RESIDENTIAL PROPERTY TRIBUNAL SERVICE
LEASEHOLD VALUATION TRIBUNAL

Property	:	**Flat C41 San Remo Towers, Sea Road, Boscombe, Dorset BH5 1JT**
Applicant	:	**Susan T L Jennings represented by Graham Taylor, chair of the residents' association**
Respondent	:	**San Remo Towers Ltd. represented by Michael Pryor of counsel (solicitors Russell-Cooke)**
Case number	:	**CAM/00HN/LSC/2010/0026**
Date of Application	:	**(to Southern Panel) 9th February 2010**
Type of Application	:	**To determine reasonableness and payability of service charges**
The Tribunal	:	**Bruce Edgington (lawyer chair) John Dinwiddy FRICS Roger Sleigh**
Date and venue of hearing	:	**27th and 28th July 2010 The Mezzanine Room, De Vere Royal Bath Hotel, Bath Road, Bournemouth BH1 2EW**

DECISION

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1. The Tribunal makes no decision on the Applicant's application to determine reasonableness and payability of service charges for the years 2003 to 2009 inclusive.

2. The Tribunal makes no decision on the Respondent's counter application to determine reasonableness of service charges demanded for the years 2003 to 2009 inclusive.

3. The Tribunal makes an Order pursuant to Section 20C of the **Landlord and Tenant Act 1985** ("the 1985 Act"). The Respondent's costs of representation in this application shall not be regarded as a relevant cost to be taken into account

in determining the level of service charges payable by any long lessee of the complex.

Reasons

Introduction

4. The property is in a complex built in about 1936. It consists of 5 Blocks of flats i.e. A, B, C, D and E arranged over a basement with each Block having a ground floor and 4 upper floors.

5. The Respondent company purchased the complex in 2002. It then had 169 flats let on various types of periodic tenancy. There were 2 staff flats. It was the Respondent's intention to refurbish each flat as it became vacant and then grant long leases. New flats have also been created in the basement. There are now 179 flats with 4 under construction. At the time of purchase, the building was run by 2 full time manageress's, namely Mrs. Crawley and Mrs. Paul, both of whom have since retired. There was a day and night porter and maintenance man, Mr. Peter Watkin. He had been employed at the building since 1985 and is still there.

6. A management structure was put in place with Foxes Property Management ("Foxes") undertaking the management responsibilities including the formation of a service charge account on the 1st January 2003. The first long lease was granted on the 7th March 2003 and by the end of that year, 18 flats had been sold. The Applicant acquired her long lease on the 26th May 2004.

7. The present breakdown of flats is that there are 137 flats on long leases, 4 more being refurbished, 4 more being created in the basement area, I staff flat and 37 still on regulated or assured periodic tenancies. Mr. Taylor explained that 100 of the flats are represented in the Residents' Association being 70 let on long leases and the remainder on regulated or assured tenancies.

8. Each lease has provisions for the payment of an initial amount towards service charges for the relevant proportion of the first year and then a percentage part of future service charges. Miss. Jennings' lease proportion was originally .50405% which equates to just over 1/200th of the total. This proportion has changed over the years because of the increasing number of units being created by the Respondent. As might be imagined with a complicated gradual transfer of management costs from freeholder to leaseholders, there have been issues over what proportion of certain fixed costs such as staff were to be met by whom.

9. A residents' association was discussed in March 2004 and then formed. It was recognised by the freeholder. Miss. Jennings was a committee member. In recent years, there have been ongoing discussions between the association and Foxes, the last meeting being on the 13th July 2010 following which, it is said, there were no issues between the association and the freeholder. At the hearing Mr. Taylor explained that although this may have been the impression given, he was simply reserving his position as he knew of this involvement in the hearing of this case.

10. There have been ongoing complaints which have culminated in this application. Procedural directions were made. A pre-hearing review was requested but refused on the basis that if the procedural directions were followed, all relevant issues would be before the tribunal. Instead, a meeting between the parties was proposed and directions suspended to enable such meeting to take place. It seems that some issues were resolved but many remain unresolved.

11. All service charge demands sent to Miss. Jennings have been paid. It should also be said that whilst Miss. Jennings has made her position clear as far as the points in issue are concerned, her main complaint has been about the lack of information and clarity about service charges. Once details had appeared in the substantial bundles prepared for the Tribunal, a significant number of the complaints were withdraw.

