

**LEASEHOLD VALUATION TRIBUNAL for the
EASTERN RENT ASSESSMENT PANEL
Landlord and Tenant Act 1985 – Section 27A
CAM/22UG/LSC/2010/0016**

Property : **34 The Mill Apartments, East Street
Colchester CO1 2QT**

Applicant : **Gray's Inn Securities Limited** **Landlord**
Represented by : **Mr Mark Wrinch, Solicitor**
Birkett Long LLP

Respondent : **Neil James Atkinson** **Tenant**
Represented by : **Mrs Rachel Atkinson (Wife)**

Date of Referral : **1 February 2010**
Date of Hearing : **12 August 2010**
Date of Decision : **11 October 2010**

Tribunal : **Mr John Hewitt** **Chairman**
Mrs Evelyn Flint **DMS FRICS IRRV**
Mr David Cox **JP**

Decision

1. The decision of the Tribunal is that:
 - 1.1 The Applicant has not shown to us that it is entitled to payment of any of the service charges claimed in the Second Court Claim (defined below) as set out in the relevant section of Appendix 1 to this Decision. The first three items are already the subject of a court judgment in favour of another party and moreover we have no jurisdiction to determine them. As to the remainder in respect of two of them there is no provision in the lease that such sums

are payable and as to the remaining three the Applicant has not shown that it has a current entitlement to them.

- 1.2 The arrears of ground rent claimed in the Second Court Claim as set out in the relevant section of Appendix 1, the claim to statutory interest and the claims to court costs are all referred back to the court for determination because this Tribunal does not have jurisdiction to determine them.
- 1.3 An order shall be made, and is hereby made, pursuant to s20C of the Act to the effect that no costs incurred by the Applicant in connection with these proceedings shall be regarded as relevant costs to be taken into account in determining the amount of any service charges payable by the Respondent.
- 1.4 The Applicant's application that the Respondent be required to reimburse it with £150 fees paid to the Tribunal be refused.
- 1.5 The Applicant's application that the Respondent be ordered to pay to it costs in the sum of £500 be refused.

NB Later reference in this Decision to a number in square brackets ([]) is a reference to the page number of the hearing file provided to us for use at the hearing.

Background

2. The Mill Apartments is a building in central Colchester which has been adapted to provide some 40 or so self-contained apartments with associated parking spaces and amenity areas. During the course of 2003 and 2004 long leases of the apartments were sold by the developer, Harding Homes (East Anglia) Limited (Harding Homes), the principal directors of which were Mark Ronald Harding and Jason Scott Harding.
3. The lease of 34 The Mill Apartments was granted to Amanda Jane Balchin on 5 September 2003. Subsequently the lease was assigned to the Respondent, Mr Atkinson, who purchased it as an investment and with a view to sub-letting the apartment. The lease provides for

services to be provided by The Mill Apartments Limited (the Company). Further details about the lease are set out later. The lease structure is for the Company to provide the services and for the tenant to pay to the Company the appropriate share of costs incurred.

4. The Company was incorporated on 25 July 2002 and allocated company registration number 4495576. Upon incorporation Mark Ronald Harding and Jason Scott Harding were appointed directors. A search made on 12 August 2010 of records filed at the Companies Registration Office showed that as of that date the Company had not gone into liquidation and that Mark Ronald Harding and Jason Scott Harding were still recorded as being the only directors of the Company.

5. On 8 April 2008 Harding Homes (represented by Birketts LLP) issued legal proceedings (the First Claim) against Mr Atkinson in which it claimed arrears of service charges amounting to £2,881.32 plus statutory interest plus costs. The arrears of £2,881.32 were made up as follows:

01.01.07	On account	£1,015.82
01.07.07	On account	£1,015.81
01.01.08	On account	<u>£ 849.69</u>
		£2,881.32

6. On 11 June 2008 a default judgment was issued in the sum of £3,198.51 made up as to £3,011.51 debt plus interest and £187 for costs. Evidently the judgment was entered in default because the Defendant/Respondent, Mr Atkinson, was unaware of the issue and service of the claim because the claim cited his address as 34 The Mill Apartments, which is not and never has been his address. However, as at 12 August 2010, at the hearing before us, Mr Atkinson's wife, Mrs Rachel Atkinson, told us that no application had been made to set aside the judgment as being irregular. We thus treat it as a regular judgment.

