

RESIDENTIAL PROPERTY TRIBUNAL SERVICE

SOUTHERN RENT ASSESSMENT PANEL AND LEASEHOLD VALUATION TRIBUNAL

Case No: CHI/46UD/LSC/2006/0105

BETWEEN :

MR IVAN HAWES & OTHERS

Applicants/Leaseholders

and

FAIRHOLD HOMES (NO. 2) LIMITED

Respondent/Landlord

Premises: Archer's Court
Salisbury
Wiltshire (the Premises)

Tribunal: Mr D Agnew LLB LLM (Chairman)
Mr R Potter FRICS
Mrs M Phillips JP

ORDER & REASONS

ORDER

UPON HEARING Mr Hawes (Flat 42) and Mrs Sivier (Flat 18) on behalf of the Applicants and

UPON HEARING Counsel for the Respondent on 6th February 2007 it is ordered as follows:-

1. The amount that the Respondent may charge the Applicants by way of service charge for the reasonable rent for the House Manager's flat at the Premises shall be:-

Service charge year	
2001/2002	£7500
2002/2003	£7700
2003/2004	£7950
2004/2005	£7750
2005/2006	£8200
2006/2007	£8750

2. The parties shall endeavour to agree the amount to be refunded and to whom consequent upon paragraph 1 of this order.
3. There shall be permission to the parties to apply to the Tribunal for a further determination in default of agreement under paragraph 2 above.
4. There shall be an order under Section 20C of the Landlord & Tenant Act 1985 such that the Respondent shall not be able to recover the costs of these Tribunal proceedings from future service charges.

REASONS

1. Background

- 1.1 On 9th October 2006 Mr Hawes, the tenant of Flat 42 at the Premises made an application to the Tribunal under Section 27A of the Landlord & Tenant Act 1985 seeking a determination as to the reasonableness of service charges levied in respect of what was described as "the rent" relating to the House Manager's flat at the Premises.
- 1.2 By an order of 13th November 2006 and amended on 16th November 2006 all the lessees of the 70 leasehold flats at the Premises save for Flats no. 29 and 33 were added as parties to the proceedings as Applicants.
- 1.3 The service charge years in question were 2001/2 to 2006/7 inclusive. The amounts charged for the House Manager's flat in each year were as follows:-

2001/2	£10951
2002/3	£11494
2003/4	£11838
2004/5	£12623
2005/6	£14561
2006/7	£16693

2. The Premises

- 2.1 The Tribunal inspected the Premises immediately prior to the hearing on 6th February 2007.
- 2.2 They comprise two blocks of flats for people of 55 years of age or above and constructed of brick under a tiled roof with upvc double-glazing, built in approximately 1997. The Premises are situated on a busy and noisy main road and are also directly adjacent to a railway line. There are a good number of car parking spaces and very pleasant gardens which lead down to one of the rivers which flow through Salisbury. The Tribunal was impressed by the quality of the Premises and their maintenance.

- 2.3 The Tribunal was able to look at the House Manager's flat. This had two bedrooms, electric storage heating, a modern well equipped bathroom and small fitted kitchen. It was generally accepted by the parties that this flat was in a noisy location and the Tribunal experienced this with the windows open during the inspection.
- 2.4 There is a nicely furnished residents' lounge with small kitchen off, and a well equipped laundry room with 4 washing machines, 3 tumble dryers, a spinner and an ironing board.
- 2.5 Although the Tribunal was unable to see it during the inspection there is apparently a guest apartment for the use of those visiting leaseholders at the Premises for which there is a charge.

3. The Leases

- 3.1 The leases set out in the Fourth Schedule the Service Charge Calculation to which the demise is made subject by clause 3.2.3 of the lease.
- 3.2 By clause 1.2 of the Fourth Schedule "Annual Service Cost" is defined as "the total of all costs expenses overheads payments charges loss and outgoings suffered by or on behalf of the landlord in any year in connection with the provision of all services in the performance of its covenants ... " and by clause 1.2.11 this is stated to include "the costs of providing and maintaining in repair and good decorative order accommodation for the House Manager(s) together with rent(s) in respect thereof."

