IN THE LEASEHOLD VALUATION TRIBUNAL
UNDER S27A LANDLORD & TENANT ACT 1985

DECISION AND REASONS

Case No	CHI/OOML/LSC/2009/0021
Property	138/138A Hollingdean Terrace Brighton
Applicant	Oasis Properties Limited (Landlord) Represented by Osler Donegan Taylor, Solicitors
Respondent	Ms V J Payne (Tenant, First Floor Flat)
Date of hearing	19 May 2009
Date of decision	10 June 2009
Members of the Tribunal	Ms H Clarke (Chair) Mr A O Mackay FRICS Ms J Dalal

1. **APPLICATION**
   The Applicant issued a claim for unpaid service charges, contractual costs, and rent in the Brighton County Court. The Respondent filed a Defence and Counterclaim (although no counterclaim appeared on the papers sent to the Tribunal). By an order of the County Court dated 18 December 2008 and drawn on 5 February 2009 the case was transferred to the Tribunal.

2. **DECISIONS**
   The sums claimed by the Applicant in respect of fees payable to Adams and Remers Solicitors between 2000-2002 were not service charges and did not fall within the Tribunal's jurisdiction.

3. The Tribunal has no jurisdiction over ground rent and made no determination regarding rent.

4. The Tribunal had no jurisdiction to decide whether the Applicant should make any payment to the Respondent in connection with roof repairs on the grounds submitted by the Respondent's representative, namely reimbursement of a sum said to have been received from another tenant.

5. The Tribunal decided that it had jurisdiction to deal with the following matters and made the following determinations:

6. Service charges are payable by the Respondent for the years ended December 2000-December 2008 for insurance, management fees & charges, and maintenance/ repair in the sums actually incurred by the Applicant as certified by Parsons Son and Basley.

7. No service charges are payable by the Respondent in respect of any period prior to 17

August 2000.

8. The Tribunal was unable to determine what sum may now be payable to the Applicant from the Respondent as insufficient information was provided regarding credits, payments or adjustments to the account.

9. The Tribunal did not make an order under s20C Landlord & Tenant Act 1985 in relation to costs incurred by the Applicant in connection with the proceedings before the Tribunal.

10. The remainder of the claim shall be remitted to the County Court.

11. **INSPECTION**
The Tribunal inspected the exterior front of the property and the small communal hall immediately prior to the hearing. No access was obtained to the rear of the property. The property comprised a flat on the upper floor of a converted terraced house probably built in the early part of the 20th century. There was a pitched tiled roof and non-original uPVC windows. There were visible signs of plant growth to external guttering and the decorations both inside to the communal area and outside were worn and weathered. Otherwise the property appeared to be in fair condition.

12. **THE LEASE**
The Lease provided for the Tenant to pay one-half of the Landlord's costs of insurance, maintenance and repairs, and redecoration by equal half-yearly payments in advance. The Landlord had power to accumulate a reserve fund, and the Lease expressly provided that fees of agents employed for management of the building shall be deemed to be allowable items of maintenance expenditure. The Lease also contained the following covenant upon the Tenant:
"to pay all expenses including Solicitors and Court Fees incurred by the Lessor in connection with the recovery or attempted recovery by the Lessor from the Lessee of any moneys due to the Lessor from the Lessee under the provisions of the Lease and which are overdue."

13. **THE LAW**
Landlord & Tenant Act 1985:
s18. Meaning of "service charge" and "relevant costs".
(1) In the following provisions of this Act "service charge" means 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 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.
(2) The relevant costs are the costs or estimated costs incurred or to be incurred by or on behalf of the landlord, or a superior landlord, in connection with the matters for which the service charge is payable.

14. Section 19:
"*(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.

15. Section 20C:
"(1) A tenant may make an application for an order that all or any of the costs incurred,...by the landlord in connection with proceedings before a .. leasehold valuation tribunal, ... 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 ...

(3) The court or tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances".

16. *Section 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.

