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HM Courts & Tribunals Service

LEASEHOLD VALUATION TRIBUNAL
Case no. CAM/00KF/LSC/2012/0028

Property	:	**45B Valkyrie Road, Westcliff-on-Sea, Essex SS0 8BY**
Applicant	:	**Kevin Garry Burke Represented by Mr. Chipperfield of counsel (*Rudds*)**
Respondent	:	**William Price**
Date of transfer from Southend County Court	:	**5th March 2012**
Type of Application	:	**To determine reasonableness and payability of service charges and administration fees**
The Tribunal	:	**Bruce Edgington (lawyer chair) Stephen Moll FRICS David Cox**
Date and venue of hearing	:	**12th July 2012, The Court House, 80 Victoria Avenue, Southend-on-Sea, Essex SS2 6EU**

DECISION

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1. The Tribunal finds that in respect of the amount claimed by the Applicant from the Defendant in the Southend County Court under case no. 2IR03846, no service charges are payable because no proper service charge demands complying with Section 21B of the **Landlord and Tenant Act 1985** ("the 1985 Act") have been served.

2. In the event that a properly drawn service charge demand is served, the Tribunal finds that the amount of service charges which would be deemed to be reasonable and payable by the Respondent is £537.25. None of the administration fees or charges claimed are payable because the lease does not provide for payment of such fees or charges.

3. The Tribunal also finds that the claim for insurance excess in the sum of £1,000 is not a service charge. In order to assist the parties and possibly the court, it offers its view that the Respondent should pay £625 towards this amount for the

reasons set out below.

4. The Tribunal makes an order pursuant to Section 20C of the 1985 preventing the Applicant from recovering any of his costs of representation before this Tribunal from the Respondent in any future service charge.

5. This matter is now transferred back to the Southend County Court to enable either party to apply for any further order dealing with the insurance excess and any other matter not covered by this decision including enforcement, if appropriate.

Reasons

Introduction

6. On or about the 11th January 2012 a county court claim form as issued by the Applicant claiming £2,787.25 from the Respondent was served. The claim was issued in the bulk centre at Salford but transferred to the Southend County Court upon the filing of a defence. By an Order made on the 28th February 2012 by District Judge Ashworth, the questions as to whether the service charges and administration fees claimed were payable and/or reasonable were transferred to this Tribunal.

7. The Applicant is the freehold owner and landlord and the Respondent is the long lessee of the property. In summary, the claims made are as follows:-

date	item	amount (£)
18.07.11	insurance excess	1,000.00
16.06.11	new driveway	1,275.00
13.09.11	new communal door lock	36.00
03.12.10	new fence	200.00
10.10.11	blocked drain	30.00
14.12.11	blocked drain	21.25
Various	administration fees	225.00
		2,787.25

8. On the 17th January 2012, the Respondent filed a defence which said, again in summary:-

   (a) There is no provision in the lease for him to pay an excess; the excesses are not reasonable and, in any event, the fact that there is an excess means that the property is inadequately insured
   (b) He has no benefit from the driveway and is not obliged to contribute towards its cost
   (c) The fence did not need replacement and could have been repaired
   (d) One drainage clearance fee and the new door lock are admitted
   (e) The lease does not allow the Applicant to charge administration fees
   (f) The service charge demands were not on the proper form as they did not include a summary of the lessee's rights etc.

The Inspection

9. The members of the Tribunal inspected the property in the presence of the parties. They only undertook an inspection of the exterior of the house in which

the property is situated. It is of part rendered brick construction under an interlocking concrete tiled pitched roof originally built in the early part of the 20th century. There appear to have been one or more extensions at the rear over the years. Windows are uPVC and there is a small balcony at the front.

10. The property is well situated within walking distance of Westcliff town centre and a main commuter railway station with a line to London and Southend as well as a good bus service.

11. Of relevance to this decision, the visible plastic pipework for soil and storm drains is extensive but apparently fairly recent and leading into a drain at the rear which appears to run across gardens of neighbouring houses into the mains.

12. The fence panels and posts at the front have clearly been replaced fairly recently, as has the parking area which now covers the whole of the front garden and includes the area which was once the footpath from the street to the front door.

