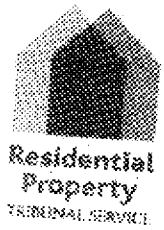
LEASEHOLD VALUATION TRIBUNAL

Case number : CAM/33UF/LSC/2005/0013



Property	:	**9-11 Church Street, CROMER, Norfolk**
Application	:	Determination of reasonableness of and liability to pay service charges for accounting years 2003, 2004 & 2005 [LTA 1985, s.27A] Determination whether the insurance available from the landlord's nominated insurer for insuring the tenant's dwelling is unsatisfactory in any respect, or the premiums payable in respect of any such insurance are excessive [LTA 1985, s.30A & Schedule]
Applicant(s)	:	Mr J B Walsh ..... Flat 9 Mr & Mrs M Whiting ..... Flat 8 Miss J G Austin ..... Flat 7
Respondent(s)	:	Waterglen Ltd, c/o Wood Managements Ltd,[1] Hercules House, 29-39 The Broadway, Stanmore, Middlesex HA7 4DJ

THE DECISION OF THE TRIBUNAL

Handed down : 15th July 2005

Tribunal	:	Mr G K Sinclair (chairman), Mr J Shrive FRICS FAAV, and Mr D Wilson
In attendance	:	Mr M J Walsh (son of Mr J B Walsh, and acting on his behalf) Miss Austin Mr & Mrs Whiting not in attendance Mr Raj Ahluwalia, for Wood Managements Ltd
Hearing date	:	Monday 20th June 2005, at The Links Hotel, West Runton, Norfolk

- Summary .....
- Relevant lease provisions ..... paras 1 - 3
- The applicable law ..... para 4
- Inspection, hearing and evidence ..... paras 5 - 8
- Findings and decision : ..... paras 9 - 12
- *The lorry damage and insurance claim* .....
- *The insurance premiums* ..... paras 13 - 15
- *Management and professional fees* ..... paras 16 - 24
- ..... paras 25 - 29

[1] The new name for DGA, having been bought by Erinaceous plc

- 2003 & 2004 service charge accounts ..... para 30
- 2005 interim service charge ..... para 31
- Costs, etc of this application ..... paras 32 - 33
- Schedule : amounts allowable for 2003 & 2004

Summary

1. Once again a firm of managing agents sends into battle on its behalf a relatively new employee, decently qualified but with no personal knowledge of the property, reliant entirely upon the file, and incapable of defending the indefensible. In this case the lessees even came to the managing agents' rescue by producing documents (which ought to have been in the file) proving that there had, in fact, been a proper consultation exercise. For the reasons which follow, however, the tribunal finds that the standard of management of the property in the relevant years has been abysmal, with requests not even answered – let alone dealt with – and even opportunities to obtain substantial grant aid ignored. The tribunal is also unimpressed with the attempts made to obtain competitive quotes for the insurance of the building. By comparison, the lessees were able quickly to obtain two significantly lower quotes between the date of the pre-hearing review and the hearing itself – barely a month.

2. The recoverable insurance premium contributions and service charges levied in the years 2003 and 2004 are therefore considered unreasonable and are substantially reduced : the combined total for 2003 from a claimed £7,709.78 to £2,118.99; and for 2004 from a claimed £6,548.77 to £2,453.73. The amount payable by each of the Applicants is one tenth of such sums, as provided by clause 2(2)(a) of each respective lease, subject to credit being given by the lessor for any part-payment and a rebate for any overpayment already made.

3. Under the terms of the relevant underlease a final determination of the amount payable for the year 2005 is premature, although the tribunal drew to the managing agents' attention the wording of the final paragraph of clause 2(2), which states that the interim service charge payments are governed (save where the lessor or its managing agents shall "reasonably require") by the amount expended during the preceding year. The amount demanded in advance for 2005 should therefore be reduced in line with the above figure for 2004, unless the managing agents can justify an increase as being reasonably required.

