

LEASEHOLD VALUATION TRIBUNAL

Property: 3 Field Court, 33 Sunningfields Road, London NW4 4QT

Applicant: Wilson Hawkins Limited, managing agents

Represented by: Mr Thompson, managing agent employed by Wilson Hawkins Limited

Respondent: Mrs Ramgee Nathan

Represented by: Self

Tribunal: Mr N. Gerald
Mr L. Jarero FRICS

Date of hearing: 1st December 2008

Date of decision: 13th February 2008

DECISION

INTRODUCTION

1. On 28th March 2008, judgment was entered in the Willesden County Court for £3,848.40 (being £2,736.45 service charge since 14th January 2004 plus a £200 "collection charge" and £911.95 interest since 14th January 2004) plus a further £100 court fee ("the County Court action").
2. On 5th August 2008, the judgment in default was set aside but ordered to stand as to £1,190.36 that being the amount which Mrs Nathan said¹ that she accepted as being owing (£1,090.36) plus £100 of county court costs. The matter was ordered to be transferred to the Tribunal "to determine reason of balance of claim" (*sic*).
3. On 10th September 2008, the Tribunal held an oral Pre-Trial Review which was only attended by Mrs Nathan. The central thrust of her complaints were that no annual service charge accounts had been prepared; she had not been permitted to see invoices; there had been no reconciliation of what she has paid since January 2002.
4. The Tribunal directed that annual service charge accounts for all years from and including 2001/02 be provided together with a statement of account reconciling all payments made by Mrs Nathan with the amounts due as shown by the service charge accounts since 2001/02 together with all supporting invoices.
5. The Claimant in the County Court was Total Credit Control Limited who were debt collectors engaged by Wilson Hawkins Limited which is the managing agent employed by the freeholder/landlord Field Court Residents Limited ("the Company") which, in turn, is a company incorporated on 4th September 2001 to acquire the freehold reversion to the block of flats. The Company is owned by all of the eight tenants, including Mrs Nathan, and acquired the freehold in about January 2002.

¹ In the handwritten schedule to her long letter dated 11th February 2008 sent to the county court

6. In those circumstances, the Tribunal also directed that its Directions be served on the Applicant and also the Company and warned that a failure to provide documents could lead to adverse inferences being drawn.
7. The Applicant and also the Company failed to comply with the Directions in all respects. On Wednesday 26th November 2008, the Applicant served a small bundle of documents relating to 2003 to 2005, which comprised an incomplete collection of invoices.
8. On the day of the hearing, Monday 1st December 2008, the Applicant delivered an almost full lever arch file comprising the lease of Mrs Nathan's flat dated 6th June 1979 ("the Lease"), the Company's accounts for the financial years ended 30th September 2002 to 2006 inclusive together with supporting invoices (again incomplete) for each year. None of the accounts are audited.
9. Thus, the Applicant did not produce service charge accounts or a reconciliation of what Mrs Nathan has paid against what was due pursuant to the service charge accounts. Mr Thompson for the Applicant stated that the only accounts available were the Company's accounts, and that they should be treated as the service charge accounts. He was content for the Application to proceed on the basis of the documentation provided to the Tribunal.
10. Mrs Nathan was undaunted by the volume of documents produced at the last moment. She wished the hearing to continue, telling the Tribunal that she was desperate for the dispute to be over as it has taken its toll on her health and she is presently on sick leave. She also made it clear that she has always been prepared to pay her share of the service charge but only on production of the underlying invoices.
11. Faced with no reconciliation from the Applicant, Mrs Nathan produced her own reconciliation of what she said she had paid against the invoices she had been shown and understood were payable. This document had not been provided to the Applicant before the hearing.
12. The Applicant objected to the Tribunal placing reliance upon this document. The Tribunal rejected those objections. It ill behoved the Applicant to object to a short reconciliation produced by a litigant in person when it itself should have but failed to produce a reconciliation and had not served its substantial bundle of documents until the hearing and (again in breach of the Directions) even then did not produce a copy for Mrs Nathan (there was a brief adjournment to enable copies to be taken). Furthermore, the Applicant has had more than enough time to comply with the Directions but has not done so.

