RESIDENTIAL PROPERTY TRIBUNAL SERVICE

SOUTHERN RENT ASSESSMENT PANEL

LEASEHOLD VALUATION TRIBUNAL

Residential Property TRIBUNAL SERVICE

Application for variation under Part IV of the Landlord and Tenant Act 1987 (as amended) ("the 1987 Act")
and
Application for dispensation with consultation under Section 20ZA of the Landlord and Tenant Act 1985 ("the Act")
and
Application for a determination as to liability to pay a variable administration charge under Schedule 11 to the Commonhold and Leasehold Reform Act 2002 ("CLARA")

DECISION AND REASONS

Case Numbers:	CHI/00HH/LIS/2010/0049 CHI/00HH/LIS/2010/0050
Property:	Flat 3 The Lawn Lower Woodfield Road Torquay Devon TQ1 2JY Flat 4 The Lawn Lower Woodfield Road Torquay Devon TQ1 2JY
Applicant :	Irene Charles and Martin Liddiard - Applications under Part IV of the 1987 Act and Schedule 11 of CLARA Laurence Anthony Prince and Irene Prince - Application under Section 20ZA of the Act
Respondent :	Laurence Anthony Prince and Irene Prince - Applications under Part IV of the 1987 Act and Schedule 11 of CLARA Irene Charles and Martin Liddiard - Application under Section 20ZA of the Act
Dates of Applications:	31st March 2010 (Amended County Court Orders) 5th August 2010 (Section 20ZA) 6th August 2010 (Part IV of the 1987 Act and Schedule 11 of CLARA)
Date of Hearing:	6th October 2010
Appearances:	James Thompson (on behalf of Irene Charles and Martin Liddiard) Laurence Anthony Prince and Irene Prince
In Attendance:	Irene Charles and Martin Liddiard
Tribunal Members:	Miss Cindy A. Rai Solicitor Chairman Mr Timothy N. Shobrook FRICS (Chartered Surveyor) Valuer Member
Date of Decision:	22nd October 2010

SUMMARY OF DECISION

1. The Tribunal determined that the application for variation of the lease to alter the percentage service charge contributions due in respect of Flats 3 and 4 did not come within the criteria set out in the 1987 Act for the reasons set out hereafter and therefore is not granted.
2. The application under section 20ZA of the Act was withdrawn by Laurence Anthony Prince and Irene Prince.
3. The Tribunal determined that the application made by Irene Charles and Martin Liddiard under Schedule 12 of CLARA succeeded so they were not liable to pay the specific variable administration charges listed below for the reasons set out hereafter:-
    a. £25 invoiced on 15.05.2010
    b. £25 invoiced on 06.06.2010
4. The Tribunal determined that the application under section 20C of the Act made by Irene Charles and Martin Liddiard in relation to the costs of their two applications not being added to the service charges is granted.
5. The Tribunal determined that the application made under Schedule 12 of CLARA by Irene Charles and Martin Liddiard for costs against Laurence Anthony Prince and Irene Prince (as Respondents) shall not be allowed.
6. The Tribunal determined that the application made under Schedule 12 of CLARA by Laurence Anthony Prince and Irene Prince shall not be allowed.
7. The Tribunal determined that neither Irene Charles and Martin Liddiard nor Laurence Anthony Prince and Irene Prince succeed in their respective applications for the return of the application fees paid to the Tribunal.
8. Full reasons for all of the decisions reached by the Tribunal are set out below.

BACKGROUND DIRECTIONS AND PREMLIMINARY HEARINGS

9. By orders made on the 16th March 2010 (which were amended on the 31st March 2010) two cases between Laurence Anthony Prince and Irene Prince (as Applicants) and Irene Charles and Martin Liddiard respectively (as Respondents) were referred to the Tribunal by District Judge Moon, from the County Court for determination "regarding the question of apportionments". These cases related to disputes about service charges allegedly due in respect of their respective properties, Flats 3 and 4 the Lawn which is the Property the subject of this decision. Irene Charles is the leaseholder of Flat 3 and Martin Liddiard is the Leaseholder of Flat 4. Laurence Anthony Prince and Irene Prince are jointly the freeholders of the Lawn, of which both Flat 3 and 4 comprise a part, and they occupy Flat 2.

