

CASE NUMBER: CHI/18UK/LIS/2006/0071

**RESIDENTIAL PROPERTY TRIBUNAL SERVICE
SOUTHERN LEASEHOLD VALUATION TRIBUNAL**

**FLAT 17
HIGH TREES
16 OAK PARK VILLAS
DAWLISH
DEVON
EX7 0DE**

**MR M H WOODHEAD FRICS
Manager and Receiver
(Applicant)**

AND

**B A GOWDY
(Respondent)**

**In The Matter Of
Section 27a Landlord And Tenant Act 1985 (As Amended)**

**And In The Matter Of
The Rent Assessment Committee (England And Wales)
Leasehold Valuation Tribunal (Services Charges Etc)
Order 1997**

**MANAGER AND RECEIVER'S APPLICATION
FOR DETERMINATION OF LIABILITY TO
PAY SERVICE CHARGES IN RESPECT OF
THE FINANCIAL YEAR 2005-06**

**DETERMINATION
MARCH 2007**

Summary Decision

1. This case arises out of the Manager and Receiver's application, made on 9th August 2006, for the determination of liability to pay service charges for the financial year 2005/06. Under section 27a of the Landlord and Tenant Act 1985 (as amended) service charges are payable only if they are reasonable. The Tribunal has determined that the charges for the year in question are reasonable.

Background

2. The applicant in this case, Martin Woodhead FRICS of Drew Pearce 14 Cathedral Close Exeter Devon EX1 1HA, was appointed manager and receiver of High Trees 16 Oak Park Villas Dawlish Devon EX7 0DE, for a period of three years from 1st March 2005, by order of the Southern Leasehold Valuation Tribunal, acting under section 24 of the Landlord and Tenant Act 1987, on 3rd February 2005.
3. On 9th August 2006 Mr Woodhead applied to the Leasehold Valuation Tribunal under section 27a of the Landlord and Tenant Act 1985 for a determination of the reasonableness of the service charges incurred in the year 2005/2006 in so far as they applied to flat 17 High Trees, the leasehold interest in which is held by the respondent, Mr B A Gowdy of Fisherman's Cottage Lower Quay Fareham Hampshire PO16 0RA.

Procedural Matters

4. Directions were issued on 10th August 2006 and, following the respondent's request that there be a pre-trial review hearing, further directions were issued on 31st August 2006.
5. A pre-trial review hearing was held on Wednesday 18th October 2006 but, in the event, the respondent was prevented from attending that hearing by sickness. The Tribunal nevertheless issued further directions on that day and directed that, in accordance with the provisions of the Leasehold Valuation Tribunals (Procedure)(England) Regulations 2003 the matter would be dealt with by written representations only and without an oral hearing.

The Lease

6. Mr Gowdy holds flat 17 under a lease dated 14th March 1988 and made between Kenneth Roy Hayden and Kathleen Vera Hayden of Oak Park Cottages Old Gatehouse Road Dawlish Devon as lessor and Kathleen Vera Hayden as (original) lessee, the benefit of which was transferred to him
7. The lease demised the property (flat 17) for a term of 999 years from the 1st day of January 1988 subject to the lessee:-

"PAYING therefore FIRST the yearly rent of twenty five pounds (£25.00) in advance on the first day of January in each year without any deduction the first of such payments being a proportionate payment from the date hereof to be made on the date hereof and SECONDLY by way of further or additional rent a sum equal to the amount specified in paragraph 22 of the Sixth Schedule hereto such last mentioned further or additional rent to be paid without deduction as hereinafter provided and in the event of non payment within seven days of the due date the Lessor may recover the same by all such processes as would be available as if such terms were rent in arrear"

subject to

"the rights set out in the Fifth Schedule hereto (which so far as not already affecting the Lessor's estate in the premises are hereby excepted and reserved from the demised) and to the covenants on the part of the Lessee hereinafter contained."

8. The Sixth Schedule contains and refers to the covenants by the Lessee with the Lessor and the management company. It provides, among other things that

"22 The Lessee shall upon demand contribute and pay and shall keep the Lessor indemnified from and against

(a) a rateable proportion of all costs charges and expenses referred in or incurred in respect of any matter or matters referred to in the Seventh Schedule hereto and in the Eighth Schedule (excluding paragraph 20 of Part II of the Eighth Schedule) hereto and until the rateable value of the premises has been assessed the lessee shall pay one twelfth of all such costs charges and expenses

(b) the proportion specified in part (f) of the Ninth Schedule hereto of the costs charges and expenses referred to or incurred in respect of the matter or matters referred to in paragraph 20 of Part II of the Eighth Schedule hereto.

