

146



Residential  
Property  
TRIBUNAL SERVICE

**DECISION OF THE LEASEHOLD VALUATION TRIBUNAL**

**COMMONHOLD & LEASEHOLD REFORM ACT 2002 – SCHEDULE 11**

Ref: LON/00AH/LAC/2010/0009

**Property:** 13 Hyrstdene, South Croydon, CR2 6JW

**Applicant-Lessee:** Mrs C Botting

**Respondent-Society:** The Hyrstdene Residents Society Ltd

**Date of decision:** 21<sup>st</sup> June 2010

**Tribunal:** Mrs H C Bowers (Chairman),  
Mrs J Clark JP

**Introduction**

- 1) An application was received by the Tribunal seeking a determination under Schedule 11 of the Commonhold and Leasehold Reform Act 2002 (the Act)
  
- 2) A paper pre trial review was held and Directions were issued on 6<sup>th</sup> May 2010. It was directed that this matter could be allocated to the Paper Track, unless either party requested a hearing. There was no request for a

hearing and therefore this matter was considered on the basis of the papers submitted to the Tribunal.

### **Background**

3) The Applicant holds a leasehold interest (as Lessee) in 13 Hyrstdene, under a lease dated 8<sup>th</sup> December 1966. The original parties to the lease were The Hyrstdene Residents Society Limited ("the Society") and David Coulter Roberts ("the Lessee"). The lease was for a term of 999 years from 29<sup>th</sup> September 1964

4) Under the terms of the lease, the Applicant covenants to pay:  
*"by way of service charge during each year of the term hereby granted a sum equal to the subscription payable to the Society under the provisions of Clause 4(b) hereof such service charge to be payable in advance on the Twenty fifth day of December in every year without any deduction whatsoever PROVIDED THAT if the Lessee shall have paid to the Society the yearly subscription payable for such year under the provisions of Clause 4(b) hereof then the amount of the service charge payable hereunder shall be a peppercorn if demanded"*.

5) Clause 4(a) of the lease sets out the service charge responsibilities of the Society, namely: indemnify the Lessor against all property taxes and rates; to insure and if the building or any part of the building is destroyed or damaged, then to rebuild and to reinstate; to keep the roadways, drives, footpaths, open spaces and amenity land in a good and proper state of repair and condition; to maintain any street lighting system on the estate and discharge any related expense. Finally, Clause 4(a)(vi) states that the Society is *"To perform and provide such other services and amenities in connection with the Estate as the Society shall in general meeting decide"*.

6) Clause 4(b) of the lease states:  
*"(i) The Lessee HEREBY COVENANTS with the Society and (as a separate covenant) with the Lessor that during the subsistence of the said term the Lessee will pay to the Society an annual subscription of FIFTEEN*

*Pounds or such other subscription as may from time to time be payable to the Society under the Society's Articles of Association*

*(ii) If at any time or times during the subsistence of the said term the Society shall expend or shall require to expend any sum or sums of money in excess of the available resources of the Society the Lessee shall forthwith pay to the Society on demand one eighteenth part of the same And the Certificate of the Accountant for the time being of the Society as to the amount of such excess shall be conclusive and binding on the Society and the Lessee”.*

7) It was explained in the Application that the Society had implemented “incentives” for the early payment of subscriptions (service charge payments). The incentives were based on the early payment of service charges on three separate dates and amounted to a total sum of £45 per annum. These incentives had been in place since 2000. It was submitted in the Application that these sums equated to a penalty charge for those lessees unable to make the early payments.

### **The Law**

8) Schedule 11 of the Act defines the meaning of “administration charge” as:

*“1 (1) In this Part of this Schedule “administration charge” means an amount payable by a tenant of a dwelling as part or in addition to the rent which is payable, directly or indirectly –*

*(a) for or in connection with the grant of approvals under his lease, or applications for such approvals,*

*(b) for or in connection with the provision of information or documents by or on behalf of the landlord or a person who is party to his lease otherwise than as landlord or tenant,*

*(c) in respect of a failure by the tenant to make payment by the due date to the landlord or a person who is party to his lease otherwise than as landlord, or*

*(d) in connection with a breach (or alleged breach) of a covenant or condition in his lease. ....”*



9) For the sake of completeness the provisions relating to service charges from the Landlord and Tenant Act 1985 are set out below:

“Section 18

- (1) *In the following provisions of this Act “service charge” means an amount payable by a tenant of a dwelling as part of or in addition to the rent-*
  - (a) *which is payable directly or indirectly for services, repairs, maintenance, improvement or insurance or the landlord’s costs of management, and*
  - (b) *the whole or part of which varies or may vary according to the relevant costs*
- (2) *The relevant costs are the costs or estimated costs incurred or to be incurred by or on behalf of the landlord or a superior landlord in connection with the matters for which the service charge is payable.*
- (3) *for this purpose*
  - (a) *costs includes overheads and*
  - (b) *costs are relevant costs in relation to a service charge whether they are incurred or to be incurred in the period for which the service charge is payable or in an earlier period”*

“Section 19

- (1) *Relevant costs shall be taken into account in determining the amount of a service charge payable for a period-*
  - (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; and the amount payable shall be limited accordingly.*
- (2) *Where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable, and after the relevant costs have been incurred any necessary adjustment shall be made by repayment, reduction or subsequent charges or otherwise.”*

12) It was suggested that if all eighteen properties within the development were to take advantage of the incentive scheme that would equate to a total sum of £810. With the incentive scheme in place there would be a budgetary deficit. It is submitted that in the 2007, 2008 and 2009 accounts, the discount/administration charges are not accounted for. Other questions are raised in respect of the Society's statements and in particular, Mr Botting wonders whether the residents may require the Society to obtain an audit.

