

5185

RESIDENTIAL PROPERTY TRIBUNAL SERVICE

LEASEHOLD VALUATION TRIBUNAL

Property : 103 and 105 Devonshire Road, Cambridge, CB1 2AT
("the Property")

Re Section 27A Landlord and Tenant Act 1985 ("the Act")

Applicants : (1) Mrs H Higgs (no.105)
(2) A Ellwood (no.103)
Both appearing in person

Type of Application : to determine whether a service charge is payable

Re Schedule 11 Commonhold and Leasehold Reform Act 2002

Applicant : A Ellwood

Type of Application : to determine whether an administration charge is payable.

Respondent : Solitaire Property Management ("Solitaire")
Represented by –
Ms C McQueen-Prince (in house solicitor for Peveral)
T Hughes (Area Property Manager for Solitaire)

Case Nos. : CAM/12UB/LSC/2010/0036 and 0034

Date of Hearing : 16th June 2010

Tribunal Members : D S Brown FRICS MCI Arb (Chair)
Mrs I Butcher
E A Pennington FRICS

DECISION

- A. The Annual Maintenance Charge payable by Mrs Higgs and Mr Ellwood for 2009 is £545.25, as follows –

Group 1 Repairs and Maintenance	£ 62.50
Insurance	£ 77.75
Management Fees	£175.00
Group 2 landscape maintenance	£ 84.17
Audit fees	£ 22.08
Group 1 reserve fund external	£100.00
Group 1 reserve fund general	<u>£ 23.75</u>
	£545.25

- B. For 2009 and 2010 the insurance premiums are to be adjusted and re-apportioned in the Maintenance Adjustment, so that the premium is apportioned between (i) the block of flats, to be charged equally to the four flats, and (ii) the estate, to be charged equally to the 12 units.
- C. The additional levy of £88.91 in respect of the external decorations is not payable and is to be refunded to both Applicants.
- D. We make an order under section 20C that all of the costs incurred by the landlord in connection with these proceedings are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the Applicants.
- E. The Respondent shall reimburse to each Applicant the application fee of £100.
- F. By consent of the parties, we order that the Administration Charge of £50 invoiced to Mr Ellwood is not payable.

Statement of Reasons

The Application

1. Mrs Higgs and Mr Ellwood submitted their applications around the same time and as they both relate to properties in the same block and both include the 2009 estimated service charge, the Tribunal directed that they should be determined together. In addition, Mr Ellwood made an application in respect of an Administration Charge, which was also to be dealt with at the same hearing.
2. Each Applicant is a leaseholder of a one-bedroom flat at the Property. Both have applied for a determination in respect of service charges for 2009 and 2010 and Mr Ellwood has also applied in respect of 2004-2008 inclusive.
3. For 2009, the items of service charge challenged by Mrs Higgs are –

Repairs and Maintenance	£ 62.50
Insurance	£233.55
Management Fees	£128.75
Audit fees	£ 22.08
Management Fees	£123.00
Reserve Fund External	£100.00
Reserve Fund Risk	
Assessment	£ 88.25
Reserve Fund General GP1	£ 23.75
Reserve Fund General GP2	£ 16.67

4. Miss Higgs states that there is no evidence of repairs to 103-106 (Group 1) properties. The insurance charge is unrelated to the invoice supplied for Group 2. The management fees are excessive, being 29.57% and 53% of charges. She says that there is no relationship between services received and charges, no meaningful response to requests for information and no audited accounts supplied, only internally verified.
5. For 2010, no individual items are specified. The six month charge of £416.13 is questioned because separate items are not listed on the invoice for that payment. Ms Higgs states that no explanation has been offered for the alteration of estimated charges between 2009 and 2010, nor of the designation of Groups 1 and 2. Letters elicit no meaningful response.
6. On his application form, for 2010, Mr Ellwood listed
Internal Decoration,
General repairs,
Health and Safety,
Electricity and
Electricity Maintenance

He did not specify any particular items for the other years in his application, he simply stated "Charges are opaque and not clear – my % is also not understandable". In a subsequent letter to Ms McQueen-Prince, dated 28th April 2010, he referred to

Insurance,
Communal TV Repairs,
General Repairs,
Internal Decorations,
Electricity,
Health and Safety and
Management Charges.

