

**THE RESIDENTIAL PROPERTY TRIBUNAL SERVICE
SOUTHERN RENT ASSESSMENT PANEL
LEASEHOLD VALUATION TRIBUNAL**



**Residential
Property
TRIBUNAL SERVICE**

**S.27A & S.20C of the Landlord & Tenant Act 1985 (as amended)
("the 1985 Act")**

Case Number:	CHI/21UF/LSC/2009/0167
Property:	Seaview Cottage The Maisonette 18 The Esplanade Seaford East Sussex BN25 1JL
Applicant:	18 Esplanade Seaford Residents Limited
Respondents:	C.D. Harman and L.C. Heard-White
Appearances for the Applicant:	Ms M Knowles of Osler Donegan Taylor Solicitors and Mr. M Clark of Parsons Son and Basely Managing agents
Date of Hearing	27th April 2010
Tribunal:	Mr R T A Wilson LLB (Lawyer Chairman) Mr A. MacKay FRICS (Surveyor Member) Mr T W Sennett MA (Professional Member)
Date of the Tribunal's Decision:	17th May 2010

THE APPLICATION.

1. This is an application pursuant to section 27A of the 1985 Act for a determination of the liability of the respondents to pay service charges in respect of Seaview Cottage for the years ending 31 December 2008 and 2009 and estimated service charge on account for 2010. The respondents also ask for a determination under section 20C of the 1985 Act disallowing the applicant's costs of the tribunal proceedings being added to the service charge account.

THE DECISION

2. The tribunal determines that all the 2008 and 2009 service charges, as disclosed by the annual accounts for these years filed with the tribunal, are payable by the respondents save as referred to in this decision.

3. The tribunal determines that the sum payable by the respondents as a result of this decision shall become due 28 days after a statutory and contractually compliant demand has been made on the respondents by the applicant for the correct sum. This demand shall not be raised until the 2009 service charge certificate for the year has been served on the respondents.

JURISDICTION

4. The tribunal has power under Section 27A of the 1985 Act to decide about all aspects of liability to pay service charges and can interpret the lease where necessary to resolve disputes or uncertainties. The tribunal can decide by whom, to whom, how much and when service charge is payable.
5. By section 19 of the 1985 Act service charges are only payable to the extent that they have been reasonably incurred and if the services or works for which the service charge is claimed are of a reasonable standard.

THE LEASE

6. The tribunal was provided with a copy of the lease relating to the subject property. At the hearing the respondents accepted that their liability to contribute towards the total expenditure on the building amounted to 14.70%. However they dispute their obligation to contribute towards the services for which they do not receive benefit. It is therefore necessary for the tribunal to recite the service charge structure set out in the lease.
7. The lease places the landlord under an obligation to provide certain services to the building such as, but not limited to, the maintenance, repair, decoration, lighting and cleaning of common ways etc and in return has the ability to levy a service charge for doing so. The fourth schedule sets out the format of the service charge and it gives the dates of the service charge period namely 1st January to 31st December in each year and how often the payments are to be made which is twice yearly. The Schedule sets out a formula for the proportion of the service charge payable by the lessee, and in this case it is agreed by the parties to be 14.70% of the total expenditure incurred by the landlord on the building in each year. The lease provides for advance payments to be made half yearly based on the landlord's estimate of the costs in the year to come. There is then provision for a final charge to be levied at the year-end when the actual costs are known. The lease also contains provision for the landlord to collect sums in advance to create a reserve fund. The purpose of this fund is to build up a sum of money to cover the cost of irregular and expensive works such as external decorations or structural repairs. The lease provides that if the lessee's share of the total expenditure in any one year exceeds the on account payments made by the lessee in that year, then the lessee shall pay the excess to the landlord within 28 days of the service upon the lessee of an annual signed statement.
8. Thus it can be seen that the lease contains not a fixed but a variable service charge, which will fluctuate from year to year depending on the actual and proposed expenditure.

