

RESIDENTIAL PROPERTY TRIBUNAL SERVICE
SOUTHERN RENT ASSESSMENT PANEL
LEASEHOLD VALUATION TRIBUNAL

S.27A & S.20C Landlord & Tenant Act 1985



DECISION AND REASONS

Case Number: CHI/29UQ/LSC/2009/0112

Applicant: Ms Debbie Peaford

Represented by: Mr Peter Leighton (Counsel)

Respondents: (1) Mount Ephraim Court Ltd
(2) Mr Philip L L Mitchell

Represented by: Unrepresented at the Hearing

In Attendance For the Applicant Miss D Bellini (Whitfield & Co Solicitors)
Mr Lionel Pelamourgues

Property: Flat 3 Mount Ephraim Court
Molyneux Park Road
TUNBRIDGE WELLS
Kent TN4 8DH

Date of Application: 03 August 2009

Date of Hearing: 03 December 2009

Tribunal Members: Mr B H R Simms FRICS MCI Arb
Mr J B Tarling MCMI

Date of this Decision: 02 February 2010

DECISION & ORDER

1. The Tribunal determined and announced at the hearing that S27A(4)(c) of the 1985 Act did not apply and the Tribunal had jurisdiction to deal with the application.
2. It is agreed between the parties that the relevant of the total service annual charge for Flat 3 is 7.42%.

3. As there have not been any proper accounts, certificates or budgets provided and as the demands do not comply with the relevant statutes, service charges for the years ended 31 March 2007 and 31 March 2008 are not payable. The Respondent may rectify these omissions in which case service charges may become payable subject to a challenge under S.20B of the 1985 Act or any other challenge not determined by this Decision.
4. The cost of cleaning at £720.00 (7.42% £53.42) for 2007 and £2,043.44 (7.42% £151.62) for 2008 are payable.
5. Bank charges in the sum of £120.00 (7.42% £8.90) for 2007 and £130.00 (7.42% £9.65) for 2008 are not payable.
6. The charges for sundries at £486.00 (7.42% £36.06) for 2007 and £297.00 (7.42% £22.04) are not payable.
7. Legal and professional fees at £1,800.00 (7.42% £133.56) for 2007 and £4,660.13 (7.42% £345.78) for 2008 are not payable.
8. The amount for repairs and maintenance at £3,123.00 (7.42% £231.73) for 2007 and £3,786.37 (7.42% £280.95) for 2008 are payable. As there was no consultation the further amount for external repairs of £7,255.63 (7.42% £538.37) for 2008 is limited to £250.00 for Flat 3.
9. The charges for company secretary's fees identified in Mr Burkinshaw's statement at £200.00 (7.42% £14.84) for 2007 and £250.00 (7.42% £18.55) for 2008 are not payable.
10. The charge for Health & Safety Inspection at £452.50 (7.42% £33.58) for 2008 is payable.
11. The Tribunal makes no determination in respect of the debt relating to Flat 12 or the payment in respect of a flood in 2008.
12. The charges for gardening at £540.00 (7.42% £40.07) for 2007 and £940.00 (7.42% £69.75) for 2008 are payable.

13. The Tribunal makes no determination in respect of the other general items.
14. An annual fee for the managing agent for each of the years 2007 and 2008 at £2,800 including VAT is payable.
15. In addition

Section 20C Application - THE TRIBUNAL ORDERS that to such extent as they may otherwise be recoverable the Respondent's costs, if any, in connection with these proceedings should not be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the Applicants.

REASONS

16. This is an application by the tenant of Flat 3 Mount Ephraim Court for a determination whether or not the amounts of apportioned service charges are payable in respect of this flat. The application is in respect of the financial years ending 31 March 2006 (2006), 31 March 2007 (2007) and 31 March 2008 (2008) and proposed service charges in respect of financial years ending 31 March 2009 (2009) and 31 March 2010 (2010).
17. There was also an application made under S.20C that the Respondent's costs in connection with these proceedings should not be regarded as relevant costs for the purpose of calculating service charges.
18. A pre-trial review hearing was held on 24 September 2009 which identified as a preliminary issue the jurisdiction of the Tribunal. The first Respondent challenged the jurisdiction citing S.27A(4)(c) of the 1985 Landlord & Tenant Act (the 1985 Act) in that the matter in dispute had been the subject of a determination by the court. This issue was to be dealt with as a preliminary matter prior to proceeding to the substantive hearing if appropriate.