He also questioned the levy of £88.92 for external redecorations. He requested maintenance fund accounts for the years 2004-2009 with copy invoices, asked for the final percentage of the revenue received by Solitaire and also details of the reserve funds.

The Lease

7. Both leases are in similar terms. Clause 1 contains relevant definitions –

"Maintenance Year" is every twelve monthly period ending on 31st December.

"The Service Charge" means a sum equal to one twelfth (or such other proportion as may be determined in pursuance to Part I of the Fourth Schedule) of the Annual Maintenance Provision for the whole of the Buildings (computed in accordance with Part II of the Fourth Schedule).

"The Estate Charge" is one thirty-third of the aggregate of the Company's expenses outgoing and other heads of expenditure as set out in Part II of the Fifth Schedule, calculated under the terms of Part II of that Schedule.

"The Amenity Areas" are all those forecourts parking areas drives access areas steps pedestrian ways or footpaths planted and landscaped areas walls fences and hedges.

In addition, "the Building" is defined in the preamble as the Building of which the Flat forms part and its curtilage.

8. The Lessee covenants to pay in each Maintenance Year the Service Charge and Estate Charge to the Company by two equal instalments in advance on the half-yearly days. Also to pay to the Company a due proportion of any Adjustment pursuant to paragraph 3 of Part II of the Fourth Schedule. The Company is Holding & Management (Solitaire) Limited.
9. The Company covenants to carry out the repairs and provide the services specified in the Fifth Schedule, provided that the Lessee has paid the Service Charge and the Estate Charge.

The Fourth Schedule

10. Part I provides that the service charge shall be one twelfth, provided that until the last lease of a flat on the Estate has been completed the proportion shall be $1/X$ where X is the number of flats where leases to purchasers have been completed. When the Estate has been fully developed, if the total number of flats is other than 12, the proportion shall be $1/Y$ where Y is the total number of flats completed and sold on the Estate.
11. Part II requires the Annual Maintenance Charge for each Maintenance Year to be computed not later than the beginning of the previous December. It is to comprise –
 - the expenditure estimated as likely to be incurred in the Maintenance year under Part I of the Fifth Schedule,
 - an appropriate amount as a reserve for or towards those matters in Part I of the Fifth Schedule likely to give rise to expenditure after the Maintenance Year but only once during the unexpired term of the lease or at intervals of more than one year
 - a reasonable sum to remunerate the Company for its administrative and management expenses in respect of the Building (including a profit element).
12. After the end of each Maintenance Year the Company shall determine the Maintenance Adjustment, which is the amount by which the estimated expenditure has exceeded or fallen short of the actual expenditure in the year. The Lessee shall be allowed or shall pay, as the case may be, on demand the appropriate proportion of the Maintenance Adjustment.
13. A certificate signed by the Company and purporting to show the amount of the Annual Maintenance Provision or the amount of the Maintenance Adjustment shall be conclusive of such amount, subject to a proviso that if the amount of remuneration to the Company is challenged by any Lessee it is to be referred for determination by an independent Chartered Accountant.
14. The Company shall arrange for accounts of the Service Costs in each year to be prepared and shall supply a summary of such accounts to the Lessee.

The Service Charge.

15. Part I of the Fifth Schedule sets out the purposes for which the Service Charge is to be applied. In summary, those relevant to these applications:-
 - o Decoration and Repair of the structure (the interior and exterior walls and ceilings and floors and the whole of the roof, foundations, main drains, boundary walls and fences, but excluding such parts as are included in the Flat) and maintenance of the grounds
 - o Decoration and Repair of the Common Parts, namely the staircase and landing leading to first floor flats used in common by the tenants of such flats, and all conduits, and keeping the common parts suitably furnished, lighted and cleaned.

- Payment of Costs Incurred in Management by the Company (a) in the running and management of the Buildings and the collection of rents and service charges and estate charges and in enforcement of the covenants and conditions and regulations contained in the leases, (b) making applications and representations in respect of notices or orders served on the lessee or any underlessee or tenant of a flat, (c) determining the Company's remuneration and (d) preparation and audit of the service charge and estate charge accounts.
- Insurance against loss or damage by fire lightning storm tempest flood escape of water explosion impact aircraft or anything dropped therefrom riot or civil commotion and such other risks as the Company shall think fit, including loss of ground rent and all architect's and surveyor's and other fees necessary in connection therewith in some insurance office of repute and through such agency as the Company shall in its discretion decide.
- Third Party Insurance against such other risks and in such amount as the Company shall think fit.