4. The Law

- 4.1 Section 27A of the Landlord & Tenant Act 1985 ("the 1985 Act") states as follows:-

The Leasehold Valuation Tribunal may determine whether a service charge is payable and, if it is, determine:

- (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
- (e) the manner in which it is payable.

- 4.2 By Section 19 of the 1985 Act service charges are only claimable to the extent that they are reasonably incurred and if the services or works for which the service charge is claimed are of a reasonable standard.

5. The Applicants' case

- 5.1 The Applicants' case was that the rents charged for the House Manager's apartment from 2001/2 onwards had been unreasonably high. The budget for that year

provided for this rent to be £7567 but in fact they were charged £10951. They said that in 1997 when the properties were built two bedroom flats in the Premises were being sold for approximately £85,000. In 2006/7 this had risen to over £240,000 whereas rents had not risen at such a rate. They suggested that average rents for two bedroom flats in Salisbury were £6300 pa in 2001/2, £6720 pa in 2002/3, £7200 pa in 2003/4, £6900 pa in 2004/5, £7500 pa in 2005/6 and £7800 pa in 2006/7. They had ascertained these figures from looking back at the properties advertised in the local paper for the respective years in the records at the library, but they were unable to produce the evidence to the Tribunal. They said that this tied in with the evidence of lettings supplied by the Respondent where the asking rents for two bedroom flats was mainly in the range £600 to £680 per month.

- 5.2 They further argued that as the leaseholders paid for all the maintenance, insurance and electricity costs for the House Manager's flats the rent paid to the landlord was therefore pure profit, which would not be the case in an ordinary Assured letting.
- 5.3 On 20th December 2006 Mr Hawes had received an unsigned letter from the freeholder by their Property Manager, Ms Louise Smith, which made certain proposals to adjust the amount for the rent for the House Manager's flat from 2001 to 2007. This was an open letter. It explained that the Respondent had not previously been aware that there was a "considerable difference in value" between the cottages (which are not part of the Premises) and the flats at Archer's Court and that this had not been taken into account when the capital value of the House Manager's flat had previously been calculated. It also proposed a rent for 2006/7 of £7,800 (which was the same figure as the Applicants had put forward as to the appropriate rent for 2006/7 in their statement of case.) The figures proposed to be adopted by the Respondent then went on to deduct from the refund due to the leaseholders if their rental figures were accepted, the amount that had been received into the leaseholders' account from letting the guest apartment which had not, as a concession, previously been taken by the Landlord.
- 5.4 In the Respondent's statement of case dated 11th January 2007 it was said that the Applicants had "flatly rejected the proposal out of hand without any explanation as to why."
- 5.5 The Applicants denied that they had ever rejected the proposal: indeed as far as the rental figures were concerned, they were happy with them. The reasons why they had not accepted the proposals were:-
- 1) that the letter came from the Landlord's manager direct when they had previously been told to have all dealings through their solicitor.
 - 2) the letter was not signed and therefore the Landlord could have resiled from the proposals
 - 3) the proposals were couched in such a way that they would have involved acceptance of the recoupment by the Landlord of the income from the guest

apartment which had previously been allowed to the lessees by way of concession. The Applicants accepted that the concession could be withdrawn but only for the future and that if it had been allowed in the past and service charges demanded on that basis it could not retrospectively be varied.

5.6 The Applicants had, they said, been given no cause to suppose that the rent proposals would be withdrawn if the Tribunal hearing had to go ahead. They thought it would be a matter of negotiating on the question of the guest apartment and of trying to come to some understanding as to the basis of future charging for the House Manager's flat prior to the hearing. They were not willing to agree the package proposed but could have accepted part of it concerning the past rents. There was also a discrepancy between the proposals of 20th December 2006 and the Respondent's statement of case in that the letter was silent on the rent for the current year.

6. The Respondent's case

6.1 The Respondent made it clear that the offer contained in the letter of 20th December 2006 had not been accepted and had now been withdrawn.

6.2 The Respondent submitted that the Applicants were looking for some "safeguard for future years" by way of a determination by the Tribunal as to the method that the Respondent may use to calculate the charge for the House Manager's flat rent. The Respondent submitted that the Tribunal has no jurisdiction to determine the method by which the rent for the House Manager's flat is to be calculated in future years. The limit of the Tribunal's jurisdiction is to consider the reasonableness of each rent as and when a charge is proposed or claimed.