7. By a transfer dated 4 December 2008 the freehold reversion of the development (Title Number EX831257) was transferred to the Applicant (Gray's Inn) and on 3 February 2009 Gray's Inn was registered at the Land Registry as the proprietor. The price paid was recorded as being £64,480.
8. The long leases of the apartments are new leases for the purposes of the Landlord and Tenant (Covenants) Act 1995 (the 1995 Act) because they were granted after 1 January 1996.
By virtue of section 23 of the 1995 Act upon the transfer of the freehold reversion the rights of the purchaser are confined to matters occurring after the date of acquisition (save as to continuing breaches). Thus any arrears of rent or service charges falling due for payment prior to the transfer remain the property of the vendor unless entitlement to prior defaults are expressly assigned to the purchaser.
9. Mr Wrinch was unable to inform us what rights (if any) in relation to service charge arrears falling due for payment prior to the legal vesting of the freehold title in Gray's Inn were assigned to Gray's Inn.
10. On 28 August 2009, Gray's Inn (represented by Birkett Long LLP) issued legal proceedings (the Second Claim) against Mr Atkinson claiming arrears of unpaid ground rent and service charges which were said to total £5,996.72 plus statutory interest plus costs [1]. A breakdown of the Second Claim is set out in Appendix 1 to this Decision.
11. A defence and counterclaim was filed. On 17 December 2009 an order was made by District Judge Mitchell that the case be transferred to the Leasehold Valuation Tribunal for determination. On 1 February 2010 the proceedings were referred to the Tribunal.
12. Directions were issued by the Tribunal on 24 February 2010. They have not been complied with. Gray's Inn's statement of case is at [37].

It claimed further sums which it says fell due after the Second Claim was issued. We are unable to deal with them because we only have jurisdiction to deal with the sums claimed in the Second Claim as referred to us by the court. In contrast to the claim to statutory interest claimed in the Second Claim, in its statement of the case in the Tribunal Gray's Inn sought to claim interest pursuant to the lease. We could not deal with this for two reasons. First such interest (if payable) will be a variable administration charge within the meaning of Schedule 11 to the Commonhold and Leasehold Reform Act 2002. Mr Wrinch was unable to produce to us a demand for such an administration charge compliant with statutory requirements. Secondly such interest was not claimed in the Second Claim and thus it was not referred to us by the court.

Mr Atkinson's statement of case is at [40]. The gist of it is that he has a counterclaim for damages which he is entitled to set off against sums otherwise due and payable by him.

13. The reference came on for hearing before us on 12 August 2010. On the morning of the hearing the Tribunal were able to carry out a brief inspection of the development. We were met by Mrs Atkinson. Gray's Inn was neither present nor represented, although it had been notified of the arrangements. Mrs Atkinson told us that there was no real issue about the level of services charges and that there was nothing particular about the development which she wished to draw to our attention. The main issue for Mr Atkinson she said was his counterclaim. The porter told us that the director to whom he reported was Mr Harding.
14. At the hearing Gray's Inn was represented by Mr Wrinch of Birkett Long LLP and Mr Atkinson was represented by Mrs Atkinson.
15. Mr Wrinch had included in the trial bundle service charge accounts as follows:

Year ended 31 December 2005 [58]

They are undated and unsigned

Year ended 31 December 2006 [62]

They record that the Managing Agent was Wolton Chartered Surveyors and the Auditors were Larking Gowen. However they are undated and unsigned

Year ended 31 December 2007 [69]

They record that they were prepared for The Mill Apartments Limited (CRN 4495576) and were said to be "Draft Financial Statements as at 04 April 2008".

They record the directors as being J Harding and M Harding. The accountants are said to be Larking Gowen. They are undated and unsigned. They purport to show Administrative Expenses of £88,626 but this includes a 'Transfer to Surplus Funds £10,595'.

Year ended 31 December 2008 [82]

They record that they were prepared for The Mill Apartments Limited (CRN 4495576) and were said to be "Draft Financial Statements as at 04 August 2009".

