IN THE LEASEHOLD VALUATION TRIBUNAL

CHI/21UD/LSC/2006/0047

IN THE MATTER OF 10A CAMBRIDGE ROAD, HASTINGS, EAST SUSSEX, TN34 1EH

AND IN THE MATTER OF SECTION 27A OF THE LANDLORD AND TENANT ACT 1985

BETWEEN:

BLOCKPORT LIMITED

Applicant

-and-

MR D SAWYER

Respondent

THE TRIBUNAL'S DECISION

Background

1. This matter was commenced in the Hastings County Court by the Applicant to recover alleged service charge arrears from the Respondent in the sum of £1,733.07. By an order made by District Judge Pollard on 15 May 2006, the matter was transferred to the Leasehold Valuation Tribunal so that a determination of the Respondent's liability to pay and/or the reasonableness of the service charge arrears claimed could be made. The Tribunal's determination is made pursuant to s.27A of the Landlord and Tenant Act (as amended) ("the Act"). In making its determination of the relevant costs

payable by the Respondent by way of a service charge, the Tribunal also had regard to the test of reasonableness as set out in s.19 of the Act.

2. The Respondent the subject property by virtue of a lease dated 4 November 1988 granted by Ian Bourne to (1) Sean Edward Pavey and (2) Tracey Jane Green for a term of 99 years from 25 March 1988 ("the lease"). Clause 1 of the lease reserves the service charge payable by way of further rent and in accordance with the provisions of the Fourth Schedule. By clause 2, the tenant covenanted with the landlord to pay the rent reserved in accordance with the lease terms.

3. Paragraph 1 of the Fourth Schedule defines the service charge period, as ending on 25 March of each year and the service charge expenditure shall be the total sum expended by the landlord in any given year pursuant to its obligation in the Sixth Schedule. It goes on to provide that the tenant's service charge contribution shall be 31.5% of the total expenditure so incurred. Paragraph 4 of the Fourth Schedule provides that on 25 March of each year, the tenant shall pay an interim service charge instalment, quantified at £200 in paragraph 1 of the same schedule. A reconciliation of any deficit or credit accruing to the service charge account is made at the end of each service charge year by the landlord. Furthermore, paragraph 9 of the Fourth Schedule gives the landlord a discretion to create a reserve fund for any anticipated major capital expenditure. Any amounts collected in this way are in addition to the sums payable in respect of the landlord's expenditure on those matters set out in the 6th Schedule of the lease.

4. A pre-trial review being held on 27 July 2006 and by Directions dated 28 July the Procedural Chairman attempted to identify the issues raised in this matter. However, the Respondent failed to properly articulate the challenges being made by him in relation to the issues identified at the pre-trial review or the other issues subsequently raised by him. The Applicant, therefore, could not be certain as to the case it had to meet.

5. At the hearing, a degree of case management was required by the Tribunal to identify the 'live' issues before it. In relation to the 2003, 2004 and 2005 service charge years, these were:

   (a) management fees – all years.

   (b) audit fee – years 2004 and 2005 only.

   (c) annual service charge payments – all years.

   (d) bin store.

   (e) major external redecoration works – year 2003 only.

   Each of these matters is considered in turn below by the Tribunal.

Inspection

6. The Tribunal externally inspected the subject property on 30 November 2006. It is a substantial mid terraced Victorian house converted into self contained flats, on 4 floors including the lower ground floor where the subject flat is situated. The building has rendered & colour washed elevations under a slate roof. The flat comprises an entrance hall, lounge, bedroom, kitchen bathroom/WC.

Hearing

7. The hearing in this matter also took place on 30 November 2006. The Applicant was represented by Mr Menzies of Counsel. The Respondent appeared in person. Given that neither the Tribunal nor the Applicant were entirely aware of the Respondent's case, he was allowed to present his case first of all.

(a) Management Fees

8. It was common ground between the parties that the Applicant's managing agents, Drawflight Estates, were charging an annual base fee of £400 plus VAT to manage the property. In addition, they were also charging a further 10% of the total service charge expenditure incurred. It appears Drawflight Estates had also charged an additional project management fee of 10% of the tendered cost in relation to the major works carried out in 2003. The Respondent complained that he had not provided with an explanation of how the management fee was calculated until 28 March 2006. In cross-examination, he said that he had sought this information from the Applicant and/or its managing agent in 2003 and 2004, without success. Although, he contended that the management had been inadequate, he did not particularise this in any way. The Respondent's main submission was that the management fee was excessive and unreasonable. The Respondent did not challenge the Applicant's entitlement, under paragraph 9 of the Sixth Schedule of the lease, to employ a managing agent and to recover any costs so incurred through the service charge account.

