



**Residential
Property**
TRIBUNAL SERVICE

Leasehold Valuation Tribunal

CHI/29UN/LIS/2009/0078

Southern Leasehold Valuation Tribunal

Landlord and Tenant Act 1985 sections 27A and 20C &

Commonhold and Leasehold Reform Act 2002 schedule 11

Address: Flat 17, Gate Quays, 5-6 Marine Gardens, Margate,
Kent CT9 1UP

Applicant/ Claimant: Comehomes Corporation (DE) Limited (freeholder)

Represented by: Mr W De-Yola (director) & Ms L Smith (property
manager)

Respondent/ Defendant: Ms S Malcolm (leaseholder)

Represented by: Mr A Conteh of Leone Legal Consultancy

Tribunal members: Mr T J Powell LLB (Hons)

Mr C White FRICS

Mr T Wakelin

**Transfer from Lambeth
County Court:**

27 August 2009

Original directions: 14 October 2009

Further directions: 28 October 2009

Inspection: 27 January 2010

Hearing: 27 January 2010

Decision: 12 February 2010

Decisions of the Tribunal

- (1) Of the £4,414.06 principal sum claimed in the County Court under case no. 9WD02198, some £350 is in respect of ground rent over which the Tribunal has no jurisdiction (though the Tribunal can confirm that the lease provides for annual ground rent of £175 and that on 27 January 2010 the Respondent admitted that she had not paid two years' ground rent i.e. £350);
- (2) Of the £4,064.06 balance claimed by the Applicant (£4,414.06 - £350), the Tribunal determines that the sum of £642.54 is reasonable and payable now by the Respondent (on the assumption that £400 in advance service charges was paid by the Respondent at the time of completion of her purchase);
- (3) The Tribunal determines that there should be no refund of Tribunal fees by the Respondent to the Applicant;
- (4) The Tribunal makes an order under section 20C of the Landlord and Tenant Act 1985 that the Applicant's costs of the Tribunal proceedings shall not be passed through the service charge;
- (5) The Tribunal has no jurisdiction over County Court costs and fees; and
- (6) This matter should now be transferred back to the Lambeth County Court.

Background

1. This is a determination of the payability and reasonableness of advance service charges and of administration charges in respect of the service charge years ending 31 December 2007, 2008 and 2009. The charges were levied by Comehomes Corporation (DE) Limited ("Comehomes"), the freeholder of a building known as Gate Quays, 5-6 Marine Gardens, Margate, Kent CT10 1UN ("the building") and were said to be payable by Ms Malcolm, the leaseholder of Flat 17, Gate Quays ("the flat").

County court proceedings

2. The matter started life in the Watford County Court case no. 9WD02198 when Comehomes commenced proceedings on 21 May 2009 seeking the recovery of £4,602.06, which appears to be made up as follows:

<u>Item claimed</u>	<u>Amount £</u>
Ground rent	350.00
Advance service charges (approximately 8 quarters)	1,714.06

Administration charges (chasing late payment of ground rent and advance service charges) (£250 x7)	1,750.00
Administration charge ('fixed fee' of managing agent's in-house solicitor for issuing proceedings)	<u>600.00</u>
Principal sum:	£4,414.06
County Court fee	108.00
Solicitor's fixed costs	<u>80.00</u>
Total on Claim Form	£4,602.06

3. As a result of a Defence filed by the Ms Malcolm on 1 June 2009, the matter was transferred to the Thanet County Court, being the court for the area in which the property was situated. Upon filing allocation questionnaires, the matter was further transferred to the Lambeth County Court where, on the 24 July 2009 District Judge Zimmels ordered Comehomes to file a Reply to the Defence.

4. Ms Malcolm's Defence, as amplified by her allocation questionnaire, made the following allegations:
 - the landlord had not carried out works "as specified"
 - there were no letterboxes;
 - The entrance gates were locked/not accessible;
 - The bin men were unable to collect refuse;
 - There were no carpets in the communal areas;
 - The steps to the flat were still bare concrete;
 - The occupants were unable to watch TV or have access to Sky or the Internet;
 - There was a failure by the landlords carry out any works or repairs
 - The majority of the flats were empty because of the landlord's failure to manage;
 - It was the drug-infested crime area;
 - It was an unfinished building requiring maintenance works, with health and safety breaches; and
 - The landlord had not completed Flat 17 and the communal areas i.e. the building works, lift and floor space.

5. By further order dated 27th of August 2009 District Judge Zimmels stayed the county court proceedings and transferred the claim for service charges and legal costs to the Leasehold Valuation Tribunal.

