SOUTHERN RENT ASSESSMENT PANEL &
LEASEHOLD VALUATION TRIBUNAL

Case No: CHI/00ML/LIS/2009/0097

Between:

Julie Ann Price and
Mr and Mrs Charman (Applicants)

and

Oasis Properties Ltd (Respondent)

Premises: 86 Ditchling Rise, Brighton, East Sussex BN1 4QQ

Determination Date: 4 February 2010

Tribunal: Mr D Agnew BA LLB LLM Chairman
Miss C D Barton BSc MRICS

DETERMINATION AND REASONS

DETERMINATION:

1. The Tribunal determines that the lessees are liable to pay management fees as claimed for the service charge years 1997 to 2008 inclusive and makes no order under Section 20C of the Landlord and Tenant Act 1985.

REASONS:

2. The Application

2.1 On 27 October 2009 the Applicants, Julie Ann Price, who at the material time was a long leaseholder of one of the three flats at 86 Ditchling Rise and Mr and Mrs Charman, who were at all material times long leaseholders of the ground floor flat at 86 Ditchling Rise applied to the Tribunal under Section 27A of the Landlord and Tenant Act 1985 (the 1985 Act) for a determination as to the liability for the lessees to pay management fees which had been included in the service charges for the years 1997 to 2008. In 2008 all three long leaseholders exercised their right to enfranchise under the Leasehold Reform Housing and Urban Development Act 1993 and the nominee purchaser 86 Ditchling Rise (Brighton) Limited became the freehold owner of 86 Ditchling Rise.

2.2 There was no dispute as to the amount of the managing agents fees nor was there before the Tribunal a dispute as to the quality of the service that the former managing agents had performed. The sole question for the Tribunal to determine was whether the lessees were as a matter of law liable to pay management fees at all.

2.3 There was also an application under Section 20C of the 1985 Act under which the applicants asked the Tribunal to determine that the landlord should be prevented from recovering the costs incurred in connection with proceedings before the Tribunal as part of the future service charges. As the freehold is now owned by the lessees' own company it is difficult to see how an order under Section 20C of the 1985 Act is now of any relevance but for the avoidance of doubt and for the reasons which will appear hereafter the Tribunal decided to make no order under Section 20C of the 1985 Act.

2.4 The parties indicated that they would be content for the Tribunal to deal with this application on the basis of only written representations and a direction to this effect was given on 9 November 2009.

2.5 The parties duly supplied the Tribunal with their statements of case and the determination was made on the basis of those written representations.

3. <u>The Law</u>

3.1 By Section 27A of the 1985 Act it is provided that:-
(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 inn which it is payable.
(2) Subsection (1) applies whether or not any payment has been made.

4. <u>The Leases</u>

4.1 The Tribunal was advised that the leases of all three flats are in substantially identical form and the clauses that are relevant to this application are identical in each lease.

4.2 The clauses of the leases which are particularly relevant to this application are as follows:-
a) Paragraph 18 of the Sixth Schedule of the lease which provides as follows:-
"The lessee shall keep the lessor indemnified from and against one

third share of all costs charges and expenses incurred by the lessor in carrying out the obligations under the seventh schedule hereto."

b) By Paragraph 19 of the Sixth Schedule it is provided as follows:-

"The lessee shall on the twentieth day of June in each year during the continuance of this demise pay to the lessor in advance and on account of the lessees obligations under the last proceeding clause the estimated sum of fifty pounds per year (hereinafter called "the estimated sum") or such other estimated sum as the lessor or its managing agent shall in its or their discretion deem necessary with power to build up reasonable reserve for outgoings not of an annual nature ..."

c) By Paragraph 20 of the Sixth Schedule it is stated that:-

"The Lessee shall within twenty one days after service by the lessor on the lessee of a notice in writing stating the proportionate amount (certified in accordance with clause 8 of the seventh schedule hereto) due from the lessee to the lessor pursuant to clause 18 of this schedule for the accounting period to which the notice relates pay to the lessor the balance by which the said proportionate amount exceeds the total sum paid by the lessee to the lessor pursuant to the last preceding clause ..."

d) By Paragraph 7 of the Seventh Schedule to the lease the lessor is required to:-

"Keep proper books of account of all costs charges and expenses incurred by the lessor or on its behalf in carrying out the obligations under this schedule or incurred in the supervision management or control of the property including the payment of professional fees and an account shall be taken as at the twenty-fourth day of June one thousand nine hundred and eighty one and as at the twenty-fourth day of June in every subsequent year during the continuance of this demise and at the termination of this demise for the amount of the said costs charges and expenses incurred since the commencement of this demise or the date of the last preceding account as the case may be."

e) By Paragraph 8 of the Seventh Schedule the lease continues as follows:-

"The account taken in pursuance of the last preceding clause shall be prepared by the lessor or its agent who shall certify the total amount of the said costs charges and expenses (including any audit fee for the said account) for the period to which the account relates in the proportionate amount due from the lessee to the lessor pursuant to Clause 18 of the Sixth Schedule."

