CHI/43U/LIS/2009/0040

DECISION OF THE LEASEHOLD VALUATION TRIBUNAL ON APPLICATION UNDER SECTION 27A OF THE LANDLORD & TENANT ACT 1985

Address:	20 The Lodge, St Judes Close, Englefield Green, Surrey, TW20 0DN
Applicant:	Retirement Care Group Limited
Respondent:	Mrs Ann Maria Pegg
Date of transfer:	20 April 2009
Inspection:	24 September 2009
Hearing:	24 September 2009

Appearances:

Landlord
Miss T. Silver — Counsel
Mrs S. Barton — Peverel Management Services Ltd
For the Applicant

Tenant
Did not attend and was not represented
For the Respondent

Members of the Tribunal
Mr I Mohabir LLB (Hons)
Mr D Lintott FRICS
Mr R Dumont

IN THE LEASEHOLD VALUATION TRIBUNAL

CHI/43U/LIS/2009/0040

IN THE MATTER OF SECTION 27A OF THE LANDLORD & TENANT ACT 1985

AND IN THE MATTER OF 20 THE LODGE, ST JUDES CLOSE, ENGLEFIELD GREEN, SURREY, TW20 0DN

BETWEEN:

RETIREMENT CARE GROUP LIMITED

Applicant

-and-

ANN MARIA PEGG

Respondent

THE TRIBUNAL'S DECISION

Introduction

1. The Applicant had commenced proceedings in the Staines County Court against the Respondent for arrears of ground rent and service charges totalling £6,787.37. Ultimately, pursuant to an order made by District Judge Wainwright dated 20 April 2009, the matter was transferred to the Tribunal, save for the issue of costs which was reserved to the County Court.

2. On 11 January 2009, the Respondent had issued a parallel application under section 27A of the Landlord and Tenant Act 1985 (as amended) ("the Act") in relation to her liability to pay and/or the reasonableness of various service charges arising in the 2004/05 and 2007/08 service charge years. Subsequently, the Respondent withdrew his application.

3. Directions were issued by the Tribunal in these proceedings on 11 June 2009. The Respondent has failed to comply with any or all of those directions.

Relevant Lease Terms

4. In the present case, it may assist in setting up the relevant that give rise to the Respondent's contractual liability to pay a service charge contribution.

5. The Tribunal was provided with a copy of the Respondent's lease dated 14 July 1993 and made between Village Residential PLC (" the Landlord") of the first part and Lovell Homes Ltd ("the Builder") of the second part and Hanorah Mary Kinley ("the Tenant") of the third part ("the lease").

6. Under clause 1.10 of the lease, the definition of the common parts is stated to include, amongst other areas, the entrance, of course, corridors, landings and staircases. The definition of the main structure is to be found at clause 1.15 and includes, *inter alia*, all exterior and is all internal repairing walls and roofs of the flats on the estate.

7. Under clause 1.13, the service charge and the provisional service charge defined by reference to the Third Schedule of the lease. By clause 3.1, the tenant covenanted to pay to the landlord a service charge contribution towards the costs and expenses of running and maintaining the estate and those other matters specifically referred to in the Third Schedule.

8. By paragraph 1 of the Third Schedule, the tenant covenanted to pay a service charge contribution on a quarterly basis to the landlord in respect of the supply of the services and other matters specified in paragraph 2 of the Schedule. The landlord's covenants generally are to be found in clause 5 .1 of the lease. The tenant's contribution is defined as a proper proportion of the reasonable costs so incurred. Clause 1.14 of the lease defines the proper proportion as being one twenty fourth part of the total expenditure incurred by the landlord in accordance with its obligations under clause 5.1 and paragraph 2 of the Third Schedule.

The Issues

9. A breakdown of the global sum of £6,763.65 claimed by the Applicant is to be found in the statement of account at B5 of the trial bundle. This is comprised of arrears of ground rent and service charges together with interest thereon and solicitors costs incurred for the recovery of those arrears.

