

**RESIDENTIAL PROPERTY TRIBUNAL SERVICE
SOUTHERN LEASEHOLD VALUATION TRIBUNAL**

Case No: CHI/OOHN/LSC/2009/0005

Re: Flats 2 & 6, Rockstead, 18 West Overdiff Drive, Bournemouth

Applicants Joan Philomena Antoinette Lardy and Linka Leif Lardy

Respondents Rene Van Gytenbeek

Date of Application 6th January 2009

Date of Inspection 18th March 2009

Date of Hearing 18th March 2009

Venue Royal Bath Hotel, Bournemouth

Representing the parties Mr A John, Solicitor, Horsey Lightly Fynn, for the Applicants
Mr Teo (Flat 1) for the Respondent

Also attending Mrs J P A Lardy
Mr Respondent Van Gytenbeek

Managing Agents: House & Son: Lesley Franklin, Senior Property Manager; Kim Head, Property Manager

Mr Ian Brown, Flat 3
Mrs M Telford & Mr James Knox (with Mrs Lardy)
Mr J Ball (member of the public)

Members of the Leasehold Valuation Tribunal:

M J Greenleaves	Lawyer Chairman
P E Smith FRICS	Valuer Member
K M Lyons FRICS	Valuer Member

Date of Tribunal's Decision: 1st May 2009

Decision

1. Flat 2 is liable to pay one-sixth of the disputed service charges incurred or to be incurred by the Respondent in respect of Rockstead as a whole, save to the extent that:
 - a. they relate to parts of Rockstead which are demised premises as defined by the leases of the six of flats (as interpreted by the Tribunal);
 - b. they relate to that part of Rockstead which contains Flat 6.
2. Flat 6 is liable to pay one-sixth of the disputed service charges incurred or to be incurred by the Respondent in respect of Rockstead as a whole save to the extent that:
 - a. they relate to that part of Rockstead which contains Flat 6; or
 - b. they relate to parts of Rockstead which are demised premises as defined by the leases of the six flats (as interpreted by the Tribunal)
3. Flat 6 is solely liable for the cost of repair, maintenance etc of the structure, main walls and roof of Flat 6.
4. The disputed items of service charge (all except management fees and accounts) set out in the detailed budget for the period 1st January 2008 to 31st March 2009 are as follows:

Item
• Cleaning communal hallway
• Drive – parking area
• Fire maintenance
• Electricity – common hallway
• Sundries
• Various assessments
• Repointing
• Redecorations – external
• Redecorations – internal
• Fascias & soffits
• Window rot
• Door rot
• Rainwater goods
• Gutters
• Flat 1 roof
5. In accordance with the leases of the flats in question, the charges are payable:
 - a. in respect of insurance premium, within 14 days of demand;
 - b. in respect of all other service charges, on demand, whether in advance or otherwise.
6. Under Section 20C of the Act, the Tribunal makes an Order that the Respondent's costs incurred in connection with the Tribunal proceedings shall not be regarded as relevant

costs to be taken into account in determining the amount of any service charge payable by the Applicants.

Reasons

Introduction

7. An application was made by the Applicants to the Tribunal under Section 27A of the Landlord and Tenant Act 1985 (the Act) to determine whether a service charge is payable and, if it is, by whom it is payable, to whom, the amount, the date at or by which it is payable and the manner in which it is payable. No other person applied to be joined as a party to the proceedings. There is a supplementary application under section 20 C of the Act.
8. The period in question under the application is 1st January 2008 to 31st March 2009 (as shown on the budget produced at the hearing by the managing agents)
9. 5 specific questions were put to us by the Applicants:
 - a. historical neglect: this was withdrawn;
 - b. as to shared items of service charge, what was payable by the Coach House and what payable by Flats 1 to 5;
 - c. as to items payable exclusively by Flat 1 or any other flat that may carry out extensions serving such flat exclusively;
 - d. items payable by the 7th leaseholder: it was accepted in the course of the hearing that none of the items in dispute were so payable;
 - e. the proportion of service charge payable for each flat in the main building to pay now and in the future and the timing of such payments within the leases.
10. However, the application relates only to Flats 2 and 6 (the Coach House) and must be determined within the constraints of Section 27A of the Act. Accordingly we rephrase the issues remaining to be determined as:
 - a. -
 - b. as to disputed items of service charge listed in the above decision, which of those items are payable by contribution from each of Flat 2 and Flat 6;
 - c. whether work done to Flat 1, or to be done to Flat 1, is chargeable to service charge payable by Flats 2 and 6 or payable exclusively by Flat 1;
 - d. -
 - e. the proportion of service charge payable for each of Flats 2 and 6 and the timing of such payments within the leases of those flats

