

CHI/21UD/LSC/2007/0084

**DECISION OF THE LEASEHOLD VALUATION
TRIBUNAL ON APPLICATIONS UNDER THE LANDLORD
AND TENANT ACT 1985: SECTION 27A, AS AMENDED**

Address: Marine Court, Marina, St Leonards on Sea, East
Sussex, TN38 0DZ

Applicant: Marine Court Residents Association

Respondent: Rother District Investments Ltd

Application: 31 August 2007

Inspection: 31 January 2008

Hearing: 31 January 2008

Appearances:

Tenants

Mr. Martin Solicitor and Leaseholder
Mr. Fanslau Leaseholder
Mr. Strickland Leaseholder

For the Applicant

Landlord

Miss Calder Counsel
Mr Couchman Maintenance Manager
Mr John Managing Agent

For the Respondent

Members of the Tribunal: Mr I Mohabir LLB (Hons)
Mr B Simms FRICS MCI Arb
Mr R Athow FRICS MIRPM

IN THE SOUTHERN LEASEHOLD VALUATION TRIBUNAL

CHI/21UD/LSC/2007/0084

**IN THE MATTER OF SECTION 27A OF THE LANDLORD & TENANT ACT
1985**

**AND IN THE MATTER OF MARINE COURT, MARINA, ST LEONARDS ON
SEA, EAST SUSSEX, TN38 0DZ**

BETWEEN:

MARINE COURT RESIDENTS ASSOCIATION

Applicant

-and-

ROTHER DISTRICT INVESTMENTS LIMITED

Respondent

THE TRIBUNAL'S DECISION

Introduction

1. This is an application made by the Applicant on behalf of the leaseholders pursuant to section 27A of the Landlord and Tenant Act 1985 (as amended) ("the Act") for a determination of their liability to pay and/or the reasonableness of various service charges arising in the 2005 and 2006 service charge years.
2. In the originating application, the Applicant makes a further application pursuant to section 20C of the Act to *disentitle* the Respondent from being able to recover all or part of any costs it had incurred in these proceedings. However, at the hearing it was conceded by Counsel for the Respondent that any such costs so incurred were not recoverable under the terms of the leases.

3. The service charges initially challenged by the Applicant were:

2005

| | |
|-----------------|------------|
| Surveyor's Fees | £24,864.68 |
| Cleaning Costs | £5,670 |
| Wages | £90,970.57 |

2006

| | |
|-------------------------|-------------|
| Wages | £120,829.11 |
| Legal Costs | £4,029.58 |
| Administration Fees for | £5,588.89 |
| Major Works | |

At the hearing the Tribunal was told that the cleaning costs and the legal costs in dispute had now been agreed by the parties as payable by the lessees. The Tribunal was also told that the basis of calculation for the wages in relation to both years had been agreed and that the actual sum that remained in issue for each of those years was only £18,957.64. The service charge costs that now remained in issue are considered in turn below.

4. The Tribunal was provided with a specimen lease relating to Flat 117 in the subject property, which contained the relevant service charge provisions. This lease is dated 2 October 1972 and was granted by Woodmill Estates (Southern England) Ltd. to MacDonald-Buchanan Trustees Ltd. for an initial term of 78.25 years from 25 December 1971 ("the lease"). It was the Tribunal's understanding that the leases of the other flats belonging to the lessees on whose behalf this application is brought were granted on similar terms. The Applicant did not seek to challenge the contractual liability to pay a service charge contribution or the contractual rate at which that contribution was calculated. It was the Applicant's case that the service charge costs in issue either had been unreasonably incurred or were unreasonable as to quantum. It is, therefore, not necessary to set out details of the relevant service charge provisions, save to say that a basic service charge of £135 per annum is payable subject to the provisions set out in Part 1 of the Fifth Schedule. In

addition, the Lessor could also recover a service charge contribution from the lessee as an additional service charge for those costs incurred under Part 2 of the Fifth Schedule. This additional service charge contribution was calculated at a contractual percentage rate on the total expenditure incurred by the Lessor.

