LRX/73/2006

LANDS TRIBUNAL ACT 1949

LANDLORD AND TENANT − service charges −recovery of legal fees paid by management company in suing person instructed to act in connection with matters falling outside scope of covenants in lease- appeal dismissed.

IN THE MATTER OF AN APPEAL AGAINST A DECISION OF THE LEASEHOLD VALUATION TRIBUNAL FOR THE LONDON RENT ASSESSMENT PANEL

BETWEEN

REDCLIFFE CLOSE (OLD BROMPTON ROAD) MANAGEMENT LIMITED **Appellant**

and

DR JORDAN LANCASTER **Respondent**

Re: Flat 41 Redcliffe Close
274-6 Old Brompton Road
London SW5 9HX

Before:
His Honour Judge Gilbart QC

Sitting at Procession House, 110 New Bridge Street, London EC4V 6JL

On 27th February 2007

Mr James Comyn, a Director of the Appellant Company, represented the Appellant
Dr Jordan Lancaster , the Respondent, represented herself.

The following case is referred to in this decision

Redcliffe Close (Old Brompton Road) Management Ltd v Kamal and Kundrath [2004] EWCA Civ 1828

No other cases were referred to in argument.

DECISION

1. This decision relates to an appeal by Redcliffe Close (Old Brompton Road) Management Ltd, which company are the Managers (under the lease described below) of a block of over 70 flats. The appeal is against the decision of the Leasehold Valuation Tribunal ("LVT") of 9th May 2006 which considered the liability of the tenant Respondent Dr Jordan Lancaster to pay disputed items in statements of service charges served by the Appellant Managers on her. Leave to appeal was refused by the LVT but granted by the President of this Tribunal on 24th August 2006 on one ground only.

2. The ground in question relates to the decision of the LVT that the managers cannot recover the costs of High Court proceedings taken by the company to recover sums belonging or owed to the Appellant company by others.

3. It is sensible at this stage to give a brief summary of the facts before condescending to more detail. The block is owned by a landlord, but it is maintained by the Appellant management company, whose directors are tenants. It holds Annual General meetings of the tenants, and in many ways also acts as a tenants' or residents' association. In 2001 an issue had arisen with the landlord over its wish to build penthouses on the roof of the building, and related car ports and to make other related changes, such as depriving the tenants of the use of the two lifts intended to give access to the penthouses. The Managers also wanted to obtain planning permission to replace some Crittall windows. It entered into a contract with a Dr Kamal, who has no relevant qualifications, to negotiate with the landlords and to assist them obtain the relevant planning permission for the replacement windows. Dr Kamal had been recommended to the Managers by a director/tenant Ms Kundrath. Unhappily the Managers entrusted a total of £97,500 of company funds to Dr Kamal, but saw little achieved for their money. By 9th October 2001 the company had instituted High Court proceedings against Dr Kamal for an account and inquiries, and an order for payment of the sums due. Ms Kundrath was also joined as a Defendant. Dr Kamal claimed that he had made the contract with the managers as an agent for another. By 21st January 2003 the High Court had rejected Dr Kamal's claimed defence, and had ordered him to account to the company for £ 97,500. It also ordered payment of £40,000 forthwith on account of their costs. Unhappily, Dr Kamal has sought to exploit all avenues he can use by which to avoid payment, and the Managers have had to resist his unsuccessful appeal to the Court of Appeal and take action to enforce the debt, which remains largely unpaid, as do the bulk of the award of costs in their favour, which were assessed at over £160,000. The Company informed the LVT that it has already taken £160,000 from the reserve fund to pay legal costs, and that the total incurred in pursuing Dr Kamal to date is £266,000. In the charges which were passed to tenants, there appear sums in excess of £210,000 which were paid to the company's solicitors to prosecute the recovery of the money from Dr Kamal.

4. The issue between the parties is this: are the Managers able to pass on to the tenants the costs they have incurred in suing Dr Kamal and Ms Kundrath ?

