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Residential Property
TRIBUNAL SERVICE

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LEASEHOLD VALUATION TRIBUNAL

LONDON RENT ASSESSMENT PANEL

DECISION ON AN APPLICATION UNDER SECTION 27A OF THE LANDLORD AND TENANT ACT 1985 (AS AMENDED)

Property:	Apartments 5 and 38 Seacon Tower, Seacon Wharf, Westferry Road, London E14 8JR
Applicant:	Seacon Residents Company Limited
Respondent:	Mr I Oshodin
Hearing Date:	20th September 2010
Appearances:	Mr J Summers of Falcon Chambers, Counsel for the Applicant Mr I Oshodin (the Respondent)
Also present:	Mr T Mitchell of Fairweather Stephenson, Solicitors for the Applicant Mr S Gayer of Hallmark Property Management, Property Manager Mr S Nock, Consultant to Hallmark Property Management Mr P Maton, former Property Manager at Hallmark Property Management Mr A Brighton, Chair of Applicant company Miss I Haman, assisting the Respondent (non-speaking role)

Members of Tribunal

Mr P Korn (chairman)
Miss M Krisko BSc(EstMan), BA, FRICS
Mrs L Hart

INTRODUCTION

1. This is an application under Section 27A of the Landlord and Tenant Act 1985 (as amended) ("**the 1985 Act**") for a determination of liability to pay service charges under the lease of the Property.

2. The Respondent is the current leaseholder and the Applicant is the management company under the leases ("**the Leases**") of Apartments 5 and 38 respectively (together "**the Property**"). Each of the Leases is for a term of 999 years from 1st January 2002 and it is common ground between the parties that for all purposes relevant to this application the Leases are in identical form. The Leases contain covenants on the part of the leaseholder to pay service charges direct to the management company.

3. Proceedings were originally issued in the Bow County Court (Claim Number 9B004137) by the Applicant on 12th October 2009 for arrears of service charge, interest and costs, the service charge element amounting to £5,872.78 in respect of Apartment 5 and £4,858.51 in respect of Apartment 38. The proceedings were then transferred to the Leasehold Valuation Tribunal for a determination of liability to pay and reasonableness of the outstanding service charge.

4. Seacon Tower is a block of 99 flats on 24 floors. On the same estate is another block known as the Naxos Building (comprising 102 flats). The Applicant management company is owned and controlled by the residents, having become independent from the landlord during the 2007/2008 service charge year. The claim relates to the service charge years 2008/2009 and 2009/2010.

5. An oral pre-trial review was held on 22nd June 2010, but the Respondent was not present.

APPLICANT'S CASE

6. Mr Summers for the Applicant said that part of the unpaid service charges reflected the cost to the Applicant of remedying water damage caused by various incidents where the cost was not recoverable from the insurers due to it falling within the insurance policy excess. The Applicant calculated the

amount attributable to water damage as £1,873.86 for Apartment 5 and £1,044.32 for Apartment 38.

7. In the course of the hearing it was explained that there had been a mistake in relation to a flat charge of £900 which was levied in 2008 on all apartments. The charge should have been levied on a proportionate basis, and apparently the mistake caused by the Applicant being under pressure to get the relevant payment out. The mistake was rectified by an appropriate credit being given at a later stage.

8. Mr Summers considered that most of the charges were not being disputed by the Respondent and that the Respondent's defence to the claim could be summarised as follows:-

    - The water damage costs should have been covered by insurance
    - In the alternative, the majority of the water damage was the fault of individual flat owners and therefore other leaseholders should not have to share the cost
    - To the extent that the water damage resulted from defective design, this issue should be taken up direct with NHBC and/or the developer
    - The legal charges levied by the Applicant were unfair and unreasonable.

9. Mr Summers referred the Tribunal to the Leases. Under clause 8 the management company covenants (amongst other things) to repair and insure the building and under sub-clauses 15.2 and 15.3 the tenant covenants to pay the service charge to the management company (as well as the cost of chasing service charge arrears). The services are set out in the Fourth Schedule and paragraph 1 of Part 1 of the Fourth Schedule and paragraph 3 of Part 2 of the Fourth Schedule contains obligations to "pay all ... insurance premiums and outgoings ..." in respect of the Apartments and the Estate respectively.

