# RESIDENTIAL PROPERTY TRIBUNAL SERVICE
# LEASEHOLD VALUATION TRIBUNAL

| | | |
|---|---|---|
| **Property** | : | **Diamond Waters,<br>218 Brighton Road,<br>Lancing,<br>West Sussex BN15 8LJ** |
| **Applicants** | : | **(1) Kathy Byrne<br>(2) Paul King<br>(3) Tony Stitt<br>(4) Gary Berrett<br>(5) Paul Batey<br>(6) Abigail Henty<br>(7) Ed Brooker<br>(8) Amber Turnell<br>(9) Maurice Poupard<br>(10) Rob Dickenson<br>(11) Steve Vicary<br>(12) Stacey Gillingham<br>(13) Christine McCormack<br>(14) Ann Davis<br>(15) John Albon<br>(16) Barbara Albon** |
| **Respondents** | : | **(1) Alexander Robert Bonetti<br>(2) Robert Paul Bonetti<br>(3) Greta Ann Bonetti** |
| **Case number** | : | **CAM/45UB/LSC/2008/0074** |
| **Date of Application** | : | **5TH November 2008 2008** |
| **Type of Application** | : | **To determine reasonableness and payability of service charges (Ss. 19 and 27A Landlord and Tenant Act 1985 ("the 1985 Act"))** |
| **The Tribunal** | : | **Bruce Edgington (lawyer chair)<br>Edward A. Pennington FRICS<br>David Cox** |
| **Date and venue of hearing** | : | **19th February 2009<br>Chatsworth Hotel, Steyne, Worthing BN11 3DU** |

# DECISION

1. The Tribunal finds that reasonable service and administration charges payable by the Applicants are:-

   (a) £150.00 per annum per flat for management fees for the years 2006 and 2007 and a proportionate part for 2008
   (b) £250.00 per annum plus VAT is a reasonable figure for accountants' fees for 2006, 2007 and 2008
   (c) the amounts paid to the cleaner for services up to 31st October 2007 was £15.00 per week and from 1st November 2007 to 29th September 2008 it was £25.00 per week and not the £25 per week claimed for the whole period.

2. The Tribunal makes an Order pursuant to Section 20C of the 1985 Act that no part of the cost of representation before this Tribunal shall be recoverable from the Applicants by way of a future service charge.

3. The Tribunal dismisses the application for an order that the Respondents pay any costs pursuant to paragraph 10, Schedule 12 of the **Commonhold and Leasehold Reform Act 2002** ("the 2002 Act").

## Reasons

**Introduction**

4. This application relates to a building which was, until 30th November 2004, a purpose built registered care home known as Diamond Waters Retirement Hotel. Thereafter, it was converted into studios and flats which were then let on 99 year leases commencing on 25th March 2001. Originally, two of these leasehold interests appear to have been demised to the Respondents who are also the freehold owners.

5. The Respondents then appear to have undertaken the management of the building themselves but the 3rd Respondent's ill health meant that her family moved to Bude in Cornwall in November 2007. The Respondents still took responsibility for the management of the building but much of the actual work appears to have been done by others thereafter.

6. A Right to Manage Company took over responsibility for the management from 29th September 2008.

7. When this application was received, it described a dispute over service charges for 2006, 2007 and 2008. The only detailed dispute related to 2006 because, it was alleged, insufficient information had been given about the subsequent years to enable the Applicants to put their case. The detailed allegations at that stage were:-

   (a) the management fees were excessive and out of line with normal commercial rates
   (b) the Respondents' fee of £500 to complete accounts is unreasonable and should be included in the management fee.
   (c) the various charges for gardening and cleaning are unreasonable and/or excessive
   (d) the Respondents' charges for calling and being present when contractors do work at the property are unreasonable
   (e) the demands for service charges do not comply with either the leases or Statute

8. Further documents have now been produced by the Respondents and it seems that the basic differences between the parties for all 3 accounting years are the same.

9. The Tribunal chair made a directions Order requiring the Respondents to file and serve a short statement of response to the claims and further directions up to the hearing. There are allegations that information was not supplied on time, but the Tribunal was provided with statements and copy documents.

10. It should be recorded that various applications were made on behalf of the Respondents during the course of the pre-hearing work to defer the work of the Tribunal indefinitely because of the 3rd Respondent's medical condition. She has had 3 heart attacks and major stomach surgery. This was not successful and she awaits an admission to hospital for further surgery.

