RESIDENTIAL PROPERTY TRIBUNAL SERVICE

LEASEHOLD VALUATION TRIBUNAL

Properties	:	**19 Brackens Drive, Brentwood CM14 5UE** **31 Queen Street, Brentwood CM14 5JZ** **29 Consort Close, Brentwood CM14 5XE**
Applicant	:	**Anthony William Clements**
Respondents	:	**(1) Pier Management Ltd.** **(2) Regisport Ltd.**
Case numbers	:	**CAM/22UD/ LSC/2004/0027,0035 & 0034**
Applications	:	**Applications to determine whether service charges are payable and reasonable (Section 27A Landlord and Tenant Act 1985)** **Applications to determine liability to pay an administration charge (Schedule 11 Commonhold and Leasehold Reform Act 2002)** **Applications for orders that the landlord's costs arising from these proceedings should not be included in any future service charge (Section 20C Landlord and Tenant Act 1985)**
Tribunal	:	**Bruce Edgington, lawyer chair** **Frank James FRICS** **Cheryl St. Clair MBE BA**

DECISION

Introduction

1. The Applicant purchased long leasehold interests in the properties on 15th August 1996, 3rd October 1997 and 9th April 2002 respectively.

2. He disputes a number of service charges levied by management companies itemised in his letter to the Tribunal dated 11th June 2004; buildings insurance

premiums levied in 2003 and to be levied in 2004 and charges of £50 per annum levied by Brackenwood Management Company Ltd.

3. The Respondents say that these various charges are reasonable save for the charges of Brackenwood Management Company Ltd. where they say that as they have no control over such charges, they have no comment to make.

The Leases

4. The only copy lease provided is in respect of 19 Brackens Drive. It is dated 20th June 1986 and grants a term of 199 years from 1st January 1984. It is assumed that the leases to the other properties are in similar terms. Certainly, none of the parties has drawn any discrepancy to the Tribunal's attention and the decisions below are therefore made on the assumption that all 3 leases are in the same terms.

5. The lessee – now the Applicant – agrees to pay 'a proper proportion' of the costs incurred by the lessor in dealing with those matters set out in the 3rd Schedule (clause 3(3)). The Lease then imposes an obligation on the lessee to agree the proper proportion with either the lessor – now the second Respondent – or the owner of the other flat in the building. There is provision for dispute resolution if there is no agreement.

6. The 3rd Schedule says:-

> *"(1) The expenses of maintaining repairing redecorating and renewing (a) the main structure foundations and in particular the roof chimney-stacks gutters and rainwater pipes of the Building (b) the gas and water-pipes drains and electric cables and wires in under or upon the Building and any accessways leading thereto and enjoyed or used by the Lessee in common with the owners occupiers tenants and lessees of the other flats comprised in the Building*
>
> *(2) The cost of insuring the building and/or other premises of which the demised premises form part in pursuance to Clause 4(4) hereof"*

7. The lessee also agrees to pay "one half or other such proportion" of "all rates taxes assessments charges impositions and outgoings which may at any time during the said term be assessed charged or imposed upon the demised premises" (Clause 2(b))

8. Finally, the lessee agrees to pay all costs charges and expenses including solicitor's costs and surveyor's fees incurred by the lessor in preparing and serving a notice under Section 146 of the Law of Property Act 1925 (Clause 2(c))

9. The lessor is obliged to insure the property "against loss or damage by fire aircraft explosion storm tempest (so far as insurable) act of war or accident or by way of other peril within the usual comprehensive policy of a reputable insurance office at the full reinstatement value thereof"

10. Obviously there are many other obligations and duties of the parties in the Lease but these are the only ones relevant to this dispute.

11. In Clause 2(f) there is a prohibition on any sale of the leasehold interest without the incoming lessee entering into a Deed of Covenant between that lessee and Brackenwood Management Company. There is also a reference to an existing Deed of Covenant dated the same day as the Lease between "the Transferee and the said Company". The term 'transferee' is not defined but presumed to be the lessee.