INSPECTION

9. The tribunal inspected the property on the morning of the hearing in the presence of the parties and their representatives. The property comprises an end of terrace building, occupying a corner location at the junction of The Esplanade and The Causeway, with the front elevation facing the English Channel and close to Seaford

town centre. Due to the property's close proximity to the seafront, the building is exposed to adverse weather conditions and a proportionately higher than normal degree of repair and maintenance is to be expected.

10. The property is arranged over basement, ground and three upper floors and comprising in all eight self contained units - six flats and two maisonettes.
11. In the basement there are two flats with their own separate access by an external staircase leading down from The Causeway. Then there are four flats and a maisonette, five units in total, approached from a common entrance hall, again approached from The Causeway. Finally, a maisonette to the rear of 18 The Esplanade and known as Seaview Cottage, is a unit of accommodation, again with its own separate entrance approached up a short flight of steps from The Causeway. To the rear of the building is a public right of way in terms of a relatively steep flight of steps leading down behind both the rear of the subject property and the adjoining properties in The Esplanade.
12. The property has rendered and painted elevations with a pitched and tiled roof, incorporating a number of relatively complicated features. The majority of the windows have been replaced with sealed double glazed uPVC units. The exterior of the property appeared to be in need of both repair and repainting.

BACKGROUND & PRELIMINARY MATTERS

13. On 25th November 2009 the case was transferred from the Brighton County Court (claim number GEN02893) pursuant to a claim made by the applicant for the recovery of service charges of £3,846.05 inclusive of solicitors and Court costs.
14. On 8th January 2010 the tribunal gave directions that the case would proceed under section 27A of the 1985 Act. The applicant was given leave to make a further application to the tribunal for a determination of the respondents' liability to pay service charges on account for 2010 and the respondents were given leave to make an application under section 20C of the 1985 Act disallowing the landlords costs of the tribunal proceedings being added to the service charge. In short the tribunal had three applications to determine.
15. At the commencement of the hearing the respondents challenged each item of service charge expenditure incurred in 2008 and 2009 but during the course of the hearing the parties entered into negotiations and as a result were able to reduce the number of contested items. At the conclusion of these negotiations the tribunal was told, and therefore records, that save as to the issues set out below, all service charge expenditure as set out in the service charge accounts for 2008 and 2009 were agreed by the respondents.
16. As to the remaining contested items, the applicant had set out its position in its statement of case and it relied upon the written and oral evidence of Mr Clark of Parsons Son & Basley the managing agents. At the hearing the applicant was represented by Ms Knowles solicitor. The respondents had set out their defence in a statement of reply and at the hearing gave evidence themselves. They were represented by Mr Heard-White the father of Miss Heard-White.
17. At the hearing, the parties expanded upon their cases and each of the disputed items is considered below.

SERVICE CHARGE YEAR 2008

A. Public way lighting £122.70

18. The applicant contended that although the lease terms entitled it to charge a proportion of this sum to the respondents, as a concession no charge was made. This was because it was recognised that the respondents obtained no benefit from these services as their entrance was self-contained.

B. Fire safety risk assessment £100

19. On being provided with an explanation, the respondents accepted this charge.

C. Smoking ban signage £1.63

20. The applicant confirmed that no part of this charge would be billed to the respondents.

D. Drainage works in the basement flat £3,155.89

The Applicant's Case

21. Mr Clark stated that the owner of Flat A had contacted his firm to complain of foul soil water coming out from the drains causing an immediate health and safety situation. Mr Clark instructed Drain Line Southern Limited to attend the site and resolve the issue. In the event Drain Line had to attend on three separate occasions before the problem was identified by the use of a CCTV camera. This inspection revealed collapsed drains resulting in the need for extensive work to be carried out to the system. Mr Clark told the tribunal that his firm had contacted the insurance company to see if the cost of these works could be recovered as a claim but the insurance company rejected this. He contended that his company had done all it could to establish liability elsewhere. On being questioned by the tribunal he accepted that the final cost of these works was such that consultation should have been carried out with the lessees but no consultation had taken place.

