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H.M. COURTS & TRIBUNALS SERVICE

LEASEHOLD VALUATION TRIBUNAL

**Sections 19, 27A and 20C of the Landlord and Tenant Act 1985 (as amended)
("the Act")**

Case Number:	CHI/00ML/LIS/2011/0093
Property:	Flats 1,2,6,7,9,11 and 15-19 Brittany Court 176 New Church Road Hove East Sussex BN3 4JT
Applicant:	Angelo Cavallo (Flat 7) Mrs V E Jebbitt (Flat 1) Mrs M Rosenbaum (Flat 2) Tim Park (Flat 6) Jeremy Lee (Flats 9 and 11) Pauline Chapman (Flat 15) Lawrence Hay (Flat 16) A Cernera (Flat 17) David Parmenter (Flat 18) Jill Piercy (Flat 19)
Respondents:	Old Estates Ltd
Appearances for Applicants:	Mr Jeremy Lee and Mr Angelo Cavallo
Appearances for Respondent:	Mr Martin Paine
Date of hearing	24 February 2012
Tribunal:	Ms E Morrison LLB JD (Lawyer Chairman) Mr R T A Wilson LLB (Lawyer Member) Mr A Mackay FRICS (Valuer Member)
Date of the Tribunal's Decision:	8 March 2012

The Applications

1. The Applicant leaseholders applied under section 27A (and 19) of the Act for a determination of their liability to pay service charges for service charge years 2005-6 through 2010-11 inclusive (six years). The Respondent is the freeholder of the block.
2. The Tribunal also had before it an application under s 20C of the Act that the Respondent's costs of these proceedings should not be recoverable through future service charges.

Summary of Decision

3. The service charges recoverable by the Respondent are as follows:

Year	General Account	Lifts Account
2005-6	13857.77	4195.21
2006-7	22863.24	11488.50
2007-8	19856.67	5614.56
2008-9	16899.03	2074.87
2009-10	22288.31	7375.57

4. An order is made under s 20C of the Act.

The Lease

5. The Tribunal had before it a copy of the lease for Flat 7 and was told that leases for all the other long leasehold flats were in similar form. The lease is for a term of 99 years at a yearly ground rent of £30 for the first 10 years and rising thereafter.
6. The relevant provisions in the lease may be summarised as follows:
 - (a) Each tenant is liable to pay a specified proportion of a general service charge and (in the case of most of the flats) a specified proportion of the lifts service charge;
 - (b) An on account payment being an estimate for the whole year is to be paid at the start of each service charge year (25 December);
 - (c) The landlord is to prepare and supply to each tenant an account of actual expenditure so soon as may be reasonably practicable after the end of each year;
 - (d) Any excess payments are to be refunded to the tenants or retained against future contributions;
 - (e) The landlord may set up a reserve fund against future expenditure.

Inspection

7. The Tribunal inspected the subject property on the morning of Friday 24th February 2012, immediately before the hearing, when the parties' representatives were also in attendance. More particularly, we were shown the outside of the property, the public ways, the flat roof and the interior of Flat 7.
8. The subject property is a detached purpose-built block of 23 flats erected in the 1930s and situated on level ground on the south side of New Church Road, at the junction of New Church Road and Brittany Road. The property is arranged on ground and four upper floors. The principal roof is of flat type construction with brick enclosing walls.

There are two entrances to the flats from New Church Road and a separate entrance in Brittany Road. There are two separate electric passenger lifts, one in the east wing and one in the west wing. There is no lift service from the Brittany Road frontage (Flats 18, 19 & 20). The lifts serve all floors and there are also internal connecting staircases. Inter alia, our attention was drawn to the following defects in the property:-

- The flat roof, flashings and parapet walls;
 - Rusting to the metal fire escapes;
 - Movement to the brickwork to the wall on the west side roof and copings to the rear walls, and defective pointing to brickwork;
 - Rusting to exposed steel members over the head of external staircases;
 - Blocked and defective downpipes and gulleys;
 - Bowing and rusting to metal windows in the public ways with broken hinges to windows;
 - Staining to carpets;
- The interior of Flat 7 was badly affected by water penetration through the ceilings, and the pipework supplying the fittings in the bathroom was blocked.

The Tribunal noted a sticker on the door to the lifts on the ground floor entrance, which stated, "Out of Service". The Tribunal inspected the lift motor rooms on the roof of the building. On the west wing lift room there was a warning notice on the lift motor gear which stated, "Do not turn on, unsafe to use due to a broken gearbox".

