RESIDENTIAL PROPERTY TRIBUNAL SERVICE

Southern Rent Assessment Panel
Leasehold Valuation Tribunal

Case Number:	CHI/29UL/LSC/2009/0081
Property:	16 Victoria Grove, Folkestone, Kent CT20 1BX
Applicant:	Mr.F.Wilson [Mrs.L.Cascarina and Mr.J.Wild were joined as applicants on their request but did not appear and were not represented.]
Respondent:	Southern Land Securities Limited

Appearances

For the Applicant:	In person
For the Respondent:	Hamilton King Management Limited (Mrs Toson and Mr Taylor)
Date of Directions:	7th July 2009
Date of inspection:	21st October 2009
Date of Hearing:	21st October 2009
Date of Decision:	27th November 2009

Members of the Tribunal

C.H.Harrison Chairman
R.Athow FRICS MIRPM
T.J.Wakelin

BACKGROUND

1. On 13th May 2009, the Applicant applied to the tribunal for a determination under section 27A of the Landlord and Tenant Act 1985 in respect of his liability to pay certain service charges under his lease of Flat 3, 16 Victoria Grove, Folkestone, Kent.

2. By Directions issued on 7th July 2009, following a pre-trial review held on that date, the issues raised in the application were identified as the six issues which are more particularly described below.

3. The application included a request for an order under section 20C of the 1985 Act.

4. Mrs.L.Cascarina and Mr.J.Wild were joined as applicants at their request but did not appear and were not represented at the site inspection or at the hearing. They are not included in the expression 'Applicant' where it occurs in this Decision.

5. This application was heard in conjunction with three other applications by the Applicant or his wife raising substantially similar issues with the Respondent, under case references CHI/29UH/LSC/2009/0079; CHI/29UL/LIS/2009/0054; and CHI/29UL/LIS/2009/0055.

THE LAW

6. Section 27(A)(1) of the 1985 Act provides, so far as is material to this case, that an application may be made to a leasehold valuation tribunal to determine whether a service charge is payable and, if it is, the amount which is payable and the persons by and to whom it is payable.

7. Section 18(1) of the 1985 Act defines a service charge as an amount payable by a tenant of a dwelling as part of or in addition to the rent ... which is payable ... for services, repairs, maintenance, improvements or insurance or the landlord's costs of management, and the whole or part of which varies according to the relevant costs. Relevant costs are defined by section 18(2) as the costs or estimated costs incurred or to be incurred by or on behalf of the landlord ... in connection with the matters for which the service charge is payable.

8. Section 19(1) of the 1985 Act provides that relevant costs shall be taken into account in determining the amount of a service charge payable for a period-
   a) only to the extent they are reasonably incurred, and
   b) where they are incurred on the provision of services or the carrying out of works, only if the services or works are of a reasonable standard;

   and that the amount payable shall be limited accordingly.

9. Section 20C of the 1985 Act provides that a tenant may apply to a leasehold valuation tribunal for an order that costs incurred, or to be incurred, by a landlord in connection with proceedings before the tribunal are not to be regarded as relevant costs for the purpose of determining the amount of any service charge.

10. Section 21B of the 1985 Act provides, so far as material to this case, that with effect from 1st October 2007 a demand for the payment of a service charge must be accompanied by a summary of the rights and obligations of tenants of dwellings in relation to service charges and that, if it is not, the tenant may withhold payment. The section also regulates liability under a lease provision relating to non or late payment of a service charge payment which is so withheld.

INSPECTION

11. The Tribunal inspected the outside of the property (including the internal common parts of the building as a whole) during the morning of the hearing day. The Respondent did not appear.

12. The property comprises the second floor flat in a four storey terraced building built about 100 years ago, in the centre of Folkestone. The building has rendered and colour-washed walls and a concrete tiled roof. The communal parts include the footpath and steps to the main entrance door as well as the entrance hall, stairs and landing to the first and second floors.

THE ISSUES BETWEEN THE PARTIES

13. <u>The reasonableness of the insurance premiums charged to the Applicant for the service charge years from and including 2004/5.</u>

14. The Applicant's lease, which was made on 20th November 2003 between (1) J.E.Wilson and (2) the Applicant, requires the tenant to make payments of a fair and rateable proportion as reasonably determined by the landlord of the landlord's expenditure on insuring the building. Such payments are service charges for the purposes of the Landlord and Tenant Act 1985.

