IN THE MATTER OF FLAT 16, SEAWALLS, SEAWALLS ROAD, SNEYD PARK, BRISTOL, BS9 1PG)

SOUTHERN RENT ASSESSMENT PANEL

LEASEHOLD VALUATION TRIBUNAL

CASE NO: CHI/00HB/LSC/2006/0076

AND

IN THE MATTER OF AN APPLICATION UNDER SECTION 27A OF THE LANDLORD & TENANT ACT 1985 AS AMENDED ("THE 1985 ACT") AND SECTION 20C of the 1985 ACT

DECISION

Applicant/Leaseholder:	Phyllis Joan Wanford Flat 16 Seawalls Seawalls Road Sneyd Park Bristol, BS9 1PG
Respondent/Landlord:	Seawalls Management (Bristol) Limited
Premises:	Flats 16 Seawalls Seawalls Road Sneyd Park Bristol, BS9 1 PG
Date of Application:	(Undated but received by LVT on 19th August 2006)
Date of Directions Hearing:	11th October 2006
Date of Inspection and Hearing of Application:	12th and 13th April 2007
Venue of Hearing:	The Appeals Service, Vintry House, Wine Street Bristol, BS1 2BP

Members of the Leasehold Valuation Tribunal: Mr A D McCallum Gregg (Chairman)
Mr J Reichel Bsc, MRICS
Mr PK D Harrison, FRICS

Clerk: Mr A J Peach

Other Persons Present At the Hearing:

The Applicant – Phyllis Joan Wanford
Mr L Carpanini

The Respondent – Seawalls Management (Bristol) Limited
Mr J Milbourn
Mr P Blackham
Mr K Dow
Mr J James
Mr L Morris

Preliminary Matters:

1. On the 12th of April 2007 prior to the hearing the Tribunal inspected the premises at Flat 16 Sea Walls. They also inspected Flat 20, the guttering and rainwater arrangements for the flats, the garage area, the pump room, the principal car parking area and its surrounds, the secondary car parking area adjoining the caretaker's dwelling, the grounds and in particular those areas of concern including two large boundary walls (the subject of severe cracking), the garden area and areas where tree felling/surgery had taken place.

2. The Tribunal then adjourned to Vintry House, Wine Street, Bristol for the hearing and the following matters were agreed to by the Tribunal:-

(a) that Mr Louis Carpanini who had previously requested to be joined in the matter as an Applicant/leaseholder be allowed to withdraw from the matter as he now preferred to be called as a witness for the applicant, Miss Wanford. (The Tribunal had previously received a Statement of Case from him.)

(b) that the Respondents' case be put by their spokesman, Mr J Milbourn.

(c) that the Tribunal had already received paginated bundles of documents from both the Applicant and the Respondent (some documents being common to both bundles) and in these Reasons the documents referred to

from the Applicant's bundle shall be prefixed by the letter "A" and those from the Respondent's bundle prefixed with the letter "R".

(d) A comprehensive Scott Schedule had been agreed and prepared by the parties pursuant to the Directions given on the 11th of October 2006 and in order that all issues between the parties be clearly identified prior to the hearing.

(e) that the premises (Flat 16) is one of twenty six flats in a block of flats known as "Seawalls" constructed in about 1977 (together with six freehold houses in the grounds of Seawalls) and the caretaker's house and that all leases are for a term of 999 years expiring in the year 2975.

(f) prior to the hearing of the application the Respondent sought leave to make an opening statement. This was given and the Applicant replied to it.

(g) both parties agree that there are fundamental flaws in the lease as are more particularly set out in a letter from the firm of Osborne Clarke dated the 24th of April 1995 (see Document A 25 to 26).

(h) A number of the issues that the Tribunal have to consider have already been canvassed in arbitration proceedings between the Respondent and Mr Louis Carpanini (the tenant of Flat 4) and which are set out in the award of the arbitrator, Professor Clarke dated the 13th of January 2003 (Documents R 486 to 494).

(i) the solution to those difficulties was set out in a letter from Mr Keith Dow the then Company Secretary dated the 10th of October 1987 (see Document A 21 and 22).

(j) whilst it is no part of the Tribunals remit to make recommendations or suggestions, it may be that the only and sensible way forward to avoid disputes in the future is for an application to be made to the Tribunal for a variation to all the leases.

The Issues:

To determine the liability and in certain cases the amount of the service charges payable by the Applicant to the Respondent for the years ending 30th June 2000, 2001, 2002, 2003, 2004, 2005 and 2006 as more particularly set out in the Applicant's application and the Scott Schedule. A Determination was also sought for the year ended the 30th of June 2007.

