

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



**Residential
Property
TRIBUNAL SERVICE**

S.27A & S.20C Landlord & Tenant Act 1985 (as amended) ("the 1985 Act")

Case Number:	<p>1) CHI/45UH/LSC/2009/0069 2) CHI/45UH/LIS/2009/0089 3) CHI/45UH/LSC/2009/0091</p>
Property:	<p>Burlington Court George V Avenue Worthing BN11 5RG</p>
Applicant: Case No.1	Mrs C Allingham
Respondent: Case No.1	Burlington Court (Worthing) Ltd. (the Freeholders)
Applicants: Case No. 2 & 3	Burlington Court (Worthing) Ltd
Respondent: Case No.2 & 3	Mrs C Allingham
Appearances for Mrs Allingham:	Mr G. Chipping
Appearances for Burlington Court (Worthing) Ltd	Mrs Ritchie of Crawfords Managing Agents Philip Goacher Consulting Civil & Structural Engineer.
Date of Inspection /Hearing	23 rd & 24 th November 2009
Tribunal:	Mr R T A Wilson LLB (Lawyer Chairman) Mr A Mackay FRICS (Valuer Member) Ms J Morris (Lay Member)
Date of the Tribunal's Decision:	12 th December 2009

THE APPLICATIONS.

The applications before the tribunal were as follows: -

Case Number 1.

- 1) For a determination pursuant to section 27A of the 1985 Act of Mrs Allingham's liability to pay service charge for the years ending 25th March 2008 and 25th March 2009.
- 2) For a determination pursuant to section 20C of the 1985 Act of the Freeholders ability to charge the costs of Case 1 to a future service charge account.
- 3) The tribunal is also required to consider pursuant to regulation 9 of the Leasehold Valuation Tribunals (Fees)(England) Regulations 2003 whether the Freeholders should be required to reimburse the fees of Mrs. Allingham in respect of Case 1.

Case Number 2.

- 4) For a determination pursuant to section 27A of the 1985 Act of the lessees liability to pay an interim service charge of £3,000 for the service charge year ending 25th March 2010.

Case Number 3.

- 5) For a determination of Mrs. Allingham's liability to pay service charge for the year ending 25th March 2008 consequent upon a determination of a previous tribunal under case number CHI/45UH/LSC/2007/0094.

THE DECISION

Case Number 1.

- 6) The tribunal determines that the following amounts charged or to be charged by way of a service charge for the service charge years 2008 and 2009 were reasonably incurred and are payable:-

ITEM	2008	2009
	£	£
Water	84	754.10
Cleaning	1,347	1,639.50
Gardening	1,967	1,877.93
Insurance	2,775	7,643.98
Director Insurance	Nil	Nil
Electricity	408	1,365.02
Maintenance and Repair	8,583	5,612.29
Accountancy and Secretarial fees	891	2,300.23
Professional fees	4,920	4,708.98
Management fees	2,900	4,499.94
Bank charges	130	128.11

Bad debts	-	-
Sundry Expenses	141	239
Exterior Redecorations	280	-
Major Works	44,760	34,043.39
Flood repairs (excess amount only)	-	100

- 7) No order is made under section 20C of the 1985 Act.
- 8) No order is made in relation to the repayment of the tribunal's fees incurred by Mrs. Allingham.

Case Number 2.

- 9) The tribunal determines that the interim service charge demand dated 19th June 2009 for £3,000 is payable by the lessees forthwith.

Case Number 3.

- 10) Case number 3 was settled at the hearing upon the terms recorded in this decision.

JURISDICTION.

- 11) The Tribunal has power under Section 27A of the 1985 Act to decide about all aspects of liability to pay service charges and can interpret the lease where necessary to resolve disputes or uncertainties. The tribunal can decide by whom, to whom, how much and when service charge is payable.
- 12) By section 19 of the 1985 Act service charges are only payable to the extent that they have been reasonably incurred and if the services or works for which the service charge is claimed are of a reasonable standard.

THE LEASE

- 13) The tribunal was provided with a copy of the lease relating to flat 12. Save for one exception, Mrs. Allingham does not contend that the service charge expenditure is not contractually recoverable as relevant service charge expenditure under the terms of her lease. It is, therefore, not necessary to set out the relevant covenants in her lease that give rise to liability to pay a service charge contribution.

INSPECTION

- 14) The tribunal inspected the property prior to the hearing. It comprises a three story stand alone block of 12 flats with 12 garages built circa 1930s. Garages 1 to 9 form a detached block to the north side of the property and garages 10 to 12 adjoin the main building. The property has a flat roof and there are two concrete staircases serving the rear of the property. The development occupies an exposed seafront location in West Worthing.

