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

Case No: CHI/00ML/LVA/2009/0001

Between:

Mr C Creswell ("The Applicant/Tenant")

and

18 Wilbury Road (Hove) Limited ("The Respondent/Landlord")

AND

Case No: CHI/00ML/LSC/2010/0017

Between:

18 Wilbury Road (Hove) Limited ("The Applicant/Landlord")

and

Christopher N Creswell ("The Respondent/Tenant")

Premises: Flat 1 18 Wilbury Road Hove BN3 3JN

Date of Hearing: 14 April 2010

Tribunal: Mr D Agnew BA LLB LLM Chairman
Mr A O Mackay FRICS
Miss J Dalal

Note: In this document the landlord will be referred to as "the company" and the tenant as "Mr Cresswell".

The Applications:

1. The Applications

1.1 By an application dated 21 September 2009 Mr Creswell applied to the Tribunal for a determination as to the reasonableness of certain administration charges that were being sought against him in the sum of £350 plus VAT for legal costs of the Landlord's solicitors in pursuing him for unpaid service charges. He also applied for an order under Section 20C of the Landlord and tenant Act 1985 that the company be

precluded in adding the costs of the tribunal proceedings onto future service charge accounts.

1.2 On 18 September 2009 the company issued proceedings in the Brighton County Court claiming from Mr Creswell the following:-

"12 August 2008: Year End adjustment to 25.12.2007 - £53.10
25 December 2008: External redecorations and repairs for the period due - £326.46
25 December 2008: On account of service charge 25 December 2008 – 23 June 2009 - £363.65
24 June 2009: Amount on account of service charge 24 June 2009 – 24 December 2009 - £353.65
Total: £1096.86"

1.3 In addition, the company claimed £23.00 being the amount outstanding in respect of the company's legal costs in respect of previous outstanding service charges which were owed by Mr Cresswell but which were subsequently paid by him.

1.4 The company also claimed interest on the unpaid sums pursuant to the lease at the rate of 12% per annum totalling £82.41 to 11 September 2009 continuing at 39 pence per day until judgment or earlier payment.

1.5 Finally, the company claimed costs to date totalling £350.00 plus VAT on an indemnity basis which they said they were able to do under the provisions of the lease.

1.6 The total amount claimed by the company in the County Court proceedings was £1192.27 plus continuing interest at the daily rate of 39 pence.

1.7 Mr Creswell entered a defence to the County Court proceedings on 29 September 2009. He purported to dispute the whole of the claim but did state on the court form that he had tried to pay £864.86 of the amount claimed by cheque to the company prior to the issue of proceedings and he also told the Tribunal that he had tried to pay that amount into court but the court told him that courts no longer accepted payments into court.

1.8 District Judge Pollard in Brighton County Court transferred the case to the Leasehold Valuation Tribunal on 30 December 2009

2. <u>The Law</u>

2.1 By Section 27A of the Landlord and Tenant Act 1985 ("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

2.2 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.

2.2 By Section 19(1) of the 1985 Act it is provided that "Relevant costs shall be taken into account in determining the amount of a service charge payable for a period –
(a) only to the extent that they are reasonably incurred, and
where they are incurred on the provision of services or the carrying out of works, only if the services or works are of a reasonable standard; and the amount payable shall be limited accordingly.

2.3 Schedule 11 to the Commonhold and Leasehold Reform Act 2002 (CLARA) Paragraph 2, "a variable administration charge is payable only to the extent that the amount of the charge is reasonable".

2.4 By Paragraph 5 of Schedule 11 to CLARA it is provided that :-
"(1) an application may be made to a Leasehold Valuation Tribunal for a determination whether an administration 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.

3. <u>The Lease</u>

3.1 "The lessee covenants with the lessor as follows:-
3 (d) (i) to pay all expenses including solicitors costs and surveyors fees incurred by the lessor for the purpose of or incidental to or in contemplation of the preparation and service of a notice under Section 146 of the Law of Property Act 1925 incurred or in contemplation of proceedings under Section 146 or 147 of that act notwithstanding forfeiture is avoided otherwise than by relief granted by the court."

