RESIDENTIAL PROPERTY TRIBUNAL SERVICE

SOUTHERN RENT ASSESSMENT PANEL
& LEASEHOLD VALUATION TRIBUNAL

COMMONHOLD AND LEASEHOLD REFORM ACT 2002

DECISION OF THE LEASEHOLD VALUATION TRIBUNAL

Case No.	**CHI/29UL/LSC/2006/0096**
Property:	**11 Cherry Court** **Cherry Garden Avenue** **Folkestone** **Kent**
Applicant:	**Mr. A. Atkins**
Respondents:	**Mr. M. L. Irwin and** **Ms M. Gorham**
Date of Hearing:	**15th January 2007**
Members of the Tribunal:	**Mr. R. Norman (Chairman)** **Mr. R. Athow FRICS MIRPM** **Mr. T. Wakelin**
Date decision issued:	

RE: 11 CHERRY COURT, CHERRY GARDEN AVENUE, FOLKESTONE, KENT.

Background

1. The Applicant and the Respondents are the freeholder and lessees respectively of the subject property which is a purpose built flat.

2. There were two applications before the Tribunal:
(a) an application for a determination of liability to pay service charges and
(b) an application under Section 168 (4) of the Commonhold and Leasehold Reform Act 2002 for a determination that a breach of a covenant or condition in the lease in respect of the subject property has occurred so that Section 168 (2) of the Commonhold and Leasehold Reform Act 2002 can be satisfied and the Applicant may serve a notice under Section 146 (1) of the Law of Property Act 1925 and seek forfeiture of the lease.

Inspection

3. On the 15th January 2007 in the presence of the Applicant, Mr. Ashe and Ms Frost of Maltbys the managing agents and Mr. Irwin we inspected the exterior of the block containing the subject property and the interior of a flat within the block which we were told was similar to the subject property before alteration.

Hearing

4. The hearing was attended by the Applicant, Mr. Ashe, Ms Frost and Mr. Irwin who confirmed that he had authority to represent his partner Ms Gorham.

Determination

5. After considering the documents provided by and on behalf of the parties and hearing the evidence given at the hearing we made findings of fact on a balance of probabilities and made the following determination.

6. The Respondents are to pay the Applicant the sum of £3,550 in respect of service charges. Payment to be made within 28 days of the date of issue of this decision.

7. The Respondents are in breach of the covenant contained in Clause 2. (3) of the lease.

8. The parties should bear their own costs of these applications.

Reasons

Service charges

9. At a Pre-Trial Review directions were given which included a direction for the Respondents to give details of the items of service charges which they disputed and to give a brief explanation in the case of each such item of their reasons for withholding payment and for considering that item to be unreasonable with documentary evidence, such as quotes for work, in support of those reasons where possible.

10. In response to that, the Respondents complained about the way the property was managed by Maltbys and explained that the service charge payment had been withheld as a protest. The Respondents gave details of the following three matters which they disputed:
(a) The fact that a cheque for £150 in respect of service charges had been sent by recorded delivery to Maltbys and yet Maltbys had then sent to the Respondents a reminder to pay that sum.
(b) The issue of parking permits and the clamping of a car belonging to a new tenant of the Respondents.
(c) The employment of R.J.Engineering in about 2002 to carry out roofing work ("the 2002 works") when roofing work carried out in about 1999 ("the 1999 works") by the same firm or their subcontractors had been to a poor standard.

11. As to the cheque, Mr. Ashe accepted that it had been received at his office and because the letter enclosing the cheque raised matters to which he needed to respond, the

letter and cheque had remained in his office in Folkestone and had not been sent to his Gravesend office where the accounts are dealt with and a reminder was sent. There followed correspondence between Maltbys and the Respondents in which the Respondents asked for an explanation as to how they could have been sent a reminder when they had paid and Maltbys asked for authority to bank the cheque. Neither party answered the questions posed and eventually the cheque was returned to the Respondents.

12. At the hearing Mr. Irwin accepted the liability of the Respondents to pay that sum.

13. As to the parking permits and clamping, at the hearing Mr. Irwin accepted that this did not fall within the jurisdiction of the Tribunal to make a determination as to the payment of service charges.

14. The Applicant had asked for a determination of the liability to pay service charges and at the hearing the parties agreed that the service charges were paid up to the 24th March 2002. The Applicant stated that after the end of the period covered in the application two further quarterly payments of service charges had become due but they were not within the application and therefore not within our jurisdiction.

15. Of the sums within the application totalling £3,550, Mr. Irwin accepted at the hearing that the Respondents were liable for and did not dispute the quarterly service charges totalling £3,100 but they disputed the £450 in respect of charges for roofing works.

