RESIDENTIAL PROPERTY TRIBUNAL SERVICE
SOUTHERN RENT ASSESSMENT PANEL
LEASEHOLD VALUATION TRIBUNAL

Residential Property
TRIBUNAL SERVICE

Sections 27A and 20(C) Landlord and Tenant Act 1985
Applications for a determination of liability to pay service charges and for an order preventing the Landlord from recovering the costs of the Leasehold Valuation Tribunal's proceedings

DECISION AND REASONS

Case Number:	CHI/15UB/LSC/2009/0119
Property:	Notter Mill Country Park
Applicant :	Notter Mill Country Park Owners Association Mr Alan Smith Mrs Margaret Elizabeth (Meggie) Smith and others
Respondent :	Mr Ray Hall and Mrs Celia Hall
Date of Application:	19th August 2009
Date of Hearing:	9th February 2010
Appearances:	Stephen Roberts and Margaret Smith (for the Applicant) Aaron Walder (Counsel for the Respondent) Kirsty McLennan (Solicitor for the Respondent)
In Attendance:	Celia Hall and other members of the Applicant Association
Tribunal Members:	Cindy A. Rai LLB Solicitor (Chairman) Timothy N. Shobrook FRICS Chartered Surveyor (Valuer Member) Peter Groves (Lay Member)
Date of Decision:	12th March 2010

SUMMARY OF DECISION

The Tribunal determined that the inclusion within the service charges for 2008 - 2009 of an amount for the notional rent in respect of accommodation for a caretaker was not reasonable; It is determined that the other items which the Respondent has sought to recover are both reasonably incurred and of a reasonable amount.

It therefore determines that the amount of Eight Thousand Eight Hundred and Sixty Six Pounds (£8,866), being the whole of the notionally incurred costs of the caretakers accommodation referred to in the Certificate for 2008 – 2009 should be deducted and the liability of each individual lessee recalculated following that deduction, which revised amount is hereby certified by the Tribunal as reasonable.

The Background

1 Mrs Meggie Smith who is secretary of the Notter Mill Country Park Owners Association (the Association) and the Association submitted an application to the Tribunal on the 19th August 2009

a. under section 27A of the Landlord and Tenant Act 1985 (the LTA 1985) for a determination of its liability to pay service charges and a determination of reasonableness in respect of the costs for the service charge year 2008/2009 and

b. under section 20(C) of the same Act for an order preventing the Landlord from recovering the costs of the Leasehold Valuation Tribunal's (LVT) proceedings.

Subsequently another ten owners were joined as applicants and on the 13th September 2009 the Respondent recognised the Association.

2 Directions were issued in respect of both applications on the 26th August and 20th October 2009 respectively, ("the Directions"). At the commencement of the hearing the Respondent confirmed that it had accepted the jurisdiction of the Tribunal to determine the applications.

The Inspection

3 Prior to the Hearing the Tribunal met at the Notter Mill Country Park ("the Park") in the presence of Mr Smith, Mr Roberts, Mr and Mrs Hall Ms McLennan and Mr Walder. A joint inspection of the general layout of the Park was undertaken and the Tribunal looked briefly at the interior layout of two bungalows one belonging to one of the applicants and the other belonging to the Respondent. They also looked at the common accessways, comprising roadways and paths, the bund, the grassland around the bungalows, the swimming pool, the tennis courts, the nature reserve, and a portion of Mill Cottage (which belongs to the Respondent) and in particular the left side of that building which at ground floor level, comprised a store and the laundry room, (used as part of the Park facilities), and above which were two rooms used by the Respondent as a bedroom and lounge (which were not inspected). In front of that side of Mill Cottage is a garage which the tribunal were told houses the quad bike and lawn mower, both used for maintenance of the grounds within the Park.

4 Twenty three Bungalows are located within the Country Park of which thirteen are privately owned on a leasehold basis. The other ten bungalows are owned by the Respondent. All of the thirteen individual owners are members of the Association. One owner is not a party to this application. Eight of the individual Applicants are resident within the Park for most of the year and of the other five, three use their bungalows for holiday lets and the other two are used as second homes by the owners and their family and friends; this user distinction is not relevant to this determination. All of the bungalows belonging to the Respondent are used for letting. A plan was produced with the application showing the approximate location of the bungalows belonging to the members of the Applicant and generally those bungalows nearer to the entrance to the Park belong to the Respondent.

5 On the lease plans the bungalows are shown as being distinct plots but there are no physical boundaries separating each plot from those adjoining or the common areas, which are contiguous to some of the plots.