The hearing

5. The Appellant company was represented, with the Tribunal's permission, by Mr James Comyn, a director. The tenant Dr Lancaster represented herself. Both gave evidence on oath. At the beginning of the hearing I stated that I wanted to see the statements of charges which had been passed to the tenant by the Managers. Only one statement was available at that point, which related to the budget for the year 2003-4. I asked to see the statements and demands for payment that had been made. After hearing evidence from both parties, I adjourned for 2 hours for Mr Comyn to obtain what information he could about past statements of account and the provision of information. He obtained copies of the statements, and also of the minutes of the company, and in some cases its published accounts and directors' reports. During the adjournment I was able to obtain the transcript of the judgement of Jonathan Parker LJ when he dismissed an appeal by Dr Kamal, and which set out the facts of the dispute. I provided a copy to both parties. After the adjournment, both parties said that they did not require another adjournment to deal with either the documents obtained by Mr Comyn, or the transcript from the Court of Appeal.

The provisions in the lease

6. The lease was made on 25th May 1979 between the then landlords, the then tenant and the Appellant company as Managers. By Clause 4, the lessee covenanted with the managers that he would pay the relevant percentage contribution to " the reasonable costs and expenses incurred by the managers in compliance with their obligations under Clause 6 ….and of all other costs and expenses incurred in the management of the building……..together with such monies as the managers shall deem appropriate to build up a reasonable reserve to meet the maintenance expenditure of subsequent years…" By Clause 6, the Managers covenanted with the landlord, and with the tenant to perform services, which are listed. They comprised the following

a. The maintaining of the structure, common parts, pipes, cables etc; the painting of the exterior and common parts, and the staff accommodation; lighting and cleaning the common parts; maintaining and renewing water and central heating apparatus

b. Paying rates, water rates etc assessed on the building apart from the flats; employing staff for the purposes of performing their covenants

c. Employing, at their discretion, managing agents to manage the building and collect rents; " to employ all such surveyors……architects engineers tradesmen accountants and other professional persons as may be necessary or desirable for the proper maintenance safety and administration of the building;" (this is Clause 6(h)(i) and (ii))

d. "Without prejudice to the foregoing to do or cause to be done all such works installations matters and things as in the absolute discretion of the Lessors and managers may be considered necessary or advisable for the proper maintenance safety amenity and administration of the building"

e. To set aside (which is treated as expenditure) " such sum of money as the managers shall reasonably require to meet such future costs as the Managers shall reasonably expect to incur of replacing maintaining and renewing those items which the managers have hereby covenanted."

The evidence of the parties

7. Mr Comyn gave sworn evidence. He is a director of the Appellant company. Like the other directors he is a tenant, and receives no payment as director. He dealt with the court case on behalf of the Appellant. It had sought to find out where £97,500 had gone. There was litigation against Dr Kamal, whom he described as having had a contract to obtain planning permissions. He would get stage payments on results. They then discovered that £97,500 had been paid out by the Appellant company. That was known only by one other member of board who was the signatory of cheques – Sylvia Kundrath. There has been litigation against them both. Proceedings were issued for an account. It got judgment in its favour and a costs assessment certificate. The Court of Appeal dismissed his appeal in 2003-4. The company did not get a judgment against Ms Kundrath. The action was brought to conclusion by consent order after the LVT hearing.

8. At this stage Mr Comyn had none of the relevant documents with him. When asked to describe what had occurred with the transactions with Dr Kamal, he stated that money was paid over for the creation of additional buildings on the roof, and because problems were being experienced in replacing Crittall windows. He said that the planning permission the company sought was for additional space to create a new roof. He believed that Dr Kamal and Ms Kundrath connived to create enrichment for themselves. The company had not gone to the Police because the solicitor told the directors not to do so. The money given to Dr Kamal was also for acquiring the freehold. The freehold was owned by Southern Properties. (It has since been acquired). He said that Dr Kamal gave no account to the company – whose directors did not know what he did with it.