FINDINGS

Introduction

13. By clause 2(3) of the Lease, the tenant covenants to pay to the landlord on the 25th December each year the sum of £75
"as a contribution towards the expenses incurred by the Lessor in performing the covenants on the part of the Lessor set forth in clause 3 hereof including the reasonable remuneration of a Managing Agent to be

appointed by the Lessor for the purpose of Managing the Building PROVIDED NEVERTHELESS that if one eighth part of the said expenses reasonably and properly incurred by the Lessor in any year (as certified by the Lessor's Surveyor hereinafter called "the surveyor" whose certificate shall be final and not subject to challenge in any manner whatsoever) shall exceed Seventy-five pounds then the Lessee shall pay to the Lessor the amount of the excess such sums to be paid within twenty-eight days after the service on the Lessee of a copy of the certificate of the Surveyor PROVIDED FURTHER that if such one eighth part shall be less [Seventy-five] Pounds then the difference shall be allowed to the Lessee".

14. The Applicant accepted that the effect of clause 2(3) of the Lease is that Mrs Nathan was liable to pay £75 every Christmas Day but was not obliged to pay any further sum or sums unless and until she had been served with a certificate from the surveyor in which event Mrs Nathan would have to pay (or be repaid) the balancing sum within twenty-eight days. The Applicant also accepted that no surveyor's certificate had been provided so that it followed that nothing more than the annual £75 was due from Mrs Nathan.
15. It follows that notwithstanding that Mrs Nathan accepted in the County Court action that £1,090.36 was owing and that she has since paid that sum, that sum was not in fact owing under the terms of the Lease. It would also appear to follow that the County Court action was doomed to failure from the very outset because the terms of the Lease had not been observed by the Company or the Managing Agents. It is unfortunate that she has been ordered to pay and has paid £100 costs.
16. Notwithstanding that point and the acceptance by the Applicant and therefore by the Company that the sums claimed were not due within the terms of the Lease (paragraph 14 above), Mrs Nathan did not wish to stand on her strict legal rights but wished the amount of the service charges claimed from her in the County Court to be finally determined by the Tribunal so as to avoid any further stress. In so doing, Mrs Nathan wished there to be finality as to the amount of service charge due, but was not otherwise waiving whatever arguments she may have as to the propriety of the County Court action, its costs or the interest claimed. The incidence of costs also interest (if any) are for determination by the County Court when this Application reverts to it.
17. Mr Thompson for the Applicant stated that the amounts claimed in the County Court action and therefore transferred to the Tribunal for determination are for the amount of actual service charge due as at 30th September 2007 plus one payment on account for the following service charge year. It is clear from the two computer print outs entitled "Detailed Statement" that the material sums claimed related to five actual service charge years ending 30th September 2003 to 2007 inclusive and payment on account for the part year 2008.
18. As already stated, the Applicant has produced no service charge accounts and certainly none certified by a surveyor. Mr Thompson stated that the service charge accounts would in all material respects be the same as the Company's annual accounts and that they should be treated as being the service charge accounts. The Applicant was prepared to stand or fall by those accounts as evidenced and supported by the disclosed documents produced to the Tribunal as set out above.

19. Mrs Nathan objected on the ground that they were not service charge accounts, were inaccurate as not being supported by invoices and also were for the wrong period – they should have been for service charge years ending either at the end of each calendar year or possibly at the end of March. She did not dispute that any of the sums claimed were in principle recoverable under the provisions of the Lease, but challenged them as being unsupported by the invoices provided.
20. The Tribunal determined that it will treat the Company's accounts as if they were service charge accounts and will then assess the amount recoverable by reference to the supporting invoices provided by the Applicant and any other information available to it. In so doing, the Tribunal bore in mind that the Applicant is content for the Tribunal to reach its decision based on the information before it and that it is the Applicant who has been the managing agent throughout the period in dispute so that it is right to infer that the documents disclosed represent the only documents in support of the Company's accounts.

Amount due from Respondent to Applicant

21. The Tribunal has considered the invoices delivered on the day of the hearing and before and the other information provided to it and determined that they support service charge expenditure of the amount shown in bold in the following table, which can be compared with the expenditure shown in the Company's accounts which is shown in the other columns.