10. Robert Wilson a procedural chairman of the Tribunal issued provisional directions on the 23rd June 2010. A pre trial review was held in Torquay and attended by both parties on the 23rd July 2010 at which Irene Charles and Martin Liddiard were both represented by James Thompson. Directions were subsequently issued which explained (inter alia) that in the absence of further applications to the Tribunal it would be limited to determining only the question referred to it by the County Court as set out in paragraph 9 above.

11. Subsequently Irene Charles and Martin Liddiard jointly submitted the two applications listed below:-
    a. An application under Part IV of the 1987 Act for variation and

b. An application under Schedule 11 of the Commonhold and Leasehold Reform Act 2002 ("CLARA") for a determination as to the liability (of the tenant) to pay a variable administration charge.

12. Laurence Anthony Prince and Irene Prince submitted an application to the Tribunal under section 20ZA of the Act being an application to dispense with section 20 consultation requirements.

13. Following receipt of the three applications referred to in paragraphs 11 and 12 above, further directions were issued by the Tribunal on the 15th September 201, in which it directed that the three applications would be consolidated and dealt with together with the two cases referred to it by the County Court (see paragraph 9 above). It also directed that the applications could not be determined without an oral hearing.

INSPECTION

14. Prior to the Hearing the Tribunal members accompanied by their clerk and Irene Charles, Martin Liddiard and their representative James Thompson and Lawrence Anthony Prince and Irene Prince inspected the external parts of the building known as the Lawn and such other parts of the Lawn referred to later in this decision.

15. The Lawn is a large detached dwelling dating from the Victorian era, which was apparently converted into self contained flats about twenty five years ago. It originally comprised a four storey house with a single storey wing fronting Wingfield Road.

16. Two parking spaces are situate adjacent to the road and a garage is located at the end of the single storey part of the building.

17. On the day of the inspection workmen were laying hot bitumen or similar material over the surface of the parking spaces which made it difficult to access the studio area more particularly described in paragraph 18 below but which was nonetheless inspected by the Tribunal members.

18. The ground on which the building is situate slopes downwards away from the road. The Tribunal members were shown the garage abutting the road, an area behind the garage at lower rear garden level, the external wall on one side of the main building and from which stucco mouldings were disintegrating and falling below. On the other side of the main building and beneath the parking spaces an area described by Laurence Anthony Prince and Irene Prince as a studio area constructed between the piers beneath and supporting the two parking spaces.

HEARING

19. At the hearing the Chairman proposed that the Tribunal would deal with the three applications before it and the cases referred to it by the County Court in the following order (which the parties did not object to):-

a. The Application made by Irene Charles and Martin Liddiard for variation under Part IV of the 1987 Act and the cases referred from the County Court, since this application had been made to enable the Tribunal to determine the question "of apportionments" referred to in from the County Court.

b. The Application made by Laurence Anthony Prince and Irene Prince under section 20ZA of the Act.

c. The Application made by Irene Charles and Martin Liddiard for determination of their liability to pay a variable administration charge under Schedule 11 of CLARA.

d. The various applications made by both parties in relation to costs pursuant to their individual applications and briefly made:-

   i. Pursuant to section 20C of the Act by Irene Charles and Martin Liddiard in respect of the applications referred to in sub paragraphs 11(a) and 11(c)

   ii. In their letter dated 6th August 2010 which accompanied their section 20ZA application and in which Laurence Anthony Prince and Irene Prince applied for "full costs of this application" and vexatious costs against James Thompson (described by them as chief advisor and representative to Mrs Charles and Mr Liddiard)

Application under Part IV of the 1987 Act

The Applicants' Case

20. James Thomson stated that the current service charge contributions due under the leases of the Property (more particularly referred to in paragraph 22 below) for the maintenance of the common parts of the building known as the "the Lawn" and of which the two flats formed a part, was no longer equitable.

21. In making the application he relied upon section 35(2)(f) of the 1987 Act and contends that the leases of the Property (referred to in paragraph 22 below) no longer make adequate provision for the computation of a service charge.

22. The applicants are lessees pursuant to the leases referred to below which were granted when the Lawn was converted into four self contained flats. The lease of Flat 3 is dated 20th June 1986 and made between Robert John Pascoe and Vera Pascoe and James Alexandra Charles and Irene Charles. ("the Flat 3 Lease") The lease of Flat 4 is dated 16th April 1987 and made between Robert John Pascoe and Vera Pascoe and Martin Stephen Liddiard and Tracey Ann Liddiard ("the Flat 4 Lease").

