3391

Residential Property
TRIBUNAL SERVICE

Leasehold Valuation Tribunal **LON/00AG/LSC/2007/0127**

London Rent Assessment Panel

Landlord and Tenant Act 1985 sections 27A and 20C

Address:	40B, Priory Road, West Hampstead, London NW6 4SJ
Claimant/Applicant:	LR Butlin Ltd
Represented by:	Miss Lorraine Scott of BLR Property Management
Defendant/ Respondent:	Mr David Metcalfe
Represented by:	in person
Tribunal members:	Mr T J Powell LLB Mr J Power FRICS Mr David Wills ACIB
Transfer from Willesden County Court:	25th October 2006
Received by Tribunal:	2nd April 2007
Oral pre-trial review:	2nd May 2007
Hearing:	18th July 2007
Decision:	14th September 2007

Decisions of the Tribunal

(1) Of the original service charge arrears of £1,496.88 claimed in the county court, the Tribunal determines that £820.14 is reasonable and payable by Mr Metcalfe;

(2) The sum of £820.14 above comprises: (a) £170.38 being a balancing charge from 2003/4, and (b) the following sums for 2004/5: insurance, £276.10, repairs and maintenance, £323.66 and management fees, £50.00;

(3) Fuller details of the sums found reasonable and payable are contained in the Decision below;

(4) While the lease provides for interest to be charged on unpaid service charges (reserved as rent) and for the lessee to contribute to the managing agent's costs and fees for the collection of rents, the Tribunal leaves it for the county court to calculate any interest due and to decide whether to allow the arrears recovery fees claimed in the original action;

(5) The Tribunal makes no order for the refund of the Tribunal's hearing fee and makes no order under section 20C of the Landlord and Tenant Act 1985.

Application

1. The Landlord LR Butlin Ltd brought proceedings against Mr Metcalfe the Lessee of Flat B, 40, Priory Road, West Hampstead, London NW6 for arrears of service charges. By order dated 25th October 2006 District Judge Cohen in the Willesden County Court stayed the county court proceedings and transferred the claim to this Tribunal "to ascertain whether charges sought are fair and reasonable." At the pre-trial review the Tribunal identified that the service charge payments due for the year 2004/5 were to be considered.

Attendance

2. Miss Scott of the managing agents BLR Property Management ("BLR") represented LR Butlin Ltd. Mr Metcalfe appeared in person.

Property

3. Mr Metcalfe's flat is on the first floor of a building which contains 4 flats. Neither party requested an inspection and the Tribunal did not consider that one was necessary.

The Lease

4. The lease of the flat is dated 20th June 1994 but details of the term were unclear from the copy provided. By clause 2 and paragraph 2 of the Fourth Schedule the lessee covenants to pay by way of additional rent by one instalment on 29th September in each year "free of deductions in advance and

on account" an estimated service charge "as shall reasonably be required by the Landlord or its Agent." The estimated charge is in respect of the Landlord's expenses incurred providing the services set out in the Seventh Schedule and the cost of complying with the Landlord's obligations in the Fifth Schedule. These latter include an obligation to insure the estate of which the building forms part. The lessee's share of the estimated and actual service charge is 25%.

5. According to the lease, the accounting period ends on 31st January in each year "or such other period as the Landlord shall adopt." In the present case, the Lessor had specified a new accounting period, which runs to 29th September in each year.

6. By paragraph 9 of the Seventh Schedule, the lessee is to make a contribution towards the costs and fees payable to any managing agent whom the Landlord may appoint for the collection of rents. By paragraph 12 of the Seventh Schedule, the Landlord may recover the cost of taking steps to comply with any legislation.

7. By paragraph 31 of the Fourth Schedule, the lessee covenants to pay interest on unpaid rent calculated on a day to day basis at 2% above the Midland Bank plc base rate, compounded with interest on each quarter day.

The law

8. Service charges and relevant costs are defined in Section 18 of the Landlord and Tenant Act 1985 (as amended). The amount of service charges which can be claimed against leaseholders is limited by a test of reasonableness which is set out in Section 19 of the Act. Under Section 27A an application may be made to a Leasehold Valuation Tribunal for a determination whether a service charge is payable, including an advance service charge.

