

RESIDENTIAL PROPERTY TRIBUNAL SERVICE
SOUTHERN LEASEHOLD VALUATION TRIBUNAL
The Residential Property Tribunal Service is a part of the Ministry of Justice.
Under the terms of the Lease there is provision for Sarsen to
maintain a sinking fund for the purpose of paying service charges.
Case Number: CHI/46UB/LSC/2008/0128

Re: Drews Park, Devizes, Wiltshire

In the matter of an application under Section 27A of the Landlord and Tenant Act 1985 for a determination of liability to pay service charges.

Between:

Sarsen Housing Association Limited Applicant

and
The Lessees of the Properties at Drews Park Respondents

Date of application: 18 November 2008
Date of hearing: 14 May 2009
Members of the Tribunal: Mr. J. G. O'rne (Lawyer/Chairman)
Mr. P. Smith FRICS (Valuer/member)
Mr. M. Cook (Lay member)

Date of decision: 22 May 2009
Decision of the Leasehold Valuation Tribunal

For the reasons set out below, the Tribunal determines that the proposed increase in the annual contribution to the sinking fund in the year 2009/10 from £200 to £668, £584 or £461 is not reasonable and to that extent is not payable by the lessees of the properties at Drews Park, Devizes, Wiltshire to Sarsen Housing Association Limited.
Further, the Tribunal orders pursuant to Section 20C of the Landlord and Tenant Act 1985 (as amended) that all or any of the costs incurred by Sarsen Housing Association Limited in connection with the proceedings before the Tribunal are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the lessees.

Reasons

The Application

1. Drews Park, Devizes is a development of 127 leasehold dwellings ("the Site") on the site of the former Roundway Hospital after it was closed in 1995. The Site was converted to housing in 1998. The Applicant, Sarsen Housing Association Limited ("Sarsen"), is now the freeholder

of the Site and is responsible for management of the common parts. The Respondents are the lessees of the 127 leasehold dwellings on the Site. Under the terms of the leases, there is provision for Sarsen to maintain a sinking fund for anticipated periodic expenditure during the term.

2. On 18 November 2008, Sarsen applied to the Tribunal under section 27A of the Landlord and Tenant Act 1985 (as amended) ("the Act") to determine whether it is reasonable to increase the contribution required from the Respondents to the sinking fund in the year 2009/10 from £200 to £668 or £584.
3. A pre-trial review was held on 13 January 2009 following which the Tribunal issued directions. The pre-trial review was attended by Mrs. Nugent, the secretary of Drews Park Residents' Association ("the Association"). She said that she represented the 98 lessees who were members of the Association but, as she had no written authority from those persons, a direction was made providing for a copy of the directions to be served on each of the lessees. The directions provided that if any lessee wished to be heard at the hearing of the application separately from the Association, then they had to notify the Tribunal by 13 February 2009. Further directions providing for parties to prepare written statements of case and for Sarsen to send a copy of its statement to each of the lessees.
4. The Tribunal received written statements of case from Sarsen, the Association, Mr. E C. Rowland (8 Wyatt Court), Mrs. D. E. Peacock (1 Wyatt Court) and Mr. A. J. Neale (10 Thurnam Court).
5. On 15 April 2009, the Association, on behalf of the Respondents, applied to the Tribunal under section 20C of the Act for an order that all or any of the costs incurred by Sarsen in connection with this application should not be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the lessees.

The Law

6. The statutory provisions primarily relevant to applications of this nature are to be found in sections 18, 19 and 27A of the Act.
7. Section 18 provides:
 - 1) *In the following provisions of this Act "service charge" means an amount payable by a tenant of a dwelling 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 landlord's costs of management, and*
 - b. *the whole or part of which varies or may vary according to the relevant costs.*

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.*

(3) *For this purpose, "costs" includes overheads and other costs which are relevant costs in relation to a service charge whether they are incurred, or to be incurred, in the period for which the service charge is payable or in an earlier or later period.*

8. Section 19 provides:—

(1) *Relevant costs shall be taken into account in determining the amount of a service charge payable for a period:*

- only to the extent that they are reasonably incurred, and*
- where they are incurred on the provision of services or the carrying out of works, only if the services or works are of a reasonable standard; and the amount payable shall be limited accordingly.*

2) *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 to subsequent charges or otherwise.*

9. Section 27A provides:—

1) *An application may be made to a leasehold valuation tribunal for a determination whether a service charge is payable and, if so, if it is as to:*

- the person by whom it is payable,*
- the person to whom it is payable,*
- the amount which is payable,*
- the date at or by which it is payable, and*
- the manner in which it is payable.*

Subsections 2 to 7 of section 27A are not relevant in this application.