The Estate Charges

16. These are defined in Part II of the Fifth Schedule as the expenses incurred by the Company in carrying out its obligations under the Sixth Schedule, including employing contractors or managing agents, accountants, solicitors or other professional persons, expenses incurred in or about the maintenance and proper and convenient running of the Estate, any VAT or similar tax payable on any such costs or expenses.
17. They also include such sum as shall be estimated by the managing agents or the Company to provide a reserve towards anticipated costs, expenses or outgoings and a reasonable sum for administrative expenses and, where managing agents are employed, management expenses, and such provision as the Company shall think fit for pensions annuities or retirement or disability of staff on the termination of their employment.
18. There are similar provisions as in the Fourth Schedule for estimating the expenses in advance for each year and for a due proportion (defined as one thirty third) of the charge to be paid in advance by the Lessee in half yearly instalments with any balance due to be paid to the Company or credited in the books as soon as reasonably may be after the end of each year. The certificate of the managing agents or (at the option of the Company) the internal accountant of the Company as to any amount due shall be final and binding.
19. Part III provides that the due proportion of the expenses payable by the Lessee shall be one thirty third, provided that if the total number of properties on the estate, when fully developed, is other than thirty three the due proportion will be $1/Y$ where Y is the total number of properties completed and sold on the estate.

The Company's Covenants

20. These are set out in the Sixth Schedule under the following headings :-

Quiet Enjoyment
To make applications

To enforce covenants of other Lessees
To impose regulations on tenants of other flats
To observe regulations in respect of retained premises
Minimum rent of letting other flats
Not to demise the structure of the Buildings
Obligations in respect of the Estate, including maintaining, cleansing, repairing, renewing and maintaining the Estate Roads and Amenity Areas, payment of rates or other outgoings on the Amenity Areas, insuring against third party risks and keeping the Amenity Areas lighted so far as is practicable.

The Law

21. S27A of the Act deals with liability to pay service charges:

- (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 by whom it is payable,
 - (b) the person to 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.
- (3) An application may also be made to a leasehold valuation tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs and, if it would, as to—
 - (a) the person by whom it would be payable,
 - (b) the person to whom it would be payable,
 - (c) the amount which would be payable,
 - (d) the date at or by which it would be payable, and
 - (e) the manner in which it would be payable.
- (4) No application under subsection (1) or (3) may be made in respect of a matter which—
 - (a) has been agreed or admitted by the tenant,
 - (b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,
 - (c) has been the subject of determination by a court, or
 - (d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.
- (5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.
- (6) An agreement by the tenant of a dwelling (other than a post-dispute arbitration agreement) is void in so far as it purports to provide for a determination—
 - (a) in a particular manner, or
 - (b) on particular evidence,of any question which may be the subject of an application under subsection (1) or (3).
- (7) The jurisdiction conferred on a leasehold valuation tribunal in respect of any matter by virtue of this section is in addition to any jurisdiction of a court in respect of the matter

Inspection

22. The Tribunal inspected the Property and the Estate prior to the hearing, in the presence of the Applicants and the Respondent's representatives. 103-106 Devonshire Road is a two-storey block of four flats on the corner of Devonshire Road and Angus Close. Each flat is self contained. The block has small front and rear gardens. Off Angus Close is a parking area in which a parking space for each flat is allocated.
23. The remainder of the Estate comprises semi detached houses at 107 and 108 Devonshire Road and 2-12 Angus Close. They also have allocated parking spaces off Angus Close. These houses are freehold owner-occupied.