19. The pre-trial review hearing also identified in Directions eleven matters which would be the limit of the Tribunal's Determination. As follows:-
- 1 The apportionment of the total service charges between properties and whether this is in accordance with the methods specified in the lease.
 - 2 The provision of accounts, certificates, budgets and demands in accordance with the terms of the lease.
 - 3 The cost of cleaning.
 - 4 Bank charges.
 - 5 Sundries and the items included within that heading.
 - 6 Legal and professional fees.
 - 7 Repairs and maintenance to include any S.20 consultation procedure.
 - 8 Company Secretary's fees.
 - 9 Charges made for health and safety inspection.
 - 10 Debts written off in respect of Flat 12 amounting to £359.36 (year end 2006 only).
 - 11 Payment in respect of flooding in Flat 2A (year end 2008 only).
20. At the hearing it became clear that many of the issues also included a dispute regarding the level of managing agent's fees with particular reference to the quality of service provided. It was agreed that as this issue had not been identified at the pre-trial review hearing both parties would be given an opportunity of addressing the point in writing and further Directions were issued on 7 December 2009 in this respect.

THE LAW

21. The statutory provisions primarily relevant to this application are to be found in Sections 18, 19, 20C and 27A of the 1985 Act as amended. The Tribunal has of course had regard when making its decision to the whole of the relevant sections as they are set out in the 1985 Act, but here sets out a sufficient extract or summary from each to assist the parties in reading this Decision.
22. Section 18 provides that the expression "service charge" for these purposes means:
- "an amount payable by a tenant of a dwelling as part of or in addition to the rent -
- a. which is payable directly or indirectly for services, repairs, maintenance, improvements or insurance or the landlord's costs of management, and
 - b. the whole or part of which varies or may vary according to relevant costs."
23. "Relevant costs" are the costs or estimated costs incurred or to be incurred by the landlord in connection with the matters for which the service charge is payable and the expression "costs" includes overheads.
24. Section 19 provides that:
- Relevant costs shall be taken into account in determining the amount of a service charge payable for a period:
- a. only to the extent that they are reasonably incurred, and
 - b. where they are incurred on the provision of services or the carrying out of works only if the services or works are of a reasonable standard
- and the amount payable shall be limited accordingly.
25. Subsections (1) and (2) of section 27A of the 1985 Act provide 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 to whom it is payable
- b. the person by whom it is payable,
- c. the amount which is payable,
- d. the date at or by which it is payable, and
- e. the manner in which it is payable.

Subsection (1) applies whether or not any payment has been made.

There are certain exceptions that limit the Tribunal's jurisdiction under section 27A and one of these is addressed in more detail as a preliminary issue in this case.

26. In addition, it became apparent during the course of the hearing that the amendment to the 1985 Act introducing Sections 20B and 21B would be relevant.
27. Section 20B is a limitation of service charges introducing a time limit on making demands.
28. Sub section (1) provides...*"if any of the relevant costs taken into account in determining the amount of any service charge were incurred more than 18 months before a demand for payment of the service charge is served on the tenant, then (subject to subsection (2), the tenant shall not be liable to pay so much of the service charge as reflects the costs so incurred."*
29. Sub section (2) provides...*"Subsection (1) shall not apply if, within the period of 18 months beginning with the date when the relevant costs in question were incurred, the tenant was notified in writing that those costs had been incurred and that he would subsequently be required under the terms of his lease to contribute to them by the payment of a service charge."*

30. Section 21B states at sub section (1)...*"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, and at (3) a tenant may withhold payment of a service charge which has been demanded from him if sub section (1) is not complied with in relation to the demand"*.
31. The Tribunal also had regard to S.47 of the Landlord & Tenant Act 1987 (the 1987 Act) which requires the landlord's name and address to be contained in demands for rents, etc. In particular at sub section (1)...*"where any written demand is given to a tenant...the demand must contain the following information, namely:*
- (a) *The name and address of the landlord and*
 - (b) *...paragraph (2) where – (a) a tenant of such premises is given such a demand, but (b) does not contain any information required to be contained in it by virtue of sub section (1), then ..."the relevant amount" shall be treated for all purposes as not being due from the tenant to the landlord at any time before that information is furnished by the landlord by notice given to the tenant..."*

THE LEASE

32. The Tribunal was provided with a copy of the lease of Flat 3 dated 27 May 1979. The Tribunal has had regard to the entire document but emphasises here those clauses directly relevant to service charges.
33. The lease requires the Service Charge to be paid in the same manner as the ground rent and at Clause 2(c) identifies the payment as being a proportionate part of the expenses and outgoings incurred by the Lessor in connection with matters set out in the Fourth Schedule.

34. Sub clause (c) continues:-

- (i) *The amount of the Service Charge shall be ascertained and certified by a certificate (hereinafter called “the certificate”) signed by the Lessor’s solicitors or accountants or managing agents (at the discretion of the Lessor) acting as experts and not as arbitrators annually and so soon after the end of the Lessor’s financial year as may be practicable and shall relate to such year in manner hereinafter mentioned*
- (ii) *The expression “the Lessor’s financial year” shall mean the period from the First day of April in each year to the Thirty-first day of March of the next year or such other annual period as the Lessor may in its discretion from time to time determine as being that in which the accounts of the Lessor either generally or relating to the Property shall be made up*
- (iii) *A copy of the certificate for each financial year shall be supplied by the Lessor to the Lessee on written request*
- (iv) *The certificate shall contain a summary of the said expenses and outgoings incurred by the Lessor during the Lessor’s financial year to which it relates together with a summary of the relevant details and figures forming the basis of the Service Charge and the certificate (or copy thereof duly certified by the person by whom the same was given) shall be conclusive evidence for the purposes hereof of the matters which it purports to certify”*

