

RESIDENTIAL PROPERTY TRIBUNAL SERVICE

LEASEHOLD VALUATION TRIBUNAL

Property: 21 Claremont Heights, Colchester, Essex CO1 1ZU

Applicant: Michael Spencer

Respondents: Holding & Management (Solitaire) Ltd

Respondents'

Representative: Derek Strand of Solitaire Property Management Co Ltd

Case number: CAM/22UG/LSC/2005/0070

Application: The tenant applies under section 27A Landlord and Tenant Act 1985 for a determination of the liability to pay service charges including the reasonableness of the service charge for the half year 1.1.2006 to 30.6.2006.

Tribunal: Mr Adrian Jack,
Mr J Raymond Humphrys FRICS
Ms Cheryl St Claire MBE BA

Date of Hearing: 8th March 2006

Attending Hearing: The Applicant and Mr Strand

The Application

1. By an application received by the Tribunal on 20th December 2005 the Applicant applied to the Tribunal under section 27A of the Landlord and Tenant Act 1985 as amended by the Commonhold and Leasehold Reform Act 2002 for a determination as to whether costs claimed by way of service charge for the half year from 1st January 2006 to 30th June 2006 are payable.

The Law

2. Landlord and Tenant Act 1985 as amended by the Housing Act 1996 and the Commonhold and Leasehold Reform Act 2002 provides as follows:

Section 18

- (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, improvement 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 of which the service charge is payable.
- (3) for this purpose
 - (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 period

Section 19

- (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 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.
- (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.

Section 27A

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 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.

Description of the Building and Property

3. The Property comprises a flat in a purpose built three storey block of 72 flats built about 1990 around a garden. Adjacent to the block is a substantially identical block also of 72 flats. The flat itself comprises three rooms, a kitchen and bathroom/WC. There are dedicated parking spaces for residents.

Inspection

4. The tribunal inspected the Property in the presence of one of the sub-tenants. The common parts were in good repair and were obviously well-maintained, as was the garden.

The Lease

5. The freeholder is the Respondent who is also the immediate landlord of the Applicant. A copy of the Lease was provided. Mr Strand confirmed that it was common to all tenants in the block. The lease is for a term of 125 years from 25th March 1989.
6. By clause 3.2 of the lease the tenant covenants to pay the service charge to the landlord by two equal instalments in advance on 1st January and 1st July. The Applicant's share of the service charge is 1.5% of the total service charge for the block. By paragraph 2(iii) of Part III of the Fourth Schedule to the lease the service charge is defined as including:
"a reasonable sum to remunerate the [landlord] for its administrative and management expenses in respect of the Block (including a profit element)...."

Documentation

7. The documents provided by the parties as being of particular relevance for the determination of the Tribunal included the following:
 - the lease
 - a statement dated 8th December 2005 addressed to the Applicant of anticipated service charge expenditure for 2006
 - an invoice also dated 8th December 2005 addressed to the Applicant for the half year's service due on 1st January 2006
 - a document entitled "Management Fee Structure – Year to December 2006" – tabled by Mr. Strand, and accepted by the Applicant

Matters in Dispute

8. At the hearing the Applicant made it clear that the sole element of the service charge he challenged was that part in respect of management fees. The annual amount claimed in respect of management fees was £205.16 including VAT, so the element in the invoice for the half year was £102.58. The Applicant also raised an issue as to the charge which the landlord sought to raise in the event that the Applicant paid his service charge by monthly instalments rather than half

yearly. This matter did not appear to be within the jurisdiction of the Tribunal and the Applicant did not pursue this matter.

Hearing

9. The Hearing took place on 8th March 2006 and was attended by the Applicant, and the Respondent's representative, Mr Strand.
10. Mr Strand explained that the landlord and the agents, Solitaire Property Management Ltd, had common directors and were both part of the same group of companies. He accepted that the arrangements between the two companies was therefore not at arms' length. He was unable to give any information on the contractual arrangements which existed between the landlord and the management company. He confirmed that he had never seen any written agreement between the two companies and that he had no knowledge of any oral agreement, which would in any event have been made many years ago, if it had been made at all. If a tenant failed to pay the service charge, then it was the management company which bore the loss. No evidence was given that the management company invoiced the landlord in respect of service charges.
11. The amount of the service charge was based, he said, on a fee structure determined by the directors prior to each year. The decision took into account profitability and market rates. The fee structure charged a fixed fee for individual flats on a sliding scale depending on the number of flats managed on an estate: 1 to 10 flats were charged £224.00 per flat, reducing to £190.00 for between 51 and 100 flats and £180.00 for over 100 flats. Each of these sums includes VAT. On major works, the agents also charged a fee of 10 per cent of the value of the works, although often this would be shared with other professionals, such as surveyors. No such fees were included in the 2006 service charge assessment.
12. At Claremont Heights, he said, there were 72 flats which were charged £190.00 each, thus producing a total figure of £13,680.00. This was then allocated in accordance with the leases. The Applicant was charged 1.5 per cent, or £205.16, which corresponds to £174.61 plus £30.55 VAT. He said no other lessees at Claremont Heights had complained of this element of the service charge and he pointed out that tenants nowadays have many possibilities, including appointing their own managers or enfranchising, if they are unhappy with the service provided by and the cost of a firm of managing agents.
13. Mr Strand accepted that if the Applicant succeeded in his application then the Tribunal should make an order under section 20C of the 1985 Act preventing the landlord recovering the cost of this application either from the Applicant or from any other tenants in the block. He also accepted that the landlord would have to pay the fees totalling £200 paid by the Applicant for this application and the hearing.
14. The Applicant had provided details of service charges on other flats which he owned, where the management charge was substantially less, both as an absolute figure and as a percentage of the total service charges.

