LON/00AB/LSL/2004/0054

DECISION OF THE LEASEHOLD VALUATION TRIBUNAL ON APPLICATIONS UNDER SECTION 27(A) AND 20C OF THE LANDLORD AND TENANT ACT 1985 (AS AMENDED)

Applicant: Mr. T. C. Fransham

Respondent: London Borough of Barking and Dagenham

Re: 34 Blithbury Road, Dagenham, Essex, RM9 4PX

Application received: 11th May 2004

Hearing date: 4th August 2004

Members of the Residential Property Tribunal Service:

Mrs J. S. L. Goulden JP
Mr. D. D. Banfield FRICS

LON/00AB/LSL/2004/0054

34 BLITHBURY ROAD, DAGENHAM, ESSEX, RM9 4PX

1. The Tribunal was dealing with an application dated 1 May 2004 under Section 27A of the Landlord and Tenant Act 1985, as amended (hereinafter referred to as "the Act") for a determination whether a service charge is payable and, if it is, as to:-

   (A)

   (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

   and

   (B) an application dated 1st May 2004 under Section 20C of the Act to limit landlord's costs of proceedings.

2. The Applicant is Mr T C Fransham. The Respondent is the Mayor and Burgesses of the London Borough of Barking and Dagenham.

3. The Applicant is the lessee of 34 Blithbury Road, Dagenham, Essex, RM9 4PX (hereinafter referred to as "the property") under a lease (hereinafter referred to as "the lease") dated 24 February 2003 and made between the Respondent (1) and the Applicant (2) for a term of 125 years from 24 February 2003 at the rents and subject to the terms and conditions therein contained.

4. The service charge years in dispute are 2003/2004 and 2004/2005.

5. The Tribunal was advised by the Respondent in its statement to the Tribunal that the background to this matter is as follows:

   "The applicant, Mr Fransham became a leaseholder of the landlord on 24 February 2003.

His leasehold property is situated within the block 34-48 Blithbury Road, Dagenham, a block which receives the services of repairs and maintenance, caretaking plus insurance.

The applicant also contributes towards a reserve fund account to cater for major works that will be carried out on the block".

Property

The property 34 Blithbury Road is located within block number 34-48 Blithbury Road, Dagenham, RM9 4PX.

The building comprises of 8 flats, with number 34 being on the first floor at one end of the building. The building has a central communal part where the stairway leads directly to the 4 flats in the middle of the building. There are also communal parts outside of the building.

Service Charge apportionment

Service charge costs are apportioned equally among the 8 flats in the building on the basis of reasonableness. Provision for this system of apportionment is made on the lease under paragraph 2 of part one, fourth schedule. It allows for a reasonable and proper method to be used to apportion charges and the method is as ascertained by the landlord.

The applicant pays 1/8th of the cost of services provided to the block".

6. The Applicant, in his application, requested a paper determination and this was confirmed in Directions of the Leasehold Valuation Tribunal dated 2 July 2004.

7. The points in issue were stated by the Applicant to be as follows:-

1) *"That I am allowed to obtain my own Building insurance rather than have to accept the Freeholders preferred insurance company as I can obtain it at more competitive rate and better cover from my Home insurance company.*

2) *If the freeholder can charge me for Caretaking service then they should keep to what they agreed £1.00 per week for the next 52 weeks, but seeing that I have only 20 yards of communal footpath that I use and my neighbour uses I see no reason why they should charge me for this service and especially that it supposed to start on the 1 April 2004 and to date it has never been done. This is after the Manager Carting for the Freeholder Mr Derek Barclay called to look at the path.*

3) *I do not see why I have to pay contribution to the overhaul maintenance of the property when in the main nothing gets done for my neighbour or myself.*

4) *I do not see why the Freeholder can charge 10% on all services including the Building Insurance this make the policy completely uncompetitive as I can get the policy cheaper with better cover, plus I would get overall reduction on both my home contents insurance and buildings cover if I had them with the same insurers".*

8. The Tribunal sets out its determinations under the appropriate heads as referred to by the Applicant in paragraph 7 above.

