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RESIDENTIAL PROPERTY TRIBUNAL SERVICE

LEASEHOLD VALUATION TRIBUNAL

Case Ref: CAM/33UD/LSC/2010/0011

Property	:	**11 Crome Drive, Breydon Park, Great Yarmouth, Norfolk NR31 0HR** **& 26 other properties at Crome Drive, Austin Road, Bright Close, Ladbrooke Road and Vincent Close, Great Yarmouth listed in Appendix 1 to the application**
Application	:	For determination of liability to pay service charges for the years 2008 & 2009 [LTA 1985, s.27A] For an order that all or any of the costs incurred by the landlord in connection with past proceedings before a leasehold valuation tribunal, and costs to be incurred in these proceedings, 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 [LTA 1985, s.20C]
Applicants	:	Marcus Noakes, 4 Prospect Place, Black Street, Winterton-on-Sea, Norfolk NR29 4BD [lead Applicant] & the owners of 26 other properties listed in Appendix 1 to the application
Respondent	:	Country Trade Limited, r/o Town Wall House, Balkerne Hill, Colchester, Essex CO3 3AD & also of 37 Hedingham Road, Halstead, Essex CO9 2DB [management company named in lease]

DECISION

Handed down 15th July 2010

Tribunal	:	G K Sinclair (chairman), B Collins BSc FRICS & G Smith MRICS
Hearing date	:	Tuesday 6th July 2010 at the Imperial Hotel, Great Yarmouth
Representation	*Applicants*	Marcus Noakes Olu Ogunnowo (also present) Ms Colleen Alp
	Respondent	Stephen Hopkins, solicitor, Holmes & Hills Michael Wright, solicitor, director of Country Trade Ltd

Summary

1. In this case the Applicants are leaseholders of flats in a comparatively new development built at Cobholm on the western edge of Great Yarmouth, bounded by the A12 bypass. The development, known as Breydon Park, comprises a mix of freehold houses and leasehold flats. The roads have been adopted as public highway, leaving only the planting of shrubs and some feature trees, maintenance of the buildings exteriors and common parts, and the cleaning, heating and lighting of common parts within the buildings as tasks requiring the attention of the management company, Country Trade Ltd.

2. According to the Applicants the service charge levied in the first two years was broadly as expected, save that a number of leaseholders had provided statements claiming that they had been informed prior to purchase that the service charge would be £200 per year, or £300 per year, or anything between £35 and £40 per month (£420–480 pa), £45 per month (£540 pa), or even as much as £50 per month (£600 pa). At the end of the 2008 service charge accounting period, however, they were all served with final bills in the order of £1,700 (less payments already made in advance).

3. The three principal issues in dispute were :
   a. An alleged failure on the part of Country Trade to notice and investigate, until drawn to its attention by leaseholders, a spike in the common parts electricity consumption for some but not all of the blocks of flats
   b. Country Trade's decision to buy in the management services of its two directors from another company, Robbet Ltd, in which those directors were respectively sole director and company secretary, at the equivalent of an hourly rate of £60
   c. The allegedly poor quality of the gardening, maintenance and management for which the leaseholders were expected to pay.

4. For the reasons which follow the tribunal determines :
   a. That the electricity was actually consumed by the relevant leaseholders before the problem was identified and corrected – at no additional cost to themselves – so that the actual electricity charges incurred at the relevant blocks are payable. Country Trade's tardiness in responding can be reflected in an adjustment made under item b
   b. That control of this development – from construction to property management and provision of human resources – is too incestuous and its management is not in accordance with the *RICS Service Charge Residential Management Code*, as approved by the Secretary of State under the terms of section 87 of the Leasehold Reform, Housing & Urban Development Act 1993. First, Country Trade does not adopt a basic annual charge per unit, with additional tasks costed according to a menu of prices based on complexity and/or time spent. Secondly, although Country Trade has 126 residential units under management on six sites

spread over three counties it has only one service charge bank account overall, with no separate arrangement for placing payments towards the sinking fund for each service charge account on deposit. The tribunal disallows the existing secretarial/agent charges, substituting a normal annual unit charge. Reflecting the standard of management provided, and the fact that the lease entitles the management company to add as a further "management charge" 15% of actual service charge expenditure, the tribunal allows the basic sum of £125 per unit for management (to which it may add 15%)

c. The cleaning and ground maintenance provided are limited in nature and the cost is not out of line for the service actually provided. To do a better job would most likely cost more. The amounts claimed are allowed in full.

