

IN THE RESIDENTIAL PROPERTY TRIBUNAL SERVICE**LEASEHOLD VALUATION TRIBUNAL FOR THE EASTERN RENT ASSESSMENT PANEL****IN THE MATTER OF SECTION 27A OF THE LANDLORD AND TENANT ACT 1985 AND
SECTION 20C****CASE NUMBER CAM/38UC/LSC/2010/0082****In the matter of : Flat 19 Charles Ponsonby House,
Osberton Road, Oxford, OX2 7PX****Parties****Applicant : Mr John Paine****Respondent : Wyndham Housing Association****Representation****For the Applicant : Mr John Paine
accompanied by Ms Enid Norris****For the Respondent : Mr Philip Smithson
Chief Executive of the Respondent and
Mr Alan Taylor Chair of the Respondent****Date of Application : 21 June 2010****Date of Directions : 28 June 2010****Date of Hearing : 10 September 2010****Tribunal Members : Mr A A Dutton Chair
Mrs S Redmond BSc Econ MRICS
Mrs N Bhatti****Date of Decision : 28th September 2010**

DECISION

The Tribunal dismisses the Applicant's application for the reasons stated below. The Tribunal orders that s20C of the Landlord and Tenant Act 1985 ("the Act") shall apply and that the Respondent's costs of these proceedings shall not be recoverable as a service charge.

REASONS

A Background:

1. This application was made by Mr Paine on the 21 June 2010 seeking to challenge two elements of the 2010 service charge. The first was Central Management costs and the second, Property Services Renewal. The Application asks the Tribunal to determine whether the figure for Central Management costs is valid "in light of various financial practises and errors in 2009 and 2010". The second question we are asked to determine is whether the figure for property services renewal is valid "in the light of a clear evasion by WHA Management when asked to justify that this figure is reasonable and fair. No valid explanation has been given as to how this figure has been calculated."
2. Prior to the hearing we received a bundle of documents prepared by the Applicant. This included a copy of the Lease and four sections dealing with the issues Mr Paine wished us to consider. The bundle also included the Respondent's papers which contained a rebuttal of the Applicant's assertions and documents in support.

B. The Hearing

3. Mr Paine's detailed written submissions, as we have stated above, contained four sections. The first section set out an introduction to the case and the background that lead to the application. We do not need to go into any detail in respect of those matters as of course the papers are common to both parties.
4. In section 2, headed Financial Management, there were a number of sub-headings, two of which were clearly not service charge matters that we could deal with. This related to a rebate of meal charges which does not form part of the lease obligations and is a contract between the Lessee and the Landlord for the provision of food which we do not need to

consider further. The second issue related to the delay in producing a standing order to the residents in respect of future monthly payments. Again this is not a service charge issue and not something we could deal with.

5. The issues we could consider under Financial Management related to a refund of the balance of the 2008 service charge surplus, the development of the annual budget for service charges, the publishing of financial information, a query in respect of the insurance and an investigation into the property services and renewal fund.
6. The refund of the 2008 service charges appears to centre around a charge made by the Respondents of £12 for dealing with such rebate. We were told during the course of the hearing that it has now been agreed between the residents and the Respondent that the threshold for any reimbursement of the service charge for a particular year is £3400. That is to say, if the service charge surplus is less than that the landlord will not make a reimbursement, if it is more then they will do so. For the year 2008 it appeared that the sum involved was less than this and although Mr Paine had indicated that he did not want a refund he nonetheless appeared to be still continuing the dispute in respect of the £12 that was charged for the administration costs associated with this refund. The reason given by the Respondent was that the £12 represented the extra administration charge for dealing with the matter and we were told that the fee was in fact charged "to make a point". The £12 remains in the House Account and has not been distributed. It is right to record that the Lease provides at paragraph 7.6 that the reimbursement of the service charge in respect of the annual costs is at the discretion of the Landlord.
7. The next issue at the hearing that Mr Paine raised was the question of the insurance for the building. His concern appeared to be the significant difference between the sum that was claimed in the budget and the actual insurance premium for the year 2009. Mr Paine told us that he had "no quibble" with the actual cost of the policy. The concern was that the sum being collected on account was estimated and was considerably in excess of the actual cost. It should be noted that the surplus for the account for the year 2009 was £635 taking into account all items spent in that year which totalled over £275,000.
8. The Respondents told us that the insurance was placed through a broker on an annual basis who researches the position for them. Meetings take place prior to the insurance being effected between the Chief Executive (Mr Smithson) and the broker to make sure that suitable cover is in place. The Respondents indicated that improvement works to the property would not necessarily result in a reduction in risk and thus the premium payable.