12. The Tribunal has not seen any such Deed of Covenant, but it is not relevant to this decision.

13. Under Clause 2(e) the lessor is entitled to charge a registration fee of "0.1% of the Notice Value of the demised premises" upon registration of "a Transfer, Assignment or devolution of the lessee's interest". The notice value is defined as the price in the document being registered or, if there is none or it is below the open market value, then "the last consideration for value relating

thereto". A subletting would not, of course, amount to a devolution of the lessee's interest.

The Law

14. Section 18 of the **Landlord and Tenant Act 1985** ("the 1985 Act") defines a service charge as being "an amount payable by a tenant of a dwelling as part of or in addition to the rent".

15. Similarly, Schedule 11 of the **Commonhold and Leasehold Reform Act 2002** ("the 2002 Act") defines an administration charge in exactly the same way. Also, it should be said that Schedule 11 only applies to administration charges payable after 30th September 2003 (**The Commonhold and Leasehold Reform Act 2002 (Commencement No. 2 and Savings)(England) Order 2003**)

16. Section 27A(4)(a) of the 1985 Act says that a Tribunal has no jurisdiction in respect of any charge "agreed or admitted by the tenant"

17. The Parts of the 2002 Act referred to by the Applicant in his written submissions as relating to forfeiture have not yet been brought into effect

18. In the reported case of **Gilje v Charlgrove Securities Ltd [2002] 3 L & TR 537** the landlord of a block of flats was required to provide a resident caretaker. He agreed the caretaker's wage at £275 per week which he charged to the service charge account. However, he only paid her £125 per week and retained the balance as rent for the flat. In other words the tenants were paying the rent for the flat. The Court of Appeal said that they should not have to pay this. In delivering the lead judgment Laws LJ said:

> *"At the end of the day, I do not consider that a reasonable tenant or prospective tenant, reading the underlease which was proffered to him, would perceive that paragraph 4(2)(1) obliged him to contribute to the notional costs of the landlord providing the caretaker's flat. Such a construction has to emerge clearly and plainly from the words that are*

used. It does not do so. On that short ground I would uphold the judge below and dismiss the appeal"

19. In the reported case of **Bandar Property Holdings Ltd. v J S Darwen (Successors) Ltd [1968] 2 AER p305** a lease provided for the landlord to insure '...in some insurance office or offices of repute or at Lloyds in the full reinstatement cost...'. He obtained insurance for a premium of £1,134 with reputable companies. The tenant obtained a quote from Lloyds for the same insurance for some £200 less and refused to pay the balance claimed. The tenant argued that there was an implied term in the lease that the lessee should pay no more by way of premium than the lessor could have obtained from Lloyds. Roskill, J said:

"...applying very well established legal principles, I can see no justification for making the implication sought, since no implication is necessary and the bargain between the parties works perfectly sensibly without making any implication. In the result, therefore, the defence fails and there must be judgment for the lessors"

20. This case and subsequent reported and unreported cases have established the now very well known principle that although a landlord cannot seek to recover a premium which is exorbitant, a sum paid to an insurer of repute at the 'going rate' for them in the ordinary course is recoverable provided it has been negotiated at arms length. There will be no implied term that the lessor should trawl around the insurance market to obtain the cheapest quote.

The Inspection

21. The Tribunal members inspected all three properties from the outside in the presence of the Applicant and his witness Mr. Bowie. They are on a small estate of mixed design dwellings built about 20 years ago of brick under tile. These three properties are more or less identical being three first floor flats, two of which have garages and the other has a parking space.

The Hearing

22. The Applicant and Mr. Bowie attended the Tribunal and confirmed that their written representations were correct. Mr. Clements produced documentation from or on behalf of 3 potential lenders who had been approached for re-mortgages within the last year or so. These confirmed rebuilding costs of about £50,000 for each property. They also stated floor areas of 52 square metres for one property and 54 square metres for another. The Applicant confirmed that all 3 properties were in fact the same size.

