RESIDENTIAL PROPERTY TRIBUNAL SERVICE
SOUTHERN RENT ASSESSMENT PANEL AND
LEASEHOLD VALUATION TRIBUNAL

Case No: CHI/19UH/LSC/2008/0087

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

BETWEEN	JOHN DONAVAN	Applicant
	and	
	BENTLEIGH CROSS LIMITED	Respondent

PROPERTY: 25 Chesil Place, Somerleigh Road, Dorchester, Dorset DT1 1AF ('The Property')

DATE OF HEARING: 14 January 2009 and 18 March 2009

APPEARANCES: The Applicant in person and Mr Hutchins of Counsel for the Respondent.

TRIBUNAL: MR D AGNEW BA LLB LLM (Chairman)
MR J McALLISTER FRICS
MR A J MELLERY-PRATT FRICS

DETERMINATION AND REASONS

1. **Determination**

The Tribunal finds that the service charges rendered for the years 2004/5. 2005/6. 2006/7 and 2007/8 are reasonable save for the head office management fees which have been charged to the service charge account for 2005/6 onwards. The Applicant shall be entitled to a refund or a credit for the

difference between what he has paid for this item and £325 for each of the years from 2005/6 to 2007/8 and for the budget for 2008/9.

The Landlord shall be precluded from adding 50% of the costs of the Application to future service charges under Section 20C of the landlord and Tenant Act 1985.

Reasons

2. The Application

2.1 On the 21 August 2008 the Applicant, who is the long leaseholder of the Property, made an application to the Tribunal under Section 27A of the Landlord and Tenant Act 1985 ('the 1985 Act') as to the determination of the reasonableness of service charges in respect of the years 2004/5, 2005/6, 2006/7 and 2007/8 and as to the reasonableness of the budget for the service charge year 2008/9. The Applicant also made an application under Section 20C of the 1985 Act seeking a determination that the costs of the application should not be added to future service charges.

2.2 The applicant is the chairman of the Somerleigh Court Residents Association and his application was supported by forty other long leaseholders at Somerleigh Court.

3. The Property

The property is a two bedroom apartment in a modern block of 14 apartments which is part of a development known as Somerleigh Court. Somerleigh Court is described as 'an integrated close care and nursing home development' in the landlord's advertising literature. The first phase of this development was the refurbishment of a Victorian hospital known as Edgcumbe Manor in which there

are twelve one and two bedroom apartments, residents lounge/dining room, meeting room, guest suite for visiting family and friends and a staff apartment. Chesil Place was constructed as part of the first phase of the new development. All fourteen apartments in this block are two bedroom on three and four stories served by two lifts. The second phase of the development was the construction of Hascombe Court which comprises seventeen one bedroom and twenty three two bedroom apartments and two penthouse apartments. Finaly,Somerleigh Court Nursing Home was completed and opened in or about November 2004. This nursing home has forty rooms and is run by a Matron-manager.

4. The Inspection

The Tribunal inspected Somerleigh Court on 14 January 2009. They found that Edgcumbe Manor had been converted and the other blocks constructed to a fairly high standard. The grounds were well maintained and the communal areas were clean and in good order.

5. The Lease

The Applicant's lease of the Property, for a term of 150 years less ten days from 1 January 2001, is made between three parties: the Landlord, Bentleigh Cross Limited (1) the Tenant (2) and Bentleigh Care Limited (referred to hereafter as 'the Company') (3).

5.2 By clause 6 of the lease the Tenant covenants with the Landlord and the Company as follows:

'6.1 To pay the Close Care Service charge and the building service charge in the manner set out in the Fifth and Sixth Schedules' of the lease.

By clause 2.9 the close care services are those services set out in Part 1 of the Fifth Schedule of the lease. The building service costs are those costs and

expenses incurred by the Landlord described in Part 2 of the Sixth Schedule of the lease.

5.3 By clause 7 of the lease the Company covenants with the Tenant that subject to the payment of the Close Care Service charge 'it will provide and perform the Close Care services ...'

5.4 By clause 8.4 of the lease the Landlord covenants to 'provide and perform the building services subject to the payment of the building service charge'.

5.5 By the Fifth Schedule of the lease the Close Care services provided by the Company are set out as follows:-

Part 1 Personal and domestic services:

1. To provide an emergency alarm system and 24 hour on-site cover to render reasonable assistance to the tenants in the case of emergency (including trained nursing staff if required).

2. To provide a daily visit to the apartment.

3. To keep the common parts clean and tidy so far as practicable.

4. To keep any planted or landscaped area within the estate communal areas in good order and condition.

5. To provide management services to assist in the day-to-day provision of the close care services.

6. To use all reasonable endeavours to provide such additional care services including, if appropriate, nursing care services as the tenant may require from time to time on the Company's normal terms prevailing at the time.

