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**HM Courts  
& Tribunals  
Service**

**LEASEHOLD VALUATION TRIBUNAL  
Case no. CAM/22UL/LSC/2012/0006**

**Property** : 1-42 Boleyn House,  
Roche Close,  
Rochford,  
Essex SS4 1PS

**Applicants** : Mr. M.G. Kaye purporting to represent all  
lessees of Boleyn House

**Respondent** : Backpen Ltd. through its managing  
agent OM Property Management Ltd.

**Date of Application** : 3<sup>rd</sup> January 2012

**Type of Application** : 1. To determine reasonableness and  
payability of service charges and  
administration fees  
2. To appoint a manager

**The Tribunal** : Bruce Edgington (lawyer chair)  
Evelyn Flint DMS FRICS IRRV  
David Cox

**Date and venue of  
hearing** : 30<sup>th</sup> March 2012 at Southend  
Magistrates Court, Victoria Avenue,  
Southend-on-Sea, Essex SS2 6EU

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## **DECISION**

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1. The correct Respondent to this application is the freehold owner, Backpen Ltd. and an order is made substituting that company for O.M. (Solitaire) Property Management as Respondent.
2. The Tribunal finds that service charges claimed on behalf the Respondent from the current lessees for the years ending 30<sup>th</sup> June 2007, 2008, 2009, 2010 and 2011 are reasonable and payable as claimed subject to the following adjustments:-
  - (a) A 50% reduction in electricity charges for the years ending June 2008 and 2009

- (b) Any credit due after apportioning the electricity charges incurred thereafter as to 8.8116% to the lessees of the property and 64.9436% to the commercial properties
  - (c) A 50% reduction in the sweeping charges for the year ending June 2009
  - (d) A 25% reduction in cleaning charges for the years ending June 2009, 2010, 2011 and, thereafter, up to the date of the hearing i.e. 30<sup>th</sup> March 2012.
  - (e) The estimated cost of light bulbs for 2010/11 and 2011/12 to be deducted.
  - (f) A reduction of management fees for the years ending June 2010, 2011 and 2012 to no more than £200 plus VAT per flat for the 42 flats involved.
3. UPON THE Tribunal finding that no notice pursuant to Section 22 of the **Landlord and Tenant Act 1987** ("the 1987 Act") has been served, and that it would have been reasonably practicable to serve such a notice, the application to appoint a manager is dismissed.
  4. The Tribunal makes an order under Section 20C of the **Landlord and Tenant Act 1985** ("the 1985 Act") preventing the Respondent from including its costs of representation in these proceedings in any future service charge demand.

### **Reasons**

#### **Introduction**

5. The named Applicant is the owner of a long leasehold interest in one of the flats at the property. He makes the application on behalf of all lessees in Boleyn House. The Respondent named in the application was O.M. (Solitaire) Property Management whereas it is clear from the evidence that the freehold owner is Backpen Ltd. It is therefore appropriate for the current freehold owner to be the Respondent and an order is made confirming this. O.M. (Solitaire) Property Management has no contractual relationship with the Applicants. They have acted at all times as agents for the freehold owner.
6. This dispute involves a fairly modern development erected in the centre of Rochford, Essex on part of the old hospital site about 5/6 years ago. The development is split into 3 blocks with Block A having a supermarket and smaller shops on the ground floor with a car park in the basement and flats on the first and second floors. Block B consists of retirement flats and Block C is built to give the appearance of being a square of 2/3/4 storey terraced properties in a modern mix of styles and materials around a landscaped parking area.
7. It was clear from the application that the Applicants' main complaints are against the developer and the managing agent for failing to keep the development in a reasonable condition, state of cleanliness and decorative order. There are complaints about the failure to secure the development against damage and mess allegedly caused by vandals and allegations of failing to keep the fire alarm active and in good working order.
8. When the Applicants' statement was filed it appeared that they complain about the following service charges. It should be noted that these figures come from a

tabulated spreadsheet prepared by Miss Hunten from flat 5. She said, at the hearing, that she works in property management and she prepared the figures from a spreadsheet sent to her by the managing agents in this case. She has tried to give average figures bearing in mind that some flats are bigger than others and pay slightly different proportions. She accepted that now she has seen the supporting documents, some figures may not be entirely accurate but she did the best she could from the figures sent to her:-

