

RESIDENTIAL PROPERTY TRIBUNAL SERVICE
SOUTHERN LEASEHOLD VALUATION TRIBUNAL

Case No: CHI/29UC/LIS/2009/0077

In the matter of applications under Section 27A of the Landlord and Tenant Act 1985 and Schedule 11 to the Commonhold and Leasehold Reform Act 2002

Re: 17 Gardeners Place, Chartham, Canterbury, Kent CT4 7TR

Applicants	St Augustine's Village Residents Association Ltd
Respondent	Mr V R Reeves
Date of Referral by Court Order	8 July 2009
Date of Inspection	16 December, 2009
Date of Hearing	16 December, 2009 and 1 April, 2010
Venue	Holiday Inn Express, Cheriton High Street, Folkestone
Representing the parties	Mr Oram of Counsel and Mr RT Athow. Mr Reeves in person (1 April, 2010 only)

Members of the Leasehold Valuation Tribunal:

M J Greenleaves	Lawyer Chairman
KM Lyons FRICS	Valuer Member
Mrs JES Herrington	Lay Member

Date of Tribunal's Decision: 3 May 2010

Interim Decision

1. The Tribunal determines in accordance with the provisions of Section 27A of the Landlord and Tenant Act 1985 (the Act) that, for 17 Gardeners Place, Chartham, Kent (the premises) in respect of the accounting years 2007 to 2009 inclusive, the reasonable estimated service charges are £1250 per annum payable, credit being given for payments made, in accordance with the lease of the premises by the following instalments: --
 - a. 1 January and 1 July in both 2007 and 2008;
 - b. 1 January, 2009
2. The Tribunal defers determination in respect of administration charges in accordance with the provisions of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 pending determination of the Respondent's account with the Applicant arising from the determination as to the estimated service charges referred to above and adjustment to comply with the terms of the lease. Either party has liberty to apply for determination of the remaining issues. In making such application, that party shall: --
 - a. specify whether it/he wishes the remaining issues to be determined with or without a hearing;
 - b. provide satisfactory evidence that the above issues have been determined by the court or agreement between the parties.
3. Under Rule 24 of the Leasehold Valuation Tribunal's (Procedure) (England) Regulations 2003 the period in which any party may make an application to the Tribunal under Rule 20 (a) shall be extended to a period of 31 days.
4. Liberty to apply generally.

Reasons

Introduction

5. The Applicant had commenced proceedings in the Basingstoke County Court for recovery of certain sums alleged to be due and payable by the Respondent. By Court Order dated 8 July 2009, the Court ordered that by August 2009 the Applicant "shall refer the issue of the reasonableness of the service charges set out in paragraph 6 of the particulars of claim" in those proceedings to the Tribunal.
6. Paragraph 6 of the Particulars of Claim is in the following terms:
" In breach thereof the [Respondent] has failed to pay interim service charges due as follows:

a. balance to 31 December, 2007	£1296.67
b. interim service charges due 1 January, 2008	£673.59
c. interim service charges due one July 2008	£673.59
d. interim service charges due 1 January, 2009	£767.83
e. managing agent's referral fee to debt collection	£340.75
f. managing agents further administration costs	£431.25"

7. The Court ordered referral of service charges as mentioned above and they are referred to as such in paragraph 6 of the Particulars of Claim as set out above. The items of £340.75 and £431.25 are strictly not service charges within the meaning of the Landlord and Tenant Act 1985 (the Act) but are administration charges within the meaning of Schedule 11 to the Commonhold and Leasehold Reform Act 2002. The Tribunal found that it was the intention of the Court Order that the Tribunal should determine the reasonableness of all 6 items of charge. These items of charge are hereafter referred to as "items".
8. At the hearing on 1 April 2010 the Applicant asked the Tribunal also to determine further administration fees incurred up to 30 September 2009 in the sum of £1052.33 as referred to in paragraph 6 of the statement of Mr Athow dated 19 November, 2009. Mr Reeves objected to that application. The Tribunal declined to accept it, noting that no formal application had been made notwithstanding the Applicant has had ample time since the hearing on 16 December, 2009 to do so and to make the application now would be contrary to the interests of justice.
9. The hearing had been adjourned on 16 December, 2009 for the reasons set out in the order/further directions of that date. As a result a further file of evidence to be submitted by the Applicant to the Tribunal had been filed and served on the Respondent.
10. The Respondent had attended on the second hearing day, but did not wish to make representations or give evidence.