The Applicants' Case

24. Mrs Higgs submitted a well presented written statement supported by various documents. She asserts that the standard of service for the gardening and the maintenance of the buildings is poor, or the work simply not done. The execution of the gardening and maintenance service has not been adequately inspected by Solitaire and so the management charges for this are not reasonable.
25. The accounts, invoices and administration are unreasonable because communications do not define what actual work has been done, no actual costs of anything are stated in the accounts, insurance has been wrongly apportioned and admitted to be so, charges are inflated, management charges are disproportionately large, accounting and communications can be inefficient and confused and no accounts cover the Reserve Fund expenditures. Services are sometimes not done or done very poorly.
26. With regard to insurance, Mrs Higgs produces a printout of insurance premium quotations from the internet in the sums of – AXA £943.07, Acumus £524.41, Brit £606.38, Finsbury £382.21, Groupama £576.80 and Zurich £483.00. All have an excess of £250 and are for buildings cover of £500,000. Public liability cover is £2million, except AXA which is £5million. Three do not include accidental damage. All include 20% loss of rent. Four include terrorism cover and two include legal expenses. There are no other details of the policies.
27. Mr Ellwood produced a copy of his letter of 28th April, referred to above but no supporting documents.

The Respondent's Case

28. Timothy Hughes, Property Manager for Solitaire, provided two written statements. He has been involved in the management of 103-108 Devonshire Road and 2-12 Angus Road since May 2009. The development is a small mixed development of 8 freehold and four leasehold properties.
29. Mr Hughes states that the service charge proportion is 1/4 of the costs incurred for the building of which the flat is part and 1/12 of the total number of properties

on the estate, there being four flats in the block and twelve properties on the Estate.

30. He refers to the various lease provisions outlined above and concludes by asserting that the management charges are reasonable for the services provided which includes day to day management of the development, arranging payments to service providers, collection of service charges, maintenance of records, submitting service charge accounts to auditors, assisting with preparation of annual service charge accounts, arranging contracts, undertaking inspections, dealing with enquiries and applications from lessees, organising and managing contractors and other service providers etc.
31. Attached to Mr Hughes' statement are the estimated service charges for 2010. Somewhat confusingly, they refer to Group 1 for the four flats and Group 2 for the Estate instead of using the lease terminology of "Service Charge" and "Estate Charge". The figures show for 2010 Group 1 expenses of £1,367 and Reserve Fund contributions of £600 against £1,678 and £848 respectively for 2009. For Group 2, the corresponding figures are - £3,886 and £200 for 2010 and £2,751 and £200 for 2009.
32. Also attached is a copy letter dated "As Postmark" to "All Owners" enclosing the service charge estimate for the year to December 2010, in which it is stated that "the budget has been increased to include a greater amount for repairs and maintenance which should be sufficient to maintain the communal areas of the development to an acceptable standard, should damage occur". The total under those headings for Group 2 has increased to £1,400.
33. In a second statement, Mr Hughes says that he has received no complaints about gardening and landscaping but when he visited in January 2010 he noticed the front lawn required tidying and litter picking and there was ivy growth at numbers 107 and 108. He has received no complaints about maintenance or works not being carried out.
34. With regard to communications, he makes the point that the Applicants are free to make an appointment to inspect the invoices and supporting documentation as is their right under section 22 of the Act.
35. He states that section 20 notices were served in respect of the external decorations carried out in 2009 and if the Applicants had any queries they should have contacted Solitaire then. The Company charged a fee of 11% of the contract price to cover meeting with the contractor on site, serving the notices, obtaining and comparing tenders, correspondence, issuing works orders, completing and settling the invoice.
36. Mr Hughes states that Reserve Funds are held in three accounts – general, external and risk assessment. He attaches accounts for 2008 as illustration.
37. Charles Bettinson of Estates and Management Ltd ("E&M") provided a written statement. He is Head of Insurance for E&M who are agents for Solitaire and have arranged the buildings insurance policy for the estate since 2005. He attaches a schedule of insurance premiums from December 2004 to March

2010. For 2009 these show Commissions paid to Kingsborough of £281.46 and £29.38 and for 2010 £153.29 and £26.44.

38. Mr Bettinson emphasises the fact that a landlord would not be fulfilling the requirements of the lease if it did not take out cover which includes accidental damage and terrorism. The Zurich quotation produced by Mrs Higgs is not valid because they are the holding insurer. The AXA quotation is the only one that covers terrorism and accidental damage and it is more expensive than the current Zurich policy but it provides £5million public liability cover against £15million by Zurich. He identifies other differences between the policies and expresses the professional opinion on the alternative quotations that the current cover is substantially wider at a price within the range demonstrated by the alternatives.

