SOUTHERN RENT ASSESSMENT PANEL &
LEASEHOLD VALUATION TRIBUNAL

Case No: CHI/00HN/LFC.2010/0122

Between:

Freehold Managers (Nominees) Limited (Applicant)

and

Mrs Julia Stewart (Respondent)

In the Matter of Section 27A of the Landlord and Tenant Act 1985 ("the 1985 Act") and
In the Matter of Schedule 11 of the Commonhold and Leasehold Reform Act 2002

Premises: Flat 6 Baxter Court, 58 Alton Road, Bournemouth, BH10 4AF ("the Premises")

Date of Hearing: 28 October 2010

Tribunal: Mr D Agnew BA LLB LLM Chairman
Mr D Lintott FRICS

DETERMINATION AND REASONS

Background

1. On 5 June 2009 the Applicant issued proceedings in the Poole County Court claiming the sum of £2,161.98 for arrears of service charges and administration charges allegedly due to the claimant from the defendant as tenant of the premises.

2. The Applicant entered summary judgement against the defendant who subsequently applied to set the judgement aside. The Respondent, however, failed to attend the hearing of the application to set aside judgement.

3. A further application was made by the Respondent to set aside judgement on the basis that she had not been informed of the date of hearing of her previous application. On 18 June 2010 District Judge

Ainsworth in Poole County Court set aside the judgement and ordered the defendant to file and serve a defence by 2 July 2010.

4. The defendant filed and served a defence dated 28 June 2010. On receipt of that defence the Applicant's solicitors wrote to the Court asking for the matter to be transferred to this Tribunal and on 20 July 2010 District Judge Weintroub sitting in Bournemouth County Court so ordered.

5. On 17 August 2010 the Tribunal issued directions providing, amongst other things, for each party to file statements of case. The Applicant duly filed a statement of case dated 17 September 2010. The Respondent failed to file a statement of case.

Inspection

6. The Tribunal inspected Baxter Court immediately prior to the hearing on 28 October 2010. It is a block of ten purpose built flats in a quiet residential road in Bournemouth and was constructed three or four years ago. It is set in a small, but on the day of inspection, a well tended garden comprising lawn and shrubs. There is a parking area for visitors in front of the block and allocated parking spaces to the rear. Outside there is a bin store and a wooden shed. The block is constructed of brick under a tiled roof. The windows are double glazed and there is plastic guttering soffits and eaves. There is a porch at the communal entrance guarded by an entry system. There is a central communal hallway and staircase. Four flats are situated on the ground floor, four on the first and two on the second floor. The hall and stairways are carpeted. On the day of inspection the communal areas were clean although the carpet was slightly grubby particularly towards the entrance door. The communal areas could benefit from a general redecoration and refreshment but were acceptable. The property is fitted with emergency lighting and an alarm system. The whole of the building can be described as low maintenance.

6. In attendance at the inspection were Mr Hulse and Mr Belcher of Broadlands Property Management, the Landlord's managing agents. The Tribunal was unable to obtain any answer from the Respondent's flat.

The Hearing

7. The Hearing took place at the Royal Bath Hotel, Bournemouth on 28 October 2010. The hearing had been listed to start at 11.00 am. Attending at that time were Mr Hulse and Mr Belcher together with the Landlord's solicitor, Miss Dickie of Messrs Shoosmiths. When the Respondent had not appeared by 11.00 am the tribunal clerk telephoned her to ask if she intended coming to the hearing. She said that she was at that moment at her mother's address in Blandford but she did want to attend the hearing and would be there as soon as

possible. The tribunal clerk indicated that the Tribunal would be prepared to delay the start of the proceedings for 45 minutes to enable her to reach the hearing venue.

8. By 11.45 am the Respondent had still not appeared at the hearing therefore the hearing began.

9. Miss Dickie began by explaining to the Tribunal the breakdown of the claim and started going through the service charge items that appeared to be in dispute from the Respondent's defence filed in the County Court.

