CHI/21UG/LSC/2008/0080

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

Address:	Colben Court, 17 Rafati Way, Bexhill On Sea, East Sussex, TN40 2EX
Applicant:	Mrs K Kennedy Redmile Gordon
Respondent:	Colben Court Residents Ltd
Application:	5 August 2008
Inspection:	25 November 2008
Hearing:	25 November 2008

Appearances:

Tenant
Mrs K Kennedy Redmile Gordon — Leaseholder
For the Applicant

Respondent
Mr H Rafati — Director
For the Respondent

Members of the Tribunal

Mr I Mohabir LLB (Hons)
Mr C C Harbridge FRICS
Ms J K Morris

IN THE LEASEHOLD VALUATION TRIBUNAL

CHI/21UG/LSC/2008/0080

IN THE MATTER OF SECTION 27A OF THE LANDLORD & TENANT ACT 1985

AND IN THE MATTER OF COLBEN COURT, 17 RAFATI WAY, BEXHILL ON SEA, EAST SUSSEX, TN40 2EX

BETWEEN:

MRS KATHARINE KENNEDY REDMILE GORDON

Applicant

-and-

COLBEN COURT RESIDENTS LIMITED

Respondent

THE TRIBUNAL'S DECISION

Introduction

1. This is an application made by the Applicant pursuant to s.27A of the Landlord and Tenant Act 1985 (as amended) ("the Act") for a determination of her liability to pay and/or the reasonableness of various service charges for the year ending 30 November 2007.

2. The Applicant is the leaseholder of Flats 1, 2, 5 and 6 in the property known as Colben Court17 Rafati Way, Bexhill On Sea, East Sussex, TN40 2EX ("the subject property"). The service charge liability under the leases of these flats arises in the same way. In an earlier Tribunal decision dated 30 May 2007, it was determined that the service charge contribution for each of these flats was payable to the Respondent company.

3. The service charges being challenged by the Applicant in this application are:

Garden expenses: £470

Bank charges: £95

Management and secretarial fees: £800

Although the Applicant had filed and served a statement of case pursuant to the Tribunal's Directions, it was not entirely clear what challenges were being made in relation to the service charges in issue. At the hearing, the Applicant clarified that she was contending as follows:

(a) that she simply wanted more information about who did the gardening and how often. She was not specifically challenging her liability to pay or the reasonableness of these costs.

(b) that the bank charges were not recoverable at all because they related to a bank account that other than the Respondent's.

(c) that the management and secretarial fees were not reasonable because this service could be provided at no cost by one of the Directors of the Respondent company or by her. In the alternative, the cost should be no more than 10-15% of the total service charge expenditure claimed.

Each of these matters is considered in turn below.

The Lease Terms

4. Save for the issue relating to the bank charges, it was not the Applicant's case that she was not contractually liable to pay a service charge contribution to the Respondent company under the terms of her lease. In the earlier Tribunal decision dated 30 May 2007, this point was considered and decided and, if necessary, the parties should refer to that decision. It is, therefore, not necessary to set out here again how that liability arises.

Inspection

5. The Tribunal inspected the subject property on 25 October 2008. Colben Court is a recently built two storey block of eight flats, being part of a small residential development called Rafarti Way. The block is built with cement

rendered walls beneath tiled roof slopes. There are two common access hallways, stairs and landings, each of which serve four flats. The subject property has, at the front, a car-park and, at the rear, pedestrian access. The Tribunal inspected the exterior of the subject property including the car-park together with the grounds and gardens, and the communal interior areas described above.

Decision

6. The hearing in this matter also took place on 25 October 2008. The Applicant appeared in person. The Respondent was represented by Mr Rafati, who is a Director of the company.

7. As a general point, the Tribunal was satisfied that the letters sent by the Respondent dated 27 February and 14 March 2008 together with the relevant service charge accounts annexed thereto, amounted to a "demand" within the 18 month time limit imposed by s.20B of the Act. Therefore, the Respondent was not time barred from being able to recover the service charge costs claimed in these proceedings. Although this point had not been specifically raised by the Applicant, it went directly to the matter of recoverability and fell, as a matter of law, to be considered by the Tribunal.

