RESIDENTIAL PROPERTY TRIBUNAL SERVICE
SOUTHERN RENT ASSESSMENT PANEL
LEASEHOLD VALUATION TRIBUNAL

Residential Property TRIBUNAL SERVICE

Application for a Determination of Liability to Pay Service Charges.
Section 27A Landlord and Tenant Act 1985.
Application to Limit Landlords Cost of Recovery for these Proceedings in any Future Service Charge.
Section 20C Landlord and Tenant Act 1985.

DECISION AND REASONS

Case Number:	CHI/00HG/LIS/2009/0016
Property:	4 Mutley Court, 108 Hill Park Crescent, Plymouth, PL4 8JW
Applicant:	Mr R.A Williams 'The First Applicant' Mrs Saundra Love 'The Second Applicant'
Respondent:	Plymouth Land Limited 'The Respondents.
Date of Application:	9th March 2009
Date of Hearing:	25th August 2009
Appearances:	Mr Eric Cowsill, Solicitor for Mrs Saundra Love Miss Samantha Thomson Solicitor for Plymouth Land Limited
Witnesses:	None
In Attendance:	Mr R.A. Williams, Mrs Saundra Love Jim May Clerk to the Tribunal
Tribunal Members:	Siobhan Casey LLB (Hons) Chair Cindy Rai LLB (Hons) Lawyer Member Mr M.J Wright FRICS, FAAV
Date of Decision:	5th October 2009

Terms of Reference/Abbreviations

Landlord and Tenant Act 1985 as amended "The Act".

Mr Williams –"First Applicant" for his daughter Miss Belinda Love- Lessee of Flat 4.

Mrs Saundra Love –"Second Applicant"- Lessee of Flat 8.
–First Applicant and Second Applicant "Applicant"
Leasehold Valuation Tribunal-"the Tribunal"

All number references in brackets relate to the corresponding page number in the Hearing Bundle.

SUMMARY OF DECISION

The Tribunal determined that the Applicants have no liability to pay the service charges for the years 1996 – 2008 no service charges are payable to the Respondent by the First Applicant or the Second Applicant
The Tribunal made an order under section 20C of the Act that all 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 in any current or future service charge year

BACKGROUND TO THE APPLICATIONS

Originally two applications dated 9 March 2009 were made by the First Applicant to the Tribunal. .The first Application was made under section 27A of the Act to determine the liability of the Applicants to pay service charges. The second, ancillary to the first, was made under section 20C of the Act for an order limiting the recovery by the Respondent of its costs connected with these proceedings through any future service charges.

The hearing was held on the 25th August 2009. The First Applicant represented his daughter, Miss Belinda Love, who is the lessee of Flat 4.Mutley Court.

The Second Applicant is the lessee of flat 8 Mutley Court, and was represented by Mr Eric Cowsill solicitor.

Miss Thompson, solicitor of Fursdon Knapper solicitors represented the Respondent.

PRELIMINARY APPLICATIONS

A number of Preliminary applications were also made to the Tribunal just prior to the hearing and it was decided that these should be dealt with at the beginning of the hearing.

First considered was the application to join the Second Applicant the Second Applicant, was represented by Eric Cowsill. The Second Applicant had made an application to the Leasehold Valuation Tribunal, dated 17 August 2009 for a determination under section 27A of the Act on the 24 August 2009. Albeit that the application was made very late, the scope of the matters to be determined by the Tribunal were not significantly altered. All parties had been aware of the pertinent issues for a number of years. No party was able to argue there was any prejudice to their case by the late joinder. In these circumstances both parties 'agreed for the Second Applicant to be joined as a party to the first primary application and the second ancillary application before the Tribunal.

Next, there was an application for the First Applicant to be permitted to represent the interests of the lessee of flat 4 namely, his daughter Miss Belinda Love. On the basis that all parties had been exchanging correspondence with the First Applicant following the application and prior to the hearing and in addition over a number of historical issues, all parties agreed and the Tribunal accepted that the First Applicant had sufficient standing to be a representative on behalf of his daughter.

