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

Case No: CHI/00HG/LSC/2010/0065

Re: 47 Citadel Road, Plymouth, Devon PL1 3AU ("the Property").

Between

Mr Gwilym Davies & Mrs Margaret Davies (the Applicants, "Landlords")

And

Mr B Hooker (Flat 1) (the Respondent, "Tenant")

Those attending the hearing were Fiona Browne and Deanna Andrew, from Executive Lets, on behalf of the Landlords, and the Tenant in person.

DETERMINATION AND STATEMENT OF REASONS

The application

1. The application, made by the Landlords under section 27A of the Landlord and Tenant Act 1985, requests the Tribunal to determine the liability of the Tenant to pay the service charge relating to Flat 1 ("the Flat") in the Property for the calendar years 2009 and 2010.

The Property

2. The Property (referred to in the lease as the Building) is a four storey terraced house divided into five flats. Flat 1 is held by the Tenant as assignee of a lease for a term of 99 years from 1 January 1984 ("the Lease") at a rent for the first 33 years of £30 per annum plus an annual sum as a service charge to be calculated in accordance with the provisions set out in Part 5 of the Schedule to the Lease. This part provides that:

> "1. The service charge shall be one-fifth of the sum which on the first day of January in every year of the said term the Landlord or its authorised agents estimate and certify in writing to be the reasonable cost and expense to the Landlord for the twelve months immediately following of (a) performing its obligation under clause 6; and (b) collecting the ground rents and service charges in relation to all flats in the building. 2. Whenever applicable in arriving at the estimated cost as aforesaid for each and every period of twelve months, the Landlord shall take account of any difference between the sum that the tenant has paid in advance for the immediately preceding period of twelve months and the cost and expense actually incurred by it and shall increase or decrease the estimated cost as aforesaid as the case may be by the amount of such difference".

Clause 6 of the lease (inter alia) includes maintenance, cleaning, lighting and repairing the common parts, keeping the exterior of the property in good repair and condition, and comprehensively insuring the whole of the Property.

3. The facts about the Property relevant to the determination of this application are as follows:

- The Flat is at basement level at the front but yard level at the rear;

- The Flat has a separate external front access by metal steps down from the pavement level ("the Front Access Steps");
- Access to the other four flats is up a flight of steps from street level through the front door into a communal hallway and interior stairs. The Tenant has access to this communal area and will need to do so to access his gas meter and post (which is not always delivered through his basement letter box);
- There are two rear access external stairs that serve as fire escapes ("the Fire Escapes"), also constructed in metal, one serving the first floor (flat 2) (" the Smaller Steps") and a bigger one from the second floor serving flats 3-5 ("the Larger Steps").
- There is a rear yard, in an unkempt condition, from which a wooden gate ("the Gate") gives access to a public street at the rear.

The parties asked for clarification of the boundary of Flat 1, both in relation to the rear yard (as part appears to be included in the demise of Flat 1), and in relation to the Front Access steps. As neither issue had any impact on the matters to be determined, the Tribunal indicated to the parties that they had no jurisdiction to comment and suggested that they take legal advice on the points if they cannot be agreed.

4. The freehold of the Property has, certainly recently, been vested in one of the five leaseholders. We were told that this had once been the previous leaseholder of Flat 1 but when the Tenant purchased the Flat some seven years or so ago, he declined the opportunity to purchase the freehold as well. Instead, it was sold to the Landlords who, we were told, are the leaseholders of Flat 2. Flat 1 is owner occupied. All the other flats are tenanted (except one, occupied by a relative of the Leaseholder).

The Property management history

5. Until 1 March 2009, the management of the freehold was done by the Landlords themselves (Mrs Davies being the active person it seems). It appears that she charged £50 per month as a service charge to the other four flats but came to an arrangement that the Tenant of Flat 1 should only pay £33.75p. (This increased to £43.75 per month from 1 March 2009 when the charges on the other flats increased by the agreed £10 per month to £60 per month.) That there was an oral agreement to this effect up to the end of February 2009 was accepted by both sides; the Landlords contended that the reduction was on the basis that the Tenant kept the rear yard clean and free of weeds (he had certainly done a major clear out on one occasion); the Tenant maintained there was no such condition but the agreement reflected the fact that he did not benefit from the cleaning, lighting and maintenance of the communal hallway and stairs. The Tribunal did not need to decide what the details of this oral agreement were as the Landlords were not seeking any additional service charge for the period up to 28 February 2009.

