RESIDENTIAL PROPERTY TRIBUNAL SERVICE
SOUTHERN RENT ASSESSMENT PANEL
LEASEHOLD VALUATION TRIBUNAL

Residential Property
TRIBUNAL SERVICE

S.27A Landlord & Tenant Act 1985 (as amended) ("the Act")

DECISION of the Leasehold Valuation Tribunal & ORDER

Case Number:	CHI/21UH/LSC/2006/0026
Property:	Millington Court Mill Lane Uckfield East Sussex TN22 5AZ
Applicant:	Anchor Trust (the Landlord)
Respondent:	Mr Dudley Joiner and others (the Lessees)
Date of Hearing:	15th August 2006
Venue:	The Town Hall, 40 Boltro Road, Haywards Heath
Appearances:	
For the Applicant:	Mr Joshua Winfield, Counsel for the Applicant
For the Respondent:	Mr Joiner for the Respondent
Tribunal Members:	Mr R T A Wilson LLB (Lawyer Chairman) Mr J Tarling MCMI (Lawyer Member) Lady Davies FRICS (Valuer Member)
Date of Decision:	5th September 2006

The Application

1. This is an Application under Section 27A of the Landlord and Tenant Act 1985 to determine what service charges should be paid in respect of the costs of making available accommodation for a warden at the Property. The Applicant / Freeholder is Anchor Trust, a registered charity and the Respondents are Mr. Dudley Joiner and others for the Residents Association. The Application is in respect of the years 2005 to 2011.

Decision in Summary

2 The standard lease for the Property does not entitle the Freeholder to recover as service charge rent foregone on the wardens flat reserved for warden use at the Property.

Inspection

3 The Tribunal carried out an external inspection of the Property on the day of the hearing in the presence of the Respondent. The Tribunal did not inspect the entire Property internally but was told that it comprised of a self contained complex of some 46 flats. In addition there were garages and gardens together with a communal lounge and laundry room and all was considered by the Tribunal to be in reasonable order. The complex, situated in the town of Uckfield, had been built circa 1987. The Tribunal inspected the interior of the warden's flat situated on the ground floor, which provided compact accommodation of a lounge, kitchen, bathroom and two bedrooms. The flat was heated by means of electric heaters. The kitchen and bathroom were well fitted and the flat was carpeted throughout. At the time of the inspection it appeared unoccupied.

The Hearing

4 At the hearing the Applicants' were represented by Joshua Winfield of Counsel. Mr. Joiner represented himself and the other leaseholders with the support of Mike Humphries and Rod Ellis.

5 In accordance with the Directions given by the Tribunal, both parties had prepared a written statement of case to include a detailed skeleton argument. These set out in a very helpful way their main arguments.

6 Both parties confirmed that it was their wish that the Tribunal have jurisdiction to hear the matters in dispute and to make a determination binding on them.

The Case for the Applicants

7 Mr. Winfield went through the Applicants written submissions and amplified the contentions made in those submissions. The principle points that he made were as follows: -

i) The Applicants' were entitled to recover a sum representing the notional rent for the warden's flat from the Respondents as part of their obligation under their leases to pay the service charge as defined in clause 2 of the lease. The scope of the service charge is set out in clause 3.1 of the lease namely, "*a contribution towards the costs and expenses of running the property and the maintenance thereof and the other matters more particularly specified in the first schedule*". The relevant part of the first schedule is paragraph (2)(a) which provides that, "*service charge shall (inter alia) make provision for the following expenditure in respect of the property:-*

a) the cost of the warden's salary and emoluments, provisions and accommodation for the warden of the property and all other costs in connection with the provisions of the warden, service laundry and guest room facilities"

Mr. Winfield contended that the above provisions were wide enough to enable the freeholders to charge to the service charge a notional rent based on the market rent as compensation for the inability to rent out the flat reserved at the property for warden use.

ii) The relevant considerations that the Tribunal should take into account in deciding the issues were set out by HH Michael Rich QC in the case of the *Earl of Cadogan v 27/29 Sloane Gardens Limited unreported, 30 March 2006*. This case held that: -

a) It is for the landlord to show that a reasonable tenant would perceive that the underlease obliged it to make the payment sought

b) Such a conclusion must emerge clearly and plainly from the words used.

