RESIDENTIAL PROPERTY TRIBUNAL SERVICE

LEASEHOLD VALUATION TRIBUNAL

LANDLORD & TENANT ACT 1985 : S27A

DECISION OF THE LEASEHOLD VALUATION TRIBUNAL

Case No:	HI/43UE/LSC/2004/0030
Property:	**Flat 7 Priory Court** **TowerHill** **Dorking** **Surrey RH4 2BB**
Applicant:	Mr J H Greenlees
Respondent:	C D Holding Ltd
Date of Application:	25 June 2004
Provisional directions issued:	21 July 2004
Date of Hearing:	23 September 2004
Members of the Tribunal:	Mr P B Langford MA LLB (Chairman) Mr R A Potter FRICS Mr T W Sennett MA MCIEH
Date decision issued:	10 November 2004

FLAT 7, PRIORY COURT, TOWER HILL, DORKING

1. The Application

This is an application by Mr John Greenlees, the leaseholder of Flat 7 Priory Court, under Section 27A Landlord and Tenant Act 1985 to determine whether the service charge of £598.50 for garden maintenance in the year ending 25 December 2004 is properly payable to the Respondent Landlords, C D Holdings Ltd. A similar application is made in respect of the year ending 25 December 2005.

2. Inspection

We attended at the property on 23 September 2004 and carried out an inspection in the presence of Mr Greenlees. We saw a two-storey block comprising 8 flats built in about 1972 surrounded by a car park area at the front and a well maintained garden. The garden area in itself was less than one acre in extent and it was mainly laid to lawn. Some areas of the lawn undulated quite sharply. There were trees and shrubs around the boundaries of the property, which would have required some maintenance. We did not inspect the interior of any of the flats, as this was not relevant to the issue in the case.

3. The Hearing

At the hearing, Mr Greenlees appeared in person. The landlords were represented by Mr Charles Turl and Mrs Jenny Barden, both from Countrywide Property Management, the Landlord's Managing Agents.

Mr Greenlees was invited to present his case. He had already set this out in skeleton form in the application itself and at the hearing he submitted a further bundle of documents headed "Applicant's Separate Bundle". He said that the Landlords would have seen all of the documents in that bundle and Mr Turl did not raise any objection to it. Indeed the majority of the documents appeared to have emanated from Countrywide Property Management, with the remainder being letters and emails sent by Mr Greenlees to Countrywide Property Management. Mr Greenlees then went

through the documents in this bundle to amplify the points he had made. The principal points appeared to us to be as follows:-

a) The service charge demand for the year to 25 December 2004 was issued under cover of a letter from the Landlord's Managing Agents dated 22 December 2003 and was based on an estimated "budget" calculation up to 25 December 2004. The figure shown for gardening was £4,788 (£399 per month).

b) Mr Greenlees maintained that this figure was excessive, having regard to the actual gardening costs incurred in the immediately preceding years. Thus after a contractor Sylvatica had been appointed with effect from 31 December 2000 the actual expenditure was calculated to be £1,258 for the year up to 25 December 2001. Sylvatica had received a specification from the Landlords and they had quoted £200 for an initial "tidying up" exercise and thereafter 23 visits at £46 per visit. In fact the actual expenditure for that year proved to be £737. For the year ended 25 December 2002, the actual expenditure was £1,748, against a budget calculation made by the Landlords in December 2001 of £1,258. For the year ended 25 December 2003, the Landlords had demanded the estimated figure of £1,500. The Accountants had not certified what the actual expenditure was for that year but in submitting their demand for the budgeted figure in respect of the year that will end on 25 December 2004, Countrywide had included a column of actual expenditure for the year ended 25 December 2003 which showed a figure of £4,941.93. Mr Greenlees said that he had not been consulted at the time regarding the change of gardening contractor from Sylvatica in the summer of 2002 when the Landlords claimed that Sylvatica had defaulted and the Landlords had had short notice to find another contractor. He now knew that a Mr Ball was appointed to take over during 2002 and that, after Mr Ball had died shortly afterwards, the contract had been taken over by his partner, Mr Whelan, who traded under the name of Tic-a-dee-boo. The leap in expenditure from £1,748 to £4,941.93 could not be justified. He paid the service charges up to 25 December 2003 but he was querying the estimated expenditure for the year up to 25 December 2004 of £4,788, although he had made some payment on account.