17. **HEARING**
A hearing took place on 19 May 2009 at Brighton. Directions were issued by the Tribunal, and each party submitted a written witness statement, documents, and submissions. The Respondent Tenant, Ms V Payne, attended the hearing and the Tribunal gave permission for her to be represented by Mr G Stephens. She relied on her own witness statement and that of Mr Stephens. The Applicant Landlord was represented by Ms Knowles, Solicitor, who relied on the witness statement of Mr M Surman, of Parsons Son and Basley, who also attended the hearing and answered questions. Mr O Judge, also of Parsons Son and Basley, attended the hearing and answered questions.

18. **DECISIONS ON JURISDICTION**
The Applicant submitted that fees payable to Adams and Remers Solicitors incurred between 2000-2002 were not service charges and did not fall within the Tribunal's jurisdiction. It relied on the Lease at 4th Schedule clauses 5, 6 and 7 to submit that the Respondent's representative was under a separate and distinct contractual obligation to pay them, and said that the fees had not been treated historically as service charges but had been placed on a separate account. They were incurred in attempting to secure payment from the Applicant of money due under the Lease. The Applicant submitted that the costs would be susceptible to assessment under the Civil Procedure Rules in the county court. The Tribunal doubted this submission, but made no finding upon it.

19. In answer to questions from the Tribunal the Respondent's representative's representative stated that the fees were not service charges. He objected to them because the documentation to support them was inadequate.

20. The Tribunal considered the provisions of the Lease in conjunction with s18 Landlord & Tenant Act 1985. Contrary to the Applicant's submission, the documents

clearly showed that the legal charges were included in service charge statements issued to the Respondent's representative by Parsons Son and Basley (eg year ending December 2002). However the Tribunal took the view that the provisions of the Lease would be determinative, rather than the way that the figures had been presented. Clause 7 was sufficiently clear in the opinion of the Tribunal as to constitute a separate obligation to pay the solicitors' fees, and as such, to remove the fees from the general costs of management of the property covered by the definition of service charges in s18. The Tribunal noted that it had not heard any submissions in opposition and that the Respondent's representative expressly accepted the Applicant's position on this matter.

21. The Tribunal accepted the submission of the Applicant that it has no jurisdiction over ground rent and made no determination regarding rent. The Respondent's representative agreed that the Tribunal had no such jurisdiction, but he submitted that consequently no forum could determine the rent, it having been transferred from the County Court to the Tribunal and no objection to transfer having been made by the Applicant at the time. The Tribunal took the view that the case should be remitted to the County Court for consideration of the matters outstanding.

22. **DECISIONS ON SERVICE CHARGES**
The Respondent's representative submitted that a 6-year Limitation Act defence was available, these being sums payable under contract; the only relevant Deed was the document of transfer of the Lease. The Applicant contended that the service charges payable under the Lease arose under a specialty as the Lease itself was a Deed, so that a 12 year limitation period applied. The charges were not reserved as rent.

23. The Tribunal preferred the submissions of the Applicant. The Lease was registered and complied with the formal requirements of a Deed; the action had been brought by the landlord and sought to recover sums payable under the Lease, and as such comprised an action upon a specialty.

24. The Respondent's representative contended that charges were not payable because the accounts had not been certified in the manner required by i) the Lease and ii) statute law. The Applicant responded that the relevant part of statute had not yet been brought into force, with which the Tribunal agreed. The Tribunal also found on the evidence that certification was carried out by a qualified accountant, which satisfied the Lease. Moreover, the Tribunal took the view that where a covenant requires accounts to be certified, it would not generally mean that the sums claimed in the accounts would otherwise not be due and payable, unless the covenant so provided in express terms, which was not the case here.

25. The Respondent's representative contended that the insurance premiums were high, and the documents did not prove that the premiums had actually been paid. He did not accept that the insurance brokers were independent. He had obtained quotations from other brokers, which were significantly lower. The Applicant confirmed that the insurance was obtained through a block policy, and it habitually sought a 3 year deal to get a good rate, but the brokers periodically went to the market. Figures were quoted for other properties in the locality insured by Parsons Son and Basley comparable to that occupied by the Respondent's representative, all of which paid higher premiums.