The Chairman of the Tribunal asked the Applicants and the Respondent if they agreed there was provision in the leases, for Flat 4 and Flat 8, to levy the disputed service charges. The two leases relevant to these applications are for the First Applicant: Flat 4 LEASE made on the 8 May 1978 BETWEEN KERPINGHAM (PROPERTIES) LIMITED, the Lessors of the one part and NICHOLAS JAMES STEVENS, the Lessee of the other part.

The relevant terms of the Flat 4 lease Clause 1 of the Lease confirms that the amount of ground rent payable is £3.00 to be paid on the 25th day of March yearly. Clause 1 also refers to the lessee having to pay 7.7% of the costs of the insurance premium. Clause 3 (1) (a) provides the Lessee covenants with the Lessor to pay the said rents as stated in the Lease.

Clause 4 (2) provides that the Lessee is to pay to the Lessor 7.7% of all costs expenses outgoings and matters mentioned in the fourth schedule hereto (hereinafter called "the Service Charge")

Clause 5 (4) – (6) lists requirements of the Lessor subject to the contributions and payments required by the Lessee as detailed in the Lease.

The Fourth Schedule of the Lease "Costs Expenses Outgoings and Matters in respect of which the Lessee is to contribute" (15) details what can be construed as service charges.

For the Second Applicant: Flat 8 LEASE made on the 15 October 1976 BETWEEN KERPINGHAM (PROPERTIES) LIMITED the Lessors and SAUDRA JANUINE SUNSET FOX the Lessee of the other part. The relevant terms of the Flat 8 Lease Clause 1 of the Lease confirms that the amount of ground rent payable is £3.00 to be paid on the 25 of March yearly. Clause 1 also refers to the lessee having to pay 7.8 % of the costs of the insurance premium.

Clause 3. (1) (a) provides the Lessee covenants with the Lessor to pay the said rents as stated in the Lease.

Clause 4. (2) provides that the Lessee is to pay to the Lessor 7.8% of all costs expenses outgoings and matters mentioned in the fourth schedule hereto (hereinafter called "the service charge")

Clause 5. (4) – (6) lists requirements of the Lessor subject to the contributions and payments required by the Lessee as detailed in the Lease.

The Fourth Schedule of the Lease "Costs Expenses Outgoings and Matters in respect of which the Lessee is to contribute" (15) details what can be construed as service charges.

Both parties agreed that clause 4(2) of both leases provided authority for the Respondent to levy service charges. The First Applicant was to pay a contribution of 7.7%of the Respondent's service charge costs. The Second Applicant was to pay a contribution of 7.8% of the Respondent's service charge costs.

STATATORY REGULATION OF SERVICE CHARGES

1. Section 18 (1) of the Landlord and Tenant Act 1985 ("the Act") defines a service charge as:

"...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..."

2. Section 19 of the Act provides that:

"(1) Relevant costs shall be taken into account in determining the amount of a service charge payable for a period –

(a) Only to the extent that they are reasonably incurred, and

(b) Where they are incurred on the provisions of services or the carrying out of works, only if the services or works are of a reasonable standard;

And the amount payable shall be limited accordingly"

3. Section 27A (1) of the Act provides that:

"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 made 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"

Section 27A (4) (a) of the Act provides that "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".

Previous payment of a service charge is not in itself a bar to application.

4. Section 20C of the Act provides 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 court, residential property tribunal, or 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.

