CHI/29UC/LSC/2007/0048

THE RESIDENTIAL PROPERTY TRIBUNAL SERVICE

DECISION OF THE SOUTHERN LEASEHOLD VALUATION TRIBUNAL ON AN APPLICATION UNDER SECTION 27A OF THE LANDLORD AND TENANT ACT 1985

GREENCROFT, OXENDEN SQUARE, HERNE BAY, KENT CT6 8TD

Applicant:	John William Purdy (Freeholder)
Respondent:	Wendy Marianne Hickman (Leaseholder)
Date of hearing:	12 October 2007
Appearances:	Mr M Paine FPCS of Circle Residential Management, for the applicant
	The respondent in person

Members of the Tribunal:

M Loveday BA(Hons) MCIArb
N Cleverton FRICS
Ms L Farrler

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BACKGROUND

1. This is an application for determination of liability to pay interim service charges under section 27A of the Landlord and Tenant Act 1985 ("LTA 1985"). The applicant has made a further application for reimbursement of fees under regulation 9 of the Leasehold Valuation Tribunals (Fees) Regulations 2003.

2. The applicant is the freehold owner of "Greencroft", Oxenden Square, Herne Bay. The manager is Circle Residential Management Ltd. The respondent is the leasehold owner.

3. There has been a previous dispute relating to the property. In 2005, the respondent issued an application for determination of liability to pay service charges and administration charges in relation to the 2002 to 2006 service charge years (CHI/29UC/LSC/2005/0096). On 5 June 2006, another Tribunal determined that, as of 5 June 2006, no further sums were owed by the respondent to the landlord. The Tribunal also made an order under LTA 1985 s.20C. An unsuccessful application was made to appeal this decision.

4. The present application relates to interim service charges of £520 allegedly due on 24 March 2007, being the next payment of interim charges due after 5 June 2006. The application is dated 24 May 2007. Directions were given on 29 June 2007 and the matter was listed for 12 October 2007.

5. At the hearing, the applicant was represented by Mr M Paine of the agents. He relied on written submissions dated 24 July 2007. The respondent appeared in person and relied on written submissions dated 21 September 2007.

6. At the start of the hearing, it was agreed that the following issues fell to be determined:
   (a) Whether the lease was invalid.
   (b) Whether the interim charge was reasonable under LTA 1985 s.19(2).
   (c) The applicant's claim for reimbursement of fees.

INSPECTION

7. The Tribunal inspected the property before the hearing. The freehold comprises two Victorian semi-detached houses on the edge of a large private square in a residential area of Herne Bay which have been converted into five flats/maisonettes. The houses are three storeys with a two storey rear addition and are of brick under a concrete tile pitched roof. The external condition is fair/poor with spalled plaster and large dark mould patches. "Greencroft" is a maisonette on the ground and first floor which extends into the rear addition. It has a large private porch and doorway. Internally, there are four rooms, a kitchen/diner, bathroom, separate WC and utility room. The property has a wealth of period details both internally and externally.

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VALIDITY OF THE LEASE

8. The lease is dated 7 December 1994 and was made between the applicant and Iris Grace Pettit. At the hearing, two copies of the lease were produced. The first was apparently a counterpart (although the page with the attestation clause presumably signed by the lessee was missing). This document was attached to the claim and was stamped. The second copy was an original signed by the applicant and witnessed. This was also stamped. The respondent produced this copy at the hearing, having found it in her solicitor's file shortly before.

9. Both copies include a term at clause 1(2) as follows:

   "There shall also be paid by way of further or additional rent such sum or sums to be assessed in manner referred to in this clause as shall be a just and fair proportion of the amount which the landlord may form time to time expend and as may reasonably be required on account of anticipated expenditure."

   The term was subject to a proviso:

   "PROVIDED THAT all such sums shall from time to time be assessed by the surveyor or agent for the time being of the Landlord and such sums shall be paid by the Tenant on the 25th day of March in each year ..."

10. The two versions differed in one respect. The counterpart included at clause 4(4)(c) a term that the lessor would:

    "if required by the Tenant to use the Landlord's best endeavours to procure that the mortgagees (if any) is noted on the policy."