6.3 As to the reasonable rent for the House Manager's flat the Respondent submitted that the Tribunal should have regard to the following:

a) a part of the factual matrix when construing the lease was that there was a Purchaser Information Pack supplied when the first purchasers entered into their lease which provided, amongst other things:-

"They [the service charges] include also rent on the House Manager's flat ownership of which is retained by the Landlord. The rent is calculated as a reasonable commercial rate of return on the initial open market value of the House Manager's flat, and is reviewed annually." It was submitted on behalf of the Landlord that this indicates the intention of the parties at the time when the lease was entered into.

b) the recoverable charge should properly reflect the cost of providing the flat to the Respondent.

c) any hypothetical letting should reflect the fact that the Respondent is bound to retain the flat and cannot by disposal or otherwise derive a return on the capital value of the accommodation. At least this was the Respondent's Counsel's opening position as set out in his "Opening Note" but during the course of the hearing this

seemed to shift somewhat. As it was his witness's evidence that the rental was worked out by taking the average capital value of sales at the premises during the previous year, applying a discount of 10% thereto and then taking 7.5% of the resultant figure as the rental figure, the Respondent's Counsel was constrained to argue that the House Manager's flat could be sold on the open market if a proportion of the residents agreed.

- 6.4 The Respondent's witness was Mr Ian Rapley who is the Respondent's Acquisition Manager and the person responsible for setting the rent for the House Manager's flats at the 365 developments owned by the Company. He explained the method of calculating the charge for the House Manager's flat over the years in question as set out in paragraph 6.3 above. He also acknowledged that it would seem that erroneously he had previously included in the calculations the higher sales figures for the cottages which shared the same site as the Premises. He had only recently become aware of this. He explained that the figure of £7800 for the current year which had been proposed in the letter of 20th December had not meant to reflect what he considered to be the true rental value of the flat but a figure which he believed the leaseholders would accept. This was proposed in order to try to avoid incurring the cost of having to attend the Tribunal. He thought it reasonable that part of the package on offer was that there should be a recoupment of the income from the guest apartment to offset the refund proposed to the leaseholders. He considered that the examples of rents for two bedroomed flats in Salisbury which the Respondent had itself placed before the Tribunal were not truly comparable with Archer's Court which was superior to those examples.

7. The Determination

- 7.1 In determining the amount which the leaseholders should be required to pay for the House Manager's flat at the Premises the Tribunal first looked at the provisions of the lease. The only specific reference to the obligation of the leaseholders to pay this item is in paragraph 1.2.11 of the Fourth Schedule. This simply refers to "the rents" in respect of the House Manager's flat. There is no further explanation in the lease as to what is meant by "the rents." If there had been no other indication of the parties' intentions it is likely that "rents" would be construed as meaning a reasonable rent for the House Manager's flat such as could be obtained under an Assured tenancy. The Tribunal was enjoined however by the Respondent's Counsel to take the Purchaser's Information Pack into account when construing the lease in this regard. It was conceded by the Respondent's Counsel that this document is not imported into the lease by any means but he said that it showed the intention of the parties to the lease and therefore should aid construction. When one considers the wording of the Purchaser's Information Pack on this point, however, it is very vague and unclear as to its meaning. First, there is no formula set out enabling anyone to

calculate the rent that will be charged. It says that "the rent is calculated on a reasonable commercial rate of return on the initial open market value...." If the sentence stopped there then only the initial open market value is to be taken on which to base the "reasonable commercial rent". This would preclude taking the rising capital value of the flat as time goes on. The sentence does not stop there, however, and there follows the words: "and is reviewed annually." This phrase is ambiguous. It does not necessarily mean, as the Respondent would like it to mean, that the market value is re-assessed and then used to form the basis of a new calculation each year. If that were the case there would be no need to have used the word "initial" before "open market value" in the sentence in question. It would have been sufficient to have omitted the word "initial" altogether. The sentence would then have read: "The rent is calculated as a reasonable rate of return on the open market value of the house and is reviewed annually." The Tribunal considered that there must have been some reason for the draughtsman to have used the word "initial" in the sentence. Returning to the phrase "and is reviewed annually" the Tribunal considered that this referred to the rent that would be reviewed annually and not the capital value of the flat.