The Hearing – Evidence and Conclusions

39. The Tribunal has read all of the written representations and has taken them into account in addition to the oral evidence, the principle points of which are summarised below.
40. The Tribunal explained that as the final accounts for 2009 have not yet been produced, it can only deal with Annual Maintenance Charge, being the estimated service charges, in respect of 2009 and 2010. We would deal with these two years with Mrs Higgs first and then deal with Mr Ellwood's application.

Mrs Higgs

41. Dealing first with 2009 and taking Mrs Higgs' items in order –

42. Repairs and Maintenance

Mrs Higgs stated that she was not questioning the amount but the manner of doing the work. She does not see repairs that have been done. As an estimate she considers that the figure of £250 for the block, giving £62.50 for her flat, is not unreasonable.

43. **The Tribunal determines that this figure is reasonable.**

44. Insurance

The insurance premium had all been charged to Group 1. Mr Hughes accepted that this was an error and that it should be charged to all twelve properties. Ms McQueen-Prince accepted that there ought to be separate policies for the flats and the Estate so that the relevant premiums could be charged out to each Group; she said that this would be done for future years. The Tribunal made the point that a proper apportionment should be made in the final service charge accounts for 2009 and 2010 and it may be necessary to get an apportionment of the premium from the insurers or, otherwise, to agree an apportionment between the flats and the estate with the lessees.

45. Mrs Higgs accepted that the internet quotations that she had obtained were not equivalent. She accepted that she had no other evidence and so cannot establish that the premium is unreasonable.
46. With regard to commission payments, Mr Bettinson had provided a schedule showing the commissions paid for the years 2004-2010. There were payments to "Kingsborough" and to "Oval". Ms McQueen-Prince explained that Kingsborough is the insurance arm of Peveral Group, who have taken over the management of the Property and Oval Limited are independent brokers. Kingsborough work for Holding and Management (Solitaire) Limited, the freeholder of the Property. They deal with the administration of arranging the insurance and dealing with claims. Mr Bettinson says in his statement that the fees are inclusive within the premium and are for services that would otherwise be carried out by the insurer. Asked what Solitaire does in respect of insurance as part of its management, she said that it still pays the premiums and collects the funds through the service charge.
47. Mrs Higgs pointed out that on the schedule the level of cover had not changed since 31/12/08 so there would be little work involved in arranging the insurance. The level of commission paid to Kingsborough was rather lower in 2010, down to £153.29 from £281.46 the year before. Ms McQueen-Prince was unable to explain this.
48. Mrs Higgs accepts that her quotations from the internet are not comparable with the cover provided by the insurance policy. We note that, even so, the premium of £933 lies within the range of those quotations and there is no cogent evidence to show that it is an unreasonable amount.
49. We have considered whether the commission paid to Kingsborough is, effectively a rebate on the premium or a payment for services, given that Kingsborough is associated with Solitaire. There is an amount of administration involved in arranging insurance, as explained by Mr Hughes and also by Mr Bettinson, who expressly states that it is payment "for services that would otherwise be carried out by the insurer". Where there is a payment for handling and administration carried out by the landlord on behalf of the insurer, the landlord is under no obligation to pass it on to the lessees- *Williams v Southwark London Borough Council [2001] 33 HLR 224*. We accept that the commission paid to Kingsborough is such a payment and we therefore determine that the full amount of the premium is payable through the Service Charge and the Estate Charge .
50. However, the premium has been incorrectly apportioned to the four flats. That part of the premium relating to the flats should be apportioned as ¼ and the part relating to the estate as 1/12. It may be necessary to obtain an apportionment of the premium from the insurer. For the purposes of the Annual Maintenance Charge, in the absence of such apportionment, we consider that the premium should be divided between the 12 units and so the sum for insurance in the 2009 estimate should be reduced to £77.75 per flat. An adjustment based on a proper apportionment of the premium

as it relates to the block and the estate should be made in the final account.

51. Management Fees

Mrs Higgs had listed a number of deficiencies in the management. She stated that the only things Solitaire was managing were the garden maintenance and the insurance. The management fee is nearly as much as those costs. Mr Hughes had mentioned a list of things that they do under the terms of the lease but there are no detailed accounts. There is an asbestos survey every other year which is not necessary.

52. The figure for gardening was £927.74 in the 2008 accounts but the estimate for 2009 has gone up to £1,010. Mr Hughes replied that there is a specification of garden works. The same contractor was used for each year. The estimate allowed for an increase in the charge by the contractor he was unable to say whether a quotation had been obtained for 2009 because he was not managing when the 2009 estimates were prepared.