The Lease

13. The Tribunal was shown a copy of the original lease. It is dated 10th February 1989 and is for a term of 99 years from the 1st January 1987 with a ground rent of £50 per annum.

14. There are the usual covenants on the part of the landlord to maintain the structure of the property and to insure it. This includes the main entrance of the building and the footpath together with boundary walls and fences. Under clause 3(2)(a) and the 3rd Schedule the lessee has to pay a quarter of the costs incurred as a service charge. This lessee has no right to use the car park and no liability to pay for its repair or replacement. There is no provision for lessees to pay for improvements.

15. Of relevance to this case, the Respondent maintains the drains and pipes within his maisonette and the Applicant maintains all drains and pipes in the common parts subject to being able to recover one quarter of the cost from the lessee. Of further relevance, the Applicant is entitled to recover, as part of the service charge:-

> "*All other expenses (if any) including professional fees incurred by the Landlord in and about the maintenance and proper and convenient management and running of the building including all management costs and the costs of employing any Managing Agent employed in connection therewith*"

16. There is also the usual provision that the landlord is able to recover all costs and expenses of and incidental to the service of a notice under Section 146 of the **Law of Property Act 1925** which is the preparatory procedural step before attempting to forfeit a lease. There is no evidence in this case that such a step is being or has been contemplated.

The Law

17. 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'.

18. 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.

19. Section 21B of the 1985 Act says that any demand for service charges must be accompanied by a statement of the rights and obligations of a lessee. If it is not, then such charge is not payable.

20. Paragraph 1 of Schedule 11 ("the Schedule") of the **Commonhold and Leasehold Reform Act 2002** ("the 2002 Act") defines an administration charge as being:-

> *"an amount payable by a tenant of a dwelling as part of or in addition to the rent which is payable...for or in connection with the grant of approvals under his lease, or applications for such approvals...or in connection with a breach (or alleged breach) of a covenant or condition in his lease."*

21. Paragraph 2 of the Schedule, which applies to amounts payable after 30th September 2003, then says:-

> *"a variable administration charge is payable only to the extent that the amount of the charge is reasonable"*

22. Paragraph 5 of the Schedule provides that an application may be made to this Tribunal for a determination as to whether an administration charge is payable which includes, by definition, a determination as to whether it is reasonable.

23. Finally, there is the issue of whether the consultation requirements have been complied with. The purpose of Section 20 of the 1985 Act as now amended by the **Commonhold and Leasehold Reform Act 2002** ("the 2002 Act") and the Regulations, is to provide a curb on landlords incurring large amounts of service charges which would involve tenants paying large amounts of money.

24. The original regime meant that if service charges were over a certain limit, then the landlord had to either (a) provide estimates and consult with tenants before incurring such charges (b) have such service charges 'capped' at a very low level or (c) try to persuade a judge to waive the consultation requirements.

25. The 2002 Act which came into effect on the 31st October 2003 tightened up these provisions considerably and extended them to qualifying long term agreements i.e. agreements involving a tenant in an annual expenditure of more than £100 and which will last for more than 12 months. The limit for qualifying works is £250 per flat.

26. The consultation requirements are set out in Part 2 of Schedule 4 of the **The Service Charges (Consultation Requirements) (England) Regulations 2003**

("the Regulations") which are extensive and include:-

a. The service of a notice on each tenant of an intention to undertake works. The notice shall set out what the works are and why they are needed or where particulars can be examined. It shall invite comments and the name of anyone from whom the landlord should obtain an estimate within a period of not less than 30 days beginning with the date of the notice. It must specify where comments should be sent and provide the date on which the 30 day period ends.
b. The landlord shall have regard to any comments made and shall then attempt to obtain estimates including from anyone proposed by a tenant.
c. At least 2 detailed proposals or estimates must then be sent to the tenants, one of which is from a contractor unconnected with the landlord, and comments should be invited within a further period of 30 days. Again, the date when the 30 days expires must be set out. Where a tenant has made observations, the landlord shall set out those observations and its response to them.
d. A landlord must take notice of any observations from tenants, award the contract and then write within 21 days telling everyone why the contract was awarded to the particular contractor.