Relevant lease provisions

4. The sample underlease produced to the tribunal was that for Mr Walsh's flat 9. It is dated 15th February 2002 and was originally granted for a term of 199 years less 3 days from 1st August 1987, at an annual rent of £50 during the first 50 years, and then rising every further fiftieth year. The lessee's obligations to pay a specified proportion of the service charges appear in clause 2(2)(a), with a further obligation in clause 2(3) to pay to the lessor a further sum equal to 15% of the yearly maintenance costs. This latter obligation, which to be enforceable would in any case have to satisfy the test of reasonableness, is in practice ignored by the lessor. The lessor's obligations to maintain, repair and insure the structure and to clean and keep lighted the common parts are to be found in clause 4(1) to (4) inclusive.

The applicable law

5. The Tribunal's powers to determine whether an amount by way of service charges is payable and, if so, by whom, to whom, how much, when and the manner of payment are set out in section 27A of the Landlord and Tenant Act 1985.[2] Provided that the application is made to the tribunal after 30th September 2003 these powers apply irrespective of whether the costs were incurred before the coming into force of this new section.[3] Please note sub-sections (5) & (6), which provide that a tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment, and that an agreement by the tenant of a dwelling (other than a post-dispute arbitration agreement)[4] is void in so far as it purports to provide for a determination in a particular manner or on particular evidence of any question which may be the subject of an application to the Tribunal under section 27A.

6. The overall amount payable as a service charge continues to be governed by section 19, which limits relevant costs[5]:

a. only to the extent that they are reasonably incurred, and

2 As introduced by the Commonhold and Leasehold Reform Act 2002, section 155(1)

3 See the Commonhold and Leasehold Reform Act 2002 (Commencement No 2 and Savings) (England) Order 2003 [SI 2003/1986], Article 2(c) and Schedule 2, para 6

4 Eg. provisions in a lease stating that the landlord's accountant's certificate shall be conclusive, or that any dispute shall be referred to arbitration

5 Including the costs of insurance

b. where they are incurred on the provision of services or the carrying out of works, only if the services or works are of a reasonable standard.

7. The consultation requirements required by the Landlord and Tenant Act 1985, section 20 in respect of significant items of expenditure have been radically amended with effect from 31st October 2003. Instead of a threshold of £1,000 or £50 per tenant (whichever is the greater) the new section 20 consultation requirements[6] apply to qualifying works, viz those in respect of which any leaseholder may be required to pay more than £250 in any one year. In the instant case the only works affected are the 2003 repairs to the oriel window (resulting from lorry damage), to which the old provisions apply, and repairs to leaking pipes, repointing, etc in mid-2004, to which the new provisions apply. Under the provisions of the old section 20 the tribunal has no jurisdiction to waive any breach of the consultation requirements. If relief is to be sought then application must be made to the local County Court. Under the new provisions, if application is made to it under section 20ZA(1), the tribunal may dispense with the consultation requirements, in whole or in part, if satisfied that it is reasonable to do so.

8. So far as the lessor's ability to recover insurance premiums is concerned, in addition to the normal limitation on recoverability provided by the reasonableness requirement in section 19, section 30A of and the Schedule to the 1985 Act provide[7] that the tenant or landlord may apply to a county court or leasehold valuation tribunal for a determination whether the insurance which is available from the nominated or approved insurer for insuring the tenant's dwelling is unsatisfactory in any respect, or the premiums payable in respect of any such insurance are excessive. Upon such an application the court or tribunal may make an order requiring the landlord to nominate or approve such other insurer as is specified in the order, or an order requiring him to nominate or approve another insurer who satisfies such requirements in relation to the insurance of the dwelling as are specified in the order.

