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**HM COURTS & TRIBUNALS SERVICE**  
**LEASEHOLD VALUATION TRIBUNAL**

Case No: CHI/00HN/LSC/2013/0005

Re: Flat 2, Clifton Court, Heathcote Road, Boscombe, Bournemouth, Dorset BH5 1EY

Applicant Peter Antony Tryska

Respondent Haysport Properties Limited

Date of Application 1 October 2012

Date of Inspection 17 April 2013

Date of Hearing 17 April 2013

Venue Bournemouth County Court

Representing the parties For the Applicant: Mrs D Tryska  
For the Respondent: Miss S Clark, Director, Ellis & Partners

Members of the Leasehold Valuation Tribunal:  
M J Greenleaves Lawyer Chairman  
A J Mellery-Pratt FRICS Valuer Member  
Mrs J Herrington Lay Member

Date of Tribunal's Decision: 9 May 2013

**Decision**

- 1) The Tribunal determines in accordance with the provisions of Section 27A (the Section) of the Landlord and Tenant Act 1985 (the Act) that for the accounting years 2006 to 2012 inclusive, the following sums are reasonable & payable sums (to the extent shown) for service charges payable to Haysport Properties Limited (the Respondent) for those years in respect of Clifton Court (the Property) of which the Applicant is liable to pay the proportion stated:

Year	Item	Claimed	Reasonable	Proportion payable
2006	Fire escape maintenance	6,142.90	6,142.90	1/6
2006	Window cleaning	116.00	nil	-
2006	Management fee	675.00	250.00	1/6

2007	Management fee	1,125.00	400.00	1/6
2007	Maintenance internal	70.50	70.50	1/6
2008	Management fee	900.00	400.00	1/6
2008	Maintenance internal	138.00	138.00	1/6
2008	Cleaning common parts	545.00	Nil	-
2008	Maintenance external	34,075.00	20,000.00	1/6
2009	Management fee	1225.84	250.00	1/6
2009	Maintenance internal	123.05	123.05	1/6
2009	Cleaning common parts	435.00	60.00	1/6
2009	Sundry expenses	310.50	310.50	1/6
2010	Management fee	1480.50	250.00	1/6
2010	Maintenance internal	56.40	56.40	1/6
2010	Cleaning common parts	525.00	Nil	-
2010	Sundry expenses	9.99	9.99	1/6
2011	Management fee	1,800.00	250.00	1/6
2011	Cleaning common parts	515.00	Nil	-
2011	Maintenance external	318.40	£200.00	1/6
2011	Sundry expenses	72.00	72.00	1/6
2012	Management fee	1,008.00	250.00	1/6
2012	Maintenance internal	99.82	99.82	1/6
2012	Cleaning common parts	720.00	Nil	-
2012	Maintenance external	4,075.00	665.00	1/6
2012	Sundry expenses	86.00	86.00	1/6
2012	Insurance premium	657.23	270.00	100%

- 2) *Note. The above reflects the Tribunal's decisions only in respect of items disputed by the Applicant. In addition the other items are payable.*
- 3) Against those sums payable the Applicant is entitled to set-off the sum of £470 i.e. the sums payable are reduced by that amount.
- 4) Section 20C Order. The Tribunal makes an order that all or any of the costs incurred or to be incurred by the Respondent in connection with these proceedings are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the Applicant.
- 5) Reimbursement of fees. The Tribunal makes an order under regulation 9 of the Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003 for reimbursement by the

Respondent of Tribunal fees totalling £350 paid by the Applicant in these proceedings. That sum shall be paid by 14 June 2013.

## **Reasons**

### **Introduction & Preliminary**

- 6) This was an application made by Mr Tryska (the Applicant) in respect of a number of particular service charges over a period of seven years. The application was made under Section 27A (the Section) of the Landlord and Tenant Act 1985 (the Act) for a determination whether service charges claimed by the Respondent for the above years are reasonable and payable to the Respondent. The Applicant also applied for an order under Section 20C of the Act.
- 7) Under the Section, the Tribunal has power to determine, in summary, whether a service charge is reasonable and payable. The full provisions of the Section are set out in the appendix to these reasons.