6 The Tribunal members were told that the drainage system for the entire Park is served by three pumps.

The Hearing

7 At the Hearing the Mrs Smith and Mr Roberts (the Chairman of the Association) spoke on behalf of the Applicant. The Respondent was represented by his Counsel Mr Walder. As the Applicant was representing itself without legal assistance, the Tribunal reminded the parties that everyone had received the written statements each produced in compliance with the Directions. Mr Roberts said that he would like Mr Richard Bicknell (who as well as being a bungalow owner was the previous owner of the Park) and some of the other bungalow owners who were present to speak in support of the application and was advised that this was appropriate but that an opportunity must be offered both to the Respondent and his representative and to the Tribunal to question anyone who was effectively giving evidence in support of the application.

8 Initially Mrs Smith (Secretary of the Association) addressed the Tribunal by reading a statement which outlined the reasons behind the submission of the Application. She said that the Respondent had estimated that the costs for the service charge year 2008/2009 would be £2,100 per bungalow and the actual costs to date were £2,092. In the previous year the lessors had paid £715 each. In the current year an interim payment on account of £1,430 has been requested representing only 50% of the estimated charge. This represented a 43% increase. Whilst she accepted that it was appropriate that the Applicants must contribute a fair share of the actual costs of running the Park, and she itemised what she thought these costs would comprise, she questioned where many of the plants the cost of which was part of the service charge, had been planted and the amount of £8,066 charged in respect of the caretaker's accommodation costs and the caretaker's salary which together amounted to a total of £26,000. She went on to say that she did not believe that the Respondents could recover the cost of improvements in the service charge.

9 It was clear to the Tribunal from this statement that Mrs Smith felt very strongly about the amount of the service charges demanded from the residents in the year 2008/2009

10 The Applicant had provided the Tribunal with a written summary of the Applicants' case which was circulated to the Tribunal and the Respondent prior to the Hearing and titled "Outline Statement" Stephen Roberts said that he would particularly refer to three key issues;

a. The Caretaker's job and whether it should be a "full time" job.

b. The new provision for the cost of Caretaker's accommodation.

c. The apportionment of the electricity costs between the owners' areas of the Country Park and those areas towards which the Applicant contributed. By way of example he said that they did not feel that it was possible to properly monitor the apportionment of the laundry running costs and the "shared" electricity bills. Later in his evidence and in his questioning of Mr Hall he queried the amount of the insurance charges too.

11 In setting out the Applicant's case Mr Roberts was supported by statements from Mr Bicknell, by way of clarification with regard to letters and emails which he had sent and copies of which appeared in the Applicant's statement of case. Other residents made statements mainly with regard to the general appearance of the grassed areas and the intermittent drainage problems which had occurred following lengthy periods of wet weather. Concerns were expressed with regard to the quality of the grass cutting and the quality and way in which the services supplied are supplied by the Respondent. It was established that although the previous owner, Mr Bicknell had provided what he called a "total care" package and offered a facility enabling each resident to have his own grass cut at the same time the grass within the Reserved Areas (defined in the lease).

12 In response Mr Walder outlined his proposed presentation of the Respondent's case. He said that a lot of "contrary evidence" upon which the Applicant relied was contained in Mr Bicknell's letters. The Defence Statement had already been circulated. He said that he would like to question the evidence given by Mr Bicknell. He would ask Mr Hall to speak in support of his statement. He would make some observations on the lease provisions and would summarise his conclusions.

13 His questioning of Mr Bicknell suggested that the Respondent considered that the amounts recharged to the service charges in previous years had not necessarily reflected the total costs of the work undertaken. Furthermore investment had been required to upgrade the drainage system which it was implied had not been properly maintained or upgraded for some time.

14 Whilst the grass cutting might have been undertaken in a different way when Mr Bicknell owned the Park little actual evidence has been supplied suggesting that the hours spent carrying it out were excessive. The majority of the actual issues raised by the Applicant seem to relate to quality of the grass cut. Given that it had not been disputed that weather conditions had been adverse at many times during the service

charge year in question the parties seemed to accept that might have impacted upon the appearance of the cut grass.

15 Whilst evidence from the Applicant seemed to imply that the management and care of the Park did not merit a full time caretaker the Respondent put forward a contrary argument suggesting that the leases of all the bungalows, although not identical, contain the same maintenance obligations, and actually require that the Respondents **must** provide a full time caretaker. Mr Walder even suggested that injunctive proceedings might properly be brought to achieve this.

16 On this basis he argued that, and in accordance with specific sections of the lease and in particular paragraph 11 of the Sixth Schedule and paragraph 5 of the Seventh Schedule the Respondent could employ such person as he shall reasonably consider necessary for the performance of the lessor's obligations in the lease. There was no stipulation preventing the caretaker from taking on other duties. Paragraph 5 gave an open ended definition of the duties "which shall include....." as set out therein but would not limit the extent of such duties.

