LEASEHOLD VALUATION TRIBUNAL

OF THE MIDLAND RENT ASSESSMENT PANEL

BIR/00CN/LSC/2004/0007c

DECISION OF THE LEASEHOLD VALUATION TRIBUNAL

ON APPLICATIONS UNDER SECTION 27a OF THE LANDLORD & TENANT ACT 1985

Applicants	Mr Devinder Singh
Respondent:	Westacre Residents Association Limited
Subject property:	18 Leabank, Finchfield, Wolverhampton WV3 9HN
Date of tenant's notice:	26th November 2004
Hearings:	20th May 2005 13th July 2005 22nd August 2005
Appearances:	
For the Applicant:	Mr M Stevens
For the respondents:	Mr P Mantle
Members of the LVT:	Mr D.B. Power FRICS Mr P J H Waller Mr D. Underhill
Date of determination:	7th September 2005

Introduction

1. This is a decision on an application made under the Landlord & Tenant Act 1985 ("the 1985 Act") to the Leasehold Valuation Tribunal by the leasehold owner of 18 Leabank Finchfield Wolverhampton ("the subject property"). The application was under section 27a of the 1985 Act for a determination of liability to pay service charges for the years 2003, 2004 and 2005. In addition the application requested the Tribunal to make an order preventing the landlord from recovering his costs in connection with the proceedings as part of the service charge, under section 20c of the Act.

2. The Applicant holds the leasehold interest by virtue of a lease originally granted between John McClean and Sons Limited (the Lessor), Westacre Residents Association Ltd (the Company) and Richard Henry Bulley and Kenneth Stephen Bulley (the Lessees). The interest of the Lessor has now been transferred to the Company and the interest of the Lessees assigned to the Applicant.

3. The subject property comprises a self-contained flat forming part of a development of 30 flats known as Leabank, in respect of which the management and the administration of the service charge is undertaken by Westacre Residents Association Ltd.

Inspection

4. The Tribunal inspected the subject property together with the exterior of the buildings and site comprising Leabank on the morning of the first hearing. The Applicant and his representatives were in attendance together with Mr A J. Goodall, Chairman of the Residents Association, and his representatives.

5. The Tribunal noted that the subject property was not occupied and a number of defects relating to the ceiling and windows were pointed out by the Applicant. The site generally had the appearance of being well cared for, the grounds were tidy and well maintained, and the buildings appeared well maintained, although it was noted that, whilst some of the window frames had been replaced, there were a number which appeared defective.

Hearing

6. Following a pre-trial review, an agreed trial bundle had been produced incorporating witness statements, copy accounts and other documents upon which the parties intended to rely on. However the Respondent did not include some accounts required by the directions following the pre-trial review. The lease required the Respondent to produce an auditor's certificate of the service charge expenditure each year whereas the only accounts produced were accounts prepared to comply with the requirements of the Companies Acts. The hearing was adjourned and the Respondent required to produce the service charge accounts for the reconvened hearing. When reconvened the hearing was spread over two separate days.

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8. The application listed the following service charge items that were at issue:

2003

- West Midlands Roofing Services £9,850
- Glaziers Opifix £9,562.01
- Alpher UK Ltd £11,460
- Solicitor's charges not known

2004

- As above but excluding the account from Alpher UK Ltd

2005

- As 2004

The questions which the Applicant wanted the Tribunal to decide for each year were as follows;

- Is the service charge fair and reasonable?
- Is the service charge payable for items upon which the landlord did not consult the tenants?
- Is the service charge payable although the applicant has not been living at his flat?

9. Detailed evidence was presented on behalf of the Applicant which challenged the activities of the Residents Association both in particular and in general, that there was no proper consultation on repair and replacement works, that the accounting regime did not conform with the requirements of the lease, and that contractors appointed to carry out work were not appropriate as they did not have trade association approval nor proper insurance.