Relevant Liabilities Under the Lease:

The Respondent's liabilities (covenants) are set out in Paragraph 4 of the Lease (see Pages R332 to 335).

The Applicant's covenants and obligations are set out in Paragraph 5 of the Lease (Pages R336 and 7) and in particular Schedule 3 of the Lease (Pages R349 and 350)

The Law:

The Landlord & Tenant Act 1985 (as amended) is the applicable law 9LTA 1985). For the purpose of the 1985 Act a service charge is defined in Section 18(1) as "An amount payable by a tenant of a dwelling as part of or in addition to the rent (a) which is payable directly or indirectly for services, repairs, maintenance, improvement or insurance or the landlord's costs of management and (b) the whole or part of which varies or may vary according to the relevant costs (including overheads)."

"Relevant costs" are defined as costs or estimated costs incurred or to be incurred by or on behalf of a landlord or superior landlord in connection with the matters for which the service charge is payable.

The word "Improvements" was added to the definition of the service charge by the Commonhold and Leasehold Reform Act (CLARA) of 2002 thus works that amount in law to an improvement, as opposed to a repair, can be the subject of a determination under the 1985 Act provided that the cost of such work is recoverable under the terms of the lease.

The question of whether any sum payable by a tenant is "a service charge" turns on the definition in Section 18(1) of the 1985 Act as amended by CLARA 2002. It does not turn on any different definition of service charges to be found in the lease.

Section 19(1) of the Act deals with the test of reasonableness and the only costs that shall be taken into account in determining the amount of the service charge are those that

(a) are reasonably incurred and

(b) where they are incurred on the provision of services or carrying out of works if those services or works are of a reasonable standard.

The LVT's jurisdiction has been extended by CLARA 2002 and now covers all aspects of the service charge including liability and reasonableness (Section 27(a)(1)(3) of the 1985 Act.

This new jurisdiction applies to all applications made on or after the 30th of September 2003 irrespective of whether the service charge costs were payable or incurred before or after the operative date.

However the amendment to Section 18 only applies in respect of improvement costs incurred on or after the 30th of September 2003.

Particulars of the Issues to be Determined by the Tribunal:

The above issues to be considered by the Tribunal are more specifically set out in the Scott Schedule (following the numbering of that Schedule) and are set out below together with the findings of the Tribunal.

1. ***Share of Costs Incorrect (2000)***

The legal advice received by all the leaseholders (see letter of 10th October 1987 A21) is that because of the defects in the lease there will be a 4.5% deficit or shortfall in the service charge. This is due to the change in the contribution from the six freehold houses in the development. The letter of the 10th October 1987 (Document A21) confirms the position, namely that the 4.5% irrecoverable default is a legitimate company cost and therefore recoverable as such.

The Tribunal is of the view that this sum is properly recoverable by way of service charge.

This was further confirmed in a letter from Osborne Clarke of the 24th April 1995 (A25).

In the Tribunal's opinion the Applicant is therefore paying 4% of the service charge after including within the annual service charge the 4.5% shortfall. This figure is therefore allowable as part of the annual service charge.

2. No Certificate of Service Charge (2000)

This item was withdrawn by the Applicant as were Items 4, 13, 18 and 25.

2A. No Certificate of Service Charge (2000)

This was withdrawn by the Respondents as were Items 6B, 11A, 16A, 19A, 23A and 21C.

2B. No Certificate of Service Charge (2000)

The Tribunal finds that the sum of £404.20 was credited against the Applicant's account for the year (see Document R358).

3. Share of Costs Incorrect (2001)

See Item 1 above as the same argument applies.

4. No Certificate of Service Charge (2001)

This was withdrawn by the Applicant. See Item 2 above.

5. *The Balcony of Flat 8 - £3,500 estimates not supplied (2001)*

The Tribunal were satisfied that no Section 20 Notice was required as the initial quote was under the cap. Furthermore, the Management Company acted reasonably in authorising the additional work. We are of the view that to have stopped the work mid-contract and obtain further quotations would have been more disruptive and in all probability more expensive. The Tribunal accepts the tenant contributed £940 to these works.

The initial quote was for £1,680. Subsequently the cost of mastic asphalt was £1,586 and in addition there were further painting works. The total contract price was £3,360 from which was deducted the tenant's contribution of £940, leaving a balance of £2,620.

As well as finding that the Management Company acted reasonably the Tribunal also finds that this is a reasonable item of expenditure.