The Tribunal's jurisdiction.

11. So far as necessary to these reasons, the Tribunal's jurisdiction can be summarised in terms that it may determine the reasonableness of the 6 items but it has no jurisdiction to deal with accounting issues. For this reason the following points arise:
 - a. this decision is Interim as it results in a need for recalculation of the Respondent's account with the Applicant to determine whether, and if so, what interest charges and administration charges are properly payable.
 - b. The first item of £1296.67 is an opening balance prepared by or behalf of the Applicant as to its position as to the total owed by the Respondent at 1 January, 2008. It may require adjustment - see below.

- c. Furthermore, the account prepared by Mr Athow dated 13 December, 2009 at page 51 in the hearing bundle will also require adjustment as referred to in paragraph 2 of the decision.
- d. Pending those accounting issues being resolved, the Tribunal is unable to determine the administration charges constituting the final 2 items.

12. Subject to the previous paragraph, the Tribunal will determine the remaining issues as to reasonableness of administration charges in due course.

Inspection

- 13. On 16 December, 2009 the Tribunal inspected the premises and the development of which it is part in the presence of Mr Athow. The inspection was in respect of all external common parts of the development and the buildings, the internal common parts of the block of which the premises form part and also the basement floor of the community centre containing the gymnasium.
- 14. The development is part new build, including the premises, part conversion and provision of leisure facilities. The living accommodation is a mix of flats and houses. There are a total of 96 units.
- 15. The development, including conversion of some parts, was completed within the last 10 years and appears to be in good condition for its age and character. The external common parts are laid out to gardens and borders and also included garages, carports and driveways protected by security gates.

Hearing & Representations

- 16. A hearing was held those attending being noted above. Evidence and submissions were received from the Applicant and the case papers were considered so far as material to the issues in this case. Save as otherwise mentioned above, the Respondent, while present during the morning of the second day of the hearing, did not give evidence or make submissions; the issues that he has in the matter are of accounting, but he has not formally agreed the issues which are the subject of this Tribunal's jurisdiction.
- 17. Lease terms.
 - 18. Amongst the papers we have a copy of the lease of the premises which we understand, so far as material to these proceedings, is in a form and terms which are common to all properties in this development. The lease is dated 16 March, 2001, the parties to it included the Applicant (as manager) and the Respondent (as lessee).
 - 19. So far as material to these proceedings, the lease contains the following provisions: -
 - a. the Respondent to pay a 1/36th share of costs and expenses incurred by the lessor or the Applicant in carrying out their obligations set out in clauses 6.1 and 6.2 including the costs of administration and management of the services in carrying

out their obligations, including also the cost of calculating certifying and collecting such sums and including also such amount by way of reasonable provision for anticipated expenditure as the lessor or the Applicant may at their respective discretion (acting reasonably) determine. Clause 6.1 provides for effecting insurance. Clause 6.2 provides for maintenance repair and renewal of all things used in common (with detailed provisions). We are not aware of any dispute as to the services provided in respect of this 1/36th share payable by the Respondent.

- b. An equal share with all other owners of a dwelling within the development of all costs and expenses incurred by the lessor or the Applicant in or incidental to carrying out obligations in clause 6.3; management and administration and other items listed. Clause 6.3 refers to maintenance etc of the amenity land and facilities, caretaking, bins, parking spaces etc and an extensive list of additional items. It also refers to the creation of reserves by reasonable provision for anticipated expenditure. Again, we are not aware of any dispute as to the services provided in respect of the Respondent's equal share.

