SOUTHERN RENT ASSESSMENT PANEL &
LEASEHOLD VALUATION TRIBUNAL

Case No: CHI/45UD/LIS/2010/0034

Between:

Mr L H Powell (Applicants)
Mr M L Powell

and

Leasonhurst Ltd (Respondent)

Premises: 45 Marineside East Bracklesham Drive Bracklesham Bay West Sussex PO20 8JJ ('the Premises')

Application Date: 23 March 2010

Date of Hearing: 26 August 2010

Tribunal: Mr D Agnew BA LLB LLM Chairman
Mr B Simms FRICS MCIArb

Background

1. On 23 March 2010 the Applicant applied to the Tribunal for a determination under Section 27A of the Landlord and Tenant Act 1985 (hereafter referred to as " the 1985 Act") as to the liability to pay and the reasonableness of certain service charges in respect of the premises.

2. On 3 June 2010 a pre-trial review took place at which the Applicant Leslie Howard Powell and Mr Richard Deighton, legal representative of the Respondent, appeared. Certain directions were given including permission being given to Mr M L Powell to be joined in the Application as joint Applicant with his father, L H Powell and dates were given for the filing and service of statements of case. The Applicant complied with that direction but the Respondent did not.

Inspection

3. The Tribunal inspected the Premises prior to the hearing on 26 August 2010. 45 Marineside is a first floor flat in a block of six flats which in turn is part of a development of three blocks of eighteen flats in total, the development being known as Marineside. The development shares common roadways with a number of freehold properties. The blocks of flats are

situated immediately adjacent to the seashore at Bracklesham Bay from which it is separated by a concrete promenade. The flats are therefore very exposed to the wind rain and salt water from the sea. The windows are UPVC double glazed units. The external walls are mainly clad with plastic material designed to look like weatherboarding and white painted render. This rendering appeared to be in good condition on the outside facing walls but in the entranceways to the staircase the white paint has peeled away leaving the original cream paintwork grinning through the top layer. The plastic cladding was also painted white, the plastic material itself not being coloured throughout.

The Lease

4. The main lease document is dated 28 January 1970 by which the landlord granted a lease of 99 years. However, by a deed dated 11 July 1986 that original lease was surrendered and a new lease granted for 999 years at a peppercorn rent but on the same terms and subject to the same covenants conditions and provisions in all respects as those contained in the original lease.

5. By clause 3 of the original lease the tenant covenanted with the lessor to pay a "maintenance contribution calculated by the agents for the annual maintenance to the building computed in accordance with the provisions of the third schedule" to the lease.

6. The third schedule to the lease is headed "computation of annual maintenance provision" and reads as follows:-
"1. The annual maintenance contribution in respect of any year commencing 29th day of September ... shall be computed not later than the end of August immediately preceding such year and shall be computed in accordance with paragraph 2 hereof.
2. The annual maintenance contribution shall consist of:
the aggregate expenditure estimated to be incurred by the agents appointed by the lessors to manage the building and shall consist of
(i) lawn cutting sweeping and edging and cleaning common parts and minor repairs and maintenance thereto
(ii) the cost of insurance of each flat ...
(iii) the cost of repainting the external parts of the building in accordance with clause 4 (iv) hereof
(iv) the agents charges for management of the building
(v) accountancy and or auditing costs
(vi) repair and maintenance of structural items and boat ramp
(vii) maintenance of tv booster aerial.
3. A certificate signed by a surveyor to be appointed by the lessors and purporting to show the amount of the annual maintenance contribution shall be conclusive of such amount and in giving such certificate the surveyor shall be deemed to be acting as an expert and not as an arbitrator."

The Law

7. By Section 27A of the 1985 Act it is provided 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 –
(a) the person by whom it is payable,
(b) the person to whom it is payable,
(c) the amount which is payable,
(d) the date at or by which it is payable, and
(e) the manner in which it is payable.
(2) Subsection (1) applies whether or not any payment has been made.
(3) An application may also be made to a Leasehold Valuation Tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvement, insurance or management of any specified description, a service charge would be payable for the costs and, if it would, as to –
(a) the person by whom it is payable,
(b) the person to whom it is payable,
(c) the amount which is payable,
(d) the date at or by which it is payable, and
(e) the manner in which it is payable.

The Hearing

8. This took place at the Tribunal office on 26th August 2010. Present were Mr L H Powell who made the application on behalf of himself and his son, Mr M L Powell who was the lessee during the period 2006/7. The Respondent was represented by Mr Kenny, solicitor. Present as observers were Miss Horsey and Mr and Miss White.