9. The Tribunal has considered the relevant clauses in the lease which is its starting point as the formal contract between the parties and which therefore sets out the respective rights and obligations between them.

10. The obligation on Mr Fransham to pay his service charge in respect of those items set out in the Fourth Schedule to the lease is contained in Clause 4.3.

Building Insurance

11. In the Applicant's statement which accompanied his letter to the Tribunal dated 10 July 2004, Mr Fransham stated:-

> *"If I was able to obtain insurance from Halifax plc for Building cover it would be less than £60.00 per annum and there would be no 10% Maintenance charge placed on it.*
>
> *The insurance with Zurich valuation on my property is £71,219.00 this under values my property considerably as in the last 4 months Abbey has valued my property at £110K this would mean I would have to sue the LBBD for the difference.*
>
> *Halifax plc Building covers is unlimited and I would not have to worry about taking Legal Action against the LBBD if my property was damaged to the point it had to be completely replaced.*
>
> *I consider that LBBD has under insurance my property and the policy is inadequate for the purpose it is required.*
>
> *Furthermore, just recently I suffered storm damaged to my fence and gate, I have found out that Zurich has exclusion clauses with respect to fences, hedges and gates, this further shows the policy is inadequate for the purpose it designed for".*

12. The Respondent supplied a copy of the insurance booklet and stated:-

"The applicant disputes this charge because according to him, he can obtain a 'better deal with the Halifax'. The estimated charge made for this service for the 2003/04 period was £92.00 and the same amount is maintained for the 2004/05 estimate.

Our response to the applicant's charge is that this service is mandatory in order to protect the interest of our residents as a whole. The cover provided is to protect the entire building from accidents such as flood or fire.

The cover is taken out with Zurich Municipal Insurance Company, which is well experienced in the provision of insurance cover for local authorities' properties.

We believe that the cover taken out with this company is adequate for the building. The current cover for the applicant's building is for the sum of £71,219 and this covers risks such as fire, explosion, lighting, earthquake, smoke, riot, civil commotion, strikes and labour or political disturbances.

The applicant may be able to bring an action against the landlord where the landlord has not provided adequate cover for the building or where there is excessive premium to be paid.

The contract to Zurich to provide insurance service was conducted in line with the Council's procurement procedure, in which three insurance companies tendered for provision of the service. One was rejected as it was only prepared to provide restricted cover. The second tender was also rejected because its price was high and the level of services offered was inadequate.

The contract with Zurich was entered into before the introduction of the Leasehold Reform Act 2002, which allows leaseholders to nominate a contractor from whom the landlord may obtain an estimate, where the cost of the service to each resident exceeds £100 per year.

The lease also provides under paragraph 6.1 part two of the Fourth Schedule that the landlord has an obligation to keep the property insured against the loss or damage while paragraphs 2 and 3, part one of the same schedule oblige the leaseholder to pay a proportion of the cost and expense of this.

Evidence from a neighbouring local authority suggests that a one bedroom property is insured at an estimated yearly premium of £100. The policy is also taken out with Zurich Municipal.

Any insurance cover taken must not only cover the leaseholder's interest but also that of the landlord, for all the risks and level of cover required under the lease".

13. The Tribunal has considered the Fourth Schedule to the lease. Paragraph 6.1 and 6.2 related to the insurance and states:-

"6.1 *To insure and keep insured the Property and at the discretion of the Corporation any other part of the Estate against loss or damage by fire tempest flood and such other risks as are at the date hereof or as may from time to time at the discretion of the Corporation be included in the respective insurance policies maintained by the Corporation in respect of premises owned by it similar in kind to the property being insured in the full reinstatement value thereof and whenever required produce to the Lessee evidence of the most recent payment of premium for*

the same and shall if so required permit the Lessee to inspect the said policy or policies of insurance on any week day (except public holidays) between the hours of 9.30 am and 4.30 pm at 90 Stour Road Dagenham Essex and (subject to sub-paragraph 2 of this paragraph) to cause all monies received by virtue of such insurance to be laid out in the re-repair rebuilding or reinstatement of the property to which such relate.