7. To provide a supply of water to the apartment.

5.6 By the Sixth Schedule of the lease building services Class A were stated to be as follows: 'To maintain repair and where necessary renew:

1. The main structure of the building including the foundations and the roof of

the building.

2. All such service installations in under and upon the building which serve more than one of the apartments.

Under building services Class B the following is included:

1. To maintain repair and where necessary renew

2. Those parts of the accessways footpaths forecourts boundary walls and fences parking spaces refuse store and other areas of the estate which fall within the estate communal areas.

3. The common parts.

4. All such service installations under the estate which serve more than one of the apartments.

6. The Law

By section 18 of the 1985 Act as amended a service charge is defined as:-

"an amount payable by a tenant of a dwelling as part of or in addition to the rent and

a) which is payable directly or indirectly, for services, repairs, maintenance, improvements or insurance or the landlord's cost of management and

b) the whole or part of which varies or may vary according to the relevant costs.

6.2 By Section 27A of the 1985 Act it is provided that:-

(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, improvement, 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 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.

6.3 By Section 20C of the 1985 Act it is provided as follows:-

'(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, Residential Property Tribunal 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. [...]

(3) a 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.'

6.4 By section 21 of the 1985 Act '(1) a Tenant may require the Landlord in writing to supply him with a written summary of the costs incurred –

(a) if the relevant accounts are made up for periods of twelve months in the last such period ending not later than the date of the request, or

(b) if the accounts are not so made up, in the period of twelve months ending

with the date of the request,

and which are relevant costs in relation to the service charges payable or demanded as payable in that or any other period. [...]

(4) The Landlord shall comply with the request within one month of the request or within six months of the period referred to in subsection (1) (a) or (b) whichever is the later. [...]

(6) If the service charges in relation to which the costs are relevant costs as mentioned in subsection (1) are payable by the tenants of more than four dwellings, the summary shall be certified by a qualified accountant as –

(a) in his opinion a fair summary complying with the requirements of subsection (5), and

(b) is sufficiently supported by accounts, receipts and other documents which have been produced to him.

6.5 By Section 25 of the 1985 Act it is provided that:-

(1) It is a summary offence for a person to fail, without reasonable excuse, to perform a duty imposed on him by Section 21 [...]

(2) A person committing such an offence is liable on conviction to a fine not exceeding level 4 on the standard scale.'

7. The Applicant's case

7.1 The Applicant identified a number of issues which were of considerable concern to him and the other lessees in respect of the service charge demands for each year from 2004 to date and with the budget for the service charge for year 2008/9. In a nutshell those concerns were as follows:-

(i) That the monies received by the Landlord by way of service charge payments were not kept in a separate trust account.

(ii) That the service charge accounts were not certified by an accountant.

(iii) Some service charge accounts had been rendered late.

(iv) That the 'Extra Close Care' which they received and which they paid for as needed was not shown in the service charge accounts and it was claimed that 'Extra Close Care' came within the definition of a service charge in Section 18 of the 1985 Act.

(v) That Standard Close Care entitled them to twenty minutes free care a day before they were liable to pay for Extra Care services. This entitlement had been eroded.

(vi) That no building costs had been included in service charge accounts for the earlier years.

(vii) That the costs being charged for Standard Close Care services was unreasonable and there was a suspicion that the long leaseholders were subsidising the nursing home.

(viii) That the increase of 12% in service charges for the year commencing April 2008 was an unreasonable increase.

(ix) That the management fee of 15% was arbitrary and unreasonably high.

(x) That there had been some discrepancies in the various service charge accounts that had been rendered.

(xi) The Applicant queried the water bills that had been rendered.

7.2 The detail of the Applicant's concerns as set out in the previous paragraph hereof were as follows:-

7.2.1 Items (i) to (iii) The Applicant had queried with the Respondent and with the bank holding the account concerned as to whether the lessees money received from service charges was being held in a separate trust account at the bank. Mr Spall, the Leasehold Advisory Officer for Age Concern had also written to Mr Waterer of Bentleigh Care Limited about this. Eventually, the Applicant says,

the Respondent did open a separate bank account for 'Somerleigh Court Residents Standard Service Charge Account' but the Applicant has seen no evidence that the account is held in trust. The accounts for years ending prior to 31 March 2006 were not certified by an accountant. The Respondents failed to reply to a request for a summary of costs dated 25 March 2005. There was also a long delay to Mr Spall's requests for information. Due to the fact that the accounts for 2006 and 2007 had to be amended and certified to comply with the legislation they were not finalised and sent out to lessees until February 2008.