9. Information was given in the accounts which were given to the company's AGMs. That would be in the September/October period. The demands given to tenants would be based on the budget for the next year for maintenance and for the reserve. The budget would then be apportioned between each flat. Now that the litigation had been settled, the remaining liability to pay costs to the Appellant's solicitors was a little under £ 10,000.

10. He stated the Appellant company relied on Clause 6(h)(ii) – see paragraph 6(c) above – on the employment of professionals. He did not suggest that the reserve ("sinking fund") could be used for purposes other than maintenance. He stated that the company would go into liquidation if it had to pay monies back.

11. Dr Jordan Lancaster gave sworn evidence. She stated that she had gone to the LVT to achieve final determination of her liabilities as a former tenant. She had ceased to be a tenant on 8th September 2006, which was before the October AGM, and had vacated her flat before she assigned her tenancy. She considered that there had been a lack of transparency over the court action. She said that she had never received any accounting relevant to the Kamal case. She said that the legal costs figures in the accounts (those for 2003-4) did not relate to the action, but to the Appellant's claim for costs against herself which had been rejected by the LVT. She referred to a letter sent to her on 15th March 2004 from the managing agents which contained a statement relating to her alleged debt to the Appellant company. The solicitors' fees wrongly claimed in that letter amounted to about £5000, which was the same amount as on the budget for legal fees.

12. The AGMs would be told about court action but not informed as to its progress as Ms Kundrath would be present. She said that she had only heard of the true figure at the LVT hearing. The decision of the LVT refers to the figures given to it by the Appellant, which showed £166,000 taken from the reserve fund to pay solicitors' fees, and a figure of costs incurred to date of £266,000. She said that no accounts given by the Appellant's solicitors had been provided. The tenants had not been informed of the nature of payments to the solicitors or of the method of funding. She submitted that the maintenance fund/reserve is held on trust for the tenants for the purposes specified in the lease. She accepted that one could use that fund to sue a person entrusted with money to carry out work falling within the purposes - so that for example one could use money to sue a plumber for money given to him. The dealings with Dr Kamal did not relate to anything covered by the service charge.

13. She was cross examined by Mr Comyn. She agreed that she had been present at a meeting in September 2001 when it was discovered that Dr Kamal had made off with the money. She agreed that the tenants at the meeting wanted to know what had happened to the money. She repeated that she had had no accounts.

14. As noted above, I was not satisfied that I had sufficient evidence. Mr Comyn then arranged for documents to be faxed to the Tribunal. I also obtained a copy of the transcript of the judgement of the judgment of Jonathan Parker LJ in *Redcliffe Close (Old Brompton Road) Management Ltd v Kamal and Kundrath* [2004] EWCA Civ 1828, which gives a very useful summary of the subject matter of the action.

15. Mr Comyn gave evidence again. He accepted that paragraphs 18 and 20-28 of the judgment were true factually. As to paragraph 19, he could not say if it was true. Paragraphs 18-28 neatly encapsulate what has happened:

> "18. Before considering the various applications, it is first necessary to set them in their factual and procedural context. I begin by summarising the factual background. As its name implies, the company is a management company formed by the tenants of a block of 74 flats in Old Brompton Road. In early 2001, the current tenants were experiencing difficulties in obtaining planning permission for the replacement of the windows in the block; and they were also

trying to resist a proposal by their landlord to construct penthouses on the roof, a proposal which also involved instructing carports on part of the garden and commandeering two of the available lifts for the exclusive use of the penthouses.

19. Following a board meeting on 5 April 2001, the Board of Directors of the company, consisting of 7 tenants, by a majority resolved to accept an offer by Dr Kamal to act as the company's personal negotiator in attempting to resolve the current difficulties. The second defendant in the action, Miss Kundrath, who was the Chairman of the Board, had had previous dealings with Dr Kamal and had recommended him for this post.