[6] The relevant consultation requirements now appear in Part 2 of the Fourth Schedule to the Service Charges (Consultation Requirements) (England) Regulations 2003

[7] See Schedule, para 8

Inspection, hearing and evidence

9. The tribunal inspected flat 10, the interior common parts, and the exterior of the building at 10:00 on the morning of Monday 16th May 2005, the date originally appointed for the hearing of these applications. 9-11 Church Street is a four-storey middle-terrace building, built about 100 years ago, with two two-storey back extensions. It has been converted into 10 self-contained flats off two staircases rising from either side of a large common entrance hall between what appear from the front to be two shops but which in fact is one large furniture shop which is connected at the rear, forming a broad U behind and under the two staircases. At the front the building opens directly on to a narrow pavement near a corner junction on the main coastal through-route in the centre of the town. On this aspect the building has two 2-storey oriel windows, one of which was badly damaged in January 2003 by a delivery lorry which pulled too close when stopping to unload. This formed the subject of an insurance claim and at the date of inspection had been fully repaired.

10. The full hearing took place on 20th June 2005. The lessor relied upon its service charge accounts for 2003 and 2004, the invoices and documents in support, the terms of the underlease, and (in respect of the insurance issue) a witness statement produced for the first time with the hearing bundle from Mr John Tillett, a director of Cadogan Insurance Services Ltd.[8] Mr Tillett did not attend, so could not be questioned. As his statement seemed to raise more questions than it answered the tribunal gave Mr Ahluwalia the opportunity during the hearing to obtain further information by telephone, but with limited success. The statement was therefore given limited weight.

11. The Applicants relied upon the matters raised in the application, the documents about the service charges disclosed by both parties, and those obtained by them concerning available insurance cover. They also gave direct oral evidence of events and matters within their knowledge, which was not a course of action available to Mr Ahluwalia, a former town planner and Member of the Chartered Institute of Housing, who had only been with the managing agents for about 10 months and had no knowledge of the management of this property other than that gleaned from the file. The person who had been directly involved in the management of Church Street had left the company,

[8] Which, like Wood Management, is also a subsidiary of Erinaceous Group plc

apparently leaving some gaps in the information available.

12. Both parties made closing submissions : Mr Walsh for the Applicants and Mr Ahluwalia for the Respondent lessor.

Findings and decision

The lorry damage and insurance claim

13. The 2003 statement of expenditure produced by the lessor's accountant reveals that the sum of £7,301.26 was spent on repairs, and a further £759.06 in survey fees (all for the lorry damage to the oriel window), but only £6,212.37 was received from the insurers in settlement. Mr Tillett's statement states, in paragraph 6, that "the impact claim was as a result of a car colliding with a bay window, which AXA were unable to recover from the third party." By contrast, Mrs Austin, a resident, was quite clear as to the cause of the accident. It was no car accident, or a hit and run; rather, a lorry delivering goods to the shop downstairs – understandably anxious to keep the road as clear as possible so close to a sharp corner and intersection – came too far on to the pavement and too close to one of the two overhanging oriel windows.

14. Quite why the vehicle's insurers were not pursued to full recovery is incomprehensible. Equally puzzling is why the managing agents instructed a surveyor, Mr Catchpole, to supervise the specification, tendering and repairs instead of leaving this to the loss adjuster appointed and paid for by the insurers. The tribunal does accept, however, that immediately after the incident it was reasonable for the lessor to arrange for its own local surveyor to report on damage and structural stability, and to arrange for emergency shoring up works to be undertaken. The net result is that the lessees have been required by the lessor to pay not only the insurance excess on this incident but also additional expenses not recovered, including unnecessary surveyor's fees.

15. The tribunal considers that the lessor has failed to provide sufficient, or any, explanation why the lessees must meet these additional costs. Insofar as the service charge account for 2003 includes expenditure on this item above and beyond the amount recovered from AXA then this is disallowed. The two debit items and the one credit mentioned in paragraph 13 above shall therefore be deleted from the account for 2003.