7.2.2 Twenty minutes 'free' care. The Applicant explained that in earlier years each apartment received a daily visit from care staff who were dedicated to provide Close Care for them. These carers would enquire if all was well, perhaps have a chat and a cup of tea with them and they would provide basic care services for the residents during that visit of up to twenty minutes. There would be no charge for this other than through the service charge to which all residents contributed. More recently, however, staff from the nursing home have been used for these daily visits and the lessees have not known whom to expect and have not been able to establish a rapport with them in the way that they had done previously with their regular carers. Now, if the carers do anything at all during the course of the visit that is charged as 'Extra Care Services'. The income from 'Extra Care Services' is not applied to the service charge account. The Applicant maintains that the 'Extra Care Services' were part of the service charge and that this income should be shown as a credit to the service charge account. The lessees did not feel that they were getting value for money in what they were paying for Standard Care Services. The Applicant produced documentation suggesting that the first twenty minutes of care would be free. This was a document dated 1 October 2001 which showed the first twenty

minutes of care being charged at a nil rate. This impression is reinforced as the notes to the document state that the additional care fees 'only apply where care is provided in excess of twenty minutes a day'.

7.2.3 The Applicant queried the reasonableness of the staff costs. The manager for most of the period in question was Mr Strong. The Applicant contended that he had no qualifications or previous experience for the type of work he was doing. The implication was that his salary was excessive. The administration manager was his wife, Mrs Strong, whose qualifications for the job were also queried by the Applicant who regarded her salary as being excessive. As far as the salaries for the close care staff was concerned the Applicant considered that income of £60,000 is generated from extra care and this should have been used to reduce the cost of Close Care staff salaries charged to the residents.

7.2.4 Management fee. Whilst the Applicant accepted that the lease did provide for a management fee to be charged the amount of 15% was not only arbitrary but excessive in view of the high cost of salaries for on-site management.

7.2.5 Increase of 12% in the budget for the year ended March 2009. This was a considerable increase on previous years and the Applicant considered the lessees were being asked to pay considerably more for a considerably poorer service.

7.2.6 Void credits. This was a query which Mr Spall from Age Concern had taken up on behalf of the Applicant and other lessees. The Respondent was contributing only 65% of the service charges charged to the lessees in respect of each unsold apartment and Mr Spall could not understand why that should be the case.

8. The Landlord's case

8.1 Mr Cotterill, General Manager of operations of the Respondent Company gave evidence for the Respondent. In response to the points in issue raised by the Applicant Mr Cotterill's evidence and Mr Hutchins' submissions were as follows:-

8.1.1 There was and is no obligation in law to maintain a separate bank account for the service charge payments being made by the lessees of Somerleigh Court. However a separate account was established in April 2008 and as a matter of law this is held on trust for the lessees.

8.1.2 It was accepted that there was a request for a statement of account on 25 March 2005 and which was not provided. The consequence of this is that it could possibly lead to a criminal charge but this breach has no effect on the recoverability of the service charges.

8.1.3 The failure to certify the accounts prior to the year 2005/6 has a similar consequence and recoverability is not affected. Mr Hutchins accepted that there had been a certain amount of education of Mr Waterer of the Respondent Company in the requirements of Landlord and Tenant law with regard to service charges. This had led to the accounts for 2006 and 2007 having to be made compliant and certified and this resulted in their late delivery. The lessees had not been charged for the 'deficit' shown in those accounts.

8.1.4 With regard to the first twenty minutes of 'free' care. Mr Hutchins pointed out that the obligation was to provide 'a daily visit'. The cost of this is part of the service charge. Anything over and above that is regarded as 'Extra Care' and is offered, in accordance with the lease, 'on the Company's normal terms prevailing at the time'. It is the Landlord's case that in 2001 twenty minutes free care was an introductory offer. The 'Extra Close Care tariff' document which was in use from 1 April 2002 made no reference to any period of free

care being part of the Standard Close Care arrangements. The Applicant had queried the distinction between Standard Close Care and 'Extra Close Care' and this was explained to him in a letter from Mr Waterer dated 27 January 2003. That explanation holds good for the extent of the standard of care service from 2002 to date. There can be no estoppel as the Applicant acknowledged that he had already entered into the lease before he would have seen any documents explaining the detail of the extent of the Standard Care Service as opposed to the 'Extra Care' Service. Furthermore, the documents setting out the current position with regard to the Standard Care Service were in existence before the relevant years that are concerned in this case.

8.1.5 No building costs were included in the budget or accounts for the early years because no building costs were incurred.

8.1.6 Mr Hutchins submitted that the 'Extra Close Care' charges were not properly part of the service charge as they were offered on an individual contract basis as part of the nursing home business.

8.1.7 The 12% increase in service charges in April 2008 can largely be explained by repairs and maintenance costs which are expected to be borne in 2008/9. All the buildings concerning Somerleigh Court are relatively new or, in the case of Edgcumbe Manor recently refurbished and therefore there have been no significant maintenance costs up to now. These will now begin to become a factor and indeed some external painting is contemplated in the budget.

