RESIDENTIAL PROPERTY TRIBUNAL SERVICE

SOUTHERN RENT ASSESSMENT PANEL

LEASEHOLD VALUATION TRIBUNAL

S.27A Landlord &Tenant Act 1985 as amended

DECISION AND REASONS

Case Nos: CHI/29UE/LIS/2009/0108 , CHI/29UE/LSC/2009/0129

Re: Kingsdown Park, Upper Street, Deal, Kent, CT14 8AX

Between:

James Clugstone (41)

Mr & Mrs M. Lowers (51)

Mrs Dreda Christine Ilyas (53)

Mr & Mrs B. Stevens (59)

Mr C. Austin-Haynes (75)

Mrs Elizabeth Cooke (2)

Mr & Mrs F. Beaney (8)

Peter Schaffer & Shelley Schaffer (14)

Mrs Susan Vale & Mr Peter Vale (16)

Joseph Cornwell (17)

David Robinson (18/84)

Noreen Maconochie (19)

Ken Pepper (22)

Mark Ford and Barbara Ford (23)

Peter Anger (24)

Dr H.S. Crawley (26)

David Aspinall & Ms A Davies (32)

David Leslie Milan (37)

Mr & Mrs M.J. Cozens (39)

Chris Whiting (42)

Janet B.E. Lowers (51)

Mr. and Mrs. Cox (52)

Edward Sharrod and Jennifer Sharrod (54)

Phillip F. Southby (57)

S.J. Cox and G.J. Cox (61)

Mr R.W. Staples (63)

Ian Berridge and Elizabeth Berridge (64)

P.J. Searle (69)

Nicola Braden (70)

Michael Blackley and Elizabeth Blackley (77)

Mr & Mrs Martin (78)

Dawn Bennett (80)

Rex Martin (85)

Martin L. Gee (86)

Mr K. Laing and Mrs M. Laing (87)

Mr & Mrs Lane (88)

Mrs Janice Kirby (91)

Rita Spall (93)

Peter Spall (94)

Mr & Mrs R. Lowe (100)

Miss Mary Phillips (110)

Rita Holme (111)

Christopher Hood (116)

Jason Gardiner (117)

Mr & Mrs J.N. Hollyer (118)

Mr T. Kingham (120)

David John Caygill (125)

Mr E.F. Dunn (127)

Mr J. Salt (138)

Ryan Thomas (143)

("The Applicants")

And

Kirsty Roberts (10)
David Withers (11 &12)
R.A. Mulhern (25)
Miss S. Chattenton (27)
Terry Webster (76)
Mr & Mrs R.G. Jackaman (83)
Mr W. de Vos and Martha de Vos (95)
Leslie Carling (98)
Daren Wright (102)
Wendy Edgar-Jones (107)
Mr Justin Preston and Mrs Kirsty Preston (109)
Shirley Marie Mans (123)
Roger Barnes (124)
Philip Harding (130)
Mr. Gwyn and Ms. H. Vaughan

("the Joined Applicants")

AND

Tingdene Holiday Park Limited

("the Respondents")

Tribunal Members: **Mr. S Lal LL.M, Barrister (Legal Chairman)**
Mr. R Athow FRICS
Mr. P.Gammon MBE

Representation:

Applicants: Mr. Andrew Lane, Counsel, Day One: 15th March 2010

Mr. Davis FRICS, Day Two: 16th March 2010

Respondent: Mr. Newborough, Solicitor, Fosters, Day One and Two

Date of Hearing: 15-16th March 2010

Date of Decision: 19th March 2010

Preliminary

1. It was agreed by all parties that Mr.M.A Gwyn and Ms. H Vaughan be joined as Applicants to the list above.

2. The Tribunal had before it in excess of 2000 pages of evidence and submissions which the Tribunal read prior to it determining the matter. For the sake of completeness it cites with approval the skeleton arguments presented by both representatives and is indeed grateful to both Mr. Lane and Mr.Newborough for the assistance they gave to the Tribunal throughout in the manner of their presentation. References to page numbers below are to the agreed bundle before the Tribunal.