The insurance premiums

16. The insurance premiums negotiated by the lessor's managing agents' in-house broker, ostensibly as part of a large block policy covering many properties across the country, are consistently higher than the quotes obtained by Mr Walsh and Mrs Austin on behalf of the lessees. The premiums actually paid in the period 2000-01 to 2004-05 appear in Mr Tillett's statement at paragraph 4. He refers at paragraph 6 to three claims paid by the insurers in this period, as a result of which "the risk is performing below insurer's acceptable loss ratio."[9] In light of this claims experience, he says, "it has been necessary to continue to place this insurance with AXA Insurance."[10] Despite this, however, the premium negotiated for the period commencing 24th June 2005 is much lower than for the previous year : down from £3,601.64 plus IPT to £2,724 plus IPT.

17. Unfortunately, the second alleged claim mentioned in Mr Tillett's statement was neither made nor paid. Mrs Austin was quite emphatic on this point. Mr Ahluwalia attempted to obtain further information by telephone but was unable to do so.[11] The only explanation he could offer for the reduced premium, despite all that had been said about the claims history, was that the insurance market had "softened" recently.

18. By contrast, the Applicants had managed to produce three much lower figures than the lessor. Mrs Austin had initially, through Norwich and Peterborough Insurance Brokers, produced a quotation dated 11th April 2005 of £1,068.39 from Advent Insurance for property owners/flats insurance, with a sum insured of £600,000. This was subject to confirmation of any claims made in the last five years, plus full details of the type of occupancy in the 10 flats. The sum insured is much lower than the £734,953 covered by AXA under the existing policy for the year 2004-05. In the further directions issued at the pre-hearing review in May 2005 the tribunal asked the Applicants to produce at least two insurance quotes for identical cover to that already provided,[12] and advised that when seeking such quotes a copy of the lease and the claims history should be disclosed.

9 See Tillett, para 7

10 Op cit, at para 9

11 By a fax dated 22nd June 2005, received well after the hearing, Mr Tillett confirmed that this was merely an initial insurer's reserve made after a claim was notified but not later pursued

12 Including sum assured

19. By the hearing Mr Walsh had obtained from Norwich & Peterborough two new insurance quotes complying with these requirements :

a. From Allianz Cornhill, dated 27th May 2005 ..... £1,396.18 plus IPT

b. From AXA, dated 27th May 2005 ..... £2,572.50 plus IPT

The latter, while the higher of the two, is the more surprising. On a one-off basis the existing insurer was willing and able to quote a cheaper price than the £2,724 plus IPT for renewal negotiated by the lessor's own in-house brokers under a supposedly more cost-effective (because discounted) block policy. In evidence, Mr Walsh stated that he had been informed by Norwich & Peterborough that, but for the large claim in respect of the lorry damage, cover could have been obtained from Allianz for significantly less than £1,400 – perhaps in the region of £800 (plus IPT). He confirmed, and produced a corroboratory e-mail to that effect dated 17th June 2005, that the brokers had been aware of the two recent property claims and their amounts – a fact rendered ambiguous by the wording on page 7 of the quote.

20. In response Mr Ahluwalia stated that Cadogan, the in-house brokers, had gone out to tender to three insurers, but two did not reply and only AXA was prepared to quote. He did not know the identity of the insurers concerned, and nor did he challenge the tribunal's assumption that only a block policy covering many different properties was under consideration. He could not say whether, faced with a choice of one, Cadogan had then approached other insurers. Instead, he reminded the tribunal of two reported cases on the subject of the lessor's choice of insurer, viz *Berrycroft Management Co Ltd v Sinclair Gardens Investments (Kensington) Ltd*[13] and *Forcelux Ltd v Sweetman.*[14]

21. In the former case the Court of Appeal held that the quotations for insurance were competitive and not unreasonable and that, as the tenant was protected by the requirement that the insurer should be one of repute, the fact that the rates proposed by the chosen company were higher than those the tenant-controlled management company could have secured was irrelevant. In the later case the Lands Tribunal stated that the test for the recovery of insurance premiums under section 19(2A) of the 1985 Act was whether they had been "reasonably incurred", not whether they were

[13] (1998) 75 P&CR 210; [1997] 1 EGLR 47 (CA)

[14] [2001] 2 EGLR 173 (Lands Tribunal)

"reasonable", and that this required consideration of the appropriateness of the lessor's actions and whether they were in accordance with the terms of the leases, the RICS code and the 1985 Act.

