IN THE LEASEHOLD VALUATION TRIBUNAL

LON/00BK/LSC/2005/0095

IN THE MATTER OF FLAT A, 4 ALDRIDGE ROAD VILLAS, LONDON, W11 1BP

BETWEEN:

BEITOV PROPERTIES LIMITED

Applicant

-and-

(1) MARTIN CLIFTON
(2) BERYL CLIFTON

Respondents

THE TRIBUNAL'S DECISION

Background

1. Unless stated otherwise the references in bold herein are respectively to the Applicant's bundle of documents **[AB]** and the Respondents bundle of documents **[RB]** and the pages that appear within those bundles.

2. This is an application made by the Applicant pursuant to s.27A of the Landlord and Tenant Act 1985 (as amended) ("the Act") for a determination of the Respondents liability to pay and the reasonableness of service charges arising in the service charge years 2002-2005. The particulars of the disputed service charges are set out below.

3. The Respondents occupy the subject premises by virtue of a lease dated 13 May 1988 granted by Pendlecross Limited to Gay Ironmonger for a term of 125 years commencing on 1 January 1988 ("the lease"). By an assignment dated 27 May 1993 the lease was assigned to the Respondents.

4. In clause 2(ii) of the lease the lessee covenanted to pay, by way of further and additional rent, the service charge. The lessee's contribution was calculated by reference to the rateable value of the demised premises in relation to the rateable value of all of the residential units in the building. The total service charge are the costs incurred by the lessor in performance of the obligation imposed by clause 3 of the lease. Clause 2(iii) of the lease allowed the lessor to demand the sum of £50 in advance, if required, or *"such other sum as the Landlord or its... Managing Agents shall specify at their discretion to be a fair and reasonable interim payment on account... "*. Clause 1 of the lease provides that the service charge, reserved as further rent, is payable together with the ground rent on 1 January of each year. The relevant service charge period was therefore annual. However, it seems that the adopted practice was that the service charge and sinking fund contributions (see below) were paid on account in advance on a half yearly basis.

5. In clause 3(ix) of the lease the lessor covenanted to *"set aside such sums of money as the Landlord shall reasonably require"* to meet any cost in the performance of the obligations imposed by clause 3. This clause effectively allowed the lessor to establish a sinking fund.

6. The Applicant's service charge statement sets out the disputed service charges **[AB/4]**. These were as follows:

Y/E 31 December 2002

Total annual service charge payments in advance	£1,086.76
Total annual sinking fund payments in advance	£ 112.50
Buildings insurance premium	£ 391.27

Y/E 31 December 2003

Total annual service charge payments in advance	£1,086.76
Total annual sinking fund payments in advance	£ 112.50
Buildings insurance premium	£ 391.27
s.20 costs re: dry rot and damp proofing works	£ 823.21

Y/E 31 December 2004

Total annual service charge payments in advance	£1,086.76
Total annual sinking fund payments in advance	£ 112.50
Buildings insurance premium	£ 402.94
s.20 costs re: dry rot and damp proofing works	£6,279.32

Y/E 31 December 2005

Total annual service charge payments in advance	£1,086.76
Total annual sinking fund payments in advance	£ 112.50
Buildings insurance premium	£ 402.94

7. However, at the hearing it was agreed by the Applicant that the s.20 costs arising in the 2003 and 2004 service charge years would no longer be pursued in this application. The Applicant agreed that the sum of £823.21 claimed in the 2003 service charge year should be deleted altogether from the service charge account, as these s.20 costs would not be claimed in any event. The Applicant also agreed that the remaining s.20 costs of £6,573.80 claimed in the 2004 service charge year would be re-credited back to the service charge account to enable the parties to attempt to reach some degree of consensus about how the dry rot and damp proofing works required by the subject property should be carried out. Therefore, the only issues to be determined by the Tribunal were confined to the service charge and sinking fund payments on account and the buildings insurance premiums for all of the relevant service charge years. Each of these issues is considered in turn below.

Decision

8. The hearing in this matter took place on 22 September 2005. The Applicant was represented by Mr Abrahams, a Director of the Respondent company, and Mr Taylor of the present managing agents, Mandells. The First Respondent appeared in person for both Respondents.

Service Charge/Sinking Fund Payments

9. The Respondents main complaint generally concerned the various management failings by the Applicant or it's managing agents as set out in their statement of case **[RB/13]**. In particular, the Respondents wanted greater transparency regarding the preparation of the sums demanded on account of

the service charge and sinking fund and how any such sums had been expended.