17 He said that the Respondents had effectively provided a full time caretaker by sharing the responsibilities between the two of them and their son Stephen. The caretaker undertakes all necessary jobs. In paragraph 10 of Part 2 of the Seventh Schedule of the lease there is a specific reference to improvements. He said that this would enable the recovery of all costs incurred to be recovered by the Respondents. He also referred to paragraph 13 of Part 3 of that Schedule which enables the Lessor to enter into maintenance and service agreements and recharge the cost. [All of these sections of the Lease to which reference was made are set out in full within this decision.]

18 He also suggested that all of the evidence put forward by the Applicant largely in reliance on information provided by Mr Bicknell, the former owner of the Park, as to whether or not the running of the Park, based on his own personal experience, required or merited a full time caretaker is irrelevant because the Respondent is obliged to provide a full time resident caretaker and the evidence the Respondent had provided supports the fact that the amount charged, and shown in the service charge certificate for the disputed year reflects the market cost of such provision.

19 Mr Hall when giving his evidence, said that the figure shown in the service charge certificate for 2008 -2009 for the caretaker's accommodation had been calculated by him following consultation with his accountants and lawyers. He had considered two approaches. Firstly he had considered a rent for Mill House and secondly a rent for a bungalow. He had chosen the latter. He could also identify the distinct utility supply costs for a bungalow. He had calculated the rent for the caretakers accommodation on the basis of a "short term" let at £125 a week which he said reflected the market rent. The difference between that and the figure shown in the service charge certificate is the utility costs which have also been added.

20 In response, to the Applicant's concerns about the increased cost of electricity, he said that there were two meters. One was the kitchen meter for the Mill House electricity. The second was for the power provided to all external plant, the pumps,

the storm pumps, the greenhouse, the swimming pool, reception, the garage the storage room and garden store, laundry room and one bedroom and lounge above the two rooms on the left hand side of Mill House. He calculated an apportioned cost for the two upstairs rooms based on a percentage of the bill he received for the rest of Mill House and deducted this from the bill before recharging it to the service charge account. The area of the two rooms is approximately 25% of the total area of Mill House. He had discounted the bill by £550. He has not considered separately metering the upstairs rooms.

21 Mr Hall's evidence did not clarify a great deal with regard to the cover afforded by the insurance policy or the way in which the premium was apportioned. He said the date of the policy reflected the purchase date of the Park. His broker said that insurance of communal areas in the Park is included within the definition of "premises". The insurer has changed. He attributes a third of the premium to the service charge. He did not explain why. He had obtained quotes through his broker. The policy chosen seemed to offer a preferential rate for holiday home owners. Mr Walder referred to the case of Berrycroft Management v. Sinclair Gardens 1997 1 EGLR 47 which he said was authority for the fact that the courts are unwilling to limit a landlords ability to choose an insurer where the lease requires him to insure the property.

22 In that case the Court of Appeal upheld a decision of a lower court dismissing applications (made in that case by the management companies and an individual tenant), for an order under sections 19 and 30A of the Landlord and Tenant Act 1985 that expenditure on insurance were not relevant costs reasonably incurred. (That part of the decision is not relevant to this determination). However the judges also found that a term cannot be implied into the covenants between the management companies and the landlord, and between the lessees and the appropriate management company, that the sum charged by the nominated insurer should not be unreasonable, or that a tenant should not be required to pay a substantially higher sum than he could himself arrange with an insurance office of repute. The right of the landlord to nominate the company and the agency for insurance was unqualified.

The Law

Sections 27A, 19, and 20(C) of the LTA 1985 are set out below:-

S27A Liability to pay service charges: jurisdiction

(1) An application may be made to a leasehold valuation tribunal for a determination whether a service charge is payable and, if it is, as to—

(a) the person by whom it is payable,

(b) the person to whom it is payable,

(c) the amount which is payable,

(d) the date at or by which it is payable, and

(e) the manner in which it is payable.

(2) Subsection (1) applies whether or not any payment has been made.

(3) An application may also be made to a leasehold valuation tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs and, if it would, as to—

(a) the person by whom it would be payable,

(b) the person to whom it would be payable,

(c) the amount which would be payable,

(d) the date at or by which it would be payable, and

(e) the manner in which it would be payable.

(4) No application under subsection (1) or (3) may be made in respect of a matter which—

(a) has been agreed or admitted by the tenant,

(b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,

(c) has been the subject of determination by a court, or

(d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.

(5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.

(6) An agreement by the tenant of a dwelling (other than a post-dispute arbitration agreement) is void in so far as it purports to provide for a determination—

(a) in a particular manner, or

(b) on particular evidence,

of any question which may be the subject of an application under subsection (1) or (3).