11. It was said, on behalf of the Respondents, that Alexander Bonetti had little to do with the property, Greta Bonetti was virtually housebound and Robert Bonetti, the Respondent who had the most to do with the property, had to look after her. Whilst the Tribunal had and still has every sympathy with the 2nd and 3rd Respondents, it did not feel that a general delay was in the interests of justice or, indeed, any of the parties.

12. The fact that this hearing could go ahead was because of Mr. Robert Bonetti's understanding of this and his willingness to do the preparatory work necessary.

13. Two days before the hearing, on the 17th February 2009, a letter was

received from the Respondents' solicitors, Dean Wilson Laing, renewing the application to adjourn. It said that the 3rd Respondent had been told that she should not travel, that Mr. Robert Bonetti should not leave his wife alone and that it had been planned for the solicitors to meet their client that afternoon. Of some considerable concern, it was also said that they were going to produce a further witness statement to deal with the management fees issue. Enclosed with that letter was a letter from Mr. Bonetti himself.

14. In stark contrast to the letter from the solicitors, Mr. Bonetti does not ask for an adjournment. He says that his solicitors are fully instructed on his behalf and that he will be available on the telephone if necessary. He makes no mention of any advice being given to him by the hospital not to leave his wife but says "...I feel I cannot leave her as this stressful situation of the tribunal has had a bad effect on her health.".

15. The Applicants, through their solicitors, strongly opposed the adjournment saying, as seemed to be the case, that the position had not really changed since the last application to adjourn.

16. After giving very careful consideration to both letters, the Tribunal decided to refuse the application and gave reasons in writing. It informed the solicitors that if there was in fact further evidence to support their position, an oral application may be considered at the hearing.

17. The Applicants also ask the Tribunal to make an order pursuant to Section 20C of the 1985 Act i.e. that the costs incurred by the Respondent in connection with this application should not form part of any future service charge.

**The Inspection**

18. The members of the Tribunal inspected the property. Mr. Albon showed them round in the presence of the Respondents' solicitor. The Tribunal inspected the common parts of the building, including the laundry room, the grounds, one of the studio flats and the penthouse flat.

19. The building was said by Mr. Albon to have been built in 1993 and the Tribunal would accept this. It is 3 storeys and built of brick under a tiled roof. The 'garden' areas were very small. Wooden decking at the rear is adjacent to what could be described as a lagoon with swans and other birds present on inspection. The used portable bar-b-ques referred to by the Applicants in their written evidence were noted.

**The Lease**

20. The Tribunal was supplied with what appeared to be a copy of the lease to Studio 6. It is a lease for 99 years from the 25th March 2001. The

recitals describe the property as *"...at present consisting of 12 flats..."*. The share of the service charge to be paid by the lessee of Studio 6 is said to be one twelfth of the total. The freeholder has to insure the building (clause 5.2) and repair and generally manage the building (clause 5.4).

21. The lessee has to pay the estimated amount of service charges in advance on the 1st January and 1st July in each year for the ensuing 6 months (clause 3.2.2) and the first of such payments was set at £600.

22. Of relevance to this dispute are the provisions in clause 5.4.5.2 which state that *"As soon as practicable after the 31 December in every year..."* the freeholder must serve on each lessee *"a fair summary in writing certified by a qualified accountant of the costs incurred and monies expended by the Lessor during the year immediately prior to the said 25 March in complying with its covenants in Clauses 5.2 and 5.4 hereof set out in a way which shows how the said costs incurred and monies expended are or will be reflected in demands for payment under Clause 3.2..."*.

23. Why the words "the said 25 March" are used is not clear because this date does not appear to be mentioned in any obvious context relating to service charge demands elsewhere in the lease. Clause 3.2 is also unusual in that the only payment actually set out is the payment in advance. If the actual expenditure exceeds the estimated then the lessee has to pay the shortfall but if the actual expenditure falls short of the estimate, the freeholder can either pay the surplus back to the lessee or keep it as part of a reserve fund.

24. Also of relevance to this dispute is the provision in clause 3.2.2 that any shortfall is not payable by the lessee until the certified summary has been sent to the lessee.

25. The position as to the proportions of the total service charge actually payable was not clear from the documents. The sample lease says that the proportion for Studio 6 is a fixed one twelfth. However, there is a letter at page 205 in the hearing bundle dated 5th June 2006 from the Respondents telling the tenants that the proportion is to be one sixteenth from the 1st April 2006.

26. There is then a further letter at page 296 in the bundle from the Respondents with a badly handwritten date which appears to be 4th February 2007, telling the tenants that the proportion from 1st January 2007 will be one seventeenth for studios 1-13 inclusive and two seventeenths for the penthouse and the garden flat.

