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RESIDENTIAL PROPERTY TRIBUNAL SERVICE

LEASEHOLD VALUATION TRIBUNAL

Case Ref : CAM/22UD/LSC/2010/0033

Property	:	46 The Square, Hart Street, Brentwood, Essex CM14 4AR
Application	:	For determination of payability of service charges for the periods 2002–2009 and interim service charge for 2010 [LTA 1985, S.27A]
Applicant	:	Mr Boyd Parker, 46 The Square, Hart Street, Brentwood, Essex CM14 4AR [& 40 others]
Respondent	:	Countrywide Managing Agents C G Freeholds Ltd, Mount Manor House, 16 The Mount, Guildford, Surrey GU2 4 *HM*

DECISION

Handed down 24th November 2010

Tribunal	:	G K Sinclair (chairman), J R Humphrys FRICS & P Tunley
Hearing date	:	Tuesday 14th September 2010, at Marygreen Manor Hotel, London Road, Brentwood
Representation		*Applicant* — Boyd Parker, Martin Bryan & George Raynor *Countrywide* — Peter Eton & Sarah Moon

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Summary

1. This application concerns a modern development of 48 flats near the commercial centre of Brentwood, Essex. The Applicant leaseholders, who have paid their service charges in full when demanded, complain that the freeholder has never taken its management responsibilities seriously, and that the development has been the subject of consistent neglect. There have also been certain construction problems which only the freeholder is able to take up with the developer or the NHBC, but it proves strangely reluctant to do anything about patent problems.

2. For the reasons which follow the tribunal determines that, save in respect of the years 2002 and 2003 (which are more than six years prior to the bringing of this application, and before the current freeholder acquired the reversion), the application succeeds and the amounts payable as service charge for each other year in question are as set out in the Schedule annexed.

3. As the application is successful the tribunal also determines, under section 20C of the Landlord and Tenant Act 1985, that any costs which the Respondent may have incurred in dealing with this application shall not be taken into account when assessing this year's or any future service charge accounts. Further, pursuant to regulation 9 of the Leasehold Valuation Tribunals (Fees)(England) Regulations 2003 the tribunal orders the Respondent to reimburse the application and hearing fees paid by the Applicants.

Relevant lease provisions

4. The lease before the tribunal relates to plot no 13 (postal address 12A) The Square, Hart Street, is dated 30th July 2001, made between Copthorn Homes Ltd and Shea Properties Ltd, and appears to have been drafted by the Countryside Properties plc legal team. The term granted is 125 years from 29th January 2001 at an initial ground rent of £125, subject to review every 25 years. The lessee's covenants appear in clause 3 and those of the lessor in clause 4. The tribunal refers below to clause 4.1 in particular.

5. The flat is liable to contribute 2 per cent towards the cost of the service charge, the items of work covered appearing in the Fifth Schedule. Payment is half-yearly in advance, with an adjustment payment (if required) at the end. A reserve fund is specifically provided for. How the service charge is computed is set out in detail in the Fourth Schedule. By paragraph 6 the lessor shall arrange for accounts of the service charge in respect of each service charge year to be prepared and shall supply to the lessee a summary of such accounts.

Material statutory provisions

6. The method of calculation and overall amount payable by tenants for works of repair and management costs by way of service charge are governed principally by the express terms of the lease, but always subject to the cap imposed by section 19 of the Landlord and Tenant Act 1985, which limits the recoverability of relevant costs :
   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.

7. By section 20, where the cost of any qualifying works shall exceed £250 for any liable tenant then the relevant contributions of tenants are limited to that amount unless the consultation requirements imposed by the Service Charges (Consultation Requirements) (England) Regulations 2003[1] have been either complied with in relation to the works or dispensed with under section 20ZA in relation to the works by (or on appeal from) a leasehold valuation tribunal. The consultation procedure includes, *inter alia*, the obtaining of "estimates" for the works from at least two contractors.

8. In order that leaseholders can keep track of what they may owe, and to discourage

[1] SI 2003/1987 (as amended)

tardiness by freeholders or their managing agents, section 20B provides that :

(1) If any of the relevant costs taken into account in determining the amount of any service charge were incurred more than 18 months before a demand for payment of the service charge is served on the tenant, then (subject to subsection (2)), the tenant shall not be liable to pay so much of the service charge as reflects the costs so incurred.