S19 Limitation of service charges: reasonableness.

(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.

(2) Where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable, and after the relevant costs have been incurred any necessary adjustment shall be made by repayment, reduction or subsequent charges or otherwise.

(5) If a person takes any proceedings in the High Court in pursuance of any of the provisions of this Act relating to service charges and he could have taken those proceedings in the county court, he shall not be entitled to recover any costs.

S20C "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 court or leasehold valuation tribunal, or the Lands Tribunal, or in connection with arbitration proceedings, are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application.

(2) 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 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;

(c) in the case of proceedings before the Lands Tribunal, to the tribunal;

(d) in the case of arbitration proceedings, to the arbitral tribunal or, if the application is made after the proceedings are concluded, to a county court.

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

23 This application has been made primarily to seek a determination as to whether the amount of the service charge is reasonable, and reasonably incurred.

24 However questions were raised at the Hearing by the Applicant with regard to the standard of the grass cutting and the Applicant questioned whether in fact the caretaking services provided by the Respondent represented "value" when the costs of providing essentially the same services had increased so much over the amount

charged in the previous year. The dissatisfaction with the amount of the increase appears to have prompted the Applicant to question both the level of the caretaker's salary and whether the caretaking services which the Lessor is obliged under the lease to provide in the Park required a level of skill commensurate with the level of salary for which the Respondent is claiming.

25 The Applicant's case is that the increased cost of many elements in the service charge for 2008 – 2009 is unreasonable.

26 However it was accepted by Mrs Smith that "one off" charges of a non-recurring nature make it difficult to make year by year comparisons. Her statement suggested acceptance of the much increased costs of repairs as being an inevitable "one off" cost. What was not accepted however was the novel cost of the caretaker's accommodation, which has significantly increased each lessee's contribution. It was also suggested that the notional salary of the caretaker is based on, or at least bears comparison, (according to the Applicant), with an appropriate salary for a non-resident caretaker. Therefore the recovery of the notional cost of accommodation (and indeed the costs of utilities and the maintenance of that accommodation) is unreasonable.

27 A specimen lease, which is the lease of Bungalow 21 made between Richard Hugh Bicknell and Margaret Elizabeth Smith, a copy of which was provided with the application is accepted by the parties as being typical of all the leases of bungalows within the Park, which although not identical, each contain the same provisions as were referred to by each of the parties and relied upon in support of their respective arguments whether put forward in person or by their representatives. Extracts of all of the relevant provisions discussed in the course of the hearing are set out below.

The Lease

28 The pertinent sections of the lease referred to primarily at the Hearing by Mr Walder and considered by the Tribunal in making its determination are set out below.

Sixth Schedule Paragraph 11

"The Lessee shall pay to the Lessor without deduction by way of further and additional rent one twenty-third of all costs and expenses incurred or deemed to be incurred by him in carrying out this obligations under and giving effect to the provisions of Part 2 and Part 3 of the Seventh Schedule hereto (hereinafter called "the Lessor's Expenses") and in relation to such further and additional rent (hereinafter called "the Service Charge") the Lessee shall observe and perform such of the terms and provisions set out in Part 2 of the Eighty Schedule hereto as ought on her part to be observed and performed PROVIDED THAT if at any time during the Specified Period any additional Units over 23 Units shall be erected on the Property the said proportions shall be reduced pro rata"

Seventh Schedule Part 2 Paragraph 5

"The Lessor shall provide for the Property throughout the said term a full-time caretaker who shall reside in the Caretaker's flat or house in or adjoining the

Property as a licensee on a service basis and whose duties hall include (a) cleaning the roads or ways paths and bridges forming part of the Reserved Property and cleaning the swimming pool and tennis court therein (b) removing at least once in each week the refuse of the Owners and occupiers of the Units (c) keeping the landscaped areas forming part of the Reserved Property clean and tidy and the grass properly mown and the trimming of all hedges therein"

Paragraph 6 following states:-

"The Lessor shall repair maintain and decorate the caretaker's flat or house and pay any rates taxes or other expenses of lighting hearing or otherwise in respect thereof". [It was clearly intended to refer to heating]

Seventh Schedule Part 2 Paragraphs 10, 13 and 14 are set out below

Paragraph 10

"The Lessor shall provide and supply such other services for the benefit of the Owners of the Units and shall carry out such other repairs and such improvements works and additions and shall defray such other costs (including modernisation or replacement of plant and machinery) as he shall consider to be necessary to maintain the Property as a s first-class holiday development or otherwise to be desirable in the general interests of such Owners"