53. It was suggested by Mrs Higgs that inspections of the Property were inadequate. Mr Hughes said that they were moving to monthly inspections. He thought they may have been quarterly before but admitted that Solitaire had no specific dates or periods for inspections.

54. Mrs Higgs referred to photographs which she had submitted showing the previous state of the site, which has now been attended to. She said that if there had been proper management visits these things would have been seen. Mr Hughes replied that when Solitaire had been alerted to problems they had dealt with them swiftly. He said they expect lessees to be their eyes and ears. Mrs Higgs retorted that if she was paying for management she did not expect to do her own inspections. Ms McQueen-Prince said that Solitaire relies on the people on site to assist them.

55. Mrs Higgs gave evidence of other alleged failings in management. She referred to problems she had had with the accounts department. One of these related to the fact that when the 2010 service charge demand was sent out it was accompanied by the schedule for Devonshire Mews in error. She did not get the correct schedule until she applied to the LVT and in the meantime she had felt obliged to pay the charge, despite getting inadequate answers to her letters, because she was being threatened with proceedings.

56. Mrs McQueen-Prince acknowledged that there had been an error by the Sales Ledger Staff who had attached the wrong schedule. She apologised to Mrs Higgs for the service that she had had in this respect, for which there was no excuse. Mr Hughes echoed that apology.

57. We accept the evidence given by Mrs Higgs. It is clear from this evidence and from the information provided by Mr Hughes that the management of this estate has been less than satisfactory and below an acceptable standard. For example, there has been no proper programme of regular inspections of reasonable frequency; it is simply not acceptable for a property management company to rely on people on site to keep them

informed while failing to make its own regular inspections. In addition, repairs have not been attended to promptly, insurance premiums have not been properly apportioned, accounts have been incorrectly prepared and queries about the accounts and requests for explanation have not been promptly answered, if at all. Solitaire has acknowledged its shortcomings in respect of the incorrect schedule being attached to the 2010 service charge demand and accepts that queries in respect of this were not answered until these proceedings commenced, by which time threats of legal action had been issued.

58. In respect of the flats, the management fee for 2009 is £495, equating to £123.75 per flat. This would be a reasonable charge for a proper level of management but is not reasonable for the service provided. The management charge on the landscape is £1,476 for which we can see no justification, given the small area of grounds involved. Taking into account the level of service being provided, we determine that a reasonable total allowance for management fees in the 2009 Annual Maintenance Provision is £175 per flat.
59. Mrs Higgs then raised questions about the section 20 notice for the external decorations. The Tribunal pointed out that this was something that could not be dealt with under the present application but would arise when the final account for 2009 was produced. However, the additional levy of £88.91 (page H23 of her bundle) could be dealt with at this hearing because it had already been invoiced and paid. Mr Hughes explained that the amount in the reserve fund for redecorations was not sufficient to cover the invoice and so the lessees were asked to make up the balance so that the invoice could be paid and this was the additional levy. The Tribunal asked what provision there was in the lease to raise such a charge. Ms McQueen-Prince referred to the provisions for Maintenance Adjustment in Part II of the Fourth Schedule but it was noted that this referred to an adjustment for the difference between the estimated and actual expenditure at the end of the service charge year. Mrs Higgs pointed out that the total of the reserve funds was sufficient to cover the cost in any event.
60. There is no provision in the lease for the landlord to recover such an additional payment. Having assessed the Annual Maintenance Provision, the only additional charge permitted is the Maintenance Adjustment, which is payable if after the end of the service charge year, when the final accounts have been prepared, the estimated expenditure has fallen short of the actual expenditure during the year.
61. In any event, the total amount in the reserve funds was more than enough to cover this expenditure. It may be convenient for the landlord and provide clarification to tenants to divide the reserve monies into different funds so that it is clear what amount of reserves have been estimated as necessary under different headings but this would be an accounting procedure and is not a basis of apportionment authorised by the lease, which simply refers to "an appropriate amount as a reserve for or towards matters in Part 1 of the Fifth Schedule....".

62. Accordingly, we determine that the extra charge of £88.91 paid by Mrs Higgs and Mr Ellwood, was not payable and must be refunded to them.