Issues for the Tribunal

3. Both representatives agreed that the following issues were what they wanted the Tribunal to Determine, they were confident the Tribunal had jurisdiction to do so.

Issue 1 - The validity of documentation giving rise to the service charges for the years in question.

Issue 2 – Whether the service charges are payable annually or quarterly.

Issue 3 – Whether the Respondent has complied with the inspection requirements of the Landlord & Tenant Act 1985 ("LTA85").

Issue 4 – Matters raised by other lessees in the claims transferred from the county court and joined to this application.

Issue 5 – Actual 2008 service charge issues

Issue 6 – Estimated service charge issues.

The Case for the Applicant

Issue 1

4. The Applicants' case is that the Respondent has consistently failed to comply with the statutory requirements set down by s.21B LTA85 [479]:

21B Notice to accompany demands for service charges

(1) A demand for the payment of a service charge must be accompanied by a summary of the rights and obligations of tenants of dwellings in relation to service charges[1]...

(3) A tenant may withhold payment of a service charge which has been demanded from him if subsection (1) is not complied with in relation to the demand.

(4) Where a tenant withholds a service charge under this section, any provisions of the lease relating to non-payment or late payment of service charges do not have effect in relation to the period for which he so withholds it.

5. Mr. Lane went on to say that on the Respondent's own case [1465(13)], the 2008 annual demand of the 4/4/08 [114-6] was not "accompanied by a summary of the rights and obligations of tenants of dwellings in relation to service charges" [120-3; 155-8]

6. A similar admission is made in respect of the 2009 demand [218-21; 1465(14)] which is why they purported to send fresh demands for the years 2008 and 2009 accompanied by the required summary of rights etc [268-80].

7. The Applicant says that the timing is crucial because on the Respondent's own case therefore, the 2008 and 2009 service charge payments were not in fact payable, because the demands were invalid and the Applicants entitled to withhold payments under s.21B, until valid demands were sent out (they rely on those sent out in November 2009 [268-280], post-dating by over 4 months the section 146 notice sent to the Applicants on the 8/7/09).

8. The Respondent seeks to argue that it is irrelevant for the Tribunal to consider the issues raised by the pre-November 2009 demands because if the latter are valid then (subject to the other objections) the service charge is payable [1466(16)]. This approach is not accepted however by the Applicants nor is it coherently thought through because:

   (a) Section 27A LTA85 makes it quite clear that if a tribunal is asked to consider whether a service charge is payable it can go on to consider the date at or by which it is so payable (as well as the manner in which payment can be made: see sub-sections 1(d) and (e)).

   (b) The question is not simply academic but highly relevant to the county court claims from which these matters have been transferred in that if the service charge for 2008 and 2009 only became payable with effect from on or after November 2009 because of the tenants' right to withhold payment until receiving a valid demand then the said county court claims have been issued prematurely [e.g. see 780] and are subsequently an abuse of process.

   (c) Further any claim for interest under the lease for late payment of the service charge will, regardless of any other argument as to their reasonableness and payability, be affected by a later legitimate demand as no interest can properly accrue prior to this later time.

(d) Finally, the management and administration time expended in the preparation, service and explanation of earlier incomplete demands and s.146 notice [208-11], as well as any legal costs, cannot be reasonable (and should be deducted from any service charge totals as being unreasonably incurred and the relevant head of expense not being reasonable in amount in any event).