3.2 By clause 4 (b) (i) of the lease it is provided that the lessee will "pay and contribute in manner hereinafter provided the lessees proportion

as defined in Recital (5) hereof of all monies expended by the lessor in complying with its covenants in relation to the Block as set forth in clause 6 (b) and (d) hereof".

3.3 Clause 4 (b) (ii) requires the lessee to pay to the lessor or its agent for the time being on the payment days in advance in every year ... such "sum as the lessor or its agents shall in their absolute discretion deem appropriate ... on account of the lessee's liability for the next half year ..."

3.4 By clause 4 (b) (iii) of the lease the lessee is required to pay to the lessor or its agent "within 21 days after the same shall have been demanded such amount as the lessor or its agents shall certify in writing to be due from the lessee under sub clause (i) hereof in respect of the said covenants of the lessor credit being given for the amounts paid under sub clause (ii) hereof."

3.5 Clause 4 (b) (iv) of the lease provides that interest on unpaid sums due shall be at the rate of 4% above base rate of Barclays Bank plc or the rate of 12% per annum whichever shall be the higher until payment.

3.6 By Clause 4 (h) of the lease the lessee covenants to "keep the floors (except the kitchen and bathroom) close carpeted and underfelted and take every precaution for ensuring quietness in the block including the placing of rubber insulators under any pianoforte gramophone wireless or television set or any sewing machine washing machine spin dryer refrigerator or other machine kept in the flat or take other effective means to deaden sound."

4. The Inspection

The Tribunal inspected the premises immediately preceding the hearing on 14 April 2010 in the presence of Mr Creswell and Miss A Fitzpatrick of the company, who is also the lessee of Flat 3. The premises are a semi-detached Victorian villa which has been converted into six flats. There is a basement flat, one flat on the ground floor and two flats on each of the first and second floors. The whole of the block appeared to be kept in good condition. The communal hallways and staircases were clean and well decorated. The Tribunal saw where Mr Creswell's washing machine had originally been housed in a cupboard under the stairs resting on some carpeting. They also saw that the washing machine is now situated in the conservatory which is not directly above the basement flat. The Tribunal also saw that Flat 1 had been carpeted.

5. The Hearing

5.1 Those attending the Hearing on behalf of the company were Dr and Mrs Sutton of Flat 2, Miss A Fitzgerald of Flat 3, Ms A Smy and Mr B

Jeffery of the basement flat. Dr Sutton was the spokesperson on behalf of the company. Mr Creswell appeared in person.

5.2 Dr Sutton began by outlining the background to the case and how they had to have recourse to solicitors to recover from Mr Creswell service charges for a previous year. Eventually Mr Creswell had paid his service charges after solicitors fees had been incurred. He settled the outstanding service charges and solicitors fees all but for £23.00 which sum was being claimed as part of the current County Court proceedings.

5.3 He also explained how Ms Smy and Mr Jeffery had appealed to the landlord company for assistance in resolving a noise problem that they had emanating from Flat 1. When Mr Creswell was living there with his family they could hear his children in the flat above them. They could also hear people walking about on the floor of the flat above and they were also disturbed by the loud sound that the washing machine in Flat 1 made when water was being discharged through the pipes.

5.4 Dr Sutton described how there was an amicable meeting with all concerned on 22 May 2009. Mr Creswell appeared to be anxious to resolve the problems. He accepted that the washing machine noise was unacceptable. Mr Creswell said that he was unaware of the covenant in his lease that required the floor to be close carpeted. The meeting concluded in an agreement that Mr Creswell would take up the laminate flooring that he had laid and replace it with hardboard underfelt and carpet and that he would move the washing machine to a position where it would not disturb the flat below, ie the conservatory. It was agreed that if Mr Creswell did that and paid for the flooring to be relaid that the landlord company would pay for the cost of moving the washing machine. Dr Sutton said that it was agreed that all this would be done by 17 July 2009.

