Residential Property
Tribunal Service

RESIDENTIAL PROPERTY TRIBUNAL SERVICE
DECISION OF THE LEASEHOLD VALUATION TRIBUNAL for the
SOUTHERN RENT ASSESSMENT PANEL

LANDLORD AND TENANT ACT 1985 SECTION 27A(1)
LANDLORD AND TENANT ACT 1987 SECTION 35

CHI/29UQ/LSC/2010/0015

Property:	Garden flat, 50 Dudley Road, Tunbridge Wells, Kent TN1 1LF
Applicant:	Mrs A Stewart-Sainsbury (lessee)
Respondent	50 Dudley Road Management Company Limited (freeholder)

The Tribunal:	Benjamin Mire BSc (Est Man) FRICS, Chairman Mark Loveday BA (Hons) MCIArb
In attendance:	Mr Michael Sainsbury on behalf of the Applicant
	Mrs Rachel Sears on behalf of the Respondent
	Mr Dion Bailey of South East PML (managing agents)

BACKGROUND:

1. These matters come before the Tribunal following the submission of an application form on the 23rd January 2010 for a determination pursuant to s.27A(1) of the Landlord and Tenant Act 1985 of the reasonableness of service charges for the years 2006/2007, 2007/2008, 2008/2009 and 2009/2010 along with a second application on the 24th February 2010 for a determination to vary the lease(s) of the property pursuant to s.35 of the Landlord and Tenant Act 1987.

2. The Tribunal had held a pre-hearing review on the 24th February 2010 in connection with the applicant's s.27A application. Directions in that application were issued on the 24th February 2010. The directions issued in respect of the s.35 application, which were supplemental to those directions, were issued on the 15th March 2010.

3. The matter was listed for hearing on the 13th May 2010. An inspection of the property was undertaken before the hearing commenced.

SUMMARY OF THE TRIBUNAL'S DECISIONS:

4. **The service charges for the subject periods were reasonably incurred were provided to a reasonable standard of workmanship and were of a reasonable amount.**

5. **The application to vary the lease(s) fails.**

6. **No order is given under s.20C.**

INSPECTION:

7. The Tribunal inspected the property on the 13th May 2010 prior to the hearing.

8. The premises comprise a lower ground level, self contained flat in an end of terrace, five storey (lower ground, raised ground, first, second and roof void) mixed use building in a popular location within easy walking distance of the town centre.

9. The building is finished in painted stucco render with maintenance free replacement windows throughout.

10. The subject flat is approached via a staircase protected from the street by metal painted railings. There are two storage cupboards/vaults beneath the pavement and the main front entrance stairs to the property. There are utility meters and rising mains passing through those cupboards serving other parts of the premises.

11. There is a side passage running along side the left hand flank wall giving access to an alleyway leading to houses at the rear of the subject fronting Lime Hall Road. A courtyard at the back of the flat is visible from this alleyway as are the 9" solid brick retaining walls supporting the earth and adjoining trees in this location. Those walls were seen by the Tribunal to be buckled and out of true.

12. The internal common parts provide access to the raised ground floor dental surgery and to three further flats on the first and second floors and within the roof void respectively. They comprised painted walls and ceilings with carpeted floors. The raised ground entrance passageway appeared to have been recently redecorated. The remainder of the halls, stairs and landings were not in as good decorative order.

SUBMISSIONS:

13. Both parties submitted representations in advance of the hearing which were paginated and prepared in to a hearing bundle by Mr Sainsbury as per the directions.

14. The bundle included a wide range of documents including a copy of the applications, the directions, the lease, the Applicant's statement of case with supporting documentation and the Respondent's response in the form of a witness statement by Dion Bailey with supporting documentation. The nature of the documentation supporting the party's cases were copies of the freehold company accounts for 2005-2008, a schedule of estimated expenditure for 2009, various contractors' invoices, bank statements, communications with the previous freeholder by way of historical reference, communications with Mrs Sears and the present freeholder and their managing agents.

