SOUTHERN RENT ASSESSMENT PANEL

LEASEHOLD VALUATION TRIBUNAL

Case Number: CHI/29UD/LSC/2006/0022

In the matter of section 27A of the Landlord & Tenant Act 1985 (as amended) ("the Act), and

In the matter of Flat 6, Archway Court, Spring Vale South, Dartford, Kent

Between:

Mr P A Buzugbe — Applicant

and

Archway Court Management Limited — Respondent

Reasons for decision

Hearings: 18th June and 1st August 2006

Date of Issue: 21st August 2006

Tribunal: Mr R P Long LLB (Chairman)
Mr M. G Marshall FRICS
Mr R Athow FRICS MIRPM

Decision

1. The Applicant applied to the Tribunal under section 27A of the Landlord & Tenant Act 1985 (as amended) ("the Act") to determine service charges payable by him in respect of 6 Archway Court, Spring Vale South Dartford Kent in the years to 31st March in 2004, 2005 and 2006. In the year to 2004 he challenged a deficit of £193-33 carried forward from the previous year and an interim service charge of £250 raised in December 2003. In the year to 2005 he challenged an interim service charge of £448-92 raised for the second part of that year and in the year to 2006 he challenged the whole of the interim service charge of £897-94. The Applicant accepted that he is responsible for paying a service charge in respect of the property to the Respondent, at the times and in the manner set out in the lease described in paragraph 6 of this note.

2. The Tribunal has made the following determinations for the reasons set out in the remainder of this note. The paragraphs in which the decisions appear in detail are referred to in square brackets, and for the avoidance of doubt the terms of those detailed paragraphs shall have precedence in the event of any conflict between them and the terms of this summary. The decisions are:

    a. that the sum of £193-33 being the amount of the deficit brought forward into the 2004 accounts is payable [20]
    b. that the amount of £250 charged as an interim service charge in December 2003 is not payable [29]
    c. that the interim service charge of £448-92 demanded in respect of the year to 31st December 2005 is payable in full [41]
    d. that the two interim service charges of £448-97 demanded in respect of the year to 31st December 2006 are payable to the extent of £432-31 each. [41]

Reasons

The Law

3. The Application was brought under section 27A of the Act. That section gives the Tribunal jurisdiction to determine whether a service charge, as defined in section 18 of the Act, is payable in respect of premises and, if it is, the amount that is payable, the identity of the persons by and to whom it is payable, the time(s) when it is payable and the manner in which it is payable. Section 19(1) of the Act provides that in order to become payable amounts included in a service charge must be reasonably incurred and the services or works must be to a reasonable standard. In Finchbourne v Rodrigues [1976] 3 AER 581 CA the Court laid down that a service charge must be reasonable in amount.

The Lease

4. The property is held under a Lease ("the Lease") dated 22nd April 1988 and made between Bexley Developments Limited (1) Archway Court Management Limited (2) and Simon Derek Palmer (3) for a term of ninety-nine years from

25th December 1987 at a rent that rises from £50 per annum in the first period of twenty five years of the term to £400 in the final period of twenty-four years. By clause 5 of the lease the Company covenants, subject to payment of service charges, to maintain redecorate and renew the building, the fences, service media and the common parts. It is to light and to clean the common parts. Clause 6 provides for it to insure the building.

5. Clause 4 of the Lease provides that the lessee is to pay one sixth of the costs and expenses incurred by the Company in carrying out the obligations mentioned in the first part of Schedule 4. In summary those sums include any rates or taxes payable upon the building rather than the flats in it, the costs of any staff employed, the fees and disbursements of managing agents, the costs of preparation of accounts, costs of proceedings and other expenses, and VAT. There is provision for a reserve to be maintained.