c) The Landlords had never confirmed a change of specification to him. The only specification provided stated – "Mow grassed areas at approximately 2-weekly

intervals throughout the growing season. During periods of drought or slow growth, less frequent cuts are required". He claimed that, despite this, throughout the hot summer of 2003 the Landlords had arranged for weekly visits.

d) Again without consultation, on the changeover from Sylvatica to Mr Ball and then to Tic-a-dee-boo, the Landlords had authorised weekly visits by the contractors, as the invoices submitted by the contractors showed they were making weekly visits and their invoices were being paid. The budgeted calculation of £4,788 for the year 2004 was based on £399 per month (or £368 each four weeks). That corresponded with £92 per visit.

e) Tic-a-dee-boo were based near Maidstone and their gardeners would therefore be faced with a round trip to Dorking of 140 kilometres. It was inevitable that the cost of travelling time and petrol would be reflected in their charges.

f) A local contractor living within 1 mile of Priory Court, Mr Harrington, had worked for Countrywide Property Management's parent company, Countrywide Residential Lettings Ltd, for 3 years until November 2003 and Countrywide Residential Lettings had been very satisfied with his services in respect of a property called "Pennymead", as was shown by their letter to Mr Harrington dated 7 October 2003, which was included in the "Applicant's Separate Bundle". Mr Greenlees had written to Mrs Barden, asking her to approach Mr Harrington for a quote. Mrs Barden had replied on 29 April to say – "Since your letter, I have received correspondence from the other residents at Priory Court. They have all signed to say that they do not wish to change the current gardener.....I do not therefore feel that it would be worth my while contacting alternative contractors". He had therefore himself approached Mr Harrington and, while he could not divulge actual figures, he could say that Mr Harrington would be prepared to undertake the work at substantially less than was being charged by Tic-a-dee-boo. He was not in a position to produce any written quotation from Mr Harrington.

4. **The Landlord's Submissions**

a) Mr Turl confirmed that the amount demanded for gardening for the year which will end on 25 December 2004 was £4,788 (i.e. £598.50 per unit). He accepted that Tic-a-dee-boo had become VAT registered and therefore started to charge VAT in the middle of 2003. The estimated total figure of £4,788 therefore omitted the VAT charge, which would increase the figure of £4,788 by £837.90 to £5,625.90. The omission of VAT from their budget calculation was a mistake on their part. Asked by the Tribunal as to how this sum could be asked for in advance, since the terms of the lease permitted only two half-yearly payments of £15 on account of costs to be incurred and the balance to be paid on the next date for payment of ground rent after the Managing Agents had certified the actual costs incurred for the year, Mr Turl said that the arrangement was purely historical, his firm having taken over from other managing agents and then simply following the procedure they had followed.

b) The specification had not changed, except that visits were now required once a week throughout the year.

c) The increase in visits had come about because it had been reported to his firm that Sylvatica was simply not sending anyone to the property. His firm wrote to Sylvatica but no reply was ever forthcoming. It seemed as if they simply disappeared. It was not, as Mr Greenlees had suggested, a matter of Countrywide Property Management terminating Sylvatica's employment on grounds that they could not satisfy health and safety requirements. Once it was apparent to them during the summer of 2002 that Sylvatica had dropped out, the leaseholders were demanding urgent action and at short notice, without going out to a tendering exercise, Countrywide had found Mr Ball. At the request of some of the leaseholders, Mr Ball was asked to attend once a week. This he did at a cost of £92 per visit. He had died in about December 2002 and Countrywide Property Management had asked Mr Whelan (Tic-a-dee-boo) to continue with Mr Ball's contract. They had not consulted with the leaseholders in advance of the appointment of either Mr Ball or Tic-a-dee-boo, because on both occasions a replacement was required urgently. However the increase of the number of visits to weekly visits was prompted by requests from some of the leaseholders (not Mr Greenlees) and this change in the specification had

therefore come about at the instigation of some of the leaseholders. The leaseholders had, with the exception of Mr Greenlees, pronounced themselves satisfied with the arrangements made in 2002 and up to the present time.

