SOUTHERN RENT ASSESSMENT PANEL

LEASEHOLD VALUATION TRIBUNAL

Case Number CHI/OOML/LIS/2008/0015

In the matter of Section 27A of the Landlord & Tenant Act 1985 (as amended) ("the Act")

and

In the matter of Flats 1 2 and 4, 35 Queens Road, Brighton

Between:

Cruiseaqua Limited — Applicant

and

Ms Carole Browne, Mr Anthony Gaitens and Mr Andrew Diffey — Respondents

Reasons for decision

Inspection: 4th July 2008

The matter was dealt with upon consideration of the papers put before the tribunal and without an oral hearing.

Date of Issue: 4TH AUGUST 2008

Tribunal: **Mr R P Long LLB (Chairman)**
Mr R A Wilkey FRICS FICPD

Decision

1. For the reasons given below, the tribunal has determined that the amounts of service charge payable by flats 1,2 and 4 at 35 Queens Road (excluding any arrears then due) are as shown against those flats in paragraph 21 for the year 2006, in paragraph 30 for the year 2007 and in paragraph 35 for the interim payments in 2008. Its observations on the further matters raised by Mr Gaitens and Mr Diffey appear at paragraphs 31-34. since no sum has been demanded for costs nor is any amount established it is unable to deal with the request to deal with the costs of these proceedings for the reasons set out at paragraphs 36-40, but it draws the attention of the parties to its observations on that aspect made there. The effect of all of this is that the Applicants have succeeded in their application, save as to the request concerning the costs of these proceedings. If here is any discrepancy between anything in this paragraph and anything in the body of the note that appears below then the terms of the body of the note are to be taken as definitive.

Reasons

The application

2. This is an application by Cruiseaqua Limited, the landlord of premises at 35 Queens Road Brighton, to the tribunal made under section 27A of the Act to determine the service charges payable by the Respondents in respect of their flats at the property for the years 2006 and 2007, the interim charges for 2008 and the costs of this application.

Inspection

3. The Tribunal inspected the subject property on 4th July 2008 in the presence of Mr Surman of Messrs Parsons Son & Basley and his assistant, and in the presence of Mr Gaitens. It saw a terraced building perhaps built around 1850 having a shop on the ground floor and three floors above that. At some time these three upper floors have been converted into flats, and there were four flats in all. The building appeared to be of brick covered (at least on the front elevation) in painted plaster rendering. The roof was not visible, but is not material to the subject matter of the application. Access to the flats is obtained by means of a separate entrance at the side of the shop.

4. The parties wished the Tribunal to see the work that has been carried out to the common hall and stairway. They told the Tribunal that the work had consisted of stripping the old plaster and re-plastering the walls and ceiling, after which the walls and ceiling were repainted as were the handrail and banisters, both of which are of wood and appear to be original. The hall and staircase had been re-carpeted in a carpet that appeared suitable for areas of heavy wear. These works are referred to in this note as "the works" where reference is made to all of them.

5. Mr Gaitens drew attention first to the standard of the plastering. In particular he complained of a number of patches where the plastering was rougher than

he said would be commensurate with a good standard of work. Similarly, he drew attention to what he considered a poor standard of cutting-in where the paint on the walls joined that on the ceilings, and to the standard of painting the handrail and balusters. He considered that the handrail, which he said was mahogany, should have been polished rather than painted with what appeared to have been a black paint, and to the painting of the individual balusters, which he said was poor and exhibited a number of runs. It was his contention, made in the presence of Mr Surman who was present on behalf of the applicants as well as in his letter of 4th April 2008 written to the Tribunal, that the work was of such a standard that it did not merit the amount it had cost, and that the cost was accordingly unreasonable.

6. Upon leaving the property the Tribunal observed that the front door to the common parts appeared to have been decorated at the same time as the rest of the hall and stairs.

7. The property as a whole is not a one that consists of expensive flats. Indeed, despite their central location the value of these flats is likely to be towards the lower end of the bracket for flats offering similar accommodation in the Brighton and Hove area.

