LON/00BG/NSP/2003/0010
LON/00BG/NLC/2003/0012

DECISION BY THE RESIDENTIAL PROPERTY TRIBUNAL SERVICE ON APPLICATION UNDER SECTIONS 19(2B) & 20C OF THE LANDLORD AND TENANT ACT 1985 (AS AMENDED)

Applicant:	Ms Helen Taylor and Mr Stefano Gilardo
Respondents:	Spiritville Investments Limited
Re:	2 Philip House, Heneage Street, London, E1 5LW.
Application date:	1st May 2003
Hearing date:	29th September 2003

Appearances:

Ms H Taylor
Mr S Gilardo
For the Applicant

Mr R Bowker - Counsel
Mr J Compton - Comptons Solicitors
Mr L Levenson - Philip Fisher & Company
For the Respondent

Members of the Residential Property Tribunal Service:

Miss L Tagliavini BA(Hons) DipLaw LLM
Mr C Kane FRICS
Ms C St Clair

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2 PHILLIP HOUSE
HENEAGE STREET
LONDON E1 5LW

THE TRIBUNAL'S DECISION

1. This is an application by Ms Helen Taylor and Mr Stefano Gilardo ("the "Applicants") pursuant to section 192B of the Landlord and Tenant Act 1985 seeking a determination of the reasonableness of the management, legal and surveyor's costs said to be incurred in respect of the subject premises and building. Specifically the Tribunal is required to consider and determine the following questions:

   (i) Is the charge a service charge and therefore within the jurisdiction of the LVT?

   (ii) Have the charges been reasonably incurred?

   (iii) Is the level of the charges made a reasonable one?

   (iv) Is the whole charge payable by the Applicants or should it be apportioned in accordance with the terms of the lease?

2. The Respondent is Spiritville Investment Limited and Phillip Fisher and Company its managing agent. The subject premises comprise a first floor flat in a purpose built block of .flats situated over commercial premises.

3. On the morning of the hearing held on 29th October 2003, the Tribunal inspected the subject premises and block. Access to the commercial premises lying underneath Mr Gilardo's flat was not provided or arranged by the Respondent although the Tribunal did visit the adjoining shop and inspected Flat 2 internally. The adjoining shop staff claimed no knowledge of the other unit, although there was clear evidence of a connecting door between the two units having recently been sealed up.

The Facts

4. The facts leading up to the disputed amount are themselves not in dispute although the reasonableness of the action taken by the Respondent is challenged. Mr Gilardo is the long lessee of Flat 2 and Ms Taylor is his tenant or licensee. On 28/11/02 Ms Taylor, acting on Mr Gilardo's behalf and with his permission sent an e-mail to the Respondent's managing agents complaining of works to the commercial premises underneath the Applicant's flat which left

> *"reinforcement rod in the ceiling of this shop.....exposed and ...rusting".*

4. Further the Applicants complained of being able to smell cigarette smoke in the subject premises. The e-mail ended;

> *"There is a degree of urgency about this as it would appear that the redecoration of the premises is imminent."*

5. A further e-mail dated 10/3/03 followed and stated;

> *"It is now 42 days since I sent you the e-mail attached. I am wondering for how much longer I am going to have to wait for a reply... ... ... Please could you let me know what action you have taken to remedy this situation."*

6. By a letter dated 13/1/03 from Comptons solicitors it was stated that:

> *... ... .In response to your letter of 28th November our clients sent their surveyor at considerable expense to inspect the works as alleged by you. He inspected the property on 2nd December and reported to our client that there was no evidence of the structural works referred to by you... ... ...*
>
> *In addition our involvement was required in order to communicate with the lessees' solicitors. As a result you have by your irresponsible and erroneous allegations caused to (sic) our client to incur managing agents' fees, surveyor's charges and legal costs.*
>
> *You will have to pay the costs and disbursement incurred as a result of your intervention. The surveyors' fees were £200, the managing agents incurred fees of £200 plus VAT and our costs for dealing with this matter to date amount to £351 plus VAT. Our clients now therefore require payment from you of £847.73* by return failing which we are instructed to sue for this sum, interest thereon and the further costs and disbursement thereby incurred."*
>
> *It was agreed by the Respondent that this sum should properly read £846.25

7. It is this sum of £846.25 that is in dispute between the parties. The Applicants assert that the sum has not been reasonably incurred and that the charges made are not reasonable. Consequently, it is said by the Applicants that no sum at

[redacted]

In answer to questioning by members of the Tribunal Ms Taylor stated she felt

that the surveyor should only be allowed his travel fare incurred on the

inspection as there was nothing in his report that was of any value to her and the problems raised by her. Ms Taylor also stated that two days after the initial e-mail was sent, the ceiling in the commercial premises where works were being carried out had been painted over.

13. Mr Gilardo also gave evidence to the Tribunal and endorsed what had been said by Ms Taylor. He confirmed that the e-mails had been sent with his knowledge and permission. In addition Mr Gilardo produced a number of photographs of the commercial premises below his flat which were taken with permission on 10/8/03. Mr Gilardo told the Tribunal that the commercial premises in question had been variously used as a travel agent and money transfer/exchange agent, and currently appeared now to be in use as a community centre.

