



9234

**First-tier Tribunal
Property Chamber
(Residential Property)**

Case reference : CAM/00KF/LSC/2013/0088

Property : First floor flat,
74 Leighton Avenue,
Leigh-on-Sea,
Essex SS9 1QA

Applicant : Westleigh Properties Ltd.

Respondent : Timothy Scott

Date of Transfer from Southend County Court : 11th June 2013

Type of Application : to determine reasonableness and
payability of service charges and
administration charges

The Tribunal : Bruce Edgington (Lawyer Chair)
Gerard Smith MRICS FAAV
Roland Thomas MRICS

Date and place of Hearing : 24th September 2013 at Southend
Magistrates' Court, Victoria Avenue,
Southend-on-Sea SS0 7NG

DECISION

1. The Tribunal determines that of the claim of £2,063.64, the following amounts are reasonable and payable:-

<u>Item</u>	<u>Date</u>	<u>Claim(£)</u>	<u>Decision(£)</u>
Service charges on a/c	01.01.12	581.64	530.25
Service charges on a/c	01.07.12	581.64	530.25
Service charges on a/c	01.01.13	581.64	530.25
Interest	11.02.13	86.17	not payable
Ground rent		50.00	no jurisdiction
Interest on ground rent	11.02.13	2.55	no jurisdiction
In house legal expenses	11.02.13	<u>180.00</u>	for the court
		2,063.64	

Therefore, of the claims for service charges and administration charges within the jurisdiction of the Tribunal (£1,831.09), the decision is that £1,590.75 is reasonable and payable.

2. The claim is transferred back to the Southend County Court under claim no. 3SYK50573 for determination of the outstanding issues such as ground rent and interest thereon, costs and enforcement. The parties should note that it will be up to them to make any application to the court in relation to those matters.

Reasons

Introduction

3. Court proceedings were issued by the Applicant for the sum stated above on 23rd March 2013. The Respondent filed a generally worded defence which did not deal with any of the particular parts of the claim. This may have been partially due to the fact that the claim itself does not contain details of the actual service charges being claimed. Having said that, he does not challenge the ground rent and yet he has seen fit not to pay that either.
4. By order of District Judge Dudley dated 11th June 2013, the court transferred the case to the Leasehold Valuation Tribunal so that the matters within its jurisdiction could be determined. On the 1st July 2013, the Leasehold Valuation Tribunal became subsumed within the First-tier Tribunal, Property Chamber, which now has all the powers and jurisdiction of the Leasehold Valuation Tribunal together with new and additional procedural rules. A directions order was made by this Tribunal on the 6th July 2013 timetabling the case to this hearing.
5. Despite being ordered to do so, the Applicant did not file its evidence on time and explained, in a letter dated 10th September 2013 to the Tribunal office, that the directions order had become misfiled. A bundle was enclosed with that letter and a copy served on the Respondent.
6. On the 13th September, Mr. Scott wrote to the Tribunal office saying that he had only just received the bundle and needed more time to consider it. As the bundle contained very little detail and the Respondent had 11 days to consider these papers, the Tribunal chair determined that the application to adjourn should be refused.

The Inspection

7. The members of the Tribunal attended at the premises for an inspection. Those present were Mr. Day-Marr and a colleague from Gateway Property Management Ltd. ("Gateway"), the Applicant's managing agent. After the inspection had started, Mr. Scott appeared. When he was told that there was no answer from the front door bell of the property, he explained that the subtenant was not prepared to allow access.
8. The property is a mid-terraced early 20th century house of rendered brick/block construction under a tiled pitched roof, converted into 2 flats. It has limited on street parking and is within walking distance of Leigh town centre. There is a small overgrown front garden. The Tribunal was unable to gain access to the rear of the property. It appears that there is a pathway around the back but Mr. Scott said that it was overgrown which prevented reasonable access.

