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BIR/47UF/LIS/2011/0033  
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**HM COURTS & TRIBUNALS SERVICE  
MIDLAND RENT ASSESSMENT PANEL  
LEASEHOLD VALUATION TRIBUNAL**

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**DECISION OF LEASEHOLD VALUATION TRIBUNAL  
LANDLORD AND TENANT ACT 1985**

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Tenants: Jacob Wilson Kerr Fraser and Jane Alicia Fraser

Landlord: Mercia Investment Properties Ltd

Property: Flat 6, Farleigh Road, Pershore, WR10 1LF

Heard at: Panel Offices, Birmingham

On: 6 December 2011

Appearances  
For the Tenant: In person

For the Landlord: Mr M Paine of Circle Residential Management Ltd  
(Landlords Managing Agent)

Members of the Tribunal: Mr D Jackson (Chairman)  
Mr I Humphries, FRICS

Date of Decision:

**APPLICATIONS**

1. This is the decision of a Leasehold Valuation Tribunal of the Midland Rent Assessment Panel in relation to cross applications by both Landlord and Tenants for a determination under Section 27A of the Landlord and Tenant Act 1985 ("the Act") in relation to liability to pay service charge for the period 2009/2011 and in relation to the Tenants application for an order under Section 20C of the Act
2. On 3 August 2011 an application made on behalf of the Landlord under Section 27A of the Act was received seeking a determination in relation to service charges 25 December 2009, 24 June 2010 and 30 September 2010. The application was amended on 4 August 2011 to confirm that the Landlord sought a determination in relation to Flat 6 only and not the other flats at Farleigh Road. None of the other tenants have applied to be joined as parties

to these applications.

3. On 6 September 2011 the Tenants applied for determination of service charges for the years 2010 and 2011.
4. By way of background there has been a previous LVT decision in relation to the same parties which was heard on 24 September 2009 (BIR/47UF/LSC/2008/0035).
5. Both parties have helpfully prepared bundles of documents (two separate bundles in the case of the Tenants). For ease of reference in this decision references are to page numbers in the Landlord's bundle.

## **INSPECTION**

6. The Tribunal inspected the Farleigh Road development on the morning of the hearing. There are a total of 18 flats in two separate purpose built three storey blocks constructed in the early 1960s of modern brick and tile construction with flat roofs. The development is beginning to show its age and externally both blocks and common parts were at best in fair condition. Block B contains flats 1-6. Block A contains flats 7-18. There are two separate unmade driveways leading to parking areas and brick built garages. The blocks are set within gardens to the front, side and rear which are entirely grass with a few shrubs/trees. There are no flower beds or other areas of cultivation. There are also drying areas at the rear of the Blocks.
7. We inspected the common parts of Block B. There is an entrance hall, two landings and staircase. The floor coverings have recently been replaced and are the subject of part of the present applications.

## **LEASE**

8. The Tenants hold the property under the terms of a lease made on 29 January 1965 and made between Hawkwood Developments Ltd (1) and Douglas Michael Halliday (2) whereby the Property was demised for 99 years from 29 January 1965 at a rate of £10 per annum (page 49-58). The lease was extended to 150 years from 25 December 2004 at a rent of £100 per annum by Deed of Variation (page 59-64).
9. The obligation to pay service charge is the tenant's covenant at Clause 4(2) of the Lease. The service charge provisions themselves are set out in the 6<sup>th</sup> Schedule which provides for the lessors expenses in carrying out its obligations under that Schedule to be an amount which shall be certified and payable upon demand under Clause 4(2). Service charge is payable twice a year in relation to expenses incurred to 24 June and 25 December respectively.
10. The lessors obligations extends to paying outgoing, insuring the Building (which it is agreed by the parties means for present purposes Block B in which Flat 6 is situated) and repairing the Reserved Property (defined in the 1<sup>st</sup>

Schedule and agreed by the Parties as comprising the grounds, main structure and common parts).

## **MANAGEMENT FEE**

11. Mr Paine explained that a fixed fee per flat of £165 + VAT per annum was charged. Mr Paine indicated that figure was arrived at based on the size of the building and geographical location. He accepted that there was no specific scale of charges to substantiate the figure of £165 but said it had been benchmarked with other agents. Mr Paine in evidence told us that the sum of £165 included collecting ground rent and service charge, general correspondence and communication with residents and discharging the Landlord's obligations under the lease in particular insurance obligations. If major works requiring consultation were contemplated Mr Paine indicated that that would incur an additional charge.
12. The Tenants case is that the standard of management has not been good and they submit that a reasonable amount would be £50 per annum.
13. Our starting point is the terms of the lease. There is no express provision for the costs of employing a managing agent in the lease. There have been a number of cases on this point (London Borough of Brent v Hamilton LRX/51/2005 and Norwich City Council v Marshall LRX/114/2007) which established the principle that costs of management reasonably incurred for the specific services which the Landlord is obliged to provide under the lease are recoverable.
14. The costs of management relating to insurance and repair and maintenance of the Reserved Property are recoverable if reasonable. The costs relating to collection of ground rent and service charge, general correspondence and communication with the residence are not. We find that a little over half of the management fee relates to those none recoverable items but that the sum of £80 + VAT is reasonable and payable in relation to management costs of discharging Landlord's obligations under the lease. We find that sum of £40 + VAT is payable by the tenants to the Landlord in each of the six months service charge period in dispute.