	30.9.03	30.9.03	30.9.04	30.9.04	30.9.05	30.9.05	30.9.06	30.9.06	30.9.07	30.9.07
Insurance	1,635	1,912	1,785	2,284	363	2,285	2,086	2,504	-	-
Repairs	329	2,929	1,145	1,455	350	350	-	-	-	-
Garden	1,200	1,300	910	1,270	1,320	1,325	715	1,265	-	-
Mge Fee	564	960	564	846	564	564	141	564	-	-
Sundry	-	30	-	-	-	30	-	-	-	-
Accting	-	250	250	250	250	250	-	250	-	-
Bk chges	-	80	-	-	-	-	-	-	-	-
Totals	4,885	7,461	4,654	6,105	2,847	4,804	2,942	4,583	-	-
Totals:	4,885	7,461	8,382	13,566	11,229	18,370	14,171	22,953	14,171	22,953
1/8 th									1,771	2,869

22. The Tribunal therefore determines that the total amount for service charge due from the Respondent to the Applicant/Company for the years ended 30th September 2003 to 30th September 2007 inclusive as evidenced and supported by the invoices is **£1,771**.
23. This finding is a pure questions of fact based solely upon the invoices produced to the Tribunal. The Company's accounts had not been audited, although they appear at least in part to have been prepared by accountants. The Tribunal was not prepared to take them at face value unless supported by invoices because the principal basis of Mrs Nathan's case is that she had repeatedly requested sight of the invoices to verify the amount of service charges and the Tribunal had itself directed that all such invoices be produced. If the Applicant and the Company were unable to produce those invoices, or any other supporting documentation of any nature whatsoever or indeed any accounts certified by a surveyor as required by the Lease, it would be quite wrong for the Tribunal to make any findings not supported by primary documentation.

24. With regard to 2007, not only were no supporting invoices or other documentation produced, but no Company or other accounts were produced. There was therefore no evidence in support of any service charge for that year.
25. The Tribunal determines that no further sums by way of the £75 payable on the 25th December 2007 or otherwise should be added to the £1,771 because it is to be inferred that that sum of £75 was paid in arrears for sums incurred by the Company in respect of the previous year. However, since for these purposes the Tribunal had adopted 30th September 2007 as the service charge year end as urged by the Applicant, it must follow that no sum of £75 would be due for that year because upon the evidence produced to the Tribunal there was no service charge expenditure incurred by the Company in 2007, so that had the £75 been paid it would have to have been credited back to the Respondent.
26. In adopting the 30th September as the service charge year end, the Tribunal makes it clear that it makes no determination as to the correct service charge year end. It merely adopts the year end used by the Applicant/Company because it would not be possible for the Tribunal to carry out its task in respect of any other year end.
27. The Respondent objected to the payment of insurance by instalments and the related interest charge, asserting that she should not have to bear one-eighth of those costs because she was always prepared to pay her share of the insurance premium on demand. The Tribunal rejects this argument because it is reasonable for a landlord to so arrange for insurance payment, especially in a Lease such as the instant one where there is no provision for payment on account.
28. Mrs Nathan also explained to the Tribunal that shortly after the Company acquired the freehold to the premises (January 2002) there had been a meeting of all tenant-shareholders of the Company (including Mrs Nathan) at which it was decided that (a) Mrs Nathan would pay her one-eighth of the service charge on production of invoices, (b) some other tenants would pay a fixed monthly sum of £35 or a quarterly sum of £105 and (c) the rest of the tenants would pay annually.
29. The Applicant was unaware of this arrangement, albeit that it had purported to demand £105 quarterly from the Applicant plus sums claimed on an *ad hoc* basis. Neither party suggested that there was any binding variation to the provisions of the Lease. Mrs Nathan's explanation was therefore noted by the Tribunal but rejected as being of any legal consequence.

Amount already paid by Respondent to Applicant

30. The Tribunal determines that in addition to the £1,090.36 paid by Mrs Nathan in the County Court action, she has also paid to the Applicant/Company £236.56 (cheque number 004165), £220.50 (cheque number 004385), £31.25 (cheque number £31.25) and £320.43 (cheque number 005616) totalling **£808.74** as evidenced by her cheque stubs in respect of the five service charge years 2003 to 2007.


