THE RESIDENTIAL PROPERTY TRIBUNALSERVICE
SOUTHERN RENT ASSESSMENT PANEL
LEASEHOLD VALUATION TRIBUNAL

Residential Property TRIBUNAL SERVICE

S.27A Landlord & Tenant Act 1985 (as amended)("the 1985 Act")

Case Number:	**CHI/43UD/LIS/2009/0094**
Property:	**Flat 1 Summersbury Hall Summersbury Drive Shalford Surrey GU4 8JJ**
Applicant:	**Summersbury Hall Limited**
Respondents:	**Michael Crust and Kimberly Crust**
Appearances for the Applicant:	**Paul Martin of Flat Focus Management**
Date of Inspection / Hearing	**25th January 2010**
Tribunal:	**Mr R T A Wilson LLB (Lawyer Chairman) Ms C Barton MRICS (Surveyor Member) Mrs J Playfair (Lay Member)**
Date of the Tribunal's Decision:	**12th February 2010**

THE APPLICATION.

1. This was an application pursuant to section 27A of the 1985 Act for a determination of the liability of Mr & Mrs Crust to pay service charges in respect of works carried out to the property by the applicant in 2007 & 2008.

THE DECISION.

2. The tribunal determines that no service charges are payable by Mr & Mrs Crust for the service charge years ending 31st March 2007 and 31st March 2008.

JURISDICTION.

3. The tribunal has power under Section 27A of the 1985 Act to decide about all aspects of liability to pay service charges and can interpret the lease where necessary to resolve disputes or uncertainties. The tribunal can decide by whom, to whom, how much and when service charge is payable.

4. By section 19 of the 1985 Act service charges are only payable to the extent that they have been reasonably incurred and if the services or works for which the service charge is claimed are of a reasonable standard.

THE LEASE.

5. The tribunal was provided with a copy of the lease relating to flat 1. The lease provisions in so far as they relate to service charge are most unusual and in some ways unsatisfactory. The lease provides that annual service charge demands must be calculated on the basis of actual service charge expenditure incurred in the previous year. The wording of the provision is as follows:-

"and also paying by way of further rent in advance a proportion amounting to 1/13th of the costs incurred or to be incurred by the lessors in respect of the items of expenditure hereinafter specified for the purpose of the management and supplying services for the mansion. The amount of such further rent shall be based on the said costs for the preceding year. Any such further rent shall become due and shall be paid by the lessee within 21 days after the lessee shall have been notified in writing of the amount thereof whether or not the term hereby granted shall have determined prior to such a notification provided however that at the option of the lessors such further rent may be payed in four installments the first within 21 days of notification and the remaining installments on the next three ensuing quarter days."

INSPECTION.

6. The tribunal inspected the property prior to the hearing. Summersbury Hall is a 3 storey detached building with cellar believed to be of Victorian construction comprising brick walls under a tiled roof. There is some parking to the front of the property and there are communal gardens to the rear. The building has been converted to form 13 flats. Summersbury Drive is a private residential road comprising a variety of styles, ages and types of property. It is a short distance from the centre of the Village of Shalford just east of the A281 south of Guildford.

7. The subject flat is at ground floor level approached immediately off the communal hallway to the front of the property. The accommodation comprises a living room, a bedroom, a bathroom with wc and a kitchen. There are suspended timber floors. The Tribunal observed rot to floor boarding and a hole in the bathroom floor.

8. The tribunal also briefly inspected the communal cellar/basement area under the building where corresponding damage was noted under the subject flat.

BACKGROUND AND PRELIMINARY MATTERS.

9. The case had been transferred from the Guildford County Court pursuant to a claim made by the applicant for recovery of service charges totaling £3,707 including Court fees of £100.

10. At the hearing it was identified that the only issues in dispute over which the tribunal had jurisdiction were two items as follows:-

    a. Service charge for the year ending 31st March 2007 amounting to £1,527 and

    b. Service charge for the year ending 31st March 2008 amounting to £2,180.