10. At the hearing, it was accepted by Counsel for the Applicant that the amounts claimed for arrears of ground rent and interest did not fall within the definition of a service charge or relevant costs within the meaning of section 18 of the Act. Therefore, these costs did not fall within the jurisdiction of the Tribunal and would have to be remitted back to the County Court to be considered with the issue of costs.

11. In relation to the service charges, a global figure of £5,606.16 is claimed for the period April 2003 to November 2007. A further sum of £2,177.08 is claimed for the period 1 April 2008 to 31 March 2009. At the hearing, the Tribunal was able to ascertain that the service charges were costs actually incurred by the Applicant and represented the Respondent's service charge contribution. These were being claimed in the following way:

2004/05: £1,707.56
2005/06: £1,845.72
2006/07: £1,971.44
2007/08: £2,060.29
2008/09: £2,177.08

12. The Applicant was seeking a determination that the costs claimed had been reasonably incurred and were reasonable in amount. The Respondent's position in this matter was not known because she had not complied with the direction to file and serve a statement of case.

The Relevant Law

13. The substantive law in relation to the determination of this application can be set out as follows:

Section 27A of the Act provides, *inter alia*, 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 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."*

Subsection (3) of this section contains the same provisions as subsection (1) in relation to any future liability to pay service charges.

14. Any determination made under section 27A is subject to the statutory test of reasonableness implied by section 19 of the Act. This provides that:

> *"(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 works, only if the services or works are of a reasonable standard;*
> *and the amount payable shall be limited accordingly."*

Inspection

15. The Tribunal visited the property after the hearing in the presence of Mrs Barton, the Applicant's Legal Services Manager. They found a relatively modern complex over two floors developed, in keeping, from an original Grade II listed late Georgian mansion comprising 24 self contained monitored units restricted to occupancy by those over 55. The development is in generally good condition surrounded by well kept gardens and car parking within gated grounds.

Decision

16. The hearing in this matter took place on 24 September 2008. The Applicant was represented by Miss Silver of Counsel. The Respondent did not attend and was not represented.

The Service Charges

17. Despite the absence of the Respondent, the Applicant was obliged to prove that the service charge costs claimed had been incurred and were *prima facie* reasonable. The Tribunal was taken to the certified service charge accounts for each of the relevant service charge years. These are to be found at pages B47-64 respectively in the bundle. The service charge budgets for the years 2006/07 and 2007/08 and the basis upon which any budgetary increases were claimed appear at pages B66-69. The Tribunal was told that the same basis was applied to any increases sought for any head of expenditure in the other relevant service charge years being considered. The service charge accounts for the year 2008/09 would not before the Tribunal and at the conclusion of the hearing, it gave directions as to the filing of these accounts together with evidence of the demands served on the Respondent for the years 2007/08 and 2008/09. In addition, the Tribunal gave a further direction that the Applicant file and serve evidence as to how the solicitors costs of £951.40 had been incurred together with any relevant disclosure. The Applicant has now complied with those directions.

18. Given the failure on the part of the Respondent to particularise her case, the Tribunal conducted a general scrutiny of the relevant service charge accounts. Mrs Barton, on the behalf of the Applicant, was offered as a witness to the Tribunal's questions. In the course of her evidence, she made a number of general points regarding the overall service charge expenditure.

19. Mrs Barton said that the subject property was a listed building and consequently some individual items of service charge expenditure were higher, for example, the window frames have to be wood rather than UPVC.

20. In relation to the 2005/06 year, Mrs Barton explained that the maintenance costs were incurred to carry out responsive repairs on the estate. Any capital expenditure required to repair and maintain the estate was met from the sinking fund. She said that the window cleaning both in this year and the other service charge years, was carried out on a monthly basis.

21. In relation to the 2006/07 year, Mrs Barton explained that the reserve fund expenditure had increased significantly because roof works had been carried out in this year, which had not been carried out before her firm took over the management. She went on to explain that the gardening costs had also increased in this year because it had been needed to bring the development up to standard. Generally, the gardening contractor visited once a month and attended to the shrubs, lawns and on occasion the trees on the estate.