9. The concept incidentally of "substantial compliance" referred to by the Respondent at 1466(16) has no relevance to the s.21B argument. This is hardly surprising given the simple method of compliance with s.21B - the 2007 Regulations[2] set out what wording needs to be in the summary and s.21B simply says such a summary must accompany the service charge demand. As Lord Justice Hale said in the context of a landlord's failure to comply with a section 21 Housing Act 1988 notice served on a periodic assured shorthold tenant[3]:

"This is not a case where the legislation permits a form to be "substantially to the same effect". The subsection is clear and precise. Nor is it difficult for landlords to comply. They know when the period ends. Furthermore, this is not a case where the consequences of failure to comply are particularly serious for landlords: a defective notice can be cured the next day. Even if the defect is not noticed until the point is taken in court, a valid notice can then be given. The landlord is not unwillingly and unwittingly saddled with a tenant who has security of tenure, as would be the case with an invalid notice under s.20. One purpose of the subsection may be to alert tenants to the need to look for alternative accommodation, but another is to give the courts a clear and simple set of criteria which trigger their mandatory duty to order possession. The notice in this case was only one day out, but once Mr Dean's first submission is rejected, his alternative submission would leave room for all sorts of arguments, uncertainty and inconsistency up and down the country on a matter about which there should be no doubt at all."

Issue 2

10. The Applicant's say that some of the leases at Kingsdown Park specifically allow for quarterly payments [92(8)] and this facility was in any event afforded to all tenants, including Mr & Mrs Cox [114], despite the fact that their lease was not so specific and did not address the question of quarterly payments.

11. The background to this arrangement has been well explained by the Applicants in their Statement of Case and Separate Submission. The facility for quarterly payments was withdrawn by the Respondent's solicitors as late as August last year [214-5].

12. As far as 2009 is concerned therefore the worst that could be said is that the Respondent was bringing forward the usual October payment to August. The question really is the matter of future payments.

13. Mr. Lane submitted that it is quite clear from paragraph 9 of the Fourth Schedule that the Lease assumes there to be:

    (a) An interim payment to have been made prior to the final account; and

    (b) This payment to be made on more than one occasion (hence "interim payments" being plural).

14. Further, the more modern leases confirm the interim payment arrangement actually employed by the owners of the site from 1995.

15. All the above factors go towards the inevitable conclusion that if the construction of the lease does not allow a right to quarterly payments then the doctrine of estoppels by convention must do. As explained in Halsbury's Laws of England Volume 16(2):

"1065. Where two parties act, or negotiate, or operate a contract, each to the knowledge of the other on the basis of a particular belief, assumption or agreement (for example about a state of fact or of law, or about the interpretation of a contract), they are bound by that belief, assumption or agreement. This is known as 'estoppel by convention', the common assumption or agreement between the parties (the 'convention') constituting the representation. There can be no estoppel by convention where, although both parties are labouring under a common mistaken apprehension, it cannot be said that they have acted on the basis of that apprehension. Nor can the doctrine be invoked to deny a party the protection of a statute from the terms of which contracting out is not possible. In order for an estoppel by convention to arise, the relevant assumption or agreement must be communicated by one party to the other, either by words or conduct."

Issue 3

16. The Applicants' submissions are as stated above and the authority cited by them is Taber-v-MacDonald & Clockscreen Holdings Ltd [1999] 31 HLR 73@ 79-80 in which Roch LJ held in respect of the section 22 duty:

"In my judgment the landlord's obligation is quite clear. The landlord must make available to the requesting tenant all those accounts, receipts and other documents supporting the summary which have been seen by the qualified accountant for the purpose of certifying the summary. In this case that did not happen. Mr Taber was never shown the accounting records of Clockscreen Holdings Limited on which the accountant's certificate was based.

He did not see, again to quote from the certificate, the underlying books and records of Clockscreen Holdings Limited, save for a small number of vouchers which related to items that were specifically attributable to Peaches Close.

I would observe that sections 21 and 22[4] are not concerned with the adequacy of the landlord's accounts or system of accounting. A landlord who cannot produce receipts and vouchers, which would normally exist to support a summary, will probably, in the absence of reasonable excuse, be held to be in breach of sections 22 and 25 . However, if the landlord satisfies the Magistrates that he has produced such accounts, receipts and documents as he has, the fact that those items are inadequate to support the summary properly in terms of the keeping of proper accounts does not amount to an offence under section 22 . Section 22 and section 25 are concerned with the wilful and inexcusable failure of a landlord to produce documents which he has. The remedies for the absence of proper receipts and documents are to be found elsewhere. The landlord will be unable later in other proceedings to produce further documents without running the risk of being prosecuted for perjury committed before the Magistrates. The absence of proper documents may also result in a complaint against the accountant who has certified the summary being made to his or her professional body."