Tribunal's Decision

15. The invoice of 8th December 2005 claims as due on 1st January 2006 half the annual fees of the managing agent. The lease provides for payment of "a reasonable sum to remunerate the [landlord] for its administrative and management expenses." (paragraph (iii) of Part III of the Fourth Schedule). These expenses will be incurred during 2006. The payment due on 1st January 2006 is therefore a payment in advance. The sole issue in our view is whether the managing agent's fees will be reasonably incurred by the landlord: see section 19(2) of the 1985 Act.
16. The Tribunal considered first of all whether the fees will be "incurred" by the landlord at all. In our judgment, it requires very little evidence to establish that the fees of a management company have been or will be incurred by the landlord. However, in this case such evidence was wholly lacking. Not only was no evidence of a contract adduced, but no evidence of invoicing of the landlord was produced. Indeed the fact that it was the management company which carried the losses from any non-payment of service charges is evidence (albeit not conclusive evidence) that the landlord was under no legal obligation to pay the management company for its services.
17. Mr Strand stated that his company was a member of the Association of Residential Managing Agents. This association requires compliance with the RICS Management Code and says that all contractual duties (including the fee structure) should be in writing. The Tribunal is concerned that transparency between landlords, managing agents and tenants is lacking in this case. Moreover it may well be that any agreement between the landlord and the management company would be a "qualifying long term agreement" under section 20ZA of the 1985 Act to which the consultation requirements would apply. Without details of the contract the Tribunal is unable to reach a view.
18. In these circumstances the Tribunal is not satisfied that the managing agent's fees will have been incurred by the landlord. Accordingly those fees are not recoverable at present. Under section 19(2) provision is made for a subsequent adjustment of service charges once "the relevant costs have been incurred". It will thus be open to the landlord later to provide evidence that it has in fact incurred the disputed management fees and then seek to adjust the service charges claimed from the Applicant.
19. If the landlord hereafter shows that it has incurred these management fees, the Tribunal needs to consider whether the fees sought to be recovered are reasonable. We note the fees charged by other agents in respect of flats owned by the Applicant. However, the fact that other agents may charge less does not necessarily mean that the fees charged by the agents in this case are unreasonable.
20. In the Tribunal's judgment, it is good practice for managing agents to charge a fixed fee for ordinary management services. If an agent charges a percentage of the outgoings then there is no incentive to keep the outgoings low. The Tribunal

has considered the fee structure adopted by the landlord and the agents for 2006. In our judgment, applying our knowledge of managing agents' fees in the market, the fee structure here is at the very top end of what might be a reasonable fee. The agents, however, appear to be doing their job well. The estate is well maintained and none of the lessees appear to complain about the standard of service. In these circumstances the Tribunal considers that the landlord and the agents are entitled to charge a management fee at the high end of the spectrum of reasonable fees.

21. That said, however, the Tribunal considers the wrong band has been adopted in this case. We note that Mr Strand said in evidence that where the landlord was a third party the management fees were negotiable, so that in such arm's length dealings the management company would apply the correct band. The block in which 21 Claremont Heights is found is admittedly one unit as regards the assessment of management charges. However, its twin, which contains 73 to 144 Claremont Heights, is also owned and managed by the same companies. In the Tribunal's judgment the two blocks should properly be considered as part of the same estate. The appropriate unit cost should therefore be that for an estate of over 100 flats, rather than for an estate of 72 flats.
22. The unit cost for a flat in our judgment should therefore be £180 (including VAT) rather than £190, as in fact charged. The total charge for 1 to 72 Claremont Court should therefore have been £12,960, of which the Applicant's 1.5 per cent share should have been £194.40 (£165.45 plus £28.95 VAT) for the whole of 2006.
23. In the event, however, the matter does not affect the amount now payable. The point may however arise in the future if the landlord rectifies the contractual position and makes a proper contract with the managing agent.
24. **The Tribunal according determines:**
 - (a) **that in the half year from 1st January 2006 to 30th June 2006 the Applicant is only obliged to pay the Respondent £192.70 by way of service charges payable in advance instead of the £295.28 claimed by the Respondent,;**
 - (b) **that it will be open to the Respondent hereafter to show pursuant to section 19(2) of the Landlord and Tenant Act 1985 that the management expenses in dispute have been incurred, in which case the reasonable sum for management expenses for the half year 1st January 2006 to 30th June 2006 will be £97.20 (including VAT);**
 - (c) **that pursuant to section 20C of the Landlord and Tenant Act 1985 the Respondent's costs incurred in connection with these proceedings before the Tribunal are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the Applicant or any other tenant at 1 to 72 Claremont Heights, Colchester;**
 - (d) **that the Respondent do pay the Applicant £200, being the fees paid by the Applicant in connection with the application and the hearing.**

Adrian Jack

Adrian Jack (Chairman)

Caution: For the purpose of reaching a decision the Tribunal inspected the subject property. Such inspection is not a structural survey and only takes a few minutes. Any comments about the condition of the property in this decision are made as a result of casual observation rather than a detailed inspection. Please do not rely upon such comments as a guide to the structural condition of the property.