SOUTHERN RENT ASSESSMENT PANEL

LEASEHOLD VALUATION TRIBUNAL

Case Number CHI/45UC/LIS/2009/0007

In the matter of section 27A of the Landlord & Tenant Act 1985 (as amended) ("the Act")
and
In the matter of Flat 4A Wick Parade Littlehampton
("the property")

BETWEEN

Betterkey Limited — Applicant

and

Mr W Hodder and Miss R L Anderson — Respondents

Decision

Hearing: 18th May 2009

Appearances: Mrs S Kuszer for the Applicants

The Respondents were neither present nor represented.

Date of Issue: 3 JUNE 2009

Tribunal:
Mr R P Long LLB (Chairman)
Mr B Simms FRICS MCIArb
Mrs J K Morris

Application

1. This matter arises from proceedings brought by Betterkey Limited ("the Applicant") against Mr W Hodder and Miss R L Anderson for £593-08 for service charges and ground rent, and for £235 for a "collection fee" in the Chichester County Court. The Court has dismissed the claim for the collection fee, and by an Order dated 26th January 2009 transferred the matter to this Tribunal for determination of the remaining matters.

2. The Tribunal's determination is summarised at paragraph 25 below.

Inspection

3. The Tribunal inspected the property, as far as it was able to do so, on the morning of 18th May 2009, prior to the hearing. None of the parties attended. It saw a brick-built shopping parade that appeared to date from the 1970's. The parade consisted of shops and a supermarket on the ground floor with two floors of flats above them. The flats are accessed by means of metal staircases leading to a walkway on each of the first and second floors. There is a large public car park at the front of the building. The front door to the property bore stickers to the effect that mortgagees had repossessed it on 5th May 2009.

4. The Tribunal was able to see that a metal staircase rose opposite what appeared to be the front room of the flat. It was secured by metal flanges let into the brickwork forming the top part of the front wall to the front room at a point adjacent to the second floor walkway that forms part of the roof to that room. The staircase had rusted somewhat and it was apparent that the flanges had themselves rusted at the point where they were let into the brickwork. The rust has resulted in some expansion of the metal, and consequent separation of some of the bricks.

5. Some work had been carried out at the very top of the wall to re-point what seems to have been some earlier cracking between several bricks, and there is now a lower crack that starts one or two courses below the top of the wall and tracks in a stepped line for a distance of some three feet along the joints between bricks in three courses below the point where it starts. It is not a wide crack, and appears to be of such a nature that re-pointing would overcome any present problems that it presents, although a long-term solution will require attention to the rusting flanges.

6. The Tribunal was not afforded access to see the inside of the property. Photocopies of photographs of the interior supplied to it were of such poor quality that it could derive no practical assistance from them.

The Lease

7. The Tribunal was provided with a copy of the lease of the property. It is dated 31st March 1999 and was made between the applicant of the one part and Wayne Gary Hodder of the other part and demises the property for a term of one hundred and twenty five years from 29th September 1998. The service

charge provisions are primarily set out at clause 2 (12). They oblige the lessee to pay on demand:

a. a fair proportion of the cost paid or payable by the lessor of cleaning lighting maintaining repairing or rebuilding any part of the building (as therein defined)
b. a fair proportion of the sum which the lessor shall have paid by way of premium for insuring the demised premises
c. a fair proportion of all contributions paid or payable by the lessor towards the costs and expenses incurred by the owner for the time being of the shopping precinct of which the premises form a part for repairing maintaining cleansing replacing and renewing as necessary the roads and access ways footpaths and pedestrian ways
d. the cost incurred by the lessor of painting decorating and maintaining the exterior of the premises

There is a mechanism for payment of £200 on account of service charges in advance in each year, and for appropriate adjustments to be made at the end of that year.

Hearing

8. The Tribunal prefaces its observations by pointing out that the law relevant to the determination of service charges is to be found primarily in sections 18, 19 and 27A of the Landlord & Tenant Act 1985. In brief summary, section 18 defines what is a service charge in terms that present no difficulty here, section 19 provides in the context of this case that a service charge must be reasonably incurred and section 27A allows the Tribunal to determine in this context how much is to be paid by the lessees to the lessor for service charges. To the extent that the point is not implicit in the legislation, the case of *Finchbourne v Rodrigues [1976] 3 AER 581* establishes that a service charge must be reasonable in amount. Other aspects of statute are mentioned at the point in the is document where they are relevant, and the relevant terms of the lease under which the Respondents hold 4A Wick Parade of the Applicants are described as they arise.