35. At 2(c)(v) the lease provides the arrangement for calculating the apportionment as follows:-

The annual amount of the Service Charge payable by the Lessee shall be calculated by dividing the aggregate of the said expenses and outgoings incurred by the Lessor in the year to which the certificate relates by the aggregate of the rateable values (in force at

the end of such year) of all the flats in the Property the repair maintenance renewal insurance or servicing whereof is charged in such calculation as aforesaid and then multiplying the resultant amount by the rateable value (in force at the same date) of the Flat

36. The expenses and outgoings are then defined within sub-clause (vi):-

The expression "the expenses and outgoings incurred by the Lessor" as hereinbefore used shall include not only those expenses outgoings and other expenditure hereinafter described which have been actually disbursed incurred or made by the Lessor during the year in question but also such part of all such expenses outgoings and other expenditure hereinafter described which are of a periodically recurring nature (whether recurring by regular or irregular periods) including the costs incurred in connection with the valuation of the Property for insurance purposes from time to time whenever disbursed incurred or made and whether prior to the commencement of the said term or otherwise including a sum or sums of money by way of reasonable provision for anticipated expenditure in respect thereof as the Lessor or its auditors accountants or managing agents (as the case may be) may in their discretion allocate to the year in question as being fair and reasonable in the circumstances

37. The general arrangement for the service charge is that an advance payment which is specified as a "...fair and reasonable interim payment" is paid at the same time as ground rent. As soon as the accounts and the certificate have been prepared and there is an adjustment either way to allow for any overpayment or underpayment.

INSPECTION

38. Prior to the hearing the Tribunal members inspected the common ways, the exterior of the premises and the interior of Flat 3. The Tribunal was accompanied by the Applicant, her Counsel and Solicitor. The Respondent was not represented although some of the Lessees and Mr Mitchell attempted to address members of the Tribunal while they were inspecting

the exterior. The Tribunal did not take account of any representations made to it during the inspection, the purpose of which was to identify any physical information that might relate to the evidence it was to hear later at the oral hearing.

39. The property is a substantial brick built property with accommodation arranged on basement, ground, and four upper floors. There are various complicated pitched roofs and some flat roof areas to Flat 3. There are extensive communal gardens and paths.
40. The Tribunal noted that were some areas of the exterior that had not been redecorated and paint was peeling, this was principally to the exterior of Flat 3.
41. The Tribunal noted that much of the common way lighting was not operating.

THE HEARING

42. On the evening prior to the hearing day the Tribunal office received an email from Mr Philip L L Mitchell to the effect that the first Respondent would not be attending the hearing and that Mr Mitchell would also not give oral evidence. The email also indicated that other flat owners who might have attended would not now be present. The email was made available to the Applicant.
43. At the hearing Mr Mitchell was present together with several Lessees and although he was given the opportunity of addressing the Tribunal no oral representations were made by the first or second Respondent or any Lessee.
44. The Tribunal referred to written submissions that had been made and had been included in the hearing bundle and did its best to identify any points of rebuttal that came out of the written submissions and put these to the Applicant as the hearing progressed.

45. Counsel for the Applicant was Mr Peter Leighton who is a member of the London Rent Assessment Panel and sits as a Chairman in that jurisdiction. The Tribunal was satisfied that neither the Chairman of this Tribunal, nor Mr Tarling, the legal member, would have a conflict with Mr Leighton representing the Applicant. Mr Leighton confirmed that he did not know the Tribunal members and he could identify no conflict of interests.

PRELIMINARY ISSUE

46. Firstly the Tribunal dealt with the challenge to its jurisdiction.
47. For the assistance of the Tribunal Mr Leighton had produced a skeleton argument which had been submitted late because he had only recently received instructions.
48. The Directions provided that the Respondent should provide a skeleton argument in support of its contention that the Tribunal does not have jurisdiction. No such statement was provided.
49. The Applicant was directed to provide a skeleton argument in defence but found herself in some difficulty as the Respondent had failed to comply with the Directions and Mr Leighton had no case to which he could respond.
50. By inference following the pre-trial review hearing and by its letter dated 28 August 2009 the then solicitor acting for the first Respondent challenged the jurisdiction citing S.27A(4)(c) of the 1985 Act in that the matter in dispute had been the subject of a determination by a court. That letter contained no further information regarding the detailed grounds for the challenge hence the Direction that a skeleton argument including any cases should be provided.
51. Mr Leighton dealt comprehensively with the issue which arises from proceedings commenced by the first Respondent on 4 March 2008 in the Tunbridge Wells County Court for alleged arrears of service charges in the sum of £3,666.13 for the period 1 December 2006 to 24 March 2008.