Our attention was drawn to the apparent lack of fire precaution measures within the public ways, including emergency lighting and smoke detection.

Representation and Evidence at the Hearing

9. The Applicants had authorised Mr Lee and Mr Cavallo, two of the leaseholders, to act on their behalf. Mr Lee presented the Applicants' case, assisted by Mr Cavallo.
10. The Respondent was represented by Mr Paine, who is a director and head of legal services of Circle Residential Management Ltd ("Circle"), the Respondent's managing agents. Although all evidence and documents produced by Mr Paine clearly emanated from Circle, Mr Paine told the Tribunal that he was 'acting in a personal capacity' for the Respondent.
11. The evidence was largely documentary, the most significant being demands for on account payments for some years, accounts of expenditure for years 2005-6 to 2009-10 inclusive with copies of supporting invoices, and a spreadsheet (provided by the Respondent shortly before the hearing commenced) entitled Service Charge Reserve Account, which compared on account and actual figures for each year and showed the balances said to be standing to the credit of each of the Applicants. The Applicants also produced a condition survey report they had commissioned in January 2012 from Stiles Harold Williams.

The Law

12. The relevant parts of the provisions in the Act are as follows:

18. Meaning of "service charge" and "relevant costs".

(1) In the following provisions of this Act "service charge" 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 the relevant costs.

(2) The relevant costs are the costs or estimated costs incurred or to be incurred by or on behalf of the landlord, or a superior landlord, in connection with the matters for which the service charge is payable.

(3) For this purposes—

(a) "costs" includes overheads, and

(b) costs are relevant costs in relation to a service charge whether they are incurred, or to be incurred, in the period for which the service charge is payable or in an earlier or later period.

19. Limitation of service charges: reasonableness.

(1) 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 provisions 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.

(2) Where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable, and after the relevant costs have been incurred any necessary adjustment shall be made by repayment, reduction or subsequent charges or otherwise.

20B. Limitation of service charges: time limit on making demands.

(1) 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.

(2) 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.

20C. Limitation of service charges: costs of proceedings.

(1) A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a court, residential property tribunal or leasehold valuation tribunal, or the Upper Tribunal, or in connection with arbitration proceedings, are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application.

(3) The court or tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances.

27A. Liability to pay service charges: jurisdiction

(1) An application may be made to a leasehold valuation tribunal for a determination whether a service charge is payable and, if it is, as to—

(a) the person by whom it is payable,

(b) the person to whom it is payable,

(c) the amount which is payable,

(d) the date at or by which it is payable, and

(e) the manner in which it is payable.

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

(3) An application may also be made to a leasehold valuation tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs and, if it would, as to—

- (a) the person by whom it would be payable,*
- (b) the person to whom it would be payable,*
- (c) the amount which would be payable,*
- (d) the date at or by which it would be payable, and*
- (e) the manner in which it would be payable.*

(4) No application under subsection (1) or (3) may be made in respect of a matter which—

(a) has been agreed or admitted by the tenant ...

(5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.

Background

13. In 2006 Circle were appointed managing agents for Brittany Court. In each relevant year a demand has been made for a payment on account of the annual service charges at the start of each year. However, no demands have been made in respect of actual expenditure at the end of each year and, in breach of the lease, until this application was filed no information had ever been supplied to the leaseholders with respect to actual expenditure. After expiration of the stipulated time for filing the Applicants' statement of case on 30 December 2011, Circle supplied expenditure figures for the periods up to 24 December 2010. The figures for the first 4 years were dated 1 December 2010; the figures for the 5th year were dated 5 May 2011. No figures were produced for the final year which ended on 24 December 2011.
14. Of the 23 flats in the block, 13 were originally demised on long leases, the remainder being retained by the freeholder. Recently 2 more flats have been sold off by the Respondent.

The Applicants' Case

15. As originally framed the Applicants complained that they had not been supplied with any accounts of service charge expenditure, balances held, or details of any reserve fund. Their application referred to requests for information made on 24 August and 21 September 2011 but nothing had been supplied in response to these requests. Accordingly the Applicants did not know how the money they had paid on account had been spent, or the state of their individual accounts with the Respondent.
16. Having now received expenditure figures for the first 5 years, the Applicants were not so much concerned with specific items of expenditure, but questioned whether the Respondent had been paying its due contribution of the service charges in respect of the retained flats. The expenditure figures contained no information as to receipts or balances.
17. A general concern was that expenditure on building repairs was insufficient to keep the block in proper repair, and that expenditure had been kept deliberately low to minimise contributions by the Respondent.