9. After the Tribunal had introduced themselves and explained the procedure to be adopted at the hearing, Mrs Kuszer presented a written statement. It dealt primarily with the Respondents' contention that they were entitled to withhold service charge because of the condition of the wall where the staircase was fixed to it and of the effect of those problems upon the flat. Otherwise, Mrs Kuszer said that the Respondents had admitted that the service charge was payable. The documents that the landlord had sent to the Tribunal on 12th March in response to the directions showed how it was made up. She was content to answer questions from the Tribunal to deal with any points that it wished to raise.

10. The following points do not follow the order in which they were raised at the hearing, but it is convenient to deal with them in this fashion in this document in order to follow the progression in which the Tribunal made its decision.

11. Mrs Kuszer was asked if the copy of the statement of monies due dated 4th August 2008 ("the Statement") that was before the Tribunal (page 2 of the documents sent with the letter from Kuszer Estates (Management) & Co on 12th March 2009 – ("the Second Bundle")) was accompanied by any other documents. She said that when they send a demand they always have all the relevant information available if anyone needs to see any detail, The Tribunal drew her attention to the Service Charges (Summary of Rights and Obligations and Transitional Provisions) Regulations 2007 (SI 2007/1257). She said that she was not aware of those regulations and that her firm did not send a statement with service charge demands in accordance with its provisions.

12. The Tribunal explained that the combined effect of those regulations and of the provisions of section 21B of the Act was that a service charge does not become payable until a demand accompanied by a statement in the form that the Regulations require is given to the intended payer. The consequence of that was that whatever sums the Tribunal may find were otherwise payable did not fall to be paid until a demand accompanied by the statement had been provided. In consequence the amounts claimed in the proceedings before the Court were not payable at the time when the proceedings were commenced, so that the claim before the Court necessarily failed.

13. It was however open to the Applicants at any time to serve a demand and statement in a proper form for whatever sum was payable whereupon a right to payment would arise.

14. With the primary intention of assisting the parties and avoiding the need for them to return to the Tribunal upon these issues (and in case it may be held to be wrong about any of the above matters) the Tribunal went on to examine the other matters that were before it. It did so by reference to the itemised demands in the Statement, and in the demand for service charges in connection with the common parts sent to the Applicants by Messrs Hammond Phillips on behalf of the head landlord dated 18th November 2008 that appears on page 8 of the Second Bundle.

15. As to the demand for a one sixth share of buildings insurance premium amounting to £142-08, Mrs Kuszer drew attention to the copies of certificates of insurance at pages 5 and 6 of the Second Bundle to show the matters covered by the insurance. The premium was £853 as appeared on page 4 of the Second Bundle. There was nothing before the Tribunal to suggest that the provisions of the insurance policy were other than reasonable, and the amount of the premium was not challenged. The premium appeared to the Tribunal within its collective knowledge and experience to fall within the range that may be expected for cover of the amount and extent offered. Accordingly it determined that the demand for a proportion of insurance premium of £142-08 was appropriate, and that the sum demanded was reasonable.

16. The second item on the Statement was an amount of £25 for "service charge in advance". Mrs Kuszer said that this was to cover her firm's administrative costs for dealing with the insurance and for doing the paperwork. It was their

managing agent's fee. She was unable to show the Tribunal which provision of the lease permitted such a fee to be charged, and the Tribunal itself could find no such provision either. Such a provision would have to appear to enable such a charge to be made and because it does not the charge of £25 is not recoverable. The position is analogous to that of the proposed collection charge of £235 claimed originally in this case and struck out by the Court because the lease made no provision for it.

17. The third item in the summary was a sum of £376 for what was described as service charge for car park maintenance. The Tribunal could not understand this figure and Mrs Kuszner could not explain how it had been derived save that it was the amount claimed for the lessees' contribution of one third to the costs incurred by the owner of the shopping parade. Page 9 of the Second Bundle was an account of the details of the total expenses so incurred in respect of 4 Wick Parade amounting to £1173.27. It appeared to the Tribunal that had one third of that total amount been charged to the lessees then the figure claimed would have been £391-09. It noted too that a sum of £5-38 plus VAT for the cost of electricity is included in the detail of the expenses on page 9 of the Second Bundle, which does not seem to be recoverable under the terms of the lease but excluding it does not assist in reconciling the figures.

