CHI/00ML/LSC/2010/0025

THE RESIDENTIAL PROPERTY TRIBUNAL SERVICE

DECISION OF THE SOUTHERN LEASEHOLD VALUATION TRIBUNAL

GROUND FLOOR FLAT, 16 ALBERT ROAD, BRIGHTON BN1 3RN

Applicant: Mr Odysseas Odysseos (Lessee)

Represented by: in person

Respondent: Chancery Lane Investments Ltd (Landlord)

Date of application: 1 March 2010

Date of hearing: 22 June 2010

Members of the Leasehold Valuation Tribunal:

MA Loveday BA Hons MCI Arb

Mr AO Mackay FRICS

Ms JK Morris

INTRODUCTION

1. This is an application for a determination of liability to pay a service charge under s.27A of the Landlord and Tenant Act 1985. The matter relates to the Ground Floor Flat, 16 Albert Road, Brighton BN1 3RN. The applicant is the lessee and the respondent is the freehold owner. A pre-trial review was held on 20 April 2010 where directions were given for the hearing of the matter.

2. The application is dated 1 March 2010. Although the application refers to the 2003-04, 2004-05, 2005-06, 2006-07, 2007-08, 2008-09 and 2009-10 service charge years, the Tribunal's directions stated that only the 2007-08, 2008-09 and 2009-10 charges were in dispute. In fact, at the substantive hearing the applicant dealt only with the service charges payable in the accounting periods ending 31 December 2009 and 31 December 2010. The application stated that the entirety of the service charges in each of these years was unreasonable, and particular the lessee challenged the costs of an asbestos survey, general maintenance and external redecoration. By a letter dated 12 May 2010, the applicant gave further details of his claim in accordance with the directions.

3. The landlord has served various service charge demands giving an address at C/O Moreland Estate Management, 5th Floor, Premier House, 112 Station Road, Edgware, Middx HA8 7BJ on 25 November 2009 and 22 February 2010. The applicant stated that this address was set out in a further demand received two days before the Tribunal. Neither the respondent nor its managing agents have replied to the application or to any of these letters. The landlord did not attend the pre-trial review or the substantive hearing.

INSPECTION

4. The Tribunal inspected the property before the hearing. The property comprises a mid-terrace house in central Brighton on three storeys plus basement which has been converted into four flats. Externally, the render to the front elevation was in fair condition, but the wooden window frames were in poor decorative order. To the front entrance were original tiled steps. The nosings were worn smooth and slippery,

and in one case the nosing had come away completely. Internally, the common parts comprised a short ground floor communal hallway and stairs to the upper flats. The hallway and stairs did not appear to have been cleaned for a very long time, paintwork was dated and carpets basic. Lighting to the internal common parts appeared to be on a separate landlord's electrical supply.

THE LEASE

5. The lease for the flat is dated 11 April 1986, although it was extended to a term of 121 years from 25 December 1985 by way of a deed dated 31 May 2007. The following are the material terms of the lease:

   (a) By paragraph 7 of the Particulars that the lessee's share of 'the Maintenance contribution' was 24%.

   (b) By clause 1(6) that the service charge "accounting period" means "a period commencing on the first day of January and ending on the thirty first day of December in any year".

   (c) By clause 4(3) that the lessee will pay "the interim charges and the service charges (as hereinafter defined) at the time and in the manner provided for in the Fifth Schedule hereto both such charges to be recoverable in default as rent in arrear."

   (d) By the Fifth Schedule paragraph 1(2) the Service Charge is defined as "such percentage of total Expenditure as is specified in Paragraph 7 of the Particulars ..."

   (e) By the Fifth Schedule paragraph 1(3) the "Interim Charge" means "such sum to be paid on account of the Service Charge in respect of each Accounting Period as the Lessor or his Managing Agents shall specify at their discretion to be a fair and reasonable interim payment".

   (f) By the Fifth Schedule paragraph 4 it is provided that "If the Interim Charge paid by the Lessee in respect of any Accounting Period exceeds the Service Charge for that period the surplus of the Interim Charge so paid over and above the Service Charge shall be carried forward by the Lessor and credited to the account of the Lessee in computing the Service Charge in succeeding Accounting Periods as hereinafter provided."

(g) By the Fifth Schedule paragraph 5 it is provided that "If the Service Charge in respect of any Accounting Period exceeds the Interim Charge paid by the Lessee in respect of that Accounting Period together with any surplus from previous years carried forward as aforesaid then the Lessee shall pay the excess to the Lessor within twenty eight days of service upon the Lessee of the Certificate referred to in the following paragraph and in the case of default the same shall be recoverable from the Lessee as rent in arrear."