They are unsigned and undated but appear to have been prepared by Larking Gowen.

They record the directors as being J Harding and M Harding.

They assert that the ultimate controlling party is Gray's Inn.

They purport to show Administrative Expenses of £67,978.

It appears that by now the Managing Agent is Desmond Boyden Partnership, Chartered Surveyors [95].

Year ended 31 December 2009 - Budget [110]

It is not clear by whom or for whom this was prepared.

Year ended 31 December 2010 Budget [122]

It is not clear by whom or for whom this was prepared.

The Lease

16. A copy of the lease had not been included in the trial bundle. However a copy had been made available to the Tribunal on an earlier occasion.

17. The lease, which is dated 5 September 2003, was made between
 - (1) Harding Homes (East Anglia) Limited as the Landlord;
 - (2) The Mill Apartments Limited as the Company; and
 - (3) Amanda Jane Balchin at the Tenant.The lease demised the Premises for a term of years at a ground rent, a service charge rent and on other terms and conditions therein set out.
18. By clause 5 the lease imposes an obligation on the Company to insure the development, to carry out repairs and redecorations and to provide other services as set out in the lease.
19. By clause 2 the lease imposes an obligation on the tenant to contribute 2.5% to the costs and expenses incurred by the Company in carrying out its obligations. A budget is to be prepared for each year and the tenant's estimated share is payable by two equal instalments on 1 January and 1 July in each year. By clause 5.10 at year-end an account is to be taken and audited by 'a competent accountant' who is to certify the amount payable by the tenant for the period in question. By clause 5.11 as soon as may be practicable after the taking of the account the Company is to serve on the tenant a notice in writing of the said total of expenditure and the amount certified to be payable. By clause 3.4 any debit balance is payable within 21 days after service of the said notice and certificate; any credit balance may be applied to any sum due or to become due by the tenant.
20. It is to be noted that the regime set out does not entitle the Company to make any further or additional demands or to impose any other levy part way through a service charge year.
21. By clause 4.4 the lease imposes an obligation on the landlord to insure the development and provide the services in the event that the Company goes into liquidation or fails to observe and perform the covenants on the part of the Company (a step-in provision).

The hearing

22. At the hearing Mr Wrinch accepted that the first three items of arrears claimed in the Second Claim, as set out in Appendix, 1 were already the subject of a judgment of a court and thus not recoverable in the Second Claim. He also accepted that the Excess Charge of £100 and the Additional Charge of £25.88 levied on 25.06.09 were not payable because there is no provision in the lease obliging the tenant to pay such sums. It was not in dispute that the Additional Charge of £145.22 demanded on 01.01.09 was part of the first half year instalment payable on that date.

23. The sum claimed as an on account sum due on 01.07.08 was due prior to the date of the assignment of the freehold reversion to Gray's Inn. Mr Wrinch was unable to produce a copy of a compliant demand for the sum claimed. Mr Wrinch was also unable to produce any documents to show that the entitlement to the sum had been assigned to Gray's Inn or that Gray's Inn was entitled in some other way to that sum. We cannot therefore determine that the sum is payable by Mr Atkinson to Gray's Inn.

24. The sums of £849.70 and £145.22 demanded as on account payments on 01.01.09 [50] would appear ordinarily to be payable pursuant the budget for 2009 but the question arises as to whom the sum is payable. The sum has been claimed by Gray's Inn. Mr Wrinch told us that Gray's Inn had stepped in because the Company had failed. He was not able to tell us when, why or how this occurred. The Company had evidently not gone into liquidation. Mr Wrinch was unable to explain why it was that Mr Harding appeared still to be responsible for the provision of services to the development; he was unable to explain how it was that accounts for the years ending 31 December 2007 and 2008 state that they were prepared by and for the Company; he was unable to tell why in those circumstances Harding Homes had seen fit to issue legal proceedings in April 2008 when it appears that the

services were being provided by and sums were due and payable to the Company and not to Harding Homes. Mr Wrinch was unable to explain to us why it was that year-end certificates compliant with the lease had not been issued to Mr Atkinson. Mr Wrinch accepted that if such certificates showed a credit balance due this would have an effect on the amount (if any) now legally due and payable by Mr Atkinson.