10. Mr Clifton said that section 9 of the RICS Code sets out the practice to be adopted by managing agents for the preparation of budgets regarding monies collected on account of service charge costs **[AB/145]**. He argued that this approach had not been followed by Mandells since they took over the management of the building on 1 January 2002. Apparently, a breakdown of the estimated service charge costs had always been provided by the previous managing agents, David Glass Associates plc **[AB/147]**. Mandells had never provided a breakdown of the estimated service charge expenditure in respect of which the service charge/sinking fund payments on account were demanded. There had been no transparency or accountability regarding the expenditure of any such monies.

11. Mr Taylor, on behalf of the Applicant, argued that accountability for the expenditure of service charge monies collected was provided in the two sets of accounts provided to the Respondents. One set of half yearly accounts was produced internally by Mandells e.g. **[RB/206]** and the second set was the annual certified accounts prepared by chartered accountants at the end of each service charge year **[AB/42, 33 & 37]**.

12. Having regard to the inter partes correspondence contained in both bundles, it was clear to the Tribunal that since 2002, Mr Clifton had made numerous written requests to Mandells to provide him with further and better particulars

about the ***estimated*** expenditure in respect of which the service charge and sinking fund payments on account were being demanded by the Applicant. It was also clear that the previous managing agents, David Glass Associates plc, had provided the breakdown requested by Mr Clifton. His complaint was generally a management failure on the part of Mandells in this regard and was not expressly denied or met evidentially by Mr Taylor. Instead, Mr Taylor relied entirely on the two sets of accounts provided to the Respondents, which set out the historic position regarding the service charge expenditure. It is clear that they did not specifically deal with the requests made by Mr Clifton regarding the estimated future expenditure in respect of which the payments on account were sought.

13. Sections 4.3 of the RICS Code ("the Code") expressly state that, as a matter of good practice, managing agents should respond promptly and suitably to reasonable requests from tenants for information and observations concerning the management of the property. Section 9.7 of the Code also requires budgets to be prepared using the best possible information. The Tribunal took the view that Mr Clifton's requests as to how the estimated budgets upon which the service charge/sinking fund demand had been prepared were reasonable within the meaning of section 4.3 of the Code. It was assumed that the estimated budgets had been prepared in accordance with section 9.7 of the Code. There should have been little difficulty on the part of Mandells to disclose this information to Mr Clifton, as David Glass Associates plc had done before. By failing to provide Mr Clifton with the information he had

requested, Mandells had not responded suitably, as required by section 4.3, and had therefore breached the provisions of that section.

14. The Tribunal is entitled to have regard to any such breaches of the Code when making a finding of reasonableness under s.19 of the Act. It firstly considered the position of the half yearly service charge demands for payment on account in advance. The Tribunal found that Mandells failure to substantively deal with Mr Clifton's requests concerning the preparation of the service charge budgets that gave rise to the subsequent demand for payment on account amounted to inadequate management. The management fees charged by Mandells formed part of the overall service charge expenditure for the relevant service charge years being considered in this application. The Tribunal was of the view that the management fees for each year under consideration ought to be reduced to reflect the finding made above.

15. In the 2002 service charge year, Mandell's management fees were 225 per unit plus VAT. In 2003 and 2004 they were £250 per unit plus VAT. The Tribunal was not told what the management fees were for the present service charge year. In any event, the Tribunal determined that the appropriate management fee in respect of all of the service charge years (2002-2005) was £150 per unit plus VAT. Accordingly, the sum of £88.13 for management fees was disallowed from the 2002 service charge account in respect of the Applicant. For the 2003 and 2004 service charge years, the sum of £117.50 was disallowed. The total amount to be re-credited back to the service charge account was, therefore, £323.13. For the same reasons, the total amount for

management fees charged for the 2005 service charge year is also limited to £150 plus VAT.

16. The Tribunal then considered the position in relation to the half yearly sinking fund contributions for each of the relevant service charge years. The total sum demanded from the Respondents for each of the relevant years was a fixed sum of £112.50. There was no evidence before the Tribunal that any such monies collected by the Applicant were being held in a separate sinking fund account. Section 5 of the Code sets out the practice to be adopted regarding the retention of these monies. They are to be held on trust for the leaseholders or tenants. The Tribunal has already found that Mandells did not properly reply to Mr Clifton's requests for information as to how these monies were being held and how it was being spent. However, the Tribunal did not consider the amounts demanded were unreasonable in quantum and Mr Clifton did not argue strongly against this. Indeed, he paid the sinking fund contribution on both occasions it was demanded in 2002. Instead, Mr Clifton's argument was based on a lack of accountability for these monies. The Tribunal was of the view that the management failures on the part of Mandells had already been adequately been reflected in the amounts already disallowed for the management fees and the Tribunal made no further award in relation to the sinking fund contributions.

