

**RESIDENTIAL PROPERTY TRIBUNAL SERVICE  
SOUTHERN LEASEHOLD VALUATION TRIBUNAL**

Case No: CHI/24UN/LIS/2008/0040

Re: Flat 2, Eastfield House, Woodlands Way, Andover, Hampshire SP10 2QU

Applicant	Fountaingate Properties Limited
Respondents	Nicholas John Aucott & Jolanda Aucott (formerly Los)
Date of Application	2 <sup>nd</sup> September 2008 (Court Referral) 7 <sup>th</sup> November 2008 (Further Application)
Date of Inspection	6 <sup>th</sup> February 2009
Date of Hearing	6th February 2009
Venue	Test Valley Council Offices
Representing the parties	Mr Timothy Deal, of Counsel, for the Applicant The Respondents in person
Also attending	Mr Case and Mr Sykes, for the Applicant Ross Addison & Amelia Williams – Flat 4 Natasha Faulkner – Flat 5 Paul Howe – Flat 6

**Members of the Leasehold Valuation Tribunal:**

M J Greenleaves	Lawyer Chairman
P D Turner-Powell FRICS	Valuer Member
Mrs J Herrington	Lay Member

Date of Tribunal's Decision: 3<sup>rd</sup> March 2009

**Decision**

1. The Tribunal DIRECTS the Applicant do file in the Chichester County Court in respect of Claim No 8CI01128 the service charge accounts for the year to 28<sup>th</sup> September 2007 showing them as having been certified prior to the commencement of those proceedings in accordance with the provisions of Schedule Seven, Paragraph 10 to the Lease (the lease) of Flat 2, Eastfield House, Woodland Way, Andover ("the premises") dated 25<sup>th</sup> November 1994 made between Kamet Properties Limited (1) and Jamie Sharman and Louise Fuszard(2)

2. Subject to compliance by the Applicant with that direction, the Tribunal determines in accordance with the provisions of Section 27A of the Landlord and Tenant Act 1985 (the Act) that for the accounting year to 28<sup>th</sup> September 2007 the sum of £695.78 is a reasonable sum for service charges payable in respect of the premises.
3. The Tribunal determines in accordance with the provisions of Section 27A of the Landlord and Tenant Act 1985 (the Act) that for the accounting year to 28<sup>th</sup> September 2008 the sum of £19,700.00 is a reasonable sum for service charges in respect of Eastfield House as a whole.
4. The Tribunal determines in accordance with the provisions of Section 27A of the Landlord and Tenant Act 1985 (the Act) that for the accounting year to 28<sup>th</sup> September 2009 the sum of £30,385.00 is a reasonable sum for estimated service charges in respect of Eastfield House as a whole.
5. That window frames of flats are part of Reserved Property and the cost of their maintenance repair and decoration of their external; parts falls to be charged to service charge.
6. Under Section 20C of the Act, the Tribunal makes an Order that the Applicant's costs incurred in connection with the Tribunal proceedings shall not be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the Respondents.

## Reasons

### Introduction

7. The original application in this case resulted from an Order of the Chichester County Court in claim No 8CI01128 that the claim in that case in relation to unpaid service charge be transferred to the Tribunal for determination [under Section 27A of the Landlord and Tenant Act 1985 (the Act)] of reasonableness and whether payment is due. The service charges in question relate to the accounting year to 28<sup>th</sup> September 2007.
8. A further application was made by the Applicant to the Tribunal on 7<sup>th</sup> November 2008 under Section 27A of the Act to determine whether a service charge is payable and, if it is, by whom it is payable, to whom, the amount, the date at or by which it is payable and the manner in which it is payable.
9. The years in question under the further application are:
  - a. To 28<sup>th</sup> September 2008 as to costs incurred, as to which the Tribunal was asked only to determine whether costs had been reasonably incurred and whether the service or works provided were of a reasonable standard.
  - b. To 28<sup>th</sup> September 2009 in respect of estimated costs to be incurred, as to which the Tribunal was asked to determine whether the estimated sums for future services and works were a reasonable amount and whether the window frames of flats constituted part of the Reserved Property

