SOUTHERN RENT ASSESSMENT PANEL AND LEASEHOLD VALUATION TRIBUNAL

In the matter of sections 27A and of section 20C of the Landlord & Tenant Act 1985 (as amended) and of section 35 of the Landlord & Tenant Act 1987 (as amended)

and in the matter of Stamford Lodge, Hayling Island, Hampshire

Case Number: CHI/24UC/LSL/2003/0001
CHI/24UH/LVT/2003/0001

Between

Mr J Delgaty and Mrs M Tipton — Applicants

and

Mr & Mrs A W Sage — Respondents

Hearings: 23rd April and 9th June 2004

Appearances :

The Applicants in person

Mr. N Faulkner FRICS for the Respondents

Decision of the Tribunal

Issued: 22nd June 2004

Tribunal

Mr R P Long LLB (Chairman)

Mr M R Horton FRICS

Mr P R Boardman MA LLB

Decision

1. The applications made in this matter by Mr Delgaty and Mrs Tipton are:
   a. for a determination of the reasonableness and payability of service charges in the years 2002 and 2003 pursuant to section 27A of the Landlord & Tenant Act 1985 (as amended ("the Act")
   b. for the variation of their leases pursuant to section 35 of the Landlord & Tenant Act 1987 and
   c. for an Order that the landlord's costs incurred in these proceedings are not relevant costs to be included in determining the service charge pursuant to section 20C of the Act.

2. The tribunal has determined, for the reasons set out below, that with the exception:

   a. of the sums demanded as a contribution to the reserve fund in the year 2003, and
   b. of the items charged in the year 2003 as arrears charges

   the service charges for the years 2002 and 2003 are reasonable and are recoverable.

3. The application to vary the leases stands adjourned until the first convenient date after 9th September 2004 to allow the parties to agree and to conclude a deed of variation of the leases in a manner acceptable to them following the discussions between them in the course of this hearing.

4. The tribunal declines to make an Order under section 20C of the Landlord & Tenant Act 1985.

Reasons

Background

5. Stamford Lodge is a detached Victorian villa that has at some time been joined to an adjacent building, that we were told once was a dairy, to make a larger building. It has subsequently been converted into flats. Originally there were five such flats, three in the house and two in the former dairy, but one of the flats at the rear of the house has since been divided into two. Four of the flats belong to Mr & Mrs Sage, who are the freeholders. The remaining two are now let on long leases to Mr Delgaty and to Mrs. Tipton. We were told that the property has been Grade 2 listed as being of architectural merit.

6. It was apparent from our inspection that the property has been neglected in some measure. We could see, for example, that the roof appeared to require attention, and that much of the exterior of the property has not been decorated for a number of years. Those parts that have been decorated have been treated in different ways. Mr. Faulkner, the landlord's agent placed a copy of a report by Mr Foster a building surveyor before us as part of the evidence that he advanced on behalf of his clients, and that report, which was not challenged as

to the defects it reported, made it plain that the property is in a rather poor condition.

7. The leases under which Mr Delgaty and Mrs Tipton hold their respective flats were both granted for a term of ninety-nine years from 1981. They contain service charge covenants whose essence is that at the cost of the various lessees the landlord is to maintain the structure of the building and to insure it, to decorate the exterior and (with an exception mentioned in paragraph 13 below) to clean and light the common parts. The service charge may include the cost of gardening and of "all other expenses normally incurred in the management of a block of flats" and "all other expenses (including the transference of money to a reserve fund) included in the aggregate maintenance fund defined in the fifth schedule". There is power in clause 1(d) of the lease to borrow in case there is a shortfall of funds to enable the landlord to carry out his obligations.

8. The lessees are to pay sums on account of service charge by reference to the preceding year's costs, after which there is a balancing exercise. These arrangements are more than usually detailed, and the manner of their operation is less clearly expressed than in many of the leases that come before the tribunal.

9. The remaining four flats are owned by Mr & Mrs Sage. We were not told whether similar leases exist in respect of those flats. It is, however, clear that Mr & Mrs Sage are in any event to pay the balance of the cost of maintenance after the contributions made by Mr Delgaty and by Mrs Tipton. That is because they are the landlords under the leases held by the applicants. Those leases oblige them to carry out the maintenance, and there is no-one else to pay the balance of the cost of that maintenance.

10. The uncontested evidence before us was that for many years past, probably from about 1986 onwards, the landlords have done no more than to insure the property and to collect from the lessees their due shares of the insurance premium. In practice Mr & Mrs Sage repaired and maintained their parts of the whole of the building and they expected Mr Delgaty and Mrs Tipton's predecessor in title, a certain Mr Charles Spong, to do the same. Mr Delagty and Mr Spong appear in practice to have gone along with this arrangement. They understood that work had been done to the roof in 1984 by a Mr Hadagan, and believed as a result that the roof was in good condition. They did not take any steps to compel Mr & Mrs Sage to perform their repairing covenants under the lease.