Inspection

11. On 18th March 2009 the Tribunal inspected Rockstead (the Property) in the presence of the parties and representatives.
12. The property consists of a main three-storey building constructed as a substantial detached house with outbuildings largely of brick under generally pitched roofs probably pre-1920. There was also a coach house which adjoins the main building. The coach house was

demolished at the expense of the owner of the unit in accordance with a licence granted by the freeholder and rebuilt as a two storey unit referred to as Flat 6. In about 1935 a single storey ballroom was added to the main building and this is now incorporated into Flat 1. Access to the whole is by a metalled driveway to parking spaces outside the main building and the Coach House. Much of the grounds are let with flats. From the entrance hall of the main building there are the front doors of Flats 1 and 2 and a stairway leading to other flats.

13. The internal communal areas and the exterior of the main building appear to be in fair condition for their age and character, but work needs to be done and a ten year plan has been drawn up. Flat 6 was built in or after 2005 and appears to be in good condition.
14. Flat 1 is on the ground floor and part of it lies under a flat roof. The lessee of this flat pointed out during the inspection various locations on the ceilings of Flat 1 where he said water penetration was occurring.

Background

15. Prior to the purchase of the Freehold by the present landlord, at least one flat in the main building had been sold on a leasehold basis. The basic format of the lease had therefore been established at that stage and formed the basis of the subsequent leases. However, the leases are not in identical form, having seen 3 of them which themselves showed differences. However we are confident that the overall principle was that each of the 6 premises (5 flats and the coach house) will contribute to the maintenance of "common parts". The complications and questions resultant from the above which have subsequently occurred are:
 - a. the leases refer to a qualification whereby the expenditure is divided between premises that "share" the services. There is an issue about how that affects the definition of "common parts".
 - b. A seventh lease of part of the garden area has been created.
 - c. the Coach House has been completely demolished and rebuilt in different form without the written agreement of the 5 flat owners. What is the effect of demolishing part of the reserved property?
 - d. Reliance has been placed on the conditions of the planning approval for the Coach House- unit 6. Does that have any impact on the other leases?
 - e. The lessees have ostensibly undertaken the maintenance of the common parts for a number of years and no managing agent had been appointed until relatively recently. As a result the property had deteriorated but there is no remaining issue which the Tribunal are asked to consider of historical neglect.

Hearing & Representations

16. A hearing was held the same day, those attending being noted above.
17. The substance of the Applicants' case:
 - a. The allegation of historical neglect was withdrawn.
 - b. Flat 6 is a separate structure from the main building and did not share any part of its use, and had no right to go into the main building, so was not liable to contribute

- towards the maintenance, etc of the main building under the terms of the Flat 6 lease.
- c. The Flat 1 flat roof: The cost of its maintenance, etc, is not shared under service charge because:
 - i. It is not used in common with any other flats;
 - ii. the planning permission in 2001 partly in relation to Flat 1 required work to be done which, had it been completed would have obviated the need for work to it now;
 - iii. had the licence granted by the landlord for work to the flat been complied with, likewise work would not be needed to it now.
 - d. Flat 2 lease: the only internal part used by Flat 2 is the hallway between the front door of the building and the flat front door off the hallway. So far as there are other internal parts, such as the stairway to other flats, it does not use those so does not have to pay towards their cost.
 - e. The seventh lease – a lease dated 25th May 2000 by the Respondent to Monaliesā Van Gytenbeek of areas of external land – both parties accepted that the service charge provisions do not include payment to cover the obligations of the lessee under that lease.
 - f. The photographs of the Flat 6 building before redevelopment were taken after 10th May 2005. That building had been demolished and entirely rebuilt as now exists.
 - g. The Respondent has no obligation to maintain any part of Flat 6.
 - h. Generally, that so far as any heads of service charge budget for the period in question (other than the Flat 1 flat roof) are concerned, they only relate to Flats 1 to 5 and are only shared between those flats (except management fees and accounts which should be paid equally between the six flats) but only to the extent they are used by all. If not so used by all, they are shared by the users. The Flat 1 flat roof is not shared by anyone so should be paid for only by Flat 1.