Tribunal proceedings

6. The Tribunal gave directions on 14 October 2009, initially indicating that the matter would be dealt with on the paper track on the basis of written representations and documents only, without a formal hearing. Comehomes were required within 21 days to send to Ms Malcolm and to the Tribunal a statement in writing setting out in detail exactly which items of service charge and administration charge are alleged to be outstanding which "shall exhibit the relevant service charge and administration demands" and "copies of all items of correspondence, documents, witness statements and other documents which they wish the Tribunal to see." Thereafter, Ms Malcolm had 21 days to prepare her written statement and exhibit relevant documents and to serve these on Comehomes and the Tribunal.
7. Shortly afterwards, a request was received for an oral hearing, which resulted in further directions being made by the Tribunal on 28 October 2009. The hearing was fixed for 27 January 2010 and the further directions stated that "if any person wishes to give oral evidence at the hearing, they should send a witness statement to the other party and to the Tribunal 21 days prior to the hearing date".
8. Neither party complied with either set of directions.

The Law

9. Service charges and relevant costs are defined in section 18 of the 1985 Act. The amount of service charges which can be claimed against lessees is limited by a test of reasonableness, which is set out in section 19 of the 1985 Act. The Tribunal's jurisdiction is set out in section 27A(1) of the Act as follows:
 - (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.
10. Administration charges must also be reasonable: see Schedule 11 of the Commonhold and Leasehold Reform Act 2002. Paragraph 5 of that Schedule provides:
 - (1) 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
- (e) the manner in which it is payable.

(2) Subsection (1) applies whether or not any payment has been made.

11. Section 20C of the 1985 Act provides that a Tribunal can make an order preventing the Lessor recovering its costs of proceedings through the service charge, if the Tribunal considers it to be just and equitable.
12. Regulation 9 of the Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003 allows a Tribunal to order a party to reimburse the whole or part of any fees paid by another party.

The lease

13. The lease between Comehomes and Ms Malcolm is dated 30 May 2007 and is expressed to run for 125 years from 1 January 2004 at an initial ground rent of £175 per annum. The ground rent is payable "in advance without any deduction whatsoever on 1st January in each year" and the leaseholder must also pay "by way of additional rent the Service Charge as herein provided."

The Service Charge

14. By clause 1.10 of the lease:

"the Service Charge" means such percentage as the landlord shall reasonably and properly determine as being an appropriate and fair proportion in respect of the Demised Premises with regard to the parts of the building as are constructed and capable of occupation (whether or not demised on a lease upon similar terms (mutatis mutandis) to this lease) and notified from time to time to the Tenant of the expenditure incurred by the landlord or its managing agents in performance of its obligations in this lease."

Tenant's covenants

15. By clause 5.1 of the lease the tenant covenants:

"to pay to the landlord or its managing agents on the date hereof a proportionate sum on account of service charge to the next following quarter day and thereafter on each quarter day in each year such sum as the management company shall consider is fair and reasonable on account of the service charge and forthwith on receipt of the Certificate (as hereinafter defined) to pay to the landlord or its managing agents any balance of the service charge then found to be owing provided always that any overdue service charge may be recovered by the landlord as if the same were rent in arrears."

16. The "quarter days" are defined by clause 1.15 as meaning "1 January 1 April 1 July and 1 October in each year."

Landlord's covenants

17. Clause 6 contains the landlord's covenants including the covenant to insure the building (clause 6.5) and to provide and perform the Services (clause 6.7), which are defined and set out in the Fourth Schedule of the lease. With regard to the provision of Services clause 6.7.1 provides:

"the landlord may employ at the landlord's discretion a firm of managing agents to manage the estate and discharge all proper fees salaries charges and expenses payable to such agents or such other person who may be managing the estate and the cost of computing and collecting the rent and service charge and if the landlord does not appoint such managing agents shall be entitled to include all administration costs incurred as part of the cost of providing the services".

The Services

18. The services in the Fourth Schedule are wide-ranging. They include in paragraph 1 an obligation on the part of the landlord:

"to maintain renew replace and keep in good and substantial repair and condition ... the common parts and the terraces including but without prejudice to the generality of the foregoing provisions ... the main structure ... any fire alarms ... the main entrances passages landings staircases and all other parts of the buildings enjoyed or used in common by the owner or occupiers of the flats in the buildings ... any refuse stores ... the balconies and terraces".

19. By paragraph 8 of the Fourth Schedule: the landlord shall:

"whenever reasonably required by the tenant to produce to the tenant details of insurance cover effected by the landlord pursuant to clause 6.5 of this lease".

20. By paragraph 10 the landlord is obliged:

"to keep full accounts and records of all sums expended in connection with the matters set out in this part of the schedule and to prepare and serve upon the tenants of all the flats in the buildings from time to time the Certificate and such other documents as are required to be served by the landlord or its managing agents on the tenant."

21. Paragraph 16 of the Fourth Schedule provides for:

"such other services or functions as the landlord or its managing agents shall think fit for the upkeep and enhancement of the estate or for the benefit of the flats erected thereon provided ... the expenditure and outgoings properly incurred by the landlord and its managing agents (and included in the service charge) in any financial year shall include: (a) cost of any managing agents employed to carry out the functions of the landlord..."

