RESIDENTIAL PROPERTY TRIBUNAL SERVICE
SOUTHERN RENT ASSESSMENT PANEL
LEASEHOLD VALUATION TRIBUNAL

S.27A LANDLORD & TENANT ACT 1985

DECISION

Case Number:	CHI/24UN/LSC/2007/0060
Property:	Ashlawn Gardens Winchester Road Andover SP10 2EU
Applicant:	Ashlawn Gardens Ltd Represented by Dutton Gregory Solicitors
Respondents:	Ashlawn Gardens Residents Association (Mr S T Webber, Secretary) Rep by Barker Son & Isherwood Solicitors
Members of the Tribunal:	Ms H Clarke (Chair) Mr R Long LLB Mr H Preston FRICS
Date of Hearing:	3 September 2007
Date of Decision:	7 September 2007

HEARING

1. The Hearing took place in Andover on 3 September 2007. There was no inspection. The Tribunal heard submissions from the following people:
   For the Applicant: Mr A Kirkconel, Solicitor, of Dutton Gregory Solicitors.
   For the Respondent: Mr S Jones, Counsel, instructed by Barker Son & Isherwood Solicitors.

   The following people were also present:
   Mr Price, from the Applicant company.
   Mr Ford, from the Lessor.
   Mr & Mrs Webber
   Mr & Mrs Bishop

Mrs Harding
Mr & Mrs Saunders, all Lessees

2. At the outset the parties confirmed that there was no objection to Mr R Long hearing and determining the case as a member of the Tribunal, he having notified the parties of his previous connection with the firm of Bell Pope.

THE APPLICATION

3. The Applicant is an Amenity Company which is a party to the Lease (a sample lease being provided to the Tribunal) and which has various obligations under the Lease.

4. The Applicant sought a determination as to the payability of service charges for the year 2005/2006. The sum in dispute consisted of legal costs incurred by the Applicant under 2 accounts rendered by Bell Pope solicitors totalling £11,605.77. The Applicant also sought a determination as to whether costs which it incurred in the present proceedings could be recovered as service charge in the years 2006/2007 and 2007/2008.

5. The Respondent applied for an Order under s20C Landlord & Tenant Act 1985 that the Applicant's costs of these proceedings should not be recoverable as service charge and/or an Order under Paragraphs 7 and 10 of Schedule 12 of the Commonhold and Leasehold Reform Act 2002 that the Applicant should pay costs to the Respondent.

DECISION

6. The Tribunal determined that the Lease did not permit the Applicant's legal costs charged under the 2 accounts by Bell Pope to be recovered by way of service charge and the sums in question were not payable by the Respondent.

7. The Tribunal also determined that the Applicant's costs of the present proceedings could not be recovered as service charge in the future.

8. Having so determined, it followed that it was not necessary for the Tribunal to make a determination under s20C Landlord & Tenant Act 1985.

9. The Tribunal refused to make an order under Schedule 12 of the Commonhold and Leasehold Reform Act 2002 that the Applicant should pay any of the Respondent's costs.

THE BACKGROUND

10. Ashlawn Gardens comprises 41 dwellings on long leases. In 2005 an application was made to the LVT by a number of residents under s37 Landlord & Tenant Act 1987. The application in the prior LVT proceedings sought a revision of clauses of the leases of flats at Ashlawn Gardens which provide for an Additional Premium and a Building Fund Contribution. The Additional Premium is a sum payable upon assignment. The Building Fund Contribution is calculated as a percentage of the price of the lease in question multiplied by the number of years during which the lease has been vested in the lessee.

11. On 19 January 2006 that application was withdrawn. By a decision dated 3 February 2006 the LVT refused to make an order under s20C that the costs incurred by Ashlawn Gardens Ltd in those proceedings should not be relevant costs for the purposes of the service charge.

