4958

RESIDENTIAL PROPERTY TRIBUNAL SERVICE

LEASEHOLD VALUATION TRIBUNAL

Case number : CAM/33UC/LSC/2009/0081

Property	:	**Crome House, 231 St Faiths Road, Old Catton, Norwich NR6 7AP**
Application	:	For determination of liability to pay service charges for the year 2008 [LTA 1985, s.27A] For an order that all or any of the costs incurred by the landlord in connection with past proceedings before a leasehold valuation tribunal, and costs to be incurred in these 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 [LTA 1985, s.20C]
Applicants	:	Daniel Crawford, 4 Crome House, 231 St Faiths Rd, Old Catton, Norwich NR6 7AP [lead Applicant] Mrs Liza Machan, 176 Hollesley Rd, Eyke, Woodbridge, Suffolk IP12 1SX [Flat 2] Ms Helen Wade, 2 Crome House, above Mr Simon Wiepen & Miss Tanya Halifax, 3 Crome House, above Miss Karen Weller, 5 Crome House, above Mrs Clare Delange (& Mr Rudolf Delange), 6 Crome House, above
Respondent	:	C A Trott Estate Maintenance, 21 Hurricane Way, Norwich NR6 6EZ

DECISION

Handed down 4th April 2010

Tribunal	:	G K Sinclair (chairman), J G Dinwiddy FRICS & David S Reeve
Hearing date	:	Tuesday 2nd March 2010 at the Holiday Inn, Norwich Airport
Representation	*Applicants*	Daniel Crawford, Rudolf Delange, Clare Delange & Helen Wade in person
	Respondent	James Sandham (counsel), instructed by Hatch Brenner, with Peter Trott & Jessica Trott

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Summary

1. By this application the six residential leaseholders in this eight unit building (two being combined as an office, but with significantly greater *de facto* car parking provision) sought the tribunal's determination of the amounts properly recoverable by the freeholder as service charges for the year 2008. The disputed works comprised :
   a. The repair of a 67 metre long by 2 metre high close-boarded fence
   b. Repairs to a gravel driveway, and associated drainage problems
   c. The installation, as a traffic control measure, of 26 concrete balls in the verge at each side of the driveway, with subsequent repair and/or replacement of several.

2. The leaseholders challenged the hours charged for, the hourly rate, the lack of disclosure of time-sheets, lack of prior consultation, and the need for some of the work (especially the expensive installation of what they regarded as unnecessary and unwanted concrete balls). However, the leaseholders sought no legal advice, and neither obtained any rival quotations for the work nor the expert opinion of a building surveyor as to its reasonable cost.

3. By the end of the hearing the tribunal considered that the parties had benefited from hearing the other's perspective on the problems of property management but, with the legal burden being upon the Applicants to prove that the disputed costs had not been reasonably incurred, the tribunal concludes that the costs of the fencing, driveway and drainage repairs were properly incurred and are payable. However, the tribunal agrees with them that the installation of the concrete balls was neither necessary nor reasonable, and that it does not fall within the obligation in the lease to "maintain repair... and renew" the "roads driveways and parking areas"[1] or "as far as practicable keep the driveways footpaths and gardens of the property in good condition.."[2] Depending on taste, their installation could either be categorised as an alteration or an improvement.

4. The cost of their initial installation and the subsequent repair or replacement of a few concrete balls hit by vehicles repeatedly when swinging into or out of the car park is therefore disallowed. This reduction in allowable cost also has the effect of reducing the freeholder's 10% management fee on top. The total reduction in the annual service charge account for the building is therefore £1,188.33 (of which the Applicants' share collectively is 75%).

5. No order is made either in the Applicants' favour under section 20C of the 1985 Act and regulation 9 of the Leasehold Valuation Tribunals (Fees) (England) Regulations 2003 nor in the Respondent's favour under paragraph 10 of Schedule 12 to the Commonhold and Leasehold Reform Act 2002.