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

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

Background to the Application

11. Mr Metcalfe purchased his lease in August or September 2004. On 30th September 2004 the previous managing agents David Glass Associates ("DGA") issued an estimated service charge demand for £647.50 from 2004/5, representing half of the total estimated service charge demand for the forthcoming year ending on 29th September 2005. Mr Metcalfe said that he received a copy of the estimated demand in October 2004.

12. Mr Metcalfe already had reservations about DGA, partly as a result of difficulties that his solicitors had had obtaining information from them at the time of purchase and partly from information that he said he had gleaned about DGA on the Internet. Shortly after receiving his first estimated service charge demand, Mr Metcalfe raised queries about it. He told the Tribunal that he had received no response from DGA to his telephone calls and e-mails, so he chose not to pay the demand.

13. On 9th February 2005 DGA wrote to Mr Metcalfe stating "our management of the property ceased as of 31st January 2005. Our accounts department is currently completing financial statements for the new managing agents, and we anticipate that they will contact you shortly. The new managing agents will be able to answer any issues for you in due course." Shortly afterwards, on 30th March 2005 DGA sent the second estimated service charge demand for 2004/5 in the sum of £647.50, which in the light of the earlier DGA letter, Mr Metcalfe understandably was reluctant to pay. He heard nothing further until the new managing agents BLR wrote to him in September 2005. They issued him with a demand for £150 ground rent and the first part of the following year's estimated service charge demand, in the sum of £414.37: sums which Mr Metcalfe paid within 2 weeks.

14. After inconclusive correspondence between Mr Metcalfe and BLR relating to his queries about the DGA estimated service charge demands, on 21st February 2006 BLR issued proceedings on behalf of the landlord in the Barnet County Court for arrears of service charges. In those proceedings, the landlord claimed the balance of service charges for the year ended 29th September 2004 (i.e. for the period shortly before Mr Metcalfe purchased his flat), the two estimated charges of £647.50 for 2004/5 and a charge of £31.50 in respect of an emergency repairs service (also in 2004/5). Mr Metcalfe submitted a defence and the matter was transferred to Willesden County Court. By order of District Judge Cohen dated 25th October 2006 the county court proceedings were stayed and the claim was transferred to this Tribunal "to ascertain whether charges sought are fair and reasonable."

15. At a pre-trial review held on 2nd May 2007 the Claimant/ Applicant confirmed that the £1,496.88 originally claimed in the county court had "now been reduced on presentation of the final accounts" to £860.34 based on invoiced charges for the year to 29/9/05, plus a £170.38 balancing charge for the year to 29/9/04. In addition, at the hearing the Claimant/ Applicant sought to recover £31.50 (also incurred in the year to 29/9/05) in respect of a charge for an emergency repairs service, a total of £1,062.22.

Evidence and the Tribunal's findings

Balancing charge from year ended 29/9/04 (£170.38)

16. The parties agreed that there was an outstanding balance carried down from the year to 29th September 2004, though they disagreed on the amount. On the papers, a DGA service charge statement showed an outstanding balance of

£584.75; Miss Scott for the landlord claimed however that Mr Metcalfe's payment of £414.37 in October 2005 was allocated towards this outstanding balance, reducing it to £170.38 (a sum which formed part of the county court claim against Mr Metcalfe). Having considered the evidence, it was clear to the Tribunal that Mr Metcalfe's payment in October 2005 was wrongly allocated to that outstanding balance, because the payment made by him was in direct response to the BLR service charge demand in September 2005 for the same amount, £414.37.

17. The Tribunal then proceeded to consider the reasonableness of the £584.75 outstanding balance. Mr Metcalfe accepted the 2003/4 service charge items for repairs and for the management fees (including VAT); he only disputed the reasonableness of the £3,171.59 insurance premium for the building as a whole, of which his share was 25%, namely £792.89. With regard to the insurance premium Mr Metcalfe said that this had increased from about £1,000 in the previous year 2002/3, but he was unable to prove that figure to the Tribunal. He also questioned the method by which the insurance had been obtained by the landlord, stating that DGA and the insurance brokers who arranged it, Deacon, shared a common director, postulating that because of this there may have been a conflict of interest, resulting in a premium above market rates.

