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HM Courts & Tribunals Service

LEASEHOLD VALUATION TRIBUNAL
case no. CAM/33UD/LSC/2011/0160

Property	:	**11 Crome Drive, Breydon Park, Great Yarmouth, Norfolk NR31 0HR** **plus 26 other properties in Crome Drive, Austin Road, Bright Close, Ladbrooke Road and Vincent Close, Great Yarmouth listed in Appendix 1 to the application**
Applicant	:	**Olu Ogunnowo (stated to be acting as a 'lead' Applicant for himself, Ola Animashaun and Joy Ademola)**
Respondent	:	**Country Trade Ltd.**
Date of Application	:	**10th January 2010**
Original LVT decision	:	**15th July 2010**
Decision of Upper Tribunal (Lands Chamber)	:	**7th October 2011**
Type of Application	:	**To determine reasonableness and payability of service charges**
The Tribunal	:	**Bruce Edgington (lawyer chair) Roland Thomas MRICS David Reeve**
Date and venue of hearing	:	**16th August 2012 The Magistrates Court, North Quay, Great Yarmouth, Norfolk NR30 1PW**

DECISION

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1. The Tribunal finds that a reasonable management charge for the subject properties to include all disbursements is £150 per flat per year for both 2008 and 2009.

Reasons

Introduction

2. This decision follows the re-hearing of part of a decision of an LVT determination handed down on the 15th July 2010. The properties are part of a relatively recent development. The term of the sample lease provided commenced on the 1st January 2005 and is for 999 years with an increasing ground rent.

3. Amongst other things, the previous, and differently constituted, Tribunal determined an annual fee for the management of the property. The Respondent was unhappy about the determination and its appeal against that determination was successful. The Upper Tribunal (Lands Chamber) in decision number LRX/118/2010 issued its determination on the 7th October 2011 to include directions timetabling the filing of statements and documents in preparation for this subsequent hearing.

4. The Upper Tribunal directed that a differently constituted Leasehold Valuation Tribunal should hold a re-hearing to **include** a consideration of:-

   (i) The extent to which "secretarial/agent charges" are recoverable on a true interpretation of the provisions of the leases, in particular, clauses 1.10, 7.1 and Schedule 3 paragraph 1(a); and
   (ii) Whether and to what extent those charges were reasonable within the meaning of section 19(1) of the Landlord and Tenant Act 1985

5. The Upper Tribunal's directions urged the parties to 'refine' the precise issues. In fact, as far as this Tribunal can see, the issues are the same as they always were.

6. The original lead Applicant was Marcus Noakes. The re-hearing was originally fixed for the 2nd February 2012. On that day, Mr. Noakes and counsel for the Respondents said that they anticipated that an agreement could be reached between all the lessees and the Respondent. They asked for an adjournment which was granted. The order was that the re-hearing was adjourned generally with liberty to restore. The recital to the order said that it was made in anticipation that an agreement would be reached. If no such application to restore was made by 1st June 2012, the application giving rise to the re-hearing would be deemed to have been dismissed.

7. On the 28th May 2012, Mr. Noakes wrote to the Tribunal saying that the 3 Applicants mentioned in the heading to this decision could not agree to the terms of the agreement and wanted the re-hearing restored. This letter was received on the 31st May.

8. It is right to say that the solicitors for the Respondent wrote objecting to this. They said that the agreement reached on the 2nd February "*was between Mr. Noakes on behalf of himself and the 26 other leaseholders and County Trade Limited. The agreement did not envisage or permit three of the leaseholders to decide that they would not be bound by the agreement and then pursue an*

application to re-instate the proceedings". Further, the letter says "*As far as we can see no application has been made by Olu Ogunnowo, Ola Animashaun or Joy Ademola. Further, no evidence has been provided to demonstrate that Mr. Noakes has authority to make such an application on their behalf.*"

9. The Tribunal had no idea that any agreement had been reached on the 2nd February. Mr. Noakes and counsel for the Respondent jointly addressed the Tribunal to say that they anticipated that an agreement could be reached but as several lessees lived abroad they would need some time to see if agreement could be reached. As is clear from the order then made, 4 months was given. It is also clear that agreement could not subsequently be reached with all 27 of the lessees. The Respondent accepted that Mr. Noakes was the spokesperson for all 27 lessees and it was he who wrote to the Tribunal before the 1st June on behalf of the 3 named Applicants above asking for the re-hearing to be reinstated.