The Lease

8. The tribunal was provided with a copy of a lease ("the Lease") dated 24th May 1985 made between Robyswan Limited of the one part and Nicholas James Petfield of the other part relating to Flat 2 on the first floor of the property. It understands that for practical purposes of this application the other leases at the property are in similar form. The term of the lease is for 99 years from 24th June 1984 and the annual rent reserved rises by increments of £25 after each twenty-five years of the term elapses to reach a rent of £100 per annum in the last twenty-four years.

9. For the purposes of the present application it is relevant that the landlord is obliged by paragraph 5(5)(a)(iii) of the lease to maintain the common parts in good and substantial repair and condition, and by paragraph 5(5)(b)(ii) to decorate those parts. The lessee covenants by clause 4(4) to pay a service charge, and the service charge and the manner of its payment are set out in the Fifth Schedule. The lessee is to pay a percentage of the expenditure incurred by the landlord in carrying out its obligations there referred to (including maintaining and decorating the common parts) by means of an interim payment by equal payments on 24th June and 25th December in each year, and a balancing charge if any twenty eight days after the service charge accounts of the accounting period from 1st January to 31st December in each year are prepared. Any excess is to be carried forward against future expenditure. The apportionment of the expenditure is dealt with at paragraph 18 below.

The Law

10. The statutory provisions primarily relevant to applications of this nature are to be found in section 18, 19 and 27A of the Act. The provisions of section 20B

of the Act also have some relevance in this particular case. The Tribunal has of course had regard in making its decision to the whole of the relevant sections as they are set out in the Act, but here sets out what it intends shall be a sufficient extract (or a summary, as the case may be) from each to assist the parties in reading this decision. Section 18 provides that the expression "service charge" for these purposes means:

"an amount payable by a tenant of a dwelling as part of or in addition to the rent-

a. which is payable directly or indirectly for services, repairs, maintenance, improvements or insurance or the landlord's costs of management, and
b. the whole or part of which varies or may vary according to relevant costs"

"Relevant costs" are the costs or estimated costs incurred or to be incurred by the landlord in connection with the matters for which the service charge is payable, and the expression "costs" includes overheads.

11. Section 19 provides that:

"Relevant costs shall be taken into account in determining the amount of a service charge payable for a period:

a. only to the extent that they are reasonably incurred, and
b. where they are incurred on the provision of services or the carrying out of works only if the services or works are of a reasonable standard

and the amount payable shall be limited accordingly".

12. Subsections (1) and (2) of section 27A of the Act provide that:

"(1) An application may be made to a Leasehold Valuation Tribunal for a determination whether a service charge is payable and, if it is, as to –

a. the person to whom it is payable
b. the person by whom it is payable,
c. the amount which is payable,
d. the date at or by which it is payable, and
e. the manner in which it is payable.

Subsection (1) applies whether or not any payment has been made."

There are certain exceptions that limit the Tribunal's jurisdiction under section 27A but none of those exceptions has been in issue in any way in this case.

13. To such extent (if at all) as the point is not implicit in the wording of the Act, the Court of Appeal laid down in Finchbourne v Rodrigues [1976] 3 AER 581 CA that it could not have been intended for the landlord to have an unfettered

discretion to adopt the highest possible standards of maintenance for the property in question and to charge the tenant accordingly. Therefore to give business efficacy to the lease there should be implied a term that the costs recoverable as service charges should be fair and reasonable.

Consideration

14. The tribunal dealt with the matter upon consideration of the papers that were before it, at the time of their initial consideration and of certain information given to it (and copied to the Respondents) as a result of enquiries it made of the applicant's representatives at that time.

15. It appears from the service charge account provided with the application that accounts are now prepared on the basis that the accounting period ends on 24th December in each year rather than 31st December as the lease provides (page 42 of the Applicant's bundle). Copies of letters written by Mr Gaitens and Mr Diffey, largely in common form, to the managing agents between November 2007 and April 2008 provided by them to the Tribunal show that they had certain concerns with the work carried out by the landlords described at paragraph 3 ("the work") above for which the charges appear in those accounts.