10. Section 20C provides:—

(1) *A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a leasehold valuation tribunal, are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application.*

2) ...

3) *The court or tribunal to which the application is made may make such an order on the application as it considers just and equitable in the circumstances.*

The Lease

11. The Tribunal had before it a copy of the lease of Unit 117. Sarsen and the Association accepted that this lease was representative of the terms of the leases of the other properties on the Site. The lease was granted by Frogmore Developments Limited for a term of 999 years from 1 January 1998.
12. Drews Park Management Limited was a party to the lease and agreed to assume responsibility for the maintenance and management of the common parts of the Site. It was described in the lease as the Management Company, which definition included any other company to which the rights and duties of the Management Company are assigned or transferred.
13. By clause 5.1 of the lease, the lessee covenanted with the Landlord and the Management Company *"to pay the Service Charge the Sinking Fund Contribution and the Interim Service Charge calculated and payable in accordance with the Third Schedule."*
14. Clause 6 of the lease contains covenants by the Management Company to keep the common parts in good and substantial repair and *"as often as reasonable necessary to decorate the exterior and the internal common parts ..."*. The lease contains an express prohibition on the tenant decorating the exterior of the unit including the external doors and windows.
15. The third schedule to the lease contains the service charge provisions. They are lengthy and will not be set out in full in these reasons. The service charge accounting year ends on 31 March in each year. The lessee is responsible for paying 1/146th of the cost to the Management Company of carrying out the services listed in part 2 of the schedule and 1/125th of the costs of carrying out the services listed in part 3. The costs of external decoration fall within part 3.
16. The third schedule provides for there to be an interim service charge, defined as *"such amount as in the opinion of the Management Company fairly represents an estimate of the Service charge for the next or current Accounting Year (as the case may be)."* The amount of the interim service charge is to be notified to the lessees in advance of or as early as may be in the accounting year and is payable by equal instalments on 15 April and 15 October in each year. The amount paid by way of interim service charge is to be reconciled at the end of the accounting year once the service charge accounts have been prepared.
17. Part IV of the third schedule provides for a sinking fund in the following terms *"In addition and together with the Service Charge the Tenant shall pay to the Management Company a reasonable provision (to be*

determined by the Surveyor acting as an expert and not as an arbitrator) towards the Management Company's the anticipated expenditure during the Term in respect of:-

- 1.1 Periodically recurring items whether recurring at regular or irregular intervals and
- 1.2 Such of the Landlord's obligations set out in Clause 6 as relate to the renewal or replacement of the items referred to there.

The Management Company is not obliged to establish or maintain a sinking fund but if it decides to do so, details of the fund must be provided to the lessees with the annual account of the service charge. Any sinking fund is to be kept in a separate account and is held on trust for the lessees for the time being.

Background

18. According to the Association, the first units on the Site were occupied from June 1998 and the last in May 2001. By 2003, the first units needed repainting. This resulted in a system whereby units were painted on an "ad hoc" basis rather than a planned approach.

19. Sarsen now wish to introduce a cyclical painting programme with all units being painted externally during 2009. A sinking fund already exists but it is not sufficient to pay for the anticipated cost of painting. Sarsen seek to increase the contribution payable to the sinking fund during 2009/10 so as to ensure that there are sufficient funds to cover the cost of painting during 2009 and to ensure that there is a surplus remaining.

Inspection
20. The Tribunal carried out an inspection of the Site prior to the hearing on 14 May in the presence of Mrs. Robinson, Sarsen's leasehold Services Manager, and Mrs. Humphreys, the Association's chair. Mr. Neale joined during the course of the inspection.

21. The Tribunal walked around the external parts of the Site and was able to observe the general state of maintenance of the Site, the general state of decoration of the external parts and the state of the external stonework.
22. The Site appeared to be well maintained. The only urgent repair brought to the attention of the Tribunal was a small piece of rot in one window in one of the clock tower bungalows. Otherwise, the external paintwork appeared to be due for painting but not in poor condition.

