LEASEHOLD VALUATION TRIBUNAL

In the matter of Section 27A of the Landlord and Tenant Act 1985

And in the matter of Flat 6 Alvandi Gardens, Herbert Road, New Milton, Hants, BH25 6BX

Between:-

Mr R C Evans (Flat 6)

Applicant

Alvandi Gardens Maintenance Limited
(represented by Mr Harris)

Mr D Shields (Flat 8)
JJ Stephenson (Flat 4)
Mr I Brett (Flat 9)
J Nicholas (on behalf of Flat 5)

Respondents

Inspection date:	13th May 2009
Hearing:	13th May 2009
Tribunal:	T A Clark (Chairman) PD Turner-Powell FRICS R T Dumont
Date of Decision:	June 2009

Application:

This is an application for a determination under section 27A of the Landlord and Tenant Act 1985 for a determination of liability to pay service charges.

There is also an application under section 20C of the Act that the costs of this current application and responding to the application should not be taken into account in determining the amount of service charge payable. If this application is successful this would mean that the managing agent's costs cannot be added into the later service charges and will therefore be borne by the managing agent/landlord alone.

The application is for a determination for the years 2005, 2006 and 2007.

Inspection:

At the time of inspection the Tribunal noted two virtually identical blocks of flats each with 6 flats. Each block had a separate entry system At the back of each block were garages split into two blocks, Block A having 5 garages behind it and block B having 7 garages. One of the tenants of block A, being the Applicant Mr Evans, had as part of his lease the use of the "7th" garage behind Block B.

All the garages run from the electricity supplied to the common parts of Block A.

We viewed a number of flats in both blocks. We were shown the entry system for both blocks. We viewed the garage blocks behind each block of flats.

The lease:

A sample lease was provided to the tribunal dated 6th January 2004. The terms of the lease were not in issue.

The relevant parts of the lease were as follows;

Clause 24 provided as follows;

The Lessee shall contribute and shall keep the Lessor indemnified from and against the following proportionate parts of all costs charges and expenses (including fees or other remuneration of any firm or Company who shall be employed by the Lessor to manage the property) incurred by the Lessor in carrying out its obligations under the Seventh Schedule hereto:-

(i) one-sixth part of such of the said costs charges and expenses incurred in relation to the block of flats being Block ' A ' aforesaid and of the appropriate yearly sum to be provided in relating to Block ' A ' as aforesaid as part of a Sinking Fund as mentioned in Clause 10 of the Seventh Schedule hereto and

(ii) one-seventh part of such costs charges and expenses incurred in relation to the said garages comprised in Garage Block ' B ' shown on Plan ' B ' annexed hereto

(iii) one twelfth part of such of the said costs charges and expenses incurred in relation to the gardens pleasure grounds drives paths bin store and forecourts forming part of the reserved property.

The 6th Schedule imposes upon the Lessees the obligation to keep the Lessor indemnified against the proportionate parts of all costs charges and expenses as to

(i) one-sixth of such part of the said costs charges and expenses incurred in relation to the block of flats being Block ' A ' aforesaid and of the appropriate yearly sum to be provided in relating to Block ' A ' aforesaid as part of a Sinking Fund as mentioned in Clause 10 of the Seventh Schedule hereto and

(ii) one seventh part of such of the said costs charges and expenses incurred in relation to the said garages comprised in Garage Block ' B ' shown on plan 'B' annexed hereto

(iii) one-twelfth part of such of the said costs charges and expenses incurred in relation to the gardens pleasure grounds drives paths bin stores and forecourts forming part of the reserved property

Schedule 7 provides for payments of rates taxes assessments and outgoings but makes no specific reference to proportions payable.

Clause 10 of the schedule refers to the operation of a sinking fund which shall be carried forward year on year.

Memorandum and Articles of Association

These relate to the Limited Company Avandi Gardens Maintenance Limited formed in relation to this property and incorporated on the 7th October 1983 with the intention of entering into and carrying into effect the terms of the leases granted at the property and importantly to manage and administer the property. As part of the purchase of the lease each Lessee holds one share. This fact was not in issue.

The relevant part of Clause 12 provides as follows;

"(a) the members of the Company ....shall from time to time and whenever called upon so to do by the Company pay to the Company ....

(b) the rateable proportion payable under this regulation in respect of each share shall be one-twelfth."

The hearing

During the course of the hearing the Tribunal heard considerable evidence as follows;

The tribunal heard from Mr Evans, the Applicant.

Mr Evans told the Tribunal that he had lived at the property since 1994 and he drew our attention to the terms of the lease.