25. We consider it unfortunate that Gray's Inn did not arrange for persons with relevant and detailed knowledge of the matters in issue to attend the hearing to explain its position to us. It was also unfortunate that the material in the trial bundle was quite inadequate and for the most part unhelpful.

26. In these circumstances we are unable to determine that any of the service charges claimed in the Second Claim are currently due and payable by Mr Atkinson to Gray's Inn. Some sums might be due and payable to Gray's Inn but Gray's Inn has not yet established its entitlement to them.

The counterclaim

27. At the hearing Mrs Atkinson explained that the counterclaim arose in the following circumstances:
 - 27.1 Mr Atkinson was contemplating a sale of the lease and entered into an agreement with the then managing agents, Wolton Commercial, for it to provide a seller's pack containing such relevant information as a purchaser might require. The cost of the pack was £146. A prospective purchaser asked to see a Fire Risk Assessment for the development which is a requirement of the Regulatory Reform (Fire Safety) Order 2005, the relevant provisions of which came into effect on 1 October 2006. Evidently no such assessment had been procured by the Company or Harding Homes but evidently steps were in hand

for such an assessment to be carried out. In the event the proposed sale did not proceed.

27.2 Mr Atkinson alleged that the sale was lost due to the absence of or delay in providing the Fire Risk Assessment and that he has suffered financial losses because it took him a while to find a new sub-tenant and meanwhile he was paying out and making his mortgage repayments.

27.3 Direction 8 required Mr Atkinson to attach to his statement of case copies of all documents or witness statements he wished to rely upon at the hearing. He did not do so. He has not quantified his claim or provided documents or any evidence to support it. Mrs Atkinson wished to give hearsay oral evidence on this point. She said that the prospective purchaser, an investor with available funds, told them that she did not proceed because Woltons were incompetent and she preferred to buy elsewhere where the managing agents were more responsive. This evidence, even if admissible and accepted, (and we did not give permission for it to be adduced) does not go anywhere near to supporting the allegation that the absence of a Fire Risk Assessment was the effective cause of the decision by the prospective purchase not to proceed. Indeed, on the contrary it would appear that the effective reason why the transaction did not proceed was the reputation for incompetence enjoyed by Woltons Commercial.

27.4 Mrs Atkinson was unable to cite any authority to support the contention that a landlord or management company was obliged by contract or statute to provide copies of Fire Risk Assessments and that a failure to do so or a delay in doing so gives rise to a claim for any loss or damage sustained.

28. We find that the contract relating to the seller's pack was entered into between Mr Atkinson and Woltons Commercial. Any claim that Mr Atkinson may have for a breach of the terms of that contract will lie against Woltons Commercial and not the landlord or the Company.

Mr Atkinson has failed to identify a breach of contract or statutory obligation relied upon to found and support his claim.

Mr Atkinson has failed to persuade us that he has a valid and supportable counterclaim against Gray's Inn. It is clear from his statement of case that the matters relied upon and the events in question occurred in April 2007, long before Gray's Inn acquired the freehold reversion.

Mr Atkinson has failed to quantify the claim he asserts that he has and has failed to provide any evidence or documents to support his alleged claim.

29. In these circumstances we find that Mr Atkinson has not made out a valid counterclaim or demonstrated that he has suffered loss and damage which he is entitled to set off against any sums otherwise due and payable to Gray's Inn.

30. Mr Wrinch submitted that the lease obliges the tenant to pay the service charges at the times and in the manner provided '*free of all deductions whatsoever*'. We agree that is what the lease provides. We reject the submission that the words used exclude the equitable right of set-off. We refer to the authorities *Connaught Restaurants v Indoor Leisure* [1994] 1 WLR 501 and *Electricity Supply Nominees v IAF Group* [1998] 1 EGLR 53 which explain that clear words are required to exclude the equitable right of set-off. Accordingly if Mr Atkinson had been able to make out his counterclaim we would have held that it could be set-off against rent or service charges otherwise due and payable.

The section 20C Application – limitation of landlord's costs of the proceedings

31. An application was made by Mr Atkinson under s20C of the Act with regard to the landlord's costs incurred or to be incurred in connection with these proceedings and an order was sought that those costs ought

not to be regarded as relevant costs in determining the amount of any service charge payable by Mr Atkinson.

