SOUTHERN RENT ASSESSMENT PANEL

LEASEHOLD VALUATION TRIBUNAL

Case Number CHI/29UG/LSC/2008/0070

In the matter of Section 27A and of section 20C of the Landlord & Tenant Act 1985 (as amended) ("the Act")

and

In the matter of Flat 1, 7 Manor Road, Gravesend, Kent

Between:

Mrs T Purvis Applicant

and

Mrs M L Harding Respondent

Mrs Purvis in person

Mr A Harding for the Respondent

Reasons for decision

Hearing: 21st October 2008

Date of Issue: 28th October 2008

Tribunal:
Mr R P Long LLB (Chairman)
Mr B Simms FRICS MCIArb
Mr R Athow FRICS MIRPM

Decision

1. The Tribunal has determined for the reasons set out below:

   a. that no sum should be paid by the applicant in respect of the exterior decoration costs referred to in the application
   b. that no sum should be paid by the applicant in respect of the solicitors' costs mentioned in the application, and
   c. that the sum of £200 for advance service charge is not presently payable although it draws attention to the position in respect of any demand for advance service charge for the current year that may subsequently be made set out in paragraph 34 below.

   The Tribunal orders that, to such extent as they may otherwise be recoverable, the Respondent's costs in connection with the matter should not be regarded as relevant costs to be taken into account for in determining the amount of any service charge payable by the applicant or by Mr Bright.

Application

2. This was an application by Mrs T Purvis, a lessee of Flat 1, which is the first floor flat at 7 Manor Road for a determination whether or not certain sums that had been demanded were payable by her as service charges in respect of that flat. The service charges were said in the application to be in respect of the service charge year 2008-09, although it became apparent that some of the matters in question had occurred some time before that. The application was made under section 27A of the Landlord & Tenant Act 19865 (as amended) ("the Act").

3. Mrs Purvis also made an application under section 20C that the Respondent's costs in connection with the matter should not be regarded as relevant costs for the purposes of calculating service charges. It was agreed by the parties at the outset that the correct respondent to the application was Mrs M L Harding who is the landlord of the property at 7 Manor Road, and not Oakdene Property and Developments Limited, who were stated to in the application to be the respondents but who are in fact the managers of the property on behalf of Mrs Harding, and that the hearing should proceed on that footing.

4. The sums challenged by Mrs Purvis in her application were:

Share of costs of exterior decorations:	£764-50
Solicitors' costs	£58-75
Advance payment of service charge	£200-00

Reasons

The Law

5. The statutory provisions primarily relevant to this application are to be found in section 18, 19, 20C, and 27A of the Act. The Tribunal has of course had regard in making its decision to the whole of the relevant sections as they are

set out in the Act, but here sets out what it intends shall be a sufficient extract (or a summary, as the case may be) from each to assist the parties in reading this decision.

6. 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"

"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.

7. 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".

8. Subsections (1) and (2) of section 27A of the 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 but none of those exceptions has been in issue in any way in this case.

9. To such extent (if at all) as the point is not implicit in the wording of the Act, the Court of Appeal laid down in *Finchbourne v Rodrigues [1976] 3 AER 581* CA that it could not have been intended for the landlord to have an unfettered discretion to adopt the highest possible standards of maintenance for the

property in question and to charge the tenant accordingly. Therefore to give business efficacy to the lease there should be implied a term that the costs recoverable as service charges should be fair and reasonable.

10. Section 20C of the Act empowers the Tribunal to determine that the Respondent's costs in connection with the matter should not be regarded as relevant costs to be taken into account for in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application.

The Lease

11. The Tribunal was provided with a copy of the lease ("the lease") of the second floor flat, flat 2, at 7 Manor Road. It is dated 12th June 1986 and was made between Frank Howard Hunter (1) and Anne-Marie Maura Tracey (2). The parties accepted at the hearing that for all purposes material to that hearing the terms that it contained were the same as those relating to Flat 1. The provisions with regard to tenant's obligation to pay the costs of external decorations are contained in paragraph 2(2)(f) of the lease, and read:

"To pay to the Lessor in accordance with paragraphs (a) to (d) of this sub-clause one third of the costs and expenses incurred by the Landlord from time to time

i. in complying with the Lessor's covenants contained in clause 4(3)(a) of this Lease
ii. for incidental expenses reasonably incurred for the benefit of the upkeep of the building
iii. in employing any surveyors agents solicitors or any other company or person to advise estimate carry out or supervise or arrange for such advice estimation carrying out or supervision of all or any of the matters referred to in sub paragraphs (i) or (ii) above."

Clause 4(3)(a) of the lease contains the landlord's obligation, subject to payment of the service charge by the tenant, amongst other matters to keep the exterior of the building "in good and substantial .... decoration".

