CASE NUMBER: CHI/15UG/LSC/2006/0115

RESIDENTIAL PROPERTY TRIBUNAL SERVICE
SOUTHERN LEASEHOLD VALUATION TRIBUNAL

PARK HOUSE
BRIDGE ROAD
STAUSTELL
PL25 5HD

MR W D CRUDDACE, MRS I D BENNETTO,
MR AND MSR T T DINGLE, MRS M JENKIN,
MRS B A EDWARDS AND MR AND MRS E G BUSBY
(Applicants)

AND

OCEAN HOUSING
(Respondent)

In The Matter Of
Sections 27a and 20c Landlord And Tenant Act 1985 (As Amended)

And In The Matter Of
The Rent Assessment Committee (England And Wales)
Leasehold Valuation Tribunal (Services Charges Etc)
Order 1997

TENANTS' APPLICATION
FOR DETERMINATION OF LIABILITY TO
PAY SERVICE CHARGES IN RESPECT OF
THE FINANCIAL YEARS 2004-05 AND 2005-06

AND

TENANTS' APPLICATION FOR AN ORDER LIMITING THE AMOUNT OF
ITS COSTS THAT THE LANDLORD MAY RECOVER

DETERMINATION

Summary Decision

1. This case arises out of the tenant's application for the determination of liability to pay service charges for the financial years 2004-2005 and 2005-2006. Under section 27a of the Landlord and Tenant Act 1985 (as amended) service charges are payable only if they are reasonable. The Tribunal, whose members were Robert Batho MA BSc LLB FRICS FCIArb (Chairman), A J Lumby BSc FRICS and D G Willis (lawyer member), has determined that, because of the way in which the leases are drawn, none of the elements of charge which the tenants sought to challenge for the years in question can be held to be reasonable.

2. Given this decision, the Tribunal allows the tenants application under section 20c of the Landlord and Tenant Act 1985 by determining that the landlord may not recover its costs in relation to the application by way of service charge.

Procedural Matters

3. On 31st October 2006 Mr W D Cruddace, the tenant of 13 Park House St Austell, made an application to the Leasehold Valuation Tribunal for the determination of the reasonableness of service charge costs incurred for the years ending on 31st March 2005 and 2006, and seeking an order under Section 20c of the Landlord and Tenant Act 1985 preventing the landlord from recovering the costs incurred in connection with the proceedings before the Tribunal as part of the service charge.

4. The Tribunal issued preliminary directions on 6th November 2006, following which Mrs I D Benetto, the tenant of 32 Park House, and Mr and Mrs T T Dingle, the tenants of 53 Park House, applied to be joined as applicants and they were so joined by Order of 24th November 2006. The original directions envisaged that the matter would be dealt with by written representations only, but following the receipt of further documentation from Mr Cruddace, on 5th January 2007 the Tribunal directed that the matter should be dealt with by way of oral hearing.

Inspection and Hearing

5. The Tribunal inspected the premises on Wednesday 7th March 2007 and a hearing of the matter took place later that day. By that time, Mrs M Jenkin, the tenant of flat 11, Mrs B A Edwards, the tenant of flat 12 and Mr and Mrs E G Busby, the tenants of flat 28, had also applied to be joined as applicants and those applications had been granted.

6. All of these named tenant applicants attended the hearing, together with Mrs J W Redfearn, the tenant of flat 64, who attended as an observer. Ocean Housing were represented by Mr Mike Rowe, their Housing Manger, and Mr Chris Stockman, their Maintenance Manager, both of whom accompanied the Tribunal on their inspection of the subject premises. They subsequently attended the hearing in company with Mr Chris Blackbeard, Ocean Housing's Managing Director.

7. At the commencement of the hearing the Tribunal chairman explained that he was a chartered surveyor in practice in the area and that, some twelve months or so earlier, he had been approached by Ocean Housing in connection with their proposed conversion into living accommodation of the former Methodist Chapel at Penwithick, a village some three miles from St Austell. The architects dealing with the scheme, Alan Leather Associates, had advised that it would be helpful to have a schedule of the condition of the building, and suggested that he do that, which he had subsequently done. The chairman explained that, whilst he did not see that involvement with Ocean Housing as affecting his independence in the present case, he would listen to any objections to his continued involvement and withdraw if the parties wished it. No objection was raised to his continuing.