18. The substance of the Respondent's case:

- a. The licence produced by the Applicants only relates to the work to Flat 6;
- b. The foundations, main structure and roofs of the buildings are common to all flats and should be paid for as to 1/6th each by all flats;
- c. All lessees might have to contribute to repair of at least part of Flat 6. There is no written consent from lessees to the building of Flat 6;
- d. The extent of Flat 1 and the flat roof of the former ballroom have not changed for very many years.

Consideration.

19. The Tribunal took into account its inspection of the Property, the evidence and submissions made at the hearing and the documents to which it had been referred.
20. We are bound to say after very full consideration of the leases of Flats 2 and 6 that interpretation of them is difficult; they have differences and the whole scheme of provision

for payment of services required to be provided by the Respondent under the leases is not suited to the Property as it exists. The conclusions that we have come to probably will not resolve all issues satisfactorily and may, indeed, raise problems and concerns. However, we are required in law to interpret the leases and not to rewrite them. We should also say that having found there are differences in the leases before us, we do not know whether any such differences, or others, appear in the lease of Flats 1, 3, 4 and 5. There may be. The application is made by the lessees of Flats 2 and 6 only and it is only those two leases about which we are required to make determinations.

21. Note. Any emphases in *italics* used below are those of the Tribunal.

22. If one aspect is clear, it is that the basic scheme for payment of service charges for the whole of Rockstead was that they would be divided in 6 equal shares – by all flats in the main building and Flat 6 together. Bearing in mind that Flat 6 is essentially a self contained entity outside the main building and only attached by a common wall, there may be little logic to Flat 6 being required to pay one-sixth part of the cost of the main building. But that is what the basic scheme seems to suggest. However, we had to consider the more detailed wording of the leases to decide what is actually provided for.

23. Flat 2 lease. We summarise the relevant terms and our conclusions:

- a. The Premises are defined as Rockstead – the entirety of the land and buildings
- b. The Demised Premises are Flat 2 and its shed and described in detail in the Second Schedule. That Schedule makes it plain that the flat includes essentially internal parts but specifically excluding main timbers and walls. It does not specifically include, for instance, the roof which must therefore be excluded from the demise.
- c. The Other Units are all of the other 5 flats (including Flat 6).
- d. Included Rights are set out in the Third Schedule. Other than external rights, there are internal rights which are (to use) “the internal hallways stairways and landings leading from the outside of the building to the door of the demised property as edged blue...on Plans B...”. Plan B is not coloured, but the black edging surrounds the entire hallway and the staircase. Accordingly we found that while Flat 2 may have no reason actually to use all the rights granted, it is nevertheless entitled to use them.
- e. Fifth Schedule. This contains the lessee’s covenants and we deal here only with those relating to payment of service charge.
 - i. The Schedule is in two parts – by virtue of Clause 3 of the lease, Part I contains lessee’s covenants with the landlord; Part II contains lessee’s covenants with the landlord and the lessees of the Other Units. They must be read in conjunction with the landlord’s obligations set out in Paragraph 6 of the Sixth Schedule.
 - ii. 5th Schedule Part I Paragraph 2. “To pay one sixth of any cost to the Lessor (whether on account of the cost to be incurred or incurred directly by payment to the Superior Lessor) of the maintenance repair upkeep renewal decoration and services of the Premises *shared* by the demised property and the rest of the premises to include (without prejudice to the generality of

(the foregoing) the maintenance and repair of the roof and foundations of the premises *and* as referred to in [Sch 6 clause 6]”.

iii. 5th Schedule Part II Paragraph 3. “to pay on demand any other costs..... incurred by the Lessor for the work procured in repairing cleansing maintaining and renewing any part or parts of the premises the support shelter protection or use of which is *common* to the demised property and the other units *and in particular* those matters set out in [Sch 6 clause 6]”.

iv. Schedule 6 Clause 6. (The landlord's covenants.)