8.1.8 With regard to the reasonableness of the Standard Close Care service charges Mr Hutchins explained that the Respondent has not adduced expert evidence. This was because when the Applicant produced his statement of case there was no challenge to the standard of service provided. The point made by the Applicant about the quality of the Standard Care Service is that since November

2008 the Residents no longer have a dedicated care staff and that as a result the standard of Standard Care has, he claims, gone down from good to mediocre. Before the Tribunal there was only a budget or estimate for the Standard Close Care service for 2008/9. It is open to the Residents to go back to the Tribunal next year when the actual figures are known if they still challenge the quality of the Standard Care service. As for previous years, there is nothing in the lease to say that residents are entitled to a dedicated staff although prior to November 2008 there was in fact a dedicated staff. The staff costs are made up of five elements: the business manager's salary, administration manager's salary, on-site staff, agency staff and maintenance staff. A copy of the job descriptions of the various members of staff are included in the hearing bundle as were details of their salaries. No detailed figures were provided for the year 2004/5 but for 2005/6 50% of the on-site managers' costs were charged to the service charge account in the sum of £14,350.00. In the following year, on-site managements costs of £15,305.01 were charged and in 2007/8 the on-site management costs charged to the service charge account was £27,778.00.

For the year 2005/6 onwards head office management costs of 15% of income (excluding income credited from the Landlord for voids) had been charged to the service charge accounts. Mr Cotterill said this had been cross-checked by taking 15% of Mr Waterer's salary, 10% of two other head office staff salaries and 4% of head office overheads to justify the reasonableness of this charge. The on-site care staff salaries charged to the service charge account were £81,950 for 2004/5, £102,738 for 2005/6, £119,329 for 2006/7 and £105,937 for 2007/8. It was £97,533 for the 2008/9 budget. This had reduced because a manager's salary had been taken out of "care staff salaries" and shown

elsewhere in the accounts under "on-site managers costs" to provide more accurate figures. Mr Cotterill explained that the on-site care staff salaries apportioned to the service charge account were worked out from the daily time-sheets compiled by the care staff. The amount of their salaries attributable to the time they spent on 'Extra Care' was then deducted from the total salaries for the care staff who, at that time, were wholly dedicated to Close Care in order to arrive at the figure charged to the service charge account. Mr Cotterill and Mr Hutchins submitted that these figures were reasonable and in line with what would be expected to be paid for the service being provided which was very labour intensive. Mr Hutchins also pointed out that for every year from and including 2005/6 to date the Respondent had undercharged the lessees for the staff costs. This undercharge had to be taken into account when considering the reasonableness of the service charges.

8.1.9 With regard to void credits, 65% of the individual flat service charges was a fair proportion because the majority of the service charge is accounted for by staff costs providing the standard care service. No such service is required for empty flats and therefore that element of the service charge should not be borne by the Respondent in respect of empty flats.

8.1.10 With regard to water charges, these were not service charge items. The water company bills the Company for the water supply which is then individually metered to the various apartments and each apartment is billed for the amount of water they consume.

8.2 With regard to the Section 20C application Mr Hutchins submitted that even if the Landlord were to lose there would have to be something extra in the nature of unreasonable conduct to lead the Tribunal to make such an order. He

submitted that the Landlord had always acted in a responsible fashion and that there would be no justification for an order being made under Section 20C.

9. The Determination

9.1 Before dealing with the detail of this particular application the Tribunal makes the following observations about the Somerleigh Court development and the service charges levied on the lessees.

9.1.1 This type of development is mutually beneficial to the lessees and the Company. The attraction to the lessees is that they have the peace of mind of knowing that in their later years there is a trained person on hand to keep an eye on them, to provide on-site care if they need it, to provide meals if they want them and, if necessary, there is always the nursing home on hand. No doubt these facilities have attracted the lessees to purchase their apartments in Somerleigh Court. The Company benefits from having a 'captive market' for its commercial services in the form of 'Extra Close Care' and from those residents who migrate to the nursing home. The scheme, however, involves a mixture of a commercial enterprise where the aim is to seek profit on the one hand with a re-imbursement regime which is supposed not to make a profit on the other. At Somerleigh Court the two are inextricably linked because, for example, the same people who maintain the buildings and the grounds deal with both the privately owned apartments and the nursing home. More importantly in this case, although up to November 2008 there were care staff dedicated solely to Close Care the same staff did the Standard Close Care (which was charged to the service charges and recovered from all lessees) as did the 'Extra Close Care' which was charged on an individual basis according to use and which was part of the Company's profit-making activity. Since November 2008 this has been complicated still further by staff in the nursing home (which is a

commercial venture) undertaking Close Care services, too. Furthermore the same people provide the management services for the apartments and the nursing home. There is therefore a tension between the profit making and the non-profit making activities of the Respondent and the Company. It is understandable, in these circumstances, that the lessees should want to know how their service charges have been arrived at and to have the information made available to them upon which they can make a judgment as to whether or not their service charges are reasonable. Indeed the whole purpose of Sections 18 to 27A of the Landlord and Tenant Act 1985 are designed precisely to enable that to happen. On the other hand, the Company, perhaps understandably being a commercial concern, does not want every aspect of its operation open to scrutiny, particularly by its commercial rivals.

