CHI-00HN-LIS-2006-0004

THE RESIDENTIAL PROPERTY TRIBUNAL SERVICE

DECISION OF THE SOUTHERN LEASEHOLD VALUATION TRIBUNAL ON AN APPLICATION UNDER SECTION 27A OF THE LANDLORD AND TENANT ACT 1985

FLATS 2 AND 5 MIAMI COURT 27A SURREY ROAD BOURNEMOUTH

Applicant:	Miami Court Management Ltd (Freeholder)
Respondents:	Theresa Mary Ghwedar (Flat 2) Peggie Daphne Wiedermann (Flat 5)
Date of hearing:	31 October 2006
Date of inspection:	7 August 2006
Appearances:	Mr Ian Hepple (Homecare Property Management Ltd) for the applicant Ms Orla Gilligan LLB (solicitor) for the Respondents

Members of the Leasehold Valuation Tribunal:

Mr MA Loveday BA(Hons) MCIArb
Mr K Lyons FRICS
Mr P Boardman MA LLB

BACKGROUND

1. This is an application under section 27A of the Landlord and Tenant Act 1985 in respect of service charges for a block of flats in Bournemouth. The matter was transferred to the Tribunal by an order of Bournemouth County Court under paragraph 3 of Schedule 12 to the Commonhold and Leasehold Reform Act 2002. On 7 August 2006, the Tribunal determined as a preliminary issue that the relevant costs of a special levy demanded on 6 and 27 April 2005 were not recoverable under the terms of the lease. It adjourned the respondents' cross application to this hearing.

2. The Tribunal inspected the premises for the purpose of the previous hearing, and did not need to inspect again. For the purpose of the adjourned application, the Tribunal was presented with an additional bundle containing both applicant and respondents' documents running to over 500 pages.

THE ISSUES

3. At the start of the hearing, Mr. Hepple indicated that the landlord did not intend to seek to recover from the lessees by way of the service charges the costs of the roof works which were the subject of the Tribunal's previous determination. The Tribunal therefore did not proceed to make any further determination in respect of those relevant costs.

4. The directions given on 7 August 2006 stated that the issue was the reasonableness of service charges for the period from 25 March 2002 to 4 April 2006. In accordance with the directions, the respondent served a statement of case identifying the issues accompanied by a Scott Schedule. With the help of the parties, the Tribunal identified three matters in this document for which a determination was now sought. These were:

   (a) Whether relevant costs of £1,600 for garden wall repairs in 2004/5 were reasonably incurred by the landlord within the meaning of s.19 of the Landlord and Tenant Act 1985;

(b) Whether accountancy costs for 2002-5 were reasonably incurred within the meaning of s.19 of the Act;

(c) Whether insurance costs for 2002/3 were reasonably incurred within the meaning of s.19 of the Act.

The respondents did not challenge any of the other relevant costs for the period 25 March 2002 to 4 April 2006.

5. The facts are set out in paragraphs 7-10 of the determination of 7 August 2006 and need not be repeated here.

THE GARDEN WALL

6. The issues here were whether the applicant "incurred" the expenditure within the meaning of s.19 of the 1985 Act, and whether the costs of the works were excessive.

7. As to the first of these, the respondents' case was set out in the Scott Schedule and supplemented by submissions at the hearing. The contention was that a garden wall had collapsed in or around January 2002 in a storm, and that this was the responsibility of the lessee of the garden flat, a Mr. D. Andermahr. Mr. Andermahr approached the applicant for help in paying for repairs to the wall, but no assistance was given. According to the applicant's bank statements, on 16 August 2002, £1,600 had been drawn on the applicant's bank account (the bundle included a statement showing cheque no.100190 being drawn for this amount on that date). However, Ms. Gilligan submitted that this money had not been paid out for works. The applicant had produced an invoice for £1,600 dated 15 July 2002 from a builder Kevin Keefe. This was for works "to re-build rear retaining wall, re-using existing blocks and forming new piers" carried out between 8 and 12 July 2002. The receipt was endorsed with the words "paid 24/7/02 100190". The respondents accepted that the works to the retaining wall had been carried out by Mr Keefe, but Ms. Gilligan suggested that the builder had been paid for this work by Mr. Andermahr, and that the endorsement was added afterwards. As evidence of this, Ms. Gilligan relied on the following:

(a) The respondents had not been able to see the original of the invoice.

