RESIDENTIAL PROPERTY TRIBUNAL SERVICE

SOUTHERN RENT ASSESSMENT PANEL AND LEASEHOLD VALUATION TRIBUNAL

Case Numbers: **CH1/15UC/LSC/2006/0070**

Re: **40 Penhaligon Court Truro Cornwall TR1 1YB**

Between: **Edward William George Horne and Mrs Rita Grace Horne**

Applicants

and

Retirement Care Group Limited

Respondent

In the matter of Applications under Sections 20C and 27A Landlord and Tenant Act 1985

Date of Hearing – 10th November 2006

Appearances – Miss Lana Wood of Counsel for the Respondent
Mr J Platt of Section 20 Limited for the Applicant

Members of the Leasehold Valuation Tribunal - D Sproull LLB (Chairman)
R Batho MA BSc LLB FRICS
A J Lumby BSc FRICS

Preliminary Matters

At the commencement of the hearing the Chairman notified the parties that Mr Lumby's mother-in-law was resident in a property the service charge for which was listed as a comparable in the papers submitted. The parties confirmed that they did not see this connection as creating any conflict which might unduly influence the Tribunal and that they were content that Mr Lumby should remain as a member.

Background

1. This was an Application by Mr and Mrs E W G Hall the leaseholders of 40 Penhaligon Court Truro TR1 1YB under Section 27A Landlord and Tenant Act 1985 for the determination of the reasonableness of the service charges in respect of the property for the years 1989/90 – 2004/05. Penhaligon Court had been developed by Lansdown Homes Limited in about 1988. There are 44 leasehold flats and 10 freehold houses. The freehold interest in the flats is owned by Penhaligon Court Residents Company Limited where the shares are owned by the residents. Lansdown Homes Limited transferred the leasehold

interest in the common parts to the Respondent by a Lease dated 8th June 1998. This Lease is for a term of 99 years and is at a peppercorn rent

2. The development has communal gardens and a residents' lounge, guest suite, dustbin area and a resident warden living in a warden's flat.

The Issues

From the statements of case lodged by the parties it appeared that the main issues to be decided by the Tribunal were:-

1. What was the correct limitation period to be applied to the application?

2. Whether an accommodation charge or notional rent for the resident manager's flat was recoverable

3. If such a charge or rent was recoverable what would be a reasonable figure for it?

4. The reasonableness of the management fee for each of the years in question

5. The recoverability of professional fees incurred in pursuing tenants who had not paid their service charge.

   Both parties agreed at the commencement of the hearing that these were the only points at issue and that neither party wished the Tribunal to address other aspects of the reasonableness or payability of the service charge.

The Arguments

Issue 1

Miss Wood contended that the Tribunal should not entertain the application in relation to any year before the service charge year ending 31st March 2000, on the basis that Section 9 Limitation Act 1980 applies to applications under Section 27A of the Act, as the foundation for such applications is statutory. She referred us to the decision of the Eastern Rent Assessment Panel of 11th April 2005 in the case of Boyd v Waterglen Decision number 1605 and to Murphy v St Andrews Square which is a Decision of the London Rent Assessment Panel dated 26th February 2004 Decision number 1143. She also referred us to an article in the Journal of Housing Law (2005) JHL3 where the learned authors argued that a tenant's application under Section 27A is an application derived from statute with six years being the relevant limitation period.

For the Applicant Mr Platt argued that the logic in Murphy should be followed and that all the years the subject of the application should be dealt with by the Tribunal.

Issue 2

Mr Platt maintained that the accommodation charge/notional rent was not properly chargeable and he referred us to the case of Cadogan v Mahdi a Decision of the Lands Tribunal of 7th April 2006 (2006) E W Lands LRA 9 2005. The Lease of the 30th June 1989 made between Landsdown Homes Limited and the Applicant defined service charge in accordance with the Third Schedule of the Lease. Clause 3.1 of the Lease contained the tenant's covenant to pay "the service charge as a contribution towards the costs and expenses of running the estate and the maintenance thereof and the other matters more particularly specified in the Third Schedule…"

Clause 5C contained the landlord's covenant to "maintain an alarm system connected to the flat for the purpose of dealing with emergency calls and employ a resident manager for general supervision of the estate and at all times whilst on duty for answering emergency calls of the tenant".

At the end of clause 5 there was a provision that "the landlord may for the better management of the estate add to or vary any of the above services…".

The Third Schedule defined the service charge as "the proper proportion of the reasonable cost…to the landlord of providing supplying maintaining and making provision for the supply of the services and other matters specified in paragraph 2 of the Schedule together with the fees and disbursements paid to any managing agents appointed by the landlord in respect of the estate or a reasonable allowance to the landlord in respect of its own management costs such payment to be calculated and made as follows…". Clause 2 of the Third Schedule set out the services to be provided, to include the employment of the resident manager and in clause 2.4 "the provision maintenance and repair of the resident manager's dwelling (including any rates or taxes payable in respect thereof)". Lastly there was what is commonly known as a "sweeping up clause" in clause 2.9 of the Third Schedule "the provision of all other services (if any) provided by the landlord in and about the maintenance and proper and convenient management and running of the estate and the gardens and grounds".