16. Their concerns were:

    a. that they had difficulties over the manner in which the costs of the works had been allocated, especially in terms of the proportion attributable to the commercial premises that are on the ground floor. On previous occasions when works had been carried out, the commercial premises had made a greater contribution, but on this occasion they were understood to have contributed only £600.
    b. There had been breaches of health and safety regulations whilst the works were being carried out.
    c. There was an issue over the loss of keys

    In addition to these matters Mr Gaitens and Mr Diffey made plain their view at the inspection, in the presence of Mr Surman, that the works had been carried out in a less than satisfactory fashion.

17. In letters addressed to the tribunal dated 4th April 2008, again in common form, Mr Gaitens and Mr Diffey asked the tribunal to determine three further matters as follows:

    a. to adjudge on the appointment (we believe that they may have intended to refer to "apportionment") of each of the leaseholders within the property
    b. whether the work was carried out to the specification and complied with health and safety laws, and
    c. the competence of Messrs Parsons Son & Basley to manage the property both in the past and in the future.

18. The tribunal received no communication of any sort from Miss Brown.

Expenditure for 2006

19. The actual cost of the services for the year 2006 was £3589.19 as appears in the third column at the top of page 34 in the Applicant's bundle. The total cost is apportioned in accordance with the rateable value of the premises as set out in the particulars of the Lease. There is no provision for the proportions to vary from time to time so that they appear to depend upon the rateable values as they stood at the time of the grant of the leases. Thus:

flat 1 bears 12.81% of that cost,
flat 2 bears 18.82%,
flat 3 bears 17.78%,
flat 4 bears 17.26% and
the shop bears 33.33%.
The applicants produced a copy of their calculations showing how this apportionment based on rateable value is achieved.

20. Thus on the face of the matter and ignoring prior arrears that have apparently arisen as well as the interim demand for 2006, the amounts actually incurred for 2006 alone were:

flat 1 £459-26,
flat 2 £675.49,
flat 3 £638.16
flat 4 £619-49, and
the shop would be responsible for the remaining 33.33%, or £1196-28.

21. The two pages 34 in the Applicant's bundle and pages 42 and 43 in that bundle are identical so that the tribunal had some difficulty in trying to establish what had been demanded for 2006 by way of interim charge. It appears from the second column at the top of page 34 (or page 42) as if a total of £3778-76 was demanded for that period, so that the demands would have in fact have been:

flat 1	(12.81%)	£ 484.06
flat 2	(18.82%)	£ 711.18
flat 3	(17.78%)	£ 671.88
flat 4	(17.26%)	£ 652.23
the shop	(33.33%)	£1259.48

22. If that is so then those would have been quite proper provisions in accordance with the terms of the lease, and the small differences between the figures respectively in paragraphs 19 and 20 above would have been carried forward into 2007 as credits to each flat that paid the demand. In fact it appears that payment was sporadic so that arrears were carried forward. There apparently had been considerable arrears in previous years that appear on the account at page 34.

23. As a result the amounts that appear as payable against each lessee's name at the end of 2006 bear little resemblance to the above figures. No evidence has been put before the tribunal concerning those earlier years and it can form no view about them. It is able only to say that no issue has been taken before it about the figures incurred in 2006 that the application asks it to determine, that the figures that it has calculated as being the apparent amount of the interim demand for the year appear reasonable in the context of what was actually incurred and to be appropriate to be demanded in the context of the service charge regime in the lease. Thus it determines that the amounts that appear against flats 1, 2 and 4 in paragraph 20 are the amounts that are payable by the lessees of those flats for that year alone. It may be that additional sums were payable by them as arrears incurred in previous years. The costs of previous years are not part of this application and there has been no issue taken before the tribunal over them. The same point arises in respect of charges determined by the tribunal for 2007, but is not repeated where those are set out.

Expenditure for 2007

24. The cost of the works according to the account on page 42 of the Applicant's bundle was £16947.03. Other items of expenditure for the period that it covers amounted to £4010.66, so that the total expenditure for the period was £20957.69. The Tribunal was satisfied that the appropriate notices under section 20 of the Act appear to have been given before the works commenced. Copies of them appear under Tab H in the Applicant's bundle and it appears from them that the requisite procedure was properly followed.

25. No issue was raised concerning any of the items that made up the sum of £4010.66, so that the issues for the tribunal so far as the 2007 costs were concerned were to determine whether the cost of the works was reasonably incurred, and whether the cost and the standard of the work was reasonable. No specification of the works was made available to the tribunal, but from what it saw and was told by the parties upon inspection it was apparent that they had consisted of the work described in paragraph 4 above.