22. As a discrete point, the sum of £5,400 had been spent from the reserve fund in 2007/08 to fit new carpets to the common areas of the building. The Tribunal was satisfied that the Applicant had consulted the tenant in accordance with section 20 of the Act. To the extent that the Respondent wanted to challenge her liability to pay and/or reasonableness of this expenditure, the Tribunal was referred, firstly, to the lease terms. It was accepted by Counsel for the Applicant that the lease did not expressly mention the renewal of carpets to the common parts. However, Miss Silver submitted that clause 5.1(a) (ii) required the landlord to, *inter alia*, renew the common parts which included the carpets therein. In addition, clause 5.1(f) gave the landlord and absolute discretion, for the better management of the estate, to add or vary any of the services it had covenanted to provide under clause 5.1. Therefore, by the installation of new carpets, the Applicant had exercised that discretion and was entitled to recover the cost of doing so as relevant service charge expenditure.

23. In the alternative, the Applicant submitted that the Respondent was now *estopped* from asserting that it was not entitled to recover the cost of replacing the carpets. The Applicant relied on the decision of an earlier Tribunal dated 18 September 2007, where in an application brought by the Respondent, she asserted, as part of her case, that her refusal to pay her service charges was

partly based on the Applicants failure to replace the worn carpets in the common parts.

24. The Tribunal accepted the Applicants primary submission that it was entitled to exercise its discretion under clause 5.1(a) (ii) to replace the carpets in the common parts. Moreover, the Tribunal was satisfied that the Applicant had carried out the required statutory consultation under section 20 of the Act and, therefore, the cost of replacing the carpet had been properly tested by tendering the cost. There was no evidence before the Tribunal that the Respondent had raised any objections during the consultation process. In the event that the Tribunal was wrong in its construction of the lease, it was satisfied that the Respondent was indeed *estopped* from asserting that the Applicant was not entitled to recover the cost of replacing the carpet in view of the stance she had taken in the earlier decision. Accordingly, the Tribunal was satisfied that the cost of replacing the carpet had been reasonably incurred.

25. As to the cost of management in each of the service charge years, Mrs Barton said that the visiting manager was an employee of the firm because this was a contractor requirement under clause 5.1 (c) of the lease. The manager visited for half a day each week and her firm maintained an office on site to deal with any concerns raised by the tenants. The manager also carries out an inspection of the estate to ensure that contractors had carried out a required works.

26. In relation to the cleaning costs, Mrs Barton said that the building had several entrances and the cleaning duties carried out by the contractor included vacuuming, cleaning the internal parts of the windows and wiping down of any woodwork.

27. In relation to the 2008/09 year, Mrs Barton said that the warden call system had been upgraded because of the age of the previous system. The cost of the upgrade was a one-off cost. Even though the minimum age for eligibility to reside on the estate had been lowered to 55 years, the requirement for this system remained because most of the residents were significantly older. The

warden call system was monitored on a 24-hour basis every day of the year because of the medical needs of the majority of the residents. The overall cost of providing the monitoring service was equivalent to £70 per person per year or £1.35 per week per person.

28. Save for the individual point relating to the cost of replacing the carpets in the internal common parts considered above, the Tribunal was satisfied that the other service charge costs claimed by the Applicant for each of the relevant service charge years had been reasonably incurred and were reasonable in amount. The Tribunal reached this finding having regard to its expert knowledge and experience based on the evidence given by Mrs Barton, the documentary evidence before it and its inspection of the subject property. In addition, the Tribunal was satisfied that the relevant demands for each of the service charge years being considered had been served on the Respondent and, therefore, no limitation point under section 20B of the Act arose.

Solicitors Costs

29. The sum of £951.40 is claimed by the Applicant separately as an administration charge, being solicitors costs incurred to recover the Respondent's service charge arrears.