(h) By the Fifth Schedule paragraph 6 it is provided that "As soon as practicable after the expiration of each Accounting Period there shall be served upon the Lessee by the Lessor or his agents a Certificate signed by such agents containing the following information:

(a) The amount of the Total Expenditure for that Accounting Period

(b) The amount of the Interim Charge paid by the Lessee in respect of that Accounting Period together with any surplus carried forward from the previous Accounting Period.

(c) The amount of the Service Charge in respect of that Accounting Period and any excess or deficiency of the Service Charge over the Interim Charge."

THE LAW

6. The general jurisdiction of the Tribunal is given by Section 27A of the Act:

27A. Liability to pay service charges: jurisdiction

(1) An application may be made to a leasehold valuation tribunal for a determination whether a service charge is payable and, if it is, as to—
(a) the person by whom it is payable,
(b) the person to whom it is payable,
(c) the amount which is payable,
(d) the date at or by which it is payable, and
(e) the manner in which it is payable.
(2) Subsection (1) applies whether or not any payment has been made.
(3) 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, a 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, and

(e) the manner in which it would be payable.

7. Service charges are limited by Section 19 of the Act:

> ***19. Limitation of service charges: reasonableness***
> *(1) Relevant costs shall be taken into account in determining the amount of a service charge payable for a period—*
> *(a) only to the extent that they are reasonably incurred, and*
> *(b) where they are incurred on the provision of services or the carrying out of works, only if the services or works are of a reasonable standard;*
> *and the amount payable shall be limited accordingly.*
> *(2) Where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable, and after the relevant costs have been incurred any necessary adjustment shall be made by repayment, reduction or subsequent charges or otherwise.*

8. The Tribunal also has power under section 20C of the Act to limit the recovery of the landlord's costs before the Tribunal:

> ***20C. Limitation of service charges: costs of proceedings.***
> *(1) A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a court or leasehold valuation tribunal, or the Lands Tribunal, or in connection with arbitration proceedings, are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application.*

9. Finally, the Tribunal's power to order a reimbursement of fees appears in regulation 9 of the Leasehold Valuation Tribunals (Fees)(England)Regulations 2003/2098.

> ***9. Reimbursement of fees***
> *(1) Subject to paragraph (2), in relation to any proceedings in respect of which a fee is payable under these Regulations a tribunal may require any party ta the proceedings to reimburse any other party to the proceedings for the whole or part of any fees paid by him in respect of the proceedings.*

THE SERVICE CHARGES

10. Although the landlord has given no disclosure, the history of the service charges is clear from the documents provided by the applicant.

11. The previous managing agents Reelstone Property Management Ltd prepared a service charge account for the Ground Floor Flat covering the period between 20 August 2003 and 24 June 2006. The landlord demanded service charges at irregular

intervals. On 20 August 2003, it demanded a charge of £300 for the six month period commencing on 23 June 2003, and thereafter it made demands for annual payments of £600 rising to £745.56 for the service charge year commencing on 25 December 2006. In each case these appeared to be interim charges with no annual balancing charge shown on the accounts.

12. Management of the property appears to have been transferred to Moreland Estate Management Ltd for the 2008 service charge year. On 4 March 2008, Moreland demanded £745.56 for a "service charge on account" for the period from 25 December 2007 to 24 December 2008. On 28 November 2008, Moreland demanded for £1,197.65 for a "service charge on account" for the period from 25 December 2008 to 24 December 2009. Attached to this was a "Statement of Budgeted Service Charge Expenditure" for the year ending 31 December 2009 as follows:

Asbestos survey	£ 475.00
Audit fees	£ 250.00
Cleaning	£ 500.00
Electricity	£ 125.00
General Maintenance	£1,000.00
Management Fee	£ 875.00
Property Insurance	£1,515.00

13. On 25 November 2009, Moreland demanded payment of a "service charge on account" for the year from 25 December 2009 to 24 December 2010 in the sum of £1,737.60. Again, this was accompanied by a "Statement of Budgeted Service Charge Expenditure" for the calendar year to 31 December 2010. The figures were identical to the 2009 budget, save that there was an additional sum of £2,500 for "External Redecoration Project."

