HM COURTS & TRIBUNAL SERVICE

MIDLAND LEASEHOLD VALUATION TRIBUNAL

DECISION

On an application pursuant to sections 27A, 19 and 20C of the Landlord & Tenant Act 1985 for a determination of liability to pay and reasonableness of service charges and an order preventing the Respondent from recovering costs in connection with the proceedings before the Tribunal

Applicants	Christopher John Robert Emmet and Gwyndra Emmet
Respondent	The Riverside Group Limited
Property	40 Barnsdale Close, Mariners Quay, Loughborough Leicestershire LE11 5AN
Case number	BIR/31UC/LSC/2011/0032
Date of Application	16 July 2011
Determination	25th January 2012 at the Courthouse, 60 Pinfold Gate Loughborough
Members of the Tribunal	Mr. R. Healey LL.B., Solicitor Mr. G. Freckelton FRICS
Date of determination	13 FEB 2012

SUMMARY OF THE DETERMINATION

The Tribunal determines that the Applicant is liable to pay the amended services charge budget for the year 1st April 2011 to 31 March 2012 showing a monthly charge of £166.11 as a proportion of the total budgeted expenditure of £63,786.94 for numbers 22-54 Barnsdale Close, Loughborough. The Tribunal makes an order in accordance with section 20C preventing the Respondent from adding any costs incurred in connection with the Tribunal proceedings to the service charge.

Reasons for the determination

Introduction

1. This is an application by Mr. Christopher John Robert Emmet and Mrs. Gwyndra Emmet ("the Applicants") for a determination of liability to pay and reasonableness of service charges by the Management Company The Riverside Group Limited ("the Respondent") in respect of the budget for the financial year ending 31 March 2012, relating to a flat known as 40 Barnsdale Close, Mariners Quay, Loughborough, Leicerstershire LE 11 5AN ("the Property") in accordance with the provisions of sections 19 and 27A Landlord and Tenant Act 1985 ("the Act"). In particular the Applicants challenge the figure of £45,615.36 for cyclical repairs in the amended service charge budget for the year. The Applicants also apply for an order pursuant to section 20C of the Act preventing the Respondent from recovering costs in connection with the proceedings before the Tribunal.

Lease

2. The leasehold interest in the Property is held by the Applicants under a lease dated 7 July 2003 made between Prospect GB Limited of the first part Riverside Housing Limited of the second part and the Applicants of the third part ('the Lease') for a term of 125 years from1 January 2003 a copy of which was before the Tribunal.

Directions

3. Directions were issued on 28 July 2011 and in accordance therewith the Applicants filed their written statement on 23 August 2011, the Respondents filed their Statement of Case and Scott Schedule on 28 September 2011, the Applicants effected disclosure of documents on 5 October 2011 and skeleton arguments were thereafter filed by both parties.

4. The Respondent filed their bundle of documents, together with a copy of the relevant legislation and a copy of a decision of the London Leasehold Valuation Tribunal *Jamie Watson v Family Mosaic Housing Association Ltd (LON/00AM/LSC/2009/0758)* and a copy of a Lands Tribunal decision *Southend-on-Sea v Mr & Mrs E Skiggs and others (LRX/110/2005).*

Inspection

5. On the morning of 25 January 2012 the Tribunal attended at Barnsdale Close and in the presence of the parties inspected the common parts of four blocks of flats comprising numbers 23-54 Barnsdale Close ("the Building"). The Property is situated in the block containing numbers 39-46 Barnsdale Close. The Tribunal noted that the common parts in the Building and particularly the block containing the Property would

benefit from decoration to the internal walls and cleaning/replacement of the carpets. The exterior of the four blocks and the gardens and parking areas appeared generally satisfactory.

The Law

6. Section 27A of the Landlord and Tenant Act 1985 ('the Act') sets out the jurisdiction of the tribunal and the relevant clause (1) provides:

> ***S27A Liability to pay service charges: jurisdiction***
> *(1) An application may be made to a leasehold valuation tribunal for a determination whether a service charge is payable and, if it is, as to—*
> *(a) the person by whom it is payable,*
> *(b) the person to whom it is payable,*
> *(c) the amount which is payable,*
> *(d) the date at or by which it is payable, and*
> *(e) the manner in which it is payable.*

7. Section 19 of the Act limits the amount of service charge payable and provides ;

> ***S19 Limitation of service charges: reasonableness.***
> *(1) 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 provisions of services or the carrying out of works, only if the services or works are of a reasonable standard; and the amount payable shall be limited accordingly.*

8. Section 20C relates to payability of Landlord's costs and provides ;

> ***S.20C Limitation of service Charges: Costs of proceedings***
> *(1)A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before... a leasehold valuation tribunal, ... are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application.*
>
> *(1) ....*
> *(2) The...tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances.*

Hearing

9. The hearing was listed for the 25 January 2012 at The Courthouse Loughborough Leicestershire. The Applicants appeared in person. The Respondent was represented by Lynn James of Trowers and Hamlins Solicitors of Manchester, supported by Matthew Penny and Jamie Styles, both of whom had lodged witness statements.