63. Audit Fees

Mrs Higgs explained that she was not querying the amount of the estimate but the meaning of the words in the auditor's statement, in which they did not "express an opinion as to the adequacy of the Reserve Fund". It was explained that it was not the job of an auditor to check whether the amounts being accumulated in the reserve fund were sufficient to meet the relevant future costs and Mrs Higgs accepted this explanation.

64. **In view of the withdrawal of the challenge to this item we make no determination.**

65. Reserves

We have dealt with the general management of the reserve funds under paragraph 61.

66. The reserve funds schedule showed expenditure of £400 for "Reserve fund external Group 1". The Tribunal commented on the misleading terminology, given that the amounts appearing under the heading "Anticipated Expenditure" were not expenditure but contributions to the reserve fund. This explanation answered Mrs Higgs' query and she accepted that £400, apportioned as £100 per flat, is a reasonable estimate.

67. **We agree that this figure is reasonable.**

68. The Reserve fund risk assessment Group 1 contribution is £353, of which £88.25 is apportioned to number 105. Mrs Higgs questioned this amount. Mr Hughes stated that Solitaire have to ensure that the estate is safe, they need to look at the communal areas and need to check on the condition of any asbestos. A check was made every two years. Mrs McQueen-Prince accepted that reserving over £700 in two years for such an inspection "may be excessive". Solitaire provided at the hearing a set of accounts for 2008, attached to which is a schedule of the reserve funds balances; Mrs Higgs and Mr Ellwood both stated that they had never seen such a schedule. It showed that at the end of 2008 the balance under Risk Assessment was £1,086.32.

69. **We conclude that the reserve fund balance, as at the end of 2008, was at a level at which it was not reasonable to make additional contributions and that there should be no allowance for this item in the 2009 Annual Maintenance Provision.**

70. The contribution for Reserve fund general Group 2 is £200, with £16.67 apportioned to 105. Mrs Higgs questioned why this was required. Mr Hughes explained that it was to cover maintenance of the gardens and common areas, other than gardening, things like repairing fences. He accepted that there had been no expenditure under this heading since 2004 and that the 2008 schedule showed an accumulated balance of £1,987.30 for this fund. The Tribunal asked if any further addition was required in 2009 and he replied, "Probably not".

71. **As tacitly accepted by Mr Hughes, this fund is also at a level where further contributions are not necessary in 2009 and this figure should be deleted.**
72. With regard to the 2010 estimate, Mrs Higgs had based her application on the incorrect schedule that had been sent to her in error. Now that she had seen the correct schedule she did not wish to challenge the figures.
73. **In view of Mrs Higgs' withdrawal of her challenge we make no decisions on these figures.**
74. Section 20C
Mrs Higgs has indicated in her application that she wished to apply for an order under section 20C in respect of herself. She said the management charges were too high so she did not think Solitaire should be able to recover today's costs.
75. Mrs McQueen-Prince referred to Clause 6 of the lease which entitles the landlord to charge such costs to the service charge account. She understood why Mrs Higgs made her application and was content for the Tribunal to decide the matter.
76. **It is clear to us that the failure of Solitaire to respond to requests for explanations and to queries raised by Mrs Higgs has been a major contributory factor in her bringing these proceedings. In addition, some of the challenges have arisen because of failings by Solitaire and we have found in favour of Mrs Higgs on a number of issues. We consider that it is just and equitable to make an order under section 20C that all of the costs incurred by the landlord in connection with these proceedings are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the Mrs Higgs.**
77. Refund of Application Fee
The Tribunal asked Mrs Higgs if she wished to apply for a refund of her application fee of £100 under the provisions of the *Leasehold Valuation Tribunals (Fees)(England) Regulations 2003*. She did. Ms McQueen-Prince had no objection to such an order being made.
78. **In our opinion, had Solitaire responded promptly and properly to Mrs Higgs' requests for information and her questions on the 2009 and 2010 estimates, this application may not have been necessary. We note that Ms McQueen-Prince makes no objection to this application and we order that Solitaire shall reimburse Mrs Higgs for the whole of the application fee paid by her, amounting to £100.**

Mr Ellwood

79. The Tribunal then turned to Mr Ellwood's application. It was pointed out to him that the directions required him to produce a schedule of the items of service

charge in each year that he was challenging, giving his reasons for doing so. He had not produced any such schedule, only his letter referred to above relating to 2009. It was explained to him that a lessee cannot just make a blanket application to cover all of the charges in a year without showing any basis for the challenge. He said that he had not seen the invoices for the previous years and so could not itemise those with which he disagreed. It was pointed out that he has had the right to require sight of them and would need to do so if he wished to proceed with his application in respect of the years prior to 2009. He withdrew his application in respect of those years.