52. District Judge Hebblethwaite made an Order on 21 April 2009 in the following terms:-

“Upon the Claimant (sic) accepting the claim for £3666.13 but subject to a right of set off in respect of her counterclaim.....and that the Claimant has been in breach of its obligation and that thereby the Defendant has suffered an ingress of water causing damages and Upon the court assessing the damages under the counterclaim at £2256”

53. Mr Leighton agreed that clearly it would be an abuse of process and contrary to public policy to allow a party to re-litigate a matter which had already been conceded or had been the subject of a finding. The claim however in that case was based on interim service charges which the first Respondent was claiming for the period 1 December 2006 to April 2008.
54. The subject matter in front of this Tribunal, should it decide that it has jurisdiction, is the balance in charges arising from clause 2(c)(viii) of the lease. In this case the service charge account and the certificate for the 2007 and 2008 accounts were not signed off until September 2009 five months after the hearing in the Tunbridge Wells County Court.
55. There was no investigation of the evidence relating to the service charges in the court hearing and the Applicant did not attempt to challenge the figures relating to the interim payments choosing to make her challenge after the final accounts had been produced. Hence this application to the Tribunal
56. In this hearing the amount shown under the 2007 account is £1,127.26 and under the 2008 account the sum of £3,309.32. Neither of these figures correlate to the sum of £3,666.13 which is the subject of the County Court Order. The Applicant therefore argues that the Tribunal has jurisdiction to hear and determine the application in respect of each of the service charges.

57. The Tribunal retired to consider its decision and determined that the Court Order did not remove its jurisdiction in respect of the 27A application and it could proceed to hear the case.
58. The amounts in the court case are different to those in this case and it is not possible to distinguish which if any of the issues determined by consent in court were now before the Tribunal. If the Court Order had related to service charges rather than interim charges and if the Order had not been made by consent the District Judge hearing the case might have wished to refer the case to an LVT for a determination before he decided the issue. He did not.

EVIDENCE

General

59. In their Statements of Case and Response both the Applicant and both Respondents make some general comments setting the scene and these are summarised here. Although Mount Ephraim Court Ltd (the Company) is the first Respondent no one has identified themselves as representing that Company. The Tribunal has a witness statement from Mr Philip L L Mitchell made as owner of Flat 1a and he identifies that he previously owned Laurel Bank (one of the flats in the block) and Flat 2a. He is a past director of the Company but does not purport to represent it.
60. The Tribunal also had two statements from Daniel Burkinshaw of Burkinshaw Block Management, the managing agents appointed by the Company to manage the building. Mr Burkinshaw makes various responses which are taken to be responses on his own behalf as the managing agent and not representing the Company.
61. Mr Burkinshaw states that the freehold title of Mount Ephraim Court is vested in the first Respondent which is now a not for profit Company established solely to maintain the freehold. There are sixteen units within Mount Ephraim Court and each of the leaseholders owns a share in the Company.

62. Mr Mitchell adds that the Company is a vehicle by which the residents collectively maintain their homes. The written statement from Mr Mitchell initially purports to represent his position as an individual lessee but throughout he offers opinions on the Company's actions but without authority to act on its behalf.
63. Throughout the written representations put forward by Mr Burkinshaw and Mr Mitchell it is clear to the Tribunal that there is a lack of understanding of the separate positions that should be adopted by the Company as the owner of the freehold and its obligation as the landlord to the various lessees. There are situations where meetings of the Company are taken to override the lease terms and although there is a managing agent the Company itself is taking action which, in many cases, would not comply with the RICS Code of Practice, namely the Service Charge Residential Management Code (The RICS Code).
64. The Tribunal was not provided with the 2006 accounts or the 2009 or 2010 budgets and made no attempt to deliberate on these years.
65. The Tribunal then proceeded to consider each of the disputed issues in turn.

Apportionment of the service charges

66. The Applicant is not pressing the issue on the apportionment of the service charge and the alternatives promulgated by the Respondent would be equally unreliable.
67. As the matter would be difficult to resolve now that rateable values were not in regular use for residential property the Applicant concedes the position and accepts the percentage for Flat 3 at 7.42%.

Provision of Accounts, Certificates, Budgets and Demands

68. The Applicant states that she has had a real problem as there has been a failure to produce documentation on a timely basis. 2006 accounts were not available, 2009 accounts or other details are not available and unless the accounts are certified the amounts are not recoverable.

69. The Applicant wishes to defer any further challenge in respect of the 2006 accounts until such time the documentation is available.
70. In response Mr Burkinshaw on behalf of the first Respondent states that certified accounts for the years ending 30 April 2007 and 30 April 2008 and draft budgets for the years 2006 and 2007 together with service charge invoices and other documents were all supplied to the Applicant by Thomson Snell & Passmore under cover of their letter dated 8 October 2009. Mr Burkinshaw does not add any indication as to when the accounts were originally provided to the Applicant as a lessee in the building, if at all, at any other time.