The accommodation charge had been introduced into the service charge budget in 2006 but had later been withdrawn by the Respondent. Mr Platt contended that the Lease made no reference to an accommodation charge nor to a notional rent, that the Respondents, in any event, only pay a peppercorn as rent for the resident manager's flat and that the cost to it of providing the resident manager's dwelling is nil. Mr Platt referred us to the Judgement of His Honour Michael Rich QC in Cadagon at paragraph 20 where he defined the approach to this point as follows:-

(i) It is for the landlord to show that a reasonable tenant would perceive that the Underlease obliged him to make the payment sought

(ii) Such conclusion must emerge clearly and plainly from the words used

(iii) *Thus if the words used could reasonably be read as providing for some other circumstance the landlord will fail to discharge the onus upon him*

(iv) *This does not however permit the rejection of the natural meaning of the words in their context on the basis of some other fanciful meaning or purpose and the context may justify a "liberal" meaning*

(v) *If consideration of the clause leaves an ambiguity then the ambiguity will be resolved against the landlord as "proferror"*

As to the construction of the Lease, Miss Wood referred us to the Court of Appeal Decision of Gilje and Charlgrove Securities Limited (2001) EWCA CIV1777 which in turn referred to the unreported case of Agavil Investments, a Court of Appeal Decision of 3rd October 1975. She also referred again to the Cadogan case and to Lloyds Bank and Bowker Orford (1992) 2EGLR44 which again made reference to the Agavil case.

Miss Wood produced to the Tribunal a copy of the Management Lease of the 8th June 1998 and referred in particular to clause 3.(8) which dealt with the use of the resident manager's dwelling and office

Issue 3

Mr Platt argued that, even if a notional rent was payable, as the resident manager's flat cost the Respondent nothing (except a peppercorn) no charge should be made and he referred us to Jollybird Limited v Farzone Limited 1990 EGLR55. We had evidence put before us by the Applicants as to the level of rents in the Truro area.

Issue 4

So far as the reasonableness of the management fees were concerned the Respondent had initiated a charge for notional rent for the resident manager's flat only this year and had later withdrawn that charge because of this application. Mr Platt argued therefore that the net service charge for this year, excluding the notional rent, should be indexed back to each of the previous years using the Retail Price Index. He maintained that the annual charge was in any event too high and that indexation of the net figure for this year, which was reasonable, was the only way of resolving that.

For the Respondent Miss Wood confirmed that it voluntarily reduced the management fee for the service charge budget 2006/07 so that the total of the management fee and the notional rent for the resident manager's dwelling did not exceed the previous year's management fee plus an increase in line with inflation. She therefore contended that the reasonableness of previous years' management fees should not be judged by using the management fee for the service charge budget 2006/07 as a yardstick.

The Tribunal heard evidence from Gregory Leader Cramer, a Director of the Respondent who said that the Respondent's management fees were broadly in line with the rest of the market but generally higher than one would expect to see for a non retirement home management fee because the level of service was greater. His company's fees were at the top end of the range.

Issue 5

The legal fees for pursuing service charge arrears were at issue, with Mr Platt maintaining that these should have been recovered from the defaulters and Miss Wood arguing that paragraph 2.9 of the Third Schedule of the Lease (the sweeping up clause) made such costs recoverable

Decision

1. In the view of the Tribunal the foundation of this application is statutory and therefore Section 9 Limitation Act 1980 applies. We would not therefore deal with any of the years prior to the service charge year ending 31st March 2000.

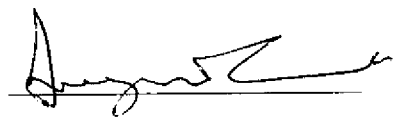
2. In respect of the accommodation charge or notional rent the Tribunal took note of His Honour Michael Rich QC's approach in the Cadagon case and, based on the tests he had set out in paragraph 20 of his Judgement, concluded that there was ambiguity and that a reasonable tenant would not perceive that the lease obliged him to make the payment sought. In our judgement is not open to the Respondents to levy an accommodation charge or notional rent.

3. In the circumstances it was not necessary to make a decision as to what a reasonable figure would be for an accommodation charge or notional rent. Had it been necessary for us to make a decision on this point we would not have concluded that an open market rent figure would have been appropriate.

4. There was no evidence before us that the management fees in respect of the years in question were excessive and, although on the higher end of the scale, we did not find them unreasonable.

5. We find that professional fees incurred in pursuing tenants who had not paid their service charge are properly recoverable under paragraph 2.9 of the Third Schedule of the Lease.

The Applicants had made an application under Section 20C of the Act. The Tribunal orders that the Respondent should only be entitled to recover one half of its costs, on the basis that the Lease only makes provision for it to recover its costs in connection with the proper and convenient management of the development, which does not include, in our judgement, the imposition of an accommodation charge. The costs incurred in respect of the part of the application relating to the accommodation charge should be disallowed.

Chairman 

Dugald Sproull LLB

Dated 21st December 2006