5359

RESIDENTIAL PROPERTY TRIBUNAL SERVICE
LEASEHOLD VALUATION TRIBUNAL

Property	:	**45 Lancaster Gardens, Southend-on-Sea, Essex SS1 2NS**
Applicants	:	**(1) David Stuart Brown** **(2) Caroline Jane Dover**
Respondent	:	**Westleigh Properties Ltd.**
Case number	:	**CAM/00KF/OCE/2010/0009**
Date of Application	:	**18th June 2010**
Type of Applications	:	**To determine the terms of acquisition and costs of the enfranchisement of the property** **To determine reasonability and payability of service charges and administration charges**
Tribunal	:	**Bruce Edgington (lawyer chair)** **Richard Marshall FRICS FAAV** **Bryan Collins BSc FRICS**
Date and place of hearing	:	**5th October 2010 at Southend Central Library, Victoria Avenue, Southend-on-Sea, Essex SS2 6EX**
Appearances	:	**Lorraine Lancaster, solicitor (Paul Robinson & Co.) for the applicants** **Ben Meagher on behalf of the managing agents Gateway Property Management Ltd. ("Gateway")**

DECISION

UPON it being confirmed that agreement had been reached on the form of Transfer, the purchase price and the costs relating to the enfranchisement **AND UPON** it being agreed that the costs, fees and interest claimed by the Respondent in Southend County Court action no. 0SS00114 shall be paid by

the Applicant David Stuart Brown in the sum of £885.29 inclusive, such sum being included in the amount set out below as being payable by Mr. Brown **AND UPON** it being agreed that the amounts set out below as being payable by the Applicants include any ground rent due

IT IS DETERMINED THAT

1. The amount payable by the 1st Applicant David Stuart Brown for ground rent, service charges, court fees, costs, interest and administration charges is £2,088.69.

2. The amount payable by the 2nd Applicant Caroline Jane Dover for ground rent, service charges and administration charges is £3,480.69.

3. The proceedings in the Southend County Court under claim no. 0SS00114 are hereby transferred back to the Southend County Court. It is this Tribunal's view that save for enforcing the terms of this decision, there should be no further liability from or to either party in those proceedings or any other proceedings relating to the recovery of service charges in connection with the property between the parties or any of them. In other words, all outstanding court cases should either be dismissed with no order as to costs or Notices of Discontinuance should be filed with no liability on the Respondent to pay any costs arising therefrom.

Reasons

Introduction

4. This case initially related to the collective enfranchisement of the property and in that connection the Applicants' solicitor informed the Tribunal that the form of Transfer, the purchase price and the costs had all been agreed and the Tribunal was not being asked to make any decision.

5. As far as the service charge and administration charges are concerned, statements from the Applicants were filed saying, in effect, that they are confused by all the paperwork provided particularly by the former managing agents, BLR Property Management ("BLR"). They point to court proceedings having been issued against them for the recovery of service charges but argue that the figures claimed are either confusing, excessive or double charged . The only statement from the Respondent is from Ben Day-Marr MIRPM from the current managing agents (Gateway) who simply produces 129 pages of statements of account, computer print outs and copy invoices without any clear coherent description or explanation.

6. In its directions order, the Tribunal requested that the current service charge dispute proceeding in the county court be transferred to this Tribunal for determination. The Tribunal was shown an Order made by Judge Dudley on the 23rd August 2010 transferring case no.

0SS00114 to this Tribunal. However it appears that the earlier proceedings against Mr. Brown which had not been concluded have not been so transferred.

7. In the few days prior to the hearing, Ms. Lancaster had spoken to BLR and had agreed some items with them. They had said that they would attend the hearing and hopefully some fruitful discussions could take place to agree outstanding issues. Unfortunately, no representative from BLR attended either the inspection or the hearing.

The Inspection

8. The members of the Tribunal inspected the property in the presence of the Applicants and Mr. Meagher. Ms. Lancaster was present in the ground floor flat.

9. The property is a 2 storey, end of terrace house constructed in the early 20th century of brick construction under a concrete tile pitched roof. It was converted into 2 flats in the 1980's each with 2 bedrooms. Each flat has use of a share of the rear garden.

10. It is within easy walking distance of Southend town centre, 2 commuter stations into London Fenchurch Street and London Liverpool Street respectively and Southend's main bus terminus. The sea front is also within a half mile walk.