9.1.2 In this particular case the Tribunal formed the distinct impression that the Respondent, who has ultimate responsibility for making the Standard Close Care available to the lessees had not, at least until recently, fully understood the responsibilities placed upon it by the legislation. It would appear that it was unfamiliar with the requirements of the landlord and tenant litigation and, as their counsel commented, underwent a learning experience through the auspices of the Leasehold Advisory Officer of Age Concern who had been brought into the situation by the Applicant. Accounts had not been certified by an Accountant as required and were not in the correct format. Moneys from service charge payments were mixed with income from the nursing home and there was not therefore a separation of client money from the Company's money and it would appear that the bank had not been notified that the service charge element was being held on trust. These problems led to the late delivery of the final accounts for years ending in 2006 and 2007. The Tribunal

finds that all these deficiencies were matters which by virtue of Section 25 of the 1985 Act could result in a local authority taking criminal proceedings but they do not enable the Tribunal to interfere with the recoverability of the service charges which have been rendered provided that those service charges are properly recoverable as such under the Lease and provided that they are reasonable. The fact that these deficiencies have occurred and the fact that it took the Respondent or the Company a long time to accept their shortcomings and remedy them has led, understandably, to the lessees having lost confidence in the Respondent and the Company in looking after the lessees' interests as well as their own. This, in turn, has led to the suspicion amongst the lessees that the Respondent and the Company are subsidising the commercial part of Somerleigh Court with income from the service charges, a charge which Mr Cotterill strongly denied and tried to demonstrate as being untrue from the information and figures he produced in evidence.

9.1.3 This was, however, no easy task. Although he produced some detailed evidence for the year ending March 2008 this was for only one year in issue. As he said in evidence, to do this for all the years in question would have been a mammoth task and the hearing bundles would have been disproportionately costly. Even then the apportionment of costs of on-site care costs, for example, depends upon the amount of time spent by the relevant staff on Standard Care as opposed to Extra Care. The Tribunal was shown examples of time sheets completed by the care staff where they note down the amount of time they have spent on a particular activity. An analysis is then carried out by a manager and the cost of time allocated to Extra Care is deducted from the overall salary of that worker to reach the amount charged to Standard Care and thus to the service charge accounts. This system therefore depends upon a) the accurate

recording of time against the appropriate activity b) the accurate apportionment of time cost to Extra Care and c) the accurate deduction of Extra Care cost from the total salary for that worker resulting in the charge to the Standard Care and thus the service charge.

9.1.4 There is no way in which the Tribunal or the lessees are really going to be able to check the accuracy of these figures because they depend upon the honesty, accuracy and diligence in recording of the staff concerned. In saying this the Tribunal in no way intends to impugn the honesty or efficiency of anyone and the impression the Tribunal had of Mr Cotterill, who was the only person connected with the Respondent or the Company before them, was that he was doing his honest best in a complex situation to demonstrate that advantage was not being taken of these elderly lessees and that the system the Respondent and the Company operate and have operated over the years in question has been fair and reasonable.

9.1.5 This does mean to say, however, that to a large extent the Respondent asks the Tribunal and the lessees to take their figures on trust. Directions issued by the Tribunal had provided for the Respondent to have permission to adduce, if so minded, the evidence of an expert in the provision of care services as to the reasonableness of the rates paid by the Respondent for the provision of Standard Close Care and as to the reasonableness of the standard of service provided by the Respondent for Standard Close Care for the amounts charged to the lessees. The Respondent chose not to adduce any such evidence. It would certainly have made Mr Cotterill's task and that of the Tribunal much easier had they chosen to do so. In the absence of any such evidence the Tribunal has approached the determination of the reasonableness of the cost to the Applicant and the other lessees for the Standard Close Care included within

the service charges from the point of view as to what it would expect the Company to have to pay for managers of the level needed for this enterprise and how much it would expect lessees to have to pay for the services provided and charged to the service charges.