10. The first matter of dispute related to the renewal of the roof to the block containing the subject property. Problems with this roof were first reported to Mr Goodall in early 2003. A report dated 28th April 2003 was obtained from Danescourt Roofing Ltd that stated that the roof was in a reasonable condition and would last about another 4 – 6 years. A quotation dated 1st of May 2003 was obtained from West Midlands Roofing Services and a further quotation dated 9th of June 2003 from the J D Roofing Ltd. The Applicant had obtained an estimate from G B Evans for a "patch" job. There was no formal consultation with the leaseholders who were advised on the 16th September that West Midlands Roofing Services would be carrying out roof replacement work commencing the following day. However, on 22nd September, heavy rainfall occurred and, due to inadequate precaution by the roofing contractor, there was flooding in the flats below. It transpired the contractor had no indemnity insurance although he agreed that the cost of renewing the roof (which was completed by him) at £9,850 should be used towards the cost of reinstatement and provided a further £10,000 for this purpose. This agreement was reached by Mr Goodall and not through the insurance company. Any shortfall on the reinstatement cost is to be funded by the roofing contractor through the insurance loss adjuster. Reinstatement work to the Applicant's flat has not been completed.

11. The second dispute relates to the replacement of defective windows to flats in the development generally. This programme began in 2003 and appears to have been as a result of one of the residents seeking to replace windows following which the contractor used was instructed to deal with defective windows in other flats. Where some windows in a flat were defective and others were not, the leaseholder contributed part of the cost of those windows

which were replaced for cosmetic reasons and the Residents Association paid for those which were defective. There does not appear to have been a clear programme setting out which flats were to have windows replaced and in which order. There is no evidence of alternative quotations having been obtained, the Residents Association and some leaseholders at least being satisfied that the cost was reasonable. Some informal consultation with individual leaseholders did take place.

12. In addition to these main matters of contention, a number of individual invoices were challenged including those in respect of removal of waste, work to trees and shrubs and relaying paving slabs.

13. Mr Goodall as chairman of the Residents Association gave evidence of the process of management of the service charge items.

Determination

14. The Tribunal was greatly assisted by the arguments and evidence submitted by both parties, all of which was carefully considered in coming to the decision.

15. The Tribunal finds from the evidence submitted at the hearing that, whilst Mr Goodall was undertaking the management function for the Residents Association, it was done without any regard for the procedures laid down in the lease nor for the requirements laid down in the 1985 Act. The majority of the leaseholders in Leabank have been content with the management methods in spite of this non-compliance. There has been a material breakdown in the relationship between Mr Goodall and the Applicant resulting from the failure to agree on the reinstatement of the subject property following flood damage and the replacement of defective wooden windows which has led to this application. It is outside the jurisdiction of the Tribunal to make any determination of the original cause.

16. The Tribunal has found no evidence of impropriety in the management and Mr Goodall has undertaken the management role not as a professional, but as a practical layperson. He has endeavoured to keep the service charge at a minimal level, and that the accounts reveal expenditure in excess of income.

17. The lease sets out, in the third schedule, the procedure for the recovery from the lessee of his proportion of the maintenance expenses. The lessee is required, on each of the quarter days, to pay 1/4 of 1/30th of the amount of expenses estimated for the following year. At the 25th December of that year. the auditor to the Residents Association is required to provide a certificate as to the total amount of the expenses for that year. Within 21 days after the provision of the auditor's certificate, the lessee is to pay, or receive, the balance between the total due and that paid. That procedure has never been implemented; the account prepared is that to comply with the requirements of the Companies Acts and does not meet with those set out in the lease.

18. Whilst Annual General Meetings of the Residents Association have been held, the minutes give no indication that there has been any discussion on maintenance programming or the estimation of expenditure either in respect of ongoing routine maintenance or specific items of major nature. There is a general lack of formal consultation by Mr Goodall with the leaseholders.