### Inspection

10. On 6<sup>th</sup> February 2009 the Tribunal inspected Eastfield House (the Property) in the presence of the parties and representatives. By reason of settled snow, inspection of the grounds was restricted.
11. The Property is a period detached house, constructed of sandstone under pitched roofs, converted into 7 self-contained flats, with parking spaces on the front and north and garden grounds to the east side. The entrance hall, stairways and landings are spacious. There is a cellar. The subject flat comprises living room, two bedrooms, bathroom/WC and kitchen. The living room has bay French windows. There is evidence of water ingress in one bedroom but otherwise the flat appears to be in good condition for its age and character.
12. The internal communal areas and the exterior of the Property appear to be in fair condition for their age and character. Internally some of the balustrade is broken away, lighting time switches are not working and the top floor ceiling shows substantial evidence of water ingress. Externally, the stonework suffers from spalling, some gutters are leaking, downpipes are blocked by birds' nests. Water is running down the outside of downpipes. Gutters are blocked and leaking. Window frames, including the bay window of Flat 2, are in need of re-decoration. Panel fencing has fallen and needs replacement; the grounds generally look rather unkempt with one tree very close to the building.

#### **Hearing & Representations**

13. A hearing was held the same day, those attending being noted above.
14. There was no issue between the parties that the window frames of flats were to be taken as included within the definition of Reserved Property for the purposes of service charges.
15. The substance of the Applicant's case:
  - a. The invoices included within the service charge accounts for the 2007 and 2008 accounting years were identified from the bundle of papers prepared by the Applicant.
  - b. Mr Sykes, Chartered Surveyor, of Andover evidence.
    - i. He had been instructed by the Managing Agents, Hampton Wick Estates ("HW"), to prepare a schedule of required repair work and he had written to the Agents about this on 14<sup>th</sup> November 2008. He estimated costs totalling about £30,800. He had since received two tenders and was waiting for a third. Those received so far were for £35,000 and £49,000 plus VAT respectively to include provisional sums, window repairs and decoration. He said the work is necessary but did not include any cosmetic work to the stonework: some had been done in 2003. He said that the damp at the front and rear would be cured by this work and the present damp would dry out. He did not know how long the Property had been in its present condition but it was satisfactory about 5 years ago. Between 2005 and 2008 he had attended the Property to deal with various matters on which HW had instructed him but he had no instruction to inspect regularly, nor did he have instructions to check work had been done e.g. for garden work or cleaning before an invoice was paid.

- ii. He said that some work, e.g. gutters, should be attended to at least annually, he was only instructed to deal with specific matters from time to time. The problem with light switches had not been referred to him.
- c. Mr Case, employed by HW, tendered his written statement dated 15<sup>th</sup> January 2009 to which are attached the service charge accounts and invoices.
- i. One-half of the estimated cost of the major works had been added into the 2008 accounts and the balance of the estimate in the 2009 estimated charges. This had been done on the basis of Mr Sykes' letter of 14<sup>th</sup> November 2008.
  - ii. He said that the cleaners and gardeners had been replaced; that the gardens had not been kept as the freeholder wished, but nobody had been charged for work which had not been done. However, he relied on either complaints from tenants or reference by Mr Sykes if work had not been done, but otherwise the bills were paid without checking.
  - iii. Management fees. The fee level had been accepted as reasonable by a Tribunal. HW would not be charging fees on the major works.
  - iv. He disputed that nothing had been done to deal with issues raised by tenants from time to time. When blocked guttering was raised in May/June 2007, he believed a builder attended. He had not sent copy invoices to tenants with the accounts but could do so.
  - v. HW had been advised that the external painting provisions of the lease were not categoric. The Property was last painted in 2003; while he accepted it should then have been done in 2006 he contended that may have been excessive. He accepted the guttering could have been attended to before now: he was less than happy about it.
  - vi. Gardening/cleaners. He did not have a copy of any written instructions which might have been given to gardeners or cleaners. Green King had started their contract recently but he did not have their contract to hand. In respect of the cleaning record he said that it might be incorrect.
  - vii. HW had managed the Property for about 10 years and 6 monthly inspections had been intended by either him or a colleague. However he had not inspected for about 12 months. He did not have any records of complaints or action taken.
  - viii. He said that HW do comply with the RICS Code of Management (the Code).
- d. Mr Deal submitted that there was no evidence that any non-compliance had resulted in increased costs; that all the charges made are reasonable; that it was reasonable to rely on contractors to carry out works; he accepted that not all correspondence had been dealt with; that the funds sought for the major works were not excessive. He submitted that Mr Case had been candid; that he had relied on colleagues but there had been difficulties which were now being sorted out. He accepted there was no provision in the lease enabling the Applicant to recover its costs of the Tribunal proceedings through service charge, but that the Applicant had had to start the Court proceedings and should not be deprived of its costs.