## **INTEREST**

15. Although paragraph 8 of the 6<sup>th</sup> Schedule does allow the Landlord to obtain from the tenant a proportionate amount in advance of the prospective costs of repairs to the Reserved Property the lease does not make provision for service charge to be payable in advance, nor is there provision for a Reserve Fund. Accordingly the Landlord in discharging its obligations has to fund the cost of outgoings and insurance "up front".
16. Mr Paine told us that Circle Residential Management Ltd provides funds from its "office account". In return it charges interest at 23% per annum. Mr Paine told us that although this may seem high it is unsecured lending at a rate comparable with credit cards and other short-term loans. Circle is regulated by the Financial Services Authority. It has been unable to find a high street or

fringe lender willing to take on this kind of lending and factoring companies were also not interested in this kind of business. Mr Paine was asked what level of profit accrued on the 23%. He said that that was a difficult question to answer. He told us that Circle itself did not have to borrow the money and that payments were made out of its own funds which he describes as "office account".

17. Again the lease makes no provision for the lessor to charge interest and the starting point again is that such interest is not recoverable (see *Frobisher (Second Investments) v Kiloran Trust* [1980] 1 WLR425 and *Boldmark v Cohen* [1986] 1 EGLR47). However in *Boldmark v Cohen* it was established that "in such contexts a reference to the cost of doing a particular work will be perfectly apt to include interest on monies borrowed to do it". We follow that authority and find that the cost of borrowing in order to pay for services that had to be paid prior to receipt of service charge payments is recoverable.
18. However although we find interest is payable we do not find 23% to be reasonable. The period during which interest was charged coincides with historically low Bank of England base rate of 0.5%. It is not entirely correct to equate service charges with unsecured lending. Although there are now statutory restrictions on forfeiture for non-payment of service charges nevertheless the service charge relates to a substantial asset which would provide any lender with considerable comfort in terms of recoverability. In addition the arrangement here is one set up entirely for the benefit of managing agent, who are making a considerable profit arising entirely from their position as the landlord's agent. We find that a reasonable rate of interest is 4% above the base rate from time to time of Lloyds TSB.
19. We are unable to recalculate interest payable at the rate of 4% over base and direct that the landlord shall produce to the tenant a schedule showing the date of payment of each item of advance expenditure in relation to each service charge period setting out the number of days that borrowing in relation to that item has remained outstanding. This will provide the tenant with sufficient information to check that the interest rate has been correctly applied. We encourage both parties to reach agreement on this figure. If they are unable to do so each party has liberty to apply to the Tribunal to determine the amount of interest payable by the tenant to the landlord based on an interest rate of 4% over base.

#### **PERIOD ENDING 25 DECEMBER 2009**

20. The Tenants have confirmed that they accept all items in the Statement of Service Charge for the period ending 25 December 2009 (pages 20 and 21) except:-

- a. Interest

See paragraph 15-19

b. General Reserve

Mr Paine concedes that the sum of £3.05 is not payable.

c. Health & Safety

Mr Paine has produced copy asbestos risk assessment dated 14 October 2009. His evidence was that this relates to the costs of £201.25 incurred in the Statement. The assessment was carried out by Geoffrey Haigh an employee of Circle. Mr Paine told us that Mr Haigh was a competent person for the purposes of the Regulations and had undergone appropriate training during the period of his employment with Circle. Mr Paine indicates that risk assessments were currently on a two year cycle. The Tenants, having now seen the assessment, dispute payment on the basis that Mr Haigh does not have the necessary experience to carry out the assessment. We accept the evidence from Mr Paine that Mr Haigh is a competent person under the Regulations. We find that the sum of £201.25 is reasonable and payable in that the asbestos risk assessment relates to the landlords obligations both in relation to insurance and repair and maintenance.

d. Electricity

The dispute relates solely to the invoice at page 98. The Tenants disputes that they are liable to pay 1/6<sup>th</sup> of that invoice only. They believe that electricity for that period has been determined by the Tribunal in September 2009. We do not accept that submission. The Heads of Agreement/Settlement marked Appendix A and signed by the parties which are attached to the Decision of 24 September 2009 deals with electricity up to the half year period ending June 2008. We therefore find electricity for the period 31 March 2009 to 23 June 2009 is payable by the tenant to the landlord and that the tenant is responsible for their 1/6<sup>th</sup> share.

e. Management Fee

See paragraphs 11-14 above. We determine that the sum of £40 + VAT is payable for the sixth monthly period to 25 December 2009.