23 The Lessee shall pay to the Lessor (by banker's standing order or direct debit if required by the Lessor) on account of the Lessee's obligations under paragraph 22 of this schedule an advance amounting to

(a) in respect of the period from the date hereof to the next ensuing usual quarter day such sum as equals an appropriate proportion calculated on a daily basis of the quarterly sum payable which is specified in part (g) of the Ninth Schedule hereto such amount to be paid on the execution hereof and

(b) on the said next ensuing quarter day and on each usual quarter day thereafter or at such shorter intervals as the Lessor shall determine from time to time during the remainder of the term hereby granted an amount determined and notified by the Lessor pursuant to paragraph 1 of part 1 of the Eighth Schedule hereto PROVIDED THAT if no such amount has been determined and notified as aforesaid by any said quarter or other date on which it shall be due the Lessee shall pay as aforesaid on such date an amount equal to the amount last determined and notified as due from the lessee to the Lessor for a previous quarter or other interval."

9. The Seventh Schedule contains and refers to the covenants on the part of the Lessor. It provides (amongst other things) that the Lessor shall

“keep the buildings insured in the name of the Lessor against loss or damage by fire aircraft explosion storm tempest and (so far as insurable at normal rate of premium) act or war or accident or by any other peril within the usual comprehensive policy of the insurers to the full cost of site clearance and rebuilding (as estimate by the lessor from time to time) plus 12.5% for professional fees and two years loss of rents and service charge...”

10. It goes on to provide (paragraph 5) that

“the Lessor shall exercise reasonable endeavours to keep and maintain in proper working order the central heating system in the building and shall have such system serviced regularly (but not less than once every year)”

and (paragraph 6)

“keep the reserved property and all fixtures fittings and apparatus therein and additions thereto in a good and tenantable state of repair decoration and condition including the renewal and replacement of all worn or damaged parts and shall keep the exterior parts of the windows front door and any other external door including the exterior of the entrance door of the premises properly decorated as aforesaid”

subject to the express agreement that

“the Lessor shall not in any way be held responsible for any damage caused by and neglect or failure to maintain the reserved property or in respect of any damage caused by any defects of or in relation to the reserved property by want of repair of the reserved property or in or to any services thereof unless and until notice in writing of such neglect failure want of repair or defects as aforesaid shall have been given to the Lessor by or on behalf of the Lessee and the Lessor has failed to commence to make good or remedy such neglect failure or want of repair or defects as aforesaid within a reasonable time after receipt of such notice.”

11. There is also the specific proviso (paragraph 9) that

“notwithstanding the generality of the Eighth Schedule hereto the Lessor shall manage and run the estate in accordance with all principals of good estate management and shall use their best endeavours to provide or procure the provision of any item of services for which the Lessor is liable hereunder to a reasonable standard and at reasonable cost and shall use their best endeavours to maintain the amount or amounts due from the Lessee pursuant to paragraph 22 of the Sixth Schedule hereto from time to time at the lowest reasonable figure consistent with the due performance of the Lessor's obligations under this lease and the leases of the other flats.”

12. Part 2 of the Eighth Schedule refers to the costs, expenses outgoings and other matters in respect of which the lessee is to contribute and identifies these as

“1 all expenditure incurred by the Lessor or their agents in and incidental to the observance and performance of the obligations on the part of the Lessor contained in the Seventh Schedule hereto and Part 1 of this schedule.

2 all fees charges disbursements expenses salaries wages and commissions paid to any auditor accountant surveyor valuer architect solicitor or any other agent contractor or employee whom the Lessor shall employ in connection with the carrying out of its obligations under this lease and the lease of all or any of the flats including the costs of and incidental to the preparation of the estimates notices and accounts referred to in Part 1 of the schedule.

3 all expenditure incurred by the Lessor or their agents in performing their obligations pursuant to the covenants contained in the Seventh Schedule hereto in respect of any employees of the Lessor or the provision of clothing accommodation and all outgoings and incidental expenditure incurred in connection there with or payable in respect thereof and the cost of any such other items in connection therewith as the Lessor shall from time to time determine.

