IN THE LEASEHOLD VALUATION TRIBUNAL

LON/00AU/LSC/2006/0323, 0324 & 0387

AND IN THE MATTER OF 4, 6 & 8 NEWBURY LODGE, HAMILTON PARK WEST, N5 1AD

BETWEEN

MR C LOY (1)

MS L FAVENTI (2)

MS A O'SULLIVAN (3)

Applicants

-and-

MARCHWALK LIMITED

Respondent

THE TRIBUNAL'S DECISION

Hearing Date: 1 February 2007

Appearances: Mr C. Loy on behalf of the Applicants

Mr C. Case on behalf of the Respondent

Tribunal: Mrs S. O'Sullivan Solicitor

Mr M. L Jacobs FRICS

Mr O. Miller BSc Hons

Decision

(1) The First Applicant is obliged to effect insurance pursuant to his lease and therefore has no liability in respect of insurance premiums charged by the Respondent for the years ending 24 March 2005 and 2006. For the avoidance of doubt the Tribunal considers that no future liability in respect of insurance premiums could in any way arise on the part of the First Applicant pursuant to his lease. The Tribunal therefore did not find it necessary to go on to consider the reasonableness of those charges.

(2) The reasonable management charge payable by the First Applicant for the service charge years ending 24 March 2005 and 24 March 2006 is £20 per annum exclusive of VAT.

(3) The Second and Third Applicants are obliged to effect insurance pursuant to the provisions of their leases and have no liability to the Respondent in respect of the service charges made in respect of insurance.

(4) In relation to the years ending 24 March 2001to 2004 when the Second Applicant agreed to allow the landlord to insure, the amounts charged by the Respondent in respect of insurance are unreasonable. The amounts allowed are set out in paragraph 28 below.

(5) The Second and Third Applicants are liable to pay 10% of the reasonable cost of insuring the property by way of a management charge.

(6) Surveyors fees in the sum of £145.40 charged in the service charge year ending 24 March 2001 are not recoverable from the Second Applicant.

(7) It was not necessary for the Tribunal to consider whether the Respondent should be allowed to add any costs of the proceedings to the service charge as Mr Case confirmed that the Respondent would not be seeking to do so. However for the avoidance of doubt the Tribunal does not consider that the Applicants' respective leases provide for the recovery of legal costs through the service charge in any event.

(8) The Tribunal orders the Respondent to reimburse the Applicants with the full amount of the Tribunal fees which they have incurred in the total sum of £250 in respect of each Applicant.

(9) The Tribunal orders the Respondent to reimburse the First Applicant the sum of £75.40 and Third Applicants the sum of £146.88 in respect of the costs incurred in relation to preparation for the hearing.

(10) Any service charges paid by the Applicants in excess of those found by the Tribunal to be due are to be refunded to the Applicants

forthwith and in any event within 28 days of the date of service of this decision upon the parties.

Background

1. Unless stated otherwise the page references herein are to pages contained within the Applicants' bundle.

2. Three applications were made to the Tribunal under s.27A of the Landlord and Tenant Act 1985 (as amended) (the "1985 Act") in respect of properties at Newbury Lodge, Hamilton Park West N5 1AD (the "Building"). Each sought a determination of each Applicant's liability to pay and/or the reasonableness of insurance and the liability to pay and/or reasonableness of management charges. The First Applicant sought a determination in respect of the two years ending 24 March 2005 and 2006, the Second Applicant in respect of the years 2000 – 2006 and the Third Applicant in respect of the five years ending 24 March 2002 to 2006. The Second Applicant also sought a determination of her liability to pay and/or the reasonableness of surveyor's fees for the year ending 24 March 2001.

3. Although the Applicants did not consider that legal costs were recoverable pursuant to their respective leases, for the avoidance of doubt, they also made a further application under section 20(C) of the 1985 Act to disallow, in whole or in part, the Respondent's costs incurred in these proceedings. The Tribunal also had to consider whether the fees incurred by the Applicants in these proceedings should be reimbursed by the Respondent pursuant to Regulation 9 of the Leasehold Valuation Tribunal (Fees)

(England) Regulations 2003. The First and Third Applicants also made an application to the Tribunal that the Respondent should be ordered to pay their costs incurred in preparation for the hearing pursuant to Schedule 12, paragraph 10 of the Commonhold and Leasehold Reform Act 2002 (the "2002 Act").

