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EASTERN RENT ASSESSMENT PANEL
LEASHOLD VALUATION TRIBUNAL

CAM/00KF/LAM/2006/0001

DECISION OF THE LEASEHOLD VALAUATION TRIBUNAL ON APPLICATIONS UNDER 24 LANDLORD AND TENANT ACT 1987 AND 27A LANDLORD AND TENANT ACT 1985.

Applicants:	**(1) Mr Roger Kalengayi** **(2) Mr Simon Ford**
Respondent:	**Westleigh Properties Limited**
Property:	**45 West Road, Westcliff-on-Sea, SS0 9AU**
Date of Applications:	**(1) 3 January 2006** **(2) 14 February 2006**
Date of Hearing:	**18 April 2006**
Venue:	**The Roslin Hotel, 10-11 Thorpe Esplanade, Southend-on-Sea, SS1 3BG**
Appearances for Applicant:	**Mr Roger Kalengayi** **Mr P M Beech** **Mrs R Bateman**
Appearances for Respondent:	**Mr John Galliers, Basicland Registrars Limited (BLR Property Management), Managing Agents**
Also in Attendance:	**Mr Bateman**
Members of the Tribunal:	**Mr John Hewitt Chairman** **Mr Frank James FRICS** **Mr Roger Rehahn**
Date of Decision:	**15 June 2006**

Decision

The Tribunal decides that:

1. The application made under s24 Landlord and Tenant Act 1987 (the LTA 1987) for the appointment of a manager shall be dismissed, and it is hereby dismissed.

2. In respect of the service charges in dispute there are payable by the Applicant to the Respondent the following sums:

Year	Sum Claimed	Sum Determined	Sum Payable by Applicant (50%)
2003			
Insurance	£1,521.82	£700.00	£350.00
Management fee	£ 281.58	£218.58	£109.29
2005			
Management fee	£470.00	£352.50	£176.25
Asbestos Survey	£176.25	£117.50	£ 58.75
Administration charge	£ 116.17	nil	nil

The above sums are payable within 7 days of cash accounts as between the First Applicant and the Respondent and the Second Applicant and the Respondent being agreed by them or, failing agreement as determined by the Tribunal.

3. An order shall be made, as is hereby made, pursuant to s20C of the Landlord and Tenant Act 1985 (the LTA 1985) in respect of the Respondent's costs of these proceedings and the maximum sum of £293.75 in respect of such costs shall be regarded as relevant costs to be taken into account in determining the amount of any service charges payable by the Applicants to the Respondent.

4. The Respondent shall reimburse the First Applicant with the sum of £150 in respect of fees paid by him on connection with these proceedings. The sum of £150 shall forthwith be entered as a credit on the cash account as between the First Applicant and the Respondent.

5. The parties shall endeavour to reach agreement on the cash accounts as between the respective Applicants and the Respondent arising as a result of the adjustments that will require to be made consequent on the decisions set out above. The Respondent shall by **4pm Friday 14 July 2006** send to each applicant a draft cash account. The parties shall endeavour to agree the cash account(s) by **4pm Friday 28 July 2006**. If the parties are unable to reach agreement by that date, any party to these proceedings may, by **4pm Friday 11 August 2006**, make a written application to the Tribunal attaching a copy of the draft cash account(s) and a summary of the items in dispute. Such application shall be copied simultaneously to the opposite party concerned. Such opposite party shall by **4pm Friday 18 August 2006** send to the Tribunal any written representations he wishes to make on the application. The written representations shall be copied

simultaneously to the other party concerned. The Tribunal shall then consider what further directions may be required to determine the matters in dispute.

Background

6. The Property is a modest terraced house (set between shops) built in the circa 1920s which has been converted into two self-contained flats. Both flats have been let on long leases which contain provisions for the payment of service charges.

7. The First Applicant, Mr Kalengayi, is the lessee, by assignment, of the ground floor flat. The Second Applicant, Mr Ford, is the lessee of the first floor flat. The Respondent is the landlord, again by assignment having acquired the freehold reversion subsequently.

8. The leases provide that the landlord will insure and keep insured the Property against certain perils and maintain, repair and decorate the Property in terms set out in clauses 4(2), 4(4) and 4(5). By clause 3(2) each lessee is required to contribute one half of the costs incurred by the landlord on the matters set out in the Third Schedule. There are seven items listed in the Third Schedule which may be conveniently summarised as follows:

    1. Repairs and redecoration to the main structure
    2. Cleaning and lighting common parts
    3. External redecoration
    4. Rates, taxes and outgoings
    5. Insurance
    6. All other expenses (if any) reasonably incurred by the Landlord in and about the maintenance and proper and convenient management and running of the building
    7. The landlord shall be entitled to add the sum of 10% to the above expenses as a service charge.