The Respondent's Evidence

14. In his evidence in chief Mr Levenson produced but did not rely on an incomplete witness statement. However, he purported to adopt the evidence as given by Mr John Lawson in his witness statements dated 3/9/03, 17/9/03 and 25/9/03 in so far as he was able. On cross-examination Mr Levenson stated that the surveyor in this case, Mr Wennington MRICS ABIFM was used only as a result of the in-house surveyor, Mr Issacs, having been away. He stated in answer to questions from the Tribunal that he had been employed by

Phillip Fisher for four years and was currently doing his articles and hoped to qualify as a surveyor in 2004.

15. On questioning Mr Levenson stated that the usual management charges included the collection of ground rent and service charges and day to day maintenance and correspondence. Mr Levenson stated that in this case he believed the management charge to be on a fixed charge and not on a percentage basis. Mr Levenson stated that he dealt with hundreds of properties and had no specific allocation assigned to him. Mr Levenson was asked about his knowledge of the RCIS Code of Management but confessed to not being aware of this in detail.

16. In the written evidence of Mr Lawson it was said that there was no written management agreement but the relationship was based on a verbal agreement going back some 15 years. Further, Mr Lawson stated that the management fees were calculated on a percentage basis (contradicting Mr Levenson's understanding of the basis on which they were charged.) It was said by Mr Lawson that the Respondent and its managing agent had acted promptly and responsibly to the alleged notice of structural damage that, there being no response from the commercial lessee's solicitors, Mr Wennington was then instructed to inspect Nos. 2 and 2A.

17. On being asked why there had been no response to the first e-mail of 28/11/02 Mr Levenson stated that Mr Lawson took over the matter and his knowledge was limited. At the time the complaint was made Mr Isaacs the in-house surveyor was not there which was why Mr Wennington was used. Further even if Mr Isaacs had been there he might still have made an extra charge for his visit. Mr Levenson stated that the commercial premises were managed by Phillip Fisher and that any alterations and additions had to be approved by the freeholder. Mr Levenson was not aware of any permission being sought or granted for alterations or additions.

18. On being asked why the Respondent had thought it necessary to instruct solicitors Mr Levenson stated that this had been done by Mr Lawson and although he had looked at the file the week before the hearing could not remember any details from it in order to shed any light on this matter.

Submissions

19. It was accepted by Mr Bowker that on the face of clause 2(2) of the lease the Respondent is permitted to claim only a proportion of the charges incurred as service charges in accordance with the terms of the lease. Therefore, it must be accepted that the whole sum demanded from the Applicants of £846.25 should, if reasonably incurred and reasonable be split between the other properties as set out in the express terms of the lease.

20. Mr Bowker further submitted that the costs in dispute were rightly to be regarded as *"all other costs and expenses"* within the terms of the lease and therefore recoverable subject to apportionment and reasonableness issues. Mr Bowker stated that there was no particular explanation for the Respondent's failure to respond to the initial e-mail of 28/11/02 but submitted that given the issues raised it was appropriate for the Respondent to have responded in the way it did. Further, he submitted it was appropriate for solicitors to have been involved at an early state as their contact with the commercial lessees' solicitors would have, likely been taken more seriously than a sole approach from the managing agent.

21. Mr Bowker submitted that it was reasonable for a surveyor to have been instructed, in case an interim injunction was required and that in all matters the Applicants received the prompt response they had asked for. On the issues of costs Mr Bowker stated that the fees and hourly rates charged were appropriate to the situation and the level of response required.

22. On the issue of the application made pursuant to section 20C L&T 1985 Mr Bowker stated that this question was largely dependent on the outcome of the case. In response to questions from the Tribunal Mr Bowker stated that the fees incurred by the Respondent in respect of the hearing were between £1,500 - £2,000 in their entirety.

23. In answer, Ms Taylor stated that she believed that the Respondents' approach and response had been entirely unreasonable and that no costs should fall to the Applicants. Further, Ms Taylor stated that the Respondents should be required to reimburse the Applicants' costs of making the application.

The Tribunal's Decision

24. It is the Tribunal's decision that the costs in dispute can properly be considered as charges falling under the service charge provisions of the lease and are therefore within the jurisdiction of the Leasehold Valuation Tribunal. Further it is noted that no point has been taken by the Applicants on this issue and they have not sought to say that the costs cannot be considered to be service charges.

25. The Tribunal has had regard to all the evidence in this case and considers that the reaction of the Respondent to appoint a surveyor and use solicitors without first replying to the Applicants or otherwise contacting them and inspecting the premises for themselves was out of all proportion to the expected response. Although the quick response of the Respondents is to be commended the manner of their response is not. The Tribunal considers the appropriate response would have been an acknowledgement of the e-mail of 28/11/03 from the Applicants and an initial visit by someone from the management company to ascertain the likely cause and/or extent of the alleged problem.