4. Directions were first made on 20 September 2006 which provided for the First and Second Applicants applications to be joined. It was directed that the applications be dealt with by way of a paper determination and directions were made which provided for the service of a statement by the Applicants and a statement in reply by the Respondents and bundles to be lodged. Further directions were made on 30 November 2006 which provided that the Third Applicant's application also be joined and that as legal submissions were required in relation to the provisions of the respective leases the matter was not suitable for a paper determination and a hearing should take place. The hearing was set for 1 and 2 February 2007.

5. In accordance with those directions a bundle was lodged by the Applicants. No reply was lodged by the Respondent save for a letter dated 23 October 2006 which attached copy certificates of insurance in respect of the subject property. This was the only evidence adduced on behalf of the Respondent.

6. The Applicants were represented by the First Applicant in person. The Respondent was represented by Mr Case of the managing agents, London Bridge Estates.

7. The Tribunal only considered those matters identified by the Applicants as being in dispute and did not consider any other aspects of the service charges for the relevant service charge periods.

Issue 1 – Insurance in respect of Flat 8

8. The Tribunal first considered the issue of insurance. As the First Applicant's lease contained different provisions as to insurance to those of the Second and Third Applicants the Tribunal considered these in turn.

9. A copy of the Lease of Flat 8 (the "Flat 8 Lease") was produced to the Tribunal at pages 2.1 -2.31. The Respondent's obligations in relation to service charges are set out in Clause 5 and the Fifth Schedule of the Flat 8 Lease and the First Applicant's obligations in relation to insurance are set out in Clause 3 (13) and those in relation to service charges are set out in Clause 4 (4) of the Flat 8 Lease.

10. The First Applicant stated that he was obliged to effect insurance of Flat 8 under clause 2(13) of the Lease and the Respondent was authorised to insure only if all the tenants agreed. By way of background the Applicant had agreed to pay towards the landlord's cost of insuring the Building until November 2000 when due to a dramatic increase in premiums the tenants decided to arrange their own insurance. The First Applicant had previously made an application to the Tribunal and the Tribunal was referred to a decision dated 1 October 2004 at pages 3.1-3.6 in which the Tribunal had held that the Respondent did not have a right to charge the Applicant for insurance premiums and that there was no obligation on the part of the Respondent to insure the Building. Despite this finding it appeared that the Respondent wilfully continued to attempt to recover the cost of insurance for the period 2000 – 2004 as arrears in service charge statements and had also

continued to charge him in respect of insurance for the years ending 24 March 2005 and 24 March 2006.

11. Despite the clear finding of the Tribunal on 1 October 2004 that the Respondent could not recover insurance premiums from the First Applicant Mr Case argued that the provisions of the Flat 8 Lease in relation to insurance were ambiguous in that the First Applicant was obliged to effect insurance of his demise only and not of the Building. This did not appear to have been considered at the hearing on 1 October 2004. In response the First Applicant submitted that the provisions of the Flat 8 Lease clearly provided that it was his obligation to insure.

Issue 1 - The Tribunal's decision

12. The Tribunal considered the provisions of the Flat 8 Lease and found that the First Applicant's obligation pursuant to clause 3 (13) was *"...to insure and keep insured the Demised Premises and other structures and facilities comprised therein"*. The Tribunal acknowledges that there are some drafting deficiencies in the Flat 8 Lease in the definitions of the demise to the tenant. However the Tribunal noted that there are no covenants on the part of the Respondent to insure either the tenant's demise or the Building save where the tenant opted not to insure. The Tribunal found that on proper construction of the Flat 8 Lease there was a clear intention by the parties that it was the tenant who was to insure both the premises demised by the Flat 8 Lease and the Building.

13. The Tribunal therefore found no reason to disagree with the Tribunal's decision of 1 October 2004 and found that the Respondent did not have the right to charge the First Applicant for insurance premiums. The Tribunal did not therefore find it necessary to consider the reasonableness of premiums in relation to the First Applicant.

Issue 2 - Management Fee payable by the First Applicant

14. An annual management fee of £150 per unit was charged by the Respondent. The Tribunal had previously decided on 1 October 2004 that the Respondent provided no management services. The tenants each have an obligation to provide lighting outside their flats, there is no cleaning provided and no accounts are prepared and submitted to the tenants in accordance with the provisions in the Flat 8 Lease. Further the agents consistently fail to reply to correspondence and do not provide any meaningful service.