6. The mechanism by which the service charge is collected provides for the managing agents to produce an estimate of the likely service charge cost for the year to 24th June in each year, and to collect one sixth of the amount of that estimate by two equal instalments payable on 25th December and 24th June. An account is to be taken at the end of each year and the lessee is either (as the case may be) forthwith to pay any balance for the year then found to be due or to be credited in the books of the managing agent or of the Company with any amount overpaid.

The Inspection

7. The Tribunal inspected 6 Archway Court on 18th June 2006 prior to the first hearing in the presence of the Applicant. It saw a brick built block under a tiled roof with wood framed windows. Although it did not inspect the interior of any of the flats it appeared that there were two flats on each of three floors. Access to them is by means of an internal staircase. The site slopes somewhat from front to rear. A rear car park area is accessed by means of a short drive that runs beneath an arch under a part of the building. The Applicant pointed out a large depression in part of the car park that he said flooded in times of rain, and drew attention to the fence and to weeds growing adjacent to it. The building is said to have been built in or about 1986, and its appearance and construction appeared typical of property of this type built at around that time.

The Hearings

8. The matter proceeded by way of two hearings, one on 18th June, and the other on 1st August 2006. At the first hearing it was apparent that there had been little compliance with the directions that had been given in the matter on 24th March 2006. Service charge accounts were produced at that hearing on behalf of the Respondent, and further directions were given. These were designed to enable the release of documents that the Applicant said he had requested but that had not been provided to him, and thereby to enable him to provide a written statement of his case. The Respondent was then to provide a written reply. Those directions were complied with, and the hearing on 1st August was for practical purposes the substantive hearing of the matter. The Respondent's

statement had been provided to the Applicant only on 28th July, but the Applicant told the tribunal when it enquired upon the point that he was content to deal with it at the hearing and did not need further time to consider it.

9. At the start of the hearing on 1st August the Tribunal explained the nature and extent of its jurisdiction under the terms of the application before it, and the matters described in paragraph 3 above that its jurisdiction allows it to determine. The Applicant accepted that a service charge is payable in accordance with the terms of the Lease and that he as the present proprietor of that lease is responsible for paying it to the Respondent or its agent. The parties agreed that there was no issue in respect of either the time or the manner in which payment was to be made. Accordingly the matters for the tribunal related to the amounts in issue described in paragraph 1 above.

10. The Applicant drew attention to the fact that in his application he had indicated that he wished the tribunal to consider the matters of communication and of consultation; it is convenient to state here as a general point that so far as its jurisdiction requires it to do so in order to determine the issues before it the Tribunal has considered those matters.

11. The arguments otherwise relating to, and the reasons for, the determinations made in respect of the matters upon which the Tribunal was required to adjudicate are set out below by reference to each of the items mentioned in paragraph 2 above.

12. References in this decision to page numbers are references to the page numbers of the bundle of papers that was before the Tribunal

<u>The sum of £193-33, being the amount of the deficit brought forward into the 2004 accounts</u>

13. The Applicant indicated that this sum appears to be derived from a deficit of £1160 carried forward from the 2003 accounts into the 2004 accounts. It is referred to in the demand sent to him on 3rd February 2006 that is at page 9, and represents the one sixth part of that deficit for which the lessee of the property is responsible. There was no suggestion before the Tribunal that this amount had not been previously demanded, or that there may be any statutory limitation upon its recovery.

14. There were inaccuracies in the cash book, and twenty five of the invoices for the year appeared to have no originator, said the Applicant. He drew attention by way of example to an entry for the cost of gas, a direct debit entry of £10 that appears as the second entry down on page 132. He pointed out that there is no gas at the property. Similarly there was a payment to Abbey National for £744-24 in respect of service charges and professional fees being the second entry down on page 134. On the basis of these and other inaccuracies it was not right that he should have to pay the amount required or any amount in respect of the deficit that had been carried forward.

15. The Applicant accepted that he had signed the accounts in question at the time when they were prepared as a director of the Respondent, a capacity that he has since resigned. He said that he had simply signed what he was asked to sign.