4 the cost of effecting and maintaining in force the insurance referred to in the Seventh Schedule hereto and of any further insurance policy which the Lessor may effect in respect of or in connection with the premises or the reserved property or any part or parts thereof or the flats or any of them (including insurance against public and third party liability and employers liability).

5 all existing and future rates (including water rates) taxes assessments and outgoings whether parliamentary local or otherwise imposed or charged upon or payable in respect of the reserved property or any part or parts thereof and until such time as the premises are rateable assessed all such payments and outgoings as may be assessed upon and payable in respect of the estate.

6 all expenditure incurred by the Lessor in or about the repair maintenance renewal building decoration cleaning lighting carpeting and furnishing and running of the reserved property and part or parts thereof and any party walls party fences and party structures thereof and therein whether or not the Lessor was or is liable to incur the same under its covenants in this lease contained.

7 all costs of running and maintaining repairing and renewing the central heating system including all costs and charges for or in relation to the supply of fuel."

13. There is then provision for the addition of value added or other taxes, interest or other charges incurred by the Lessor in borrowing money and expenses fees and costs incurred under or in relation to section 136 of and schedule 19 to the Housing Act 1980, but there are then specific reference to

"11 all other expenditure incurred by the lessor in and about the running and management of the premises and the flats or any of them and the reserved property or any part or parts therefore including the costs of repairing and auditing accounts and printing and sending out notices rules regulations circulars reports or accounts and all fees payable to the government or any other body.

12 all fees and disbursements paid to any managing agents appointed by the Lessor in respect of the reserved property or any part or parts thereof or the premises or the flats or any of them PROVIDED THAT so long as the lessor does not employ managing agents it shall be entitled to add such reasonable sum as it thinks fit to any of the matters referred to in this schedule for management and administration."

14. There is also provision for a reserve or sinking fund, in Schedule 8 Part 2 at paragraph 13. Part 2 deals with

“costs expenses outgoings and other matters in respect of which the lessee is to contribute”

and paragraph 13 provides for the payment of

“such sum as the lessor shall properly determine as reasonable to be set aside in any year towards a reserve fund to make provision for expected future capital expenditure or for all or any of the costs expenses outgoings and matters referred to in this schedule or in the 7th schedule hereto.”

15. There are also provisions for hire charges, for the provision and repair or television or radio aerials, the cost of complying with statutory requirements, specified legal costs; a door entry system; the costs of maintaining roads and drains and

“20 all expenditure incurred by the Lessor or their agent in and incidental to the provision and maintenance of communal central heating system in the building including (but without prejudice to the generality of the foregoing) all costs and expenses of maintenance servicing and renewal of the said system and all costs of fuel and standing charges by suppliers.”

16. The Ninth Schedule provides, amongst other things, that the proportion of costs payable in respect of this last mentioned item (the provision of maintenance of the communal central heating system) shall be 10.09%.

The Applicant's Case

17. In his written statement the applicant sets down the background to his application by reference to his appointment; to the history of the management of the building; and by reference to his plan for dealing with the effects of a previous lack of maintenance. He refers to the schedule of works prepared by his firm and provided to the individual leaseholders, and to the steps that he has taken to keep leaseholders advised of how maintenance repair and improvement matters are and would be dealt with
18. Mr Woodhead makes reference to the relevant service charge provisions in the lease and he provides copy accounts; copies of the landlord company's accounts; bank statements and vouchers, all in accordance with the directions of 24th October 2006.
19. Mr Woodhead's statement contains some criticism of the respondent, and his persistent refusal to meet service charge demands. Mr Woodhead says that he recognises Mr Gowdy's right to use the legislative provisions to protect himself from unreasonable demands, but he seeks the assistance of the Tribunal in achieving a smooth operation of the service charge system for the years ahead.

The Tenant's Response

20. By way of a response, Mr Gowdy sets out the background by reference to a previous application made by the present applicant in respect of service charge due from him, and to the Tribunal's determination in that matter. He acknowledges the production of the financial statements but notes that these are dated 29th November 2006, whereas the lease provision is that they should have been made available to the lessees by 30th September 2006. He suggests that their production has come only as a result of the Tribunal's direction. Mr Gowdy draws attention to the surplus shown in the accounts for the relevant service charge year of £13,380.
21. Mr Gowdy raises no objection to specific items in the service charge account for the year 2005/2006, but he raises the more general point that he does not believe that the provisions contained in the lease allow for the creation of a reserve fund or a sinking fund such as the applicant has now established. He refers to paragraph 22 of the Sixth Schedule to the lease, and says that the service charge demands have become excessive compared to the expenditure incurred, because of the applicant's attempt to create this sinking fund.
22. He goes on to say that those demands have resulted in a significant surplus on the account when no significant repair works have been carried out. He argues that the lease only provides for service charges to be made to cover expenditure that has been incurred, or on account of expenditure to be incurred in the immediate future.
23. Mr Gowdy also refers to the previous application made by the applicant and the disproportionate cost of that application in the face of an offer of settlement which he had previously made.