27. The parties agree that there is provision in the leases for the freeholders to either appoint managing agents or to do the job themselves and charge a fee as if they were 3rd party contractors.

**The Law**

28. Section 18 of the 1985 Act defines service charges as being an amount payable by a tenant to a landlord as part of or in addition to rent for services, insurance or the landlords' costs of management which varies 'according to the relevant costs'. Clearly, the claims by the landlord which are the subject of this application come within that definition.

29. There is also mention in the claims and the representations of monies which could amount to administration charges which are defined in Schedule 11 (pursuant to Section 158) of the 2002 Act and relate to separate charges made by a landlord for extra services. Insofar as any of the disputed claims from the Respondents amount to administration charges, they will be resolved by this decision without any further specific mention of the difference between service charges and administration charges.

30. Section 19 of the 1985 Act states that 'relevant costs', i.e. service charges, are payable 'only to the extent that they are reasonably incurred' and the same applies to administration charges. A Leasehold Valuation Tribunal has jurisdiction to make a determination as to whether such a charge is reasonable and, if it is, as to the amount which is payable.

31. Section 153 of the 2002 Act was brought into effect and applies to all service charge demands sent after 1st October 2007. It says that *"A demand for the payment of a service charge must be accompanied by a summary of the rights and obligations of tenants of dwellings in relation to service charges"*. This must be in a prescribed form and the Section also provides that a tenant may withhold payment of a service charge if the demand is subject to this section and the information has not been provided and *"...any provision of the lease relating to non-payment or late payment of service charges do not have effect..."* until the notice has been provided.

32. As far as the Applicant's costs of representation before this Tribunal are concerned this Tribunal has the power under Section 20C of the 1985 Act to make an order preventing a Lessor from recovering such costs in future service charge demands.

33. During the hearing, the Applicants alleged that the behaviour of the Respondents had been a breach of paragraph 10 of the 12th Schedule to the 2002 Act. It was said that the lack of information to the tenants over

the years caused a great deal of unnecessary expense. No schedule of costs was submitted but the Applicants said that they could provide one.

34. A Tribunal can only make such an order if it is satisfied that a party has acted *"...frivolously, vexatiously, abusively, disruptively or otherwise unreasonably in connection with the proceedings."* and that unnecessary costs have been incurred as a result up to a maximum of £500.

**The Hearing**

35. The hearing was attended by Mr. Albon, the 15th Applicant who represented all the Applicants with the help of his wife, the 16th Applicant. Also in attendance were Kathy Byrne, Gary Berrett, Paul Batey and Rob Dickenson.

36. The Respondents were not present but were represented by Emily Fitzpatrick. It should be said at the outset that both representatives were reasonable, sensible and helpful to the Tribunal in the way they presented their cases.

37. At the outset, several pieces of paper were handed in including a further letter from Mr. Robert Bonetti explaining more about his role as a manager, an undated letter from the cleaner, Mrs. S. Godfrey and a very helpful schedule prepared by Mr. Albon which set out the latest position of the Applicants.

38. It was clear that the areas of dispute fell into 4 categories which can usefully be described as (i) the level of management charges imposed by the Respondents, (ii) the level of accountancy charges, (iii) the cleaning/gardening charges and (iv) extra charges imposed by the Respondents in 2006 for works undertaken and disbursements incurred by the Respondents. The first 3 categories covered the period from and including 2006 until 29th September 2008 when the RTM company took over.

39. Management Fees The Applicants' position is that the total sums of £12,815.60 charged over the period of nearly 3 years are excessive as they are far more than a professional managing agent would charge. They produced evidence that some managing agents charge £150.00 plus VAT per flat per year. The Respondents representations were that some managing agents charge more than that.

40. It is clear on any view of the evidence that the Respondents were charging more than most professional managing agents. The evidence together with the knowledge and experience of the Tribunal members would indicate that £150 - £200 per flat per year plus VAT is the bracket of charges one would expect to pay for a professional agent.

41. The difficulty in this case is that Mr. Robert Bonetti was, until November 2007, local and he says that he knew all about the building and was able to 'tend to' the property and provide a much better service than some professional and 'remote' agency. He may well be right and the Tribunal suspected that some of the tenants may have benefited from having someone on site.

42. However, when assessing what is reasonable, the Tribunal has to look at the lease and decide, within the terms thereof, what it would be reasonable to expect the tenants to pay. A person purchasing one of these flats and seeing the provisions in the lease would expect to pay for a normal commercial managing agent or an equivalent cost of the Respondents managing the property.