1. “6.1 maintain repair redecorate and renew In a good and substantial manner (a) the structure of the premises and in particular the foundations main walls roof drains gutters and rainwater pipes of the premises (b) [common services] (c) the timbers joists and beams of the ceilings and roofs and the slabs of the floors in the premises (d) [non-exclusive conduits] (e) all those parts of the premises not exclusively enjoyed by lease licence or otherwise by the lessee or by the occupiers of the other units including the gardens and grounds at the premises.

2. “6.3 keep the parts of the premises referred to in paragraph 6.1(e) above clean tidy and reasonably lighted.”

24. The Applicants ask us to find that “shared” is applied to all items referred to and therefore that, for instance, the flat roof of Flat 1 and some parts of the hallway/staircase and the whole of Flat 6 are not shared by Flat 2 so that that flat does not contribute to such items.

25. The word “shared” only appears in one of the two covenants with the landlord. The two covenants are, confusingly, different.

26. Considering, first, the Part I covenant separately from the Part II covenant. We found:

a. “*Shared*” does not necessarily imply “shared use”. If *use* was implied, it could lead to endless argument as to what specific parts of the building or its services were used by Flat 2.

b. The “*shared*” parts are stated to include “the roof and foundations of the premises”. Those items are also specifically referred to in clause 6 of Schedule 6, so it would seem they might serve no purpose by specific mention in the Part I covenant. They do however, have some purpose in that covenant when considering the further words in that covenant: “and as referred to in Schedule 6 clause 6”. To make sense of the covenant, we found that the word “shared”, whatever it may mean, could only apply, at most, to the words “the maintenance and repair of the roof and foundations of the premises” as otherwise their inclusion was, as we have previously stated, of no purpose. Even then they are of little purpose because of the full terms of Clause 6 Schedule 6. We found that the use of the word “*and*” was an *extension* of that to which the lessee was required to contribute one sixth, rather than any limitation to “shared” items. In so doing it seems to us this is the right approach consistent with the overall intention of all units paying one sixth each rather than leaving the landlord with any part to pay.

- c. We also concluded that "shared" did not mean shared use. Like many other aspects of the drafting of this lease, the word lacks clarity. It is almost always the case in other similar properties that all lessees contribute a specific proportion to the cost of internal parts which are not used solely by one flat. These are generally referred to as "common parts". One flat may not use a facility included within the common parts or may use it less than others. Nevertheless all the lessees between them pay 100% of the cost of maintenance and the landlord does not contribute at all. We consider that that is the only sensible approach to dealing with this issue and we interpreted the word "*shared*" to mean parts not included in demised premises, but which exist, could be used by more than one lessee and need to be maintained, etc whatever the actual extent of their use. To do otherwise would be a recipe for argument.
- d. The Part II covenant "*use of which is common to the demised property and the other units and in particular those matters set out in [Sch 6 clause 6]*" is different, but in a similar way we decided while "*use of which is common*" is more clear, the second part: "*and in particular those matters....*" were an extension of the provision, not restricted by "*use of which is common*" and consistent with our interpretation of the Part I covenant.
- e. Roof(s). In the 6th Schedule the Respondent covenants for the upkeep of the "roof". The Applicants say that this does not apply to the flat roof of Flat 1 because only Flat 1 uses it. We found:
 - i. The flat roof has been in situ since well before the leases in question were granted;
 - ii. The flat roof is part of the roof of the premises – Rockstead as a whole;
 - iii. We have no evidence that the lessee of Flat 1 has failed to comply with any obligation of a Planning Permission or Licence for alterations granted by the Respondent. (The Applicants failed to produce a copy of the relevant Licence for us to consider). Even if that were so, the lessees of Flat 2 would not thereby be relieved from their covenant to contribute – they are bound by their contractual obligations in their lease;
 - iv. Although it is not essential to liability that any flat benefits from it, in any event the integrity of the flat roof is important to the main building as water ingress could adversely affect the foundations of the main building as a whole as well as the parts of Flat 1 that are beneath the main roof;
 - v. For the same reason as set out at 26b above, the Flat 2 covenants do cover also a one sixth contribution towards the upkeep of this flat roof as it is part of the roof of Rockstead.

27. We next consider the service charge contribution requirements in the lease of Flat 6.

- a. 5th Schedule Part I Paragraph 3: "to pay one sixth of any other cost to the landlord Of the maintenance repair renewal decoration and services of the premises shared by the demised property and the rest of the premises to include (but without prejudice to the generality of the foregoing) the maintenance and repair of the roof and foundations of the premises".

