HM COURTS & TRIBUNALS SERVICE

LEASEHOLD VALUATION TRIBUNAL

In the matter of an application under section 27A of the Landlord and Tenant Act 1985

Case No.	CHI/29UN/LIS/2011/0088
Property:	**Flat 1, 21 Ethelbert Crescent** **Cliftonville** **Margate** **Kent** **CT9 2DU**
Between:	**Mr GS Thind** **(the Applicant/Landlord)** and **Mr D Deciacco** **(the Respondent/Tenant)**
Date of hearing:	29th February 2012
Date of the decision:	9th March 2012
Members of the Tribunal:	Mr D. Dovar LLB (Hons) Mr R Norman Mr R Athow FRICS MIRPM

INTRODUCTION

1. This is an application under sections 27A of the Landlord and Tenant Act 1985 ('the Act') having been transferred from the Croydon County Court by the order dated 9th November 2011 of District Judge Wright in claim number 1TT00231 for the purpose of determining the quantum of the service charge. Directions were given for this application on 16th November 2011.

2. The service charge years in question are those for the years ending 25th February 2010 and 2011.

FACTS

3. 21 Ethelbert Cresent ('the Property') is part of residential terrace on the seafront containing five flats. Flat 1 ('Flat 1'), which is owned on a long lease by the Respondent, is situated in the basement of the property.

4. There have been previous proceedings between these parties relating to non-payment of service charge for the years ending 2008 and 2009. The Applicant instructed solicitors to recover those sums and eventually they were paid by the Respondent's mortgagee. The solicitors charged the Applicant £193.75 for recovering those sums.

5. The Applicant claims that:

   a. On 20th March 2010 he sent a letter to the Respondent claiming, amongst other sums, £264.90 for insurance and £280.95 Service Charge for the year ending 2010;

   b. On 21st April 2010 he sent a further letter claiming the sums referred to in the previous letter and threatening proceedings in the alternative;

   c. On 17th May 2010 he sent a service charge statement claiming for the year end February 2010:

      i. Gutter clearance - £84.74

ii. Roof repairs - £900

iii. General repairs - £420

iv. Insurance - £1324.50

v. Accountancy Fee - £248.

Those sums were apportioned so that the Respondent was only charged one fifth of the amount shown above. In addition he claimed solely from the Respondent: Court fee - £85 and Recovery, Solicitors Fee - £193.75.

d. On 1st April 2011, he sent to the Respondent a service charge statement for the year end February 2011. That claimed (again with the Respondent being charged one fifth of the full amount shown below):

i. Electricity charges - £131.80

ii. Roof repairs - £240

iii. General Maintenance - £900

iv. Chimney Cover maintenance - £211.50

v. Insurance £2,500

vi. Accountancy Fee - £295

6. On 28th April 2011, the Applicant issued proceedings in the Thanet County Court for the recovery of the sums claimed. Those proceedings were transferred to the Tribunal for the determination of the service charge.

7. The Respondent filed a Defence dated May 2011 in those proceedings. He stated that he had not received any demand until mid April 2011 and had not received any particulars of the sums claimed.

8. In his statement dated 20th January 2012, the Applicant stated that he had had no response from the Respondent to the letters and demands sent.

9. The Applicant in complying with the directions given on 16th November 2011, has supplied vouchers supporting the sums claimed for each years service charge. In support of the £900 for roof repair for the year ending 2010, the Applicant relied on a sales invoice addressed to the owner of the top floor flat, which was broken into two jobs. The first was £500 'To overboard ceiling in lounge plaster and paint also repaint walls'. Further in support of the £420 general maintenance for the same year an invoice was produced for £55 for mice problems in flat 5. The Tribunal also noted that the insurance schedule for the year end 2010 stated 'No DSS, Local Authority Referrals Students or Asylum Seekers.'.

10. The Respondent has provided a statement (dated 5th January 2012) in which he contests that he is liable to pay. He relies on:

    a. Clause 6.3 of the lease which provides for any dispute over the service charge to be determined by a surveyor;

    b. The absence of a summary of rights and obligations with the service charge demand that he received;

    c. The fact that the service charges had not been demanded within 18 months of having been incurred;

    d. A failure to consult, in particular in relation to the insurance charges and general maintenance;

    e. The need to hold the service charges on trust for the tenants;

    f. The fact that £900 appears in both years service charge and that the insurance charge has nearly doubled.