4.3 The Applicants premised that the Respondents would also seek to rely on Paragraph 6 of the Sixth Schedule of the lease which states that:-

"Any costs charges or expenses incurred by the lessor ... in doing such works as shall be reasonably required for the cleaning or maintenance of the property or in providing such services or employing such cleaners porters or other employees shall be deemed to have been properly incurred by the lessor in pursuance of its obligations under the Seventh Schedule hereto notwithstanding the absence of any specific

covenants by the lessor to incur the same and the lessee shall keep the lessor indemnified from and against the lessees due proportion thereof under clause 18 of this schedule accordingly."

The Applicants' Case

5.1 The Applicants submitted that the starting point for the Tribunal in a case where the recoverability of service charges was an issue is the lease and "the well accepted position" stated by the Court of Appeal in Gilje and others v Chalgrove Securities Ltd (2001) where Laws LJ said: "The landlord seeks to recover money from the tenant. On ordinary principles there must be clear terms in the contractual provisions said to entitle him to do so." As a further illustration of this principle the applicants cited the case of Embassy Court Residents Association Ltd v Lipman 1984 [2EGLR60] where it was held that the costs of employing a managing agent would not be recoverable unless the lease expressly provides so. A passage from Cumming-Bruce LJ was identified by the Applicants where he said: "Again, it is perfectly clear that if an individual landlord wants to ... recover the costs from the lessee, he must include explicit provisions in his lease." The Applicants point out that the Respondent was not a company owned by the leaseholders during the years with which the Tribunal is concerned.

5.3 The Applicants also cited the case of John Cassidy v Raj Properties Ltd (LON/00BB/LSC/2007/0369) as an example as to how the Leasehold Valuation Tribunal deals with such matters. That case cited the Court of Appeal decision in Sella House Ltd v Mears [1989] 12EG67 as being of assistance in construing a lease as to whether it authorised a landlord to charge management fees. In the Sella House case, which concerned the question as to whether a landlord could charge to the service charge its legal costs incurred in recovering service charges from other tenants Taylor LJ said "for my part I should require to see a clause in clear and unambiguous terms before being persuaded that that result (that the fees of solicitors might be included within the service charge) was intended by the parties."

5.4 Finally, the Applicants anticipated that the Respondents would rely on the case of Norwich City Council v Marshall (LRX/1144/2007) a decision of the Lands Tribunal which overturned the decision of the Leasehold Valuation Tribunal where the Lands Tribunal considered that the LVT had not properly considered the lease provisions in the light of the context in which the lease was demised. In that case the original lease was granted by the Council, a public body, continued to manage the property themselves. The Applicants contend that the Norwich case is distinguishable from the case the Tribunal has to deal with because the Council in the Norwich case were seeking their own fees for management and supervision and not the fees of an independent managing agent and in the lease in that case there was a "direct requirement to exercise a management function" on the part of the landlord.

6. The Respondent's case

6.1 The Respondent argued that the cumulative effect of the lease clauses quoted above is as follows:-
a) that the Respondent can charge the costs of employing cleaners porters or other employees as shall be required for the cleaning or maintenance of the property to the service charge account.
b) that the lessees are required to indemnify the landlord for one third of his expenses incurred in complying with his obligations in the Seventh Schedule and that payment has to be made within 21 days of the service of the end of year demand as certified by the Respondent or its managing agents.
c) the recoverable service charge expenses include the payment of professional fees incurred in supervision management or control of the property (Paragraph 7 of the Seventh Schedule) and
d) that the annual service charge accounts are to be prepared by the Respondent or its agent.

6.2 The Respondent submits that the appointment of external managing agents is clearly contemplated in the lease in Paragraph 20 of the Sixth Schedule and paragraph 8 of the Seventh Schedule. They also contend that managing agents fees for cleaning and maintaining the property are especially recoverable by Paragraph 16 of the Sixth Schedule.

6.3 The Respondent further submits that if the Tribunal does not consider that the management fees are expressly recoverable under the lease then such a term should be implied having regard to the decision in Norwich City Council v Marshall referred to above. The Respondent contends that the fact that the Norwich case concerned a local authority should make no difference. In both cases there is an express requirement in the lease for the freeholder to exercise a management function and that costs incurred in exercising that function should be recoverable and that it may be by in-house or external costs.

6.4 In its statement of case the Respondent contended that although the Applicants have sought a determination as to management fees going back over a twelve year period they were only entitled to a determination for the last six years as the relevant limitation period is six years. They also argue that the Applicants Mr and Mrs Charman cannot recover management fees that pre-date their ownership of their flat on 25 May 2001. The Applicants contend that the appropriate limitation period is twelve years but question whether the Tribunal has jurisdiction to deal with the point and that this would be a matter for the County Court to determine.