Paragraph 13

"The Lessor shall enter into agreements with the manufacturers or with reputable maintenance contractors for the regular inspection and servicing of all apparatus plant and machinery serving the private drainage system serving the Property or the swimming pool forming part of the Reserved Property"

Paragraph 14

"The Lessor shall keep the Reserved Property in a clean and tidy condition and the grass properly mown"

The lease contains (inter alia) the following definitions in recital 1

"Lessor"	*includes the person or persons for the time being entitled to the reversion immediately expectant on the determination of the term hereby created*
"Property"	*means the property described in the First Schedule*
"the Reserved Property"	*means that part of the Property not included in the Units being the Property more particularly described in the Second Schedule hereto*
"Units"	*means the holiday bungalows forming pat of the Property and "Unit" has a corresponding meaning.*

"Owner" *in relation to a Unit means (in the case of a Unit let or demised otherwise than by way of mortgage by the Lessor for a term of more than 21 years) the holder of the term created by that letting or demise and (in the case of a Unit not so let or demised) the Lessor and "ownership" in relation to a Unit has a corresponding meaning*

"Specified Period" *means the period of 80 years commencing on the 1st April 2003....*

The wording in the first and second schedules is set out below.

THE FIRST SCHEDULE

ALL THAT piece or parcel of land situate at Saltash in the county of Cornwall and forming part of the Lessor's Notter Mill Country Park TOGETHER WITH the holiday bungalows erected or to be erected thereon or on some part thereof ALL OF WHICH said piece or parcel of land is for the purpose of identification only delineated on the Plan annexed hereto and thereon edged red

THE SECOND SCHEDULE

ALL THOSE the private drainage system roads ways paths footbridges and car parks now constructed or to be constructed on the Property y with the Specified Period and swimming pool (including all plant and machinery in respect hereof) tennis court landscaped areas boundary walls fences and hedged and other parts of he Property which are used or intended to be used in common by the Owners or occupiers of any two or more of the Units

29 The Respondent contends that he is entitled to recover the cost of a caretaker's salary because those duties that would have been undertaken by such an employee have been carried out effectively by the Respondent and their son. Furthermore he believes that the lease entitles him to recover the notional costs of accommodating such an employee on the Park as well.

30 The Tribunal however had difficulty in accepting this claim as being derived from the correct interpretation of the Lease, which it believes was intended to enable a Lessor who actually provided accommodation on or adjoining the Park to be compensated for his "lost" rental income, and also on the basis that the salary of a resident caretaker would be less than the salary of a non-resident caretaker.

31 In this case no actual caretaker was employed. Therefore no accommodation was provided and no rental income has been foregone. The Lessor had not suffered a loss of rent but has included within the service charges the notional costs of "lost" rent.

32 The Respondent argued that since the lease entitled him to recover this cost, it was not relevant whether or not he had incurred the expense of providing either a caretaker or the accommodation. His only requirement was to ensure that the amount charged within the service charge was reasonable. For this reason he had not sought to recharge a notional rent for Mill House where he lived but opted instead

to assess the rent of one of the bungalows. Similarly he suggested that the level of salary notionally charged was about the "going rate" as evidenced by a selection of advertisements which the Respondent claimed were for similar positions to that of a caretaker for the Park.

33 In fact all the advertisements, copies of which were produced to the parties and the Tribunal at the Hearing, referred to the employment of a couple and included accommodation. One, which offered a slightly higher salary than the rest, was for a seasonal position. In each case the salary with accommodation was of the level which the Respondent sought to recover for the notional caretaker's salary. Whilst the amount of the salary claimed was questioned no real alternative amount was discussed at the Hearing although evidence was provided that the Respondent had offered to reduce the level of the salary in a letter to Alan and Meggie Smith. [This letter is referred to in more detail and in part quoted in paragraph 38 below.]

34 The Applicant had also suggested that the hourly rate of circa £10 an hour for a caretaker which was what the salary equated to, does not reflect or compare with salaries in the local job market. The Respondent disagreed. He said that the work which the Respondent had to undertake would exceed the hours that could be worked by a single employee. The Applicant and the Respondent were at odds. Evidence provided by the former owner Mr Bicknell disputed whether the number of hours that the Respondent claimed he needed to work were necessary. Mr Bicknell in the evidence he gave at the Hearing reiterated this based on his own personal knowledge and experience of the caretaking duties he had undertaken when he had owned the Park. However the Respondent had dismissed this argument as being irrelevant because the lease referred specifically to a requirement to provide a full time caretaker. In fact although there was much discussion about the type of duties undertaken by the Respondent as caretaker, their honesty in accurately recording a log of the time that they spent (albeit for a period subsequent to the service charge period the subject of this application) was not questioned.