LEASE PROVISIONS

11. By a lease dated 30th January 2007, the Applicant demised Flat 1 to the Respondent for a term of 99 years from 29th September 2003.

12. By clause 3.33, the Respondent covenanted to '*keep the Landlord fully indemnified against ... costs expenses actions demands proceedings claims ... incurred by the Landlord arising directly or indirectly out of: 3.33.1 any act omission ... of the Tenant ... or 3.33.2 any breach or non-observance by the Tenant of the covenants conditions or other provisions of this lease or any of the matters to which this demise is subject*'.

13. By clause 5.1.2, the Respondent covenanted to pay one fifth of the insurance premium on demand.

14. Clause 6 provides for the repairing obligations of the Landlord and the service charge recovery mechanism.

THE STATUTORY PROVISIONS

15. Section 20B of the Act provides that service charges will not be recoverable if they have been demanded 18 months after they have been incurred unless prior to that date, the landlord has notified the tenant of those costs and that it is intended to recover those costs at a later date.

16. Section 21B of the Act prescribes information which must be provided with a service charge demand before the sum demanded will fall due. In particular notice of the rights and obligations of a tenant of a dwelling in relation to service charges.

17. Section 20 of the Act prescribes various expenses which a landlord will have recovery capped if they do not follow the appropriate statutory consultation procedure. In brief this relates to building works, where the sum to a tenant will exceed £250 per annum or any contract entered into by the landlord where the duration of the contract is for more than one year and the cost to an individual tenant is greater than £100 per annum.

18. Section 42 of the Landlord and Tenant Act 1987, stipulates that sums held by the landlord on account of service charge are impressed with a statutory trust and are held for the benefit of the leaseholders.

INSPECTION

19. The Tribunal inspected the common parts and the external parts of the property on the morning of the hearing. The property seemed to be in fairly good condition for its location, type and age.

HEARING

20. The Applicant attended both the inspection and the hearing. The Respondent was not present at either. Both parties had complied with the directions and therefore the Tribunal had in the bundle prepared by the Applicant the objections to the application raised by the Respondent in the form of a letter on which the date 5th January 2012 had been written on top by the Applicant.

21. The Tribunal asked the Applicant to address the points raised in Respondent's statement.

22. He seemed to accept that the demands were not accompanied by a summary of rights and obligations. He said that he had been to his solicitors since receiving the Respondent's statement and had sent out both demands with the prescribed notice attached. He produced a copy of a letter sent with the demands and the prescribed information. He confirmed that this had been sent on 26th January 2012 and he produced evidence from the post office of sending.

23. He also stated that he did not hold any service charge money as he was only claiming sums that he himself had already expended.

24. In relation to the roof repair, he clarified that the first set of works, amounting to £500 were within flat 5 and had been caused by a leaking

roof. He also accepted that the £55 could have been for flat 5 only. He said the court fees of £85 claimed in the year end 2010 accounts were in relation to the present proceedings and the solicitor's recovery fees were in relation to the previous proceedings.

25. Finally, in relation to the insurance, he stated that the premium had almost doubled because the flats were being rented to DSS tenants. He produced at the hearing the schedule which, unlike the previous year, did not have the DSS prohibition on it.

The issues

26. Dealing with the issues raised by the Respondent.

Failure to appoint a surveyor to make a determination

27. Whilst the lease does provide for the resolution of any dispute by the appointment of a surveyor, neither party activated this clause. Further, on receipt of the claim form, the Respondent chose to accept the jurisdiction of the county court by filing a substantive defence rather than one disputing jurisdiction. It follows that the Respondent is bound by that election and is therefore bound by the transfer to this Tribunal of the determination of service charges.

Section 21B – summary of rights and obligations

28. The Applicant accepted that he had not served a summary of rights with the demands. In the Tribunal's view this meant that no sums were due until that requirement had been complied with. The Act is clear in that no sums will fall due until the prescribed information has been provided with the demands.