23. The applicants are now the sole lessees of Flats 3 and 4 respectively. At the time the Flat 3 Lease and the Flat 4 Lease were granted the Lawn comprised four flats. Leases were granted of three of the flats which leases obliged the tenants to make the following percentage contributions towards the communal costs of servicing the building and the common parts being the annual service charge:-

   a. Flat 3 27.03%

   b. Flat 4 19.93%

   c. Flat 1 18.58%

   The percentages referred to above for Flats 3 and 4 are referred to in the Flat 3 Lease and the Flat 4 Lease, copies of which have been produced to the Tribunal. Neither of the parties produced a copy of the lease of Flat 1 but it was agreed

that that lease obliged the lessee to make the percentage contribution referred to above. It was also agreed that, hitherto the freeholders have accepted that they are liable to contribute 34.46% of the service charge in each service charge year (being the balance of the 100%) in respect of Flat 2 in respect of which no lease has been granted.

24. James Thompson stated that Flat 2 has recently been divided and converted into two self contained flats. Laurence Anthony Prince and Irene Prince have extended the living space into what was originally the garage, and built on additional area at ground floor level beyond the former garage which although it appears to be a garage is in fact a bedroom. Furthermore they have created a "garden flat" under the two existing parking spaces. It is his contention that this additional construction means that the percentage division of the service charges as allocated in the original leases is unfair.

25. He believes that the calculation of the percentage contribution in the leases of Flats 1, 3 and 4 was based on the ratable values of the flats at that time. He contended that because Flat 2, (the freeholders' property) contained the most elegant of the principal rooms in the original building should influence the amount which the lessees of the flats were obliged to contribute towards service charges. Furthermore he argued that Flat 4 had limited headroom having formed from what would have been the original attic rooms. In addition the current freeholder had refused to accept that some of the exterior walls surrounding the balcony were common parts because the plan to the Lease of Flat 4 appeared to include that area within the lease. He argued that as the plan was stated in the lease for that flat to be "for identification only" it was inappropriate for the freeholder to reach such a conclusion.

26. It is his case that it would be inequitable for the current percentage contribution until now paid by the freeholder to be split between the owner of the smaller flat 2 and the new flat 5. Instead the freeholder should continue to pay the same contribution for the smaller flat 2 and the lessee of flat 5 should pay an additional amount which he suggests should be circa 15%. Since this would result in recovery of more than 100% of the costs the leases of the existing flats should be varied since such an arrangement would mean that the existing leases would fail to make satisfactory provision with regard to the computation of the service charges.

27. He alluded to the fact that the owner of Flat 1 is not party to the application, and so by implication he has concluded that she does not want a reduction in her contribution and suggested reasons which have not been recorded here as these are not relevant to the decision. It is his conclusion however that a reduction should be made only in relation to the service charge contributions of Flats 3 and 4.

28. In his arguments James Thompson attached much weight to the conversion of the former garage as extended living accommodation as well as to the potential for further development of rooms beneath the new garage. He also referred to the creation of the garden flat (studio) situate beneath the two car parking spaces.

29.. In addition he suggested that the insurance provisions might also be unsatisfactory although this suggestion was not pursued.

30. In summary the application has been made because the applicants contend the leases of the Property no longer make satisfactory provision with regard to the computation of the service charge contributions because of the extension of the building by the respondent by adding the new garage and living accommodation below it and the creation of the garden flat (studio) beneath the piers supporting the car parking spaces.

The Respondent's Case.

31. The respondents' case was submitted by both Laurence Anthony Prince and Irene Prince. They rebut the suggestion that the alterations which they have made to the Lawn are either significant or substantial and should affect the computation of the service charges payable by the applicants. They do not accept the contributions were ever based or influenced by ratable value.

32. They confirmed that a new lease of Flat 5 has been created but since this flat has been created out of a subdivision of Flat 2, the service charges that have until now been paid by the freeholder will henceforth be split between the freeholder and the lessee of the new Flat 5.