43. The evidence is that it is possible to obtain a professional managing agent in this locality for £150.00 per annum per flat. The Tribunal considers that this is the reasonable sum and that anything in excess of this is unreasonable. A professional managing agent would, of course, be expected to keep records and books of account for handing over to a qualified accountant for the purpose of certification in accordance with the lease and Section 21 of the Act.

44. Accountancy fees In this case the 'accountant' used was a G.D. Hicks of Hicks & Associates who describe themselves as 'Accountants & Chartered Tax Advisors' although there is no indication from their notepaper of what the accountancy qualification might be. On the schedule presented to the Tribunal on the morning of the hearing, the Applicants conceded that something should be payable for accountancy services but during the hearing they started to argue that Mr. Hicks was not an 'accountant' for these purposes and they should not pay anything.

45. After some discussion between Mr. Albon and the Tribunal chair, it was agreed that the Applicants would revert to their initial position as in their schedule. This showed that £1,950.00 had been charged over the 3 years in question and, of that, a refund of £1,003.59 was claimed.

46. The Tribunal had to consider this question on the basis of the hypothetical professional managing agent because there is no reason why the tenants should have to pay for the accountant to supply the sort of book-keeping tasks which it appeared that Mr. Hicks was providing. The experience and knowledge of the members of the Tribunal is that a chartered or certified accountant would charge something in the region of £300.00 plus VAT for receiving a prepared statement from the managing agent, auditing this by considering the vouchers and providing the certificate needed.

47. In this case, however, the accountant had not supplied the certificate he was required to provide and the Tribunal therefore concludes that £250.00 plus VAT per year is reasonable. This would also apply to 2008 because the Tribunal did not see that any additional work would have been required on the accountant's part on a transfer to an RTM company.

48. Cleaning/gardening charges This caused the Tribunal some consternation because of the letter provided from the cleaner on the morning of the hearing which was not accepted by the Applicants and the evidence of Mr. Albon that she had been spoken to and had agreed to charge what she had charged before i.e. 1½ hours per week at £10.00 per hour. The letter was therefore considered in detail. It reads as follows:-

> *I Mrs. S Godfrey cleaner at Diamond Waters was paid £25.00 a week. From when Mr & Mrs Bonetti left. The extra monies was for materials and small repairs plus reading meters. For this Mr. Bonetti opened a account at a local hardware store."*

49. Careful consideration of this letter reveals that she only appears to have been paid £25.00 per week from when Mr. and Mrs. Bonetti moved to Bude which we know was in November 2007. It seems reasonable to infer that £25.00 per week was more than she was paid before and the extra was to compensate her for going to a hardware store to obtain materials on Mr. Bonetti's account, undertaking repairs and reading meters.

50. The only inference that the Tribunal can draw, and this is its finding on the balance of probabilities, is that Mrs. Godfrey was paid £15.00 per week until the end of October 2007 when she was then paid £25.00 per week for the reasons stated. When the RTM company took over, the additional tasks were taken back 'in house' and she reverted to the previous figure of £15.00 per week. Thus the finding of the Tribunal is as set out in the decision.

51. As to the extra charges, Mr. Albon said that as the amount involved was only £175.00, if the Tribunal found that the management fees were excessive then this claim would be abandoned. As it has been found that they were excessive, no finding is made with regard to this item.

52. As far as costs are concerned, the Applicants have largely been successful. However there will be no further service charge demands which means that an order under Section 20C is rather pointless. However, it would be unreasonable for the costs of representing the Respondents to be recovered from the Applicants and the order will be made to avoid any future misunderstanding.

53. The claim for costs against the Respondents is dismissed. These can only be costs arising from behaviour in connection with the proceedings themselves. Mr. Robert Bonetti and his wife have delayed in providing information and it is quite probable that the Applicants have been incurred in extra expense. However, Mr. and Mrs. Bonetti are obviously going through a very traumatic time which must be distracting them and the Tribunal has no hesitation in holding that the threshold in Schedule 12 has not been crossed.

54. The only matter left for consideration is the final calculation of the amounts to be refunded to the tenants. The points in issue have been decided by the Tribunal and it is only a matter of arithmetic for the figures to be ascertained. This is therefore a final decision and any period for appeal starts to run from the date when this decision is given. However, if, in the unlikely event that final figure cannot be agreed and it is necessary to ask the Tribunal to decide the actual figure, then an application to re-open the case for that purpose will be considered provided that such application is made with 3 months from the date hereof.

.....

**Bruce Edgington**
**Chair**
**19th February 2009**