The Certificate of annual expenditure

22. Clause 6.8 of the lease states:

"As soon as practicable after the end of each financial year (as hereinafter defined) of the Landlord or its agents to furnish the Tenant with an account of the Service Charge payable for that year due credit being given for the advance contribution relevant to that year and amounts carried forward from previous financial years (if any) and to

carry forward to the next financial year any amount which may have been overpaid by the Tenant as the case may require and for the purpose of this clause:

- 6.8.1 The expression "the financial year" of the Landlord shall mean the period from 1st January to 31st December in each year or such other annual period which the Landlord may in its sole discretion from time to time decide
- 6.8.2 The amount of the Service Charge shall be ascertained and certified annually by a certificate of the annual expenditure ("the Certificate") signed by the landlord or the managing agents so soon after the end of the financial year of the landlord as may be practicable and shall relate to such years in manner hereafter mentioned
- 6.8.3 The Certificate shall contain a fair summary of the Landlord's expenditure and outgoings as incurred in the financial year of the Landlord and the Certificate shall be final and binding on the Tenant except in the case of manifest error
- 6.8.4 A copy of the Certificate of each such financial year shall be issued to the Tenant and the Tenant may by prior appointment with the Landlord within 28 days of the issue of the Certificate inspect the vouchers and receipts in respect of the expenditure and outgoings for the financial year."

The Tenant's liability for costs

23. By clause 4.7 of the lease the tenant covenants:

"to pay all expenses including solicitors costs ... properly incurred by the Landlord incidental to the preparation and service of a notice under section 146 of the Law of Property Act 1925 or incurred in or in contemplation of proceedings under sections 146 and 147 of that Act notwithstanding in any such case forfeiture is avoided otherwise than by relief granted by the court."

24. By clause 4.9 the tenant covenants:

"to be responsible for and to keep the Landlord fully indemnified against all ... costs expenses ... incurred by the Landlord arising directly or indirectly out of ... 4.9.2 any breach or non-observance by the Tenant of the covenants conditions or other provisions of this lease."

The property/ inspection

25. The development at Gate Quays, Margate occupies a rectangular piece of land with an L-shaped purpose-built block of 36 flats and 3 commercial units. It is believed that construction commenced about 15 years ago with the construction of the block fronting Marine Gardens. The side block in which the subject property is situated was commenced later, with the flats being completed and sold in 2006 and 2007. There is a communal car park and refuse area behind the buildings on the remainder of the site. The 'foot' of the L-shaped building fronts a busy road known as Marine Gardens. This part of Gate Quays is a low-rise tower block comprising (empty) flats and the 3 commercial units at ground level (all empty and boarded up).

26. The 'upright' of the L-shaped building extends down Grosvenor Place, a narrow one-way side street at right-angles to Marine Gardens. Along this street there is a "main

entrance" to the tower block (which was boarded up upon inspection) and a horizontal four-storey block of flats ending with an archway, used to gain access to the rear car park. The flats have wood-framed double-glazed windows. Externally, the brickwork appeared to be in good condition, though one of the rainwater downpipes was not connected to the drainage at ground level. Four flats on the ground floor had boarded-up windows. The new building is opposite a terrace of five-storey Victorian houses on the other side of Grosvenor Place, which were in very poor, run-down decorative condition.

27. Of the 36 flats in Gate Quays, 12 were let under long leases. The remaining 24 flats were still in the possession of Comehomes and were empty and unoccupied.
28. There are no accessible letterboxes for any of the occupied flats. On the morning of the inspection a Tribunal member witnessed a postman knocking on the window of a ground floor flat and handing post directly to an occupant inside, who opened the window for this purpose.
29. The Tribunal members were met at the property by Mr Abdul Conteh, a representative acting on behalf of the Ms Malcolm (the leaseholder of Flat 17, on the second floor), and later by Mr Paul Duhig, Ms Malcolm's subtenant. As notified to the parties, the inspection began at 10 a.m. Mr Duhig invited the Tribunal members to inspect the inside of Flat 17, which was in excellent decorative repair, save for some minor water staining on the ceiling of the hallway (apparently from historic water penetration). The flat was equipped with a television and it seemed clear that signal reception was not an issue. There was no letterbox in the door of the flat, nor attached to the external wall.
30. As for the common parts, the archway entrance to the rear of flats was supported by rusted rolled steel joists which had not been boxed in. The external rear staircase giving access to the upper floors was exposed to the elements. The concrete steps were unfinished, with rough edges and occasional holes. The concrete balconies were also unfinished, with occasional rough surfaces and holes. The Tribunal noted that rainwater pooled on the balconies, next to the external walls of the flats, due to the inward-sloping fall of the balcony surfaces. A part of the inside face of the tower block (comprising the foot of the L-shaped building) was unfinished at ground level and fenced off. There was no sign of any current building work. The main building fronting Marine Gardens has a lift shaft at the rear but the lift has not been fitted. Access to the main building and lift (when fitted) will be obtained from the walkway

entrance to the subject flat. At the present time the door access from the walkway is locked.