6. In early 2009, the management of the Property was (with the agreement of all leaseholders) taken over by an agent of the Landlords and Executive Lets were appointed from 1 March 2009. All leaseholders agreed to pay an extra £10 per month service charge to recover the agent's fees (so the basic charge increased to £60 per month). On 25 February, Ms Deanne Andrew of Executive Lets wrote to the Tenant including the following paragraph:

"Mrs Davies has informed me that arrangements need to be made to keep the communal area in the basement (*at the hearing it was accepted this reference is to the rear yard*) clean and

tidy. We wondered if you would consider taking on this responsibility and maintain your service charge payment at £43.75. Alternatively, we will arrange for a contractor to carry this out and your service charge will be increased to £60 each month in line with the other leaseholders. Please could we have your thoughts on this."

7. The Tenant made it clear in subsequent correspondence that he did not accept the offer to have the reduced payment in return for keeping the rear yard clean and tidy. He maintained then, and through to the hearing, that the arrangement for the reduced service charge was because he made no use of the communal hallway and stairs (and, indeed the rear Fire Escapes) and so should not have to pay for the cost of maintenance of these parts. Since 1 March 2009, the Tenant has continued to pay only £43.75 (£33.75 plus the extra £10) every month and maintained this payment in 2010 even though the monthly service charge was increased to £70 per month from 1 January 2010. Arrears have therefore mounted and this application was the consequence.

8. The service charge claim for 2009, as set out in the application, also includes a claim for £662.40p stated as being one fifth of the cost of repair works to the two Fire Escapes undertaken in that financial year. We comment further on this aspect below. Further maintenance work is planned to deal with the Tenant's concerns on the current state of the Front Access Steps and for external painting but as these works have not yet been actioned, they are not the subject of this application.

The Landlord's case

9. The case for the Landlords was set out succinctly by Fiona Browne and Deanne Andrew. They made it clear that they were asked to collect £60 per month for 2009 from 1 March and the Tenant had only paid £43.75 per month. An additional £662.40 included in the arrears was the one fifth share of costs or work to the two Fire Escapes, a sum that had been paid by the other four leaseholders. Those repair works had been done first as it was considered they were the most pressing. When the Tenant had not paid, his mortgagee had been informed and it was they who suggested a LVT application. No mention was made in the landlord's submissions of any consultation with the tenants under the Landlord and Tenant Act 1985 in respect of the major works to the Fire Escapes.

10. The case for 2010 was straightforward, it was said. A written statement was produced that set out the income requested, at £70 per month per flat, or £840 per annum for each leaseholder, a total of £4,200. Anticipated expenditure on cleaning, insurance electricity and the management fee was £2,340 and that left £1,860 for repairs and redecoration.

11. The application refers to the sum of £1,860 as a 'sinking fund'. Discussion with the representatives of the Landlords revealed that this was not a sinking fund in the sense of building up funds for future major expenditure, such as roof repairs. The Lease terms do not seem to permit such a sinking fund, however desirable they might be (see Leicester City Council v Master, LT, 2007). Rather, this relatively modest sum was a contingency to cover repairs and maintenance in the year not anticipated on I January 2010. Such a contingency, provided it is taken into account at the annual reconciliation before the next year's service charge is fixed, is permitted by the Lease.

The Tenant's submissions

12. The Tenant took us through his paperwork supplied (copies of letters and e mails, photographs, and one part of the statement of accounts in the bundle supplied on behalf of the Landlords). The Applicant's agents had not been provided with a copy of the tenants document bundle. A copy was given at the hearing and opportunity was given to consider the information. Although he had not filed a statement of case the Tenant summarised eight separate points at the conclusion of his submission. It will be convenient to comment on his submissions in the order that he listed them.