THE ISSUES IN DISPUTE AND PRELIMINARY MATTERS

- 15) A pre-trial review was held on 30th July 2009 when the issues in dispute were identified and it was directed that all three cases should be consolidated and heard at the same time.
- 16) Both parties had endeavored to set out their positions on the issues in their statements of case and both parties had prepared and submitted large bundles of evidence. The bundles submitted by Mrs Allingham ran to in excess of 500 pages and the bundle submitted by the Freeholders in excess of 200 pages. In arriving at its decision the tribunal has had due regard to all the evidence put forward by the parties both written and oral even if the same is not explicitly referred to or set out in this decision.
- 17) At the commencement of the hearing Mrs Allingham applied to the tribunal to include additional documentation in her bundle. She said that this was necessary because of the Freeholders' failure to comply with the tribunal's directions in a timely manner. In particular they had failed to provide invoices as directed by the tribunal. In addition the revised date of the hearing had caused her prejudice and she needed more time to assemble her evidence. The Freeholders confirmed that they had no objection to the inclusion of further documents in Mrs Allingham's bundle. The Freeholders had also been late in complying with directions and had submitted their evidence late. The tribunal therefore granted the application and adjourned the hearing for three hours to allow both parties further time to assemble their bundles and then to exchange them prior to the hearing proceeding.
- 18) When the tribunal reconvened, it received confirmation from both parties that they had had sufficient time to consider the additional documents included in the bundles and that they were both satisfied that their respective bundles represented all the papers they deemed relevant to their respective applications and were ready to proceed.
- 19) Prior to the commencement of the hearing the parties were able to considerably refine and reduce the issues to be determined by the tribunal and following negotiations, which took place outside the hearing room particularly on the second day of the hearing, Case Number 3 was in effect compromised and agreed. Furthermore the issues in dispute in Case Number 1 were reduced down to just a few items of expenditure each of which are considered below.

THE HEARING

Case Number 1

Service charge for the year ending 25th March 2008

- 20) Mrs Allingham's main objection to the service charge for both years was that she had not been given vouchers to support the items of expenditure claimed. In addition she had difficulty in interpreting the company accounts which purported to show the service charge amounts due. However, now that some vouchers had been given to her, she was by and large satisfied that most of the expenditure was justified. This left just two contested items for 2008, namely a charge of £574 for directors' indemnity insurance and £87 for a courier's fee for the delivery of accounts to Companies House. There was no provision in the lease allowing directors indemnity insurance to be included as a

service charge item. It should therefore be disallowed. The courier fee of £87 should also not be charged as a service charge item because if the accounts had been prepared in a timely fashion, hand delivery should not have been necessary. In the event the accounts had only been delivered a few days before the statutory deadline.

- 21) The Freeholders claimed that paragraph 1 of the fifth Schedule to the lease allowed them to charge the cost of director's indemnity to the service charge.

The relevant part reads as follows:-

Total expenditure means the total expenditure incurred by the lessors' in any accounting period in carrying out their 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, (b) the cost of any accountant or surveyor employed to determine the total expenditure and the amount payable by the tenant hereunder and (c) an annual sum equivalent to the fair rent of any accommodation owned by the lessors.

- 22) For an item of expenditure to be recoverable as service charge there must be clear and unambiguous wording in the lease covering the expenditure in question. The tribunal does not consider that on a proper construction of paragraph 1 above the wording is sufficiently wide or explicit to cover the cost of director's indemnity insurance. This insurance cannot properly be regarded as property related and is not covered by the specific heads of expenditure set out in sub-clauses (a) (b) or (c) of paragraph 1 and it is therefore disallowed.
- 23) We also agree with Mrs Allingham's comments that had the accounts been prepared and finalised in a timely fashion then the expense of hand delivery to Companies House could have been avoided. We therefore disallow this item.
- 24) Mrs. Allingham contested no other items for the year ending 25th March 2008 at the hearing.

Service charge for the year ending 25th March 2009

- 25) At the hearing only three items were contested by Mrs Allingham namely tax of £174.64, flood repairs of £3519.12 and major works of £34,043.39

Tax: £174.64

- 26) Mrs Allingham contended that this figure represented tax deducted at source on service charge money held by the company in trust for the lessees. As the company was a 'not for profit company', it should be able to reclaim the tax paid and therefore the full amount of interest earned should be passed on to the lessees without deduction.
- 27) Mrs Ritchie told the tribunal that the correct treatment of interest arising out of service charge money held on behalf of lessees by freeholders was far from clear and the issue was still under investigation by her in consultation with tax advisers. The fact was that interest had been deducted and she was in effect passing on, for the benefit of the

lessees, only the net amount. This was why the amount of tax deducted at source featured as a service charge item.