8. The chairman also sought confirmation from the applicants that the only matters of service charge in issue were, as stated on the original application form, the costs of electricity and of caretaking services, and that all other charges were agreed or accepted. The applicants, through Mr Cruddace, confirmed this to be the case and the hearing proceeded accordingly. Although references were made in evidence to other items of charge, the Tribunal's determination refers only to these two disputed areas.

The Premises

9. Park House is a block of 67 flats arranged on 12 floors and is located just to the west of the St Austell town centre. The block was built in the late 1960s or early 1970s by Restormel Borough Council as part of its provision of housing accommodation, but in about 2004 the Council's entire housing stock (said to be some 3,500 units as at the date of the hearing) was transferred to Ocean Housing, a registered social landlord.

The Lease

10. During the hearing it became apparent that leases on the flats have been granted at various times, and that there are three different forms of lease applicable to the building. It was stated that the first type of leases were granted by Restormel Borough Council in the early years after the block was built, but there was then a change to a different style of lease from about the late 1970s and Ocean Housing had introduced a third form of lease since they took over the property. It was nonetheless agreed at the hearing that all of the tenant applicants believed that they held their flats on leases expressed in identical terms, following those of the lease under which Mr and Mrs Cruddace hold flat 13, and the Tribunal has proceeded to make its determination on that basis.

11. Mr and Mrs Cruddace hold flat 13 under the terms of a lease dated 25th October 1999 whereby the Council demised

> "ALL THOSE premises (hereinafter called "the flat") known as 13 Park House Bridge Road St Austell Cornwall and more particularly delineated on the plan number one annexed hereto and thereon edged red situate on the second floor and ground floor store of the building known as Park House Bridge Road St Austell Cornwall (hereinafter called "the building") which expression shall be deemed to

include the curtilage thereof the location of which is shown edged red on plan number two annexed hereto TOGETHER WITH the use of all the fixtures and fittings in the said flat and together with the free and uninterrupted passage and running of water and soil gas and electricity from and to the flat through the sewers drains channels and water courses cables pipes and wires which now are or may at any time within 80 years of the date hereof be laid in through or under the said building or any part thereof (this shall not however prevent the Council from replacing or altering the main services in the interest of the block as a whole) and the right of support and protection for the benefit of the flat as is now enjoyed from the other flats and all other parts of the said building together with the right to the sole use of the garden drying or utility area (if any) so designated and marked on the said plan to be enjoyed by the tenant of the flat and together with a right in common with the Council and all others having the like right to use for the purposes only of ingress to and egress from the flat the paths entrance hall passages stairs and passenger lift (if any) of the building...

TO HOLD unto the tenant for a term of 125 years from the 25th day of October1999...

YIELDING AND PAYING therefor the yearly rent of £10.00 TEN POUNDS (£10) on the 1st day of April each year TOGETHER WITH a further and additional rent on the 1st day of April in each year equal to one sixty-seventh of the amount of costs incurred by the Council since the preceding 1st day of April in respect of the expenses and outgoings incurred by the Council in the repair maintenance renewal overhaul and insurance of the building and the other heads of expenditure set out in the First Schedule hereto.

12. Under the provisions of Clause 4 of the lease,

"the Council hereby covenants with the tenant that
(2) to keep the building insured against loss or damage by fire and rebuild and reinstate the same as speedily as possible."

13. The First Schedule of the lease defines the "Council's Expenses And Other Heads Of Expenditure In Respect Of Which The Tenant Is To Pay A Proportionate Part" and lists them as follows:-

(A) The expenses of maintaining repairing redecorating and renewing amending cleaning re-pointing painting graining varnishing and whitening or colouring the exterior of the said building and all the appurtenances apparatus and other things thereto belonging including drains gutters roofs chimneys and where the building is over two stories in height all external windows (and replacement glass in the event of window replacement)

(B) The cost of structural defects set out in the Second Schedule hereto and any structural defects of which the Council first becomes aware after a period of 5 years from the date of this lease.

(C) The cost of insuring and keeping insured throughout the term hereby created the said building and all parts thereof and the Council's fixtures and fittings therein and all the appurtenances apparatus and other things thereto belonging.