19. The 1985 Act, as amended by the Commonhold and Leasehold Reform Act 2002 lays down a procedure for consultation by the manager (in this case the Residents Association) with the lessees in respect of major works, the cost of which to any one lessee, currently, would be more than £250 in any one year. There are other matters in respect of which consultation is required but these do not apply to the current case. The consultation involves the provision of specifications, at least two estimates and takes place within a set time scale. If the procedure is not complied with, the manager is not able to recover the cost from the lessees.

20. Prior to the provisions of the Commonhold and Leasehold Reform Act 2002 coming into force on 30th September 2003, in respect of any works which should have been the subject of consultation in accordance with section 20 of the 1985 Act, the power to grant dispensation from those requirements was held by the County Court and a Leasehold Valuation Tribunal was not empowered to do so. Since that date however, that power is vested in the Tribunal.

21. Applying these criteria to the matters in dispute, the replacement of the roof to the block containing the subject property was a major repair for which consultation under section 20 of the 1985 Act was a requirement and this was not done. There was adequate opportunity for the consultation process to be undertaken having regard for the period of time between the initial estimates having been obtained and the work commencing. It was argued before the Tribunal that no payment was made for the roof replacement as the cost which would have been paid was retained and diverted, with the agreement of the contractor, towards the cost of reinstating storm damage. As the contractor completed the replacement of the roof, the Residents Association have, in effect, paid for it. Without dispensation, the works having commenced before the 31st October 2003, the maximum recoverable is limited to £1000 (1985 Act section 20 (3) (b) as amended by the Service Charge (Estimates and Consultation) Order 1988)

22. The programme for window replacement appears to have been on an ad hoc basis and the contractors instructed unit by unit and not a comprehensive contract for a replacement of all windows in every flat. On this basis, the cost of window replacement falls below the ceiling for consultation both in respect of work commenced prior to the 31st October 2003 (as above) and work commenced after that date (where the limit is £250 maximum payable by any one leaseholder). The Tribunal finds that these costs have been properly incurred.

23. The lease provides that in the event of damage resulting from an insured peril, the Respondent shall apply the receipts from insurers to be applied in making good such damage (clause 4(F). This cost should not therefore be part of the service charge and the invoice from Alpher UK excluded as it applies to reinstatement.

24. Turning to the question of reasonableness, the Tribunal acknowledges that the service charge management has been undertaken in a non-professional but well-meaning way. The standards of a professionally qualified managing agent, complying with the Code of Practice set out by the Royal Institution of Chartered Surveyors cannot be expected where these particular arrangements apply. On the positive side, it is evident that, in spite of underfunding, the service charge payable by each leaseholder has been maintained at a very

low level and management charges have been very limited. The identification and selection of contractors has been somewhat haphazard. The Tribunal has concluded that the costs incurred are not unreasonable.

25. As to payability, the lease makes no provision for the suspension of payment of the service charge whilst the property is unoccupiable following damage, only in respect of the ground rent. The Tribunal has no power to order that the service charge be suspended in these circumstances.

26. The third schedule of the lease requires the managing company to prepare an estimate of the anticipated expenditure in any one year ending 25th December. This has not been done other than the expenditure in one year anticipated to be at the same level of the previous year and the interim payment kept at the same level but with some minor variation. However the third schedule also requires that an auditor's certificate be prepared and served on the lessee as a result of which any balance is payable or refundable. This has not been done and it is a condition precedent upon further monies being due from the lessee. Whilst this is capable of remedy, the Residents Association has not sought to correctly balance the service charge account year by year. No other lessees have been called upon to pay other than the quarterly contributions and unless the Residents Association operates in accordance with the terms of the lease, the Tribunal will not make an order for the Applicant to contribute anything more than has been demanded of the other lessees.

27. The Respondent in this case is the Residents Association who own the freehold and in turn the leaseholders own the Residents Association. Any decision of this Tribunal which results in service charge costs being reduced below the actual cost would be ineffective because any shortfall would still have to be funded by the leaseholders as the owners.

28. As the Respondent has not administered the service charge in accordance with the provisions of the lease by providing an auditor's certificate of the expenditure each year and demanding/refunding any difference between the estimated cost and the actual cost for that year, the Applicant should not pay any amount other than the estimated service charge for each of the relevant years. The provision of that certificate is a condition precedent to any liability to pay any sum different to the estimated sums.