9. The Tribunal accepted the Respondent's broad submission that the basis on which the management fee was calculated was both unreasonable and excessive. The total management fee charged for each of the three service charge years does not appear to have been less than £900 plus VAT. Paragraph 2.4 of the RICS Residential Management Code provides that management fees should be charged at a unit rate. This allows a tenant to have certainty about the management fee. The Tribunal was satisfied that the present method, using a calculation based on a percentage of expenditure, did not provide that certainty to the Respondent. Nevertheless, the Tribunal recognised that the commencement of the Commonhold and Leasehold Reform Act 2002 (as amended) imposed additional statutory obligations on landlords and managing agents and that ought properly to be reflected in the fees charged by them. Accordingly, the Tribunal determined that the total management fees for the entire property were reasonable and recoverable by the Applicant:

(a) 2003 - £800 plus VAT.

(b) 2004 - £900 plus VAT.

(c) 2005 - £1,000 plus VAT.

Of course, the Respondent's liability is to be calculated at the contractual rate set out in the lease. As to the estimated additional project management fee of £1,910.46 charged by Drawflight Estates, the Tribunal considered that, whilst it should be entitled to charge a fee, the amount was excessive. Drawflight Estates appear to have had minimal involvement in the overall management of the major works carried out in 2003. That appears to have largely been done by a Mr Hall of Building Design Services. He not only carried out the tender

process but also appears to have had the majority of the responsibility for the supervision of the project. The Tribunal, therefore, determined that Drawflight should only be entitled to a project management fee of £250 plus VAT for the major works in 2003, as being reasonable.

(b) Audit Fee

10. These invoices related to the 2004 and 2005 service charge years. The Respondent stated that he was only putting the Applicant to proof as to this expenditure. He later accepted that these fees had been incurred and were reasonable. The Tribunal was, therefore, not required to consider this matter further.

(c) Annual Service Charge payments – All Years

11. The Respondent did not challenge any particular item of service charge expenditure. Instead, it appears that he was seeking clarification as to how the sums paid by him had been accounted for. He said that he had purchased his premises in April 2002 and upon completion had paid the sum of £1,460 to the landlord. In the service charge statement for the year ending 25 March 2003, it seems that this amount had been credited to the Reserve Fund. In the following year, he paid a service charge contribution of £6,411.08 for the cost of the major external repairs and redecoration. In addition, he said that the total expenditure of £20,352064 for the major works set out in the service charge statement did not coincide with the tender price. In evidence, Mr Shields of Drawflight Estates, said the reason for the discrepancy was that the actual cost of the work was less than the estimate cost. Nevertheless, the

Respondent claimed that he had been charged additional service charges of £1,048.82 and £701.18 in 2003 and 2005 respectively for survey fees. He submitted that these sums should have been paid from the monies in the reserve fund, to which he had already contributed.

12. The Tribunal was satisfied that there had been no false accounting or misappropriation of funds in the preparation of the service charge statements for the three years being considered. The service charge statements in respect of each service charge year reflected the expenditure that had already been incurred. In other words, it is prepared in arrears. The left hand column of the service charge statements sets out the estimated expenditure for the next service charge year.

13. The payment of £1,460 paid by the Respondent in 2002 is reflected in the service charge statement for the year ending 25 March 2003 and has been credited to the reserve fund. As to the cost of the major works, Mr Shields explained that the actual cost was £20,352.64 and not the estimated sum of £21,927.35. The balance has been credited to the reserve fund. The Tribunal was not entirely clear about what other point, if any, was being taken by the Respondent about this matter. In relation the survey fees charged in 2003 and 2005, in the Tribunal's view, this made no material difference. It is either paid as part of the annual service charge or from the reserve fund. It is matter for the Applicant of its managing agent as to how that expenditure is met. The Tribunal saw nothing improper in this.

(d) Bin Store

14. This item concerned the cost of supplying and installing a new door to the bin store area of the property. The cost claimed by the Applicant is £488.66 and fall within the 2005 service charge year as part of the overall general maintenance costs.

15. The Respondent submitted that the cost was unreasonable because the door was not new, did not have a working lock, had poor quality of glass and could not be closed properly. It seems that the Applicant had later replaced the glass on 8 November 2006. Of the sum claimed, the Respondent submitted that only £250-300 should be allowed as reasonable. In cross-examination, he said that his own front door had only cost £120 from B & Q. The bin store door was of much poorer quality and was not the door specified in the invoice supplied by the Applicant. In evidence, Mr Shields conceded that the door had in fact been a second hand door but said that, nevertheless, the cost was reasonable.