He stated that having analysed earlier charges and from 1994 onwards there was a period of time when no money was spent on inside peoples flats and work done in block A and block B was identical.

In relation to the outside parts everything was divided by one twelfth. In relation to work inside the blocks, which included decoration, replacement of carpets and light fittings,

this was divided by two and then by one sixth. This of course resulted in a one twelfth split ie result was the same.

A simple administrative procedure therefore evolved whereby all costs were split one 12th.

By 1995 Mr Evans was Chairman of the residents association. Following advice, an Extraordinary General Meeting (EGM) was held on 27th September 1995 at which Mr Evans as Chairman proposed that both blocks A and B should be run on the basis that the total cost of maintenance continue to be divided equally between all Lessees (on a one twelfth basis) but with a proviso that if any one item exceeded £500 then that item should be borne only by the block concerned rather than split one twelfth. This was seconded and the motion was passed.

The Annual General Meeting of the Managing Company was then held on 14th February 1996. Mr Evans remained Chairman and the minutes of the EGN were approved and unanimously agreed.

2005

Time passed without problems until 2005. During this year an amount of £70 was charged to the Lessees in respect of a ball valve which had to be replaced in block B for 2 flats. Mr Evans stated that he expected to see a credit for this in the accounts but it never came. There was another item is respect of block B for an entry telephone costing £35. These were Mr Evans two objections to the 2005 accounts.

2006

In 2006 a bill for £477 in respect of block B was apportioned equally between the 12 Lessees. This was in relation to the door entry system but covered not only the main entry system but also the handsets in each persons flat within block B. Mr Evans stated that he believed that the telephone within the flat should be borne by the individual Lessees but the outside button should have been apportioned equally.

Mr Evans said he raised the issue of payments and apportionment at the 2007 AGM by which time he was no longer Chairman.

2007

The Tribunal heard from Mr Evans that in 2007 there was an invoice for £160 in respect of electrical repairs to block B only. This figure can be seen in the year end accounts for 29.9.2007 under heading "Schedule of Repairs".

Reference was also made to the year end accounts for 2005, 2006 and 2007 both during Mr Evans account and when hearing from the Respondents. We were also directed to individual invoices which make up some of the total figures within the accounts These were at E3 onwards of the bundle prepared by Mr Evans.

The tribunal heard primarily from the following Respondents, Mr Harris for Avandi Gardens, Mr Shields, and Mr Stevenson. Other Lessees supported their evidence.

We heard the following evidence from the Respondents

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On 27th February 2006 the AGM took place. The records show that the 2005 accounts were proposed by Mr Shield and seconded by Mr Evans, the Applicant. Mr Evans disputes that evidence.

We heard that other work had been done that benefited block A at the expense of block B but this did not relate to the years in question that we have to consider. Again Mr Evans disputed this evidence.

We heard considerable evidence that the intention of the Lessees was always that, following the EGM in 2005 and AGM in 2006 at which the minutes of the EGM were approved and agreed that this would constitute an agreed alteration to how service

charges would henceforth be apportioned, that the charges were to be apportioned one twelfth with a £500 upper limit to charges.

The Tribunal was referred to individual bills at section E of the bundle provided by Mr Evans. We were also referred to the 2006 and 2007 accounts.

We heard evidence about a bill concerning a ball valve in a tank which services two flats.

We also heard evidence of guttering works to the garage block A and guttering to Mr Evans garage being part of garage block B. Mr Evans said that the works extended beyond his garage. The respondents disagreed with this and said the guttering was around his garage only.

The law

Section 27A of the Landlord and Tenant Act 1985 provides that

"An application may be made .... For a determination whether a service charge is payable and., if so, 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

(4) no application under section (1) or (3) may be made in respect of a matter which -

(a) has been agreed or admitted by the tenant

(b) has been, or is to be, referred to arbitration .....

(c) ...

(d) ...

(5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.

Our attention was drawn by Mr Harris for the managing agent to the to the case of Morestead Mansions Limited v Leon De Marco reported at [2008] EWCA Civ 1371, a case in which the Court of Appeal determined that where service charges had been levied against a tenant not as tenant but as a shareholder in the limited company pursuant to its memorandum and articles of association then there was "almost no defence" to such a claim for payment of a debt owed .

The tribunal determined that i) the tribunal does not have jurisdiction in company matters and would have to have remitted that matter back to a county court having company law jurisdiction to make a determination on this point. No such application was made to us to adjourn the matter and remit the matter to the courts for a determination.

However in addition ii) the tribunal distinguished the Morestead case from the case before us now on the basis that the service charges payable in this case were levied as service charges pursuant to the lease and not stated to be pursuant to the memorandum and articles of association of the Limited Company.