9.2.1 Turning now to the specific issues raised by the Applicant in challenging the service charges for the year 2004/5 to 2007/8 and the budget for 2008/9 the Tribunal first determined the question as to whether Extra Close Care was truly a service charge item so that its cost and the income derived from its provision should be included in the service charge account. The Applicant thought that it should as it fulfilled the definition of service charge set out in Section 18(1) of the 1985 Act. The Tribunal decided, however, that the cost of Extra Close Care was not a service charge, nor should the income from this service be credited to the service charge account. The Tribunal's reasons for so holding are:-

a) the Close Care Services which the Respondent and the Company are required to provide and the lessee is required to pay for are set out in the Fifth Schedule to the lease.

b) this entitles the lessee to a 24 hour emergency service, a daily visit (no minimum time specified), cleaning of common parts and maintenance of common parts, and management services to assist in providing the foregoing. Finally there is an obligation to provide additional care services, including if appropriate, nursing care services but it is clear that this is to be on the Company's terms prevailing at the time. Consequently, the provision of such a service is the Landlord's responsibility but once the service has been made available its take up is to be at the lessee's individual expense. This is only fair and reasonable. The very considerable cost of a full nursing service may be required by one lessee and minimal care (just a daily visit) might be required by

another. It would not be fair or reasonable to expect all lessees to have to contribute to the disproportionate costs of another lessee which would be the case if this had been a service charge item. If the cost is not charged to the lessees then the income derived from the service should not be credited to the service charge account. The Tribunal can understand how the Applicant has taken the view he has as it is perhaps not helpful that Close Care Services are not clearly divided into Standard Close Care and Extra Close Care (referred to in the Fifth Schedule as additional care services) in the lease and they come as item 6 in a list of seven items under the heading 'Close Care Services' in the Fifth Schedule to the lease. Nevertheless, it is the fact that the Extra Close Care is of benefit only to the lessee (and their spouse or partner if any) who requires such care that takes the cost and income of such service out of the realm of a service charge, in the Tribunal's view.

9.2.2 With regard to the issue of the first twenty minutes of care being 'free' the Tribunal finds that although this may have been the case in 2001 by the time the years in question in this case arrived that was no longer what was being offered. In this regard the Tribunal was required to look at what the lease (which is the principal document covering the Landlord's and the Company's obligations) says about such provision. The Close Care Services set out in the Fifth schedule simply refer to a daily visit to each apartment. No length of time is specified, nor is the service to be provided at such visit specified. By 2003 in a letter to the Applicant, Mr Waterer of the Respondent Company said to the Applicant that the duration of the daily visit will usually be for just a few minutes. Some minor assistance may be given which will take longer. This is done 'as a matter of discretion' by the staff. They are told that no visit to a flat should take longer than 20 minutes and that a visit of that length should be 'exceptional'.

The Applicant confirmed to the Tribunal that he had not seen the 2001 document until shortly after he had purchased his apartment so it could not be said that he bought in reliance upon that document or that the Respondent is estopped from charging other than on the basis of the 2001 document. It may well be that in the early days of the development when there were considerably fewer lessees than there are now the staff were able to spend more time with the residents and that this changed as more apartments were sold. The Landlord's obligations are, however, dictated by the lease and as this does not specify the minimum period for a daily visit or precisely what the staff are permitted to do at such a visit these are matters for negotiation between the lessees and the Respondent or the Company. Further, the lease does not require that the same dedicated staff should be detailed to individual lessees under the Standard Close Care regime. The Tribunal can understand that this may well be regarded as an important feature by the lessees and that in an ideal world that would be desirable. On the other hand the Respondent and the Company will be anxious to keep costs down as much as possible and it makes economic sense to use nursing home staff for the Standard Care Service to the lessees if that staff would otherwise be under-utilised. As Mr Cotterill said in evidence he can supply to the lessees whatever level of service they want but that comes at a cost. He did not think the lessees would be prepared to pay the cost of the service they would ideally like. This, again, is a matter for negotiation between Mr Cotterill and the lessees and is not a matter for the Tribunal. All the Tribunal can be concerned with is whether the service they are entitled to under the lease has been provided to a reasonable standard and at a reasonable cost.

9.2.3 With regard to the reasonableness of the staff costs the Tribunal decided that the overall management costs for the years in question were about what one would expect for managers of that level and the resulting service charges per apartment are in line with what the Tribunal would expect for a development such as Somerleight Court. The Tribunal did find, however, that the head office management fees of :-

	2006	2007	2008
1 bed flat	376.06	374.79	372.00
2 bed flat	538.04	539.72	535.77

were too high. The Tribunal saw no reason to differentiate between a one and two bedroom apartment as far as these head office management costs were concerned and thought that apportioning 10% of two people's salary and 15% of a third plus 4% for office overheads was excessive bearing in mind the amount paid in addition for on-site management. The Tribunal decided that a charge of £325 per flat for each of the years 2005/6, 2006/7 and 2007/8 and for the budget for 2008/9 would be reasonable for such head office costs irrespective of whether this is for a one or two bedroom flat. The Applicant should therefore be credited with the difference between what he has paid for his contribution towards head office expenses for 2005/6 onwards and £325 per annum for this item. The Tribunal does not have sufficient information to enable it to calculate the amount of this overpayment. The Applicant and Respondent should endeavour to agree the same. If they are unable to do so either party may ask the Tribunal to determine this if a written request is received within 28 days of this determination accompanied b the necessary written information to enable the Tribunal to make the calculation. If no request is received within that

time the Tribunal will treat the matter as having been agreed and is unlikely to entertain a later request for such a further determination.