12. It is unfortunate that in documents such as the draft 2009 accounts and other documents seen by the Tribunal, Miss. Jennings is 'branded' as the only complainant and the cause of a great deal of trouble. The Tribunal found her to be honest and straightforward. Mr. Taylor certainly gave the impression that he fully supported her and shared her views both as a fellow lessee and as chair of the residents' association. It is hoped that the singling out of Miss. Jennings as the only complainant will be removed from the final version of the accounts.

The Inspection

13. The members of the Tribunal inspected the building in which the property is situated in the presence of Mr. Taylor, Miss. Jennings, Mr. Pryor of counsel and a staff member. It was as described above. Each Block is semi-detached to the next one and the complex is in a 'U' shape around a large court yard area with seating and some minimal landscaping. The car park etc. is under this court yard. The building is of brick construction under a mainly flat concrete tiled roof with various parts of the roof having raised parts of the building with pitched tiled roofs. There are *art deco* style decorative features evident on the exterior.

14. The members of the tribunal walked around the entire exterior of the complex. The weather was dry and warm. They saw the part of the basement area which does not consist of apartments including the car park, caged storage areas, lounge with snooker table, boiler room, laundry room and various passages. On the ground floor, they saw the office and the reception desk in Block C.

15. They were then taken onto the roof where they were shown areas of rendering which are showing signs of damp damage emanating, apparently, from behind the paintwork. One area in particular on one of the north facing walls had evidence of blown rendering under the paint which, the tribunal was told, is typical of other areas. Apart from these areas, the decorative condition of the outside and common parts was generally reasonable. All the windows appear to be relatively modern uPVC units.

The Lease

16. The Tribunal was shown a copy of what purports to be the original lease of Miss. Jennings' flat. The freeholder, through its counsel, says that this is 'typical' of

long leases in the building. The lease is for a term of 125 years from the 1st January 2003 with increasing ground rents. The lease defines 'the property' as being "*San Remo Towers Sea Road Boscombe Bournemouth as the same is shown edged green on plan 1*". There is no plan marked '1' but there are two plans attached and one contains green edging. It is clear that this is intended to be plan 1. The green edging surrounds the whole complex including landscaped garden areas between the Blocks and the fences and walls on the perimeter. As will be seen later, this is important because it includes all the buildings on the complex including the garage, which is not included in the common parts maintainable as such.

17. The lessee's covenants to pay the service charge (called The Maintenance Charge) are in the 5th Schedule and include a covenant to pay such charges in advance and a further covenant to pay for what are described as emergency charges.

18. There are covenants for the landlord to insure and keep in repair the whole building "*(excluding The Demised Premises and Other Units)*" in the 6th Schedule, Part 1. Included within this Schedule is a requirement to "*pay and discharge any rates (including sewage charges water (if any) and service charges) taxes duties assessments charges impositions and outgoings assessed charged and impose upon The Property...*". The wording, once again, is significant because the landlord's obligations cover the whole building including the garage etc.

19. There is a requirement on the lessor to employ staff and provide accommodation free of rent and rates for such staff.

20. The 8th Schedule defines The Maintenance Charge. In essence these are to be those monies which the lessor has to pay to comply with Schedule 6, Part 1 plus cleaning, decorating lighting and heating the club room billiard room launderette and office plus the common parts enjoyed by the lessees.

21. The Maintenance Charge also includes, in paragraph 16, legal costs incurred in "*successfully seeking*" a declaration that service charges are reasonable.

The Law

22. Section 18 of the 1985 Act defines service charges as being an amount payable by a tenant to a landlord as part of or in addition to rent for services, insurance or the landlords' costs of management which varies 'according to the relevant costs'.

23. Section 19 of the 1985 Act states that 'relevant costs', i.e. service charges, are payable 'only to the extent that they are reasonably incurred'. A Leasehold Valuation Tribunal has jurisdiction to make a determination as to whether such a charge is reasonable.

24. If it is reasonable, then section 27A of the 1985 Act gives this Tribunal the jurisdiction to decide whether service charges are payable.