The Cost of Cleaning

71. The Applicant points out that since September 2005 one of the directors of the Company Pat Jarman had been performing the cleaning and the only reimbursement received was for the cost of cleaning products. At the beginning of 2006 other residents took over the cleaning because Mr Jarman became ill and similarly there was no cost other than materials.
72. At some time in 2006 the situation became unclear and the Applicant gives a detailed summary of her understanding of the position. She was concerned that following the court case in April 2009 most of the section of the hallway between Flat 2 and Flat 3 was not cleaned properly.
73. A cleaning company has now been employed to carry out the work.
74. Mr Burkinshaw says that he does not understand the points being made and he does not produce any invoices in support of the amounts shown in the accounts and being paid for cleaning.
75. In the account summary the amount for cleaning for year end 2007 is £1,140.00 (7.42% £84.59) and for 2008 £2,043.44 (7.42% £151.62). These amounts are challenged on the basis that the cleaning contractors were not employed for the full period and no invoices have been produced in support of the charge.

Bank Charges

76. The Applicant states that there is no express provision in the Lease for the recovery of Bank charges as part of the service charge and therefore these amounts should not be included.
77. In response Mr Burkinshaw believed that authorisation is contained at paragraph 6 of the Fourth Schedule to the lease in that "*the fees of the lessors managing agents for the collection of the rents of the flats in the said building or buildings and for the general management at administration thereof*" would include a provision for claiming bank charges. He also points out that there is no current Bank charge for the years 2010, 2011.
78. In the accounts Bank charges are shown at £120.00 (7.42% £8.90) for 2007 and £130.00 (7.42% £9.65) for 2008.

Sundries

79. The Applicant's concern is that no details have been provided regarding the individual items included in the total for sundries. There is no information and therefore the amounts should not be allowed.
80. The Respondent makes no attempt to deal with the point and does not produce any details.
81. In the accounts the amount for 2007 is a net figure of £486.00 (7.42% £36.06) and for 2008 £297.00 (7.42% £22.04).

Legal and Professional Fees

82. The Applicant states that there is no express provision within the Fourth Schedule of the Lease for legal and professional fees recovery by way of the service charge. The Applicant is concerned that the impact on the service charges under this heading is substantial. The amount for 2007 is £1,800.00 (7.42% £133.56) and for 2008 £4,660.13 (7.42% £345.78).

83. No information has been provided regarding the detail of how these charges have arisen and why they should be allocated to the service charge.
84. During the period in question time and legal costs have been spent by the Company in drafting and agreeing new leases for the building and there have been legal costs in connection with the court case. These costs will form a major part of this charge in the accounts. These fees are not service charge items although they may be expenses of the Company and they should not be recovered via the service charge.
85. In response Mr Burkinshaw provides no additional detailed information or invoices but believes that the fees are recoverable under the same paragraph 6 of the Fourth Schedule he mentioned earlier.
86. He says that the professional fees are all for the benefit of those lessees who are paying the service charges and the Respondent must collect service charges from those who enjoy the services in essence paid for by others. The Respondent has no option other than to issue recovery proceedings in the absence of non payment by defaulting lessees.
87. Mr Mitchell recalls that much of the legal costs relates to the acquisition of the freehold. He also wondered why the lawyers were changed during the period and offers a hearsay comment about the reason.

Repairs and Maintenance

88. The Applicant was initially concerned that no S.20 procedure had been followed in respect of repair works. During the course of the hearing it was conceded that none of the work in respect of the 2007 expenditure required S.20 consultation.
89. The amounts involved are for 2007 £3,123.00 (7.42% £231.73) and for 2008 two items of general repair items of £3,786.37 (7.42% £280.95) and external repairs of £7,255.63 (7.42% £538.37).

90. The Applicant states that there has been no S.20 consultation procedure in respect of the larger sum for external repairs so consequently the amount is not recoverable.
91. In response Mr Burkinshaw indicates that none of the work requires compliance with S.20 of the 1985 Act after December 2006 but again he provides no information, invoices, or other details in connection with the amounts involved.

Company Secretary's Fees

92. The Applicant states that there is no express provision within the Fourth Schedule of the Lease for the recovery of this cost which for 2007 is not identified but in 2008 is shown as £250.00 (7.42% £18.55).
93. Mr Burkinshaw believes that paragraph 6 of the Fourth Schedule allows for the recovery of this amount via the service charge.

Charge for Health and Safety Inspection

94. The Applicant believed that this charge may be something other than the cost of an H&S Inspection and might be related to difficulties in connection with the insurance of the building.
95. Mr Burkinshaw states that some fees were paid to an external third party chartered health and safety practitioner but he produces no evidence or copies of invoices.
96. The amount involved is not analysed for 2007 but in 2008 is shown as £452.50 (7.42% £33.58).