(a) Gardening

8. In answer to the eqnquiry made by the Applicant, Mr Rafati explained that the gardening duties were carried out by a man known as "Lionel" and the invoices reflected the number of visits he made in 2007. He visited approximately once a month to clean the external areas located to the front and left hand side of the property. The timing of the visits was left at the discretion of Lionel because it was often dependant on such factors as the weather. Only one visit was made by Mr Featherlight in November 2007 to carry out the gardening when Lionel had either been ill or was unavailable for some other reason. The cost of each of these visits had been £60 and £50 per month for Lionel and Mr Featherlight respectively. An invoice from Lionel indicated that on the occasion of the visit to which the invoice referred, he spent 7.5 hours at the property, and that his account included materials and the

costs he incurred in disposing of the accumulated rubbish. Having had this explanation, the Applicant conceded that the gardening costs were reasonably incurred, reasonable as to amount and payable by her.

(b) Bank Charges

9. At the last hearing in this matter, the Tribunal found that any service charge contributions paid by the lessees had to be paid to the Respondent only and, so it seems, directed that a bank account in the Respondent's sole name be opened, in which service charge monies should be held. It appears until that time, any service charge monies collected had been paid into an account with the name of Hastings and Rother Property Services Limited ("HRPS").

10. It was a matter of common ground that the bank charges in issue had been incurred in relation to the "service charge" account in the name of HRPS. Mr Rafati explained that the Respondent had not been able to open a new service charge account in the name of the Respondent because, at the relevant time, the Applicant had been a Director of the company and had failed to cooperate by personally attending the bank. It was not until the Applicant resigned as a Director that a new bank account in the name of the Respondent could be opened on 1 February 2008.

11. In reply, the Applicant stated that she had not attended the bank because she had asked Mr Rafati several times to confirm that a new bank account was in fact being opened and had failed to receive a direct reply. In any event, she had wanted the new account to be opened at the Barclays Bank branch in Bexhill and not at the bank or the branch proposed by Mr Rafati at Hastings.

12. The Tribunal, firstly, considered the issue of whether the bank charges were recoverable as relevant service charge expenditure under the terms of the leases. The expenditure that can be recovered in this way is set out in the Fifth Schedule of the specimen lease of Flat 1 provided to the Tribunal. When asked by the Tribunal, Mr Rafati had submitted that these costs may fall within the wording of the preamble and/or paragraph 5.9 of the Fifth Schedule. However, it was not necessary for the Tribunal to specifically decide this point

because, even if Mr Rafati's submission was correct, the Fifth Schedule expressly provides that only service charge costs incurred by the Respondent or the landlord or for which they may be liable are recoverable as relevant service charge expenditure. On any view, it could not be said that the bank charges were costs for which the Respondent or the landlord were liable or may be liable. Sole liability for those costs remained solely with HRPS and no one else. The conduct or otherwise of the Applicant had no relevance to this issue. Accordingly, the Tribunal determined that the bank charges were not recoverable at all because they had not been incurred by either the Respondent and/or the landlord. It follows from this that, if they had no liability for those costs, they were not recoverable under the Fifth Schedule of the leases as relevant service charge expenditure.

(c) Management & Secretarial Fees

13. The costs of £800 are claimed by the Respondent for the various administrative duties carried out for the period 13 June 2005 to 30 November 2006 and 1 December 2006 to 30 November 2007. They are set out in an invoice from HRPS to the Respondent dated 31 December 2007. The Tribunal pointed out to the parties that these costs largely fell outside the service charge year being considered. The Tribunal invited the Applicant to consent to the application being amended to include the period of time for which these costs were claimed and she, helpfully, agreed to do so.

14. Mr Rafati, firstly, submitted that these costs were recoverable under paragraph 5.14 of the Fifth Schedule of the leases. He also submitted, in terms, that the costs had been reasonably incurred. Although there is a formal Company Secretary for the Respondent, Mrs Mansbridge, she was elderly and not able to perform the administrative tasks for which these costs were claimed. They could not be carried out by a managing agent because at this time there had been none and the management of the property was carried out by himself and other leaseholders. The reason why the invoice was on the notepaper for HRPS was that it had simply been used for secretarial purposes and not the management of the subject property.