15. The Tribunal heard from Mr Loy that the Flat 8 Lease does not contain any provision for a management charge to be included in the service charge. However clause 5(g)(i) provides that the First Applicant must contribute towards the cost of collecting the rent. He referred the Tribunal to the decision of the Tribunal dated 1 October 2004 when the Tribunal had found that a reasonable fee for this service would be £20 per flat excluding VAT.

16. Mr Case conceded that the only services provided were the collection of rent, insurance premiums and the preparation of very basis

service charge demands. He submitted however that the charge of £150 per annum exclusive of VAT per flat was a reasonable charge in view of the fact that the managing agents could at any time be called upon to provide further services. The Tribunal also heard from Mr Case that since the date of the last hearing he now carried out 6 monthly rather than annual inspections. On questioning however it was clear that no telephone contact details were provided in the Building for the managing agents and that the tenants themselves carried out any necessary works to the Building by mutual agreement, such as the redecoration of the common parts.

Issue 2 - The Tribunal's decision

17. The Tribunal found that there had been no change in circumstances since the Tribunal had last considered the issue of the management fee on 1 October 2004 and had concluded that no services were provided. The Tribunal did not accept the Respondent's submission that the costs were reasonable in view of the services it may be called upon to perform at any time. It also did not accept Mr Case's evidence that he carried out 6 monthly inspections of the Building as he was unable to provide more than a basic description of the Building and admitted that he had been unaware that the tenants had themselves arranged the redecoration of the common parts some 3 years previously. The Flat 8 Lease does provide under clause 5(g)(i) that the Applicant must contribute towards the cost of collecting the rent and the Tribunal found that a reasonable management fee per unit for the services provided is £20 per annum excluding VAT.

Issue 3 - Insurance in respect of Flats 4 & 6 – is the Landlord entitled to insure?

18. The insurance provisions contained within the Second and Third Applicants' leases (the "Flat 4 Lease" and the "Flat 6 Lease") were identical and the Tribunal therefore considered these together.

19. It was the Applicants' case that the provisions of the Flat 4 Lease and Flat 6 Lease at clause 4(vi) provided that it was the tenant's responsibility to insure. The Tribunal heard that the leases of flats 1,2,3,4,6 and 7 at the Building all contained identical provisions as to insurance. The issue of insurance in relation to Flat 7 had been considered by the Clerkenwell County Court on 19 November 2004 and the Tribunal heard that the Court had held that it was the tenant's obligation to insure and that the Respondent was not entitled to charge the tenants for insurance premiums. This was not disputed by Mr Case on behalf of the Respondent. The Applicants had however been unable to obtain a copy of the transcript of the Court hearing so the Tribunal was unable to consider the judgment.

20. At clause 4 (vi) of the Flat 4 Lease and the Flat 6 Lease the lessee covenants to "insure and keep insured the demised premises against loss or damage by fire and other such risks (if any) as the Lessors think fit with such insurance office as the Lessors shall determine..". There are no covenants on the part of the Respondent to insure contained within the leases. Mr Loy submitted that the provisions of the leases provided that whether or not the

Respondent had nominated an insurer it remained the tenant's responsibility to insure. His evidence also was that the landlord had failed to nominate an insurer at any time.

21. Mr Case submitted that the tenant's obligation to insure was dependant on their insuring with an insurance office nominated by the landlord. Although he accepted that the landlord had failed to nominate an insurer he submitted that the landlord had never been given an opportunity to do so. He blamed this on a history of animosity between the landlord and the tenants. In view of the tenants' failure to insure with a nominated insurer he submitted the landlord had the right to insure the Building. Mr Case was however unable to point to any provisions contained within the Flat 4 Lease and Flat 6 Lease which contained any covenants on the part of the landlord in relation to insurance save as to the provision within the Fourth Schedule that the landlord could recover the cost of insurance for 3rd party risks where the tenant failed to do so.

Issue 3 - The Tribunal's decision

22. The Tribunal found that the Respondent did not have the right to charge the Second and Third Applicants for insurance premiums and that the tenants were obliged to effect the insurance pursuant to clause 4(vi) of both the Flat 4 Lease and Flat 6 Lease. There were no obligations on the part of the landlord to insure the Building contained within the leases save as to a provision that the landlord could recover the cost of 3rd party risks if the insurance were in fact taken out by the lessor instead of the tenant. As to Mr

Case's submission that any insurance had to be effected though an insurer of the landlord's option Mr Case had conceded that the landlord had never provided any such nomination and in fact there was a history of the managing agents failing to respond to correspondence from the tenants in relation to insurance and avoiding the issue altogether. Accordingly the Tribunal found that the tenants were entitled to use an insurer of their choice in the absence of any direction being given by the landlord. In any event where a lease provides that a tenant is required to insure with an insurer nominated or approved by the landlord as in this case the tenants may well have the protection of s30A of the 1985 Act which enables a tenant to make an application to either the court of the Leasehold Valuation Tribunal to challenge the landlord's choice.