11. The result of this arrangement, which seems to have had the effect of causing minimal expenditure by the parties to it upon the maintenance of the property, has been that the property is now in bad condition, as evidenced by the report by Mr Foster. He says that it is likely to require the expenditure of some £70,000 to bring it into proper condition, although no tenders for the work have yet been obtained.

The Service Charge matters

12. Mrs Tipton bought her flat in 2002, or a little before that. As a result of enquiries made by her solicitors steps were taken to put the service charge mechanism back into operating order, and an account has been prepared for 2002, and a budget for 2003. Items in the accounts and in the budget are the subject of the application to the tribunal by Mr Delgaty and by Mrs Tipton under section 27A of the Act to determine the reasonableness and payability of the service charges for those two years.

The 2002 Accounts

13. For the year 2002 Mr Delgaty and Mrs Tipton initially questioned five of the elements making up the service charge. They were:

A1	Work to the south west walls
A2	Work to a sash window
A4/5/9/10	Main flat roof repair
A7	Cost of communal lighting
A8	Cost of insurance

The numerical references are to the numbering of the paragraphs in the list of charges for 2002 with comments from both sides that was before us. It became apparent during the hearing that Mrs Tipton's lease obliged her to meet the cost of the electricity for common lighting under paragraph A7, and objection to that item was dropped on the basis that it would be removed from the account and Mrs Tipton would bear the cost in accordance with her lease.

A1 - The downpipe, the guttering and the fence

14. For some years prior to 2000 an ivy plant, whose roots were in land retained by the landlords, grew up and covered much of the south west wall of the main part of the building. Eventually Mr Sage cut the plant at its roots at Mr Delgaty's instigation and the plant was left to wither and die. It remained attached to the wall for more than a year but eventually fell during a storm, and took a cast iron down-pipe and part of the box guttering with it. The same storm damaged some fencing. A Mr Fairs repaired the down-pipe by replacing it with a plastic one, making a further hole in the box guttering to enable him to do so. At the same time he replaced two fencing panels, one strut and three or four posts. The total cost of the work was £570, and there is no breakdown between the cost of the work done to the down-pipe or that done to the fence.

15. The applicants produced no evidence to say what in their opinion the reasonable cost of this work should have been. They contested the standard of the work, which they said was inadequate for a house of this type. The landlords accepted that the work was not the neatest job, but said that work to the box guttering was not easy. The down pipe worked, and the problem that the work addressed had to that extent been cured although it was accepted that a hole remains in the box guttering.

16. Plainly the work that was done to the gutter and down-pipe was quite inappropriate to a Grade 2 listed building. It was the sort of cheap repair that occurs when minimal standards of maintenance are applied. The fencing work was not in dispute, although no evidence was offered as to its cost. As an expert tribunal we may form our own view, based upon our collective knowledge and experience, of that cost, and we consider that it would have been of the order £125 to £150. That would leave a cost of some £420 to £445 attributable to the guttering and down pipe. Again using our collective knowledge and experience, it seems to us that such a charge is not unreasonable for what was done, bearing in mind the height of the gutters, and the use of ladders (a the least), that this would have involved. A "proper" job would have cost quite considerably more than that. In this instance that parties have received reasonable value for what they paid. They have been asked to contribute to a low cost, and have got a cheap job that may be regarded as reasonable for what was paid.

A2 Work to the sash window

17. The sash window in question is the small window on the first floor landing outside the front door of Mrs Tipton's flat. We were told that the sash cords had broken so that it could not be kept open. The work that was done did not repair the sash cords. Two blocks were fixed in place so that the sash with the broken cords was held shut. The other sash, whose cords are apparently in sufficient order, continues to work, so that the window can be held half-open by them. On this occasion Mr Fairs also attended to repairs to a handrail and to the main door, and cleaned a patio. The total cost of the work was £350. Mrs Tipton says that £50 should be deducted because of the type of repair that was done to the window.

18. We have not been told the full extent of the remaining work covered by this invoice, but it seems to us that the work to the window can only have been a fairly minor part of it. As with the down-pipe, a full repair to the window, involving the removal of the box sections to expose the faulty sash cord, would have been quite an expensive exercise. Once more, this was a cheap job for a cheap price, and the applicants received reasonable value for the price to which they have been asked to contribute.

