Residential Property
TRIBUNAL SERVICE

Case Number: CHI/18UG/LIS/2009/0083 and 0103

RESIDENTIAL PROPERTY TRIBUNAL SERVICE

SOUTHERN LEASEHOLD VALUATION TRIBUNAL

PROPERTY: 77A High Street, Totnes, Devon, TQ9 5PB

Applicant Lessee: Ms Miranda H Spicer

and

Respondent Landlord: London and Western Holdings plc

In The Matter Of

Section 27A and 20C of the Landlord and Tenant Act 1985 (Liability to pay service charges)

Tenant's application for the determination of reasonableness of service charges for the years 2008/9 and 2009/10.

Tribunal
Mr A Cresswell (Lawyer Chairman)
Mr J S McAllister FRICS (Valuer Member)

Date of Consideration: 11 December 2009

DETERMINATION

The Application

1. On 5 August 2008, proceedings were begun at Plymouth County Court by the Respondent for recovery of, amongst other sums, the cost of insurance

attributable to the property, 77A High Street, Totnes for the year from 15 May 2008. Those proceedings were, so far as they relate to the sum demanded by the Respondent for insurance, first stayed on 11 June 2009 and then transferred to this Tribunal on 28 August 2009. On 23 July 2009, the Applicant, the owner of the leasehold interest in 77A High Street, Totnes, made an application to the Leasehold Valuation Tribunal for the determination of the reasonableness of the service charge costs for insurance claimed by the landlord, of £628.53 and £461.89, for the years 2008/9 and 2009/10 respectively. The application referred to the apparent unreasonableness of the charges.

Inspection and Description of Property

2. The Tribunal inspected the property on 11 December 2009 at 10.30 a.m. Present at that time was the tenant, Ms M Spicer. The property 77A consists of a staircase from the ground floor and leading to the first floor of 77 High Street, Totnes, and the whole of the first and second floors of 77 High Street and a yard and store at the rear. The entire structure encompassed two typical flats and two A1 retail shops. The property 77A is a two storey [first and second floors] 2 bedroom, maisonette forming part of 75-77 High Street which is a Grade 2 Listed Building. It is traditionally built of rendered and slate hung walls under a slate covered roof. The whole building comprises 2 ground floor shops with 77A and another flat over 75. The building is end terraced and was apparently virtually completely rebuilt about 30-40 years ago.

Summary Decision

3. Under Sections 19 and 27A of the Landlord and Tenant Act 1985 (as amended) service charges are payable only if they are reasonably incurred. The Tribunal has determined that the Respondent has not demonstrated that the charges in question were reasonably incurred, and parts of those charges are not payable by the Applicant.

INSURANCE		
YEAR	2008/9	2009/10
SOUGHT	£628.53	£461.89
PAYABLE	£459.20	£459.20

4. The Tribunal allows the tenant's application under Section 20c of the Landlord and Tenant Act 1985, thus precluding the Respondent from recovering its cost in relation to the application by way of service charge.

Directions

5. Directions were issued on 31 July 2009 [case 103] and on 5 October 2009 [case 083] consolidating both applications. These directions provided for the matter to be heard on the basis of written representations only, without an oral hearing, under the provisions of Regulation 13 of the Leasehold Valuation Tribunals (Procedure)(England) Regulations 2003, as amended by Regulation 5 of the Leasehold Valuation Tribunals (Procedure)(Amendment)(England) Regulations 2004.

6. The Tribunal directed that the parties should submit specified documentation to the Tribunal for consideration. It was, in particular, provided that

> *" The respondent shall within 28 days of receipt of the papers referred to in paragraph 3 hereof, send to the applicant and to the Tribunal a statement in writing saying why it contests the application and the reasons why it does so. The respondent should accompany the statement with such copy correspondence, documents or other papers as they consider relevant to the matter as issued. In particular they shall supply copies of all receipts, invoices, schedules and other documents that it wishes the Tribunal to see in support of its case."*

7. This determination is made in the light of the documentation submitted in response to those directions. Whilst there was considerable documentation submitted, the information available to us was not commensurate with the size of the bundle of papers.

The Law

8. The relevant law is set out in sections 18, 19 and 27A of Landlord and Tenant Act 1985 as amended by Housing Act 1996 and Commonhold and Leasehold Reform Act 2002.
9. The Tribunal has the power to decide about all aspects of liability to pay service charges and can interpret the lease where necessary to resolve disputes or uncertainties. Service charges are sums of money that are payable – or would be payable - by a tenant to a landlord for the costs of services, repairs, maintenance or insurance or the landlord's costs of management, under the terms of the lease (s18 Landlord and Tenant Act 1985 "the 1985 Act"). The Tribunal can decide by whom, to whom, how much and when service charge is payable. A service charge is only payable insofar as it is reasonably incurred, or the works to which it related are of a reasonable standard. The Tribunal therefore also determines the reasonableness of the charges.

Ownership and Management

10. 77A High Street is owned freehold and managed by the Respondent as part of 75-77.