31. Having completed its inspection the Tribunal members were in the process of leaving, when Mr Wyle De-Yola (a company director and shareholder of Comehomes) and Ms Louise Smith (property manager) arrived at the property, at about 10:15 a.m. The Chairman of the Tribunal introduced himself and gave them a summary of what the Tribunal had seen (as set out above). He asked whether they wished to point out anything else at the building, which the Tribunal members had not seen. They said that there was nothing more to show. Therefore, the Tribunal members and the parties drove to the Canterbury Christchurch University at Northwood Road, Broadstairs where the hearing was due to begin at 11 a.m.

The hearing

32. The hearing began at 11 a.m. Comehomes was represented by Mr De-Yola and Ms Smith, and Ms Malcolm was represented by Mr Conteh. In addition to representing Ms Malcolm, Mr Conteh also gave evidence on her behalf, which the Tribunal found less compelling than if Ms Malcolm had attended the hearing in person.

Adjournment for new documents

33. Both sides wanted to introduce new documents to the Tribunal. In the case of Comehomes, the new documents included a statement of case, a witness statement from the managing agent's former in-house solicitor Mr Steve Newman (SJ Newman solicitors), service charge statements of account and a bundle of chasing letters in respect of unpaid ground rent and service charges. Mr Conteh sought to introduce a witness statement from Ms Malcolm and copies of letters relating to service charge demands by Comehomes.
34. The Tribunal expressed its unhappiness that neither party had complied with clear directions which, both parties admitted they had received but not acted upon. The parties apologised to the Tribunal. Documents were exchanged between the parties and certain copies were handed to the Tribunal members. However, both parties needed time to photocopy additional documents for exchange and filing. The Tribunal therefore adjourned at 11:20 a.m. to give the parties time to prepare the documents upon which they relied, but the task took so long that the hearing was not able to restart until 2 p.m. At that stage, both parties were asked whether they needed further time to consider each other's documents, and whether either required an adjournment for this purpose. Both representatives indicated that they had read

the documents, but they did not wish for there to be an adjournment and that they were happy to proceed with the hearing on the basis of the documents now produced.

Re-commenced hearing

35. For Ms Malcolm, Mr Conteh said that she accepted that "reasonable" sums were payable towards the service charges, but she wanted the Tribunal to decide what those reasonable sums were.
36. The Tribunal asked Mr De-Yola to point out the relevant service charge provisions in the lease, but he was unable to do so. Mr De-Yola did not even have a copy of the lease but when one was provided to him by Mr Conteh, he said simply that he would be unable to assist the Tribunal, because he had only received advice concerning the contents of the lease and he had no knowledge of it himself. It was therefore left to Tribunal to try and find the relevant provisions of the lease relating to service charges. Those which were found have been listed above.
37. The Tribunal asked Mr De-Yola whether Comehomes had yet produced the end-of-year Certificate for Ms Malcolm, as required by clause 6.8 of the lease and paragraph 10 to the Fourth Schedule. Mr De-Yola pointed to several documents to explain the service charge position. These included a document of "Service Charges Demanded" for each of the 12 occupied flats in the building for the years 2006 to 2009, a similar document showing "Year by Year Service Charge Arrears", a total "Income and Expenditure Summary" for the four service charge years showing the landlord's contribution to the global expenditure, an itemised summary of "Service Charge Expenditure" showing the global costs incurred by the landlord for the service charge years broken down between headings, and the service charge statements of account for 2006 to 2009.
38. None of these documents constituted "the Certificate" required by the lease and none of them indicated what percentage liability of each year's actual expenditure was attributable to Flat 17.
39. With regard specifically to Flat 17, the documents included two statements of account, one showing ground rent arrears of £350 (two years from 1 July 2007 at £175 per annum) and the other being a "Statement of Service Charge" for the two-year period between 1 July 2007 and 30 June 2009. This latter document showed the quarterly payments due from Ms Malcolm during that two-year period. These comprised a quarterly sum of £214.18, which represented the interim on-account service charge demand for each quarter, and £250 in administration charges for each

quarter, apparently representing "no more than" 10 letters per quarter chasing unpaid service charges and ground rents, at £25 per chasing latter. The total amount due as at 30 June 2009 were said to be £3,463.44.

40. The Tribunal notes in passing that whereas the Statement of Service Charge shows the quarterly demand of £214.18 in respect of the on-account service charge demand, the same demand was said to be £214.40 in paragraph 10 of the Applicant's Statement of Case and £214.80 per quarter in paragraph 12 of the Applicant's Statement of Case.