Issue 4

17. The matters raised in the county court defences of the other 5 lessees joined to this application [771] can be seen at pages 776-9, 784-6, 791-3, 798-801 and 807-809 of the Applicants' Bundle.

18. In terms of issues not covered elsewhere they comprise of:

    i. 17.5% VAT charged on the 31/12/08 end of year certificate when the rate had been reduced to 15% on the 1st of that month [777 – raised on the 5/3/09 by KPCOA @ 335].

    ii. Failure to consult on car park works [778; 800].

19. The 2nd issue is dependent upon whether the original estimate is the appropriate one to consider (£36,000 [278] as opposed to the costs claimed now by the Respondent of £20,115 plus VAT [1474(52); 1527-8]) and the applicability of VAT in considering the works amount above which consultation is statutorily required.

20. The statutory and regulatory consultation provisions are at pages 443 to 473 of the Applicants' Bundle. When considering the costs of works for the purposes of the consultation requirements (and right to receive estimates) referred to above - i.e. are these "qualifying works": see sub-section 5 - the present limit over which the consultation requirements are triggered is £250[5].

21. Mr. Lane submitted that the key issue in the circumstances of the information supplied at 1527-8 is to what extent the works described therein cover or are part-performance of those planned in the original estimate (in other words, are further works to follow – the answers appear to be "yes": see 1480(82)).

Issue 6

22. The Applicants' case is that reference is made by the Respondent in its Response to a March 2009 report by LincSafe (Health & Safety) Ltd [1539-46]in which a health & safety management audit was undertaken for the site (much wider incidentally than the play area). As far as the play area is concerned it simply said [1542]:

"These are poorly maintained and no longer appear "child friendly". The floor surfaces would need to be changed and the equipment either replaced or refurbished. A disclaimer sign should also be erected as there is no supervision available from the park staff."

23. The Applicant's argue that this does not, upon proper reading of the lease, demonstrate a need for the works[6] such as to incur liability of the part of the chalet owners. Further, there appears no explanation for the £11,116.45 costs in any event.

24. The costs of the LincSafe report(s) are also challenged [Applicants' response @ page 12(83)].

25. Finally in this subsection, Mr. Lane submitted it was difficult to understand how these charges can be deemed reasonable when done in breach of planning requirements [see the last page of the Applicants' Response & 723-723G].

Grass cutting

26. This matter has not been dealt with in the Respondent's Response at 1480-1, or at all, and Mr. Lane simply therefore referred to pages 13 to 14 of the Applicants' statement of case at paragraphs 72 to 78.

The Case for the Respondents

Issue 1

27. It is the Respondent's case that the 2008 demand and rights and obligation information was sent on a date no later than 4 April 2008 (paragraph 13 page 1465). The 2009 demand and estimate and rights and obligations were sent on a date no later than the 1 July 2009. In November 2009 the Respondent sent further copies of the estimate of annual service charge, actual service charge, a copy of the accountant's certificate and a copy of the rights and obligations for both 2008 and 2009 to each chalet owner.

28. The Respondent's go on to say that Section 21a deals with withholding of service charges where "where documents have not been supplied". Section 21b deals specifically with a failure to supply the rights and obligation information.

Issue 2

29. The Respondent's say that each chalet owner has entered into a covenant to pay the service charge on demand. The Respondent has served an annual demand in accordance with the terms of the lease. The Respondent says that liability to pay the service charges must be determined in accordance with the personal covenants each chalet owner has given. The Respondents say that the covenant to pay is clear.