Net amount now due

31. In summary, the Tribunal determines that the following sums are properly recoverable and accountable in respect of the five service charge years ending 30th September 2007, the net result being that Mrs Nathan falls to be credited with the

sum of £128.10 as she has overpaid the amount of service charge for the five years in question:

Service charge	1,771.00
Amount paid before County Court action	(808.74)
Amount paid after County Court action	(1,090.36)
Net amount of overpayment by Mrs Nathan	128.10

32. In stating that the sums are properly recoverable, the Tribunal is recording its findings of the amount of the service charge properly recoverable in respect the relevant years and records the amount paid by Mrs Nathan. However, as already stated, the Applicant/Company has failed to comply with the terms of the Lease and conceded that no sums were properly recoverable. Nonetheless, at the request of both parties, the Tribunal determined the amounts which would otherwise be recoverable had the proper procedure laid down by the Lease been observed.
33. In making its determinations, the Tribunal makes it clear that it was severely hampered by the Applicant/Company's failure to provide all necessary documentation in respect of the service charge expenditure and also in respect of the amounts paid by Mrs Nathan. In respect of the latter, the Applicant was simply unable to challenge Mrs Nathan's evidence and indeed conceded that at least one sum (the £236.56) had not been recorded in its electronic ledgers as having been paid even though there was a manuscript entry recording that it had been paid. The Tribunal therefore had little hesitation but to accept the evidence of Mrs Nathan in that regard.
34. Attached is a Schedule which sets out the detailed assessment of the service charge expenditure as evidenced by the disclosed invoices.


Chairwoman

13/2/19

**SCHEDULE
(DETAILED ACCOUNTS OF INVOICES PRODUCED)**

SUMMARY

	01.10.02 to 30.09.03	01.10.03 to 30.09.04	01.10.04 to 30.09.05	01.10.05 to 30.09.06
Insurance:	1,634.92	1,785.35	363.35	-
Repairs & Maintenance:	329.00	1,145.00	350.00	-
Garden maintenance:	1,200.00	910.00	1,320.00	715.00
Management fees:	564.00	564.00	564.00	141.00
Accounting:	-	250.00	250.00	-

01.10.02 to 30.09.03:

Insurance:	1,634.92	1,634.92
Repairs & Maintenance: P&R Roofing Contractors - 03.10.02 invoice	329.00	329.00
Garden maintenance: City Landscapes – 12 x £100 pm	1,200.00	1,200.00
Management fees: Wilson Hawkins – 4 x £120 + VAT	564.00	564.00

Notes:

(1) Flat Roof Company's invoice for £2,600 roof repairs to the roof above number 4 are excluded because letter dated 23.03.03 states that the Company was to be reimbursed by flats 1 and 5. The Applicant provided no contrary explanation suggesting that it was properly recoverable under the service charge provisions of the Lease.

(2) Keates' invoice for £1,451 excluded because it relates to internal redecoration to flat 4. The Applicant provided no other documentation or explanation suggesting that it was properly recoverable under the service charge provisions of the Lease.

01.10.03 to 30.09.04:

Insurance:	1,785.35	1,785.35
Repairs & Maintenance: RCM Maintenance - 08.09.04 invoice	1,145.00	1,145.00
Garden maintenance: City Landscapes – 8 x £110 pm and 1 x £110 pm	910.00	910.00
Management fees: Wilson Hawkins – 4 x £120 + VAT	564.00	564.00
Accounting: A.H. Tan 20.07.04 invoice	250.00	250.00

01.10.04 to 30.09.05:

Insurance: - 07.12.04 terrorism insurance	363.35	363.35
Repairs & Maintenance: V&G Clark Builders - 15.06.05 invoice	350.00	350.00
Garden maintenance: City Landscapes – 12 x £110 pm	1,320.00	1,320.00
Management fees: Wilson Hawkins – 4 x £120 + VAT	564.00	564.00
Accounting: A.H. Tan 11.07.05 invoice	250.00	250.00

01.10.05 to 30.09.06:

Insurance:	2,086.00	2,086.00
Garden maintenance: City Landscapes – 6 x £110 pm + £55 extra for 30.11.05	715.00	715.00
Management fees: Wilson Hawkins – 1 x £120 + VAT	141.00	141.00