12. It is also material to the matters in issue that Clause 2(2)(b)(ii) of the lease provides that:

"The Lessor will as soon as is practicable after the commencement of the said term and thereafter in each year of the said term make and notify in writing to the Lessee an estimate of the Service Cost during the financial year then current and the amount and proportion thereof ... attributable to the demised premises."

The expression "the Service Cost" is defined in clause 2(2)(a) as being what is effectively the total of the various amounts payable by the tenant to the

landlord under the lease for services of the type described in clauses 2(2)(e) and 2(2)(f) of the lease.

The tenant is to pay one quarter of the amount of the estimate on the usual quarter days in the year in question and there are provisions for balancing payments or allowances as the case may be at the end of the year when a final account is taken.

Inspection

13. The Tribunal inspected the property prior to the hearing on the morning of 21st October 2008 in the presence of Mrs Purvis. It saw a terraced property with a shop and archway on the ground floor and with residential accommodation on the two upper floors with separate access. The building appeared to it to have been constrcuted in the second half of the nineteenth century. The building is of brick under a tiled roof, and stands very close to the centre of Gravesend. There are eight sash windows, four to each floor, on the first and second floor in the front elevation. Those on the first floor are of wood, and those on the second floor appear to have been replaced with upvc sash windows. The building faces south, so that the windows are in a relatively sheltered position. In particular they are not exposed to any spray from the river, which is a few hundred yards to the north.

14. It was possible only to see the paintwork to the windows in any detail from within Mrs Purvis's flat. That inspection revealed that the cills to the windows were in very poor condition. They were severely pitted and may suffer in places from wet rot. An attempt had been made to fill them roughly with some form of proprietary filler. The cills and the windows were covered in peeling gloss paint. At some points the cills were soft and it was not possible without removing the peeling paint to discover whet her this arose at any point because the filler had not hardened or because some form of rot lay beneath. The brickwork surrounding the windows had itself been irregularly covered in paint to an extent of about an inch from the edge of the window frame.

Hearing

15. Mrs Purvis said that she was also representing Mr Bright the tenant of the flat on the second floor who was unable to attend the hearing. The decoration work to the windows had been done badly. Scaffolding had been erected in the summer of 2005, and she had stayed at home during the whole of the time when the work was done because she considered that the existence of the scaffolding in a town centre location like this presented a security risk. The workmen had come and had brushed the windows down. She had asked when they were going to sand them, and they said they would come back later to do that. The windows were not sanded before painting began, but the cills were filed with what she believed to have been Polyfilla. The window sashes were not opened during the work, and consequently were sealed shut with paint. Mr Purvis had to release them to allow the windows to open. The scaffolding was up for nearly a fortnight.

16. She had told Mr C Harding (referred to at the hearing as "Kit Harding"), who was managing the property, about her concerns over the standard of the work some time after it had been completed, and after the scaffolding had been removed. He had removed the charge from the service charge account pending some sort of resolution of the problem. He had invited the workmen to return and to consider remedial work. They had re-inspected the property and had replied that one could not "make a silk purse out of a sow's ear". Mr Harding had instructed solicitors to pursue the matter. After an initial letter had met a rebuff, they had advised that to pursue the matter through the Courts would cost some £3000, and the matter went no further.

17. The £764-50 charge for the decoration work had been restored to her service charge account this year. The landlords had sought £58-75 for one half of the solicitors' fee incurred in pursuing the decorators. These figures appeared in the demand for 2007-08 that she had received in May or June 2008. In a letter from Oaklands Property and Developments Limited dated 30 May 2008 she had also been asked to pay £200 on account of the 2008 service charge. A budget for the 2008 service charge has been prepared and she has received it.

18. There was some discussion at the hearing concerning such demands and correspondence as Mrs Purvis had received from or on behalf of the landlord between 2005 and 2008 that may have been material to the Tribunal had it been necessary for it to form a view as to the time when various demands were made in respect of the decoration work and the solicitors' fees for the purposes of The Service Charges (Summary of Rights and Obligations, and Transitional Provision) (England) Regulations 2007 ("the Regulations"), but for the reasons given at paragraph 30 below it proved unnecessary for it to do so.

19. Mrs Purvis exhibited some confusion over the £200 that had been demanded as advance service charge. Her case initially had been that the amount was required for a reserve fund and that the lease did not allow for such a fund. In that respect Mr Harding accepted that it had been proposed at one time to open a sinking fund against the cost of repair in particular of the roof, but it had subsequently been accepted that the lease did not permit this to be done. She referred to the sum at the hearing on occasion as the management fee, and on others as the advance charge. It happened that a management fee of £200 has also been demanded. After questioning from the Tribunal upon the matter that involved distinguishing carefully between the various concepts and amounts she confirmed that she did not challenge the service charge, but that she did challenge the demand for the advance payment of £200 referred to in the letter of 30th May, despite a subsequent indication in a letter that she wrote to Mr Harding on 8 July 2008 that she would make a payment that would include the £200 on account of service charges for 2008-09.