6.2 *In any case in which within three years of the Property or any part thereof suffering any insured loss or damage it is not possible to enter into a contract for the rebuilding or reinstatement thereof the insurance monies and all interest earned thereon shall be divided between the Corporation and the Lessee in the ratio of the open market values of their respective interest in the Property immediately prior to the occurrence giving rise to the insured loss or damage (there being taken into account the likelihood of the Lessee being able by virtue of any statutory provision to retain the use and occupation of all or any part of the property after the expiry of the term) and any dispute as the division of such insurance monies shall be referred to arbitration pursuant to sub-clause 7.5 of this Lease".*

14. The Respondent has a clear duty to insure and the Applicant has a clear duty to pay his proportion thereof within the service charge.

15. The Respondent cannot be criticised for arranging a block policy, and the Tribunal does not consider it would be either appropriate practically or permissible under the terms of the lease for the Applicant to arrange his own insurance cover. The Tribunal rejects Mr Fransham's assertion that to prevent his arranging his own insurance would be a breach of his human rights.

16. By clause 10.16 of Part 3 of the Fourth Schedule, the Respondent is entitled to recover an administration and management charge and the Tribunal considers 10% not unreasonable.

17. The sum insured represents the rebuilding costs, and not the total value of the property. The property does not therefore appear to be undervalued. In any event the Respondent covenants in the lease to insure in the full reinstatement value and if it were not to do so, the Respondent would be in the breach of its contractual obligations to the Applicant.

18. From the booklet provided, it would appear that fences, hedges and gates are included in the insurance cover.

19. The Tribunal determines that the estimated charges for insurance in respect of the years 2003/2004 and 2004/2005 in the sum of £92 in each respective year, if incurred, would be reasonable.

Caretaking

20. The Applicant states:-

> *"I see no reason why I should continue to pay the Caretaking costs as I am not getting any service and I have like the leaseholders at 36, 46 and 48 have only strip of 20 sq meters of tarmac, that in the case of 36 and myself its damaged and has been reported but nothing has been done by LBBD".*

21. The Respondent states:-

> *"The applicant in his claim disputes this charge on the basis that no work has been done. Our response is that caretaking service has been provided to the block 34-48 Blithbury Road since 6 May 2004.*

This service is aimed at improving the general condition of the block. The service was introduced into the community in December 2003 and started on 34-48 Blithbury Road on 6 May 2004, a period which falls within the financial year April 2004 to 31 March 2005.

The charge made for this service is £52 per year and it is an estimate pending when the final account is available. The charge made is based on the anticipated level of service that will be carried out.

Duties carried out by caretakers are:

- *Sweeping of the internal parts of the block.*
- *Mopping of the stairs.*
- *Picking of litter around the block.*
- *Removal of cobwebs in the common parts.*
- *Removal of bulk rubbish.*

The service provided is both routine and responsive, as inspections are carried out to the block to ascertain the condition and to respond accordingly.

The landlord agrees that frequency of the service has not been as anticipated, but where service level falls, there will be commensurate reduction in the charge".

22. The Respondent provided a quality control monitoring form which set out the caretaking duties carried out between 6 May 2004 and 24 June 2004. The Tribunal noted that the inspections on 16 and 24 June were not carried out due to staff shortages.

23. The Tribunal has considered the Fourth Schedule to the lease. Paragraph 9.3 of Part Two of the Fourth Schedule relates to caretaking

and imposes on the Respondent an obligation to provide if applicable, a suitable caretaking service.

24. The Tribunal determines that the estimated figure of £52 in respect of the service charge year 2004/2005 if incurred would be reasonable.

