SOUTHERN LEASEHOLD VALUATION TRIBUNAL

In the matter of section 27A of the Landlord & Tenant Act 1985 (as amended) and in the matter of 1 Rena Hobson Court, Bingwell Valley, Tiverton, Devon.

Case number: CHI/18UD/LSC/2006/0087

BETWEEN:

Mr L Gardner and others

Applicants

and

Bithrey Holdings Limited Respondent

Hearing: 9th November 2006

Further (written) representations completed: 1st December 2006

Appearances:

Mr Gardner for the Applicant
Mr L Gardner and Mr Gardner, Mr Farr and Mr Chappell

Mrs H Harvey and Mr D Arney of H Management Services Limited for the Respondent, and Mr Bithrey

Statement of the tribunal's decision and reasons

Date of Issue: 20th December 2006

Tribunal:

Mr R P Long LL B (Chairman)
Mr P J R Michelmore FRICS
Mr I M Arrow

Application

1. The Applicant applied to the Tribunal on 5 September 2006 under section 27A of the Landlord & Tenant Act 1985 (as amended) ("the Act") to determine liability to pay a service charge in respect of flat 1 Rena Hobson Court, Bingwell Valley, Tiverton for the years 2002 to 2006. Directions were issued on 15 September 2006 to which the Applicant did not respond, but the Respondent filed a statement pursuant to those directions dated 23rd October 2006. On the same day, the Tribunal ordered that Mrs V Payne, Mr L Chappell and Mrs P Farr might be joined as Applicants in the matter.

2. The Tribunal's decisions in respect of the matters that were before it are summarised at the end of this note in paragraph 42.

The Law

3. The statutory provisions primarily relevant to applications of this nature are to be found in section 18, 19 and 27A of the Act. The provisions of section 20B of the Act also have some relevance in this particular case. The Tribunal has of course had regard in making its decision to the whole of the relevant sections as they are set out in the Act, but here sets out what it intends shall be a sufficient extract (or a summary, as the case may be) from each to assist the parties in reading this decision. Section 18 provides that the expression "service charge" for these purposes 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, improvements or insurance or the landlord's costs of management, and
b. the whole or part of which varies or may vary according to relevant costs"

"Relevant costs" are the costs or estimated costs incurred or to be incurred by the landlord in connection with the matters for which the service charge is payable, and the expression "costs" includes overheads.

4. Section 19 provides that:

"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".

5. Subsections (1) and (2) of section 27A of the Act provide that:

"(1) An application may be made to a Leasehold Valuation Tribunal for a determination whether a service charge is payable and, if it is, as to –

a. the person to whom it is payable
b. the person by 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."

6. To such extent (if at all) that the point is not implicit in the wording of the Act, the Court of Appeal laid down in Finchbourne v Rodrigues [1976] 3 AER 581 CA that it could not have been intended for the landlord to have an unfettered discretion to adopt the highest possible standards of maintenance for the property in question and to charge the tenant accordingly. Therefore to give business efficacy to the lease there should be implied a term that the costs recoverable as service charges should be fair and reasonable.

7. Section 20B of the Act provides that service charge costs incurred more than eighteen months before they are demanded from the tenant are not recoverable unless the tenant has been notified within that period that they have been incurred and that he would be required to contribute to them as service charge under the terms of his lease. The provision does not apply, however, if the tenant has been notified within the eighteen-month period that the expenses have been incurred and that he will subsequently be required to contribute to them.

The Lease

8. The Applicant holds the property for the residue of a term of ninety-nine years from 13th August 1992 granted by a lease ("the Lease") made the 5th day of August 1992 between Bithrey Developments Limited (1) and Bithrey Holdings Limited (2) subject to the payment of a yearly rent of fifty pounds for the first fifteen years of the term, which rent is (in very general terms) to rise in line with a formula based upon the General Index of Retail Prices for each of the following three periods of fifteen years and for the final two periods of seventeen years of the term.

9. The service charge is also reserved as rent, and is expressed to be payable by two equal instalments in advance on 24 June and 25 December in each year. The Tribunal understands the remaining leases of flats at Rena Hobson Court to have been granted in substantially the same terms as the copy lease that was before it, and this understanding appears to be borne out by the covenant contained in Clause 5(3) to let the remainder of the block (in the Lease apparently meaning the part of the building that contains flats 1-12, but the term is not defined) subject to identical covenants.