Consideration

24. Whilst references to the previous case are of no direct relevance to the Tribunal's determination in this case, the Tribunal notes that the previous determination was not that the sums sought were excessive: rather, the Tribunal concluded that, subject to a limited reservation over legal and professional fees (in respect of which the evidence was incomplete), and acknowledging that part of the sums claimed were (and had been accepted by the applicant to be) barred by limitation, the service charge figures claimed were reasonable. It was only where there was a lack of evidence that the Tribunal felt unable to determine that the charges were reasonably payable, but that is not to be taken as implying how the Tribunal would have viewed those charges had the evidence been available.

25. No such lack of evidence is apparent in relation to this case, and the Tribunal notes that Mr Gowdy does not challenge the figures as presented, other than to the extent that he draws attention to their being presented late. The Tribunal acknowledges that the strict timetable has not been complied with, but does not consider that either Mr Gowdy, or indeed any other leaseholders, will have been prejudiced by that.
26. It concludes that the delay in the production of the figures may well have been occasioned by a desire to satisfy the Tribunal's directions (which were then anticipated) in the most efficient manner, avoiding any duplication of work.
27. Mr Gowdy's argument in favour of a determination of unreasonableness relates to the sinking fund which, he says, should exist, if at all, only in respect of expenditure to be incurred in the immediate future.
28. The Tribunal notes that the Service Charge Residential Management Code makes specific provision for reserve funds, saying that

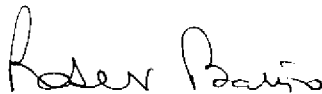
"although some leaseholders/tenants may be able to achieve better returns on money they retain and invest themselves, one of the purposes of reserves is to facilitate the carrying out of expensive non-annual items of work. Unless money is accumulated collectively there is always the likelihood of work not being carried out due to lack of funds. Even if leaseholders/tenants intend to live at a property for a short period of time they can achieve financial benefit on sale by pointing out to purchasers the existence and extent of the reserve fund."
29. The relevant lease provision in this case, at Schedule 8 Part 2 paragraph 13, provides for the payment of

"such sum as the lessor shall properly determine as reasonable to be set aside in any year towards a reserve fund to make provision for expected future capital expenditure or for all or any of the costs expenses outgoings and matters referred to in this schedule or in the 7th schedule hereto."
30. There is nothing in that wording which imposes any kind of time limit such as Mr Gowdy suggests should be applied. The reference is simply to "expected future capital expenditure" and the sums being demanded by the applicant in this case relate to a program of work which is clearly set out, and which involves collecting, over an eighteen month period, sufficient sums to undertake the quite significant works which are required to the building.
31. The alternative would have been for the applicant to demand the full sum immediately, but although that might have enabled him to commence these major works more quickly, it would have placed a greater burden upon the tenants. The applicant appears to have taken the quite reasonable view that there should be a balance between the needs of the building and the financial abilities of the tenants whom he is appointed to serve.

32. The Tribunal has not been provided with any evidence in support of the objection which Mr Gowdy raises, The Tribunal therefore determines that all of the charges set out in the documentation presented by the applicant and in support of its case are reasonable, and that that sums demanded of Mr Gowdy are accordingly payable in full.

Other Matters

33. The Tribunal acknowledges that dealings with this property, and dealings between the parties to this application, do not appear to have resulted in any harmony between the parties. The Tribunal has no jurisdiction to direct how the parties might better conduct themselves for the future, as the applicant suggests that it might,
34. The Tribunal would however suggest (albeit as an aside only) that the applicant appears to be attempting to act professionally within the terms of his appointment and in the best interests of the company which he manages.



Robert Batho (Chairman)

A member of the Southern Leasehold Valuation Tribunal appointed by the Lord Chancellor

Dated 2nd March 2007