(b) The applicant's company accounts did not show the amount as having been paid out. The 2005 profit and loss account included an item of £1,310.36 apparently owed by Mr. Andermahr as having been written off.

(c) In a letter to the first applicant dated 4 April 2006, Mr. Anthony Ford, of the managing agents Castleford Management, stated that "as far as I am aware, Mr Andermahr paid for the cost of the wall, which was £1600".

In the circumstances, Ms. Gilligan invited the Tribunal to find that the £1,600 paid out of the applicant's bank account did not go to Mr. Keefe and that the words which appeared on the invoice had been added afterwards. Furthermore, , the accountant should not have accepted the information provided by the applicant when preparing the accounts.

8. Ms. Gilligan called the first respondent's husband Mr. Ghwedar. Mr. Ghwedar is an engineer. He stated that the cost of the works was excessive because only recycled bricks had been used. The accounts for the applicant did not show the wall as a separate expense. Mr. Ghwedar stated that the loss to the applicant was £2,910.36 in respect of both the payment of £1,600 and an additional sum of £1,310.36 in "trade creditors" wrongly written off in the 2004/5 annual accounts. When questioned by the Tribunal, Mr. Ghwedar did not know whose handwriting was on the receipt. The letter of 4 April 2006 was a response to faxes from the first respondent, but he did not have copies. Mr. Ghwedar stated that the cost of the works had been demanded from Mr. Andermahr, but that he had not paid this cost.

9. Mr. Hepple stressed that the respondents admitted both that the landlord could recover the costs of the works under the lease and that the works were in fact carried out by the contractor. As evidence that the applicant incurred the cost, he relied on the bank statement and the endorsement on the invoice which corresponded. He also relied on the minutes of a board meeting dated 5 March 2004 which recorded the first respondent as being present. The minutes stated that Mr. Ford had authorised the re-building of the wall without consulting with Mr. Andermahr, paid the contractor through company funds, and then

transferred the charge to Mr Andermahr. The meeting therefore resolved "unanimously" to accept the cost of re-building the garden wall. Mr. Hepple called Mr. Roger Morris ACA, ATII a partner in the firm of Morris Lane accountants. He had the files for each of the years in question. In the relevant year one of his staff had prepared a schedule of payments which he produced at the hearing (and which Ms. Gilligan did not object to). This showed cheque no. 190 for £1,600 with "Kevin Keefe" as payee dated "9/8/02". The description was "re-build rear garden wall". This description would have been picked up from the company's purchase ledger. There was also a summary of payments taken from bank statements showing a similar entry. The documents were then used to prepare the company's annual accounts. The suggested £2,910.36 was double counting. The £1,310.36 could not be added to the £1,600. The £1,310.36 formed part of a larger sum of £2,628. When cross examined, Mr. Morris stated that the summary of bank statements was prepared from entries on the cheque book stubs soon after the end of the March 2003 accounting year. However, the books and records list was not on the file. The accounts produced by his firm were not an audit. Ms. Gilligan cross-examined Mr. Morris extensively on the figures in the profit and loss account for 2004/5.

10. The Tribunal first has to determine the materiality of Ms. Gilligan's arguments about the 2004/5 profit and loss account. Mr. Hepple gave an explanation to reconcile the figures. However, the Tribunal considers that this contention is wholly irrelevant to the issues which it has to determine. s.19(1) of the Act requires the Tribunal to consider whether "*relevant costs ... are reasonably incurred*" and to limit the amount payable by any lessee accordingly. A "*relevant cost*" under s.18 of the Act is a "*cost ... incurred ... by or on behalf of a landlord ... in connection with the matters for which the service charge is payable.*" In this instance, the Tribunal is mindful that it has only been presented with company accounts, which for tax purposes necessarily involve concepts of profit and loss. There is no suggestion that as part of their service charges the respondents are liable for any loss sustained by the company. If the Tribunal is satisfied that the costs have been paid by the applicant, that cost has been "*incurred*" for the purposes of s.19(1). However those costs may be treated

in the company accounts, the Tribunal has no jurisdiction to consider losses sustained by the company: that is solely a matter for the courts.