9. The lease entitles the landlord to obtain advance contributions to the service charges. There is no formal regime set out in the lease specifying an accounting year and the dates(s) for payments on account, for providing estimates of expenditure and providing for year end balances. However it has been the practice of the Respondent, at least in recent years, to keep accounts on a calendar year basis, to provide estimates and to invoice for account payments in two equal instalments, in January and June each year. The Respondent also keeps separate cash accounts for each Applicant recording sums claimed to be due and sums paid.

10. The First Applicant acquired the lease of his flat during 2003 and evidently came to an arrangement with his vendor as to the estimate of service charges for the year 2003. The Tribunal is not concerned with that arrangement as it is a private matter between Mr Kalengayi and his vendor.

11. Mr Kalengayi made an application in 2004 pursuant to s27A LTA 1985 in connection with the cost of insurance for the Property at £951.83 and management fees of £282.00. Reference CAM/00KF/LSC/2004/0048. On that occasion Mr Kalengayi did not adduce any evidence of alternative insurance costs from reputable insurance companies and the tribunal which determined the application considered, on the evidence before it, that the cost of insurance and the management charges were reasonable in amount.

12. There are now two applications before the Tribunal. One application is for the appointment of a manager pursuant to s24 of the LTA 1987. The second is an application pursuant to s27A of the LTA 1985 in respect of certain service charges arsing in 2003 and 2005. The two applications have been case managed and heard together because the issues overlap and it is convenient and cost effective to do so.

13. The applications came on for hearing on Tuesday 18 April 2006. Mr Kalengayi attended and was supported by Mr P M Beech. Mr Ford was unable to be present but was represented by his mother, Mrs Bateman, supported by her husband, Mr Bateman. Mr Galliers of BLR Property Management, the Respondent's managing agent, represented the Respondent.

Appointment of a Manager

14. On 20 October 2005 Mr Kalengayi served a preliminary notice on the Respondent pursuant to s22 LTA 1987. The grounds and matters of complaint cited were:
    1. The landlord was in breach of obligation under the lease.
    2. The landlord has made and proposes unreasonable service charges.
    3. The landlord is in breach of the RICS code of practice.
    4. Other circumstances exist which make it just and convenient for the appointment of a manager.

15. Details of the complaints were set out in a schedule to the notice. In essence Mr Kalenagyi complained of breach of covenant for quiet enjoyment because unreasonable demands for service charges were made and for making demands for sums on account. The breaches of the RICS Code relied upon were para 4.3 – prompt response to reasonable requests from leaseholders, and para 16.9 – timely provision of details of insurance cover and any commissions to be given upon request. The other circumstances relied upon were the alleged convoluted and fragmented method of presenting the accounts.

16. The application was opposed by Mr Galliers

17. Initially it was proposed that Mr Kalengayi should be appointed as the manager, or failing him, Mr Beech. It was pointed out to the parties that

generally speaking the appointment of a manager was a remedy of last resort following very serious breaches of covenant over a lengthy period. On the Applicant's own case that was not (yet) the position. Moreover where a manger is appointed he or she carries out functions in his or her own right as an appointed official of the Tribunal. A Tribunal will usually require the appointee to be a professionally qualified person with appropriate experience and professional indemnity cover and, most importantly, independent of both parties. Mr Beech was present at the hearing as an advocate for the tenants, he did not have experience of residential property management, he did not have professional indemnity cover and he did not have an office with appropriate back up and did not have trust bank accounts set up to hold and administer service charge funds.

18. In the circumstances the Tribunal decided that it would not appoint Mr Kalengayi or Mr Beech as manager because neither was independent of the parties and neither had relevant experience and professional qualifications. In the absence of any other appropriate candidate for appointment, the Tribunal decided that it had no alternative but to dismiss the application.

Service Charges

19. The service charges claimed by the Respondent which are challenged by the Applicants are as follows:

2003	
Insurance	£1,521.82
Management fee	£ 281.58
2005	
Management fee	£ 470.00
Asbestos Survey fee	£ 176.25
Administration Charge (S/C)	£ 116.17

Insurance

20. Mr Galliers said that the insurance for 2003 was placed in December 2002 by previous managing agents. He said that BLR took over in March 2003. At page H2 is a copy of the insurance certificate issued by AXA UK to the Respondent which states the total premium payable is £1,367.12. At page E15 is the year end service charge for 2003 which says the cost of insurance was £1,521.82. Mr Galliers was unable to account for the difference other than he believes that before BLR was instructed an adjustment to the sum insured was effected which resulted in the slightly higher premium. Mr Galliers said that he did not have any documents to

support him and nor was he in a position to justify a sum insured above £200,409.

