Residential Property
TRIBUNAL SERVICE

Case Number: CHI/18UH/LIS/2007/0014

RESIDENTIAL PROPERTY TRIBUNAL SERVICE

SOUTHERN LEASEHOLD VALUATION TRIBUNAL

PROPERTY: Flats H1, H2, G4, F4, and G3 Lee Cliff Park, Warren Road, Dawlish Warren, Devon, EX7 0NE

Applicant: John Aspinwall (H1)
Margaret Violet Reeves (H2)
Robert Beaven (G4)
Kenneth Smith (G1)
Peter Duncan Griffin (F4)
Malcolm Smith (G3)

and

Respondent: Carr & Madge Limited

In The Matter Of

Section 27A and 20C of the Landlord and Tenant Act 1985 (Liability to pay service charges)

Tenants' application for the determination of reasonableness of service charges for the year 2005/2006.

Tribunal
Mr A Cresswell (Chairman)
Mr T E Dickinson BSc FRICS
Mr J Tarling MCMI

Hearing: 5 September 2007 at Committee Room, Exmouth Town Council

DETERMINATION

The Application

1. On 21 April 2007, John Aspinwall, the owner of the leasehold interest in Flat H1, made an application to the Leasehold Valuation Tribunal for the determination of the reasonableness of the service charge costs claimed by the landlord, Carr and Madge Limited for the "year" 1 October 2005 to 20 July 2006 (the latter date reflecting the sale by the landlord of the freehold to a new landlord). Subsequently, the other four applicants have asked to be added as applicants.

Preliminary Issues

2. There was a request made by Malcolm Smith, owner of the leasehold interest in Flat G3, on 7 May 2007 to be joined as a respondent. The Tribunal has concluded that Mr Smith's request was made in error, as he has had no part as a respondent in levying a service charge. In the circumstances, we have treated him as an applicant and as a party to the proceedings.

Inspection and Description of Property

3. The Tribunal inspected the property on the morning of 5 September 2007. Present at that time were the present owner of the freehold, Mrs Parmigiani, Mr Aspinwall, Mrs O'Connor (K7), Mr Murray (K11), and Mark (maintenance). The Tribunal made it clear that the purpose of the inspection was not to receive evidence, but rather to inspect relevant features of the property. The Tribunal saw the laundry, the drains, the car park and the water meters amongst other features of the site. The site in question consists of 3 blocks of flats, A, B and C (all of the applicants residing in Block C); there are communal gardens, a car parking facility, a reception block, laundry and storage block. Also on the same site are 14 chalets and the freeholder's house.

Summary of the Tribunal's Decision

4. Under Sections 19 and 27A of the Landlord and Tenant Act 1985 (as amended) service charges are payable only if they are reasonably incurred. The Tribunal has determined that, subject to limited exceptions, the landlord has not demonstrated that the charges in question were all reasonably incurred, and so, parts of those charges are not payable by the applicants. The Tribunal lists below the charges originally requested and those which we have found to be reasonable and, therefore, payable:

ITEM	Water Rates	Insurance	Wages	Drainage Repairs	Survey	Grounds/Car Park
SOUGHT	£1149	£1536	£512	£5000	£1169	£1000
PAYABLE	£1149	£1078.30	£512	£240.79	£26.36	£675.90

Each tenant is liable to pay one tenth of the above service charges.

5. The Tribunal allows the tenant's application under Section 20c of the Landlord and Tenant Act 1985, thus precluding the landlord from recovering its cost in relation to the application by way of service charge.

Directions

6. Directions were issued on 27 April 2007 and 1 June 2007. These directions provided for the matter to be heard on the basis of written representations only, without an oral hearing, under the provisions of Regulation 13 of the Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003, as amended by Regulation 5 of the Leasehold Valuation Tribunals (Procedure) (Amendment) (England) Regulations 2004.

7. The Tribunal directed that the parties should submit specified documentation to the Tribunal for consideration.

8. This determination is made in the light of the documentation submitted in response to those directions.

The Law

9. The relevant law is set out in sections 18, 19 and 27A of Landlord and Tenant Act 1985 as amended by Housing Act 1996 and Commonhold and Leasehold Reform Act 2002.