25. Section 153 of the 2002 Act was brought into effect and applies to all service charge demands sent after 1st October 2007. It says that *"A demand for the payment of a service charge must be accompanied by a summary of the rights and obligations of tenants of dwellings in relation to service charges"*. This must be in a prescribed form and the Section also provides that a tenant may withhold payment of a service charge if the demand is subject to this section and the information has not been provided and *"...any provision of the lease relating to non-payment or late payment of service charges do not have effect..."* until the notice has been provided. In this case, no issue has been raised over whether the service charge demands included these details. All the Tribunal will say is that if such prescribed information has not been given, service charges are not payable until it is.

26. In the hearing bundle, the tribunal was given statements of evidence as follows:-

(a) Simon Mckno Bladon is a director of the Respondent and he describes how his company purchased and developed this complex. He gives factual background information and details of how the service charge regime developed. He records how he paid £60,000 into the service charge account as 'compensation' for no objection being raised to an application for planning permission.
(b) Peter Watkin is the person mentioned above who has been employed on the complex since 1985. He is now called a buildings manager. He sets out the time he spends and the use of facilities. He seems to have reacted badly to the accusations he feels are being made by Miss. Jennings and says that certain concessions he allowed e.g. the use of his car to collect things and the use of his computer and internet facilities to order things for the building without charge has now ceased.
(c) Steven Graham Cox is a property manager employed by Foxes He describes how Miss. Jennings has been given access to documents.
(d) Damon Green is a chartered building surveyor who prepared the specification of works for the Section 20 process of consultation with regard to the external decoration works commenced on 2007.
(e) Nigel Soloman is a chartered engineer responsible for contract administration for these decoration works. He deals with the investigations undertaken at the end of the contract following complaints that some of the new paintwork was showing signs of water damage within months of the contract being completed. His enquiries included consultation with ICI, the paint manufacturer, who concluded that because of the solid wall construction, the age of the property and the ability of water to penetrate at parapet level where moisture is able to enter the structure through the brickwork behind the render, this problem was likely to recur. ICI was satisfied, according to Mr. Soloman, that there had been proper preparation.

The Hearing

27. The hearing itself was attended by the above witnesses, Miss. Jennings, Mr. Taylor, Mr. Pryor and Karl Lyons from the managing agents. At the outset, Mr. Pryor attempted to introduce more documents including a statement from Karl Lyons and a 3rd bundle of documents apparently containing copy agreements relating to the basement area. The statement had been e-mailed to the tribunal

office the day before but the bundles were only produced on the day.

28. The tribunal, mindful of the fact that the Applicant was not represented by a lawyer and that much of the information in the original bundles of some 1000 pages was only seen for the first time a few working days before the hearing, refused permission for this new statement and the new documents to be admitted in evidence. Warning had been given in the directions order that this could happen if documents or statements were late.

29. It had been the intention of the tribunal to go through the Applicant's schedule item by item and deal with each in turn. This was because most of the facts in this case appeared to be agreed and submissions were therefore the most appropriate way of dealing with matters. However, to his credit, it was Mr. Taylor who suggested that the professional witnesses should give their evidence first as to the major works so that they could be released to save cost.

30. Mr. Green and Mr. Soloman therefore gave evidence first. They were questioned about the major works and whether any of the painting had been undertaken when it was raining and, if so, what would have been the effect. Mr. Soloman was the witness who gave the major evidence. He said that he did not personally witness all the painting works and therefore could not comment on Miss. Jennings' assertion that painting had been undertaken whilst it was raining. However, on those areas where evidence of internal damp penetration was becoming obvious through the paint, he did witness all the preparation and repainting in 2009 which was undertaken by the contractor at no expense to the lessees. This work was all done in dry conditions.

31. After those witnesses had given their evidence, the plan to go through the schedule proceeded. On the first day of the hearing, some 75 items had been dealt with.

32. Several points became clear to the Tribunal at the end of the first day. Firstly, if the Tribunal did find that service charges were unreasonable going back over 7 years then the task of correcting this amongst the long lessees would be monumental. Because of the increase in number of flats, the percentages payable by the lessees changed over the years. Furthermore, it was going to be very difficult for the Tribunal to actually assess some items.

33. For example, there was an argument over electricity charges e.g. item 1 in the schedule was for charges of £11,978.00 which was split into two parts. One part alleged that the proportion paid by the Respondent for the garage was too little. The other alleged that the Respondent should refund the amount paid for electricity from the meter in the snooker room. The decision of the Tribunal was likely to be different on these two issues and trying to unravel which charges related to which item was going to be nigh on impossible.