10. The Applicants confirmed that their statement of case was fairly summarised in the Scott Schedule produced by the Respondent. The Tribunal proceeded to hear the evidence and submissions of the parties and determine each of the Applicants allegations or concerns.

Applicant alleges that Respondent to fund external work

11. The Applicants stated that they were led to believe that the Respondent funded external work and there was a savings fund for internal works. They referred to an agenda for a consultative meeting held on 1 February 2005. Reference is made in the notes to that meeting of a sinking fund which refers only to carpets. No mention is made of a sinking fund to cover for external works. (Items 1 & 2 in Applicants' bundle)

12. The Applicants referred to a letter from Riverside Housing dated 12 September 2006 (Item 11 in Applicants' bundle) which referred to the proposed inclusion in the service charge of monies to provide for three yearly internal decoration of communal areas. The Applicants submit that again no reference is made to the costs of external works being included in the service charge.

13. The Applicants referred to notes from a meeting between the Respondent's representatives and the residents/owners dated 16 October 2008 (Item 3 in Applicants' bundle) which stated that items which include the structure should be part of a sinking fund and that "Riverside will contact Prospect" to arrange for private owners to agree a scheme to set up a sinking fund.. The Applicants draw attention to the items to be included in the sinking fund; they ask what has happened to the sinking fund for the carpet and submit there is nothing to suggest they are responsible for external maintenance.

14. The Applicants referred to a letter dated 3 June 2008 from the Respondent to themselves (Item 5 in the Applicant's bundle). The Applicants refer to the final paragraph on page 1 of the letter which includes the cyclical repair estimate for internal decoration, paint metalwork and cleaning carpets. This element of the service charge is stated to be "capped at £75.00 per year" and "topped up by Riverside as necessary". The Applicants submit that this is an acknowledgement by the management company that they will be responsible for those costs in excess of the £75.00 cap.

15. The Applicants referred to a letter dated 4 October 2010 from the Respondent to themselves (Item 7 in the Applicants' bundle) which gave information on the acceptance of the lowest tender for internal and external redecoration. The total cost is stated to be £65,490.15 which will be met from the cyclical fund. The Applicants submit that when read in conjunction with the earlier documentation this is consistent with the Respondents being responsible for the additional costs.

16. The Applicants submitted that the external aerial work had been funded by the Respondent which was a further indication of their acceptance of liability for external expenditure.

17 The Respondent drew attention to the Lease. In clause 5 of which there is a covenant for the tenant pay the service charge as more particularly set out in the lease. The obligation extends to the "Building Charges" defined in Part 1 of the Second Schedule to the Lease which cross refers to the obligations of the Management Company in clause 8. These include at clause 8.3 (amongst other things) the cost incurred by the Management Company in decorating (as often as is reasonably necessary) the exterior parts and the internal communal parts of the Building, previously decorated in a proper and workmanlike manner.

18. The Respondent submits that:-

(i) In the Lease the Building is defined – as previously in this determination – as the four buildings known as the Prospect Blocks on the development.

(ii) The tenant's proportion is expressed to be 1/32nd . Accordingly the Respondent submits that the Applicants are liable for 1/32nd of the costs of decorating both the internal and the external parts of the Building.

(iii) The aerial work was carried out in May 2010

(iv) The total cost of the aerial works for the Building was £6204.00 and this sum was included in the 2010/2011 accounts for payment through the service charge.

(v) The sum of £6,204.00 was temporarily funded by the Respondent as shown on page 95 of their bundle.

19. The Respondent denies at any time indicating to the Applicants that the aerial work or any other external work would be funded by it. The Respondent alleges that such works are to be recovered through the service charge as provided for in the Lease.

20. The Tribunal determines there is insufficient evidence to show any agreement or conduct between the parties to override the Lease and the provisions in the Lease for service charge calculation and recovery remain unchanged.