HEARING:

15. The Tribunal dealt first with the service charge application. The lease is dated 10 April 2002. By clause 5.1 the lessee agreed to pay a service charge, which was defined in clause 1.9 as "the contributions equal to the Tenant's Proportion of the expenditure described in the sub-clause 7.1 and in the Third Schedule". The material provision is clause 1.10, which defines "the tenant's proportion" as "20% of the expenditure described in sub-clause 7.1 and in the Third Schedule or such other proportion as shall be considered by the Landlord to be fair and reasonable in all the circumstances." Sub-clause 7.1 and the Third Schedule provided a standard service charge scheme of interim payments, certification of expenditure at the end of the year and payment of a balancing charge by the lessee (if any).
16. Mr Sainsbury explained that his wife was concerned that although the relevant costs which had been incurred in the years in question (2005-2008)

were modest, the estimated expenditure budget for 2009 included a far most costly item (the installation of a fire alarm) which would bring with it a higher maintenance charge than had previously been the case.

17. He explained that whilst in the past his wife had accepted that she had a one fifth liability for all service charge costs it was only now, when a higher level of expenditure was intended for the internal common parts that she felt she needed to take a stand. In her view the one fifth share was appropriate for external repairs and the insurance premium. However, she should have no liability for the costs of electricity, cleaning and redecoration in relation to the internal common parts as she did not enjoy any access to those areas. Through her husband she was submitting that the latter costs should be split equally between the three flats and the dentist who did have access and who enjoyed the benefit of that expenditure.

18. Mr Sainsbury submitted that the former freeholder, a Mrs Ursula Clemens, had told his wife that she would not have a liability towards the costs of maintaining the internal common parts. Mr Sainsbury directed the Tribunal to communications within the bundle with the former freeholder, and in particular a letter dated 2 November 2002. This stated "Is there a possibility that the owners would object to painting the garden walls (paying for it) as the maintenance of the internal common stairways (painting, new carpets etc) is divided by four - 25% only - I do not know the legal position on this."

19. Following questioning by the Tribunal it was agreed by the parties that the lease of the dental surgery provided that the lessee of the surgery was solely responsible for redecoration of the entrance hallway up to the foot of the first rise of the internal stairs. However, no documentary evidence of that was in front of the Tribunal, there being no lease for the surgery within the bundle.

20. Mr Sainsbury also took the Tribunal to communications within the bundle with the current freeholder. Mrs Sears acquired the freehold on 12 May 2005. In a letter dated 18 May 2005 she wrote that "any bills that come in ... i.e. electricity bills for the communal area" would charged "for each lessee 1/5 share".

21. On close examination by the Tribunal it was found that the lease of the premises did not come in to effect until after Mrs Stewart-Sainsbury had been in occupation of the flat for some time. It was confirmed to the Tribunal that the terms of the lease were therefore entered in to by the then parties in the full knowledge of the idiosyncrasies of the building.

22. Neither party could take the Tribunal to any statutorily compliant demands for service charge or to any balancing service charge accounts. The only demands were in letter and email form requesting the payment of a fixed sum per year which has not been raised from the level of £500 per year for the years in question. The only accounts available to the parties and therefore the Tribunal were company statutory accounts which contained scant detail.

23. Mr Sainsbury's submission was essentially based on the terms of the lease. Clause 1.10 sets out the definition of "The Tenant's Proportion" as "20% of the expenditure described in sub-clause 7.1 and in the Third Schedule or such other proportion as shall be considered by the Landlord to be fair and reasonable in all the circumstances". Mr Sainsbury said that definition allowed the Landlord to charge different percentages for genuine communal items and those specifically incurred on the internal common parts. The inclusion of the relevant costs of maintaining and lighting the common parts was not "fair and reasonable" for the reasons given above. Furthermore, the costs would not be "reasonably" incurred under s.19 of the Landlord and Tenant Act 1985.

24. Mrs Sears in setting our the respondent's case in defence of the application stated that she had misconstrued the provisions of clause 1.10 when she had first read it but now she was sure that a one fifth liability for all items of expenditure was what the lease had intended and was what she considered fair and reasonable.

25. The Tribunal heard evidence from the parties as to the ownership of the retaining walls to the rear garden courtyard and which flat enjoyed the benefit. Mr Bailey, of the managing agents South East PML advised the Tribunal that the remaining owners had expressed a view to him that in the same way as Mrs Stewart-Sainsbury-was now claiming. If she had no liability to the internal common parts to which she had no access and from which she derived no benefit, they too would not contribute to the future cost of maintaining the retaining walls - as they had no access to the rear courtyard behind the garden flat and they derived no perceivable benefit from the retaining walls.

