

**SOUTHERN RENT ASSESSMENT PANEL  
LEASEHOLD VALUATION TRIBUNAL**

**In the Matter of the Landlord and Tenant Act 1985 Section 27A**

**and**

**In the Matter of Flat 30, Sandown Heights, Frogmore, Fareham, Hampshire PO14  
3DD**

**Between:-**

**PEARLBECK LIMITED**

**Applicant**

**and**

**MR GURDEV SINGH BABBRA**

**Respondent**

On hearing Mr Grenville Healey Counsel for the Applicant and Mr Babbra in person

**Reasons for Decision**

Inspection: 8th May 2008

Hearings 8th May 2008  
17th June 2008

Tribunal:

Miss T Clark (Chairman)  
Robert Long LLB  
D Lintott FRICS

## **Decision**

1. The tribunal has determined that the total of the services charges to be paid for the years 2004, 2005 and 2006 for the subject property that were in issue in this case is £1,629.89 and is properly payable by way of service charge. It is made up as set out in paragraph 37 and 38 below. This sum is payable in addition to any sums that may have been demanded and are payable but have not been in issue in these proceedings.

## **Reasons**

### Background to the Application

2. This matter commenced in the Portsmouth County Court as a claim dated 1st May 2007 for arrears of service charges in the sum of £1,629.89 and for a declaration under section 81 of the Housing Act 1996 that service charges claimed for the years 2004, 2005 and 2006 were properly due and payable..
3. A Counterclaim was filed and served by the Defendant Mr Babbra on 12th September 2007. The Defence and Counterclaim alleged:

"The issue which the court is asked to consider is that on several occasions the claimants Managing Agents (hereinafter referred to as "the Claimant") were notified of structural deficiencies to the external parameters of the property. The primary defect which resulted in the structure being adversely affected was the lack of a ventilation or air brick to the external walls. This caused severe condensation within the internal walls of the property."
4. The Defendant claimed loss of rental caused by lack of ventilation making the flat in question unfit for human habitation due to "mould and dampness."
5. In support of that Defence and Counterclaim a report was compiled by a company called MT Preservation Ltd dated 21st March 2005 which reported on the reasons why the flat of which Mr Babbra is the tenant has suffered such problems with condensation. This and two further reports referred to were appended to the Defence and counterclaim and produced to us at the hearing.
6. The report of MT Preservation Ltd concluded that the heating had been left on in the flat, there were no windows open and piles of clothes/rubbish were left against walls. Two further reports, one from a company called Bo-Wood dated 23rd March 2005 and another from a company called McCoy-Hill dated 30th March 2005 both conclude that there were no adverse moisture readings.
7. An application for summary judgment was made by the Claimant under the Civil Procedure rules Part 24. That application was dealt with by District Judge Jolly on 24th January 2008. He dismissed the application for summary judgment by the

Claimant, but also dismissed the Counterclaim by Mr Babbra. He remitted the matter to the tribunal which is how this application has come before us.

8. Provisional directions were given on the 8th February 2008.

### **Inspection**

9. The inspection by the tribunal took place on the 8th May 2008 in the presence of Mr Healey and of Mr Babbra. The tribunal inspected the interior of the property although they were not able to gain access to two of the three rooms about which complaint was made by the Respondent as the Respondent did not have a key to allow access. The tribunal viewed one bedroom, the bathroom, kitchen and hall. There was some evidence of the mould of which Mr Babbra complained present in that bedroom. Mr Babbra pointed out the position in the kitchen where he had hoped to install an extractor. The tribunal also viewed the external parts of the building. It saw a brick purpose-built block under a tiled roof, built in or around 1975. The Respondent's flat was on the first floor.