10. The property referred to in the appeal is, as described above, 11 Crome Drive which is, in effect, a sample property. Although the present Applicants are lessees of 19, 23 and 25 Ladbrooke Road, this decision will still refer to 11 Crome Drive because this is a re-hearing.

11. The Applicants assert that they were given 'estimates' of the likely service charges before they signed their leases which were broadly complied with for 2006 and 2007. The service charges then increased substantially and they claim misrepresentation. That is not an issue over which this Tribunal has jurisdiction. The only relevant matter within its jurisdiction is reasonableness and payability of service charges.

12. Whilst there are one or two 'niggles' about the level of service provided by the Respondent, the only real issue for this Tribunal to deal with is the level of management charges for 2008 and 2009. By way of example only, the service charge account for 2008 at page 442 in the bundle shows the following entries with the 2007 figures (page 426) in brackets. This is for a block of 6 flats i.e. plots 76-81 which includes 11 Crome Drive:-

	£	
Telephone, accounts, stationery, etc.	216.72	(287.40)
Utilities	2,042.59	(450.00)
Insurance	577.19	(336.54)
Cleaning	220.00	(420.00)
Ground maintenance	132.18	(102.86)
Secretarial/agents charges	1,705.60	(0.00)
Fire risk/extinguishers	326.97	(0.00)
Keys cut	1.35	(0.00)
	5,222.60	(1,596.80)
Management Company charge – 15%	783.39	(239.52)
Amount claimed	6,005.99	(1,836.32)
Amount per flat	£1,001.00	(£306.05)

13. The figures were slightly distorted because, in addition to these figures, the Respondent seems to have started charging VAT at about this time and there was a £30 claim for a sinking fund which, according to the 2007 demand was to be paid into a "solicitors' account". It does not say whether this sinking fund is held in a separate bank account or a single client/trust account as suggested by the Royal Institution of Chartered Surveyors 'Service Charge Residential Management Code' ("the RICS Code") to comply with Section 42 of the Landlord and Tenant Act 1987.

14. It is now clear that the Applicants' complaint about these increased figures, as limited by the Upper Chamber, is whether the secretarial/agents charges are reasonable and whether they can be charged in addition to the 15% charge. Similar charges have been made in subsequent demands.

15. The Respondent says (at page 484 in the bundle) that in 2008, £23,982.50 was paid by the Respondent to Robbet Ltd. which provided office accommodation, office equipment and an agent who dealt with all matters requiring a management input. 65% (i.e. £15,588.63) of that was apportioned to the management of 82 leasehold properties (i.e. £190.11 per property). In addition, the Respondent paid £5,337.50 for secretarial services which were apportioned in the same way (i.e. £42.31 per property). If those figures are correct, then the secretarial/agents charges for plot 76-81 above should have been £1,394.52 and not £1,705.60.

16. A letter written to the Tribunal by the Respondent's solicitors the day before the hearing (see below) seeks to give some other explanation for this but the written evidence from Mr. Wright dated 31st October 2011 is clear.

17. The end result of this is that the lessees were asked to pay £1,705.60 + £783.39 = £2,488.99 in this block for management. Thus each lessee was being asked to pay £414.83 in 2008. If the Tribunal's view of the maths in the previous paragraph is correct, the figure is £355.21. Whichever it is, the Applicants say, rightly in the Tribunal's view, that this is much more than other lessees in similar flats would have to pay for the cost of management.

18. The Respondent also says, at page 486 in the bundle, that the 15% charge is pure profit. It does not include any overhead.

The Inspection

19. As the previous Tribunal inspected the property and there is a full description in the previous decision, this Tribunal did not see the need to re-inspect and none of the parties requested an inspection.