5. As legal costs are not recoverable by way of service charge the tribunal makes no order under section 20C, save that (as directed earlier) the management company may recover its reasonable costs of preparing the hearing bundles as a cost of management chargeable as part of the current year's service charge. The reasonableness of such cost is a matter for agreement between the parties or determination as part of a future application to a tribunal under section 27A.

Relevant lease provisions

6. The sample lease produced is dated 9th November 2007, made between Breydon Ltd (a company registered in Guernsey) as landlord, Country Trade Ltd (registered in England and Wales) as management company, and Ms Colleen Alp as tenant of the first floor flat known as Plot 114. Judging both by the quality of construction and historical precedent the term granted is an unnecessarily generous 999 years commencing on 1st January 2005. The initial ground rent is £50 per year, increasing in 2016 and every twenty-first year thereafter by 150% of the rent previously payable.

7. In clause 1.10 of the lease the Service Charge is defined as :

> The contributions equal to the tenant's proportion of the expenditure described in sub-clause 7.1 and in the Third Schedule (plus 15% of such expenditure as a management charge)

The Tenant's Proportion is stated in clause 1.11 to be one fourth.[1] The precise purpose of the 15% "management charge" top-up shall be considered later.

8. By clause 7.1 the tenant covenants :

> to pay contributions by way of service charge to the management company equal to the tenant's proportion (the items of expenditure comprising each part of the tenant's proportion to be determined by the management company whose decision shall be final and binding upon the tenant) of the amount which the management company may from time to time expend and as may reasonably be required on account of anticipated expenditure on rates services repairs maintenance or insurance being and including expenditure described in the Third Schedule AND to pay the service charge not later than 28 days of being demanded the contributions being due on demand...

[1] This will vary between flats, depending on how their particular block is sub-divided for service charge purposes

9. Paragraph 1 of the Third Schedule describes in more detail the nature of the expenditure recoverable from the tenant by way of service charge contribution. In paragraph 1(2) is included "the proper fees of surveyors or agents appointed by the management company or in default by the landlord", but there is no reference to legal fees or disbursements. Paragraph 5 makes provision for the recovery from the tenant of contributions towards a sinking fund for expenditure items of a periodically recurring nature.

10. Also worth mention are :
    a. Clause 6.2, which requires the tenant, if and when so required by the landlord after all flats in the building have been sold, to join in the acquisition with fellow tenants of the landlord's reversionary interest for the nominal sum of £1.00
    b. Clause 7.13(d)(I), which requires the tenant upon any transaction to which the tenant is a party or over which he has control involving a transfer or assignment of the lease to ensure that the transferee or assignee as a result of the transaction or disposition becomes a member of the management company and so registered if at the date of such transaction or disposition the Articles of the management company so permit
    c. Clause 8, by which the management company covenants to insure the building and carry out the various services
    d. Clause 11, which (despite the lease being drafted as recently as 2006 and granted in 2007) purports to entitle the landlord to forfeit the lease if the rent or any part of it is in arrear and unpaid for 21 days whether formally demanded or not, wholly ignoring the provisions of sections 166 to 168 of the Commonhold and Leasehold Reform Act 2002.

Material statutory provisions

11. The method of calculation and overall amount payable by tenants for works of repair and management costs by way of service charge are governed principally by the express terms of the lease, but always subject to the cap imposed by section 19 of the Landlord and Tenant Act 1985, which limits relevant costs :
    a. only to the extent that they are reasonably incurred, and
    b. 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.