Flat 12 Debt

97. During the course of the hearing it was conceded that this was not a matter that the Tribunal could deal with as it relates to accounting procedures.

Payment in Respect of Flood (2008)

98. Again this issue was not sufficiently clear for the Tribunal to determine.

Additional Issues Not Specified in the Directions

99. Although not specified in the Directions as specific issues in dispute, in order to assist the parties, the Tribunal allowed some additional items to be heard if it felt that the Respondents had had reasonable warning and an opportunity to address the points in their written submissions.

Gardening

100. The Applicant states that there has been no maintenance of the east south east part of the garden, about 20% of the total, despite repeated requests by her. The Applicant herself has been carrying out gardening in another area. The only area of the garden that is maintained is outside the flat of an ex-director of the Company.
101. Mr Burkinshaw doesn't deal with this issue.
102. Mr Mitchell believes that there is a lack of expenditure on garden maintenance. The "management" say that when there are sufficient funds they will commit more to the garden but actions involving the Applicant have depleted funds to a level where they cannot commit more at this time. The areas outside the ex-director's flat are maintained by the ex-director.

Other

103. The other matters relating to the cost of television aerial and Sky satellite dish could not be identified within the accounts and the objection was therefore not pursued.
104. Questions were raised in respect of the insurance policy and the Applicant felt that part of the property was not insured for leakage. She did not challenge the premium that was being charged.
105. Neither Mr Burkinshaw or Mr Mitchell dealt with the question of insurance.

General

106. Mr Burkinshaw has dealt with the issues as far as he is able although in no part of his statement does he say he is representing Mount Ephraim Court Ltd, although clearly he is appointed as managing agent by the Company.
107. Much of Mr Mitchell's written statement referred to the apportionment issue which did not need to be addressed as it was conceded by the Applicant and much of the remainder repeats comments made to him by other lessees which the Tribunal has to treat as hearsay. Any of the lessees could have attended the hearing or provided written statements themselves.

Managing Agent's Fees

108. Following the hearing in accordance with the Further Directions, written submissions and replies were received from the Applicant and both the first and second Respondent.
109. The Applicant refers to a general poor standard of management which in itself does not justify the charges levied. She had referred generally to this at the hearing.
110. For the year 2007 the figure in the accounts is £1,963.00 (7.42% £145.65) and for 2008 £3,500.00 (7.42% £259.70).
111. She cannot understand the sharp increase between 2007 and 2008.
112. Reference is made to the RICS Code which sets out the duties generally of a managing agent and where additional fees can be charged.
113. Mr Leighton for the Applicant states that bearing in mind the duties and responsibilities placed on an agent under the Commonhold & Leasehold Reform Act 2002 management fees of between £200 and £250 per unit were not unusual in the London area.
114. No evidence of actual fees charged by other managing agents in the locality are provided.

115. Mr Leighton also identified a long list of situations whereby the quality of management has fallen below a reasonable standard at Mount Ephraim Court. This includes the general poor appearance of the block particularly externally in respect of decoration, the garden and missing light bulbs. Reference is also made to the late preparation of accounts and failure to send out proper demands.
116. The Applicant requests a deduction of between 30% and 50% from the fee for each of the years in question and for any estimated figure for 2009 and 2010.
117. In response Mr Burkinshaw as the managing agent for the Company makes no comment on the fees for 2007 other than to say that the fee for this period was £466.66. It is not clear whose fee this is.
118. There is a management agreement between Mr Burkinshaw's firm and the Company. Unhelpfully he states that a copy is available from the directors but does not provide one to the Tribunal. He states that his firm's annual fee is £2,800 including VAT although it is unclear which year this refers to. He also states that a separate fee of £200 including VAT is charged for company secretarial services.
119. Although it is unclear he believes to be justifying his charge because of the contract between his firm and the Company. There is no reference to charges made by other managing agents in the locality as a comparison, or a justification for the level of charge that he makes.
120. He then goes on to refer in detail to those matters identified by the Applicant in her representations as examples of poor management and in support of her case for reducing the managing agent's fees. These were clearly debated fully at the hearing and the Tribunal has taken no account of his extra comments made now when dealing with managing agent's fees. He submits additional evidence and invoices none of which relate to the question of managing agent's fees and are therefore disallowed.