16. On behalf of the Respondent Mrs Moody accepted that the book keeping standards had not been of the highest. However, the accounts in which the deficit appeared had been prepared by reputable Chartered Accountants well known in the locality, who would have necessarily have made proper adjustment of those errors as part of their function. A part of the cost included in the figure in dispute was a sum of £100 and VAT incurred as a result of the Applicant's delay in returning the signed accounts.

17. The Tribunal accepted that the cash book was inaccurately prepared as the Applicant had shown. It also accepted that the two errors referred to above had been mentioned as examples only and that there may have been other errors in the cash book forming part of the twenty five entries for which invoices had no originators or indeed in other respects. The standard of book keeping of the Respondent's agents clearly fell well short of the sort of standard one might reasonably have expected at the relevant time, although Mrs Mooney says that it has now improved.

18. The Tribunal accepted too that the managing agents might have communicated better with Mr Buzugbe, although it noted that they or their accountants seemed to have had difficulty, at least in respect of the approval of the 2003 accounts, in getting responses from him. In particular they appeared to have failed properly to respond to his requests to see documents supporting the accounts, whether by supplying copies of them or by arranging for him to inspect them. In that respect the standards of management themselves fell short of those that should have been provided.

19. However, it was unlikely that reputable Chartered Accountants would not have made the appropriate adjustments to the figures in question in preparing the accounts, even if the accounts had not been shown before the tribunal to have been certified by them. The accountants' bill for the year in question at page 141 showed that they had reconciled cash movements to total expenditure as the Act requires. Such a reconciliation would ordinarily have shown up errors, including the sort of errors to which the Applicant referred. On a balance of probabilities and in the absence of any direct evidence upon the point, they would have done so here.

20. It was in the Tribunal's judgement considerably more likely than not that the figures produced by the accountants in the 2003 accounts from which the deficit in question arose were accurate and took account of the various errors to which the Applicant referred. It was not suggested to the Tribunal that any of the payments actually comprised in the service charge for 2003 were unreasonable in amount or had been unreasonably incurred or that any work represented by them was of unreasonable standard. That being so the Tribunal determined that the sum of £193-33 is properly payable as a part of the service charge payments for the 2004.

The amount of £250 charged as an interim service charge in December 2003

21. The Applicant said that he did not know the purpose for which this sum had been demanded. Mrs Mooney was able after some searching to produce a letter sent to the lessees at 6 Archway Court on 2 December 2003 indicating that it was proposed to ask for an interim payment of £250 to cover work done to the roof by Messrs Breyer Group plc, a copy of whose invoice was at page 90, and for aerial installation by Messrs Ward whose invoice was at page 91. The Breyer Group plc work was carried out to repair slipped slates tiles. On being shown a copy of the letter the Applicant was at first not sure whether he had seen it, but on reflection denied having done so.

22. An issue arose whether or not the work to the roof was required as emergency work following storm damage. The Applicant said that he was resident at the property at the time, and that he knew as a result that the damage was storm damage. Mrs Belshaw said that she did not believe that this was the case. Mrs Mooney was unable to show any estimate that had been obtained before the work was carried out, nor was she able to show that any insurance claim had been made subsequently. She submitted that the latter point tended to support Mrs Belshaw's contention that the damage in question had not been storm damage.

23. The work carried out by Messrs Ward appears, so far as it is possible to make sense of a rather confused narrative, to have related to a TV set at Flat 3 that needed to be retuned. The attempt to check of the aerial system appears to have been a formality associated with that work. Neither party was able to cast any further light on that aspect.

24. The Tribunal preferred the Applicant's evidence that the work to the roof was necessitated by storm damage. He was living at the property at the time and Mrs Belshaw's recollection, whilst no doubt sincerely held and proffered, did not derive from a first hand experience of the property at the time when the event happened, as the Applicant's did. Furthermore it appeared that at that time Mr Southwell rather than Mrs Belshaw was in charge of management of Archway Court. Mrs Belshaw was thus more likely to have been mistaken in her recollection than was the Applicant.