29. However, the Applicant produced evidence which the Tribunal was content to receive at the hearing which demonstrated that as of the end of January

2012, he had remedied that situation and had served demands which had the correct summary accompanying them.

30. The Tribunal was prepared to allow this evidence in as it was material to the issues and appeared credible. Further the Respondent had chosen not to attend the hearing and so had deprived himself of the opportunity to deal with this issue or raise an objection.

31. The Tribunal therefore finds that although at the date he issued proceedings he was not entitled to claim the sums set out as service charges, as of 28th January 2012 (two days after posting), those sums had, subject to the deductions set out below, fallen due.

Section 20B – time limits

32. The Tribunal does not accept the Respondent's claim that the fact that the demands were not proper demands means that by reason of section 20B they cannot now be claimed. The Respondent has focused on only one part of this section. The Tribunal considers that the second part of section 20B (notification of sums incurred within 18 months) can be satisfied by a demand that falls foul of section 21B.

33. There was an issue as to whether or not the Respondent had been served with any demands until April 2011. The Tribunal heard the Applicant on this point and found him credible when he said that he had sent demands and letters before April 2011. The first demand for the year ending 2010 being sent in March 2010. Therefore although they were not proper demands as they fell foul of section 21B, they were sufficient for section 20B in that they notified the Respondent of costs incurred and an intention to recover those costs.

Section 42 – Service charges held on trust

34. The Applicant confirmed that he was only seeking to receive sums that he had already spent. Therefore he was not holding any service charges on account. In those circumstances the provisions of section 42 do not apply.

Section 20 - Consultation

35. The Tribunal does not consider that any of the charges identified by the Respondent required consultation. There was no one item of building works which cost a tenant more than £250 per annum. Further, the landlord had not entered into any agreement lasting more than a year under which a tenant was charged more than £100 per annum.

Service charges

36. It does appear that in the year ending February 2010 some charges were demanded which fell outside the service charge. In particular, the Tribunal does not consider that the £500 for repairs to Flat 5 fall within the Respondent's repairing obligation and therefore should not be charged to the tenants. The same applies to the £55 for mice control in Flat 5. These all fell within the demise of another flat and did not relate to structure or common parts. These sums are therefore not recoverable by way of service charges.

37. The Tribunal also has difficulty with the legal costs (and court fee) incurred and claimed under the year end February 2010. The Applicant said the court fees were for the present proceedings, yet the claim form showed those as £95 rather than £85. If they were for the previous proceedings, then they should have been subject to an order for costs in any event. If they were for these proceedings, then they are not yet recoverable and can be awarded by the County Court on transfer if appropriate. The Tribunal therefore does not find that this sum is recoverable. In relation to the solicitor's costs, this appears to be the cost of enforcement of the judgement obtained and therefore would not have been the subject of a

costs order. They also appear to flow from the failure of the Respondent to pay his service charges and therefore in the view of the Tribunal they are recoverable in full from the Respondent under clause 3.33 of the Lease.

CONCLUSION

38. At the time the proceedings in the county court were issued, because no summary of rights had been served, there were no sums due. The county court proceedings were therefore premature.

39. Since then, by the end of January 2012, the Tribunal determines that the following sums are due:

Year end 2010

Block costs – apportioned to the Respondent as 1/5th of total expenditure £484.30, being 1/5th of:

a. Gutter clearance - £84

b. Roof Repairs - £400

c. General Repairs - £365

d. Insurance - £1324.50

e. Accountancy fee - £248

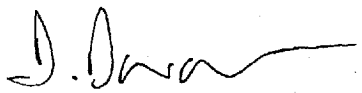
Plus £193.75 solicitors recovery costs payable in total by the Respondent under clause 3.33

Year end 2011

£855.66. No reduction being made to this years expenditure.

40. The parties should note that the Tribunal has not dealt with the issue of ground rent for either year as this does not fall within its jurisdiction.

41. The Tribunal therefore determines that as of the date of this decision, the sum of £1,533.71 is owed to the Applicant by the Respondent by way of service charge for the years ending February 2010 and 2011.



D Dovar LLB (Hons)
Chairman