

SOUTHERN RENT ASSESSMENT PANEL

LEASEHOLD VALUATION TRIBUNAL

In the matter of Section 27A of the Landlord & Tenant Act 1985 (as amended (“the Act”))

and

In the matter of Flat 3, 12 Jonas Nicholls Square, Southampton

Between:

Mr L S Rathor

Applicant

and

Hyde Housing Association Limited

Respondent

Miss J Spoor, Tenancy Services Manager, Hyde Housing Association, for the Respondent. Ms. Lang of Hyde Housing Association with her as an observer.

Reasons for decision

Inspection: 15th January 2008

Hearings: 26th March 2008
16th April 2008

Date of Issue: 6th May 2008

Tribunal: Mr R P Long LLB (Chairman)
Mr D Lintott FRICS

Decision

1. The total amount that the Tribunal has found, for the reasons set out below, to be payable by the Applicant in respect of the items of service charge for the subject property that were in issue in this case is £727-87. It is made up as shown in paragraph 46 at the end of this note. This amount is payable in addition to any sums that may have been demanded but have not been in issue in these proceedings.

Reasons

2. References in this document to a 'page' are references to the numbered pages of the bundle that was before the Tribunal.

Application

3. On 29th August 2007 the Applicant applied to the Tribunal to determine his liability to pay a service charge in respect of the property for the year commencing 1st April 2007. He expressed the concern that his service charge for that year was suddenly to be £84-69 per month, whereas for the preceding year it had been £4-99 per month.
4. A pre trial review was held on 28th September 2007 after which the Respondent submitted a budget and statement of case in accordance with directions given. The Applicant replied in accordance with the directions, and raised six issues by reference to the gross sums provided for in the budget that the Respondent had supplied, namely:
 - a. that the cost for provision of a communal television aerial amounting to £300 was both unnecessary and excessive,
 - b. that the entry phone rental of £300 was excessive,
 - c. that internal communal decorations, for which a provision of £317-50 was made in the budget were not needed,
 - d. that the provision for cyclical exterior redecoration and repair amounting to £1041-05 was not needed and was excessive,
 - e. that it was not clear what was covered by a provision for £1076-50 for miscellaneous items. He wished to have this explained, and
 - f. that it was not clear what was covered by a provision for £260-26 for utilities. He wished to have this explained also.

Inspection

5. The Tribunal inspected the exterior of 12 Jonas Nicholls Square ("the block") on 15 January 2008. The Tribunal was to have considered the matter without an oral hearing on that day, but having inspected the building concluded that there were matters that it would need to pursue at a hearing. Neither party attended the inspection (the Applicant had telephoned on the previous day to say he had a long awaited hospital appointment), and the Tribunal was unable to have access to see the common parts of the building. It saw a brick building under a tiled roof that appeared to have been built in the late 1980's. The

block appeared to consist of four flats. The entrance door is direct from the street, and the building appeared to include no garden or amenity land. The block has hardwood windows, and as far as could be seen from such external inspection as was possible it appeared externally to be in satisfactory condition.

The Lease

6. The Applicant's flat was demised for a term of ninety nine years from 25th March 1989 by an underlease ("the Lease") made on 31st May 1990 between Leegate Housing Society limited of the one part and Michael David Alan Lock of the other part. It is a shared ownership lease.
7. The service charge provisions in the Lease are of unusual complexity. They turn upon its interaction with the Head Lease mentioned below. Miss Spoor told the Tribunal it had taken a very long time to establish who was responsible for what payments, and that had inhibited the management of the building. The complexity arises in part because of the nature of the building, but in large measure because of the very extensive (and un-annotated) cross-referencing used in drafting the covenants in the two leases, which results in the reader typically having to visit seven or eight points in the two documents to seek to establish what are the precise provisions relating to a specific item. Since nothing turns in the instant case upon the greater detail of their form, they may be summarised.
8. The Applicant is to contribute different proportions (called in the Lease "the Specified Proportion" in each case) of the various costs incurred by the Respondent in carrying out its obligations under the lease. Those Specified Proportions are;
 - a. 25% of the following costs incurred by the Respondent namely:
 - i. of complying with certain covenants in a lease dated 1st February 1990 made between Danby Construction Limited of the one part and Leegate Housing Society Limited of the other part ("the Head Lease") under which the Respondent holds the property, and whereby the Respondent is to maintain repair redecorate and renew the entrance halls landings and staircases leading to the property, to light and to keep such ways and staircases clean and to redecorate the outside of the first and second floors of the building.
 - ii. costs of complying with notices issued by the local or other competent authority
 - iii. fees of persons employed from time to time by the Respondent in or about the management or maintenance of the building
 - iv. rates taxes and duties etc charged from time to time on the whole of the building or on the common parts.
 - b. 16.66% of the following costs incurred by the Respondent in complying with further covenants in the Head Lease requiring it