18. Miss Scott referred to a letter from Deacon dated 10th July 2007, which stated that the reason for the increase in the insurance premium was partly due to two large insurance claims in July and October 2003 (together exceeding £7,000) and partly due to the property being in a historically bad subsidence area, together with a large number of mature trees within 30 feet of the property. The letter states "we were unable to obtain any alternative quotations from our panel of insurers due to this." In Mr Metcalfe's opinion these factors could only have justified an increase in the premium of about 25% on the previous year's figure.

19. Mr Metcalfe produced no alternative quotations for the insurance for this period and provided insufficient evidence to challenge the method by which the insurance had been obtained. In the light of the letter from Deacon the Tribunal was satisfied that efforts had been made by the landlord to obtain alternative quotations. Therefore, the Tribunal determined that the £3,171.79 insurance premium was reasonable and payable by Mr Metcalfe in the proportion stated in his lease.

20. The Tribunal therefore determines that the full balancing service charge for the year ending 29th September 2004 is reasonable and payable by Mr Metcalfe. Since in the county court proceedings the Applicant/ Claimant only sought to claim £170.38 as the balancing charge for this period, the Tribunal determines that this sum is also reasonable and payable by Mr Metcalfe.

Reasonableness of estimated service charge demands for 2004/5

21. At the Tribunal's hearing on 18th July 2007 Miss Scott on behalf of the landlord understandably wanted the Tribunal to concentrate on the question of the reasonableness of the estimated service charge demands raised by DGA in

September 2004 and March 2005. However, Mr Metcalfe was more concerned with the actual charges incurred during the service charge year ended 29th September 2005, to which the estimated charges related.

22. Given that final, invoiced amounts were now available, the Tribunal considered firstly whether the estimated charges for 2004/5 were reasonable at the time that they were made and, secondly how much was now a fair and reasonable amount for the Respondent/ Defendant to pay in respect of the costs actually incurred during 2004/5.

23. In September 2004 DGA prepared a budget of estimated service charges, which was notified to Mr Metcalfe in October 2004. The budget anticipated expenditure of £3,380 for insurance, £500 for repairs, £510 for management fees (including VAT), £300 for an asbestos survey and £490 for a health and safety risk assessment. Mr Metcalfe's 25% of the total anticipated expenditure came to £1,295. Although the lease allows the landlord to recover an amount in advance and on account of the service charges in one payment on 29th day of September in each year, as a concession to lessees the landlord sought payment in two 6-monthly tranches, in September and March. The two half-yearly payments to be made by Mr Metcalfe were £647.50 each. The first payment was due within a few weeks of his purchase of the flat in August or September 2004.

24. Shortly after receiving the budget for 2004/5, Mr Metcalfe challenged the estimated figures, complaining that there was a lack of information and invoices to support them. However, the Tribunal agreed with Ms Scott who argued that one would not expect invoices to accompany a budget which, by definition was in respect of future expenditure not yet incurred. At the Tribunal Mr Metcalfe went on to question why BLR was pursuing him for the estimated service charge demands, when the actual expenditure figures were now available.

25. In the main Mr Metcalfe's dispute centred upon the amount estimated to be charged in respect of the insurance for 2004/5. The Tribunal in its deliberations gave particular attention to the insurance premium, bearing in mind that the budget anticipated a premium of £3,380, whereas the actual cost was only £1,104.40. Miss Scott explained that when the 2004/5 budget was prepared, DGA had based the anticipated insurance premium figure on the previous year's actual figure, £3,717.59 (in 2003/4). In the event, a much more attractive insurance premium was negotiated for 2004/5. Miss Scott said that the reasonableness of both the budgetary figures and the estimated service charge demand had to be considered in the light of knowledge at the time that the budget was prepared.

26. Mr Metcalfe raised an administrative point that the insurance period did not coincide with the service charge year. In the Tribunal's view this is a common occurrence and it had no bearing on the reasonableness or payability of the insurance premium in this case.

27. In relation to the estimated amount for repairs, for the asbestos survey and for the health and safety risk assessment Mr Metcalfe challenged these figures on the basis that no information or invoices had been provided to him. He rightly

assumed that the survey and assessment had not been carried out during 2004/5, but the Tribunal accepted Miss Scott's arguments that the landlord was under a statutory obligation to carry out the survey and assessment and it was reasonable to include the cost of these in the budget. The lease also provided for the lessee to pay for the landlord's costs of complying with any legislation relating to the estate. With regard to the budgeted figure for repairs, this was significantly lower than the actual cost of repairs for the service charge year 2004/5.