(2) Subsection (1) shall not apply if, within the period of 18 months beginning with the date when the relevant costs in question were incurred, the tenant was notified in writing that those costs had been incurred and that he would subsequently be required under the terms of his lease to contribute to them by the payment of a service charge.

9. The amount payable may be determined by the tribunal under section 27A. This is the provision under which this application has been brought. Please note sub-sections (5) & (6), which provide that a tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment, and that an agreement by the tenant of a dwelling (other than a post-dispute arbitration agreement)[2] is void in so far as it purports to provide for a determination in a particular manner or on particular evidence of any question which may be the subject of an application to the Tribunal under section 27A

10. Section 47 of the Landlord and Tenant Act 1987 provides that any written demand for payment of rent or other sums payable to the landlord under the terms of the tenancy must contain the name and address of the landlord and that, where a demand is given which does not contain such information, then any part of the amount demanded which consists of a service or administration charge shall be treated for all purposes as not being due from the tenant at any time before that information is furnished by the landlord by notice given to the tenant.

11. Since 1st October 2007 section 21B of the 1985 Act provides that a demand for the payment of a service charge must be accompanied by a summary of the rights and obligations of tenants of dwellings in relation to service charges. The content of that summary is prescribed by the Service Charges (Summary of Rights and Obligations, and Transitional Provision) (England) Regulations 2007.[3] The document must contain the prescribed heading and text and must be legible in a typewritten or printed form of at least 10 point.[4] If this is not complied with then a tenant may withhold payment of a service charge which has been demanded from him.

Inspection and hearing

12. The tribunal inspected the development at The Square, which backs on to Hart Street to the north, at 10:00 on the morning of the hearing. Also present were Boyd Parker, Martin Bryan & George Raynor on behalf of the Applicants. Neither C G Freeholds Ltd, the freeholder, nor Countrywide (the former managing agents) were represented. The development was constructed in about 2001 or 2002 near the centre of Brentwood, just

[2] Eg. provisions in a lease stating that the landlord's accountant's certificate shall be conclusive, or that any dispute shall be referred to arbitration

[3] SI 2007/1257

[4] *Op cit*, reg 3

to the south of the High Street. It is bounded to the north by Hart Street, to which some external doors give access, and to the west by King's Road. To the south is Chatham Way, providing vehicular access to the semi-underground parking and to a public car park to the east.

13. Working within the constraints allegedly imposed by the local authority's conservation officer, the development comprises a number of tall blocks of differing heights, some of natural brick and others rendered, but all with dormer windows within pitched roofs of varying colours. The buildings are supposed to blend into the local late 19th/early 20th century town centre vernacular. They are arranged around the boundaries of the site, and from the inside of The Square are observed to be constructed on top of a central concrete deck with large square light well providing light and ventilation to the dedicated car parking spaces beneath. Affixed to the underside of this deck, and visible from within the car park until they enter the public sewerage system under the streets, are surface water and other drainage pipes. This communal parking area, access to which is through an electrically controlled metal gate, is lit by many ceiling-mounted light fittings which apparently are permanently on, and have been for years. Despite this, no-one seems aware of who the utility provider is, and no bills have ever been paid for this usage.

14. The central deck, otherwise referred to at the hearing as "the podium", comprises an internal walkway and garden, with a series of narrow raised beds contained within large, ornate painted wooden frames, approximately of table height. The timber is protected from the soil and vegetation by a black plastic membrane, but there is no provision for irrigation other than by watering can or hose. Elsewhere around the grounds are some large ornamental shrubs.

15. Vehicles descend to the car park by a ramp, but there is no pedestrian ramp access to the podium or any other part of the premises. Some flats at the Hart Street end are at street level, and accessed via a lobby and external door on that side, but on the Chatham Way side pedestrians must use steps up to various external doors or, on each side of the vehicular entrance, up to the podium.

16. External inspection of the buildings from the podium revealed that some roofs were uneven, there was cracking to brickwork, window cills were defective, lead had slipped around some dormer windows. From a maintenance perspective, access to a number of dormer windows was rendered difficult and more expensive due to the presence of glazed conservatory roofs beneath them, and the complete inability of a cherry picker to gain access to the podium. This had in the past resulted in scaffolding being required to reach some of the chimneys stacks (although some could reasonably have been accessed by a tall cherry picker from the Hart Street side).