26. The Tribunal accepted that the certificates were prima facie evidence that the premiums had been paid, as it was unlikely that they would have been issued otherwise. It would be so reckless for a freeholder to fail to insure a property that evidence to establish such an omission would need to be very persuasive, and the evidence before the Tribunal did not establish that the premiums had not been paid. The Tribunal reminded itself that the fact that the landlord might have obtained a lower premium elsewhere does not prevent him from recovering the premium which he has paid. Nor does it permit the tenant to defend the claim by showing what other insurers might have charged. No evidence was provided to indicate that the same cover could have been obtained more cheaply. No suspicion therefore attached to the premiums incurred by the Applicant nor was there evidence of any special feature of the transaction which took it outside the normal course of business. On the evidence available, the Tribunal found that the insurance premiums were reasonably incurred and were payable.

27. The Respondent's representative objected to service charges of £2,616.76 carried forward from the period prior to August 2000 when Parsons Son and Basley took over management, there being no documents to support them. The Applicant's witness said that he had been told by the freeholder that it was thought that the figure related to insurance premiums. There were no records now in existence relating to that period, but when Parsons Son and Basley took over from the former managing agents they would have been given the figures and had prepared their own records on that basis.

28. The Tribunal noted that the first document showing any certified accounts was for the year ending December 2000. The supposition that the balance allegedly carried forward related to insurance premiums was not substantiated in any way, and there was no proof of what the figure represented nor that it had been correctly demanded. On the evidence available the Tribunal determined that the sum was not payable.

29. The Respondent's representative challenged the annual management fees charged by Parsons Son and Basley and in addition certain specific charges for inspections in respect of asbestos check and a revaluation. He contended that there was no evidence of management work sufficient to justify the management fees; the tenants had arranged themselves for necessary work to be done. The invoices were not receipted, so he questioned whether the sums had been charged or paid; he also contended that as the Lease provides for a 'basic' management charge of £100, this should not have been increased. (He withdrew a submission made on the papers that the Lease did not allow it to be increased). The asbestos report appeared to relate to a different property. The accounts provided by the Applicant did not include credits for payments made, were inconsistent with other entries, and were not particularised.

30. The Applicant responded that the asbestos report was correct, but a stray sheet from another property had been attached to it by mistake. New accounts had been prepared in order to clarify the position prior to issuing the claim. The old accounts and service charge demands were relied on to comply with s20B Landlord & Tenant Act 1985 but had not been correctly drawn up. However, it was not part of the Applicant's claim, that the Tribunal should decide what was to be paid by the Respondent's representative; the Applicant asked the Tribunal only to determine

whether the sums claimed were reasonably incurred, and it intended to return to Court to decide what was due as a balance.

31. The Tribunal noted that its jurisdiction under s27A Landlord & Tenant Act 1985 extends to determining the sum 'payable' by a tenant, and is not confined to the issues sought to be put before it by the Applicant. The Tribunal would consider it to be a normal part of its responsibility, to determine the sum payable by one party to the other in respect of service charges.

32. The Tribunal considered that the accounts put before it were profoundly unsatisfactory. It proved impossible to trace through the documents to establish whether payments made by the Respondent had been credited, and against which liability. The Tribunal was presented with a schedule which was entitled '*Statement of Account; This document provides a breakdown of the sums owing. This breakdown takes into consideration sums paid by the Respondent*'. The document listed only debit entries, and it was explained by the Applicant that as and when the Respondent's representative had made payments they 'cancelled' other debits. However none of those payments or other debits were shown on the schedule. A different summary of the income and expenditure account, prepared and certified soon before the hearing, showed that debit adjustments had been made to the reserve fund which did not then appear to give rise to an equivalent credit elsewhere, although the Applicant suggested that funds may have been transferred to the Respondent's service charge account. It likewise showed no credits from the Respondent, although the Applicant did not dispute that some payments had been made during the relevant time. Figures described as a 'balancing charge' appeared in some years, then were removed in later years. In all the circumstances the Tribunal would not have been able to determine what sum was properly due from the Respondent even in respect of the items falling within its jurisdiction.

