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LON/00AQ/LSC/2006/0142

THE RESIDENTIAL PROPERTY TRIBUNAL SERVICE

DECISION OF THE LONDON LEASEHOLD VALUATION TRIBUNAL ON APPLICATIONS UNDER SECTION 27A OF THE LANDLORD AND TENANT ACT 1985

Property: **Flats 1 and 2, Kemble House, Bridges Road, Stanmore, HA7 3LZ**

Applicants: Miss Janet Morrison (tenant, Flat 1)
Mrs Frances Stern (tenant, Flat 2)

Respondent: Paddington Churches Housing Association (landlord)

Date heard: 11 April 2007
Inspection 30 April 2007

Appearances: Miss Janet Morrison and Mrs Frances Stern

Mr Ranjit Bhose, counsel, instructed by Mr C Ashplant, solicitor
Ms Helen Gray, Housing Officer
Mr Charles MacDonald, Head of Care and Support
for the respondent

Members of the leasehold valuation tribunal:

Lady Wilson
Mr W J Reed FRICS
Ms S Wilby

Date of the tribunal's decision: 8 May 2007

Background

1. These are applications under section 27A of the Landlord and Tenant Act 1985 ("the Act) to determine the tenants' liability to pay service charges. They are made by Miss Morrison and Mrs Stern, who are the weekly tenants of Flats 1 and 2 respectively, Kemble House in Stanmore. This is a two storey block of eight sheltered flats, designed for older people, which was built in or about 1991 and is owned by the Paddington Churches Housing Association, a Registered Social Landlord. Flats 2 and 3 and Flats 6 and 7 share common entrance halls and stairwells and the other flats have their own entrances. The applications are dated 21 April 2006 and both are in the same terms. They seek determinations of the tenants' liability to pay service charges for the years 1991 to date, but at a preliminary hearing on 9 October 2006 the tenants agreed to limit the dispute to the years ended 31 March 1994 to date, and at the present hearing they agreed to limit the ambit of the dispute to the period from 1 April 1997. At that preliminary hearing at which, due to a misunderstanding, the respondent was not represented, the tenants raised the question whether they were liable to pay any service charges at all because, they understood, their tenancy agreements made no provision for the payment of a service charge. This question was considered at a further preliminary hearing on 8 December 2006 at which Ms Helen Gray, the landlord's Housing Officer responsible for supervising Kemble House, gave evidence on this issue; but although the tribunal in its directions expressed the view that it appeared that the tenancy agreements provided that the tenants were liable to pay a service charge for the services provided by the landlord, Mr Bhose, who represented the landlord at the hearing before us, agreed that no final determination had been made on this issue at the preliminary hearing and that the view expressed at the second preliminary hearing had been a provisional one.

2. At the hearing on 11 April 2007 both tenants appeared to present their case and gave evidence. The landlord was represented by Mr Bhose, who called Ms Gray and Mr Charles Macdonald, the landlord's Head of Care and Support. At the hearing issues arose as to the landlord's powers to vary the tenants' tenancy agreements and, with the tribunal's permission, Mr Bhose provided written submissions after the hearing. The tribunal inspected the block in the presence of the tenants and of Ms Gray and Mr Macdonald on 30 April 2007.

3. The issues which arose for determination were these:

i. whether the tenants were liable to pay a service charge to the landlord;

Assuming they were so liable:

ii. whether any of the disputed charges were subject to a limitation period so that the tenants' allegations were time barred;

iii. whether the tenants, by paying their service charges up to date, as they had done, had agreed or admitted that they were due so as to prevent them from now saying otherwise;

iv. whether any part of the tenants' claim should be struck out as an abuse of process;

v. whether the landlord had, with effect from 24 May 2004, validly changed the service charges payable by the tenants from variable service charges, which are subject to the tribunal's jurisdiction under section 27A of the Act, to fixed service charges, which are not subject to the tribunal's jurisdiction under section 27A;

vi. whether the costs upon which those service charges over which the tribunal does (depending on the answers to the above questions) have jurisdiction were reasonably incurred. The charges disputed by the tenants included telephone, alarms and fire equipment, television aerial maintenance, management fees and administration, gardening and cleaning, and depreciation charges and management fees on depreciation charges on items such as the television aerial, alarm, carpet and entryphone system.

Mr Bhose said that the landlord did not propose to place its costs in relation to these proceedings on any service charge and no order under section 20C of the Act is therefore required.