(D) The cost of maintenance replacement overhaul repair or renewal of any other communal property over or in respect of which the tenant has rights.

(E) The cost of cleaning decorating renewing repairing and lighting the communal passages landings hallways staircases.

(F) The cost of maintaining repairing renewing or replacing the communal supply pipes wires cables ducts flues channels or water courses.

(G) The cost of employing maintaining and providing accommodation in the said building for a caretaker or warden (if any).

(H) The fees of the Council in respect of the management of the building.

(I) The expense of making repairing maintaining and rebuilding all communal paths ways parking areas paved areas drying areas tarmaced areas sewers drains pipes water courses party walls party structures party fences walls garden areas a shrubberies.

(J) The cost of maintaining repairing or renewing the lifts lift shafts or machinery (if any).

(K) The cost of communal heating and ventilation systems and the boilers (if any) including the cost of overhaul maintenance repair and renewal and the cost of fuel.

(L) The cost of communal fire extinguishers fire alarm systems TV aerials including the cost of overhaul maintenance repair and renewal (if any).

(M) The cost of overhaul repair renewal and maintenance of communal washing and drying facilities including washing machines and driers (if any)."

14. The Second Schedule, to which particular reference is made at clause B of Schedule One, provides that

> "During recent works to the flats, void areas behind the external rendered panels were discovered. These are not considered to have any structural implications but in the long term will require attention."

The Applicants' Case

15. Mr Cruddace spoke on behalf of the group of tenant applicants, although other tenants made additional comments from time to time. Mr Cruddace introduced his presentation to the Tribunal by emphasising that he had no personal argument with any individual employees of Ocean Housing.

16. It was clear to the Tribunal, both during their inspection of Park House and at the hearing, that there was a good relationship between Mr Cruddace and the members of Ocean Housing who were present. Sadly, such relationships are seldom found, and so the Tribunal considers it important to recognise the good relationship here, and to acknowledge the fact that this application arises from a fundamental difference of opinion over the interpretation of what is, by common acceptance, a poorly drawn lease.

17. Mr Cruddace explained that he had originally been a council tenant in Park House and had purchased his lease in 1999 under the Right to Buy scheme. Over the years he had been a member of the Tenants' Panel and the Borough Panel which followed it, before becoming a member of the board of the housing association, which he had to leave when he bought his lease since there was no provision for leaseholders to be on the board. He was now on the Ocean Housing representative panel as a leaseholder representative. For the most part he accepted the service charges but he did have particular issues in relation to the sums charged for electricity and the cost of the caretaker.

18. With regard to electricity, the total for the block had been £2,941.12 in the year ending in 2004 but then rose to £7,678.84 for the following year and to £9,854.58 for the year ending on 31st March 2006. The meter reading details which had been provided to him were not consecutive and a different meter appeared to have been introduced. Ocean Housing had said that there had been a problem with estimated readings, so that there was an element of "catching up" in the 2004-2005 year but, even so, the charges had gone up yet again in the 2005-2006 year, still with no explanation.

19. Mr Cruddace felt that the particular problem was that Ocean Housing were seeking to recover all of the electricity costs for the whole building, when clause E of the First Schedule of his lease allowed the landlords to recover the cost of the lighting of common parts only. He had offered to pay what he had considered would be a reasonable contribution towards that cost, but his offer had been refused.

20. A further particular concern related to the laundry. At one time the washing and drying facilities took the form of domestic machines which could be used without charge, but they had been replaced with commercial machines leased on contract, with users making a payment for each use. That approach was acceptable if the charge covered all of the costs, but the reality was that the cost of the electricity was being recovered as part of the service charge, when the lease did not allow for that. Ocean Housing said that the lease implied that they were allowed to make a charge, but he did not consider that to be a valid argument, and indeed given the changes that there had been he no longer considered clause M of Schedule One to have any validity.