20. Mr Harding said that the landlord had bought the property in 2002. It had been neglected for a number of years before that, and the only charges raised against the lessees in that period had been the rent and the charge for insurance. In 2004 it was apparent that windows of the flats and of the common parts required to be painted, and the appropriate procedures, including obtaining quotations, under section 20 of the Act were followed. Neither tenant responded to them, and the contract was awarded to Messrs

Harrison & Hewitt. The Tribunal was provided with copies of the section 20 notices, and it was not suggested that the procedure was not properly followed. The work had been supervised, and certified when it was finished, by Kit Harding, who is a qualified chartered surveyor.

21. The landlord had sought to recover one half of the cost of the decorating work from Mrs Purvis. She had not paid. Subsequently the charge had been temporarily removed from the accounts and unsuccessful attempts to ask Messrs Harrison & Hewitt to do remedial works as described in paragraph 16 above, were made. Their view was in some measure perhaps influenced by the fact that the scaffolding was no longer in position. Mr Harding told the Tribunal that they had said that no further works were necessary, and the fact that the windows are now in much the same state as they were then to some extent confirmed the contractors' contention. Thereafter the landlord instructed Messrs Church Bruce, solicitors, to pursue the matter with the result described in the same paragraph. Mrs Purvis had declined to pay anything towards the cost despite correspondence culminating on the letter of 30th May 2008.

22. The landlord relied on the provisions of Clause 2 of the lease to support the demand for repayment of the proportion of the cost of decoration and of the solicitors' fee. It relied on the same clause for the claim for advance service charge. Mrs Purvis had been slow to pay service charges in the past, there having been a Court case in respect of other arrears that she has since paid in 2007, and the landlord took the view that it must revert to the provisions of the lease in this respect, that it had not previously followed, in order to obtain funds against expenses to be incurred.

23. In response to questions from the Tribunal Mr Harding said that Kit Harding attended on three occasions to supervise the works. He had kept no site notes. He accepted in retrospect that these were major works, but said that at the time it had not seemed necessary to prepare a specification. He would have expected the contractors to draw attention to any wet rot they found. The managers' objective had been to keep windows that were plainly failing usable for another five years. The property is in a conservation area so that purpose-built windows will be necessary at considerable cost to replace the existing ones. Mrs Purvis's reluctance to pay service charges was an element in the decision that they took.

24. Mr Harding said that he had not divided the cost of the external decoration by three as paragraph 2(2)(f) of the lease required. Only the two flats were involved, and it would have been unfair to raise a charge against the shop. He had taken the practical view, and throughout had sought to minimise costs to the tenants. He had not been aware until the matter was raised with him at the hearing of the requirements contained in the Regulations to issue a statement of tenants' rights with service charge demands. No statement of the sort that they required had been served with any demand made since 1st October 2007.

25. The Tribunal asked if either party had any representations to make in respect of the application made under section 20C of the Act. Neither wished to do so.

Consideration

26. The Tribunal's view of the first two elements challenged by Mrs Purvis, namely the exterior decorating cost and the solicitors' fee, was informed primarily by the view it took of the work that was carried out in 2005 by Messrs Harrison & Hewitt. It bore very carefully in mind that the work was carried out three years ago and so will in any case have deteriorated somewhat since it was carried out. It took account of Mr Harding's evidence that his Mr Kit Harding, a qualified chartered surveyor, both supervised and certified the work. Even making such allowances it determined from its inspection, and finds as a fact, that this was work of a very poor standard, and not carried out to a standard that was remotely professional. In short, it was bodged, and appeared to satisfy only a requirement, implicit in what Mr Harding told the Tribunal in response to its questions, that something should be done to the windows in place of any proper steps to deal with them on a more permanent basis.

27. The work to the cills was needed either to deal with wet rot or to deal with holes. All that happened was that the cills were roughly filled with a proprietary filler that was either unsuitable to the purpose or was not used in accordance with the manufacturer's instructions. The evidence before the Tribunal was that of a lack of maintenance for a number of years. This work would as a matter of general knowledge ordinarily have required thorough preparation back to bare wood, dealing appropriately with any wet rot, and cutting out any defective timbers and replacing them. There is no indication at all that any of this was done, or had been required to be done, and the invoice for their work from Messrs Harrison & Hewitt clearly shows that it was not.

28. What the Tribunal saw was paint that had almost entirely peeled (except for that on the brickwork) to the extent that it was quite difficult to see what lay underneath without pushing leaves of peeled paint apart. The work was so bad that in the Tribunal's judgement it conferred no material benefit upon the tenants. The tenant of the upper flat has evidently taken that view as well because he has (whatever the technical position as to landlord's permission or planning or other permission) taken it upon himself to replace his windows with upvc ones at his own cost.