d) While it was accepted that a cheaper contractor might be found, cheapness was not the only criterion and it was important that the contractor should perform his duties satisfactorily. Sylvatica had failed to do so and the new contractors were satisfying the majority of the leaseholders. Mr Turl did not accept that the fact that the contractors had to come from the Maidstone area would increase their costs. They had two other properties in the locality where they worked and they could therefore adjust their timetable accordingly.

e) As to consultation with Mr Harrington, they had received a petition from six of the eight leaseholders at the end of April 2004 in which they variously stated their satisfaction with the current arrangements relating to garden maintenance. The petition was in our bundle of papers. Unless a majority of the leaseholders stated their discontent with the existing arrangements, the Landlords did not feel it worthwhile to approach other contractors. A note from Mrs Meredith at Flat 5 at the bottom of the petition stated that "Flat 6 is not here, but she has said that she agrees and is happy with the gardener's work". He said that the gardening charges for 2004 had been paid by the other seven Leaseholders in the block.

5. Consideration

a) We first took note of the relevant terms of Mr Greenlees' lease. By clause 2 (iii)(b) it is provided that the tenant covenants *"To pay to the Landlord in respect of each year ending on 25 December a sum of money equal to one-eighth of the actual cost (as certified by the managing agent) incurred by the Landlord in performing the covenants hereinafter contained on the part of the Landlord for the maintenance and management of the building and estate roads, visitors' parking area, paths and ground and any outgoings charged thereon payment hereunder to be made as to Thirty pounds (i.e. basic annual amount) by equal half yearly payments in advance on the 24th day of June and the 25th day of December in each year.....and as to the balance (if any) on the rent day next following the issue by the Managing Agent of*

such certificate as aforesaid". By clause 1(i) the rent days are stated to be the 24th June and 25th December in each year. Among the Landlord's covenants is a covenant contained in clause 3 (2)(d) which provides that the Landlord will at all times during the term "*keep in good and substantial repair and condition (subject to all tenants paying their contribution as set out in clause 2(iii) hereof) the boundary walls, fences and hedges of the grounds of the building which belong to the property and the garden thereof laid out and cultivated".*

b) The scheme of the lease is therefore that the actual costs of the Landlord's services are calculated at the end of each year ending on 25th December and the balance of the actual charges become payable on the next rent day thereafter, subject only to each leaseholder having first paid on account £15 on 24 June and a further £15 on 25th December in the course of the year in question. The Tribunal cannot therefore be invited to say whether certain service charges should be paid until they have been ascertained. The gardening charges for the year which will end on 25th December 2004 have not yet been ascertained and certified by the Managing Agents. It follows that we consider this application must be considered as being made under Section 27A (3) of the Landlord and Tenant Act 1985, which provides – "An application may also be made to a leasehold valuation tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, the service charge would be payable for the costs and, if it would, as to –

a) the person by whom it would be payable,
b) the person to whom it would be payable,
c) the amount which would be payable,
d) the date at or by which it would be payable,
e) the manner it would be payable."

It is a curious feature of the case that all the Leaseholders (including Mr Greenlees – except for the year ending 25 December 2004) have been paying their service charges annually in advance against budget estimates, and that has prompted the Tribunal to look for evidence that the terms of the leases may have been amended by agreement or by application to the Court. Leaseholders are often aware of the disadvantage of a landlord having inadequate funds to finance his obligations, as this may cause the landlord to be tardy in the discharge of those obligations. However no evidence has

been put before the Tribunal to show that the terms of the leases have been amended, and accordingly our decision in this case is based on the terms of Mr Greenlees' lease.