9. The property, when viewed from the front, can only be described as being in a bit of a 'sorry state'. The roof had some slipped tiles and part of the cement fillet around the chimney was clearly loose. The wooden barge boards had not been decorated for some years. There was a serious problem with the structure surrounding the bay windows.
10. As is often found in properties of this age, there is a brick/block base under the ground floor bay window but above that window, the construction is timber framed with the upstairs bay window fixed into that timber framing. Above the first floor window is a *faux* gable end construction with a tiled pitched roof. Accordingly, the structure is light and flexible but it needs to be strong to take the considerable weight above.
11. It was immediately evident that half the rendering covering the wall between the 2 windows had fallen off revealing a rough cement screed. The lower part of the timber frame was partially visible and was showing signs of severe rotting. In fact the part of the lower wooden strut to the left had disappeared and what appeared to be an untreated piece of wood had just been wedged into the gap.

The Hearing

12. The hearing was attended by those who had attended the inspection plus one further observer from Gateway and Nigel Amos from Lorica, who are the insurance brokers handling the insurance on this property.
13. The Tribunal first had to establish what the issues were. The parts of the claim within its jurisdiction were simply service charge demands for money on account of anticipated insurance, management fees, interest and repairs. The Applicant had served a statement from Michael Lawton which was adopted by Mr. Day-Marr who represented the Applicant throughout the hearing. That statement said that the demands had been "*based on a budget which was prepared with careful consideration to the typical levels of expenditure for properties of this age and nature*".
14. Upon questioning from the Tribunal, it turned out that this was not strictly accurate. A budget of sorts had been prepared on 12th January 2010 at page 53 in the bundle which, it was said, had been based on the previous year's figures. There had been no subsequent budget and the Tribunal was not shown the accounts for 2009 or 2010.

15. This 'budget' consisted of a list of figures viz:-

Buildings insurance	621.00
Repairs and Renewals	1,177.00
Management fees	470.00
Accountancy charges	47.00
Bank charges	<u>12.00</u>
	2,327.00

This figure was for the whole building and, thus, the annual claim for each of the two flats was £1,163.50 or £582.00 every 6 months.

16. The bundle also contained the service charge accounts up to 31st December 2012 which showed a surplus. The charges incurred were:-

Buildings insurance	779.00
Management fees	528.00
Accountancy	48.00
Bank charges	12.00
Postage	<u>12.00</u>
	1,379.00

More than that had been demanded on account for that year which left a 'surplus' of £948 which was said in the accounts to have been transferred to 'reserves'. Mr. Day-Marr said that this was, in effect, a fiction because the tenants had not paid their service charges.

17. Mr. Scott was then asked what he wanted to say to the Tribunal. It should be said that during the giving of his evidence it transpired that he was a partner in Scott & Stapleton who are local agents involved in property sales and letting. His headed paper contains what is sometimes known as a 'strap line' i.e. an advertising statement which says "*20 years of moving people*". With this in mind, the Tribunal were somewhat concerned that he had given no prior indication of the items he was challenging. He had, after all, received the service charge accounts for 2012 in May 2013 and could have at least written to the Applicant at that stage to raise more specific concerns.
18. The 3 items he wanted to challenge were (1) the fact that this property had not been managed at all (2) the level of management fees, even if it had been managed and (3) the level of insurance premiums. Dealing with each of these, in turn, the evidence was as follows.
19. As to **whether the property had been managed**, the Applicant's submission was that Gateway had taken over management on the 1st June 2009. The first indication of anything positive being done was in December 2012 when (1) they were told of the rendering falling off the wall at the front and effected temporary repairs and (2) they served notice of intention to undertake works at the property pursuant to section 20 of the **Landlord and Tenant Act 1985** ("the 1985 Act"). They were intending that the specification would now be prepared but they were not intending to have these works carried out until next year.
20. Mr. Scott said that he had not received any section 20 notice. Mr. Day-Marr was unable to produce a copy but confirmed that the address he had for Mr. Scott was the correct one.
21. As to the **management fees**, Mr. Day-Marr said that Gateway complied with the RICS code of conduct. He asserted that £200 per flat per annum plus VAT was reasonable and he pointed to a previous LVT decision from earlier in 2013 which had confirmed that £200 plus VAT was a reasonable management fee in a another case. Mr. Scott

