

RESIDENTIAL PROPERTY TRIBUNAL SERVICE
SOUTHERN RENT ASSESSMENT PANEL
LEASEHOLD VALUATION TRIBUNAL



Residential
Property
TRIBUNAL SERVICE

S.27A Landlord & Tenant Act 1985 as amended

DECISION & REASONS

Case Number: CHI/21UD/LSC/2007/0036

Property: 133 Marina
St Leonards-on-Sea
East Sussex
TN38 0BT

Applicant (RTM Company): 133 Marina RTM Company Ltd
Represented by Mr George Okines of Arko Property Management.

Respondent (Lessee Flat 1): Miss H M Sheppard
Appearing in person.

Landlord: Flatholder Ltd (Not represented)

Date of Application: 23 April 2007

Date of Hearing: 24 July 2007

Tribunal Members: Mr B H R Simms FRICS MCI Arb (Chairman)
Ms J Talbot MA (Cantab) (Legal Member)
Mr R Athow FRICS MIRPM (Valuer Member)

Date of Decision: 30 August 2007

Summary of Decision

The informal agreement for Miss Sheppard to pay the revised amount of £362.45 is not in accordance with the lease.

The service charge for the accounting period ended 31 December 2006 is to be limited to the amount of £2,055 of which 20% is payable by the Respondent, an amount of £411.

No reserve is to be collected for the years ended 31 December 2006 and 2007.

The interim charge for the accounting period ending 31 December 2007 is to be limited to £544 for the year in respect of Miss Sheppard.

BACKGROUND

1. This is an application made by the RTM Company under S.27A of the Landlord & Tenant Act 1985 (the Act) for the Tribunal to decide the liability of the lessee to pay certain items of service charges for the year ended 31 December 2006 and proposed payments in advance in respect of the year ended 31 December 2007.
2. The hearing was convened and held at the Hornbye Park Sports Complex, Bohemia Road, Hastings, at which Mr Okines and Miss Sheppard were in attendance.
3. Prior to the hearing and as arranged, members of the Tribunal inspected the property generally. Miss Sheppard pointed out various matters of concern to her.
4. During the inspection Miss Sheppard indicated that she believed an agreement had been reached between herself and Mr Okines and she was therefore surprised that the Tribunal intended to proceed with the case. The Chairman advised Miss Sheppard that the Tribunal was not aware of any agreement and the hearing would proceed.
5. The property is a typical Victorian terrace building with accommodation arranged on the basement and four upper floors. It has rendered elevations and what is believed to be a flat roof behind a parapet wall.

RELEVANT LAW

6. The Tribunal's jurisdiction derives from the Landlord & Tenant Act 1985 as amended. In coming to our decision we have had regard to the Act in full but include a summary here for the assistance of the parties.
7. S.18 defines the meaning of a service charge as being "...an amount payable by a tenant ... in addition to the rent – (a) which is payable directly or indirectly, for services, repairs, maintenance, improvements, 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".
8. S.19 limits the relevant costs to be taken into account in determining the amount of service charge only to the extent that they are reasonably incurred and only if the services or works are of a reasonable standard.
9. S.27A provides that a Leasehold Valuation Tribunal may determine whether a service charge is payable and if it is, the Tribunal may also determine the person by whom it is payable, the person to whom it is payable, the amount which is payable, the date at or by which it is payable and the manner in which it is payable. These determinations can (with certain exceptions) be made for current or previous years and also for service charges payable in the future.