Respondents' Case

22. The Respondents case was that firstly as they received no benefit from the work they should not be responsible for any part of the cost. In the alternative they contended that the works had taken far too long to be completed and therefore an allowance should be made to them because of this delay. In the alternative they suggested that the rodding carried out by the drainage company might have contributed to the collapse of the drain but they were unable to point to any evidence or expert opinion to back up this theory. They also contended that they should have been formally consulted about the works especially as the final cost exceeded the threshold for consultation.

The tribunal's consideration

23. The tribunal is satisfied that the service charge provisions contained in the lease are wide enough to encompass the costs of the work carried out to the communal drainage system. The tribunal noted that the drainage company was called out on four separate occasions before the job was satisfactorily completed. The first

occasion was in March 2008 at a cost of £323, the second occasion in May 2008 when the cost was £129 and the third occasion was in June 2008 when the cost came to a little over £250. The fourth visit was in September 2008 when the remedial work was completed at a cost of £2,449. Drawing on its own collective experience and expertise the tribunal concluded that the callout fees for the first three visits were reasonably incurred. The tribunal considers that it was reasonable to carry out minor work to the drains in the hope that this would remedy the problem before embarking upon the major work, which gave rise to the fourth invoice.

24. From its inspection the tribunal was able to ascertain that the drainage system is a communal one and that Seaview Cottage does benefit from the system. As to the final cost, the tribunal was presented with no evidence to suggest that the price charged to the applicant for the fourth visit was unreasonable. However, the tribunal does find as a matter of fact that the cost of the fourth visit exceeded the threshold for statutory consultation, which in this case amounts to any work costing more than £1,228. Accordingly, as the applicant failed to properly consult the lessees in connection with this work the amount recoverable from the respondents in respect of the fourth invoice is capped at £250. The tribunal determines that the three earlier visits can be regarded as separate contracts each one below the consultation threshold and are therefore recoverable in full.

E. Works carried out by Taylor Builders £3,401.62

The applicant's case

25. The tribunal was told that these works related to a leak and damp problems penetrating through the external wall into Flat 5. The owner of Flat 5 reported the problem to the managing agents who appointed a surveyor to look into the damage and the likely cost of repair. The managing agents were advised that the likely cost of carrying out repairs would be in the region of £1000 which fell below the consultation threshold and accordingly they instructed Taylor Builders to carry out the work. However, the tribunal was also told that after scaffolding had been erected and work commenced, the builders noticed that the downpipe near the balcony of Flat 5 was broken and that the balcony itself was in a bad state of disrepair. The applicant decided to carry out essential works to both the downpipe and balcony as the latter posed a health and safety issue. Mr Miles confirmed that the lessees had not been consulted in relation to these works because the Surveyor had contended that the situation would get worse as the weather deteriorated and therefore time was of the essence. In the event the final cost came to the amount claimed above although the builders did deduct £250 plus VAT from their invoice as a gesture of good will.

The respondents' case

26. The respondents were concerned that despite repeated requests they had not received a specification relating to the works. Furthermore they had not been consulted in respect of the scope of the works and they wondered whether the works could have been covered by the buildings insurance.

The tribunal's consideration

27. The tribunal noted that the respondents had not raised any issue with regard to the quality of the work and neither had they contended that it fell outside of the scope of the service charge provisions contained in the lease. Their sole concern was that they had not been consulted, a fact conceded by the applicant. In the

circumstances as in the case of the drainage works the tribunal determines that the total amount chargeable to the respondents for this work should be capped at the statutory figure of £250.