6. *Alterations to the Car Park – Sixteen Thousand, Six Hundred and Forty Six Pounds £16,646 (2001)*

The Applicant has challenged this figure (See Document A41). The Tribunal inspected these works during their inspection of the premises and came to the view that all the works were entirely reasonable and were carried out to a good standard and amounted to qualifying works. The works particularly benefited traffic movement around Sea Walls and especially those of large and heavy vehicles such as removal vans and rubbish collection vehicles. Furthermore, the Tribunal has seen the photographs of the damaged paving slabs that had been broken by the access to and egress from the premises by heavy vehicles which they considered to be hazardous. The replacement of the paving slabs by Brick Paviers was a sensible and realistic way of addressing the problem.

Furthermore, the levelling of the entrance to the car park and relaying of the French drain were regarded as sensible and expedient repairs and to avoid damage to vehicles coming in and out of the upper car park area.

With regard to the removal of the brick "flower bed planter". The Tribunal accepts that this had been damaged before it's removal and this again was a sensible course of action which gave more space in which cars could manoeuvre.

With regard to the removal of tree roots and consequential patching of the tarmacadam surface outside the caretaker's house and the surfacing of the dustbin area, the Tribunal finds that these were necessary repair and maintenance works.

The painting of the car park wall and some of the parking bay lines was also a necessary and ongoing item of maintenance.

The Tribunal therefore finds that this is an allowable item of expenditure and that it had been fully consulted upon prior to the commencement of the works.

6A No Certificate of Service Charge (2001)

This item relates to the adaption of drainage downpipes. The Tribunal felt that this was a reasonable solution to a difficult problem and therefore amounts to qualifying works, particularly as it serves to prevent rainwater running all over the surface of the balcony concerned.

6B No Service Charge (2001)

This was withdrawn by the Respondent.

7. Share of Costs (2002)

See Item 1 above as the same argument applies.

8. No Certificate of Service (2002)

See Item 40 Below.

9. LVT's Solicitor's Costs of £4,720 claimed under Section 20C LTA 1985 (2002)

The Tribunal are of the view that these were legitimate costs that were properly incurred by the Respondent and as such are recoverable by way of service charge.

10. The Applicant's costs for painting, cleaning and repairing her balcony (2002)

This claim is now over 7 years old and is therefore statute barred. (See Document R184.) the Tribunal accordingly makes no finding on this issue.

11. Fee to Small Claims Court of eighty pounds (£80) (2002)

This was the Applicant's fee to the Small Claims Court and which was ordered by the Judge to be paid by the Applicant.

It is therefore not recoverable and the Tribunal has no jurisdiction over it.

11A. No Certificate of Service Charge (2002)

This was withdrawn by the Applicant. See Item 2 above.

12. Share of Costs (2003)

See Item 1 before as the same argument applies.

13. No Certificate of Service Charge (2003)

This was withdrawn by the Applicant (see Item 2 before).

14.Tree Works of one thousand one hundred and eighty eight pounds (£1,888) (2003)

These were carried out pursuant to Paragraph 4(1)(e) and 4(1)(f) of the lease. (See also Document R188.)

The Tribunal finds that these were maintenance works and are covered by Clause 4 of the lease. The Tribunal accepts that this was an emotive issue and finds that there was consultation at a meeting of the Management Committee (see Documents R188 to 190 and R192). The issue was voted upon and approved albeit with some dissenting votes. The Tribunal therefore finds that this charge is allowable.

15. Legal and Professional Fees thirteen thousand, four hundred and twelve pounds (£13,412) (2003)

These relate to the arbitration hearing (see R165 and 166). The Arbitrator found that the arbitration costs should be regarded as a service charge.

The Tribunal finds that it is therefore properly attributable as a service charge.

16. Over provision of Insurance Claims - nine hundred and seventy seven pounds (£977) (2003)

This item was withdrawn by the Applicant (see Document A62 and 63).

16A. No Certificate of Service Charge (2003)

This item was withdrawn (see Item 2A before).

17. Share of Costs incorrect (2004)

See Item 1 before as the same argument applies.

18. No Certificate of Service Charge (2004)

This item was withdrawn by the Applicant (see Item 2A before).

18A. No Certificate of Service Charge (2004)

See Item 40 later.

19. Lifts - eight thousand, three hundred and twenty four pounds (£8,324) (2004)

The Applicant has conceded that there was a notice pursuant to Section 20 LTA 1985 and that it had been posted downstairs with an estimated costing of £3,036.

The Tribunal finds that the Respondents did therefore comply with Section 20 LTA 1985 (see R229).

19A. No Certificate of Service Charge (2004)

This was withdrawn by the Respondents (see Item 2A before).