7.2 As this wording was vague and unclear the Tribunal decided that very little guidance as to the intentions of the parties could be placed on it and the Tribunal was therefore driven to construe the lease simply as requiring the lessees to pay a reasonable rent for the property. This would compensate the landlord for having his capital invested in residential property. The Tribunal considered that a reasonable rent would be that which the flat might command if let on an Assured tenancy.

7.3 The Tribunal had regard to the evidence produced by the Respondent of rents being asked for two bedroom flats in Salisbury to the Applicants' acceptance of that evidence and to its own knowledge and experience. It was particularly impressed by the location, amenity, character and condition of Archer's Court and concluded that Archer's Court was probably slightly superior to some of the examples before the Tribunal. The Tribunal also bore in mind the Applicants' point that the amount paid to the Respondent for this flat was pure profit whereas this would not be the case in respect of the lettings examples of which had been given to the Tribunal.

Consequently the Tribunal decided that the following rents for the House Manager's flat should apply (inclusive of the services offered):-

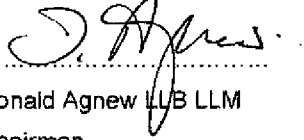
2001/2	£7500
2002/3	£7700
2003/4	£7950
2004/5	£7750
2005/6	£8200
2006/7	£8750

It will be noted that the rent for 2004/5 is lower than that for the previous year. The Tribunal's experience is that there was a decrease in rents during that year.

- 7.4 Having determined the rents for the House Manager's flat for the years in dispute in paragraph 7.3 above, it follows that a refund of service charge will be due to those leaseholders who have overpaid. It is hoped by the Tribunal that the parties will be able to agree as to who is owed what amount but should that not be possible permission is given to the parties to apply to the Tribunal to make an order to determine the matter. If that is necessary the Tribunal will need to be furnished with the dates upon which the current leaseholders acquired their flats, and, if possible, the names and addresses of all previous owners where applicable going back to 2001.
- 7.5 The question as to whether or not the income from the guest apartment should be credited to the leaseholders or retained by the Landlord is not a service charge matter, in the Tribunal's judgment, even though in the past it has had the effect of reducing the amount of service charge demanded. In any event, no such income has to-date been withheld from the leaseholders and so there is nothing upon which the Tribunal can adjudicate even if it had jurisdiction.
- 7.6 Although it will be a disappointment to the Applicants the Tribunal has no jurisdiction to determine how future rents for the House Manager's flat are fixed. If the lessees do not consider that a reasonable sum is demanded either in the budget or when the service charge is actually levied their remedy is to apply afresh to the Tribunal for a determination.
- 7.7 The Applicants had made an application under Section 20C of the Landlord & Tenant Act 1985 to preclude the landlord from seeking to recover the costs of the Tribunal proceedings from future service charge demands. The Tribunal was referred by the Respondent's Counsel to the unreported case of the Tenants of Langford Court v Doren Limited (unreported) in the Lands Tribunal where His Honour Judge Rich laid down the principles upon which the Tribunal should exercise its discretion in this regard. The conduct and the circumstances of the parties as well as the outcome should be taken into account in coming to a result that is "just and equitable" in all the circumstances. In this case the lessees have succeeded in reducing the amount they have had to pay for the House Manager's flat over the past five years and the current year. The difference between the rent charged and that now determined is significant. Although the Respondent made an offer to settle this was bound up with a requirement to offset the income from the guest apartment which was not a matter in respect of which the Tribunal had jurisdiction. Further, it did not make clear that if the package as a whole were not acceptable to the lessees that the proposed rent figures would be withdrawn. No time limit for acceptance was given in the letter. The Tribunal did not consider therefore that the Applicants can be criticised for having

declined to accept the Respondent's offer prior to the hearing. Taking all these factors into consideration, in all the circumstances the Tribunal decided that it would be just and equitable for the Respondent not to be able to seek to recoup its costs of the Tribunal proceedings through future service charges. This means in effect that the parties bear their own costs of these proceedings.

Dated this ^{2nd} day of *March* 2007



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Donald Agnew LLB LLM
Chairman