10. Mr Summers explained that Seacon Tower (and the neighbouring Naxos Building) had a very poor claim history as regards water damage, there having been a huge number of water damage incidents. The claims history of the Naxos Building was relevant because the two buildings were insured under the same insurance policy; it was one policy with two schedules – one for each building. As a result of the poor claims record there had been substantial excesses applied to water damage claims on the insurance policies. However, he argued that since the Applicant took over insurance policy renewals in 2009/2010 there has been a significant downward trend in excess levels, the implication being that this has been as a result of the Applicant having taken active steps to reduce the number of water damage claims since March 2008. Mr Summers pointed to copy correspondence showing the steps taken by the

Applicant to persuade leaseholders to look after their flats more carefully and setting out specific steps that needed to be taken.

11. It was conceded that SMS's report in October 2007 referred to there being some evidence of cheap build to the waste services, but the design of the building was described as 'unfortunate' rather than defective.

12. As regards the argument that the cost of repairs necessitated by water damage should have been covered by insurance, Mr Summers argued that the cost **was** covered by insurance but that there was simply an excess on the policy and that it is perfectly normal for a policy to have an excess. As to its recoverability, Mr Summers submitted that the excess could be characterised as an "outgoing" relating to insurance and also that it is implicit that an insurance policy can include a provision for excess, this being standard practice under modern insurance policies, and that this excess is recoverable as a service charge.

13. Mr Summers also made reference to the RICS Code, which states that the excess should be considered part of the cost of insurance, and he quoted from the textbook *Service Charges and Management: Law and Practice* and its cross-reference to the LVT decisions in *Sutcliffe v Bradford & Northern (LVT/SC/T/005)* and *AEL Properties v Wallis (L23/99/H)* as follows: *"where a landlord is obliged to make a claim and seeks to recover the excess from the tenants as part of a service charge, he will generally be entitled to do so (as long as it is not excessive) ... the rationale is that the greater the excess, the lower the premium, and the tenant cannot take the benefit of that while at the same time rejecting the burden"*.

14. Mr Summers conceded that the excess was high but denied that it was unreasonable. The previous poor claims history made the level of excess inevitable. As to whether insurance could have been obtained on more favourable terms, Mr Summers submitted that it could not and that the Applicant had tested the market but he did not have any documentary evidence to back up this submission.

15. As regards the possibility of taking action against individual leaseholders responsible for damage, the Applicant's argument was that under the individual leases the tenant's repairing obligations and liability for water damage is excluded where damage is covered by insurance.

16. As regards making a claim against the developer, the Applicant did not consider that there would be any merit in such a claim but there was the additional problem that the Applicant did not itself have a cause of action against the developer (presumably on the basis that it had not suffered any loss). It also did not consider it a good use of service charge funds to embark on speculative litigation.

17. As regards making a claim against NHBC, the benefit of the NHBC was vested in the individual leaseholders, not in the Applicant. In addition, the Applicant's understanding was that after the first two years the NHBC cover was only for major defects.

18. As to the role of the landlord, Mr Summers said that his instructions were that a rebate of 40% was given by the insurers to the landlord in 2007/2008 and that a further discount was subsequently given to the landlord; the Applicant was concerned about this (in common with the Respondent) and was investigating but in Mr Summers' submission the rebate/discount was only relevant to the level of insurance premium (which was not being challenged) and was not relevant to the level of excess which was due to the number of claims.

19. In relation to the legal costs, Mr Summers submitted that the Applicant had a right to charge these under sub-clause 15.2.2 of each Lease and that the amount claimed was reasonable. He considered that it was best characterised as an indemnity rather than an 'administration charge' or a 'service charge' but that if he was wrong on this point the costs had in any event been reasonably incurred. In response to a point raised by the Respondent, Mr Mitchell said that the costs related to liaising with the client, sending a letter before action, drafting particulars of claim and calculating interest. Mr Mitchell's own hourly rate was £195 + VAT but he conceded that the work could be done by a slightly more junior lawyer at (say) £160 + VAT per hour.

20. Regarding the interest charges included in the claim, Mr Summers confirmed that the Applicant considered that it had a right to charge interest on late payment of service charges.

21. The building service charge proportion for Apartment 5 was 0.80% and for Apartment 38 was 0.78%.

RESPONDENT'S RESPONSE

22. The Respondent said that he was not generally a late payer and was up to date with his service charge until December 2008 when the issues with the water damage started to come up. He then raised his concerns about leaseholders having to pay for damage which they had not caused, although he did this by telephone (twice) and not in writing.

23. The Respondent described the sums paid or reimbursed to the landlord by the insurers as "backhanders" and did not accept that they had no effect on the level of excess. He was concerned that no attempt had been made to pursue the developer or NHBC or those leaseholders who were actually at fault in respect of the water damage. There was no evidence that the Applicant had

done much to reduce the excess nor that it had tried to obtain alternative quotations.