18. With respect to Circle's management fees charged in 2005-6, the Applicants queried what work had been carried out for this fee.
19. Some other specific items of expenditure were questioned but objection was abandoned once the supporting invoices were identified and explained by Mr Paine.
20. The Applicants' Bundle contained evidence that the previous managing agents had collected monies to be allocated to 'General Reserve'. The Applicants did not know what had happened to that money.
21. There were no expenditure figures yet available for 2010-11. The Applicants confirmed that they were no longer challenging the amounts demanded on account for that year.

The Respondent's Case

22. It was accepted that no details of expenditure had been supplied until very recently. No reason for this was given. Mr Paine submitted that although the freeholder did not make payments on account (and was not required to do so as it is not subject to the provisions of the lease), the Respondent had paid its due proportion of the actual expenditure incurred. Monies paid on account by a leaseholder that exceeded his contribution to actual expenditure were held to the credit of that leaseholder as shown in the spreadsheet produced just before the hearing.
23. With respect to management fees, these were based on a fixed cost per unit, regardless of the amount of work carried out, although some types of work, e.g. section 20 consultations, were charged separately. In the first 3 years, management fees had been split between the general and lifts accounts; in the subsequent years they were all charged to the general account.
24. The Tribunal questioned the level of fees, which varied between £268.91 inc VAT to £406.00 inc. VAT per flat over the years. Mr Paine submitted that the fees charged were within the range of reasonableness for an older building with a lift. The annual fee covered, where relevant, the work set out at Part 2 Para 2.4 of the RICS Service Charge Residential Management Code, although he accepted that Circle did not routinely visit or inspect the block.
25. The Tribunal also questioned the sum of £1364.82 charged as expenditure on Interest in the general account for 2005-6. Mr Paine said this was interest paid on monies loaned to the service charge account when it was overdrawn. The lender was not identified and there was no documentary evidence of the overdraft, the sum borrowed, the interest claimed, or showing how it had been calculated. Mr Paine accepted there was no provision in the lease permitting Interest as a service charge item but he argued it was an overhead within s 18(3) (a) of the Act and he referred to a decision of the Leasehold Valuation Tribunal, case ref BIR/47UF/LSC/2008/0035 Flat 6 Farleigh Road Pershore, which had held that interest incurred by a lessor in carrying out its repairing obligations could be included in the service charge.
26. Finally, as there were 3 years in which the actual expenditure on the Lift account exceeded the on account demand, Mr Paine was asked to comment on the applicability and effect of s 20B of the Act. He accepted that the leaseholders had not been notified in writing that the costs had been incurred. However he submitted that s 20B does not apply where there are no demands for payment and excess contributions carried forward from previous years are used to pay the current year's balance.

The Determination – General Points

27. There was no evidence before the Tribunal to indicate that the leaseholders have been required to pay more than the percentages specified in the lease towards actual service charges. The Respondent's spreadsheet supported Mr Paine's contentions and also,

albeit supplied very late in the day, finally provides the Applicants with information as to the current balance held for each flat, which includes sums brought forward from 2004-5. It is clear there is no reserve in the sense of a sinking fund; there are simply credit balances on individual leaseholder's service charge accounts.

28. Although there are steps that may be taken in respect of a freeholder's breach of repairing covenants and shortcomings in management, these fall outside the scope of the current application and could not be considered by the Tribunal.
29. The Tribunal accepts Mr Paine's submission, following the authorities of *Gilje v Charlegrove Securities* [2003] EWHC 1284 (Ch) and *Brennan v St Paul's Court Limited* [2010] UKUT 403 (LC), that s 20B has no application in this case.
30. With respect to management fees, the Tribunal concludes that a reduction must be made because the services provided have not been of a reasonable standard as required by s19(1)(b) of the Act. There has been a wholesale and prolonged failure by the managing agents Circle, acting on behalf of the Respondent, to comply with the provisions of the lease with respect to the provision of service charge expenditure accounts. Circle have also failed to carry out key functions expected of managing agents, namely those listed in Part 2 Para 2.4 c) f) k) and l) of the RICS Service Charge Residential Management Code 2nd ed. This has been to the detriment of the leaseholders, who have been kept in the dark about service charge expenditure or balances held, while the condition of the block has clearly deteriorated. Taking all the circumstances into account, the Tribunal determines that a reduction of 40% should be made to the management fee charged each year in respect of both general and lifts accounts.