30. The later leases do contain a provision allowing the Respondents, should they so elect, to collect service charge by instalments. Those leases preserved the right to recover the estimated charge on demand. The negotiation of such a covenant by the Respondent negates the Applicants case that there was a convention. The Applicants have advanced no evidence to support their argument that there was an agreement by the Respondent or Archcare Limited. Merely allowing chalet owners to pay by instalments is not evidence of binding agreement to waive the terms of the personal covenant upon which estoppel could operate. The burden is upon the Applicant to prove the terms of binding agreement on which they say the convention by estoppel operates. The Respondents deny that the owners of the site before them agreed or acted on the assumption that their willingness to accept payments in a manner prevented them from recovering the service charge on demand should they chose to do so.

Issue 3

31. It is the Respondents case that they have provided inspection of documents and cooperated with the Defendant. The duty rests on the Applicant to establish relevance of each document sought and the Respondent seeks directions on the extent of any further disclosure from the Tribunal.

32. With regard to the VAT charge, the invoice circulated in December was an instalment of the annual service charge. The VAT change came into effect on 1 December 2008 but as it was only instalment of the annual charge the applicable rate for the year was 17.5%. The Respondent has to charge VAT on the prevailing service, so it follows that if a product was ordered from a trade supplier for example on 30 November 2008 it is that date that will be the determining factor for the VAT rate. The Respondent raised an invoice for the actual 2008 charge at 15% when it should have been invoiced at 17.5%. The Applicants have therefore paid less than they should have done.

Issue 4

33. The Applicants have served a further summary through T N Davis. The Respondent has replied to that in a letter of 11 March 2010. These issues are to be dealt with on the second day of the Tribunal hearing. The Respondent will through Mr Paul Spriggins address each that the Applicants raise at the hearing. The Applicants schedule does not identify which of the service charge items they contend are unreasonable.

Issue 5

34. The Respondent employed external contractors because it was cost effective to do so. The alternative would be to employ additional people and purchase plant and machinery and pay for the service and maintenance of that plant and machinery.

Issue 6

35. The Respondent says that the play area and grass cutting are reasonable expenses within the meaning of the Act and that the new play area equipment is allowed in any event by the lease.

The Tribunal's Decision

The Law

36. The statutory provisions primarily relevant to applications of this nature are to be found in section 18, 19 and 27A of the Act. The Tribunal has of course had regard in making its decision to the whole of the relevant sections as they are set out in the Act, but here sets out what it intends shall be a sufficient extract from each to assist the parties in reading this decision. Section 18 provides that the expression "service charge" for these purposes means:

"an amount payable by a tenant of a dwelling as part of or in addition to the rent-
a. which is payable directly or indirectly for services, repairs, maintenance, improvements or insurance or the landlord's costs of management, and
b. the whole or part of which varies or may vary according to relevant costs."

"Relevant costs" are the cost or estimated costs incurred or to be incurred by the landlord in connection with the matters for which the service charge is payable and the expression "costs" includes overheads.

37. Section 19 provides 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
b. where they are incurred on the provision of services or the carrying out of works only if the services or works are of reasonable standard

and the amount payable shall be limited accordingly."

38. Subsections (1) and (2) of section 27A of the Act provide 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 to whom it is payable
b. the person by 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.

39. The notion of something being reasonable has been held to mean that the landlord does not have an unfettered discretion to adopt the highest standard and to charge the tenant that amount; neither does it mean that the tenant can insist on the cheapest amount. The proper approach and practical test were indicated in Plough Investments Ltds v Manchester City Council [1989] 1 EGLR 244 that as a general rule where there may be more than one method of executing in that case, repairs, the choice of method rests with the party with the obligation under the terms of the lease.

40. Further the tenant cannot insist on the cheapest method and a workable test is whether the landlord himself would have chosen the method of repair if he had to bear the costs himself. Ultimately it is for the court or tribunal to do decide on the basis of the evidence before it and exercising its own expertise. In that regard the LVT is an expert tribunal and is able to bring its own expertise and experience in assessing the evidence before it.

