RESIDENTIAL PROPERTY TRIBUNAL SERVICE
LEASEHOLD VALUATION TRIBUNAL

Property	:	**Flat 3, 31 Brunswick Terrace, Hove, East Sussex BN3 1HJ**
Applicant	:	**Carl Bate**
Respondents	:	**Thirty-One Brunswick Terrace Ltd**
Case number	:	**CAM/00ML/LSC/2009/0046**
Date of Application	:	**31st March 2009**
Type of Application	:	**To determine reasonableness and payability of service charges and administration charges**
The Tribunal	:	**Bruce Edgington (lawyer chair) Marina Krisko BSc (EST MAN) BA FRICS David S. Reeve**
Date and venue of hearing	:	**11th August 2009 The Grand Hotel, 97-99 Kings Road, Brighton, East Sussex BN1 2FW**

DECISION

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1. The Tribunal finds that reasonable service charges payable by the Applicant are £1,821.00.

2. The Administration charge of £25 plus VAT claimed from the Applicant by Jacksons, on behalf of the Respondent is unreasonable and not payable.

3. The application for an order pursuant to Section 20C of the **Landlord and Tenant Act 1985** ("the 1985 Act") that the costs of the Respondent in presenting its case before this Tribunal shall not be regarded as relevant costs in any future service charge demand is refused.

4. The Applicant's application for the Respondent to reimburse the application fee of £100 and the hearing fee of £150 is granted and £250 should therefore be refunded to the Applicant within 14 days of this Order being sent to the parties.

Reasons

Introduction

5. The Respondent is a company set up to acquire and manage this block of 9 flats which is a Grade I listed building near the centre of Brighton on the sea front. The leaseholders, including the Applicant, appear to be members. The Applicant said that he is not a director.

6. According to the statement of Bryony Box and Barry Crosby filed as part of the Respondent's case, those two people are the only Directors who actually deal with the management of the building ' by default' as they say.

7. Day to day management has been given to a local firm of managing agents namely Jacksons of 193 Church Road, Hove. It seems that all the 9 flats have been sublet save for that occupied by Barry Crosby and the impression given to the Tribunal is that none of the lessees really wants anything to do with the management of the block.

8. The dispute in this case is straightforward although the answer is less so. The Applicant refuses to pay service charges demanded for the year 1st April 2008 to 31st March 2009 totalling £2,283.60, not because he does not consider them to be reasonable but because he claims that they are not payable. He points to the fact that there is a substantial reserve fund. He claims that there is no power in the leases to have a reserve fund and thus the monies held should be repaid and this will extinguish the claim against him.

9. Jacksons also claim £25.00 plus VAT from the Applicant as a fee for the collection of service charges in arrears. He seeks a determination that this is unreasonable because the service charges are not payable.

10. The Applicant seeks an order pursuant to Section 20C of the 1985 Act that, in effect, the Respondent should not be allowed to claim its costs of representation in these proceedings as part of any future service charge demand from him. Finally, he asks that the Tribunal order the Respondent to pay him the application fee of £100 and the hearing fee of £150.

The Inspection

11. The members of the Tribunal inspected the property in the presence of the Applicant and Mr. Gary Pickard from Jacksons. It is a 5 storey terraced building including a basement. It faces the sea. The construction is of rendered brick and/or block under what looks like a mansard roof on the original building at the

front. There is a substantial rear extension with a flat roof round a central well.

12. The common parts including a passageway in the basement are in need of repair and refurbishment with evidence of, amongst other things, blown plaster, exposed new pipework and cracking. There is evidence of movement in the building which may or may not be 'old' movement. There is also evidence of damp.

13. The front elevation is in reasonable decorative order at the moment but it has constant exposure to the south and the elements from the direction of the sea.

The Lease

14. The Tribunal was shown a copy of what appears to be the counterpart of the lease to the property which is described as "ALL THAT flat on the Ground floor of the said building and known as Flat C...". This lease is for a term of 99 years from the 1st October 1970. There is then a Deed of Variation wherein the Respondent is named as landlord and the property is described as "...Flat C (now known as Flat 3), 31, Brunswick Terrace...".

15. The Deed of Variation was clearly drawn up after the Respondent's acquisition of the building to extend the term to 167 years from the 1st October 2001, to crystallise the ground rent, which was uncertain in the original lease, to increase the number of flats in the building from eight to nine and to clarify one or two other points which the lessees thought were in need of clarification. There is nothing particularly relevant to the issues raised in this case.