10. The Tribunal has the power to decide about all aspects of liability to pay service charges and can interpret the lease where necessary to resolve disputes or uncertainties. Service charges are sums of money that are payable – or would be payable - by a tenant to a landlord for the costs of services, repairs, maintenance or insurance or the landlord's costs of management, under the terms of the lease (s18 Landlord and Tenant Act 1985 "the 1985 Act"). The Tribunal can decide by whom, to whom, how much and when service charge is payable. A service charge is only payable insofar as it is reasonably incurred, or the works to which it related are of a reasonable standard. The Tribunal therefore also determines the reasonableness of the charges.

Relevant Lease Provisions

11. We were provided with a copy of a lease of one of the flats. The lease provides that the tenant should pay a service charge, which is defined in Paragraph 2 of the Fifth Schedule to the lease:

THE FIFTH SCHEDULE
Covenants by the Lessee with the Lessor

"The Lessee shall pay by way of further additional annual rent a charge for services provided by the Lessor ("the Service Charge") calculated and payable in accordance with the terms of the Seventh Schedule hereto".

THE SEVENTH SCHEDULE
The Service Charge

1 The Service Charge shall consist of:

1.1 10% of the actual costs to the Lessor of providing all or any of the services and defraying the charges and expenses specified in Part I of the Sixth Schedule hereto; and

1.2 2% of the actual costs to the Lessor of providing all or any of the services and defraying the charges and expenses specified in Part II of the Sixth Schedule hereto;

THE SIXTH SCHEDULE

Covenants on the part of the Lessor

PART 1

1 The Lessor shall so often as reasonably required

1.2 maintain repair rebuild and renew .... all cisterns tanks sewers drains pipes .... not solely used for the purpose of a Flat

3 .... shall keep the Common Parts .... in a good and tenantable state of repair decoration and condition

8 The Lessor shall employ such surveyors builders engineers tradesmen and other professional persons as may be necessary or desirable for the proper maintenance safety or administration of the Building

PART II

1 The Lessor shall pay the water rates from time to time payable in respect of the Property ....

2 The Lessor shall maintain cleanse and keep in good condition the parking area drives footpaths garden ground external and boundary walls fences and other appurtenances and amenities of the Property save such as are exclusively incorporated with the demise of any Flat

3 The Lessor shall maintain a policy of insurance for the Common Areas in respect of third party public and occupiers liability in such sum as the Landlord shall deem appropriate from time to time

5 The Lessor shall employ such surveyors builders engineers tradesmen and other professional persons as may be necessary or desirable for the proper maintenance safety or administration of the Property

Service Charges In Issue

12. The Applicants have asked the Tribunal to determine their liability to pay under a number of heads identified in the service charge presented by the Respondent for the period 1 October 2005 to 20 July 2006, being those for Water Rates, Insurance, Wages, Drainage Repairs, a Survey, and Grounds/Car Park. The Applicants detail their concerns in a Statement of Case and the Respondent details its response in a Contest to Application.

13. Water Rates.

The Applicants argue that there are 2 water meters, one of which supplies water to the 10 flats in Block C, and 6 of the chalets and 13 caravans also on the site. They say that the Respondent has indicated in correspondence that it has effected an apportionment between all of those receiving water from the particular meter save when the chalets have been unoccupied; this, however, is not apparent from the accounts. The applicants query whether they are paying for the other 8 chalets, laundry room, office and landlord's own house. They say that the new landlord, Mrs Parmigiani, has told them that the Respondent has in the past received water free of charge. They suggest that a sight of the Respondent's water bill would resolve this.

The Respondent says that the charge for each flat in Block C was £114.90 yet for each flat in Blocks A and B it was £168.91, which indicates that the charge for Block C is reasonable. They say that the total invoice for the particular meter was £2496.71, and that each invoice from the water supplier has been reviewed and apportioned by management on a fair and reasonable basis. They deny that the meter covers also the other 8 chalets, laundry room, office and landlord's own house. They say that there are no water meter readings for the private house.