9.2.4 With regard to the amount charged to the Landlord for service charges in respect of void flats, it was submitted on behalf of the Respondent that 65% of the full service charge was a reasonable sum for the Respondent to pay because the majority of the service charge related to the cost of the provision of care which was not applicable where a flat was empty. The Tribunal accepted this argument and considered that 65% was reasonable in the circumstances. The Tribunal noted, however, that for the 2008/9 budget the Landlord's contribution with regard to voids was reduced to 60% of the normal service charge per apartment at a time when the provision towards repairs and maintenance which the Landlord would benefit from were increasing. The Tribunal therefore considers that the Landlord's contribution in respect of the voids for the 2008/9 budget should remain at 65%.

9.3.1 With regard to the budget for 2008/9 it has to be borne in mind that this is only an estimate of likely expenditure for the year. If the expenditure is less than the budgeted figure, then provided all lessees pay the budgeted service charge amount there will be a surplus at the end of the year which can be applied to reduce the next year's service charge or it can be applied to reserves or to the sinking fund. Once the actual figures are known for 2008/9 any lessee can challenge the reasonableness of any of the figures by means of a fresh application to the Tribunal. The main increase in expected expenditure for 2008/9 is related to maintenance: repairs and renewals being £32,215 higher than in any previous year with a corresponding increase in management fees of just under £10,000. It was explained by Mr Cotterill that this was the first year that significant sums had been budgeted for repairs and renewals. This was

because decoration of the West and South elevations of Edgcumbe Manor and Chesil Place was due to be carried out during the year. Further, work is needed to make the lifts more reliable than they have been and expenditure was also anticipated in respect of the fire alarm, nurse-call systems, emergency lighting and light fittings. In summary, the Tribunal thought that some of the items in the budget may turn out to be on the high side, but it was only a budget and the Tribunal saw no reason to interfere with any of the items at this stage.

9.3.1 With regard to the Section 20C application, the Tribunal is given a wide discretion under the Act. Although the Respondent has essentially succeeded in persuading the Tribunal the most of its service charges have been reasonable and that it is only the head office management fees that have been reduced, the success or otherwise of the outcome of the application is only one of the factors a Tribunal is likely to take into account when deciding whether or not to make an order. The Tribunal did not agree with Counsel for the Respondent that even if the Respondent had 'lost' there would have to be some unreasonable conduct on the part of the Landlord for the Tribunal to deprive it of its ability to recover the application costs through the service charge. It is a matter of weighing up what is 'just and equitable in the circumstances'. In this case the Tribunal considered that there was every justification for the Applicant to have queried the service charges. In a complex situation as exists in the case of Somerleigh Court the Tribunal considers it incumbent upon the Landlord to make its service charges as transparent as possible. Here, the service charges were far from transparent because of the sharing of costs and resources with the commercial side of the facility. The Tribunal, which is very experienced in such matters, had some difficulty in ensuring that sufficient information was available to enable it, doing the best it could, to make an

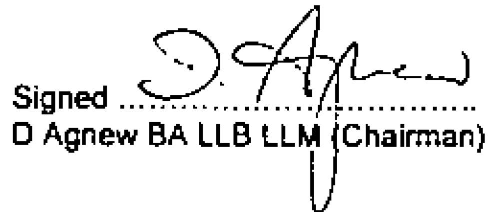
informed determination as to reasonableness. How much more difficult it must be for the elderly lessees of the Close Care development at Somerleigh Court. The Tribunal is of the view that Mr Cotterill and others in the Respondent and the Company will need to devise some method of satisfying the lessees going forward that they are being charged only for the services they are receiving and that there is no subsidising of the commercial activities by their service charges, if further complex and costly applications to the Tribunal are to be avoided in the future. This will probably entail a considerable amount of openness as to financial information.

9.3.2 The lessees must also realise that the services that they enjoy are very labour intensive and therefore costly. In other similar developments residents have opted to depart from 24 hour on-site care to use an emergency call out service which serves several sites. That may not be an option for Somerleigh Court but it is an indication that other lessees in a similar position have decided that the type of service being provided at Somerleigh Court is too costly for them. The Tribunal hopes that the lessees will be able to work with Mr Cotterill to find the most appropriate level of service for them at a cost they are prepared to pay.

