

**THE RESIDENTIAL PROPERTY TRIBUNAL SERVICE
SOUTHERN RENT ASSESSMENT PANEL &
LEASEHOLD VALUATION TRIBUNAL**

In the matter of an Application under Section 24(9) of the Landlord & Tenant Act
1987 (Application for a Variation of an Order appointing a Manager)

Case No. CHI/45UH/LVM/2008/0002

Property: 5 Bedford Row, Worthing, West Sussex, BN11 3DR

Between:

Mr C.J. Halls FRICS

("the Applicant/The LVT appointed Manager")

and

The Lessees

("the First Respondents")

And

Mr S. Robinson

("the Second Respondent/Freeholder")

Members of the Tribunal: Mr J.B. Tarling, MCMI, Lawyer/Chairman
Mr B.H.R.Simms FRICS MCI Arb

Date of the Decision: 14th November 2008

**THE DECISION
OF THE LEASEHOLD VALUATION TRIBUNAL**

**The Tribunal determines not to vary the existing Order of the LVT dated
11th May 2004.**

REASONS FOR THE TRIBUNAL'S DECISION

Background to the Application

1. On 6th July 1999 the Tribunal made an Order appointing Mr David L. Fitness to be the Manager of the property under the provisions of Section 24 of the Landlord and Tenant Act 1987 ("the 1987 Act"). On 11th May 2004 the Tribunal varied the previous Order and appointed the Applicant, Mr C.J.Halls as the LVT appointed Manager in place of Mr Fitness.
2. On 4th August 2008 the Applicant wrote to the Tribunal requesting a variation of the current Order. Copies of that letter of application were sent to the First Respondents and the Second Respondent whose names and addresses were attached to the Application Form. On 20th August 2008 the Tribunal gave Directions inviting the parties to make any written representations they wished the Tribunal to consider. The Tribunal gave Notice under Regulation 13 (1) of the Leasehold Valuation Tribunals (Procedure)(England) Regulations 2003 (as amended) that it intended to make its determination on paper without an oral hearing, unless any party requested a Hearing. No party requested a hearing and the Tribunal proceeded to make its determination. Neither the Second

Respondent/Freeholder, nor any of the First Respondent/Lesseees, made any written submissions to the Tribunal in respect to the application.

3. The Applicant's Case

The Applicant set out his application in a letter to the Tribunal dated 4th August 2008 and despite being invited to do so, did not take the opportunity to expand on the application beyond what was contained in his original letter. The relevant parts of the Applicant's letter of application are as follows:

(a)"I continue to have difficulty in recovering arrears of service charge as demanded from a lessee of one of the flats within the premises and this is causing difficulties in me organising works of repair and maintenance and in particular necessary safety improvements through the service charge arrangements under the Lease."

(b)"I have sought independent legal advice in this matter and they have reviewed the Order made in accordance with my required functions of Manager and Receiver. You will appreciate that the Order required me to provide a list of services and furthermore that I would undertake those functions of Manager and Receiver in accordance with the terms of the RICS Service Charge Residential Management code. I was also originally requested to provide a copy of my standard management contract, which again I understand formed the basis of the Order of Appointment. "

(c)"I am advised by the solicitors that in their opinion my management functions include the collection of ground rent and service charge and other payments due from the lessees up to the time of instructing solicitors and that such work falls within my basic annual management fee. Further they advise that I am entitled to charge additional fees at my agreed hourly rate for work undertaken in collecting ground rent, service charge etc., after solicitors have been instructed."

(d)"They advise however that the Order does not entitle me at present to charge for solicitors fees incurred in connection with collection. In the circumstances if I wished to recover these as part of the service charge, then I am advised that an application should be made to the LVT under Section 24 for directions and/or variation of the terms of the Order appointing me.

(e)"I take this opportunity of providing a photocopy of a specimen Order appointing a Manager which I am advised is more comprehensive than the one under which I was appointed and I would ask the Tribunal to consider a variation of my appointment in accordance with this specimen Order."