The Determination – For each year

31. 2005-6

General account

The on account figure demanded was £27,513.23. The expenditure claimed was £17,478.59.

The Tribunal does not accept that interest can be charged to the service charge account if this is not provided for in the lease and accordingly the figure of £1364.82 is disallowed. As Laws LJ stated in *Gilje v Charlegrove Securities* [2001] EWCA Civ 1777, "The landlord seeks to recover money from the tenant. On ordinary principles there must be clear terms in the contractual provisions said to enable him to do so". The statutory scheme of the Act regulates but does not enlarge recoverability. To the extent that the Tribunal decision relied on by Mr Paine may not depend on the construction of the lease in that particular case, this Tribunal declines to follow it. In any event the figure claimed for interest was entirely unsubstantiated.

The management fee of £5640.00 will be reduced by £2256.00 to £3384.00 for the reasons stated above.

Accordingly the Tribunal determines that the recoverable service charge is £13857.77.

Lifts account

The on account figure demanded was £6,600.00. The expenditure claimed was £4935.21.

The management fee of £1850.00 will be reduced by £740.00 to £1110.00 for the reasons stated above.

Accordingly the Tribunal determines that the recoverable service charge is £4195.21

2006-7

General account

The on account figure demanded was £31,395.00. The expenditure claimed was £25,119.24.

The management fee of £5640.00 will be reduced by £2256.00 to £3384.00 for the reasons stated above.

Accordingly the Tribunal determines that the recoverable service charge is £22863.24.

Lifts account

The on account figure demanded was £6,600.00. The expenditure claimed was £12,968.50

The management fee of £3700.00 will be reduced by £1480.00 to £2220.00 for the reasons stated above.

Accordingly the Tribunal determines that the recoverable service charge is £11488.50.

2007-8

General account

The on account figure demanded was £31,395.00. The expenditure claimed was £22,112.67.

The management fee of £5640.00 will be reduced by £2256.00 to £3384.00 for the reasons stated above.

Accordingly the Tribunal determines that the recoverable service charge is £19856.67.

Lifts account

The on account figure demanded was £6,600.00. The expenditure claimed was £7094.56

The management fee of £3700.00 will be reduced by £1480.00 to £2220.00 for the reasons stated above.

Accordingly the Tribunal determines that the recoverable service charge is £5614.56.

2008-9

General account

The on account figure demanded was £32,965.00. The expenditure claimed was £19,373.03.

The management fee of £6185.00 will be reduced by £2474.00 to £3711.00 for the reasons stated above.

Accordingly the Tribunal determines that the recoverable service charge is £16899.03.

Lifts account

The on account figure demanded was £6,600.00. The expenditure claimed was £2074.87.

This does not include a management fee and accordingly the Tribunal determines that the recoverable service charge is £2074.87.

2009-10

General account

The on account figure demanded was £32,000.00. The expenditure claimed was £24,762.31

The management fee of £6185.00 will be reduced by £2474.00 to £3711.00 for the reasons stated above.

Accordingly the Tribunal determines that the recoverable service charge is £22288.31.

Lifts account

The on account figure demanded was £6,600.00. The expenditure claimed was £7375.57.

This does not include a management fee and accordingly the Tribunal determines that the recoverable service charge is £7357.57.

2010-11

At the hearing the Applicants agreed the on account demands and therefore the Tribunal was not required to make a determination. Once the actual expenditure accounts are supplied the leaseholders may make a further application under s27A if they wish.

Section 20C Application

32. This application was not opposed by the Respondent and the Tribunal determines, for the reason set out paragraph 34, it is just and equitable for an order to be made that the Respondent's costs of these proceedings are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the Applicants.

Concluding Remarks

33. The spreadsheet provided by Circle just before the hearing will now need to be revised to take account of the Tribunal's determination as to the recoverable service charges, and it is suggested that each leaseholder should then receive a full statement of the service charge for his flat, running from the date on which Circle took over management, accounting for any surpluses brought forward from earlier periods, and itemising all debits and credits (including any interest earned on credit balances), with running and final balances.
34. In the view of the Tribunal this application would have been avoided if proper accounts had been supplied on a timely basis. The leaseholders are referred to the provisions of s 21 of the Act in the event of future difficulty.

Chairman



E Morrison

Dated: 8 March 2012