LEASE

10. The arrangement for receiving and paying service charges derives from the lease between the parties.

11. The Tribunal was provided with a copy of the lease of flat 1, being the flat on the lower ground floor of the building. It is dated 1 March 2002 and is between Russell Brett Beswick and Sharon Anne Beswick and Mrs A Czajka. It is understood that the current landlord is entitled to the reversion and Miss Sheppard is the current tenant who acquired the flat on 2 December 2005. The Applicant is the Right to Manage (RTM) Company responsible for the management of the property. In coming to its decision the Tribunal has had regard to the complete lease document but highlights here those clauses which it believes are specifically relevant to the payment of service charges.
12. In the Particulars of the lease the tenant's share of expenditure is shown as 20% of maintenance charge.
13. In Clause 1(6) of the lease "the Accounting Period" shall mean a period commencing on the first day of December and ending on the thirtieth day of November in any year.
14. An obligation on the lessee to pay a service charge and other expenses is set out in Clause 4 sub-clauses (4) and (5) as follows:-
- "(4) Pay the Service Charge and any other charges contained herein within fourteen days of it being so demanded by the Lessor and that such charges shall be recoverable in default as rent in arrear*
- (5) Pay all expenses on an indemnity basis incurred in or about the maintenance and proper convenient administration management and running of the building or in considering or fulfilling the Lessor's obligations or discretionary powers under this Lease or under the leases of the other Flat Owners to the extent that such expenses are not exclusively paid by a Lessee of one flat Expenses in this paragraph include without affecting the generality of the above:-*
- (i) professional and other fees for advice or otherwise*
- (ii) handling specific requests of the Lessee's."*
15. The Lessor's obligations in respect of maintenance and insurance are contained within Clause 5 (5) of the lease which includes the usual obligations for maintenance and repair and allows for the employment of a firm of managing agents to manage the building together with surveyors and other professional persons that may be necessary.
16. Within Clause 5 (5) at sub-clause (I) there is included arrangements for building up a reserve fund as follows:-
- "(I)(i) the Lessor shall so far as is reasonable equalise the amount from year to year of the Lessor's expenses in the Fifth Schedule by charging against those expenses in each year and carrying to a reserve fund reasonable sums as provision for future expenses liabilities or payments whether they are certain or contingent obligatory or discretionary*
- (ii) Payments on account and reserves retained by the Lessor and expended in the year of payment by the Lessee shall be held by the Lessor in a separate bank account upon trust to expend them in subsequent years in pursuance to the Fifth Schedule and subject thereto in trust for the Lessee absolutely*

(iii) When a future expense liability or payment for which reserves have been made has been paid by the Lessor the Lessor shall make an adjustment which may be necessary with the Lessee by reduction of subsequent charges or otherwise."

17. It should be noted that the reserve fund is to be held specifically for the provision of future expenses and is to be held in a separate bank account.
18. The Fifth Schedule sets out the arrangements for dealing with the service charge. The landlord's expenditure as already defined, comprises the service charge in any accounting period but in addition there is an arrangement for the payment of an interim charge which is defined at paragraph (1)(3) as:

"...such sum to be paid on account of the Service Charge in respect of each Accounting Period as the Lessor or his Managing Agents shall specify at their discretion to be a fair and reasonable interim payment."

and the arrangements for payment and balancing at the end of each accounting period are set out at paragraphs 4, 5 and 6 as follows:

"4 .If the Interim Charge paid by the Lessee in respect of any Accounting Period exceeds the Service Charge for that period the surplus of the Interim Charge so paid over and above the Service Charge shall be carried forward by the Lessor and credited to the account of the Lessee in computing the Service Charge in succeeding Accounting Periods as hereinafter provided

5. As soon as practicable after the expiration of each Accounting Period there shall be served upon the Lessee by the Lessor or his agents a certificate signed by such Agents containing the following information:

- (a) The amount of the Total Expenditure for that Accounting Period.*
- (b) The amount of the Interim Charge paid by the Lessee in respect of that Accounting Period together with any surplus carried forward from the previous Accounting Period*
- (c) The amount of the Service Charge in respect of that Accounting Period and of any excess or deficiency of the Service Charge over the Interim Charge*

6. The said certificate shall be conclusive and binding on the parties hereto but the Lessee shall be entitled at his own expense and upon prior payment of any costs to be incurred by the Lessor or his Agents at any time within one month after service of such certificate to inspect the receipts and vouchers relating to payment of the Total Expenditure".

19. This part of the lease is quite specific with regard to the issue of certificates and the method of balancing.
20. There is a specific exclusion at paragraph (2) of the Fifth Schedule relating to the reserve fund.

21. Unfortunately there is a typographical error in the paragraph which refers to Clause 5(5)(m) of the lease, whereas it should be 5(5)(l). At the hearing the parties agreed the intention of the lease was clear. Paragraph (2) states "*...any surplus carried forward from previous years shall not include any sums set aside for the purpose of Clause 5(5)(m) [sic] of this lease.*" In the Tribunal's view this is intended to mean that any surplus on the normal service charge is not to be retained as part of the reserve fund.