12. The amount payable may be determined by the tribunal under section 27A. This is the provision under which this application has been brought. Please note sub-sections (5) & (6), which provide that a tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment, and that an agreement by the tenant of a dwelling (other than a post-dispute arbitration agreement)[2] is void in so far as it purports to provide for a determination in a particular manner or on particular evidence of any question which may be the subject of an application to the Tribunal under section 27A.

13. By section 87(1) of the Leasehold Reform, Housing & Urban Development Act 1993 the Secretary of State may, if he considers it appropriate to do so, by order approve any code of practice which appears to him to be designed to promote desirable practices in relation to any matter or matters directly or indirectly concerned with the management

[2] Eg. provisions in a lease stating that the landlord's accountant's certificate shall be conclusive, or that any dispute shall be referred to arbitration

of residential property by relevant persons; and which has been submitted to him for his approval. A failure on the part of any person to comply with any provision of a code of practice for the time being approved under the section shall not of itself render him liable to any proceedings; but in any proceedings before a court or tribunal any such code of practice is admissible in evidence; and any provision of any such code which appears to the court or tribunal to be relevant to any question arising in the proceedings shall be taken into account in determining that question.[3] The *RICS Service Charge Residential Management Code* has been approved by the Secretary of State under the terms of the section.

Inspection and evidence

14. The tribunal inspected the premises in the presence of representatives of the parties at 10:00 on the morning of the hearing. The development may be accessed from the town centre via the Haven Bridge and Marsh Road, but also from the A12 bypass via a new access road for the Tesco superstore. Breydon Park lies immediately adjacent to some long-established housing, with Austin Road running out of one side of the development and connecting directly with it, while the other estate roads either loop around or are cul-de-sacs.

15. After viewing the exterior the tribunal first inspected the interior common parts of Mr Ogunnow's building on the northern corner of Ladbrooke Road and Crome Drive.[4] Of three storey construction, the ground floor in each building comprises dedicated garages or parking spaces plus a communal entrance lobby with individual, wall-mounted mail boxes and access to the stairs. All the flats are situate on the first or second floor. In this building the communal lobby is generously proportioned but the stairs, approached by a doorway at one side, are narrow. The stairs give access on each of the upper floors to a large but sterile communal space or lobby with a window and night storage heater at each end, and from which the doors to two flats are accessed via a dark, narrow corridor spurring off from the middle of this lobby. Behind a locked door on the top floor the tribunal was able to inspect the meter cupboard for the relevant flats and garages. Neither the stairs nor lobbies had any light switches, but lurking at the back of this long narrow room or walk-in cupboard (which does have a light switch – but it did not work) is an electrical timer to control both lights and heating. These are therefore either both on or off for whole periods of the day or night, depending on how the timer is set. On the ground floor a notice was affixed to the wall, recording visits by the cleaners.

16. The tribunal next inspected the interior of Ms Alp's building, on the corner of Ladbrooke Road and Bright Close. Ms Alp did not have a key to the external door with her, and neither did Mr Michael Wright from the management company. Eventually someone was able to attract the attention of a tenant in residence and the tribunal was able to inspect. While waiting, it was observed that there was no external door handle to the softwood door. It had come off and been replaced several times.[5] By the corner of the building

3 See s.87(7)

4 As the estate plans, leases and all service charge accounts and demands refer only to plot numbers rather than postal addresses the precise identification of the premises is difficult

5 The evidence – a small pile of broken handles and their attachments – was later seen behind the door in a corner of the ground floor lobby

three plastic vertical pipes were observed. The two large ones are first the surface water downpipe from the gutters and secondly (starting several feet above ground level) protective insulation for two gas pipes rising from external meter boxes on the ground. The much narrower pipe is the soil pipe from the flats. All three are of a different colour. Internally, the lobbies in this building are smaller, and the electricity meters and timer for lights and heating are housed in a wide but shallow cupboard on the ground floor. The tribunal noted that in both buildings the stairs are narrow and of a natural hardwood finish. The skirting boards on the stairs match, but on each landing they butt up against much lower, white gloss-painted softwood ones. The effect, like the softwood front doors and non-matching external pipes, is cheap and shoddy.