Relevant lease provisions

6. By clause 3(b) of the lease of flat 4 dated 30th March 1988, originally granted by Colin Arthur Trott and Jacqueline Ann Trott as lessor to themselves on behalf of their daughter Jessica (who was then a minor) as lessee, the lessee covenants :

   to pay to the lessor without any deduction by way of further and additional rent

[1] Clause 5(d)(iv) of the lease; and see Fifth Schedule, Pt 1, para 1

[2] Clause 5(e); and see Fifth Schedule, Pt 1, para 2

the share specified in paragraph 7 of the Particulars[3] of the expenses and outgoings incurred by the lessor in the repair maintenance renewal and insurance of the property and the provision of services therein and the other heads of expenditure as the same are set out in the second part of the Fifth Schedule hereto such further and additional rent (hereinafter called "the service charge") being subject to the terms and provisions set out in the first part of the Fifth Schedule.

7. This provision is slightly confused, as the various heads of expenditure appear in the first part of the Fifth Schedule while the second part deals with the calculation, mechanism and timing of payments.

8. As it is relevant to the issue of costs the Respondent's counsel also drew the tribunal's attention to clause 3(f), which at first sight is the usual provision entitling the lessor to recover its costs of and incidental to the preparation of a notice under section 146 of the Law of Property Act 1925, but goes on to add :

> ...or which may be incurred by the lessor in recovering or endeavouring to recover any overdue payment of rent or service charge hereunder.

9. The lessor's covenants, including his obligations concerning insurance, maintenance and repair, and the provision of services, appear in clause 5.

Material statutory provisions

10. The overall amount payable for works of repair and management costs by way of service charge is governed by section 19 of the Landlord and Tenant Act 1985, which limits 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.

11. 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)[4] 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.

12. 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[5] have been either complied with in relation to the works or dispensed with in relation to the works by (or on appeal from) a leasehold valuation

3 Namely 12.5%

4 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

5 SI 2003/1987 (as amended)

tribunal. The consultation procedure includes the obtaining of "estimates" for the works from at least two contractors, one of whom is unconnected with the landlord.

Inspection and hearing

13. The tribunal inspected the property immediately prior to the hearing, on a cool but dry and sunny day. The building appears originally to have been erected as a substantial house sometime in the eighteenth century, with perhaps a later side extension with a lower first floor and differently shaped windows, all under a separate and slightly lower roof. Dormer windows in both the original building and the extension indicate that each has a second floor within the roof space. The building, which was not inspected internally, has been converted notionally into 8 separate units, but 2 on the right are in use as a single office attracting a varying amount of visitors' traffic. The other 6 units are let as residential flats. Each of the 8 units is responsible for an equal share (12.5%) of the service charge costs, but the tribunal's jurisdiction is limited only to the residential ones.

14. The boundary with the public highway at the front is marked by a low brick wall curving inwards to form a vehicular entrance slightly off centre. The property lies slightly below the level of the road, with the access from the pavement just outside the entrance pillars being a gently sloping but badly cracked and weathered tarmac surface. There is evidence of some patch repairs, but the whole slope requires digging out and thorough replacement. At the boundary, behind a concrete rainwater channel, the surface changes to gravel, with a driveway providing access to a large gravel car parking area to the right – in front of the building – and kinking left around the left-hand gable and through a second set of entrance pillars (almost flush with the face of the building) to form the driveway to two private houses in separate ownership, which lie to the rear. To the left of the entrance and driveway to the subject property the ground is maintained as grass, with two small grassed areas immediately to the right of the entrance and in front to the left hand end of the building, where the driveway kinks left. A further strip of grass lies between the front wall and the car park. Twenty five concrete balls of approximately 250–300mm in diameter, plus the footings for a twenty sixth, mark the verges of the first three grassed areas described.

15. Behind a wooden doorway at each end of the building a narrow pedestrian path leads to the large rear garden running the full width of the building, and which is largely laid to grass. Dividing this garden from the driveway to the properties at the rear to the left of the building and across the back is a 2 metre high close-boarded wooden fence slotted into flanged concrete uprights. Unusually, these posts are about 3 metres (c.10 feet) apart instead of the usual 2 metres or 6 feet. The whole fence is about 67 metres long and of some age, with obvious signs where new boards have been inserted to replace those which may have become broken, rotten or missing. Along the right hand boundary is a fence of similar height, but it is the responsibility of the adjoining property and need not concern the tribunal.