The Lease

20. The provisions of the leases referred to by the Upper Tribunal are as follows:-

"1.10 The Service charge : The contributions equal to the Tenant's

Proportion of the expenditure described in sub-clause 7.1 and in the Third Schedule (plus 15% of such expenditure as a management charge)

7.1 to pay contributions by way of Service Charge to the Management Company equal to the Tenant's Proportion (the items of expenditure comprising each part of the Tenant's Proportion to be determined by the Management Company whose decision shall be final and binding upon the Tenant) of the amount which the Management Company may from time to time expend and as may reasonably be required on account of anticipated expenditure on rates services repairs maintenance or insurance being and including expenditure described in the Third Schedule...(the remainder of this sub-clause deals with payment only)

Third Schedule

1. *The expenditure (in this Schedule described as "the Service Charge Expenditure") means expenditure:*
   (1) *In the performance and observance of the covenants obligations and powers on the part of the Management Company and contained in the Lease or with obligations relating to the Estate or its occupation and imposed by operation of Law*
   (2) *In the payment of the expenses of management of the Estate of the expenses of the administration of the Management Company of the proper fees of surveyors or agents appointed by the Management Company or in default by the Landlord in connection with the performance of the Management Company's obligations and powers and with the apportionment and collection of those expenses and fees between and from the several parties liable to reimburse the Management Company for them and of the expenses and fees for the collection of all other payments due from the tenants of the flats in the Building and the remainder of the Building not being the payment of rent to the Landlord*

   (the remainder of this Schedule deals with improvements etc. and payment of bank charges and interest)

The Law

21. A number of issues arise in this case which touch upon various legal provisions.

22. Section 18 of the 1985 Act defines service charges as being an amount payable by a tenant directly or indirectly as part of or in addition to rent for services, insurance or the landlords' costs of management which varies 'according to the relevant costs'. Relevant costs are defined as "*...the costs...incurred...by or on behalf of the landlord...in connection with the matters for which the service charge is payable.*"

23. Section 19 of the 1985 Act states that 'relevant costs', i.e. service charges, are payable 'only to the extent that they are reasonably incurred'. A Leasehold

Valuation Tribunal has jurisdiction to make a determination as to whether such a charge is reasonable.

The *Contra Proferentem* Rule

24. It could be argued that the terms of the lease about the recovery of the 15% Management Charge in addition to other management charges are ambiguous.

25. In order to assist courts (and Tribunals) in these difficult matters of interpretation, the *contra proferentem* rule was devised many years ago. It is not, of course, the only rule of interpretation but it is, perhaps, relevant to this problem. It translates from the Latin literally to mean "against (*contra*) the one bringing forth (the *proferens*)".

26. The principle derives from the court's inherent dislike of what may be described as 'take it or leave it' contracts such as residential leases which are the product of bargaining between parties in unfair or uneven positions. To mitigate this perceived unfairness, this doctrine was devised to give the benefit of any doubt to the party upon whom the contract was 'foisted'.

27. In the case of **Granada Theatres Ltd v. Freehold Investments (Leytonstone) Ltd** [1958] 1 WLR 845, Mr. Justice Vaisey said, at page 851, that "a lease is normally liable to be construed contra proferentem, that is to say, against the lessor by whom it was granted".

Ejusdem generis

28. This is a rule of interpretation referred to by Mr. Ogunnowo at the hearing and applies where specific words are followed by general words, then the general words are then limited to things of the same kind.

The Unfair Terms in Consumer Contracts Regulations 1999

29. In the case of the **London Borough of Newham v. Khatun and others** [2004] EWCA Civ 55, Lord Justice Laws, with the concurrence of the other Lords Justice, said, at paragraph 77, that he could not perceive any rationale for the exclusion of land transactions from the European Directive's scope and, hence, the regulations on unfair contract terms. In her skeleton argument, counsel for the Respondent concedes that they could apply to the agreement between the landlord and the tenants but not, for some reason which is not explained fully, to that part of the leases where the tenants agree to pay money to the Respondent management company.

The Hearing

30. The hearing was attended by Mr. Ogunnowo. No-one else appeared and a telephone call was put to the office of the solicitors for the Respondent. They said that they had faxed a letter to the Tribunal office the day before. They must surely have known or at least ought to have known that case workers go around the east of England attending hearings. Although the 6 line heading to the letter did mention a hearing on the 16th August, there was no headline message in large type to tell anyone in the Tribunal office that the letter was extremely

urgent. Neither the case worker in this case nor the Tribunal had seen this letter. Mr. Ogunnowo said that he did not know of any letter.