20. The Applicant's case

21. Mr Athow had taken over management on 1st January 2008 and did not have much knowledge of how estimated service charges had previously been calculated. His evidence was largely based on the production of budget estimates for the 3 years in question, invoices for 2007 and a spreadsheet summary of those invoices and also accounts for 2007 prepared in February 2009.
22. The Applicant's case as to reasonableness of estimated charges was founded on the calculation of charges based on budgets for each year allocated between the different categories. Those for 2008 and 2009 were based on the allocations made for 2007 which had been prepared by previous managing agents and is shown at page 58 of the hearing bundle. Each of these allocations budgets for each year seeks to apportion the estimated charges in 5 categories: category 1 covering all 96 units, category 2: 4 refurbished units; category 3: 36 new build, category 4: 28 garages and category 5: 36 carports. By reference to the 2009 budget allocations, he gave us example percentage allocations between the categories. These appeared to be on the basis of the allocations made for 2007, but he did not know how those original allocations had been arrived at; as an example he did not know how the cost of caretaking had been apportioned between the categories. He had recommended to the Applicant that it should address the issue of preparation of allocations which could be substantiated to satisfy the strict terms of the lease. The Applicant had not done so, considering it had more important matters to address.
23. However, it was the Applicant's case that the first 4 items were reasonable on the basis that allocations had been made and that the Tribunal should accept that someone with knowledge had prepared the original allocation budget. However, they also produced invoices and a summary spreadsheet of those invoices giving more information in respect

of some expenditure for 2007. Mr Athow accepted that some items of charge had not been properly allocated.

24. As a preliminary decision, the Tribunal determined that in the absence of any allocation between categories being based on evidence other than the simple fact of allocation in the 2007 budget, the Tribunal would consider such allocation items to be not reasonable as being unsubstantiated on any evidence. Where there was other evidence in relation to any particular invoices in the spreadsheet of expenditure for the year ended 31 December, 2007 or in the invoices for that year included with the case papers it would take those into consideration in determining the issues.
25. In the light of that determination, the Applicant did not proceed with further presentation of evidence in relation to the spreadsheet or invoices for 2007, but did say that budget apportionment was a speculative exercise and might be able to identify further evidence within another 14 days. The tribunal considered that the Applicant had had more than sufficient time and it would proceed on the evidence available to date. (The Applicant applied for and was granted an extension of time for application to the Tribunal for leave to appeal in respect of that determination).

Consideration.

26. The Tribunal considered all the evidence produced including such evidence as was available from the spreadsheet analysis and invoices for 2007.
27. The balance of £1296.67.
 - a. In the account at page 51, this balance ("the balance") is shown as an opening debt from CPM due 1 January, 2008. The Applicant was unable to substantiate the balance by reference to any budgets. The budget for 2007 showed total allocations to the Respondent's premises of £1443.55. Another budget for 2007 issued on 27 November, 2006 suggests a total allocation to the Respondent of £1467.90. The Applicant was unable to reconcile these figures with the balancing figure. The Respondent's accounting schedule for the same year suggested total charges of £1467.90 and, on 4 October 2007, a payment of £974.68.
 - b. As the balance does not clearly identify sums of service charge only, it must be assumed that it is an accounting figure which reflects, in some way, both service charges (estimated and/or actual) and payments on account. As such it is therefore an accounting figure and the Tribunal cannot make any specific determination in respect of its correctness or otherwise, let alone whether it is reasonable or not. What the Tribunal can do is to determine estimated service charges for the year 2007 which the Applicant believes to underlie this accounting figure. Accordingly the correctness or otherwise of this opening figure may be determined on an account, through Court or by agreement, but in the light of our determination for that year, this accounting figure is likely to change.

28. 2007

- a. In the way the Applicant presented its case, in placing reliance on the allocation of charges among the 5 categories, we had initially decided that there was no sufficient evidence on those allocations alone to satisfy us that the allocation to the Respondent was reasonable. We considered the actual expenditure figures and information to see if there was any assistance to be gained, although it seems very unlikely that the 2007 actual expenditure had any bearing on preparation of budgets for that year.
- b. It might have been reasonable to assume that similar information would have been available for 2006 when the budget was prepared and allocations made and if so that might have been of assistance in justifying the 2007 allocations. However, there is very little. For example, in the course of the hearing reference had been made to an invoice of Robert Hawkins Limited dated 17 January, 2007 relating to "repair front communal door". Mr Athow readily accepted that this could relate to a communal door anywhere on site. There are other examples. The fundamental problems with the budget for this year (of which we have 2 versions anyway) is first, that we had no evidence as to the source of the overall sums for each budgeted heading and, secondly, we have no significant evidence at all, other than the fact of allocation, on what basis those allocations have been made. On Mr Athow's evidence, the applicant has chosen so far not to address the question of achieving a proper apportionment/allocation.
- c. In summary, we found that the evidence to justify the items for the heads of charge or allocations made was so limited that there was wholly inadequate evidence to justify reliance on these 2 versions of the budget for 2007 to support a finding that the resulting sums charged to the Respondent were reasonable.