25. The Tribunal also took into account its own general knowledge and experience in weighing this evidence, as it is entitled as an expert tribunal to do. The building clearly appears both from the evidence of the lease and from inspection to have been built in or about 1986. In the collective experience of the members it would be unusual for a simple slippage of tiles to occur at such a relatively early stage of the life of a building of this type.

26. The Tribunal therefore determined, once more on the balance of probability, that the damage repaired by Messrs Breyer Group plc was storm damage. It understood that insurance was in place, and whilst the lease does not

specifically require insurance against storm damage it would be very unusual for a buildings insurance policy not to include cover against such a risk. It was likely therefore that an insurance claim should have been made the proceeds of which would have been available to offset the amount claimed as interim service charge, but there was no evidence that one had been made.

27. Whilst the situation with regard to the work carried out by Messrs Ward was not entirely clear, the problem appeared more likely to have been one relating to the television set belonging to the individual lessee and not to the aerial system provided by the landlord. The cost therefore should have been borne by the lessee in question and not by the service charge fund.

28. Accordingly the cost of the repair to the roof, on the balance of probability, should have been recovered from an insurance claim. Whilst an interim demand may have been appropriate if there were insufficient funds in hand to pay the immediate cost of that work, most (if not all, for there may have been an excess applicable) of the money should have been recovered well before now and made available to the service charge fund, and thus to the credit of individual lessees. No such claim was made.

29. Given that the refund should now be available to the lessees had such a claim been made the Tribunal determined that the element of the interim demand relating to the roof work was unreasonable. It similarly determined that the cost of the work carried out by Messrs Ward appears to have been the responsibility of the lessee of flat 3. Whether or not it may have been reasonable to demand the interim payment of £250 (which amount in any case somewhat exceeds one sixth of the total cost of the two elements said to make it up) at the time when it was originally requested in December 2003, it is now quite clearly unreasonable that the Applicant should be required to pay that sum. That is because the Tribunal finds it is made up of elements where, as to the roof work, he should by now have been recompensed, and as to the television work he should not have been called upon to pay in the first place.

<u>The interim service charge of £448-92 demanded in respect of the year to 31st March 2006 and the interim service charge of £897-94 demanded in respect of the year to 31st March 2007.</u>

30. The parties agreed that the arguments relating to these elements were the same and that it was appropriate to consider them together as a result.

31. The sum of £448-92 had in the terms of the application (page 7) been demanded in respect of the year (as defined in the terms of the Lease) to December 2005 as the second part of the interim application for service charge for that year. Two further sums of £448-97 each had been demanded in respect of interim service charges to December 2006. These are the payments on account of service charge for which the Lease provides in clause 4(ii). The Tribunal was shown a copy of the company and service charge accounts to 31st March 2005 and a copy of the 2006 budget, both of those documents having been produced with others by Mr Southwell at the hearing on 18th June.

32. It appears that the Respondent's company year end is 31st March, whilst the lease refers to accounting on a calendar year basis in clause 4(ii) and merely to accounts for a "year" in clause 4(iii). To that extent the tribunal has had to do the best it could in dealing with the figures and balances throughout this matter, and has sought to give effect to the apparent commercial intention of the parties that the service charge costs are recoverable on an annual basis. The Respondent's agents appear to prepare budgets and to issue demands on a calendar yearly basis (as the proper construction of the Lease would appear to require) although the accounts are produced to 31st March.

33. The Applicant's primary contention was that the interim service charge was £324 per half year in 2004, and rose to £448-94 for no apparent reason in 2005. As to its elements he primarily challenged the management fee. It had been £990 when he bought in 2000, and had risen to £1286 in 2006 despite the fact that nothing had changed. Further, he understood that "maintenance" in the terms of the obligation to repair maintain repair and renew the structure in clause 5(1) of the lease referred to planned maintenance. There should be no other maintenance cost than that for planned maintenance if the property was properly managed, but the amounts included in the demands under discussion were to cover the cost of matters that may arise during the year. The property required no gardening, but there was an item for "cleaning and gardening" in the budget.