26. In response to questioning from the Tribunal, Mr Sainsbury conceded that there was no dispute as to in to which category any of the items of expenditure fell nor of the need to incur the expenditure or cost of the services themselves. The matter between them was solely the percentage liability to be applied.

27. The Tribunal then heard the case in support of the lease variation application.

28. Mr Sainsbury said this was simply needed because his wife required certainty as to her service charge liability and in her view the provisions of clause 1.10 did not provide that.

29. He told the Tribunal that his wife considered that the lease was open to interpretation as to what was a fair proportion and she wanted certainty as to what was intended by the use of the words in clause 1.10 of "fair and reasonable" as otherwise he could see his wife returning to the Tribunal in a few years with a further service charge dispute.

30. In response Mrs Sears stated that she thought the wording of 1.10 was clear and that it gave certainty.

31. Finally the Tribunal dealt with an application made by Mrs Sainsbury-Sainsbury under s.20C of the Landlord and Tenant Act 1985 to limit the amount the landlord could add to the service charge in connection with the subject applications.

32. Mr Sainsbury said that he was concerned on the costs aspect as once the applications had been made the Respondent instructed a solicitor and he believe had incurred a bill in the region of £1,500 with other fees, such as for the attendance of the managing agent still to come. He told the Tribunal that as he and Mrs Sears had discussed and communicated with one another about these matters over the years he could not understand why she had instructed a solicitor so he was asking the Tribunal to make an order under s.20C refusing to allow any of the costs to be passed through the service charge.

33. Mrs Sears said it had been intended that Mr Bailey would deal with the s.27A application but when the s.35 application was received this was beyond his expertise and the freeholder and the other residents felt they had to have specialist legal advice. Mr Bailey said the legal advice had cost around £1,000 and that he would not be making a charge for his work in compiling his witness statement nor attending at the Hearing.

STATUTORY FRAMEWORK:

34. Section 18 of the Landlord and Tenant Act 1985 sets out the meaning of "service charge" and "relevant costs":

> **18 Meaning of "service charge" and "relevant costs"**
> (1) In the following provisions of this Act "service charge" means 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) The relevant costs are the costs or estimated costs incurred or to be incurred by or on behalf of the landlord, or a superior landlord, in connection with the matters for which the service charge is payable.
> (3) For this purpose—
> (a) "costs" includes overheads, and
> (b) costs are relevant costs in relation to a service charge whether they are incurred, or to be incurred, in the period for which the service charge is payable or in an earlier or later period.

35. Section 19 of the Landlord and Tenant Act 1985 limits the relevant costs to those that were reasonably incurred to a reasonable standard.

> **19 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 provision 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.

36. Section 20C of the Landlord and Tenant Act 1985 makes provision for a tenant to make an application to the Tribunal to limit the cost of the proceedings that can be added to the service charge.

> **20C.— Limitation of service charges: costs of proceedings.**
> (1) A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a ... leasehold valuation tribunal ... are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application.
> (2) The application shall be made—
> ...
> (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;
> ...
> (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.

37. Section 27A of the Landlord and Tenant Act 1985 sets out the jurisdiction of the Tribunal to determine whether a service charge is payable and if it is, the amount payable amongst issues such as by whom to whom and how and when the amount is payable.

> **27A 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.

...

38. Finally s.35 of the Landlord and Tenant Act 1987 sets out the grounds upon which an application may be made if the lease fails to make satisfactory provision for the computation of the service charge (sub-clause 2(f)):

PART IV VARIATION OF LEASES

s35 Application by party to lease for variation of lease

(1) Any party to a long lease of a flat may make an application to the court for an order varying the lease in such manner as is specified in the application.

(2) The grounds on which any such application may be made are that the lease fails to make satisfactory provision with respect to one or more of the following matters, namely—

... f) the computation of a service charge payable under the lease.

... (4) For the purposes of subsection (2)(f) a lease fails to make satisfactory provision with respect to the computation of a service charge payable under it if—

(a) it provides for any such charge to be a proportion of expenditure incurred, or to be incurred, by or on behalf of the landlord or a superior landlord; and

(b) other tenants of the landlord are also liable under their leases to pay by way of service charges proportions of any such expenditure; and

(c) the aggregate of the amounts that would, in any particular case, be payable by reference to the proportions referred to in

paragraphs (a) and (b) would either exceed or be less than] the whole of any such expenditure.