24. In relation to the claims history, the Respondent expressed scepticism as to how a washing machine leak, for example, could cause so much damage.

25. As to the legal costs, they seemed excessive and the Respondent had not been given a proper explanation as to what they related to.

INSPECTION

26. The Tribunal members did not inspect the Property. Neither of the parties had requested an inspection, and the Tribunal's view was that an inspection was not necessary in order for it to make a determination in the circumstances of the particular issues in dispute.

THE LAW

1985 Act

27. Section 19(1) of the 1985 Act provides:

"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 shall be limited accordingly."

28. Section 19(2) of the 1985 Act provides:

"Where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable, and after the relevant costs have been incurred any necessary adjustment shall be made by repayment, reduction or subsequent charges or otherwise."

29. "Relevant costs" are defined in Section 18(2) of the 1985 Act as *"the costs or estimated costs incurred or to be incurred by or on behalf of the landlord... in connection with the matters for which the service charge is payable".*

"Service charge" is defined in Section 18(1) of the 1985 Act as *"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 cost of management, and (b) the whole or part of which varies or may vary according to the relevant costs".*

30. Section 27A of the 1985 Act gives a leasehold valuation tribunal jurisdiction to determine (on an application made to it) *"whether a service charge is payable and, if it is, as to...the amount which is payable..."*.

CLARA

31. Sub-paragraph 1(1) of Part 1 ("**Part 1**") of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 ("**CLARA**") defines an "administration charge" as including *"an amount payable by a tenant of a dwelling as part of or in addition to the rent which is payable directly or indirectly ... in respect of a failure by the tenant to make a payment by the due date to the landlord or a person who is party to his lease otherwise than as landlord or tenant, or ... in connection with a breach (or alleged breach) of a covenant or condition in his lease"*.

32. Sub-paragraph 1(3) of Part 1 defines a "variable administration charge" as *"an administration charge payable by a tenant which is neither (a) specified in his lease, nor (b) calculated in accordance with a formula specified in his lease"*.

33. Paragraph 2 of Part 1 provides that "a variable administration charge is payable only to the extent that the amount of the charge is reasonable" and paragraph 5(1) of Part 1 provides (inter alia) that *"an application may be made to a leasehold valuation tribunal for a determination whether an administration charge is payable and, if it is, as to ... the amount which is payable"*.

APPLICATION OF LAW TO FACTS

34. The Tribunal notes the various submissions made at the hearing and the written statements of case and supporting information contained in the hearing bundles.

Water damage

35. The Tribunal accepts that under the Leases the Applicant is obliged to insure the building and keep it in good condition and that the Respondent is obliged to pay its proportionate share of the cost of insurance and its proportionate share of the cost of repair through the service charge. What is the position, though, in relation to any insurance excess? It is not uncommon for a lease specifically to provide that the tenant has to pay its share of any excess, but in this case the Leases are silent on this point. Mr Summers argues that the point is covered by the tenant's obligation to pay 'outgoings', although in the Tribunal's view it is not clear that this is the case and it is an established

principle that in the case of ambiguity service charge payment clauses are construed against the landlord (or in the case the management company).

36. However, if one looks at the tenant's obligation to pay the insurance premiums, the obligation is to pay the relevant proportion of the cost to the management company of complying with its obligation to insure the building from loss or damage by the Insured Risks. "Insured Risks" is defined quite widely, to include *"loss or damage by ... flood Acts of God bursting or overflowing of water tanks apparatus or pipes ... and such other risks of insurance as may from time to time be required ..."*. In the Tribunal's view, this definition does not seek to distinguish between those risks that are fully insured in the sense that they are not subject to any excess and those risks that are subject to an excess (and which therefore, according to this logic, are not 'insured' in the narrow sense of the word to the extent that the excess applies). Whilst the excess in this case is, as the Applicant readily admits, very high and whilst the present situation could arguably be distinguished from the more normal situation that the RICS Code and the textbook quoted by Mr Summers (see paragraph 12 above) perhaps have in mind, nevertheless on balance the Tribunal is of the view that in this case the obligation on the part of the tenant under the Leases to contribute towards the excess falls within the obligation to contribute towards the cost of insurance against the Insured Risks. In the alternative, it is covered by the obligation to contribute towards the cost of repair (i.e. repair of damage caused by an uninsured risk: see paragraphs 1, 2 and 4 of Part 2 of the Fourth Schedule and other relevant provisions.

