

**LEASEHOLD VALUATION TRIBUNAL for the
LONDON RENT ASSESSMENT PANEL**

DETERMINATION BY THE LEASEHOLD VALUATION TRIBUNAL

LANDLORD AND TENANT ACT 1985, AS AMENDED

REF: LON/00AY/LAC/2007/0016

Address: Flats 2 and 3, 2 Martell Road, London SE21 8EE

Applicants: Stephanie Hockaday (Flat 2) and Sharon Trevisick (Flat 3)

Respondent: Esther Miller

**Tribunal: Mrs JSL Goulden JP
Mr W J Reed FRICS**

1. The Applicants, Ms S Hockaday and Ms S Trevisick made an application dated 24 August 2007 under Schedule 11 to the Commonhold and Leasehold Reform Act 2002 for determination of the liability to pay or for the variation of an administration charge, together with an application to limit landlord's costs of proceedings under S20C of the Landlord and Tenant Act 1985, as amended ("the Act").

2. The application described 2 Martell Road London SE21 ("the property") as a Victorian conversion comprising four flats. A copy of the lease of Flat 2 only was provided. This was dated 14 October 1981 and was made between Conway Ltd (in liquidation) (1) and J Newton and S P Newton (2) and was for a term of 99 years from 25 March 1980 at the rising rents and subject to the terms and conditions therein contained. Part of that lease was missing.

3. The grounds of the application were in respect of an insurance claim. The application stated that *"the claim was made due to damage by tree roots from the adjoining property, infiltrating the drains. This was done in conjunction with major works to the building which cost approx. £40,000. For this work leaseholders had already paid 10% management to Feldgate. We also pay an annual management fee to (them)(currently £600).* The Applicants said that they were unable to find any clause in the lease which states that an administration fee was payable on an insurance claim.

4. A Pre Trial Review was held on 26 September 2007. Both Applicants attended. The Respondent did not attend and was not represented but written representations on her behalf were submitted by her managing agents, Feldgate Ltd. ("Feldgate"). Directions were issued on the same date. It was decided by the Procedural Chairman on that date that the issue did not relate to an administration charge, but rather to the payability of a management fee under S27A of the Act. He therefore decided that the application form should be treated as an application

under S27A of the Act without the need for amendment or for a replacement form to be filed. No object was raised by or on behalf of the Respondent.

5. The issue to be determined by the Tribunal related to the payability and reasonableness of the managing agent's invoice No 728 dated 8 November 2006 in the sum of £1,293.37 which represented a charge of £1,100.74 plus VAT, representing a 10% management fee for completing and negotiating an insurance claim for work carried out to drains.

6. It was agreed by the Applicants at the Pre Trial Review that Clause B9 of the Second Schedule to the lease permits the Respondent to charge the fees and expenses of her managing agents for the general management of the building and its curtilage, but they disputed whether the insurance claim was necessary in the first place, since

- (a) the cost of works could and should have been borne by the neighbouring property, whose tree roots had caused the damage to 2 Martell Road.
- (b) If the cost had been borne by the neighbouring property, the managing agent's charges would not have been incurred and
- (c) In any event, the charge of 10% on the cost of works was unreasonable in amount and should have been included in the annual maintenance charge for each flat in the building.

7. The matter was set down for a paper hearing and this was noted in the Tribunal's Directions. Written representations were received from both sides. Neither side made a request for a formal hearing.

8. The Tribunal is satisfied that, in the circumstances, it is not necessary to inspect the property.

The Applicants' case

9. The Applicants' statement of case indicated that the damage to the drains at the property was caused by the infiltration of tree roots belonging to a neighbouring property, Park Court, a three storey block of flats. The tree in question was situated on a grass verge which ran parallel to a private access road, both belonging to Park Court. The growth of the tree roots caused the wall and railings belonging to the subject property to be dismantled and the railing had long since fallen off. The concrete on the garage forecourt became raised and cracked as a result. The drains were situated on the opposite side of the forecourt and under the pathway to the basement flat. Photographs were provided.