33. They do not accept that a garden flat has been created. The area constructed beneath the car parking spaces is not habitable. It is hoped to make it usable as a studio. It is for this reason that they have been attempting to seal the surface of the car parking spaces which effectively forms the roof of the studio. The costs of construction have not been taken from the service charge account. None of the parties either volunteered or questioned who was paying for the resurfacing of the car parking spaces.

34. The Tribunal could not inspect the interior of the newly constructed garage but inspected the space created beneath it and from that inspection concluded that this space is not suitable for use as living accommodation in its present condition.

35. In relation to the insurance issue raised by the James Thompson they specifically referred to section 4(3) of the leases which would enable either lessee to request an increase in the level of cover. Neither Irene Charles nor Martin Liddiard has apparently done this.

36. It is accepted that the creation of the new garage has extended the footprint of the building but following advice from their lawyer, they contend that it does not materially affect the service charge contributions so they decided it was unnecessary and would be too expensive to vary the existing leases.

The Law and its findings

37. Part IV of the Act provides that an application may be made to a leasehold valuation tribunal by a party to a lease for an order varying it in reliance on any of the matters specified in sub-paragraphs (a) to (e) of section 35(2).

38. The wording of section 35(2) is not quite as James Thompson suggested in his submissions. Section 35(2) states that the grounds on which an application may be made are "that the lease fails to make satisfactory provision" on one or more of the stated grounds referred to in paragraph 37 above. Paragraph 32(2)(f) refers to "the computation of a service charge payable under the lease" and it is the alleged unsatisfactory provision within the leases which the applicants rely on in support of their application for variation of their respective leases. Therefore to

succeed Irene Charles and Martin Liddiard would need to convince the Tribunal that this is the case but the arguments put forward on their behalf by James Thompson evidence the contrary. He has said that until recently the leases had made satisfactory provision. It is only on account of building works, (the creation of the garden flat) and the apparent extension and subdivision of the freehold Flat 2 that it is now perceived that the provision in the leases is inequitable.

39. The Tribunal is unable to find any discernable logic in the argument put forward by James Thompson that an allocation of an additional percentage contribution in the lease of the new flat 5 would cause the provisions in the existing leases to become unsatisfactory.

40. Furthermore on the strict wording of section 35 the provision in the lease would have always had to be unsatisfactory or there would have had to be a material alteration to the footprint of the building in relation to which service charge contributions are calculated. From their inspection there is no evidence of a substantial alteration. It is a fact that a new garage has been built. However no habitable living accommodation was observed either from the road entrance or behind the garage. It is a fact that works have been carried out to create a studio or garden flat beneath the parking spaces. The area is not habitable and as yet does not seem suitable for beneficial use. It was not apparent that exterior decoration of either of these areas has been undertaken recently although there is reference to it in some of the written submissions of the parties and that Laurence Anthony Prince and Irene Prince excluded the costs of the exterior decoration of these areas from the service charges.

Decision

41. The Tribunal rejects the application for variation of the leases of flats 3 and 4 for all of the reasons set out above. As a consequence and with regard to the question referred to it from the County Court it determines that the apportionment of the service charge contributions in the current leases is satisfactory.

Application under section 20ZA of the Act.

42. Prior to the applicants stating their case the Tribunal explained the nature of such an application. The respondents interjected to state that they accepted that the full consultation procedures had been undertaken by Laurence Anthony Prince and Irene Prince and that therefore they did not understand (as they had indicated already in their written submissions) the reason for the application.

43. Irene Prince suggested that they had been misled by the Tribunal at the pre-trial review hearing and by the Tribunal office sending various forms to them following that hearing. The Tribunal had confirmed that it would not offer legal advice to any of the parties at the pre trial review but had agreed to arrange for certain application forms to be dispatched by the Tribunal office to both the parties.

44. James Thompson reiterated that neither Irene Charles nor Martin Liddiard had at any time previously suggested, nor did they now, that full consultation had not been undertaken by the applicants. Their issue with and refusal to contribute towards the service charge costs was based on other matters, not least the absence of responses from the applicants to certain questions relating to the proposed urgent works. Following further statements dealing with related issues,

but issues that were not material to the application, Laurence Anthony Prince and Irene Prince withdrew their application accepting that it was inappropriate on account of the fact that their dispute with Irene Charles and Martin Liddiard in relation to the payments due in respect of the proposed repair works was not in relation to lack of consultation.

