CHI-29UG-LSC-2008-0056

THE RESIDENTIAL PROPERTY TRIBUNAL SERVICE

DECISION OF THE SOUTHERN LEASEHOLD VALUATION TRIBUNAL ON AN APPLICATION UNDER SECTION 27A OF THE LANDLORD AND TENANT ACT 1985

60 BURCH ROAD, NORTHFLEET, GRAVESEND, KENT DA11 9NE

Applicants:	Ms S Williams (Flat 8)
	Ms D Chidgey (Flat 1)
	Mr J Richardson (flat 2)
	Mr N Gibbs (Flat 3)
	Mr S Player (Flat 4 – 2003 to 2008)
	Mr A Sellars (Flat 4 – 2008 onwards)
	Mr A Edwards (Flat 5)
Respondent:	Three Keys Properties Ltd
Date of hearing:	16 September 2008
Date of inspection:	16 September 2008
Appearances:	Ms S Williams, Ms D Chidgey, Mr N Gibbs in person
	Mrs C Bagley (Director) and Mr T Bagley for the respondent

Members of the Leasehold Valuation Tribunal:

Mr M Loveday BA(Hons) MCIArb
Mr R Athow FRICS MIRPM
Mrs L Farrier

BACKGROUND

1. This is an application under section 27A of the Landlord and Tenant Act 1985 ("LTA 1985") for a determination of liability to pay service charges. The applicants are the leasehold owners of flats at 60 Burch Road, Northfleet, Gravesend Kent DA12 1AU. The respondent is the freehold owner of the block. The application relates to fire safety systems in the property.

2. A hearing took place on 16 September 2008. The applicants appeared in person and the Respondent was represented by Mrs C Bagley (a Director) and her son Mr T Bagley.

3. The application dated 13 June 2008 is for a determination in respect of the amount payable for 2003, 2007 and 2007/8. Directions were given on 12 October 2007. There are four issues:
   (a) Whether the applicants are liable to pay the sum of £9,765 in relation to fire precaution works carried out in 2003;
   (b) Whether the applicants are liable to pay the sum of £2,232 for remedial works to the fire alarm system and emergency lighting system carried out in 2007/08.
   (c) Whether the applicants are liable to pay the sum of £1,018.53 in relation to fire safety equipment servicing in 2007/08;
   (d) An application for an order under section 20C of LTA 1985.

   An argument in relation to the relevant costs of building insurance (which was not specifically referred to in the application) was not pursued by the applicants at the hearing.

THE LEASE

4. The Tribunal was provided with a sample lease for Flat 8 dated 10 March 2000, which was agreed to be in similar form to the leases of each flat. By clause 3(2) the tenant agreed to pay to the landlord such maintenance rent as was defined in the lease as the tenant's proportionate part of:

"all moneys expended or contracted to be expended by the landlord in complying with the covenants on the part of the landlord hereinafter contained (including the covenant as to insurance) within twenty one days of the demand therefore by the landlord at such intervals as the landlord shall consider expedient."

5. The landlord's obligations were at clause 4 to 8 of the lease. By clause 5 the landlord was required:

"To keep the property adequately insured against damage by fire and such other risks as are normally covered by a Householders Comprehensive Policy and third party risks..."

INSPECTION

6. The Tribunal inspected the property on the date of the hearing. 60 Burch Road comprises a 4 storey property converted into 8 flats. The street door gave entry to a communal entrance hall, stairs and landings which had several pieces of fire safety equipment. In the entrance hall was a wall-mounted control box, two fire extinguishers (marked as inspected in 2007), an alarm activation point, two ceiling mounted multipoint smoke detector/sounders and emergency lighting. Some of this equipment had LED indicator lights fitted. The LED lights to the detector/sounders in the entrance hall showed no lights, the LED lights to the emergency lighting were lit continuously and the control box showed a red flashing indicator suggesting that a sounder was operating in the building (although no alarm could be heard). On the first floor the Tribunal inspected the interior of flat 8. The kitchen was fitted with a fire door (with spring loaded door closer) which was propped open. The internal hallway had a ceiling mounted multipoint detector/sounder similar to the ones seen in the ground floor entrance – except that this unit showed a small red LED light flashing at intervals of about 20 seconds.

7. The respondent was not present at the inspection. At the start of the hearing, the Tribunal explained all the matters which it had observed and invited the parties to comment on them during the course of their submissions.