Inspection

5. The Tribunal externally inspected the subject property on 31 January 2008. It also carried out an internal inspection to some areas of the common parts of the building. The property is an iconic mansion block comprising 168 flats built in the style of an ocean liner on the seafront in St Leonards on Sea. The building was constructed in the 1930s with cement rendered elevations under a flat roof. The flats are arranged on 11 floors with a penthouse on floor 12 all above the ground floor commercial premises. There are four separate entrances at the front each with staircase and lift access and a series of subsidiary and fire escape staircases at the rear. The Tribunal made a general brief inspection of the interior common ways and exterior on a very windy day. The building externally is in a poor state of repair and decoration.

Decision

6. The hearing in this matter also took place on 31 January 2008. Mr. Martin, a solicitor and also a leaseholder, represented the Applicant. The Respondent was represented by Miss Calder of Counsel.
7. For the Applicant, the Tribunal heard evidence from Mr. Strickland, the Secretary of the Residents Association, Mr. Fanslau, the leaseholder of Flat 169 and Mr. Martin here is the leaseholder of Flat 117. Evidence for the Respondent was given by Mr. Couchman, the maintenance manager and Mr. John, the managing agent.

2005

(a) Surveyor's Fees - £24,864.68

8. The previous managing agents, Seaford Property Management Co. Ltd. ("SPMC") were appointed on 1 May 2002. It seems that a level of dissatisfaction grew amongst some of the leaseholders about the management of the subject property by SPMC and, subsequently, on 6 February 2006 Godfrey John and Partners ("Godfrey John") were appointed as the current managing agents.
9. These costs were surveyor's fees paid, in the main, to a firm known as A W Vint & Son ("Vint") for surveys carried out in relation to various matters pertaining to the building¹ and were incurred during the tenure of SPMC.
10. The Applicant's challenge that these costs had not been reasonably incurred was made in two ways.

(i) The Agreement

11. The Applicant relied on a purported agreement by Godfrey John in a letter dated 20 October 2006² to refund the sum to the service charge account in 2007 if validity was not provided by SPMC by 31 December 2006. It was a matter of common ground that no such refund had been made and the managing agent, Mr. John, in cross-examination said that he had been instructed by the Respondent not to do so.
12. The Tribunal concluded that the purported agreement was not conclusive evidence that these costs had not been reasonably incurred. Taken at its highest, it was simply *prima facie* evidence of an agreement to credit the service charge account by this amount and no more. The Tribunal was of the view that, in the absence of any direct evidence on the point, it could not safely conclude that Mr. John had express authority to enter into such an agreement on behalf of the Respondent and whether it was binding upon it. In

¹ See page 20 of the bundle

² see page 151 paragraph 2 (a)

the circumstances, found that the Applicant could not rely on this purported agreement.

(ii) No Works Carried Out

13. It was submitted on behalf of the Applicant that none of the works in respect of which the survey reports had been commissioned were carried out and, therefore, the costs had not been reasonably incurred.
14. In cross-examination, Mr. Strickland said that he had not been aware of the necessity to have the various surveys carried out. Indeed, no section 20 notices had been served by the Respondent in relation to any works that had been the subject matter of these surveys. The first time he had been made aware of proposed major works was when he was served with a Notice of Anticipated Costs by SPMC dated 20 December 2004³. He accepted in principle that before the major works could be commenced, it may be necessary to carry out investigation in the nature of survey reports. Mr. Fanslau and Mr. Martin largely agreed with Mr. Strickland's evidence but said that they had received preliminary reports. Materially, they accepted that the subject property was in need of major works carried out to it.
15. Mr. Couchman was able to confirm that a number of investigative surveys had been carried out, for example, the survey of the external façade using roped access⁴.
16. The Tribunal determined that these costs had been reasonably incurred. It was abundantly clear that the Respondent had intended at the time to carry out major works to the subject property in the foreseeable future. From a reading of the relevant invoices⁵ there is no doubt that the various surveys had been carried out with a view to preparing a specification of works, undertaking a tendering process and consulting with the leaseholders as required by section 20 of the Act. Indeed, save for the buildings insurance reinstatement cost

³ see page 58 of the bundle

⁴ see page 31

⁵ see page 32 onwards

survey, it would be difficult to imagine how the Respondent could undertake such a process without first having carried out these surveys in such a large and complicated building. The various surveys later carried out were consistent with the proposed works set out in the Notice of Anticipated Costs prepared by SPMC dated 20 December 2004 and served on the leaseholders. The fact that the proposed major works have not commenced does not prevent the Tribunal from making a finding that these costs were reasonably incurred. The Tribunal accepted the explanation given by the Respondent, at paragraph 6 of its statement of case⁶, that it was unable to do so because a number of the leaseholders were withholding payment of their service charge contributions for the major works.