29. The Tribunal's view of the matter was in some measure reinforced by the evidence before it first that when Mrs Purvis raised her reservations about the standard of the work Mr Kit Harding took the charge out of the service charge account, and second that he was prepared to instruct solicitors in the matter after the contractors declined to do anything in response to his request that they rectify the work. Those facts clearly indicate to it that Mr Harding himself must have had very serious reservations about the standard of the work that had been done, and the Tribunal's conclusion is that such reservations would have been amply justified.

30. The Tribunal therefore finds that whilst it was plainly reasonable that work should have been carried out to the windows in 2005, the work that was done was not done to a remotely acceptable standard, such that it would have

conferred any material benefit upon the lessees. It is not therefore reasonable that they should be called upon to pay anything for it. It adds that had any sums been payable then, despite the quite reasonable points that Mr Harding made at the hearing, the lease governs the position and Mrs Purvis should in any event have been required to pay only one third of any recoverable cost rather than one half. Having reached that conclusion it was unnecessary for it to consider whether in the circumstances that the demand originally made had been suspended any new demand for that or for any other sum would have to have been accompanied by the statement required by the Regulations.

31. The Tribunal further concluded that it was unreasonable that Mrs Purvis should have to pay the £58-75 demanded for solicitors' fees. First, she was liable only for one third of any sum properly payable upon a correct reading of the lease, and not for one half. Secondly these were works that upon the facts that the Tribunal has found as to their standard should plainly not have been certified as sufficient, and have been paid for when they were completed. It would have been appropriate for a manager to withhold payment until proper remedial work had been carried out. That was not done with the result that the landlord was left in a position of relative impotence when the contractors declined to do any more, and it is not reasonable that the tenant should have to bear cost incurred as a result of the landlord's neglect in that respect.

32. The Tribunal accepted that it is open to the Landlord to require a payment of sums against the budget for the year in question. The position is governed by clause 2(2)(b)(ii) of the lease. The landlord says that Mrs Purvis has agreed to pay that sum or admitted it, and if that is so then the Tribunal might have no further jurisdiction upon the point, since its jurisdiction is precluded in such cases by the provisions of section 27A (4)(a) of the Act. Although mere payment does not exclude the jurisdiction, a written admission does so.

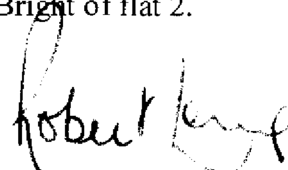
33. The Tribunal concluded that it was not possible to say that Mrs Purvis's agreement in her letter of 7th July to pay £200 on account of service charge was an informed agreement sufficient to exclude its jurisdiction. Mr Harding told the Tribunal that no service charge budget for the lease had been prepared or served for 2008-09. There has therefore been no proper demand for interim service charge in accordance with the terms of the lease in respect of which Mrs Purvis could give an informed agreement. All she has done is to accede to a speculative demand. If it is wrong about that the Tribunal notes that in any case the demand was not accompanied by a summary of rights as required by the Regulations. Thus Mrs Purvis would not have been aware of her rights in the matter as the law requires, and it follows too from the regulations that no amount is recoverable unless the demand has been accompanied by such a statement.

34. All of this is not to say that the Landlord may not seek an interim payment of service charge, but merely that the £200 is not payable as matters stand. It will be necessary for the Landlord to prepare and to serve a reasonable budget made up as the lease specifies, accompanied by an estimate established in the same way and a statement in accordance with the regulations in order to establish a proper demand for interim service charge in accordance with the provisions of the lease.

35. Since Mrs Purvis had at one time misunderstood the demand for an interim service charge to be a demand for a payment to a reserve fund, the Tribunal makes it plain that the two are not at all the same thing. The reserve fund is a fund built up over time against likely future major expenditure, but an interim charge is simply a mechanism for funding expenditure during the year, and in this case the lease contains an appropriate mechanism either for the payment of any unpaid balance or for any overpayment to be credited at the end of each year.

The section 20C application

36. Neither party wished to address the Tribunal on the subject of this application. It may in any case be a matter for argument whether the terms of the lease would permit the landlord to recover her costs of this matter through the service charge regime that it sets out. The matter is otherwise one for the Tribunal in its absolute discretion. In this instance the tenant has won, save to the extent that an interim service charge can be recovered if it is properly established. The landlord has in some respects ignored the terms of the lease, from whatever motives, and undoubtedly has arranged for the provision of very inferior work whose cost it has sought to recover from the tenant. The Tribunal orders that, to such extent as they may otherwise be recoverable, the Respondent's costs in connection with the matter should not be regarded as relevant costs to be taken into account for in determining the amount of any service charge payable by the applicant or by Mr Bright of flat 2.



Robert Long
Chairman
28th October 2008