# RESIDENTIAL PROPERTY TRIBUNAL SERVICE

# LEASEHOLD VALUATION TRIBUNAL

## LANDLORD & TENANT ACT 1985 : SECTION S27A

## DECISION OF THE LEASEHOLD VALUATION TRIBUNAL

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| **Case Nos:** | CHI/45UF/LSI/2004/0008 |
| **Property:** | Stanford Orchard, Warnham, Horsham, RH12 3RF |
| **Applicants:** | Mr Frank Hawke and Others |
| **Respondent:** | Retirement Lease Housing Association (RLHA) |
| **Date of Application:** | 21st June 2004 |
| **Members of the Tribunal:** | Mr P B Langford MA LLB (Chairman)<br>Mr J N Cleverton FRICS<br>Ms J Morris |
| **Date decision issued:** | 25th November 2004 |

# STANFORD ORCHARD, WARNHAM, HORSHAM.

## 1. The Application

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 cost of providing accommodation for a warden at the Stanford Orchard Estate. The applicants are Mr Frank Hawke, the Leaseholder of flat 1 Stanford Orchard, and numerous other leaseholders at Stanford Orchard, whose names are recited in the order for directions made by the Tribunal on 28th July 2004. The Respondents to the application are the head lessees of Stanford Orchard, Retirement Lease Housing Association (RLHA). The application is in respect to the years 1997 to 2004.

## 2. Inspection

We attending at the property on 15th October 2004 and carried out an inspection in the presence of representatives of both RLHA and the leaseholders. We observed a block of flats, which we did not inspect internally but were told comprised 18 flats. We also saw two terraces which had been divided into fourteen cottages, providing accommodation on two storeys. In addition there were garages and gardens. The estate had been built in about 1990 by Wates Built Holmes Ltd. It was situated in a quiet position in the village of Warnham, approximately three miles from Horsham. The buildings and grounds looked well maintained. We then inspected the accommodation of the warden (now known as the resident manager) in her presence. This was a modern first floor flat which provided accommodation of a spacious lounge, kitchen, bathroom and two bedrooms, one of which was small and was currently used by the resident manager as an office. There were electric night storage heaters and double glazed windows. The kitchen and bathroom were well fitted, the resident manager supplying the washing machine and refrigerator. The flat was well maintained. We then inspected the flat of Mr and Mrs Hawke, flat number 1. This provided accommodation of a spacious lounge, kitchen, bedroom with en-suite bathroom, a second bedroom and second bathroom. The property was well maintained.

## 3. The Hearing

At the hearing the leaseholders were represented by Mr Hawke. He was supported by Mr Lesley Howes BEM, the chairman of Stanford Orchard Residents Association (SORA) and Mr Collin Farr the Secretary of SORA. Mr Howes and Mr Farr reserved the right to speak themselves. RLHA were represented by the chief executive, Mr Ben Young and he was supported by the area housing manager, Mr William Duncan MBE. In accordance with the directions given by the Tribunal, both parties had prepared a written statement of case, which set out in a very helpful way their main arguments.

## 4. The Case for the Leaseholders

Mr Hawke went through the Leaseholders written submissions and amplified the contentions made in those written submissions. The principal points that he made were as follows:-

I) By clause 2(2) (a) of the sixth schedule to the leases, RLHA were entitled to recover in the service charge "the cost of the wardens salary and the provision of accommodation for the warden at the property and all other direct costs in connection with the provision of the warden's service" Mr Hawke said that there was no evidence that RLHA had paid the freeholders for the wardens flat. The flat cost RLHA nothing and therefore nothing was recoverable under this head. It might be different, if having not paid anything, RLHA were the owners of the Stanford Orchard Estate but they were not. The owners were the freeholders, Wates Built Holmes Ltd.

II) The argument that RLHA lost rent from the warden's flat, because no rent was charged, and therefore there was a cost to the landlord, was not open to RLHA because by the terms of their head lease from Wates Built Holmes Ltd RLHA could not "assign, underlet or part with possession of the demised premises or any part thereof save for the grant (I) of an occupation lease of any dwelling in the demised premises substantially in the form of the occupation lease and (II) a garage lease of any garage in he demised premises substantially in the form of a garage lease." In this context, the leaseholders did not understand the concept of "a licence to

occupy" and two firms of estate agents they had consulted had been unable to explain what was meant by the phrase.