    The equivalent clause in the original was as follows:

    "if required by the Tenant to use the Landlord's best endeavours to procure that the Tenant's interest and that of the Tenant's mortgagees (if any) is noted on the policy"

11. The respondent accepted that clause 4(4)(c) was not a provision which made a difference to the service charges. However, she submitted that the difference between the two versions made the lease invalid. The applicant submitted that the difference between the two versions was irrelevant to any issue raised in this application.

12. The Tribunal concluded that the lease was valid for two reasons. First, the terms are plainly set out in the original lease. The two copies show that the lease was executed by exchange of original and counterpart. Where there is any conflict between the terms of the lease and the counterpart, the ordinary rule is that the terms of the lease prevail: ***Woodfall*** at 5.009. Here, we have a copy of the stamped original and this therefore contains the terms of the lease.

13. Secondly, insofar as there is a mistake in the original, this can be remedied without affecting the validity of the lease itself. The rule set out above does not apply where there is a clear mistake in the original lease: ***Woodfall*** at 5.009.

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Here, there is apparently a conflict between the terms of clause 4(4)(c) in the original and counterpart. The latter is of course incomplete, and it may not have been executed at all. However, if the counterpart was executed, the Tribunal considers this highlights an obvious error in the wording of clause 4(4)(c) as it appears in the original (the clause makes no grammatical sense). The Tribunal concludes that a court would have little hesitation in either supplying the missing words which were added in the counterpart, or in varying the provision. However, whichever course would be adopted, the error would not invalidate the lease or impugn any of the service charge provisions which are the subject of this application.

REASONABLENESS

14. Mr Paine stated that the interim charge of £520 was due on 25 March 2006 in respect of the 2006/07 service charge year. Total expenditure was estimated at £2,600 of which the respondent was liable for 20%. The service charge statement dated 22 February 2006 included this figure. Mr Paine produced a copy of the agent's service charge estimate which broke this figure down into four heads of expenditure. These were based on historical expenditure but also took into account the agent's experience with other properties as a benchmarking exercise. The agents managed some 2,500 properties and the benchmarking exercise suggested that the charge for Greencroft was below the 2006 benchmarking figure of £600 for this kind of property. The component parts were:
    (a) £165 for accounting. This was a fixed fee of £140 plus VAT per unit. Actual expenditure shown in the 2005/06 certified service charge statement dated 29 March 2006 had been £164.50.
    (b) £1,300 for building insurance. This was based on the actual premium of £1,201.37 paid during the 2005/06 service charge year with an uplift. The landlord effected a block insurance policy and the relationship with the individual insurers was reviewed through brokers on an annual basis.
    (c) Management fees of £881.00. Historically, the agents had charged £125 per flat plus VAT. The estimate was for £150 plus VAT. The management fees had been reviewed in 2003.
    (d) £354 for repairs. This was a nominal figure, which was a product simply of rounding off the remaining estimated costs.

    Mr Paine submitted that when budgeting, one did not have to do a precise calculation. The test of reasonableness in section 19(2) applied to the whole figure rather than the individual component parts. When cross-examined, Mr Paine stated that the historic expenditure had been £1,692.33 in 2002/03, £1,750.48 in 2003/04, £2,179.60 in 2004/05 and £2,343.75 in 2005/06. The accounts for this property were not complicated and the accounts were prepared on the agent's in-house management computer software. In fact, actual expenditure for 2006/07 was now known, and the estimate had proved quite accurate: actual expenditure amounted to £2,554.58.

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15. The respondent submitted that the costs estimated by the agents was excessive:
    (a) Only £40 should have been allowed for accounting. Mr Foley, the accountant who had certified the 2002/03 and 2003/04 accounts told the applicant that this was what he in fact charged the applicant. The conversation took place on or about 21 April 2007. In cross examination the applicant accepted that previous year's accounts showed a much higher figure for the accountants charge and that a letter from the respondent to Mr Foley dated 29 June 2007 did not mention this figure at all.
    (b) The insurance figure compared unfavourably with an estimate for buildings cover from Residents Line insurance dated 29 November 2006. The premium quoted was £672.00 including terrorism cover. There was a £1,000 excess and no history of claims.
    (c) As for managing agents, the respondent accepted that someone had to collect service charges and oversee repairs. Oxenden Square itself was managed by agents who charged £60 per property. On 8 April 2003, Alderman Property Services Ltd had quoted £100 per property for managing the block plus 5% of the cost of major works.