11. The main disadvantages with the location are that it backs onto a main railway line, there is no off street parking and the on street parking is bad. There is a driveway alongside the property which appears to be used for parking by the residents although it is not included on the lease plans. As the office copy Land Registry entries in the bundle did not include the filed plan, it was impossible for the Tribunal to see whether this drive was included within the freehold title. Mr. Brown seemed to think it was owned by the railway company.

The Leases

12. The bundle provided to the Tribunal appears to have copies of the 2 leases although the counterpart lease to the ground floor does not have a commencement date. Fortunately there was also a copy of the original lease – or at least every other page thereof – and the Land Registry entries which provide the information. It is concerning that the parties' (and more importantly, their predecessors') solicitors have allowed an original lease and a counterpart to be different.

13. The ground floor lease is dated 12th August 1988 and is for 99 years from that date. The first floor lease is dated 19th October 1987 and is for 99 years from that date. At first glance the 2 leases appear to be different in that they have different type faces, they are for different terms and some of the wording is different. However, on closer inspection, the relevant terms are the same in so far as service charges are concerned.

14. There are the usual terms for the landlord to insure and keep the structure etc. in repair with covenants on the part of the lessees to pay one half of the cost of those items each. The landlord has the ability to collect charges in advance.

15. As far as costs, fees and charges are concerned, the landlord can recover all costs, charges and expenses, including solicitors' fees, for the purpose of or incidental to the preparation of a notice under Section 146 of the **Law of Property Act 1925** which is a procedure intended to enable a landlord to commence forfeiture. In view of relatively recent changes to the law, particularly Section 168 of the **Commonhold and Leasehold Reform Act 2002**, this procedure, on its own, is now largely redundant.

16. In addition, the 3rd Schedule to the leases allows the landlord to recover "*all other expenses (if any) reasonably incurred by the Landlord in and about the maintenance and proper and convenient management and running of the building*" together with managing agent's fees.

The Law

17. 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'.

18. 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.

19. Section 27A of the 1985 Act gives this Tribunal the jurisdiction to decide whether service charges are payable.

20. Paragraph 1 of Schedule 11 of the Act ("the Schedule") defines an administration charge as being:-

> *"an amount payable by a tenant of a dwelling as part of or in addition to the rent which is payable...for or in connection with the grant of approvals under his lease, or applications for such approvals...or in connection with a breach (or alleged breach) of a covenant or condition in his lease."*

21. Paragraph 2 of the Schedule, which applies to amounts payable after 30th September 2003, then says:-

> *"a variable administration charge is payable only to the extent that the amount of the charge is reasonable"*

22. Finally, paragraph 5 of the Schedule provides that an application may be made to this Tribunal for a determination as to whether an

administration charge is payable which includes, by definition, a determination as to whether it is reasonable.

The *Contra Preferentem* Rule

23. It could certainly be argued that the terms of the leases are ambiguous in their provisions for the payment of fees and interest as part of service charges and administration fees. Do they enable the landlord to claim fees for non payment of service charges? Do they enable the landlord to claim interest on unpaid service charges outside court proceedings?

24. 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*)".

25. 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'.

26. 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".

The Hearing

27. The hearing was attended by the Applicants, Ms. Lancaster, Mr. Meagher and one of his colleagues who was observing. Mr. Meagher said at the outset that he was only representing Gateway and the Respondent since his company had taken over the management in 2009. He had understood from BLR that they would be attending the hearing to put their own case.

28. Ms. Lancaster said she had also been told that BLR were attending. She had produced to the Tribunal a schedule of agreed and disputed items. BLR were not there to confirm this but the Tribunal accepted from Ms. Lancaster that she had had these discussions and that the schedule was an accurate reflection of her discussions.

29. The schedule assumed the starting balance to be the figures in the service charge account produced by Gateway i.e. £11,000.21 due from Mr. Brown and £10,785.94 from Ms. Dover. Although these amount look to be substantial, the sinking fund of something over £12,500.00 was only a figure held in the accounts as a sinking fund. No contributions had actually been paid towards it which is why the starting balance is so much in debit.

30. There was then a list of agreed figures for the external decoration works, sinking fund contribution, service charges and some agreed charges in connection with the consultation procedure prior to the decoration works. These reduced the amounts owing to £4,327.02 and £4,112.75 respectively. The Tribunal has used the same figures as set out by Ms. Lancaster but in Mr. Brown's case, the mathematics is not quite correct on her schedule.

31. There was then the amount of costs, interest and court fees owed by Mr. Brown in respect of action no. 0SS00114 which Gateway and Mr. Brown agreed at £885.29 during a brief adjournment of the hearing. This reduced Mr. Brown's indebtedness to £3,441.73.