10. Miss Stewart arrived at the hearing at 12.30 pm. The Tribunal explained to Miss Stewart that they had given her until 11.45 am as promised but could not hold up the hearing any further and they explained to her what had transpired up to that point in the hearing. Miss Stewart expressed her gratitude to the Tribunal for their indulgence in having delayed the start of the proceedings and fully understood that the hearing had to commence. She explained that yesterday she had it fully in mind to attend the hearing but that it had simply slipped from her mind. She was engaged in attending to her poorly mother when she received the clerk's call. She apologised to the Tribunal for the inconvenience she had caused. She explained that over the past two years she had suffered some considerable personal tragedies, the details of which need not be given in these reasons and she asked for the Tribunal's indulgence. She did wish to challenge the service charges claimed as she considered that they were too high. As Miss Stewart's paperwork was in disarray the Tribunal decided to adjourn for the short adjournment at 12.40 pm and resume the hearing at 2 pm in order to give Miss Stewart the opportunity to assemble her documentation in some order as this would hopefully expedite the afternoon's proceedings.

The Applicant's case

11. Miss Dickie explained that the claim as at the date of issue of the County Court proceedings was made up as follows:-
(a) an invoice for service charges dated 29 February 2008 demanded payment of £523.64 for the service charge year March 2007 to March 2008.
(b) a credit note was issued on 22 August 2008 for £116.15.
(c) an invoice dated 11 September 2008 demanded service charges in the sum of £273.54 for the service charge period September 2008 to March 2009.
(d) an invoice dated 12 February 2009 demanded service charges of £347.33 for the period March 2009 to September 2009.
In breach of their lease the Defendant has failed to pay therefore the total sum of £1,028.36 up to the date of issue of the claim.
(e) interest under the lease has accrued at 4% above Barclays Bank base rate which amounted to £45.49 up to the date of the issue of the

County Court claim.
(f) Miss Dickie also pointed out that the lease provided for the Respondent to pay the Applicant on an indemnity basis all costs fees charges disbursements and expenses properly incurred in relation to the recovery or attempted recovery of arrears of rent or other sums due from the Respondent. At the time of issue of the proceedings those costs were said to be £88.13 owed to the management company for administration charges in attempting to recover the outstanding service charges. Miss Dickie said that her firm's legal costs to pay in respect of this matter amounted to approximately £12,000.00. As at the issue of the County Court proceedings they were said to be £1000. Between 5 June 2009 and the date when the case was transferred to the Tribunal on 9 August 2010 invoices for fees and disbursements totalling £7,228.65 including VAT had been rendered by Shoosmiths to the Applicant. Since transfer to the Tribunal and up to 22 October 2010 the Applicant's solicitors had rendered invoices totalling £4575.50.

12. Miss Dickie explained why the costs had amounted to the very large sum they had. In part, this was due to the difficulties they had experienced in communicating with the Respondent who had refused to give them a postal address during the time when she was not resident at the premises. In part, the costs have mounted due to their having to respond to two applications to set aside judgement and in preparing the case before the Tribunal. She contended that the Respondent had acted frivolously vexatiously or otherwise unreasonably in respect of the proceedings and that the Tribunal should exercise its discretion in awarding the Applicant £500 to be paid by the Respondent as a consequence under the jurisdiction given in Schedule 12 of the Commonhold and Leasehold Reform Act 2002. Miss Dickie pointed out, however, that the claim for legal costs was being made under contract (i.e. under the contractual terms of the lease) and not under any jurisdiction of the courts or Tribunal to award costs.

13. With regard to other matters seemingly being challenged by the Respondent Miss Dickie said that the Applicant's case was as follows:-
(a) Costs of cleaning the common parts. The cleaning company, with whom the Applicant's managing agents have a contract to carry out cleaning at Baxter Court, work under a specification. They have been charging £25.00 per month for a visit once per month up to March 2010. Since March 2010 they have been required to pay two visits per month at £25.00 per visit. They are required to clean glassware, woodwork, balustrades and handrails. Carpets are vacuumed and the bin-store is swept out. Light bulbs are changed if necessary. The managing agents have received no complaints with regard to cleaning. The internal paintwork is due to be carried out during 2011 and the Section 20 consultation procedure will be followed.
(b) Management fees. These are £202 including VAT per flat. Miss Dickie submitted that this was a reasonable fee.