33. However the Tribunal did take the view, drawing on its expert knowledge and experience, that the management charges were typical of charges for a property of this scale; the Lease allowed for the landlord to recover them, and the evidence indicated that they had in fact been incurred notwithstanding the absence of receipts from the landlord. Management work carried out included the placing of the insurance, maintenance work evidenced by a few invoices for works over the relevant period, and obtaining the insurance valuation and asbestos report. The Applicant produced evidence of a letter it had sent to the Respondent's representative explaining what was encompassed in the role of managing agent, with which the Tribunal concurred. The Tribunal did form the view that the accounting procedures and records of service charge accounts in use at Parsons Son & Basley in respect of this property had not been as clear as they ought to have been, but it was not appropriate to discount the agent's charges for this matter as evidently records had been kept and accounts had been prepared. The one-off charges for asbestos inspection and revaluation of the property, whether described as management charges or administration charges, fell within the Tribunal's jurisdiction and in the expert knowledge of the Tribunal, were in the normal range for such tasks. In any event no evidence had been adduced demonstrating that the charges were inappropriately high.

34. In the circumstances the Tribunal was not prepared to order that the Respondent had to pay the sums previously demanded by way of service charges budgeted on

account. Whilst the Lease permits an annual on-account payment with a year-end reconciliation, the Tribunal considered that the treatment of the accounts was so inadequate as to leave it uncertain that the budgeted figures had ever been correctly reconciled with the outgoings. The Tribunal accordingly determined that the Respondent was liable to pay her share of the costs actually incurred.

35. The Respondent's representative submitted that she was entitled to a payment from the Applicant of about £1010.50 in respect of certain roof repairs which she had had carried out in 2004-2005, these being the responsibility of the landlord. The payment reflected one-half of the cost, and the Respondent's representative said that the tenant of the lower flat had agreed to pay one-half but had made the payment to the Applicant instead of the Respondent. The Respondent had not obtained the consent of the landlord nor the agreement of the managing agents before arranging for the work, but it was her case that the agents were aware that former works had failed, causing the leak to recur.

36. The Applicant denied receiving any payment from the tenant of the lower flat.

37. The Respondent's representative did not formulate the legal basis for seeking the payment, and the Respondent did not in fact claim for 'her' half of the work's cost, but sought reimbursement of money alleged to have been paid by the other tenant. Such a claim fell outside the Tribunal's jurisdiction. The Tribunal noted the possibility that, if the facts supported it, the Respondent's claim could constitute a set-off for damages for the landlord's failure to carry out repairing obligations. There was clear evidence of the work and its cost in the form of builders' estimates and invoices, and letters written to Parsons Son & Basley, and to Adams and Remers (former solicitors for the landlord) in 2000, which put them on notice of leaks to the roof. However, the Tribunal did not make a finding on this matter as the Respondent's representative had put her case on a different basis over which the Tribunal had no jurisdiction.

38. **DECISION IN RESPECT OF S20C LANDLORD & TENANT ACT 1985**
In response to questions from the Tribunal the Respondent confirmed through her representative that she wished to make an application for an order that the costs incurred by the Applicant in connection with the proceedings before the Tribunal were not to be to be taken into account in determining the amount of any service charge. However, at the conclusion of submissions the Respondent's representative stated that her position was that the costs incurred in connection with the Tribunal hearing and proceedings were not in any event relevant costs to be taken into account in a service charge, but were, like the Adams and Remers costs from 2000, referable to the distinct clause of the Lease on which the Applicant had relied. The Applicant confirmed that it intended to rely on that Clause and did not propose to recover costs as service charge. For the same reasons as are set out above in relation to those costs, the Tribunal accordingly took the view that it had no jurisdiction to make an order under s20C.

Signed *Helen Clarke* Chair

Dated10th June 2009