- e. Major Aucott's evidence.
  - i. He said he had no problem in paying service charges but his flat had suffered for want of work being done, especially in relation to damp in the bedrooms and external painting of windows.
  - ii. He submitted his Court defence and letter to the Tribunal dated 11<sup>th</sup> December 2008. During the whole of their ownership of the flat, they had seen little evidence of work being done; he referred to the state of the garden, the panel fencing, overgrown grass; little evidence of cleaning and the record being out of date; no evidence of management. He therefore challenged all the charges made. He also referred to correspondence over the years to HW which had not resulted in any action. He also submitted that HW should pay all the cost of the major works to bring the Property up to standard.
  - iii. He wanted an Order to prevent the Applicant recovering its Tribunal costs through service charge as the proceedings had only started because of HW's failures.
- f. The Respondents called the following to give evidence:
  - i. Paul Howe – Flat 7. He had moved into the flat in early 2006. Apart from cleaners there had been very little activity, lawns being coarse-mown every couple of months. He had often contacted HW and would be told it was being taken care of. He thought the leak next to the atrium was identified in August 2008 and nothing was done except the carpet being cleaned the day before the hearing. He said that hardly anything he contacted HW about was answered or dealt with.
  - ii. Ross Addison – Flat 4. He had lived there since 2006. He had written letters and made phone calls to HW but not once had had answers; otherwise he confirmed what Mr Howe had said.
  - iii. Amelia Williams – Flat 4. She said that the hike in service charges for 2009 was due entirely to past lack of repair.

### **Consideration**

16. The Tribunal took into account all the evidence given at the hearing, the documents to which it had been referred and its inspection.

### **17. Windows.**

18. The Tribunal noted that the parties agreed these should be treated as part of the Reserved Property and the cost of upkeep accordingly paid for as service charge, but the Applicant sought the Tribunal's determination of the matter.

### **19. Relevant terms of the Lease:**

- a. Sixth Schedule Paragraph 27. The lessee covenants to pay 14.29% of the costs and expenses, etc of the developer in carrying out its obligations under the Seventh Schedule.

- b. Seventh Schedule Paragraph 3. "The developer shall keep the Reserved Property and all fixtures and fittings therein and all additions therein and all additions thereto ..... in a good and tenable state of repair and condition inside and out.....".
- c. Seventh Schedule Paragraph 4. "The Developer shall..... paint..... all the wood iron and other external parts of all buildings for the time being on the Estate....".
- d. Definitions:
  - i. "The Reserved Property":
    - 1. Recital (1)(e) "means that part of the Estate not included in the flats being the property more particularly described in the Second Schedule.."
    - 2. Second Schedule. "... all those main structural parts of the building comprising the flats forming part of the estate including the roofs foundations and external parts thereof (but not the glass of the windows or the front doors of the flats nor the interior faces of such of the external walls as bound the flats) and all [services, pipes etc]"
  - ii. "Estate": First Schedule. "All that land and premises known as Eastfield House Andover.... edged blue on the plan annexed hereto".[NB no plan was attached to the copy before the Tribunal].
  - iii. "Demised Premises". Third Schedule. "First all that ground floor flat forming part of the estate and known as Flat 2 all which flat is delineated on the plan annexed hereto and thereon edged red together with the ceilings and floors of the said flat and together with [service pipes, etc] except and reserving from the demise the main structural parts of the building of which the flat forms part including the roof foundations and external parts thereof (but not the glass of the windows or the front door of the flat nor the interior faces of such of the external walls as bound the flat)..."