The Tribunal noted the state of the external paintwork at 10 Thurnam Court which appeared to be in need of painting but not in poor condition. The Tribunal noted some evidence of spalling stonework which will need to be treated in the near future but not urgently.

The Hearing and the Issues

23. The hearing took place at Devizes Town Hall on 14 May 2009. It

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24. Sarsen was represented by Mrs. Robinson together with Leanna Walters, the leasehold services co-ordinator, and Stephen Craig, the service charge officer.
25. The Association was represented by Mrs. Humphreys together with Mrs. Nugent, the secretary of the Association, Mr. Benns and Mrs. Fitzmaurice, members of the Association's committee. The Association said that they represented 103 of the 127 lessees.
26. Mr. Neale appeared on his own behalf.
27. A number of other lessees were present at the hearing but only Mrs. Holt (41 Thurnam Court and 3 Burnham Court) addressed the Tribunal.
28. The issue to be determined by the Tribunal was put by Sarsen in its application as follows: *"The year in question 2009/10. ... An increase in the annual contribution to the sinking fund from £200 to either £668 or £584 depending on the outcome of the consultation over "subsidising" the sinking fund through use of the service charge account credit. The sinking fund is currently £78,000 and the painting programme due to start next year is estimated at £110,000. The increase is to cover this cost and leave a balance. A stock condition survey is due to take place in December. Description of the question you wish the Tribunal to decide: Whether the increase is reasonable."*
29. Mrs. Robinson applied to adduce in evidence an amended version of appendix A to the Rand report. As the Association would have needed time to consider the effect of the amendments and as the figures appeared to be only slightly different, Mrs. Robinson agreed to work on the basis of the existing appendix and her application was refused.

The Evidence

30. Mrs. Robinson gave evidence on behalf of Sarsen.
31. In her statement there is a copy of the annual return for Drews Park Management Limited filed at Companies House in 2001 which shows that all the issued shares in Drews Park Management Limited had been transferred to Sarsen in 2001. Mrs. Robinson confirmed that the rights and duties of Drews Park Management Limited had been assigned to Sarsen at that time. Mrs. Humphreys accepted that that was the case.
32. In the application, Mrs. Robinson states that the scheme had been poorly managed in the past and the sinking fund used inappropriately. She expands on that in her statement and says that the units had been painted on an "ad hoc" basis with units being identified as being in need of painting by the Association. This resulted in the units being at a different standard of decoration and repair. Further, the units had

never been the subject of a stock condition survey nor a detailed comprehensive planned maintenance programme.

33. Mrs. Robinson said that Sarsen now wished to put in place a planned maintenance programme for the Site. A stock condition survey had been commissioned in November 2008 which was carried out by Randi Associates in January 2009. A draft of their report was attached to Mrs. Robinson's statement. At page 9 of that report is a table showing the anticipated cost of catch up repairs and future major works for the next 30 years, broken down into 5 year intervals. The total cost of anticipated works over 30 years is shown as £1,257,916. The part of that which is due in years 1 to 5 is shown as £110,801, consisting of £86,964 painting works, £20,380 repairs to external walls and £3,457 sundry works. The report also provides an estimate for contingent major repairs and contractor's preliminaries, including the cost of scaffolding.

34. The report states that the costs in the report are based on Randi's schedule of rates compiled specifically for use in conjunction with stock condition surveys. It states *"the rates used within this report do not take account of the current commercial climate and have not been market tested"*. In relation to cost of external redecoration, the rates are based on redecoration of the Site at 5 yearly intervals and *"carrying out this work to individual properties in separate years is likely to result in a greater unit rate and therefore overall cost for external redecoration"*.

35. Mrs. Robinson stated that Sarsen wish to paint the whole Site in 2009. Sarsen's view was that it was more cost effective to do the work in one go rather than spread it over 2 years due to the overhead costs of scaffolding and management. However, she had no evidence as to the extra cost that would be involved. As the Site is listed, Sarsen is in the process of applying for listed building consent but as yet no tenders have been obtained for carrying out the work. In 2008, Sarsen had obtained an informal estimate of £110,000 for the external painting from a partner contractor and the calculations had been based on that estimate.