22. From the evidence available to it, including the fact that the same insurer was prepared to quote Mr Walsh a price £150 cheaper for this building than Cadogan could obtain, the tribunal is satisfied that the rate obtained by Cadogan is not competitive. All three quotes obtained by the Applicants were cheaper than that by Cadogan; two appreciably so. The premiums are also affected by the claims history, the larger part of which ought to have been recovered in full from the owners or operators of the lorry which caused the damage in January 2003. The Applicants' evidence is that, but for these claims, cover would have been significantly cheaper. As well as the information provided to Mr Walsh there is the evidence that (admittedly with a smaller sum insured) Advent would have been willing to provide cover for only £1,068.

23. What the tribunal has to assess is whether the insurance premiums for 2003 (£3,302.52) and 2004 (£3,781.72) were reasonably incurred.[15] There is no evidence of any alternative quotes for those particular periods but, bearing in mind that the Applicants' quotes are so much cheaper, the tribunal considers that they provide a reasonable indication that cheaper cover would probably have been available. It also considers that the Advent quote may provide a more reliable base point than the "£800ish" quoted to Mr Walsh, although the supposed reduction of £600 from an actual £1,400 quote gives a useful percentage discount of 43%, rounded to 40%, to adopt as a guide. Applying that percentage to the two AXA quotes produces discounted figures of £1,543.50 (Walsh) or £1,634.40 (Cadogan), just slightly higher than the actual quote by Allianz which takes fully into account the current claims history. In other words, even if the AXA premium had not been loaded to take account of the lorry damage claim, it would likely still exceed that by Advent and actually exceed that by Allianz with loaded premiums.

24. The tribunal is not satisfied that sufficient effort was made by the lessor to obtain more than one insurance quote, and the result is that the premium – far from being discounted due to the greater purchasing power of a large block policy – is higher than that which

[15] Both premiums, payable in June, would have taken the January 2003 claim into acount

the Applicants could obtain from the very same insurer. The broker has failed to ensure that an unfair premium loading be removed, and Mr Tillett's statement is riddled with mistakes. The conclusion of the tribunal is that the premiums for the years in question have not been reasonably incurred. Doing the best it can, the tribunal reduces each premium by 40%.

Management and professional fees

25. Save for the initial investigation of the damage caused in January 2003, the tribunal considers that the lessor has made considerable and unnecessary use of its surveyor when a loss adjuster (for claims) or a member of the managing agents (for other matters) could have attended. Such fees would have been incorporated within the managing agents' costs of management.

26. The 2003 service charge account includes legal fees. Mr Ahluwalia was unable to say what these were for, and there was nothing on the file to assist. The tribunal considered that this item should be disallowed.

27. The service charge accounts for both years include accountancy fees. Those for 2003 are allowed as normal business expenditure. However, the service charge accounts for 2004 show that the accountant had failed properly to check the accounts and insist upon production of receipts. This became manifest when two different sets of accounts for the property were produced, each bearing the same date. One, however, included an item for "porter's wages & accommodation" and the sum of £2,088.79, producing a total of £8,637.50 instead of the amount now claimed, viz £6,548.77. This entry was wrong, and no sensible explanation for it could be provided. The accountant's fee is disallowed.

