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HM Courts & Tribunals Service

LEASEHOLD VALUATION TRIBUNAL
Case no. CAM/00KF/LSC/2011/0168

Property	:	**43a St. Helens Road, Westcliff-on-Sea, Essex SS0 7LA**
Applicant	:	**David Bull**
Respondent	:	**Westleigh Properties Ltd**
Date of application	:	**25th November 2011 (rec'd 8th Dec.)**
Type of Application	:	**To determine reasonableness and payability of service charges and administration charges**
The Tribunal	:	**Bruce Edgington (lawyer chair) Stephen Moll FRICS David Cox**
Date and venue of hearing	:	**28th February 2012 The Court House, 80 Victoria Avenue, Southend-on-Sea, Essex SS2 6EU**

DECISION

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1. Westleigh Properties Ltd., as freehold owner, is substituted for Gateway Management Co. Ltd. ("Gateway") as Respondent because Gateway is the managing agent acting for the freehold owner and has no contractual relationship with the Applicant.

2. The Tribunal determines the claims set out in the application form as follows:-

Date	Description	Amount (£)	Decision (£)
y/e 2010	management fee	235.00	176.25 is reasonable
"	accountancy fees	23.50	not reasonable
"	bank charges	5.00	not payable
y/e 2011	management fee	240.00	180.00 is reasonable
"	insurance	431.60	reasonable
"	accountancy fees	24.00	not reasonable
"	bank charges	6.00	not payable

This means that a total amount of £787.85 is found to be reasonable and payable from the amounts claimed.

3. The Tribunal makes an order pursuant to Section 20C of the **Landlord and Tenant Act 1985** ("The 1985 Act") preventing the Respondent from claiming its costs of representation before this Tribunal as part of any future service charge.

4. The application by the Applicant for an order that the Respondent pay his costs of £600 is refused.

Reasons

Introduction

5. This application is by the long leaseholder of the property for the Tribunal to determine the reasonableness of service charges claimed for years ending June 2010 and 2011 as set out above. The application also asks for an order that no such charges can be claimed for any future year. The Applicant says that he has asked for details of the claims but has not been provided with any which is why he has made this application.

6. Whilst he has been told that the fees claimed are management fees, he says that there has been no management and no work on the property for years and he wants details as to the management provided. He also challenges the insurance premium claimed. As to insurance, the usual directions were given requiring the Respondent to provide details of the claims record for the property and then requiring the Applicant to provided competitive 'like for like' quotes. There are 2 insurance quotes in the hearing bundle. They are both for the whole building and one is for £585.02 including terrorism cover with Liverpool Victoria and the other for £300 with Allianz which does not include terrorism cover. These would equate, respectively to £292.51 and £150 for this property.

7. The management of this building has now been taken over by a right to manage company as from the 16th December 2011. The Respondent, through its managing agent Gateway, seems to accept that there has been no physical work undertaken to this property during the 2 years in question, but they have had to insure and would have had to act if any urgent management issues had arisen.

8. Gateway filed a statement from Ben Day-Marr MIRPM, the Director of Operations for Gateway. He asserts that details have been given of the amounts due. He refers to a previous decision of this Tribunal to justify the management role and the fee payable. That case relates to a property in Silverdale Avenue in Westcliff and the paragraphs relied upon say:-

> *35. As far as managing agents are concerned, it is true that there is very little outward appearance of this property having been properly managed for some years. However, management is not only a matter of keeping the property in good decorative order and repair. There are a large number of statutory responsibilities imposed on a landlord for the protection of*

lessees and a managing agent has to undertake these. They are not immediately obvious to lessees but they do mean that staff have to be employed and costs have to be incurred as part of a regime designed to protect lessees from past generations of greedy landlords.

36. *A firm of managing agents in the Southend area would, in the Tribunal's experience, expect to recover in the region of £175-225 per flat per annum plus VAT as a management fee. This assumes a reasonable level of management including preparing legible and understandable documentation and accounts which appear to have been sadly lacking in this case, particularly from BLR.*

37. *As BLR has not, in this Tribunal's view, come up to the standards which a landlord could expect for a reasonable managing agent, the Tribunal decides that a reasonable fee in this particular case is £150 per annum per flat plus VAT. None of this dispute concerns Gateway's fee but, for the avoidance of doubt, the Tribunal considers that £200 per annum plus VAT is reasonable for them.*

9. As to insurance, he simply states that this is dealt with by the freeholder's insurance agent. He adds that this application should not have been made and he proposes to charge for his company's work in these proceedings at £120 per hour.

