IN THE LEASEHOLD VALUATION TRIBUNAL

CHI/43UF/LIS/2004/0040

IN THE MATTER OF 1 FERNLEIGH, YATTENDON ROAD, HORLEY, SURREY, RH6 7BS

BETWEEN:

(1) MISS JOANNE WAIN
(2) MR D WOOD

Applicants

-and-

SINCLAIR GARDEN INVESTMENTS (KENSINGTON) LTD

Respondent

THE TRIBUNAL'S DECISION

Background

1. Unless stated otherwise, the page references in bold in the Decision are to the page references contained in the agreed bundle of documents. Unfortunately, the pages in the bundle are not numbered sequentially. Pages 1-44 are the procedural documents. The subsequent pages 1-150 are copies of the relevant documents disclosed and relied on by the parties. As a matter of convenience these will be referred to herein as the procedural documents **[PD]** and disclosed documents **[DD]** respectively.

2. The Applicants makes two applications in this matter. The first application is made pursuant to s.27A of the Landlord and Tenant Act 1985 ("the Act") (as

amended) for a determination or her liability to pay and the reasonableness of service charges arising in the years ending 24 June 2002 to 24 June 2005. The relevant service charges are set out in detail below. The second application is made pursuant to s.20C of the Act to disallow in whole or in part any costs incurred by the Respondent in these proceedings. The Tribunal is also required to consider, pursuant to Regulation 9 of the Leasehold Valuation Tribunals (Fees) (England) Regulations 2003, whether the Respondent should be required to reimburse the fees incurred by the Applicants in these proceedings.

3. The First Applicant occupies the subject property by virtue of a lease **[DD/35]** dated 20 April 1989 granted by Picanest Limited to Edwin Thompson for a term of 99 years from 24 June 1989 ("the lease"). The Tribunal was not told when the First Applicant took an assignment of the lease. The Tribunal had not been provided with a copy of the Second Applicant's lease. However, it was not contended by either party that the terms of his lease were not identical to that of the First Applicant or that his liability to pay service charges arose in a different way. By clause 4(2) of the lease, the lessee covenanted to:

"Contribute and pay to the Lessor a sum or sums of money (hereinafter called "the Maintenance Contribution") equal to the percentage which the rateable value of the flat bears to the aggregate rateable values of the other flats in the building of the costs expenses outgoings and matter mentioned in the Fourth Schedule... ... ".

The expenditure incurred pursuant to the Fourth Schedule is the expenditure incurred in "the Lessor's financial year", which is defined in clause 4(2)(b) of the lease as being from 1 January in each year to 31 December of the same year or such annual period as the Lessor in his discretion shall determine. Clause 4(2)(c) gives the Lessor a further discretion to demand with every half yearly payment of rent such sums in advance and on account of the Maintenance Contribution. Clause 1 of the lease provides that the ground rent is payable by equal half yearly payments in advance on 25 day of December and 24 June in every year. It seems in practice that the Respondent had also adopted 24 June as being the end of each annual service charge year.

Inspection

4. The Tribunal inspected the property on 17 June 2005. It established that the property is a two storey former dwelling house, built probably during the 1920's or 1930's with a pebbledash external rendering over brick under a pitched tiled roof. The building has been extended and was converted into self-contained flats most probably in mid to late 1980's just prior to sale and the granting of the subject leases. In general the building was found to be in good condition.

Decision

5. The hearing also took place on 17 June 2005. The Applicants were represented by Mr Sym-Choon. The Respondent had instructed a firm of solicitors, Messrs Chevalier & Co, in the preparation of its case but was represented at the hearing by Mr Goodman, a Chartered Quantity Surveyor.

Both parties had set out their respective positions in their statements of case **[PD/10 & 17]**. The Tribunal also had the benefit of what was effectively a Scott Schedule prepared by the parties **[PD/36]**, which was perhaps of greater assistance in identifying the issues in this matter. At the hearing, the Tribunal dealt with the matter on the basis of the submissions made by both parties with reference to the relevant documents in the bundle. Each of the disputed items for the relevant service charge year is considered below.

Y/E 24 June 2002

6. The disputed items were:

   (a) £466.50 – J & C Builders (car park maintenance).