The Hearing

27. The hearing was attended by the parties and the Applicant was represented by Mr. Chipperfield of counsel. He had not attended the inspection.

28. Both parties gave evidence and were questioned by both the parties and the Tribunal members. The Applicant had clearly not appreciated that there was a breach of Section 21B of the 1985 Act. He had also not appreciated that the administration fees he was claiming were not payable because (a) they were not 'expenses' and (b) as no service charges were payable, they were unreasonable in any event. He said that they covered his time and some expenses such as special delivery postage, printer cartridges etc.

29. As the hearing was short, the Tribunal will include the cases put forward by the parties in evidence and by way of representations in the conclusions set out below.

Conclusions

30. The way in which the Tribunal will deal with this section of the decision is to set out the various headings of claim and say whether, if payable, the service charges and administration fees in the claim are reasonable. However, the first and overriding point to make is that until a proper demand is served with the appropriate mandatory information, none of the service charges claimed are, in fact, payable.

31. Thus the first thing for the Applicant to do is send a demand in the prescribed form to the Respondent claiming all outstanding service charges. If this is done in respect of the amounts set out below, there will be no need to trouble this Tribunal again with a decision as to whether each individual charge is reasonable and payable under the terms of the lease. Hopefully the parties will then not need to trouble the court further although if the case is settled between the

parties, they should notify the court in writing.

32. **Insurance excess.** It is the Tribunal's view that this is not in fact a service charge. Also, the Defendant's case that he is not liable to pay an insurance excess, sounds attractive but it does not stand up in law. The evidence is that a pipe in the Respondent's flat split and, as a result, damage was caused to the flat below and possibly some of the structure e.g. joists etc. As the Respondent is liable to keep his pipes in good order, the cost of remedial works is, in effect, a claim by the lessee of the flat below or the landlord – in fact the same person, namely the Applicant – for damages for breach of contract. If any of this money can be obtained from the landlord's insurance, then so much the better. Landlord's insurance would be expected to cover this sort of claim and the Respondent would therefore expect to recoup some or all of his losses in this way.

33. It is for this Tribunal to determine whether the insurance excess is reasonable because it is unusually high and a lessee would not normally be expected to pay such a high excess. Has the landlord acted in such a way as to create or allow the high excess which could, in itself, amount to a breach of an implied term in the lease? The evidence from the Applicant and the documents is that the excess was £250 but it 'jumped' to £1,000 following the insurer's knowledge of 2 occasions when damage had been caused because of water leaks. The Applicant said that the insurance company did this of its own volition. The Respondent alleged that the Applicant had asked the insurers to increase the excess in order to keep the premium down.

34. The Respondent, when asked by the Tribunal whether he had spoken to the insurers about this, said that he had not and was just making an assumption. The Tribunal preferred the evidence of the Applicant on this point. However, that is not an end to the matter. It was the Applicant's case that all of the increase in premium was down to the Respondent because of his previous claims. In fact this turned out not to be the case. In the insurance premium demand which first mentioned the increased premium, two previous leaking incidents were set out, namely a claim for £730 on or about 22nd January 2010 and an incident on 4th April 2011 when no claim had been made. The Applicant accepted that the first incident arose from one of the other flats and not the subject property. Thus his assertion that the increase was solely due to leaks from the subject property was patently wrong.

35. Having raised the excess by so much, the Tribunal would have expected the Applicant to have asked other insurers whether they would take on this risk without such a high excess and without increasing the premium. The insurance industry is volatile and, in the Tribunal's experience, other insurers would have considered this, even with the necessary full disclosure of claims history.

36. In so far as it has any jurisdiction to determine the issue, it is this Tribunal's view that the Respondent should be liable for £250 anyway because that is the sort of excess he should have expected to pay. As a previous leak from his flat had caused the excess to rise by £750, he should also be liable for half of this increase because another flat had also contributed to this increase i.e. a further £375, making a total of £625. The resultant loss to the Applicant landlord is for

failing to test the insurance market to see if he could obtain insurance without such a high excess.

37. This may amount very much to a 'rough and ready' approach to quite a complicated legal problem, but it is the Tribunal's view that it is a fair resolution to a situation where there has been fault on both sides.