17. The tribunal's attention was drawn to what looked like the results of a small trial pit next to a wall, where gravel and membrane had been disturbed. The leaseholders also were keen to show the tribunal an area where concrete tiles had previously been lifted to deal with a surface water drainage problem. This was allegedly due to the gap between concrete car park roof and deck level being filled with hardcore, through which channels had merely been cut and then become blocked, rather than pipes laid. The tribunal was in no position to check the accuracy of this account, but it is recorded as it featured later

during the hearing.

18. Internally, the tribunal was shown a stairway from the car park up to one of the Hart Street lobbies. The plaster to the wall showed evidence of extensive black mould, but this was apparently in better condition than it had been previously. Unheated, and with a door at the bottom, this stairway was simply a cold sink. The light worked, but until not long before the stairway had apparently been not only mouldy but in pitch darkness.

19. The hearing began at around 11:30. Directions for the hearing had been issued on 29th April 2010. Amongst these were requirements for disclosure of documents and witness statements by 2nd July 2010, and for a bundle to be delivered by the Respondent to the tribunal office at least 7 days in advance of the hearing date. Apart from the Respondent filing a Statement of Case dated 26th July 2010 the freeholder and its current managing agent[5] did not comply, so the main bundle was therefore prepared by the Applicants. The Respondent took no part in the application other than the filing of a supplemental bundle and submission dated 9th September 2010, which exhibited comments and various documents provided by Countrywide. In paragraph 4 the submission states :

> As neither the Respondents nor their new managing agents have any direct knowledge of the works they have to rely on the invoices and, as such, will not be attending the hearing. No disrespect to either the LVT or the Applicants is meant by the non-attendance but it is believed that no useful purpose will be served by them attending the hearing.

Further, in a covering letter with this submission dated 9th September 2010 the solicitor to Freehold Managers plc stated :

> As we stated in the submission neither the Respondents nor the present managing agents will be attending the hearing. No disrespect is intended to the tribunal but please appreciate that the challenges relate to a period prior to the appointment of the present managing agents and **the freeholders undertake no management responsibilities and therefore cannot comment** any further than is set out in the submissions. *[tribunal's emphasis added]*

20. The highlighted remark, which also appeared in the Respondent's Statement of Case, is strictly inaccurate, as in clause 4.1 the lessor clearly covenants to carry out the works and provide the services specified in the Fifth Schedule. Whether or not the lessor chooses to delegate such tasks to a managing agent, ultimate responsibility rests with it. If the managing agent is not up to the task then it is the lessor's fault for not keeping a beady eye on what is going on.

21. Despite the above, and much to the tribunal's surprise, Mr Peter Eton, a representative of Countrywide, had at a few days notice been asked to attend and presented himself at the hearing. Mr Eton described himself as a regional manager with Countrywide, based in the southeast at the Brighton office. He had no direct knowledge of the development or its management, save that he had some dealings with the relevant East London office for a time in 2007, so the tribunal was also surprised that he had not sought to inspect

[5] Although the freeholder is C G Freeholds Ltd, and management passed from Countrywide plc to Broadlands LLP trading as Broadlands Estate Management in November 2009, the Respondent has acted in these proceedings through the solicitor to Freehold Managers plc. Its role is unclear.

it, just a mile or so from the hearing venue. Later during the day he was joined by a fellow employee, Ms Sarah Moon.

22. The evidence before the tribunal was largely documentary in nature, being compiled by Mr Parker since he became chairman of the unofficial leaseholders or residents' group in 2007. Despite request, the freeholder has not chosen to recognise it. Mr Parker told the tribunal that an unsuccessful attempt had been made to collectively enfranchise, but they could not raise the required amount. It was not explained whether this was an amount demanded by the freeholder or determined by a Leasehold Valuation Tribunal. There was currently an application for the right to manage proceeding.

23. As a result of questioning it became clear that other documents which might be relevant were not before the tribunal. Over the course of the day various other documents, including surveyors' reports commissioned by the freeholder and/or Countrywide and a schedule showing a breakdown of each year's service charge, were produced by the parties.