10. The remaining provisions in the Lease relating to service charge are to be found variously in Clauses 3 and 5, and in the Sixth Schedule. Clause 3(1) deals primarily with the accounting mechanisms to be employed in determining the total, and seeking payment of the relevant proportion, of the service charge. It is lengthy, and its provisions are not in issue in this case, although it is appropriate to note that it expressly includes provision allowing the landlord to employ a managing agent whose reasonable fees are to be included in the service charge.

11. Clause 5 of the Lease contains the landlord's covenants to insure the building in its full reinstatement value and to reinstate at its own expense in the event of loss or damage by fire or any other insured risk. In addition the landlord thereby covenants (subject to contribution of service charge) to keep the main structure, the service media, the common parts, furniture and equipment and gardens in good order and substantial repair and condition, to pay outgoings on the common parts, to redecorate the exterior of the block, to enforce covenants and to clean the exterior windows.

12. Schedule 6 of the Lease is prefaced by a sub heading that reads "Costs Expenses Outgoings and matters in respect of which the Lessee is to "contribute a fair proportion". The lease does not appear anywhere else to seek to define the "fair proportion". Those items are the costs of and expenses incidental to running the management company whether or not the management company is also the lessor, the expenses incurred by the landlord in carrying out his obligations in clause 5 summarised above, the cost of maintaining communal aerials, a contribution to a reserve fund against expenditure that may arise in the following three years, rates, other expenses incurred by the landlord in and about the maintenance and proper and convenient management of the block, and the fees and disbursements of any managing agents. It also contains further provisions in fairly standard form about the accounts that are to be kept.

Inspection

13. The Tribunal inspected Rena Hobson Court prior to the hearing on 9 November 2006 in the presence of Mr Arney of H Management Services Ltd, the managing agents. It saw an estate that consists of two buildings, each of which consists of a number of flats and understands that the block was built in or about 1992. The buildings are of brick under a tiled roof with wooden window frames, and are surrounded by strips of lawn. There are a total of four entrances both at the front and at the rear. Access to a large rear car park was by means of a road between the two blocks. Approximately three quarters of the car park had been recently resurfaced with tarmac, but the southwestern end of it had not.

14. Mr Arney explained that the two buildings were each divided into two self-contained blocks of twelve flats each. The flats in three of those blocks had been sold to individuals, but the fourth, outside of which was the unresurfaced part of the car park, had been sold to and was operated by Sanctuary Housing

Association. There are a total of thirty-two flats in the blocks managed by H Management Services that contribute to the service charges in issue.

15. The buildings, the gardens and the common parts appeared at the inspection to be in satisfactory repair and decorative order. Mr Arney showed the Tribunal the location in which the fire had occurred in 2003 that had destroyed part of the roof and in which the then occupier of flat 10 had lost his life. Flat 10, the roof and the other parts affected by the fire have been restored and flat 10 appears once more to be occupied.

Hearing

16. At the hearing Mr Gardener said that he was content to accept the responses in the Respondent's written statement upon some of the matters that he had raised in his application. Consequently there remained four issues for the Tribunal's decision. The further issue of the section 20 consultation arose during the hearing. It is convenient to describe the arguments advanced in respect of each issue, followed by the Tribunals decision in respect of that issue and its reasons for reaching it. Each separate issue is identified by means of its own sub-heading.

17. The insurance policy covers 22 of the 32 flats in management at Rena Court, and each flat pays one twenty-second part of the premium. The other costs are shared equally between all 32 flats. There was no issue between the parties with regard to the identity of the person responsible for paying the charges in issue, the person entitled to receive them, the manner in which they are to be paid or the date by which they are to be paid. It was not suggested that these proportions are other than "fair".