16. Affixed to a wall at the right hand side of the property are two signs, one indicating where residents may park along and perpendicular to the front of the building and the other indicating where the parking is for the commercial tenants. This area, by the frontage wall and two rows deep, is proportionately more substantial than that enjoyed

by the six residential lessees[6] and is a constant source of grievance for the Applicants. Interestingly, none of the residential leases actually grant the lessees a specific right to park, although they are responsible for a share of the cost of maintaining the parking area. Whether such a right can be implied is not a matter within the purview of this tribunal.

17. The hearing commenced at 11:10 with counsel for the Respondent lessor handing in a detailed skeleton argument. The bulk of the parties' respective submissions and evidence were set out in writing in documents within the hearing bundle. The service charge statement for the year in question appears at page 29, with seven specific items being in dispute (and having a consequent effect on the lessor's 10% management fee) :

a.	General repairs	£173.61
b.	Fencing repair	1,354.73
c.	Repair driveway potholes	977.93
d.	Unblock and clean drains	285.53
e.	Drain repair	725.51
f.	Repair drive edging	333.11
g.	Concrete balls to grass areas	958.10

18. There is no dispute about other significant cost items such as insurance and gardening.

19. The dispute can be reduced to three "cost" issues – the fence, driveway & drains, and the concrete balls – and two overlapping "management" issues. These latter can be described as :

a. Lack of proper disclosure, and
b. Lack of prior consultation.

The fence

20. The lessees' concern was triggered by the fact that the materials cost for the fence repair was just £78.72 plus VAT whereas the labour cost was shown as £1,354.73, or 39.5 hours at an hourly rate of £27. That is just about as far as the evidence goes, because the labour was provided and the task undertaken by a company owned or operated by the lessor – C A Trott (Plant Hire) Ltd – which shares the same office address. Disclosure of invoices and relevant supporting documents was therefore limited to a brief one-line charge item from the company. The lessees, despite repeated requests, were unable to see any time sheets for the work undertaken by an elderly workman, Mr Ray Smith, who may have been sub-contracted to the company rather than to the lessor direct.

21. However, in support of the reasonableness of the claimed amount and in response to further submissions by the Applicants , Mr Trott had adduced for the hearing two short letters from some independent building firms in the area, S W Greengrass (Builders) and J I High Builder & Contractor Ltd. Their respective hourly rates at the time would have been £24 and £25 (in each case plus VAT), and each regarded the hours spent on the job to a non-standard fence as reasonable. Mr Trott also adduced in support an e-mail dated 3rd December 2009 from Yarco Fencing, which quoted a price of £2,934.98 plus VAT for simply replacing the fence with new concrete posts at 3 metre centres, gravel boards and 1.8 metre high close-boarded panels. Thus rival contractors might have been slightly cheaper, but a more straightforward and perhaps faster replacement would have been

[6] The Applicants argue that the 2 commercial units enjoy at least 45% of the space

the more expensive option.

22. Against this the Applicants were able to comment only that Mr Smith appeared to be working rather slowly and, from individual observations, was not always there. This is why they were so interested in obtaining the time sheets against which he was paid. However, they were able to produce no rival quotation or estimate for the work apart from a quote of £20 per hour from City Garden Services obtained over the telephone without any inspection; nor (as they could have done) the opinion of a building surveyor as to the reasonableness of the time and cost claimed.

Driveway and drains

23. So far as the repairs to the driveway were concerned the dispute focussed on whether the time and effort claimed were really justified. The Applicants considered that the application and periodic raking over of the grave was sufficient. By contrast Mr Trott argued that potholes had to be dug out, a solid foundation of hard core provided, and then a top-dressing of gravel applied. To contain this a concrete edging was required, especially where most vehicles turned right into the parking area. Heavy vehicular traffic may also have caused damage and/or blockage to surface water drainage pipes running somewhere under the driveway and grounds. With no manhole or inspection chamber visible tracing the line of the drain became an intensive manual job. Eventually the route was established, the drain repaired and a new manhole installed in the grass area to the left of the entrance. Again, this task was undertaken by Mr Smith at the same hourly rate.