Issue 1: the tenants' liability to pay service charges

4. Miss Morrison is a secure tenant of the landlord under a weekly tenancy which took effect on 23 December 1991, having previously been the landlord's secure tenant of another property. He tenancy agreement provided at clause 2.2 that the landlord should provide the services set out in schedule 3 to the agreement, that the tenant should pay a service charge by way of rent and that "any service charge may be varied by not less than 4 weeks written notice to the Tenant to allow for increases in the cost of providing the services". Clause 3.1 of the agreement, which explains further the way the service charge may be varied, provides that "the rent payable includes £12.92 as the amount ascribed for the provision by the [landlord] of the services as detailed in Schedule III of [sic] this Agreement". The third schedule was produced by Ms Gray at the preliminary hearing on 8 December 2006. Miss Morrison has lost her copy of the tenancy agreement, but we accept that the schedule produced by Ms Gray was attached to it when it was made and that the landlord was, by the agreement, under a duty to provided the services listed in the third schedule to Miss Morrison's tenancy agreement and that she was liable to pay a variable service charge in return.

5. Mrs Stern is an assured tenant of the landlord under a weekly tenancy which took effect on from 31 May 1993. Clause 1(1) of her tenancy agreement sets out the weekly rent and service charge payable under the agreement and provided, at clause 1(3): "The [landlord] agrees to provide the services set out in Appendix Three attached to this Agreement for which the tenant shall pay a service charge as set out in clause 1(1) above. The service charge represents 25% of the costs of providing services to the Properties known as 2 Kemble House Bridges Road." (Flat 2, 3, 6 and 7 share common parts of the block.) Further provisions within clause 1 explain the way the service charged may be varied, and clause 3 provides that the tenant must pay "the rent and other weekly charges" in advance. The copy of Appendix 3 to the agreement which is included in the bundle of documents is blank, save that Mrs Stern has written on it "Please provide schedule of services provided". At the preliminary hearing Ms Gray gave evidence that it was common practice for a typed schedule to be attached to all agreements and that she had inspected other tenancy agreements made at about the same time as Mrs Stern's. She had not, however, been able to

locate Mrs Stern's original tenancy agreement. Mr Macdonald confirmed that this was the position.

6. We are satisfied that the tenancy agreements of both tenants required the landlord to provide services for which the tenants were required to pay a variable service charge. We think it is overwhelmingly likely that the schedule of services which was originally attached to Mrs Stern's agreement has been lost, but, in any event, it is clear that she agreed to pay a variable service charge of the appropriate proportion of the costs referable to her flat, namely 25% of the cost of providing services to the four flats sharing the common parts of the block.

Issue 2: limitation

7. Mr Bhose submitted that the tenants could not ask for a determination of their liability to pay any service charges due more than six years prior to the date of their applications. He relied on section 5 of the Limitation Act 1980 which provides that the time limit for actions founded on simple contract is six years from the date when the cause of action accrued.

8. We are satisfied that that submission is not correct for the reasons set out in a decision of the tribunal dated 26 February 2004 in relation to *St Andrew's Square* (LON/00AW/NSI/2003/0054), namely that the tenants are in the position of beneficiaries under the statutory trusts affecting service charges which are set out in section 42 of the Landlord and Tenant Act 1987 and that, by section 21(1) of the Limitation Act, no period of limitation applies to actions by beneficiaries for breach of trust. Furthermore, if the tenants have overpaid service charges in the belief that they were reasonably incurred and it later emerges, by reason, for example, of a tribunal's decision, that the service charges were not reasonably incurred, their application is, in effect, an action for "relief from the consequences of a mistake" and is thus, by virtue of section 32(1) of the Limitation Act, not subject to a period of limitation.

Issue 3: have the tenants agreed or admitted that the service charges which they have paid are due

9. By section 27A(4)(a) of the Act, no application may be made in respect of service charges which have been agreed or admitted by a tenant but, by section 27A(5), a tenant is not to be taken to have agreed or admitted any matter by reason only of having made payment. It is common ground that the tenants have throughout, with the assistance of Housing Benefit, paid the service charges demanded of them in full and on time. However, it was quite clear from their evidence that they have, during the whole of the relevant period, frequently complained about the quality of some of their services and have tried to obtain legal help and advice over a number of years in order to challenge them, but that they have paid what they have been asked to pay because they do not wish to be in debt. We are satisfied that in these circumstances they have not, by paying, agreed or admitted their liability to pay.