	<u>2008/9</u>	<u>2009/10</u>	<u>2010/11</u>	<u>2011/12</u>
<u>Block charges</u>				
Electricity car park	106.10	11.41		
Sweeping	31.00			
Cleaning	95.18	118.60	118.60	118.60
General repairs etc. (int)	100.06	19.77	52.71	69.71
General repairs etc. (ext)	67.58	27.80	69.70	52.71
Light bulbs car park	0.48	0.70	10.46	19.77
General reserve	19.77	19.82	19.82	96.20
External reserve	15.81	15.82	15.82	
Internal reserve	36.90	38.15	38.15	
Management fees	195.47	276.74	291.24	291.23
Health & safety ass.			9.83	9.83
<u>Estate charges</u>				
Sweeping	3.00	5.24	7.34	7.34
General reserve		6.30	6.29	6.29
Management fees	31.22	15.00	15.79	16.60

9. There are other schedules with the statement but these simply repeat the above by disputing the overall cost and asserting that the proportions payable are unreasonable.
10. Also with the statement were repeats of the general allegations together with 2 DVDs, one of which contains films taken on a camcorder with the photographer walking around both inside and outside of parts of the development. The other contains still photographs. All of these appear to show some defective gutters, loose roof tiles, cracked walls, a destroyed wall, dirty stairwells, evidence of vandalism, fire alarm off, water stains in ceiling tiles and on floors, litter, dirty walls, badly fitted, damaged and dirty carpets and a damaged fence.
11. There is also a minute of a meeting held on the 25<sup>th</sup> August 2009 between representatives of the managing agent and various lessees from which it appears that general and specific complaints were aired and action was promised. There is a chronology of events covering a period from 28<sup>th</sup> January 2010 and newspaper articles in January 2010 and April 2011 from which it becomes clear that the main difficulty being encountered on this development is the unsocial behaviour of people, assumed to be local youths.

12. The police and the fire service have been involved. There are allegations of graffiti, drug use and vandalism. The newspaper articles refer to lessees now refusing to pay any management charges as a protest.
13. The Respondents have filed 2 bundles of documents, one containing copy invoices for expenditure and the other containing statements of law relating to the application for appointment of a manager and of fact from Neil O'Connor who has been responsible for this site since about May 2010. He appears to be an experienced property manager.
14. In essence, Mr O'Connor's evidence is that the electricity costs have been properly apportioned between the commercial and residential parts of the development; that he offered to cut the sweeping charges in half for 2008/9 and had not thought that there was a dispute thereafter; that many of the complaints appear to relate to design faults and building and equipment defects which are the responsibility of the original developer Barratts and that this development is very difficult to manage because of its design and lack of inbuilt security. On the last point, the development is a mix of commercial and residential and is in the centre of a market town which attracts local youths.
15. Mr O'Connor produces inspection sheets which appear to show that the development is inspected about once a month and the resultant reports show that problems are noted and instructions seem to be given for any rectification or maintenance. He states that all the charges claimed are reasonable. With regard to the service charge reserves, he produces a copy of bank statements of a designated account in the name of "OMPM Roche Close Estate Charge" which shows, as at the 5<sup>th</sup> March 2012, that it is overdrawn to the extent of £16,685.61. On 5<sup>th</sup> September 2011, it had been overdrawn to the extent of £143,393.37.
16. Finally, in terms of pre-hearing paperwork, a letter dated 26<sup>th</sup> March 2012 was received from John Mortimer Property Management setting out their proposals for managing this development including their terms and conditions.

### **The Inspection**

17. The members of the Tribunal inspected the development on the morning of the hearing. It was a bright, sunny and unusually warm spring day. Mr Kaye, Miss Hunten and some other lessees took the members of the Tribunal together with Miss Khan, solicitor, and Mr O'Connor representing the Respondent, around those areas of the development which they wanted the Tribunal to see. Mr Kaye made the point that the common parts were as clean as they had been for years due to much last minute activity.
18. The parts of the development shown were similar to those areas evidenced in the DVDs and the Tribunal members noted the matters pointed out to them.
19. The attention of the Tribunal was drawn to a flat door which showed evidence of having been broken into. It was explained that this had been done by a fireman

because the alarm was sounding. It turned out to be a false alarm.