Issue 4 – were the charges made by the Respondent in respect of insurance reasonable?

23. The Second Applicant had asked the Tribunal simply to consider whether she was obliged to pay for the landlord's insurance as she had been taking part in the tenants' policy since November 2000. The Third Applicant however had continued to pay the landlord's insurance after the tenants first took out a policy in November 2000 and had not taken part in the tenants' policy until the year ending 24 March 2005. She had therefore asked the Tribunal to also consider whether the charges made by the landlord in respect of insurance were reasonable for the period during which she continued to pay the landlord's charges.

24. In view of the Tribunal's finding at paragraph 21 above that the Respondent was not entitled to charge for insurance premiums the Tribunal restricted its consideration as to the reasonableness of the insurance premiums to the years during which the Third Applicant had continued to pay the landlord's policy, namely the service charge years ending 24 March 2002 to 24 March 2004.

25. The Tribunal had been provided with copies of the certificates of insurance taken out by both the tenants and the landlord since 2000. The Tribunal noted that the premiums paid by the landlord were consistently almost double those paid by the tenants under their policies for an almost identical level of cover. Mr Case stated that the insurance was effected through Princess Insurance Brokers at the insistence of the Respondent and he was unable to provide a reason for the considerable difference in the amounts paid by both parties although he thought this might be down to the fact that the tenants were insuring as homeowners. The Tribunal noted however that the tenants insured as Newbury Residents Association. As for the policies themselves there was no discernible difference between the cover provided. On questioning Mr Case was unable to demonstrate that the Respondent had regularly gone to the market to obtain competitive quotations.

26. Mr Case conceded that he had no criticism of the cover obtained for the Building pursuant to the tenants' policy. He also confirmed that the managing agents received a commission of 10% on the premium which was a reduction from the figure of 15% previously received.

Issue 4- The Tribunal's decision

27. The Tribunal finds that the Respondent has failed to act in a reasonable manner when dealing with the issue of insurance. It is clear from the papers that the premiums increased considerably after the present managing agents were appointed and has remained consistently much higher than the premiums paid by the Residents Association. The Tribunal was at a loss to understand why the Respondent continued to insure the Building when the tenants were taking out a policy for almost half the cost, and in respect of which the Respondent had no criticism.

28. Accordingly the Tribunal finds that the charges made for insurance premiums in the service charge years 2002 to 2004 are not reasonable. The Third Applicant is responsible for a proportion of one eighth of the total reasonable charges. On the basis of its knowledge and experience the Tribunal found that the insurance premiums payable under the policies taken out by the tenants for these periods were reasonable and therefore adopted these premiums as a basis for a reasonable charge. The amount of service charge payable by the Third Applicant therefore for the years in question, applying the figure of one eighth is as follows:-

Year	Premium Charged	Premium Allowed
	£	£
2002	916.93	114.62
2003	1122.26	140.28
2004	1282.86	160.36
Total allowed		**£415.26**

Issue 5 – Are Management Charges payable by the Second and Third Applicants?

29. The Tribunal also considered whether management charges were payable by the Second and Third Applicants. A management charge of £150 per flat had been charged to each applicant. As the provisions relating to service charge were identical in the Flat 4 Lease and the Flat 6 Lease the Tribunal considered them together.

30. Mr Case conceded that the leases did not make any specific reference to the inclusion of a general management charge in the service charge. However in asserting that a management charge was recoverable he relied upon the Fourth Schedule which sets out the "costs, expenses and matters in respect of which the lessee is to contribute" and, in particular, clauses 1 and 6 of the Schedule.

31. Clause 1 of the Fourth Schedule relates to the costs of maintaining and repairing the Building. Clause 6 provides that;

"The Lessor shall be entitled to add the sum of 10% to any of the above items for administration expenses and where any repairs redecorations or renewals are carried out by the Lessors they shall be entitled to charge as the expenses or cost thereof their normal charges (including profit) in respect of such work".

32. Mr Case had conceded that the only services carried out by the Respondent in the relevant period had been the collection of rent, the insurance of the Building and the preparation and service of basic service charge demands.