16. The provisions as to service charges start with clauses 3 and 4 in the lease. In clause 3 the Lessee covenants to comply with the obligations set out in the 6th Schedule. In clause 4, the landlord covenants to comply with the obligations set out in the 7th Schedule.

17. In the 6th Schedule, the lessee agrees to pay the landlord or the managing agent:-

"*...in respect of each year ending on the 31st day of March such proportion* (there does not appear to be a dispute about the proportion) *of the total expenditure incurred by the Lessor for that year as certified in the certificate of expenditure and the Lessee shall on each of the said half yearly days fixed for payment of rent pay...a sum equal to one half of the amount which the Lessor or the Lessor's Managing Agents shall estimate as the Lessee's share of such expenditure to the Lessee for the current year and will also within one month after delivery of such certificate of expenditure to the Lessee pay to the Lessor any amount by which the Lessee's share of such expenditure shall exceed the total already paid on account thereof by the Lessee and so that if the total already paid on account in any year shall exceed the Lessee's share of such expenditure the excess shall be accumulated by the Lessor to be applied towards the expenditure in the*

following year."

18. The half yearly days for payment of rent are 1st April and 1st October in every year. There are also provisions as to the form of the certificate in clause 7 of the lease which say that the certificate is to be provided by the landlord's accountants.

19. The words upon which the Applicant seeks to rely are those which say that the amount payable in advance shall be an estimate of the amount payable "*...for the current year...*". He says that this precludes the ability to demand payment of a contribution to a sinking fund to cover anticipated expenditure beyond the current year.

20. The Respondent seeks to rely on words in paragraph 1(7) of the 7th Schedule. This Schedule contains the landlord's covenants amongst which is the covenant to "*do all such other acts and things for the proper management administration and maintenance of the said building as the Lessor in his sole discretion shall think fit.*". These words, it is said, allow the Respondent to collect contributions towards a sinking fund.

The Law

21. Section 18 of the 1985 Act defines service charges as being an amount payable by a tenant to a landlord as part of or in addition to rent for services, insurance or the landlords' costs of management which varies 'according to the relevant costs'.

22. Section 19 of the 1985 Act states that 'relevant costs', i.e. service charges, are payable 'only to the extent that they are reasonably incurred'. A Leasehold Valuation Tribunal has jurisdiction to make a determination as to whether such a charge is reasonable.

23. If it is reasonable – and there appears to be no dispute about this – then section 27A of the 1985 Act gives this Tribunal the jurisdiction to decide whether service charges are payable.

24. Section 153 of the **Commonhold and Leasehold Reform Act 2002** ("the 2002 Act") was brought into effect and applies to all service charge demands sent after 1st October 2007. It says that *"A demand for the payment of a service charge must be accompanied by a summary of the rights and obligations of tenants of dwellings in relation to service charges"*. This must be in a prescribed form and the Section also provides that a tenant may withhold payment of a service charge if the demand is subject to this section and the information has not been provided and "*...any provision of the lease relating to non-payment or late payment of service charges do not have effect...*" until the notice has been provided.

25. Schedule 11 of the 2002 Act provides for the same conditions and jurisdiction

with regard to administration charges which are defined as including payments demanded in addition to rent "*...in respect of a failure by the tenant to make a payment by the due date to the landlord...*".

The Financial Position

26. In the accounts for the period up to the 31st March 2008, duly certified by the Respondent's accountants, Justice & Co., it is said that the sinking fund as at the 1st April 2007 was £44,612.25 and, after payments out, interest and contributions demanded from the lessees, it was £44,280.65 as at the 31st March 2008.

27. In the accounts for the period up to the 31st March 2009, again, duly certified, it is said that the sinking fund after payments out, interest and contributions demanded from the lessees, was £17,850.79 after major works to a party wall and a chimney stack costing £35,445.89.

28. In their statement to the Tribunal, the Respondent's directors Bryony Box and Barry Crosby, state that 2 major items of expenditure are due in the current year ending on the 31st March 2010, namely refurbishment of the hall landing and stairs (estimated at £7-9,000) and decoration of the front elevation (estimated at £8-10,000) which, added together, will probably exceed the sinking fund.

The *Contra Preferentem* Rule

29. It could certainly be argued that the terms of the lease are ambiguous. The lessee's obligations appear to be to pay only what the landlord anticipates the expenditure is likely to be in the year following the demand for monies on account. On the other hand there is a general concession to the landlord that it can do anything else which is necessary for the proper management of the building which could include the collections of additional monies for a sinking fund.

30. In order to assist courts (and Tribunals) in these difficult matters of interpretation, the *contra preferentem* rule was devised many years ago. It is not, of course, the only rule of interpretation but it is, perhaps the most relevant to this problem. It translates from the Latin literally to mean "against (*contra*) the one bringing forth (the *proferens*)".