### **Inspection**

- 8) On 17 April 2013 Tribunal inspected the Property in the presence of Mrs Tryska and Miss Clark. It inspected the exterior of the Property and the interior of Flat 2.
- 9) The Property comprises a block of 6 flats laid out on 3 floors constructed of brick under a tiled mansard roof. Major works, as mentioned below, had being carried out in 2008 so that the 1st and 2nd floors appeared to be in good condition for their age and character. However, the ground floor and the grounds and boundary walls were in poor condition. The brick wall fronting the road needs substantial repair, the brickwork of the building is, in some respects, missing or loose or in need of pointing; the bay window to Flat 2 has a corner metal post exposed and rusted; the front door and woodwork are in significant need of repair and decoration. The grounds give the impression that they have not received any attention for a long period of time either in terms of ordinary gardening work or clearance of rubbish. The Tribunal was unable to have access to the common hallway/stairwell. Its inspection of Flat 2 showed evidence of significant dampness on all the external walls.

### **Hearing, Representations & Consideration**

- 10) A hearing was held the same day attended by those referred to above. The Tribunal had already received, not only the information on the Applicant's application form, but also a statement of case on behalf of the Respondent dated 6th of February 2013 and the Applicant's statement of case in response.
- 11) In making its decisions, the Tribunal took into account, so far as material to the issues, all the case papers and the evidence and submissions at the hearing.
- 12) At the hearing, the Tribunal heard further evidence from Mrs Tryska and from Miss Clark. In addition to the above documents, at the prompting of the Tribunal Miss Clark obtained some further documents from her office.
- 13) Generally.
  - a) In the application form the Applicant had set out various specific complaints about the standard of services provided or the lack of services provided for the 7 years in question. The Tribunal had issued directions on 7 January 2013 which, at paragraph 2, required the Respondent by 7 February 2013 to file and serve its statement of case in reply to the application. The directions further stated "the statement of case, any supporting documents and any witness statements of witnesses of fact shall be

contained in one indexed bundle with each page numbered consecutively. The supporting documents shall include copy service charge demands in dispute and any documents served therewith, service charge statements and account receipts for any expenditure challenged and any relevant correspondence. The above documents will comprise the Respondent's hearing bundle".

- b) However, the Respondent's statement of case and documents contained very little information by way of reply to the application form. Save as otherwise mentioned below it consisted essentially of statements of budget and expenditure which did not address the issues for determination by the Tribunal. There were no witness statements for the Respondent, no witnesses were called and it appeared that Miss Clark had very limited knowledge of the Property, the issues or its history. Furthermore there was very little evidence of management attendances at the Property or to check that work had been done for invoices received.
- c) Conversely, Mrs Tryska was, in the very clear view of the Tribunal, able to provide evidence on the detailed issues and the history and to the extent that the evidence differed, the Tribunal preferred her evidence to that for the Respondent, noting that her evidence was consistent with the condition of the Property as found by the Tribunal at its inspection.
- d) Miss Clark told the Tribunal that work had not been done at the Property because of failure by tenants to pay service charge. In the event of failure, good management would require action to be taken to enforce payment. That no enforcement steps were taken is, in addition to the evident condition of the Property, a further clear indication of poor management.
- e) It was clear from the application form and representations made at the hearing that the application was now being made because the Applicant was trying to sell his flat and was having difficulty in doing so because of the condition of the Property. While that was the reason for the application it was not a factor to be taken into account by the Tribunal in making its decisions, which are based solely on the provisions of the Act.

### **The service charges**

2006

#### **14) Fire escape maintenance.**

- a) While the Applicant did not dispute the cost, he considered that he was not liable to pay the sum as the work should have been carried out before his purchase in August 2004 so that the previous owner should bear the cost.
- b) The covenants in this lease are, in this respect, no different from most other leases of similar properties and require, in terms, that the lessee pays his proportion of the reasonable cost of carrying out work provided that the service charge, or notification of an anticipated charge is demanded within 18 months of the work having been carried out. A freeholder is entitled to recover the service charge from the current lessee for work done and this does not depend on whether it could or should have been done at an earlier date. Consequently the Respondent is entitled to recover this sum from the Applicant. Accordingly the Tribunal decided the sum is payable by the Applicant.

#### **15) Window cleaning.**

- a) Mrs Tryska's evidence was clearly that nobody other than her had ever cleaned the windows in any of the years in question so that the sum is not payable. Miss Clark said that they had been told by tenants that the work had not been done so that they did not charge it in subsequent years. On the balance of the evidence the Tribunal found that the sum is not payable.