20. Share of Costs (2005)

See Item 1 before as the same argument applies.

21. No Certificate of Service Charge (2005)

This was withdrawn by the Applicant (see Item 2 before).

22. Legal and Professional Fees – seven hundred and twenty two pounds (£722) (2005)

This was withdrawn prior to the hearing.

23. Contribution to Reserve – eleven thousand pounds (£11,000) (2005)

See Item 40 later.

23A. This was withdrawn by the Respondents under 2A before. (2005)

24. Share of Costs (2006)

See Item 1 before as the same argument applies.

25. No Certificate of Service Charge (2006)

This was withdrawn by the Applicant (see Item 2 before).

26. Smoke Detectors – one thousand pounds (£1,000) (2006)

The smoke detectors have not yet been installed and the Applicant's account was credited as part of the rebate (see Pages R371 and R375). Further, when the smoke detectors are installed the Tribunal considers that this is a proper charge to services. The Management Company has had a professional risk assessment carried out and they will be failing in their duty if they do not carry out the recommendations. Such a failure may also invalidate their ability to insure the premises under Paragraph 4(1) of the lease.

The applicant does not agree with this proposition and asserts that it is an improvement that can not be properly charged because the lease makes no specific provision for it. However see Section 18 of the Landlord & Tenant Act 1985 as amended.

The Tribunal does not therefore accept the Applicant's view on this matter.

27. Lockers – five hundred pounds (£500) not a reasonable cost (2006)

No cost has been or will be incurred for this item since the lockers were donated by a benefactor and credit has been given to the Applicant on her statement of final service charge (see R375).

28. Alcove Work – one thousand pounds (£1,000) (2006)

Again, no work has been done on this item. When work is done to repair the wall of which the alcove is an integral part the Tribunal is of the view that it will be a proper charge (see R274).

It is also the view of the Tribunal that the repairs should be limited only to necessary structural repairs as opposed to decorative tiling.

29. Solicitors' and Surveyors' Fees – one thousand, one hundred and twenty three pounds (£1,123) (2006)

The Tribunal finds these to be qualifying expenditure and therefore reasonable as a service charge (see items R267 and R233).

30. Remove Ash Tree (2006)

No work was carried out in 2006 and again credit has been given to the Applicant's service account (see Page R375). No actual charge was therefore made.

31. Contribution to Reserve – eight thousand pounds (£8,000) (2006)

See Item 40 later.

31A. Bank Charges of twenty six pounds (£26) (2006)

The Tribunal finds that this is a perfectly normal charge for banks to make for the operation of an account and it is therefore a proper and allowable cost of management.

31B. Tax Incentive – two hundred and fifty pounds (£250), Sale of Carpet Cleaner – three hundred and seventy nine pounds (£379) (2006)

This was conceded by the Respondent prior to the hearing and withdrawn.

31C. No Certificate of Service Charge (2006)

This was agreed prior to the hearing.

31D. This was withdrawn at the hearing (2006)

32. Share of Costs (2007)

See 1 above as the same argument applies.

33. Certificate of Service Charge (2007)

This was withdrawn prior to the hearing.

34. Garage Doors – six thousand, seven hundred and fifty pounds (£6,750) (2007)

The Avon & Somerset Police and the Neighbourhood Watch have recommended installation of doors/gates as a security measure. These have not been installed and this item of expenditure has not therefore been incurred.

The Tribunal find that this is a grey area and the Management Company should therefore re-consult with all the leaseholders.

This could amount to an improvement and if so be a justifiable service charge.

The Tribunal finds that this is probably a sensible security measure in this day and age and as one observer put it "the lease cannot remain ossified in the 1970s!"

35. Smoke Detectors – two thousand pounds (£2,000) (2007)

See Item 26 before. The Tribunal regards this as a qualifying expenditure when incurred.

36. Alcove and Garden Wall (2007)

See Item 28 before. (Page R274).

37. Contingency for Health & Safety Requirements – two thousand pounds (£2,000) (2007)

See Documents A83 and R271, R276, R311, R312 and R313. When incurred it is the Tribunal's view that this item is properly chargeable and a justifiable expenditure. It is not a reserve item and amounts to qualifying works.

38. Removal of Ash Tree – one thousand pounds (£1,000) (2007)

The actual cost of the removal of the tree was £580. The Tribunal finds that this work was outside the Estate technically and there was a breach of the terms of the lease however the cost was limited to £580.

Furthermore, the Management Company would have had to have taken down the tree inside the estate and we assume that the costs would have equated to these costs. They were therefore properly incurred as a quid pro quo and the Tribunal would allow the cost of £580 for tree felling.