EVIDENCE

22. Mr Okines, for the Applicant, produced various documents including a schedule of expenditure for the year ending 31 December 2006 showing the total expenditure of £2703.05 and a credit of bank interest of £17, leaving expenditure for service charges of £2,686.05. These accounts were certified by Sellens French Chartered Accountants, on 21 February 2007.
23. In addition Mr Okines submitted various service charge statements and demands identifying various arrears and interest charges. These were issued at different dates but the Tribunal was presented with revised versions all dated 10 June 2007 some showing different amounts for the same periods. Miss Shepherd said she had not received the revised versions. It would appear that service charges on account were collected at £280 per half year. Mr Okines indicated that this amount was specified by the RTM Company and he had not produced a budget of expenditure on which to base the interim charge.
24. In the service charge demands there was a charge of £200 per half year identified as a sinking fund. Mr Okines indicated that this was meant to represent the reserve fund as required under the terms of the lease.
25. Mr Okines explained that there were five flats at the property. Four of the lessees, excluding Miss Sheppard, form the RTM Company and this Company had set the sinking fund at £200 per half year. No budgets showing how this amount had been calculated were produced.
26. Mr Okines explained that there had been a discussion between himself and Miss Sheppard regarding various items of expenditure in the accounts for the year ending 31 December 2006 which Miss Sheppard believed should not form part of her service charge payment as she received no benefit being in the basement flat. These three items were electricity for the common ways (£60.80), cleaning of the common ways (£340) and the door entry system (£450). Mr Okines had therefore recalculated Miss Sheppard's liability, excluding these items, and had arrived at a figure of £370.45. The Tribunal questioned Mr Okines as to whether there had been a variation of the lease or if the RTM Company had agreed to these adjustments. Mr Okines confirmed that there has been no lease variation and he was a little vague as to whether the RTM Company had agreed to the variation. It was pointed out to Mr Okines that if these three items were omitted from Miss Sheppard's contribution then it would necessarily increase the contribution of the other four lessees contrary to the terms of the leases.
27. The Tribunal pointed out to Mr Okines that there had been an incorrect allocation of charges between cleaning and general maintenance and following Mr Okines' checking the figures he agreed that the correct allocation to Miss Sheppard in accordance with the agreement should have been £362.45.

28. With regard to insurance Mr Okines indicated that the premium was £929.71 for the period 13 September 2006 to 12 September 2007. The schedule of expenditure for the year ending 31 December 2006 showed an amount of £273.84 for insurance but this discrepancy could not be explained by Mr Okines.
29. Miss Sheppard was concerned about the charge of £478.95 for external redecoration. Only part of the property had been decorated and in particular the upper floors had not been touched. The colour used was different from the remainder and the work had been carried out in a poor manner causing the drain to block in her basement area. There were a large number of paint drips left in the area outside her flat which had not been cleared up following completion of the work.
30. Mr Okines explained that the external redecoration had been identified as being required by Mr Faulkner of Flat 2. Mr Faulkner had arranged for the redecoration and had simply deducted the cost of the work from his own service charge payment. Mr Okines confirmed that he had had no involvement with the arrangement of the work and the invoice for the completed work was a fait accompli. There had been no liaison with the RTM Company.
31. Miss Sheppard was concerned that she had been without a television aerial for a long period. The aerial had now been repaired but the lack of television programmes for the period was irritating. She estimated an amount of £25 would compensate her for this inconvenience.
32. An overflowing cistern from the ground floor flat had been allowed to stain and damage her wall and this had never been satisfactorily resolved.
33. Miss Sheppard had been content with the informal agreement reached to pay the amount of £370.45 but she realised that there was no formal written agreement to reduce her liability to this amount.
34. Mr Okines explained that his usual fee charged for management was £156 per flat. In the year in question he had charged only a total of £315 as there was insufficient funds available to pay him in that year.
35. The Tribunal questioned Mr Okines in respect of the interest charges that had been added to the demands sent to Miss Sheppard. He was unable to show the Tribunal how the interest charge had been calculated.
36. The Tribunal then turned to the reserve fund and, after the lunch break, Mr Okines produced the bank account statements for the reserve account. These showed no credits to the account since 2005. Mr Okines explained that there were never sufficient funds in the maintenance account and he had used any monies collected as a sinking fund to settle outstanding accounts on the normal service charge expenditure and there was therefore nothing to put into the reserve account.