### **The Lease**

20. The Tribunal was shown what appears to be a copy of the original lease of plot number 5a which is on the first floor of Block A. It is dated 20<sup>th</sup> December 2007 and is for terms of 155 years from 1<sup>st</sup> January 2004 with a ground rent reviewable over the term.
21. It is, perhaps, understandable with so many flats and commercial premises within the same development, that the service charge provisions are complex. There is an estate charge – ‘Head of Charge 1’ – and then various separate Block charges. The estate charge is divided between the commercial properties (70%) and the flats (30%). The 30% is divided equally between the flats.
22. The Block charges are divided between the flats by a formula using floor areas but the lease does not set out those figures.

### **The Law**

23. Section 18 of the 1985 Act defines service charges as being an amount payable by a tenant to a landlord as part of or in addition to rent for services, insurance or the landlords’ costs of management which varies ‘according to the relevant costs’.
24. Section 19 of the 1985 Act states that ‘relevant costs’, i.e. service charges, are payable ‘only to the extent that they are reasonably incurred’. A Leasehold Valuation Tribunal has jurisdiction to make a determination as to whether such a charge is reasonable and, if so, whether it is payable under the terms of the lease.
25. Section 20C of the 1985 Act allows a Tribunal to order that the landlord’s costs of representation before a Tribunal shall not form part of any future service charge demand.
26. Section 24 of the 1987 Act gives the Tribunal the power to appoint a manager to carry out the management functions on a development such as this one. However, it is up to the Applicant to serve a notice on the landlord before the application is made setting out (a) that he proposes to make an application for the appointment of a manager and (b) what he considers to be wrong with the present management. If those matters are capable of remedy, then the notice must give a reasonable time within which such matters must be rectified.

### **The Hearing**

27. The hearing was attended by lessees from flats 5, 6, 7, 8, 21, 29, 37, 39, 41 and 42. Councillor Lucas attended as did one or two others as ‘supporters’. For the Respondent was Miss Khan, Mr O’Connor and also Mr Doherty who was able to assist with regard to the accounts submitted.

28. It should be said that the hearing was conducted in a businesslike fashion. The lessees obviously felt very strongly about the issues raised in the application and they made this clear. However, they were not offensive or rude and did their best to assist the Tribunal in its deliberations. Miss Khan, Mr O'Connor and Mr Doherty also behaved appropriately.
29. The first matter to be dealt with was the issue of the application for the appointment of a manager. The Tribunal chair read out the provisions of Section 22 of the 1987 Act which require a notice to be sent to the landlord etc. setting out the intention to make an application for the appointment of a manager, the nature of the complaints and, if capable of remedy, setting out a timescale for any remedial action to be taken. Although general letters of complaint had been sent, none could be described as a Section 22 notice and the chair therefore indicated to the Applicants that this application would have to fail.
30. Thus, the hearing concentrated on the issues with regard to the service charges. As is acknowledged by the parties, some of the figures in Miss Hunten's spreadsheet are extremely helpful but not entirely accurate. As the evidence unfolded, it became clear that the Tribunal was not going to be able to determine the precise amounts involved in the dispute.
31. Accordingly, it has determined the issues raised and it will be up to the managing agents, no doubt assisted by the Applicants, to arrive at final figures. The other complication was that the figures for the last 2 years are estimated because final accounts for the year ending June 2011 have not yet been produced.

### **Evidence and Conclusions**

32. The main problem with this development is its position and design. Its position in the centre of a town which has no real facilities to entertain teenagers; the inclusion of commercial premises within the development and maintenance regime; the need to have the underground car park open and the inclusion of stairwells and small spaces where people can congregate without immediate detection all point towards a development which will attract vandals. The lack of a proper lessee run management company as a party to the leases or a properly formulated and recognised tenants' association makes management much more difficult.
33. Dealing with the individual subjects raised by the Applicants:-
34. Electricity. The lessees pay 2 lots of electricity. There is power required to light the dark passages in the residential part of the building which operate on sensors as was demonstrated during the inspection. The other part is a proportion of the electricity used by the underground car park and that needed for the fire escapes leading from the car park. The complaint here was that the lessees pay too large a proportion. However, it transpired during the hearing that the main complaint was that at night the car park lights should work on sensors rather than be on all the time.