(c) Gardening. At one time one of the lessees who has a business dealing in garden maintenance had the contract. There were complaints about the state of the gardening and the managing agents also noticed that this was unsatisfactory. That contract was therefore terminated and there is a new contract in place with another firm who are charging the same amount and this seems to be working satisfactorily. The former gardener had to be given a chance to improve but he was unable to perform satisfactorily and therefore his contract was terminated as soon as possible. The cost of the gardening is £83.33 including VAT per month. The gardener is required to attend twice per month from April to October and once per month during the winter months.

The Respondent's case

14. Miss Stewart said that when she entered into the lease the developer represented that the service charge would be in the region of £400 per year. She did not expect it to remain at precisely that figure but it had gone up considerably since 2007. She did not object to paying a reasonable service charge provided that the quality of the service was reasonable. However, the gardening was being poorly done and £83.33 per month was an outrageous fee for the work required. She thought that a local man being paid £10 per hour for one to two hours per week in the high season, once per fortnight in the spring and autumn and once per month in the winter would be all that is required.

15. With regard to cleaning, she says that the cleaners only do some hoovering and they do not clean woodwork or glass. She thought that half an hour for hoovering and one hour per week on the glass and woodwork after an initial four hour blitz would be an appropriate amount of time to spend on the cleaning.

16. With regard to the legal costs, Miss Stewart said that these were far too high and she challenged them but she would have to leave it to the Tribunal to decide what was an appropriate amount.

17. With regard to the management fees, she felt that these too were high. She did not consider that the management company could justify their management fees. If they do visit the premises they certainly do not arrange to meet any of the lessees and discuss management issues. She said that she had tried to contact them by telephone to complain about matters such as the gardening and the cleaning but she had been unable to get through to speak to anyone on a sensible basis. She had offered to pay service charges by instalment but this had been refused. She said that other lessees in the block were also unhappy with the standard of service they were receiving and she was taking this stand as much for their benefit as for her own.

The Law

18. By Section 27A of the 1985 Act it is provided that:-
(1) An application may be made to a Leasehold Valuation Tribunal for a determination whether a service charge is payable and, if it is, 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.
(2) Subsection (1) applies whether or not any payment has been made.
(3) An application may also be made to a Leasehold Valuation Tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvement, insurance or management of any specified description, a service charge would be payable for the costs and, if it would, 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.

19. By paragraph 2 of Schedule 11 to the Commomhold and Leasehold Reform Act 2002 it is provided that:-" A variable adminstration charge is payable only to the extent that the amount of the charge is reasonable" and by paragraph 5 of the said schedule, an application may be made to a leasehold valuation tribunal for a determination whether an administration charge is payable, and, if it is, 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
the manner in which it is payable.

The Lease

20. By clause 1(c) of the lease the Service Charge is reserved by way of further rent.

21. By clause 2.1.2 of the lease the tenant covenants to pay the Service Charge in accordance with the provisions of Clause 5.

22. The landlord's obligations with regard to the maintenance and repair of the block are set out in Clause 4.1.2 of the lease

23. By Clause 4.2.1 the Landlord is required to maintain a reserve fund.

24. By Clause 2.17 the tenant is required to "pay to the Landlord on an indemnity basis all costs fees charges disbursements and expenses.....properly incurred by the Landlord in relation or incidental to.....

(c) the recovery or attempted recovery of arrears of rents or other sums due from the Tenant including costs of and incidental to compliance with Section 81 of The Housing Act 1996 and applications and proceedings before the Land (sic) Valuation Tribunal."