24. The Applicant's principal complaints were that the development had simply never been managed properly from the outset, with challenges to the quality of the cleaning and gardening, a failure for a prolonged period to establish a sinking fund, failure to repair a broken roller shutter at the car park entrance (this has recently been replaced by a sliding gate), a large and unexplained bill for light bulbs, an insurance claim appearing in a summary but not in the proper accounts, a substantial but unexplained "repairs" bill of £9,220, a claim for scaffolding being kept in place for 12 months while deciding what to do about some high-level chimneys (the scaffold only being removed when the supplier's contractor client was in financial difficulties), and a continually high annual management charge despite a lot of the work being left to Mr Parker and other leaseholders.

25. Further, the Applicants reminded the tribunal that the chimney investigations formed the subject of a 2008 application[6] by Freehold Managers plc to a Leasehold Valuation Tribunal seeking dispensation with the statutory consultation requirements under section 20ZA of the Landlord and Tenant Act 1985. The tribunal, in its decision dated 2nd January 2009, declined to dispense with the requirements of section 20. Scaffolding remained in place for about 12 months before being removed, but the work to the leaking chimneys was not eventually undertaken (by cherry picker from Hart Street) until 2010.

26. In 2009 Countrywide was removed as managing agents by the freeholder. At the time of handover there was little in the kitty, despite the fact that from and since 2007 a sum of £7,200 has been claimed as part of the service charge and paid in order to build up a sensible reserve fund towards the redecoration of the premises. When questioned about this fund, in view of the fact that no such redecoration works had yet been undertaken, Mr Eton conceded that the money had probably been applied for general purposes. It should have been kept in a separate account, but he did not know whether it was.

27. With no direct knowledge of the site, and none of the property managers at material times appearing as witnesses, there was little that Mr Eton and Ms Moon could do except refer to documents. They apologised for the fact that by September 2010 there were

[6] Case Ref CAM/22UD/LDC/2008/0010

still no accounts for 2008. This was said to be due to the introduction of new software by the company, which delayed matters by 6 to 8 months. However, more than 6 to 8 months had now elapsed, and according to the lease the 2009 accounts should also have been produced by now. Despite the absence of these accounts service charge demands had still been sent out based on the 2007 figures, including £7,200 for reserves.

Discussion and findings

28. The tribunal decided at the outset that claims going back as far as the 2002 and 2003 service charge years, when the development was brand new, there was not much wrong with it, and the current freeholder had not acquired it, were far too old.

29. However, the tribunal wishes to put several matters on record. First – a point made by the Applicants – in view of the potential cost of redecorating high and complicated buildings such as these, a reserve fund should have been established right at the outset, but it was not for five more years. Secondly – and this is a point not challenged by the Applicants but identified by the tribunal from the documents – the water rates charged for this development seem to have fluctuated wildly. The tribunal finds this troublesome, as the amounts seem horrendously high. Managing agents should have been monitoring this and challenging the water company as a matter of course. Thirdly, there seems to be no evidence that electricity for the common parts has ever been invoiced, and there was some doubt about the location of the relevant electricity meter.

30. Insofar as the other years are concerned, the tribunal takes the view that generally the gardening – which is largely maintenance of shrubs – has been of a reasonable standard, although the extensive high wooden planters will be a nightmare to maintain and provide no opportunity either for fixed irrigation or for drainage. With hand watering it is not surprising that plants died in the early years. Fortnightly gardening was requested by the leaseholders, but this was ignored. They can do some of this themselves just as effectively. Fortnightly is a reasonable frequency, and the same is true for the cleaning of carpets, etc in the limited common parts. It was noted that invoicing for cleaning seems to have been weekly. This is unnecessarily frequent. These invoices are reduced by half.

31. The replacement of emergency lighting was not explained, at £3,000 and £1,000, and neither was the £1,900 for light bulbs. The amount of lighting in the common parts was very limited, with no exotic or specialist lighting units involved.

32. The tribunal cannot understand how a competent managing agent could leave expensive scaffolding needlessly in place for a year in connection with a chimney problem which was the fault of the original builder, yet expect the leaseholders to pay for it. A surveyor is able to carry out a sufficient inspection of the chimneys from a cherry picker; the means – so the tribunal was informed – by which repairs were eventually carried out in 2010. The tribunal understands that the original builder accepted responsibility for the cost of these repairs, but understandably refused to accept that it should also pay for scaffolding kept in place for such a prolonged period. Neither should the leaseholders be expected to pay for this failure in management.

