5532

Residential Property
TRIBUNAL SERVICE

RESIDENTIAL PROPERTY TRIBUNAL SERVICE
LEASEHOLD VALUATION TRIBUNAL for the
LONDON RENT ASSESSMENT PANEL
LANDLORD AND TENANT ACT 1985

LON/00BG/LSC/2010/0558

Premises:	33 Tay Court 4 Meath Crescent London E2 0QG
Applicant:	Mr A Ellingham
Represented by:	Mr R Southam, Chainbow managing agents
Respondent:	Freehold Properties GR Ltd
Represented by:	Stevensons solicitors
Tribunal:	Mr NK Nicol Mr P Tobin FRICS MCIArb Mr P Clabburn
Date of Hearing:	13/12/10
Date of Decision:	13/12/10

REASONS FOR DETERMINATION

1. The Respondent is the freeholder of a development of five blocks containing 258 similar leasehold flats, including the subject property (there are also two blocks of flats managed by a housing association). The Applicant is the lessee of the subject property.

2. The Applicant has been concerned that the management of the blocks on behalf of the Respondent by Countrywide Seven Ltd and then Countrywide Property Management Ltd has been wholly inadequate. This is possibly what motivated the lessees to form their own Right To Manage company which took over management on 21st September 2010. Mr Southam of Chainbow, the RTM company's appointees as managing agents, described the development as one of the worst-managed sites he had ever come across.

3. In consequence, the Applicant made two applications challenging the service charges levied prior to the RTM company taking over. The Respondent's response is that, as far as they are aware, all documents and paperwork in respect of the management of the property were passed by Countrywide Property Management Ltd to Chainbow and that the Applicant should seek all the information they need from Chainbow. By letter dated 8th December 2010 the Respondent's solicitors informed the Tribunal that they would not be attending the hearing on 13th December 2010.

4. In the Tribunal's opinion, the Respondent's behaviour in attempting to wash its hands of the applications is extraordinary. Even if they were correct that Chainbow now held the relevant documents, that does not in any way limit their liabilities or the Tribunal's powers. The fact is that the two Countrywide companies were their agents. Only the Respondent has or had the power to require Countrywide to provide them with the information or documents they needed to address the issues arising in these applications. The phraseology of their representations ("As far as I am aware"; "It is believed") suggests that they have not even attempted to exercise that power.

5. Mr Southam, appearing at the Tribunal hearing on behalf of the Applicant, gave evidence, accepted by the Tribunal, that Chainbow has received nothing from Countrywide and that Stevensons solicitors were verbally informed of this some

weeks ago. In the circumstances, the Tribunal has had no choice but to proceed on the basis of the evidence available to it which includes only one statement and one letter, with no supporting documentation, from the Respondent. The prejudice this would inevitably cause the Respondent concerned the Tribunal and so an adjournment was considered to allow them a further opportunity to participate. However, the Respondent had full notice of the hearing and chose not to attend, informing the Tribunal of that choice just two working days in advance. The Tribunal concluded that it would not be fair to the Applicant nor in the interests of the administration of justice to adjourn simply to allow the Respondent another opportunity to do what they had already decided not to do.

6. The Applicant's case concerned a number of issues which are dealt with in turn below.

Excess of budgeted over actual expenditure

7. Countrywide demanded service charges on the basis of their estimates of future expenditure. It is apparent from the only audited accounts, for the year ended 31st August 2008, that the budgets far exceeded the actual amounts which were ultimately paid. Neither Countrywide nor the Respondent has explained the substantial excess. Further, there being no further audited accounts, they have not demonstrated that the excess has been credited in any later years.

8. The Applicant carried out his own analysis of the differences between budgeted and actual expenditure – a copy is attached as an appendix to this decision. He used non-audited accounts for the year ended 31st August 2009 for the figures for that year and the year following. His calculations, which the Tribunal accept as the best evidence available, show an excess of £53,871 in budgeted amounts over actual expenditure in the year to 31st August 2008 and then £25,724 in each of the following two years. He did not calculate his share of that because the apportionment is somewhat complex with different proportions for four different schedules of costs:-

Schedule 1 0.342%

Schedule 3 0.3287%

Schedule 8 0.273%

Schedule 9 0.316%

9. Managing agents are not required to be exact in their estimates of service charge expenditure but they are required to act reasonably. The excess of budgeted amounts over actual expenditure is so large that it demands an explanation. None has been received. Neither the Applicant nor the Tribunal know how the budgeted figures were determined. In the circumstances, the Tribunal has to go on the best evidence available which is that the budgeted amounts should have been much closer to the actual expenditure. Further, there is no evidence that any lessee has received any credit for the excess in later service charge years. Therefore, the Tribunal has determined that the excess of budgeted amounts over actual expenditure as calculated by the Applicant for the three years from 2007 to 2010 is neither reasonable nor payable.

Qualifying long term agreement

10. After taking over the management of the property, Chainbow found out that a company called Octopus provided CCTV, the fire alarm system, the door entry system, the lift telephone and the communal TV aerial all on a single 20-year agreement. Such an agreement is a qualifying long term agreement within the meaning of s.20ZA(2) of the Landlord and Tenant Act 1985 and is subject to the consultation requirements of s.20 and the Service Charges (Consultation Requirements) (England) Regulations 2003. The Applicant stated, and the Tribunal accepts, that no such consultation was carried out. The Applicant's liability for the service charge items incurred under the agreement is therefore limited by the same statutory provisions to a total of £100 in each accounting period.