Issue 4: should any part of the tenants' claim be struck out as an abuse of process

10. Mr Bhose submitted that, in the event that the tenants' claims in respect of earlier years were not disallowed as time-barred or on the ground that the charges had been admitted or agreed by the tenants, they should be struck out on the ground that they were an abuse of the process of the tribunal.

11. We accept that there may be some cases where stale claims might be struck out, particularly where the cost of investigating service charges long since paid might be disproportionate to the amounts at stake. However, the tribunal's powers to strike out claims are contained in by regulation 11 of the Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003, and the relevant notice under that regulation has not been given in the present case. And in any event, since the same, or virtually the same, charges are challenged in each of the relevant years, to allow investigation of all the charges in dispute does not materially add to the length of the proceedings. For these reasons we have not struck out any part of the tenants' claims as an abuse of process.

Issue 5: has the landlord validly changed the service charges from variable to fixed

12. Section 18 of the Act defines "service charge" for the purposes of the relevant provisions of the Act as "an amount payable by a tenant of a dwelling as part of or in addition to the rent ... the whole or part of which varies or may vary according to the relevant costs ...". The tribunal's jurisdiction is limited to such variable service charges. The landlord says that, with effect from 24 May 2004, it changed the basis of charging the tenants for services from the variable charges for which their tenancy agreements provided to fixed service charges over which the tribunal has no jurisdiction under section 27A. It seems to be clear that the applicant tenants did not personally agree to such a change, and it has therefore to be established for the purpose of this decision whether the landlord had power to convert the service charges from variable to fixed without their agreement. If the landlord validly introduced a fixed service charge in May 2004 it follows that the tribunal cannot determine the reasonableness of the service charges made since that date by means of an application under section 27A, although it would have jurisdiction on a reference under section 13(4) of the Housing Act 1988 to consider whether the total rent, including the service charge, was the open market rent of the property.

13. The question whether the landlord had lawfully changed the basis of charging for services from variable to fixed was the subject of Mr Bhose's very helpful written submissions which we received after the hearing. They were also sent to the tenants, but they made no comment upon them.

14. Mr Bhose submitted that the position is as follows:

i. Miss Morrison's secure tenancy was governed by the provisions of Part IV of the Housing Act 1985, section 102(1) of which provides that the terms of a secure tenancy may be varied without the agreement of the tenant in accordance with section 103. Section 103(1) provides: "The terms of a secure tenancy which is a periodic tenancy may be varied by the landlord by a notice of variation served on the tenant." The remaining provisions of the section set out the circumstances in which this may validly be done. It seems to us that the letter dated 12 December 2003 which landlord

sent to all the tenants of Kemble House complied with the requirements of section 103 and effectively varied the service charges from variable to fixed.

ii. Mrs Stern's tenancy is not a secure tenancy and is not affected by sections 102 and 103 of the Housing Act 1985. However, he submits, clause 1(6)(a) of her tenancy agreement provides a clear contractual basis for the variation which the landlord wished to effect. That clause provides:

> *The [landlord] may vary this Agreement where the management committee of the [landlord] has resolved that, having regard to the charitable objects of the Association, variation is necessary to the [landlord] or that the benefits to the objects of the charity outweighs* [sic] *the disadvantage to the Tenant provided that the [landlord] has carried out proper consultation with those tenants who may be affected by the variation prior to such resolution.*

Mr Bhose submitted that the consultation procedure which the landlord carried out, which is described in the correspondence which was produced to us, complied with the requirements of this clause in the tenancy agreement. He also, at the tribunal's request, made submissions as to the effect of The Unfair Terms in Consumer Contracts Regulations 1999, which the Court of Appeal has held to apply to tenancy agreements (*London Borough of Newham v Katun and others* [2004] EWCA Civ 55). He submitted that clause 1(6)(a) provided a good and valid reason why the variation should take effect and was not unfair to the tenant within the meaning of the Regulations. Nor, he submitted, were there any other public policy arguments for concluding that the variation was unfair or otherwise contrary to public policy, for, if setting fixed service charges kept social landlords' costs down, it was beneficial.

15. We agree with Mr Bhose's submission and are satisfied that the landlord validly changed the service charges from variable to fixed with effect from 24 May 2004 and that, accordingly, we have no jurisdiction under section 27A of the Act in respect of service charges demanded of the tenants on or after that date.

16. In the light of this conclusion we are concerned with the reasonableness of the disputed costs incurred from 1 April 1997 to 24 May 2004.