13) It was further argued that the service charge provisions in the lease should only cover the disbursements of the Society and not the incentive scheme proposed. There are no provisions in the lease that allow for discounts/administration charges to be recovered by the Society and that it is the lease that sets out the legal relationship between the parties. There are no provisions in the lease for the recovery of the service charge on three separate dates.

14) Mr Botting stated that the decision at the AGM in 2000 to use incentives to ensure early payment of the service charge contributions was beyond the authority of the Society.

15) Copies of invoices that were sent to the Applicant were included in the papers. As the Applicant had paid one of the invoices after an arbitrary date set by the Society, then the Applicant was required to pay the £15 discount/administration charge.

16) It is submitted that attempts have been made to resolve this issue, but there has been no satisfactory response from the Society. If Mrs Botting is successful then there is an application that the Society should reimburse Mr Botting the application fees.

### **Respondent's Representations**

17) In the written representations from the Society an explanation was provided as to the nature of the private estate and the membership of the Society. It was stated that the main duties of the Society are to maintain the

communal areas and as one of those duties was the renewal of tarmac areas for the driveways and parking areas, then the Society was trying to accumulate a financial reserve.

18) It was stated that the service charge year runs from 1<sup>st</sup> October and that is also the due date for the charge for the whole year. In order to encourage timely payment then the charge is split into three equal parts and a reduction of £15 per instalment is made if the payment is made early or on time.

19) It was explained that the £15 discount is seen as an incentive rather than an administration or penalty charge. Mention is made of a number of utility companies that provide incentive schemes for early payment and suggests that the current arrangement is of assistance to the Society's Treasurer.

20) The incentive scheme was first proposed and agreed to on an unanimous basis at the 1997 AGM. It was noted that Mrs Botting did not attend the meeting, nor was she represented. The discount has increased over the years and Mrs Botting has had some benefit from the scheme and that there has been no objection to the scheme until this time. Many of the members of the Society, who have benefitted from the instalment and incentive scheme, would be upset by its removal.

21) The Directors of the Society are part of the community and have endeavoured to act with the best interests of all, in mind. They note that the "*commercial type of landlord /tenant relationship does not operate here*".

22) Attached to the Respondent's submissions is a copy of correspondence from residents in the development, applauding the hard work of the Society.

## **Decision**

23) This Application was made under the provisions of Schedule 11 of the Commonhold and Leasehold Reform Act 2002, as to the reasonableness of administration charges. The definition of administration charges is set out in paragraph 1(1) of Schedule 11 and that is quoted above.

24) It is the opinion of the Tribunal that the "incentive" scheme which is the subject of this Application does not fall within the definitions of paragraph 1(1) of Schedule 11. Under the scheme there are no sums that are payable by the tenant. Consequently, it is the decision of the Tribunal that "incentives" are not an administration charge within the definition of Schedule 11. Accordingly, the Tribunal determine that this Application is dismissed.

25) However, the Tribunal considers that it would be of assistance to both parties if it was to comment on the scenario before them. This matter would appear to be an issue in respect of service charges and as such comes within the provisions of sections 18 to 30 of the Landlord and Tenant Act 1985. The main provisions that apply to this case are set out above.

26) In the first instance, in order to consider whether a service charge is reasonable, it is necessary to examine the provisions of the lease. The lease is the contractual agreement between the parties and this document should set out the obligations and rights of both parties.

27) In examining the headings of cost that could be recovered from the service charge provision, namely clause 4(a), there are no provisions for the use of the service charge funding for any payment incentive scheme. The Tribunal agrees with the proposition of the Applicant, that the scheme would appear to be funded by the service charge provisions and contributions. As there is no provision for this charge and if we had an Application under section 27A of the Landlord and Tenant Act 1985, then we would conclude that the charges to the service charge account are unreasonable and as such the Society should ensure that the service charge account is fully credited with the sums that have been distributed as discount payments.



28) We have no doubt that the Society has acted in the best interest of the residents of the development and that the scheme operated by the Society would appear to have some benefits to lessees, in the sense of timing and discount of payments. However, as mentioned above it is the contractual obligations which should be adhered to in the administration of the services to be provided to the lessees.

29) Mr Botting enquired of the Tribunal as to whether the lessees would be able to require the Society to obtain an audit of the accounts. Whilst it is not for the Tribunal to advise the parties, it once again guides the parties to the provisions of the lease. As there are no requirements in the lease for an audit of the accounts, nor the provision for the recovery of the costs of such an audit, then it appears that the lessees have no right to require an audit.

30) An application fee of £50 was incurred by the Applicant in bringing this Application. Mr Botting has sought for this sum to be recovered from the Respondent. However, it is the opinion of the Tribunal that as the Application was made under the wrong provisions that it would be inappropriate for the Respondent to be responsible for these fees and as such makes no order for the Respondent to reimburse these fees.

Chairman  
Helen Bowers

8<sup>th</sup> July 2010