Application under Schedule 11 of CLARA

The Applicants case

45. James Thompson in presenting this case stated that in fact the application now related to two specific charges to which he would refer to:-

    a. 14th May 2010 – see page CL 7.2 of the applicants bundle - £25

    b. 6th June 2010 – see page CL 10.1 of the applicants bundle - £25

46. Laurence Anthony Prince and Irene Prince stated that in fact the Tribunal should imply from their letter dated 12th July 2010 a copy of which is numbered CL15 in the said bundle that the charge imposed by their letter dated 12th July 2010 a copy of which is numbered CL14 is withdrawn.

47. James Thompson states that it is his argument that the administration charges imposed by the respondents are invalid and not recoverable under the provisions of the Flats 3 and 4 Leases. He referred the Tribunal to Schedule 11 of CLARA and stated that the charges purported to be made were not within the meaning of an administration charge as set out in CLARA.

48. Even if these charges had been valid the demands for payment were not accompanied by an appropriate statement (as prescribed by CLARA) and therefore the applicants were entitled to withhold payment on both grounds.

49. He went on state that the Flat 3 Lease and the Flat 4 Lease set out the dates during the service charge year at which service charge payments or payments on account of service charges not yet incurred could be recovered. He said that in a previous County Court case the judge had made a decision about recurring payments. He said the respondents could only claim costs charges and payments if the said leases enabled them to do so. Whilst in exceptional circumstances, and he cited the current emergency with regard to the falling masonry, the applicants might be prepared to make immediate payments thus waiving the landlord having to comply with the strict provisions of the leases, this should not be interpreted as a waiver which would enable the landlord to demand future payments whenever it wished. It is for the landlord to perform his obligations to repair the building under the lease and for him to recover its costs in accordance with the procedures contained in and provided for in the leases. Whilst it may not be easy for the landlord to finance repairs that is its obligation under the leases. He explained all this in justification of the refusal of Irene Charles and Martin Liddiard to respond to the demands for payment made by Laurence Anthony Prince. It appears that the applicants' refusal to pay had prompted the imposition of the administration charges which appear to relate solely to the non-payment of service charges (when demanded).

Respondents' case

50. Laurence Anthony Prince and Irene Prince stated that any determination made by a judge in a previous case was irrelevant. They also disagreed with James Thompson's interpretation of the decision.

51. They said that last year had been stressful and the tenant of Flat 1 had always responded to their payment demands. The leases entitle them to recover management charges in circumstances where no managing agent is employed. They referred the Tribunal to the terms and conditions of TMS South West (a firm of managing agents), a copy of which they had supplied to the Tribunal and which referred to that company making specific charges for issuing letters chasing debts. They therefore considered that since they are managing the Lawn themselves they are entitled to make the same charges as would be made by a managing agent, because the lease entitles them to charge for the management of the Lawn, if no managing agent is employed.

The Law and its findings

52. Clause 3(i) of the lease obliges the lessee to pay a service charge equal to (and the relevant percentage share dependent upon which lease is referred to is stated) of the expenses set out in sub-paragraphs (a) to (j). Sub-paragraph (d) refers to "the costs and expenses incurred by the Lessor in employing Managing Agents to manage the building PROVIDED THAT if the Lessor shall decide to manage the building himself he shall be entitled to charge the same remuneration as a professional firm for the same services and a firm of Chartered Accountants to prepare a management account. The Tribunal does not accept that it is appropriate for the respondents to seek rely upon the terms of business of a managing agent as entitling them to recover an administration charge for issuing a letter demanding the payment of an unpaid service charge. The fact that a managing agent includes such charges in its standard terms does not mean that it would be permitted to recover these charges if the lease does not provide for such recovery. In this case the applicant has also argued that the service charges have not been demanded in accordance with the provisions of the lease. This argument has also been taken into account by the Tribunal.

53. The Tribunal considered the wording of Schedule 11 of CLARA . Paragraph 1 (1) refers to the definition of an administration charge which includes (inter alia) an amount payable by a tenant in addition to rent which is payable directly or indirectly (d) in connection with a breach (or alleged breach) of a covenant or condition in his lease. Since the "charge" levied by the respondents is neither specified in the lease nor calculated in accordance with a formula specified in the lease (see paragraphs 1(3) (a) and (b) of Schedule 11) it falls within the definition of a variable administration charge.