121. The second Respondent simply states that the questions relating to the managing agent's fees are best answered by the managing agent and he defers to him.
122. In a similar way the remainder of Mr Mitchell's representation relates to items raised as examples of poor management rather than references to the managing agent's fees. The Respondents chose not to be represented at the hearing and the Tribunal will not allow issues that have already been heard to be smuggled in under the guise of representations relating to managing agent's fees.
123. Mr Mitchell says that he does not accept that the agent has ignored any duties and provides some detail in respect of specific points. The Tribunal has not taken notice of these detailed comments as these stray into the areas already dealt with at the hearing.
124. Towards the end Mr Mitchell made some relevant comments. He states that he would not be surprised if the managing agent stopped responding to communications from the Applicant. The cost to the Company is too high and from his personal experience he knows that it does no good and only results in a cascade of further communications from the Applicant.
125. Mr Mitchell expected Mr Burkinshaw to forward his terms and conditions of engagement to the Tribunal but as will be seen this has not happened.
126. Mr Mitchell includes an extract of a letter sent, presumably by him, to Mr Burkinshaw in May 2009. It deals with gardening and is therefore not admissible as this issue was concluded at the hearing. Mr Mitchell also includes statements by current and previous residents together with a signed statement. The issues dealt with in the statement and the list of signatories are all matters which do not relate directly to managing agent's fees. There is however an indication that management fees were kept to a minimum as several residents undertook much of the work normally undertaken by agents but no evidence is presented.

CONSIDERATION

127. As a general point the Tribunal found this case to be disappointing. There clearly has been a breakdown of communication between the Company and the Applicant and further aggravation is being caused by the refusal of either the directors of the Company or the managing agent to clearly identify the difficulties and respond adequately to reasonable requests. This failure to respond has produced further correspondence and so the situation gets worse and worse.
128. Much of the difficulty seems to stem from a misunderstanding by the individual lessees of their different duties as shareholders or directors of Mount Ephraim Court Ltd and their actions as lessees. It would seem that the Company by means of the shareholders and directors does not consider the relationship with all lessees to be that set out in the lease. Some other arrangement seems to be usual practice.
129. The Fourth Schedule in the lease clearly sets out those matters which can be recovered by way of service charge and generally these do not include the cost of running the Company or other similar associated costs. The recoverable amounts are only those permitted under the lease. It is understood that new leases were drafted and prepared but not all of these have been implemented so the original lease as seen by the Tribunal will apply.
130. As the Company is a not for profit company and as all lessees are shareholders or directors, any costs not recoverable by way of the service charge will presumably fall upon the Company. However, these costs should not be recovered by way of the service charge.

131. Dealing now with the specific issues:-

Apportionment

132. It is conceded by the Applicant that the correct apportionment is 7.42%.

The Provision of Accounts, Certificates, Budgets and Demands

133. Accounts and certificates if they exist have not been provided on a timely basis. No proper demands have been produced to the Tribunal and this goes to the heart of payability.
134. On the basis that no proper certificates have been provided in accordance with the terms of the lease then no service charges are payable for the years in question. It is open for the first Respondent to rectify the position should it so desire and provided that proper demands, certificates and accounts are produced then service charges may become payable.
135. However, the Applicant is not prevented from making any application under S.20B, or for that matter S.27A, in respect of those demands subsequently received to deal with issues that have not been determined here.

The Remaining Matters

136. Any further comments here regarding the amount of service charges payable are subject to the issue of proper demands and certificates and any challenge under S.20B.

Cleaning

137. The costs of cleaning for 2007 were identified at £720.00 (7.42% £53.42) and for 2008 £2,043.44 (7.42% £151.62) and are reasonably incurred and payable. Both these amounts were agreed by the Applicant at the Hearing.

Bank Charges

138. Contrary to the managing agent's assertion there is no reference in paragraph 6 of the Fourth Schedule of the lease to the inclusion of bank charges in the service charges. These may be charges to the Company but not necessarily to the service charge account.
139. Bank charges do not fall within the general definition of S.18 set out earlier in this Decision and are not payable.

Sundries

140. The Directions clearly identified this cost as an issue that would be dealt with by the Tribunal. In spite of this the Respondent made no attempt to identify the items included within this costs heading and did not supply information as to why any of the items could not be included in other main cost headings.
141. The Tribunal therefore has no information to decide whether these amounts are payable and therefore disallows all of them.

Legal and Professional Fees

142. Again the Tribunal does not accept Mr Burkinshaw's assertion that these fees are covered within the Fourth Schedule of the lease. Without any express provision for the recovery of these costs the Tribunal is duty bound to find against the landlord if any doubt exists.
143. From Mr Mitchell's testimony it is clear that some of the costs might well include solicitor's charges in connection with the purchase of the freehold which is clearly not a service charge item or the preparation of new leases which again cannot be recovered by way of the service charge. These costs may be recovered from the Company rather than via the service charge.
144. None of the legal and professional fees in the accounts are payable.

Repairs and Maintenance

145. The figure for 2007 is a reasonable amount for this type of property and although no details were provided in support of the figure it is payable. The amount falls below the consultation requirement for S.20 so that issue does not arise in respect of 2007.
146. Similar comments apply to the repairs and maintenance item in the 2008 account and this total of £3,786.37 (7.42% £280.95) is payable.

147. The larger amount of £7,255.63 (7.42% £538.37) for exterior repairs is not allowed as the Respondent has produced no evidence of how the amount is made up or any evidence that the S.20 consultation procedure has been followed. As there was no consultation the recoverable amount is limited to £250.00 for Flat 3. This is the amount prescribed under the Service Charges (Consultation Requirements) (England) Regulations 2003.