5.5 Dr Sutton said that on 7 August 2009 the company became aware by means of a letter from the managing agents, Austin Rees, that Mr Creswell owed £1109.86 in service charges for 2009. Thinking that this was a repeat of the situation the previous year where there were arrears of service charge the company referred the matter to their solicitors, Dean Wilson Lang, to pursue. Their first letter to Mr Creswell on the matter of the flooring was on 29 July 2009. This acknowledged that Mr Creswell had placed carpet on top of the hardwood floors that he had put down but that this had not remedied the problem because he had not taken "other effective means to deaden the sound". The letter asserted that the placement of wooden flooring on the floor even if covered by carpet, was in breach of the lease and that unless he remedied the situation within seven days proceedings would be issued in the Leasehold Valuation Tribunal as a pre-requisite to forfeiture of his lease. Alternatively, the company could take proceedings to obtain an injunction. Mr Creswell did not respond directly to that letter but did try to communicate with the members of the company. By a letter

dated 13 August 2009 Dean Wilson Lang asked Mr Creswell to desist from having any further contact with the company's directors or the leaseholders and to communicate only with them. This letter again threatened injunction proceedings and also mentioned for the first time the outstanding service charges which they gave seven days to pay failing which proceedings would be issued.

5.6 Mr Creswell responded by writing to Dean Wilson Lang on 18 August 2009 protesting at the threat of forfeiture of his lease if he did not comply with a strict seven day time limit. He said that seven days for completing the works demanded was unachievable. He pointed out that the flat had been unoccupied for over a month and would not be occupied again until the flooring had been replaced. He said that he had tried to deal fairly and openly with his neighbours' complaints. There was no need to incur legal costs or to threaten injunctions and forfeiture. He pointed out that he had doubts as to the cause of the noise problem but he confirmed that he would nevertheless remove the wooden flooring and have felt and carpets laid, that the work would be commenced at the latest in the week commencing 31 August, that the works would not exceed three weeks from the start date and that the flat would remain unoccupied until the work was completed.

5.7 Dean Wilson Lang responded on 21 August 2009. They said that if the wooden flooring had not been lifted and underfelt and carpets laid by Monday 7 September they would issue injunctive proceedings without further notice. They also said that they had instructions to issue proceedings for collection of the unpaid service charges on 7 September 2009 if not paid by then.

5.8 Before that deadline, on 4 September 2009, Mr Creswell sent a cheque to the managing agents for £864.86 being the total amount claimed in respect of service charges in the sum of £1109.86 less £245.00 being the cost of relocating the washing machine as previously agreed.

5.9 This cheque was forwarded to the company's solicitors who returned it to Mr Creswell saying that it would not be accepted as it was not for the full amount being claimed.

5.10 The cheque was returned to Mr Creswell by Dean Wilson Lang under cover of a letter dated 15 September 2009. This would have been received by Mr Creswell at the earliest on 16 September. The Particulars of Claim are dated 18 September 2009 and they were issued by the court on 22 September 2009.

5.11 Mr Creswell completed the work to the floorboards when the managing agent was due to inspect the work. This inspection was duly carried out and was apparently to the managing agent's satisfaction as no complaint was made by him about the work that had been done.

5.12 Ms Smy and Mr Jeffery confirmed that during the period when the flat was unoccupied they suffered no problem with regard to noise and that once the washing machine had been re-sited there had been no further problems with noise emanating from that machine. They told the Tribunal, however, that there was still impact noise from people walking over the floor in the flat above and that therefore the works that had been carried out by Mr Creswell had not cured that problem. The company wishes to have a report from acoustic engineers as to the cause of the problem and this is in hand.

6. The Company's Case

6.1 Thinking that they were going to have similar difficulties in collecting service charges from Mr Creswell as they had the previous year the company instructed their solicitors to recover the outstanding sums due immediately they had been advised by the managing agents of the arrears in August 2009. The solicitors were already in correspondence with Mr Creswell concerning the noise problem and the issue of the service charge arrears was therefore included in the ongoing correspondence concerning that issue.