28. The Tribunal having heard the evidence and considered carefully the documents determined that the budget was reasonable at the time that it was made and therefore the estimated service charge demand of £1,295 had been reasonable and should have been paid by Mr Metcalfe. However, the estimated service charge demand was no longer payable, because the budget figures had been superseded by the actual expenditure figures for 2004/5. The Tribunal therefore went on to consider the reasonableness and payability of the actual service charge figures, in order to reply to the county court's question whether the charges sought were fair and reasonable.

Actual expenditure for the year ended 29th September 2005

Insurance charge for 2004/5

29. The overall insurance charge for 2004/5 was £1,104.40, of which Mr Metcalfe's share was £276.10.

30. Mr Metcalfe complained that there had been a 6-month period between March and September 2005 when the building had been without insurance. Miss Scott was unable to confirm that the property was insured during this period, which was the period of transition from management by DGA to management by BLR. While the Tribunal was very concerned that the property may well have been uninsured for a 6-month period, it did accept Miss Scott's submission that Mr Metcalfe had not been charged for buildings insurance for that period, so in itself this was not a service charge issue for the Tribunal to consider.

31. The insurance service charge to cover the period from September 2005 to September 2006 was £1,104.40, an amount which the Tribunal determined was reasonable and payable by Mr Metcalfe in the 25% proportion set out in his lease, namely £276.10.

Repairs and maintenance charge for 2004/5

32. The actual expenditure for repairs and maintenance was stated to be £1,649.57, of which Mr Metcalfe's share was £412.39. Neither Mr Metcalfe nor the Tribunal had been shown the invoices to which this figure related. However, Mr Metcalfe said that he would be willing to pay this charge, if he was shown the invoices.

33. The evidence was that this charge related to part of damp proofing work which had been carried out to the ground floor of the building, probably from 2002 onwards. The contractor was a firm called Strand Preservation Ltd ("Strand"). It appeared that the bulk of that company's invoices had been paid in a previous service charge year, which pre-dated Mr Metcalfe's occupation. However, the landlord had clearly been slow to pay Strand's charges, since Strand had sued for its fees and on 23rd June 2005 had obtained a judgement against the landlord in the Bromley County Court.

34. Miss Scott accepted that the £1,649.57 included some £120 for court costs and an unspecified amount in respect of interest. She conceded that these incidental costs should be and would be deducted from the service charge payable by Mr Metcalfe.

35. At the hearing, the Tribunal was in some difficulty because the invoices relating to the damp proofing work were not produced. Mr Metcalfe did not challenge the standard of work carried out, nor the cost. After the hearing and at the Tribunal's request Miss Scott supplied the Tribunal and Mr Metcalfe with copies of invoices from Strand relating to works at the premises. Although Miss Scott was still not able to confirm how much of the June 2005 judgment related to interest, the Tribunal noted that there was exactly one year between the date of the Strand invoice dated 24 June 2004 and the court judgment dated 23 June 2005. The current interest rate under section 69 of the County Courts Act 1984 is 8 per cent per annum. The Tribunal was able to calculate the interest element of the combined judgment debt and interest of £3,171.86 by dividing this sum by 108 and multiplying it by 100, and then multiplying the result by 8%. This produces a figure of £234.95 for interest.

36. The Tribunal therefore determined that after deduction of the £120 court costs and £234.95 for interest, the reasonable amount for the damp proofing work is £1,294.62. The original claim against Mr Metcalfe was for £412.39 in respect of the repairs and maintenance costs, but this should be reduced by 25% of the court costs (i.e. £30) and 25% of the interest (i.e. £58.74) reducing his share to £323.66.

Management fees for 2004/5

37. The overall management fees for 2004/5 were £687.38, of which Mr Metcalfe's share was £171.85.

38. Miss Scott maintained that BLR had taken over responsibility for the management of the building in January 2005, despite an apparent admission at the pre-trial review that BLR had taken over responsibility only from September 2005. She said that that was a misunderstanding and inaccurate. She explained that the transfer of the portfolio of properties then being managed by DGA took some time and this property was at the bottom of the list. Although BLR were in place from January 2005, DGA continued to correspond with Mr Metcalfe after this date and they sent out the second estimated service charge demand in March 2005.