16. Mr Paine responded that there was no evidence Mr Foley had charged the agent only £40. As for insurance, Mr Paine produced a copy of the actual insurance policy with National Insurance and Guarantee Corporation Ltd ("NIG"). The alternative estimate was not on a like for like basis. The sum insured with NIG was £450,000, whereas the Residents Line policy was for £400,000 of cover. The latter did not include alternative accommodation benefits (something of importance where the landlord did not occupy the property). The management fee was also not comparable. The work involved in managing the upkeep of a garden square was not really comparable with management of a building. Even if other agents might charge less, Circle Residential still represented good value for money. Alderman Property Services was a small local agent and it was not FSA registered. It was therefore unable to handle the insurance of the property on behalf of the landlord.

17. LTA 1985 s.19(2) states:
    "Where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable, and after the relevant costs have been incurred any necessary adjustment shall be made by repayment, reduction or subsequent charges or otherwise."

18. The Tribunal finds that the interim charge of £2,600 for the five flats was not greater than was reasonable. It accepts Mr Paine's submission that the Tribunal must look to the global figure rather than considering each individual item of expenditure. The legislation permits the landlord more flexibility when estimating charges under LTA 1985 s.19(2) compared to s.19(1) which deals with costs which have already been incurred. Hence the requirement under LTA 1985 s.19(1) is for the costs to have been *"reasonably incurred"* rather than

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the amount being "*reasonable*" in section 19(2). The process described by the agent for estimating the charges based on previous years' expenditure cannot really be faulted and the figures arrived at are broadly in line with 2004/05 and 2005/06 actual expenditure.

19. However, if individual items within the total charge are grossly excessive, this will be grounds for finding that the total charge is a "*greater amount than is reasonable*". The Tribunal also bears in mind that the respondent and other lessees always have the opportunity to challenge relevant costs actually incurred under LTA 1985 s.19(1) once the service charge year is over (as it is here). Turning to these individual items, the Tribunal does not find it at all likely that an accountant would have certified the accounts for a figure of £40. It accepts that the service charge statements accurately reflect the charge made by the accountant to the agent. The insurance estimate from Residents Line is not comparable in that the amount of cover is significantly less. The agents who carry out garden maintenance in the garden square are not a useful guide to what should be charged for management of a multi-occupier residential property. There was little information about the service which Alderman Residential would offer for the charge of £100 per flat per annum. However, this was not so very different from Circle Residential Management's charge of £150 per flat. This level of charge is not in the Tribunal's own experience an excessive charge for management in this part of Kent. No challenge is made to the estimated cost of repairs.

20. Taking all these factors into account, the Tribunal finds that the charge of £520 cannot be described as being an amount which is greater than is reasonable.

LTA 1985 s.20A

21. The respondent contended that the interim charge was not recoverable because the demand for the charge did not contain the information prescribed by LTA 1985 s.21A. The Tribunal explained that the provision arose by way of an amendment made by section 152 of the Commonhold and Leasehold Reform Act 2002 ("CALRA 2002") and that this applied only to service charge demands issued after 1 October 2007: see Commonhold and Leasehold Reform Act 2002 (Commencement no.5 and Saving and Transitional Provisions) Order 200X. The respondent therefore did not pursue this argument.

REIMBURSEMENT OF FEES

22. Mr Paine sought reimbursement of the application fee of £70 and the hearing fee of £150. He submitted that the Tribunal's jurisdiction was wide and it was not limited to situations where the other side had acted frivolously or vexatiously. One could take other conduct into account. He relied on the admission by the respondent that part charges were payable, which equated to about 50% of the interim charge demanded. The respondent had acted unreasonably because she should have made payment of at least part of the

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charge. The landlord may not have pursued the application had he been offered part of the sums claimed.