c) If the words used could reasonably be read as providing for some other circumstance, the landlord will fail to discharge the onus upon it.

d) This would not permit the rejection of the natural meaning of the words in their context on the basis of some fanciful meaning or purpose, and the context may justify a liberal meaning.

e) If consideration of the clause gives rise to an ambiguity, the ambiguity will be resolved against the landlord as proferror.

iii) Mr. Winfield contended that each of the five points had been met in this case, and taking each in turn these are as follows: -

a) The test was an objective one and the reasonable tenant must be taken to know the relevant background information, which would include the knowledge that the Applicant was required to use the warden's flat for the purpose of housing a warden. Schedule 1 paragraph (2)(a) of the lease expressly included the cost of accommodation for the warden within the categories of expenditure in respect of the property in respect of which the service charge shall make provision. The obvious interpretation of the cost of accommodation was rental / licence fees. Hence a reasonable tenant would be aware of the restriction on the use of the warden's flat and he would conclude that such rental cost would not be the actual rent on accommodation owned by another party but a notional rent. Therefore the reasonable tenant must perceive that the cost of accommodation referred to the notional rental costs of the warden's flat.

b) The above conclusion emerged clearly and plainly from the words used.

c) The words could not reasonably be read as providing for some other circumstance.

d) This interpretation did not involve the rejection of the natural meaning of the words in their context on the basis of some other fanciful meaning.

e) In the circumstances there was no ambiguity as to the meaning of any of the relevant charging provision in the lease and for these reasons there was no necessity to apply the contra profferentum rule in this case.

iv) Mr. Winfield referred the Tribunal to the case of *"Agavil Investments Limited v Corner and others unreported 3rd October 1975"*. This case, which was still good law, supported his contention that notional rent could fall within costs or expenses incurred by them in carrying out their obligations. Mr. Winfield also referred to the case of *"Gilge and others v Charlgrove Securities Limited 2001"* which distinguished Agavil on the grounds that the relevant words in the executive provision in the Gilge case were monies "expended" as opposed to "costs, expenses, outgoings and matters" as contained in the Agavil

lease. Gilge did not allow notional rent as service charge. Mr Winfield submitted that the position in this case was closer to Agavil in that the words in the executive provision were "costs and expenses of running the property and the maintenance thereof and the other matters more particularly specified in the first schedule." The wording in Schedule 1 paragraph (2)(a) namely "*the service charge inter alia shall make provision for the following expenditure*" was more consistent with the Agavil wording than the Gilge wording. Therefore the Tribunal should follow the Agavil case and allow notional rent as service charge.

v) Mr. Winfield then addressed the Tribunal on the level of notional rent. It was his contention that the notional rent should be a reasonable sum by reference to a market rent for a periodic tenancy subject to the same covenants as the lease and he outlined his reasons for so considering. Mr. Winfield referred to the valuation obtained by his client, which suggested that a market rent on this basis should be £425 per calendar month. It was this sum that his clients sought to recover by way of service charge.

The Case for the Respondents

8 Mr. Joiner in turn went through the Respondents' written submissions and he too amplified the contentions made in those written submissions. The principle points that he made were as follows: -

i) In determining whether or not it was a contractual liability to include rent for the warden's flat as part of the service charge, one must look at the lease as a whole and ask whether this was the clear intention of the parties at the time, whether a reasonable tenant would perceive that the lease carries this obligation, whether it emerged plainly and clearly from the words used taking into account the context and common assumptions, and whether it is reasonable. Applying this test Mr Joiner submitted that there was no ground for including a notional rent in the service charge. A rent for the warden's flat could not reasonably be construed as a part of running and maintaining the property. Accordingly if it was intended to include the rent for the warden's flat it could only come under the words, "*other matters more particularly specified in the first schedule*". Paragraph (2)(a) of the first schedule says that the service charge shall make provision for, "*the following expenditure*" and lists the expenditure. In the context of paragraph 2, all items of cost must be expenditure. In his opinion notional rent did not amount to "expenditure" as nothing has been expended. In short the charging provisions

in the lease were not sufficiently widely drawn as to allow a notional rent to be charged as service charge.