- i. to repair maintain redecorate and renew the roofs and main structure of the building, the gutters and rainwater pipes, the communal television aerial, the conducting media for services and the access ways and refuse facilities and other common facilities in the building
 - ii. to pay costs of preparing accounts and collecting rents under the Head Lease
 - iii. to pay the Head Lessor's expenses incurred in dealing with the service charge provisions of the Housing Act 1980
 - iv. to pay other expenses incurred by the Head Lessor in managing the property
 - v. to pay VAT and other costs and expenses of any kind incurred by the Head Lessor
 - c. "A fair proportion" of the cost of insurance of the building against the usual risks incurred by the Head Lessor
9. It will be seen from the forgoing summary that the Applicant is responsible for 16.66% of the cost of the aerial, and of the external decoration work and the maintenance and repair work to the whole of the building but of 25% of the cost of the other works. The point is complicated in this case by the fact that the report obtained by the Respondent from Messrs Fairthorn Farrell Timms ("the FFT report") apparently deals only with maintenance and repair costs for its part of the building (ie the two upper floors) so that the Applicant is effectively responsible for 25% of the costs therein stated.
10. Clause 7(4)(b) of the Lease (page 43) allows the Respondent to retain monies as a reserve.
11. The service charge under the Lease is payable monthly in advance. It is collected by means of an estimate first made before the beginning of the of the account year of the estimated cost of the various expenses and reserves to arise in that year to which the Lessee is to contribute. The Lessee then pays the Specified Proportion of those sums on a monthly basis. If at the end of the year there has been an overpayment the lessee is to be "allowed" it, or if there has been an underpayment he is to pay the balance forthwith.

The Law

12. The statutory provisions primarily relevant to applications of this nature are to be found in section 18, 19 and 27A of the Act. The provisions of section 20B of the Act also have some relevance in this particular case. The Tribunal has of course had regard in making its decision to the whole of the relevant sections as they are set out in the Act, but here sets out what it intends shall be a sufficient extract (or a summary, as the case may be) from each to assist the parties in reading this decision. Section 18 provides that the expression "service charge" for these purposes means:

“an amount payable by a tenant of a dwelling as part of or in addition to the rent-

- a. which is payable directly or indirectly for services, repairs, maintenance, improvements or insurance or the landlord’s costs of management, and
- b. the whole or part of which varies or may vary according to relevant costs”

“Relevant costs” are the costs or estimated costs incurred or to be incurred by the landlord in connection with the matters for which the service charge is payable, and the expression “costs” includes overheads.

13. Section 19 provides that:

“Relevant costs shall be taken into account in determining the amount of a service charge payable for a period:

- 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

and the amount payable shall be limited accordingly”.

14. Subsections (1) and (2) of section 27A of the Act provide 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 to whom it is payable
- b. the person by 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.”

There are certain exceptions that limit the Tribunal’s jurisdiction under section 27A but none of those exceptions has been in issue in any way in this case.

15. To such extent (if at all) as the point is not implicit in the wording of the Act, the Court of Appeal laid down in *Finchbourne v Rodrigues* [1976] 3 AER 581 CA that it could not have been intended for the landlord to have an unfettered discretion to adopt the highest possible standards of maintenance for the property in question and to charge the tenant accordingly. Therefore to give business efficacy to the lease there should be implied a term that the costs recoverable as service charges should be fair and reasonable.