Section 20(C) (2) provides the application shall be made:

a) In the case of court proceedings, to the court before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to a county court.

b) In the case of proceedings before a residential property tribunal, to a leasehold valuation tribunal

a. In the case of proceedings before a leasehold valuation tribunal, to the tribunal before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to any leasehold valuation tribunal

5. Section 20B (1) of the Act provides states service charges must be demanded within 18 months of being incurred. Alternatively, within the same 18-month period, the tenant must be notified in writing that the costs have been incurred. Section 20B (2), any such notice must state the nature of the works the amount of the costs incurred and the proportion attributable to each tenant. Failure to comply with these requirements means that the tenant is not liable to pay the service charges.
Section 20B of the Act:

(1) If any of the relevant costs taken into account in determining the amount of any service charge were incurred more than 18 months before a demand for payment of the service charge is served on the tenant, then subject to subsection (2), the tenant shall not be liable to pay so much of the service charge as reflects the costs so incurred.

(2) Subsection (1) shall not apply if, within the period of 18 months beginning with the date when the relevant costs in question were incurred, the tenant was notified in writing that those costs had been incurred and that he would subsequently be required under the terms of his lease to contribute to them by the payment of a service charge. (Inserted by the Landlord and Tenant Act 1987, s41 (1), Sch2, para 4.)

THE INSPECTION

The Tribunal inspected flat 4, and Flat 8, on 26 August 2009 prior to the hearing. The property formed part of a large block of buildings situated on the junction of North Hill and Hill Park Crescent, comprising of twelve residential flats and maisonettes together with empty commercial premises on the ground floor level fronting North Hill.

The Property is appropriately described within the content of a letter from Plymouth City Council dated the 12th August 2009 and addressed to the First Applicant. It gives an overview of the findings of a Building Condition Assessment Report carried out by an independent surveyor on behalf of the Council. The overview reads as follows:

'The property is in a very poor condition.

The occupied parts of the property are in better condition but are suffering from the dampness from the failed neighbouring structures.

The unoccupied parts of the property are derelict and not secure.

The principal external walls are stable but it is likely that the timber lintels and floor joists in the masonry will be decaying and will need to be replaced. This will require at least partial rebuilding of the principal external walls.

The roofs, floors, services and fittings are mainly obsolete or in a failed conditions."

There were limitations to the survey as the building is in a semi-derelict condition and most of the building is unsuitable for occupation. Parts of the property were not safe to access for survey, particularly the upper floor level fronting onto North Hill and the upper parts of flats 9-12 in Hill Park Crescent. These parts of the building showed extensive decay from water ingress and fire damage. Also some of the unoccupied parts are infested with pigeons and there was a significant build up of guano which presents a health issue for surveying. The roof voids could not be inspected as the ceiling structures are rotten and weak and access is unsafe.

The valuation report states the following:

"It is evident from an inspection of the exterior.....that the buildings suffer from serious and extensive elements of disrepair and indeed for the most part are in a derelict or semi-derelict condition."

"It would seem likely that there are elements of structural movement throughout the buildings due to ground conditions, traffic vibration, and lack of ongoing maintenance over a period of many years and various other issues".

The valuer states that it is doubtful that a scheme of renovation to reinstate the buildings in their current configuration would be economically viable at the present time. The total cost of renovation is expected to be over £1,000,000.

It is our initial opinion that the most satisfactory course of action will be demolition and we are currently seeking clarification on some legal issues we have with the process from our solicitors ..."

From its inspection of the external parts of the property and a limited inspection of the common parts of the building in which the flats belonging to the Applicants were located the Tribunal accepts that the descriptions contained in that letter as accurately reflecting the Tribunal's observations. The Tribunals' inspection was limited due to the unsafe condition of the structure of the building

THE SCOPE OF THE MATTERS BEFORE THE TRIBUNAL

The combined applications requested the determination by the Tribunal of the amount of the service charges, which should be paid over the period 2001 and earlier years and then up to 2008, (see applications lodged by both Applicants).