### **The Law**

10. The statutory provisions primarily relevant to applications of this nature are to be found in sections 18, 19 and 27A of the Act. The Tribunal has of course had regard in making its decision to the whole of the relevant sections as they are set out in the Act, but here sets out what it intends shall be a sufficient extract (or a summary, as the case may be) from each to assist the parties in reading this decision. Section 18 provides that the expression "service charge" for these purposes means:

"an amount payable by a tenant of a dwelling as part of or in addition to the rent -

(a) which is payable directly or indirectly for services, repairs, maintenance, improvements or insurance or the landlord's costs of management, and

(b) the whole or part of which varies or may vary according to relevant costs"

"Relevant costs" are the costs or estimated costs incurred or to be incurred by the landlord in connection with the matters for which the service charge is payable, and the expression "costs" includes overheads.

11. Section 19 provides that:

"Relevant costs shall be taken into account in determining the amount of a service charge payable for a period:

(a) only to the extent that they are reasonably incurred, and

(b) where they are incurred on the provision of services or the carrying out of works only if the services or works are of a reasonable standard

and the amount payable shall be limited accordingly”.

12. Subsections (1) and (2) of section 27A of the Act provide that:

“(1) An application may be made to a Leasehold Valuation Tribunal for a determination whether a service charge is payable and, if it is, as to –

- i. the person to whom it is payable
- ii. the person by whom it is payable,
- iii. the amount which is payable,
- iv. the date at or by which it is payable, and
- v. the manner in which it is payable.”

Subsection (1) applies whether or not any payment has been made.

There are certain exceptions that limit the Tribunal’s jurisdiction under section 27A but none of those exceptions has been in issue in any way in this case.

13. To such extent (if at all) as the point is not implicit in the wording of the Act, the Court of Appeal laid down in *Finchbourne v Rodrigues* [1976] 3 AER 581 CA that it could not have been intended for the landlord to have an unfettered discretion to adopt the highest possible standards of maintenance for the property in question and to charge the tenant accordingly. Therefore to give business efficacy to the lease there should be implied a term that the costs recoverable as service charges should be fair and reasonable.

### **The Lease**

14. The relevant parts of the lease under which Mr Babbra holds the property (“the lease”) are as follows;

15. The lease demised the property for a term of 99 years from 7th May 1976.

16. The Lessees obligations are set out at Clause 2 of the lease where it provides:

“To pay to the Lessors without any deduction by way of further and additional rent a proportionate part of the expenses and outgoings incurred by the Lessors in the repair maintenance renewal and insurance of all land and buildings from time to time situate on the Lessors’ Estate and the provisions of services therein and other expenditure as the same are set out in the Fifth Schedule hereto such further and additional rent (herereinafter called "the Service Charge") calculated in accordance with and subject to the following provisions:- ..”

and

"The expression 'the expenses and outgoings incurred by the Lessors' as hereinafter used shall be deemed to include not only those expenses outgoings and other expenditure hereinbefore described which have been actually disbursed incurred or made by the Lessors during the year in question but also such reasonable part of all such expenses outgoings and other expenditure hereinbefore described which are of a periodically recurring nature (whether by occurring by regular or irregular periods) whenever disbursed incurred or made .. by way of reasonable provision for the anticipated expenditure in respect thereof as the Lessors their Auditors or Accountants or Managing Agents (as the case may be) may in their discretion allocate to the year in question as being fair and reasonable in the circumstances"

17. The Sixth Schedule to the lease sets out the Lessors' obligations including "to maintain repair redecorate renew ... the structure of the premises of the building, external and internal walls but not the interior faces of such parts of the external walls " .... the "drains ... gas and water pipes ... in under and upon the demises premises. .." and "the cost of keeping insuring and keeping insured .... all buildings"
18. Schedule 5 refers to these items as being those to which the lessee is obliged to pay a proportionate part of such cost.