31. The principle derives from the court's inherent dislike of what may be described as 'take it or leave it' contracts such as residential leases which are the product of bargaining between parties in unfair or uneven positions. To mitigate this perceived unfairness, this doctrine was devised to give the benefit of any doubt to the party upon whom the contract was 'foisted'.

32. In the case of **Granada Theatres Ltd v. Freehold Investments (Leytonstone) Ltd** [1958] 1 WLR 845, Mr. Justice Vaisey said, at page 851, that "a lease is normally liable to be construed contra preferentem, that is to say, against the lessor by whom it was granted".

33. The question for this Tribunal, therefore, is whether the provision of a reserve fund is a matter for the benefit of the landlord. If so, then *contra preferentem* would appear to dictate that a ruling is made in favour of the Applicant lessee.

The Hearing

34. The hearing was attended by the Applicant and Mr. Pickard. The Tribunal would like to say that the conduct of the case was a model to others. The application was clear and concise and the statements for each party were informative but to the point. The bundle was provided well in advance and both the Applicant and Mr. Pickard on behalf of the Respondent conducted their cases in an entirely professional and proportionate way.

35. At the start of the hearing the Tribunal chair asked a number of questions to clarify the parties' positions. The following information was given:-

    (a) The Applicant agreed that whatever the Tribunal decided about a sinking fund, the service charges claimed were reasonable. Thus the only issue was payability.
    (b) He also agreed that if the amount claimed was found to be payable then the administration fee of £25 plus VAT is reasonable
    (c) The Respondent had bought the property in about 2002 by way of enfranchisement
    (d) The Applicant wants the reserve fund spent on the common parts and decorating the front elevation. He is not seeking a refund
    (e) The Applicant had no quarrel with the way Jacksons were managing the property and Mr. Pickard had no quarrel with the Applicant's desire to have the issue of the sinking fund resolved.
    (f) All service charge demands had the statutory information endorsed on the reverse sides.

36. Thus, it became clear that both the Applicant and the Respondent, or at least its representative, wanted the issue of the sinking fund sorted out one way or the other.

37. Mr. Pickard gave evidence that the front elevation of the building would have to be decorated between March and October 2010. This is required by the local authority and if it is not done, such authority has been known to come and do the work itself and then charge the owner. Jacksons manage other properties in the locality and have some experience of the attitude taken by the local authority. The Applicant certainly did not dispute this and said that he was in favour of the work being done.

Conclusions

38. It may be confusing to some that the Applicant, as a member of the Respondent company, can be seen to be challenging the Respondent on this issue. There is

nothing in English common law which requires members of a limited company to come to decisions which are unanimous before acting on those decisions. Certain decisions relating to the structure of a company do require a certain percentage of members to vote in favour but this does not apply to the sort of decisions being made in this case.

39. The Tribunal was not shown the Memorandum and Articles of Association of the Respondent but there is nothing in the standard documents relating to a company such as the Respondent which says that decisions by members have to be unanimous.

40. Thus, the fact that the Applicant disagrees with the other members of the Respondent company does not, of itself, negate any decision it takes to require a sinking fund.

41. It should also be said that it is clearly good management practice to have a sinking fund, particularly with a Grade I listed building close to the sea front, because it is likely that there will be considerable expenditure from time to time. It is for the benefit of lessees that this expenditure should be programmed over a number of years rather than be the subject of perhaps unexpected applications, year by year, for what may be very substantial payments towards major works.

42. The landlord is, in effect, the lessees as a corporate body and there are therefore no other corporate 'reserves' which the Respondent can call upon to pay for major works unless money is borrowed. This may be difficult for this sort of corporate body.

43. In the case of **Moreshead Mansions Ltd v Di Marco** [2008] EWCA Civ 1371, a management company of 104 flats in a block had all the lessees as members. This company passed resolutions to establish what it described as a 'recovery fund', which was, in effect, a sinking fund. This involved demanding instalments of £2,000 each from members. Mr. Di Marco refused to pay but the Court of Appeal said that he had to pay. Mummery LJ said that "*...there is a crucial difference between liability qua tenant and liability qua member of a company*".

44. As far as the financial matters are concerned, the Tribunal noted that the only work likely to be undertaken in the current financial year is the repair and refurbishment of the common parts. It considered that the estimate of £7-9,000 was certainly not excessive. It also understood and accepted that the Applicant was not seeking the refund of any part of the sinking fund. This is an entirely reasonable and responsible attitude to take. Thus the decision of the Tribunal will, in effect, ignore the existing sinking fund and leave this to discharge the liabilities anticipated for the common parts and the front elevation.