12. Ashlawn Gardens Ltd had instructed solicitors Bell Pope, now part of the firm of Dutton Gregory, who rendered two accounts dated 30 January 2006 and 18 August 2006. The accounts together totalled £11, 605.77. The Applicant included the amount of £11,605.77 in the service charge for the year ending 30 September 2006. The Residents objected, and the Applicant issued the Application for determination.

13. The parties were agreed that the question of whether the costs were payable as service charge turned on matters of law, and there were no relevant matters of fact which the Tribunal had to decide.

THE LAW

14. Section 18 of the Landlord & Tenant Act 1985 states:
"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 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".

15. Section 27A of the Landlord & Tenant Act 1985 states:

"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".

16. Both parties produced case law to the Tribunal which the Tribunal found to be familiar and helpful. The following cases were relied upon by the parties:
Gilje v Charlgrove Securities Ltd [2001] EWCA Civ 1777
Gilje v Charlgrove Securities Ltd [2000] 44 EG 148 (Lands Tribunal)

Electricity Supply Nominees Ltd v IAF Group Ltd [1993] 37 EG 155
Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] 1 WLR 896
Sella House Ltd v Mears [1989] 12 EG 67
Iperion Investments Corporation v Broadwalk House Residents Ltd [1995] 46 EG 188
Staghold v Takeda [2005] 47 EG 146
Reston v Hudson [1990] 37 EG
Earl Cadogan v (1) 27/29 Sloane Gardens (2) Mahdi [2006] 24 EG 178

Longmint v Marcus [2004] 3 EGLR

17. The Tribunal also referred to the case of *St Mary's Mansions Ltd v Limegate Investment Co Ltd [2002] EWCA Civ 1491 [2003] 1 EGLR 41* and invited comments upon it from the parties.

18. The Tribunal relied in particular on the following extracts:
from *Earl Cadogan v (1) 27/29 Sloane Gardens (2) Mahdi [2006] 24 EG 178:*
"It is for the landlord to show that a reasonable tenant would perceive that the underlease obliged it to make the payment sought. Such conclusion must emerge clearly and plainly from the words used. Thus, if the words used could reasonably be read as providing for some other circumstance, the landlord will fail to discharge the onus upon it. This does not, however, permit the rejection of the natural meaning of the words in their context on the basis of some other fanciful meaning or purpose, and the context may justify a

"liberal" meaning. If consideration of the clause leaves an ambiguity, the ambiguity will be resolved against the landlord as "proferror"
and from *Sella House Ltd v Mears [1989] 12 EG 67* cited with approval in *St Mary's Mansions Ltd v Limegate Investment Co Ltd [2002] EWCA Civ 1491 [2003] 1 EGLR 41:*
"For my part I should require to see a clause in clear and unambiguous terms before being persuaded that that result [charging legal fees as part of the service charge] was intended by the parties."

THE LEASE

19. A sample Lease was provided to the Tribunal and it was common ground that the relevant sections applied to all the residents in question. The relevant sections of the Lease provide that the Lessee shall pay a service charge based on the cost of certain Items including in particular:
"Schedule 2 Part 1 Clause 3 (9): The cost of employing managing agents and/or Solicitors and Accountants to supervise the provision of the Items and the performance of the obligations of the Amenity Company and any VAT charged on their services"

20. The obligations of the Amenity Company are largely found at clause 5 of the Lease. Sub-Paragraphs (1) - (9) refer to obligations to maintain and insure the property, and employ a warden. Paragraph 5(10) obliges the Amenity Company:
"to apply the Building Fund Contribution in discharging its obligations under this Lease".

21. The Lease sets out the Items at Schedule 2 Part 1 Clause 3. Clause 3(9) is itself one Item. The other Items refer to the cost of cleaning and insuring the property, maintaining the lifts, paying rates, maintaining the Residents' Lounge, employing maintenance staff and wardens plus the cost of their accommodation, and the cost of preparing estimates and certificates of expenditure.