20. The terms included a fee for Dr Kamal of £30,000, of which half, £17,500, was to be paid up front, plus £2,500 on account of costs and disbursements. A sum of £20,000 was duly paid into Dr Kamal's bank account.

21. At a board meeting on 7 May 2001 attended by Dr Kamal, Dr Kamal reported on the progress. At this meeting, Dr Kamal asked for £20,000 on account of costs and disbursements, plus one third of in effect the benefits accruing to the tenants as a result of his efforts. The board agreed to £12,500 upfront on account of costs and disbursements and a reduced percentage in respect of any benefits accruing.

22. Thereafter during the period May to August 2001 further payments were made by the company to Dr Kamal totalling some £97,500. All such payments were made directly into his personal bank account.

23. In August 2001 the company asked Dr Kamal to undertake additional work, which involved instructing valuers. On 9 August 2001 the managing agents paid £10,000 into Dr Kamal's bank account as an agreed payment on account of expenses and disbursements incurred in carrying out this additional work. In addition, it seems that it was agreed that Dr Kamal should be entitled to a further share in any enhancement in the value of the block resulting from his efforts.

24. By September 2001, the tenants were becoming increasingly concerned as to what had happened to the money they had paid to Dr Kamal; and at an Extraordinary General Meeting of the company held on 27 September 2001, it was resolved that Dr Kamal be required to produce all documentation relating to his dealings with the sums paid to him, and generally to account for what he had done with the money. This demand was duly relayed to Dr Kamal. The company's demand was not complied with, and on 9 October 2001 the present action was commenced. As against Dr Kamal, the company seeks accounts and enquiries designed to establish where the money has gone and an order for payment of the sum due.

25. By his Defence, Dr Kamal does not dispute that some £97,500 was paid to him by the company; but he contends that he was acting throughout for a disclosed principal, a company incorporated in Minnesota called AKMA Solutions Inc (I will refer to it simply as "ASI"); and in consequence that he has no liability to account to the company. Dr Kamal also counterclaims for sums due to him on the basis, which he denies, that he entered into contractual relations with the company. As mentioned earlier, that counterclaim has been and remains stayed.

26. In due course, preliminary issues were directed, designed to resolve the issue of Dr Kamal's accountability to the company. The precise terms of the

preliminary issues were varied by consent at the outset of the hearing before the Judge, both sides being represented by counsel.

27. In his judgment, the judge held that the company had contracted with Dr Kamal as principal and not as agent of ASI; but that in any event, Dr Kamal was accountable to the company, given (a) that, as Dr Kamal had accepted, it was he personally who was to act on behalf of the company in the various respects requested by the company, and (b) that the money had all been paid directly to him and into his personal bank account.

28. As to Dr Kamal's contention that he had throughout been acting as agent for ASI as a disclosed principal, the Judge found in paragraph 50 of his judgment that the contract concluded in April 2001 was a contract between the company and Dr Kamal alone. He noted that later letters from Miss Kundrath to Dr Kamal included references to ASI in Dr Kamal's address. But he concluded in paragraph 52 of his judgment that these letters could not affect the contract which had by then been concluded; and that in any event Miss Kundrath's inclusion of a reference to ASI in Dr Kamal's address was perfectly consistent with a trading name being used by Dr Kamal."

16. Mr Comyn stressed that the tenants, including Dr Lancaster, had been kept informed at all times of what was happening. He then produced various documents (NB years run to 30th September):

a. Demands for payment from tenants accompanied for budgets for the years 2002-3, 2003-4, 2004-5, 2005-6, 2006-7;

b. Accounts/Directors' Reports for the years ending 2002, 2004, 2005;

c. Minutes for the AGM of 30th September 2002, and EGMs of 20th July 2004, 21st March 2005 and 5th October 2006;

d. An internal working document of the board drawn up for a board meeting on 17th June 2004.