37. Having heard and seen the relevant evidence the Tribunal agrees on the balance of probabilities that it was not a realistic option for the Applicant to take legal action against the developer or against NHBC as a means of trying to recoup some or all of the cost of making good water damage. The Respondent has offered no real evidence to demonstrate that the Applicant would have had a cause of action against the developer. As regards the NHBC cover, whilst it seems to the Tribunal that it is unsatisfactory for the management company not to be able to rely on the NHBC cover itself in respect of the common parts, from the evidence presented it seems on the balance of probabilities that it indeed cannot itself take any action against NHBC, even assuming that it could demonstrate that the fault was primarily a design and/or construction defect rather than primarily the fault of individual leaseholders.

38. Should the Applicant have pursued individual leaseholders direct in respect of the various incidents of water damage rather than simply adding them all to the service charge? To try to answer this question, one needs to look at the evidence of the individual incidents. The evidence is unfortunately not very detailed and therefore the Tribunal is forced to do the best it can with the available evidence. Looking at Annexure 1 to the Applicant's reply to the Respondent's statement of case, the various incidents of water damage are

separately listed. The two items from 2007 and the two from 2010 are not relevant as the service charge years in respect the claim has been made are 2008 and 2009. Taking the others in turn (using the 'Date of Loss' or, where no date, a brief description), the Tribunal would comment as follows:-

(i) 08/06/2008 – on balance it seems to the Tribunal that this may not have been obvious to the relevant leaseholder.

(ii) 12/06/2008 – no loss.

(iii) 30/09/2008 – the leaseholder would seem to have been clearly at fault. *Total cost: £21,871.44.*

(iv) 02/09/2008 – this appears to have been caused by defective construction/design and therefore not primarily the fault of the leaseholder.

(v) 12/11/2008 – no loss.

(vi) 08/12/2008 – on balance it seems to the Tribunal that this may not have been obvious to the relevant leaseholder.

(vii) 07/01/2009 – on balance it seems to the Tribunal that this may not have been obvious to the relevant leaseholder.

(viii) 29/01/2009 – the leaseholder would seem to have been clearly at fault in respect of the washing machine element. *Total cost: £25,616.92.*

(ix) (Undated) Leaking soil stack – on balance it seems to the Tribunal that this may not have been obvious to the relevant leaseholder.

(x) (Undated) Boiler Leak in Flat 50 – on balance it seems to the Tribunal that this may not have been obvious to the relevant leaseholder.

(xi) (Undated) Disconnected wash hand basin – the leaseholder would seem to have been clearly at fault. *Total cost: £32,296.84.*

(xii) (Undated) Leak from sink valve waste – the leaseholder would seem to have been clearly at fault. *Total cost: £31,544.40.*

(xiii) (Undated) Leak from bath in Flat 34 – on balance it seems to the Tribunal that this may not have been obvious to the relevant leaseholder.

39. In the Tribunal's view, therefore, on the balance of probabilities, the relevant individual leaseholders were at fault and should be held responsible for items (iii) *(£21,871.44)*, (viii) (the washing machine element only), (xi) *(£32,296.84)* and (xii) *(£31,544.40)*. Using an admittedly broad-brush approach, the Tribunal attributes one-third of the total cost of damage specified in (viii) above to the washing machine element, i.e. *£8,538.97*. The aggregate of these sums is *£94,251.65*. As each item fell within the insurance excess, the whole sum has been charged to leaseholders through the service charge. The share attributable to Apartment 5 is 0.8%, i.e. *£754.01*, and the share attributable to Apartment 38 is 0.78%, i.e. *£735.16*.

40. The Leases (and, it was agreed between the parties, the leases of other apartments within the building) contain a tenant's covenants not to do, permit or suffer any nuisance, annoyance, damage or inconvenience to be caused to the landlord or other occupiers (paragraph 1 of First Schedule) and a covenant not to do or suffer anything to be done which may prejudice, weaken or endanger the relevant apartment or the main structures (paragraph 6 of First Schedule). There is also a tenant's covenant to pay all expenses incurred by the landlord or management company in or about any renewal of any insurance policy rendered necessary by a breach of the covenant not to do, permit or suffer to be done anything which might increase the insurance premiums (paragraph 2 of First Schedule). Clause 9.5 of the Leases contains a landlord's covenant to enforce the leaseholders' covenants under their respective leases.