10. On 30 April 2004, Ms Hockaday wrote to Feldgate stating that the tenants of the property should not incur costs. A copy of that letter was provided.

11. In response, Feldgate wrote to Ms Hockaday on 5 May 2004. This letter stated, inter alia *"it is necessary for a CCTV survey to be carried out at the leaseholders' costs to firstly establish the extent of any repairs necessary to the drains. Any damage by tree roots will be the subject of a buildings' insurance claim, the cost of the CCTV survey being offset against part of the policy excess, the balance (if any) would form part of the claim settlement. It is not for the Management*

Company to claim from the Freeholders of the adjacent property, this is a matter for the insurers to deal with”

12. In a report on dilapidations carried out in June 2003 on behalf of Ms Trevisicks, the surveyor suggested that financial recovery could be claimed from the owners of the adjoining property. Only a part of the schedule to that report was produced to the Tribunal.

13. Repair of the drains was included in a schedule of works for major repairs to the property as a provisional sum of £6,000.

14. Since agreement could not be reached, a Tribunal hearing took place in November 2005 where it was agreed that the provisional sum be removed from the schedule of works and that the repairs should be the subject of an insurance claim.

15. The Applicants stated *“Feldgate decided to claim on our buildings insurance policy rather than contacting the managing agent of the adjacent property...without our prior knowledge or consent. We were also not made aware of the fact that a claim on our own buildings insurance would incur a fee payable to Feldgate. The leaseholders were not given the choice of which contractors would be chosen to complete the work on the drains or indeed who would undertake the reinstatement of the walls and pathways on completion.....the leaseholders had paid approximately £40,000 for repairs and redecorations to both the external and internal communal areas. This sum included management fees at 10% and professional fees of 12%. Each leaseholder paid approximately £2,800 in fees alone....leaseholders pay an annual management fee of £600 to Feldgate”*

16. The first time that the Applicants became aware that the charge would be levied was when they received the excess service charge demand for the year ended 25 March 2007. Although they felt that they should pay nothing, they offered Feldgate £100 each in order to avoid coming to the Tribunal. This offer was declined. The Applicants said that they would have been willing to liaise with the insurance company themselves if they had known that a charge was to be applied for doing so.

17. With regard to the S20C application, the Applicants stated *“in view of our previous offer to compromise that Feldgate be prevented from charging any fees or expenses resulting from this hearing”*.

The Respondent's case

18. In a letter to the Tribunal dated 19 September 2007 (before the Pre Trial Review was held), Feldgate, on behalf of the Respondent, stated *“our involvement in the insurance claim was a completely separate issue and should not be combined with the major works. In accordance with the management agreement our reasonable additional fee for this service is charged at 10% which includes our involvement with all parties, loss adjusters, freeholders, leaseholders and contracts to ensure carry out these works satisfactorily to completion”* With that letter, Feldgate also included an extract from an earlier LVT decision in

respect of another property, Brentfield House, managed by Feldgate, together with a copy of the 2006 management agreement.

19. In written representations dated 23 October 2007, Feldgate stated inter alia *"there was a lot of involvement from filing the claim up to completion of the works....there was an issue of the insurance company about the causation of the damage and Feldgate was successful...that all works should be included in the claim"*.

20. Feldgate also supplied information as to consultation with the tenants of the flats, the last being on 3 January 2006 when Ms Hockaday had been notified that all documentation had been sent to Mr M Cambridge of Resource Management Ltd as representative of the lessees. Feldgate stated *"as we have not received any further correspondence we believed that there was (sic) no further comments, and proceeded with the claim accordingly"*. Mr Cambridge was also sent a copy of a letter written by Feldgate to Oster Insurance Services on 15 December 2005 which stated *"may we also point out that this claim is subject to surveyor's fees and management fees for supervising and dealing with the claim"*. Feldgate said *"we would appreciate your confirmation of this point"*.