A4 and A5 - work to main flat roof

19. The 'main flat roof' is, we understand, that on the part of the building that was originally a dairy, so that it is above flats 5 and 6. Mr & Mrs Sage let those flats, and in the past have paid for the maintenance of that part of the building. In 1998 they had work done by R & D Roofing to replace the flat roof, whose useful life had come to an end. By 2002 certain aspects of that work were proving unsatisfactory. Invoices A4, 5, 9 and 10 relate to work done by Mr Fairs to remedy the problems that had arisen. The nature of that work is described in various quotations of his in exhibit 008 attached to Mr Faulkner's letter to the tribunal dated 15th December 2003.

20. The applicants' argument here as we understand it is not that the work that Mr Fairs did to remedy the defects in R & D Roofing's work was of inadequate standard or even that it was of unreasonable cost. What they say is that the work should have been done properly in 1998, and that if it had, or if there had been a proper guarantee, then no part of its cost would fall upon them now. Accordingly, they should not have to contribute to the items in question.

21. We reject that argument. The applicants paid nothing towards the 1998 work because Mr & Mrs Sage carried it out under the previously existing maintenance regime that we have described. If the terms of the leases had been observed at that time, as they should have been, the applicants would have had to contribute to the work in 1998, but they did not do so. The leases are now being observed, as best may be, as they should, and the applicants are required by the leases to contribute towards the cost of the work that has now been done. They do not dispute either the adequacy of that work or the reasonableness of its cost. Thus there is nothing before us that might establish a finding that the proper proportions of theses costs in each case should not be paid by the applicants in accordance with the terms of their leases. It is not necessary for us to consider what the position might have been if the applicants had in fact contributed their proportions to the cost of the 1998 work.

A8 – The insurance premiums

22. The buildings insurance premium at Stamford Lodge in 2002 was £2455-24 for buildings insurance cover of £434000. In 2003 it had fallen to £1165-39 plus £68 for terrorism cover, a total of 1233-39 although the sum insured had risen to some £462000. The applicants invite us to say on that evidence alone that the cost of the premium in 2002 was unreasonable. We do not feel able to do so.

23. First, both the 2002 and 2003 insurances appear to have been arranged by competent brokers, though different ones in each case, acting in the open market. Secondly, Mr Faulkner points out that the 2003 policy was obtained for similar cover (other than as to the sum insured) by brokers acting for his firm who may be able to obtain better rates because of the volume of work that his firm is able to place from its various managements. Finally, we are aware from our own collective knowledge and experience that there was some, albeit not very great, relaxation in the rates of premium applicable locally to properties of this nature between 2002 and 2003. The premium is not of itself unreasonable just because a lower figure may have been achieved by others enjoying certain advantages, but otherwise acting in the same market.

The 2003 Account

24. The items in contention in the 2003 budget were:

1. The contributions to a reserve account
2/4 The charges for flat roof repairs
9/14 Arrears charges

The numerical references here are to the numbering in the statement of 2003 charges that was before us.

1. The Reserve Account

25. There are a number of references in the leases to a reserve account. We are satisfied that a very considerable sum of money needs to be spent on Stamford Lodge to bring it to a decent standard of repair, and to protect the value of the respective interests of all the parties in the building. It may well be sensible to start to build up a fund to meet the cost of that work. However, we are far from clear that the lease is properly to be construed as permitting a reserve account of more than overpayments made by lessees in any year that, by clause 1(d) may be paid into it.

26. Paragraph 8 of Schedule 4 of the lease envisages that one of the "expenses and matters to which the lessees are to contribute" may be "any other expenses (including the transference of any monies to a Reserve Fund) included in the aggregate maintenance expenditure as defined in the Fifth Schedule hereto". In paragraph 1(d) of the Fifth Schedule, "the aggregate maintenance expenditure" is defined as the total amount of expenditure (certified as there set out) including fees and expenses of managing agent and accountants, and "together with such an amount as shall within the discretion of the managing agents be transferred to a Reserve Fund in respect of anticipated future expenditure".

27. "The maintenance charge" (which is the amount that the lessee covenants in clause 1(d) on the first page of the lease to pay) is defined by paragraph (e) of Schedule 5 as "the amount payable to the Landlords by the Lessees and certified by the Accountant calculated by dividing the aggregate of the said expenses and outgoings incurred by the Landlords in the year to which the Certificate relates" by reference to the comparative rateable value of the flats in the building. According to paragraph 2 of the Fifth Schedule, aggregate maintenance expenditure and the maintenance charge are distinct from each other, rather than the latter including the former. "Maintenance charge" therefore does not include "aggregate maintenance expenditure", and so appears to exclude any further contribution to reserve fund over and above the amount mentioned in clause 1(d) on page 1 of the lease, despite the care with which that term has previously been defined.