Determination

25. With regard to the service charge items in dispute the Tribunal determines the following:-

(a) Cleaning of common areas. Other than for the Respondent's assertion that the cleaning was unsatisfactory the Tribunal had no evidence of this. The cleaning was satisfactory on the day of the Tribunal's inspection and there was no written record of complaints about the cleaning having been made to the managing agents. Even if Miss Stewart, due to her own personal difficulties, found it difficult to write to the managing agents about this, the other lessees could have done so. Accordingly, the Tribunal is not prepared to disallow any of the cleaning costs.

(b) Gardening costs. There is evidence that the gardening was unsatisfactory for a time up until January 2010 when the contractor was changed. However, the previous contractor was in fact a lessee at Baxter Court and one would have thought that he would have ensured that his own property was well looked after. The Tribunal accepts that it was reasonable to give the former contractor a period in which to improve his performance and that the contract could not have been terminated instantly. As the deficiencies were noted by the management company and they took steps to remedy the situation the Tribunal do not consider that the managing agents can be criticised in this respect. Accordingly, the Tribunal does not disallow any of the gardening charges although it is pleased to see that the contract has now been changed and appears to be working satisfactorily.

(c) With regard to the management fee, the Tribunal considered that £202 per flat including VAT was not an unreasonable charge for the managing agents to make. As stated above, this is a fairly low maintenance block and the Tribunal would expect the managing agents' fees to be at the lower end of the generally accepted scale of charges, which this is.

26. The Tribunal has no jurisdiction to make a determination with regard to the amount of interest claimed in the County Court proceedings. The claim for interest under the lease is a fixed charge and not a variable charge and therefore the Tribunal has no jurisdiction to determine the reasonableness of the interest claimed under Schedule 11 of the Commonhold and Leasehold Reform Act 2002.

27. Whilst Miss Stewart was concerned that the service charges have increased considerably since the original £400 envisaged by the developers she must bear in mind that the charges now include a

£1000 provision to a reserve fund which is provided for under the lease and which is a sensible provision as it allows for a gradual building up of a fund to cover matters such as the internal decorating expenses due to be encountered next year.

28. Although the Tribunal finds that all the amounts claimed under the service charges (as opposed to administration charges) were reasonable the lease does provide that the charges for the first year shall be £400. In the event, the management company demanded £523.64 for the first year's service charges. A credit of £116.15 was subsequently applied but that still left a demand of a total of £407.49. That is £7.49 more than the lease provided for. Miss Dickie for the Applicant conceded that the claim was therefore £7.49 too high and should be reduced accordingly.

29. The Tribunal next considered the question of administration charges, which are £88.13 for the landlord's costs and a staggering £12,000 approximately in respect of the landlord's solicitors' costs. In fact, the Tribunal calculates that the total costs up to the Tribunal's hearing totalled £12,891 to which the costs of the Tribunal hearing should also presumably be added.

30. The Tribunal does consider that it has jurisdiction to deal with all these costs as administrative costs under Schedule 11 of the Commonhold and Leasehold Reform Act 2002 but it does not consider that it would be appropriate for it to trespass upon the County Court judge's discretion as to costs for the period between the issue of the claim form and the transfer of the case to the Tribunal. It is reinforced in this view because it notes that when permission was given to appeal the district judge ordered that there should be no order as to costs. The district judge has therefore already considered the question of costs for at least one of the applications that were before the court during the period in question and it seems to the Tribunal therefore that it would be wrong for it to impinge on the County Court's concurrent jurisdiction to deal with the costs during that period.

