THE RESIDENTIAL PROPERTY TRIBUNAL SERVICE
SOUTHERN RENT ASSESSMENT PANEL
LEASEHOLD VALUATION TRIBUNAL

S.27A Landlord & Tenant Act 1985(as amended)("the Act")

Case Number:	**CHI/21UD/LSC/2008/0112**
Property:	**Flat 3 9 Kenilworth Road St Leonards On Sea East Sussex TN38 0JD**
Applicant	**Kenilworth Tenants Assoc Ltd**
Respondent	**Mr R Youssof**
Appearances for the Applicant:	**Ms R Akorita (Managing Agent)**
Appearances for the Respondent:	**Respondent appeared in person**
Date of Inspection /Hearing	**22nd January 2009**
Tribunal:	**Mr R T A Wilson LLB (Lawyer Chairman) Mr B H R FRICS MCIArb(Valuer Member) Miss J Dalal (Lay Member)**
Date of the Tribunal's Decision:	**9th February 2009**

THE APPLICATION

1. The Applicant applies for a determination as to the reasonableness of service charges levied by the landlord in respect of the property for the service charge years 2005, 2006, 2007 & 2008. Initially there was also an application to determine the reasonableness of the 2008 half yearly interim service charge demand for £391.31 but at the hearing this was accepted by the Respondent.

2. The Tribunal is also required to consider, pursuant to regulation 9 of the Leasehold Valuation Tribunal (England) Regulations 2003 whether the Respondents should be required to reimburse the fees incurred by the Applicant in these proceedings.

DECISION IN SUMMARY

3. The Tribunal determines for the reasons set out below that the amounts demanded by the Applicant from the Respondent covering water standing charges/usage for the years 2005 to 2008 inclusive are not recoverable as service charge under the lease relating to the property.

4. No order is made in relation to the repayment of fees incurred by the Applicant in these proceedings.

INSPECTION

5. The property comprises an inner terrace house, built on sloping ground with cement rendered elevations under a roof hidden behind a parapet. The property is located in an urban area of St Leonards not far from the sea-front. The house was built about 100 years ago and has subsequently been converted into four flats located on the lower-ground and three upper floors. The common ways are in satisfactory order. The inspection of the exterior was brief and conducted in driving rain.

THE LAW

6. The Tribunal has power under Section 27A of the Act to decide about all aspects of liability to pay service charges and can interpret the lease where necessary to resolve disputes or uncertainties. The Tribunal can decide by whom, to whom, how much and when service charge is payable. A service charge is only payable in so far as it is reasonably incurred, or the works to which it is related are of a reasonable standard. The Tribunal therefore also determines the reasonableness of charges.

7. Section 18(1) of the Act defines service charge as, *'an amount payable by the tenant as part of or in addition to the rent –*

   a) which is payable directly or indirectly, for services, repairs, maintenance, improvements, or insurance or the landlords cost of management and

b) *the whole or part of which varies or may vary according to the relevant costs.*

18(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.

It follows therefore that the Tribunal only has jurisdiction to decide costs, which fall within the definition of a service charge as defined above.

THE LEASE

8. The Tribunal had a copy of the lease relating to the property, which is dated the 11th November 1988 and is for a term of 99 years from the 24th June 1988 at a ground rent of £30 per year for the first 33 years of the term and rising thereafter.

9. The provisions relating to the calculation and payment of the service charge are to be found at clauses 4(4) of the lease and the Fifth Schedule. Clause 4(4) provides for the tenants to pay the Interim Charge and the Service Charge at the times and in the manner provided in the Fifth Schedule. The Fifth Schedule states that the tenants' share of the Service Charge is one-quarter part of the General Total Expenditure as defined in the Fifth Schedule and a one third part of the Interior Total Expenditure as defined in the schedule. The Interior Total Expenditure includes amongst other things the cost to the landlord in complying with the provisions of clause 5(5)(e)

10. Clause 5(5)(e) states, '*to pay the discharge any rates (including water rates) taxes duties assessments charges imposition and outgoings assessed charged or imposed on the Building and the curtilage thereof as distinct from any assessment made in respect of any demised part of the Building*'.

11. In the Fifth schedule there is a definition of the General Total Expenditure which in broad terms is the sum total of costs incurred by the landlord in complying with its repairing and insuring covenants and the landlords obligation to keep the common parts clean.

ISSUES IN DISPUTE & DETERMINATION

12. The hearing took place on the 22nd January 2009. Ms R Akorita appeared for the Applicant and the Respondent appeared in person accompanied by his wife.