PARTIES' SUBMISSIONS

22. For the Applicant, Mr Kirkconel submitted that Schedule 2 Clause 3(9) read in conjunction with Clause 5 of the Lease enabled the sums in question to be recovered as service charge. The costs which had been incurred in dealing with the prior proceedings were incurred in the protection of the Building Fund, because the prior proceedings had sought to change the lessees' obligation to pay towards that Fund. As such, it was good practice and good management to defend the prior proceedings. He conceded that the phrase 'provision of the

Items' had no bearing on the costs in question. However, the obligation at Clause 5 (10) *"to apply the Building Fund Contribution in discharging its obligations under this Lease"* should be read as extending to steps taken to protect or defend the Fund. Consequently it fell within the obligations of the Applicant to have opposed the prior proceedings. By Clause 3(9), the Applicant was entitled to pass on the cost of using solicitors. The dictionary definition of "supervise" includes "be responsible for", "conduct", "control", "direct" or "handle". Thus, 'supervision' of the Applicant's obligations by solicitors could mean 'handling' or 'conducting' legal proceedings in connection with those obligations. The costs were incurred in having the Applicant's actions 'supervised' by solicitors. Moreover, he submitted, the totality of Clause 5 ought to be read as imposing a general implied duty to manage the properties. Such a construction would be supported by case-law. The Applicant was therefore performing its obligations under the Lease by managing the property, and opposing the prior proceedings was a proper part of managing the property.

23. The Applicant acknowledged that part of the second account dated 18 August 2006 related not to the prior LVT proceedings but to a dispute concerning Flat 7a held on a long lease by a subsidiary of the Lessor, in respect of which no service charge had been paid for many years. The parties agreed that the account dated 18 August 2006 could be attributed 80:20 as between work relating to Flat 7a and the prior LVT.

24. For the Respondent, Mr Jones initially submitted in writing that the Tribunal had no jurisdiction to determine the payability of the sums in question. In the course of the hearing he developed his submission to a position where it was common ground between both parties that the Tribunal had first to construe the Lease to determine whether the sum in question was payable under the Lease as a service charge within the scope of s18 Landlord & Tenant Act 1985, before determining whether it was payable under s27A.

25. Mr Jones further submitted that the ordinary and natural meaning of the words in the Lease did not extend to any implied duty to manage. The Applicant's obligations were set out in specific terms. Case-law allowed for some flexibility in interpretation, not in enlarging the obligations of either party. Even if the Applicant could demonstrate some ambiguity in the Lease (and the Respondent's case was that there was no ambiguity) the principle of *contra preferentem* would mean that it would be construed against the Lessor. In the absence of any general obligation to 'manage' in the Lease, no such obligation should be read into Clause 3 (9). There was no primary obligation to which any legal costs could attach. Moreover clause 5(10) could not be read as a covenant to 'protect' the Building Fund. If there was any role for solicitors it was in supervising the Building Fund being

applied. The cases cited by the Applicant could all be distinguished because in each of them the lease contained a duty to 'manage'.

26. The Respondent did not challenge the amount of the bills as being unreasonable. If it failed on its primary submission, Mr Jones submitted that the proportion of costs relating to Flat 7a was wholly outside the Applicant's obligations, related to an arrangement between the Lessor and its subsidiary, and it would be unreasonable to pass the costs of dealing with it onto the Lessees.

27. On the matter of costs, the Applicant submitted that the application had to be brought. Although many Lessees had paid the sums demanded, many were now withholding later payments as a protest against the costs having been charged. The Respondent argued that if the application was dismissed as a matter of construction of the Lease, it was such an obvious point that the Tribunal ought not to have been troubled by it and this brought the matter under the scope of Paragraphs 7 and 10 of Schedule 12 of the Commonhold and Leasehold Reform Act 2002.

DETERMINATION

28. The Tribunal construed the terms of the Lease to establish what sums could be recovered. On a natural reading of Clause 3(9), solicitor's costs could be recovered for supervising the Applicant's obligations. The primary issue, therefore, was to establish what were the obligations of the Applicant. The Tribunal noted that the Applicant was a distinct party to the Lease and made covenants in its own right.