Insurance

11. The property is only a few years old. It has suffered from severe problems with the plumbing and heating installations, the main issues being a failure of the cold water supply pipe to the hot water cylinders and leaks in the cistern plumbing systems. As a result, Countrywide had difficulties arranging the buildings insurance and eventually agreed a £200,000 excess in respect of all water related

losses. Premiums varied between £48,000 and £76,617. Countrywide refused to make a claim under the NHBC building guarantee scheme to cover repair works.

12. Since taking over, Chainbow have actively pursued an NHBC claim and have renegotiated the insurance. The excess is now at £20,000 and will come down to a normal level when the insurers are satisfied with the progress of the NHBC claim. The insurance premium is £30,000.

13. The Applicant accuses Countrywide of mismanagement in that they could have got an insurance policy without such a large excess and at a much lower premium through active management, including making an NHBC claim. The Respondent has provided no explanation as to what happened and relies simply on the fact that insurance is now the responsibility of the RTM company. This is typical of the Respondent's behaviour in this case – the fact that they are not responsible for future insurance does not absolve them of responsibility for what happened in the past.

14. The Tribunal is satisfied that a reasonable premium for each of the three years from 2007 to 2010 would have been no more than £30,000 so that service charges demanded in respect of amounts in excess of that are not payable. To the extent that such sums have already been paid, the Applicant is entitled to recover the money from the Respondent.

Repairs

15. The Tribunal would not have expected to see much, if any, expenditure on repairs on such a new building. The Tribunal is satisfied on the evidence available that the costs of repair works which have been passed through the service charges relate to work on the plumbing and heating installations which should have been covered by insurance or the NHBC guarantee. Therefore, it was not reasonable for any of the repair charges to have been included in the Applicant's service charges and they are not payable by him.

Management fee

16. Countrywide charged a management fee for their services which worked out at £163 per year for the Applicant. The Applicant has accused Countrywide of mismanagement and the Tribunal has set out examples above. He acknowledged that Countrywide did some management during their time as agents but also that in some instances their efforts were worse than nothing. He asserted that, on that basis, the only reasonable fee would be nothing.

17. The Tribunal can understand the Applicant's frustration with management that was clearly inadequate. The Tribunal also has no evidence from the Respondent to gainsay the Applicant's assertions. However, it is clear that Countrywide did more than nothing. Mr Southam tentatively suggested their fees should be reduced to 10%. In the circumstances, the Tribunal has decided to accept Mr Southam's submission and to hold that a reasonable charge would be no more than 10% of Countrywide's actual charges, thus limiting the Applicant's liability on this item to £16.30 per year.

Costs – s.20C

18. The Tribunal has the power under s.20C of the Landlord and Tenant Act 1985 to order that the Respondent's costs incurred in these proceedings should not be added to the service charge if it is satisfied that it would be just and equitable to do so. The Respondent has lost on all issues raised by the Applicant, in large part due to their failure to take a proper role in these proceedings. In these circumstances, the Tribunal is satisfied that it is just and equitable to make a s.20C order.

Costs – reimbursement of fees

19. The Applicant paid an application fee and a hearing fee. The Tribunal has the power under reg.9 of the Leasehold Valuation Tribunals (Fees) (England) Regulations 2003 to order the Respondent to reimburse the Applicant those fees. For the reasons already set out in relation to s.20C, the Tribunal is satisfied that it is appropriate to order such reimbursement.

Costs – unreasonable behaviour

20. The Tribunal also has the power to order a party to pay up to £500 of the other party's costs of the proceedings if it is of the opinion that that party has acted frivolously, vexatiously, abusively, disruptively or otherwise unreasonably in connection with the proceedings. The Applicant has incurred around £2,500 for Mr Southam's representation of him, including at the hearing.

21. The Respondent has failed to provide any disclosure or to attend the Tribunal hearing and so has comprehensively failed to provide any information which could shed light on the issues in this case. Their excuse has simply been that the RTM company has taken over, which is no excuse in relation to the past rather than the future. The Tribunal is satisfied that the Respondent has thereby acted frivolously, vexatiously and unreasonably so that it is appropriate to order them to pay costs of £500 to the Applicant in addition to the reimbursement of fees.

Conclusion

22. In summary, the Tribunal has determined:-

    (a) The excess of budgeted amounts over actual expenditure for the service charges in the three years 2007-2010 is not payable.

    (b) The Respondent failed to comply with the statutory consultation requirements for the agreement they had with Octopus for several services at the property and so the Applicant's liability for those services is limited to £100 in each year.

    (c) A reasonable insurance premium in each of the three years 2007-2010 would have been no more than £30,000 so that service charges resulting from amounts above that level are not payable.

    (d) The repair costs incurred in the three years 2007-2010 should have been covered by insurance or the NHBC guarantee and so are not reasonable or payable.

    (e) Countrywide's management fees for the three years 2007-2010 should have been no more than 10% of the amounts actually charged.

(f) The Tribunal has ordered in accordance with s.20C of the Landlord and Tenant Act 1985 that the Respondent may not include any costs incurred in these proceedings to the Applicant's service charge.

(g) The Tribunal has further ordered that the Respondent shall reimburse the Applicant his Tribunal fees and additionally pay him £500 costs.

Chairman.....M.K. Nicol.....

Date 13th December 2010