Buildings Insurance

17. Mr Clifton argued that the buildings insurance premium obtained by the Applicant was not competitive. He asserted that the insurance company,

Norwich Union, paid Mr Abraham a commission. It was not in his commercial interests to obtain a cheaper insurance. The buildings insurance premium had increased by 60% over the preceding three years. Mr Clifton accepted that although insurance premiums had increased generally in recent years, they were not as high as the amounts claimed by the Applicant, especially having regard to the fact that cover for terrorism was not included in the level of cover He submitted that the premiums should be reduced by the Tribunal by 35% for all of the relevant service charge years.

18. In reply, Mr Taylor argued that the FSA regulations were strict and required the insurance brokers to obtain competitive quotes for the buildings insurance. They had tested the market. Copies of the relevant policy schedules had been sent to the Respondents. However, he accepted that a copy of the policy document had not been provided because it was too extensive to copy.

19. Mr Abrahams commented that the insurance broker had dealt entirely with the placing of the buildings insurance policy. He had no involvement in the matter. He said that the reason for the increase in the premiums was the cost of re-building and other levels of cover had gone up considerably especially after "9/11". Mr Abrahams confirmed that commission had been paid by Norwich Union to a third party company, of which he was a Director. He also confirmed that the buildings insurance policy was in fact a block policy covering a portfolio of properties with each property having an individual valuation figure. The level of cover had to be revalued each year, but there was no evidence before the Tribunal of any ***historic*** valuation of the subject

property having been carried out for any of the service charge years being considered in this application. The Applicant only adduced evidence of a valuation carried out after the hearing, which provided the Tribunal with no assistance.

20. There was also no evidence before the Tribunal that the insurance brokers had competitively tendered for the buildings insurance policy. Mr Abrahams admitted that the commission paid by Norwich Union was to a company of which he was a Director. This raised the issue of whether the subject property was in fact overvalued because of this commercial interest. However, there was no relevant valuation evidence before the Tribunal.

21. The Respondents case, as advanced by Mr Clifton, was that the buildings insurance premiums charged by the Applicant far exceeded the general increase in the insurance market. If this point was being raised by the Respondents, it was incumbent on them to evidentially prove it. No such evidence had been adduced. In the absence of such evidence, the Tribunal was unable to make a finding in the terms submitted by the Respondents.

22. Clause 3(ii) of the lease requires the landlord to insure the building, in addition to the compulsory risks set out in the clause, for *"such other risks as the Landlord may think fit"*. The Applicant, therefore, has an absolute discretion in relation to any additional risks to be included in any buildings insurance policy. This may or may not include cover for acts of terrorism. It is a matter for the Applicant. There was no evidence to support the Respondents

contention that the buildings insurance premiums for each of the relevant service charge years were not competitive. There was also no evidence that the buildings insurance premiums were 35% greater than the appropriate market level. There was also no evidence before the Tribunal that the level of commission paid by Norwich Union to a company, of which Mr Abrahams was a Director, had necessarily resulted in a more expensive insurance policy being taken out. The payment of commission on the placing of insurance policies is a common commercial practice. In any event, it is settled law that there is no obligation on a landlord to accept the cheapest insurance quote that can be obtained on the open market: see ***Berrycroft Management Ltd v Sinclair Gardens Investments (Kensington) Ltd*** (1996) HLR 444, CA. Accordingly, the Tribunal found that all of the buildings insurance premium contributions claimed by the Applicant in relation to each of the relevant service charge years to be reasonable.

Section 20C & Reimbursement of Fees

23. Mr Taylor submitted that clause 2(xv) of the lease allowed the Applicant to recover the costs it had incurred in bringing this application. They were as a result of the Respondents breach of covenant to pay the disputed service charges. Mr Clifton submitted that the Applicant should not be entitled to its costs because it had acted unreasonably by failing repeatedly to provide the information requested by him concerning the matters that formed the subject matter of these proceedings.

24. Having regard generally to the extensive correspondence that had taken place between the parties, it is clear that a more constructive approach could have been adopted, especially by Mandells, thereby possibly avoiding the necessity of making this application. The Tribunal also had regard to the findings it had made and decided that the appropriate order to make was that the Applicant shall only be entitled to half of the costs and fees that it had incurred in bringing this application. The Tribunal should make it clear that this award does not include a finding that any ***costs*** (only) allowed are also reasonable. Unless the costs are agreed, they may form the subject matter of a further s.27A application.

CHAIRMAN..... I. Mowbray .....

DATE..... 17/11/05 .....