The hearings

16. The matter has been characterised by some difficulty in bringing it to a hearing. Initially, and following a pre trial review held at the end of September 2007, provision had been made for further documents to be filed and that the matter should then to be the subject of a determination without an oral hearing in January 2008. In January 2008, following an inspection that was not attended by any of the parties so that it had been able to see only the outside of the building (the Applicant had notified the Tribunal on the preceding day that he had a long awaited hospital appointment), the Tribunal concluded in the light of what was then before it that an oral hearing would after all be necessary. Provision was made for such a hearing to take place on 26 February.
17. The Applicant notified the Tribunal that he would be unable to attend on that date as he had a further hospital appointment and the hearing was postponed to 26th March. On 26th March the applicant did not appear, and upon being telephoned by the Tribunal's clerk said that, despite having been sent written notice of the date, he had believed the hearing to have been fixed for 28th March. The Tribunal's clerk having also spoken to the Applicant's representative whom the Tribunal believes to have been Mr Mandair) a further adjourned date of 16th April was fixed upon which the hearing would be held and the Tribunal indicated that the matter would proceed on that day.
18. On 11th April the Applicant's representative (whom the Tribunal again believes to have been Mr Mandair) telephoned the Tribunal's clerk to ask for a further adjournment on the ground that the Applicant was now in hospital. On the Tribunal's instructions he was asked by the clerk to arrange for the production of a medical certificate to that effect, but declined to obtain one on the ground that it would place his client under undue stress to have to seek such a certificate. The clerk reported to the Tribunal that he had added that in any event his client had little more that he would wish to place before the Tribunal at a hearing.
19. The Tribunal has in such a case to balance the interests of the parties, and bore in mind that by this time any part of the amount that the Applicant was contesting as it may eventually determine to be payable would have been outstanding since the time of the delivery of the initial budget by the Respondent, which was by now more than a year ago. Its request for a medical certificate that may have obliged it to consider taking a different view had been declined on grounds that it did not find entirely convincing, and the Applicant's representative could very well, had he chosen to do so, have appeared before the Tribunal to make any points on the Applicant's behalf that he wished. Bearing in mind too the terms in which the Tribunal had previously adjourned the hearing on 26th March, it concluded that the balance of the interests of the parties required it to proceed to hear and to determine the matter without further delay.

20. Miss Spoor explained that there are four flats in the building in which the subject property is located. The access to them is by means of a common entrance and staircase that leads from Jonas Nicholls Square. Beneath them is a shop, presently unoccupied, that fronts St Mary's Street. The freeholder of the building is now a Mr Dorrington. She drew attention to the fact that the effect of the service charge provisions is that in most cases that the Respondent is to reimburse the landlord for certain costs incurred by him pursuant to his obligations contained in the Head Lease (with the exception perhaps of some rather remarkable provisions whereby an obligation to maintain common parts which at one point in the Head Lease is undertaken by the Head Landlord, is subsequently expressed nonetheless to be the responsibility of the Respondent). All four flats had been let to the Respondent, and then individually sublet by it on the same terms as are contained in the Applicant's lease.
21. Mr Dorrington, who has been the freeholder for the last couple of years or so, has not, said Miss Spoor, in practice undertaken any of the work that is his responsibility under the Head Lease. This had placed the Respondent in a somewhat difficult position in terms of making provision to collect costs from its lessees, and it had presently sought to collect service charges under the terms of clause 7(4) of the Lease (page 63). That provision enables it to charge a sum to tenants at the beginning of a financial year to cover the expenditure estimated by the Surveyor to the Respondent as likely to be incurred in that year upon the various matters of maintenance, decoration, insurance and so on for which the service charge is recoverable. In the year in question a budget had been prepared and circulated to the lessees, although the Applicant had not received his copy for some time because he had not notified the Respondent of his residential address.
22. The Respondent had commissioned the FFT report in 2006 to enable it to forecast likely demands upon it for its share of funds for the running of the building over the next sixty years. The Tribunal was not shown the full report. The Respondent's experience was that its lessees preferred to spread the cost of major expenditure, and complained when it did not do this. The Lease in this case allowed for a reserve fund to be created that would be held in a trust fund in the proper way, and the change in the level of charge to which the Applicant referred arose because this was the first year in which the procedure had been adopted at this property despite the fact that the Lease had always permitted it.
23. The report indicated the likely level and frequency of such costs at 2006 price levels and made no provision for inflation. Because the Lease allowed the Respondent to maintain a reserve fund it was its policy to create such a fund to even out the demands for service charges made to lessees over the years as far as may be. Because of the peculiar nature of the service charge arrangements in this particular case they were in practice building up a fund to meet the demands from the head landlord from time to time but that did not, in Miss Spoor's submission, alter the principle.