CONSIDERATION

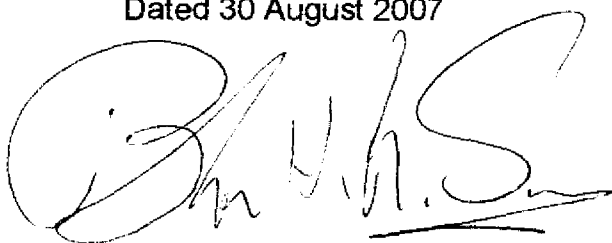
37. The Tribunal has serious concerns about the arrangements for the keeping and accounting of the service charges and in particular the reserve funds. Until it can be shown that proper arrangements are being made for the collection and keeping of the reserve fund, in accordance with the terms of the lease, and in accordance with the relevant statutes, the Tribunal is not prepared to allow the payment of any amount for a reserve fund.
38. Mr Okines could not show how interest charges, shown in the various revised service charge demands, had been calculated and, in view of the poor accounting procedures showing arrears and other amounts due no interest charges are payable.
39. The informal agreement for Miss Sheppard to pay a reduced amount because she does not have the benefit of the common ways has no affect. The lease is clear and Miss Sheppard should pay 20% of the total reasonable charges in any service charge year. The lease does not distinguish between the flats and each lessee is to pay the appropriate percentage on all the charges.
40. The Tribunal has considered the schedule of expenditure for the year ending 31 December 2006 and is satisfied that all expenditure other than for redecoration, management and administration expenses are reasonable and payable.
41. The redecoration has not been well done. It relates to part only of the property and the workmanship is unsatisfactory. Proper consultation of the lessees did not take place. The expenditure was not reasonably incurred and is not recoverable.
42. With regard to the management fees, the amount of £315 shown in the accounts for the year ending 31 December 2006 was a special charge made for that year only. As this was the sum shown in the audited accounts the Tribunal accepted it as a reasonable amount but was not prepared to allow a higher sum.
43. There is no provision in the lease for the recovery of bank charges and the sundry expenses could not be identified so these items at £13.10 and £15 are not allowed.
44. There is an accountancy charge of £141. In the Tribunal's view the accounts were confusing, not self-explanatory and not in accordance with the requirements of the RICS Code. The accounts have therefore been of no benefit to the lessees. The accounting charge of £141 is not allowed.
45. With regard to the interim charges for 2007, the budget produced was for £2,720, 20% of which is £544, rather than the £560 proposed to be charged. The Tribunal can see no reason to charge an amount other than the budgeted figure and the interim charge for 2007 is therefore limited to £544 per lessee.
46. The Tribunal was presented with at least two versions of service charge demands showing, in addition to the interim charge and sinking fund, arrears and interest charges. The documents could not be relied on so the Tribunal has insufficient information to calculate any credit or deficit for the previous year.

47. Although the accounting period used for the property is different from that set out in the lease, the Tribunal did not consider that this was material to the calculation of the service charges.
48. Although the Tribunal understands the difficulties experienced by Miss Sheppard during the period when she was without a television aerial the Tribunal has no power to award damages.

DECISION

49. The informal agreement for Miss Sheppard to pay the revised amount of £362.45 is not in accordance with the lease.
50. The service charge for the accounting period ended 31 December 2006 is to be limited to the amount of £2,055 of which 20% is payable by the Respondent, an amount of £411.
51. No reserve is to be collected for the years ended 31 December 2006 and 2007.
52. The interim charge for the accounting period ending 31 December 2007 is to be limited to £544 for the year in respect of Miss Sheppard.

Dated 30 August 2007

A handwritten signature in black ink, appearing to read 'Brandon H R Simms', written in a cursive style.

Brandon H R Simms FRICS MCI Arb
Chairman