produced fee notes from Scott & Stapleton showing an annual figure of £150 plus VAT for other properties and he confirmed that one of the properties involved was the same as the current one i.e. a house converted into 2 flats. It was only when being cross examined about these fee notes, that Mr. Scott revealed his firm's work as a managing agent.

22. As to the **insurance premiums**, Mr. Scott produced premium demands for 3 other properties from AXA, NIG and BRIT. He said that they were for similar properties to this one and were for considerably less money. Mr. Amos then gave evidence pointing out differences between the insurance for this property and those produced by Mr. Scott. The Tribunal asked him what commission was earned by Lorica and he said that he "*could not comment*". When it was put to him that this could be as much as 40% he did not deny it but continued to say that he could not comment.
23. He pointed out that this was a block policy which had advantages because some of the properties in the portfolio of properties may not be able to be insured otherwise as insurers would not take on the risk. Also he confirmed that if there was, for example, a block of flats with a very bad claims record, this would be reflected in the premium for the subject property for the very reason that it was a block policy and, thus, risk was 'spread' over all the properties covered.

Conclusions

24. The Tribunal would like to comment on a point made by Mr. Day-Marr in his opening remarks. He suggested that undertaking work to a property when the service charges had not been paid was difficult because there is no money to spend. Whilst one may have sympathy for that comment within the context of a domestic budget, the fact is that we are not talking about that context. In this case, the landlord's contractual liability is to maintain the property. It cannot just wash its hands of the responsibility if service charges are not paid as some sort of 'punishment'. That is the risk which landlord's take on when they purchase or commence long leases.
25. For the following reasons, the Tribunal determines that reasonable amounts to be claimed on account of service charges for the years in question are:-

	£
Buildings insurance	621.00
Repairs and renewals	1,200.00
Management fees	<u>300.00</u>
	2,121.00

Thus, the half yearly figure for each flat will be £2,121.00 divided by 4 i.e. £530.25. There would also be VAT on the management fee but this would not be payable until much later and has not been included in the 'advance' payment. As far as interest is concerned, there is no contractual liability to pay interest in the lease although the Tribunal notes that interest has been claimed in the proceedings under section 69 of the **County Courts Act 1984**. That is a matter for the court.

26. Even on the Applicant's own evidence, the first time Gateway appeared to actually do any management, apart from collect the service charges, was in December 2012, i.e. some 3½ years after they took over management. They did not even arrange the insurance cover. They were fully aware that Mr. Scott was challenging the level of service and yet did not make any efforts to suggest, for example, that they regularly inspected the property or did anything else. Bearing in mind the condition of the property as seen from the front, it seems clear to this Tribunal that the level of management has been very poor.
27. One obvious result of this is the bay window at the front of the property. It appears that the bottom of the timber frame has been exposed to the elements since December 2012. Efforts should have been made then to at least protect the wood from the elements. Gateway are now saying, despite allegedly commencing a section 20 consultation in December 2012, that they will let the frame be exposed for a second winter before effecting repairs.
28. As to the level of management fees, the Tribunal agrees that £200 per annum plus VAT per flat is just within the range of reasonableness in the Southend area. Some agents are cheaper. In the previous LVT case referred to by the Applicant, Gateway had only recently taken over management and had done some urgent work to sort out accounts and paperwork.
29. The Tribunal accepts – as, presumably, does Mr. Scott – that management fees have to cover backroom staff who have to be available to deal with emergencies, paperwork, taking instructions and difficult problems. Thus 'management' does not necessarily involve hands on work at the property itself. However, in this case, the standard of management has been low and, using its knowledge and experience, the Tribunal considers that an annual fee of £150 plus VAT per flat is reasonable for this property for the years in question.
30. As to the additional fees charged, the Tribunal assesses them at 'nil' for a number of reasons, the most important of which are:-
- The insurance provides DAS Home Assistance which means that Gateway are not troubled with out of hours emergencies
 - The RICS Service Charge Residential Management Code (2nd edition) at paragraph 2.4, sets out those things which should be included within a fixed annual fee e.g. produce annual spending estimates; produce and circulate service charge accounts; arrange periodic health and safety checks; visit the property to check its condition; administer building and other insurance etc. The service charge accounts are very straightforward and should not attract either an additional internal charge or an accountant's charge.
 - Postage is an overhead to be included within any professional charge
 - No evidence has been produced of any bank charge incurred