11. The Tribunal has no hesitation in finding that a relevant cost of £1,600 was in fact "incurred" for rebuilding the wall. The evidence of the invoice and bank statement is compelling. The Tribunal also accepts that the schedule produced by Mr. Morris was made from the cheque stubs soon after the end of the accounting year. The respondents' primary contention would have required forgery of three documents (the receipt, the cheque stub and the purchase ledger) of which there is no direct evidence. Furthermore, if Mr. Andermahr indeed paid this bill, it would have been a simple matter to produce some evidence from either him or Mr. Keefe to this effect. The letter of 4 April 2006 is ambiguous and was made nearly three years after the events in question. That the money was laid out by the applicant is put beyond doubt by the minutes of the meeting of 5 March 2004 which was attended by the first respondent. Whether the board was right or wrong to pursue Mr. Andermahr for re-payment of the £1,600 depends on the terms of his lease. However, in the light of Ms. Gilligan's concession that these costs were recoverable under the terms of the respondents' leases, that is not for the Tribunal to determine.

12. Finally, the Tribunal must consider whether the cost was "reasonably" incurred. The suggestion that £1,600 was excessive was not supported by any evidence whatsoever. This was a contract which took two days to complete and it involved re-building a retaining wall in the garden. The cost of £1,600 is not so obviously high that this Tribunal would find it was not reasonably incurred.

13. The Tribunal was not invited to consider whether costs were limited by s.20 of the 1985 Act or to consider any application under s.20ZA of the Act.

ACCOUNTANCY

14. Morris Lane's accountancy costs amounted to £764 in 2002/3, £735 in 2003/4 and £470 in 2004/5. Ms. Gilligan accepted that the costs were recoverable under the terms of the leases. She also accepted liability to pay £400 + VAT in 2004/5

but submitted that the relevant costs of accountancy should be limited to £350 + VAT for 2002/3 and 2003/4. The respondents contended that Morris Lane's accounts did not equate with figures in bank statements. Ms. Gilligan relied on a letter from Morris Lane dated 23 June 2004 which stated that they had not increased the fee from £350 for a number of years and that they wished to increase their fee to £400 + VAT per annum.

15. Mr. Hepple explained that the accountants charged a fee of £350 + VAT (£411.25) in 2002/3 and 2003/4 for basic accountancy purposes. On 22 September 2004, the company board authorised additional fees to be paid as a result of the complex accounting scheme operated. The basic fee covered the preparation of company financial statements which doubled as service charge statements. At the end of the financial year, the management accounts were sent to the accountants who prepared and produced copies of the accounts. Mr. Morris gave evidence. As for the 2002/3 fee, he relied on a letter to the first respondent dated 31 March 2004 which explained the fee of £763.50. This included the basic fee of £411.25 for the 2002/3 accounts (£350 + VAT), together with additional costs of £91.25 for VAT on the 2000/1 accounts, £61.25 for VAT on the 2001/2 accounts and £199.75 for "sundry costs" between 2000 and 2003. The latter was charge for additional corporation tax work (3 hours billed at £60-£70 per hour). As for the 2003/4 accounts, there had been considerable number of direct enquiries from lessees for which an additional charge of £175 + VAT (£205.62) was made on an hourly basis. For small companies, his firm offered a basic service for a low fixed fee involving preparation of accounts. Where there was extra work, he charged extra on an hourly basis. Eventually, the Directors had instructed the accountants not to answer requests from lessees directly since this was leading to a significant increase in the accountancy charges. In 2004/5 his fees therefore fell back to the basic fee of £400 + VAT.

16. The Tribunal is satisfied that the relevant costs of accountancy in the two years were reasonably incurred. These are relatively modest sums. The combination of a fixed fee for a basic service plus additional time based fees for additional work is not unreasonable. It is clear that additional costs were incurred in these

(b) 2003/4	Accountancy	£ 735
(c) 2004/5	Garden wall repairs	£1,600
	Accountancy	£ 470

21. As a final observation, the Tribunal notes that many of the issues raised in this application have arisen because the applicant has for many years prepared only company accounts. The leases have a requirement at clause 2(2)(b) for the applicant to produce annual "accounts" and the evidence of Mr. Hepple was that the applicant's company accounts also served as the service charge accounts. Although such a course may mean a marginal saving in accountancy costs, this application demonstrates why company accounts should not be used as service charge accounts. Moreover, such accounts are unlikely to comprise a valid summary of costs under the presently worded s.21 of the 1985 Act or a proper statement of account under the new s.21 of the Act when this comes into force.

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Mark Loveday BA(Hons) MCI Arb
Chairman
Dated: 25 November 2006