10. Unbeknown to the Tribunal, the freeholder's insurance agent did provide a letter setting out several relevant facts but this was not in the hearing bundle. On considering the letter at the hearing it says, in essence, that the agents first insured the property on the 24th June 2010 as part of the freeholder's portfolio, that several insurers were asked for a quotation, that the brokers receive a commission of 25% of the premium for which they handle claims and that neither the freeholder nor Gateway receive any commission.

11. A few days before the hearing a letter was received from the Applicant asking if he could open the investigation to earlier years in view of what was revealed in the documents. He was informed that it was really too late to do this. It would be open to the Applicant to make another application with regard to previous years but he should be aware that no application can be made with regard to service charges which have been agreed or admitted. Whilst payment of such service charges would not, of itself, mean agreement or admission, the circumstances surrounding payment are taken into account. In this case, it seems that previous service charges, including the insurance premium for 2010, had been paid without question. In those circumstances, it is likely that they would be deemed to have been admitted at the time of payment.

The Inspection

12. The members of the Tribunal inspected the property on the morning of the hearing. The weather was bright and dry. The Applicant was in his flat but did

not accompany the Tribunal. Mr. Day-Marr attended.

13. The property is the 1st floor flat in a converted semi-detached house of brick construction under an interlocking concrete tile roof originally built in the early part of the 20th century. It is in what could be described as 'fair' condition. The windows at the front appeared to be original but the frames are in need of repair and decoration. The outside wall – particularly at the back – is also in need of attention as the protective coating is flaking. The property is within walking distance of Westcliff town centre, a railway station with frequent trains into central London and a bus route into Southend-on-Sea.

14. Of concern was the condition of the staircase at the back which appears to be the route from the property to the rear garden. The basic structure of the staircase has moved slightly and there is evidence of decay to the timber steps. They have also retained algae on their surfaces which has created quite a serious slip hazard and needs urgent attention.

15. The internal common parts consist of a small hallway with a meter cupboard off which are doors to the 2 flats.

The Lease

16. The bundle contained a copy of the lease which is dated 7th December 1984 and is for a term of 199 years from that date. The ground rent is £35 per annum. Clause 3(2) of the lease is a covenant by the lessee to pay half of the cost of the landlord dealing with its obligations as set out in the Fifth Schedule.

17. Significantly, and relevantly, it is the lessee's responsibility to insure the property through a company and agency approved by the landlord. The landlord is able to dictate the level of cover although this must be reasonable.

18. The Fifth Schedule does allow the landlord to recover the cost of insurance if in fact the landlord insures. As to fees, the landlord is able 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*".

The Law

19. 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 landlord's costs of management which varies 'according to the relevant costs'.

20. 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 and, if so, whether it is payable.

21. Schedule 11 of the **Commonhold and Leasehold Reform Act 2002** ("the 2002 Act") provides for the same conditions and jurisdiction with regard to administration charges which are defined as including payments demanded in

addition to rent "*...in respect of a failure by the tenant to make a payment by the due date to the landlord...*".

22. In the Lands Tribunal in the case of **Rettke-Grover v Needleman** [2011] UKUT 283 there was a similarly worded 'sweep up' clause as is in this lease. In that case, there was an obligation on the landlord to have the service charges certified annually and provide a certificate signed by the lessor or its agents. The landlord tried to recover the cost of an accountant who had provided the certificate. The LVT allowed this under the general 'sweep up' clause.

23. On appeal, HHJ Huskinson said that as there was no specific provision in the lease for the landlord to recover the cost of an accountant, it was not payable. He said that the wording of the 'sweep up' clause was "*directed towards services that are actually enjoyed by the lessees as the fruits of 'the efficient management of the building...'...the lessees could not reasonably be expected to accept that the dealing with accounting problems lying on the lessor's desk was such a service".* The present claim does not, of course, relate to the separate charges of an accountant or bank interest charges but it does show that the Upper Tribunal (Lands Chamber) is strictly interpreting such lease terms.

The Hearing

24. The hearing was attended by those who were at the inspection plus a neighbour of the Applicant who happened to be a barrister. Mr. Day-Marr confirmed that there were no invoices for the bank charges and no evidence of these particular payments for bank charges having been made. He also confirmed that he had inspected the property from the front once only to see whether it needed any work. He concluded that it did and was intending to include this property in a programme of decoration and repair work for 2012. This was abandoned when the right to manage procedure was undertaken.