17. The only challenge made in relation to the buildings insurance reinstatement cost assessment was that a copy of the report was not provided to the lessees. This in itself did not prevent the Tribunal from finding that this cost was also reasonably incurred. There was no evidence that such a reinstatement cost assessment had been carried out by the Respondent in the preceding years. The Tribunal was of the view that the Respondent had acted prudently in having this assessment carried out to ensure that the building was adequately insured at the proper reinstatement cost thereby protecting not only its interests but those of the lessees also. The Applicant had not challenged the quantum of the total costs claimed as being unreasonable. Accordingly, these costs were allowed by the Tribunal without deduction.

2006

(b) Management Administration Fees for Major Works - £5,588.89

18. These costs related to the administration fees charged by Godfrey John to regarding the installation of new boilers, being the major works, at the subject property in 2006. The cost of installing the new boilers was £47,565 excluding VAT and was carried out by a contractor known as Ambient Technologies. Godfrey John charged a management administration fee of £4,756 calculated at 10% of the cost of the work. It appears that the work was

⁶ see page 21

carried by a Mr. Buss, an employee of Godfrey John. It was the Respondent's case that this charge was in accordance with paragraph 8 of the management contract between it and that firm⁷.

19. The Applicant contended that the management administration fee by Godfrey John was unreasonably high because there had been little or no supervision of the work carried out by that firm. Indeed, Mr. Strickland asserted that it was he who negotiated a discount of 10% from the cost of the work because he had enjoyed a business relationship with Ambient Technologies.
20. Mr. Fanslau said that what he knew about the installation of the new boilers was entirely hearsay. Although he admitted that he had no experience regarding contracts of this kind, he nevertheless contended that the administration or management fee charged by Godfrey John should be between 5 -7.5% and not the 10% claimed. Mr. Martin said that he could not say if the work had been supervised by Godfrey John but he too also contended that the supervision carried out was not sufficient to justify a fee of 10%.
21. In his evidence, Mr. John explained the duties performed by Mr. Buss on behalf of his firm. These are set out at paragraph 31 of the Respondent's statement of case⁸ and need not be repeated here. However, Mr. John asserted that it was Mr. Buss and not Mr. Strickland who had negotiated the 10% discount for the cost of the work.
22. The Tribunal determined that the administration or management fee charged by Godfrey John regarding the installation of the new boilers was reasonable. No complaint was made by the Applicant that the managing agent had not tendered properly for the work. The Tribunal took account of the fact that this is a large building containing 168 flats and any contract for repair work requires extensive administration on the part of the managing agent. The only complaint made against Godfrey John is a lack of supervision of the work.

⁷ see page 123

⁸ see page 26

However, supervision of the contract does not form part of the duties of a managing agent and, indeed, Godfrey John did not charge for it. Supervision would normally be undertaken by another specialist surveyor, for example, a heating engineer or facilities management surveyor, who would charge a fee for undertaking this duty. The Tribunal made no finding about whether it was Mr. Strickland or Mr. Buss who negotiated the 10% discount on the cost of the work. The evidence on this point directly conflicted and there was no compelling evidence either way. The Tribunal attached no weight to the evidence of Mr. Fanslau because it was entirely hearsay and Mr. Martin could not give any direct evidence on this matter. In any event, even if the discount had been negotiated by Mr. Strickland, it would not have resulted in a reduction of the administration or management fee because the Tribunal would have found the fee of 10% to be reasonable having regard to the other administrative and management duties performed by Godfrey John in relation to this work.

(c) Wages - Both Years

23. The complaints made by the Applicant largely concerned Mr. Couchman. He has been employed as a full-time maintenance manager at the subject property for the last seven to eight years. It was said on behalf of the Applicant that Mr. Couchman's duties should also have included, for example, external painting of the rear of the property. He generally lacked supervision in the way he worked and, therefore, he did not perform his duties adequately and routine maintenance was not undertaken. In the circumstances, the Applicant submitted that Mr. Couchman's salary for both years should be reduced by 50%.