23. Mr. Clements repeated his assertion as far as insurance is concerned by saying that his main problem was simply lack of information from the managing agents to justify the dramatic increase in the level of premiums in 2001 which had been maintained thereafter. Whilst there was a certificate to show the overall cover for 23 or 22 flats, there was no breakdown of this figure nor any analysis of the loss of rent cover. He also pointed out that there was nothing to show whether any different calculation had been made for flats with garages as opposed to those without.

24. As far as costs are concerned, Mr. Clements was particularly annoyed that his mortgagors had been involved without prior notification, resulting in payment and charges being made on his accounts. He also drew the Tribunal's attention to his own costs and asked for an order that his application fee should be returned. Finally, on this subject, he asked for a ruling that the Respondents had behaved unreasonably and they should therefore pay his costs up to £500 pursuant to Schedule 12, paragraph 10, of the 2002 Act.

25. Mr. Bowie gave evidence. He is an expert in the field of insurance and his evidence was that the certificates provided by the landlord's agent are difficult to understand. He stated that the reinstatement figure should be as at the commencement of the year, but it was common practice to increase this to cover anticipated inflation between then and the likely timing of any claim arising from that year's cover. The figure could well be 50% more than the actual rebuilding costs and this was within acceptable limits.

26. As far as loss of rental income was concerned, it was impossible to see whether this was just a free inclusion in the cover or whether it was being paid for as an additional part of the premium.

The Decision

27. It is clear from the Lease as drawn that the lessor is not entitled to recover any management costs apart from those relating to the service of a Section 146 Notice. No doubt this was an error of drafting, but this Tribunal can only decide who is liable to pay what and to whom under the terms of the Lease as it exists. Using the words of Laws LJ in the **Gilje** case referred to above, the payment of management costs "does not emerge clearly and plainly from the words that are used" in the Lease. If necessary, the landlord will have to apply to amend the leases on this estate.

28. This includes the fee purportedly charged as a subletting administration fee. The respondents' say that this was charged pursuant to clause 2 (e) in the lease. However, such a fee can only be charged in the event of a transfer, assignment or devolution of the lessee's interest. A subletting does not come into any of those categories..

29. It is also clear that any decision about liability to pay money to Brackenwood Management Company is not within the jurisdiction of this Tribunal. Such monies would appear to be payable under the terms of a separate Deed of Covenant which is not an agreement which is expressed to be collateral to the Lease. Any moneys payable cannot be "part of or in addition to the rent".

30. This therefore leaves only the matter of the insurance premiums, the claim by the managing agent for costs relating to the preparation of a notice under Section 146 of the **Law of Property Act 1925** and any arguments over the costs of these proceedings.

Insurance

31. On the matter of insurance premiums, it was clear that the insurance had been arranged through a reputable insurer. The Tribunal therefore decided, for

the reasons stated above, that it could only interfere if the premiums charges were exorbitant. There was certainly more than sufficient evidence to show that such premiums were too high, but that is not necessarily the same thing. Alternatively, the Tribunal could interfere if it found that inaccurate information had been assumed by or given to the insurer.

32. For the purpose of this decision, the Tribunal worked on the premiums actually paid for the insurance rather than the monies debited to the tenants' accounts. The reasons for that are firstly that the managing agents agree that the amounts claimed are inaccurate and secondly one can only compare the premiums actually paid with the insurance certificates provided.

33. On this basis, the premiums paid in respect of 19 Brackens Drive have been £45.68 for the 6 months up to 1st July 2001, £128.75, £163.76 and £180.76 for the next 3 complete years. The applicant has asked for details of how the premiums for his property have been calculated but none have been forthcoming except the block policy certificates. On the 15th July and 4th August 2004, this Tribunal directed that the Respondents set out the facts relied upon to support their cases.