36. In her statement, Mrs. Robinson sets out a table showing how Sarsen has calculated the contribution required from the lessees. It shows that there was a predicted balance of £96,642.16 in the sinking fund as at 31 March 2009. Allowing for external painting at £110,000, the cost of the stock condition survey (£9,347.20), other contingent expenditure (£12,000) and retaining a reserve in the fund of £200 per unit, Sarsen (£26,400), Sarsen calculated that lessees would have to contribute £461 in 2009. It was this figure that Sarsen is asking for now rather than either of the figures in the application.

37. Mrs. Robinson gave evidence that the actual balance in the sinking fund as at 31 March 2009 was £76,425 which is less than the predicted figure but she did not seek to change the contribution figure of £461.
38. Mrs. Robinson said that no decisions had yet been made about future works beyond the proposed painting. Sarsen would have to work out a figure for future contributions to the sinking fund to take account of the anticipated expenditure over 30 years but she did not anticipate that contributions would continue at the figure of £461. She accepted that it was a one-off hit this year.
39. Mrs. Robinson did not seek to oppose the application under section 20C and said that there had never been any question of charging any costs arising from the Tribunal to lessees.
40. Mrs. Humphreys spoke on behalf of the Association. She had submitted a statement. She does not dispute that it is appropriate to have a planned maintenance programme. Indeed, she says that the Association has been suggesting a "Court by Court" painting programme since 2006. The Association accepts that it is necessary to increase the sinking fund to meet the cost of such a programme. However, she says that an increase from £200 to £461 in one year is too much. She says that the majority of residents would prefer a painting programme over 2 years. She says that painting the Site in one year would lead to the Site looking visually tired at the end of the 5 year cycle. Also, such a programme would be inflexible and would not take account of the varying degrees of weather exposure of different parts of the Site.
41. Mrs. Humphreys also challenged the method by which Sarsen had arrived at the figure of £461, based as it is on an informal estimate by a contractor partner. She said that the Association had obtained an estimate for painting the whole Site for £80,000 which would remain the same whether the work was done in one or two years. She criticized Sarsen for asking for the increase without having gone through the process of a stock condition survey, consultation, specification of work and obtaining tenders. She suggested an increase in the sinking fund contribution to £250 per year which would be sufficient to cover the cost of the painting works if phased over 2 years and would then continue to build up the sinking fund for future works.
42. Finally, in relation to section 20C, Mrs. Humphreys said that the application was unnecessary and the whole question of contribution to the sinking fund could have been resolved by negotiation if Sarsen had approached the matter in a methodical manner.
43. Mr. Benns emphasised the need for a systematic approach to planning the work and the need to consider the differing effect of weather on different units.

44. Mr. Neale, in his written submission, raised a number of issues which are not relevant to the present application although they are issues between him and Sarsen. They centre on the fact that his unit (10 of the Court) has not been painted since he purchased it in 1999. He also challenges the need for Sarsen to commission a stock condition survey at the cost of the lessors. He recognises the need for a phased programme of works and would prefer a 3 year cycle. He opposes the suggestion of a £46 contribution as he says that the figure has been plucked out of the air. Instead Sarsen should be working on the basis of tender prices.

45. Mr. Rowland made a written submission to deal with a point raised by Sarsen in its submission which is not relevant to this decision. He said that he was not opposing Sarsen's application. Mrs. Peacock made a written submission suggesting that the cost should be distributed between the units in a different manner. That is not an issue which can be addressed by the Tribunal as it is determined by the lease.

Conclusions

46. The Tribunal accepts that it is good practice in estate management to carry out painting and routine maintenance on a cyclical basis. That is not to say that what has happened in the past is wrong because, by the appearance as seen by the Tribunal, the Site appears to have been reasonably well kept. Both Sarsen and the Association accept that it is appropriate to put in place a system of cyclical maintenance. The question is how the immediate maintenance needs should be funded.

47. There was no clear evidence as to whether it will be more economical to do all the painting work in one go or over a period of 2 or 3 years. Sarsen's evidence consisted of the statement in paragraph 3.04 of the Rand report that a phased programme "is likely to result in a greater unit rate and Mrs. Robinson's unsupported statement that it would be more cost effective to do the work in one hit. The Association claims that it has an estimate for the work to be done at the same price whether over one or 2 years but the Tribunal has not seen the estimate. The Tribunal is not satisfied on the basis of the evidence before it that it would be cheaper to do the work in one go.