26. The staircase at the property is extensive. It rises through three storeys and to the flat in the roof and is of regency proportions. In addition there is a hallway of matching proportion. Without having been in a position to undertake any useful measurement, it was apparent to the members of the tribunal at the inspection that a very large area of wall had been successively stripped of plaster and then re-plastered throughout the hall and the staircase. That area and the ceiling had then been redecorated throughout with (apparently) vinyl paint, the regency staircase with a very large number of individual balusters had been repainted, and finally heavy duty carpet of a sort often to be found in common parts had been laid. There were certainly defects in the work. Mr Gaitens pointed out many of them, as described in paragraph 5 above, and they were undoubtedly present.

27. In the tribunal's judgement the work was certainly not carried out to the highest standard and to that extent Mr Gaitens' criticisms of it are justified.

No evidence of the likely cost of such work in the locality was put to the tribunal, and it was accordingly compelled, as an expert tribunal, in order to determine the matter to fall back on its collective general knowledge and experience of the cost of work of this nature in the Brighton area. In its judgement, the cost that was incurred was the sort of cost that it would expect to have been incurred for work of a reasonable standard (as opposed to a very high standard) in the locality. If the lessees had wanted work of the standard that Mr Gaitens suggested was appropriate during the inspection then it is likely within the tribunal's experience that they would have had to pay a good deal more for it.

28. Whilst there were imperfections, the plaster work was generally of a good standard. The painting of the walls and ceilings was reasonable even if the cutting-in of colours where the wall and ceiling met was sometimes less than perfect. The work to the balusters and handrail left something to be desired, and no doubt it would have been preferable for the hand rail to have been treated in some other fashion, as Mr Gaitens mentioned. However, for the cost incurred the work even here was adequate and did not fall outside of the band that may be described as 'reasonable'.

29. In consequence the tribunal has been unable to find that the standard of the works, or their cost, was unreasonable. There has been no suggestion before it that the works were not required or that it was in any way unreasonable to have sought in the first place to have them carried out. In consequence, the cost of them was reasonably incurred.

30. It follows therefore that the tribunal finds that the costs incurred for 2007 were reasonably incurred and were reasonable. The total cost of £20957.69 appears to fall to be borne as before so that the amounts payable by each flat for the year will have been:

flat 1	(12.81%)	£ 2684.68
flat 2	(18.82%)	£ 3944.24
flat 3	(17.78%)	£ 3726.27
flat 4	(17.26%)	£ 3617.30
the shop	(33.33%)	£ 6978.91

The Respondents' Other Concerns

31. The Respondents raised three other concerns described at paragraph 16 above. They turned upon the apportionment of the costs, the issue of health and safety, and upon the question of the competence of Messrs Parsons Son & Basley.

32. As to the apportionment of costs, the tribunal requested the computation of the proportions from Messrs Parsons Son & Basley, and it was provided. A copy was sent to the Respondents and they have not commented upon it. Whatever may or may not have happened in the past, there appears no reason from what is before the tribunal to conclude that the apportionment is not strictly in

accordance with the terms of the leases of the residential part of the property (the tribunal have not seen the lease of the shop) nor is there any evidence before the tribunal that the calculations provided by Messrs Parsons Son & Basley are not accurate. There are therefore no grounds upon which the tribunal could properly find that the apportionment is inaccurate in any way.

33. Questions of health and safety are outside of the tribunal's jurisdiction. In any event, it is not immediately apparent that even if there had been evidence before it of any breaches of health and safety requirements during the carrying out of the works (and it has no more than the Respondents' assertions that this may have been so) that such breaches would affect the judgement that the tribunal must make of the reasonableness of the result in the terms described earlier.

34. The Respondents have made assertions about Messrs Parsons Son & Basley's competence to manage the property. The tribunal has found that in the matters that were before it the works and their cost were in all the circumstances reasonable. It is not required or able to go further than that. If the Respondents wish to pursue that question (and this applies too if the reference to "appointment" in paragraph 17 above was intended to suggest that they wished to be appointed to manage the property rather than that they wished, as we have understood the matter, to question the apportionments) they would have to take advice upon the possible applicability of sections 21-24 of the Landlord &Tenant Act 1987 to the issues that concern them. The matter could not be one for the tribunal under this application.