24. It is appropriate to add at this point that when it came to consider the matter after having heard all of the evidence the Tribunal concluded that it was open to it only to apply the apportionments of the total costs that it found to be payable that are contained in the leases. These are the figures that are summarised in paragraph 7 above, and the appropriate figure from that paragraph is used in each of the apportionments that appear below.
25. It reached this conclusion despite the difficulties presented by a combination of the terms of the leases and the apparent present unwillingness of the Head Landlord to carry out works because those are the terms that have been contractually agreed and it is not open to it, as the Respondent appears to have sought in some cases to do, to depart from those arrangements. It reflects too the rather odd arrangement whereby despite the Head Landlord's covenant to decorate clean and light the common parts in clause 5 of the lease (page 92), the Respondent thereafter covenants to do that work in paragraph (c) of Schedule 5 in the Head Lease, although the service charge arrangements do not appear to have been altered in any way.
26. We deal below individually with the evidence that was specifically put before the Tribunal in relation to each of the issues that the Applicant raised that are mentioned in paragraph 3 above, and set out the Tribunal's decision in respect of that point and its reasons for reaching it.

Communal Aerial

27. The budget for the year 2007-08 includes a provision of £300 in respect of works that may be required to the communal television aerial. The Applicant challenges this in his statement sent in response to the directions by saying that this charge is totally absurd and asking why it was needed. Miss Spoor directed us to the covenant to maintain the communal aerial in clause 5(1) of the Head Lease on page 92. The Applicant's responsibility to contribute to this charge arises from clause 7 of the Lease, and the effect of the definition of the proportions payable on page 3 of the Lease (page 43 in the bundle) is that he is to pay 16.66% of any allowable sum.
28. Miss Spoor told the Tribunal that in 2005/6 a sum of £225 had been paid for works to the communal aerial. Residents had complained of poor reception and that was why the work had been done. There had been no complaints since then about the aerial or its performance, but although there may be no problems when a budget is fixed the Respondent had to consider that they might arise. Since a budget was fixed some six months before the beginning of the year to which it was to apply, the Respondent was always looking forward up to eighteen months when this was done. The present provision of £300 was to allow a sum to be held that would be in hand if such work was required again. That amount would be held as a reserve, and any reserves would be held in a proper trust account.
29. The Tribunal determined that it was reasonable to make some provision against the cost of works to the communal aerial, but that it did not consider it reasonable to seek to recover the whole of the cost of potential works that may

or may not be required in one payment. In reaching that decision it bore in mind that if expense was incurred in any year then the service charge provisions allow any balance required to make up the whole of the cost of works to be paid at the end of the year when the accounts are prepared. The work to the aerial was of such a nature that it would not be likely to arise more than once in every few years, and when the present budget was prepared no further complaints about the aerial had been received for some months at least.

30. Against that background it may have been reasonable for the Respondent to seek to build up a fund towards work to, or to the replacement in due course of, the aerial. An eventual target sum of £300 would not in the Tribunal's judgement be unreasonable but it was not necessary in the circumstances to provide that all at once. Given the likely cost of such items as and when they may arise, it appeared to the Tribunal on the information before it that a contribution of £100 per annum would be adequate to make proper allowance for the matters for which the Respondent had sought to provide.
31. The Respondent had sought to recover 25% of the cost of the provision from the Applicant, but the effect of the apportionment provisions mentioned above are that it is only entitled to recover 16.66% thereof. Accordingly the Applicant's liability of £75-00 as demanded (being 25% of £300) is diminished to a liability to pay £16-66 (16.66% of £100) under this head.