III) During 2001/2002, there was no incumbent manager for a period of 9 ½ months the warden's flat was therefore unoccupied. During part of that period, the warden's flat could not have been occupied because it was extensively damaged by a burst water pipe, making the flat uninhabitable for some three months. If, as the Ombudsman had suggested, the "notional charge" in respect of the wardens accommodation was deemed to be part of his salary, then no charge could be raised in respect of the time when no salary was payable to a warden.

IV) The issue was a moral issue, not simply a legal issue, because the leaseholders were old age pensioners, living on restricted incomes. They felt they had not been probably consulted about the charge. RLHA had already decided to impose the charge when they first decided to "consult" with the leaseholders. The leaseholders had been justified in rejecting an offer made by RLHA of £500 so that they could obtain there own Counsel's Opinion, because this offer was given with a time limit and in any event they had been advised that the sum offered was inadequate. They had consulted Age Concern and the Independent Housing Ombudsmen but had not been able to obtain satisfaction from them, and had been advised to bring the matter before the Tribunal.

V) In addition to contesting the principle of being charged for the warden's accommodation, the leaseholders challenged the amount involved. They had no idea how it had been arrived at and they had not seen a copy of any advice from a valuer as to how "notional rent foregone" had been arrived at. They considered that the sums involved over the years were too high having regard to the effect that there would only be a restricted class of applicants for "a licence to occupy". Mr Howes, a qualified surveyor, said that the costs of the accommodation could be equated with the nominal ground rent of five pence per annum which RLHA had to pay to the freeholders. He said that the leaseholders could have no confidence in Counsels Opinion, because Barristers often seemed to submit the advice which their clients wanted to hear and it was obvious that only one half of barristers could be right.

VI) On the Tribunal enquiring of the leaseholders whether or not, after the initial challenge in 1997, the leaseholders had agreed all the payments that they had made in respect of the warden's flat from then until at least 2002, Mr Farr pointed out that this was not the case and he referred us to a number of letters that had been written, starting with Mr Hawkes letter of November 2000 in which he clearly challenged the accommodation charge and asked for its removal from the list of service charges. Mr Farr also referred us to his own letter of 6th July 2001 to RLHA (Mr Duncan), in which he stated, "our main reasons for disputing this levy is that the rent is not a cost against providing accommodation; the true cost of providing accommodation, in our view, is that sum which is the actual amount spent on servicing and maintaining the flat." The dispute had rumbled on since that time. No one on the leaseholders side challenged RLHA evidence that the leaseholders had paid all outstanding service charges with the exception of those demanded from the leaseholder for 1 Stanford Orchard, 4 Stanford Orchard and 18 Stanford Orchard for the current year.

## 5. The Case for RLHA

Mr Young replied to the points made by the leaseholders, as follows:

I) Counsel, Mr Edward Denehan, had advised in 1996 "that the notion of the cost to the lessor" of providing accommodation for a resident manager was not limited to the recovery of expenditure actually incurred. Obviously if a lessor has to "buy" accommodation for the resident manager in the market, the cost of the same is recoverable if the relevant lease so provides. However, even if the lessor owns accommodation which he makes available to the resident manager, he still incurs a cost in the sense of money foregone; that is, but for the occupation by the resident manager, the lessor could exploit his accommodation to his economic advantage. It follows that merely because a lease provides a service charge may include "the cost incurred" by the lessor of providing accommodation, or words to that effect, it does not follow that the association is barred from recovering a notional rent if the association provides accommodation which it owns and does not pay for". Mr

Denehan's Opinion also referred to the cases of Lloyds Bank PLC v Bowker and another (1992) 2EGLR 44 and to the unreported Court of Appeal decision in Agavil Investments Co v Corner. Mr Young relied on Counsel's Opinion.

II) Counsel, Mr Denehan, had advised in an opinion dated 10th September 2002 that the restriction in the head lease preventing RLHA from subletting or parting with possession with any part of the premises included in the head lease (except for the purposes of an occupation lease) did not prevent RLHA from granting a licence to occupy any part of the premises included in the head lease. As a matter of law, the granting of licence to occupy was not deemed to be a "parting with possession" of the premises in question. It was a matter for a valuer to advise whether the consideration for a licence to occupy would be different from a rent paid under a tenancy. Mr Young relied on Counsel's Opinion.