13. Both parties had set out their respective positions in their statements of case and both parties had prepared and submitted a bundle of evidence.

14. At the hearing the Tribunal established that there was no dispute in respect of the 2008 half yearly interim service charges made by the Applicant and the only issue in dispute related to demands for the cost of water supplied to the flat between 2005 and 2008 inc.

THE APPLICANT'S CASE

15. Ms Akorita commenced her evidence by saying that the amount outstanding from flat 3 in respect of water from 2005 to December 2008 was £639.07. Up to 2005 there had been no formal management of the building and all bills, including water bills had been paid on an ad hoc basis. In 2005 Ms Akorita had taken over management of the building and initially she had done this without charge. However, since 2006 she had made a charge as she was entitled to do under the terms of the lease. Ms Akorita continued her evidence by saying that since 2005, she had billed the Respondent for his proportion of the water supplied to his flat. Despite repeated requests, the Respondent had refused to pay anything other than the standing charge for water on the grounds that his flat was empty and therefore not consuming water. It was Ms Akorita's case that the lease made no distinction between those flats which were occupied and those which were vacant and that under the terms of clause 5(5)(e) the Respondent was required to pay a quarter part of the General Total Expenditure for the building which included a one quarter part of the composite water bill relating to the building. As valid demands had been raised in respect of amounts that were reasonable she invited the Tribunal to make an order under section 27A of the Act determining that the total amount of £639.07 was due.

16. In cross examination, Ms Akorita acknowledged that the whole of 9, Kenilworth Road, St Leonards On Sea was served via one water meter which was located in the cellar. This was a measured service but there was no separate meters recording actual usage of each flat. She confirmed that the long existing arrangement was that the Applicant sent bills received from Southern Water to each individual lessee with a request that the lessee issue a cheque in favour of Southern Water for their one quarter share. All other lessees were happy with this arrangement and it got around the problem of there being no individual water supplies to the flats.

17. Ms Akorita contended that the authority for this arrangements and the legal basis on which demands were made were contained in clause 5(5)(e) of the lease and the Fifth Schedule. It was her contention that the combined effect of clause 5(5)(e) and the Fifth Schedule were to provide an obligation on the lessee to pay his one-quarter share. On being challenged that clause 5(5)(e) related to water rates assessed on the common ways and did not relate to actual water supply to the individual flats, Ms Akorita rejected this as being the wrong interpretation. The clause in her opinion was wide enough to enable to landlord to make a charge to each lessee for water consumed. The definition of water rates included the supply of water to individual flats

THE RESPONDENTS CASE

18. The essence of the Respondent's case was that when they purchased the flat in 1996 there was a long standing arrangement that they only paid for water usage during the times when their flat was tenanted. When their flat was vacant they paid a quarter of the standing charges. Ms Akorita had changed this arrangement without consultation when she had taken over management in 2005 and she now billed them for one-quarter share of the total bill regardless of whether or not their flat was occupied or vacant. In point of fact their flat had been largely vacant since 2005 and therefore they had consumed very little if any water. In these circumstances it was not reasonable that they should have to pay anything

more than the standing charge. The Respondent also confirmed that when their builder had been at the flat and had done 2 days work, they had paid a sum of £32 to cover any water usage for that period.

19. When questioned by the Tribunal it became clear that a second part of their defence was that they did not accept that clause 5(5)(e) of the lease or the Fifth Schedule constituted an obligation on them to pay for water supplied to the premises. They considered that this clause related only to water rates and not water usage. The Respondent felt that the charge levied was not a service but it was a utility based on usage, and it was not appropriate for them to pay for someone else's usage of water.

THE TRIBUNALS' DELIBERATIONS

20. The Tribunal found as a matter of fact that the building has a single water supply connected to a single water meter located in the cellar and evidence was given at the hearing by the Applicant that this meter pre-dated the conversion. This is an unusual arrangement for a building which has undergone a relatively recent conversion into four self-contained flats.

21. This application has come before the Tribunal because the above arrangement is unsatisfactory. Instead of having an individual metered supply to each flat there is but one supply to the building. If on conversion of the building to four flats each flat had been provided with a separate water supply then there would be no problem over the apportionment of the cost of supply and usage of water.

22. The Tribunal heard evidence that until 2005 an arrangement existed whereby apportionment of the cost of water supply was agreed by the leaseholders and payment made to Southern Water apparently by four separates cheques, one from each leaseholder. This arrangement appeared to involve distinguishing between occupied and vacant flats with vacant flats paying less. This dispute has arisen because in 2006, Ms Akorita apparently adopted a new arrangement without consultation and without the agreement of all parties. This new arrangement consisted of simply dividing the water charge equally between all of the leaseholders regardless of whether or not the flat was vacant or occupied. The Respondent has objected to this new arrangement on the basis that it is unfair for no allowance to be made in respect of vacant flats.