   (b) £3,055 – Ocean Property Services (external decorations).

   (c) £660.42 – Allcure (rising damp).

   (d) £733.21 – Hurst Managements (management fee).

7. At the hearing, Mr Sym-Choon was prepared to concede that both the service charges set out at paragraph 6(c) and (d) above were reasonable and payable by the Applicant. For the avoidance of doubt, the apportioned management fee for Flats 1 and 2 was £182.83 and £136.03 plus VAT respectively.

8. In relation to the cost of £466.50 paid to J & C Builders to clear and maintain the car park **[DD/2]**, Mr Sym-Choon submitted that this had not been reasonably incurred. No additional costs should have been incurred as it was within the function of the managing agents, Hurst Managements ("Hurst"), to arrange for the clearing of the carr park and that the cost of doing so should

not be passed on to the lessees. If he was wrong about that, Mr Sym-Choon submitted that the cost of £200-250 was reasonable. Mr Goodman stated that the management fee did not include the provision of services. He went on to say that the car park was prone to rutting and the dumping of rubbish. The contractors not only attended to these matters but also applied weedkiller, which was required every year. The job had been carried out in a day by two at a total labour charge of £222. The use of a skip was also necessary at a cost of approximately £60. Mr Goodman said that the contractors employed had been used many times by him and were reliable. He did not accept that the cost of having the work carried out had increased by the fact that the contractors were not local and were based in West Sussex.

9. The Tribunal accepted Mr Goodman's evidence that the car park required regular maintenance annually and that the cost of doing so was not included in the management fee charged by Hurst to the Respondent. The costs of maintaining the car park was one of the general expenses allowed by paragraph 5 of the Fourth Schedule of the lease to form part of the Maintenance Contribution, for which the lessees are liable. However, the Tribunal did not accept Mr Goodman's argument that the use of a contractor based in West Sussex had not increased the cost of the work. That argument would have had greater force if Hursts had sought an estimate for the work from a local contractor as a cross check for the cost of the contractor that was used. Apparently, this had not been done. The Tribunal also had regard to the rather modest size of the car park. It, therefore, found the cost of employing J

& C Builders to be unreasonable and allowed the sum of £335 inclusive of VAT as being reasonable. That figure is comprised as follows:

Labour cost x 2 = £150

Cost of skip hire = £100

Cost of gravel = £35.00

Total = £285

VAT @ 17.5% = £49.87

Grand Total = say £335.00

10. The other disputed service charge item was the cost of £3,055 paid to Ocean Property Services to redecorate the property externally **[DD/4]**. Mr Sym-Choon argued that the specification for the work **[DD/73]** was generic and not specific to the property. Accordingly, the tendering estimates could not have been sufficiently accurate and could not represent value for money. Mr Sym-Choon accepted that the extent and standard of the work carried out was reasonable. He submitted that half of the cost paid to Ocean Property Services was in fact a reasonable amount to redecorate the external parts.

11. Mr Goodman said that three estimates had been obtained for the external redecoration of the property and the appropriate s.20 notice dated 8 June 2001 was served on the lessees **[DD/68]**. None of them had commented on the proposed work. The estimate provided by Ocean Property Services was in fact the lowest estimate provided but he was unable to say whether the contractors who tendered for the work had attended the property before

preparing their estimates. He argued that the Respondent was obliged under the terms of the lease to periodically redecorate the external of the property and could not do so on a piecemeal basis. As evidence that the cost was reasonable, Mr Goodman pointed out that a further s.20 notice served on the lessees in March 2005 to redecorate the external parts was based on a similar figure. As to the generic specification, he said that the specification used was in standard form as Hurst had a substantial portfolio of property and it would not be practical or uneconomic for individual specifications to be prepared for each property.