Limitation Act and S20B (1) of the Act. The First Applicant was served with documents headed "Management Accounts" on 27 July 2006 covering the period 2001-2007 (18-24) and later, during the course of these proceedings, similar management accounts for the period 2008-2009 (35-36) were served. The Second Applicant was served with "Management Accounts", on 20 May 2005 for the period 2000-2005, (bundle72-78), but has not received any documentation of any type since

that date. The documents are not in fact Management Accounts but demands for service charges payable for the years stated in each demand

Mr Cowsill on behalf of the Second Applicant although he had already accepted that there was provision in the lease to demand service charges submitted that liability to pay depended (inter alia) upon proper delivery of accounts as prescribed by clauses 4(2), (a), (b) and(c) of the leases and the statutory requirements of the Act. He argued any claims for the years prior to 2003 were now time barred by the Limitation Act, as they were over six years old. The liability of the Second Applicant to pay service charges for years 2006 and 2007 would now be time barred by the provisions of s20 B (1) of the Act as no demands had been made within 18 months of these charges apparently being incurred. The charges levied upon Second Applicant for service charges for the years 2004, 2005 and 2008 would be recoverable if proved to be in relation to works carried out to a reasonable standard and at a reasonable cost, (Section19 of the Act).

The First Applicant also challenged the liability to pay on the basis that accounts and balances pre 2003, were now time barred and as far as later years were concerned he did not accept that any works were actually carried out and/or the Respondent had failed to follow the requirements set out in the Lease and in the Act.

The First Applicant gave evidence to the Tribunal that demands were only served upon him on 27 July 2006 at the time he was trying to sell Flat 4 at a West country Property Auction at the Novotel, Marsh Mills, Plymouth held on 27 July 2006. During the course of that auction the Respondent faxed a batch of statements to the auctioneers. The First Applicant told the Tribunal that he had never seen any of those accounts previously. He suggested that the purpose of the faxes was to make potential purchasers aware that the Respondent was alleging substantial outstanding service charges from the First Applicant including outstanding balances as at 2000 dating back as far as 1995 and for accounting periods 1st January 2001 to 31 December2006 (bundle 18-24). The Tribunal attempted to find out if there was other evidence which would satisfactorily explain the sudden appearance of the faxed information. The Tribunal were keen to examine this evidence to ensure costs were demanded in accordance with the terms of the leases and the statutory requirements of the Act.

Miss Thompson on behalf of the Respondent was requested to produce originals or copies of evidence that the service charge payments had been demanded on the yearly basis that the leases referred to. Miss Thompson was unable to supply any evidence that the demands had been served in compliance with the Section 20B (2)

The Applicants asked that the Tribunal consider both Section 27A and S19 of the Act, specifically were the works and services provided and performed to a reasonable standard and charged at a reasonable level? Essentially, this argument which was put was that the Respondent had failed to meet its obligations contained within clause 5(4)-(6), of the Leases. They challenged each item set out in the management accounts (18-24) and (73-78). They argued that they had not seen evidence of works ever being carried out as claimed in the management accounts, namely building works (18), (21), (23) and they asserted that the dilapidated state of the Property evidenced the lack of repair works and maintenance. Further they argued there had been no provision of communal electricity, management, accounting and administrative services.

The Applicants also challenged the claim for contributions to insurance costs. Clause 1 of the leases provided that insurance cover for the whole Property was to be arranged by the Respondent and the cost to be apportioned between the lessees. The First Applicant claimed that from 1989, Flat 4 had always paid their own buildings cover insurance premium. The original landlord, Kerpingham Properties had accepted this arrangement. In 1996 the freehold interest in the Property was sold to the Respondent, Plymouth Land Ltd, and they were advised of these existing insurance arrangements. In 1996, 2006, and 2008 Flat 4 suffered insured damage. On each occasion the First Applicants' insurers, 'Abacus', wrote to the Respondent requesting information due to damage having been caused by water penetration from the adjoining properties. The Respondent failed to reply to any of these letters. The First Applicants insurers paid out under the First Applicants policy and the excess was paid for by Belinda Love (First Applicant's daughter) on all three occasions; no benefit was received from the Respondents' policy.