35 The Tribunal has not been provided with sufficient evidence to demonstrate that the level of the caretaker's notional salary is unreasonable. It does however record the fact that that the evidence supplied seems to suggest that the salary claimed in the accounts is for more than a single employee and that the actual cost of employing a couple as caretaker and supplied with accommodation might well be similar to the figure actually charged in the service charge account for 2008 – 2009.

36 The definition of the "Lessor's Expenses" is set out in Paragraph 11 of the Sixth Schedule and Clause 11 of Part 2 of the 8th Schedule contains a deeming provision which states:-

"The expression Lessor's Expenses" shall be deemed to include an annual sum equal to the annual rack rental value of the caretaker's flat or house owned by the Lessor and provided by it rent free to such caretaker."

37 Clause 12 of Part 2 of the 8th Schedule states:-

"Any costs or expenses incurred by the Lessor in providing services or employing

Solicitors Accountants or Surveyor or Caretaker or others shall be deemed to have been properly incurred by the Lessor in pursuance of his obligations under Part 2 or Part 3 of the Seventh Schedule hereto notwithstanding the absence of any specific stipulation by the Lessor to incur the same"

38 The amount of the annual service charge is the total of Lessor's Expenses. On the basis of the provision in the lease set out above the Respondent included in the 2008-2009 accounts the sum of Seventeen Thousand Four Hundred and Twenty Five Pounds (£17,425) on account of the notional caretaker's salary and in addition the sum of Eight Thousand Eight Hundred and Sixty Six Pounds (£8,866) as the cost of notionally providing caretaker's accommodation. The Applicant has provided copies of letters from the Respondent within its statement at pages 24 - 26 and which states inter alia:-

[Extract from a letter dated 17th July 2009 to Alan and Meggie Smith]

"We realise that recovering the costs of accommodation is new this year. The reason we have done this is that we now realise how much it costs to keep the Park running Our conclusion was that the way the service charge had previously been set would not recover those costs.

Although the accommodation charge is new we do not think that there is any reasonable objection to this or to the level at which we have set the charge. The leases require us to provide a caretaker and to provide that caretaker with free accommodation, to meet the utility bills etc and the costs of maintaining and decorating the accommodation. Nothing in the lease prohibits us from carrying out the caretaker role or from recovering the accommodation costs associated with carrying out that role.....The accommodation costs set out in the service charge is made up of the off season rent we actually charge for the bungalows plus the cost of utilities etc for the bungalow that have arisen from its use."

39 Later in the same letter, the Respondents offered to reduce the amount claimed by way of the notional caretaker's salary for that year to £14,500 based it was said on an advertisement for a couple to carry out similar duties and with the provision of accommodation on a park elsewhere in England.

40 When Mr Walder set out the Respondents' defence and commented on the Applicant's case he said that in relation to the wording of the Lease, and clause 5 of the Seventh Schedule, he would normally suggest that "shall" is binding. Clause 5 of the Seventh Schedule to the Lease is set out below:-

"The Lessor shall provide for the Property throughout the said term a full-time caretaker who shall reside in the Caretaker's flat or house in or adjoining the Property as a licensee on a service basis and whose duties shall include (a) cleaning the roads or ways paths and bridges forming part of the Reserved Property and cleaning the swimming pool and tennis court therein (b) removing at least once in each week the refuse of the Owners and occupiers of the Units (c) keeping the landscaped areas forming part of the Reserved Property clean and tidy and the grass properly mown and the trimming of all hedges therein"

41 However he said not withstanding the word "shall", there was no obligation for the caretaker to live on the park in tied accommodation. He admitted that the Applicant had not offered contrary arguments with regard to any of the wording of the lease schedules. He said however that clause 12 of the Eighth Schedule would enable the recovery of any costs incurred by the Lessor in employing a caretaker. In paragraph 11 of his statement of defence Mr Hall had said that if there was a full time caretaker and that caretaker lived on or adjoining the park the provisions of paragraph 11 of Part 2 of Schedule 8 would apply; i.e. it was a deemed expense which could appropriately be included in the Landlords Expenses and therefore recharged as part of the Service Charge.

42 His argument is not accepted by the Tribunal. He contends that a caretaker must be employed and must be offered accommodation, whether or not it is required or necessary but takes no account of the fact that no caretaker is employed and he relies upon a deeming provision in the lease to recover a salary which is not actually incurred because the job is undertaken informally by the Respondent and a relative. Furthermore the provision in clause 5 of Schedule 8 actually refers to the employment of a caretaker being on a "service basis" which would seem to the Tribunal to also suggest the basis of calculation of such a caretaker's salary, but that is not the basis upon which a caretaker's salary has been claimed as part of the service charge. In fact Clause 5 of that Schedule actually refers to "Caretaker" as if it is a defined term but sadly no definition is contained in the lease and when the term is used later no capital is used so no further assistance in interpreting what a caretaker is, or might be, is contained within the lease.