20. The Tribunal accordingly found:

- a. that the Reserved Property excludes the flats, flats ("demised premises") being defined to exclude main structural parts of the building and external parts of the building other than window glass and the flat front door and interior faces of external walls bounding the flat;
- b. that the Reserved Property Includes the external parts of the building.
- c. That reference to just the glass of the flat windows suggests that the frames are to be treated differently; that if frames were to be included in the "demised premises" they would, like the flat front door, be specifically referred to as included; that therefore the frames are not included in flats. If they are not part of flats are they then part of the Reserved Property? First, if they are not part of the demise by the lease, they must have been retained by the developer and, secondly, while they may not be structural parts of the building they are nevertheless "external parts of the building" which are part of the Reserved Property.

21. The determination of the Tribunal was accordingly that window frames of flats form part of the Reserved Property and their repair and maintenance costs are an obligation of the Applicant and chargeable to service charge. The decoration of the exterior of the frames is the obligation of the Applicant under the Seventh Schedule Paragraph 4 and also chargeable to service charge.

22. Overview of the Evidence.

- a. The Property is plainly now in need of significant repairs. The Respondents' case shows clearly that there have been ongoing issues for a number of years. While HW say they rely on Mr Sykes and the tenants to report problems, the Tribunal accepted that Mr Sykes had no general instructions to inspect the Property on a regular basis or to report on more than he was specifically instructed to do. The Tribunal was satisfied on the oral evidence and from letters produced that tenants had contacted HW fairly regularly over the last few years; that HW were unable to produce records, if any, they kept as to such contact or how issues had been dealt with. Mr Case accepted there had been problems but his evidence was generally vague on management issues; he himself admitted he had not inspected the Property for about 12 months. HW had not themselves been checking that work invoiced had been carried out. While Mr Case said that HW complied with the RICS Code of Management, the evidence suggests to the contrary: if it did comply, the past problems would probably not have occurred.
- b. The overall picture is one of minimal management which has allowed maintenance, repair and decoration of the Property to fall well below the standard that the tenants were entitled to expect over several years. That has led to the Respondents making a stand, resulting in not only Court proceedings and these applications, but also HW finally apparently beginning to take a grip on management in terms of steps taken to carrying out the major works.
- c. A significant issue for the Respondents is that because of failure by the Applicant/HW to carry out works in a timely manner, the cost of the major works is much higher than it might otherwise have been and indeed that HW should therefore bear its entire cost.
- d. The Tribunal accepts that there has been historical neglect, but there is no evidence from the Respondents to demonstrate resulting additional expense. The Tribunal decided that while delay might result in some decay, there is no evidence of measurable damage. The Tribunal was not satisfied that the state of the guttering, downpipes and the presence of nesting has caused additional damage or that window frames have suffered damage other than dampness which will dry out. The Tribunal also considered that if there had been regular cleaning of gutters, the cost of that work would exceed any possible increase in costs now.
- e. For those reasons the Tribunal found that no additional costs had resulted from any failure by the Applicant and HW so that the full cost should be charged to service charge.

23. Reasonableness of Service Charges. *[NB where a year is referred to, it means the accounting year to 28<sup>th</sup> September in that year].*