Entry Phone Maintenance

32. Once more a sum of £300 had been inserted into the budget to cover a potential cost for maintaining the entry phone system. Miss Spoor said that the budget had erroneously shown this sum as being for rental. There had been no problems with the system as far as she was aware since 2003. Nonetheless the nature of the system coupled with the nature of the locality in which it (and particularly the external part of the system) located was such that a potential need for repair at anytime could never be disregarded. The Applicant's written comment upon the matter had been that this element was totally overpriced.
33. There was some discussion concerning the entitlement of the Respondent to raise any charge in this respect in the light of the wording of the leases. The Tribunal understands that the system (or perhaps a predecessor system) has been part of the building since its erection. Doing its best to give commercial effect to the two leases it concluded that in those circumstances the provision in paragraph 7(5) of the Lease (page 63) as to recovery of expenditure incurred in provision of services to the building was probably just about sufficient to enable the Respondent lawfully to seek to recover the cost of maintenance of the entry phone system from the lessees. The provision as to the maintenance of wires and cables in the Head Lease (page 92) on which Miss Spoor had sought primarily to rely however fell short in that respect.
34. Again this is a cost that is likely only to arise from time to time. No such cost has arisen since 2003. Whilst in the light only of call out charges for such work a provision of £300 would not be unreasonable to allow for the cost that may arise in the event that maintenance becomes necessary, once more (and

again bearing in mind that additional costs can be recovered at the end of any year) the Tribunal determined that it would be reasonable to build that sum up at the rate of £100 a year. Since this is an item that falls under clause 7(5) of the lease it is one to which a contribution of 25% is applicable by each of the four flats. Hence in this instance the Applicant's contribution for 2007/8 is properly £25 (25% of £100) rather than £75.

Internal Decoration of Common Parts.

35. In this case the Applicant's written comment was that this provision amounting to £317-25 was unnecessary, and was totally overpriced. Miss Spoor said that these items were recoverable pursuant to the provisions of Schedule 5 Part 2 (pages 104-105, see especially clause (c)) and of Schedule 4 Part 1 of the Head Lease (page 100) and so of clause 7(5) of the Lease (page 63). Those provisions were to the effect that the common parts should be redecorated once in every three years but in practice and by common consent this was done every five years. It was last done in 2005. There were three floors to do, and the cost when next the work arose, given that the estimate of £1350 in the FFT report was at 2006 prices without any provision for inflation, was likely to approach £1500.
36. The Tribunal accepted that the work in question will have to be done, and that a cost of between £1350 and £1500 for the extent of the work described to it, (it had not had the benefit of seeing the internal common parts) was likely to be reasonable in the circumstances. It followed that a provision towards those costs of £317-25 raised now was not unreasonable, and in this instance effect of the apportionment provisions is that the Applicant is required to pay £79-31 being 25% of that amount for the year in dispute. As before the work is not intended to be done at once, which no doubt explains the Applicant's concern that it was not required immediately at the time when he made his representations.

External Decorations

37. The Applicant's comment about this matter was that external redecoration was not needed and that the prospective cost was totally overpriced. In this instance, said Miss Spoor, the FFT report had indicated a cost at 2006 levels of £4430. It was anticipated that the exterior of the building would be redecorated in 2009, and the majority of the cost incurred in so doing would be that of hiring and maintaining necessary scaffolding. A sum of £1041-05 had been included in the 2007-08 budget towards that cost. The work was intended to be done on a five-year cycle. The Tribunal understands the cost that is referred to in the FFT report to relate only to the obligations that the Head Lease places upon the Respondent to bear the cost of work to the upper floors. The Applicant is responsible for 25% of that sum, but only for 16.66% of the cost of other external redecoration.
38. Once more the Tribunal accepted that the work in question will have to be done, especially bearing in mind that the sea air in Southampton tends to result in more frequent external decoration being necessary than may be the case in

more inland locations. Having seen the outside of the building it accepted that considerable scaffolding would be required for the work at a cost likely to be in the region of that mentioned in the FFT report, and the breakdown of other costs in the copy of the schedule from the FFT report sent with the Respondent's letter of 16th October 2007 appeared to show that the work itemised would be reasonably necessary and the indicated cost was at a reasonable level. It bore in mind that the 2009 costs would of course be at a higher level than those shown in the FFT report.