F. Bowden Consultants invoice £176.25

28. The respondents withdrew their challenge to this figure.

G. Asbestos survey carried out by Parson Son & Basley £352.50

The applicant's case

29. The applicant had included a copy of the survey in the hearing bundle. They contended that it was a legislative requirement to conduct and produce an asbestos register for each property and therefore the applicant had a duty to carry out the work. They accepted that the respondents had not been consulted in relation to this work but there was no necessity to do so. They confirmed that the survey related to the common parts only and this was the reason why no access had been required to the subject flat. They contended that the charge of £352.50 was reasonable and the scope of work was covered by the service charge provisions in the lease.

The respondents' case

30. They considered that the applicant had been very tardy in carrying out the work and it should have been done back in 2005 in which case the cost would not have been borne by them but by the previous owner of the subject property. In the circumstances they invited the tribunal to disallow the charge in full.

The tribunal's consideration

31. The tribunal is satisfied that it is good management practice to have the common parts of the property surveyed for asbestos and that the reasonable costs of this work is covered by the service charge provisions contained in the lease. The cost appears reasonable for the amount of work carried out and the tribunal rejects the defence that the tardiness in carrying out the work should result in the applicant being denied the ability to recover the cost. The lease places no time restraints on the commission of this work. The charge is upheld.

DRAFT ACCOUNTS FOR 2009

A. Public way lighting £113.37

32. The applicant confirmed that no part of this charge would be billed to the respondents.

B. Health & safety Risk Assessment £379.50

The applicant's case

33. Mr Clark told the tribunal that his firm had the qualifications to carry out a health and safety risk assessment which was done in 2009 pursuant to provisions set out

in the lease. He contended that the amount charged was reasonable having regard to the scope of the work and he invited the tribunal to uphold the charge in full.

The respondents' case

34. As in the case of the asbestos survey the respondents contend that the survey should have been carried out much earlier and if it had been then they would not be responsible for the cost. They put forward no evidence that the scope of the work was outside the service charge provisions in the lease or that the cost itself was too high.

The tribunal's consideration

35. The tribunal is satisfied that the service charge provisions of the lease enable the applicant to have this work carried out and to charge it as a service charge item. The tribunal accepts that the cost is reasonable bearing in mind the scope of work carried out is complex in nature and upholds the charge in full.

C. Insurance Valuation Survey £345

36. The respondents agreed this sum.

D. Maintenance and repairs £2,844

The applicant's case

37. Mr Clark told the tribunal that the above figure was made up of two invoices and that the applicant only intended to charge the respondents their share of the second invoice which totalled £1,207.50. This invoice related to repainting works which were carried out to the front porch in 2009. Due to the exposed location of the block it was necessary to regularly carry out maintenance in order to keep the block looking smart and in order to comply with the applicant's obligations contained in the lease. The invoice was below the threshold for consultation and therefore should be fully recoverable.

The respondent's case

38. The respondents accepted that the lease enables the applicant to carry out this work but they considered "that it was a lot of money for such a small porch way and felt that a better job could have been done on it". However they were not able to put forward any comparable quotations or other evidence to suggest that the work was sub-standard.

The tribunal's consideration

39. The tribunal is satisfied that the service charge provisions of the lease entitle the landlord to carry out this work and recover the costs as a service charge item. The tribunal had inspected the porch earlier in the morning and considered it to be in reasonable decorative order. The charge although high was not deemed excessive and in the absence of evidence to suggest that the work could have been done for less, concluded that no reduction was merited.

BUDGET STATEMENT for the Financial Year Ending 31st DECEMBER 2010.

TOTAL BUDGET £21,013.05

The applicant's case

40. The applicant's case is that the lease enables the landlords to build up a reserve fund to cover expenditure of an irregular nature and that it also allows them to collect funds in advance to defray expenditure anticipated in the current year. The 2010 budget had been set in September 2009 at an AGM of the company. It was made up of the following amounts:-

Building insurance	£1,374
Directors insurance	£136
Current repairs	£2,500
Independent accounts	£300
Management fee	£1,702
Maintenance fund	£15,000

41. The budget statement had been sent to all lessees with an accompanying letter which set out in detail how the figures had been arrived at. It was their contention that all these sums were reasonable and based on either past expenditure or estimates obtained in the respect of future expenditure. It was essential that reserves be built up to carry out essential external work to the building which is now scheduled for 2011.