25. Both the Applicant and his neighbour addressed the Tribunal and asserted that the charges levied were unreasonable, in particular with regard to insurance.

Conclusions

26. It will be of no surprise to the parties that the previous decision of this Tribunal in the case of Silverdale Avenue is accepted and will be followed for the reasons set out therein.

27. The problem for Gateway is the lack of any positive work since they took over management. The following points are relevant:-

- The lease provides for the lessee to insure the property. It is generally recognised that buildings insurance is cheaper for a property owned and occupied by the insured person because that person can say who will be living at the property i.e. the insurer will be much better able to assess the risk of fire etc. This issue does not appear to have been considered by Gateway who should be aware of the lease terms.
- Gateway accept that nothing has been done to maintain the property save for one very brief inspection of the front. If they had undertaken anything more than such a rudimentary inspection, the problem with the rear

staircase would have been evident.

- It is self evident that there has been no asbestos survey, fire risk assessment or safety check.
- The service charge demands and accounts are very simple and would have taken practically no time to complete.
- Apart from collecting the premium, Gateway did not deal with insurance which is usually arranged by the managing agent and included within the managing agent's fee.

28. Taking all these matters into account, the Tribunal decides that whilst £200 per annum per flat plus VAT would be reasonable for a properly managed property, there is evidence in this case of management which was not as thorough as it should have been. This may well have been due, in part, to the problems encountered by Gateway in trying to catch up with the management of the freeholder's stock of property following problems in the past. However, this is the freeholder's problem and any additional cost or lack of service should not have to be borne by the leaseholders.

29. Thus, the Tribunal finds that £150 per flat per annum is reasonable plus VAT. The figures in the decision itself have taken account of the change in VAT over the relevant period. As far as the accounting figures are concerned, it seems that these charges are from Gateway for the preparation of very simple accounts and are really no more than an additional management fee. They are unreasonable.

30. As to the bank charges, the lease only provides for actual management expenses to be charged. It was very fairly accepted by Mr. Day-Marr that he could not provided evidence that any specific bank charges have been allocated to this property and such charges are therefore not 'payable' under the terms of the lease.

31. Finally, the Tribunal turns to the issue of the insurance premium. This has proved to be a very difficult matter. It was impossible to ascertain why the landlord assumed responsibility for insurance. It may be the freeholder landlord just took this over to make sure that the building was insured. On the other hand, it may be that this or previous lessees did not insure and the landlord felt that it needed to protect its building.

32. Gateway did not raise the matter with the Applicant but, on the other hand, there is no evidence that the Applicant or any other lessee complained and said that they would arrange their own insurance. This would have been perfectly possible and would have been a way of mitigating any loss. As has been said, it is more likely that landlord's insurance would be more expensive than owner occupier's insurance.

33. The Tribunal can take judicial notice of the fact that the insurance market is volatile as the existence and success of price comparison websites makes clear. It must also take note of the well known line of legal authority which says that a landlord does not have to choose the cheapest insurance. As long as insurance is arranged during the course of business and with an insurer of repute

– as the Tribunal accepts it was in this case – it does not matter that the premium is not the cheapest available in the market, so long as the market is tested from time to time. Admittedly, the evidence on this latter point is not detailed.

34. Therefore, whilst the Tribunal agrees that the insurance premium seems large on the face of it, the legal authorities in particular lead it to the conclusion that the premium charged in 2011 is 'reasonable' from a legal point of view.

35. As to the costs of the Respondent's representation, the lease does not provided for the recovery of the cost of representation before this Tribunal. There is no evidence that the behaviour of the Applicant within these proceedings has been so unreasonable as to warrant an award pursuant to the very limited jurisdiction conferred by Schedule 12 of the 2002 Act. In order to provide the Applicant with peace of mind the Tribunal does make an order pursuant to Section 20C of the 1985 Act preventing the Respondent from including the costs of representation in any future service charge.

36. In his written submissions to the Tribunal, the Applicant also requests an order that the Respondent pays his costs of £600 which he said he would quantify at the hearing. As is intimated in the previous paragraph, orders for costs are not normally made because the power to make such an order is limited by the 2002 Act. The Respondent has not behaved in such a way in connection with the proceedings which would warrant such an order and none is made.

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Bruce Edgington
Chair
29th February 2012