14. The uncontested evidence of the applicant was that since he acquired the lease in July 2007, the landlord had not provided any certificate of annual service charge expenditure in accordance with the Fifth Schedule to the Lease.

THE APPLICANT'S CASE

15. Service charges. The applicant stated that he was very disappointed with the level of service provided by the landlord and Moreland. Service charge costs had risen significantly in recent years, but no real work or maintenance had been carried out the property at any stage.

16. The applicant dealt with each of the heads of cost in the budget statements as follows:

(i) Asbestos survey. The landlord had included this in the budgeted expenditure in each of the last 3 years. It was unreasonable to seek payment for an asbestos survey every year. In any event, no survey had been carried out. The applicant spent most evenings and weekends in the flat and had never seen a surveyor. He had never had an appointment card or been asked for access. The other residents (who spent more time at the property during the day) had never mentioned any survey being carried out. There were no signs of any invasive testing.

(j) Audit fees. No annual certificate of service charges or annual accounts had ever been provided, let alone a set of audited accounts.

(k) Cleaning. The applicant did not challenge the £500 for cleaning.

(l) Electricity. The applicant did not challenge the £125 for electricity.

(m) General Maintenance. The communal areas were very limited. The steps to the front had been left in a dangerous condition, and the only repairs had been undertaken in 2010 on the day before the pre-trial review. The steps were still dangerous despite those works. Broken glass panes had also been replaced in the front door, but this may well have been done by the letting agents for the flats in the upper part of the property (which were let to students). No work at all was carried out in 2009. Again, he had not seen any signs of work at the property, he had had no appointment cards for access, and none of the other residents had mentioned any work being carried out. It was obvious nothing had been done.

(n) Management Fees. In effect, Moreland Estate Management did nothing. They did not provide accounts or answer complaints about repairs. The applicant had

telephoned them in late 2009 about the proposed decorations which appeared in the 2010 budget, but they were unable to explain what work was proposed.

(o) Property Insurance. The insurance premium was excessive, although the applicant accepted that he had no evidence to support this contention.

The applicant also dealt with the Decoration project referred to in the 2010 Budget. Moreland had been unable to give even the most basic information about what was proposed when he spoke to them on the telephone. In any event, it was already June, and no consultation had begun. He still had not been told what was to be done, when work was to start and so on. Had they given him a breakdown of the proposed works, he might not have issued the application – but the lack of a specification spoke volumes. In any event, the front of the building was not in a particularly poor state compared to adjacent properties.

17. Costs and fees. The applicant's statement of case dated 12 May 2010 (which was copied to the respondent) dealt with a number of other costs. The applicant asked the Tribunal to waive a "late payment fee" of £200 made by Moreland Estate Management. It also sought a waiver of a fee of £49.99 charged by a debt collection agency. He sought reimbursement of legal costs of £180 while obtaining advice on the agent's actions and in "understanding residential [property] law". Finally, the applicant sought reimbursement of the application fee of £100 and the hearing fee of £150 paid to the Tribunal. The applicant argued that the landlord had acted improperly throughout, had charged excessive service charges, failed to provide information and not engaged with the application to the Tribunal.

18. Section 20C. Paragraph 19 of the directions invited the parties to make written submissions on any application under s.20C of the Act or invited them to do so orally at the hearing. The applicant made oral submissions on s.20C at the hearing. He submitted that the landlord had brought the matter on itself, and that it had not responded to the application or assisted the Tribunal in any way.

THE TRIBUNAL'S DECISION

19. 2009 service charge year. There is a minor discrepancy between the dates of the service charge years in the budget statements and the applications for payment. However, the calendar year adopted in the two budget statements is correct: see the definition of the service charge "accounting period" in clause 1(6) of the lease.

20. The landlord and its predecessor in title have throughout operated a system which disregards the specific requirements of paragraph 6 of the Fifth Schedule to the lease. They have apparently never prepared certificates of the amount of actual expenditure at year end. Instead, the landlords have apparently been content to levy fixed interim charges every year, irrespective of the actual amount of the relevant costs incurred.