FIRE SAFETY WORKS

8. The issue here is whether the cost of fire safety works is recoverable under the terms of the leases of the flats. These were part of major works carried out to the property in 2004. The works followed service of a "minded to" notice by Gravesham BC under the Housing (Enforcement Procedures for Houses in Multiple Occupation) Order 1997. Following the notice, a specification of works was prepared by Range Property Consultants which referred to fire precautions at sections 5-9. The successful tender submitted by DR Knight Developments (London) Ltd on 26 April 2002 included the following works priced at £9,765 exclusive of VAT and fees:

   (a) Fire doors £2,458

   (b) Fire fighting equipment £650

   (c) Emergency lighting installation £1,589

   (d) Fire and Smoke Alarm system installation £3,948

   (e) Notices and signs £960

   (f) Internal repairs after fire works done £160

   The relevant costs were invoiced to and paid by the lessees in 2004 as part of the major works.

9. The applicants contend that these items are not specifically recoverable under the terms of their leases. At the start of the hearing, it was evident that the respondent was not aware that this was the central thrust of the applicants' case. Mrs Bagley conceded there was no specific provision in the lease which allowed the respondent to recover the cost of fire precaution works. However, she relied on the insurance provisions in clause 5 of the lease and submitted that a term must be implied into clause 5 that the landlord should carry out fire precaution works and recover those costs from the lessees. This was because the landlord could not comply with its insurance obligations without carrying out the works. The applicants submitted that it was unnecessary to imply any words into clause 5. They said that their insurer had told them the property was on cover even though there may be a breach of 'fire regulations' by not carrying out the works.

10. Decision. A term will only be implied into an agreement such as a lease where:

   (a) it is necessary to give business efficacy to the agreement between the parties or;

(b) the term is so obvious that it goes without saying (the "officious bystander test");

and in either case the term is reasonable, capable of clear expression and not in conflict with any express provisions in the agreement. In order to imply a term, it is not enough that it is objectively reasonable for the lease to include such a provision.

11. Was it necessary to give business efficacy to the agreement for the landlord to carry out fire safety works and to recover those costs from the leaseholders? In this instance, the applicants suggest that the property could have been properly insured by the landlord without the fire precaution works – although they did not produce any evidence to this effect. On the other hand, the landlord produced no evidence to support its central assertion that the works were necessary to obtain the insurance required by clause 5 of the lease. If it is necessary to resolve this point, the Tribunal prefers the evidence of the applicants. Such evidence as there is suggests that the fire precaution works were prompted by the local authority intervention rather than any requirement of the respondent's insurers.

12. However, there is a more fundamental objection to the suggested implied term. Even if works were required to obtain insurance, this does not mean it is 'necessary' to imply a covenant on the part of the landlord to carry out those works and to recover those costs from the lessees. Plainly it may be desirable for works to be carried out to reduce the cost of insurance premiums, but clause 5 is an effective insurance provision without any such requirement. Still less can it be said that recovery of the cost of works from the lessees must be a condition precedent to the landlord performing its obligation to insure.

13. Was such a term so obvious that the parties need not have expressed it? The tribunal considers that an officious bystander could not have assumed that the landlord would install fire doors and that the lessees would pay. Such an observer may equally have concluded the landlord would pay for the works if so required or that the parties would share the cost. In any event, the suggested provision has not been clearly formulated. Whether the landlord must carry out all works required by an insurer or

works reasonably required by an insurer or some other wording has not been clearly formulated as an implied term.

14. In short, the Tribunal does not imply any term into the lease that the landlord will carry out works to ensure that insurance cover is provided and it follows that the relevant costs of £9,765 plus VAT and fees is not recoverable under the lease.

REMEDIAL WORKS IN 2007/08

15. The landlord carried out works to repair the fire precaution systems in 2007/08 at a cost of £2,320.50. The issue here is whether these relevant costs were "reasonably incurred" under section 19(1)(a) of LTA 1985 and whether the works were of a "reasonable standard" under section 19(1)(b) of the Act.