Maintenance

25. The Applicant states:-

> *"With respect to Maintenance Charges that are levied at £30.00 per year, up to the last few months nothing had been done to my property the listed of work that LBBD had done between 2003 and April 2004 was solely to middle block of flats, 38-44. As the LBBD has carried out some repairs to my property over the last few months I do not see why we should not contribute to them even seeing that LBBD made mess of the jobs.*
>
> a) *LBBD were asked to come around to check my door, with respect to the lock, instead of them calling to myself they went to the main part of the block wasting my time waiting for the to call, they called back later.*
>
> b) *LBBD called to repair some guttering they took 2 months to call this was twice as look as they stated. When they did the repair on the 25 June 2004 they did not correct the leak they had to comeback and when they called back they damaged a bracket that support the roof tiles that to date has not been repaired.*
>
> c) *LBBD has not yet carried out a repaired to broken fence and gates that allows foxes to come into my garden and damage the lawn that has just been laid.*

d) *LBBD has done nothing about the pathway that is damaged and has been reported by Leaseholders at 36 Blithbury Road".*

26. The Respondent states:-

"In his application, Mr Fransham disputes the estimated charge of £30 for repairs and maintenance for the 2003/04 and 2004/05 period because according to him, he did not receive any service.

Our response to this is that the yearly estimated charge of £30 covers the cost of anticipated repairs and maintenance to the block for each of the 2 years in question (2003/04 and 2004/05). The total cost of the repairs carried out will be equally divided amount 8 flats in the block. Our financial year runs from 1 April to 31 March.

The final account for the 2003/04 period will be ready in September 2004. This is in line with legislation, according to Section 20(b) Landlord and Tenant Act 1985, which allows the landlord to produce the final account not later than six months after the end of the financial year to which the account relates to, which makes a total of 18 months.

On preparation of the final account, commensurate adjustments will be made to the charges made to the account to reflect the actual cost of spending on the block.

For the 2004/05, final account will be available in September 2005, which is six months after the end of the 2004/05 financial period.

The applicant's lease dated 24 February 2003, provides under paragraph 7 and 8 part two of the Fourth Schedule that the

landlord undertakes repairs to the building while paragraph 2, part one of the Fourth Schedule defines what the service charge covers and paragraph 3 of the same part places responsibility on the leaseholder to pay a proportion of the cost incurred".

27. The Respondent provided details of the block repairs carried out for each of the service charge years in dispute.

28. The Tribunal has considered the Fourth Schedule to the lease. Paragraph 7 & 8 of Part II of the Fourth Schedule imposes an obligation on the Respondent as follows:-

> "*to keep in repair the structure and exterior of the building in which the Property is situate (including the Property) and to take reasonable steps to make good any defect affecting that structure".*

Repair structure of Estate

8. *To redecorate, renew, amend, clean, paint and generally to repair and maintain the following except such parts thereof as are the responsibility of the Lessee by the terms of this Lease*

8.1 *the structure of the Estate and every part thereof including in particular but without prejudice to the generality thereof the roofs foundations external walls internal structural walls and internal party walls of any building window frames balconies and doors opening thereunto and any doors opening onto the exterior of a building and the frames thereof chimney flues and stacks gutters and rainwater and soil pipes thereof*

8.2 *any sewers drains channels watercourses gas and water pipes cables and wires and supply lines and any other such conducting media which directly or indirectly serve the Property situate in under upon or over the Estate whether or not such media are situated within the Property.*

8.3 *any boilers and heating and hot water apparatus or equipment of any kind serving the Estate or part thereof save and except any heating apparatus installed in the Property serving exclusively the Property and not comprising part of a general heating system serving the whole or part of the Estate*

8.4 *the lift shafts lifts and machinery appertaining thereto*

8.5 *the passages landings staircases and any other internal communal parts of the Estate and any other premises or areas connected with the provision of such services and other facilities as may be from item to time provided for the benefit of the Estate or any part thereof".*

29. The yearly sum of £30 per annum is an estimate and is restricted at present to that sum plus inflation under the Applicant's S125 Offer Notice. The Tribunal determines that this sum in respect of maintenance/repairs, if incurred, would be reasonable.

Administration and Management

30. The Applicant states:-

> "*I see no reason to pay 10% on my building insurance when the policy is inadequate for my needs*". Mr Fransham makes no specific complaint under this head in respect of any other matter.

31. The Respondent states:-

> *"It is a condition of the lease under paragraphs 10.14 and 10.16; part three of the fourth schedule that costs incurred by the landlord in the management of the estate is a part of the service charge. Paragraphs 2 and 3.1 of part one of the fourth schedule oblige him to pay this. The landlord charge 10% of the total service cost as management fee. This charge compared to other local authorities is very low, as it does not fully cover the actual cost of managing the building and estate".*

32. The Tribunal has considered the Fourth Schedule to the lease and in particular Clause 10.16 of Part 3 (as referred to in paragraph 16 above).