34. All the parties and their respective representatives had behaving impeccably during the hearing. On the evidence, it was likely that any adjustment ordered would be less than £50 per annum in favour of the lessees if most of the Applicant's arguments succeeded which was by no means certain. One also

had the problem of how to deal with the Freeholder's one off contribution of £60,000 to the service charge account plus the £10,000 per new flat. The Tribunal chair therefore asked the Applicant whether she was in fact seeking reimbursement or whether, as the members of the Tribunal were concluding from the way her case was being put to the Tribunal, she was really seeking a fairer way of service charges being calculated in the future.

35. Miss. Jennings made it clear that what she was really seeking was not re-imbursement but the establishment of a fairer system for the future.

36. The Tribunal therefore offered the parties a way forward by suggesting that:-

    (a) It made no detailed assessment of the fairness or payability of past service charges which Miss. Jennings had paid on the strict understanding that this was a goodwill decision on behalf of both parties so that a line could be drawn under the past.
    (b) The Respondent should pay for its own representation before this Tribunal i.e. there should be a Section 20C order applying to all long lessees.
    (c) The Tribunal would give its view as to the issues raised in this dispute so that the 2009 draft accounts could be amended to take this view into account

37. It was made clear that there were inherent difficulties in this course because other long lessees might take it upon themselves to renew this application. However, the benefit to the Respondent would be that it would have this decision to use in the event of this happening and, assuming that everyone decided to adopt the course suggested by the Tribunal, then the enormous cost of rectifying all the previous years' service charge accounts would be avoided. This would have been an expense which the landlord could not pass on to the lessees.

38. Both parties were allowed what time they wanted to discuss this with their advisers and they both came back to say that they would welcome this plan. The remaining items on the schedule save for the 2009 period were therefore discussed and the issues upon which the Tribunal would like to make 'determinations' are set out in the analysis. It is appreciated that not all the items of dispute are detailed. This is because many are small items in terms of their impact on the overall service charge budget. Of more importance so far as the parties are concerned has been the reasonable and responsible attitude shown by both parties who each made considerable concessions as the schedule was considered in detail.

39. The Tribunal reminds the Respondent that it said several times in the schedule that it acknowledged that certain charges were payable by it and the Respondent is therefore on trust to honour those assertions.

Analysis

40. There were some 121 items of complaint. However, these covered some 7 years i.e. 2003 to the budget in 2009. Many of the items were repeated year after year. It is therefore appropriate to deal with the schedule in subjects to avoid repetition. 2009 will not be dealt with as the accounts have not been finalised and can be amended to reflect the following comments.

Major works

41. This is a very difficult issue. One can certainly understand that lessees would not be happy about external decoration works being spoilt so soon after they are undertaken. The Tribunal has no doubt that Miss. Jennings saw work being undertaken when it was raining. However, it also accepts the evidence of Mr. Soloman that he personally supervised remedial works in 2009 which did not cost anything in addition to the contract price.

42. There is no doubt in the minds of the Tribunal members that the fabric of this building is the cause of the problem. If rendering is stripped off, the walls have to have time to dry out which will take some time. During that time, the walls will have to be exposed which will draw in additional salt from sea spray etc. into the fabric. Although the members of the Tribunal have no specialist knowledge as to its viability, the only real solution might be to remove all the render, provide a complete cover for the building with driers and then seal and re-render. This will take months, will be very unsightly, cause a great deal of disturbance especially to the upper flats and be extremely – probably prohibitively – expensive.

The garage and storage areas

43. The garage and storage areas are not common parts but they are part of the building. This has caused confusion. The landlord has paid the majority of the electricity. The lessees take the view that the landlord should pay more because only very small parts of that area are used by them as of right. The non recyclable rubbish is put outside the garage and the rest could, in their view, be put there as well. There are a very small number of parking places available but the majority of parking spaces and storage cages are let out to some lessees and the assertion was that the landlord benefited from this and should pay most of the overheads.

44. On inspection, the Tribunal looked at this area for some time. There is a small area for people to wash their cars and there is an electric point for such items as electric invalid cars, carriages etc. to be charged. There is a relatively small area with commercial sized rubbish bins. The rest is either marked out for parking or consists of the storage cages.