Insurance Premium

18. On behalf of the Applicant, who is his son, Mr Gardner said that the first of the areas with which the Applicant was concerned was the matter of the increased insurance premium that had been payable since the time of the fire. The insurance companies had demanded considerably larger premiums since that time. Mr Gardner submitted that such element of the premium now payable that was in excess of the amount that would have been payable had the fire not happened should be borne by the landlord. Clause 5(2)(b) on page 11 of the Lease (page 22 in the Applicant's Bundle) provides:

"In the event of the Block or any part thereof being damaged by fire or any other insured risk the Lessor will reinstate the same at its own expense with all convenient speed".

In Mr Gardner's submission those words were properly to be construed as producing the result that, as well as rebuilding at its own expense, the Landlord would bear any additional costs arising from such an event. This was a proper result, since the building was erected with all fireproofing in place.

19. At Mrs Harvey's request the tribunal allowed her fourteen days in which to make submissions upon Mr Gardner's argument upon the point. As a result of his failure to comply with directions that had been issued she had not been made aware of the argument set out above until the time of the hearing. Mr Gardner was then to have a further seven days in which to reply.

20. Following that ruling, Mrs Harvey submitted a copy of a letter from Messrs Michelmore's dated 20 November 2006. They expressed the opinion that clause 5(2)(b) of the lease dealt with the landlord's obligations, and that as such it could not bear upon the lessee's responsibilities. It related only to the reinstatement of the fire damage. Mr Gardner replied in an undated letter received by the Tribunal office on 1 December 2006 in which he briefly reiterated his submissions set out above.

21. The Tribunal was in little doubt that the ordinary meaning of the wording of clause 5(2)(b) does not bear the construction for which Mr Gardner contends. It refers quite clearly to the reinstatement of the Block, and to nothing else. In particular, it does not suggest that the Landlord is in any other way to put the parties in the same position as they would have been if the fire had not happened. For Mr Gardner's argument to succeed the words used would have to be capable of bearing the construction that he advocates in their ordinary sense and in the context in which they appear. In the Tribunal's judgement they are not capable of that construction. Mr Gardner did not argue that the amount of the premium incurred was of itself unreasonable. Accordingly Mr Gardner's arguments upon the question of the insurance premium fail, and the premiums that have been charged may stand. It was not argued before the Tribunal that the landlord was not in this case entitled to recover commission on the insurance premium, or that the premium paid was in any other sense unreasonable.

Management Charges

22. Mr Gardner's argument about the management fees turned upon the rate of increase. He said that in the year ended in June 2003, the management fees had been £1592, but by 2006 they had risen to £5600. There had been no Annual General Meeting or consultation with the residents.

23. Mrs Harvey said that the managers had felt that the most equitable way to calculate the service charge was to take a percentage of the total service charge expenditure, rather than to charge a fixed amount per unit. They had had to review the amount of the percentage charge a couple of years ago to take account of the increased costs occasioned by the provisions of the Commonhold and Leasehold Reform Act 2002("the 2002 Act"), European legislation and Health and Safety requirements, as well as the need to keep realistic sinking funds.

24. H Management Services Limited is not, the Tribunal was told, registered for VAT, so that the fees shown are net of that tax. The company received commission on the insurance payments. The percentage charge was calculated on the whole of the premium paid (including the commission) Mr Arney

explained that the commission went into a central operating budget and was not credited to the income for Rena Hobson Court. He submitted that it is reasonable that the percentage charged for management should include a percentage charge upon the element of the insurance premium that is received by the company as commission.

25. Rena Hobson Court is a modern block, and of modern construction. There are no lifts or common heating systems, nor are there any of the other services, for example the provision of a concierge service or other employees or facilities, that sometimes add materially to the cost of management. In short it is block whose day-to-day management is not, in the Tribunal's judgement, in any way unusual.

26. The Tribunal first considered the level of the increase in management charges that Mr Gardner had described, and which the accounts show. The charge made in the year ended 30 June 2003 represented a charge of £49-75 per individual flat, there being 32 flats in the three blocks under management. That equated to a charge of 19.79% of the relatively low amount expended. Using its collective knowledge and experience of the level of management charges in Devon generally, it had little difficulty in recognising that that amount almost certainly represented an undercharge at that time for the level of work done. The charges for the years ended 30 June 2004 and 2005 on the same basis had been £130-62 and £132-81 per flat respectively.