23. The respondent stated that she had also received another invoice from the landlord for £6,000, and she had been concentrating on the dispute about that, rather than about the £520. She had not been supplied with proper information by the agents.

24. Regulation 9 of the Leasehold Valuation Tribunals (Fees) Regulations 2003 is as follows:
Reimbursement of fees
9 *-(1) Subject to paragraph (2), in relation to any proceedings in respect of which a fee is payable under these Regulations a tribunal may require any party to the proceedings to reimburse any other party to the proceedings for the whole or part of any fees paid by him in respect of the proceedings.*

25. There is no guidance from the courts or from the Lands Tribunal on the provision. The Tribunal accepts that its discretion is a wide one. The words can be contrasted with the words of CALRA 2002 paragraph 10(2) of schedule 12 (which plainly fetters the Tribunal's discretion) and the express qualification that the Tribunal must find it "*just and equitable*" to make an award under LTA 1985 s.20C(3). The Tribunal may therefore consider both the conduct of the applicant and the conduct of the respondent falling short of actions which are "*frivolous*", "*vexatious*" or otherwise an "*abuse*" of process. Nevertheless, the Tribunal bears in mind the general presumption that a party before the Tribunal "*shall not be required to pay costs incurred by another person in connection with proceedings*": see CALRA 2002 paragraph 10(4) of schedule 12. Given the wide discretion, previous determinations of other Tribunals (particularly where the reasoning is short) are of limited assistance.

26. The Tribunal does not require the respondent to reimburse the applicant the application and hearing fees. It takes into account the previous history of Tribunal hearings which did not suggest a pattern of the respondent raising unmeritorious objections to charges. The respondent genuinely contested the charges at the hearing even if some of her objections (such as the section 21A point) were bound to fail. However, this is not sufficient reason to reimburse fees and displace the presumption set out above.

CONCLUSIONS

27. The Tribunal therefore determines that the interim charge of £520 is payable by the respondent to the applicant in respect of interim service charges in 2006/07. This does not, as stated above, preclude the respondent from making an application for a determination that the actual costs incurred by the landlord in 2006/07 were not reasonably incurred. The Tribunal does not order reimbursement of fees paid by the applicant under Regulation 9 of the Leasehold Valuation Tribunals (Fees) Regulations 2003.

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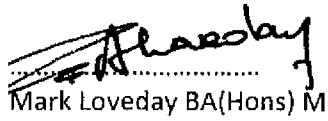
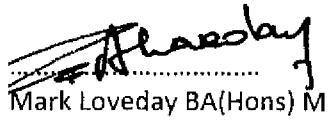


Mark Loveday BA(Hons) MCIArb
Chairman

4.XI.09.



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4.XI.09.

CHI-21LC-LSC-2007-0047

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FLAT 25, 25-30 SUNDERLAND CLOSE, ROCHESTER, KENT ME1 3AS

Applicant:	Shuttleworth Property Co Ltd (Freeholder)
Respondent:	Ms Claire Richards (Lessee)
Dates of hearing:	11 October 2007
Appearances:	Mr M Paine FPCS of Circle Residential Management Ltd, for the applicant The respondent did not attend

Members of the Leasehold Valuation Tribunal:

Mr MA Loveday BA(Hons) MCIArb
Mr C White FRICS
Ms L Farrier

CHI/29UC/LSC/2007/0048

THE RESIDENTIAL PROPERTY TRIBUNAL SERVICE

DECISION OF THE SOUTHERN LEASEHOLD VALUATION TRIBUNAL ON AN APPLICATION UNDER SECTION 27A OF THE LANDLORD AND TENANT ACT 1985

GREENCROFT, OXENDEN SQUARE, HERNE BAY, KENT CT6 8TD

Applicant:	John William Purdy (Freeholder)
Respondent:	Wendy Marianne Hickman (Leaseholder)
Date of hearing:	12 October 2007
Date of decision:	14 November 2007

Members of the Tribunal:

M Loveday BA(Hons) MCIArb
N Cleverton FRICS
Ms L Farrier

1. The applicant is the freehold owner of "Greencroft", Oxenden Square, Herne Bay. The manager is Circle Residential Management Ltd. The respondent is the leasehold owner.