33. The attitude of the managing agents, for most of the time, has been surprising. Apart

from a new property manager, who held a meeting in 2007 (but later went on long-tem sick leave and never came back), there has been limited contact between leaseholders and managing agents, with the company admitting in an e-mail on 6th February 2009 not even to knowing who their new property manager was. At page 4 in the Respondent's bundle, at point 4 in Countrywide's comments on the application, it is stated that "the managing agent has no obligation to call a residents meeting." At the same time evidence was given that the property managers are not qualified surveyors, yet they were asking an unqualified resident to check for slipped tiles. Countrywide claim to be members of ARMA, but the tribunal considers that this attitude is neither very professional nor in keeping with the standards expected by that Association.

34. The Applicants invite the tribunal to reduce the level of the claimed management fees by 50%, particularly since Mr Parker argues that in recent years he has been performing a substantial amount of work effectively on their behalf. The tribunal could have been bolder, in view of the managing agents' general non-cooperation with the leaseholders and disregard of their interests, and the absence of any proper structural survey of the development (which might assist the freeholder in pursuing the developer for design faults which are clearly not the leaseholders' responsibility to put right). However, it is content to award the relief that the Applicants seek, a reduction in fees by one half.

35. Insofar as 2008 and 2009 are concerned, no accounts have yet been produced for either year, although at attachment CG/2 the Respondent produced, just before the hearing, a purported statement of account for a non-standard period and some computer print-outs. A host of invoices were also served at the last minute as attachment CG/4, but with no-one able to explain or attempt to justify any of them to the tribunal. In late 2009 Countrywide's services were dispensed with, and a handover took place to the current managers. However, the latter should by now have been able to produce a set of service charge accounts by June 2010, as required by the lease.

36. The tribunal therefore disallows as legitimate, recoverable expenditure for these years all costs and expenses save for the insurance premiums and utility bills, although again the tribunal queries why the water bills are quite so high.

37. As the Applicants have succeeded in their application the tribunal also accedes to their request that an order be made under section 20C. Costs incurred by the Respondent in connection with these proceedings shall be ignored when calculating the service charge payable by any of the Applicants for this or any future service charge accounting period. The Respondent shall also be required to reimburse the Applicants for the amounts overpaid by them in past years and for the tribunal fees which they were required to pay for this application and hearing.

Dated 24th November 2010

Graham K Sinclair – Chairman
for the Leasehold Valuation Tribunal

SCHEDULE : AMOUNTS PAYABLE

Description	2004	2005	2006	2007	2008	2009
Applicants' page no.	1/R	1/Z	1/AK	1/AV		
Repairs/renewals	£9,332	£15,431	£11,574	£11,095	*£0*	*£0*
Auditors	£0	£0	£540	£0		
Management fee	*£3,787*	*£3,666*	*£4,409*	*£4,430*	*£0*	*£0*
Cleaning/gardening	*£3,490*	*£3,490*	*£3,696*	*£3,528*	*£0*	*£0*
Insurance	£8,636	£8,752	£8,712	£9,001	£17,505	£10,879
Accountancy	£469	£611	£541	£541		
Refuse bin hire	£1,039	£849	£926	£982	£1,306	£1,035
Sundry/misc exps	£0	£0	(£25)	£197	*£0*	£0
Water rates	£5,909	£17,358	£11,547	£4,934	£7,611	£16,356
Pest control	£165	£0	£0	£0		
Car park service fee		£1,074	£1,193	£1,281	*£0*	*£0*
Prof/legal fees			£147	£0	*£0*	*£0*
Car park barriers				£6,061		
Fire alarm maint.				£1,876	£2,265	£1,797
Inspection fees					*£0*	£0
Bank interest					(£61)	£0
Car park security					*£0*	£0
Ins valuation fee					*£0*	£0
Fire safety risk assmt					£0	*£0*
Lighting protection					£0	*£0*
[Car park schedule]					*£0*	*£0*
Total payable :	**£32,827**	**£51,231**	**£43,260**	**£43,926**	**£28,626**	**£30,067**
Total claimed :	£40,103	£58,387	£54,301	£51,883	£74,822	£74,558
Difference :	£7,277	£7,156	£11,042	£7,958	£46,196	£44,491

NB. Figures in italics have been reduced by the tribunal