Ms Spicer's Lease

11. Ms Spicer holds 77A High Street under the terms of a lease dated 6 December 1974, which was made between Westward Developments (Totnes) Limited as lessor and a Martin Robert Boulton and Kathryn Margaret Boulton as lessees and under a Deed of Variation dated 1 June 1988 between North London Property Group Limited (the previous name of the Respondent, as can be seen from a Certificate of Incorporation on Change of Name) and June Lesley Palk. The titles of both lessor and lessee have passed with time to the Respondent and Applicant. This is clear from the Official Copy entries of the Land Registry, the Respondent being shown as the holder of the Title Absolute of the Freehold on Title Number DN85430 dated 12 December 2002 in respect of 75 and 77 High Street, Totnes, and the Applicant being shown as the holder of the Title Absolute to the Leasehold on Title Number DN201192 dated 4 January 2001 and 28 January 2009.
12. Clause 3 of the Deed of Variation provides

> *(i) That the property demised by the Lease shall extend down to the level of and shall include the beams joist or other supports on which the first*

floor of the Property rests and the entrance door and staircase and structure thereof leading to the demised property from ground floor level

(ii) That the Landlord will at all times during the term of the Lease (unless such insurance shall have been forfeited or shall be vitiated by any act neglect default or omission of the tenant or any sub-tenant or their agents servants licencees or invitees) insure and keep insured the structure of the Property for a sum which is not less than the full reinstatement value with an insurance office or underwriters of repute against fire and such other risks as the Landlord deems desirable and will if required produce to the Tenant (but not more than once in any year) evidence of such insurance and in case of destruction or damage by an insured risk (unless the insurance monies shall become or shall have become irrecoverable through any act or default of the Tenant or any sub-Tenant or their agent licencee or invitee) the Landlord will with all reasonable speed cause all monies received to be forthwith laid out in re-building and reinstating the structure of the property

(vii) The Tenant will forthwith on demand by the Landlord pay to the Landlord a fair proportion of the cost incurred by the Landlord in insuring the Property in accordance with the provisions hereof

The Applicant's Case

13. Ms Spicer explains in her Statement of Case the history of the dispute with the Respondent in relation to the Insurance costs for her portion of the building 75 to 77 High Street. She queries whether she is bound by the terms of the lease (we have explained at paragraph 12 above why she is covered by the terms of the lease as amended by the Deed of Variation). She asks the Tribunal to assess whether the costs claimed by the Respondent are reasonable and presents examples of alternative quotations. She points out that a lesser sum of £626.53 had been used in correspondence from the Respondent of 15 May 2008 in reference to the 2008/09 insurance apportionment.

The Respondent's Case

14. The Respondent also refers to the history of the dispute. It says that the design and layout of 75 to 77 High Street are such that it is not feasible or practical to have other than a single insurance policy with the premium apportioned as to floor space occupied by the respective units, and that this was the reason for the Deed of Variation (previously the duty to insure fell upon the lessee). A schedule, LWH1, within the Respondent's papers details an apportionment of 450 sq ft or 41% to 77A, 500 sq ft or 27% to the flat at 75A and 240 sq ft or 13 % and 350 sq ft or 19% to the shops at 75 and 77 High Street.

15. With regard to the actual costs of the premiums for 2008/9 and 2009/10, a letter from the Respondent's broker is attached. This explains that the broker has been responsible for insurance for the building for at least 10 years. The Applicant made claims against the policy in 2005 and 2006 of £2660 and £1,128.75, which were settled by Allianz, which was still covering the insurance risks for 2008/9. Because of the increasing cost of insurance, the brokers approached Norwich Union, which already had a substantial cover with the Respondent for one of their companies, and it was this association which led to the lower quotation for 75 to 77 High Street for 2009/10.

16. With regard to the alternative quotations produced by the Applicant, the Respondent lessor submits that the quotations provided by the Applicant are not appropriate and show why it was necessary to obtain a global cover for 75 to 77 High Street. A quotation from the Post Office was with Axa; the brokers had obtained a quotation for that company on a whole building status, which would have meant a cost to the Applicant, on apportionment, of over £500, rather than the £461.89 demanded for 2009/10.

Consideration and Determination

17. What is in issue, therefore, is whether the actual expenditure on insurance for the years 2008/2009 and 2009/2010 was reasonably incurred, and whether the apportionment of those costs was done fairly.

18. The Tribunal was supplied with a schedule from the Respondent, LWH1, in which the Respondent detailed the methodology involved in its apportionment of the insurance costs for the whole structure of 75/77 High Street, Totnes, which included this property. LWH1 records a calculation of the square footage of the two shops, 75 and 77 High Street, and the two flats, 75A and 77A High Street. The addition and apportionment of those areas of square footage detailed in LWH1 results in a different percentage share to that used by the Respondent in LWH1. The addition of square footage results in a total of 1540 sq ft. 77A is said to represent an area of 450 sq ft, which equates to 29.22%, rather than the 41% detailed on LWH1 and applied to the total cost of insurance. In the bundle the Respondent prepared for the County Court, there is at the rear a bundle of correspondence. "Page 4" of that correspondence looks to be an earlier iteration in 2003 of the substance of LWH1. The overall area is shown on "page 4" as 1840 sq ft, not 1540 sq ft, and 77A as 750 sq ft, not 450 sq ft. 750 sq ft equates to 40.76% of the total area or £459.20 as a proportion of the insurance charge for 2009/10.