c) Mr Greenlees has made certain telling points against the projected costs for the year 2004, which he was called upon to pay by the Landlords in advance in December 2003 - £4788 for the whole block with Mr Greenlees's one-eighth contribution amounting to £598.50. It must be right that it would be desirable and likely to save costs if a local contractor could be engaged. It was not desirable to have a contractor with a round trip of 140 kilometres to undertake, in performing his duties. The fact that the Contractor had another property to look after in the Dorking area may mitigate the problem but does not overcome it. While it is understandable that the majority of the Leaseholders might wish there to be weekly visits by the gardening contractor throughout most of the year (including even a dry summer), it must be more questionable whether such visits on a weekly basis could be justified in the months November to February in each year. The garden was mainly laid to lawn and in the normal way there would be no mowing to be done in those months. It is true that leaves might have to be cleared from the lawn and that some of the trees and shrubs would require attention. However we appreciated that it might be difficult to obtain a gardening contractor without being able to offer continuity of employment in the winter months. The point was worthy of exploration. We did not accept Mr Greenlees point that the Landlords should have obtained three tenders for the garden work when first Sylvatica and secondly Mr Ball dropped out. The Landlord's evidence was that the contract with Mr Ball and with Tic-a-dee-boo were contracts made orally and were on a month-to-month basis. There was no evidence to challenge this. On that basis these agreements were neither "qualifying works" nor a "qualifying long term agreement". We did not consider that the Landlords had fallen foul of the Section 20 consultation requirements. It certainly appeared that the Landlord's Managing Agents had not consulted Mr Greenlees at least regarding the various changes of contractor at the time they were made and it appeared that the Landlords had not notified any of the Leaseholders when Tick-a-dee-boo increased their charges by 17½% to allow for VAT. The other seven leaseholders have already paid their contributions to the budget service charge of £4,788 in respect of the gardening for the year ending 25th December 2004. Whether they accept the

additional 17½% charge remains to be seen and we do not intend to make any finding as to whether or not that charge would be reasonable.

d) The Landlords rely on one main point in defence of their budget charges, namely that all the seven other leaseholders were very satisfied with the gardening arrangements. That they were also satisfied with the cost of the gardening arrangements was demonstrated by the fact that they had all paid the contributions demanded. Mr Greenlees was the only person to have challenged the charges. That is a very powerful argument. It does seem that the Landlord's Managing Agents have not been good at keeping Mr Greenlees informed but, while that is a valid criticism of their stewardship, it is not in itself a reason for saying that the charges are too high.

e) On balance, we have decided that Mr Greenlees has failed in his argument at the last hurdle. He has shown grounds for saying that the charges are too high. Since the Landlord's Managing Agents, relying on the support of the other leaseholders, had not consulted any other contractor, we considered that the onus was on Mr Greenlees to obtain a firm quotation in writing from another contractor, perhaps Mr Harrington, to a particular specification. He could then have placed that before the Managing Agents with a request that they should review the existing arrangements and consult the other leaseholders regarding a possible change of contractor. At the same time Mr Greenlees could of course have canvassed the other leaseholders and perhaps been able to enlist support from some or all of them. The Landlords would then have been very ill-advised not to take note of the alternative quotation. As it was, we were faced with a situation of approving a budget figure of £4,788 which all the other seven leaseholders apparently approved or fix a lower figure without having any firm figure before us and without being certain that an alternative satisfactory contractor would be able and willing to do the job at the figure specified. In that situation we considered that we must approve the figure of £4,788. We say nothing about whether or not the Tribunal would approve any increase above that figure, if the actual costs incurred should exceed it, as seems likely if the same number of visits are maintained for the rest of the year and VAT is chargeable.

f) As to the year 2005, we do not consider that it would be possible to make any sensible finding about the costs in that year. Clearly Mr Greenlees has fired a

warning shot across the bows of the Landlord's Managing Agents and much may happen in the remaining months of 2004 which might affect the gardening arrangements for the year up to 25 December 2005. Furthermore the Landlord's Managing Agents had not yet submitted a budget figure to the Leaseholders for the year 26 December 2004 – 25 December 2005.

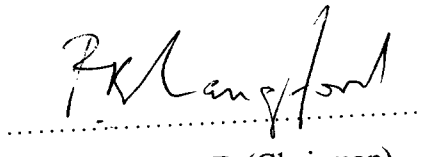
g) Mr Greenlees has submitted additional correspondence since the close of the hearing, copies of which have been passed to the Landlords. However the Tribunal reached its decision prior to receiving these additional papers and see no reason to re-open the hearing to consider them.

6. Decision

For the reasons we have given, we have decided that:-

1) For the year ending 25 December 2004, if costs were incurred for gardening at Priory Court in the sum of £4,788, Mr Greenlees should pay to C D Holdings Ltd, £598.50, of which £15 should have been paid on 24 June 2004, a further £15 on 25 December 2004 and the balance on the first rent day after the Managing Agents have certified the actual expenditure.

2) The Tribunal makes no finding in respect of the year 26 December 2004 to 25 December 2005.



P B LANGFORD (Chairman)