### **The hearings**

19. The tribunal has determined that subject to a small number of exceptions as detailed below the services charges are reasonable, including for the avoidance of any doubt the management charges and health and safety charges.
20. Before turning to the charges in detail the tribunal has also determined that the maximum amount that the Applicants it can determine in the terms of the reference to it is that contained in the pleadings issued in the County Court and in particular the "prayer" which is at the end of the Particulars of Claim when the Applicant sets out the exact remedy he is asking for and the amount claimed. The amount claimed in this case is £1,629 although the amount that appears actually to be payable is £1,725.82 as set out at page 32 of the main bundle.
21. We have heard evidence from Mr Babbra and have read his detailed witness statements.
22. We have heard evidence from Mr Growse the managing agent on behalf of the Applicant and we have read his witness statement. We have had regard to the schedule directed to be prepared after the first day of the hearing which sets out Mr Babbra's complaints about the service charges and the Applicants responses to those complaints.

23. Mr Babbra put questions to Mr Growse concerning the schedule. He raised the issue of the lack of air bricks. He asked us to ignore the findings of the County Court which had dismissed his Defence and Counterclaim. We refused to do this for the reasons set out in paragraph 26 below.
24. Except as recorded in this decision Mr Babbra did not challenge the service charges that had been demanded from him on any other grounds.
25. Mr Babbra's complaints can be summarized as follows:
- i) that no air brick was fitted nor was he given permission to fit his own airbrick.
  - ii) that 42 Cowes Court is a ground floor property and yet the landlords were charged and passed on to the tenants the cost of scaffolding to undertake works to the roof. He says that this is indicative of poor management in not picking up that this was a ground floor flat. The Respondents dispute that it is a ground floor flat and the plans indicate that it is a first floor flat.
  - iii) the excess in insurance claims was charged to the tenants in all cases, whether or not the work done came within the Lessors' or Lessees' responsibility under the terms of the lease.
  - iv) in some cases the balance of works done over and above the excess was incorrectly charged to tenants through the service charge rather than being payable by the relevant Lessee directly, and
  - v) that despite a request so to do he has never received permission to put in an air vent extractor from the kitchen to the outside of the property.

We deal with each of those issues in turn.

#### Failure to fit an airbrick to the premises

26. Insofar as the Defendant asks the tribunal to reconsider the issue of the Counterclaim and whether or not the property suffered from condensation and damp due to the absence of an air brick the tribunal concludes that it is bound by the decision of the Court which dismissed the Counterclaim and we determined that the reason for such dismissal is not material to our decision. It is, as a matter of trite law, not open to the tribunal in effect to retry a matter that has already been determined. Mr Babbra was specifically asked by the tribunal whether or not the County Court heard him upon the counterclaim, and he confirmed that it had but said that in his view the decision of the Court was wrong.

#### Wrongly charging for work done to the roof above 42 Cowes Court

27. Whether 42 Cowes Court is on the ground, first or second floor, the tribunal is satisfied that the invoice represents work undertaken to the flat roof above flat 42 and the payment of this invoice affords no indication of poor management by the Applicants.

Excess charged to Tenants under service charge, whether or not work was Landlords' or Tenant's responsibility

28. The evidence given to the tribunal showed, and it finds as a fact, that for some of the items claimed as part of the service charge the Applicants had undertaken work in relation to individual tenants' flats which were the landlords' responsibility under the tenancy and in respect of such work they made an insurance claim. The excess under the insurance policy was £100. This excess was charged to the tenants by way of service charge. The tribunal was satisfied that having had regard to the provisions under the lease as to the landlords' responsibility as set out above that such charges and excess of insurance were properly added to the service charge by the Applicants, and that this was not unreasonable.

Balance of cost of work over and above excess charged to service charge whether or not individual Tenant or Landlords responsibility

29. The tribunal is satisfied that on a very small number of occasions the Managing Agents did charge the Tenants collectively through the service charge for work done over and above the excess in cases where it should have been the individual Tenants' direct financial responsibility. Mr Growse accepted that this may have happened, and that some of the insurance excesses in such cases had been charged to the service charge account as well. Having heard his evidence, it is satisfied that there did not appear to be any consistency in how items falling within this category were dealt with, and on some occasions individual tenants were billed whilst on other occasions the amount was added to the service charge payable by the Tenants as a whole. This latter approach is not sanctioned by the terms of the lease.
30. The Applicants also on occasions undertook work that was the individual Tenants' responsibility under the terms of *their* respective leases, and in situations where either the cost of the work undertaken was just below the excess of £100, or was just above that figure and it was not considered worth making a claim. Again on some occasions this work was never "recharged" to the tenant but instead added to the service charge. "Category 3". The tribunal finds that there was no consistency as to how the cost of such works were treated and, more important in this context, that the terms of the lease to charge such sums do not permit the Applicant to recover such sums through the service charge.