The Applicants' case

9. Mr L H Powell (hereafter referred to as the Applicant as he was the lessee for the majority of the period in respect of which this application relates and it is he who has put forward the arguments on behalf of the two nominal Applicants) sought to challenge the following items for the service charge year 2008/9:-

a) exterior cladding and painting
b) the cost of asbestos removal from flats 47-49
c) a contingency sum of £1000 towards potential costs of repairing "the sea wall"
d) legal costs of £110.00 per tenant
e) interest charged £18.50 per tenant

10. With regard to the exterior cladding and exterior painting, the Applicant had asked the Respondent for details of the cost to be charged but he had received no response. He said that there had been no proper Section 20 consultation. Doing the best he could from the defective Section 20 documentation he had received it appeared as though the lessees were going

to be charged £1000 per tenant this year and next. He did not agree that the cladding needed to be replaced and he had been deprived of the opportunity of objecting because he had not received a stage 1 notice under Section 20.

11. As far as the exterior painting is concerned, this had been badly done as was evidenced by the fact that the original coat is now showing through in places at the entrances to the flats' staircases.

12. The Applicant objected to paying a contribution towards the cost of repairing "the sea wall" as this was not a liability contemplated under the lease. He maintained that the land containing the sea wall was not acquired by the landlord company until after the leases for the flats were entered into.

13. The Applicant objected to the legal costs charged and interest claimed as there was no provision in the lease enabling the landlord to recover these items.

14. The Applicant objected to the lessees being charged on the service charge account for the cost of asbestos removal from flats 47 and 49. These flats are directly above the Applicant's flat. He said that the Landlord had given different explanations as to where the asbestos was located but from the invoices for the asbestos removal that he had seen it appeared that this asbestos was contained in insulation around pipework. He maintained that these pipes were part of the demise to the individual flats and therefore the removal of the insulation should not be a charge to the service charge account but should be borne by the individual flat owners themselves.

15. With regard to the service charge year 2007/8 he challenged the figure of £1012 per lessee for the cost of exterior decorations. He maintained that no Section 20 notice had been served in respect of any such item.

16. With regard to the service charge year 2006/7, the Applicant said that the accounts for the Landlord company showed that a surplus of £16,604 or £922 per tenant had been achieved due to excess of income over expenditure. There was no provision in the lease for there to be a reserve fund and the Applicant therefore maintained that there should be a refund of the surplus for that year to the tenants. As Mr M L Powell was the owner of flat 45 during this service charge year it is he who should be entitled to the refund of £922.

The Respondent's case

17. As stated above the Respondent had not filed and served a statement of case and therefore the Respondent's case was not known until the hearing. The Respondent's solicitor stated that no service charge demands had been made in respect of either the external cladding or the external paintwork. Furthermore it had not been decided as to whether a formal service charge demand would be made for these items. He accepted that the service charge demands that had been made had not been made in strict accordance with the mechanism laid down in the lease although the service charge provisions

set out in the lease were far from satisfactory or comprehensive. Accordingly as things stand at present the Applicant L H Powell, who was lessee at the appropriate time, is not liable to pay any service charge with regard to external cladding and painting as a result of landlord and tenant law. He pointed out, however, that the Applicant along with all other lessees is a shareholder of the Landlord company. Whether or not the Applicant is liable for any of the charges in question by virtue of his membership of the company is a separate matter and not one of which the Tribunal had jurisdiction to decide. The Respondent has not come to a settled view as to whether the Respondent could claim that there is liability on the part of the Applicant under company law and contract.

18. With regard to the asbestos removal, Mr Kenny accepted that it was unclear as to where the asbestos was actually located although he quoted from a surveyor's report (a copy of which had not been previously supplied) that implied that the asbestos was also in parts of the fabric of the building in the vicinity of the pipework. If that was the case then it would have been in a part of the premises not included within the demise of the individual flats.

19. With regard to legal costs and interest Mr Kenny accepted that there was no provision for such in the lease and that the Applicant could not therefore be properly responsible for the same under the service charge.

20. With regard to the service charge for 2007/8 again he accepted that at present there had been no proper claim as the provisions of the lease with regard to the mechanism for claiming service charges has not been followed nor was it certain that a claim on the service charge would be made.

21. With regard to the sea wall it was unclear as to what was actually meant by the "sea wall". It appears that the Landlord's title and therefore part of the retained common areas includes land up to the Median High Water Mark but it was not clear from any of the plans attached to the various registered titles as to whether this included the actual sea wall or not. The Landlord's title at the time when the leases of Marineside were granted does, however, seem to include at least a part of the concrete promenade between the flats and the shore and it would be prudent for the Landlord to include a provision for anticipated expenditure during the following year as part of the budget and £1000 divided between 18 flats was not an unreasonable provision.

22. With regard to the service charge year 2006/7 Mr Kenny accepted that there was a surplus of income over expenditure for that year and that the lease does not provide for there to be a reserve fund. In normal circumstances this surplus would have been offset against the charge for the following year but this had not been done and furthermore, in this case it may be that no proper service charge demands have or would be made in respect of the Applicant for the following year. Accordingly, if the Tribunal considers that there should be a refund then it should be made to the owner of the flat at the time namely Mr Mark Leslie Powell.