24. In his evidence, Mr. Couchman set out the duties and tasks performed by him. He, helpfully, set these out in a maintenance program prepared by him⁹. His working day commenced at 8.30 a.m. when he would listen to the report of the duty porter, arranged the duties of the decorator and deal with any maintenance problems that had occurred. On any given day, he would be

⁹ see page 192

called upon to perform between 6 and 15 tasks. He went on to say that the subject property was a complicated building, for example, the plumbing fittings were not in imperial measurements because of their age. This meant that many of the fittings were not standard. He only carried sufficient stock to carry out emergency repairs and as a result he often had to leave the building to purchase any necessary supplies. This was exacerbated when SPMC were managing the building because of the petty cash system they operated and he was often away from the building for longer periods. Under Godfrey John an account system with local suppliers was now in place and this saved on average a couple of hours each day. In cross-examination, Mr. Couchman said that he had been provided with no plan for ongoing maintenance by the Respondent. Essentially, his job was one of re-action rather than pro-action.

25. Having regard to the nature of the subject property and the duties performed by Mr. Couchman, the Tribunal determined that the salary paid to him in relation to both service charge years was entirely reasonable. It was not the case that Mr. Couchman failed to perform his duties adequately or at all. Mr Strickland, in cross-examination, said that he had asked Mr. Couchman to carry out minor repairs for him twice in the preceding 12 months and Mr Couchman had done so. Mr. Strickland conceded that it was a difficult building to maintain and that a lot of the service installation and technology was old. He described the building as being idiosyncratic. Mr. Fanslau also confirmed that Mr. Couchman had assisted him on numerous occasions when asked to do so. Taking all of these matters into account, the Tribunal concluded that the salary paid to Mr. Couchman was reasonable for both years. If the allegation of a lack of supervision was upheld by the Tribunal, it would appear to be a management failure on the part of the Respondent and did not provide a basis upon which the Tribunal could make a finding that Mr. Couchman's salary was unreasonable.

Costs & Fees

26. The liability for the recovery of costs by way of the terms of the lease has already been dealt with at paragraph 2 above. However the Tribunal has to consider whether it would be reasonable for the Respondent to recover the

costs if it were allowed. The issues raised at the hearing could have been dealt with in a more straightforward manner and although the Respondent had to answer the case it is not reasonable for it to recover its costs by way of the service charge. Any Order preventing recovery is made.

27. As to the matter of the fees paid by the Applicant in bringing this application, the Tribunal had regard to the fact that it had effectively lost on the issues upon which a determination was sought. Applying the principle that "costs should follow in the event", it is right and proper that the Applicant should not be able to recover the fees paid by it to the Tribunal.

Dated the 9 day of April 2008

CHAIRMAN.....*J. Mohabir*
Mr. I. Mohabir LLB (Hons)

**THE LEASEHOLD VALUATION TRIBUNAL for the
SOUTHERN RENT ASSESSMENT PANEL.**

CHI/21UD/LSC/2007/0084

S. 27A LANDLORD & TENANT ACT 1985 (as amended)

**DECISION ON AN APPLICATION FOR LEAVE TO APPEAL
RE: MARINE COURT, MARINA, ST LEONARDS-ON-SEA, TN38 0DN**

Applicant: Marine Court Residents Association

Respondent: Rother District Investments Ltd

1. The Tribunal has considered the Applicant's request for permission to appeal dated 30 April 2008 and determines that permission be refused on the basis that the grounds of appeal disclose no reasonable prospect of success.
2. The various grounds of appeal relied on all effectively turn of the same point, namely, that the Tribunal could not have reached the conclusions it did based on the evidence before it. The Tribunal does not consider that it had erred in its findings for the reasons set out in the Decision.
3. In accordance with Section 175 of the Commonhold and Leasehold Reform Act 2002, the Applicant may make further application for permission to appeal to the Lands Tribunal.

**Tribunal: Mr I Mohabir LLB (Hons)
Mr B H R Simms FRICS MCI Arb
Mr R Athow FRICS MIRPM**

Signed:  **Dated: 11 June 2008**

Chairman