**PERIOD ENDING 24 JUNE 2010**

21. The Tenants confirm that they accept all items in the Statement of Service Charge for the period ending 24 June 2010 (see pages 24-25) except:-

a. Interest

See paragraphs 15-19.

b. Management Fee

We find £40 + VAT is payable.

c. Building Repairs

Having seen the invoice at page 108 the Tenants concede that the sum of £12.50 is payable by them.

**PERIOD ENDING 25 DECEMBER 2010**

22. The Tenants confirm that all items on the Statement of Service Charge for the period ending 25 December 2010 (pages 78-79) are payable except

a. Major Works Sinking Fund

The sum of £95 is the Tenants contribution to a total of £570 (see page 140) relating to new flooring to the entrance hall and landings. This is a prospective cost dealt with under paragraph 8 of Schedule 6 of the Lease (page 57) and payable by demand issued in September 2010 (page 86). The prospective cost is reconciled in the statement for the period ending 24 June 2011 (see paragraph 23c below). The Tenants case is that the work was not carried out to a reasonable standard and did not need doing at all on the upper landing. Mr Paine's evidence was that the floor covering was previously thermoplastic tiles, in all probability dating back to construction of the Block in the 1960s. The tiles were curling, damaged and a potential trip hazard. We find the expenditure was reasonably incurred. We have inspected the new flooring. The tenants showed us a gap in the join of two parts of the floor covering and some spilt adhesive. Having inspected the floor we find that it has been laid to a reasonable standard. We therefore find that the tenants contribution of £95 towards replacement of the floor covering (incorrectly described in the statement as Major Works Sinking Fund) is reasonable and payable.

b. Interest

See paragraphs 15-19.

c. Refuse

Conceded by Tenants having seen invoice at page 127.

d. Management Fee

We find £40 + VAT is payable.

e. Building Repairs

Conceded by Tenants having seen invoice at page 128.

f. Electricity

Conceded by Tenants having seen invoice for their 1/6<sup>th</sup> share totalling £8.42.

g. Buildings Insurance

Conceded by Mr Paine that this should be £181.92 (not £189.20).

**PERIOD ENDING 24 JUNE 2011**

23. The tenants have confirmed that they accept all items in the Statement of Service Charge for the period ending 24 June 2011 (pages 74-75) accept:-

a. Interest

See paragraphs 15-19.

b. Management Fee

We find £40 + VAT is payable.

c. Building Repairs £113.33

The total of £680 comprises £570 in relation to flooring and a further £110 supported by an invoice at page 143. Credit is given to the Tenants for their £95 contribution paid in advance (see £570 Major Works Sinking Fund) and accordingly the only additional sum relates to the £110. The invoice at page 143 is not helpful as it does not indicate whether the work was in relation to either of the Blocks or the Reserved Property. The invoice does however refer to cleared paths and we therefore find that it does relate to the garden/Reserved Property areas. Mr Paine conceded that in that case the Tenants contribution should only be 5.5% which equates to £12.25. We therefore find that the total payable by the Tenants under building repairs is £107.21 (the Tenants should note that the Statement for this period correctly records credit of £95 in relation to payment in advance for the floor covering).

d. Building Repairs £3.33

Mr Paine relies on invoice at page 140 relating to the additional three nose caps to top of stairs totalling £60. The Tenants say no nose caps were replaced. On the balance of probabilities we accept the invoice of Clive Scarrott and find that the sum of £3.33 is payable.

**ADMINISTRATION CHARGES**

24. The Tenants also wish to challenge interest and letters which have been charged in subsequent invoices raised by Circle in relation to late/non payment. As explained to the Tenants at the hearing these are Administration Charges and if the Tenants wish to challenge those sums they must make a further application for a determination of reasonableness and payability of Administration Charges under Schedule 11 of the Commonhold and Leasehold Reform Act 2002.

**COSTS**

25. Mr Paine gave an undertaking that costs in relation to these applications would not be charged to the Service Charge account. We therefore make an order under Section 20C of the Act that all costs incurred by the Landlord in connection with proceedings before the 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 Tenants.

**SIGNED:** .....  
**D JACKSON - (CHAIRMAN)**

*13 January 2012.*