80. As Mr Ellwood has specified 2009 on his application form and as the details of the Annual Maintenance Charge for that year have been the subject of representations and evidence in connection with Mrs Higgs' application, our decisions in respect of 2009 apply to Mr Ellwood as well as Mrs Higgs.

81. For 2010, Mr Ellwood had also been misled by the incorrect schedule being sent with the demand and now that he had seen the correct schedule there were several items that he was content to withdraw. The remaining items were:-

82. Insurance

For 2010, insurance has been divided between the flats and the estate. Mr Ellwood raised the same question about commission paid to third parties as had been discussed earlier. He agreed with the points made by Mrs Higgs and added that the charges were 24% in 2004 and 30% in other years until 2010 when they had gone down.

83. As no evidence is before us in relation to the amount of the insurance premiums, we make no determination on those items. Our finding on the commissions paid remains as for Mrs Higgs' application. However, for the reasons set out in paragraph 50, apportionment according to the level of cover for the block and the estate must be made in the final account.

84. Internal Decorations

Mr Ellwood had objected to this item on the basis of the wrong schedule. He withdrew his objection to this item but wanted to make the point that when he queried it with Solitaire he was informed that it was a typing error and should have been external decorations. Solitaire ought to have discovered at that point that it had sent to wrong schedule out. Ms McQueen-Prince acknowledged that this was an error and that his query should have been properly dealt with.

85. Electricity

Mr Ellwood made the same point here. It was only by making this application that he gained an explanation about the wrong schedule. There is no electricity charge on the Property.

86. Health & Safety

Mr Ellwood had questioned what this expenditure was. Ms McQueen-Prince explained that it should have been shown as the contribution to the Risk Assessment reserve. Mr Ellwood accepted it on that basis.

87. **We note the withdrawal of objections to the above three items and make no decisions on them.**

88. Management Charges

Mr Ellwood agreed with the representations made by Mrs Higgs. He said he would expect to be treated with customer satisfaction. When he was threatened with proceedings he was somewhat distraught. He felt that there were hidden charges. This was the first time he had queried his bills. "If I cannot get a reply, any charge is overly expensive".

89. **For the reasons set out in paragraphs 70 and 71, we determine that a reasonable total allowance for management fees in the 2009 estimate is £175 per flat.**

90. Section 20C

The application for an order was on the grounds that he was to be taken to court for non-payment of a bill which was not applicable to him. He said that for 2009 all the reasons for making an order had come out at this hearing; without the tribunal's endeavours matters would not have been cleared.

91. Ms McQueen-Prince said that the amount on the 2010 demand was correct it was only the schedule that was incorrect. Solitaire has had to respond to the application. Once it became involved it had communicated and had put things right.

92. **We acknowledge that Solitaire has responded to the application but it should have responded before the application was made to earlier queries raised by Mr Ellwood. For the reasons set out in paragraph 76, we consider that it is just and equitable to make an order under section 20C.**

93. Refund of Application Fee

Mr Ellwood made a similar request to that made by Mrs Higgs for refund of his fee. Ms McQueen-Prince again made no objection.

94. **For the reasons set out in paragraph 78, we order that Solitaire shall reimburse Mr Ellwood for the whole of the application fee paid by him, amounting to £100.**

Administration Charge

95. Ms McQueen-Prince said that the administration charge for non payment would be withdrawn. The Tribunal indicated that it could note this withdrawal or it could make an order by consent that it was not payable. Mr Ellwood preferred the latter.

96. **We make an Order, by consent of the parties, that the Administration Charge of £50 is not payable.**

97. NOTE. We wish to remind the parties that these decisions relate to the Annual

Maintenance Provision (that is the estimated service charges) for 2009 and 2010. They do not relate to the actual expenditure or the Maintenance Adjustment, the accounts for which have not yet been completed.

Signed:



Date: 15 July 2010

D S Brown FRICS MCI Arb (Chair)