15. The Applicant does not dispute the 30% proportion which the Respondent has applied to this and all other heads of service charge expenditure. He does dispute the overall cost of the insurance in terms of the rate of premium (net of insurance premium tax) per £1,000 of cover. Those costs and rates for the under mentioned years are:

Year	Cover	Premium (net ipt)	£ rate (net ipt) per £1,000

2005/2006	**£259,936**	**£383.71**	**1.4761**
2006/2007	**£274,232**	**£404.81**	**1.4761**
2007/2008	**£290,686**	**£429.10**	**1.4761**
2008/2009	**£302,314**	**£446.27**	**1.4762**

16. The Applicant considered that the rate is too high and produced a quotation for 2008/2009 from AXA insurance for a portfolio of houses and flats at £0.63 per £1,000 of cover (total building cover in excess of £31.74 million). The Applicant also evidenced other quotations at about £1 per £1,000 (from Norwich Union for a period when the Applicant owned the freehold interest in the building of which the property forms part) and, from the same broker, at £0.98 per £1,000 in respect of a block of flats owned by the Applicant.

17. The Applicant submitted that both AXA and Norwich Union offered one rate across the board for houses and flats in his portfolio of properties, being about 95% houses and 5% flats.

18. The Respondent, through Hamilton King Management Limited, considered the premium rates are reasonable in the circumstances and, as Mr. Taylor put it, at least on a like for like basis as the indication of cover put forward by the Applicant. Mr Taylor explained the Respondent follows the usual procedure of obtaining quotations (copies of which were not held by Hamilton King Management Limited):- quotations are sought before the insurance expiry date, a meeting is held with the broker. The amount of insurance cover is index-linked.

19. The tribunal considers it is not incumbent on a landlord, who procures insurance on a normal basis, to seek to obtain the lowest quotation. The tribunal notes that the Applicant's lease obliges the Respondent to place insurance with insurers of repute. The tribunal considers that the insurance renewal process, described by the Respondent and not challenged by the Applicant (notwithstanding the clear challenge on the premium rate) appears to be reasonable and normal. In *Berrycroft Management Co. Ltd. V. Sinclair Gardens Investments (Kensington) Ltd.* [1996] 29H.L.R. 444, CA, there had been a change in the freehold ownership of a block of flats held under leases which allowed the landlord to select insurers 'of repute'. The new landlord placed insurance with insurers whose premiums were higher than those charged by the former landlord's insurers. The tenants argued that the new more expensive insurance had been unreasonably incurred. The Court of Appeal considered that the new premium should be regarded as having been reasonably incurred so long as the insurance was procured in the normal course of dealing, even though the premium was higher than other insurers might charge.

20. The tribunal disclosed to the hearing that, in its own general experience, a rate of £1.47 (net of ipt) for premises such as the subject property is not out of normal range. The tribunal also explained to the hearing that, having regard to its own general experience, the Applicant might be able to secure a competitive single rate for the portfolio he had

described in the context that approximately 95% of it comprises houses which typically command lower rates of premium than flats.

21. In all those circumstances, the tribunal had no evidence before it that the insurance cost was unreasonably incurred. On the basis of the rates which are actually charged, which are in line with the tribunal's own experience (disclosed to the hearing, as above), the insurance cost appears reasonable for the years tabled at paragraph 15 above.

22. Accordingly, the tribunal determines that the premiums set out in that table, being the costs incurred by the Respondent, plus insurance premium tax, for the applicable years are relevant costs. No evidence was adduced in respect of the years 2004/5 to the tribunal, which makes no determination in respect of that year.

23. The reasonableness of the amounts that the Applicant has been charged for the supply of electricity for the service charge years from and since 2004/5.

24. The Respondent has levied service charges in respect of communal electricity supply costs as set out in the table below:

Year	Overall cost	Related service charge
2005/2006	£62.66	£18.80
2006/2007	£51.52	£15.37
2007/2008	£84.30	£25.29
2008/2009	£100.91	£30.27

25. Clause 3(3)(c) of the Applicant's lease obliges the tenant ***To pay and contribute a fair and rateable proportion as reasonably determined by the Landlord of the cost to the Landlord (including fees payable to Solicitors Accountants Managing Agents and other professional fees) of compliance with Clause 5 as hereinafter contained.***

26. Clause 5 of the lease lists landlord's obligations to insure, to repair, to decorate the outside and inside parts of the building and to enforce other tenant's obligations. But the clause does not refer to the payment of any utility charges or to the lighting or heating of common parts.

27. The provisions referred to in paragraphs 25 and 26 above might not, in theory, be the only provisions of the lease which require the tenant to pay a service charge. However, it appeared to the tribunal during the hearing that, in fact, the lease does not contain one. The Respondent argued that it is entitled to treat communal electricity charges as relevant costs in reliance on the proviso to clause 3(2) of the lease which obliges the tenant ***To pay all existing and future rates taxes assessments and outgoings whether parliamentary local or otherwise now or hereafter imposed or charged upon the Demised Premises or any part thereof or on the landlord or the Tenant respectively provided always that where any***

such outgoings are charged upon the Building without apportionment the Tenant shall be liable to pay a rateable proportion thereof as reasonably determined by the Landlord. (the tribunal's emphasis)

28. In the tribunal's opinion, the reference to 'outgoings' in the proviso refers back to 'rates taxes assessments and outgoings'; but another construction could be that the word simply refers back to the same 'outgoings'. The formulation 'rates taxes assessments and outgoings' is a common one and has been held to include even unusual expenses, such as street paving works as in *Aldridge v. Ferne*, [1886] L.R. 17 Q.B.D. 212.