31. It seems to the Tribunal, however, that different considerations apply to the costs which have been incurred prior to the issue of proceedings and to costs that have been incurred since the transfer of the proceedings to the Tribunal. The Tribunal has been furnished with details of the costs incurred and has had the opportunity of seeing all the documentation produced for the Tribunal hearing. It is therefore well placed to be able to determine those costs and, arguably, in a better position to do so than, with respect, the County Court judge. Accordingly, the Tribunal does intend to make a determination with regard to the reasonableness of the pre-action costs and the costs that have been incurred since the transfer of the case to the Tribunal. The Tribunal therefore intends to make a determination as to the reasonableness of costs totalling £5,575.50 (i.e. £1000 pre-action costs and £4575.50 from the date of transfer to the Tribunal) plus unspecified

costs of the hearing. The 2002 Act provides that such costs are only payable to the extent to which they are reasonable and in order to be reasonable they have, in the Tribunal's view, to be proportionate to the amount at stake. In this case the sum of £769.16 was outstanding when Messrs Shoosmiths first became involved and the amount outstanding rose to £1,161.98 (net of legal fees) at the time of issue of proceedings. The Applicant is claiming approximately the same amount in costs for this period. The Applicant's solicitors were engaged in a certain amount of correspondence largely with the Respondent's mortgagee but also with the Respondent herself, but this was mainly of a routine nature and did not justify a charging rate of £165 – 185 per hour plus VAT which applied from December 2008 until February 2009. The matter was, for example dealt with by a trainee solicitor at £125 per hour from March 2009 until the proceedings were issued in June 2009. In all the circumstances, the Tribunal determines that £500 plus VAT would be a reasonable amount for the Applicant to recover by way of its solicitors costs for the pre-action period.

32. With regard to the post-transfer costs, totalling some £4,575.50 plus unspecified hearing costs, the Tribunal again has to bear in mind questions of proportionality. The costs claimed, however, far outweigh the amount at stake. Further, a considerable amount of time was spent in drafting the Applicant's statement of case and compiling the hearing bundle and preparing and reviewing the Applicant's statement of case. The Tribunal considers the amount of time spent on these activities bearing in mind the amount at stake was disproportionate and that instead of the £4575.50 claimed, £2,287.75 (i.e.50%) plus vat would be a reasonable amount to charge the Respondent.

33. As for the hearing itself, the Tribunal considers that a sum of £700 plus VAT would be a reasonable amount for the Applicant to recover. The hearing was protracted due to the Respondent's failure to attend the hearing on time. Unnecessary costs were therefore incurred by the Applicant through no fault of its own.

Summary

34. The result of the foregoing is that the Tribunal finds that the Respondent is liable to pay to the Applicant the following in respect of service charges and administration charges:-
For the service charge year March 2007 to March 2008
Service charge of £400
For the period 24 September 2008 to 23 March 2009
Service charge of £273.54
For the period 25 March to 2009 to 24 September 2009
Service charge of £347.33

35. Pre issue costs: £500 plus VAT
Costs post-transfer to Tribunal £2,2987.75 plus VAT

The Tribunal makes no determination with regard to interest as it is outwith its jurisdiction.

The Tribunal makes no determination with regard to costs post issue of the County Court claim form up until transfer of the case to the Tribunal as it considers this to be more appropriately the province of the County Court judge. For the assistance of the County Court judge and in no way to impinge on the judge's discretion, the Tribunal would point out that on the evidence before it £879.46 of the £6,814 incurred during this period relates to costs of and incidental to the service of a Section 146 notice which, due to the fact that service charge was reserved as rent, was unnecessarily incurred.

Concluding remarks

36. This has been an extremely expensive exercise for both parties. By challenging a relatively modest increase in the service charge from the time of inception of the lease the Respondent has incurred costs which far exceed the amount she could possibly have gained in her challenge. The Applicants have suffered by failing to recover a substantial amount of costs which they have incurred. The Tribunal does concur with the Respondent's remark at the conclusion of the hearing that communication is vital in such circumstances. By her actions, however, she has made it extremely difficult for there to be communication with her, although this may have been the unfortunate result of the tragic circumstances she has suffered in recent times. Going forward, however, the Tribunal trusts that the dialogue which it encouraged the parties to engage in immediately after the hearing will have established an understanding as to how there can be better communication between the parties and thereby hopefully the avoidance of future costly disputes of this nature.

Dated this 22nd day of NOVEMBER 2010

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D. Agnew BA LLB LLM

Chairman