16. The facts are largely not in dispute. By 2007, the fire precaution system had failed. Both parties submitted documentation from Gravesham BC which included records of fire safety inspections. For example, a fax from the council to Ms Williams dated 17 July 2008 refers to an inspection on 23 November 2006 which found that the fire safety system installed in 2003 had been of the wrong type and that the system was "in fault mode". As a result, on 3 January 2007, the local authority served notices under s.372 Housing Act 1985. These required the landlord:

> *"to arrange for a suitably qualified and competent person to thoroughly inspect and test the installation and to carry out all repairs necessary to leave the whole system in sound working order throughout"*

and to provide an annual inspection certificate. A periodic inspection and testing certificate dated 19 October 2007 found further defects with the system. The landlord then instructed contractors called First Choice Facilities plc. In October 2007, an engineer visited and concluded that 16 detectors in the premises required replacement. Although the Tribunal was not provided with the report from the engineer, a letter from First Choice to the landlord dated 12 December 2007 stated that he had found:

> *"the existing detectors to be showing an alarm condition and could not be reset. We recommend that these units are replaced with 16no. Combi*

Detectors. This would mean replacing every single existing detector so this would involve works in each flat within the premises. The total chargeable fee for these works would be £1,900 plus VAT"

On 21 January 2008, the landlord wrote to the lessees stating that the 16 units would be installed "*two in each flat*" and that the cost would be apportioned between the lessees. On 1 February 2008, the First Choice engineer managed to clear some faults on the system, but he was unable to finish his work because of lack of access to three flats. Access was eventually given and the contractor completed its work on 21 February 2008. The landlord demanded a contribution towards the cost of this work on 21 March 2008. A copy of invoice no.6385 to Ms Williams required payment of £269.07:

"as per our letter addressed to all lessees dated 21st January 2008, First Choice Facilities attended 60 Burch Road to undertake remedial works to the Fire Alarm System/Emergency Lighting System. Net amount of £1,900 + 17.5% VAT = £2,232.50 £297.07 per Flat Visit Date: February 1st 2008."

17. Ms Williams and Ms Chidgey stated that the fire precaution system installed in 2003 had never really worked properly. Within 6 months of installation the alarm started to go off for no reason. Ms Williams contacted the alarm company and they told her how to disable the alarm by keying in a combination on the control panel keypad. The control panel was the same as the one still in the entrance hall. Ms Williams stated that she disabled the alarm and rang the landlord three times. She said she left messages, but nothing was done. Furthermore, the applicants suggested that the new system did not work properly even after the 2007 works were carried out. The applicants referred to a technical data sheet for the multipoint smoke detector /sounder (a Rafiki Twinflex model) which stated that the LED lights on this unit should flash at 20 second intervals to show it was operating normally. The LED unit to the ceiling mounted multipoint unit in flat 8 complied with the data sheet – but this could be contrasted with the similar units in the entrance hall. The control box indicator lights suggested there was still a fault in the system. Mr Gibbs stated that not all 20 sounders needed replacement. He examined the detectors removed by First Choice in 2007, and that some of them still worked. He had written to Mr Clancy (who worked for the landlord) with a full report about the replacement works, but he had not

retained a copy. In cross examination, Ms Williams accepted she had not had the system tested professionally. The applicants submitted that the relevant costs were not reasonably incurred because the repairs should have been carried out under the warranty given by the installers of the original fire safety system. In any event, the works had been unnecessary since the sounders which had been replaced still worked. They submitted that the works were not of a reasonable standard because the fire precaution system evidently still did not work. The system indicated there was a fire which was not there.

18. Ms Bagley stated that it was the landlord that had instigated the whole project in 2007. It had placed the works in the hands of First Choice, who were a professional firm. The landlords had given the firm the schedule to the local authority notice of 3 January 2007 as a specification and asked them to remedy the defects. Ms Bagley was unable to comment on the quality of the works since she relied on what the contractors had advised. She was more than happy to get another contractor back to look at these works. When questioned by the Tribunal, Ms Bagley stated the landlord had no qualified surveyor in-house, and therefore it relied on advice given by outside advisers. The landlord submitted that the costs were reasonably incurred and the works of a reasonable standard.

19. Decision. The first issue is whether the costs were reasonably incurred. The unchallenged evidence is that the landlord made proper enquiries of an independent specialist fire precautions contractor and relied on the advice given. However, the Tribunal does find that there were significant faults with the system from the outset in 2003. The Tribunal further finds that replacement of the 16 multipoint combi detector/sounders was not the solution for these faults. It would be unusual for 16 units all to fail in eight separate flats at the same time and there is some evidence from Mr Gibbs that they were not faulty. Moreover, the Tribunal is satisfied from its inspection that the fire precaution system does not work at present, even with the replacement sounders). The Tribunal therefore considers that the system ought to have been rectified under guarantee within a short time of the faults appearing in 2003, and that it was not reasonable to incur the cost of replacing the 16 units in 2007.