21. Since the sums demanded by the landlord over time do not reflect relevant costs, the Tribunal faces particular difficulty where a lessee later applies for a determination as to liability for service charges under s.27A. The Tribunal was given guidance by the Lands Tribunal in the case of ***Warrior Quay v Joaquim*** LRX/42/2006. HHJ Huskinson stated as follows:

> *"25. It is clearly unsatisfactory that [the landlord] has failed to comply with its obligations under the [the lease]... However, I also conclude that [the landlord] cannot take advantage from its own breach of covenant and cannot unilaterally put off into the future the ability of a tenant to obtain finality of decision as to how much is payable for a particular year. Section 27A of the 1985 Act clearly contemplates that a tenant can apply to an LVT to obtain a binding decision on this point. I therefore also agree with [the lessee's] submissions that, if in such circumstances a leaseholder does make an application to the LVT for a decision (as happened in the present case),* ***the LVT must reach the best informed decision it can upon the material available to it. The absence of any proper certificate is a matter which may weigh against [the landlord] and may result in the LVT deciding that a lesser sum than hoped for by [the landlord] may be decided to be the amount payable.*** *Also the absence of the certificate should result in the position being that the amount which is decided by the LVT to be payable by way of shortfall will not be payable until a proper certificate (certifying that at least this amount is payable) is provided by [the landlord's] auditors or accountants. However, if the LVT's decision is that the service charge payable for the relevant year is less than the sum paid on account, then the leaseholder is entitled to the benefit of that decision immediately (and without waiting for a certificate from the relevant auditor or accountant).*

22. This Tribunal adopts the approach of the Lands Tribunal in ***Warrior Quay***, and makes the decision below on the basis of the limited information available. There is no specific evidence of actual expenditure or any proper certificate of costs in accordance with the Fifth Schedule to the lease. This may mean that there are other relevant costs which have in fact been incurred by the landlord in 2009 which were not envisaged at the time of the 2009 service charge budget. However, the absence of any certificate or accounts inevitably "*weighs against the landlord*" in this respect. The Tribunal therefore considers only the seven heads of relevant costs which appear in the 2009 budget.

23. On each of these, the Tribunal's findings are as follows:

(a) Asbestos Survey (£475). The Tribunal finds that the landlord did not incur the cost of any asbestos survey in 2009. The evidence of the applicant is that no survey was carried out. There is no documentary evidence such as a receipt or correspondence to suggest that it did. Such costs have not therefore been "incurred" under section 19(1) of the Act. In any event, an annual asbestos survey is not required by any legislation and is not required as good management practice. The cost has not therefore been "reasonably incurred". The Tribunal allows none of the cost of an asbestos survey in 2009.

(b) Audit Fees (£250). The Tribunal finds that the landlord did not incur the cost of any audit in 2009. The evidence of the applicant is that no end of year accounts were prepared, let alone an audit. There is no documentary evidence (such as accounts or correspondence) to suggest that an audit took place. Such costs have not therefore been "incurred" under section 19(1) of the Act. In any event, an annual third party audit of service charge accounts is not required by the lease and it is not required as good management practice for such a small property. The cost has not therefore been "reasonably incurred". The Tribunal allows none of the cost of an audit in 2009.

(c) Cleaning (£500). The applicant did not dispute that he was liable to contribute to this head of expenditure.

(d) Electricity (£125). The applicant did not dispute that he was liable to contribute to this head of expenditure.

(e) General Maintenance (£1,000). The Tribunal finds that the landlord did not incur any maintenance costs in 2009. The evidence of the applicant is that no maintenance was carried out. There is no documentary evidence (such as receipts or correspondence) to suggest that any maintenance had been carried out in 2009. The inspection did not show any obvious signs of work of any kind having been carried out to the property in 2009. Such costs have not therefore been "incurred" under section 19(1) of the Act. The Tribunal allows none of the maintenance costs in 2009.

(f) Management Fee (£875). Plainly some management work was undertaken in 2009, albeit that this had minimal direct benefit to the applicant. Insurance appears to have been arranged. A service charge budget was prepared and service charge demands issued. However, the evidence of the applicant is that Moreland Estate Management Ltd was unable to deal with even the most basic enquiries about repairs or service charge matters. There is no evidence that they attended the premises at any stage in 2009.Finally, no certificate of expenditure or service charge accounts were prepared. The Tribunal therefore finds that the management service provided was not of a "reasonable standard" under s.19(1)(b) of the Act. In any event, in the Tribunal's experience the amount stated to be payable to Moreland Estate Management Ltd (which amounts to approximately £220 per flat), exceeds the general level of management fees payable for this kind of property in Brighton. Doing the best that it can, the Tribunal limits the management fees to £400 for 2009 (i.e. £100 per flat) to reflect the poor standard of management provided.