18. The figure of £376.00 claimed under this head was thus unexplained, but was lower than the amount that on the face of the matter it seemed to the Tribunal might have been charged. Of that sum an amount of £252.46 (being one third of the total of the cost of £524-63 for cleaning and £232-75 for general repairs - £757-38 in all) was for what are clearly qualifying works under section 20 of the Act. The balance of £123-54 making up the £376-00 claimed appeared to relate to matters that were not qualifying works under the Act, although one third of the cost of £5-38 for electricity (£1-79) falls to be deducted from it leaving a sum payable for those elements of £121-75.

19. There was no evidence before the Tribunal that would lead it to conclude that the figures in the detailed service charge statement on page 9 of the second bundle provided to support the demand on page 8 of that bundle were themselves unreasonable, although it had seen no invoices or other supporting evidence. They were of a level that in its collective experience could perfectly well be incurred for the cost of maintaining quite extensive roads and accessways. With some hesitation the Tribunal concluded that it would be appropriate to apply the limit recoverable under section 20 only to the element (£252-46) of the figure of £376-00 that clearly related to qualifying work. As a result it concluded that £371-75 (ie £250-00 plus £121-75) is recoverable for the cost of "service charge for car park maintenance" rather than £376-00.

20. If the figures included in the statement on page 2 of the second bundle had been broken down in the statement to the lessees into their component parts in the same way as they appear in the statement on Page 9 of the Second Bundle then no problem would have arisen in connection with section 20 because none of the items would have exceeded £250. The Applicant may wish to consider adopting that course on another occasion. As matters stand the Tribunal cannot separate out the component parts (not least because the figure

of £376-00 is unexplained). The matter causes only a small adjustment on this occasion but may produce a larger one on another.

21. Matters of ground rent are not ordinarily within the Tribunal's jurisdiction, but since the Court has asked it to deal with the claim it set out to determine that aspect. Clause 1 of the lease provides that at the present time a ground rent of £50 per annum is payable in advance on 1st January in each year. However, the Applicant has not followed the terms of the lease in this respect, as Mrs Kuszer accepted was the case both in this and other aspects. It has charged ground rent in advance from 29th September for reasons that are not explained. The Tribunal understood that this is its normal procedure.

22. The result appears to be that to the extent that the demand relates to the period from 1st January 2009 to 28th September 2009 it was made before the ground rent was lawfully due. In any event, the demand conforms neither with the requirements of section 166 of the Commonhold & Leasehold Reform Act 2002 as to demands for rent from long leaseholders nor with the provisions of the Landlord & Tenant (Notice of Rent) (England) Regulations 2004. Thus it was not at the time when the proceedings were commenced, and still is not, lawfully payable by reason of the provisions of section 166(1).

23. There are two points that it is appropriate that the Tribunal should add. The first is that it was not addressed upon the question of the fairness or otherwise of the apportionments of the proportions of the service charges. Mrs Kuszer explained that the insurance was charged in one sixth parts because it covered both 4 and 5 Wick Parade, consisting of a total of two shops and four flats, whilst the other service charge items were charged in one third parts as they all related to 4 Wick Parade, consisting of one shop and two flats. The Tribunal records, in the circumstances largely for the information of the Applicant, that it had some doubts whether such an arrangement could be said to be entirely fair since it might be argued that a shop should bear a greater proportion of such charges, or at least some of them, than should a flat, but the matter was not placed in issue, or argued, before it and it makes no finding on the subject.

24. Secondly the Tribunal was aware that the Respondents have in the past indicated that they have withheld service charge payments because of an alleged defect whereby water has penetrated into the front room of the flat from a point where the staircase to the upper flat is fixed to the roof. The Tribunal was not afforded access to the flat to see the alleged damage, and photocopies of photographs that had been sent to the County Court and passed on by it were so poor that it was unable to derive any benefit from them. The Respondents did not appear to pursue the point. In the circumstances the Tribunal was unable to make any findings about it.

Summary of Determination

25. The Tribunal has accordingly determined that, subject to prior delivery of proper demands, the sum recoverable by the Applicant is £513-83, made up as follows:

Share of Insurance premium	£142-08
Service charge in advance	Nil
Share of "car park maintenance"	£371-75
Ground rent	Nil
	£513-83

However, the failure to have delivered demands in proper form has the effect that the present claim before the Court necessarily fails because the relevant statutory requirements were not fulfilled (as to which see paragraphs 11-12 and 22 respectively).

Robert Long,
Chairman

1st June 2009