Issue 1- Validity of Documentation giving Rise to Service Charges

41. The Tribunal accepts Mr. Lane's arguments that Section 21B of the 1985 Act as being absolutely clear in that a demand for payment of service charges must be accompanied by a summary of the rights and obligations of tenants. The Respondent has de facto conceded that the 2008 annual demand was not accompanied by such a summary and a similar admission was made in part in respect of the 2009 demand although the time line is disputed. Mr. Newborough argues for July 2009 and Mr. Lane for November 2009. The Tribunal, applying the civil standard is satisfied that the summary of rights and obligations was not in fact sent until November 2009. There is no credible evidence that this was done in July 2009. The Tribunal rejects any notion of "substantial compliance" with the Act. To adopt such an approach would negate the clear purpose of the legislation and would itself be ultra vires.

42. In practical terms this means that any County Court actions begun against any of the Applicant's prior to November 2009 were premature and therefore an abuse of process. Further any legal or other costs in respect of these matters are not recoverable against the Applicant's if they took place before November 2009.

Issue 2- Service Charges Payable Annually or Quarterly?

43. The Tribunal finds itself in agreement with Mr. Lane that the older style leases may, by referring to interim payments(s) (in the plural) imply a right to quarterly payments. In any event the Tribunal is satisfied that an estoppel by convention has arisen where quarterly payments have been made and indeed encouraged to have been made. This has been the arrangement for a number of years and the Tribunal are satisfied that when the present Respondent took ownership of the Park, they were happy to continue with this. The Tribunal is fortified in its belief by the terms of the new type of lease which allows for quarterly payments in any event. The Tribunal finds as an evidential fact that an estoppel has arisen by custom and convention.

Issue Three and Five: Service Charge Year 2008

44. The Applicant's have advanced a two-fold submission in this regard. Taking their case at its highest, they say that the 2008 Service Charge is invalid per se because it has not been certified in accordance with Section 21 of the Landlord and Tenant Act 1985. Mr. Davis and Mr. Newborough both accepted that if the Tribunal found the service charge had not been so certified than the matter would end there, although Mr. Newborough invited the Tribunal to go on to determine the matter of reasonableness in any event and indeed much of the evidence on Day 2 of the hearing concerned this matter.

45. The Tribunal having considered the matter with care are satisfied that the document at page 1501 of the Bundle is not a proper certification under the 1985 Act. The reason for this is that the document, prepared by Grant Thornton, Chartered Accountants, refers to itself as a "Report of Factual Findings to verify the service charge expenses." It refers, and in the Tribunal's opinion a quite remarkable error, to Section 152 of the Commonhold and Leashold Reform Act 2002 which is not even in force!

46. Indeed the reason why it is not yet in force yet is because the style and layout of the account has yet to be set by Government.

47. The Tribunal noted the evidence from Mr. Spriggins that the document itself was a confidential document in respect of which permission had subsequently to be requested from Grant Thornton to allow the Applicant's to see it. The Tribunal are satisfied that far from being a certification under the 1985 Act it was no such thing and indeed was intended to be a private report for the Respondents.

48. The Tribunal would deplore, as was suggested by Mr. Newborough, any subsequent attempt to get Grant Thornton to "re-issue" the document (hopefully this time referring to the correct Act!). The Tribunal, employing its own expertise, would expect any certification to comply with the RICS Code of Practice. 2nd Edition, Part 10 and guidance issued by the relevant accountancy bodies as to how service charge accounts are to be presented. This should not be viewed as a "rubber stamp exercise" but is an important statutory provision to allow tenants to see in a fair way how any service account is arrived at.

49. Having found that the 2008 Service Charge was not correctly certified, the Tribunal is not prepared to determine the issue of reasonableness per se as suggested by Mr. Newborough. The Tribunal is of the view that were it to do so, that would negate the statutory intention created by s.21 of the 1985 for tenants to be supplied with a statement of account that deals fairly with the matter. In effect it would be saying to tenants that it does not matter that the landlord has not complied with the statutory requirements as the issue of reasonableness can be determined by a LVT. That is to be discouraged because it is the provision of certified statements that are transparent and clear, that will allay concerns that things may be unreasonable in the first place.