- a. Buildings Insurance. No issues were raised about the premiums paid or estimated for 2009 and the Tribunal found them to be reasonable.
- b. Repairs 2007. No issues were raised about this item and the Tribunal found it reasonable for the work done.
- c. Gardening/Grounds Maintenance 2007, 2008 & 2009. There is no satisfactory evidence as to the work covered: HW were unable to produce any documentary evidence, even for the new contract with Green King. The Tribunal notes complaints made by tenants by letters to HW on 5<sup>th</sup> July 2007 and an undated letter (but which seems likely to pre-date the smoke detector work in January 2007 as it complains about those too). The Tribunal was satisfied that the level of gardening work was not of the standard or frequency expected<sup>1</sup> and had not been checked by HW despite matters being drawn to their attention. The Tribunal decided that reasonable sums for the work done were 2007: £932 and 2008: £395. For 2009, the Tribunal expects management to be brought up to standard and on the basis of Green King's invoice considered the estimated £1,530 to be reasonable.
- d. Electricity. 2007, 2008, 2009. No issues were raised about this item, save that the bills might be reduced if the time switches are operating. However, the Tribunal found them reasonable for the supply.
- e. Audit Fee 2007. No issues were raised about this item and the Tribunal found them reasonable for the work required.
- f. Cleaning 2007, 2008, 2009. On the evidence, including the two letters referred to above concerning gardening, cleaning had not been checked and had fallen short of a reasonable standard. The Tribunal considered for the work done the sum of £430 was reasonable for 2007; that the sum charged for 2008 of £571.06 was consistent with the work done (while inadequate for the nature of the Property) and was therefore reasonable. The estimated £1,125 was reasonable for 2009 on the basis that the quality and frequency of cleaning should be much improved.
- g. Management fees.
  - i. The Tribunal accepts that fees should be based on a rate per unit as provided by the Code Paragraph 2.4. As the Code states, this is a basic fee for carrying out all the work referred to in Paragraph 2.5 so it does not include payment for management aspects of Major Works which would be provided for by compliance with Paragraph 2.6 of the Code. The Applicant indicates that the fee of £240 per unit for 2007 and 2008 and £247.14 for 2009 would also cover major works management, but that is not the correct approach.
  - ii. For this area the Tribunal's experience is that £150 per unit as a basic fee under Paragraph 2.5 of the Code is normally reasonable on the basis that the work covered by it is carried out. The Tribunal was satisfied in this case

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<sup>1</sup> The Tribunal would expect, as a minimum, fortnightly mowing, hedging and trimming through most of the year.



that HW has substantially failed to comply with that Paragraph for 2007 and 2008 by reason of lack of inspections, failure to deal with complaints and lack of maintenance. For those two years the Tribunal considered that £90 per unit was reasonable for the work done. On the basis that management for the future is brought up to standard, the Tribunal considered that £150 per unit for the basic fee would be reasonable. It appears HW is not registered for VAT, but these figures are all exclusive of VAT.

h. Reserve 2008. £15,590.31.

- i. The lease (Seventh Schedule, Paragraph 9) provides that “the Developer shall so far as it considers practicable equalise the amount from year to year of its costs and expenses in carrying out its [repairing, etc] obligations”.
- ii. The tenants are concerned that the Applicant is not doing that in providing for about half of the cost of the major works in one accounting year. The Applicant may, for the future, wish to consider whether contributions to a reserve or sinking fund should be provided for on the basis of a rolling programme of maintenance. However, in the present circumstances, the Tribunal consider it reasonable to charge this reserve sum to 2008 on the basis of the initial advice from Mr Sykes that the cost would be about £30,800.

i. Major Works, Internal Decoration & Surveyor’s fees balance 2009. Mr Sykes has received two estimates so far for the major works, the lower being £35,000 + VAT. These 3 items in the 2009 estimated account total £23,000 and with the £15,590.31 from 2008 would result if funds totalling £38,590.31 resulting in a shortfall on this lower estimate. So the Tribunal was satisfied that these 2009 items together were reasonable.

j. General maintenance 2009 £1,000. For this type of Property the Tribunal would expect a managing agent to make provision of this order. There are, for example, fence panels to be replaced – these are not part of the major work. The Tribunal found the item to be reasonable.

24. Section 20C. The Tribunal found that the provisions of the lease do not allow the Applicant to recover as service charge its costs in connection with these proceedings, but in case it is wrong about that, in all the circumstances of the case as noted above, it made an Order preventing the Applicant from doing so.

25. The Tribunal made its decisions accordingly.



Chairman

A member of the Tribunal  
appointed by the Lord Chancellor

The Schedule  
(Reasonable sums)

Item	2007	2008	2009 estimated
Insurance	2,219.70	2,439.01	2,600.00
Repairs	213.38	-	-
Major Works	-	-	15,750.00
Internal decoration	-	-	5,750.00
Surveyors fees balance	-	-	1,500.00
Gardening/Grounds Maintenance	932.00	395.00	1,530.00
Electricity	73.83	74.62	80.00
Audit Fee	370.12	-	-
Cleaning	430.00	571.06	1,125.00
General maintenance	-	-	1,000.00
Reserve	-	15,590.31	-
Management Fees (ex VAT)	630.00	630.00	1,050.00
<b>TOTAL</b>	<b>4,869.03</b>	<b>19,700.00</b>	<b>30,385.00</b>