15. The Applicant submitted that paragraph 5.14 of the Fifth Schedule only allowed for management costs and not secretarial costs to be recovered as relevant service charge expenditure. In the alternative, she submitted that these costs had not been reasonably incurred, for example, because:

(i) the lessees were charged a separate fee of £25 for arranging the buildings insurance. This was, in effect, double charging.
(ii) there were no invoices regarding the cleaning of the guttering.
(iii) there had only been four gardening invoices to consider and the amount of time involved in the administration was minimal.
(iv) it was not necessary for Mr Rafati's secretary, Mrs Fitzgerald, to carry out these administrative duties. It could either have been done by him or another lessee at no cost.

16. As to the issue of recoverability, the Tribunal did not accept the Applicant's submission that these costs were not recoverable because the Fifth Schedule only allowed the cost of management and not secretarial costs to be recovered. Paragraph 5.12 of the Fifth Schedule expressly allows the cost of employing a managing agent to be recovered as relevant service charge expenditure. However, paragraph 5.14 also provides the Respondent with an additional discretion to:

> *"Employing and maintaining such staff agents and advisers.....as may be required to attend to the care and management of the Building.....".*

It seems, therefore, that the Respondent may employ such other staff or agents, in addition to a managing agent, in relation to the management of the building and the exercise of this discretion is not conditional upon the cost of any such service being obtained at little or no cost elsewhere. The Applicant did not dispute Mr Rafati's assertion that there was no managing agent appointed at the time these costs were incurred. She also did not dispute that he, due to time constraints and Mrs Mansbridge, due to her age, could not carry out these administrative duties. In the circumstances, the Tribunal found that the Respondent appears to have properly exercised the discretion provided

by paragraph 5.14 of the Fifth Schedule by employing secretarial support from HRPS and that those costs, in principle, are recoverable as relevant service charge expenditure and were reasonably incurred.

17. As to the costs themselves, it appeared that the Applicant had some experience as a managing agent or of management. When asked by the Tribunal what sum she considered to be reasonable, in the event that these costs were held to be recoverable, she submitted that the sum of £260 be allowed as reasonable, being 10-15% of the overall service charge expenditure. However, in further questioning by the Tribunal, the Applicant conceded that she would not charge less than £100 per unit per annum as a managing agent. The obvious point was, of course, that there are 8 flats in total in the subject property and her costs, as the managing agent, would not have been less than the sum claimed by the Respondent. Moreover, the sum of £800 claimed was for a period of 29 months, which equated to £27.58 per month or £330.96 per annum for the entire building. The liability per flat was £41.37 per annum and the Tribunal considered this amount to be almost *de mimimis*. Accordingly, the Tribunal allowed the sum of £800 claimed to be reasonable and recoverable by the Respondent.

Section 20C & Fees

18. In the substantive application, the Applicant also made an application under s.20C of the Act. Essentially, by making this application, the Applicant invites the Tribunal to make an order preventing the Respondent from recovering all or part of the costs it has or may have incurred in these proceedings through the service charge account.

19. Section 20C provides the Tribunal with a wide discretion to make an order where it is just and equitable to do so having regard to all of the circumstances of a case.

20. In the present case, the Tribunal, having regard to all the circumstances and, in particular, the fact the Respondent had largely won on the issues, made no order preventing it from being able to recover it's costs in these proceedings.

Moreover, the Tribunal bore in mind that this was a "tenant owned" block and to make an order under s.20C would have the effect of financially penalising the other non-participating lessees by being able to recover some of the cost of this litigation from the Applicant who holds half of the flats in the subject property. For the same reasons, the Tribunal also does not direct the Respondent to reimburse the Applicant the fees paid in bring this application.

Dated the 5 day of December 2008

CHAIRMAN.....
Mr I Mohabir LLB (Hons)