23. The Applicant contends that the lease makes no distinction between occupied and vacant flats and therefore the Respondent is obliged to pay a quarter of the total bill regardless of user. In support of this contention, she relies upon the combined effect of clause 5(5)(e) and the Fifth Schedule to the lease.

24. The Tribunal rejects this argument. In its opinion clause 5(5)(e) is intended to cover not the supply of water to the individual flats but to the payment of water rates (if any) assessed on the building as a whole. We take this to mean rates assessed on the common parts covering by way of example the provision of an outside communal tap. We do not accept the Applicant's assertion that clause 5(5)(e) or the Fifth Schedule covers the supply of water to the flats. In coming to this conclusion we have considered both the wording of the lease and also the conduct of the parties.

25. The Fifth Schedule of the lease sets out the leaseholders proportion attributable to the clause 5(5)(e) costs as one third and not one quarter. Both the Applicant and the Respondent confirm that in the past flat 3 has only been asked to contribute one quarter of the cost of the water supply and never one third. We believe this supports our conclusion that clause 5(5)(e) and the Fifth Schedule cannot provide the legal basis upon which the Respondent has been paying for his water supply. If clause 5(5)(e) is the contractual basis upon which payment is demanded and paid then it is logical to expect the share demanded and paid to be as set out in the clause namely one third.

26. Further more clause 5 (5) (e) ends with the words "*as distinct from any assessment made in respect of any demised part of the Building.*" In the opinion of the Tribunal the intention of these words is to exclude from the application of this clause any rates or services supplied to the individual flats contained in the building. On this interpretation clause 5(5) (e) cannot provide the basis for charging water supplied to the flat.

27. The applicant states that the lease is silent on the question of whether the owner of a vacant flat should pay less for water than for an occupied flat. She contends that this silence should be taken to mean that all flats have to pay the same amount. The Tribunal does not share this interpretation. We believe that the lease is silent on this point because there was no express intention on the part of the draughtsman of the lease for the landlord to pay for the supply water supply and recover the cost from each leaseholder.

28. It is an important principle that the landlord's power to levy a service charge and a leaseholder's obligation to pay for it are governed by the provisions of the lease. The lease is a contract between the leaseholder and the landlord and there is no obligation to pay anything other than what is provided for in the lease. The principle of the lease is that the landlord is not obliged to provide any service that is not covered by the lease and the leaseholder is not responsible for payment where there is no specific obligation set out in the lease. We can find no other clause in the lease, which is explicit enough to place an obligation on the landlord to maintain a water supply to the Respondent's flat.

29. We accept that there has been a long standing arrangement for each leaseholder to contribute towards the water supply for which they benefit. However, we consider this to be a 'collateral arrangement' which exists outside of the service charge provisions of the lease. On this basis it is possible that the leaseholder is under a contractual obligation, albeit not one in writing, to pay for the water supplied to the premises. However, the jurisdiction of the Tribunal relates to the payability and reasonableness of a service charge as defined by the Act. The definition of a service charge is a service that the landlord is under an obligation in the lease to provide.

30. We find on the facts that the existing arrangement cannot be termed, as a service charge item as the landlord is not under a contractual liability to make this supply as is required by the legislation. In these circumstances we have no power to determine if the amount demanded is payable or reasonable pursuant to section 27 of the Act.

31. The Tribunal accepts that this finding does not resolve the issue. In the interests of assisting the parties the Tribunal considers that the solution lies in either the parties continuing to honour a private "collateral arrangement" either in its previous or amended form, or, if this proves impossible, then the alternative is for each leaseholder to contract for its own supply directly with Southern Water. In our opinion it follows that if the

Applicant is not obliged under the lease to make water supply available then in the absence of a contractual liability, it is free to either suspend or to discontinue the supply.

REIMBURSEMENT OF FEES

32. The Tribunal makes no order in relation to the reimbursement of the fees incurred by the Applicant, as the Tribunal finds no fault with the conduct of either party in this case. Both parties have cooperated fully with the Tribunal and the issue to be determined although simple in nature has turned on a fine interpretation of the lease. Even though it could be said that the Respondent has successfully defended the application, the Tribunal accepts that it was reasonable for the Applicant to make it. For these reasons no order is made in relation to the reimbursement of fees.

Chairman Signed

R.T.A.Wilson LLB Solicitor

Dated 9th February 2009