48. The Tribunal accepts the Association's evidence that there are some units on the Site which are more exposed to weathering which may mean that some units require more frequent decoration. A degree of flexibility may be required to take account of that fact.

49. The Tribunal's main concern with Sarsen's proposal is the way in which it has sought to substantially increase the contributions to the sinking fund in order to fund works which it intends to carry out in the current year.

50. The lease stipulates that the sinking fund should be for "*the anticipated expenditure during the term*". This clearly includes the cost of cyclical painting. However, a sinking fund envisages looking ahead through the period of the term to anticipate likely expenditure and accruing a fund with which to pay it. This has happened in the past and there existed a sinking fund of £76,425 as at 31 March. Sarsen has now started the process of calculating what may be required by way of future contributions to the sinking fund by commissioning the Rand report which has estimated the likely expenditure over the next 30 years. It has not yet completed that process.
51. At the end of the day, it makes little practical difference to the lessees whether they are being asked to fund the painting works through the sinking fund or by an interim service charge. The end result will be the same in that they will have to pay for the cost of the work. However, the Tribunal considers that Sarsen has fallen down by confusing the need to build up a sinking fund to meet anticipated expenditure in the future with the need to raise an interim service charge in the current year to fund works to be carried out in the current year. What the Tribunal must consider is whether the proposed increase is reasonable.
52. Sarsen's evidence is that the painting works will cost £110,000. That is based on an informal estimate by a contractor. That conflicts with the evidence in the Rand report which puts painting costs at £86,964. Rand admit that their costings have not been commercially tested. The Association says that it has obtained an estimate in the region of £80,000. The Tribunal has no firm evidence before it of the cost of the proposed work. Sarsen's plan for funding the work is to use part of the existing sinking fund (but keeping back £200 per unit and a contingency of £12,000) and asking the lessees to fund the balance through this year's service charge. Sarsen did not give any satisfactory reason as to why they need to keep back £200 per unit rather than to use it to pay for the work. The Tribunal is not satisfied that it is reasonable to do so.
53. The Tribunal also notes that the application refers to "*an increase in the annual contribution*". Mrs. Robinson accepted that she thought that this would be a one-off hit but that is not what is said in the application. The lease also stipulates that the amount of the contribution to the sinking fund is to be determined by the surveyor. There was no evidence before the Tribunal that there has been any such determination.
54. The Tribunal sees no justification for increasing the contribution to £461 whether it is for one year or more. Sarsen has not properly costed the works which it wants to carry out this year. It has not justified the need to carry out those works in 1 year rather than 2. It

has not justified why it needs to retain a reserve in the sinking fund of £200 per unit.

55. The Association has suggested that the contribution be increased to £250 and says that if the painting works are spread over 2 years, there will be sufficient funds in the sinking fund to meet the painting costs. The contributions can then be continued on an annual basis to meet future costs and build up the fund again. In the absence of justification from Sarsen, the Tribunal accepts that suggestion.
56. Although the Tribunal accepts that Sarsen wants to maintain the Site properly as it is bound to do, the Tribunal does not consider that Sarsen has properly thought through the process of funding the painting works. For those reasons, the Tribunal is not satisfied that it is reasonable for Sarsen to increase the annual contribution to the sinking fund to £461 in 2009. To the extent that Sarsen attempts to increase the contribution to the sinking fund to that level, any such increase is not payable by the lessees.
57. Mrs. Robinson said that if Sarsen is not allowed to increase the contribution, Sarsen would not be able to do the painting work in 2009. The Tribunal does not accept that proposition. If Sarsen decides to go ahead with painting the whole Site in 2009, there is no reason why it should not seek to raise further funds by way of an interim service charge when it has obtained appropriate estimates. Alternatively, it may decide on a phased programme of painting.
58. Sarsen does not seek to oppose an order under section 20C. Even if it did, the Tribunal is satisfied that it would be just and equitable to make such an order. Sarsen started the application by asking for a contribution of £668 or £584. It is now seeking £461. It issued its application at a time when it had no proper estimates for the cost of the work and at a time when it had only just commissioned the stock condition survey. The application was premature. The Association says that it was unnecessary and that proper consultation could have avoided the need for the application. The Tribunal agrees with that view.



Mr. J G Orme
Chairman
Dated 22 May 2009