35. The evidence from the Respondent was that it would be expensive to install the necessary equipment and that it was more cost effective to leave things as they are. The evidence from the lessees contradicted the first part because it was stated that until about 3 years ago, the car park and the fire escapes were on sensor switches at night. The Tribunal accepted this evidence. The sensors must have been there and presumably can be activated or refitted.
36. The lessees accepted that Boleyn House should pay 8.8116% of the total charges but only on the basis that the more cost effective lighting system was re-activated. Despite the evidence produced from the electrician, the Tribunal took the view that a lighting system which changed from constant during the day to sensor activated during the night was bound to save energy and costs. There would be large amounts of time in the early hours when the lights would not be on.
37. As a further incentive, it seemed to members of the Tribunal that if the underground car park gave the appearance from the outside of being in total darkness, it would be less likely to attract vandals and would act as a positive disincentive. If it did not, it would be somewhat irritating for them to be plunged into darkness from time to time.
38. As far as amounts are concerned, there was little evidence of the precise costings and how they would be affected by the change proposed. The Tribunal has therefore taken the rather pragmatic view that the 50% reduction offered for 2008 and 2009 should be implemented and that the balance should remain as it is subject to any adjustment for the 8.8116% apportionment and the comments concerning replacement light bulbs below.
39. Sweeping. The only year in dispute is the year ending June 2009 and an offer of a 50% reduction has been made. As this brings the amount payable by each lessee to about £15, the Tribunal did not consider that further time should be spent arguing about this, particularly as the evidence was sparse, to say the least.
40. Cleaning. This was a more difficult issue. There was clear evidence that excrement had remained in the fire escapes for a long time. It was also clear that despite the recent cleaning, there was ingrained dirt in the fire escapes in particular, suggesting a lack of attention. The carpets and woodwork in the passages in the residential part looked as though they had been recently vacuumed but did appear 'grubby'. Having said that, the Tribunal saw the evidence of the photographs and considered that there had been some regular cleaning, albeit not as thorough as the lessees would wish.
41. Again, the Tribunal considered that it was somewhat hampered by the lack of evidence. It was indeed unfortunate that the cleaning records had gone 'missing'. Doing the best it could from the evidence, the Tribunal decided that

the 25% concession offered up to June 2010 should be accepted and extended up to the date of the hearing.

42. General repairs. These included damage to a cycle shed and another shed, the replacement of broken walls and a doorway surround with inferior materials, damage to the carpet in the passageways etc. It was very difficult for the Tribunal to ascertain what or who had caused the various items of damage. For example, if they had been caused by lessees or subtenants, why should the remaining lessees pay? If walls had been damaged by a commercial vehicle serving the supermarket, why should the residential lessees pay?
43. The replacement walls seen by the Tribunal did not seem to be of a particularly poor quality apart from the fact that the doorway appears to have been further damaged. It was said that some of the repairs could have been insurance claims. That may be the case but it is not easy for this Tribunal, after all this time, to go over each and every item to try to get to the bottom of it.
44. On the basis of the evidence and what the members of the Tribunal saw, they cannot say for certain that any particular in this category is unreasonable and it should be remembered that it is up to the lessees in any case to establish at least some basis for saying that a particular service charge is unreasonable.
45. Light bulbs. This was puzzling. The replacement light bulbs claimed against the lessees for the years when there were audited accounts showed very low figures of less than £1 per flat. The estimates for 2010/11 and 2011/12 then shot up by over ten times and then doubled again respectively. It was impossible for the Tribunal to get to the bottom of this.
46. There was a comment from Mr Doherty that the accounting methodology had changed so that this item was either to be or not to be now included in the electricity charge. This was not a very satisfactory explanation. The Tribunal considered that based on the previous years, the estimates were totally disproportionate and should be removed. The actual cost can then be seen when the audited accounts are prepared and the change in accounting procedure properly explained to the lessees. Its reasonableness or otherwise can then be considered.
47. Reserves. This was very worrying. The Respondent's evidence shows that the 'paper' reserve for this block is £7,221.86. As has been said, the designated bank account for service charge revenue and expenditure shows that the account is seriously overdrawn. In the last year or so, the overdraft has reduced by over £125,000 in a period when many lessees of Boleyn House were refusing to pay.
48. The lessees expressed the view that they were very worried about this. Until the last year or so they had been paying their service charges as requested. They wanted to know why the overdraft had grown so much in the early years. The