(f) The copy specimen Order attached to the letter of application comprised four pages and included extensive "Directions" and a "Schedule of Functions and Services". It is not clear from the Applicant's letter of Application exactly which of these provisions he is seeking the Tribunal to include in the variation he is requesting.

4. The Existing Order

The current Order under which the Applicant manages the property is the one dated 11th May 2004. Paragraph 2 of that Order provides that "Mr C.J. Halls of Messrs Graves Jenkins be appointed Receiver and Manager of the premises with effect from 7th June 2004 subject to compliance with a number of conditions (the following of which are relevant to this application):

2. (a)...

(b) ...

(c) He shall on or before 14th May 2004 serve on the tribunal a summary of the services he will provide, in consideration of the annual management fee he will be entitled to charge of £200 per flat plus VAT.

3. Mr C.J. Halls shall undertake the functions of receiver and Manager in accordance with the terms of the Royal Institution of Chartered Surveyors Service Charge Residential Management Code.”

5. **The Statutory provisions**

The relevant law that applies to this application is contained in Section 24(9) and 24(9A) of the Landlord and Tenant Act 1987 (“the 1987 Act”). Those Sections read as follows:

24 (9) A Leasehold Valuation Tribunal may, on the application of any person interested, vary or discharge (whether conditionally or unconditionally) an order made under this section;

24(9A) The Tribunal shall not vary or discharge an order under subsection (9) on the application of any relevant person unless it is satisfied

(a) That the variation or discharge of the order will not result in a recurrence of the circumstances which led to the order being made, and

(b) That it is just and convenient in all the circumstances of the case to vary or discharge the order

6. **What the Tribunal is being asked to decide.**

The Tribunal read the Applicant’s letter of application carefully and identified what it was that the Applicant was asking the Tribunal to decide. Clearly the Applicant had accepted that he had power to collect the arrears from the one defaulting Lessee. What he seems to be asking was whether he is able to “charge for solicitors fees incurred in connection with the collection.” He has failed to identify exactly what it is that is missing from the terms of his appointment.

7. **The terms of the Leases**

The Tribunal started by reviewing the terms of the Leases and in particular what is said about the “costs of collection” in the service charge provisions. In respect of the costs of collection of service charges the following provisions of the leases are relevant:

(a) *Clause 5(5)(f)(i) “To employ at the Lessor’s discretion a firm of Managing agents to manage the Building and discharge all proper fees salaries charges and expenses payable to such agents or such other person who may be managing the Building including the cost of computing and collecting the rents in respect of the Building or any parts thereof.*

(ii) To employ all such surveyors builders architects engineers tradesmen accountants or other professional persons as may be necessary or desirable for the proper maintenance safety and administration of the Building

(b) *The Fifth Schedule sets out the Service Charge provisions in detail. In particular the following provisions of the Fifth Schedule are relevant:*

1. (1) "Total Expenditure" means the total expenditure incurred by the Lessor in any Accounting Period in carrying out its obligations under Clause 5(5) of this Lease and any other costs and expenses reasonably and properly incurred in connection with the Building including without prejudice to the generality of the foregoing

(a) the cost of employing Managing Agents and (b) the costs of any Accountant or Surveyor employed to determine the Total Expenditure and the amount payable by the Tenant hereunder

8. The said Certificate shall be conclusive and binding on the parties hereto but the tenant shall be entitled at his own expense and upon prior payment of any costs to be incurred by the Lessor or its agents at any time within one month after service of such Certificate to inspect the receipts and vouchers relating to the payment of the Total Expenditure."

8. It is not clear to the Tribunal exactly what the Applicant is seeking when he refers to "solicitors fees incurred in connection with collection." Firstly regarding the collection of Ground Rent, that is a matter for the Freeholder to whom the Ground Rent is payable. If the Applicant receives instructions from the Freeholder to collect the arrears of Ground Rent he should normally expect the Freeholder to pay any costs, including Solicitors costs, of such collection of Ground Rent. The Tribunal is reminded that the Lease contains the usual clause relating to Section 146 Notices. That is clause 3(9) of the Lease and the opening words of that section is a covenant by the Tenant "To pay to the Lessor all costs charges and expenses including Solicitors Counsels' and Surveyors costs and fees ..." In other words it is a matter between the freeholder and the defaulting Lessee as to who is to ultimately pay any Solicitors costs incurred by the Freeholder in the collections of Ground Rent and such costs should not normally fall on the Service Charge Account.