Further it appeared to the Tribunal that the effect of the Morestead case was to ignore the protection afforded by the entirety of the legislation intended to provide protection for tenants in relation to service charges if they were levied instead as payments into a Sinking Fund. The Tribunal found that this was not the case in the application before us.

Decision:

The tribunal has determined that in relation to the year 2005 there is compelling evidence that Mr Evans agreed those accounts at the time. In this respect we prefer the evidence in the written Minutes and of the Respondents to that of Mr Evans who cannot remember seconding the 2005 accounts. We found that he did second those accounts. The tribunal therefore conclude that Mr Evans agreed these sums and the 2005 accounts and that this

constitutes an acceptance within the meaning of Section 27A(5) of the Landlord and Tenant Act 1985.

In relation to the years 2006 and 2007 the tribunal has determined that there is no evidence of Mr Evans having agreed to the accounts for these two years.

In those circumstances the tribunal has concluded that the parties to this application are bound by the terms of the lease. It follows from this that the contribution that the Lessees of each block, both Block A and Block B must pay towards the charges of their respective blocks is a one sixth contribution in relation to that block only. This is in accordance with the terms of the lease.

In relation to the garages the contributions must accord with the terms of the lease and be split as to one fifth (block A or one seventh (block B) respectively subject ot our findings below.

We have therefore considered the accounts for the years ending 29th September 2006 and 29th September 2007 and each element of the said accounts and the evidence that we have heard.

In 2006 there will need to be a credit to what we shall call the "central fund" in the sum of £477 for the door entry repairs which will then need to be borne equally by the Lessees of Block B only. This is the amount referred to by the Applicant in his application.

For the year 2007 the tribunal find that the following sums were charged equally between all 12 Lessees but in breach of the precise terms of the lease.
The agents will therefore need to credit the following sums into a central fund
£65.18 in respect of entry phone system chargeable to block B only.
£131.31 in respect of entry phone system chargeable to block B only.
£50.82 in respect of entry phone system chargeable to block B only.
79.95 in respect of broken light fittings chargeable to block B only.

The Tribunal were not persuaded that the item in the 2007 accounts headed "Electrical and Lighting Repairs/Light Bulbs/Batteries" related solely to block B and the Tribunal found that there was insufficient evidence to support such a finding.

We heard and accepted evidence that two invoices (at E8 and E9 of the bundle) were chargeable to block A only being
£90.48 on 26.3.2007
£92.90 on 28.8.2007
and again payment for these amounts should be from block A Lessees only.

The tribunal do not find that one can or should differentiate between those parts of the entry phone system outside a flat or within it - the system is a whole and should be treated as such for accounting purposes save possibly by way of example only where damage is caused by a Lessee to the handset in their own flat which requires replacement.

In relation to the guttering carried out to the garages; even though the actual guttering was carried out to block A garages only we find that because Mr Evans garage was one of the block of 7 garages behind block B they must of necessity benefited from guttering carried out to his garage and therefore no adjustment is needed for this item.

In relation to the ball cock valve invoice about which we heard evidence from Mr Evans we heard that the ball cock was in a tank servicing two flats. The tribunals view is that the lease provides that individual flats should only be responsible for "cisterns tanks ... used solely for the purposes of the said flat or garage and no other ..." and that this expense should therefore be a block expense not an individual one for the two Lessess in question.

There may be other invoices which are comprised in the final accounting figures for 2006 and/or 2007 and in the event that these are in respect of only block A or block B then appropriate credits and recharging to the relevant block will have to be undertaken.

Either a separate invoicing procedure can be adopted to individual Lessess to cover these costs or alternatively and more likely the managing agents may set up 3 funds, a central fund and a block A and block B fund. Regrettably the tribunal agrees with the Respondent Lessees that this is likely that the administration of the new funds in accordance with the lease will incur considerable additional cost.

The tribunal has determined that it is not open to the parties to vary the terms of the lease in the way suggested and that unless and until the lease is varied either by application to the Tribunal or it is varied by agreement and all such appropriate steps are then taken in law to give effect to such agreed variation then the terms of the lease must be adhered to.

In relation to the application pursuant to Section 20C of the Landlord and Tenant Act 1985 the Tribunal were not persuaded to grant this application. The Tribunal concluded that the one twelfth split of the costs of running block A and B was as a matter of record put forward by the Lessees themselves and indeed was a proposal put forward by Mr Evans in 1995. In the circumstances this application is refused.

23.6.09

T A CLARK
(Chairman)