- 28) The tribunal accepts that the tax issues arising out of interest payable on service charge funds are complex. We consider that the landlord should make reasonable attempts to reclaim interest deducted at source, but it must balance these endeavours against the costs of recovery which themselves may be recoverable as service charge. If the costs of recovery exceed the tax saved then there is an argument that recovery is not mandatory. If the landlord is acting reasonably, it should not be out of pocket and be required to pay over to the lessees more interest than it is able to commercially receive. That said the tribunal questions whether tax withheld can be properly regarded as a service charge item. It might for example be better treated as a receipt by the company of the net amount. In these circumstances it is doubtful that the tribunal has jurisdiction to decide the issue and it is to be hoped that the parties will resolve this issue between themselves.

Flood repairs at £3,519.12

- 29) As to the cost of flood repairs, Mrs Ritchie confirmed that although they had cost £3,519.12 an insurance claim had been made and payment received of £3,419.12 i.e. the full amount of the repairs less the £100 excess. Mrs. Allingham was satisfied with this explanation on the basis that the total cost of the repairs to her would be 1/12th of £100.

Major works of £34,043.39

- 30) Mrs. Allingham confirmed that her claim in respect of this figure related solely to the cost of work carried out to the garages in 2008/2009, which was in the order of £30,000.
- 31) It was her contention that the garages were in a state of disrepair as long ago as 1998. At that time a tender to carry out the repairs had been obtained in the order of £10,000. In the event only temporary repairs were commissioned. By the time permanent work was carried out in 2008/2009 the cost of repair had escalated to £30,000.
- 32) It was Mrs Allingham's contention that the escalation in costs was entirely due to the incompetence of the Freeholders and in particular arose out of their negligent delay in having permanent work carried out to the garages. She should therefore not have to pay any element of the increased cost of the work which she estimated to be approaching £24,000 since 1998 and nearly £6,000 since 2005.
- 33) In support of this contention she placed reliance upon an extract of a tender obtained by the Freeholders in 1998 showing a tender price in the region of £10,000. This document had been included in Mrs Allingham's bundle on the day of the hearing with the consent of the tribunal and the Freeholders. She contended that it was absolutely clear for all to see that the deterioration in the garages gathered pace from 2005 onwards. In effect the Freeholders were in breach of their repairing covenants and she was entitled to a set off to compensate her for this breach.
- 34) The Freeholders called Mr Goacher to give evidence in relation to this claim. Mr Goacher told the tribunal that he had considered the 1998 tender documents overnight and formed the conclusion that the 1998 specification differed considerably from the 2008 specification. It was therefore necessary to make a number of adjustments to be

able to compare like with like. Firstly, the 2008 specification contained additional works to include re-roofing, new fascias, re-pointing and a number of other items totaling nearly £12,000 by today's prices. The cost of these items should therefore be disregarded.

- 35) Like-for-like costs were therefore £27,000 (being the 2008 tender price excluding vat) minus £12,000, which equaled £15,000 plus vat.
- 36) Furthermore, to get a direct comparison, it was also necessary to adjust for inflation between 1998 and 2008. Applying the data contained in a recognised adjustment table for building costs produced a percentage figure of 74%. Applying this percentage to the 1998 tender resulted in an adjusted figure of £14,000.
- 37) Furthermore the 1998 tender contained no contingency figure and it was his opinion that the work would not have been carried out at the tender sum because more work would have been necessary when the damaged areas were opened up for inspection. He considered it reasonable to add a contingency figure of £2,000. Added to the first adjusted figure of £14,000 gave an overall figure of £16,000 for the 1998 tender as against £15,000 which represented the adjusted 2008 figure.
- 38) It was therefore his considered opinion that the delay in carrying out the garage works did not give rise to any additional cost to the lessees whatsoever.
- 39) The tribunal accepted the evidence of Mr Goacher who came over as a credible witness with a balanced and expert approach to the issues being debated. In particular we found on the facts that the 1998 and 2008 specifications did differ considerably in the scope of work to be carried out. We also agreed that adjustments were necessary to take into account inflation over the period and it was also necessary to build in a contingency sum to the 1998 tender. Mrs. Allingham was not able to successfully challenge the evidence given by Mr. Goacher. Furthermore Mrs. Allingham led no evidence contending that the cost of the works in 2008 was unreasonable. Her arguments centered primarily on the fact that she was entitled to a set off on account of the Freeholders breach of covenant.
- 40) Taking all these factors into consideration the tribunal was not persuaded that Mrs Allingham had made out her case for a reduction in the service charge payable for the major works. In the circumstances we find that the full figure claimed of £34,043.39 is therefore payable in full.