9. In respect of the collection of arrears of Service Charges the parties are reminded that Section 81 of the Housing Act 1996 restricts the exercise of a right of re-entry or forfeiture until there has been a determination of an LVT that an amount of service charge is payable. The current law is set out in Section 27A of the Landlord and Tenant Act 1985 which was inserted in that Act by Section 155 of the Commonhold and Leasehold Reform Act 2002. This allows an Applicant (being a Landlord or a Tenant or any other person, including, in the view of the Tribunal, an LVT appointed Manager) to make an application to the LVT for a determination as to liability to pay service charges, if they are in dispute. If the tenant has not admitted the liability to pay the service charge, the normal practice is for the Landlord or his Agent (or an LVT appointed Manager), to make such an application to the LVT. In practice many such applications are frequently made by lay people and the Tribunal is quite experienced and competent to deal with matters on that basis. In the current case the Applicant appears to be seeking a power to incur solicitors costs as to the collection of service charges and the Tribunal presumes that the Applicant is seeking to extend his current powers to include solicitors costs of making such an application. If that is so the Tribunal is not inclined to extend such powers beyond any that currently exist in the Lease or any statutory provision. The Tribunal cannot vary the liability of a tenant under a Lease


except in very limited circumstances under Part IV of the Landlord and Tenant Act 1987. It is the preliminary view of this Tribunal that such circumstances do not exist in the current matter and the existing Lease seems to include all the usual and necessary power of management of the Building. The mere fact that the wording of the Lease does not seem to allow the Landlord to charge Solicitors costs of collections is not, in the opinion of this tribunal, of itself sufficient to justify the need to consider a variation of the wording of the Lease.

10. The Tribunal takes the view that a competent Manager should be able to make an Application to the Tribunal under Section 27A of the 1985 Act and deal with the process without incurring Solicitors costs. This assumes there is nothing unusual about the case and there are no complicated points of law or practice which are likely to arise. Certainly from the Tribunal's preliminary reading of the Lease this appears to be the case. In other words the Tribunal believes the existing powers given to the Manager by the LVT's original Order are sufficient to enable him to take whatever action he thinks appropriate and legal including making an application under Section 27A of the 1985 Act. The Tribunal did not limit his powers in the original Order and the Tribunal sees no good reason for extending them, for the reasons set out above.
11. The position as to costs (whether they be solicitors or any other professional fees) relating to the recovery of arrears and an Application under Section 27A of the 1985 Act depends on a number of factors. Firstly, it will depend on the terms of the Lease. The wording of Section 5(f) of the Lease does not actually include Solicitors costs of collection of service charge and the preliminary view of the Tribunal is that it is therefore doubtful if such expense was contemplated by the parties when the Lease was granted. It would need a Tribunal to make a decision on an application under Section 27A of the 1985 Act to confirm the position. Secondly any party may make an application to the Tribunal under section 20C of the 1985 Act for an Order that "all or any of the costs incurred by the Landlord in connection with the LVT proceedings are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge..." It will be a matter for the Tribunal hearing the case to decide whether or not to make such an Order.

12. **THE TRIBUNAL'S DECISION**

Having reviewed the matter, for the reasons set out above, the Tribunal concludes that it has decided not to vary the existing Order of the LVT dated 11th May 2004. As the Tribunal has decided not to vary the existing Order, it is not necessary for it to consider the provisions of Section 24(9) of the 1987 Act

Dated this 14th day of November 2008

J.B. Tarling 

.....
John B. Tarling, MCMJ Lawyer/Chairman
A member of the Panel appointed by the Lord Chancellor