17. Those documents show the following

a. In 2002 the tenants were informed that action had been taken against Dr Kamal, and judgement given for £82,500 with costs. He had been ordered to pay £ 80,000 into court before trial. £40,000 had been paid out to the Appellant company. His remaining liability was assessed as £140,000. Ms Kundrath also owed costs to the company;

b. The 2002-3 budget, prepared in September 2002, reported the litigation in an accompanying letter. Of the total budget of £142,500, £30,000 was represented by legal fees payable by the Appellant company. The 2003-4

budget of September 2003 included a figure for such fees of £5000 out of £116,303.

c. The Board's working paper for 17th June 2004 shows legal fees being incurred of

2001-2	Actual	£97,267
2002-3	Actual	£61,273
2003-4	Projected actual	£40,042

d. On 20th July 2004, an EGM was held. Dr Lancaster was shown in the Minutes as being present. Mr Comyn was recorded as having given a progress report on the legal action. It recorded that Ms Kundrath was also present. It was hoped that all legal costs would be recovered, but that at worst the recovery might be limited to the amount in court of £40,000. A threatened counterclaim of £ 800,000 by Dr Kamal was intimated.

e. On 11th October 2004, the budget for 2004-5 was sent out. It included a figure of £10,000 for legal fees.

f. On 21st March 2005 another EGM was held. Mr Comyn reported that the case was presently " in limbo." He reported that Dr Kamal had been ordered to pay £165,000 to the Appellant before he could issue a counterclaim.

g. On 22nd August 2005 the Appellant distributed its accounts and directors' report for the year ended 30th September 2004. It reported that Dr Kamal had not satisfied the judgments and orders against him. It noted that £40,000 had been paid out, but that £150,000 was still owed. The accounts show legal fees incurred in 2002-3 of £39,672, and of £61,273 in 2003-4.

h. On 2nd September 2005 the Appellant company sent out the budget for 2005-6. It included legal fees of £ 20,000.

i. On 7th August 2006 the Appellant company sent out the directors' report and accounts for the year 2004-5. It warned that in early 2005 Dr Kamal had been allowed by the court to issue a counterclaim, and that the company had been stayed from issuing a bankruptcy petition against him. He had not satisfied the judgment and various orders. Legal fees for 2004-

5 were shown as £40,165. The budget for 2006-7 was sent out on 25th September 2006. It showed an item of £ 5000 for legal fees.

j. An EGM was held on 5th October 2006. It approved a proposal that the action against Dr Kamal and Ms Kundrath be settled out of court.

18. Dr Lancaster was recalled by the Tribunal. She accepted that apart from the internal document, and the document of 7th August 2006, the EGM of 5th October 2006 and the 2006-7 budget, she had received all the other documents. She had attended AGMs. She now said that she had never thought that the £5000 in the 2003-4 budget related to the claim for costs against herself. She had presumed that the majority of the legal fees related to the Kamal litigation. Her concern, then and now, was that there was no breakdown of the figures. She had been present at the 20 July 2004 EGM, when she asked for an account of the litigation.

19. She said that the Minutes of 21st March 2005 refer to a figure of £165,000 – but that the accounts show far more. The first time she had been given of a figure for costs of £270,000 was at the LVT. She considered that she had not been given answers . She had paid all claims made. She wanted to be assured that no further claims would be made on her.

20. In a final submission, Mr Comyn stated that if the result went against the Appellant it would have to go into liquidation if it had to repay the money to tenants. He considered that all times the Appellant company had acted in the best interests of the tenants.