16) Management fee

- a) The Applicant considered that no management had being carried out. The Tribunal pointed out that the fire escape work had been carried out. Miss Clark said that inspections had been carried out as well as administrative matters being done in the office. She said that she inspected once every 2 months. Until prompted by the Tribunal, she had no evidence of inspections but then produced, having been to her office, inspection record sheets for 15 March 2007, 21 March 2007 and 17 March 2010 in respect of inspections by Mr Welch.
- b) The Tribunal found that some management was being carried out in terms of paying bills, accounting and other office administration. That would not be seen particularly by the Applicant but the Tribunal was satisfied it did take place and that it was properly chargeable. This included work in relation to the fire escape. The Tribunal was not satisfied that there had been any regular inspections and had no evidence from Mr Welch, nor evidence of Miss Clark's inspections. If there were inspections, the Tribunal was not satisfied that they resulted in any activity to the benefit of the Property.
- c) It is instructive to note the RICS Service Charge Residential Management Code 2<sup>nd</sup> Edition which sets out at paragraph 2.4 all the work which would normally be expected to be covered by a management fee. (The first edition of that Code, which applied until April 2009, was in similar terms in this respect). It appeared to the Tribunal that little of that was being carried out. These comments apply to all the years in question.
- d) The Tribunal accordingly found that the level of management including lack of inspections in all the years in question fell far short of that required and expected to justify a reasonable management fee. For the management work carried out in this year, the Tribunal decided that a reasonable fee could not exceed £250.

2007

17) Management fee £1,125

- a) Mrs Tryska considered that £100 would be reasonable because nothing had been done while accepting that there are administration costs to be paid for. Miss Clark said that in this year it was realised that a lot of work needed to be carried out to the Property so that they had to obtain all costings, arrange for scaffolding to be erected and so on. They had also consulted with the tenants on the costs (Mrs Tryska agreed that they had been consulted).
- b) On the basis of the level of work for this year being similar to the previous year with the addition of the extra work carried out concerning proposed major works, the Tribunal considered that a reasonable fee for this year was £400.

- 18) Maintenance internal £70.50. The accounting records show that this seems to relate to the "new lamps in common way". Mrs Tryska was unaware of replacement of lamps. While the stairwell had been dark from 2006 to July 2007, they had been told it related to an incorrect setting of the time switch. Miss Clark said they had no paperwork but believe the lamps were

replaced. Bearing in mind the evidence of darkness from Mrs Tryska, the Tribunal accepted that the work had been done and the cost was reasonable.

#### 2008

##### 19) Management fee £900

20) Miss Clark told the Tribunal that the charge included supervision of the major works. She said that the works were to cost about £34,000 and that sum had been paid out as a result of inspection by a surveyor. However, instead of covering all the works which were to include the ground floor repairs, the sum had been exhausted, no further funds were available and that the contractor had gone into administration.

21) The Tribunal noted that the entire contract sum referred to by Miss Clark had been paid out for much less than the entire contract works. This demonstrated a significant lack of supervision and therefore that the higher management fee claimed was not justified. The Tribunal decided that an overall sum of £400 was reasonable to include the limited amount of management noted in previous years.

##### 22) Maintenance internal

23) Mrs Tryska couldn't remember any new light bulbs being provided but that the lighting was always off and on. Miss Clark said that they would not have paid for them unless the work had been checked. In this instance, whether or not the work had been checked, bearing in mind Mrs Tryska's evidence, the Tribunal considered the sum had probably been properly spent and that the sum was reasonable.

24) Cleaning common parts £545. Mrs Tryska said there had been no cleaning. There was no evidence to the contrary and the Tribunal accordingly disallowed the sum completely.

##### 25) Maintenance external £34,075.

a) Mrs Tryska said that because the major works had not in the event included the ground floor, they had benefited only from the replacement of the roof and that they should only have to contribute towards that in the sum of £1,566, a 1/6 share.

b) Miss Clark produced a copy of a letter to Mrs Tryska dated 10 July 2007 setting out quotations. This showed total costs for the roof and mansard of £14,622, pointing to external walls £7260 and replacing all non-UPVC windows £13,114. The total is £34,996.

c) Using its knowledge and experience, the Tribunal estimated that allowing for the value of work not carried out under the major works contract in relation to ground floor pointing and windows and other works was about £11,000 so that a reasonable sum would be £24,000 and that was the sum to which the Applicant should contribute 1/6.