28. Mr Walsh gave evidence that he had been trying for a long time to get the water damage to his father's flat repaired. He was told that the service charge account was in arrears, so he cleared it in full and then asked for repairs to be undertaken to the roof. he stated that he wrote numerous (15+) letters and made various phone calls. Eventually, due to poor health, his father moved out. Only after making this application did work take place to the roof. He said that his father had suffered deep anxiety and distress as a result of this, which was down to the incompetent and useless management of the block. He said

that the management fee should be struck out.

29. Supporting this approach, Mrs Austin told the tribunal that Cromer Heritage money was available for works contributing to the architectural heritage of the town. The property is in zone A, attracting the maximum level of grant, and she had asked the agents about claiming for renovating. She said that according to the literature the building would qualify for a grant of 64% (minimum), and this could be used to renovate the stonework on the front elevation. Grants covers the whole external street-scene. She said that she had mentioned it to the agents and sent them the literature, but with absolutely no response. She also dealt with the rather poor arrangements for cleaning the premises and changing of light bulbs, much of which she had felt obliged to do herself. It was only recently that the managing agents had bothered to start paying her a modest amount for such work.

2003 & 2004 service charge accounts

30. Having considered the written and oral evidence of the parties, and taking the above matters into account, the tribunal determines that the amounts recoverable by the lessor from the Applicant lessees by way of service charge for the years in question are as set out in the Schedule annexed.

2005 interim service charge

31. The tribunal drew to the managing agents' attention the wording of the final paragraph of clause 2(2), which states that the interim service charge payments are governed (save where the lessor or its managing agents shall "reasonably require") by the amount expended during the preceding year. The amount demanded in advance for 2005 should therefore be reduced in line with the above figure for 2004, unless the managing agents can justify an increase as being reasonably required. It is, however, rather premature for the tribunal to make a final determination of the amount recoverable in respect of this current year.

Costs, etc of this application

32. Although Wood Managements Ltd (formerly DGA) failed to attend on the earlier hearing

date and has been subjected to a lot of criticism in this decision it would be wrong to say that either party has acted frivolously, vexatiously, abusively, disruptively or otherwise unreasonably in connection with these proceedings. The circumstances do not therefore exist in which either party may be ordered to pay a contribution towards the other's costs.[16]

33. Under the terms of the lease the freeholder can recover the costs and fees incurred by its managing agents for the collection of the rents of the flats and for the general management of the block, including architects' and surveyors' fees. For the avoidance of doubt the tribunal directs, under section 20C of the Landlord and Tenant Act 1985, that neither the fees paid by the freeholder to the tribunal nor the costs incurred by it shall be recoverable as part of any present or future service charge demand concerning leaseholders of 9–11 Church Street, Cromer.

Dated 15th July 2005

.....

Graham Sinclair – Chairman

for the Leasehold Valuation Tribunal

[16] See CLRA 2002, Sch 12, para 10

SCHEDULE

Part A — 2003

Item	Amount claimed	Amount allowed
Insurance	£3,302.52	£1,320.00
Repairs (Oriel window)	£7,301.26	£0.00
Electricity	£30.54	£30.54
Legal fees	£414.34	£0.00
Survey fees	£759.00	£205.62
Accountancy fees	£123.38	£123.38
Insurance claims – receipts	(£6,212.37)	£0.00
Management fees (incl VAT)	£1,551.00	£0.00
Fire alarm system	£439.45	£439.45
Total :–	£7,709.12	**£2,118.99**

Part B — 2004

Item	Amount claimed	Amount allowed
Accountancy fees	£129.50	£0.00
Cleaning	£40.00	£40.00
Fire alarm system	£395.98	£395.98
Insurance	£3,781.72	£1,512.69
Insurance claims – excess	£250.00	£250.00
Management fees (incl VAT)	£1,656.76	£0.00
Repairs	£206.88	£206.88
Survey fees	£88.12	£88.12
Rounding error	£0.06	£0.06
Total :–	£6,549.02	**£2,493.73**