7. The Tribunal's Determination

7.1 The Tribunal first considered the question of its jurisdiction to determine the limitation point and decided that it did have jurisdiction. Section 27A of the 1985 Act gives the Tribunal jurisdiction to determine the liability for service charges. In the Tribunal's opinion this includes considering the question of limitation. If the application were statute barred then the Tribunal would be unable to determine that a party was liable to pay the service charge in question. It follows that it must be within the Tribunal's jurisdiction to determine questions of limitation. Causes of action arising under a deed are actions on a specialty and are subject to a twelve year limitation period under Section 8 of the Limitation Act 1980. Where, however, the service charge is reserved as rent it is subject to the six year limitation period specified under Section 19 of the Limitation Act 1980. Here, the service charge is not reserved as rent and therefore a twelve year limitation period would apply. However, in the leasehold valuation case of In re 3, 13, 23 and 29 St Andrews Square (LON/00AW/NSI/200/0054) that Tribunal determined that an application brought by a tenant is not covered by the Limitation Act 1980. Whether or not the Limitation Act applies in this case, the service charge is not reserved as rent and therefore the Tribunal is able to determine the liability to pay service charges covering a twelve year period as sought in the application. It would clearly not be appropriate for a tenant to apply for a determination in respect of service charge years prior to their own acquisition of their lease. The Tribunal assumes that, as no objection was taken to Ms Price's application, that she has owned her flat for the whole of the twelve years being the subject of this application. If that is not the case then, as the Tribunal understands that all service charges have been paid up to date and in the light of the Tribunal's determination of this application, it is immaterial as to whether or not she has been a long leaseholder of a flat at 86 Ditchling Rise throughout the whole of the twelve year period the subject of the application.

7.2 Turning now to deal with the substantive question as to whether or not the lessees are liable to pay the landlord's managing agents' fees as part of the service charges the Tribunal accepted and adopted the following propositions:-

a) that the lessees will only be liable to pay such charges if the lease requires them so do to.

b) that it is a matter of construction of the particular leases of these premises as to whether the lessees are liable to pay such charges.

c) that in construing the lease the Tribunal must take into account the provisions of the lease as a whole.

d) that in construing the lease the Tribunal must endeavour to ascertain the intention of the parties as expressed in the actual words used in the lease.

e) the words used must be given their usual and natural meaning.

f) that in order to fix a lessee with liability for paying the service charge of a particular type then there must be clear terms in the contractual provisions to that effect.

g) if there is any doubt the lease should be construed against the

landlord ("contra proferentem").

7.3 The Tribunal considered carefully the wording of the paragraphs in the Sixth and Seventh Schedules of the lease. First, it was clearly envisaged when the lease was drawn up that the landlord may wish to employ managing agents as such agents are specifically referred to in Paragraph 19 of the Sixth Schedule and Paragraph 8 of the Seventh Schedule.

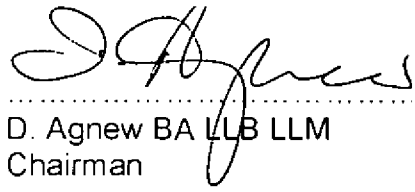
7.4 The Tribunal did not consider that Paragraph 16 of the Sixth Schedule to the lease assisted the Respondent's case. The Tribunal construed that clause to relate to the landlords' own costs and not those of its managing agent, in directly arranging for cleaning services to be carried out at the property.

7.5 The Tribunal decided, however, that Paragraph 7 of the Seventh Schedule was worded in such a way that it was clear that it encompassed the requirement of the lessees to pay for the services of the landlords' managing agents. The Tribunal considered that the meaning of this paragraph was clear and that it required the landlord first of all to keep an account of its costs and expenses incurred in the supervision *management or control* (emphasis added) "*including the payment of professional fees*" (emphasis added). This paragraph goes on to say that the account is taken on 24th June in every year during the continuance of the lease and the next paragraph, Paragraph 8, states that this account shall certify the total amount of the said costs charges and expenses "*due from the lessee to the lessor pursuant to Clause 18 of the Sixth Schedule*". The Tribunal determines that these provisions taken together with Clause (sic) or paragraph 18 of the Sixth Schedule clearly provide that the lessee may be required to pay the landlords managing agents fees which are professional fees "incurred in the supervision management or control of the property".

7.6 The Tribunal is of the view that the liability of the lessees to pay, amongst other things, as part of the service charge the landlords' managing agents fees is clear and there is no scope for the Tribunal to have to invoke the maxim that in a case of doubt the lease should be construed against the landlord.

7.7 In view of the Tribunal's determination above, the Respondent has clearly succeeded in its arguments and the Tribunal does not consider that even if there were to be future service charge demands from the Respondent, which there cannot now be as the lessee's own management company owns the freehold, this would not be an appropriate case for the Tribunal to make an order under Section 20C of the 1985 Act.

Dated this 11th day of February 2010



D. Agnew BA LLB LLM
Chairman