The Respondent did neither and has offered no adequate explanation as to these failures. Mr Lawson who may have been able to shed light on these matters did not attend and although his witness statements have been taken into account he was not available for questioning either by the Applicants or the Tribunal.

26. In the absence of Mr Isaacs the Tribunal would have considered it reasonable for Mr Wennington to have been instructed. However, the Tribunal does not accept that an 'extra' charge should have necessarily be incurred by the lessees when all that was being provided was essentially 'holiday cover' and this has not been satisfactorily explained by the Respondent. Further, it is not known what instructions were given to Mr Wennington as no letter of instruction has been produced, and no arrangements for proper access appeared to have been made. Further, the Tribunal is unclear as to the basis on which the management fees are charges as the Respondent's evidence on this point conflicted.

27. It is the Tribunal's view that the events complained of by the Applicants were not outside the normal course of events that lessees complain of and managing agents are expected to investigate. Consequently, the failure of the managing agents to carry out even a basic inspection before the instruction of a (chargeable) surveyor does in the Tribunal's view render the use of the surveyor as inappropriate.

28. Further, it is the Tribunals opinion that Mr Wennington's letter of 4/12/02 cannot properly be regarded as a report particularly in the absence of the letter of instruction and the lack of specifics contained within Mr Wennington's letter which appears to have relied on chance to provide access to the relevant parts of the building and which fails to address specifically the two questions raised by the Applicant's e-mail of 28/1/02. Consequently, it is the Tribunals' opinion that even had it been reasonable to call upon Mr Wennington in the absence of Mr Issacs the report produced does not justify the sum expended. Further, the Respondent's failure to send a copy of the report to the Applicants, or even to provide a summary of it, highlights the Respondents' unprofessional approach to a genuine concern properly raised by the Applicants. Consequently, it is the Tribunal's decision that the charges incurred in respect of the managing agents and the surveyor are both unreasonably incurred and unreasonable.

29. Further it is noted that there is a conflict in the Respondent's own evidence between Mr Levenson and Mr Lawson as to how managing fees are charged. Mr Lawson asserts that they are charged on a percentage basis but Mr Levenson stated he believed that they were charged on a fixed fee basis. The Respondent's failure to properly explain the terms of the management agreement did not assist the Tribunal in its deliberations and findings. Mr Levenson's lack of knowledge as to the RCIS Code of Management was surprising in light of his expressed hope to qualify as a surveyor in 2004

notwithstanding Mr Bowker's objection to a copy of the relevant Code being shown (without prior notice) to Mr Levenson at the hearing.

30. In light of the above the Tribunal considers the instruction of solicitors also to have been unreasonable. Once again the Tribunal reiterates the Respondent's failure to acknowledge the Applicant's complaint and the immediate procession to the instruction of a surveyor and solicitors. The use of the solicitors in this case appears to some extent to be connected to ongoing litigation with the commercial lessee which does not concern this Tribunal. This may also have contributed to the speedy decision to employ and outside surveyor. However, it is noted from Mr Wennington's report that prior access to the commercial premises and Flat 2 was not arranged or requested prior to his visit and appears to have been afforded simply by chance despite the instruction of solicitors and their letter of 29/11/02 to the commercial lessees' solicitors of the commercial premises below Flat 2.

31. In conclusion it is the Tribunals' opinion that the Respondent's costs in relation to the (i) management fees (ii) surveyor's fees and (iii) legal fees have not reasonably incurred. Further, the Tribunal is of the view that the level of any costs incurred by the managing agents and surveyor are not reasonable in that the charges for such an unexceptional event should already form part of the managing agent's fees and the surveyor's report is not of a quality or standard that could reasonably be expected. Consequently, the Tribunal

decides no charges are payable by the Applicants in respect of the sum of £846.25 claimed.

Section 20C

32. In light of the above decision the Tribunal determines that it would not be just and equitable for the Respondent to add the costs incurred in respect of these proceedings to the service charge account. Further the Tribunal finds that the Respondent's costs assessed at between £1,500 - £2,000 to be out of all proportion to the sum claimed. This is particularly the case in view of the concession by the Respondent of there being no alternative but to apportion the costs of £846.25 between the other properties in accordance with the express terms of the lease. Were this apportionment to be carried out each lessee would be liable to pay in the region of £60.00 had the sum of £846.25 been reasonably incurred.

Reimbursement of Fees

33. On the question of the reimbursement of fees the Tribunal has had regard to the genuine and responsible approach of the Applicants and Ms Taylor in particular, in making known to the Respondent a perceived and possibly significant defect in the commercial premises below their flat. The Tribunal decries the unhelpful, unresponsive and antagonistic attitude of the Respondent and its managing agents that the Applicants have had to endure. It is the Tribunals' view that the Respondent through its managing agent has

unnecessarily incurred the Applicants in costs by its uncompromising approach and therefore orders that the Respondent reimburse the Applicants the entirety of the fees paid in these proceedings in accordance with Article 8 of the Leasehold Valuation Tribunal (Fees) Order 1997.

Chairman: M L Tagliavini

Dated: 14 NOVEMBER 2003