34. In reply Mrs Mooney said that the previous managers of the property (who were the managers in 2000) had been a small company who were not required to be registered for VAT because of the level of their turnover. The present managers took them over at a time between 2000 and the present, and were thereafter obliged to charge VAT on the management fees as they were VAT registered. That accounted for £173-25 of the rise between 2000 and the present time. The remaining rise in fees over the six year period was thus £122-75 or £104-46 net plus VAT. The managers now charged a fee of approximately £182 per flat as against £165 in 2000. When the Applicant said that there was no proof of the VAT point, she produced a letter dated in 2001 from the previous agents that showed no VAT number but could not give further proof that they were not VAT registered.

35. In respect of the maintenance point Mrs Mooney submitted that the Applicant was wrong. There were many matters of an unexpected nature that might arise in respect of a property like this, and in respect of which planned maintenance would never be possible. It was always prudent to make an allowance for them in any budget, and she would expect to provide £800-£1000 even when budgeting for a new building of this size having the benefit of an NHBC guarantee.

36. Mrs Mooney accepted that no gardening was ordinarily necessary at Archway Court. The heading was commonly used, but was misleading in that respect in this case. The amount provided allowed a cost of some £45-50 per month, and after allowing for VAT. That paid for some 4-5 hours cleaning per month at

normal contractors' charges. The Applicant accepted what Mrs Mooney said on this aspect and did not further challenge that element.

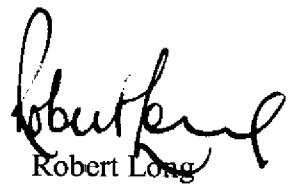
37. Finally Mrs Mooney said that she had budgeted a lower figure for accountancy in 2007. In the past there have been problems over finding directors for the respondent company, and in getting directors to deal with the accounts, and all of them had added considerably to that element. She hoped now to overcome them, and to be able to reduce that cost in future.

38. Mrs Mooney was content to strike out the provision for insurance excess of £200 in the 2007 budget on the ground that the lease did not appear to provide for this to be a recoverable service charge in this instance.

39. The Tribunal accepted Mrs Mooney's evidence about the cost of management. Despite the Applicant's challenge to the proof of what she had said about VAT registration and its effect upon the fee, it is (as with so much else of the disputed or limited evidence in this matter) a requirement only that the Tribunal is satisfied upon the matter on the balance of probability. Her evidence is credible, and tends to show a fairly low rate of increase in management fees over the six years to which she referred. In any event, the Tribunal is entirely satisfied that the present management fees are subject to VAT, and the net fee of approximately £182 per flat that this produces is, in its collective general knowledge and experience, within the band that one might ordinarily expect in the Dartford area. Consequently the Applicant's challenge to the reasonableness of the management fees fails.

40. In the Tribunal's judgement the Applicant's submissions about the maintenance fees are not well founded and must fail. There are, as Mrs Mooney submitted, many matters that fall outside of planned maintenance provisions that can arise, often unexpectedly, in the case of a building like this. A very few of the more obvious examples are those of clearance of blocked drains, lock repairs, damage to carpets, doormats and light fittings and damage to exterior woodwork. It would be very unwise to manage a building of this sort on the assumption that no unplanned maintenance items will arise in the course of any year.

41. Mrs Mooney abandoned the claim for insurance excess of £200 budgeted for in the course of the year to 2007. Hence each of the claims for £448-97 for the two instalment in 2006 against the budget expressed to be to 31st March 2007 are reduced by £16-66 to £432-31, but for the reasons stated above no other adjustment falls to be made to any of the three interim demands that fall under the heading to this part of this decision.



Robert Long
Chairman
17th August 2006