20. Furthermore, the works were, in the Tribunal's view, not of a reasonable standard. The contractor was asked to deal with the schedule to the local authority notice, which required the system to be left in sound working order. This did not happen, and it appears no annual safety certificate has been issued. The fire safety system was left in a state which was inoperable and hazardous. The repairs were not therefore of a reasonable standard.

FIRE SAFETY EQUIPMENT SERVICING

21. The application to the LVT raised the question of whether the landlord was able to recover the cost of the "annual servicing" of the fire alarm system under the terms of the lease. The application stated that this cost was £1,018.53 for the 2007/08 service charge year. The respondent produced a copy of the annual statement for "maintenance rent" for the year ended 31 December 2007 which amounted to £1,108.53 (£127.32 per flat). This statement included building insurance, works to communal lighting, communal electricity and a number of other items. These items include two matters relating to the fire safety system. There is a cost of £520 (plus VAT of £91) for "*Fire Alarm - Annual Maintenance*". There is also a cost of £56.50 (plus VAT of £9.88) for "*September 2007 Annual Maintenance – Fire Extinguisher Systems.*" There are individual subheadings for the cost of four pressure gauges, four tamper seals, a fire extinguisher sign and a safety pin. It is therefore clear that the complaint does not relate to the entirety of the maintenance charge of £1,108.53 but to relevant costs of £677.38 relating to the fire systems.

22. The applicants contended that the costs were not recoverable under the leases on the same grounds that they relied upon in relation to the 2003 works. The respondent relied again on a contention that there is an implied term that this work must be carried out before it can comply with its insurance obligations under the lease and that the cost is recoverable from the lessees.

23. For the same reasons as given above, the Tribunal finds that the relevant costs of annual maintenance of the fire alarm and fire extinguishers is not recoverable under the terms of the applicants' leases.

LANDLORD'S COSTS BEFORE THE TRIBUNAL

24. There is an application under section 20C of the LTA 1985.

25. The applicants submitted that they had paid their charges in good faith. When they sought advice from the Leasehold Advisory Service in January 2008, they were advised that the costs relating to the fire safety systems were not recoverable under the terms of the leases. The landlord had not responded to the complaints about the fire safety system. The application was issued in June 2008 and the landlord had not conceded this point. Although there had not been misconduct by the landlord after the application was issued, the landlord had failed to serve its statement of case or evidence by 11 August 2008 (the date required by the directions given on 27 June 2008). The Tribunal's clerk had twice left telephone messages and written to the landlord. The statement of case and evidence was eventually sent on 22 August 2008.

26. The respondent accepted that there was no specific provision in the lease which enabled the landlord to recover legal costs or travelling to the hearing, but Ms Bagley stated that the landlord would seek to recover its costs in connection with the application under the maintenance charge. The landlord had always acted on the advice of specialist contractors.

27. Having regard to the guidance given by the Lands Tribunal in ***Tenants of Langford Court v Doren*** LRX/37/2000 the Tribunal considers it just and equitable to make an order under s.20C of LTA 1985. The applicants have succeeded in relation to each issue. At no stage between the issue of the application and the hearing did the landlord address the central point that costs relating to the fire systems are not recoverable under the terms of the leases. The respondent failed to reply to at least some complaints about the 2007 works shortly before issue of the application (see letter from Ms Williams dated 28 May 2008). Moreover, the respondent was late with its statement of case despite chasing from the Tribunal. The Tribunal therefore

determines that no part of the landlord's relevant costs incurred in the application shall be added to the service charges.

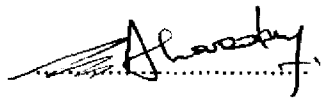
CONCLUSIONS

28. The applicants are not liable to pay relevant costs of £9,765 in relation to fire precaution works carried out in 2003. These costs are not recoverable under the terms of the applicants' leases.

29. The applicants are not liable to pay the relevant costs of £2,232 for remedial works to the fire alarm system and emergency lighting system carried out in 2007/08. These costs are not reasonably incurred under section 20(1)(a) of LTA 1985 and the works involved were not of a reasonable standard under section 20(1)(b) of the 1985 Act.

30. The applicants are not liable to pay the sum of £677.38 in relation to fire safety equipment servicing in 2007/08. These costs are not recoverable under the terms of the applicants' leases.

31. The Tribunal determines under section 20C of LTA 1985 that no part of the landlord's relevant costs incurred in the application shall be added to the service charges.



Mark Loveday BA(Hons) MCIArb

Chairman

10 September 2008