43 The other items included within the service charge certificate for 2008 -2009 which were questioned by the Applicant were the charges for the electricity and for insurance.

44 The charge has risen from a total of Eleven Thousand Three Hundred and Sixty One pounds (£11,361) for the service charge year ending 31st March 2008 to Forty One thousand Eight Hundred and Fifty Four Pounds (£41,854) for the disputed year. The Tribunal were told that in previous service charge years a deal had been obtained for the bulk purchase of electricity by the previous owner but that such an arrangement was apparently no longer available to the current owner. Also there was apparently some error in the way the electricity had been charged which made a year by year comparison inequitable. A single meter covered the cost of electricity for the swimming pool pumps, the drainage pumps, the garage (housing the mower and the quad bike), the ground floor laundry room and store and the two rooms above. When the upper rooms had been used within the Park no apportionment had been made and the previous owner recharged all the electricity costs; now as the upper floors were used privately by the Respondent he contributed towards the costs of the electricity in the service charge account, but there was no way of demonstrating the fairness or adequacy of this contribution. In addition the Respondent apparently also benefitted from any takings in the laundry room where both the machines and dryer were coin operated. It was not disclosed who maintained these or whether these costs were apportioned within the Service Charge. Factually, regardless of the rights of the Applicants collectively, it was clearly only owners of those bungalows without washing machines, which were presumably those used for holiday lets rather

than those permanently occupied, who would benefit from the existence of such a facility. No-one offered any explanation as to why a sub meter or a separate meter could not be installed. Although it was suggested by the Applicant that the apportionment may be unfair it was not suggested what apportionment would be fair. For those reasons although the Tribunal accepts that it may be potentially unreasonable not to separate the metering with regard to the Respondents' personal usage, the apportionment method used by the Respondent to calculate a figure to credit back to the service charge appears reasonable although some attention should perhaps be paid to the electricity costs of the machines in the laundry room. However in the absence of any suggested adjustments the Tribunal does not have sufficient evidence before it to establish that the electricity charges are unreasonable.

45 Although a copy of the current insurance policy was produced, the concerns of the Applicant were not clearly expressed other than to suggest that the cost was too high. The Respondent claimed that the policy was a special policy relating to holiday accommodation. A third of the costs were included in the service charge. The figure for the disputed year was much higher than that previously charged. Clearly the policy appeared to cover the Mill House and those bungalows owned by the Respondent as well as covering the common parts of the Park. It was suggested that when the current policy expired a new policy could be written more clearly. However the Applicant offered no actual evidence of alternative costs. The method of apportionment was not challenged by the Applicant although the amount recharged in the service charge was, but the Tribunal has insufficient information to determine that the amount is unreasonable. Neither does the Applicant actually suggest this. It seems to the Tribunal that if in future years the Respondent obtains a policy which clearly separates the risks and apportions the premium with regard to the risks covered, any argument about apportionment of the premium would be avoided. Alternatively it may be preferable for the Respondent to insure his own property separately from the Park so that the whole of the premium relating to the Park policy could properly be included within the service charge. In the absence of any suggested alternatives and clarification the Tribunal cannot determine that the amount charged within the service charge for insurance is unreasonable. It accepts however, that the Landlord does have a right to choose his own insurance policy, that it is not unreasonable for him to do so and that he is not obliged to seek the cheapest insurance cover.

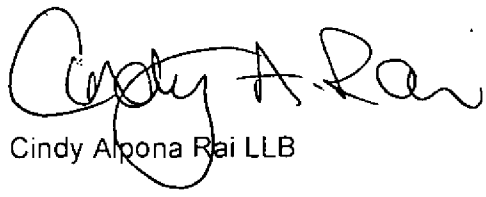
Decision

46 The primary issue at the centre of this application is the inclusion within the service charges of the cost of caretaker's accommodation when this "cost" is notional and has not actually been incurred by the Respondent. For all of the reasons set out above the Respondent's argument that he is entitled to include this as a "deemed expense" is not accepted.

47 The Tribunal therefore determines that the costs of caretaker's accommodation should be removed from the Service Charge Certificate for the year 2008 – 2009 as on the basis of the evidence before it, it is not a reasonable expense and has not been incurred. Whilst it notes the concerns expressed by the Applicant with regard to both the costs of insurance and electricity it is unable determine, on the basis of

the evidence supplied, that either of these costs is unreasonable; Neither has it been suggested that these costs were not reasonably incurred. The nub of the Applicant's discontent seems to be with regard to the apportionment of the metered costs. The Tribunal has already commented on the way in which these costs have been apportioned and for those reasons already expressed previously within this decision the Tribunal determines that the costs in the service charge account for electricity and insurance are reasonable for the service charge year 2008 - 2009.