Similarly the Second Applicant has always arranged her own buildings insurance cover. The Second Applicant has carried out repairs and maintenance when her

property has suffered damage due to water penetration. She has never received any benefit from the Respondents insurance policy. She has had to make claims upon her own policy some of which have been refused due to the Respondents continuing failure to maintain the main building. Questions were then asked about the Respondents insurance policy and the extent and scope of the cover. . The documents headed, 'Block of Flats Schedule of Insurance' (25 -30) detailed the risk address as 28 Mutley Court, North Park Crescent. The Applicants queried whether this related to the Property. The Respondent claimed that this was the Property; however no documentary evidence was provided to enable the Tribunal to clarify the address. It was apparent from its inspection that the Property had suffered fire and water damage, which had not been rectified and the Tribunal asked why no claim had apparently been made.. Items appeared in the insurance schedule 'sums insured' which did not appear relevant for this Property; for example, damage to gardens, and contents in the garden (25); Landlords garden equipment, contents temporarily removed, (28). No explanations were given by the Respondent to clarify these items except to say the policy was a 'block policy'.

QUESTION OF AN AGREEMENT WITH FIRST APPLICANT; FOR THE PERIOD 2001-2007

The Respondent argued that the First Applicant was barred from making part of his application for a determination under S27A of the Act due to a binding agreement made in November 2007, which provided that the First Applicant pay £7,200.00 for full and final settlement of all the outstanding service charges for Flat 4. The agreement was partially documented within Solicitor's communication when Flat 4 was being sold and copies of the letters between Solicitors acting for the First Applicant and the Respondent (31 to 32.) If it was accepted that there was such an agreement the Tribunal would not have jurisdiction to make a determination in relation to these service charges under Section 27A (4) of the Act. Particular reference was made by Miss Thompson to document 105 in the bundle. This was a letter written on 09 December 2008 by Matthew S Becker LLB of Curtis solicitors to the First Applicant. Miss Thompson asserted this document was proof of a settled agreement and its effect was to remove the service charges for the period 2001-2007 from the Tribunal's determination.

With regard to service charge accounts served upon the First Applicant for the period 2008 to 2009 the Respondent argues that copies of insurance schedules and "management accounts" are shown on pages 33 to 36 of the bundle. They say that in order to settle the arrears they would agree to deduct interest charged / accruing on the balance of the previous year's unpaid service charges and were willing to reduce the amount of money to contribute to insurance cover due to their own administration error on the management accounts. Taking into consideration the above comments sums due for accounting period 1st January to 31st December 2008 would be a total of £320.45: for the accounting period of the 1st January to 31st December 2009 a total of £131.16. The First Applicant did not accept this offer, challenging whether any works had actually been done or any services provided.

SECTION 20C OF THE ACT

The Applicants' position was that the Respondent should be restricted from claiming any of the costs associated with these applications in any future service charge because to do otherwise would be unfair. The Applicants allege no service charges were demanded until the auction from the First Applicant and 2005 from the Second Applicant. The Respondent failed to demonstrate or produce any evidence that demands were actually sent to either applicant except in relation to years for which any claim is now statute barred. The Applicants argue that the Respondent had failed to maintain the Property in accordance with the lessor's covenants and obligations in the lease (clause 5) The Applicants argued that the Respondent's failures had cost them a lot of money. Furthermore, the Respondent had failed to compile accounts and to provide evidence of delivery of service charge demands and the necessary information regarding the works within the prescribed period; hence they had no basis to pursue claims for works, services, insurance contributions, management, accounting or administrative fees. In all of these circumstances it would be unreasonable for the Respondent's costs of these proceedings to be borne by the Applicants.

Miss Thompson asserted this application should not be granted. Her argument is that:-

There had been a binding agreement made in 2007 with the First Applicant and that dealt with all charges up to 31st December 2007.
A fair proposal for settlement of the insurance charges for the periods 1st Jan 2008-31st December 2009 had been made by the Respondent
As a consequence the Respondent should be able to recover all of the service charges demanded.