ii) Mr. Joiner accepted that the five point approach set out in the *Cadogan* case was the right approach for the Tribunal to use in this case. He submitted that a reasonable tenant would not have perceived that the lease obliged him to make the payment of a notional rent for the warden's flat. Secondly he maintained that the lease contained no clear, plain, unambiguous words stating that rent was payable for the flat and therefore the conclusion that a notional rent was payable did not emerge clearly and plainly from the words used. Thirdly he contended that the words used could reasonably be read as providing for some other circumstance, namely the ongoing cost of maintaining and the upkeep of the warden's accommodation. In Mr. Joiner's opinion the natural meaning of paragraph (2)(a) of the first schedule in the context of the lease was to make the leaseholder responsible for all actual ongoing costs in connection with the provision of the warden service, not notional, theoretical or fanciful costs. Finally the *Cadogan* approach stated that if consideration of the clause left ambiguity then the ambiguity should be resolved against the landlord as profferor. Mr. Joiner maintained that there was potential for ambiguity in paragraph (2)(a), for instance it wasn't clear whether the cost of accommodation could include a notional cost i.e. something given up or a more restrictive interpretation covering only the price of something paid out. As there was an ambiguity, it followed that the paragraph should be resolved against the landlord.

iii) Mr. Joiner also considered the circumstances prevailing in the other cases. In Agavil he maintained the properties were not sheltered, the caretaker could have been housed elsewhere and the landlord gave up a flat for this purpose. It was therefore not the same as this case. In *Cadogan* v 44/46 *Lower Sloane Street Management Company Limited and Henry McHale,* the leases expressly provided for "the cost of employing a house keeper (including loss of rack rent thereon, to be recovered via the service charge"). In *Cadogan v Sloane Gardens,* the service charge expressly included "the cost of providing accommodation including an annual sum equivalent to the market rent of any accommodation provided". In contrast the property here was purpose built retirement housing, and there was a planning agreement restricting the flat to warden use and the landlord had already been compensated by virtue of planning gain. The Landlord in this case did not give up rental income from the flat and therefore the above cases could not fairly be compared with Millington Court and indeed could be distinguished because of the different facts.

iv) With regard to the level of notional rent, Mr. Joiner submitted that the yard stick should not be a market rent as the landlord was not in a position to receive a short term market rent by virtue of restrictions contained in the planning agreement and also in the leases themselves. He referred the Tribunal to a valuation provided by Messrs Strutt & Parker which suggested that the correct approach was to start with a market rent and then to discount it to take into account the restrictions applicable. Strutt and Parkers' report concluded that an appropriate rent in this case would be £385 per calendar month. That said having regard the points made by him above he believed that no rent should be payable.

The Tribunals Deliberations

9 We have considered the various points made by the Applicants and the Respondents and have concluded as follows:-

i) We agree with the primary submission made by the Respondent as outlined in paragraph 8 i) above that a reasonable tenant reading the lease that was proffered to him would not perceive that clause 3.1 read together with the expenditure set out in the first schedule, would oblige him to contribute to the notional cost to the landlord of providing the warden's flat.

ii) Based on the approach outlined in *Earl of Cadogan v 27/29 Sloane Gardens Limited*, which we see no reason to depart from, such construction must emerge clearly and plainly from the words used and in this case it does not. The scope of the service charge is given at clause 3. It is defined as "*a contribution towards the costs and expenses of running the Property and the maintenance thereof and the other matters more particularly specified in the First Schedule.*" We consider this wording contains two separate and divisible charging provisions. The first being the *costs and expenses of running the property* and the second *the expenditure items set out in the First Schedule*. We do not consider that notional rent comes within the words "*the costs and expenses of running the Property and the maintenance thereof*". A rent for a warden's flat cannot reasonably be construed as part of running and maintaining the Property. By definition "the Property" means the land and buildings not the estate in a general sense. Nor can notional rent be properly regarded as"expenditure" so as to fall within Schedule 1 paragraph (2) (a) of the lease as nothing has been spent. In our opinion in the context of paragraph (2), all items of cost must be actual expenditure.