Cost of annual insurance

41. When trying to determine the reasonableness and payability of the service charge demands levied by Comehomes, the Tribunal was hampered by the lack of any end-of-year certificate or any document which showed what percentage of the actual annual expenditure incurred by Comehomes was being claimed against Ms Malcolm in respect of Flat 17. Initially, the Tribunal attempted to obtain this information from Mr De-Yola in relation to the annual insurance, which the Tribunal hoped would be a relatively straightforward matter. The insurance for 2006 was £2,620. The notes to the service charge statement of accounts 2006 stated "there are 6 flats in the building ready for occupation with each flat paying 16.66% of the service charge costs incurred". These service charges predated Ms Malcolm's lease, which was dated 30 May 2007.
42. According to the documents, the insurance expenditure for 2007 was £6,363. According to the notes to the service charge statement of accounts 2007 "there are [now] 12 flats in the building ready for occupation with each flat paying 8.33% of the service charge costs incurred". The straightforward application of that percentage to the insurance costs would produce a liability for Flat 17 of £530.04. However, Mr De-Yola said that this was not how the service charges had been apportioned and charged to leaseholders. He explained that with regard to the landlord's total expenditure of £19,879.44 during that year, some £8,186.69 [i.e. 41.18%] was met by Comehomes, while the remaining £11,692.75 [i.e. 58.89%] was met by the 12 leaseholders. Mr De-Yola said that each of the leaseholders paid 8.33% of the £11,692.75, which the Tribunal calculated would result in a liability of £974 per flat.
43. When asked how this calculation correlated with the charge apparently raised in 2007 against Flat 17 in the sum of £829.60, Mr De-Yola explained that Ms Malcolm had paid an obligatory £400 contribution towards the service charge upon completion of

her purchase [in about May 2007] and, thereafter, had been charged two quarters' interim on-account service charge demands of £214.18 each.

44. When the Tribunal pointed out that a contribution of £829.60 for Flat 17 represented 4.13% of the total landlord's expenditure of £19,879.44, Ms Smith said that that was not how the service charge for Flat 17 had been calculated. It had, in fact she said, been calculated by charging Flat 17 an amount equivalent to £1.33 per square foot of the property per year. When asked, neither Mr De-Yola nor Ms Smith knew the square footage of Flat 17, but Ms Smith said that in 2008 and 2009 the calculation had resulted in a total interim on-account charge of £859.18, from which the Tribunal was able to calculate that the square footage of Flat 17 must have been 646 ft² (£1.33 x 646 = £859.18).
45. The Tribunal was still confused as to how much of the total insurance expenditure had been allocated to Flat 17. The Tribunal asked Mr De-Yola and Ms Smith to point out the invoice which related to the insurance for 2007, to be told that no invoices for any service charge expenditure had been copied for the Tribunal's use, only copies of invoice demands and reminders. Ms Smith had a bundle of original invoices which she could show the Tribunal if they were necessary; however, she did not actually have a copy of the insurance invoice for 2007. At this point Mr De-Yola said that he would be able to produce a copy of the invoice if the Tribunal were to agree to an adjournment of the hearing.

Alleged non-service of the service charge demands

46. Mr Conteh said that Ms Malcolm was unaware of how much she owed by way of service charges and how any figures were calculated. He said that Ms Malcolm had seen no invoices to support any service charge demands. She had also received none of the invoice demands and reminders, which appeared to have been sent on an almost weekly basis to her at Flat 17. He said that there were no letterboxes for the leaseholders, so there was no way for the letters to be delivered.
47. In response, Mr De-Yola said that there had been letterboxes in the main entrance of the tower block, but that had been closed "on and off" it seemed for about 50% or more of the time since construction, due to vandalism. Mr De-Yola stated that the main entrance was currently boarded up, and when asked he could point to no current physical means for post to be delivered to Flat 17 on the second floor. However, Mr De-Yola said that none of the other leaseholders had had such problems; without producing any evidence, he said that the other leaseholders had

paid their service charges and, therefore, must have received their service charge demands.

48. The non-receipt of demands and chasing letters was confirmed by Ms Malcolm in her witness statement. Mr Conteh relied on "Exhibit B" which was a letter apparently from "SJ Newman solicitors" dated "April 2009" addressed to Mr Conteh (not Ms Malcolm!) at 17 Gate Quays. That was a letter before action which, in the ordinary course of events, the Tribunal would have expected to be addressed to the leaseholder herself. Mr Conteh also pointed to a letter from Comehomes stated 12th February 2009, also addressed to him, enclosing a large number of ground rent and service charge demands covering the previous two years, but all of them dated 12 February 2009 (presumably the date on which they were printed by Comehomes). Mr Conteh said that he had only received the letters from SJ Newman and Comehomes after he had filed a Defence on behalf of Ms Malcolm on 27 May 2009, when these copies that he now produced had been sent to him in May/ June 2009 at his work address in Camberwell, London SE5.
49. There then followed a discussion as to whether or not Mr Conteh was the "manager" of Flat 17, which he denied, and how it was if Ms Malcolm had not received any of the letters and demands as she said, nonetheless the letter from the court enclosing the Claim Form and Particulars of Claim, also sent to Flat 17, had come into her possession (via her subtenant Mr Paul Duhig, who was not present at the hearing to explain).