48 Although neither party addressed the Tribunal on the section 20C application the Tribunal determines that in the absence of any provision within the lease enabling recovery the costs of the LVT proceedings must not be added to the service charges charged back to the Applicant.



Cindy Alpona Rai LLB

Chairman

RESIDENTIAL PROPERTY TRIBUNAL SERVICE

LEASEHOLD VALUATION TRIBUNAL

Residential Property TRIBUNAL SERVICE

Case Number: CHI/15UB/LSC/2009/0119

In the matter of the Landlord and Tenant Act 1985 (as amended)

And in the matter of Notter Mill Country Park (the Property)

Mr Ray Hall and Mrs Celia Hall (the Landlord) (the Appellant)

Notter Mill Country Park Owners Association

Mr Alan Smith Mrs Margaret Elizabeth (Meggie) Smith and others (the Respondent)

And on an application by Ray Hall and Celia Hall for leave to appeal against a decision of the Leasehold Valuation Tribunal dated 12th March 2010

Dated 26th April 2010

Tribunal Cindy A. Rai LLB Solicitor (Chairman)

Timothy N. Shobrook FRICS Chartered Surveyor (Valuer Member)

Peter Groves (Lay Member)

1 The Landlord seeks leave to appeal against the decision of the Leasehold Valuation Tribunal dated 12th March 2010.

2 Its grounds of appeal are that:-

a. The Tribunal erred in law by not properly constructing the Leases (relating to the Property) and in so doing reached the conclusion with which the Landlord disagrees

b. That the Tribunal failed to consider the relevant facts namely its own findings and the factual matrix causing it to err in its conclusions

The grounds are repeated in relation to the section 20(C) application of the Tenants made under the Landlord and Tenant Act 1985 (and not the 1993 Act to which the Landlord refers in its application for leave to appeal).

3 The Landlord suggests that two specific findings show that the Tribunal wrongly interpreted the leases of the Property and thus wrongly applied the relevant law leading to its failure to have regard to its own findings of fact.

4 In reliance on these suggestions the Landlord states that the Tribunal erred in concluding that:

a. the costs of accommodation for the caretaker was not recoverable under the lease and that

b. The (Landlord's) costs of the proceedings are not recoverable under the Leases

5 The Tribunal rejects the grounds that the landlord has set out in its application namely that the Tribunal had been wrong to suggest that no caretaker was employed. In the evidence put before the Tribunal both at and prior to the hearing it was neither suggested, nor was evidence provided, to show that this was incorrect. Indeed in paragraph 36 of its decision it quotes from a letter written by the Landlord which seems to indicate quite clearly that the Landlord simply carries out the role of a caretaker.

6 In its application for leave to appeal the Landlord sets out different arguments from those put forward at the hearing. It is inappropriate to give such arguments any consideration in this application because do so would amount to a reconsideration of the issues determined at the hearing.

7 With regard to the Landlord's application to reject the application by the Tenant under section 20(C) of the Landlord and Tenant Act 1995 its ground are rejected. The argument in the application was not put forward to the tenant either at the hearing or indeed in the Landlord's written case supplied to all of the parties prior to the hearing.

8 The Leasehold Valuation Tribunal does not accept that any of the grounds of appeal put forward by the Landlord demonstrate that the Tribunal:-

a. wrongly either misinterpreted or applied the law or

b. took account of irrelevant considerations, or

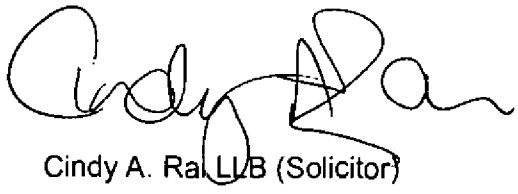
c. failed to take account of relevant considerations or evidence, or

d. that there was a substantial procedural defect;

Accordingly the Tribunal declines to grant leave to appeal; the Landlord is entitled to renew its application for leave to appeal to the Lands Tribunal which is the Lands Chamber of the Upper Tribunal at 43 -45 Bedford Square WC1B 3AS but must do so within 14 days after the date of this decision.

A form of application for leave to appeal may be found on the Lands Tribunal website at

http://www.landstribunal.gov.uk/Documents/rules_procedures_and_forms/AprilNewForms/LR.pdfhttp:



Cindy A. Rai LL.B (Solicitor)

Chairman

26th March 2010