iii) We consider the operative provisions of the lease covering service charge are ambiguous in so far as no direct reference is made to notional rent as being an item of recoverable expenditure. In that there exists an ambiguity, such ambiguity must be resolved against the landlord. As stated in Gilge, the landlord seeks to recover money from the tenant and there must be clear contractual provisions entitling him to do so. The lease was drafted or proffered by the landlord and it falls to be construed contra profferentum.

iv Mr. Winfield asserts that the Millington Court lease can be compared to the Agavil lease. We do not agree that the two leases are comparable; the Agavil lease was cast in different terms. The key provision in the Agavil lease was expressed thus, *"the cost, charges and expenses incurred in employing a caretaker for the buildings whether resident on the premises or otherwise"*. We find that in the Millington Court lease the words "costs and expenses" relate only to the cost and expenses of running the Property and the maintenance and upkeep thereof. We agree with Mr. Joiner that the rent for the warden's flat cannot reasonably be construed as part of running and maintaining the Property. On balance we consider the wording in the Millington Court lease is more consistent with the wording in the Gilge lease wherein it was held that the landlord was not entitled to recover the notional rent of the caretaker's flat through the service charges. Having said that, the wording in all three leases differs and therefore both the Agavil and the Gilge decisions are of limited assistance in enabling us to arrive at a conclusion.

v In determining whether or not it is a contractual liability to include rent for the warden's flat as part of the service charge, one must look at the lease as a whole and ask whether this was the clear intention of the parties at the time, whether a reasonable tenant would perceive that the lease carries this obligation, whether it emerged plainly and clearly from the words used taking into account the context and common assumptions, and whether it is reasonable. Applying this test we consider that there is no ground for including a notional rent in the service charge.

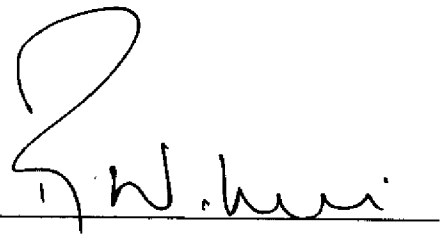
vi The evidence presented to us includes copies of service charge accounts for the early years following construction of Millington Court and these accounts do not specifically include a notional rent as part of the service charge. We believe this omission supports the contention of the Respondents' that it was not the intention of the parties at the time when the leases were granted that such costs should form part of the service charge.

vii It is established law that if a landlord wishes to recover as service charge interest charged on monies borrowed, there must be express provision in the lease allowing for this and we see no reason why the position should be any different for notional rent. Our reading of the relevant cases covering notional rent for wardens' flats leads us to the view that there must also be clear and express wording in a lease allowing notional rent to form part of the service charge. In other words the obligation must be clearly spelt out in the lease, and we find no such wording in the Millington Court lease.

viii As the Tribunal finds that a notional rent is not payable under the lease it follows that there is no necessity for the Tribunal to determine what that notional rent should be and accordingly it has made no finding in this respect.

10. Section 20C Application

At the end of the hearing Mr Joiner said he was considering making an application under Section 20C of the Landlord & Tenant Act 1985 for an order limiting the landlord' costs of the proceedings being charged through the Service Charge account. In reply to a question from the Tribunal Mr Joiner confirmed that the Service Charge was no longer under the control of the landlord, but under the control of the Right to Manage Company, of which Mr Joiner was a Director. When asked by the Tribunal if the landlord was proposing to charge any part of the costs of the proceedings through the Service Charge Account, Mr Winfield, Counsel for the landlord, helpfully confirmed that the landlords did not propose to make any such charge. Relying on that assurance, Mr Joiner did not pursue his proposed Application and the Tribunal made no such Order.

Chairman 

R.T.A.Wilson

Dated 5th September 2006