#### 2009

26) Management fee. For similar reasons as mentioned in respect of 2006, the Tribunal considered a reasonable fee was £250.

27) Maintenance internal. Mrs Tryska said she was not aware of any problems with the door lock or lights. On the balance of probability the Tribunal considered that these sums were probably properly spent and were reasonable.

28) Cleaning common parts. Mrs Tryska's evidence was that as a result of a visit from Ellis and Partners the Property had been cleaned but only 3 times so that a charge of £545 was

completely unreasonable. Miss Clark produced cleaning invoices for the period from March to December 2009. There is no satisfactory evidence that any cleaning has been carried out in any year after those 3 occasions. For the year 2009 the Tribunal decided that £60 was a reasonable sum but nil for all other years.

- 29) Sundry expenses. This relates to an asbestos survey. The survey was not produced nor was there any invoice but because of the strictness of the criminal law in relation to the absolute need for periodic asbestos surveys, the Tribunal considers it highly unlikely that the survey was not carried out and accordingly on that basis decided that a charge was payable and the sum was reasonable.

#### 2010

- 30) Management fee £1,480.50. For the same reasons as mentioned above the Tribunal decided a sum of £250 was reasonable.
- 31) Maintenance internal. On the balance of probability the Tribunal considered that these sums were probably properly spent and were reasonable.
- 32) Cleaning common parts. For the reasons mentioned above the Tribunal found the sum to be unreasonable and not payable.
- 33) Sundry expenses. The Tribunal was prepared to find that this had been incurred and was reasonable.

#### 2011

- 34) Management fee £1,800.00. For the same reasons as mentioned above the Tribunal decided a sum of £250 was reasonable.
- 35) Cleaning common parts. As above.
- 36) Maintenance external. The Tribunal, from its inspection, was not satisfied that the work had been carried out satisfactorily and considered £200 to be a reasonable sum.
- 37) Sundry expenses. See 2010.

#### 2012

- 38) Management fee £1,008. Miss Clark said that this included dealing with insurance claims. For the same reasons as mentioned above, the Tribunal decided a sum of £250 was reasonable.
- 39) Maintenance internal. On the balance of probability the Tribunal considered that these sums were probably properly spent and are reasonable.
- 40) Cleaning common parts. For the reasons mentioned above the Tribunal found the sum to be not payable.
- 41) Maintenance external.
- a) Of the total sum of £4075, £2640 relates to "supervision works, fire escape and external brickwork and pointing". This was the work carried out in 2008 in respect of which the last bill was paid on 10 March 2008. Accordingly this present charge is made well over 3 years after that work was carried out. The Tribunal has already commented above about its findings as to the standard of supervision and has accordingly allowed above for the level of supervision which it found was chargeable. Not only does the Tribunal find that this present charge of £2,640 is entirely unreasonable, the Tribunal was told by Miss Clark that no further charge was to be made beyond that levied in

2008 but in fact it has been. Furthermore, this proposed charge in 2012 is plainly made well outside the "18 month rule" specified in Section 20B of the Landlord and Tenant Act 1985 and there is no evidence whatever of the landlord protecting its position by any notice under subsection (2) of that section. Indeed, it was plain that Miss Clark was unaware of the section.

- b) Other charges in this item were for front door works £650; weeding £120. From the condition of the property as inspected, the Tribunal was not satisfied these works had been done, so they were disallowed.
- c) For these reasons the Tribunal found those elements of the entire sum unreasonable and not payable, but the remainder of £665 payable.

42) Sundry expenses. See 2010.

43) Insurance premium.

- a) The premiums are not shown on any documents produced by or on behalf of the Respondent save in relation to the proportion of premium being levied on the Applicant's account. In 2012 the premium was £657.23 payable by the Applicant as compared with previous years when it was around £270-£280.
- b) Miss Clark told the Tribunal that her firm does not deal with the insurance but is provided with the information by the landlord who had revalued the Property in 2012. However, her firm had found multiple discrepancies. She considered that the premium should be around £270 and not the charge shown.
- c) The Applicant considered that the premium should actually have gone down bearing in mind the decrease in Property values over the last 2 years while the sum charged represents a 121.5% increase in declared value of the Property.
- d) There was no evidence before the Tribunal as to the insurance value of the Property or as to how the charged premium was calculated or whether the landlord had actually tested the insurance market as would be expected. The Tribunal noted that Miss Clark considered £270 to be reasonable in the absence of any explanations and on the basis of previous years, the Tribunal agreed.