29. However, the Court of Appeal construes service charge provisions restrictively and judges are consequently reluctant to allow recovery of expenditure which is not clearly listed, see *Gilje v. Charlgrove Securities* [2002] L&TR. 33, where Laws L.J. held "*The landlord seeks to recover money from the tenant. On ordinary principles, there must be clear terms in the contractual provisions said to entitle him to do so. The lease, moreover, was drafted or proffered by the landlord. It falls to be construed contra proferentem ...* ." (... that is, construed against the party proffering the draft document, in any case of ambiguity). In *Earl Cadogan v. 27/29 Sloane Gardens* [2006] L.& T.R. 18 (Lands Tribunal) H.H.J. Rich Q.C. interpreted Laws L.J's test as being as follows:

a) The inclusion of the item in the service charge must emerge clearly and plainly from the words used;
b) If the words used could reasonably be read as providing for some other circumstance, the landlord will fail to discharge the onus on him;
c) This does not, however, permit the rejection of the natural meaning of the words in their context ... and this may justify a 'liberal' reading; and
d) If consideration of the clause leaves an ambiguity then it will be resolved against the landlord.

30. The substance of what one would regard, from a reasonable reading of the lease as a whole, as its 'service charge provisions' is to be found in clauses 3(3)(c) and (d) of the lease, where paragraph (d), cross-referring to the costs mentioned in paragraph (c), expressly refers to those costs as "the Service Charge". The 3(3)(c) costs are those incurred by the landlord under clause 5. Clause 5 does not refer, either expressly or by any reasonable or necessary implication, to electricity supply costs. However, a service charge for the purposes of section 18 of the 1985 Act does not have to be defined as such in the relevant lease. Under that section, a service charge is simply a variable amount payable by a tenant for services, repairs etc.. Consequently a section 18 service charge may come in many different guises; and the tribunal is not persuaded against the Respondent's construction of clause 3(2) because of the 'Service Charge' reference in clause 3(3)(d).

31. Nor does the tribunal place any reliance on test (d) in paragraph 29 above. Irrespective of whether or not there is ambiguity in the words "*outgoings are charged upon the Building*", there is no evidence before the tribunal concerning which of the original parties to the lease

put it forward in draft. Even if there were such evidence, the tribunal is conscious that the original parties were husband and wife.

32. Ultimately it is a matter of impression. The electricity costs are charges made, for the most part, by estimates and are expressly billed by the electricity company "For services at L/lords supply at 16 Victoria Grove ...". It is difficult to deny that such charges are an assessment or an outgoing charged in respect of the building. When faced with that proposition, the tribunal considers (despite the initial misgivings it had on receiving the Respondent's argument at the hearing) that a reasonable tenant, when accepting a liability to pay a proportion of "*such outgoings ... charged upon the Building*", as any tenant of this lease must necessarily accept, and when seeing the common stairs, entrance hall and landings with their lighting arrangements, would accept that the liability extends to common electricity costs. In sum, the tribunal considers that, whereas there may be some arguable margins about whether the *Earl Cadogan v. 27/29 Sloane Gardens* tests (a) and (b) are satisfied (paragraph 29 above), test (c) is satisfied in the context of the Applicant's lease so as to allow the electricity costs as relevant costs under the 1985 Act, without being repugnant to the restrictive entitlement test applied by *Gilje v. Charlgrove Securities.*

33. Accordingly, the tribunal determines that the costs stated in the second column of the table at paragraph 24 above are relevant costs for the purposes of the 1985 Act and that the Applicant's service charge liability in respect of those costs are as stated in the right column of that table. The tribunal makes no determination for the year 2004/2005 because no evidence of costs was produced for that year.

34. The Applicant's liability for and the reasonableness of interest that the Respondent has sought to charge the Applicant on unpaid service charges from and since the service charge year 2004/5.

35. A statement of account delivered on the Respondent's behalf to the Applicant refers to interest due from the Applicant to the Respondent. Clause 3(10) of the lease provides for payment of interest at a specifically defined rate which is set out in that clause. Even if, which the tribunal considers is not the case, such amounts of interest are service charges for the purposes of the Landlord and Tenant Act 1985, under section 27A(4)(a) of that Act the tribunal has no jurisdiction to determine the reasonableness of a matter which has been agreed by the tenant. Consequently, as the lease sets out an agreed rate of interest and provides for the circumstances in which that interest is payable, there is no issue of liability or reasonableness which the tribunal can determine.