Issue 5 - The Tribunal's decision

33. The Tribunal did not accept that clause 1 of the Fourth Schedule entitled the Respondent to levy a management charge as it related to the costs of maintaining and repairing the property rather than to any professional fees incurred. The Tribunal found that the Respondent did have the right to include a management charge pursuant to the Flat 4 Lease and the Flat 6 Lease but that this charge was restricted by clause 6 of the Fourth Schedule to the sum of 10% of the costs of carrying out any items contained within the Fourth Schedule by way of an administration charge and where repairs or renewals were carried out the Respondent was entitled to charge normal charges as expenses. The Tribunal found that the only item carried out by the Respondent set out in the Fourth Schedule in the relevant period was the cost of insuring. As the Tribunal has found that the Respondent does not have the right to charge any of the Applicants in

respect of insurance the Tribunal finds that for the periods during which the tenants have chosen to insure, no management charge is payable by the Second or Third Applicants.

34. However for the three years ending 24 March 2002 to 2004 the Third Applicant had by agreeing to pay the premiums in effect consented to the landlord insuring and, accordingly, the Tribunal finds that pursuant to clause 6 of the Fourth Schedule the Respondent is entitled to recover 10% of the reasonable insurance premium from the Third Applicant by way of a management charge. The charge payable is calculated by reference to the insurance premium found to be reasonable set out in paragraph 28 above as set out below:-

Year	Insurance Premium	Management Charge Allowed
	£	£
2002	114.62	11.46
2003	140.28	14.02
2004	160.36	16.03
Total allowed		**£41.51**

Issue 6 - Surveyors Fees

35. The Second Applicant had also asked the Tribunal to determine whether the Respondent was entitled to charge for surveyors fees in the sum of £145.40 incurred in connection with the preparation of a report in 1999. Mr Case was unable to point to any clear provision contained within the Flat 6 Lease which provided for the recovery of professional fees such as surveyors fees. He sought to rely on clause 6 of the Fourth Schedule set out above. Mr Case was unable to provide a copy of the surveyor's report or a copy of the invoice and on questioning appeared confused as to the reason why the report was commissioned initially.

Issue 6 - The Tribunal's decision

36. The Tribunal did not agree that clause 6 of the Fourth Schedule entitled the Respondent to charge for surveyor's fees and found that there was no provision within the Flat 6 Lease which allowed for the recovery of surveyors fees and consequently disallowed the charge of £145.40 for surveyors fees.

Applications for cost

The law

37. Section 20C of the 1985 Act provides that a Tribunal can make an order preventing the lessor from recovering its costs of proceedings through the service charge if the Tribunal considers it to be just and equitable.

38. Regulation 9 of the Leasehold Valuation Tribunal (Procedure) (England) Regulations 2003 allows a Tribunal to order a party to reimburse the whole or any part of any fees paid by another party.

39. Paragraph 10 of Schedule 12 of the 2002 Act allows the Tribunal to award up to £500 in costs if one of the parties has acted frivolously, vexatiously, abusively, disruptively or otherwise unreasonably in connection with the proceedings.

Costs - The Tribunal's decision

40. In their applications the Applicants each stated that they did not believe that costs were recoverable under the terms of their leases but asked that the Tribunal make a specific order to this effect. On behalf of the Respondent Mr Case confirmed that the Respondent would not be seeking to add any costs of the proceedings to the service charge and therefore it was

not necessary for the Tribunal to make any order pursuant to section 20(C). However for the avoidance of doubt the Tribunal does not consider that legal costs are recoverable as service charge items pursuant to any of the applicants' leases.

41. In view of the successful outcome of the applications to the Tribunal and the fact that the Respondent appears to have wilfully ignored both an earlier decision of the Tribunal and a County Court decision and the fact that the Applicants were effectively forced to seek a decision due to the managing agents seeming refusal to tackle either the issue of insurance or management fee, the Tribunal considers it appropriate that the application fee of £100 and the hearing fee of £150 paid by each Applicant should be reimbursed by the Respondent forthwith.

42. The First and Third Applicants also sought recovery of costs incurred in copying documentation and preparing bundles for the hearing. The Tribunal is satisfied that the Respondent has acted unreasonably in connection with the proceedings and orders that the Respondent pay the sums incurred in the sum of £75.40 in respect of the First Applicant and £146.88 in respect of the Third Applicant, such sums to be paid within 28 days of the date of service of this decision upon the parties.

CHAIRMAN

DATED 14 February 2007