Tribunal did not have sufficient information to investigate this. However, it is certainly a matter which should be investigated.

49. Has the managing agent failed to take sufficient steps, for example, to recover service charges, particularly from the commercial lessees? Was the fund properly set up in the first place with the developer paying in contributions which applied to completed but unsold premises?
50. It is hoped that the managing agents will provide full and detailed information to the lessees. If not, then the members of the Tribunal would not be at all surprised if lessees did not involve the police in this matter.
51. Management fees. The fees charged per flat in 2009/10 and estimated for 2010/11 and 2011/12 are approaching £300 per flat per year. That is above the market rate for this locality. The market rate for managing even a small unit which does not have the same economies of scale is £150-250 per flat per annum in the south Essex area.
52. Having said that, the design and level of vandalism in this development create problems which involve much more management input than would be normal. That cannot be put at the door of the managing agent. However, the Tribunal was troubled by some obvious inadequacies in the management regime. There had been only one minuted meeting with the lessees and this had been in 2009. It was said that there were other meetings which involved the police and the fire service where lessees had been invited. However, with a development of this size, there should be at least annual, minuted meetings where lessees can voice grievances so that solutions can be discussed, costed and agreed for implementation.
53. It also appeared to the Tribunal that there was lack of supervision of works and a failure to pick up matters such as the lack of attention to detail by the cleaners in the monthly visits. It may be that there have been so many problems that the agents have only had the ability to devote resources for the 'fire fighting' of problems. However, it seemed clear to the Tribunal that Mr O'Connor does not really make use of the goodwill amongst lessees to provide him with the information he needs. If he or someone on his behalf just reacted to information about lack of cleaning when it was reported, an immediate inspection could be carried out and the contractor could be told to do the job again.
54. There was also evidence by way of the chronology of management issues having been raised by the lessees with little or no action having been taken by the managing agents.
55. The fire alarm and CO2 detectors are also of concern. The Respondent's attitude to this seems a little complacent to say the least. The Tribunal was shown the cupboards containing the mechanisms. The members of the Tribunal are not experts on this topic but it did seem that something was seriously wrong.

The evidence of the broken door to the flat seen on the inspection was also unexplained. There clearly needs to be a thorough investigation into the effectiveness and reliability of these items of equipment. If they have never worked properly, the landlord clearly needs to consider what action should be taken with the manufacturers and/or installers.

56. In all the circumstances, and, in particular, in view of the shortcomings, the Tribunal's view is that the maximum management fee which is reasonable and payable is £200 plus VAT per flat per annum since June 2009. This may involve some apportioning between the flats, but the total management fees for the residential flats in Boleyn House should not be more than the £200 plus VAT per flat.
57. Health and Safety Assessment. It is true to say that a landlord is required to undertake health and safety checks from time to time to ensure that the common parts are safe for visitors, contractors and others. The amount claimed does not appear to be that unreasonable for a building of this size.
58. Thus, it is this Tribunal's view that most of the actually service charges claimed are reasonable and payable. It seems clear that there is a separate designated bank account for service charges although it is overdrawn. As far as the Respondent's costs of representation are concerned, the Tribunal considers that the outcome of this case makes it just and equitable to make an order that such costs cannot be recovered through any service charge demand. It is appreciated that the application to appoint a manager was doomed to failure but this was noted in the Tribunal's directions and should not, therefore have taken up much time.