16. As to the roofing works, in the Respondents' statement made in response to the directions given, complaints were made about the 1999 works and the Respondents produced a survey carried out after that work had been done. The survey showed a number of defects in the work. These defects were pointed out to Maltbys but nothing was done to correct the defects until about 2004. Mr. Ashe could not provide any explanation for that delay. The Tribunal could understand the Respondents' frustration caused by that delay. The Applicant and Mr. Ashe did explain that the uneven appearance of the ridge tiles after the 1999 works could be because there was difficulty in obtaining ridge tiles similar to those in place on the building and the replacement only of tiles which required replacement.

17. Neither party produced to us any evidence of the current state of the roof and Mr. Ashe accepted that he did not know if all the remedial work had been done but Mr. Irwin stated that at present there was not a problem of water penetration into the subject property.

18. Generally the onus would be on the Applicant to satisfy the Tribunal on a balance of probabilities that the sums claimed were reasonably incurred but in complying with the directions, the Respondents had listed only those items in paragraph 10 above. The 1999 works had been paid for and were not within the scope of the application and no specific complaint had been made by the Respondents about the quality or cost of the 2002 works. Therefore the Applicant had not been put on notice that evidence of the quality or cost of the 2002 works was required. At the hearing Mr. Irwin told us that he had recently been on the roof and had taken photographs of it but the photographs had not come out. The photographs he said would have shown missing joints i.e. ridge tiles not jointed properly and not levelled properly and some lead not cut properly. He also said that some of the mortar is sandy and that not much had changed since the survey he commissioned in 2000.

19. Consequently, we had insufficient evidence before us of anything which would justify withholding or reducing the £450 contribution to the 2002 works.

Breach of covenant

20. It was accepted by the Applicant, Mr. Ashe and Mr. Irwin that:
(a) In the lease there was the following covenant by the lessee:
"(3) Not to injure cut or maim any of the walls ceilings floors or partitions of the said flat and not to make any structural alterations or structural additions to the said flat or the internal arrangements thereof or remove any of the landlord's fixtures without the previous consent in writing of the Lessor such consent not to be unreasonably withheld"
(b) The Respondents had made alterations to the flat by constructing stud walls to divide a room and create a lobby so that the original two bedroom flat became a three bedroom flat and that the alterations required the consent of the landlord as provided by the lease.
(c) The Applicant had no complaint about the standard of workmanship or the materials used to carry out the work.
(d) The Applicant was aware that the alteration had been made.
(e) The Respondents had provided drawings and there had been correspondence between the Respondents and Mr. Chapman of Messrs. Pengelly & Rylands Solicitors acting on behalf of the Applicant and between Maltbys and the Respondents.
(f) A letter dated 26th July 2002 had been written by Mr. Chapman in which it was stated that "I have heard from the freeholders agent that Mr. Atkins is prepared to grant retrospective consent provided you provide the necessary documents and make a formal request, together with your offer to pay the costs."
(g) In reply to that letter on the 29th July 2002 Mr. Irwin wrote a letter which included " I would request that the property is allowed to stay the way it is. The property is the same as it was on Mr. Ashe's visit in December 2000, when he extended approval of the work quality! I would confirm that necessary requirements will be met by myself and are proceeding with them."
(h) Planning permission was not required.
(i) A Regularisation Certificate certifying that the requirements of the Building Regulations were satisfied was issued on 18th December 2002.
(j) When the Respondents had bought the lease of the subject property it was in a very poor state and that the Respondents have made improvements to it.

21. We heard evidence from Mr. Irwin:
(a) That he thought the landlord's consent had been arranged between himself, his letting agent Mr. Cooper and Mr Ashe because Mr. Ashe had said at a meeting give us a plan and get consent.
(b) That at the request of Mr. Irwin, Brighter Homes (Folkestone) Limited had written to Mr. Ashe giving an opinion that building regulation consent and planning permission would not be required for the alterations.
(c) That a scale drawing of the alterations was sent to Mr. Ashe.
(d) That Mr. Irwin did not receive a reply to his letter of the 29th July 2002.
(e) That Mr. Irwin thought he had done all he needed to do. By the date of his letter of the 29th July 2002 the Applicant and Mr. Ashe knew the alterations which had been made.