45. On the main issue the Tribunal accepts that the lease is ambiguous. However, the provisions of the 6th Schedule are clear and the preamble to the 7th Schedule,

in effect, acknowledges that they apply. These terms are that on the 1st April and 1st September in each year, the landlord can ask for an amount on account of the anticipated expenditure in the current year only. Any excess can be taken over to the next year but the estimate has to be in the basis of expenditure in the current year.

46. For example, the demand for monies on account sent on the 1st April 2009 cannot include the anticipated expenditure for the work to the front elevation because this is not due until the year commencing 1st April 2010. Thus the landlord is not entitled to collect monies for that work now i.e. a sinking fund.

47. The wording of the 7th Schedule upon which the landlord seeks to rely, is simply a general provision that the landlord can do what it likes. It is just this sort of general over-arching provision in favour of the landlord which the *contra preferentem* rule was designed to prevent. This Tribunal considers that this rule applies in this situation and therefore the 6th Schedule prevails and the lease does not make provision for a sinking fund to be collected.

48. The service charge demand in question is at page 19 in the bundle. The Tribunal has therefore removed the claim for 2 contributions of £231.30 to the sinking fund but has allowed the remainder in view of the Applicant's statement that he does not want a refund. Thus £1,821.00 is reasonable and payable.

49. Given the clear wording of the lease and the fact that the Applicant did draw this problem to the attention of the Respondent, through its agent, the Tribunal does not consider that the administration fee should have been incurred and it is therefore unreasonable.

50. On the question of costs and fees, the position is not straightforward because the Applicant is a member of the Respondent company and will therefore have to pay some of the costs in any event. As the Respondent company is not a commercial property owning company with assets of its own, and this issue is something which should really have been sorted out without the intervention of this Tribunal, the only fair way of resolving matters is to share the cost between all company members. Thus the cost of the landlord's representation can be recovered from all lessees as part of a future service charge and the Respondent company should repay the Tribunal fees to the Applicant. He will then pay his share of those fees through a future service charge.

The Future

51. This decision will no doubt disappoint the other lessees. However, it is very important indeed to have leases which are clear and unambiguous. It is also important that there is no need for devices such as that used in the **Moreshead Mansions** case referred to above. Otherwise, it is possible that a potential purchaser of a leasehold interest will not proceed because his or her solicitor will advise that the service charge provisions are likely to give rise to disputes in the

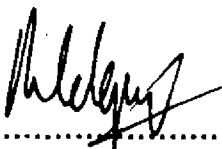
future. This often happens and the vendor may never know the true reason for the withdrawal of a purchaser. This can have a material detrimental affect on the value of a property, particularly if it becomes generally known amongst local selling agents that there is a 'problem' with the service charge arrangements to a particular block of flats.

52. The problem started with the way the original lease was drawn. However, it was subsequently compounded by the Deed of Variation. This deed is curious in several ways. It is certainly normal with a recently enfranchised property to change the leases. In the experience of the Tribunal, the changes would be to extend the leases to terms of 999 years and to effectively eliminate ground rent by reducing it to a peppercorn. The leases would then be amended so that they are in modern form e.g. by enabling the creation of a sinking fund.

53. The problem was compounded again by advice apparently given to Jacksons at page 141 in the bundle to the effect that the clause in the 7th Schedule was drawn widely enough to allow the creation of a sinking fund. This may simply have been a matter of the solicitor not being given the whole problem. On its own, and looked at in isolation, Schedule 7 is wide enough for the provision of a sinking fund. However, for reasons which have been given above, it simply cannot be looked at in isolation.

54. The view of the Tribunal is that this problem will not go away and the only way to resolve the issue is to have further deeds of variation which should vary the 6th Schedule to make it clear that a sinking fund is permissible. This may also be used to give the lessees the further benefits referred to above of an extended term and a reduced liability for ground rent. This would go some way towards paying for the Deeds and it would also avoid the administrative cost of having to distribute the ground rents to the company members in due course. If possible, perhaps the solicitors involved in the creation of the previous Deed of Variation could be asked why these matters were not dealt with at the time.

55. On the other hand, it would be possible for an application to be made to this Tribunal to vary the leases but this is bound to create expense and possible antagonism between company members. It is also likely to be more expensive because of fees and the fact that if the Tribunal did order variations, such variations could not extend the leases or change the ground rent, and they would have to be prepared for all the leases and then be registered.



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Bruce Edgington
Chair

12th August 2009