12. The Tribunal took the view that the generic specification used by Hurst only dealt with the redecoration of the property and not repairs to it. It was, therefore, not necessary for Hurst to carry out a survey thereby avoiding any additional costs to the lessees by having a surveyor attend the property. Mr Sym-Choon also accepted that the work had been reasonably incurred and was of a reasonable standard. The only challenge made by the Applicant was that the cost of the work was unreasonable. There was no evidence before the Tribunal that any of the contractors that tendered for the work had attended the property before preparing their estimates. It was possible that the estimates had been prepared solely by reference to the generic specification adopted by Hurst. Had there been any evidence that the contractors had prepared their estimates after having inspected the property, the Tribunal might have been minded to allow the cost of redecoration in full. However, in the absence of such evidence, the Tribunal considered the cost paid to Ocean Property

Services to be high and allowed the sum of £2267.75 as being reasonable. That figure is comprised as follows:

Cost of scaffolding = £1,000

Labour cost of 2 men x 4 days @ £160 per day = £1,280

Materials = £150

Total = £1,930

VAT @ 17.5% = £337.75

Grand Total = £2,267.75

Y/E 24 June 2003

13. The disputed items for this service charge year were buildings insurance costs of £981.62 and Hurst management fee of £775.49, both of which Mr Sym-Choon conceded were reasonable and payable by the Applicant. Again, for the avoidance of doubt, the apportioned management fee for Flats 1 and 2 was £193.38 and £143.88 plus VAT respectively.

Y/E 24 June 2004

14. The disputed items were:

    (a) £381.88 – Business Clean (garden clearance).

    (b) £381.67 – A & J Electrical Services (construction of a wood cabinet).

    (c) £211.50 – J & C Pebbledash (external render and steel door surround to Flat 4).

    (d) £741.14 – Blackman Fencing (repairs to panel fencing in car park).

    (e) £869.50 – Hurst management fee.

15. Again at the hearing, Mr Sym-Choon was prepared to concede that both the service charges set out at paragraph 14(c) and (e) above were reasonable and payable by the Applicant. The management fee apportioned as between Flats 1 and 2 was £216.82 and £161.32 plus VAT respectively.

16. The garden clearance cost of £381.88 paid to Business Clean **[DD/23]** related to the maintenance and cleaning of the car park. Mr Goodman said that the actual cost of the work was £185 plus VAT and the cost of hiring a skip of £164.50. It was less than before because there was slightly less work done. The Tribunal adopted the same reasoning set out at paragraph 9 above in relation to these costs. The Tribunal allowed the total sum of £334.88 inclusive of VAT as being reasonable. It accepted the labour costs of £217.38 as being reasonable but only allowed the sum of £117.50 for the cost of the skip hire.

17. The sum of £381.67 paid to A & J Electrical **[DD/24]** related to the construction of a small wooden cabinet under the staircase in the front entrance hall to the property. Mr Sym-Choon argued that the cost was unreasonable having regard to the small size of the cabinet. He also said that the work took over three months to complete and he had been told by the contractor that the materials had only cost £20.

18. Mr Goodman said that a risk assessment audit and report had been prepared by Hurst on 19 August 2003 **[DD/128]**. That report recommended that the

electrical meters below the staircase should be boxed in. To ensure that the recommendation was correct, Hurst instructed A & J Electrical Services on 15 September 2003**[DD/135]** to attend the property. The firm was based, again, in West Sussex. Mr Goodman said that the firm had carried out work for Hurst for many years and was reliable. He accepted that the cost of the work was high but apparently this was as a result of an earlier abortive visit by the contractor because he could not gain access. Mr Sym-Choon accepted that at the relevant time, Hurst had not been provided with a copy of the key to the front door thereby allowing access to the communal hallway.

19. The Tribunal accepted that the cost of installing the wooden cabinet around the electrical meters would have been increased by the abortive visit of the contractor. However, that being said, the Tribunal still considered that the total cost of the work to be high having regard to the extent of the work, the materials used and the continued insistence by Hurst to use non-local contractors. Accordingly, the Tribunal allowed the sum of £125 for labour and £30 for materials providing a total sum of £182.12 inclusive of VAT as being reasonable.

20. The sum of £741.14 paid to J Blackman **[DD/26]** related to the repairs carried out to the fencing around the boundary of the car park and rear of the property. Mr Sym-Choon accepted that the work had been reasonably incurred. His challenge was on the basis that the final cost was unreasonable having regard to the work carried out. Mr Goodman explained that 3 wooden panels had been replaced at the rear of the property and a further five panels repaired in

the fencing around the car park. The work had been carried out in a day by two men at a total labour cost of £400 per day.