Other matters

44) Interest.

- a) The Applicant also sought a determination from the Tribunal as to the amount of interest charged and indeed whether interest was payable.
- b) The jurisdiction of this Tribunal is set out in Section 27A of the Act as set out in the appendix to these reasons. "Service Charge" is defined in Section 18 of the Act as being "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 the relevant costs".
- c) The Tribunal considers
  - (1) Interest is payable, if at all, for not paying service charge; it is not paid for services, etc.



(2) Additionally, that as the rate of interest is specified in this lease at 5% above National Westminster bank's base rate, *if it could be regarded as a service charge at all*, it is not in this lease a variable service charge within the meaning of section 18 (because it is to be calculated at a specified rate) and therefore the Tribunal has no jurisdiction. That issue may well be a matter for the court but not this Tribunal.

45) Set-off £470.

- a) The Applicant seeks to set off against liability for the major works charges a sum of £470 which he spent in 2011. He attached a copy of a report dated 25 June 2011 from Castle Construction and Damp Cure for "re-fix loose bricks above window head and re-point an area of brickwork." The Applicant's statement showed that in 2009 Mr Ellis and Mrs Sarah Rose (as Miss Clark then was) visited the Property after several requests and they were shown gaps in the pointing, missing brick over the front Bay and the exposed metalwork of the front bay; further that Mr Ellis promised that the problems would be rectified within the next 2 months. The statement also notes, against a photograph of the lounge window, that "despite numerous phone calls, emails and letters asking for this damage to be repaired it remained like this for 5 years allowing rain and the elements to cause further damage".
- b) The Tribunal is satisfied that had the major works contract in 2008 been effectively supervised and further that if in 2009 the work had been rectified as promised by Mr Ellis, it would not have been necessary for the Applicant to incur this cost of £470. These costs are a direct failure to complete that contract. In the circumstances the Tribunal found not only that the cost incurred is reasonable but that it is also right that the Applicant be entitled to set off this sum of £470 against any remaining liability for payment of service charge.

Section 20C order.

46) The Applicant also seeks an order that any costs that the Respondent may incur or have incurred in relation to these Tribunal proceedings shall not be recoverable by way of service charge against the Applicant. The Tribunal does not consider that the terms of the lease would enable any such costs to be recovered by way of service charge but in case it is wrong about that it considered whether to make such an order. The Tribunal has no doubt that these proceedings by reason of poor management of the Property over many years and that it would be entirely wrong for the Applicant to be further penalised by facing a claim for costs of these proceedings by the Respondent. The Tribunal accordingly made the order.

Re-imbusement of fees.

47) The Tribunal has power under regulation 9 of the Leasehold Valuation Tribunal's (Procedure) (England) Regulations 2003 to require any party to the proceedings to reimburse any other party to the proceedings for the whole or part of any fees paid by him in respect of the proceedings. The fees incurred by the Applicant total £350. For the same reasons as set out in the preceding paragraph, the Tribunal made such an order.

The Tribunal made its decisions accordingly.

[Signed] MJ Greenleaves  
Chairman of the Tribunal  
appointed by the Lord Chancellor

## Appendix

### S 27 A liability to pay service charges: jurisdiction

- (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.
- (3) An application may also be made to a leasehold valuation Tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs and, if it would, as to—
  - (a) the person by whom it would be payable,
  - (b) the person to whom it would be payable,
  - (c) the amount which would be payable,
  - (d) the date at or by which it would be payable, and
  - (e) the manner in which it would be payable.
- (4) No application under subsection (1) or (3) may be made in respect of a matter which—
  - (a) has been agreed or admitted by the tenant,
  - (b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,
  - (c) has been the subject of determination by a court, or
  - (d) has been the subject of determination by an arbitral Tribunal pursuant to a post-dispute arbitration agreement.
- (5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.
- (6) An agreement by the tenant of a dwelling (other than a post-dispute arbitration agreement) is void in so far as it purports to provide for a determination—
  - (a) in a particular manner, or
  - (b) on particular evidence,of any question which may be the subject of an application under subsection (1) or (3).
- (7) The jurisdiction conferred on a leasehold valuation Tribunal in respect of any matter by virtue of this Section is in addition to any jurisdiction of a court in respect of the matter