DECISION

The Applicants requested a section 27A determination of service charges from 1996-2009 on the basis that either;
(a) the outstanding service charges had not been demanded in accordance with the terms of the leases or they were statute time barred under the Limitation Act or
(b) S20B (1) of the Act, and/ or the required information of S20B (2) of "the Act" had not been provided, or
(c) the works and services had not actually been carried out or services supplied.

If the Tribunal accepts the Applicants arguments outlined above no service charges would be payable for 1996 – 2008.

The Applicants have always maintained that the works and services charged by the Respondent purporting to be claimable, as service charges were never demanded at the appropriate time.. In addition they argued that they did not accept that the works or services were ever actually carried out. The Property is now undoubtedly in a dilapidated condition. There was no evidence from the Respondent that building works, management, accounting or administration services had been provided. In the bundle and during the Hearing numerous references were made to the Applicants requests for information and provision of copy documents from the Respondent, and that these requests were not complied with. The Applicants questioned the veracity of the entire set of so called management accounts (which were apparently service charge demands) and the authenticity of the works referred to within. They pointed out that these demands had been provided as a batch and all had a uniform appearance

casting doubt on their genuineness as true demands in relation to works and services actually provided.

It did appear to the Tribunal that the demands contained in the bundle were very uniform and sparse in terms of the information contained therein. and that in the absence of any other evidence, that these had all been prepared and delivered as one batch on the dates stated by the Applicants. Miss Thompson was invited by the Tribunal to refute this finding by producing documentary evidence of the dates these demands were despatched but she was unable to do this .The Tribunal adjourned the hearing to enable Miss Thompson to make further enquiries and to gather further evidence if she could. The dispute regarding these service charges had continued for some years and it was surprising to note that despite the length of time which had elapsed, the simple provision of copies of correspondence demanding the service charge payments and provision of required information at the appropriate time could not be provided by the Respondent.

An inspection of the building in which both flats are located was carried out by the private sector housing renewals officer, Carol Knapp, on 11th March 2009 for local taxation purposes, the report is contained in the bundle (28 to 36). The report describes a dilapidated property in a state of substantial disrepair with severe water ingress throughout the building. Flats 9, 10, 11 and 12 are all derelict and the block has suffered fire and water damage. This report, combined with the Tribunal's own observations during the course of their inspection raised further doubts whether these works etc were done. The failure to provide written documentation regarding service charges, annual service charge accounts, insurance details schedules and receipted accounts, negotiations and consultation regarding works to be carried out left the Applicants case effectively unchallenged. In the absence of evidence from the Respondent the Tribunal determined that none the service charges demanded by the Respondent and detailed in the two applications was payable neither had any evidence been provided to support that any of the purported charges listed on the demands were reasonable or had been reasonably incurred.

S27A (4)

The Respondent contended that an agreement had been reached with the First Applicant, which prevented the First Applicant from making any application in relation to charges up to November 2007.

There were a number of communications dealing with this in the bundle however they did not provide a sufficiency of evidence to assist in conclusively determining that an unconditional agreement had been reached. It was clear the First Applicant was seeking to reach a settlement on a nuisance basis in order to effect the sale of Flat 4 and the negotiations in November 2007 were for the sole purpose of achieving the sale of the flat. The First Applicant had gone some distance towards affecting a successful sale and needed the landlord's cooperation to ensure that all service charges were settled at the date of sale otherwise the purchaser would doubtless withdraw from the transaction. During the Hearing Miss Thompson had referred the Tribunal to (105), (letter from Matthew Becker of Curtis solicitors to his client, the First Applicant); asserting that this letter proved there was a settled agreement for the First Applicant to pay the sum of £7200-00 for the period 2000-2007 however, the Tribunal were of the view that this letter expressed the opinion of the writer not the instruction of the First Applicant and was insufficient to prove there was an unconditional agreement.

SECTION 20C OF THE ACT

In view of the fact that the Tribunal had determined that no service charges were due to the Respondent they ordered that Respondent should be prevented from claiming any of its costs in relation to these proceedings through any future service charges

Signed Siobhan Casey

Dated 1 October 2009