21. With regard to the caretaking charges, they had amounted to a total of £14,526 for the year 2003-2004 and £14,935 for the year 2004-2005, but then for the year 2005-2006 they had suddenly risen by some £3,000, when part of the caretaker's time was spent elsewhere. There had been no explanation for that increase. [The summary of service charges provided to the Tribunal gave no gross figure for the cost of caretaking for the 2005-2006 but indicated a cost per individual flat of £270.91. The Tribunal has assumed that that derives from a gross cost of £18,159.97]. Mr Cruddace had asked for the details of the cost of the caretaker but those details had not been given. He did say, however, that he knew that the caretaker now had to pay for his own accommodation, and that the accommodation cost was not passed to the tenants.

22. Mr Cruddace noted that the boilers which had originally been in the building had been removed.

23. In answer to questioning Mr Cruddace acknowledged his close involvement with various tenant representative bodies and the consultations that there had been over such matters as the caretaking services. He agreed that the laundry had proved problematic over the years, with abuse such as one tenant washing all the towels from a hairdressing salon and another washing all the kit from a football team. He acknowledged that the change in the way in which the laundry was run came as a response to tenant complaint, but Mrs Cruddace then interjected that the system was not fair because they were being charged for electricity for the laundry room but, because of the variations in the leases, there were some tenants who were not. She saw no reason why, if she wished to use to the laundry, she should have to pay money for its use and then a separate charge for the electricity used in the process.

24. Mrs Redfern who, although not a party to the application, was allowed to speak with the agreement of the parties, said that she objected to paying for the electricity because she was physically incapable of using the laundry and it seemed wrong that she should be expected to pay by way of service charge something which was affectively a subsidy to outsiders.

The Respondent's Reply

25. In presenting the case for the landlords, Mr Rowe explained that there had been a period during which electricity bills were estimated, and that there had indeed had to be a period of catching up, but that readings were now taken monthly and tenants were charged on an actual use basis. He pointed out that electricity charges generally have gone up in recent years, and that there was a short period when a negotiated charging rate expired and electricity was charged for at a higher default rate, but that Ocean Housing's buying power enabled it to negotiate good terms for all of its tenants.

26. He suggested that these terms were reviewed on an annual basis (thus taking it outside the long term agreement provisions of the legislation) although he was not completely certain about that. He confirmed that all electricity for the common parts of Park House pass through one central meter, although there was a landlord installed reading sub-meter in the laundry.

27. In relation to the caretaker's employment, there had indeed been an error last year whereby £3,000 was wrongly charged. Revised bills were to be submitted to the tenants, but that had been deferred pending the outcome of this application. Apart from this, 10% of the caretaker's costs were attributable to caretaking services in another accommodation block elsewhere in St Austell and those costs were invoiced the residents of that accommodation.

28. With regard to the laundry, Ocean Housing's position was that they would rather not have the laundry at all, but it had been established by consultation that the residents saw it as a useful asset which they wished to keep. The service had never been provided free, but there had been a problem of abuse, and

consultations of the residents had led to the introduction of industrial leased units with a cash charge, although that cash charge did not take account of utility costs.

29. When he had been in the Housing Department of Restormel Borough Council he had tried to set a reasonable charge for this service, which was not the full cost but about half the rate that one might expect to pay in a commercial establishment: that policy had been maintained thereafter, and he had continued it on the transfer to Ocean Housing.

30. Last year there had been a further consultation on yet a new charging basis but, once again, that would not have covered utility costs, only hire costs but the system had not been introduced. Overall, the aim was to be fair: Ocean Housing had tried to work with all residents and although some might not be happy with the outcome the overall result was fair.

31. Mr Rowe confirmed on being questioned that it was his view (based on legal advice) that clause M of the First Schedule allowed for everything to be charged as service charge cost. He also confirmed that in relation to clause E of Schedule One (that relating to the cleaning, lighting etc of communal passages landings hallways staircases) all leases were the same.

32. He went on to say that there had been a tenants association but that that had not continued. Consultation continued nevertheless, although Mr Cruddace complained that in relation to the consultation over the caretaking services, Ocean Housing had "moved the goal posts". It was stated that the caretaker now occupied one of the 67 flats on the same basis as other occupiers: he paid the rent and he was also expected to pay a service charge.