(g) Property insurance (£1,515). This is a significant item, and the applicant argued that the cost was excessive. Although the landlord has not provided any evidence of the premium paid, the applicant he did not suggest that the property was not insured. Moreover, he did not provide any evidence from an insurance broker or other expert to suggest that the insurance premium was above the market rate. The burden lies on the applicant to show a prima facie case that the cost was not reasonably incurred. With some hesitation, the Tribunal finds that the applicant has not discharged this burden. The cost of the insurance premium is therefore allowed in full.

24. The Tribunal therefore limits the relevant costs to £2,540 for the 2009 service charge year. The applicant's liability under his lease is to contribute 24% of these costs. The Tribunal concludes that the applicant is liable to pay service charges of £609.60 for the 2009 service charge year. That sum does not exceed the claim for interim service charges of £1,137.60 made for the 2009 service charge year. The applicant is entitled to the benefit of this decision immediately (and without waiting for a certificate from the landlord or its agent in accordance with paragraph 6 of the Fifth Schedule).

25. 2010 service charge year. This presents a rather different problem. Although there is limited evidence that any relevant costs have been incurred so far in 2010, it may well be that the respondent does incur costs for maintenance, management, audit etc in the remaining half the 2010 Accounting Period. Moreover, it is possible that the landlord will complete consultation under s.20 of the Act (or that it will seek dispensation from the consultation requirements under s.20ZA) to enable it to incur costs on a major decorative programme before the end of 2010. An application to determine whether any of these costs has been reasonably incurred under s.19(1) is premature. At this stage, there is therefore no evidence that the interim charge budget calculation for 2010 was unreasonable under s.19(2).

26. Reimbursement of fees. The applicant's statement of case dated 12 May 2010 (which was copied to the respondent) asked the Tribunal to waive various charges made by Moreland Estate Management and a debt collection agency. There is no obviously provision of the lease which deals with such charges, and there is no application before the Tribunal in relation to paragraph 5 of Schedule 11 to the Commonhold and Leasehold Reform Act 2002. The applicant also seeks reimbursement of legal costs of £200 incurred before the issue of the application. The Tribunal does not have jurisdiction to deal with these under paragraph 10 of Schedule 12 to the Commonhold and Leasehold Reform Act 2002 since the landlord is the respondent to the application.

27. However, the Tribunal does have jurisdiction under regulation 9 of the Leasehold Valuation Tribunals (Fees) (England) Regulations 2003/2098 to order the

reimbursement of fees paid to the Tribunal. In this instance, the respondent has brought the application upon itself. The certification and accounting procedure in paragraph 6 of the Fifth Schedule to the lease provides a basic protection to the lessees against excessive service charges, and the landlord has failed to meet this requirement. Moreover, it has failed to respond to requests by the applicant or engage in any way whatsoever with the application. The landlord's conduct has been unreasonable both before and after the application was made. It is therefore appropriate to order reimbursement of the application fee of £100 and the hearing fee of £150.

28. Section 20C. It is unclear whether any provision of the lease allows the landlord to recover its costs in connection with proceedings before this Tribunal – and it is also unclear whether the landlord has incurred any such costs. However, if such costs are recoverable, the Tribunal considers that it is just and equitable to make an order under s.20C of the Act, having regard to the guidance given by the Lands Tribunal in ***Tenants of Langford Court v Doren*** LRX/37/2000. The applicant has succeeded in relation to the main issues. Furthermore, the landlord has acted improperly in connection with matters before the Tribunal in that it has failed to respond in any way or provide documentation which would have assisted with the actual relevant costs incurred. Moreover, there are no countervailing considerations. The landlord is not a lessee-owned freehold company and the applicant has acted properly and proportionately in connection with the proceedings before the Tribunal.

THE TRIBUNAL'S DECISION

29. Under s.27A of the Act, the Tribunal determines that the service charges payable by the applicant to the respondent in the 2009 accounting period is £609.60. That sum does not exceed the sum of £1,137.60 claimed by the landlord for interim service charges in 2009. The applicant is entitled to the benefit of this decision immediately (and without waiting for a certificate from the landlord or its agent in accordance with paragraph 6 of the Fifth Schedule).

30. Under regulation 9 of the Leasehold Valuation Tribunals (Fees)(England) Regulations 2003/2098 the Tribunal orders that the landlord shall reimburse the applicant fees of £250 paid to the Tribunal.

31. Under section 20C of the Act, no part of any costs incurred by the landlord in connection with proceedings before the Tribunal are to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the applicant.

Mark Loveday BA(Hons) MCIArb
Chairman
23 June 2010