21. The Tribunal was of the view that, having regard to the nature and extent of the fencing repairs carried out, the cost was unreasonable. The Tribunal allowed the sum of £446.50 inclusive of VAT as being reasonable. That sum is comprised as follows:

Cost of 3 wooden panels @ £80 per panel = £240

1 hour labour to fit 3 panels = £20

4 hours labour @ £20 per hour to remove 5 old panels to car park to repair and re-erect = £80

1 hour labour @ £20 to re- hang old wooden gate = £20

1 hour labour @ £20 to clear debris from site = £20

Total = £380

VAT @ 17.5% = £66.50

Grand Total = £446.50

Y/E 24 June 2005

22. The disputed items for this service charge year were estimated costs of £600 for repairs and general and maintenance and a reserve fund provision of £1,715 for the cost of internal and external redecoration of the property **[DD/22]**. Mr Sym-Choon conceded that the estimated cost of £600 for repairs and general maintenance was reasonable. However, he believed that the total reserve fund provision of £1,715 was insufficient to meet the cost of

redecorating the internal and external of the property. He believed that the total cost would be nearer £3,500 and a provision of £1,000 per lessee was more appropriate. Mr Goodman was prepared to agree this figure.

Section 20C & Reimbursement of Fees

23. Both of these matters can be taken together as the Tribunal's considerations in relation to both are largely the same. After the hearing, the parties filed written submissions in relation to the application made by the Applicants under s.20C of the Act. The section gives a Tribunal a discretion to disallow in whole or in part the costs incurred by a landlord in proceedings before it. The Tribunal has a very wide discretion to make an order that is *"just and equitable in the circumstances"*.

24. Mr Sym-Choon submitted on behalf of the Applicants that there was no provision in the lease allowing the Respondent to recover its costs incurred in these proceedings. In the alternative, he submitted that the costs of the Respondent's solicitors, Messrs Chevalier & Co, and Hurst were unreasonable.

25. In their written submission dated 24 March 2005, the Respondent's solicitors referred the Tribunal to the judgement of Gibson LJ in the leading case of *Iperion Investments Corporation v Broadwalk House Residents Ltd* [1995] 46 EG 188 as to the exercise of its discretion under s.20C. It was submitted that the exercise of that discretion in favour of a tenant should be used sparingly

and only when the landlord has acted oppressively or in circumstances that would be unjust. They went on to submit that it was also not the purpose of s.20C for a Tribunal to carry out an assessment of the landlord's costs, as this could be the subject matter of a separate s.27A application by a tenant (see *Langford Tenants v Doren*). The Respondent's solicitors similarly contended that it was not necessary under s.20C for a Tribunal to decide whether the terms of the lease enable recovery of such costs from a tenant and relied on the decision of Professor Farrand QC in the matter of 29 Talbot Grove House, London, W11 (LON/00AW/LSL/2004/0032). The Tribunal agreed with both submissions.

26. The Tribunal had regard to the fact that the majority of service charge costs initially disputed by the Applicants were largely agreed by the time of the hearing. At the hearing, Mr Sym-Choon made further concessions on the majority of the remaining disputed items once an explanation of how those costs had arisen had been provided by Mr Goodman. As long ago as 22 October 2004, the Respondent offered to meet with the Applicants to provide that explanation. No response was received from the Applicants. Indeed, Mr Sym-Choon in his written submission dated 28 June 2005 admits that the Respondent's offer to meet to attempt to resolve the service charge dispute was declined. In the Tribunal's view, had such a meeting taken place it may well have resulted in a narrowing of the issues or total agreement being reached by the parties thereby avoiding the necessity of a hearing. By refusing to meet with the Respondent and pursuing this application regardless, the Applicants had acted unreasonably. The Applicants s.20C application would

have found greater favour with the Tribunal if the proposed meeting with the Respondent had taken place and proved to be unsuccessful because the Respondent had acted unreasonably. Accordingly, the Tribunal makes no order under s.20C. For the same reasons, it also makes no order under Regulation 9 of the Leasehold Valuation Tribunals (Fees) (England) Regulations 2003.

CHAIRMAN..... J. Mohabir

DATE..... 21/7/05