The respondents' case

42. Mr Heard-White told the tribunal that his daughter and son-in-law could see no value for money and that there had been no improvement to the building since his daughter had purchased the property in 2008. They had been led to believe that the service charge would be in the order of £500 per annum and therefore it was unreasonable for the applicant to levy such a large increase especially when it was not evident that anything was being done to improve the state of the building.

The tribunal's consideration

43. As previously stated the tribunal is satisfied that the lease does contain provisions enabling the landlord to collect sums in advance and also to create a reserve fund to cover the cost of expensive works such as external redecoration or structural repairs. The tribunal is satisfied that external works of repair and decoration to the building are necessary and in its opinion it is likely that the cost of this work will exceed the money currently on reserve and the additional money sought. The budget figures for the 2010 expenditure follow closely the actual figures incurred in 2009, and there are no extra ordinary items set out in the 2010 budget. In the absence of a coherent defence from the respondents in respect of these figures the tribunal upholds the 2010 budget in full.

SECTION 20C APPLICATION

44. The legislation gives the tribunal discretion to disallow in whole or in part the costs incurred by a landlord in proceedings before it being treated as relevant costs to be taken into account when determining the amount of service charges payable. The tribunal has a wide discretion to make such an order that is just and equitable in all the circumstances. The decided cases suggest that in arriving at its decision the tribunal should have regard not only to the outcome of the case but also the conduct of the parties.
45. The tribunal does have some sympathy for the respondents. It is clear that they have been under the wrong impression that their annual service charge liability would be in the order of £500. It is not clear where they have formed this impression but it may be from the agent's sales particulars relating to the flat, copies of which are contained in the hearing bundle. These particulars state the figure of £500 per annum plus ground rent. However whatever the respondents may have thought, or been led to believe, the lease contains a variable not a fixed service charge regime and there is no evidence that it was the applicant who misrepresented that a fixed service charge applied to the flat. The tribunal is surprised that the nature of the variable service charge contained in the lease was not clearly explained to the respondents by those advising them at the time of purchase.
46. It is also clear that they feel strongly that the apportionment of the service charge is not fair bearing in mind the layout of the subject flat. Seaview Cottage can almost be described as a self-contained annex quite separate from the main building which comprises six out of the eight flats. It could be properly argued that not all the work carried out to the main building will directly benefit Seaview Cottage. Conversely not all the work carried out to Seaview Cottage will necessarily benefit the main building. However the service charge regime is quite clear in incorporating Seaview Cottage into the maintenance charge structure set for the main building. Accordingly the tribunal has no authority within the context of these proceedings to set about altering the service charge structure or the apportionment of the total spend on the building on the basis that the existing structure and apportionment contained in the lease provides a perceived unfair result and should be more demonstratively apportioned according to direct benefit.
47. The applicant has been very largely successful in proving its case and nearly all heads of expenditure have either been upheld by the tribunal or accepted by the respondents. Furthermore the tribunal is satisfied that the applicant has throughout sought to provide explanations to the respondents in respect of their concerns. There are two letters in the hearing bundle from the applicant to the respondents in which a very full explanation is given as to the service charges for 2008 and 2009 and there is also a letter giving very clear information on the budget figures for 2010. The tribunal does not fault the conduct of the applicant save that it failed to carry out statutory consultation. However that failure has resulted in the charges being capped and the tribunal considers that the applicant should not be further penalised in respect of its legal costs if these are recoverable under the lease.
48. Accordingly having regard to both the outcome of the case and the conduct of the applicant, the tribunal considers that it would not be just, equitable or fair for a section 20C order to be made and therefore this application is refused.

Chairman


R.T.A. Wilson LLB solicitor

Dated 17th May 2010