13. *The service charge must be fixed on 1 January and later increases are not permissible.*
The precedent that had been established for lower payments remained binding.
It was not reasonable that he should pay for maintenance and services that did not benefit Flat 1.
The first three submissions can be conveniently considered together. The first submission was that it was not possible under the terms of the lease to ask for an increase in service charge payments mid-year, i.e., on 1 March 2009. The second and third were based on his belief that 'he had not signed the lease' and the practice agreed when he purchased, on a tight budget, should continue; and in any event it was not reasonable to him to pay for aspects of work to the Property that did not benefit him in any way.
The Tribunal took the view, communicated to the parties with an opportunity to each to comment, that the wording of the lease in Part 5 of the Schedule made it clear that the Tenant was liable to contribute one fifth of the total authorised expense covered by the service charge provisions. Such a position was not uncommon in leases.
There would be other aspects of possible work that might not benefit other tenants (work to the Small Steps for example could only benefit Flat 2) and the five leases were granted on the basis that each paid one fifth of the total rather than have service change divisions with complex calculations as to who benefited from what.
The Tribunal accepted that the actual wording of Part 5 had the effect that (in the absence of agreement to the contrary) the Landlords could only request a monthly payment in advance calculated on the planned expenditure during the year plus a contingency for the year and then nothing more until the accounting was done at the end of each calendar year. The Tribunal was also of the view, similarly communicated, that the terms of the lease must always apply except in the case of a clear agreement to the contrary. Such agreement as there was, relating to reduced service charge payments by Flat 1, was undoubtedly terminated on 28 February 2009 and thereafter the Tenant was liable for one fifth of the total service charge.

14. *The work to the Gate, charged at £260 in the 2009 accounts, was not of reasonable standard.*
The tenant's fourth submission was that a item in the service charge, a replacement of the rear Gate and frame, had not been done properly. The Tribunal took this as a claim that the work was not of a reasonable standard within section 19(1)(b) of the Landlord and Tenant Act 1985. The claim was that the charge was for replacing the Gate but the Tenant alleged that it had been retained and just poorly painted and could not now be closed. There were indications from the photographic evidence of the tenant that the gate may well be the original item repainted and poorly realigned. However, since the Tenant had not sent his bundle of documents to the Landlords, it was not possible for the representatives of Executive Lets, even in the lunchtime adjournment, to ascertain the true position

from contractors. The Tribunal noted that the Tenant's would be content if the Landlords rectify the standard of the works and the subsequent undertaking by Executive Lets to this effect.

15. *The landlords had not consulted properly before authorising the works to the Fire Escapes. There were unacceptable discrepancies in the sums claimed for the cost of the works to the Fire Escapes.*

The fifth and sixth submissions can be conveniently considered together. The fifth submission of the Tenant was made on the basis of statutory notes; he was not aware of the detailed requirements of section 20 of the Landlord and Tenant Act 1985 but the Tribunal accepted this submission as a claim that the statutory requirement for consultation had not been met. The Tenant also pointed out that the letter sent by Executive Lets with the details of the proposed works stated that the cost would be £3312 including VAT, or £662.40 for each of the five flats; but the amount on the invoice and in the accounts showed a total cost of £3,800 plus VAT of £665, a total of £4,465.

The representatives of Executive Lets seemed to be unaware of even the basic requirements of consultation for major works. They did produce a letter dated 17 April 2009, which they conceded was the only document that gave any notice to the leaseholders, which stated:

> "Please find enclosed a copy of an estimate received form Ace Ironworks to make repairs to the rear staircase.
>
> I would suggest, to keep costs low, that we opt for replacing the treads, instead of the whole staircase, at a total cost of £3312 including VAT. This will be divided by all at a cost of £662.40 each owner. To achieve this I will require funds in advance."