Applicant alleges no attempt to set up a savings fund for external work

21. The Applicants submit that no attempt was made by the Respondent to set up a sinking fund for the Building until a cyclical reserve contribution was proposed in the service charge for the service charge year 1 April 2011 to 31 March 2012 in the sum of £45,615.36

22. The Respondent refers to clause 6.29 of the Lease which provides that the Tenant's covenant to pay the Service Charge shall be deemed to include reasonable provision for the future in respect of –

> Periodically recurring items whether recurring at regular or irregular intervals and;
>
> The replacement or renewal of items the expenditure on which would fall within the Service Charge

23. In addition the Respondent refers the Tribunal to paragraph 1.5, Part 3 of the Second Schedule to the Lease which provides that the Building Charges and Common Parts Common Parts Charges include the cost of setting aside such sums of money (which shall be deemed items of expenditure incurred by the Management Company) as the Management Company may reasonably require by way of reasonable expenditure for future expenditure in complying with its obligation under the Lease.

24. The Respondent therefore submits that the Lease gives it power to set up a sinking fund but does not impose an obligation on it to do so.

25. Having considered both parties submissions and evidence the Tribunal determines that paragraph 1.5, Part 3 of the Second Schedule to the Lease does not impose an obligation on the Respondent to set up a fund to make provision for future repairs or contingencies but gives them power to do so. However the Tribunal would consider it good practice for the Management Company to set up and run a sinking/cyclical fund as permitted by the Lease.

Applicant requests information on savings/reserve/sinking fund.

26. The Applicants state that they have requested from the Respondent details of the saving/cyclical/ sinking fund on many occasions but without success. The Respondent state it is unaware of any failure to respond. Indeed the Respondent refers to the consultation with the Applicants which it alleges was undertaken as required by section 20 of the Act and dealt with in detail subsequently.

27. The Respondent identified provisions that had been made in the accounts for depreciation. In particular –

(i) (Item 6 in Applicants' bundle) Year ending March 2004. Five items identified for annual depreciation totalling £4864.80.

(ii) (Page 60 in Respondent's bundle) Year ending March 2006. Four items identified for annual depreciation totalling £4,898.60.

(iii) (Page 61 in Respondent's bundle) Year ending March 2007. Four items identified for annual depreciation totalling £4,898.60.

The Respondent acknowledged that the above monies totalling £14,662.00 were not entered into the accounts.

28. The Respondent alleges that no sums were collected for retention in the year ending 2008 and in the year ending 2009 the sum of £2,400 was collected and credited back as a surplus towards service charges for the year ending 2009.

29. The Respondents identified the sum of £2400 for cyclical fund contributions in the Service Income and Expenditure Accounts for the year ending 2010 (Page 84 of Respondents' bundle) and the further sum of £3,840 in respect of cyclical fund contributions for the year ending 2011 (Pages 92 and 94 of Respondents' bundle). This leaves £6,240 for transfer to the cyclical fund as provided for in clause 6.29.1 of the Lease.

30. Accordingly the Tribunal determines that £6,240 is available for transfer to the cyclical fund.

The Applicants request a detailed explanation of the breakdown of the £45,615.36.

31. This is the sum claimed in respect of the cyclical repairs budget in the amended service charge budget starting 1st April 2011 (Page 69 in the Respondent's bundle) and reduced from £75,960.01 in the original budget (Page 66).

32. Mathew Penny employed by Riverside Home Ownership as Scheme Finance Officer gave evidence for the Respondent and explained that the original figure of £75,960.01 was calculated on the basis of the actual cost of the external works as 63,960.01, less the sinking fund referred to above of £6,240 plus £18,240.00 calculated as being the amount appropriate for decoration over a five year cycle. (See Matthew Penny's Witness Statement at page134/136) and the decoration contribution calculation at page136.)

33. In his statement Mr Penny explained that the calculation of the amended cyclical repairs budget for 2011/12 may be summarised as follows –

Cost of works		£ 63,960.01
Add Cyclical redecoration over five years		£18,240.00
Less - Depreciation £14,662.00 from para 27 above but introduced as.	£14,643.20	
Interest added to above	£ 2,259.95	
Contributions paid (para. 29 above)	£ 6,240.00	
Credit 10% Management fee 2003-10	£ 2,804.86	
Saving for cyclical internal decorations extended to seven year cycle	£ 10.632.84	
Additional interest	£ 3.80	
Budget for cyclical works	£ 45,615.36	
	£ 82,200.01	£82,200.01

34. The Tribunal determines that from the evidence produced and the submissions made by the Respondent the above calculation is acceptable to determine the cyclical repair figure shown in the amended 1 April 2011 to 31 March 2012 budgets.

Allegation that the figure of £41,615.36 is incorrect as leaseholders' savings used.

35. The Applicants submit that the sum of £41,615.36 calculated for the cyclical repairs fund is incorrect as the Respondent has credited the Applicants (and other leaseholders) with their own savings that were to be used for internal work.