28. For these reasons we have, after careful thought, concluded that the lease as drawn does not allow for a general contribution to a reserve fund over and above any excess of interim contribution allowed for in clause 1(d) on page 1 of the lease. Because the "aggregate maintenance expenditure" is not included in express terms in "maintenance charge" we are reluctant to conclude that such was the clear intention of the parties.

29. Because that is so, it would be wrong in our judgement to seek to give effect to a commercial intent. Such intent may or may not have existed. In any event,

doubt of this sort must in our view be construed against the landlord as the person who prepared the lease. It may be that the failure to include "aggregate maintenance expenditure in "maintenance charge" was no more than a mistake, but it may be that only any excess of the previous year's interim payment was ever intended to be added to a reserve fund. Thus we are unable to find that the proposed contribution to a reserve fund is recoverable.

2/4 The charges for flat roof repairs

30. Further works were carried out to the flat roof in 2003. The cost of them totals £930. Exactly the same arguments were advanced by the applicants with regard to them as applied to the 2002 works, and we reject them for the reasons previously given.

9/14 Arrears charges

31. Numerous charges were included in the 2003 account for work in connection with collection of arrears. The applicants contended that these were unreasonable, but offered no evidence to show why that was so. There is nothing before us that would enable to find that the charges were unreasonable, but it appears to us that there is nothing in Schedule 4 paragraph 6 that allows the landlord to recover such charges as service charges under that provision. It may however be that they are recoverable under clause 2(10) of the leases from the individual lessees concerned, but that is not a matter on which it is necessary for us to express any settled opinion.

20/21 Messrs Daniels & Harrison's charges

32. The applicant contended that Messrs Daniels & Harrison's charges for Mr Foster's report were not recoverable because they had neither had notice that the report was to be prepared, nor had they received notice of that fact under section 20 of the Act. Mr Faulkner argued that professional fees of this sort are not subject to the regime that that section imposes before works are carried out or long term contracts are entered into. We agree that that is so. Section 20(2) of the Act describes "qualifying works" (which are the works to which the section 20 regime applies) as works "on a building or any other premises". In its ordinary sense that expression implies "works" of a physical nature. There is nothing before us to suggest that it is alleged that the fees were in any way unreasonable for what was done, or that they are not recoverable under the service charge regime set out in the leases for any other reason.

The application to vary the leases

33. The applicants applied under section 35 of the Landlord & Tenant Act 1987 to vary the leases on the ground that they do not make proper provision for the recovery by one party to them of monies expended by him on behalf of others. Both parties had submitted conflicting drafts of variations to the present leases that they submitted would improve them, and both accepted that the present leases are not satisfactory in this respect. We indicated that it may be that we would not accept either draft, but may seek to determine a manner in which

the leases were to be amended that properly balanced the interests of the parties. At first sight it appeared that neither of the drafts before us succeeded in achieving such a balance.

34. The parties agreed that they would discuss the matter, and have indicated that they have reached a general agreement, subject to legal advice. They asked for three months in which to achieve the preparation and completion of a deed of variation agreed between them, and we in turn agreed to an adjournment to the first convenient date after the end of that period. The parties are to notify the tribunal if in the meantime they achieve a completed deed of variation.

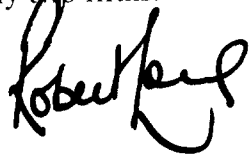
The section 20C Application

35. The applicants asked for an order that the landlords' costs of appearing before the tribunal in this matter should not be treated as relevant costs to be taken into account in determining the cost of future service charges. We are not prepared to make such an order. We bore in mind three factors.

36. First, the present situation has been brought about by the collective failure of the parties (or, in the case of Mrs Tipton, her predecessor in title) to ensure that the terms of the lease were observed and the landlord's covenants were observed. Mrs Tipton was not of course a party to those arrangements, but she was plainly aware of them when she bought because of the enquiries her solicitors properly made at that time.

37. Secondly, the lessees have not made out their case in other than two respects. Even as to the reserve fund, the decision we have made will only operate to defer just a little the day when the parties will all need to find quite substantial funds to rectify the defects at Stamford Lodge, however they are funded. We have strongly recommended to them that they should try to work co-operatively to try to establish an adequate timetable in which to carry out the necessary works at a speed that will meet the needs of the building as best may be, but will also allow all of the parties to meet their cost.

38. Finally, even to such extent as the lease may allow any of the landlord's costs to be recovered as section 20C describes (and in the light of our other findings it was not necessary for us to consider that point), the landlords will have to bear more or less three fifths of them. That is because the applicants are only responsible under their leases for approximately two fifths.



Robert Long
Chairman

22nd June 2004