9. The next major issue was the service charge account recorded as "property services and renewal". The concern Mr Paine had was that there appeared to be no clear indication as to how this sum was calculated and also whether this fund was held in a separate account. Apparently the Respondents were looking to create a contingency fund of sum £250,000 although Mr Paine had heard talk of increasing that fund to some £500,000. The real concern to Mr Paine was how this information was presented to him and the other residents. The three questions he wanted answering were firstly how was the fund contribution calculated; secondly what say do the lessees have in how the sum is spent; and thirdly what is the sum they were looking to accumulate for the future. He confirmed that in principle he was perfectly happy with a reserve fund. Mr Smithson for the Respondents confirmed that the fund stood at around £207,000 and was an interest earning account with Barclays. The monies were kept completely separate from any other day to day running costs both for this property and for another development that the Respondents managed.

10. He told us that the Board had set a figure of £250,000 to cover long term objectives based on a survey report they had done in 2002 but also their experience both of this site and another site in Oxford, known as Wyndham House. He told us that the contribution to the Property Services Renewal was based on previous years figures and that they were relying on a ten-year rolling programme. It became clear in the course of the answers received from Mr Smithson that there was some confusion over exactly what this fund was supposed to represent. It appears from the papers to be a reserve fund payment but Mr Smithson indicated that funds could be used to meet day-to-day running expenses notwithstanding that there appears in the accounts a separate heading for cyclical repairs and maintenance. The monies on a budget that were being claimed from the residents for the Reserve Fund payments, although as indicated by Mr Smithson could be drawn upon, appeared not to be - the total contributions tied in almost to the pound with the amount shown as being credited to the property and services renewal fund in 2008 and 2009. We will return to this element in our "Findings" section. There was no clear indication as to what fund the Respondents were looking to create but there was discussion as to whether there was the need for a further survey to be carried out and who would cover the cost of same.

11. Two other issues that Mr Paine had raised in his introduction related to the publishing of financial information, although we were told that this had now been resolved and that the accounts were available in the library, and also the annual budget and in particular

payments of large lump sums for what might be considered to be major works. We were told that in October 2009 some £26,000 was spent on replacing the boiler. No Section 20 procedures had been followed but no lessees had complained and Mr Paine did not in the course of these proceedings raise that as an issue. We were told by Mr Smithson that it was not policy to worry the elderly residents and that they would be told what works were required at the time they were needed. However this matter has brought to light the lack of the proper procedures being undertaken by the Respondents and there is now a process of involvement that Mr Paine says he finds acceptable and should avoid problems in the future.

12. At the conclusion of the hearing the Respondents indicated they would wish to consider recovering the costs through the service charge regime which they estimated would be in the region of £800. They reminded us that they were a non-profit making organisation. Mr Paine asked that the costs should not be recoverable against the service charge.

B INSPECTION:

13. Prior to the hearing, which was attended by a number of the residents, we had the opportunity of inspecting the accommodation. The building is 3 storeys in a form of "H" with garden area forming the central section to the rear. The flats, of which there are 34, are in the main one bedroom with a living room and kitchen area and bathroom. Many have access either to the garden, from patio doors or private balconies overlooking the gardens either in the middle or to the side. We saw that there were two guest rooms and also accommodation for the warden as well as a library and a general sitting room. The food is apparently delivered to each individual flat on a daily basis both a hot meal at lunch time and a cold supper. The property was in excellent order and appeared on our inspection to provide pleasant accommodation for the elderly residents who managed to maintain both their independence whilst having unobtrusive care provided.

C THE LAW:

14. The law applicable to the determination as to the recoverability of service charges is to be found at s27A of the Act. This states that at paragraph (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;*

(e) *the manner in which it is payable.*

15. Section 20C of the Act entitles us to make a finding that the costs associated with the proceedings before the 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*". The basis upon which we decide this is set out at sub-section 3 which states that we may "*make such Order on the application as it considers just and equitable in the circumstances*".

D FINDINGS:

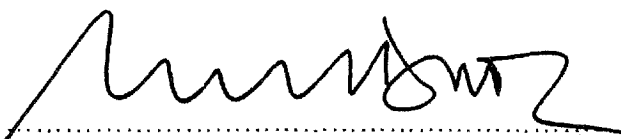
16. Although Mr Paine brought this application for himself much of it was presented to us on the basis that it appeared to reflect the concerns of the residents. We had seen in the papers before us a letter from a number of residents who did not support Mr Paine's application and indeed one resident, Mrs Grice, voiced her dissatisfaction at the conclusion of the hearing.
17. Nonetheless Mr Paine has made the application dealing with the issues we have set out above. As we have indicated it does not seem to us that the question of the reimbursement of meal charges nor the complaint in respect to the completion or rather late delivery of standing orders are service charge issues for which we have jurisdiction and therefore we make no findings on these issues.
18. Insofar as the refund for the surplus for the 2008 service charge is concerned as we have indicated above the lease indicates that this is in discretion of the Landlord. It seems to us that the Landlord, given the sums involved on this occasion, would have been quite entitled to have indicated that no such rebate was to be made. To go ahead and do so and then to charge £12 administration fee seems to us inappropriate and were that the only issue we were asked to consider we would have found that such a charge was perhaps unreasonable and should not have been levied. However, given the sum involved we make no order for reimbursement.
19. The question of the insurance policy seemed to centre upon Mr Paine's concern that the amount sought in the budget was quite a bit more than the actual insurance cost for the year in question. However as we pointed out to him the overall budget/actual cost showed a small surplus of £635. This suggested to us that the Respondents had very accurately calculated the budget and that to take one element from that budget, namely the insurance and seek to reduce that would seem to us to be unreasonable. A budget is a budget. The