45. The Tribunal took the view that the Respondent, as freeholder, should pay 90% of the electricity bill for the lighting and the door with 10% falling to the service charge account. As to the door and the CCTV equipment, it seemed to the Tribunal that the whole building benefitted from having a secure door and surveillance to this area which was closed and operating respectively to prevent strangers getting into the building via the garage and to avoid vandals getting in and causing damage. If they set the garage on fire, this could be catastrophic for everyone.

46. Thus the Tribunal took the view that the supply and installation of this equipment was a proper service charge expenditure. On the other hand, the many repairs to the door should be borne by the freeholder because it was people either working for him or paying him additional sums who used it with such regularity. Delivering rubbish could be dealt with either through interior doors or through the

older sliding door on the right of the entrance.

47. The cost of light bulbs has been an issue but it has been impossible to tell which part of this expenditure relates to the garage. Most of the some 36 lights in the garage are strip lights which go on and off regularly. The Tribunal's view is that 25% of the cost of light bulbs should be attributable to the garage and paid by the freeholder unless and until, appropriate records giving the lessees a more accurate picture of what is spent where can be devised.

48. As far as fire alarm maintenance and that part of the lift insurance which covers the garage door, the Tribunal felt that all lessees had the benefit of this and, on a broad brush approach, the service charge fund should meet these costs.

49. There are some items such as rates, buildings insurance and renewals and repairs where complaints were made that as some of these covered the garage, there should be a contribution from the freeholder. Apart from repairs to the garage door which are dealt with above, these items are covered by the general provisions in the lease. In other words, the landlord is obliged to insure the whole building and keep it in repair, and pay rates including the garage (Schedule 6, part 1) and the lessees are bound to pay all of those costs as part of the service charge. Lessees may not feel this is fair but they are bound by the leases.

50. The Tribunal noted from the draft 2009 accounts that the landlord proposes to increase the share of the service charge paid by lessees who have agreements to use parking spaces, storage cages etc. That is obviously a matter for the Respondent so long as there is not more than 100% recovery from those liable to pay into the service charge fund, including those shares payable by the freeholder. All the above comments apply to lessees without the benefit of such agreements.

<u>The staff flat</u>

51. This is provided by the landlord because at least one member of staff uses it to stay for several nights a week. The lease says that the landlord should do this and allow the member of staff to stay rent free. The landlord has been claiming a notional rent plus service charges from the service charge account less a contribution because the staff also do work for the freeholder's part of the property.

52. There are 2 issues. Can the landlord do this under the terms of the lease? If so, is the allowance from the landlord sufficient? The first issue took some time to debate at the hearing and is complicated because of the apparent divergence of view expressed by the courts and the Lands Tribunal.

53. The lease itself says, under the landlord's covenants in Schedule 6 part 1, that the landlord can provide "*accommodation* (i.e. a staff flat) *either in The Property or elsewhere (free from payment of rent or rates by the occupier).* Schedule 8 says that the service charge shall be, amongst other things, expenses incurred by the landlord in complying with covenants in Schedule 6, Part 1 and "*proper costs incurred by The Lessor...in the running and management of the property*".

54. There have been a number of cases over the years dealing with just this point i.e. in a situation where a landlord is obliged to house a caretaker rent free, can the landlord claim a notional rent for a caretaker's flat from the lessees as part of the service charge? Mr. Pryor helpfully provided copies of the main decisions. The first in time is **Lloyds Bank v Bowker Orford and others** [1992] 2 ELGR 44 which is a decision of Mr. David Neuberger QC, as he then was, sitting as a deputy High Court Judge. The lease simply said that the landlord should provide a resident caretaker and the service charge should cover 'any other beneficial services which may be properly provided by the lessors'. The Judge found that this covered the situation and that the lessor could charge a notional rent to the service charge. In effect the lessor was providing the resident caretaker and the notional rent was an additional beneficial service for which it should be recompensed.

55. **Gilje and others v Charlgrove Securities Ltd** [2002] 1 ELGR 41 is a Court of Appeal case. Laws LJ gave the lead judgement. They were 2 appeals against decisions of Judge Rich QC in different cases. One was from him sitting as a judge in the county court and the other was from the Lands Tribunal. The leases were in similar terms and said that the lessor should provide a resident caretaker who shall reside in a flat provided in the building. The service charge had to meet particular named expenses of the caretaker's accommodation because they were within the definition of 'monies expended'. The same could not be said for the recovery of a notional rent.