33. In relation to insurance, of which no details were given in the service charge account, it was explained that the arrangement made by Restormel Borough Council had been that insurance costs were billed separately with the ground rent and that Ocean Housing had continued that. They held a block insurance for all the properties in their ownership, but Mr Cruddace objected that although the cost was only £30.00 per flat per annum the policy was subject to a £1,000 excess, which meant that the residents tended to have to pay the cost of dealing with vandalism damage, because it was below the excess, when they could reasonably have expected that this would be dealt with by insurance.

34. By way of clarification, Mr Rowe explained that the electric meter had been changed and it was for this reason that the number had changed. There was no gap in the readings, it was simply that not all of the documentation had been produced, as it should have been: he produced the relevant documentation and so satisfied the Tribunal of the correctness of this claim. He said that, overall, Ocean Housing were satisfied that the charges were right.

35. In conclusion, Mr Rowe said that he agreed that there were grey areas in relation to the lease interpretation. Ocean Housing had wanted to remove the laundry and replace it with a community facility, such as a lounge that could be used by all residents, thereby removing that particular problem, but the

residents had rejected that idea. Ocean Housing had therefore endeavoured to establish a fair operating system by consensus.

Consideration

36. The Tribunal recognises that both the applicants and the respondents in this case are the victims of a poorly drawn lease. The Tribunal accepts that, whether they have communicated the fact well or not, Ocean Housing have attempted to "make the best of a bad job" by interpreting the lease in a way which is fair to all tenants. It is a tribute both to them and to the tenants that they have been able to maintain a remarkably good working relationship during that process, although that is not to overlook the fact that there has been a clear lack of consensus over such items are car park charges (which are outside the service charge provisions), and here at least there are some tenants who feel that Ocean Housing have acted in a high handed manner.

37. This application has come before the Tribunal because there are fundamental differences of opinion over the interpretation of the lease and the parties, quite understandably, want to achieve some certainty. In seeking to provide that certainty, the Tribunal is constrained by the inadequacies and inconsistencies of the very lease upon which it is asked to make a determination.

38. In relation to **caretaking charges**, the Tribunal acknowledges Ocean Housing's admission that they made a mistake. The correction of that mistake will reduce the charge for the 2005-2006 year to a level which corresponds with that for the previous years. The Tribunal takes the view that the landlord is entitled to recover, not only the salary paid directly to the caretaker, but also the associated on costs of National Insurance and the like which are associated with that employment. The Tribunal therefore concludes that the adjusted charges which the landlord seeks to recover in respect of this element are reasonable, and so should be considered to be recoverable in the full adjusted sums demanded.

39. The Tribunal notes that the tenants may well have benefited by the change in policy whereby the caretaker is obliged to pay a rent for the accommodation which he occupies, although the lease would entitle the landlord to charge such a cost in addition to the cost of employment.

40. The **electricity costs** are more difficult, largely because of what the lease does not say. Clause D of the First Schedule, for example, refers to the cost of

> "maintenance replacement overhaul repair or renewal of any other communal property over or in respect of which the tenant has rights"

and clause J refers to recovery of

> "the cost of maintaining repairing or renewing the lifts lift shafts or machinery (if any)"

but neither of these clauses gives right to recover the cost of operating a lift. As clause E refers to

> "the cost of cleaning decorating renewing repairing and lighting the communal passages landings hallways and staircases"

there is no charging provision there either. The landlord is contractually entitled to recover only those charges for which the lease makes specific provision, and so although the landlord may recover the cost of maintaining a lift system he cannot recover the operating costs, and in relation to communal areas he can only recover the cost of lighting.

41. It is the applicants' complaint that the landlords have added to this charge the fuel costs associated with operating the laundry room, and the landlords argue that they find justification for this in the provisions of clauses K and M.

42. Clause K allows the landlord to recover

> "the cost of communal heating and ventilation systems and boilers (if any) including the cost of overhaul maintenance repair and renewal and the cost of fuel"

and clause M allows for

> "the cost of overhaul repair renewal and maintenance of communal washing and drying facilities including washing machines and driers (if any)."

43. The Tribunal finds no difficulty in concluding that clause K allows the landlord to recover the cost of the electricity used in operating the centralised bathroom ventilation system. It does not see, however, that either of these clauses entitles the landlord to recover the cost of the electricity used in running the laundry room.