- No explanation has been given for the invoice for £48 at page 64 in the bundle described as 'Management Fees – Gateway additional 2012 fee'. This simply seems to be a method by which Gateway increase their annual fee of £200 plus VAT to £240 plus VAT.
31. In his written evidence, Mr. Lawton says that "*with the amendments to recent legislation affecting our industry there is a subsequent increased liability for Managing Agent's (sic) which has necessitated an increase in staffing levels, extended training, more sophisticated computer software and increased levels of professional indemnity insurance to reflect the increase in risk and complexity of the legislation*". With the greatest of respect to Mr. Lawton, this statement is simply not correct.
 32. The last substantial changes in legislation came into effect in 2007 with amendments to the 1985 Act such as having to service charge demands with prescribed information to tenants. Thus, with the passage of time and greater awareness of those changes, many of which were before 2007, suggestions that the complexity of legislation has somehow increased risk recently must be wrong.
 33. As far as insurance is concerned, the Tribunal does not have sufficient evidence before it to do as Mr. Scott asks. The 'evidence' he has produced is from his own firm. Having said that, the 2 AXA premium demands are comparatively similar and so tend to suggest that property insured on an individual basis will be cheaper.
 34. The problem faced by the Tribunal is the long standing thread of court cases which has set down the general principle that provided insurance is arranged in the normal course of business with an insurer of repute, then a landlord does not have to go for the cheapest quote.
 35. Nevertheless, this case has raised some doubts about this general principle which was established many years ago. The whole issue of a block policy as opposed to individual policies is particularly worrying because the benefit of a block policy should be economy of scale. There is no logical reason why the lessees of this particular property should pay a premium which is higher than could be achieved with an individual policy simply because another property on the block policy cannot be insured elsewhere or has a particularly bad claims record. That seems to be the effect of Mr. Amos' evidence.
 36. The issue of commissions is also a worry. Mr. Amos' refusal to say what commission his agency earns and, in particular, his refusal to deny that this could be as much as 40% of the premium is interesting. The combined experience of the members of this Tribunal, leads them to believe that the commission could well be 40% or more. It is accepted that there is a great deal of work involved in organising a block policy, but insurance companies want this sort of work and are clearly willing to pay handsomely in commission for it. As it is the lessee who has to pay for this, one wonders how 'reasonable' it is.

37. In this case, there is an additional feature namely the increase in premiums since 2009. In the budget referred to above the figure was £621 for that year. It is now £778.77 including insurance premium tax. Mr. Amos suggests that this is because of incremental rises imposed by insurers. He could not say when the property was last valued for insurance purposes. The experience of this Tribunal is that the insurance industry has been very competitive over the last few years. Whilst re-building costs have gone up, property values have not moved very much since 2009 and neither have insurance premiums.

38. Based on this and the evidence of the other AXA premium demand produced by Mr. Scott, it is the Tribunal's view that insufficient has been done by the broker in this particular case to insure this property properly in the course of business and the Tribunal determines that the correct premium in compliance with the current case law is £621 per annum.

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Bruce Edgington
Regional Judge
26th September 2013

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