56. Laws LJ said "*at the end of the day, I do not consider that a reasonable or prospective tenant, reading the underlease that was proffered to him, would perceive that paragraph 4(2)(1) obliged him to contribute to the notional cost to the landlord of providing the caretaker's flat. Such a construction has to emerge clearly and plainly from the words that are used*".

57. The next case concerns another decision of Judge Rich QC. His Lands Tribunal decision is **Cadogan v 27/29 Sloane Gardens Ltd and another** [2006] EWLands LRA_9_2005. The case is complex in the sense that the headlease provided only for the landlord to provide a caretaker's flat but it was the underlease which said very clearly that the landlord of such underlease could recover a nominal rent for the caretaker's flat. The argument was that because the headlease was as ambiguous as in **Gilje** the landlord should not be able to recover under the rule of construction called *contra preferentem*. Judge Rich decided, in effect, that because the underlease did make clear provision that the landlord was entitled to recover the nominal rent, *contra preferentem* did not need to be invoked. The appeal by the lessees before Lords Justice Pill and Lloyd ([2006] EWCA Civ 1331) failed.

58. It therefore appears, on the face of the later authorities, that unless clear provisions are made, courts will invoke *contra preferentem* and rule against the landlord. What, if anything, can be drawn from the lease in this case? Mr. Pryor points to the provision which says that the caretaker's accommodation can be provided either in the complex or elsewhere. If it was provided elsewhere then there is no doubt that the rent charged to the landlord would be an expense and

could be recovered through the service charge.

59. When Mr. Taylor was asked whether he appreciated that if the caretaker's accommodation was outside the complex, the service charge account would have to pay the rent, he said that he did understand that. Miss. Jennings said that she did not but only, she conceded, because the terms of the lease had not been explained to her.

60. It is obviously of benefit to the lessees to have the caretaker's flat on the complex. By doing that, the landlord is deprived of the ability to either sell a long leasehold interest or achieve a rack rent for this flat. The landlord could recover rent paid for a caretaker's flat obtained elsewhere. The Tribunal finds that it is this provision which sets this case aside from the **Gilje** case. In other words, the wording in this lease does make it clear because it would be unreasonable and completely illogical for the landlord to lose money simply because it decided to choose the course which was of greater benefit to the lessees i.e. by having the caretaker's flat in the complex rather than elsewhere.

61. Thus, and subject to the position as to set off mentioned below, the landlord can charge a notional rack rent to the service charge account. This would be the market rent for the flat let on an assured shorthold tenancy. However, the point should be made that such a market rent would include service charges. Therefore the service charge account should not have to meet any additional service charge element.

Proportion of staff costs etc. payable by landlord

62. This has been a contentious issue. It is clear, as is acknowledged by the landlord, that his activities as freeholder have taken staff etc. resources from the complex and have created disturbance for the lessees. He has been refurbishing flats all over the complex and creating new ones in the basement area with inevitable disturbance from builders etc. The lessees expect reimbursement. The landlord has attempted to reimburse what he considers to be a reasonable sum and the lessees say that the contribution is too little.

63. Two problems have been encountered by the Tribunal. Firstly there have been real problems in simply assessing the level of contribution and secondly, there is the issue of the lease terms.

64. As to the first issue, for example, it is clear that the lifts have been used for the transportation of materials and workmen to the flats being refurbished. But how can the Tribunal assess whether such use has increased any overheads? If so, by how much? It would be taking conjecture to its extremes to just pluck a figure out of the air. The position is a little better so far as staff, office facilities and other overheads are concerned because some effort has been made by the landlord to make a record of the time spent by employees on different tasks.

65. The other issue relates to the lease terms. Mr. Pryor did not seem to share the view expressed by the Tribunal lawyer chair on this matter. The Applicant was asked several questions. Firstly, did she accept that all the staff employed over the years were actually needed to run the complex? Secondly, did they fulfil

their obligations to the lessees fully? The answers to these questions were 'yes'. Thirdly, did any work undertaken for the freeholder prevent them doing their jobs for the lessees? The answer was 'no'.