27. The 2006 charge, however, had risen to the equivalent if £175 per unit and represents a charge of 26.53% of the substantially increased amount expended. By reference to that same collective knowledge and experience, the Tribunal concluded that this seems to have been an over reaction to what had no doubt initially been an unsatisfactory situation.

28. The Tribunal accepted the accuracy of Mr Arney's observation that management is becoming more complicated. It kept in mind, however, that many of the changes mentioned in the 2002 Act that bear in particular upon management accounting in its broadest sense have yet to come into force, and certainly have not been in force in the years in respect of which it is required to make decisions. It similarly accepted that the arrangements for the reserve fund have been sensible, and that the amounts collected for it have by now been largely expended in accordance with the terms governing that fund.

29. It was not appropriate in the Tribunal's judgement to include an amount paid to the manager for insurance commission in the total expenditure upon which the management fee is charged when that fee is charged as a percentage of expenditure. To do so amounts to a double charge upon the lessees, first for the commission and then for the management fee upon the commission received by the manager. In the Tribunal's judgement the amount of the management fee charged upon the commission element is unreasonably incurred and it made a small adjustment accordingly when considering the fees charged in the past.

30. The Tribunal is aware from its own knowledge and experience, which as an expert Tribunal it is entitled to use where appropriate in order to arrive at its conclusions, that when fees are charged in the locality on a "per flat" basis for the more straightforward types of block they tend presently to be charged at between £130 and £150 per flat. It follows that those levels of fee take into account the difficulties that Mr Arney described that have so far come into force. There was no other evidence put before it to show what, if any, difference there might be in the level of fees where, as here, the fee is charged on the basis of a percentage of expenditure.

31. The Tribunal notes that paragraph 2(3) of the RICS Service Charge Residential Management Code, which Mrs Harvey said the managing agents seek to follow, states that a cost per flat basis of charging is preferable to the method of charging a percentage of expenditure. Such information as it has reflects the "per flat" basis of charge. Taking into account the material set out above the Tribunal determined that a reasonable management charge for the year ended 30 June 2006 would be £135 per flat. It saw no reason on grounds of reasonableness to interfere in the management charges made in years before that.

Cost of Car Park Works

32. The cost of resurfacing that park of the car park that is used by the residents of the landlord's flats was £9950 incurred in the year ended June 2006. Mr Gardner accepted, as does the Tribunal, that that was a reasonable cost for what on the limited inspection that the Tribunal was able to make, appeared to it to be work of reasonable standard. However, two problems arose with regard to the recovery of the total of that sum in the course of the hearing.

33. In June 2006 the managing agents wrote to the lessees in accordance with the terms of a draft letter at document 6 of the respondent's bundle that was before the Tribunal. They indicated that the cost of resurfacing the car park would be £9750 at worst. That letter of itself does not satisfy the requirements of section 20 of the Act as it has been amended by the 2002 Act. Mr Arney told us that another letter had also been sent in December 2005, but agreed that the effect of the two letters, whilst they informed the lessees of what was intended, was insufficient to satisfy the requirements of section 20 and of the Service Charges (Consultation Requirements) Regulations 2003 (SI 2003/1987).

34. That being so the Tribunal is obliged to limit the amount that can be recovered. Unless the landlord is able to obtain a retrospective dispensation pursuant to section 20(1)(b) of the Act from the requirement to comply with those regulations then the amount that can be recovered for the cost of the car park work is statutorily limited to £250 per flat, or a total of £8000. An application for such dispensation is a separate matter, requiring a separate application and notification to the lessees, and is not therefore a matter that this Tribunal might have considered on this occasion.

35. The second, and possibly academic, problem arose in connection with the contribution that should have been recovered from Sanctuary Housing

Association. Mr Arney told us that a sum of £350 or so should have been recovered from them in accordance with conditions attaching to their rights to access the part of the car park that they (or their lessees) occupy. Dealing with them has proved very difficult in the past, he said, and they had told the managers that they would have to obtain valuations and other information before they could make any payment. Accordingly it had been decided that it might be cheaper to ignore them, and the 2006 account shows that the whole cost of the work has been passed to the lessees.