24. The Applicants' complaints – submissions rather than evidence – were that :
    a. Mr Smith was again working rather too slowly to justify the hourly rate claimed
    b. Such extensive work was unnecessary
    c. It was generally unfair that the residential lessees should have to shoulder such a large share of the cost when no contribution was being made by the owners of the two private houses at the rear (the driveway also being their only means of access) and when most of the vehicular traffic causing the damage was associated with the office and its visitors.

Concrete balls

25. Twenty six concrete balls were fixed to concrete foundations in order to prevent a traffic problem, viz the parking of cars on the grass (one advertising that it was for sale), which the Applicant lessees believed had already been solved by the writing of several warning letters. They also complained that the work was undertaken without any prior consultation, was unwanted, excessive and inappropriate in nature (both as a matter of taste and because the balls were difficult to see yet easily hit and damaged by cars swinging into or out of the car park – and thus some were in need of repeated repair or replacement). Further, they argued that the cost of this work was not recoverable under the service charge provisions in the lease.

26. On behalf of the lessor it was argued that Mr Trott's dilemma was that he was under an obligation to maintain the grass under the lease. How was he to do it? The drain is under the left hand bit of grass, and traffic was driving over the grass on the right. There had been three untaxed cars, and one for sale. The concrete balls were in keeping with the building. Insofar as the decision was an aesthetic one it was for the landlord to decide

what to do. He made a reasonable decision and should not be penalised for it.

Non-disclosure

27. The Applicants' complained that by insisting upon having the work undertaken through a related business, which shared the same office, Mr Trott was able to avoid disclosing that third party's time sheets and sub-contractor's invoices to itself (ie what hourly rate Mr Smith may have been charging it, rather than that at which it charged out his time). Instead, only the invoice passed across the desk from one business to the other was disclosed.

28. A further issue identified by the tribunal, and casting doubt on their veracity, was the extraordinarily confusing numbering system adopted for these invoices. Thus at page 78, re-ordered chronologically, appear the following :

Invoice no.	*Date*	*Amount*	*Description*
6955426	11/12/2007	£285.53	To clear drain
6955421	08/01/2008	£1,354.73	Fencing repairs
6955427	11/01/2008	£333.11	Edgings and gravel
6955424	18/01/2008	£725.51	Repair drain
6956015	22/01/2008	£958.10	Install concrete balls
6955423	31/01/2008	£977.93	Fill potholes + compact driveway
6955391	05/02/2008	£63.45	Repair concrete ball
6955437	31/03/2008	£63.47	Lightbulb + concrete car stop

No explanation could be offered for this by Mr Trott or by his daughter Jessica, with whom the lessees tended to deal.

Lack of consultation

29. The lessees complained about Mr Trott's management style, which involved no prior consultation with them (as demonstrated by the saga of the concrete balls). At page 125, second complete paragraph, they say this :

> A matter of concern to residents, is the fact that landlords who behave without transparency and accountability to their tenants are the cause of why new home purchasers are hesitant to acquire leasehold properties, thereby negatively affecting the demand and thus saleability of property, having a direct financial impact on residents who are property owners.

30. They also queried why a lot of the disputed jobs were undertaken over the same time span but treated as individual billable items, whereas if a surveyor had been asked to prepare a schedule of works these would perhaps all have featured, the total would have exceeded £2,000 (or £250 per unit), thus triggering the statutory consultation regime under section 20 of the Act and the Service Charges (Consultation Requirements) (England) Regulations 2003.

31. In response Mr Trott observed that it was very difficult to consult a disparate group of

lessees, and if they were to form a tenants' association for communication purposes it would make his task a lot easier. He also commented that by arranging for work to be done "in house" he was actually doing them a favour. It would be far easier for him simply to instruct a surveyor (at their expense), have him draw up a schedule of works and tender documents, and have major works undertaken more slowly and expensively.

Discussion and findings

32. The tribunal agrees with Mr Sandham's submission that where service charge items are put in issue then the burden of proof is upon the Applicant. However, although the Applicant is frequently the lessee seeking to challenge the reasonableness of an item of work, or its cost, this is not always so. Sometimes the boot is on the other foot, where for example a lessor is seeking to justify its advance service charge or as a preliminary step to issuing a section 146 notice. In each case the burden falls upon the Applicant.