Careful examination of the estimate and the final account revealed that this letter contained a number of errors. The estimate was for both Fire Escapes, not just one; the planned work was replacement of the Small Steps and *retreading* the Large Steps; the total cost for this work was not £3312 (£2,800 plus VAT) but £4465, (£3,800 plus VAT), or £893 from each leaseholder.

When the Tribunal pointed out the statutory consultation requirements, Fiona Browne claimed that it had not been possible to get a reputable firm to give a second quote as it was specialist work and firms outside Plymouth were not interested in travelling for a small job. But she admitted that the leaseholders had not been told this nor given the opportunity to suggest another contractor.

The Tribunal was surprised that a firm holding itself out as managing agents should not be aware of the existence either of the RICS Service Charge Residential Management Code or of the requirements of a statute (the Landlord and Tenant Act 1985, as amended) that impinges heavily on the issue of service charges with significant adverse consequence for non compliance. Given that further significant works are planned, it suggests the Landlord's agents acquaint themselves rapidly with their statutory obligations before authorising further works to the Property.

16. *The Landlords should not have contacted the Tenant's mortgage lender*

The seventh submission was in respect of £4 paid to the Land Registry in tracing the Tenant's mortgagee. The Tribunal was of the view that this was an acceptable action where there is an allegation of non compliance with the lease of a mortgaged property.

17. *The service provided by Executive Lets was unsatisfactory*

The Tenant contended they had not attended to his concerns about the condition of his Front Access Steps and also pointed to the other issues raised at the hearing. He conceded that they had been

exemplary in dealing with an insurance claim after a leak into his flat. His submission was that the management fee should be reduced for poor service.

Conclusions

18. We determine that the Tenant is liable to pay a service charge for the calendar year 2009 at the rate of £60 per calendar month from 1 March 2009. As he paid £43.75 per month, the shortfall is £162.50p. However, from the evidence presented, the Tribunal is not at present satisfied that the works to the Gate were of a reasonable standard. This means that we cannot at present say that the Tenant is liable for one fifth of the charge of £260 for the work to the Gate. We accept that the Landlords did not have the opportunity to consider the evidence and respond in time. The parties seemed to be willing to work to resolve the issue to their mutual satisfaction and we hope it will not be necessary for the Applicants to apply to have the matter restored for a further hearing over a matter of £52. But they have the opportunity to do so within 56 days of this determination. We conclude on the current evidence that the Tenant is liable to pay an additional service charge of £110.50p.

19. We determine that the work undertaken by Ace Ironworks at a total cost of £4,465 were subject to the consultation requirements of section 20 of the Landlord and Tenant Act 1985. We find that those consultation requirements were not met. Even if the letter of 17 April had not contained errors, it could not qualify as a notice within the Service Charge (Consultation etc) (England) Regulations 2003, Schedule 4 part 2. For example, it did not adequately describe the works and state the reasons why the landlord considered the work was necessary; it did not invite observations; it did not invite nomination of a contractor; and it did not include at least two estimates.

20. In the absence of an application under section 20ZA of that Act (seeking a waiver of the consultation requirements), we had no jurisdiction to consider whether it was reasonable to dispense with those consultation requirements. The result therefore is that the Tenant is not liable to pay the sum requested of £662.50 (or indeed £893); the Landlords are now limited to recovery of the statutory maximum of £250.

21. The total additional liability of the Tenant for the year 2009 is £110.50p plus £250 or a total of £360.50p. We hope however, the issue of the Gate can be mutually resolved; if so, an additional £52 will be payable if the account is agreed.

22. We determine that the Tenant is liable to pay a service charge for the calendar year 2010 at the rate of £70 per calendar month.

23. We do not accept that submission of the Tenant that reductions in the management fee charged is appropriate. Whilst the tribunal has not seen the terms of engagement of the managing agents, from the statutory responsibilities alone we are unable to conclude that the sum charged is unreasonable. Some failures do not warrant a reduction.

24. As noted in 16 above it was quite appropriate when a leaseholder is in arrears for a lender to be notified and therefore the Land Registry charge is reasonable.

Signed:

Professor David Clarke, MA, LLM. 16th August 2010
Bill Gater, FRICS, ACIArb.