The Tribunal saw that there are two water meters at the site, one at the front gateway, and the other outside the site at the bottom end of Block C. The Tribunal had been provided with bills for the 2 meters. In the absence of more technical information, the inspection suggested that the meter at the bottom end supplies the 10 flats in Block C, and 6 of the chalets, (and, previously, some 13 caravans on what is now another adjacent site). The serial number of this meter is 95M079761. The Tribunal decided that a reasonable approach to attribution of the costs associated with this meter had been made by the Respondent. A division of the total bill of £2025.29 by 16 (10+6) gives a figure in excess of that claimed.

14. Insurance.

The Applicants contend that the same invoice as last year was supplied, dated 5 December 2006. The tenants have been charged 91% of the total. The policy covers 33 flats, 14 chalets including their contents, laundry room, office/reception, garage, store, landlord's public liability insurance. They should only have to pay for the insurance of the flats and a percentage of the

communal laundry room. Last year the apportionment was 82% and a Leasehold Valuation Tribunal had said that the apportionment should be 51%. The Applicants had supplied that Tribunal with alternative quotations of £2475 and £3784.

The Respondent states that the invoice is in fact dated 5 December 2005. After a refund for the period beyond 20 July 2006, the amount was £5068 which was divided equally between each flat at £153.60. The company apportioned on the basis of square footage on the advice of its brokers, weighted to account for the difference in value of flats and chalets, and the property covered by the policy. It queries what the level of cover was in the alternative quotations.

The Tribunal noted that the letter from the brokers was dated 5 December 2005 as the Respondent stated. However, no other documentation was produced. The Respondent had not commented on what the Applicants had asserted as to the nature of the cover provided. The Tribunal noted that the Respondent was entitled to charge for third party public liability insurance within the terms of the lease. In the circumstances, the Tribunal decided that a reasonable charge would be £1078.30 (£5068 divided by 47, i.e. 33 flats plus 14 chalets and then multiplied by 10 flats)

15. Wages.

The Applicants ask how the figure of £1054 is reached.

The Respondent says that the break-down of the hours relates to cleaning, pressure washing, leaks etc, and the replacement of weather boards. No charge is included for work by Mr Seaton on Block C.

The Tribunal considered that this was a reasonable charge given the Respondent's explanation as to how it was quantified.

16. Drainage Repairs.

The Applicants state that the drains were repaired some years ago, and covered by insurance and suggest that the claim should be examined. They say that the drain takes sewage from Block C and 6 chalets and the caravans and argue that the cost should be in communal charges. They argue that they have been charged twice for these repairs as £4125 of last year's reserve of £5981.14 was retained to cover a disputed invoice with Drainage

Direct, but the Respondent had told them that £5000 was paid in full settlement. They argue that only £1250 of the works of £9430 relates to the drains; the remainder was spent on the provision of 4 car parking spaces for the Respondent, and the Respondent's survey refers specifically to this. They say that Drainage Direct has said that the majority of work was the provision of additional car parking spaces and that the Respondent had told Drainage Direct that the work on the drains was part of an insurance claim.

The Respondent states that the insurance claim was for a different area of drain. At the point of damage, only Block C is serviced. The work relates to Block C and should not be included in communal charges. There has not been a double charge; there is a sum of £5981.14 to be returned to all tenants. The works were not to provide for additional car parking spaces; that was a consequence of the necessary work. The £5000 paid to Drainage Direct was to settle a larger disputed account for the works.

The Tribunal examined the apparent course of the sewers. It also considered the terms of the lease detailed above. There was no reason either in terms of the lease, or, indeed, the geography of the site to suggest that this should be a cost falling to the tenants of Block C. The cost of sewer repairs outside the buildings is clearly a communal cost. An examination of both the account from Drainage Direct and the Surveyor, David C Neale, led the Tribunal to conclude that only certain of the works carried out by Drainage Direct could be recoverable as a service charge as being works authorised by the terms of the lease. Accordingly, the Tribunal finds reasonable and payable costs associated with the investigation and repair of the sewer, and the damage caused by tree roots. The tenants cannot be required to pay for the other work, including the provision of 4 extra parking spaces. The Tribunal used the expert evidence of the Respondent's surveyor, Mr Neale, to arrive at the reasonable costs of the work truly associated with the sewer repair, which came to a total of £1131.73. This amount is the sum of the items listed on page 1 of Mr Neale's Report dated 7th February 2006 (page 91 of the Bundle) The Tribunal divided this figure by 47 and multiplied it by 33 so as to ascertain the figure payable by the tenants of the flats, a figure of £794.62, which equates to £240.79 for Block C (£1131.73 divided by 33, multiplied by 10).