21. Mr Galliers was unable to explain how the premium had been arrived at or what market testing had been undertaken. Mr Galliers accepted that the premium for 2004 was £951.83, a considerably lower sum. For 2005 the premium was even lower at £450.40.

22. Mr Galliers was unable to assist with floor areas at the Property and did not know why the sum insured was £200,409. In cross examination it was put to Mr Galliers that 10 Anns Road, a nearby property also owned by the Respondent and managed by BLR, was similar in size and also a conversion into two flats and the sum insured there was only £117,053, but Mr Galliers was unable to explain the apparent discrepancy. Mr Galliers was able to confirm that the subject Property did not have an adverse claims history.

23. Mr Galliers was not able to explain why Emergency Assistance Cover at a premium of £65 was taken as this was a decision of the previous managing agents. He supposed that it might assist to reduce the effect of water damage claims and hence the claims history.

24. Mr Beech did not produce any evidence of comparable quotations, despite the decision in the previous application, and instead relied solely on the comparisons of £951.83 for 2004, £450.40 for 2005 as evidence that £1,521.82 was an unreasonable amount for 2003. Mr Beech also relied upon a 50% reduction in insurance cost that the Respondent had been able to achieve in relation to 10 St Anns Road. Finally Mr Beech submitted that generally that insurance costs ought not to exceed about £2 per £1000 sum insured and that the sum insured should be fair and realistic.

25. The Tribunal was satisfied that there was no evidence at all to support the Respondent's claim for £1,521.82. Equally there was no evidence it felt it could rely upon to support the premium of £1,367.12 referred to in the certificate. It was unfortunate that the Respondent chose not to adduce any evidence as to the circumstances in which the premium was arrived at and the efforts made to test and the market and achieve a reasonable quotation.

26. On balance the Tribunal preferred the general tenor of the Applicant's submissions because, having regard to its expertise and general experience in these matters the premium does seem to be very high given the nature and location of the subject property. Taking all of these matters into account the Tribunal is satisfied that for 2003 the Respondent ought not reasonably to have incurred a cost of any more than £700 for insurance.

Management Fees

27. Mr Galliers acknowledged that the Property did not require a high level of management. In accordance with RICS guidance a unit fee is charged.

This fee covers management account systems, administration, preparation of the budget, operating bank accounts, demanding and collecting ground rents and service charges, the service of any required notices, responding to lessee's enquiries and ensuring compliance with legal and statutory requirements. Mr Galliers explained how his office was set up and described the overhead costs incurred.

28. For 2003 the unit fee was £93 plus VAT. For 2005 the policy was to adopt a standard unit fee of £150 plus VAT, subject to a minimum fee of £400 per building. This means that 2 unit buildings have an effective unit fee of £200 plus VAT. Mr Galliers said the Respondent had a sizeable portfolio under management with a wide mix of unit numbers per building. BLR's business has also expanded and has won new instructions, quite often from RTMs.

29. Mr Beech suggested that a unit fee of £100 plus VAT was appropriate because that is what he used to pay in Brighton. He submitted it was unreasonable to double the fee from 2003 to 2005.

30. The tribunal decided that for 2003 a unit fee of £93 plus VAT was reasonable for the location of the subject Property. The Tribunal accepted that an increase was justified for 2005. The experience of the Tribunal is that a unit fee of £150 is not unreasonable for 2005. The Tribunal did not consider the policy of a minimum of £400 per building to be reasonable as that effectively sought a unit fee of £200 for a 2 unit building. The Tribunal has no doubt that the Respondent could have successfully negotiated a unit fee of £150 for the subject Property, whether with BLR Property Management or an alternative local reputable managing agent.

31. Accordingly the Tribunal decides that the management fee for 2003 shall be £218.58 and for 2005 shall be £300, plus VAT in both cases.

Asbestos Survey Fee

32. Mr Beech objected to the expenditure in principle and also said the cost was excessive and the work carried out by a company closely connected with BLR Property Management.

33. Mr Galliers went over the statutory requirements and the need for a risk assessment for all non domestic property which included common parts in residential buildings. The Tribunal was satisfied with and accepted the explanation given.

34. Mr Galliers explained that the survey was carried out in May 2005 at a cost of £176.25. The survey was organised by HR Surveys, a company linked to BLR Property Management and of which he was a director, as regards times/dates and notifications to lessees but the actual survey was sub-contracted by HR Surveys to a company called ECS a specialist in the field. He said that HR undertook a competitive tender for the sub-contract but he did not have details to hand. He also said that ECS would not take

on any administration or organisation of surveys and their quotation was based on the premise that they would be given a schedule of times and dates for inspections. Mr Galliers was not able to tell the Tribunal how much of the £176.25 was paid on to ECS.