36. The Tribunal concluded that attempts should have been made to recover those sums, but that the effort would have resulted in some additional cost that could have been recovered from the lessees. Doing the best it might with the limited information before it, the Tribunal would have made a reduction of £175 in the amount that the landlord might have recovered for the cost of the car park if it were not for the limitation upon recovery described above.

37. It would have reached that conclusion on the basis that steps ought to have been taken to make recovery on behalf of the lessees, but that the managing agents may have been entitled to charge an additional fee in accordance with terms of the leases and of the RICS management code of £175, half the amount recovered, for their work in so doing. That leaves a notional further £175 credit to the lessees. This deduction will only be of importance in practice only if such a dispensation as is described in paragraph 34 above is in fact obtained, and the point is dealt with here to avoid further delay if that that happens.

Cost of Cleaning

38. Mr Gardner said that the cost of cleaning had risen very sharply since 2002. At that time it was £1626-90 p.a for the three blocks managed by H Management Services Limited. In 2006 the figure had risen to £4100-00. He contended that the latter figure amounted to an unreasonable cost for dealing with three entrances and staircases. The work actually involved is described for the purposes of the quotations mentioned below as dusting and vacuuming front entrance, cleaning all internal glass, dusting and vacuuming all corridors and stairs, dusting wooden banisters and window cills, cleaning ledges, skirting boards and light switches, and sweeping front and back entrances.

39. Mrs Harvey said in the Respondent's written reply that the cleaning contractors had informed the managing agents in July 2005 that it was uneconomical to continue to do the work at the level of service then provided, which consisted of one visit per week. However when quotations for the work were sought as a result of that notification, their quotation for three visits a week was less than that of other contractors who quoted for only one. They quoted £73-51 per week, whilst the other quotations were respectively for £85-00 and £87-50 per week, (in each case the quotations were ex VAT). This proved, she said, that the existing contractors' quotation was competitive.

40. Having seen for itself the extent of the three entrances in question, the Tribunal considered that the figures so produced appear to be high for the

work involved. It considered that the work in question was likely to be capable of being properly carried out in three or four hours at most, and the hourly rate that the quotations represented on that basis seemed more than it might reasonably have expected. On the other hand it is aware that works of this nature these days tend to be done by contractors rather than (as may have been the case in the past) by a single part time employee of the managing agents because of the additional regulations attendant upon employment and control of such a person that now obtain.

41. Rather reluctantly, therefore, the Tribunal concluded that the present cleaning costs, and by extension therefore those in all of the years covered by Mr Gardner's application (which are lower), are reasonable. It is in its judgement reasonable for the agents in present circumstances to employ a contractor rather than an individual to do the work. It can only deal with the matter in the light of whatever terms of engagement are available from contractors. The validity of the three quotations put before it has not been challenged in any way, and it must follow that the cost in 2006 (which reflects those quotations) is a reasonable one.

Summary

42. The Tribunal has therefore determined:

a. That clause 5(2)(b) of the Lease does not bear the interpretation for which Mr Gardner argued so that it is not for the landlord personally to pay that part of the premium incurred because of the fire that happened. It was not argued before us that the premium itself was unreasonable.[Paragraph 21]

b. That the amounts that have been charged for management fees up to the year 2005 may stand, but that the amount to be charged as a management fee in 2006 is £135 per flat. [Paragraph 31]

c. That as matters stand the landlords are able only to recover a sum of £8000 from the total cost of £9950 for resurfacing the car park because the consultation procedure laid down in section 20 of the 1985 Act were not followed and accordingly the statutory restrictions apply. [Paragraph 34]

d. That the managing agents failed to collect, as they should have done, a sum from Sanctuary Housing Association towards the cost of the car park. It would be reasonable to deduct a sum of £175 from the total cost to be paid by the lessees for that work if the landlords are able to obtain a retrospective dispensation form the requirements of section 20 of the Act.[Paragraph 37]

e. That the costs of general cleaning incurred in the years the subject of the application are reasonable. [Paragraph 41]

43. The figures that the Tribunal has determined fall to be inserted in the accounts of the year in question and the amounts payable to be adjusted accordingly. The parties have leave to apply to the Tribunal in the event that any issue arises over the manner in which this is to be done.

Robert Long
Chairman

19th December 2006