Case Number 2

Liability to pay an interim service charge for service charge year ending 25th March 2010.

- 41) Mrs Allingham's case was that she had no objection in principle to a £3,000 demand. She accepted that there was provision in her lease to make such a demand, but a cash call could only be made against planned work. In this case there was no planned work and therefore no on-account charges should be levied.
- 42) Mrs Ritchie denied that there was no planned work. The lessees had been consulted in respect of a programme of works to be carried out to the rear staircases. The section 20ZA procedure had been carried out; competitive tenders had been obtained and these

were being evaluated. It was true that the preferred building company was no longer able to do the work, but this did not mean that the project had been abandoned. It was still the intention of the Freeholders to carry out the work as soon as possible and in particular as soon as an acceptable price had been agreed with the other builders who had participated in the tender process. In the circumstances she invited the tribunal to uphold the demand of £3000.

- 43) On the evidence before it, the tribunal was persuaded that the demand was made pursuant to contractual provisions contained in the lease and that the Freeholders had a clear intention to carry out works to the rear staircases as soon as possible. The tribunal was also satisfied that the work would cost in the region of £20,000 to £30,000. On these figures an on account payment of £3000 was reasonable. The tribunal had evidence before it that the consultation procedure had been complied with, and it considered that the inability of the preferred contractor to carry out the work could not be construed as an abandonment of the work. The tribunal therefore upholds the interim service charge demand of £3,000 per lessee and directs that it should be paid forthwith.

Case Number 3

Liability to pay a service charge for the service charge year ending 25th March 2008

- 44) On the second day of the hearing the tribunal was told that the parties had reached agreement and therefore did not require a determination. The terms of the agreement were recorded by the tribunal as follows:-

The amount payable by Mrs. Allingham by way of service charge as a result of the decision of the tribunal dated 2 April 2008 Ref: CHI/45UH/LSC/2007/0094 is £6,500. By agreement of the parties this amount will be reduced to £6,154.79 provided Mrs Allingham pays £5,250 by way of service charge in cleared funds on or before 17th December 2009.

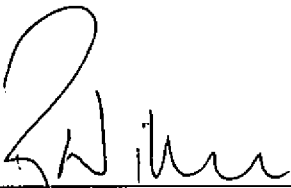
COSTS AND REIMBURSEMENT OF FEES

- 45) Both of these matters can be taken together as the tribunal's considerations in relation to both are largely the same. The legislation gives the tribunal discretion to disallow in whole or in part the costs incurred by a landlord in proceedings before it being treated as relevant costs to be taken into account when determining the amount of future service charges payable. The tribunal has a wide discretion to make an order that is just and equitable in all the circumstances.
- 46) In arriving at its decision the tribunal has had regard to the conduct and outcome of the proceedings. Whilst the Freeholders have been largely successful in defending the allegations made against them, the tribunal considers that the company accounts prepared by them do not provide sufficient detail and do not follow with sufficient precision the service charge mechanism as set out in the leases. The tribunal found the accounts difficult to follow and in several cases the entries could only be understood in the context of oral explanations provided by Mrs Ritchie at the hearing. For these reasons the tribunal can understand why Mrs. Allingham initially found her service charge demands to be questionable. It is the tribunal's view that to avoid further misunderstandings the Freeholders should prepare two sets of accounts one for Companies House and the second dedicated to showing service charge expenditure as

provided for in the leases. The service charge accounts should contain more detail of expenditure incurred and should follow the provisions of the leases more accurately. If this is done the tribunal believes that scope for misunderstanding will be much reduced.

- 47) In addition interim service charges should be demanded strictly in accordance with the dates set out in the leases. Furthermore an annual balancing charge should be invoiced to each lessee following the annual publication of the service charge accounts as provided in the leases.
- 48) That said it remains the case that Mrs. Allingham has succeeded on only a handful of points involving a rebate of less than £1000 against an initial challenge of over £25000. Having regard to all the circumstances of the case and bearing in mind the conduct of the parties and the outcome of the proceedings we therefore do not consider it would be just and equitable for the tribunal to make an order under section 20C of the Act as requested by Mrs. Allingham. This means that if the leases so provide, the Freeholders can charge their reasonable costs and expenses incurred in these proceedings to a future service charge account.
- 49) Furthermore for the same reasons we do not think it would be just and equitable for an order to be made directing the Freeholders to repay Mrs. Allingham's application or hearing fees.

Chairman



R.T.A. Wilson

Date: 12th December 2009