66. There was no suggestion that any employee was over paid for what they did for the lessees.

67. In simple terms, Schedule 6, part 1, paragraph 7 of the lease says that the landlord can employ such staff as he considers reasonable. Schedule 8 provides that the service charge bears all the expenses and costs incurred in complying with Schedule 6, part 1. There is no reservation or allowance stated such as 'except in so far as the staff are doing work for the landlord.'

68. As to whether Section 27A of the 1985 Act confers on this tribunal any discretion to decide payability on the basis of what it thinks is reasonable, Judge Huskinson decided in **Southend-on-Sea Borough Council v Skiggs and others** [2006] 21 EG 132 that "*the expression 'a determination' as to whether a service charges 'is' payable and, if it is, as to certain other matters concerning the service charge that 'is' payable, is appropriate language to confer a jurisdiction on the LVT to reach a decision as to what liabilities actually exist between the parties. It is not appropriate language to confer a jurisdiction for the LVT to decide what liabilities it concludes, in its discretion, should exist between the parties*".

69. This case has important consequences because it would appear to be the only case which determines what an LVT should do when faced with a direct conflict between the terms of the lease and the terms of Section 27A of the 1985 Act. In the **Southend** case, the Tribunal considered that it would be unfair for the lessees to pay certain service charges on the date specified in the lease because of the amount involved. It ordered that they be paid over a period of time in compliance, it thought, with Section 27A which says that an LVT may decided the date upon which service charges are payable.

70. The Lands Tribunal concluded that where the terms of the lease are clear, they override any powers given by Section 27A. This Tribunal finds this a very persuasive argument and follows it. Therefore, in circumstances such as this, where there is no challenge to the overall cost of employing the staff, to the standard of service given or to the amount of attention given by the staff to the lessees, what discretion does the tribunal have in determining whether part or all of the costs are payable? The lessees' case is that morally the freeholder should make a contribution.

71. Lest the landlord should consider that it should now abandon any contribution, the Tribunal should say that it has great sympathy with the moral case put forward by the lessees. It is clear that when the leases were drawn, no real thought was given to coping with this situation. The freeholder has taken it upon itself to make allowances. It is equally clear that if an application were made to the court for a declaration that there should be implied into the relevant lease provisions a reservation on the lines expressed above i.e. that time spent on landlord's work should be compensated, the county court judge would be hard pressed not to make such a declaration in view of the landlord's own actions in

making such concessions over a number of years.

72. In this context therefore, the Tribunal considers that the concessions presently proposed by the landlord in the draft 2009 accounts i.e. that it should contribute 10% or thereabouts towards certain expenses are on the right lines and should include all overheads of Peter Watkins or any replacement i.e. wages, notional rent for the flat etc. The freeholder is also contributing all Mr. Watkins pension contributions. As far as other overheads are concerned such as maintenance of the lifts, alarms etc., the Tribunal felt that it really was impossible to determine that any such costs were directly attributable to the freeholder. Therefore, unless there was a specific call out arising from an identifiable problem caused by the freeholder or its agent these would remain as costs to be paid by the service charge account.

73. If there are items where the landlord/freeholder is using a disproportionate part of the facilities paid for by the service charge, then further contributions should be considered. For example if the office is being used for administering the flats with periodic tenancies, then the freeholder should bear its appropriate share.

Management fees and accounts

74. The Tribunal will express a view about this as a challenge was made about interest and whether the managing agent should be allowed to keep this. The Tribunal was told that the present charge is about £160 per flat per year which, in the experience of the Tribunal members, is reasonable and in keeping with market levels. The contract with the landlord provides that, in addition, the agents can keep any interest earned on service charge monies held.

75. There is money held in the managing agent's general account and a separate client's account for the reserve fund. The Royal Institution of Chartered Surveyors 'Service Charge Residential Management Code' second edition, at paragraph 9.6, says that "*Funds held for longer terms, or comprising large balances, should be held on an interest earning account*". Paragraph 9.7 says "*You should consider holding the reserve fund in the same account as the service charge account if the aggregation of the two funds invested will achieve a better return or exemption from bank charges – remembering that the arrangement must be discrete to the property or contributions concerned*".