32. There were then 4 disputed items which the Applicants alleged should be deducted from the figures owed namely:-

    (a) Arrears late payment charges claimed by BLR in the sum of £388.00 from Mr. Brown and £263.80 from Ms. Dover.
    (b) Balancing charges claimed by BLR which remained in the service charge accounts after a judgment in Mr. Brown's case and an agreement in Ms. Dover's case. These were debit items in the service charge accounts which should have been removed after the judgment and agreement respectively. The Tribunal agreed with this analysis.
    (c) Disputed service charges being the management fees of BLR which were said to be excessive.
    (d) The court fee, interest and costs of the proceedings issued against Mr. Brown on the 8th May 2008 in the sum, of £240.91 which included claims repeated in the subsequent proceedings in action no. 0SS00114. This sum had been debited to the service charge account. As there had been 2 sets of proceedings dealing largely with the same amounts, the Tribunal agreed that this figure should be credited back.

Conclusions

33. As the Tribunal's conclusion in item's (b) and (d) above have been given, it now considers the other 2 items.

34. As far as the arrears late payment charges are concerned, it is clear to the Tribunal that the *contra preferentem* rule applies so that any ambiguity in the wording of the leases should be construed in the lessee's favour. Thus any right to claim what amount to administration charges etc. must be clear and unambiguous. In this case, the leases provide for the landlord to claim expenses *'in and about the maintenance and proper and convenient management and running of the building'* but not further. The leases do not expressly permit the landlord to claim late payment fees or interest on late payments.

35. If specific bank interest charges had been incurred because the service charge bank account had become overdrawn because of late payment,

this would probably be an 'expense' incurred in the management of the building subject, of course, to specific proof. However, this is very different to a blanket ability to claim general interest and/or fees on unpaid monies. The Tribunal determines that these are not payable.

36. From the plethora of documents filed by the Respondent, the Tribunal concludes that the claims against each Applicant for management fees by BLR after the relevant sets of court proceedings are as follows:-

Ms. Dover (from 8th March 2006)

Date	Claim	Amount(£)	Bundle Page no.
28.03.06	management fee	58.75	255 (half)
22.06.06	management fee	58.75	256 (half)
22.06.06	management fee	58.75	257 (half)
19.12.06	management fee	58.75	236 (half)
21.03.07	management fee	58.75	237 (half)
22.05.07	management fee	58.75	238 (half)
30.08.07	management fee	58.75	239 (half)
08.11.07	management fee	73.44	225 (half)
28.03.08	management fee	73.44	224 (half)
28.05.08	management fee	73.44	223 (half)

Ms. Dover and Mr. Brown (from 3rd September 2008)

08.09.08	management fee	146.88	221
22.12.08	management fee	2.50	192
22.12.08	management fee	168.91	197
22.12.08	management fee	.75	200
17.03.09	bank charges (BLR)	2.50	195
17.03.09	bank charges (BLR)	1.69	196
17.03.09	management fee	165.32	198
17.03.09	management fee	112.05	199
17.03.09	postage & stationery (BLR)	.75	201
17.03.09	postage & stationery (BLR)	.51	202

37. The management fees claimed by BLR in 2006 were £235 per unit including VAT. In 2007 they claimed £249.69 and in 2008, £231.34 respectively. The market rate for management fees in the Southend area at the time was in the region of £150-200 per unit for a reasonable service.

38. The Applicants submitted that they would be prepared to pay £200 per annum per unit. The Tribunal agreed that the amounts claims were excessive. As the proposal suggested by the Applicants was at the high end of the scale of charges which this Tribunal would consider to be reasonable, the Tribunal accepted their figures.

39. Thus the conclusion reached by the Tribunal was that the reductions in the service charges payable by the Applicants were in accordance with the figures they put forward which resulted in balances payable by the

Applicants on completion of £2,088.69 of £3,480.69 respectively for Mr. Brown and Ms. Dover in full and final settlement of all outstanding service charges, ground rents, interest and court fees and costs.

40. It is appreciated that this Tribunal has no power to make orders in respect of ground rent, court fees, costs and interest in court proceedings. The Respondent may wish to raise these issues with the court in respect of the period when BLR was the managing agent. Hopefully the court will find the *obiter* comments in this decision a help rather than a hindrance. They are made with the intention of bringing finality to all litigation between the parties. BLR clearly knew of the hearing on the 5th October and had told both the Applicants' solicitors and Gateway that they would be attending but chose not to.

.....

Bruce Edgington
Chair
6th October 2010