Application for an adjournment

50. There was significant confusion and a real lack of progress in determining the issues, due to the very poor preparation and presentation of their respective cases by the parties. The amounts in dispute involved ground rent of £350 (which is outside the Tribunal's jurisdiction), service charges of £1,714.06 (or £1,714.40 according to paragraph 10 of the Applicant's Statement of Case) and a staggering £1,750 in respect of administration charges chasing such payments. Towards the end of the hearing both parties were seeking an adjournment, but the Tribunal had no confidence at all that the parties could clarify the confusion at any future hearing. At 3:15 p.m. the Tribunal broke off to discuss the application for an adjournment.

The Tribunal's decision in relation to the application for an adjournment

51. The Tribunal declined to adjourn the hearing. It considered that to do so would be disproportionate in terms of time and expense given the sums of money involved.

The Tribunal indicated that it would make a decision on the evidence before it. The Tribunal remained deeply unhappy that both parties had failed to comply with two sets of directions.

52. The parties were invited to summarise their cases to the Tribunal. Mr De-Yola relied on clause 1.10 of the lease as permitting the freeholder to share liability for the service charge expenditure in accordance with the number of flats occupied. He did not accept that the cost of those service charges, in particular the costs of insurance, should be shared on an equal basis between all of the flats in Gate Quays (whether let on long leases or retained by the landlord) and the commercial units.
53. He argued that Comehomes had "only demanded what was fair and reasonable". The demands were on the basis of £1.33 per square foot. Ms Malcolm had been aware of the service charge arrangements when she had purchased. The 24 empty flats had not been completed because of the downturn in the property market so that their sale made this not viable. As unoccupied flats and empty commercial units still in the possession of Comehomes should not have to share in the costs relating to Gate Quays in a proportionate way.
54. Mr Conteh said that Ms Malcolm would pay "fair and reasonable" service charges but it appeared that the service charges were fixed each year without regard to the actual expenditure, contrary to the provisions of the lease. There was no proof that any of the demands or chasing letters had been sent by Comehomes but, in any event, there were no letterboxes accessible to enable such letters to be received by her.

The Tribunal's decision on the matter referred to it by the County Court

55. Of the £4,414.06 principal sum claimed in the County Court under case no. 9WD02198, some £350 is in respect of ground rent over which the Tribunal has no jurisdiction. The most the Tribunal can do is to confirm that the lease provides for annual ground rent of £175 and that on 27 January 2010 Ms Malcolm admitted that she had not paid two years' ground rent, i.e. £350.
56. Of the £4,064.06 balance claimed by Comehomes (£4,414.06 - £350), the Tribunal determines that the sum of £642.54 is reasonable and payable now by Ms Malcolm, in respect of the advance on-account service charges (on the assumption that £400 in advance service charges was paid by Ms Malcolm at the time of completion of her purchase), but the £1,750 administration charges are disallowed in full, as is the £600 incurred in respect of the "fixed fee" costs of SJ Newman solicitors.

57. The Tribunal has no jurisdiction over the county court costs and fees.

The reasons for the Tribunal's decision

58. In reaching its decision, the Tribunal feels it important to emphasise that the service charges under consideration are only interim advance on-account service charges. They are not final, end of year actual expenditure figures.

Advance service charges

59. The Tribunal accepts Mr De-Yola's evidence that Ms Malcolm agreed to pay £400 on account of the service charges at the time that she purchased her flat. Thereafter, the landlord was entitled to demand quarterly on-account service charge payments in accordance with clause 5.1 of the lease. According to clause 5.1 the amount to be charged is that considered "fair and reasonable" and according to the statement of service charges for Flat 17 the amount was £214.18 per quarter. Whether it was reasonable or not to link this quarterly payment to an annual charge of £1.33 per square foot of flat is unknown, because there was no evidence to support this contention.
60. However, as this was a very early stage of the lease, at a time when leases were being granted to other flats in the building, the Tribunal will not disturb the on-account figure with hindsight as to the actual landlord's expenditure for 2007. Furthermore, the Tribunal will allow not only the interim charges for July-September and October-December 2007, but also that for January-March 2008, in the first quarter of the new service charge year, before the actual 2007 expenditure figures could have been known accurately, and the Certificate of final expenditure could be prepared and served on Ms Malcolm.
61. In summary, therefore, the Tribunal allows the following advance interim on-account service charges: namely £400 plus three quarterly sums of £214.18, i.e. a total of £1042.54. It is however, understood by the Tribunal that Ms Malcolm paid £400 towards these advance service charges at the time of completion of her purchase and, therefore, only the balance of £642.54 is now payable.
62. However, all interim on-account charges after the January-March 2008 quarter are disallowed. They are not considered to be reasonable or payable by the Tribunal because Comehomes has not complied with the express requirements of clause 6.8

of the lease, namely:

"as soon as practicable after the end of each financial year ... to furnish the Tenant with an account of the Service Charge payable for that year ... (in the form of) ... a certificate of the annual expenditure ("the Certificate") signed by the Landlord or the managing agents ... [containing] ... a fair summary of the Landlord's expenditure and outgoings as incurred in the financial year... [and] ... a copy of the Certificate of each such financial year shall be issued to the Tenant ..."

[emphasis added by the Tribunal]

63. The terms of clause 6.8 are mandatory. At the end of each financial year the landlord is to produce a certificate of expenditure and is to carry out a balancing exercise between the amounts received from the leaseholder (if any) and the amount determined to be payable in respect of the actual expenditure incurred. That procedure is required to be carried out, regardless of whether or not the leaseholder has paid any of the advance on-account demands during the financial year.
64. There are less than a dozen heads of service charge expenditure (and many of these record a nil expenditure in each year), so it should have been an extremely simple matter to prepare a certificate showing (a) the landlord's total expenditure and (b) the proportion of that actual expenditure which it was the liability of Ms Malcolm in Flat 17 to pay.
65. There was no excuse at all not to produce the Certificate by the second quarter of each financial year. After that, it should have been clear whether the previous year's advance on-account demands had been pitched at the right level or whether, as the Tribunal suspects, they were far too high. Certainly, one would have expected an adjustment to have been made with regard to the quarterly on-account demands to reflect the actual expenditure, or possibly budgeted future expenditure (though no budgets were produced to the Tribunal).
66. In the Tribunal's view, Ms Malcolm was perfectly entitled to withhold payment of her advance service charges, unless and until Comehomes had complied with its obligation in the lease to provide an end of year certificate relating to actual expenditure incurred, and linking this to the percentage payable by Ms Malcolm's flat. It is not acceptable for Comehomes to fail to produce this document, but to continue charging an interim sum, unrelated to any past expenditure or future budgeted figures.
67. It is extremely important for any lessee to know what the actual expenditure is, for a reasonable budget to be made for the following financial year and for a leaseholder to understand that the interim charge is demonstrably fair and reasonable with regard to

likely future expenditure. There was no evidence provided in relation to the alleged £1.33 per square foot of flat. The Tribunal was also unconvinced that the landlord's apportionment of the actual service charge expenditure was "fair and reasonable" given that this Malcolm's flat was only one of 36 flats in the building, and no allowance appeared to have been made for the commercial units.

68. A "fair and reasonable" apportionment of the service charges would have taken into account, certainly in relation to insurance but possibly also in relation to other items of expenditure, that these expenses had to be shared equitably between those flats which had been let on long leases and those which had been retained by the freeholder.
69. No evidence was provided in support of any of the varying costs for electricity, window cleaning, security, estate repairs and managing agents' fees. The Tribunal is therefore not equipped to say what those services involved, whether the costs were reasonably incurred or whether any of the work or any of the services were carried out to a reasonable standard.
70. The Tribunal found it very odd that the demands destined for Ms Malcolm were in fact sent to Mr Conteh. There was no adequate evidence as to why this should have been so. The demands were not properly dated and it appears that Mr Conteh only received them after the filing of the Defence in the county court proceedings.

Administration charges - chasing letters

71. The Tribunal was astonished at the number of chasing letters apparently sent to Ms Malcolm at a Flat 17 almost on a weekly basis. There was no evidence (such as proofs of posting) that the letters had been sent but, more importantly, the Tribunal was doubtful that any of them could have been received properly by Ms Malcolm given the lack of letterboxes at the property.
72. The letters themselves were routine, computer-generated letters. They were far too many of them to be reasonable. One or two letters were justifiable in the face of non-payment by Ms Malcolm, but in the Tribunal's view the cost of those could and should have been met through the normal managing agent's charges. There was no justification for sending 10 letters per quarter and the cost charged of £25 per letter is exorbitant. Assuming for the moment that the letters were indeed posted to Ms Malcolm, any reasonable managing agent must have realised very early on that an alternative method of trying to contact her was necessary, if none of such letters was producing the required result.

73. Overall, the Tribunal determined that the chasing letters were wholly unreasonable and their entire cost (which in each quarter exceeded the interim service charge demand) was unreasonable and to be disallowed.