39. Mr Metcalfe was unhappy with the level of management during 2004/5. He maintained that in effect the only management had been carried out by DGA between October 2004 to January 2005 and even then he complained that they had never had answered his telephone calls and e-mails requesting information about the service charges. Mr Metcalfe said that he would be prepared to pay one-third of the management fee, but no more.

40. The Tribunal took the view that the management of the building was sorely lacking during 2004/5. DGA purported to act as managers between September 2004 and February 2005, but the Tribunal accepted Mr Metcalfe's evidence that he could get no sensible response from DGA to his queries about the service charges. The letter from DGA dated 9th February 2005 stated in bald terms that they had ceased to act as managing agents, but the letter failed to provide any information about the new managers. Despite DGA sending out an estimated service charge demand in March 2005, Mr Metcalfe received no further communication from the new managers until September 2005. In practical terms, the Tribunal considered that there had been no effective management of the building and this could have led to problems for all of the leaseholders. Of greatest concern to the Tribunal was the fact that there appeared to be no insurance in place for the period between 23rd March and 29th September 2005, which was an unacceptable state of affairs.

41. The Tribunal therefore determined that a reasonable management fee per flat for 2004/5 is £50, including VAT, and this the amount that Mr Metcalfe should pay, instead of the £171.85 charged.

Charge for Emergency Repairs Service £31.50

42. The county court claim for unpaid service charges included a charge to Mr Metcalfe for £31.50 in respect of an emergency repairs service, an insurance product to cover urgencies, which had been billed directly to the lessee. Mr Metcalfe told the Tribunal that he would not dispute this charge if the invoice could be provided to him, but there was no invoice in the papers at the hearing.

43. Despite a request sent by the Tribunal after the hearing, Miss Scott was unable to produce a copy of the invoice for the emergency repairs service from the previous agents, but stated that since this was an insurance product "there may not have been a separate invoice for this service." Accordingly, without an invoice to support this charge the Tribunal determined that the charge of £31.50 was not payable by Mr Metcalfe.

Arrears Recovery Fees & Interest

44. The county court claim also included a proposed charge to Mr Metcalfe for £141.31 for interest and £300.80 for arrears recovery fees. While the lease does make provision for both to be recovered from the lessee, the Tribunal is not in a position to calculate the amount of any interest that may fall due under paragraph 31 of the Fourth Schedule to the lease and leaves this to the county

court. Equally, the Tribunal leaves it to the county court to decide whether or not to allow the arrears recovery fees claimed in the original action.

Refund of fees and section 20C application

45. The Tribunal heard submissions from both parties. Miss Scott sought recovery of the £150 Tribunal hearing fee paid by the landlord and opposed the application by Mr Metcalfe for an order under section 20C of the 1985 Act, limiting recovery of the costs of the Tribunal proceedings through the service charge. Miss Scott emphasised that Mr Metcalfe had not paid the estimated service charge when due and that the landlord had been forced to bring proceedings. Mr Metcalfe had requested evidence in support of the estimated service charge demand, but this did not exist because the costs had not yet been incurred.

46. For his part Mr Metcalfe emphasised that he had not received adequate management services from DGA and that he had been justified in not paying the second estimated service charge demand, because of the contents of the DGA letter dated the 9th February 2005.

47. Although the Tribunal had some sympathy with Mr Metcalfe, under the lease he had a clear liability to pay a reasonable sum by way of estimated service charge. However, the Tribunal felt that both parties might be open to criticism in relation to the current dispute: on the one hand Mr Metcalfe had not paid sums due under the lease, but on the other it appeared to the Tribunal that the managing agents had rather rushed to issue proceedings on the estimated service charge demands, when the actual expenditure figures were only days away, which was something the agents should have known.

48. Taking into account these matters the Tribunal makes no order for the refund of the hearing fee.

49. The Tribunal also makes no order under section 20C of the 1985 Act. If and when the landlord's costs of the Tribunal proceedings are applied to the service charge account as part of a future demand, this decision does not affect Mr Metcalfe's right to challenge the level of those costs at that time by way of a separate application to the Tribunal, if he so wishes.

50. The matter should now be returned to the Willesden County Court.

Chairman: T. Powell

Timothy Powell

Date: 14th September 2007