Issue 6: the disputed charges

i. telephone

17. The relevant charges are as follows:

1997/1998: £230
1998/1999: £176
1999/2000: £358
2000/2001: £253
2001/2002: £258
2002/2003: £102
2003/2004: £nil
1 April to 24 May 2004: say, 13.5% of £65

18. The tenants' case was there was no communal telephone at Kemble House. However the landlord's witnesses explained that this charge was for the care line which connected each tenant's flat to a warden call system. Mrs Stern said that she did not require such a system and had disconnected the equipment inside her flat, but we accept the landlord's evidence that such a service was necessary and that it would be negligent for the landlord not to provide such a system in sheltered accommodation. The charges appear to be reasonable and, although not all the invoices from British Telecom were produced, many were (tab 8/pages 39 - 87). We accept that these charges were incurred and were reasonably incurred.

ii. alarms and fire equipment

19. The relevant charges were:

1997/1998: £489
1998/1999: £2088
1999/2000: £1335
2000/2001: £1811

2001/2002: £293

2002/2003: £nil

2003/2004: £nil

1 April to 24 May 2004: say, 13.5% of £392.

20. It is agreed that there are presently no fire extinguishers in any of the common parts at Kemble House, although it may be that some fire equipment has been provided in the past, and an invoice for four fire extinguishers and four fire blankets (tab 8/page 88 of the bundle) was produced by the landlord. It is agreed, and we confirmed at our inspection, that smoke detectors are provided in the common parts of the block.

21. The tenants' case was that the landlord had never provided any fire extinguishers or fire blankets at the block and that in these circumstances the charges were excessive. Mr Macdonald said that the landlord had been put in a difficult position because of the large number of years in dispute, and had had great difficulty in finding evidence to support the charges. He also said that he had been informed by the landlord's finance department that "alarms and fire equipment" was a generic term which covered the provision of both the care alarms and the fire equipment.

22. Some of the charges are clearly too high to relate only to the somewhat rudimentary fire precautions provided in Kemble house, either now or in the past. We are satisfied, on balance, that they relate, as Mr Macdonald suggested, in large part to the provision of the care alarm system. There are invoices in bundle (tab 8/pages 1 - 38) from the London Borough of Harrow from the "Harrow Helpline Service" which go some way to explain the charges and which include a rental of £97.76 per quarter; and there is an invoice (tab 8/page 38) from Initial Shorrock Customer Services dated 24 February 2000 for maintenance to the warden call system.

23. On balance, therefore, and, recognising as we do the difficulties faced by the landlord in assembling documentary support for the charges, we have come to the conclusion that the charges claimed were in fact incurred and were reasonably incurred.

iii. television aerial maintenance

24. The charges made were £175 in each of the years 1997/1998 and 1999/2000.

25. The tenants said in their written statement of case that they did not accept that these charges had in fact been incurred, but they did not pursue this dispute at the hearing.

26. No invoices were produced to support the charge, but, on balance we accept that these charges, which are not unreasonable in amount, were incurred and reasonably incurred.

iv. management fees and administration

27. In each of the relevant years the landlord charged a management and administration fee of 15% of the cost of providing the services and a management fee of 10% on depreciation.

28. The tenants' case was that management charges should be covered by the rent and that in any event the standard of management was very poor and did not justify a fee of 15% over cost. Mrs Stern said that the tenants were "fed up" because nothing got done. She said that letters were not answered, there were frequent changes of staff, the property was deteriorating, that the tenants could not get the landlord to do anything and that the landlord's accounts were not properly kept. She could not understand why a "pot of money for improvements" which she knew to exist was not available to improve the building.

29. The landlord said that that it did its best to provide a reasonable service. Ms Gray, who is the officer responsible for Kemble House and other sheltered accommodation owned by the landlord, said she visits the property once a month and answers the telephone when she is in her office and she said that the landlord had set up a handyman service to deal with minor repairs but that the Small Minor

Improvements Budget which Mrs Stern had in mind was not available to sheltered housing schemes.

30. On the issue of the management charge on depreciation, the tenants could not understand the basis of this charge. Mr Macdonald said that these charges were a kind of sinking fund which was accumulated to replace capital items which needed to be replaced at irregular intervals. He said that no charge would arise when the expense was incurred because the necessary funds, or some of them, would have been collected.

31. We are satisfied that the standard of service, though probably not perfect, was on the whole reasonable and justified the charge of 15%. The management of sheltered accommodation must be time consuming since vulnerable groups such as older people offer particular challenges to those involved in managing their needs.