6.2 With regard to the agreement that was reached at the meeting on 22 May the company considered that they were no longer bound by their agreement to pay for the washing machine to be moved as Mr Creswell had not complied with the agreement to complete the works in moving the washing machine and relaying the floor by 17 July.

6.3 Mr Creswell's payment of £864.86 had been returned to Mr Creswell on the advice of their solicitors as it was not for the full amount and legal costs had been incurred in the meantime.

6.4 The company considered that as Mr Cresswell had previously paid solicitors fees for recovery of service charges the previous year that he had established a precedent and that he should pay the legal fees incurred this time too.

6.4 It was asserted by Dr Sutton that it was a matter of regret that they had to resort to using solicitors to recover the sums outstanding but they felt that they had no alternative and that matters were not being resolved amicably.

7. The Respondent's Case

7.1 It was the Respondent's opinion as a person involved in the building trade that the noise problem in the basement flat would not be cured by the works that the company required him to carry out to the flooring in his flat but he agreed to do it in order to placate his neighbours. It had cost him over £2000 and the fact that the problem still seems to exist indicates that he was correct all along. The company had not had an acoustic engineer's report when their solicitors were writing to him

claiming, he believes unjustifiably, that he was in breach of the covenant of his lease. The problem he believes is more likely to be an inherent defect in the building.

7.2 His case was that throughout this matter he had tried to work with his neighbours and the company directors to find an acceptable solution to the problem. Although he had initially agreed to complete the works by 17 July 2009 this turned out to be an unrealistic timescale. He said that time was not made of the essence of the agreement on 22 May. He said that throughout he was keeping the company informed as to progress. He forwarded to them estimates for the cost of moving the washing machine. He was not using the washing machine as from 23 May 2009 and used a launderette instead. He then vacated the flat on 17 July and kept it empty until 1 December 2009 when he sub-let it. There could therefore have been no noise nuisance from mid July until well after the County Court proceedings were issued. Furthermore he had paid a cheque to the managing agents for the outstanding service charges less the amount that the company had agreed to pay towards the moving of the washing machine on 5 September 2009 which was within the deadline imposed by the company's solicitors.

7.3 He considers that the correspondence from the solicitors was unduly aggressive and unnecessary as by 16 September 2009 he had completed all the work that he had agreed to do and had paid what the company were expecting him to pay in accordance with the agreement reached at the meeting on 22 May 2009. He also felt that the tone of the letters and the fact that he was told not to have any contact with the other lessees, pending court action was threatening, despite his attempts to resolve matters amicably. He was therefore challenging the administration charges of £350.00 plus VAT as being unreasonable.

8. <u>The Determination</u>

8.1 Mr Creswell did not dispute that the following sums were properly due to be paid by him by way of service charge and he did not challenge them, namely:-

Year end adjustment to 25.12.2007	£ 53.10
External redecorations and repairs for the period December 2007 – December 2008	£326.46
Service Charge on Account December 2008 – 23 June 2009	£353.65
Service charge payment on account 24 June 2009 – 24 December 2009	£353.65
Total:	£1096.86

8.2 He also did not challenge and therefore the Tribunal has no jurisdiction to determine, his liability to pay the sum of £23 by way of costs incurred by the company in recovering service charges due for 2008. That

makes a total of service charges due to be paid by Mr Creswell of £1119.86.

8.3 However Mr Creswell claims that he should be able to set off against that sum the amount which the company agreed to pay by way of reimbursement of the amount he paid for the relocation of his washing machine which was agreed at the meeting on 22 May 2009. The company say that as Mr Creswell did not abide by his initial agreement to carry out that work and also work that they required to be done to the flooring by 17 July 2009 then they are no longer bound by the agreement to reimburse him the cost of the relocation of the washing machine. This cost Mr Creswell £245 and he seeks to deduct that from the £1119.86 he owes by way of service charge. Indeed, he tried to pay the balance of £864.86 by way of a cheque made payable to the managing agents and hand delivered on 5 September 2009 but this was returned on the advice of the company's solicitors as it was not for the full amount due.