III) It was true that in 2002 there had been flooding in the warden's flat which would have prevented any occupation of the flat by the warden. No charge had been raised in respect of the warden's occupation during that time. This period just in excess of three months formed part of a larger period of some nine months when the premises were unoccupied due to the fact that one warden had left and a replacement could not immediately be found. A charge was made in respect of the period, approximately six months, when the flat could have been occupied by a warden but was not. RLHA had taken further opinion from Mr Denehan because of the suggestion made by the Ombudsman that the provision of a flat for the warden was to be regarded as remuneration in kind for the warden and therefore would not be payable when no warden was employed. In his opinion, Mr Denehan stated that:-"as to the analysis of the Ombudsman, I am not convinced it is the correct analysis; I prefer the "money foregone" approach. Even if it is correct, and one must look at the accommodation as part of the resident manager's salary package, in order to make that salary package available immediately, upon an appointment, the relevant accommodation had to be kept empty, and this cost the association notional money. That notional money is recoverable via the service charge provisions in the residential leases". Mr Young relied on Counsel's Opinion.

IV) Mr Young did not accept Mr Hawke's criticisms that RLHA were behaving badly in moral terms. He accepted that the Ombudsman had criticised RLHA for a lack of genuine consultation when the charge for providing the wardens flat was first mooted in 1996,but otherwise they had tried to be transparent in their dealings with the leaseholders. They were a registered social landlord responsible to the Housing Corporation, who had the ability to shut them down if they were acting improperly. They had found it impossible to undertake the management of their various properties on the amounts which the Housing Corporation permitted them to charge for management. The money which they received from the warden's flat at Stanford Orchard and from warden's flats in other blocks which they owned and managed would supplement the management fees recoverable. Such money would not create any profit because they were not a profit making organisation. Asked by the Tribunal whether RHLA were getting round the "cap" on management fees imposed by the Housing Corporation, Mr Young said that he did not regard it in that light. Asked whether the Government in fixing the "cap", took account of the fact the RHLA would also be able to obtain money in respect of the provision of the accommadation, he said that he was ignorant as to how the "cap" on management fees was arrived at. RLHA had tried to act reasonably, for example, offering £500 to cover the cost of the leaseholders taking their own Counsels Opinion and, if they had approached him for a higher sum, he would have considered that request.

V) With regards to Mr Howes' remarks about the value of taking Counsel's Opinion he submitted a "curriculum vitae" for Mr Edward Denehan, which showed that he had over 20 years experience as a Barrister, that at various times he had been a tutor of property law at the University of Warwick, a tutor in Landlord and Tenant Law at the Inns of Court School of Law, and was the author of two books on Landlord and Tenant Law. As to the charge made for providing the warden's accommadation £5099 for the year ending 30th November 2004. RHLA relied on advice received from Countrywide Residential Lettings that the current value was between £495 -£525 per calendar month (the Tribunal assumed from Countrywides fax that these were "per month" although not expressly stated). RLHA deliberately charged a lower figure than that.

VI) With regard to the question of which leaseholders had paid what, Mr Duncan confirmed that all payments had been made in respect of the years up to and including the year ending 30th November 2003 and that in respect of the current year ending on 30th November 2004, the only arrears were a half years payment in respect of the whole service charge from Mr Hawke at 1 Stanford Orchard (£427.07) and a full years service charge from the leaseholders at 4 Stanford Orchard and 18 Stanford Orchard of £858. 95 each. These latter two properties were being sold and recovery of the outstanding sum was expected to take place on completion of the respective sales.

## 6. Consideration

We have found on the evidence the following facts to have been established (many of which were not in any event in dispute):-

I) The freeholders of the Stanford Orchard estate are Wates Built Holmes Ltd.

II) The landlords in this action, RHLA, hold a head lease of Stanford Orchard estate from Wates Built Holmes Ltd for a term of 999 years from 29th September 1993.

III) RHLA covenanted in the head lease "not to assign, underlet or part with possession of the demised premises or any part thereof save for the grant (1) of an occupation lease of any dwelling in the demised premises substantially in the form of the occupation lease and ii) a garage lease of any garage in the demised premises substantially in the form of a garage lease". The arrangement under which the warden occupied her flat was not an "occupation lease" as defined in the Lease.