36. The liability of the Applicant for any service charges to date due to the alleged non-service of statutorily prescribed information required to be served with service charge demands.

37. The Applicant submitted that no Summary of Rights and Obligations, under the Service Charges (Summary of Rights and Obligations, and Transitional Provision)(England)

Regulations 2007 had accompanied the service charge demands from 1st October 2007. The Applicant drew attention to the statutory consequences of that failure under section 21B of the 1985 Act. He referred the tribunal to the originals of certain specimen service charge demands and accompanying covering letters received from Hamilton King Management Limited which he had earlier sent to the tribunal's office from which, the Applicant asserted, the Summary of Rights and Obligations were absent.

38. Hamilton King Management Limited, on the Respondent's behalf, stated that they were non-plussed by the Applicant's assertions. They were confident that the Summary of Rights and Obligations had been pre-printed on the reverse side of the demands, notwithstanding that the reverse side of the demands copied in the Respondent's bundle did not include the Summary.

39. The tribunal examined the original papers which had been sent earlier by the Applicant. From them, it was clear that the Summary of Rights and Obligations had been pre-printed on the reverse side of the managing agents' covering letter which, itself, enclosed the service charge requests for payment.

40. Accordingly, the tribunal determines that the relevant demands for the payment of service charges were accompanied by the Summary of Rights and Obligations. (The tribunal queried during the hearing whether the Summary was in fact printed in at least 10 point, as was stated on the Summary and as is required by the 2007 Regulations. The Respondent so confirmed and the Applicant provided no evidence to the contrary.)

41. <u>The reasonableness of amounts proposed to be charged to the service charge account for the year 2009/10</u>

42. The Respondent stated that there has been no formal proposal and the Applicant confirmed that this is not an issue between the parties.

43. <u>The reasonableness of the Managing Agents management fee for each of the years in question aforesaid</u>

44. The Respondent, acting through its managing agents, has demanded annual management fees as part of the service charge from the Applicant. The annual amounts range as follows:

Year	Management fee (<u>including</u> vat)	Related service charge
2005/2006	£264.38	£79.31
2006/2007	£411.25	£123.38
2007/2008	£414.77	£124.43
2008/2009	£420.90	£126.27

45. The Applicant submitted that the management fees were unreasonable because the managing agents have a bad record of attending the building and because they do no management work, apart possibly from being involved with insurance. The Applicant would not object to the amounts charged if there had been proper management; but, as there has effectively been none, he considers no fees are due at all.

46. The Respondent submitted that the managing agent's fees are reasonable and are charged in accordance with the provisions of the lease. Hamilton King Management Limited were asked by the tribunal which provision of the lease so provides and they referred to clause 3(3)(c) referred to in paragraph 25 above but the tribunal considers it worth repeating: ***To pay and contribute a fair and rateable proportion as reasonably determined by the Landlord of the cost to the Landlord (including fees payable to Solicitors Accountants Managing Agents and other professional fees) of compliance with Clause 5 as hereinafter contained.***

47. Mrs Toson and Mr Taylor valiantly argued that clause 3(3)(c) serves to entitle the landlord to recover, through the service charge, a general management fee. But that, in the tribunal's opinion, is not what the clause says. The clause entitles the landlord to charge fees payable to managing agents (and the other specified professionals) engaged by the landlord but limited in connection with the clause 5 matters, so that such fees are part of ***the cost to the Landlord ... of compliance with Clause 5***. Clause 3(3)(c) does not say, in terms, that the tenant must contribute his proportion towards the clause 5 matters and, in addition, a management fee. Nor does any other provision of the lease refer to an obligation to pay a management fee.

48. Consequently, one must look exclusively to the managing agent's involvement in the discharge of the landlord's responsibilities under clause 5 to gauge a reasonable level of management fee for the relevant accounting period. In that context, the tribunal considers that, on the evidence before it, the managing agents do discharge basic administrative functions in respect of the building and that the overall fees charged for the relevant years are not unreasonable. Accordingly, the tribunal determines that the fees listed in the second column of the table at paragraph 44 above are relevant costs for the purposes of the 1985 Act and that the service charges referred to in the third column of that schedule are due from the Applicant to the Respondent.

SECTION 20C

49. The tribunal considers it would not be just and equitable to make an order under section 20C of the 1985 Act. In coming to that conclusion, the tribunal has not considered whether the Applicant's lease enables the Respondent to treat any of its costs in these proceedings as relevant costs for any service charge recovery.

Dated 27th November 2009

C.H.Harrison-Chairman