29. 2008 & 2009.

- a. In respect of the accounting year 2008, a similar allocation budget showed a total allocation of service charge to the Respondent of £1347.21.
- b. In respect of the accounting year 2009 the similar allocation budget showed the total allocation of service charge to the Respondent of £1535.63.
- c. It appeared that allocations for these 2 years had been made by following the same unsubstantiated apportionment as had been used in the budgets for 2007 and we came to the same conclusion in respect of them as we had in relation to the 2007 budgets.

30. However, findings on the Applicant's case as presented would result in an unjust and unreasonable determination as against the Applicant and most importantly would also adversely affect the Respondent as funds would not be available on account to continue the provision of services. We decided that we should use our own knowledge and

experience in relation to property of this nature, including health and fitness facilities, as to what a reasonable sum might be for the premises for the estimated service charges in advance. We concluded that overall estimated service charges in advance for the 3 years in question for the subject flat would reasonably be represented by the sum of £1250 per year taking into account the following particular points (using our own expert knowledge and experience):

- a. There is no satisfactory evidence as to how any head of service charge has been estimated. The usual starting point is the previous year's expenditure but we have no evidence of that being available at the time of preparation of any of the budgets for the 3 years in question.
- b. Management fees. On this particular development, apart from the gymnasium, there are 4 refurbished flats, 36 new build flats and a total of 96 units. By deduction we conclude that there are 50 houses. We consider that a reasonable level of management charge (for a development of this nature including health and fitness facilities) per flat, including VAT, on present rates would be about £200 in the Kent area and that for houses, where management issues would be significantly lower, the appropriate rate would be about £120 including VAT per unit. That leads us to conclude that in the 2007 an overall budgeted management fee would be in the region of £13,000, in 2008, £13,500 and in 2009 £14,000, but subject to apportionment between the categories on a proper calculated basis. We note that in the 2007 accounts the actual management fee charged was £8779 as against a budget of £15,373.40. That actual information, however, may not have been available when any of the budgets for the 3 years in question was set so we discount it in our consideration. However, for 2008 the budgeted fee is £15,000 and in 2009 and £20,000 so we consider for each of the 3 years in question the budgeted total management fees to be unreasonably high.
- c. It would not be reasonable, in addition to management charge, to charge additional out of hours management cover as has been budgeted for in the 2007 budgets. This had been accepted by Mr Athow.
- d. Common parts electricity. The 2007 accounts shows a sum of £9792.54 including a provision of £2300, so this suggests total payments for 2007 of a net £7492.54. This compares with budgets of £1500 for 2007, £3000 in 2008 and £5050 for 2009. We do not know whether any of those budgets included some element of provision, but it would not be reasonable for the same provision to be estimated for in each year. If they do not, the substantial escalation in the budgeted figures is surprising if they are based on any evidence at all.

31. The Tribunal made its decisions accordingly.

32. *Note. [Not part of the reasons] It appears to us that in resolving the accounting issues in this case overall, to take into account also our decisions to date as above, the Applicant*

must now urgently address and produce allocations which can properly justify to lessees as exactly as possible on what basis service charges are demanded. In relation to the caretaker, for instance, that might require time sheets to show what time is spent on caretaking in any particular area or building so that a proper apportionment can be made. There needs to be much more clarity and precision. Continuing reliance on historical unsupported allocations will not assist either for the 3 years in question or the future and could prevent resolution of the accounting issues in the case currently before the County Court.

[Signed] M J Greenleaves

Chairman

A member of the Leasehold Valuation Tribunal
appointed by the Lord Chancellor