32. We are also satisfied that the additional management fee of 10% charged on depreciation was reasonably incurred because of the need to manage the accumulation of the funds required to replace capital items, and that such charges fall within the provisions of the tenancy agreements, it being incidental to the landlord's liability (in clause 2(3) and 2(4) of the tenancy agreements, to keep the property and installations in good repair.

v. gardening

33. The relevant charges were:

1997/1998: £2206
1998/1999: £2119
1999/2000: £2180
2000/2001: £1793
2001/2002: £2084
2002/2003: £2763
2003/2004: £2133

1 April to 24 May 2004: say, 13.5% of £2384, namely £322

34. The tenants' case was that all the landlord did was to mow the lawn, that the gardeners did not always come once a week as they should have done, and often did not spend very long at the property. They were concerned that some of the paths were uneven and dangerous, they had asked for the patios to be scrubbed and this had not been done, and that they had to sweep the paths themselves. They said that the gardener who used to look after the grounds was very good, but that he had left some time ago and the standard had gone down in the last three to four years.

35. The landlord's case was that the charges were reasonable for the work done. Its witnesses said that the cleaning and gardening were carried out by contractors called ADBA, whose comprehensive specification for cleaning and gardening was produced (tab 3/page 29), together with the invoices for 2005/2006 but no others (tab 8/pages 89 – 104). Mr Macdonald said that the earlier invoices could not be found

36. We determine that the charges were reasonably incurred. The grounds are quite large, and it is not suggested that they have ever been really neglected. In our view the charges, which equate to an average of around £40 per week for the quite extensive work set out in the specification, were reasonable for the work required to be done and which, we are satisfied, was done.

vi. cleaning

37. The relevant charges were:

1997/1998: £468
1998/1999: £619
1999/2000: £958
2000/2001: £359
2001/2002: £675
2002/2003: £1002
2003/2004: £884

1 April to 24 May 2004: say, 13.5% of £1511, namely £204

38. The tenants complained that cleaning had not always been done regularly and that the carpets in the communal stairways were in a disgusting state.

39. The landlord's case was that the charges were reasonable for the work done. The cleaning specification provides that the cleaning of the common parts is to be carried out weekly (see tab 8/page 133) and that other works, such as window cleaning and washing walls is to be carried out less frequently. Invoices for cleaning were produced at tab 8/pages 105 -121.

40. In our view these charges were reasonably incurred. Although we recognise that an inspection is no more than a single snapshot, the carpets appeared to be reasonably clean, and there is no suggestion that they have been recently replaced. We are satisfied that the standard of cleaning of the common parts was satisfactory and that it justified the charges made.

vi. depreciation charges

41. The carpets were depreciated over a period of 5 years and the alarms, television aerial and entryphone system were depreciated over a period of 10 years.

42. The amounts charged were, in total, £1026 in each relevant year with the exception of 2001/2002, when it was £1745, and in 2004/2005, when no amount is given for depreciation but the sum of £1451 was transferred to the "replacement fund" which we take to be the equivalent. 13.5% of that figure is £196.

43. The basis of these charges appears to be the written down value of the capital cost. Mr Macdonald said that the charges were based on a sinking fund principle to provide for the replacement of the items in due course.

44. The tenants said that the carpets had never been replaced and that these charges were not reasonable and were "dreamt up".

45. The landlord said that it was reasonable to make such an allowance and that the tenancy agreements permitted such charges to be made.

46. We are satisfied that the arrangement whereby items are depreciated to build up a sum for their replacement based on past cost is a reasonable one, provided that the period of depreciation selected is reasonable. It would have been helpful to have been told how much now stands in the depreciation account. Nevertheless we agree with the principle behind this charge. However it seems to us that 5 years' depreciation period for the carpets is too short. It does not appear to be suggested that the carpets have been replaced since the tenants moved to Kemble House some years ago and, on the basis of our inspection, we conclude that they do not yet require replacement. In our view a ten year period of depreciation of the carpets would be reasonable and the reasonable charge for depreciation of the carpets is therefore not £100 per annum as charged, but £50 per annum. Miss Morrison is not affected by this reduction because her flat has no common parts and she does not pay this charge. Mrs Stern is, however, liable to pay 25% of the charge, and she has therefore, according to this determination, overpaid by £12.50 a year in each of the years in question.

46. It follows from this decision that the tenants are liable to pay all the charges which they have challenged with the exception of £12.50 per year which Mrs Stern has over-paid in respect of depreciation on the carpets in the common parts in respect of which she pays a service charge.

CHAIRMAN:.....

DATE: 8 May 2007