33. In this case the Applicant residential lessees have in most respects failed to meet the burden placed upon them. They did not have the benefit of legal or other professional advice, other than that one of them is an accountant with an understandable desire to see the invoicing documents relied upon by the lessor. Without alternative estimates for the work undertaken, or the expert report of a qualified building surveyor as to the cost and reasonableness of the works undertaken on behalf of the lessor, their evidence was at best sketchy on all issues other than on the concrete balls.

34. The tribunal therefore finds that the lessor's case concerning the repairs to the fence, corroborated by the views of two independent builders and a quotation for replacing the fence entirely, is justified, and that the Applicants have been unable to undermine it. The same is true so far as the repairs to the driveway and drains are concerned. The tribunal accepts Mr Trott's account of how the route of the drain had to be located by hand, and that repairs to the driveway required more than simply the application and periodic raking of fresh gravel. It also accepts that each lease is quite clear about the proportion of the overall cost payable by each flat, viz 12.5%. This is irrespective of usage of the parking area, and despite the quite astonishing fact that no lease actually grants a right to park anywhere on the property.

35. However, the tribunal does accept the Applicants' case concerning the concrete balls. A landlord has a wide discretion as to how a property is managed, irrespective of the wishes of the tenants who are actually paying for it. However, a complete lack of consultation may in appropriate circumstances incline a tribunal to consider that certain cost items have not been reasonably incurred. A landlord is also generally governed by the terms of the service charge provisions in the lease, save to the extent that these have been modified or disapplied by statute. In this case the tribunal does not consider that the costly installation of 26 concrete balls on both sides of the main driveway was necessary in order to discourage parking on the grass – which it accepts had probably ceased as a result of the warning letters sent earlier – or that it falls within the definition "maintain repair... and renew" the "roads driveways and parking areas",[7] or "as far as practicable keep the driveways footpaths and gardens of the property in good

[7] Clause 5(d)(iv) of the lease; and see Fifth Schedule, Pt 1, para 1

condition..."[8] Depending on taste, installation of these items could either be categorised as an alteration or an improvement.

36. As an effective means of keeping cars off the grass they are also a failure in the specific area which matters, viz to the right hand side, where vehicles swing in to the parking area. The tribunal heard that they are difficult for drivers to see, which is why the same one or two have been damaged repeatedly. On inspection one was loose on its footing and the other had gone. If installation of these concrete balls is disallowed then so too must their ongoing repair or replacement. This element of various general repair bills is therefore disallowed in full. The total deduction is £1,080.30, comprising :

6956015	Supply & Installation	£958.10
6955391	Repair to concrete ball (x 2) @ £63.45	£63.45
6955437	Repair to concrete car stop @ £58.75	£58.75
		£1,080.30
This reduces the 10% management fee by		£108.03
making a total sum disallowed of		**£1,188.33**

37. More generally, the tribunal notes the odd invoice numbering and lack of discussion before the works were done. The rendering of four invoices for items of work within one month suggest that they could have been treated as one job (undertaken by the same contractor and workman) and therefore the Consultation Regulations may have applied. That would at least have informed the lessees in advance of the nature of any proposed works and their likely cost, and given them an opportunity to comment and recommend a contractor that should also be invited to tender. It would also have delayed the work, which may ultimately have been no cheaper.

38. The lessees had good reason to be suspicious, and had the parties taken the opportunity to discuss matters constructively much earlier then the need for this application may well have been avoided. Although the hearing provided a beneficial opportunity for an exchange of information the Applicants' changes of mind over the desire for a hearing only added to the cost.

Costs

39. Although the net effect of the tribunal's findings is to reduce the amount recoverable from the residential lessees of six of the eight liable units collectively by 75% of £1,188.33 (which includes the lessor's 10% uplift for management fees) the tribunal does not consider that it is appropriate to grant the Applicants' request for an order under section 20C, nor to order the reimbursement by the Respondent lessor of either the application or hearing fees. Conversely, although a hearing could have been avoided, the tribunal does not believe that a party exercising its right to attend and make oral submissions (and thus engage in much-needed debate with the other party) is acting either vexatiously or unreasonably so as to justify an award of costs against it of up to £500.

Dated 4th April 2010

Graham K Sinclair – Chairman
for the Leasehold Valuation Tribunal

[8] Clause 5(e); and see Fifth Schedule, Pt 1, para 2