38. **Replacement of the driveway**. In answer to the comment that this lessee is not liable for the cost of replacing the driveway, the Applicant says that part of this cost was for replacement of the footpath leading to the front door which the Respondent is liable for. In evidence, the Applicant did confirm that the other 3 leases in the building were different in that the lessees had a right to park on the front and therefore had to contribute to any repairs to the parking area.

39. The Respondent did not really seek to suggest that the front area including the path was not in need of attention. This included not only the surface of the parking area and the path but also work to the edges and the plinth. The total bill for the work was just over £5,000. The Respondent had worked out some figures based purely on a proportion of the total area and considered that his contribution to the path was just over £100. The Tribunal considered that the area of the path was about one sixth of the total. However, taking into account the slightly greater proportion of the cost of edging which would be attributable to the path and the cost of the plinth to which he would have had to contribute in any event, the proper proportion was £1,000 of which he is liable for £250 i.e. one quarter. The consultation was flawed but as the £250 limit has not been exceeded, this is irrelevant.

40. **Communal front door lock**. This is admitted.

41. **Replacement fence**. As the cost per flat is less than the £250 limit, a consultation was not actually required. The only question for this Tribunal to decide is whether the work and the cost were reasonable. The Respondent did not challenge the view that work was needed to the fences on both sides of the front area. He, or rather his brother who considered the issue, took the view that matters could have been rectified by replacing some panels. He accepted that the fences had been *in situ* for at least 10 years and that the posts were wooden.

42. The Applicant's evidence was that he would have jumped at the chance of just replacing some panels but a close examination of the fence revealed that the wooden posts had rotted beneath the surface and he and the other relevant lessee took the view that replacement was necessary. The Respondent was also unable to explain why he had not responded to the consultation letter which said that the fences were being repaired because of the rotting posts. He did not challenge this at the time. The Tribunal preferred the Applicant's evidence and finds that the cost of the fence replace is reasonable. The claim of £200 is therefore reasonable.

43. **Cost of clearing blocked drains**. One of these (unspecified) is admitted. The evidence was that the drain at the rear of the building had become blocked and had to be cleared on 2 occasions. It was said that the cause was oil and solid food waste which 'blew back' when the drain was being cleared. A contractor

was asked to put a camera into the drain to see what the problem was. The view was that there was nothing wrong with the drain but it was impossible to say which flat was responsible for the blockage. The Respondent also tried to suggest that the water company responsible for this area should have been asked to deal with the blockage. He produced some evidence from the internet to suggest that as from 1st October 2011, water companies had taken over responsibility for the maintenance of private sewers which went over neighbouring properties before connecting to a mains company sewer. The Tribunal took the view that the blockage could have arisen in a section of the private drain that may not be interpreted as being a 'private sewer'. In any event, there was nothing to suggest that water companies would not levy a charge for clearing drains and as the amounts are so small, the Tribunal determines that they are reasonable and will be payable as soon as a proper demand has been given to Mr. Price. The decision of the Tribunal is that the amount claimed i.e. one quarter of each bill for clearing the drains is reasonable.

44. **Administration fees**. These are not payable under the terms of the lease. Despite the case put forward by the Applicant, the terms of the lease only allow "expenses" to be claimed. The Administration fees and charges claimed are not expenses. They are penalties for late payment. Thus, although they come within the definition of administration fees in the 2002 Act, they are not payable because the lease does not provide for payment of anything other than specific, provable "expenses". In any event, as no service charges are due, no such fees would be payable. As has been said, certain expenses were incurred. If services charges had been overdue, such expenses may well have been payable.

45. **Summary**. Thus the decision of the Tribunal can be summarised as follows. The following service charges are deemed to be reasonable:-

	£
Front path	250.00
Door lock	36.00
Fence	200.00
Blocked drains	51.25
	537.25

In addition, the Tribunal would decide that £625 would be payable to the Applicant as the Respondent's share of the insurance excess for the water leak.

46. As no service charges or administration fees were due from the Respondent to the Applicant at the commencement of these proceedings, the Tribunal considers it just and equitable to make an order that the Applicant cannot recover its costs of representation before this Tribunal from the Respondent in any future service charge demand.

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Bruce Edgington
Chair
13th July 2012