50. The Tribunal does however make the following observation. It became quite clear from the evidence of Mr. Spriggins on Day Two of the hearing that the Respondent's were placed in an invidious position when they took over the Park. They were in effect starting from scratch and there appears to have been no proper handover. The Tribunal are satisfied that the Respondent continues to make efforts to make the invoices more clear and transparent and no doubt some of the things that initially may have looked suspicious were clearly explained by Mr. Spriggins, especially in respect of the coding numbers that appear on some of the invoices.

51. Likewise the Tribunal is sympathetic to the Tenants in that it can understand why they may well have queried some of the invoices. It behoves all those concerned to have that level of frank exchange as occurred on Day Two of the hearing where individual items of expenditure are actually explained. Consequently certain invoices and other expenditure may not look as sinister as on first inspection. It is unfortunate that Mr. Spriggins was only able to explain some of the matters and give some of the backgrounds facts in evidence at the Tribunal hearing. The Tribunal is left with the distinct impression that this could and should have been done earlier without both sides resorting to litigation, for example it may have come as a surprise to the Applicant's that the on site bar was actually making a loss and any refurbishment may therefore not have been an attempt to maximise the Respondent's profits!

52. In any event, the Tribunal determines that because of the incorrect certification under the 1985 Act, the 2008 service charge account is not valid and the matter can go no further. It would be open to the Respondent to remedy the position but they must do so in a way that complies with the Act, namely in a way that deals fairly with the matters and is supported by the accounts, receipts and other documents.

Issue 4- Additional Matters

53. The Tribunal finds as a matter of principle that VAT can almost certainly be charged at the rate applicable when it is levied. In other words the quarterly demands made in 2009 must be at the rate of 15%. However the Tribunal notes that this area has been the subject of some commentary following the recent decision of the European Court of Justice in the case of Tellmer and in respect of service charges would be subject to specific regulations such as paragraph 1(e) of and Notes 11 13 to Group 1, Schedule 9, VAT Act 1994 (formerly paragraph 1(d) of and Notes (10) (10A) and (10B) to Group 1, Schedule 6, VAT Act 1983), dealing with holiday style accommodation. The Tribunal therefore would expect both parties jointly (the Applicant should do this through the Resident's Association) to obtain proper advice from HMRC as to the correct approach as to how VAT is to be charged and whether the principle noted by the Tribunal at the start of this paragraph is the correct one. It seems to the Tribunal that HMRC should be the proper arbiter in respect of the correct approach to be adopted and the Tribunal expects evidence of this to be done prior to either party raising this issue in the future.

Service Charge Year 2009 Issue 6

54. The Tribunal accepts the argument advanced by Mr. Lane that the sum of £11,116.46 in respect of refurbishment of the children's play areas is not a reasonable sum in the absence of planning permission. It does so on that basis that Mr. Spriggins had no real answer when asked in cross-examination what would happen to any monies if the planning appeal were to be unsuccessful. In any event, in the Tribunal's opinion even if the planning appeal were to be successful, the Lease only permits for maintenance, repair and decoration and not improvement.

55. In the Tribunal's opinion the play area as observed is of a wholly different character to the limited amount of play equipment that was previously there. Indeed the previous level and amount of equipment could hardly be described as a play area at all and the new equipment seems to have transformed this area of the park. Therefore even if planning permission were to be granted, the Tribunal are of the opinion that any costs can only be charged in respect of repairing or refurbishing what was already there and not the provision of new sets of play equipment.

56. In respect of grass cutting, the Tribunal finds that it is perfectly reasonable for the Respondent to charge for professional contractors as described on the 2009 statement of account. It is clear to the Tribunal that the grass areas of the Park cannot be cut "in-house" but must be done by professional contractors. The grass cutting cost as listed is commensurate with evidence available for previous years and cannot in itself be described as unreasonable.