31. The Applicant should have looked to the individual tenant to make good the cost of the work by "re-charging" the monies spent on behalf of that tenant in the instances mentioned in the two preceding paragraphs.

32. The amount of service charge incorrectly charged to the tenants are as follows:

In respect of the matters mentioned in paragraph 29 the total sum of £470 has been incorrectly added to the service charge. Mr Babbra's share of that is £8.12. In addition the Applicants have acknowledged that the excesses mentioned there should have been recharged to the tenant and were not. These amount to £1,000 exactly, of which Mr Babbra's share is £17.24. These were figures given to the tribunal on behalf of the Applicant during the course of the hearing. The tribunal is satisfied that these figures are accurate and represent the appropriate reduction in Mr Babbra's share of the service charge.

33. In respect of the matters referred to in paragraph 30 above, where work was undertaken of a value under £100 or just above £100 which formed part of the tenants responsibility and for which the tenant in question was not the figure given to the tribunal, and which it accepted, amounts to £365, of which Mr Babbra's share is £6.29

Landlord failing to respond to Mr Babbra's request to insert extractor fan to kitchen

34. The tribunal finds as a fact, having heard evidence from Mr Growse upon the matter, that it accepts that the Applicants did not receive any notice (whether or not sent) of Mr Babbra's wish to have an extractor fan fitted to the kitchen. Even if such request had been received, the fact that it was not dealt with does not appear to the tribunal to constitute a reason for Mr Babbra to withhold payment of service charges.

**Summary**

35. The amounts set out above have been determined as unreasonable and therefore not payable by way of service charge. The total deduction attributable to the amounts otherwise said to be due from Mr Babbra amounts to £31.65 (£ 8-12 + £17-24 + £6-29) being Mr Babbra's share of the amounts that the tribunal has determined should not have been charged. The total amount claimable but not actually claimed was the sum of £1,725.82, the breakdown of which is set out at page 32 of the main bundle. The actual amount claimed in the Particulars of Claim, and the subject of the reference to the tribunal, is £1,629.89. The tribunal was told on behalf of the Applicants that this was an error.

36. Nevertheless for the purposes of the matter presently before the tribunal the claim is for a maximum amount of £1,629.89. The tribunal has therefore deducted the sum of £31.65 from the total claimable (but not actually claimed). This brings the



total otherwise recoverable to £1,725.82 minus £31.65, namely £1,694.17. *Since* the Applicant is limited *in* the amount claimed by the amount which has been put in the "prayer" the tribunal determined for the purpose of the reference by the Court to it that the amount of £1,629.89 is payable by way of service charge within the terms of that reference. It has further determined for completeness that the balance of £ 64-28, being the part of the service charges accidentally not claimed, are reasonable in amount and not capable of challenge.

**Landlord and Tenant Act 1985 Section 20C application**

37. Finally we heard an application by Mr Babbra under section 20C of the Landlord and Tenant Act 1985 for an order that all or any of the costs incurred by the landlord in connection with the proceedings are not to be taken into account as relevant costs in determining the amount of service charge payable. The tribunal declined to make such an order. Whilst there have been very minor findings in his favour, Mr Babbra failed to make his case on the principal grounds for which he contended, and the tribunal considers that it would on balance be unjust to penalize the Applicant as a result. In so doing it expresses no view on whether or not the lease allows the Applicant to include its costs in this way. That point was not argued before it.

Tonia Clark (signed)  
Chairman  
31 July 2008