31. The letter was read over to the Tribunal chair who conveyed a précis of the contents to the hearing. It was also sent by e-mail. In essence, it said that the Respondent would not be attending the hearing and would not be represented. It re-stated previous arguments referred to above and added (of relevance):-

- Mr. Ogunnowo was present at the hearing on the 2nd February and participated in the negotiations which resulted in the said agreement. If there was an agreement on the 2nd February 2012, then the Tribunal is puzzled as to why there was any need for an adjournment. If agreement was reached after the hearing, then why did the solicitors and Mr. Noakes did not tell the Tribunal on the 3rd February?
- "The tribunal considered that all 26 leaseholders should be required to sign the agreement". This statement was not made by the Tribunal and is simply not understood. Why should the Tribunal be involved in any negotiations? The Tribunal cannot tell the parties how to conduct negotiations. It is up to the parties to formulate a method of reaching agreement. Clearly the 3 named applicants above did not agree.

32. Faced with this unusual situation, the Tribunal asked Mr. Ogunnowo what further submissions or evidence he would like to put before the Tribunal. He referred to the 3rd Schedule to the lease and was of the view that the wording only allowed the Respondent to charge for the costs of its administration. He also felt that the *ejusdem generis* rule of interpretation applied which, in effect, limited the extent of the 3rd Schedule to costs of administering the Respondent company. He also challenged whether the secretarial and other costs had been incurred as Mr. Wright had allegedly been ill for some time during the relevant period.

33. When asked whether the service charge demands complied with the statutory requirement as to the information they needed to contain, he fairly accepted that they did even though this was not absolutely clear from the bundle. He also confirmed that the Tribunal was only concerned with management costs for the years 2008 and 2009.

Conclusions

34. The Upper Tribunal allowed some latitude in the matters to be considered by this Tribunal. The failure of the Respondent to even turn up at the hearing was extremely unhelpful, particularly as it was the appellant to the Upper Tribunal. The Tribunal chair had written to the parties on the 27th January 2012 asking for comments on various legal and factual positions including reference to the unfair contract terms regulations and the response to most of these points were in counsel's skeleton argument.

35. The first question for the Tribunal to determine is whether it has jurisdiction to deal with this re-hearing. The facts are quite straightforward. This application involved 27 properties with 27 lessees who agreed that Mr. Noakes should

represent them and be the 'lead' Applicant. On the 2nd February 2012, counsel for the Respondent agreed to this and accepted that although Mr. Noakes thought that agreement could be reached with everyone, they i.e. Mr. Noakes and the Respondent needed a few months to complete the agreement between all the lessees. Three of the lessees could not reach agreement and an application was made to the Tribunal on their behalf to re-instate the re-hearing, in time, by the person who was accepted by the Respondent as being the representative of all 27 lessees. The Tribunal concludes that it has jurisdiction.

36. The next question is whether the lease allows charges to be made both for the expenses incurred in management i.e. the secretarial and agents charges and the 15% "*management charge*". The wording used by the lease i.e. management **charge** is of particular significance. As it turns out, the Respondent makes it very clear in its evidence that this sum represents only profit for the Respondent.

37. The Tribunal concludes first of all that it will not interfere with the charge of 15%. It represents a very 'old fashioned' way of charging a management fee which is now frowned upon by the RICS Code because it encourages landlords and management companies to inflate service charges in order to inflate the 15% element. The RICS Code recommends charging a fixed amount per unit i.e. per flat per year. This encourages efficiency and ensures that the lessees have a good idea, in advance, what that element of their service charge is going to be.

38. This is emphasised by the evidence produced by the Applicants and the Respondent plus the information provided by the Tribunal from quite a large number of managing agents i.e. that they all now charge on a fixed cost per unit.

39. Can the Respondent charge for the actual cost of management in addition? In the circumstances of this particular case, the Tribunal concludes that it would be reasonable of it to do so but only to the extent that it brings the total cost of management up to a level which would be 'reasonable' as compared with other similar properties. The main reason for this conclusion is the simple matter of the amount involved.

40. Whether the 15% is, technically, a service charge within the meaning of Section 19 of the 1985 Act, is a mute point. As it does vary 'according to the relevant costs', it probably is because it varies according to the matters for which service charges are payable. If the amount of service charges is £100, the management charge is £15. If it is £200, the management charge is £30 and so on.