Conclusions

21. Although Mr Comyn was confused at first, and was hampered by not having the documents, I am satisfied that if one puts the judgement of Jonathan Parker LJ together with the various documents later produced, one gets a reasonably clear picture, except that I am not satisfied on what the total bill for costs has been or will come to. I do not consider that the figure in excess of £250,000 given at the LVT is in any sense reliable. I prefer to take the figures from the accounts. They show that fees have been spent/budgeted as follows

2001-2	£97,267
2002-3	£39,672
2003-4	£61,273
2004-5	£40,165
2005-6	£ 20,000 (budget)
2006-7	£ 5000 (budget)

That amounts to £ 223,212. Once one adds in the money paid to Dr Kamal (£ 97,500) and deducts the amount taken out of court, it can be seen that the whole exercise has or will cost £280,712 from the management company's resources.

22. I accept Mr Comyn's evidence that he kept the other tenants informed as far as he was able. While I accept that objectively more information could have been given, I reject Dr Lancaster's evidence that the Appellant's conduct was not transparent. I find that she knew that fees were being incurred, and to a reasonable degree, on what. However that does not mean that her case on liability is to be rejected.

23. The power of the Appellant company to levy service charges is defined by the lease. I shall consider first the payments to Dr Kamal in the context of the terms of the lease. Insofar as he was instructed to negotiate with the landlords about the penthouse proposals or about acquiring the freehold, that fell outwith any of the purposes falling within Clause 6. In my judgment Clause 6(h)(ii) would have permitted a professional person to be instructed to advise on the consequences of the landlord's proposals in structural or maintenance terms, or to advise on the replacement of the windows, but did not permit what Dr Kamal was instructed to do. Further, insofar as the monies placed in his hands were from the fund levied under the provision in the lease which permits the raising of "such sum of money as the managers shall reasonably require to meet such future costs as the Managers shall reasonably expect to incur of replacing maintaining and renewing those items which the managers have hereby covenanted, " the purposes for which Dr Kamal received the large sums provided to him did not fall within that compass, with the possible exception of the replacement of the windows, which I consider further in the next paragraph.

24. The Appellant company has not sought to reclaim the £97,500 from the tenants. In my judgment wisely so, because patently it largely related to items that had nothing to do with the obligations on the Managers. While the obtaining of planning permission for replacement windows could be said to fall within the terms of the lease, it is inconceivable that an agent's fee for submitting a planning application would amount to more than a few thousand pounds, even assuming that he had town planning or architectural qualifications (which Dr Kamal did not) and had prepared plans. The main concern of the tenants was over the proposals of the landlord to erect penthouses on the roof, and to negotiate with regard to the freehold. It is hard to see how any of the issues confronting the tenants in 2001 could have justified paying an unqualified man £30,000 up front followed by other payments of £67,500. However, I need not come to a firm conclusion about that. For there is nothing in the lease which entitled the managers to reclaim from the tenants the cost of negotiating with the landlord over his proposals, or instructing a valuer, or over the acquisition of the freehold. Still less is there anything in the lease which permitted sums within the maintenance reserve to be handed over to Dr Kamal as a fee for conducting negotiations.

25. I do accept that if the money paid to Dr Kamal did fall within the items of permitted expenditure under the lease, then it was open to the company to reclaim as service charges the costs of recovery from him. If the money handed over to Dr Kamal was not money properly spent within the terms of the lease, then it follows that money spent on recovering it from him and/or Ms Kundrath is also expenditure which falls outside the terms of the lease. Given my conclusions on the propriety of the payments to him, it follows that the LVT was correct to disallow these items, and this appeal must be dismissed.

26. This is an immensely sad case, as often occurs when decent people put their money in the hands of someone who has behaved as Dr Kamal did. I have no power to protect the directors of the Appellant company from the consequences of the most unwise decision to entrust Dr Kamal with its money, nor from their decision to spend very considerable sums in pursuing him. If the company goes into liquidation, certain consequences may follow. I do counsel all the directors concerned over the years to get independent legal advice, which does not emanate from any solicitor or firm who or which has acted or is acting for the Appellant company in the litigation or otherwise. That is not to criticise the firm which has acted, but merely to stress the importance that the advice must be independent.

Dated 7th March 2007

Signed His Honour Judge Gilbart QC