30. Apparently, these costs relate to an invoice dated 1 February 2007 and rendered to the Applicant by its solicitors. Maddersons, for pursuing a claim against the Respondent in the Staines County Court for ground rent and service charge arrears. The solicitors profit costs are £650 (6 .5 hours at £100/hour) and a disbursement of £150 plus Vat for Counsel's fees for attending the County Court hearing on 15 December 2006, when the proceedings were stayed and transferred to the LVT,

31. The Applicant submits that these costs are contractually recoverable, as an administration charge, under clause 4.10 of the lease. By this clause, the tenant had covenanted, *inter alia*, to pay the landlord's costs of or incidental to the preparation of a notice under sections 146 or 147 of the Law of Property Act 1925, as a precursor to commencing forfeiture proceedings for breach of

covenant. The Applicant contended that the lease predated the current legislation and a landlord must now seek a determination from the Tribunal that a tenant has breached one or more terms of a lease before being able to serve a section 146 notice. Therefore, the costs of seeking such a determination must be regarded as being incidental costs and recoverable as such under this clause.

32. The Tribunal did not accept the Applicant's submission as being correct in this case because it is not an application brought under section 168(4) of the Commonhold and Leasehold Reform Act 2002 (as amended) for a determination that the Respondent is in breach of a covenant of her lease. The present application is brought under s.27A of the Act and, as a consequence of the Tribunal's determination, all the Applicant is entitled to do is to seek to recover any service charge arrears from the Respondent as a debt. The Applicant is not entitled to prepare and serve a section 146 notice because there has been no finding made by this Tribunal that the Applicant is in breach of one or more covenants of her lease and, indeed, the Tribunal has no jurisdiction to do so in this application. Accordingly, the Tribunal found that the Applicant was not entitled to contractually recover the legal costs under clause 4.10 of the lease.

33. However, the Tribunal accepted the Applicant's alternative submission that it was entitled to recover the legal costs under paragraph 1(1)(c) of Schedule 11, Part I of the Commonhold and Leasehold Reform Act 2002. In the Tribunal's judgement, these costs were a direct consequence of the Respondent's failure to pay her arrears of ground rent and service charge arrears and gave rise to the County Court claim. The Tribunal was also satisfied that these costs fell within the definition of a variable administration charge within the meaning of paragraph 1(3) of Schedule 11.

34. As to the costs themselves, paragraph 2 of Schedule 11 provides that a variable administration charge is only payable to the extent that it is reasonable. No statutory definition or test of reasonableness is provided. Nevertheless, in the Tribunal's judgement, by extension, the same approach

must be adopted as is taken under section 19 of the Act. The Tribunal was satisfied that the costs had been reasonably incurred because it is beyond doubt that the Respondent was significantly in arrears with her ground rent and service charges in 2006. In addition, having regard to the cost/hourly rates allowed in the County Court in 2006, the costs claimed by the Applicant's solicitors were eminently reasonable. Accordingly, the Tribunal allowed the legal costs as claimed and made no deduction.

Schedule 12 Paragraph 10 Costs

35. At the conclusion of the hearing, the Applicant made an application under Schedule 12 paragraph 10 of the Commonhold and Leasehold Reform Act 2002 that the Respondent pay a contribution of £500 towards the costs it had incurred in these proceedings. It was submitted that the Respondent had acted frivolously, abusively or otherwise unreasonably in connection with the proceedings by failing to respond or advance any case at all.

36. The Tribunal had little difficulty in accepting the Applicant's submission as being correct. The Respondent had failed to comply with any or all of the Tribunal's Directions and had failed to attend the hearing. The Respondent's inability to attend the hearing did not prevent her from preparing and advancing a case "on the papers" which could have been considered by the Tribunal in this way. Nevertheless, the Respondent wholly failed to participate in these proceedings and, invariably, the Applicant had incurred greater costs by having to litigate this matter to a hearing. The Tribunal could think of no clearer conduct that amounted to either an abuse of process or was otherwise unreasonable. Therefore, the Tribunal orders the Respondent to pay a contribution of £500 towards the Applicant's costs, such amount to be paid be her within 28 days of this Decision being handed down to the parties.

Dated the 2 day of December 2009

CHAIRMAN..... I. Mohabir .....

Mr I Mohabir LLB (Hons)