- b. 5th Schedule Part II Paragraph 3: "to pay on demand ... one sixth as referred to in clause 3 of Part I of the Fifth Schedule of the cost incurred by the landlord for the work procured in repairing cleansing maintaining and renewing any part or parts of the premises the support shelter protection or use of which is common to the demised property and the other units and in particular those matters set out in Clause 6 of the Sixth Schedule".
- c. Sixth Schedule Paragraph 6: "the landlord shall procure the maintenance repair redecoration and renewal in a good and substantial manner of (a) the structure of the premises and in particular the foundations main walls roof drains gutter rainwater pipes of the premises (b) the... pipes drains...cable and wire in under or upon the premises used by the tenant in common with the owners and tenants of the other units..."
- d. In some ways, these provisions are more clear than those relating to Flat 2. In the 5th Schedule Part II provision, once again we took the use of the word "and" to denote an *extension* going beyond the preceding wording so that the lessees are required to contribute one sixth towards those items set out in the Sixth Schedule provision, paragraph 6(a) of which provided for upkeep of what we would regard to be the main structure and fittings of all the Rockstead buildings as they existed at the time the original leases were granted. That includes, for the same reasons as above, the flat roof of Flat 1 and it is again consistent with the overall scheme that all 6 units pay the cost of the upkeep of the whole of Rockstead.
- e. That deals with structure but not, for instance, with decoration and cleaning of the entrance hall and stairways in the main building. We consider that the Part I provision covers that liability in that we interpret the use of the word "shared" in the same way as we did in relation to Flat 2 and the covenant requires Flat 6 to pay one sixth towards "*maintenance repair upkeep renewal decoration*".

28. Accordingly we concluded, subject to what we say below, that Flats 2 and 6 are liable to contribute one sixth each to all such parts of the main building and Flat 6 as are not demised premises.

29. Flat 6 The Coach House.

- a. This is essentially a separate unit which for all practical purposes only shares the use of some external common parts, in particular the driveway and car parking. For that basic reason and their interpretation of the lease, the Flat 6 lessees say they should not contribute to the main building costs. We have found to the contrary, but the issue arises as to what part of service charge Flat 2 has to pay towards the upkeep of Flat 6. Our finding in relation to Flat 2's liability may also apply to the other units, but we can make no decision about that as we have not seen those leases and they may well contain inconsistencies such as we have already seen.
- b. The Second Schedule defines the demised premises. The definition broadly shows that internal parts constitute the demised premises but they also include any basement area "and the airspace and strata above the demised premises". That definition is circular, but we concluded the only sensible way of construing it is that "airspace and strata" may be intended to include any roof space. The roof and main structure are not expressly included and this is confirmed by the landlord's

repairing obligation in respect of foundations main wall roof drains, etc. So we concluded that they must be excluded in the same way as for the main building.

- c. We have set out above the service charge covenants for Flat 6. In principle it would seem as a consequence that the main structure, etc, in respect of Flat 6 also, are maintained, etc by the landlord who is entitled to recoup 1/6th from each of the 6 units.
- d. However, so far as we are aware, the leases of all the five units in the main building were granted prior to 10th May 2005 when the photographs were taken. Therefore when the 5 main building flats were let, their service charges covenants, so far as they related to the upkeep of what is now Flat 6, related to the then existing building. On 16th May 2005 a Licence was granted to Monaliesa Van Gytenbeek (MVG). The Respondent was a party to the grant of that licence. In terms it authorised MVG to complete alterations to the ground floor and all incidental works and to form a second floor. MVG also indemnified the Respondent against any liability which might result from the grant of the licence or from doing the authorised work. The result of that work is the present unit which as compared with the photographs and our inspection is completely different from that previously existing; indeed we were told that the previous building was demolished and that it was necessary to construct entirely new foundations to support the replacement building.
- e. There seem to be three consequences:
 - i. The Respondent is in breach of his covenant with the other lessees to maintain all of the premises in accordance with his covenant in the Flat 2 lease (Sixth Schedule Paragraph 6);
 - ii. Flat 6 is liable to indemnify the Respondent from liability;
 - iii. The Flat 2 lessee covenanted to contribute service charge in respect of a building which since 2005 has not existed.
- f. We decided the result was that the lessee of Flat 2 had no remaining liability to contribute to the cost of a building which no longer existed and could not be taken to have accepted financial liability for the existing building of Flat 6; that the Respondent has no liability for its upkeep and therefore, as the Applicants thought, they alone as lessees of Flat 6 are liable for its entire upkeep.
- g. But it must be stressed that as referred to above, the Flat 6 lessees nevertheless *also additionally* remain liable for their 1/6th service charge liability for the main building (see Para 25 above), as well as external common parts. This will, we are sure, seem unfair to the lessees of Flat 6, but this is the only conclusion we feel is open to us on the facts of the case and the documents.