29. There is an issue that the Applicant has so far not completed his obligation to take an assignment of the one £10 share to become a shareholder in the management company as required under clause 6 of the lease but that is not a matter for this Tribunal.

30. As to the question of costs, the Applicant has made application to the Tribunal in an endeavour to obtain determination of the matters in dispute. Although it is beyond the powers of the Tribunal to resolve all aspects, those relating to the service charge are. The findings confirm the accounts have not been administrated in accordance with the lease or statute and the applications are fully justified. In these circumstances, the application fee of £150 and the hearing fee of £350, totalling £550, should be reimbursed by the Respondent to the Applicant.

31. An application is also made under section 20c of the Act to prevent the Respondent from recovering costs incurred in connection with these proceedings as part of the service charge. Such cost penalty would be

inequitable to the Applicant and in any event, the Tribunal is not persuaded that the lease is drawn up in sufficiently clear terms to enable inclusion in the service charge.

32. The Tribunal was invited to penalise the Respondent through costs by failing to respond to the Directions to submit service charge accounts in compliance with the terms of the lease. Section 10 of schedule 12 to the Commonhold and Leasehold Reform Act 2002 empowers the Tribunal to make a determination, under subsection 2(b) if a party has, in the opinion of the Tribunal, acted frivolously, vexatiously, abusively, disruptively or otherwise unreasonably in connection with the proceedings. The Tribunal does not consider this failure in these circumstances is of sufficient gravity to award such costs.

Decision

33. The Tribunal has no jurisdiction to dispense with the consultation procedure in respect of the renewal of the roof and the cost recoverable in that respect is limited to £1000. An application for dispensation, if appropriate, should be made to the County Court

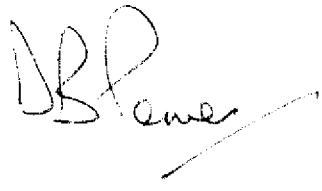
34. Excluding the roof, the Tribunal determines that the works undertaken within the service charge have been reasonably incurred and the cost is reasonable.

35. For the years to 25th December 2003 and 2004, the Applicant shall pay the balance of the estimated service charge demanded.

36. The application for the future service charge year to 25th December 2005 requires the Tribunal to consider the issues of the roofing account from West Midlands Roofing services and that from Opifix. These issues have been dealt with in respect of the previous years

37. The Respondent will reimburse the Applicant the application and hearing fees totalling £550

38. The Respondent's costs incurred in connection with these proceedings shall not be recovered as part of the service charge.

Signed 

Date 3 OCT 2005

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20. Prior to the provisions of the Commonhold and Leasehold Reform Act 2002 coming into force on 30th September 2003, in respect of any works which should have been the subject of consultation in accordance with section 20 of the 1985 Act, the power to grant dispensation from those requirements was held by the County Court and a Leasehold Valuation Tribunal was not empowered to do so. Since that date however, that power is vested in the Tribunal.

21. Applying these criteria to the matters in dispute, the replacement of the roof to the block containing the subject property was a major repair for which consultation under section 20 of the 1985 Act was a requirement and this was not done. There was adequate opportunity for the consultation process to be undertaken having regard for the period of time between the initial estimates having been obtained and the work commencing. It was argued before the Tribunal that no payment was made for the roof replacement as the cost which would have been paid was retained and diverted, with the agreement of the contractor, towards the cost of reinstating storm damage. As the contractor completed the replacement of the roof, the Residents Association have, in effect, paid for it. Without dispensation, the works having commenced before the 31st October 2003, the maximum recoverable is limited to £1000 (1985 Act section 20 (3) (b) as amended by the Service Charge (Estimates and Consultation) Order 1988)

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25. As to payability, the lease makes no provision for the suspension of payment of the service charge whilst the property is unoccupiable following damage, only in respect of the ground rent. The Tribunal has no power to order that the service charge be suspended in these circumstances.