16. The Tribunal disallowed the cost claimed in relation to the supply and installation completely. It was satisfied that the work carried out was not done in accordance with the relevant invoice. The description given in this document related to other work. Having inspected the bin store door, the Tribunal was also satisfied that the installation of the door had not been carried out to a proper standard. The cost of any remedial work should be met by the Applicant and not the Respondent.

(e) Major Works

17. These works concerned external repairs and redecoration of the property as set out in a specification of works prepared by Mr Hall in October 2002. The estimated total gross cost of the work was placed at £25,927.35. Service charge contributions were collected from the leaseholders in the year ending 25 March 2004. As stated earlier, the actual cost of the work was £20,352.64.

18. The Respondent submitted that the overall standard of the workmanship was poor. In particular, no stabilising solution had been applied to the rear external wall of his bathroom and cream paint was still showing through the coat of external paint that had been applied. By a letter dated 18 October 2004, Mr Hall accepted these criticisms and stated that the necessary remedial work would be carried out by the contractor, Bexhill Builders. By a further letter dated 27 April 2005, Mr Hall confirmed that the remedial work was still outstanding. Subsequently, Bexhill Builders ceased trading. On or about July 2005, another contractor, SEM, was instructed by the Applicant. They had made the Respondent's front door weatherproof and had also treated the external wall of his bathroom with stabilising solution. The Respondent claims that he had been charged a further sum of £900 for the latter. The remedial external painting generally remained outstanding. The Respondent submitted that £2-3,000 should be disallowed from the overall costs.

19. The Tribunal accepted, Mr Shield's assertion that the major works had been carried out more than two years previously and that some allowance had to be made for this. However, the level of deterioration of the external decoration

exceeded what the Tribunal expected to find after such a short period of time. It was clear that the original work had not been completed to a standard required by the specification and schedule of works prepared by Mr Hall. For example, the Tribunal found peeling paint to the surface of the rendering at the rear of the building and to the surfaces of most of the window frames. This would only have occurred because of a lack of proper preparation when the work had been carried out. No painting at all had been carried out to the extension gutter boards. The Tribunal considered that a sum of £3,000 inclusive of VAT should be disallowed from the total cost of the work claimed to reflect its findings. In reaching this sum, the Tribunal had to rely on its own expert knowledge and experience because it had not been provided with a priced specification by the Applicant.

Section 20C - Costs

20. The Respondent submitted that the Tribunal should make an order disentitling the Applicant from being able to recover any costs incurred in these proceedings. He stated that he not at any stage refused to pay the service charge arrears. He had simply sought various explanations in relation to the relevant service charge accounts and had not received these.

21. Mr Menzies, for the Applicant, rightly submitted that its contractual entitlement to recover the costs it had incurred arose under paragraphs 10 and 11 of the Sixth Schedule of the lease. He further submitted that the Tribunal should make no order under s.20C because the Applicant had made every effort to resolve this matter. On four separate occasions in March and April

2006, the Respondent had been invited to attend the offices of Drawflight Estates but he refused to do so. Moreover, the Respondent had also been invited to attend the offices of the Applicant's auditor, which was situated 25 yards from the subject property. Again, he refused to do so. As far as the management contract and invoices for the auditor was concerned, theses issues were not raised until the Respondent had served his statement of case. Any inability by the Applicant to resolve the Respondent's complaints was because he had failed to properly articulate them.

22. The discretion afforded to the Tribunal by s.20C of the Act is a wide one. Having regard to all the circumstances in this case, the Tribunal decided that it should make an order disentitling the Applicant from recovering its costs incurred in these proceedings. The Tribunal decided that it was just and equitable that costs should follow the event. The Respondent had largely succeeded on the substantive challenges brought by him. It would, therefore, be inequitable for the Applicant to nevertheless be able to recover its costs against him. To do otherwise, would in effect allow the landlord to "get through the back door what had been refused by the front" (see: ***Iperion Investments Corporation v Broadwalk House Resident Ltd*** [1995] 46 EG 188 per Gibson LJ. Accordingly, the Tribunal makes an order that all of the Applicant's costs incurred in these proceedings are not to be regarded as relevant costs to be taken into account in determining the amount of service charges payable by the Respondent.

Dated the 7 day of February 2007

CHAIRMAN.....

Mr I Mohabir LLB (Hons)