41. However, the other charges for management most certainly are service charges. Thus, in this Tribunal's view, it is entitled to look at the total amount paid for management and come to a view about whether it is reasonable to pay anything more than the 15%. In 2008, according to the figures interpreted by the Tribunal above, the cost per flat of the 15% was £87.93. This is made up as to a total of service charges of £3,517.00 (without the secretarial and other costs) divided by 6 to make £586.17. 15% of that figure is £87.93 per flat per year.

42. If this were any other comparable estate of properties with modern leases, the lessees could expect to pay for either a professional managing agent or an equivalent amount to the landlord or management company. The Tribunal is therefore entitled to look at the level of these charges in order to satisfy the 'reasonableness' test. 'Reasonable' must be looked at objectively. A reasonable charge for management is not what the landlord or management company thinks is reasonable nor, perhaps rather perversely, what the landlord or management company has actually incurred. Equally, it is not the cheapest that can be obtained. It is what any average lessee would expect to pay in similar circumstances within a range of reasonableness.

43. The preponderance of evidence is that a professional managing agent employed to look after a modern estate with a modest amount of common parts would expect to be paying about £150 including VAT. Some more, some less. The Respondent complains that there is no specification of works provided by the comparables mentioned by the Applicant and the Tribunal. The Tribunal's comparables say that the agents comply with the RICS Code which is a specification of works and is far more information than the Respondent provided at the outset for its 'services'. Lessees would certainly not expect to pay £414.83 or even £355.21 per flat, per annum which, as can be seen above, is what these lessees were charged in 2008.

44. The Respondent should know that the Tribunal's expertise in this geographical area leads them to believe that the cost per flat in Norfolk and Suffolk is less than in some other areas. This would have been put to the Respondent for comment if it had turned up at the hearing. The Tribunal was not prepared to adjourn the case again for this purpose. The Tribunal concludes that the total amount for management should be in that region. For 2008, the Tribunal concludes that the reasonable amount payable for management should be £150 to include VAT and the 15%. For 2009, the amount is the same.

45. As to any other issues raised, the Tribunal comments as follows:-

- As the prospective lessees were told at the outset that they would have to pay a management charge of 15% of the service charges and the Respondent admits that it refused to give any indication as to what would be in the service charges, the Tribunal accepts their assertion that they did not believe that anything would be paid for management save for the 15%. As His Honour Judge Gerald said, at paragraph 20 of the appeal decision in this case, the description 'management charge' might suggest a complete charge for the management provided.
- The Tribunal construes the provisions of Schedule 3 *contra proferentem* in so far as they purport to allow the Respondent to charge any more than is a reasonable amount in total for management.
- *Ejusdem generis* is probably not applicable here
- The unfair contract term regulations do apply to the whole agreement here

because the lessees are also 'consumers' of the Respondent. However, in view of the decision reached, it is not considered appropriate to explore that avenue any further.

46. Finally, the Tribunal would just say this. The landlord and Respondent companies appear to have set up this estate on the basis that the people behind the companies would make a profit out of management. Indeed, they make this clear from the information sheet provided for lessees. However, they showed an apparent lack of expertise in residential property management. The information sheet provided in 2008 (at page 217 of the original bundle) after the leases had commenced includes such comments as "*we do not recognise the authority of any residents association*" and "*any communication from such an association will be ignored*"; and "*if we have to visit the estate our charges will be £60 per hour of time spent including travelling time*"; and "*rent is payable...whether demanded or not*" and if service charges are not paid "*we may cut off the Service Installations serving the apartment...*".

47. It is generally recognised that a good residents' association helps in the task of management. The RICS code of management makes it clear that a competent managing agent should make regular visits to the property and include the costs in the management fee. Ground rent is not payable until a properly drawn demand is sent and cutting off Service Installations would be a very dangerous step to take.

48. Management of properties which are or can be people's homes must be taken seriously and must be undertaken professionally in this day and age. This management structure seems to involve a relatively small number of properties spread over Norfolk, Suffolk and Hampshire from an office many miles away in Essex. In the Tribunal's expert view, it is difficult to see how this can be made to work efficiently and at reasonable cost to the lessees. That is not something which the lessees should have to pay extra for.

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Bruce Edgington
Chair
17th August 2012