21. After a further exchange of correspondence concerning the payment of surveyors fees, the loss adjuster advised Feldgate by letter dated 23 January 2007 that the insurance company *"understood that a surveyor was appointed to oversee general renovations already taking place at the property. They feel that the nature and extent of works for this particular claim does not seem to warrant the involvement of a surveyor and they would not usually expect to incur professional fees"*.

22. No evidence was provided that Feldgate's claim for management fees for supervising and dealing with the claim was either pursued by Feldgate or rejected by the insurance company.

23. In their letter of 23 October 2007, Feldgate also said that there would be additional fees for their involvement in LVT proceedings in accordance with the management agreement. They said *"It is..not fair that the freeholder should contribute towards the application as this was their option and could have been avoided."*

Hearing on 15 January 2008

24. The Tribunal with conduct of the paper hearing decided that it had insufficient information before it in order to come to a determination, and therefore an oral hearing took place on 15 January 2008.

25. At the hearing, the Applicants attended, together with Mr J Rottenberg and Mr A B Berger, both of Feldgate, the Respondent's managing agents. Further written submissions and other documentation were supplied to the Tribunal including an extract from the lease of Flat 1 which Mr Rottberg said mirrored the terms in the other leases (which had been missing from the copy supplied to the Tribunal – see paragraph 2). Details of the insurance schedules were also provided on the request of the Tribunal.

26. Although the Applicants maintained that Mr Cambridge, their earlier advisor, had not kept them informed and that the Respondent should have sent copies of all letters to them, it was clear from the correspondence that Mr Cambridge had held himself out as acting for the Applicants, and therefore Mr Rottenberg, not unreasonably, had written to him alone. In the Tribunal's view, Mr Rottenberg can not be criticised in this respect.

The Tribunal's determination

27. The cause of the insurance claim was due to the tree roots from a neighbouring property, but it is unreasonable of the Applicants to suggest that they should liaise with the insurance company themselves in order to avoid the charge made by Feldgate. This is the duty of the managing agents acting on behalf of their Client, the landlord. Further it is clear that initially the insurance company were not going to meet the whole claim, but only part thereof, and Feldgate persuaded the insurance company otherwise.

28. With regard to the Applicants' suggestion of £100 each by way of compromise is on the low side, although it is noted that Feldgate failed to suggest a compromise figure of its own.

29. With regard to the management agreement, this is a contractual matter between the landlord and her agents. The tenants are not a party. The Tribunal can still consider the question of reasonableness of work carried out by the managing agents.

30. From its consideration of the documentation provided, the Tribunal is of the view that certain work was carried out by Feldgate for the benefit of the tenants and was in accordance with the lease terms. This work is over and above the usual work expected to be carried out within the management fee for the block of £600. As such, the tenants must be prepared to pay additional fees for such additional work carried out by the managing agents.

31. Mr Rottenberg supplied the Tribunal with a copy of a previous LVT case where, by a decision dated 28 June 2007, the 10% additional management fee had been allowed by that Tribunal in full for an insurance claim. As was explained at the hearing, the Tribunal is not bound by the decisions of a previous Tribunal and must deal with the particular merits of each individual case as presented to the Tribunal.

32. However it is noted that in the earlier LVT case to which the Tribunal was referred, that Tribunal commented "*in our judgment Feldgate did a good job*". In this particular case, whilst the Tribunal has acknowledged the work carried out by Feldgate, there had been an ongoing dispute with regard to the tree roots since Feldgate had first been appointed in 2004, but it appears that there has still been no decision on whether action should be taken against the owners of the neighbouring property in which the tree which apparently caused the damage is situated, they did not pursue their own insurers as to whether or not the managing agents' fees should be paid by the insurers and the excess of £250 on the claim has not been satisfactorily explained and does not appear to accord with

the insurance schedule. In addition, subsidence cover has now been removed by the insurers, thus leaving the tenants exposed.

33. In view of these shortcomings, the Tribunal determines that additional management fees should be payable, but limited to the sum of £550 plus VAT (ie a total sum of £646.25). The sum of £646.25 is therefore relevant and reasonably incurred and properly chargeable to the service charge account.