The 2008 Interim Demand

35. The Respondents have taken no issue with the figures contained in the budget forming the basis of the 2008 interim charge for service charge. The total of that budgeted expenditure is £5247-00 (page 57 in the Applicant's bundle). On the face of the matter that sum falls to be paid in the same proportions as set out previously at the times referred to in paragraph 3 of the Fifth Schedule to the Lease (page 31 in the Applicant's bundle). Accordingly each Respondent is liable to pay one half of the budgeted amount attributable to his or her flat on 24th June 2008, and the balance on 25th December 2008. The relevant amounts of the half yearly payments appear to be:

flat 1	(12.81%)	£ 336.07
flat 2	(18.82%)	£ 493.74
flat 3	(17.78%)	£ 466.46
flat 4	(17.26%)	£ 452.82
the shop	(33.33%)	£ 874.49

The Costs Application

36. The Applicants say that they intend to add the costs of the application to the service charge account. They say that the amount of their fees and expenses (unquantified in the papers before us) is reasonable, and that they are entitled

by clause 5(5)(j) of the lease (page 23 of the Applicant's bundle) to recover such sums. It appears that their reference is intended to be to clause 5(5)(j)(ii) since clause 5(5)(j)(i) refers specifically to the fees of managing agents.

37. The matter has not been argued in any way before the tribunal. Indeed it may be that the Respondents have not fully understood the import of the request, for they have said nothing about it. The tribunal is aware that there have been a number of cases on the question whether or not legal fees can be recovered from time to time before the Court of Appeal, with varying outcomes, dependent upon the expression used in the lease. It may possibly be in this instance, however, that the case that most nearly deals with the wording that appears here is Sella House v Mears [1989] 1 EGLR 65.

38. In the present case the costs have not been quantified, nor as far as the tribunal is aware has any amount on account of them been demanded. It would be inappropriate for the tribunal to express a view on an unquantified sum merely against an assurance that that sum would be reasonable in amount. In any event the amount has not been demanded and such a demand would have to be accompanied by such a statement of the rights of the Respondents as the law now requires in order to be payable. It is clearly therefore the case that at present, and on the information before the tribunal, no such sum is payable.

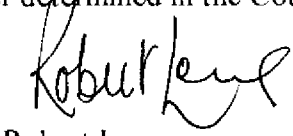
39. Whilst this tribunal would have jurisdiction to determine the point for the limited purposes of its service charge jurisdiction, it may well be that if the matter is to be determined in due course then the better forum in which to argue and to obtain a definitive declaration upon the interpretation of the lease in this respect is the County Court. The parties are referred to the observations upon such matters of Judge Rich QC in Canary Riverside PTE Ltd v Schilling LRX/65/2005 at paragraph 41 et seq..

Summary

40. The application to the tribunal required it essentially to deal with the service charges payable for 2006 and for 2007 and with the budget for 2008. The tribunal has determined that the amounts so payable by the lessees of each of the flats the subject of the application for each of those two years and for the instalments in 2008 are as set out respectively in paragraphs 21, 30 and 35 above. The figure for the shop is included for completeness but is not a determination by the tribunal since it has no jurisdiction over commercial premises. Flat 3 is not included in the application and again the figure is shown only for completeness.

41. In particular the tribunal's determination does not, in case there should be any doubt upon the point, include any sums that may be payable by any of the flats in respect of arrears of service charge arising in years before 2006. The accounts at page 34 and page 42 suggest that such arrears may be claimed but there is no evidence about them, no doubt because the tribunal is not asked in the terms of the application to determine them. The tribunal has declined to make an Order under section 20C of the Act.

42. As to the costs of these proceedings the tribunal determines that no sum is presently payable. There has to date been no demand nor has any amount been established. If such a demand is payable then that matter may be determined, but for the reasons set out above it may be, although the tribunal would be able to deal with the matter, that it would be better determined in the County Court.



Robert Long
Chairman

28th July 2008