer to questioning from the tribunal, Mr Mackintosh agreed that he had acted contrary to the lease terms by taking on personal management of the property. He accepted that the leases set out those service charge items that the tenants were obliged to pay for as part of their one quarter share, and the time and manner in which they should be paid. He said he was not aware of the existence of the Residential Code of Management produced by the Royal Institution of Chartered Surveyors, or that the Code had parliamentary approval. We pointed out to Mr Mackintosh that the Code applied, regardless of whether the property was managed by the landlords themselves or a professional managing agent, and that the Code

obliged the landlord, inter alia, to arrange the independent auditing of service charge accounts, irrespective of the tenants' opinions. Mr Mackintosh said he understood this but stressed that he had tried to resolve disputes and manage the property more informally and cheaply.

The Decision

27. We retired to consider the evidence we had read and heard, and dealt with the disputed items in turn.

S.33 of the 1993 Act: Landlords' Legal Costs

28. In relation to the first item, the landlords' solicitors legal costs, we accepted the submissions of Mr Wright on behalf of the tenants, that the landlords could only recover costs as provided for within the meaning of S.33 (see paragraph 9 above). We considered that Mr Mackintosh was in some difficulty in having to explain and justify his solicitors' costs, in their absence. We were surprised and concerned that any solicitors should hold themselves out as competent to advise on collective enfranchisement matters yet tell their client that they lack the necessary expertise to appear before the tribunal.

29. We considered the narrative attached to Gates & Moloney's bill. We were concerned that it was not prepared until 14 June 2004, even though the work to which it related had commenced in January 2003. We concluded that the breakdown of work did not specify any investigation of questions arising out of the tenants' enfranchisement notice. We accepted that no points had been raised at the appropriate time challenging the validity or contents of the initial notice. However, we took the view that it had been necessary for the solicitors to peruse and assess the content of the notice in order to ascertain whether any such questions did arise, and to consider the position of the tenants of flat 2 who were also joint freeholders, as mentioned in correspondence. This was a relatively straightforward matter and did not justify the level of costs claimed. In addition, we noted that some of the items arose after the application to the tribunal, and these were of course excluded under S.33(5).

30. We therefore decided to reduce the landlords' legal costs to £150.00 plus VAT. We concluded that one hour's legal costs at that rate was enough to carry out the necessary work under S.33(1)(a). We confirmed also the agreed costs of valuation and conveyancing, under S.33(1)(d) and (e), at £235.00 plus VAT and £375.00 plus VAT respectively. Thus the total costs payable by the tenants pursuant to S.33 are £760.00 plus VAT.

31. We were aware that some confusion had arisen during the course of the enfranchisement process between the landlords and their solicitors over the relevance of the Commonhold and Leasehold Reform Act 2002. The issue of the correctness of the initial notice was not before us within these proceedings, but we comment that the tenants' solicitors were correct in their assertion that the sections of the 2002 Act dealing with the Right to Enfranchise (RTE) company, and the notice of intention to participate (sections 121 to 124), are not yet in force. It would have been a simple matter for the landlords' solicitors to ascertain this by reference to the relevant statutory regulations. It is regrettable that they failed to do so.

32. In relation to the landlords' own costs of £1,392.50, we recorded that Mr Mackintosh had withdrawn his claim for these costs, recognising that they were not recoverable.

Section 27A of the 1985 Act: Service Charges

33. We considered the landlords' solicitors legal costs of £1,500.00 plus VAT. It was clear that the lease terms, at paragraph 11 of the eighth Schedule, entitled the landlord to charge to the maintenance fund "all legal and proper costs incurred by the lessor in the running and

management of the Property". We had to determine whether the costs claimed were properly incurred and were reasonable.

34. Again we considered the narrative attached to Gates & Moloney's bill. Given the considerable sum claimed, we were again most concerned that the bill was not prepared until 14 June 2004. It looked as though the bill had only been forthcoming because of the imminent tribunal hearing date. It was most unsatisfactory that the period to which the bill related was unclear and that the narrative was so sparse and unspecific. Moreover, it was hard to reconcile the narrative with the 128 letters and 8 telephone calls referred to in the letter dated 2 March 2004. Arguably the first few items listed in the narrative, namely, a few letters to one of the lessees concerning arrears of service charges and ground rent, should have been charged to that individual lessee, and not to the maintenance fund. Some of the work, such as sending out copies of the service charge account in January 2004, was not legal in content.

35. Broadly we accepted Mr Wright's submissions that there was no evidence to justify the level of charges claimed, and that much of the correspondence between solicitors in the bundle of documents before us, demonstrated that Gates & Moloney had failed to address legitimate issues raised and so had not progressed matters . We considered it likely that Mr Mackintosh was correct when he said that much of the work charged for would have related to communication between himself and his solicitors. We concluded that it would not be reasonable for this element to be included in the service charges.

36. We therefore reduced the legal costs to £150.00 plus VAT, this being one hour of chargeable time, which we considered would have been enough to cover any necessary legal work as "proper legal costs incurred" within the terms of the lease.

37. Turning to the fourth item the landlords' own costs of management, we accepted Mr Wright's submission that there was no provision under the terms of the lease for the landlord to charge for his own time in managing the property. We noted that Mr Mackintosh also accepted this. He could have appointed managing agents and charged their reasonable costs to the maintenance fund, but he had chosen not to do this. He could not pass the responsibility for this choice to the tenants. It was the landlords' responsibility to comply with their obligations under the leases and to ensure that the requirements of the RICS Code were adhered to, including the independent certifying and auditing of the accounts.

38. We therefore disallow the landlords' own costs as they are not payable as service charges.

39. The tenants had made an application under S.20C of the 1985 Act that the landlords' costs of the proceedings should not be charged to the tenants as service charges. Mr Mackintosh confirmed that he did not intend to make any such charges so it was not necessary for us to make an order.

40. Finally, the parties had asked that the tribunal should give Directions for a timetable for the completion of the collective enfranchisement process and the transfer of the freehold. We considered this request, but decided that we did not have any jurisdiction to give Directions of this sort. This is because the contract between the parties was made when they agreed the purchase price of the freehold. The transfer should then proceed in order to perform the contract. If there is any failure to so do, then is open to the parties to apply to the county court for an order for specific performance, as the tribunal has no enforcement powers in this regard.

Conclusion

41. The tribunal therefore hereby orders:
    (1) that the tenants pay the landlords' legal costs in the total sum of £760 plus VAT pursuant to S.33 of the 1993 Act;

(2) that the landlords' reasonable legal costs payable by way of service charges are £150.00 plus VAT, pursuant to S.27A of the 1985 Act;

(3) None of the landlords' own costs are recoverable either pursuant to S.33 of the 1993 Act or S.27A of the 1985 Act.

Dated 2 August 2004

(signed)
.....
Ms Jane Talbot MA(Cantab)
Solicitor and Chairman of the Tribunal