22. We heard evidence from Mr. Ashe:
(a) That Brighter Homes (Folkestone) Limited is a building company not a surveyor.

(b) That Mr. Irwin had been asked to make an application on several occasions and had not done so. On the 11th June 2002 Mr. Ashe wrote a letter to Mr. Irwin which included "As we have discussed your queries again with Mr. Atkins, he has asked us to point out that he has still not received copies of the building regulations in respect of the alterations to the flat, not (sic) have you applied for his permission to alter the property, and therefore we look forward to receiving a copy of same." On the 24th June 2002 Mr. Ashe wrote to the Respondents a letter including the following: "You will recall in our letter of the 11th June 2002, Mr. Atkins still requires confirmation from the Shepway District Council whether Building Regulations have been approved, or are not required at the property, together with your application to alter the premises." On the 11th July 2002 Messrs. Pengelly & Rylands wrote to Mr. Irwin and included in that letter the following two paragraphs: "Could you please let us know when the work was carried out, and if Building Byelaw Consent and/or Planning Consent was applied for and obtained in respect of the alterations." " Could you please let us have a plan of the alterations and a formal request, in writing, together with details of any application made by you to the Local Authority."
(c) That Mr. Ashe did not consider Mr. Irwin's letter of the 29th July 2002 to be a request for permission as he had still not provided documents as to whether Building Regulations were satisifed or whether Planning Consent was required or had been obtained.
(d) That a reply was sent to Mr. Irwin's letter of the 29th July 2002 but Mr. Ashe could not find it.
(e) That Mr. Ashe had seen the alterations. He had entered the subject property in relation to a complaint that Mr. Irwin was carrying out work which was creating a noise problem and there was a meeting but Mr. Ashe was not there for the purpose of looking at alterations although Mr. Cooper did mention them. The alteration work was well progressed but not completed at that time.
(f) That Mr. Ashe had requested to see what had been done in the subject property because another tenant had said Mr. Irwin had made changes to it.

23. Mr. Atkins gave evidence:
(a) That he thought application should be made to him personally or to his solicitor although he accepted that Mr. Ashe was his agent and dealt on his behalf with matters concerning the block of flats.
(b) That he would not now be prepared to give consent to the alterations.
(c) That the conversion of the subject property from a two to a three bedroom flat would have an adverse effect on the parking problems at the block even though no more than one parking permit would be issued to any flat.

24. We found that there had been a breakdown in communication. Both Mr. Irwin and Mr. Ashe had written letters and the Applicant or Mr. Ashe had had letters written by solicitors on behalf of the Applicant. Often a letter covered a number of matters and this was not helpful to either party. Both Mr. Irwin and Mr. Ashe wrote letters which did not answer questions which had been asked but raised other questions which in turn were not answered.

25. We could see how Mr. Irwin could be under the impression that consent (but not written consent) had been obtained. He had provided a drawing of the alterations, he had provided a letter from Brighter Homes (Folkestone) Limited. At a later stage it was confirmed that Planning Permission was not required and a Regularisation Certificate was obtained as to satisfaction of the Building Regulations. There had been a meeting with Mr.

Ashe at the subject property and Mr. Irwin had understood from Mr. Ashe that if a drawing were to be provided then consent would be given.

26. We did not accept the evidence from Mr. Ashe that because he had attended to deal with a noise complaint he was not in a position to consider the alterations. He was aware that work at the subject property was claimed to be causing noise. We would expect a managing agent to be aware that such work could well suggest a change to the property which required consent and there was discussion of the alterations at the meeting.

27. We did not accept the evidence from the Applicant that an application for consent could only be made to him personally or his solicitor and not to Mr. Ashe. Mr. Ashe was the managing agent of the Applicant and had written letters to the Respondents about the consent to the alterations and a letter from the Applicant's Solicitors refers to having "...heard from the freeholders agent that Mr. Atkins is prepared to grant retrospective consent...".

28. We did not accept that shortage of parking spaces would be a reasonable ground for refusal of consent to the alterations because we were told that no more than one parking permit would be issued to any flat.

29. We found that the letter from Mr. Irwin dated 29th July 2002 was a written request for consent to the alterations and that no reply was made to that letter.

30. However, the fact remains that in order to comply with the covenant in the lease consent in writing should have been obtained before the works were undertaken. Consent was not applied for until later and the respondents are in breach of the covenant. We would suggest that if proceedings for forfeiture of the lease are commenced in the County Court the full content of this determination be placed before the learned judge so that it may be clearer how this situation came about and in particular that there had been an offer to give retrospective consent and application for consent had been made but no reply had been given.

31. Both parties applied for costs and the Applicant applied for reimbursement of the fees in connection with these applications. We found that there had been a failure of communication between the Applicant's professional agent and/or solicitor and the lay Respondents. There had been a failure to answer each other's questions. There was a failure to reply to an application for consent and there was a lack of supervision of works and professional administration by the Applicant's managing agents. These were the main factors in reaching a position where applications had to be made to the Tribunal and as a result, although the Applicant was successful, the parties should each bear their own costs.

R. Norman
Chairman