33. The Tribunal determines that an administration/management charge of 10% is not unreasonable.

S20C Application to limit landlord's costs of proceedings

34. The Applicant makes no specific representations under this head.

35. The Respondent states that they are entitled to put the landlord's costs of proceedings on the service charge account in accordance with paragraph 10.14 of Part Three of the Fourth Schedule to the lease.

36. The Tribunal has considered not only the paragraph referred above but also paragraph 11 of Part Three of the Fourth Schedule to the lease. These are set out below:-

10:14 "*Any other costs expenses and outgoing reasonably and properly incurred by the Corporation in connection with the management of the Estate.*

11 *Insofar as the Corporation may at its discretion consider it necessary or desirable in connection with the obligations powers and requirements of this Schedule or with the general conduct management and security of the Estate and all parts thereof the Corporation may*

11.1 *appoint management agents for the purpose of managing the Estate*

11.2 *employ architects surveyors solicitors accountants contractors buildings gardeners and any other person firm or company*

11.3 delegate any of the things or matters mentioned in this paragraph to any person firm or company whose business it is to undertake such".

37. Mr Fransham has every right to bring his application before the Tribunal and the Respondent has every right to defend the same, which must incur costs to the Respondent.

38. It is clear from the wording of the lease that such costs may be placed to the service charge account and the question for the Tribunal is whether it is "just and equitable" that it should so in accordance with the Act.

39. The Tribunal is unable to take into account the personal circumstances of any party and/or their ability to pay.

40. The Applicant has not succeeded in substantiating his claims.

41. The Tribunal determines that the costs incurred by the Respondent in connection with these proceedings before this Tribunal are to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable.

Application for Costs

42. The Respondent made an application for costs against the Applicant personally under Schedule 12 (Leasehold Valuation Tribunals; Procedure) of the Commonhold and Leasehold Reform Act 2002, paragraph 10 of which states:-

> (1) a leasehold valuation tribunal may determine that a party to proceedings shall pay the costs incurred by another party in connection with the proceedings in any circumstances falling within sub-paragraph (2).

(2) The circumstances are where:-

(a) he has made an application to the leasehold valuation tribunal which is dismissed in accordance with regulations made by virtue of paragraph 7, or

(b) he has, in the opinion of the leasehold valuation tribunal, acted frivolously, vexatiously, abusively, disruptively or otherwise unreasonably in connection with the proceedings.

(3) The amount which a party to proceedings may be order to pay in the proceedings by a determination under this paragraph shall not exceed:-

(a) £500, or

(b) such other amount as may be specified in procedure regulations

(4) A person shall not be required to pay costs incurred by another person in connection with proceedings before a leasehold valuation tribunal except by a determination under this paragraph or in accordance with provision made by any enactment other than this paragraph.

43. In support of this application for penal costs to be awarded to the Respondent, it was stated "*we consider him to have acted frivolously and vexatiously in bringing this action. The Homeownership Section spends a great proportion of time dealing with complaints from the applicant, which since February 2003, has accumulated to a total of 21 Corporate complaints. Aside from these, there have been numerous telephone calls, in which he demands instant attention and acts in*

threatening manner towards staff". The Tribunal was supplied with documentary evidence in support.

44. Although the Applicant does appear to have made a great number of complaints to the Respondent, the Tribunal is only concerned with the proceedings before it.

45. The power to award penal costs should be exercised with reluctance and, in the view of this Tribunal, the Applicant cannot be said to have acted frivolously, vexatiously, abusively, disruptively or otherwise unreasonably in connection with these proceedings. The latter power appears very wide, but is construed restrictively under the ejusdem generis rule of construction (whereby earlier specific words limit 'sweeping up' expressions to be ' of the same kind').

46. Accordingly, in the particular circumstances of this case, no order is made as to costs.

Chairman .....

Date 17 August 2004