19. It seems very likely to the Tribunal that the creator of LWH1 has misread either "page 4" or some other manuscript detailing of the recorded areas of the 4 properties, because the percentages used in "page 4" appear to have been applied in years subsequent to 2003, and an "eye view" inspection of the premises suggests that the area of 77A is nearer to 40.76% rather than 29.22% of the whole area of the structure. The Tribunal deplores this inaccuracy on the part of the Respondent, which could have led to us assessing the payable charge at the lower percentage rate.

20. We noted that the lease required the Applicant to pay a fair proportion of the cost incurred by the landlord in insuring the property in accordance with the provisions of the Deed of Variation. In the absence of any evidence of an independent assessment of percentage share of the whole building, we have proceeded upon the basis that the measurements or areas detailed by the Respondent within LWH1 ("page 4 ") are correct.

21. The Tribunal next considered whether the cost of the insurance contracts entered into by the Respondent were themselves reasonable. There was no evidence before us of any alternative quotations obtained by the Respondent in 2008/09. There was, however, evidence of an alternative quotation in 2009/10, resulting from an approach by the Respondent's broker to the company used by the Respondent for cover for other properties within its portfolio. Such an approach shows the savings which could have been made in 2008/09. We are aware that costs of insurance have normally increased, rather than decreased, year on year. We have concluded, therefore, that it would have been possible for the Respondent to have obtained cover in

2008/09 at a level at least as low as that obtained in 2009/10. On that basis, we have concluded that in terms of overall cost for the entire structure, the reasonable level of recoverable expenditure in 2008/09 should be no higher than the premium paid in 2009/10.

22. A letter of 2 December 2009 from the Respondent to the Tribunal tells the Tribunal that the current insured value of the entire structure is £404,819. We were not, however, told how this figure had been reached; there was no evidence of any involvement of a surveyor or assessor. Whilst the Tribunal was not itself able to provide an accurate valuation, the figure posited by the Respondent appeared to us to be on the high side.

23. The Applicant had provided quotations for the insurance of the property, but these were not on a like-for-like basis, and did not assist us in arriving at our determination.

24. In the absence of any technical, measured analysis of costings by either party, the method suggested by the Respondent finds favour with the Tribunal. We, therefore, approached the question of what sum should be payable for the 2 years on the basis which we have discussed above. Accordingly, we find that the charge for insurance payable for the year 2008/09 should be the same as that achieved in 2009/10, i.e. £1,126.56. The Applicant's share of that cost is some 40.76% or £459.20 for each of the two years.

Section 20c Application and Costs

25. The Respondent asks the Tribunal to make an award to it of its County Court costs of £135 in relation to the claim in that court, transferred to this Tribunal, of the demand in respect of insurance costs for 2008/9, and £575 as a contribution to the costs of the Respondent in relation to these and the County Court proceedings.

26. The Applicant has made an application under Section 20C Landlord and Tenant Act 1985 in respect of the Respondent's costs incurred in these proceedings. The relevant law is detailed below:

Section 20C Landlord and Tenant Act 1985: Limitation of service charges: costs of proceedings

(1) A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a ... ... leasehold valuation tribunal, ...are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application.
(3) The ... tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances.

27. We could see no provision either in the lease or the Deed of Variation which allows the lessor to recover costs incurred or that may be incurred in legal proceedings as service charges. Even if there was such a provision, the Tribunal finds that the Applicant has been successful both in terms of resisting the claim as made by the Respondent in the County Court, and in part in pursuing her application in this Tribunal, and that her application under Section 20C would be successful too.

28. The LVT has the power to award costs of up to £500 where an application is

dismissed on the grounds that it is frivolous or vexatious or otherwise an abuse of process, or where a party has, in the opinion of the LVT, acted frivolously, vexatiously, abusively, disruptively or otherwise unreasonably in connection with the proceedings. None of those circumstances apply here, and the Tribunal has no other powers in relation to the payment of costs.

General

29. The Tribunal has recorded its view at paragraph 22 above that the insurance valuation of the whole structure appears to be on the high side; the landlord's total premiums also appeared to us to be rather high. There is a need regularly to obtain several competitive quotations so as to ensure that the lessees are charged reasonable amounts for the insurance of the building. The likely cost to the parties of further applications to this Tribunal for future years may also be allayed by the commissioning of a professional assessment of the reinstatement value and of the areas of the respective units and a further deed of variation to encompass the precise shares of the units of the cost of insuring the whole structure.

A. Cresswell

Andrew Cresswell (Chairman) **Date: 21 December 2009**
A member of the Southern Leasehold Valuation Tribunal
Appointed by the Lord Chancellor