17. The shrubs planted in large beds throughout the development were seen to be tidy and reasonably well-kept. They will take some years in which to become established, and complaint was made that some had died through inattention but not been replaced.

18. The hearing commenced at 11:00, with Mr Noakes explaining that through the Breydon Park Action Group, an association which Country Trade refuses to recognise and deal with, he represented 26 other leaseholders on the development. He began to explain that most potential purchasers would ask the selling agent about the likely service charge costs, and that answers were given. The chairman interrupted to explain that the tribunal was unable to deal with any suggestion of misrepresentation; all it was empowered to do was determine the payability of the actual service charges levied by the management company.

19. Mr Noakes then focussed upon his three main points. There were two principal reasons for the dramatic increase in the actual service charge for 2008 above the estimated charge. The third was an issue of service quality. These points were :

a. That the utility (electricity) charge was exceptionally high, and as the recipient of the quarterly bills it should have identified the problem and done something about it quickly. Instead it was the leaseholders who, when alerted to the consumption by the common parts supply in some of the buildings, looked into it and got to the bottom of the problem. Unknown to the leaseholders, and to Country Trade as well, the electricity supply to the garages or open-fronted parking areas was connected to the common supply instead of to the individual leaseholder's meter.

b. That the companies involved in this development were all interlinked, and that there was no legitimate reason for the employment of Robbet Ltd as Country Trade's agent at the hourly rates claimed. It was simply a device for charging for Mr Wright's time. On page 95 in the bundle the actual "agent/secretarial" charge for 2008 was £1,137 as against the estimated charge of only £220. While the Applicants acknowledged that some high-level oversight was required, the volume of work for a new estate is a relatively mundane activity which does not justify the charge by Robbet Ltd. It was not a reasonable charge.

c. That the services provided – really limited to cleaning and ground maintenance – were infrequent and of poor quality. Cleaning took place only once every two months, some gardening was patchy, and trees had died. The development had improved quite considerably in the week leading up to the inspection and hearing, following a visit by Mr Curry, the principal director and shareholder in Country Trade. Not all was bad, however, and on occasions when he telephoned the

office the response would be good.

20. In response, Mr Hopkins for Country Trade relied upon Mr Wright's witness statement and his oral evidence. He agreed that there were really only three issues in this case : the utility charge, the introduction of an agent/secretarial charge, and whether the services provided were poor.

21. On the utility charge issue he pointed out that once the problem was identified Country Trade acted quickly, and Mr Curry was able to persuade the developer, Landfast (Anglia) Ltd – in which he was a director and significant shareholder – to pay for the adjustment to the electricity connections so that individual leaseholders would thereafter be charged for usage in their own garages. This work cost the leaseholders absolutely nothing. Mr Wright said that the high bills in some buildings were assumed to have been caused by leaseholders adjusting the timers.

22. So far as the introduction of Robbet Ltd was concerned, Mr Hopkins referred to Mr Wright's witness statement, at paragraphs 49 to 52. Also pertinent are paragraphs 20 to 25, which explain how until 2008 Mr Curry had been spending between one and two days a week in administering Country Trade, but without making a charge for his services. Robbet was therefore used as a means of providing the administration for a number of Mr Curry's companies, at a cost calculated on the basis of £60 per hour. Mr Wright was invited to assist in the administration and agreed to divide his time between being a solicitor for Holmes & Hills and providing non-legal services for Robbet Ltd. Particularly noteworthy in his statement is that the total paid by Country Trade for the services of Robbet in 2008 was £23,982.50, which Country Trade split on a 35%/65% basis between freehold units and leaseholds – the latter regarded by it as taking up more management time. This cost, which was a one line item on the invoice, was then simply divided by the number of leasehold units across all the six sites managed by Country Trade. No attempt was made to assess the actual cost of managing this development.