44. Whilst it might be possible to argue that the reference to boilers in clause K would allow the landlord to charge the cost of operating the water boilers in the laundry, the Tribunal notes that clause K refers to communal facilities when the laundry does not, in this sense, appear to be such a communal facility. Further, the Tribunal notes that the laundry facilities are separately dealt with under the lease, and this too suggests that the boilers referred to in clause K were not envisaged as being part of those laundry facilities as referred to in clause M.

45. Interpreting the lease in the manner for which the landlords contend would lead to the unfair result that tenants would be charged for the facility regardless of use, and although the Tribunal recognises that leases can at times create such unfairnesses, it considers that such a conclusion would not be justified by the simple wording in this case.

46. The Tribunal also notes that it is only in clause M of Schedule One that there is any reference whatsoever to the communal washing and drying facilities. They are not in any way defined as forming any element of the common parts of the building; there is nothing which allows the tenants to demand that such a facility

be provided; and there is nothing which places any obligation on the landlord to provide such a service.

47. It might therefore be held that a reasonable interpretation of the lease was that there is neither requirement nor obligation to provide the service, but if the landlord chooses to so provide it (as it appears to have done, albeit reluctantly) then it may recover from the tenants by way of service charge the cost of overhaul, repair, renewal and maintenance, but any other costs, including fuel costs, must be recovered by way of a user charge.

48. In practice, overhaul, repair, renewal and maintenance would normally be seen as natural concomitants of the lease agreement into which the landlord has entered, and one might therefore doubt the justification for any separate charge. It would no doubt be more satisfactory if all charges were levied on a user basis, and the service charge provisions abandoned in this respect, but that is not a direction which the Tribunal has in its power to insist that either party take.

Conclusion

49. In summary, in relation to electricity charges, the Tribunal concludes that the lease allows the landlord to recover the cost of lighting the communal passages landings hallways and staircases but not the laundry room, which is not defined as a common part; and it may recover the cost of the communal ventilation system.

50. The costs of operating the lift system, and the fuel costs associated with operating the laundry room, are not recoverable as part of the service charge.

51. The Tribunal recognises that this leaves the landlord with a significant practical difficulty, because there is only one electricity meter relating to the common parts. It is, of course, possible for the landlord to separate out the charges associated with the laundry room, by using the figures recorded on the landlord's meter, but apart from that it might only be possible to address the problem in an objective manner by introducing a very much sophisticated metering system. That would almost certainly require very extensive and expensive alterations of the electrical installation generally, and the Tribunal doubts that that would be justified.

52. Given the very good relationship which exists between the parties, therefore, the Tribunal considers that the best way forward would be for the parties to seek to agree between themselves some reasonable apportionment between those charges which are and are not recoverable, possibly by reference to the broad power consumption levels of the individual types of facility. The Tribunal has neither the knowledge nor the expertise to make such a judgement and no evidence of, for example, the likely power consumption of the lift, has been presented to it.

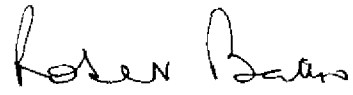
Further Considerations

53. For the longer term, however, it seems clear that the proper way forward will be by agreed amendment of the leases into a standard form which the makes the rights and obligations of the parties clearer and which defines the contributions which the tenants should make in a less equivocal manner. Given the good relationship which exists between the parties, the Tribunal is hopeful that this might be achieved by negotiation but, if it cannot, the Tribunal would be pleased to consider an appropriate application made under the provisions of the Commonhold and Leasehold Reform Act 2002.

Section 20c Application

54. No formal representation was received, either in writing or orally, in respect of the application under 20c of The Landlord and Tenant Act 1985. The Tribunal has therefore considered that application on its face value and in the light of its determination as above. The Tribunal concludes that the parties had little choice but to refer their quite reasonable differences of opinion to a third party but that, as on balance it has found more justification in the applicants' arguments than those of the landlords, it concludes that it would be right to grant the application.

55. It therefore orders that the respondent landlord may not recover any of its costs associated with the application by way of service charge cost. The Tribunal would expect the landlord to levy its normal 10% management fee for the year in which those costs are incurred, and nothing more.



Robert Batho (Chairman) **Date 16th March 2007**
A member of the Southern Leasehold Valuation Tribunal
Appointed by the Lord Chancellor