IV) All service charges have been paid by all leaseholders, with the three exceptions stated by RLHA and referred to in paragraph 5 (vi).

We have considered the various points made by the leaseholders in sub paragraph (I)-(VI) and RLHA answers and have concluded as follows:-

I) Following the decision of the Court of Appeal in Agaville Investments Co v Corner in 1975 and the later decision in Lloyds Bank Plc v Bowker and

another, we regard it as decided law that the landlord can recover the "costs foregone" under the head of "the costs of accommodation" for the wardens flat.

II) We consider that Mr Denehan's submission in his opinion that the terms of the head lease do not prevent RLHA granting a "licence to occupy" in respect of the wardens flat to be correct and therefore it can be said that RLHA are foregoing money in allowing the warden's flat to be occupied without payment.

III) For the reasons given by Mr Denehan in his Opinion, RLHA are entitled to charge a notional sum in respect of a licence to occupy during the period in 2001/2002 when the warden's flat was unoccupied and they were unable to find a replacement for the previous warden.

IV) Any moral arguments which there may be can not affect the view which the Tribunal must take in applying the relevant provisions of the law to this issue.

V) We are not able to follow Mr Howes' statement that the sum which RLHA are entitled to claim in respect of the warden's flat should be equated with the ground rent payable under the head lease. Equally we do not accept his view of the value to be attached to Counsels' Opinions. This seems to be based on the fact that each of two parties on a case may engage a barrister but one party emerges the winner and one the loser. Such an analysis ignores the fact that Barristers may commonly advise their clients of weaknesses in the case but are nevertheless instructed to continue with it. More importantly, the analysis ignores the fact that much of the Barrister's work is advisory and does not take place in the court room. A client will ask for advice regarding a proposed cause of action so that, if such a cause of action were subject to challenge in the courts, the client can be confident that the Judge will approve it. A Barrister whose advice is proved wrong will receive no thanks from his client and thus any Barrister valuing his connection with that client and the possibility of obtaining further work from him will be at pains to give the correct advice and not simply the advice which he thinks his client will want to hear.

VI) We have taken note to the advice tendered to RLHA by Countrywide residential lettings (apparently dated 10th September 2004) in which they said that the current value was between £495 to £525 both as rent for an assured shorthold and alternatively as sum payable under a licence to

occupy. In our view a tenancy for this flat in its present location would command a rent of £150 per week. We considered however that there would be a much smaller market available for potential licensees and there should be a reduction of 25% to reflect this point, resulting in a net sum of £113 per week. That was in fact more than RLHA were seeking to charge which, at £5099 per year worked out at £98.05 per week. We considered therefore that RLHA claims were justified. We considered that also that the amounts claimed in respect of earlier years were justified.

VII) The Tribunal only has jurisdiction to determine service charges which have not been agreed between the parties. Payment of a service charge does not necessarily mean it has been agreed. On the basis of the evidence before us, we have decided that the sums claimed by RLHA in respect of the warden's accommadation were both paid and agreed by the leaseholders up to and included the year ended 30th November 2000. Accordingly the Tribunal has no jurisdiction to consider the charges for those years. The sums claimed for the years ended respectively 30th November 2001, 30th November 2002 and 30th November 2003 were reasonable and have been paid by all leaseholders. The amount claimed at £5099 for the year ending 30th November 2004 was reasonable and the charges still outstanding from the leaseholders of Flat 1, Flat 4 and Flat 18 should therefore be paid.

## 7. Decision

For the reasons we have given the Tribunal determines that:-

I) We have no jurisdiction to consider the sums claimed for the years ended 30th November 1997, 30 November 1998, 30 November 1999 and 30 November 2000.

II) The sums claimed in respect of the years ended 30th November 2001, 30th November 2002 and 30th November 2003 were properly payable to RLHA and have been paid by all leaseholders to RLHA.

III) The sum claimed in respect of the year ending 30th November 2004 is reasonable and properly payable and therefore the leaseholders of Flat 1 should pay to RLHA £427.07 the leaseholder from Flat 4 should pay to

RLHA £858.95 and the leaseholder of Flat 18 should pay to RLHA £858.95 (all other leaseholders having duly paid their contributions).

Dated 25th November 2004

Signed P B Langford MA LLB (Chairman)