23. In oral evidence Mr Wright explained the nature of the management work undertaken by Robbet. It checks invoices, any reports that might come in (eg on fire risks), and dictates letters to the secretaries, after considering any post that needs a reply. It deals with telephone calls other than those that can't be dealt with by the secretarial staff, and with VAT returns. It also does the management accounts for Country Trade, prepares spreadsheets, makes apportionments not easily dealt with by the secretarial staff, and does a lot of work that would otherwise be dealt with by accountants, such as prepare service charge accounts, collating all information required by the accountants so that they can deal with Country Trade's accounts, the certification of service charge statements, going through the accounts with the accountants and dealing with queries. Mr Wright also told the tribunal that he deals with any problems that arise on the Sage Accounting package used by Country Trade, and prepares the nominal accounts structure for the accounting package.

24. The charge raised by Robbet to Country Trade covers all outgoings incurred by Robbet in performing those functions, including the provision of necessary office space. This, it transpired, was rented. The arrangement involved a number of interlinked Curry entities. The office used by Country Trade (Curry) is a suite of four offices leased to

Landfast Ltd (Curry) by a pension fund (a Curry SIPP). The rent charge to Landfast is £5,000 per year for accommodation. The secretarial staff employed by Country Trade occupies a quarter of that – half of a large room – and is charged a quarter of the rent plus all the outgoings relating to that accommodation. Robbet (Curry) is also charged for its use of office accommodation, but passes on none of that to Country Trade.

25. On the quality of service issue Mr Wright confirmed that cleaning takes place once every two months, the gardening contract does not include replacement of dead plants, and that periodic inspections are undertaken monthly by Mr Curry when he visits the area.

26. In answer to questions from the tribunal on a number of points Mr Wright stated that :
    a. While the lease may have envisaged a sale of the freehold reversion of individual blocks to the leaseholders this had not taken place and was not contemplated
    b. Similarly, although he had drafted the leases himself, Country Trade managed a number of different sites and so had no intention of permitting leaseholders to become members of the company or to attend meetings or participate in any way
    c. There was no formal contract between Robbet and Country Trade, so despite the fact that Country Trade employed no staff but engaged secretarial assistance only on a self-employed basis, Robbet's services could be dispensed with at a moment's notice
    d. None of the cleaning or ground maintenance contracts were for more than one year, so the consultation requirements of long term agreements did not apply. Since the Breydon Park development was built, however, Country Trade had never changed supplier or tested the market
    e. The £60 per hour figure was discussed between Mr Curry and himself, but this had never been tested against any outside body. Asked whether the cost of time and outgoings required in order to manage around 126 units was economic, he admitted that he had no idea of other managing agents' scales of charges
    f. The 15% recoverable on top of expenditure as a "management charge" is not to cover the costs of administration but is the profit element
    g. There is just one global Country Trade bank account covering all sites, with no separate arrangement for building up a sinking fund. There are no separate trust accounts for each service charge fund.

Discussion and findings

27. The tribunal was not impressed by the fact that the representative of the management company attending on the inspection did not even have keys to let it into a building, so it is unlikely to have checked meter cupboards on a regular basis (or perhaps at all). Should it have noticed a spike in some of the electricity bills? The leaseholders could not, as they do not receive them. The tribunal believes that it should have done so. Before the inspection the tribunal was puzzled by the reference to leaseholders adjusting the timers. Timer switches for lighting on communal staircases and landings are common in multiple occupancy premises, allowing whoever enters the main door enough time to reach and open their own front door before the light goes out. However the system in use here is very different. There are no light switches at all (save in the meter cupboard – and that did not work). Instead, the lighting – which seems also to be directly linked to the radiators in the lobbies – is controlled by timers so that it is probably on during the hours of darkness. If disabling the heating during the warmer months means that the

lights don't work either then there is a serious heath and safety risk on the stairs.[6] The tribunal is unable to say which is the more likely; that the problem was caused by excessive power usage in private garages linked to the communal meter, or failure to adjust the timer switches in particular buildings. Usage may have been lower if the leaseholders had been alerted to the problem by Country Trade, but they were not. On the other hand Country Trade did get the electrics sorted out very quickly and at no cost to leaseholders. The utility charge was actually incurred, the problem has been sorted out, and it is unlikely ever to recur. In the circumstances the tribunal considers that the electricity charges should be allowed in full. These can be found in the first table on page 85 in the bundle, a schedule prepared by the Applicants. The tribunal can address by other means Country Trade' s failure to notice the problem and react to it by conducting an investigation into the cause.