39. It is no doubt primarily the scaffolding requirement that makes the cost appear higher than the Applicant may have expected, but in these days such scaffolding is essential, not least for reasons of health and safety, and of course the work is not expected to be needed until 2009.
40. Consequently the Tribunal determined that the sum of £1041-05 towards the external decoration cost is reasonable and is reasonably incurred. The Applicant is responsible for 25% of that amount, or £260-26.

Miscellaneous

41. Miss Spoor explained that this had been a misleading heading. It covers the repair and eventual replacement where necessary of the roof, rainwater pipes, structure, cladding and pointing, windows, entrance door, external lighting, internal communal doors, cupboards and fire prevention (the cupboard in the common parts contains the electrical meters and consumer unit serving the flats) and internal lighting and rewiring of common parts. The roof the cladding and the pointing were treated in the FFT report on a 60 year cycle, the internal communal doors on a 40-year cycle, the rainwater pipes, the windows, the communal lighting and wiring on a 30-year cycle, and the external lighting on a 20-year cycle. The item relates to a provision into the reserve fund against the cost of those items, as before at 2006 prices and the amount provided in the budget is £1076-56. It is derived, as before, from the FFT report.
42. Miss Spoor's explanation appears to deal with the Applicant's reasonable request in his representations that it be made clear what this item covered. It appeared to the Tribunal that it was reasonable for the Respondent to incur these charges for the reasons that Miss Spoor had given, and there was nothing before it to suggest that the provision made was unreasonable in amount.
43. It appeared to the Tribunal that the reserve fund, to which all the payments under this heading are a contribution, could only properly be established to constitute be a fund to provide for the Respondent's obligations that arose under the Head Lease because of the nature of the service charge arrangements in both the Head and the Lease.
44. That being so the fact that many of the items (but not all of them) in Miss Spoor's list were items to which the Respondent would only have to contribute 16.66% of the Head Landlord's costs, whilst it would have to contribute 25% for others, was not an issue with which it needed to be concerned, in respect of

the subject property. That was because the FFT report was dealing only with the prospective expenditures that the Respondent must face, at whichever rate they were to be apportioned, in respect of the four flats of which it was the landlord. Thus the charge to the individual flat would be the appropriate proportion of each item, and it was appropriate for the Applicant to contribute 25% of the overall amount. That amounts to £ 269-14.

Utilities

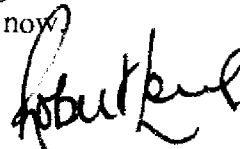
45. In his representations the Applicant quite properly asked what this payment was for. Miss Spoor explained that it was for communal electricity for lighting the common parts and one external light. The previous bill was for £306-62. It was high as no meter reading had been undertaken in the previous year. The present figure was an estimate in the budget for the succeeding year based on that information. The cost is incurred as a part of the provision of lighting to the common parts set out in clause 5(2) of the Head Lease (page 92) and as appears from paragraph 7 above the Applicant is responsible for 25% of the cost. There was again nothing before the Tribunal to suggest that the charge was not reasonably incurred or that the cost was unreasonable. Accordingly the amount payable in this case is 25% of £260, namely £77-50.

Summary

46. The amounts that the Tribunal has determined are payable by the Applicant for the items in issue therefore £727-87 made up as follows:

	£
Communal aerial:	16-66
Entry phone maintenance	25-00
Decoration of Common Parts	79-31
External decorations	260-26
“Miscellaneous” Items (as defined above)	269-14
Utilities	<u>77-50</u>
	727-87

This amount is payable in addition to any sums that may have been demanded but have not been in issue in these proceedings, and since the financial year in respect of which the payments were sought is now over the amounts are payable by the Applicant to the Respondent now.



Robert Long
Chairman
2nd May 2008