29. The Applicant submitted that it was under a duty to manage the property competently, and that resisting proceedings which could threaten the funds available for upkeep, maintenance etc, was a part of good management. However, the Lease did not contain an express obligation on the Applicant to 'manage' the property. Whilst several of the specific obligations of the Applicant had the character of 'managing' the property, no such phrase appeared in the Lease. The Tribunal therefore considered whether in the light of the case-law, it would be right to read the Lease as imposing a general obligation to 'manage'.

30. Bearing in mind the approach taken in the cases of *Earl Cadogan v 27 Sloane Square* and *St Mary's Mansions Ltd* (noted above), the Tribunal determined that the clear and plain interpretation of the words of the Lease was that the list of obligations at Clause 5 were to be read as finite. In the view of the Tribunal, it went beyond the natural meaning of the words to import a general duty of 'management'. The cases cited by the Applicant could all be distinguished because in each of them the lease contained a duty to 'manage', whereas in this

case no such duty appeared on the face of the Lease. Whilst a liberal interpretation of the provisions of a lease could be appropriate, the Applicant's submission called for an obligation to be imported into the contract between the parties. Clear and unambiguous terms would be required in order for such an obligation to arise.

31. The Tribunal considered whether Clause 5(10), which referred to a duty to apply the Building Fund, should be construed as giving rise to an obligation to protect or defend the Fund. The Tribunal noted that the Building Fund was calculated by reference to a formula and not by reference to works done. In this context, the Tribunal considered that the obligation of the Applicant under the Lease arose in relation to the Fund as it stood at any given time, and could not be interpreted as an obligation to protect or defend the Fund. This was the natural meaning of the words in the context of the Lease. The Tribunal did not consider that any ambiguity arose in the wording of this obligation.

32. For these reasons, the Tribunal determined that none of the Applicant's obligations under the Lease extended to the actions taken by the Applicant in opposing the previous LVT proceedings nor in dealing with the dispute about Flat 7A.

33. The Tribunal also found it difficult to see what was contemplated in the Lease by the term 'supervise' in the context of the normal relationship between solicitors and client. It would be unusual for a solicitor to supervise his client's activities rather than providing advice, although the Tribunal did accept that the Applicant had referred to definitions of 'supervise' as including 'handling' or 'conducting' a matter. Nonetheless, the Tribunal remained of the view that the accounts had not been charged for the supervision of the performance of any of the Applicant's obligations under the Lease even if it could be said that Bell Pope had supervised the Applicant's actions in connection with the prior proceedings and Flat 7A.

34. In the circumstances, the Tribunal considered that a reasonable person reading the Lease and advised by a lawyer would not expect that a lessee would be liable to pay the cost of instructing solicitors to deal with the matters for which the accounts here were rendered.

35. It followed from the above reasoning that the costs of the present Application could also not be recovered within the terms of the Lease as they would not have been incurred for the supervision of the performance of any of the Applicant's obligations under the Lease. In any event, the Tribunal would have been inclined to make an order under s20C Landlord & Tenant Act 1985 that the Applicant's costs of these proceedings should not be recoverable as service charge in the light of the Tribunal's findings on the substantive issue.

36. The Tribunal refused to make an order that the Applicant should pay any of the Respondent's costs because the power to do so would arise only if the Tribunal took the view that the Application was frivolous or vexatious or amounted to an abuse of process, or if the Applicant had behaved unreasonably in the course of the proceedings. No suggestion had been made that the Applicant had behaved unreasonably. The fact that the Application had been unsuccessful did not make it frivolous or vexatious or an abuse of process. Although the Tribunal found against the Applicant, having heard the case, it accepted that it was reasonable for it to make and to pursue the Application.

Dated 7-9-2007

Signed

H Clarke Barrister
Chair of Tribunal