fact that there may have been a slight over-egging of the pudding as far as the insurance provision is concerned does not, in our mind, give reason to challenge. We were satisfied from the information given by the Respondents that the insurance is effected in a proper manner. They go to the market to test the appropriate insurance cover available through brokers, liaise regularly with those brokers and in those circumstances we could find no fault with the insurance level. Indeed the sums involved, some £4727 in the year 2009 gives a premium of just over £139 which seems to us to be perfectly reasonable given the property that is being covered by the policy. Further Mr Paine did not challenge the final figure

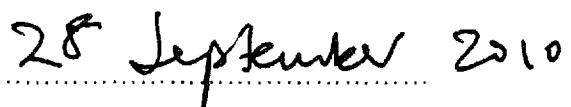
20. The concerns in respect of the Property Services and Renewal Fund are understandable. The evidence given to us by the Association was confusing. It seems perfectly clear from the budget that this money is intended to form part of the Reserve Fund to be collected annually. However when Mr Smithson gave evidence, it appears that was not the case. Against that however it seems clear that the sums which are collected as budget figures do appear in the account as a sum which is then transferred to the Reserve Fund. We were left somewhat confused and understand Mr Paine's confusion on this point. What we do require is that in future the Respondents must clearly show what sum they are seeking to charge in respect of the contribution to the Reserve Fund, clearly stipulate that is the intention of that demand and show that sum is added to the Trust Account so the residents can clearly see where their money has gone.
21. As we have indicated above Mr Paine has confirmed that the arrangements for publishing the financial information are satisfactory and that was not an issue we needed to pursue.
22. It is a pity that this application had to come before the Tribunal. Certainly our inspection of the premises led us to believe that the Respondents were dealing with the management of the property in a good way and it is a unfortunate that there appears to be some concern on the part of Mr Paine and possibly other residents that there is not a clear understanding of the monies being demanded and why those monies are being demanded. Certainly in the course of the hearing it came to our attention that the method by which information is disseminated to the tenants regarding future works is perhaps not as it should be. Whilst we appreciate that the Respondents are looking after the care and welfare of more elderly members of society it does not seem to us appropriate to assume that they do not wish to take an interest in the finances. The information should be provided and they can decide what they make of it. This is particularly so, it seems to us, in connection with the Reserve Fund payments which confused Mr Paine and it seems Mr Smithson. There is no

complaint on our part that a Reserve Fund should be set up. The lease provides for it and as stated at paragraph 7.4.2 the contribution was to be "*computed in such manner as to ensure as far as is reasonably foreseeable that the service provision shall not fluctuate unduly from year to year*". It therefore seems to us necessary for the Respondents to clearly differentiate between cyclical repairs and routine maintenance that is to say the annual running costs and the sums to be paid into the sinking fund.

23. The other matter we feel bound to raise is the failing on the part of the Respondents to adhere to the provision of s20 of the Act. This section is intended to protect lesses and require the Landlord to consult with them on major works which are going to cost each lessee in excess of £250. Failure to do so exposes the Landlord to a possible limitation on the amount that can be recovered from the lessees unless dispensation is granted under section 20ZA of the Act. Insofar as the boiler replacement was concerned we could see the need to deal with that as a matter of urgency given the type of accommodation with which the Respondents are dealing. However there is of course provision by virtue of s20ZA of the Act to seek dispensation in respect of matters of emergency and it does not seem to us to be good enough just to say that in essence the residents did not want to be worried or bothered with these matters. It is possible the Respondents may find that someone does not take such a relaxed view on this point as Mr Paine has done. There is no challenge by Mr Paine to the amounts spent on correcting the boiler deficiencies nor the fact that the procedures were not followed. However we understand that the parties have agreed that this is not a matter that should be ignored and in future there will be at least some form of consultation between the residents and the Management Company so that agreement is reached even if the strict provision of s20 are not adhered to.
24. It was these concerns that persuaded us to make the Order under s20C. Although Mr Paine appears to have adopted role as advocate for other lessees (a role which is not necessarily supported by all) it does seem that he has raised certain issues that do need to be reviewed. We do wish to credit Mr Smithson's considerable efforts to answer the sometimes large volume of correspondence generated by Mr Paine over the various matters that have been of concern to him. Nevertheless, whilst we have no wish to interfere with what in the main appears to be an efficient and well run operation it is for the Respondents to ensure that they comply with legislation as necessary and this has perhaps been highlighted by Mr Paine's application. In those circumstances we conclude that it is appropriate for them to meet their costs other than through the service charge.



Chairman



Date