Determination

23. The Tribunal considered that the situation with regard to service charges in respect of Marineside seems to be in something of a mess. The least unsatisfactory aspect of it was that the service charge year was not that as laid down in the lease. If such a situation has been accepted by the lessees for a period of time then it is possible for a new accounting period to be established. In this case, however, the Landlord seems to have simply adopted the Landlord company's accounting year as the service charge year and has relied on the company's accounts rather than proper service charge accounts. The two are not necessarily the same.

24. Of more concern to the Tribunal is the somewhat deficient provisions in the lease with regard to the service charge mechanism. Whilst the lease does provide a means by which the service charge can be quantified for any particular year the lease is silent as to any accounting for service charge expenditure at the end of a service charge year and is also silent as to what is to happen to any surplus that has been acquired during a particular service charge year.

25. A lessee is not liable to pay a service charge unless it is properly demanded in accordance with the lease and statute and Mr Kenny seems to accept that this has not been done in the case of the Premises.

26. In particular, there has been no service charge demand of the Applicant in respect of the external cladding or painting and it is not certain that any service charge demand will be made in respect thereof. Accordingly, the Tribunal finds that the Applicant is not liable to pay a contribution towards the external cladding and painting for the year 2008/9 as things stand at present, nor is there any definite figure that the Tribunal can determine that would be reasonable for this work if a proper demand were to be made. Accordingly, the Tribunal does not consider that it is able to make any determination under Section 27A (3) of the 1985 Act. The Tribunal has no jurisdiction to determine whether or not the Applicant is liable to contribute to these costs by virtue of his position as a shareholder of the Landlord company under company law. Unless or until a valid service charge demand is made of the Applicant he is not liable to pay towards the cladding or external painting under landlord and tenant law. If a valid demand were to be made the Applicant is not precluded from making a further application to the Tribunal for it to consider whether the service charge item in question was reasonably incurred and is of a reasonable amount.

27. The service charge for 2008/9 not having been properly demanded it is unnecessary for the Tribunal to determine as to whether or not the charge for asbestos removal or the legal costs or interest charges are the liability of the Applicant as demanded. Suffice it to say that as far as the legal costs and interest charges are concerned, the Respondent through its solicitor has accepted that there is no provision in the lease giving power to the landlord to make such charges and therefore the Applicant cannot be liable for them as service charges. As far as the asbestos removal charge is concerned, if the

Tribunal had to make a determination about this item it is likely that it would have found (although the position is not clear) that the asbestos was removed from areas other than just the insulation around the water pipes. Even if it had been restricted to that insulation, however, there is an argument for saying that although the pipes themselves may be part of the demise that does not extend to insulation round those pipes. On balance, therefore, this Tribunal would have been likely to have found that the asbestos removal would have been properly charged to the service charge account. This Tribunal cannot however bind another Tribunal and another Tribunal may come to a different conclusion on this point. We include our thinking on the subject, however, in an attempt to assist the parties as it may be relevant if the Applicant should be in a position of having to decide at some future date as to whether or not to include this item in any application to the Tribunal.

28. With regard to service charge year 2007/8, again this has not been properly demanded and therefore the Applicant is not yet liable to pay it as far as a service charge claim is concerned. Again, as far as Section 27(3) of the 1985 Act is concerned, there is nothing yet for the Tribunal to determine because it is far from clear that any such service charge demand will be made. If and when proper service charge demands are made for the years 2007/8, it would be open for the Applicant to make a further application to the Tribunal for a determination as to his liability to pay and the reasonableness of the amounts sought as it would for 2008/9. The Applicant has made the point that there was no Section 20 consultation in respect of this item and this is something that the Respondent will need to take into account when deciding whether or not it can serve a valid demand for this item for more than the £250 statutory cap in the absence of Section 20 consultation.

29. With regard to the surplus from the service charge year 2006/7 it is conceded by the Respondent through its solicitor that there is no provision for a reserve fund contained within the lease. A surplus of income over expenditure was made by the Landlord company during that year there can be no liability therefore it seems to the Tribunal for the lessee to pay over and above the expenditure for that year. Mr Mark Powell is therefore entitled to receive a refund of £922 (being 1/18 of the surplus of £16,604) for that year.

Section 20C Application

30 The Applicant made an application under Section 20C of the 1985 Act for a determination by the Tribunal that the costs of the Tribunal proceedings should not be added to future service charge demands. The Respondent has accepted that there is no provision in the lease entitling it to claim such costs by way of service charge and therefore such a charge cannot be made. Even if that were not the case, however, the Tribunal would have made an order under Section 20C. The Tribunal considers that the Applicant was more than justified in making his application to the Tribunal in view of the unsatisfactory way in which service charges have been dealt with and it would therefore have been just and reasonable for an order to be made under that Section.

Dated this 9th day of September 2010

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D. Agnew BA LLB LLM
Chairman