28. The tribunal does not consider that the actual administration costs incurred by Country Trade, whatever they might be, can simply be loaded on to the service charge – with a 15% profit margin on top. Most of the tasks which Mr Wright seems to be engaged in – and most of the invoices in section 6 of the bundle – concern the running of a business, not the business of managing property. In the instant case, with a brand new estate, the maintenance and services required are minimal. With 126 units under management the economics of this operation simply do not justify the employment of high-grade staff for menial tasks. A Sage accounting package is far more than is required, and if work needs to be contracted out then it should be to a firm of professional managing agents for whom an additional 126 units will make little difference to its operational overheads.

29. The method of charging is not in accordance with the "fixed unit fee plus menu of prices" recommended in the *RICS Service Charge Residential Management Code* (the Blue Book), and it is evident that neither Mr Curry nor Mr Wright know how their costs compare with professional managing agents or are interested in anything other than keeping as much as possible in-house. Virtually everything to do with this development, from the developer, the contract administrator, management company, management services company, and even the pension fund which is the office landlord, is connected with Mr Curry. The landlord in this case, Breydon Ltd, is a company registered in Guernsey and, according to a schedule prepared by Mr Noakes (at page 250), its directors are both nominees. According to paragraph 8 of Mr Wright's statement Breydon is part of a group of companies which also includes Scroby Ltd and Tolhouse Ltd. Country Trade manages properties for Landfast, Breydon, and Scroby, and may soon acquire such an interest in a development by Tolhouse. Mr Wright was not asked specifically whether the Guernsey companies were also companies in which Mr Curry was heavily involved, but the tribunal would not be surprised.

30. The tribunal does not accept that this incestuous relationship is legitimate where it acts against the interests of the service charge payer. In the tribunals' determination a more cost effective and reasonable approach to managing this development would be for Country Trade to sub-contract the management to a professional agent, charging on a normal unit cost basis. What should that cost be? At £175 per unit plus VAT this would be very much at the top end of rates available locally. Country Trade charged the equivalent of £284.26 for management in 2008 (much more than estimated), and then

[6] Except if there were an electrial failure, in which case the emergency lighting would come on

sought to add 15% of all expenditure on top. £150 per unit might be closer to a true figure, but reflecting the limited amount of work required and Country Trade's right under the lease to add a further15% as a profit element, the tribunal allows an annual charge of £125 plus VAT (if applicable) for management, to which Country Trade can add its 15% on top. The figures in the second table on page 85 are therefore disallowed for 2008 and 2009 and the figure of £125 per unit is substituted in each case. VAT may be added if applicable.

31. The tribunal is surprised that the cleaners are only visiting once every two months, but rates are very low. Indeed, there is no travelling involved, as they operate from 16 Crome Drive. If visits were more frequent and the cleaners reported back if there were any problems then there would be no need for monthly inspections by Country Trade. However, the rates are reasonable and the tribunal makes no alteration to the amounts charged for cleaning or gardening (the latter being the equivalent of only £5 per unit per month). The figures in the third table on page 85 shall stand.

Costs

32. As it is conceded by the Respondent that there is no provision for recovery of legal costs under the service charge there is no need for the tribunal to make the requested order under section 20C of the Landlord and Tenant Act 1985. This is subject to the proviso that (as directed earlier) the management company may recover its reasonable costs of preparing the hearing bundles as a cost of management chargeable as part of the current year's service charge. The reasonableness of such costs is a matter which, in default of agreement between the parties, must be determined as part of any future application to a tribunal under section 27A.

Dated 15th July 2010

Graham K Sinclair – Chairman
for the Leasehold Valuation Tribunal