8.4 The Tribunal finds that the cheque could have been accepted in part payment of the sum claimed to be due and that this could have been done without prejudicing the company's rights to claim the balance should they have so wished. That would have been the pragmatic thing to do in the circumstances. The company would have recovered the bulk of its money and indeed the amount that it was expecting to receive in accordance with the agreement of 22 May 2009.

8.5 Whilst it is correct to say that Mr Creswell had not completed the works agreed by 17 July 2009 it is also correct to say that as a general rule time is not of the essence of a contract until made specifically so. The Tribunal finds that the company did not make time of the essence of the agreement on 22nd May 2009. In circumstances where:-

1) Mr Creswell was taking steps to fulfil his part of the contract by obtaining quotes for the necessary pipework for the relocation of the washing machine;
2) where the works had been completed approximately six weeks after the initially agreed date;
3) where Mr Cresswell was in communication with the company's directors as to carrying out the work thought to be necessary to resolve the problem with the flooring;
4) where the bulk of the work to the floor had been carried out seemingly to the company's managing agent's satisfaction within the same timescale;
5) the flat was unoccupied from 17 July until after the work had been done so that the nuisance was not being suffered by the basement flat and the company knew this

the Tribunal finds that it was unreasonable for the company to have engaged the services of their solicitor particularly when seemingly no reminder had been sent to Mr Cresswell either by the managing agent or the company warning him that in the event of non-payment the matter would be referred to solicitors. The employment of a solicitor in

circumstances such as these is understandably seen as a hostile act. Whilst Mr Creswell was upset by the content and tone of the solicitor's letter it has to be borne in mind that solicitors can only work within the context of the legal remedies available to them which in this case included forfeiture and injunction proceedings. These are draconian steps and it is not surprising that Mr Creswell took umbrage when he considered that he was in the process of resolving the situation without the necessity of involving expensive lawyers. The Tribunal finds that some of the time limits imposed by the solicitors were unreasonable or unrealistic. The Tribunal also considers that it was unfortunate that the company was insisting on all communications being made through their solicitors rather than with them direct. In a situation such as this where there is a small number of flats it is preferable if the lessees can resolve the problems that arise between themselves without involving lawyers.

8.6 The Tribunal did consider whether or not it has jurisdiction to take into account the set off when determining the amount of service charges payable. It is not aware of any direct authority on the point. However, it is settled law that the Tribunal can take into account a set off where the tenant has a claim for damages against the landlord for a breach of an obligation under the lease and the Tribunal decided that it did have jurisdiction to determine whether or not there should be a set off in this case. The amount in dispute is only £245 and it would not be cost effective for the parties to have to litigate such a small sum in the County Court in addition to having spent a day arguing this matter before the Tribunal.

8.7 The only aspect of the 22nd May agreement that Mr Creswell had not complied with was that the works had not been completed by 17 July 2009 but they were substantially completed six weeks later and were completely achieved before proceedings were issued. Furthermore, there was no noise from the washing machine as from 23rd May 2009 and no noise from the flooring as Flat 1 was unoccupied from 17th July onwards. In those circumstances the tribunal finds that the company should be held to its side of the bargain and reimburse Mr Creswell the £245 he paid to relocate the washing machine. Accordingly the Tribunal determines that £245 should be set off against the service charges of £1109.86 due.

8.8 This still leaves Mr Creswell to pay the sum of £864.86 plus interest. As far as interest is concerned, the Tribunal considers that this should be payable up to 5 September 2009 when a cheque for that amount was hand delivered by Mr Creswell. The Tribunal calculates the interest payable as follows:-

1) On the sum of £53.10 from 12 August 2008 to 5 September 2009 (389 days at £0.02) per day - £7.78

2) On the sum of £326.46 from 25 December 2008 to 5 September 2009 (254 days at £0.11p per day) - £27.94

3) On the sum of £353.65 from 25 December 2008 to 5 September 2009 £29.53
4) On the sum of £353.65 from 24 June 2009 to 5 September 2009 – (73 days at £0.12) £8.76
A total of £74.01