32. Mr Wrinch was unable to identify any provision in the lease which entitled Gray's Inn to put through the service charge account any sums which it may have incurred in connection with proceedings such as these.
33. In these circumstances and for the avoidance of doubt we have made an order under s20C of the Act.

Reimbursement of Fees and Costs

34. An application was made by Mr Wrinch that we require Mr Atkinson to reimburse Gray's Inn the sum of £150 hearing fee paid to the Tribunal in connection with these proceedings.
35. An application was made by Mr Wrinch for an order that Mr Atkinson pay costs of £500 to Gray's Inn. Evidently Gray's Inn has incurred costs in excess of £3,440 in connection with this matter. Mr Wrinch contended that Mr Atkinson had acted unreasonably in pursuing an untenable counterclaim.
37. The applications were opposed by Mrs Atkinson. Mrs Atkinson submitted that they had made reasonable offers to settle issues and that they had been rejected. Mr Wrinch acknowledged that offers had been made and that with the benefit of hindsight they ought not to have been rejected.
38. We reject and refuse both applications. We acknowledge that the alleged counterclaim was unmeritorious but equally Gray's Inn's case is also misconceived and as regards service charges includes claims to sums already the subject of a judgment and claims other sums which it has not shown an entitlement to. We find that it would not be just and

equitable to require Mr Atkinson to reimburse the hearing fee of £150 or to order him to pay any costs to Gray's Inn.

The Law

39. Relevant law we have taken into account in arriving at our decision is set out in the Schedule to this Decision.

The Schedule

The Relevant Law

Landlord and Tenant Act 1985

Section 18(1) of the Act provides that, for the purposes of relevant parts of the Act 'service charges' 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 the relevant costs.

Section 19(1) of the Act 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 are of a reasonable standard;

and the amount payable shall be limited accordingly.

Section 19(2) of the Act provides that where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable, and after the relevant costs have been incurred any necessary adjustment shall be made by repayment, reduction of subsequent charges or otherwise.

Section 20C(1) of the Act provides that a tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a leasehold valuation tribunal are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application.

Section 20C(3) of the Act provides that the tribunal may make such order on the application as it considers just and equitable in the circumstances.

Section 27A of the Act provides that 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.

Section 27A(3) of the Act provides that an application may 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.

Landlord and Tenant Act 1987

Section 47 provides that every demand for rent, service charges or administration charges must contain the following information:

- (a) the name and address of the landlord, and

- (b) if that address is not in England and Wales, an address in England and Wales at which notices (including notices in proceedings) may be served on the landlord by the tenant.

Where a demand does not contain the required information the sum demanded shall be treated for all purposes as not being due from the tenant to the landlord, until such time as the required information is furnished by the landlord by notice to the tenant.

Commonhold and Leasehold Reform Act 2002

Schedule 11

Paragraph 1 sets out a definition of a 'variable administration charge'.

Paragraph 2 provides that a variable administration charge is payable only to the extent that the amount of the charge is reasonable.

Paragraph 5 provides that any party to a lease of a dwelling may apply to a Leasehold Valuation Tribunal for a determination whether an administration 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.

No application 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.

A tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.

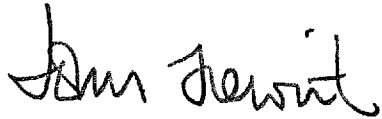
Schedule 12



Paragraph 10 provides that a Leasehold Valuation Tribunal may determine that a party to proceedings shall pay the costs incurred by another party in circumstances where he has made an application which dismissed by virtue of paragraph 7 or he has, in the opinion of the Tribunal acted frivolously, vexatiously, abusively, disruptively or otherwise unreasonably in connection with the proceedings. The amount which a party may be ordered to pay is currently limited to £500.

Leasehold Valuation Tribunals (Fees) (England) Regulations 2003

Regulation 9(1) provides that subject to paragraph (2) a Tribunal may require any party to the proceedings to reimburse any other party to the proceedings for the whole or any part of any fees paid by him in respect of the proceedings.



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John Hewitt

Chairman

11 October 2010