35. The common parts at the subject Property are very small indeed and the Tribunal considered that the survey would not have taken very much time at all. Travel time and costs would be minimal if, as suggested by Mr Galliers HR Surveys arranged a number of surveys to be undertaken in the locality on the same day. In all of the circumstances the Tribunal considered the total cost claimed was unusually high, in its experience. In the absence of evidence as to part of the fee passed onto ECS the Tribunal did not consider that the sum claimed was justified or reasonable in amount. The experience of the Tribunal is that a charge on no more £117.50 (£100 plus Vat) could be regarded as reasonable.

Administration Charge

36. Mr Galliers explained that for 2005 the cost of insurance, the management fee and the asbestos survey fee totalled £1,161.65 and the Respondent sought to add 10% to that, in accordance with paragraph 7 of the Third Schedule to the lease. Mr Galliers was not able to point to any service provided by the Respondent to justify this claim and the sum does not appear to have been expended. Evidently the Respondent does not invoice BLR Property Management for it, but BLR accounts for it to the Respondent if it is received.

37. Mr Beech objected to the charge and said it was a pure windfall for the landlord and double dipping.

38. The Tribunal prefers the submissions of the Applicants. The Tribunal is not satisfied that the sum has been incurred by the Respondent or that any service has been rendered to justify it. Even if an invoice had been rendered the Tribunal is by no means satisfied that it represents a service provided or an expense reasonably incurred or reasonable in amount. It may be that if the landlord did not employ (and hence charge for) professional managing agents but did the management itself, a charge along the lines of 10% of expenditure might (arguably) be justified. However that plainly is not the case here.

The s20C Application.

39. Mr Galliers said that the landlord's costs of the proceedings would be £500 plus VAT because that is his standard fee for preparing cases and attending tribunal hearings. The Respondent will be invoiced that sum, whatever the outcome of the case. Mr Galliers said that expenditure falls within paragraph 6 of the Third Schedule to the lease and is thus recoverable by the landlord.

40. Mr Galliers submitted that the Respondent ought to be allowed to recover it as an item of service charge expenditure because the Applicants failed to establish the case for the appointment of a manager, the service charge issues were small and the Applicants could have pursued an alternative course of collective enfranchisement or exercised the right to manage if they were unhappy with the Respondent's management.

41. Mr Beech submitted that every effort was made to resolve matters without these proceedings and he drew attention to 23 letters written by him to try and get clarification. He said that progress was only made after the issue of the proceedings. He said that exercising enfranchisement or RTM rights is a complex process and out of proportion for a 2 unit building where the lessees are of modest means. He complained of BLR Property Management's aggressive style of management which contributed to the need for the proceedings.

42. The Tribunal find that the terms of the lease, in particular paragraph 6 of the Third Schedule, would include as service charge expenditure the cost of proceedings to determine the amount of service charges payable and related management issues. Thus in principal the reasonable expenditure is recoverable. The Tribunal is also satisfied that a charge of £500 for the preparation of the case and attending the hearing is reasonable. The Tribunal consider that whilst the Applicants may not have succeeded in their application for the appointment of a manager, they have succeeded in a number of challenges to service charge expenditure. The Tribunal finds that if BLR Property Management had been more accommodating and cooperative with provision of information and documents the need for the proceedings might well have been avoided. Taking all of these matters into account and taking a broad brush approach the Tribunal find that a just and equitable outcome is that the Respondent ought to be limited to recovering one half of its expenditure on these proceedings.

Fees

43. The Applicants have paid to the Tribunal fees amounting to £300 in connection with these proceedings. Mr Beech submitted that the Respondent should be ordered to reimburse them. Mr Galliers opposed the application. Much the same arguments were adopted by the parties as set out in paragraphs 40 and 41 above.

44. Under regulation 9 of the Leasehold Valuation Tribunals (Fees) (England) Regulations 2003 the Tribunal has power to require any party to the proceedings to reimburse any other party for the whole or any part of any fees paid by him in respect of the proceedings.

45. For very much the same reasons as given under paragraph 42 above the Tribunal considers that it is just and fair that the fees incurred be shared equally between the Applicants and the Respondent. Accordingly we determine that that the Respondent shall pay to the First Applicant £150, and that the sum shall be treated as a credit to his cash account.

Further Directions

46. In the light of the findings we have made there is a need for each Applicant and the Respondent to reconcile the respective cash accounts between them. We hope that this can be done speedily and amicably. During the hearing we were informed that both Applicants had made some payments on account of their respective liabilities.

47. If the parties are not able to agree the cash accounts the Tribunal will determine them and the further directions given shall apply.

John Hewitt
Chairman
15 June 2006