Administration charges - "fixed fee" for proceedings

74. Given that the landlord had not complied with its obligations under clause 6.8 of the lease to produce an annual end of year certificate of actual service charges incurred, the Tribunal considers that the issue of court proceedings in this case, based purely on advance on-account charges, was premature and unjustified.
75. The nature of the £600 "fixed fee" was not fully understood by the Tribunal. It was said to be a fee for issuing of proceedings on behalf of Comehomes charged by Steven Newman (apparently a solicitor practising under the name SJ Newman, solicitors, though again there was no proof of this). However, in Mr Newman's witness statement dated 21 January 2010, the basis of his charge was unclear and contradictory. Mr Newman stated first, in paragraph 1, that he was an employee of a management company; then in paragraph 2 he states that as a solicitor he agreed a fixed fee with that management company; however, in paragraph 3 he states that the fixed fee was agreed with the claimant, i.e. with Comehomes.
76. Whatever Comehomes may have agreed with its managing agent and/or their employee Mr Newman with regard to the fees for issuing proceedings, the Tribunal determines that it is not reasonable for these to be paid by Malcolm.

The future

77. The Tribunal's decision relates to advance service charges, which largely speaking were found to be unreasonable and not payable for the reasons given above, and administration charges to June 2009. The Tribunal is not saying that actual service charges for the period 2007 to 2009 are not payable by Ms Malcolm. It is only saying that the advance service charges levied are unreasonable.
78. For the future, Comehomes can comply with clause 6.8 of the lease and issue an end of year signed certificate to Ms Malcolm. However, there must be a link between the summary of the landlord's actual expenditure for each service charge year, and the proportion which Ms Malcolm is to pay. That proportion must comply with clause 1.10 of the lease, i.e.

"such percentage as the Landlord shall reasonably and properly determine as being appropriate and fair proportion in respect of the Demised Premises ... of the

expenditure incurred by the Landlord or its managing agents in the performance of its obligations in this lease."

79. That means that Comehomes has to determine the financial expenditure in each year and then apply "an appropriate and fair" percentage to that figure to determine Ms Malcolm's liability.
80. If the Comehomes does this, then, subject to any issues as to timing and delay which may affect payability, Ms Malcolm will be in a position to know (a) what the actual expenditure of the landlord is in any given year and (b) what percentage of that expenditure she has to pay.
81. Ms Malcolm will then be in a position to assess whether to pay such service charges as reasonable, or to challenge them for any reason and to challenge the percentage applied, if for any reason she does not consider it to be "reasonably and properly" determined or "an appropriate and fair proportion".
82. Currently, Comehomes is seeking to recover £859.18 per annum from Flat 17 as against total expenditure of between £18,021.62 and £19,879.44 in the last three years. This equates to between 4.17% and 4.77% of the landlord's total expenditure. These percentages appear to be very high given that there are a total of 36 flats and three commercial units, which should share much of these costs.
83. Given that Ms Malcolm has expressed herself willing to pay a reasonable sum towards the service charges, the Tribunal hopes that contact between the parties will now result in an agreed settlement and payment by Ms Malcolm.
84. As for the outstanding ground rent, the decision by Ms Malcolm whether to pay these or not must be between her and her legal advisers. The Tribunal would only comment that there are serious risks involved where any leaseholder fails to pay their ground rent.

Refund of fees and section 20C application

85. Despite a request Comehomes had not paid the £150 Tribunal hearing fee. The Tribunal indicated that the decision would not be issued until that fee had been paid. Ms Smith agreed to make the necessary arrangements when she returned to the office.
86. Both parties made submissions on Ms Malcolm's application for an order under section 20C of the Landlord and Tenant Act 1985, by which the Tribunal may order that the landlord's costs of the Tribunal proceedings are not to be passed through the

service charge. Mr De-Yola said that Ms Malcolm could have settled her ground rent and service charges but, by failing to do so, had forced Comehomes to issue proceedings. Mr Conteh said that Ms Malcolm did not know of any claim until the issue of proceedings. Mr De-Yola complained that even after the issue proceedings he had received no contact from either Ms Malcolm or Mr Conteh.

87. Having considered the parties' representations and in the light of the decisions reached above, the Tribunal does not order Ms Malcolm to refund any part of the Tribunal fee to Comehomes. Furthermore, given that the Tribunal determines that the proceedings were premature and unjustified, and given the totally unsatisfactory nature of the evidence presented, the Tribunal determines that it is just and equitable to make an order under section 20C of the Act, namely that none of the landlord's costs of the proceedings should be passed through to leaseholders as part of the service charge.

Costs and fees in the County Court

88. The Tribunal has no jurisdiction over County Court costs and fees.
89. This matter should now be returned to the Lambeth County Court.

Chairman:



Timothy Powell

Date:

12 February 2010