8.9 With regard to the administration charges of £350.00 plus VAT the Tribunal determines as follows.
These administration charges are only payable by the lessee if they are provided for in the lease. The lease does not specifically provide that the landlord can recover its legal costs of pursuing an individual tenant for arrears of service charges or breach of other covenants. The lease does however provide for the expenses including solicitors costs and surveyors fees incurred by the lessor for the purpose of or incidental to or in contemplation of the preparation and service of a notice under Section 146 of the Law of Property Act 1925, incurred or in contemplation of proceedings under Section 146 or 147 of that Act notwithstanding that forfeiture is avoided otherwise than by relief granted by the court. It is necessary therefore for the Tribunal to construe this clause in connection with the administration charges claimed. It is trite law that where there are cases of doubt a lease should be construed "contra proferentem" (i.e. against the person proffering the lease which is usually the landlord.)

8.10 This lease was granted in January 2003 before the coming into effect of Section 168 of CLARA. This provided that "a landlord under a long lease of a dwelling may not serve a notice under Section 146 (1) of the Law of Property Act 1925 (restriction on forfeiture) in respect of a breach by a tenant of a covenant or condition in the lease unless subsection (2) is satisfied. By subsection (2) it is provided that the subsection is satisfied if –
(a) it has been finally determined on an application under subsection (4) that the breach has occurred ...
(c) a court in any proceedings ... has finally determined that the breach has occurred."

8.11 Thus, when this lease was entered into, it was not a requirement that there had to be a determination by a court (or a Leasehold Valuation Tribunal in accordance with subsection (4) of Section 168) that a breach of covenant had occurred. Furthermore, clause 3(d)(i) of the lease is a standard form clause which has been a common clause in leases for many years before CLARA was enacted. The Tribunal therefore construed this clause narrowly and did not consider that the clause referred to writing letters before action prior to a money claim or the money claim itself as being necessarily for the purpose of or incidental to or in contemplation of the preparation and service of a notice under Section 146 of the Law of Property Act 1925 or incurred or in contemplation of proceedings under Section 146 or 147 of that Act.

8.12 Futhermore, had the company accepted Mr Creswell's cheque of 5 September 2009 the amount outstanding would have been lower than the £350 limit below which there can be no forfeiture for failure by a tenant to pay an amount consisting of rent service charges or administration charges. Consequently forfeiture would not have been an option and any action taken after 5 September 2009 could not have been construed as an act in contemplation of forfeiture proceedings.

8.13 Accordingly the Tribunal decided that the lease did not provide for recovery by the landlord of the administration charges incurred in this case but even if it did the administration charges claimed were unreasonable in all the circumstances. The Tribunal considers that it was unreasonable for solicitors to have been instructed at that stage when, seemingly, no communication had been sent by the managing agents or the company warning that if payment was not made the matter would be placed in the hands of solicitors.

9. Conclusion

9.1 The Tribunal therefore determines that Mr Creswell is liable to pay the company the sum of £938.87 being £864.86 by way of service charge plus £74.01 interest thereon. Allowing for receipt of the determination through the post the total sum of £938.87 is payable within 21 days of the date that this determination is dispatched to the parties by the Tribunal office.

9.2 The Tribunal also determined that it would be just and equitable in the circumstances to make an order under Section 20C of the 1985 Act that the costs of these Tribunal proceedings should not be added to any future service charge. Mr Cresswell had largely been successful in his arguments before the Tribunal and the proceedings could have been avoided if the company had taken a less aggressive course.

9.3 The case will now be referred back to the County Court for determination as to what order for costs, if any, should be made in the County Court proceedings. In view of the small sums involved and bearing in mind that this case would come within the small claims jurisdiction of the County Court the parties are encouraged by the Tribunal to try to come to some agreement on those costs to avoid the necessity of further time and expense being incurred.

Dated this 22nd day of April 2010

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D. Agnew BA LLB LLM
Chairman