Company Secretary

148. The amount charged for the company secretary's fee is clearly a Company cost and not a service charge item covered by the Fourth Schedule. The amount is not payable.

Health and Safety Inspection

149. It is usual and sensible for a Health and Safety Inspection to be made on a regular basis and it is reasonable for a managing agent to employ outside surveyors to carry out the task. With no information to the contrary an amount of £452.50 (7.42% £33.58) is reasonable for this type of inspection and is payable.

Debt in Respect of Flat 12 and Payments in Respect of Flooding

150. These are not service charge issues and are outside the jurisdiction of the Tribunal.

Gardening

151. The Tribunal agrees with the Respondent's comment and finds that the amounts charged for gardening are reasonable and payable and are at a low level for the amount of common areas and gardens at the property that need to be properly maintained.

Insurance Policy

152. The insurance policy was not produced and the Tribunal could not understand the suggestion that damage caused by a leaking roof was excluded. The risks included in the policy will be clearly identified in the document and the lease sets out the requirement and the risks to be covered. If a request is made the insurance policy may be produced and the Applicant can check her concerns against the policy wording and raise any issues with the managing agent in accordance with the RICS Code.

153. The Tribunal makes no further comment on these additional items.

Managing Agent's Fees

154. Mr Burkinshaw states that his firm charges £2,800.00 including VAT each year. This is not the amount shown in the accounts but no explanation is given as to the difference.

155. The fee stated represents £175.00 including VAT for each of the sixteen units. Using its own knowledge and experience as no evidence was presented to it, the Tribunal believes that this is a reasonable figure for managing the property.

156. He states that although the Applicant made numerous references to poor quality management much of the problem seems to relate to the attitude and the relationship between the Company, the Managing Agent, and the Applicant rather than to poor management of the block generally. It is unclear why some external decorations have been omitted and why light bulbs are not replaced. The Tribunal felt however that it was unreasonable to penalise the Managing Agent for these alleged indications of poor management as its charge is at the lower end of a general scale of charges that agents might make.

157. Similarly the presentation of accounts, certificates, and other matters, are very much in the hands of the Company and the Managing Agent should not be penalised for the poor performance.

158. The Tribunal is therefore allowing a maximum of £2,800 for each of the years 2007 and 2008.

20C

159. The Applicant asks the Tribunal to make an Order and the Tribunal has full discretion to decide whether to make an Order or not.

160. The Applicant says that the Respondent failed to offer a proper defence to assist in concluding the outstanding issues. She believes that the standard of management and attention to the contents of the leases leaves a lot to be desired and the costs of this unnecessary hearing should not fall upon the service charge. The Respondent has rejected all offers to discuss matters in order to avoid these proceedings. The Applicant says that she has complied fully with the Order made by the Tribunal and has paid the interim service charge requested for the year to 25 March 2009 in spite of the Respondent's continuing failure to provide service charge certificates, accounts and access to supporting documents.

161. Mr Burkinshaw invites the Tribunal to dismiss the request for a S.20C Order. He states that the Respondent has incurred substantial legal costs as a result of the Applicant bringing these proceedings, the matters which have at least in part already been determined by a District Judge in the earlier court proceedings.

162. Mr Mitchell states that two residents have sold their properties stating that the Applicant prevented them from enjoying their home. The residents concerned did not produce statements or evidence in support of this statement. He indicates that the Tribunal should consider awarding costs to the Respondent the full extent of its powers. This indicates a general misunderstanding of the 20C application as there is no application in front of the Tribunal for the awarding of costs.

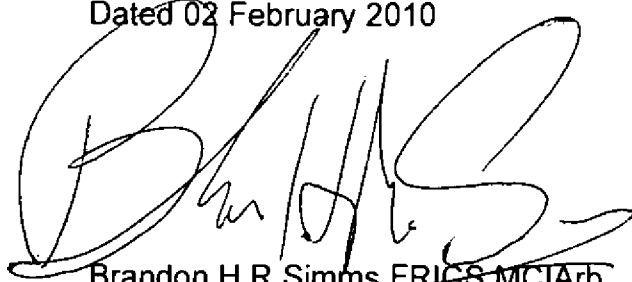
163. In view of the general result in that much of the service charge account has been disallowed as not payable and taking into account the lack of proper

responses from the first and second Respondents the Tribunal has no hesitation in making the Order.

164. The Order only comes into play if the lease allows for the recovery of the landlord's costs in these cases via the service charge in which case they will be disallowed. The Tribunal has not interpreted the lease to see whether or not costs of this type can be recovered.

165. The Tribunal's Decision is set out in paragraph 1 of this document.

Dated 02 February 2010

A handwritten signature in black ink, appearing to read 'B H R Simms', written in a cursive style.

Brandon H R Simms FRICS MCI Arb
Chairman