34. Neither the Applicant's requests nor the Tribunal's directions have produced any further information. The Tribunal has therefore had to consider the expert evidence before it together with its own knowledge and experience, which is considerable. Using these resources, the policy certificate for the year up to 30th June 2004 (page P5) was considered. It is unfortunate that the number of properties described as 'Flats' has been altered from 23 to 22. The Applicant gave evidence that he had not made the alteration. As 17 Brackens Drive was seen by the Tribunal to be a house rather than a flat and as 17 has been deleted from the certificate, the Tribunal inferred that the insurance was intended to cover 22 flats.

35. The sum insured is said to be £1,903,270. Without the breakdown requested by the Applicant, the Tribunal can only, once again, infer that the cover for each flat is the same i.e. £1,903,270 divided by 22 which equals £86,512.27

per flat. It is not known whether the cover includes cover for the common parts of the estate which may be damaged, for example, in the event of a large fire.

36. Assuming a size of 54 square metres per flat, this equates to £1,602 per square metre in rebuilding costs. It is the opinion of the Tribunal that rebuilding costs on the 1st July 2003 would have been no more than £800 per square metre. In accepting Mr. Bowie's evidence, the Tribunal will add 50% to that figure to come to £1,200 per square metre. On this basis, the Tribunal finds that the premium charged is not what Norwich Union would have charged if that company knew the true rebuilding costs.

37. Doing the best it can, the Tribunal has therefore used these figures as the basis for calculating what it considers to be the correct premium for each of the 3 properties for the years in dispute. These are annexed to this decision as a Schedule. An amount has been added to allow for the cover of common parts of the estate as indicated above.

Costs

38. In view of these conclusions and the fact that the managing agent has sought to debit irrecoverable costs to the Applicant's accounts, the Tribunal finds that the charges for the preparation of the Section 146 notice are unreasonable and not recoverable.

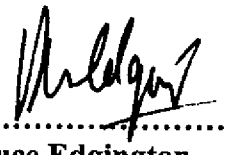
39. With regard to the application under Section 20C of the 1985 Act, any decision as to whether the landlord can collect the costs arising from these proceedings in future service charges could be described as a rather pointless exercise bearing in mind that the Lease does not allow the landlord to collect them anyway. Had the landlord the power to collect such charges, the Tribunal would have decided that it was unreasonable for it to do so because of its unreasonable behaviour in dealing with the collection of fees and expenses.

40. The Applicant also asked for the repayment of his application fee. The Tribunal does not agree to this. The relevant regulations are not there to imply that a return of the fee is 'normal' in the case of an Applicant who succeeds. In this case, the application was properly brought but the Applicant has not succeeded in total.

41. The Tribunal now turns to the Applicant's application for his costs in respect of these proceedings on the basis that the Respondents have behaved unreasonably. He puts his case for this on the basis that the Respondents did not turn up to the hearing. Regrettably the Tribunal cannot agree to this firstly because the Respondents were not present at the hearing to respond to the application and secondly because the Tribunal would have to make a finding that the unreasonable behaviour was in relation to the proceedings themselves. The mere fact that the Respondents chose to absent themselves from the hearing or indeed could not attend because of some very good reason, does not amount to unreasonable behaviour.

42. Finally, the Tribunal directs that the Respondents refund to the Applicant (a) any amount they recovered from any lender (b) any Land Registry fees incurred in the Respondents finding out the names of the lenders and (c) the fees of such lenders charged to the Applicant which the Tribunal found to be £15 from the Bristol and West for 19 Brackens Drive and £110 from Abbey National in respect of 31 Queen Street.

Dated this 13th day of October 2004



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Bruce Edgington
Chair

INSURANCE SCHEDULE

Address	Period From	Landlords Certificate	LVT Decision
19 Brackens Dr	July 02	£163.76	£113.24
	July03	180.76	125.00
		£344.52	£238.24
29 Consort Cl	July02	£162.24	£112.19
	July03	179.09	123.84
		£341.33	£236.03
31 Queen Street	July02	£162.24	£112.19
	July03	179.09	123.84
		£341.33	£236.03