DECISIONS:

39. The Tribunal considered all of the evidence before it, both in the bundle of documentation and of the submissions made verbally to it.

40. In reaching its determination the Tribunal is mindful of the fact that service charges in previous years do not appear to have been demanded and collected in accordance with the terms of the lease. There have been interim service charge demands but apparently there have been no regular annual certificates of expenditure or any calculation of any balance charge. In such circumstances the Tribunal has regard to the guidance given by the Lands Tribunal in the case of Warrior Quay v Joaquim (11 January 2008) LRX/42/2006 that this Tribunal "must reach the best informed decision it can upon the material available to it." The Tribunal therefore proceeds to determine liability for the relevant costs of heating, lighting and decorating the internal common parts in the light of the landlord's apportionment of those costs.

41. The Tribunal considered carefully the construction of clause 1.10 of the lease and finds that it is clear and concise that the service charge proportion payable by the applicant was is 20% of the relevant costs set out in clause 7.1 and the Third Schedule. Since there is no dispute that the relevant costs in issue (i.e. repairs, maintenance electricity and other costs relating to the internal common parts) all fall within the Third Schedule, there is prima facie no basis for challenging those costs being included in the service charge for the Applicant's flat.

42. The basis of the challenge is firstly that the words "as shall be considered by the landlord to be fair and reasonable in all the circumstances" qualify the stipulated percentage in that clause. The Tribunal does not consider that this is the correct interpretation. Those words permit (but do not require) the landlord to vary the fixed percentage of 20%, provided that the landlord adopts a figure which is "fair and reasonable". Moreover, the clause applies a percentage contribution to all expenditure on the Building ("20% of the expenditure described in clause 7.1"). It does not permit the landlord to apply a different percentage contribution to one part of the building as opposed to another - which would be the result of the Applicant's submissions. It follows that the only issue is whether under s.19 of the 1985 Act the relevant costs were not reasonably incurred as a result of the landlord's failure to exercise the discretion to vary the percentage. In the subject case the evidence before the Tribunal was that the respondent did not consider it fair or reasonable to vary that percentage. The Tribunal does not consider the landlord acted unreasonably in this regard. The respondent adopted the percentage set out in the lease, that percentage is based on the number of flats, the numbers of

flats in the block are small, and (as stated above) the percentage is to be applied to all expenditure on the Building. As Mr Bailey stated, other lessees might well object to contributing to costs on parts of the building to which they do not have access. This is a simple and straightforward apportionment appropriate to a small residential block of flats and it is not unreasonable for the landlord to apply this percentage. That other more complex methods of apportionment might have been made by other landlords does not mean that the respondent's decision in this case is objectively unreasonable. The Tribunal therefore determines that the applicant's service charge liability was 20% of the relevant costs incurred.

43. It was further advised to the Tribunal that there was no dispute as to the reasonableness of the amount of the relevant service charge costs which have been incurred. The Tribunal therefore did not need to consider and make a finding of whether or not the landlord had made proper compliant demands from the tenant.

44. Having regard again to the guidance given by the Lands Tribunal in Warrior Quay v Joaquim (11 January 2008) LRX/42/2006 there is no need for the Tribunal to determine any specific sum payable under the s.27A application.

45. In relation to the application for a variation under s.35, our findings above are that clause 1.10 is clearly expressed and that the provisions are easily operable. It therefore follows that the lease makes "satisfactory provision with respect to ... the computation of a service charge payable under the lease". The applicant has not satisfied the test set out in s.35 and the Tribunal determines that the application to vary the terms of the lease fails.

46. Finally, the evidence before the Tribunal was clear and unchallenged that legal costs were incurred only after the s.35 application was made. Such an application is of a technical and legal nature and the Tribunal accepts that it was necessary for the respondent to seek specific legal advice as a consequence of the application having been made. There is no evidence that the landlord has behaved improperly in relation to the directions or its response to the application. The landlord has succeeded on all points. No section 20C order is therefore made. As no legal or other costs have yet been added to the service charge and as there was no clear evidence before it as to the proposed charge the Tribunal did not make a finding either as to the sum that it would have been reasonable to incur nor if the lease permits recovery of the same.

Tribunal: Benjamin Mire BSc (Est Man) FRICS, Chairman
Mark Loveday BA (Hons) MCIArb, Lawyer

Dated: 3rd June 2010