30. In coming to these conclusions, we wish to stress Paragraph 22 above.

31. When is service charge payment due?

- a. Insurance premiums are due, according to Fifth Schedule Part I paragraph 2 of both leases, within 14 days of demand.

b. Other service charges are due, according to Fifth Schedule Part II paragraph 3, on demand and, according to Fifth Schedule Part I Paragraph 3, they may be payable for items incurred or to be incurred

32. Section 20C. The Tribunal found that the provisions of the Flat 2 and 6 leases do not allow the Respondent to recover as service charge his costs in connection with these proceedings, but in case it is wrong about that, in all the circumstances of the case as noted above, it made an Order preventing the Respondent from doing so.

33. The Tribunal made its decisions accordingly.



Chairman

A member of the Leasehold Valuation Tribunal
appointed by the Lord Chancellor

RESIDENTIAL PROPERTY TRIBUNAL SERVICE
SOUTHERN LEASEHOLD VALUATION TRIBUNAL

Case No: CHI/OOHN/LSC/2009/0005

Re: Flats 2 & 6, Rockstead, 18 West Overcliff Drive, Bournemouth

Applicants Joan Philomena Antoinette Lardy and Linka Leif Lardy

Respondents Rene Van Gytenbeek

Members of the Leasehold Valuation Tribunal:

M J Greenleaves	Lawyer Chairman
P E Smith FRICS	Valuer Member
K M Lyons FRICS	Valuer Member

Date of Tribunal's Substantive Decision: 1st May 2009

**Decision on the Applicants' Application for Leave to Appeal
the Tribunal's Decision Dated 1st May 2009**

Decision

1. The Tribunal grants leave to appeal the decision.
2. The Tribunal does not have power to consider any application for extension of time in respect of an appeal to the Lands Tribunal.

Reasons

3. By letter dated 18 May, 2009 the applicants applied to the Tribunal for leave to appeal the Tribunal's decision dated 1st May 2009.
4. The general grounds of appeal may be summarized as follows:
 - a. the decision is unjust and breaches the Applicants' rights under the law and the documents applicable to the premises;
 - b. the decision is contrary to precedent established by the respondent in various ways
 - c. the decision is discriminatory, damaging and prejudicial to Flat 6, the decision being based on interpretation not agreed in the past or present
 - d. the decision is also appealed on the grounds of present evidence and Applicants' rights.

5. The Applicants also applied for extensions of time to enable them to deal with an appeal to the Lands Tribunal.
6. The Tribunal considered the application on the following basis:
 - a. in coming to our decisions in this case we were very conscious of the considerable problems which arose simply because of the very significant inconsistencies in drafting of the leases and, in respect of Flat 6 the fact that the premises which had existed had been demolished and Flat 6 created.
 - b. We specifically noted in our reasons "We are bound to say after very full consideration of the leases of Flats 2 and 6 that interpretation of them is difficult; they have differences and the whole scheme of provision for payment of services required to be provided by the Respondent under the leases is not suited to the Property as it exists. The conclusions that we have come to probably will not resolve all issues satisfactorily and may, indeed, raise problems and concerns. However, we are required in law to interpret the leases and not to rewrite them."
 - c. We do not accept that our interpretation of the leases is in any way biased for or against the Applicants or the Respondent but is consistent with the documents.
 - d. However, as we have recognised previously there are significant issues in this case and we consider it right to grant leave.
7. We should say that supplemental grounds of appeal were submitted to us, but these were not provided within the time limited by the Regulations and we therefore did not consider them.
8. The Tribunal granted leave accordingly.

18th June 2009


Chairman

A member of the Leasehold Valuation Tribunal
appointed by the Lord Chancellor