26. The third schedule of the lease requires the managing company to prepare an estimate of the anticipated expenditure in any one year ending 25th December. This has not been done other than the expenditure in one year anticipated to be at the same level of the previous year and the interim payment kept at the same level but with some minor variation. However the third schedule also requires that an auditor's certificate be prepared and served on the lessee as a result of which any balance is payable or refundable. This has not been done and it is a condition precedent upon further monies being due from the lessee. Whilst this is capable of remedy, the Residents Association has not sought to correctly balance the service charge account year by year. No other lessees have been called upon to pay other than the quarterly contributions and unless the Residents Association operates in accordance with the terms of the lease, the Tribunal will not make an order for the Applicant to contribute anything more than has been demanded of the other lessees.

27. The Respondent in this case is the Residents Association who own the freehold and in turn the leaseholders own the Residents Association. Any decision of this Tribunal which results in service charge costs being reduced below the actual cost would be ineffective because any shortfall would still have to be funded by the leaseholders as the owners.

28. As the Respondent has not administered the service charge in accordance with the provisions of the lease by providing an auditor's certificate of the expenditure each year and demanding/refunding any difference between the estimated cost and the actual cost for that year, the Applicant should not pay any amount other than the estimated service charge for each of the relevant years. The provision of that certificate is a condition precedent to any liability to pay any sum different to the estimated sums.

29. There is an issue that the Applicant has so far not completed his obligation to take an assignment of the one £10 share to become a shareholder in the management company as required under clause 6 of the lease but that is not a matter for this Tribunal.

30. As to the question of costs, the Applicant has made application to the Tribunal in an endeavour to obtain determination of the matters in dispute. Although it is beyond the powers of the Tribunal to resolve all aspects, those relating to the service charge are. The findings confirm the accounts have not been administrated in accordance with the lease or statute and the applications are fully justified. In these circumstances, the application fee of £150 and the hearing fee of £350, totalling £550, should be reimbursed by the Respondent to the Applicant.

31. An application is also made under section 20c of the Act to prevent the Respondent from recovering costs incurred in connection with these proceedings as part of the service charge. Such cost penalty would be

inequitable to the Applicant and in any event, the Tribunal is not persuaded that the lease is drawn up in sufficiently clear terms to enable inclusion in the service charge.

32. The Tribunal was invited to penalise the Respondent through costs by failing to respond to the Directions to submit service charge accounts in compliance with the terms of the lease. Section 10 of schedule 12 to the Commonhold and Leasehold Reform Act 2002 empowers the Tribunal to make a determination, under subsection 2(b) if a party has, in the opinion of the Tribunal, acted frivolously, vexatiously, abusively, disruptively or otherwise unreasonably in connection with the proceedings. The Tribunal does not consider this failure in these circumstances is of sufficient gravity to award such costs.

Decision

33. The Tribunal has no jurisdiction to dispense with the consultation procedure in respect of the renewal of the roof and the cost recoverable in that respect is limited to £1000. An application for dispensation, if appropriate, should be made to the County Court

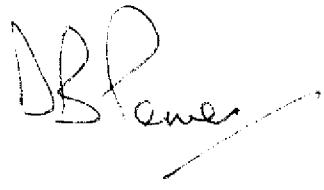
34. Excluding the roof, the Tribunal determines that the works undertaken within the service charge have been reasonably incurred and the cost is reasonable.

35. For the years to 25th December 2003 and 2004, the Applicant shall pay the balance of the estimated service charge demanded.

36. The application for the future service charge year to 25th December 2005 requires the Tribunal to consider the issues of the roofing account from West Midlands Roofing services and that from Opifix. These issues have been dealt with in respect of the previous years

37. The Respondent will reimburse the Applicant the application and hearing fees totalling £550

38. The Respondent's costs incurred in connection with these proceedings shall not be recovered as part of the service charge.

Signed 

Date 3 - OCT 2005