41. There is no evidence that the Applicant or the landlord made any attempt to claim sums back from individual leaseholders nor even investigated the possibility of doing so. Nor is there any indication that the Applicant – if it believed that the power to do so rested only with the landlord – made any attempt to persuade the landlord to demand payment from individual leaseholders. Either on the basis of the express wording of the Leases and/or on the basis of the general duty to mitigate one's loss when making a contractual claim, the Tribunal considers that the Applicant has failed to discharge its responsibilities in this regard by not making any attempt to pursue individual leaseholders where they have seemingly been at fault. Applying the principle in *Continental Property Ventures v White (LRX/60/2005)*, whilst it could be argued that the costs themselves were reasonably incurred, in the Tribunal's view the Respondent is entitled to a set-off in view of the Applicant's and/or landlord's failure to try to recover the relevant amounts from individual leaseholders.

Legal fees

42. In the Tribunal's view the legal fees constitute a 'variable administration charge' under CLARA (see sub-paragraphs 1(1) and 1(3) of CLARA), and

therefore under Paragraph 2 of Part 1 of CLARA they are only payable to the extent that they are reasonable.

43. The legal fees in this case in aggregate amount to £1,673.50. It is accepted that the solicitor concerned would have needed to liaise with the Applicant, send a letter before action and draft the particulars of claim in respect of each apartment. However, the claim is virtually identical for each apartment and therefore it will have taken little more time to deal with two than to deal with one. It is hard to see that the work would have needed to take more than 4 hours in total, which even at the higher rate of £195 + VAT mentioned during the hearing would only amount to just over £900 in aggregate. Therefore the Tribunal considers that the legal fees should be reduced to £450 for each apartment (£900 in total).

Interest charges

44. The interest charge is calculated in accordance with a formula specified in the Leases, albeit that this could have been made clearer in the County Court particulars of claim. As the calculation needs to be in accordance with a formula specified in the Leases, the interest charge is not a 'variable' administration charge as defined in sub-paragraph 1(3) of Part 1 of CLARA the Tribunal does not have jurisdiction to determine whether the amount is reasonable. However, paragraph 5(1) of Part 1 of CLARA nevertheless gives the Tribunal jurisdiction to determine **whether** it is payable and the **amount** that is payable. The relevant provision is clause 15.1.2 of the Leases under which the tenant covenants to pay on demand "Interest (as defined in the definitions section) on all rent which is in arrears ...". It is noteworthy that interest is only payable on 'rent' and that the services charges are not reserved as rent in the Leases. In the Tribunal's view, therefore, the Leases do not contain a mechanism for charging interest on unpaid service charges and therefore the specific interest charges included within the two claims (as opposed to any statutory interest, which is for the County Court to determine) are not payable.

DETERMINATION

45. The arrears of service charge for Apartment 5 of £5,872.78 (as at the date of the County Court claim) are reduced by £754.01 by way of set-off in respect of water damage.

46. The arrears of service charge for Apartment 38 of £4,858.51 (as at the date of the County Court claim) are reduced by £735.16 by way of set-off in respect of water damage.

47. The legal costs specified in the County Court claim for Apartment 5 are reduced from £836.75 to £450.00.

48. The legal costs specified in the County Court claim for Apartment 38 are also reduced from £836.75 to £450.00.

49. The interest charges of £222.73 specified in the County Court claim for Apartment 5 are not payable.

50. The interest charges of £173.36 specified in the County Court claim for Apartment 38 are not payable.

51. The Respondent has applied for an order under Section 20C of the 1985 Act that none of the costs incurred by the Applicant in connection with these proceedings should be recoverable as service charge. The Tribunal has partially found in the Respondent's favour, but the Applicant has succeeded on a substantial part of the claim and the Respondent has not provided a satisfactory explanation as to why the undisputed part of the service charge was not paid. In addition, the Applicant is a residents' company which seems to have been trying to do its best and there is no suggestion that it was trying to profit out of the situation, and therefore taking all the circumstances into consideration the Tribunal **declines to make an order under Section 20C**.

52. However, the service charge provisions do not, in the Tribunal's view, contain a provision entitling the landlord or management company to charge the legal costs incurred by them in connection with court or tribunal proceedings to the leaseholders as a whole through the service charge – Mr Summers referred the Tribunal to sub-clause 15.2.2 of the Leases in the context of the specific legal costs which form part of the original claims, but clearly sub-clause 15.2.2 is not a service charge provision. Therefore, the Tribunal considers that the Applicant's legal costs in connection with these proceedings are not recoverable through the service charge as a matter of construction of the terms of the Leases.

53. No other cost applications were made by either party.

CHAIRMAN..
Mr P Korn

15th October 2010