17. Survey.

The Applicants query whether this should be charged to the service charge account. They say that it was for the Respondent to dispute the Drainage Direct account, most of which did not relate to the flats.

The Respondent argues that the survey was needed to support the claim that Drainage Direct's account was excessive.

The Tribunal decided that this was a charge properly made by the Respondent within the terms of the lease, but that, like the preceding charge, it would only be reasonable if more widely apportioned between all those premises which benefited. The Tribunal has found that £1131.73 was the cost of the work truly associated with the sewer work. That figure represents 10.6% of the Drainage Direct total account of £10680. The Tribunal has decided that a similar percentage calculation should apply to the Survey report, which looks at the totality of the Drainage Direct account. Accordingly, the Tribunal applied 10.6% to £1169, which reduced it to £123.91, and then divided that figure by 47 and then multiplied by 10 to arrive at £26.36, the reasonable charge for Block C.

18. Grounds/Car Park.

The Applicants suggest that a claim of 200 hours cannot be correct for the 42 week period. There is a grassed communal area which needs cutting and borders which need tending. The present landlord has charged £125 for 71 days. There is little work in the winter. The Cot Store is a store used solely by the landlord. The re-tarmac of the car park was only for the benefit of the landlord, following the creation of 4 additional car parking areas for the landlord's own use. The spin dryer is the property of the landlord. The lease gives use of the laundry, but all income is retained by the landlord, and the laundry should be self-financing.

The Respondent argues that this charge is fair and that only 66% is allocated to the flats overall. The Cot Store is owned by Mr Aspinwall and is an extension to his kitchen. "Cot Store" here is an electricity meter which supplies electricity to the lights of Block C. The re-tarmac was needed after the Drainage Direct work, but was charged to communal charges as there was an element of improvement. The laundry is not a business but an amenity which carries costs.

The Tribunal decided that 200 hours work on the site grounds over 42 weeks was a reasonable number of hours, having seen the site, and allowed £1600. There was no detail as to what the charge for the Cot Store entailed, and this charge was disallowed for that reason. The retarmac work included an element which was not for the benefit of the tenants, and this was reduced by three quarters to £452.50. The Tribunal saw the laundry room, which appeared to be run as a business, with a slot machine on the spindryer. If there was to be a recharge to the tenants in respect of the spindryer, they would effectively be paying twice, and that charge was disallowed for that reason. The Respondent had calculated this element of the service charge on the basis of 2% and the Tribunal did the same; the new figure of £3379.50 @ 2% equates to £675.90 for Block C, and is the sum that the Tribunal allows.

Section 20c Application

19. The Applicants have made an application under Section 20C Landlord and Tenant Act 1985 in respect of the Respondent's costs incurred in these proceedings. The relevant law is detailed below:
Section 20C Landlord and Tenant Act 1985: Limitation of service charges: costs of proceedings

(1) A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a ... ... leasehold valuation tribunal, ...are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application.

(3) The ... tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances.

20. The Tribunal allows the tenant's application under Section 20c of the Landlord and Tenant Act 1985, thus precluding the landlord from recovering its cost in relation to the application by way of service charge. The reason for this is that there has not been sufficient reaction by the Respondent to the guidance given to it by the earlier decision of the Tribunal as to the assessment of service charges, and there appears to have been little effort to resolve the issues in this case short of a determination by the Tribunal.

A. Cresswell

Andrew Cresswell (Lawyer Chairman)
Date: 25 September 2007
A member of the Southern Leasehold Valuation Tribunal
Appointed by the Lord Chancellor