76. Any such monies are held by the managing agent are as trustee for the lessees which means, of course, that interest on such monies are also held as trustee. The Tribunal does not make any direct challenge to the level of the managing agents' fees, particularly at a time when any interest earned would be minimal. However, it does consider that perhaps Foxes would be well advised to seek advice from the RICS if the monies held by them are 'large balances' as they presumably are in a complex of this size.

77. Finally, on this issue, the Tribunal was a little concerned to note that the accounts produced have been prepared by chartered accountants but they say quite clearly that such accounts have not been audited and no verification is given as to the accuracy of information given. This cost the lessees over £2,300 in 2009. In other words, the provision of these accounts is really just a book keeping

exercise.

78. In the Tribunal's view, competent managing agents should be able to produce reasonable service charge accounts within the fees they charge. Having them audited is clearly a matter of good practice which adds protection to lessees who may not be so inclined to challenge figures which have been independently audited. It was also within the contemplation of Parliament which has passed the new Section 21 of the 1985 Act (although not yet implemented) requiring service charge accounts to be the subject of an audit.

79. Finally on the question of the accounts, it is the Tribunal's view that the whole sums should be shown with the Respondent's contribution as a percentage and the actual amount deducted as a separate entry. This will certainly aid the 'transparency' which both parties wish to achieve.

Fire alarms and intercom

80. This is a relatively small matter, but an irritation for the lessees none the less. It seems that the freeholder has been charging the costs of connecting and/or reconnecting fire alarm sensors and the intercom to the service charge account when finishing the flats he is refurbishing or creating. This is clearly a cost attributable to the freeholder as part of the development costs and should not have to be met by the remaining lessees.

Snooker room

81. Another small but irritating issue is the electricity for the snooker room. Little evidence is available. The service charge pays the electricity but there appears to be a separate meter and the freeholder keeps the money from that meter. If that money is to pay for the same electricity, then it is clearly unfair for the money raised to be pocketed by the freeholder.

Conclusions and general comments

82. As has been said, the parties in this case have, in the end, behaved sensibly and in a conciliatory way. However, it has to be said that this has not always been the case and the Tribunal was very concerned to hear that many of the documents in the bundle had never been seen by the Applicant before and it was said on many occasions during the hearing words to the effect of 'if only we had seen this evidence before, this matter would not have been challenged'.

83. The Respondent clearly realised this and, through Mr. Pryor, commitments were made about the future and advice was sought from the Tribunal as follows:-

(a) Transparency. Advice was sought as to what evidence should be retained for individual invoices when not much detail was given. The answer to that is that someone from the managing agents should look at these invoices at the time and make a handwritten note of what they relate to whilst things are still fresh in their mind. He or she should put themselves in the shoes of the lessees and put down the sort of information which would be needed to justify the expenditure. If that cannot be recollected, then the contractor would have to be asked. After all, a reasonable person would not pay an invoice without knowing exactly what it was for. Mr. Taylor added to that by suggesting,

sensibly, that if an invoice refers to a time sheet or estimate, then a copy of such document should be attached to the invoice.

As far as the provision of information is concerned, Mr. Pryor said that his client would send to any lessee, on request and upon payment of copying charges, a copy of the Foxes in and out ledger, the accountants' nominal ledger and reconciliation account. The Tribunal suggested that these documents should in any event be sent to the residents' association at no cost each year.

(b) The freeholder wanted a decision on the questions of the caretaker's flat, the landlord's contribution to staff etc. and on the question of the major works. These are above.

(c) The Tribunal also asked for and received an assurance from the freeholder that a copy of this decision would be sent to each long lessee with the revised 2009 accounts at no extra cost.

(d) The Tribunal would also urge the lessees to be a little more pragmatic about such matters as gratuities at Christmas. The problem is that these are always a matter of personal choice unless, as with the M & S vouchers, they are in the employee's contract. One would have thought that it would be in the interests of the lessees as a whole for a regular tradesman to be given a small gratuity at Christmas to smooth along the long term maintenance of a good service.

84. Finally, the Tribunal repeats its request to the Respondent that it sorts out Miss. Jennings' problem with her towel rail etc. There was discussion during the hearing as to why the service charge account had to bear the cost of £10,000 to renew a pipe to one flat. It is surely not unreasonable to expect Miss. Jennings problem to be sorted out so that she is not paying a disproportionate share of the running costs of her flat.

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Bruce Edgington
Chair
30th July 2010