34. The challenge to the surveyor's fees of £172.80 including VAT has not been specifically addressed by the Applicants, but the amount is not high, and it appears from the documentation that the surveyor did meet the loss adjustor and liaise. The Tribunal determines that the surveyor's fees of £172.80 is therefore relevant and reasonably incurred and properly chargeable to the service charge account.

Limitation of landlord's costs of proceedings under Section 20C of the Act

35. "(1) a tenant may make an application for an order that all or any of the costs incurred or to be incurred by the landlord in connection with proceedings before a court or leasehold valuation tribunal, or the Lands Tribunal, or in connection with arbitration proceedings, are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application.

(2) The application shall be made;

- (a) in the case of court proceedings, to the court before the proceedings are taking place or, if the application is made after the proceedings are concluded, to a county court;**
- (b) in the case of proceedings before a leasehold valuation tribunal, to the tribunal before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to any leasehold valuation tribunal;**
- (c) in the case of proceedings before the Lands Tribunal, to the tribunal.**
- (d) in the case of arbitration proceedings, to the arbitral tribunal or, if the application is made after the proceedings are concluded, to a county court.**

(3) The court or tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances."

36. In applications of this nature, the Tribunal endeavours to view the matter as a whole including, but not limited to, the degree of success, the conduct of the parties and as to whether, in the Tribunal's opinion, resolution could or might have been possible with goodwill on both sides.

37. In the judgement of His Honour Judge Rich in a Lands Tribunal Decision dated 5 March 2001 (**The Tenants of Langford Court v Doren**), it was stated, *inter alia*, "where, as in the case of the LVT, there is no power to award costs, there is

no automatic expectation of an order under Section 20C in favour of a successful tenant, although a landlord who has behaved improperly or unreasonably cannot normally expect to recover his costs of defending such conduct. In my judgement the primary consideration that the LVT should keep in mind is that the power to make an order under Section 20C should be used only in order to ensure that the right to claim costs as part of the service charge is not to be used in circumstances that makes its use unjust".

38. Under new legislation, there is now a limited power for the Tribunal to order costs, but Judge Rich's comments are still valid.

39. In accordance with Section 20C(3), the applicable principle is to be the consideration of what is just and equitable in the circumstances. Of course, excessive costs unreasonably incurred would not be recoverable by the landlord in any event (because of Section 19 of the 1985 Act) so the Section 20C power should be used only to avoid the unjust payment of otherwise recoverable costs.

39. In the judgement, Judge Rich indicated an extra restrictive factor as follows:-

"Oppressive and, even more, unreasonable behaviour however is not found solely amongst landlords. Section 20C is a power to deprive a landlord of a property right. If the landlord has abused his rights or used them oppressively that is a salutary power, which may be used with justice and equity, but those entrusted with the discretion given by Section 20C should be cautious to ensure that it is not itself turned into an instrument of oppression".

40. The Applicants say that they were forced to make the application because Feldgate refused their offer of £100 each by way of compromise. This was refused by Feldgate who, by way of support, sent Ms Trevesick a copy of an earlier LVT decision on 3 August 2007. Mr Rottenberg suggesting that the landlord's costs would be in the region of £800 plus VAT.

41. It is noted that Feldgate did not appear at the Pre Trial Review. Although the landlord was entitled to refuse the Applicants' compromise suggestion, perhaps Feldgate could have suggested another, higher, offer to the Applicants which might have been acceptable to their Client, in order that the hearing could have been avoided.

42. Whilst it is appreciated that both sides have incurred costs which are irrecoverable, in the particular circumstances of this case, the Tribunal determines that it is just and equitable that the costs incurred by the Respondent in connection with proceedings before the Tribunal are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable.

The Tribunal's determinations as to service charges are binding on the parties and may be enforced through the county courts if service charges determined as payable remain unpaid.

CHAIRMAN..........DATE. 24 January 2008.....