57. Having regard to the guidance given by the Land Tribunal in the Tenants of Langford Court v Doren LRX/37/2000, the Tribunal considers it just and equitable to make an order under s.20C of the Landlord and Tenant Act 1985. The Applicants have succeeded in respect of the vast majority of their submissions. The Tribunal directs that no part of the Respondent's relevant cost incurred in the application shall be added to the service charges. The Tribunal further directs that the Respondents do pay the Applicant's (that is Mr and Mrs Cox only) fee in respect of this application and also the hearing fee.

Chairman.....

Date....19/3/10.....

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LEASEHOLD VALUATION TRIBUNAL

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DECISION SEEKING PERMISSION TO APPEAL

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Rita Spall (93)

Peter Spall (94)

Mr & Mrs R. Lowe (100)

Miss Mary Phillips (110)

Rita Holme (111)

Christopher Hood (116)

Jason Gardiner (117)

Mr & Mrs J.N. Hollyer (118)

Mr T. Kingham (120)

David John Caygill (125)

Mr E.F. Dunn (127)

Mr J. Salt (138)

Ryan Thomas (143)

("The Applicants")

And

Kirsty Roberts (10)
David Withers (11 &12)
R.A. Mulhern (25)
Miss S. Chattenton (27)
Terry Webster (76)
Mr & Mrs R.G. Jackaman (83)
Mr W. de Vos and Martha de Vos (95)
Leslie Carling (98)
Daren Wright (102)
Wendy Edgar-Jones (107)
Mr Justin Preston and Mrs Kirsty Preston (109)
Shirley Marie Mans (123)
Roger Barnes (124)
Philip Harding (130)
Mr. Gwyn and Ms. H. Vaughan

("the Joined Applicants")

AND

Tingdene Holiday Park Limited

("the Respondents")

Tribunal Members: **Mr. S Lal LL.M, Barrister (Legal Chairman)**
Mr. R Athow FRICS
Mr. P.Gammon MBE

Date of Decision: 19th March 2010
Date of Permission to Appeal: 19th April 2010
Date of Decision: 19th May 2010

1. Further to the receipt of Permission to Appeal (hereinafter referred to as the "Grounds"), the decision of the Tribunal dated 19th March 2010 the Tribunal makes the following observations.

2. In respect of Ground One, the Tribunal had the benefit of extensive oral submission by counsel for the Applicant's and solicitors for the Respondent. The Tribunal was perfectly entitled to find on the basis of the evidence presented to it and applying the civil standard of a balance of probabilities, that it was more probable than not that the demands had not in fact been sent until November 2009. The explicit rejection of any argument based on a substantial compliance with the requirements of the Act as advanced by the Respondent reinforces the view taken by the Tribunal that demands in the proper form were in fact not sent until November 2009. The Grounds seek to argue no more than a disagreement with the view the Tribunal took of the evidence and submissions made before it and they disclose no error of law as the Tribunal was perfectly entitled to consider the evidence before them in the manner that they did.

3. In respect of Ground Two, the Respondent seeks to argue that the Tribunal was persuaded wrongly to take account of the payment arrangements. The Tribunal is perfectly entitled to take a view of the material before it and the arguments raised by both sides. The Tribunal concluded that an estoppel by convention had arisen on the basis of the information before it and it was perfectly entitled to reach this conclusion.

4. In respect of Ground Three, the Tribunal notes it observation in Paragraph 55 of the Decision that the play area is of a wholly different character from what was there before and therefore the sum of £3374.46 is not recoverable because it cannot relate to an existing play area and is inextricably linked to the failed attempt to obtain planning permission.

5. Ground Four in respect of costs is rejected because the Joined Applicants have substantially succeeded in their case and hence the award was proportionate and proper in the circumstances.

6. For the Reasons above Permission to Appeal is refused.

Chairman.....

Date 19/1/10.