2. On 24 May 2007 the applicant applied for a determination of liability to pay an interim service charge under section 27A of the Landlord and Tenant Act 1985 ("LTA 1985"). The matter was heard on 12 October 2007. By written reasons dated 14 November 2007 the Tribunal determined that the lease of the property was valid, that the interim charge of £520 was reasonable under LTA 1985 s.19(2) but refused to order that the respondent should reimburse the applicant's hearing and application fees. According to the Tribunal secretariat the decision and reasons were posted to the parties on 15 November 2007.

3. On 16 November 2007, the respondent wrote a lengthy letter to the Tribunal Chairman. That letter raised various points, but materially it stated that the applicant "would be making an application" to the Tribunal to correct allegedly erroneous management charges sought by the agent. The letter asked how the respondent could "apply if the agent wants to". The Tribunal clerk wrote to the respondent on 27 November 2007 stating that the Tribunal was unable to enter into correspondence but pointing out that if she wished to appeal the decision made by the Tribunal, the final date for doing so was 21 days from 15 November 2007. On 12 December 2007 the respondent wrote another lengthy letter to the President of the southern panel of the Residential Property Tribunal Service. This letter asked him to "revisit the decision of the Tribunal".

4. An appeal from the Leasehold Valuation Tribunal lies to the Lands Tribunal under section 175 of the Commonhold and Leasehold Reform Act 2002 from a decision of the LVT. Permission to appeal is required. The time limit for applying to the tribunal for permission is 21 days starting with the date on which the document which records the reasons for the decision was sent to the appellant: see regulation 20(a) of the Leasehold Valuation Tribunal (Procedure) (England) Regulations 2003. There is no express power to extend this time limit. However, under regulation 24 of the procedure regulations the tribunal may extend any time limit provided that the application is made before expiry of that time limit.

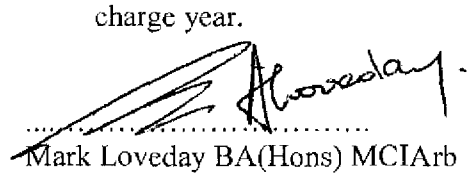
5. In this case, as stated above, the written reasons were sent to the respondent on 15 November 2007. The last day for making an application for permission to appeal was therefore 6 December 2007 and no application w as made for an extension of time before that date. The letter of 12 December was after this date and is out of time for any application for permission to appeal. The issue that arises is whether the letter of 16 November 2007 is an application for permission to appeal. If it is, the Tribunal must consider this application. If it is not, there is no appeal against the decision of 14 November 2007.

6. In the Tribunal's view, the letter of 16 November 2007 cannot be considered an application for permission to appeal. The procedure rules do not specify the form of any application for permission to appeal. Ordinarily, the word "appeal" would be expected to appear in the application with some intimation that the

Lands Tribunal was being asked to reconsider, overturn or review the decision of the Tribunal. It is possible that other words might suffice, but at the very least the applicant's desire to obtain permission to take the matter further should be clear from the document. In this instance, the word "appeal" did not appear in the letter of 16 November 2007. The only specific reference in the letter to any application was an objection to the relevant costs of management fees - which were not the subject of the decision of 14 November 2007. A request for information was met with a letter from the Tribunal office specifically drawing the applicant's attention to the time limits for appeal. The applicant failed to lodge any formal application within that time limit.

7. It follows that no application for permission to appeal has been made in time.

8. In any event, the Tribunal would not have given permission to appeal. The subject of the decision of 14 November 2007 was an interim service charge due on 25 March 2007. Section 19(2) of LTA 1985 permits the landlord much more flexibility in making an interim charge compared to the more restrictive position where a balancing charge is made at the end of the service charge year. The process adopted by the landlord in assessing its interim costs due on 25 March 2007 could not really be faulted. This does not, of course, preclude the applicant from challenging the final balancing charge made on expiry of the service charge year.



Mark Loveday BA(Hons) MCIArb
Chairman

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