The Tribunal also finds that the matter was discussed in committee and by the residents and a planning application was made which was duly notified to all the residents by the Bristol City Planning Department.

39. Pump Room – thirteen thousand, three hundred pounds (£13,300) (2007)

The Tribunal are of the view that this expenditure arose as a result of an emergency situation and the Committee had no option than to proceed with those works. There are two pumping systems, one for the storm waters and the other for the foul drainage. Whilst the two systems are independent of each other both broke down at the same time (see Documents R298 and 299).

In any event since each system cost less than £6,500 and if this had not been an emergency, which it clearly was, then there would have been no need for consultation. We find that three quotations were obtained for the sewage pumps and the original submersible pumps which had failed were replaced by two new surface mounted pumps which was the most sensible and practical option.

Because the storm water pumps had come from a company known as ADS and which were housed in a purpose built housing it was sensible to replace those pumps with like replacements that were available and that could be accommodated in the housing without further structural alteration. This item is therefore an allowable item of expenditure for service charge purposes.

40. Contribution to Reserve Fund – seventeen thousand, five hundred pounds (£17,500) (2007)

See also Items 8, 18A, 23 and 31 beforehand and refer to Documents A85 and R307 to R310. the Tribunal finds that this is a justifiable charge as per Clause 4(1)(k) of the lease (see Page R335). The Management Company appear to be following a conservative but responsible policy which also follows professional advice and RICS Recommendations.

The Tribunal finds that there is no justification for the Management Company departing from the policy that they are pursuing.

Furthermore, a reserve is a provision for foreseeable expenditure and not a cushion for unforeseen and emergency expenditure. This item is therefore a justifiable charge.

41. Proposal to Borrow from the reserve for working capital at the beginning of the year (see Pages A46 and R321) (2007)

Strictly the service charges should be paid 6 monthly in advance. They are however being paid monthly by standing order.

This can and did lead to cash flow problems. However the Tribunal finds that there was no borrowing from reserves and that the residents co-operated by accelerating their monthly payments. There is therefore no decision to be made by the Tribunal. With regard to projected expenditure, the Tribunal can see that the interim service charge may have to increase to avoid a cash flow problem and this will have to be addressed by the Management Committee.

The above are the findings of the Tribunal on the issues that they were specifically asked to address and as per the Scott Schedule.

Further Issues that the Tribunal Were Asked to Consider:

The Tribunal were asked by the parties to comment on Paragraph 6 of the 3rd Schedule of the lease (see Documents A60 and A66 and R86, R89 and R350). Paragraph 6 of the 3rd Schedule says as follows:-

"As soon as practicable after the expiration of each accounting period there shall be served upon the lessee by Sea Walls Agents a certificate signed by a chartered surveyor being a member of or appointed 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 an surplus carried forward from the previous accounting period.
(c) the amount of the service charge in respect of that accounting period and of any excess or deficiency of the service charge over the interim charge".

This issue was aired and commented upon in the arbitration award of Professor David Clarke (see Page R488 and R492/493). It is the view of the Tribunal that Mr Easton, the surveyor instructed by the Management Company, is an independent surveyor and that the Management Company are complying with the terms of the lease in providing the information required under the terms of the lease (see Documents R86 and R89).

Furthermore, the format of the certificate does not matter and would undoubtedly vary from surveyor to surveyor.

So long as the certificate contains the information required in Paragraph 6A to C of the 3rd Schedule and relates to the year by year service charges, that is sufficient.

The Tribunal assumes that in preparing his certificate Mr Easton will have seen the bills for the year involved.

It is the Tribunal's recommendation that whilst not strictly necessary, the Management Company continue to produce each year schedules as per Page R506 though this is not part of the certificate or, as we have said, a requirement under the terms of the lease.

In interpreting the word "agent" the Tribunal are of the view that the Sea Walls agent could be the company secretary and does not necessarily have to be an independent surveyor or managing agent and, quite apart from the cost implications of instructing a further surveyor or managing agent, any certificates produced by such a person would be duplicitous and unnecessary.

Section 20C Application:

On Page 3 of her application the Applicant indicates that she wishes to make a Section 20C Application and that she wishes the Tribunal to make an order preventing the "landlord", in other words the Respondent, recovering their professional costs.

It is the Tribunal's view that the Respondent can properly recover the costs incurred and that these can be regarded as part of the service charge.

Signed.....

Andrew D McCallum Gregg (Chairman)

A Member of the Southern Leasehold Valuation Tribunal

Appointed by the Lord Chancellor

Issued: The 8th day of May 2007