### **The Future**

59. If all the management problems identified by the lessees were to be resolved on the basis that things stayed as they are, this would really involve a site office and someone on the site at all times. This would be extremely expensive and certainly more than the £2/300 per flat per year being charged at the moment. It does not take a genius to realise that £2/300 per flat from the flats plus the contributions from the commercial premises would hardly pay for a member of staff to be there during the daytime let alone a night shift and appropriate premises for the manager or caretaker. One could be looking at a figure approaching £1,000 per flat per annum just to cover a daytime service.
60. There are some problems with the building itself such as cracks, evidence of damp, poor carpets etc. Some are matters of maintenance of the structure which, with a property of this age, should presumably be dealt with by the developer either through NHBC or otherwise. It is noted that the managing agent has liaised with Barratts. Work has been done to resolve the source of the damp which has stained the ceiling tiles. A decoration programme is felt to be appropriate but it is said that the refusal of some lessees to pay their service charges has meant that the actual funds available, despite what is said to be in

the reserve, will not be able to finance such work at this time.

61. The Tribunal has some sympathy with the lessees. It may be sensible for them to take advice from an experienced property lawyer to see whether any court action might lie for misrepresentation or breach of the landlord's responsibility to keep the buildings in repair. All this Tribunal can do is to say whether the service charges actually claimed are reasonable and payable. It certainly cannot say whether any court action would succeed. The end result of this may be that the lessees will have to accept that the cost of management have to go up. Someone on site and able to see vandals in security cameras would at least be able to call the police immediately.
62. The managing agents have clearly communicated with the police and the fire service and sought their advice. There has been at least one meeting with lessees. It would have been sensible, in the Tribunal's view, to have at least one per annum. However, they cannot stop vandals without having all vulnerable areas made secure.
63. By way of comment only the Tribunal would say that the following could be considered:-
  - Now that the lessees have seen the bank account, they need to work out what the position would be if they paid their service charges in full. If there would still be insufficient to cover the reserve, then there needs to be a careful and possibly independent investigation into how the service charge account built up such a large overdraft in September 2011 when it was said to include reserves
  - The fire and CO2 detector systems need a proper appraisal
  - Miss Hunten said during her evidence that a full appraisal and costing of security measures should have been presented to the lessees. She may have been right but as someone who claims to specialise in property management in her employment, she had clearly not been able to provide any ideas herself. Perhaps the reason for this is that it is impossible to improve the situation without a radical – and expensive – rethink
  - One solution would be to consider large security gates at the entrance to the development which are closed at night. Clearly there would have to be liaison with the fire service. Hopefully the local authority would co-operate because allowing planning permission for this development when it seems to have been highly likely that this sort of problem would arise is open to criticism.
  - Consideration could be given to providing different and separate escape routes from the underground car park and the residences. This would mean that the current 'connection' between the two could be blocked off. The residents would obviously lose their ability to get to the car park direct.
  - It should be possible to install a secure grilled gateway to the underground car park which could be closed at night with the residents and the fire

service being able to open the gate. Alternatively, if the gate were to remain only accessible to the fire service, the landlord would have to either provide alternative parking at night for lessees or make an allowance to those lessees who have the right to park here overnight.

- Perhaps the managing agents or freeholder and Barratts should give proper consideration to the issues, prepare costed suggestions to improve matters and then meet with the local authority, the fire service and both the commercial and residential lessees of Boleyn House. The residential lessees in the other blocks do not really suffer the same problems.

64. These are only some comments and ideas which the Tribunal considered. It is to be hoped that the open hostility to the managing agents will now be tempered with some understanding of the inherent problems which are not all of their making. It is easy to see how people would be 'seduced' into purchasing one of these flats when the development was shining and new. It has pleasant and differing architecture. The residents have easy access to shops and the other benefits of Rochford town centre including access to a main line railway station to London. It must have looked like an ideal living environment.

65. However, a bit of thought would have shown that the inherent defects including lack of security would make themselves obvious in due course. Having public access to the underground car park and then stairs and passages from the car park to the private passageways in the residential section was likely to cause problems. It makes the security doors to the residential part of Boleyn House rather redundant.

66. Thus, the lessees should, it is hoped, be able to accept that either the present problems with security are likely continue or the cost of any solution may have to be shared between all parties.

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**Bruce Edgington**  
**Chair**  
**3<sup>rd</sup> April 2012**