36. The Respondent assumes that the Applicants are referring to the sums previously collected as depreciation and which are set out above. The Respondent submits that it has not informed the Applicants that this would be used for internal works other than decoration.

37. The Tribunal determines that the monies may be used by the Respondent as permitted by paragraph 6.29 of the Lease subject to compliance with current legislation.

Applicants submit that they not told in advance of amount of monthly payments

38. The Applicants say they were not informed of the monthly cost to them in advance of the external redecoration works being undertaken.

39. The Respondent submits that it has complied with section 20 of the Landlord and Tenant Act 1985 and the Service Charges (Consultation Requirements) (England) Regulations 2003 and that there is no obligation to notify leaseholders in advance the monthly payment being charged. At the request of the leaseholders the Respondents reduced the monthly service charge payments in the budget for the year 2011/12 from £245.14 to £166.11 in the manner set out above.

40. The Tribunal determines there is no obligation imposed on the Respondent in the statutory consultation procedure to notify the monthly service charge amount in advance of the budgets.

Applicants claim they have been charged for work done on other properties

41. The Applicants consider that they have been charged for work done on two other blocks of flats on the development which adjoin the Building.

42. The Respondents confirm that the neighbouring two blocks are owned and managed by them. However the cyclical works carried out to the other two schemes were dealt with entirely independently. There was no cross over between the two schemes for the neighbouring blocks and the Building in relation to the works or the recovery of costs related to those works.

43. The Tribunal determines that the Applicantshave not been charged for work done on other properties.

Applicants have produced a counter proposal which has not found favour with the Respondents

44. The Applicants state that they have drafted a counter proposal to the 2011/12 budget but have received no response from the Respondent.

45. The Respondent submits that the Applicants' proposal was that they should not be charged for the external decoration and that the recoverable costs for the internal decoration be reduced significantly. In addition the Applicants wished to limit the recovery of cyclical costs going forward. The parties met on 16 August 2011 and the proposals were not accepted.

46. The Tribunal determines the Respondent was entitled to reject the Applicants' proposals.

The Applicants' allegation that the service charge increase is unreasonable.

47. The Applicants allege that it is unreasonable to demand such a large increase as some owners cannot afford it, owners who let their property would have difficulty keeping tenants and it would be difficult for owners to sell their properties. Further Mr

Emmet submitted that it was unreasonable for the Respondent to charge for work to the exterior and he would like to spread the payments over a further length of time. He also submits that a sinking fund should have been running for 8.5 years; that it is unreasonable to use the monies that were set aside for carpets to be now used for cyclical works and that it is unreasonable that he was not told of the lack of available funds before the works started.

48. The Respondent submitted that there was no reason for the Applicants to believe that they were only responsible for internal works; the Lease was clear on this point. However, the Respondent submitted it had attempted to assist the Applicants and that it had reduced its management fee by 10% for the period from 2003 to 2010, that it had attempted to ensure that as much of the cost as possible is recoverable from money already held in the scheme and that it had spread the cost of the works over a 12 month period.

49. The Respondent referred the Tribunal to the Leasehold Valuation Tribunal decision of *Jamie Watson v Family Mosaic Housing LON/00AM/LSC/2009/0758* as persuasive authority for a reduction in the Managing Agents fees of 10% per year for failure to make proper provision for the implementation of a sinking fund which amounted to £128.90. In the present case the Respondent proposes a reduction in their fees of 10% per year for the period from 2003 to 2010 which amounts to £2,804.86. This figure has already been built into the 2011/12 budgets. The Tribunal accepts the offer made by the Respondent as fair recompense to the Applicants for its failure to implement a reserve fund and therefore determines this proposal to be acceptable.

50. The Respondent referred the tribunal to a Land Tribunal case of *Southend Borough Council v Mr & Mrs Skiggs and others LRX/110/2005* and submitted that sections 19 and 27A of the Act did not give the Tribunal jurisdiction to determine matters other than those specifically granted. In particular it was submitted that the Tribunal did not have jurisdiction as to the date and manner of the service charge being paid nor did it have jurisdiction to determine the amounts to be placed in a reserve fund. The Tribunal accepted that it was bound by the Lease and determined it had no jurisdiction to determine these matters.

Landlord and Tenant Act 1985 section 20C

51. The Respondent indicated that it did not intend to treat any of its costs incurred in connection with the proceedings before the Tribunal as relevant costs to be taken into account in determining the amount of any service charge. The Tribunal agreed with this approach and made an order to this effect in accordance with the provisions of 20C of the Act.

..... Roger Healey - Chairman