54. Paragraph 5 of the said Schedule 11 provides the Tribunal with jurisdiction to determine if an administration charge is payable. For any administration charge to be payable it must be provided for in the lease. The Tribunal invited the respondents to indicate which provision in the lease entitled it to recover the administration charges it had imposed. The only provision to which the respondents referred was paragraph 3(17) of the leases which is a tenant covenant "to pay to the Lessor all expenses (including Solicitors' costs and Surveyors' fees) incurred by the Lessor incidental to the preparation and service

of a Notice under section 146 of the Law of Property Act 1925 notwithstanding that forfeiture is avoided otherwise than by relief granted by the Court". This provision relates only to the recovery of expenses incurred by the Landlord in relation to an application for forfeiture of the lease and not to any other costs or expenses.

Decision

55. In the absence of any provision in the leases of the Property entitling the landlord to recover administration charges the Tribunal determines that Irene Charles and Martin Liddiard are not liable to pay the charges set out in paragraph 45 above.

The parties costs applications

Decision (Section 20C)

56. Irene Charles and Martin Liddiard have applied for orders under section 20C of the Act that the landlord's costs should not be recoverable as service charges in relation to both of their applications (for variation and liability to pay administration charges). Neither party has referred the Tribunal to any provision in either of the leases of the Property that would enable the landlord to recover these costs. The Tribunal has not identified such a provision in the Flat 3 Lease or the Flat 4 Lease.

57. Given that the County Court transferred two cases to the Tribunal both of which were applications made by the Landlord, the Tribunal makes such an order in respect of the application for variation since it accepts that that application was made by Irene Charles and Martin Liddiard to enable the Tribunal to determine the questions referred to it by the County Court. It also makes a similar order in relation to the application for liability to pay the administration charges since it has determined that these charges are not recoverable under the leases of the Property.

Decision (Paragraph 10 of Schedule 12 of CLARA)

58. With regard to the application made by Lawrence Anthony Prince and Irene Prince for costs against James Thompson under the provisions of paragraph 10 of Schedule 12 of CLARA this application is not within the jurisdiction of the Tribunal since James Thompson is not party to these applications but has appeared and participated solely as a representative of Irene Charles and Martin Liddiard. Therefore the Tribunal cannot determine such an application.

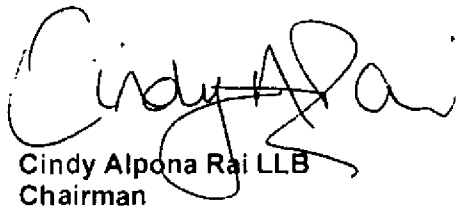
59. With regard to a similar application to that referred to in paragraph 58 made by Irene Charles and Martin Liddiard for costs against Lawrence Anthony Prince and Irene Prince in respect of their section 20ZA application the Tribunal does not consider that anything has been submitted to it which indicates that the proceedings were either "frivolous or vexatious" or "otherwise an abuse of process" within paragraph 7 of Schedule 12 of CLARA and therefore it makes no determination under paragraph 10 of the said Schedule. It accepts that the section 20ZA application was made mistakenly by Laurence Anthony Prince and Irene Prince, although given the several references in their written submissions to their having taken legal advice it is perhaps surprising that they did not seek advice in relation to all of the applications before the Tribunal.

Decision (Applications for return of application fees)

60. Laurence Anthony Prince and Irene Prince suggest that the issue of "apportionments" could have been dealt with easily if appropriate plans had been produced. However no such plans were supplied to the Tribunal by either party. Notwithstanding that they themselves could have supplied plans showing their alterations and they declined to do so they still considered that their application fees should be reimbursed by the Irene Charles and Martin Liddiard.

61. James Thompson considers that if his clients are successful with regard to their application under Schedule 11 of CLARA their application fee should be reimbursed by Laurence Anthony Prince and Irene Prince.

62. The Tribunal has jurisdiction to order the return (by the other party of fees in respect of those applications listed in paragraph 9 of Schedule 12 of CLARA which includes fees in respect of each of the three applications it has determined. However having considered all of the evidence disclosed both at the hearing and in the papers which accompanied all their applications, it determines it is inappropriate to make an order that any of the parties' application fees be reimbursed.



Cindy Alpona Rai LLB
Chairman