10 In all the circumstances the Tribunal decided that it would be just and equitable in this case to make a determination under Section 20C that the Respondent be limited to charge 50% of its costs associated with this application to future service charges. Whatever that 50% is, it must be reasonable. The Tribunal heard no detailed evidence as to the Respondent's costs although they are likely to be substantial as there has been a pre-trial review, two separate hearing days, a detailed statement of case has had to be prepared and there are two witness statements from Mr Cotterill. If or when the costs do appear in the service charge demands any of the lessees will be entitled to challenge the

amount of these costs by making a further, fresh application for the Tribunal to consider the reasonableness of the same.

Dated ....21st April....2009



Signed ....
D Agnew BA LLB LLM (Chairman)

SOUTHERN RENT ASSESSMENT PANEL

LEASEHOLD VALUATION TRIBUNAL

Case No: CHI/19UK/LSC/2008/0087

IN THE MATTER OF Sections 20C and 27A of the Landlord and Tenant Act 1985 (as amended) ("the Act")
AND IN THE MATTER OF 25 Chesil Place, Somerleigh Court, Dorchester, Dorset DT1 1AE ("the Property")

BETWEEN

MR J DONOVAN — Applicant/Lessee

and

BENTLEIGH CROSS LIMITED — Respondent/Landlord

DECISION ON APPLICATION FOR PERMISSION TO APPEAL

DATE OF ISSUE:-

TRIBUNAL: Mr D. Agnew BA LLB LLM (Chairman)
Mr J. McAllister FRICS
Mr A. J. Mellery-Pratt FRICS

1. On 5th May 2009 the Respondent's solicitors lodged an appeal in respect of the Tribunal's decision of 21st April 2009, issued under cover of a letter of 22nd April 2009.

2. The appeal is limited to the Tribunal's determination that the Respondent be precluded from adding 50% of the costs of the application to the Tribunal to future service charges under Section 20C of the Landlord and Tenant Act 1985.

3. The grounds of appeal are:-

a) that the Tribunal misdirected itself that it had a broad discretion as to costs whereas it is contended by the Respondent that the Tribunal's power should only be exercised in circumstances which make the use of the Landlord's right to recover costs is unjust, such as where the Landlord has abused its rights or

has used them oppressively in relation to the proceedings.

b) that the Tribunal wrongly held that the Landlord was under a duty to make its service charges as transparent as possible whereas there is no such duty where the Lessees have made no request for inspection of documents under Section 22 of the Act. It is said by the Respondent that the Tribunal failed to take account of its own finding that neither the Tribunal nor the Lessees could check the accuracy of the staff cost figures.

c) that no reasonable Tribunal could conclude that in circumstances where the Landlord has a contractual right to costs, has been substantially successful and is not under a legal duty to ensure transparency.

4. The Tribunal HEREBY REFUSES permission to appeal for the following reasons:-

a) in every case where Section 20C is relevant the Landlord has a contractual right to seek to recover its costs of the application by way of future service charges but Parliament has specifically provided by Section 20C that the contractual right may be overridden by the Tribunal in an appropriate case.

b) Section 20C itself provides no limitation to the Tribunal's ability to make a determination restricting or denying completely the Landlord's contractual right to recover costs: it may make "such order as it considers just and equitable in the circumstances".

c) the Tribunal did take all the circumstances into account particularly the matters for which there was a specific finding in paragraphs 9.1 and 9.2 of the Reasons. It specifically took into account the fact that the Respondent had ultimately been largely, but not wholly, successful (paragraph 9.3.1 of the Reasons). It also took into account that in the Tribunal's view the Applicant had

every justification in querying the service charges particularly in the light of the substantial rise in service changes in April 2008 and the failure by the Landlord to comply with various statutory requirements. As stated in the Reasons the Tribunal itself had some difficulty in acquiring from the Respondent sufficient information on which to make an informed judgement as to the reasonableness of the service charges.

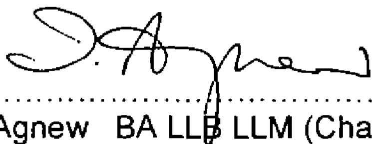
d) the Tribunal considers therefore that its decision on the Section 20C application was one which in all the circumstances it was entitled to make exercising the discretion given to it by the Section.

e) the Tribunal did not say that the Respondent was under a legal duty to the Applicant to be as transparent as possible with regard to the service charges. The Tribunal's approach to determining the Section 20C application can be ascertained by reading paragraph 9.3.1 of the Reasons in its entirety.

f) in all the circumstances the Tribunal does not consider that the appeal has any realistic prospect of success and therefore refuses permission to appeal.

5. The Respondent is entitled now to pursue its application for permission to the Lands Tribunal within fourteen days of the issue of this decision.

Dated this 9th day of June 2009



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D. Agnew BA LLB LLM (Chairman)