11. Both parties had set out their positions on the issues in their statement of case and both parties had submitted bundles containing their evidence. At the hearing the representatives expanded upon the points made in the statements and each of the disputed items is considered below.

THE APPLICANT'S CASE.

12. The applicant's case, simply put, was that the respondents owed the freeholders £3,707. This was made up of service charge arrears of £1,527 for 2007 and £2,180 for 2008. Mr Martin told the tribunal that the respondents had been requested to pay these sums on countless occasions but had declined to do so and also had not raised any valid defence.

13. The tribunal asked Mr Martin for an explanation of how the service charge had been demanded and how the figures contained in the demands had been arrived at. Mr Martin confirmed that it was the applicants practice to settle the annual figure to be demanded each year at the AGM based on estimates of proposed expenditure and not on actual expenditure from the previous year. Demands were sent out to the lessees either by hand or sometimes posted. The tribunal pressed Mr Martin to provide an explanation of how these estimated sums were reconciled with actual expenditure on an annual basis but Mr Martin was unable to do so.

14. Mr Martin told the tribunal that he had inherited this practice of collecting service charge from the directors of the company who had self managed the building until March 2008 when his firm had been given management instructions. He was unable to produce contemporaneous copies of service charge demands issued to the respondents for the years in question. On being questioned by the tribunal he accepted that the copy service charge demands submitted as part of his clients bundle were not true or complete copies. Rather they were electronically reproduced reconstructions from an email sent to him by his clients and contained information which would not have featured on the original demands. For example the summary of tenants' rights had been included in error in the 2007 demands. He confirmed that the original demands themselves were not in his possession and he believed they had been destroyed.

15. Mr. Martin was not able to offer a satisfactory explanation as to why the service charge procedure set out in the Lease, which required service charge demands to be based on past expenditure, had been replaced with demands based on estimated amounts and he could not inform the tribunal what percentage of the total annual service charge expenditure was attributable to the subject flat.

16. Mr Martin accepted that the copy lease that he had submitted to the tribunal related not to the subject flat but another flat in the building. He apologised for this error but he had thought that all the leases in the building were on similar terms. He now accepted that this was not the case and that the correct service charge proportion for the subject flat was $1/13^{th}$ of total expenditure and not $1/12^{th}$ as he had thought.

17. Mr Martin told the tribunal that the repairs and decorations to the building were carried out regularly and although the annual on account call of £2,000 was high, it reflected the age of the building. For instance, in due course the roof would need replacing and this would be an expensive job, it was therefore necessary to build up a substantial reserve fund to ensure that the annual sums demanded did not fluctuate to an un-acceptable level. In addition the building had substantial grounds which were expensive to maintain. In these circumstances he considered that £2,000 was a reasonable figure.

THE RESPONDENT'S CASE.

18. Mrs Crust told the tribunal that she and her husband disputed all the service charge demands for 2007 and 2008 primarily on the grounds that she had not been sent any valid demands for payment. She denied having received in 2007 and 2008 the service charge demands contained in the applicant's bundle. She told the tribunal that the first time that she had seen the company accounts for 2007 and 2008 was when the applicants had complied with the tribunal directions and delivered to her flat the applicants bundle in December 2009. This bundle had included service charge demands and the company accounts but she was quite adamant that she had not received the originals of any of the items in 2007 or 2008. She admitted there had been correspondence concerning payments but no formal demands.

19. She accepted that she had received notice of the annual general meetings held in 2007 and 2008 but she told the tribunal that she had felt very anxious at the 2006 general meeting and as a result had not attended any further meetings. She accepted that work was being done on the building but not always strictly in accordance with the repairing obligations contained in her lease. As she did not attend the AGMs or receive service charge demands or annual accounts she was in the dark as far as her service charge liability was concerned.

20. She was particularly concerned that despite numerous letters and other correspondence, the landlords had failed to carry out repairs to the broken floorboards in her bathroom.

21. Finally she told the tribunal that she had taken advice from a housing barrister who had advised her that service charge for 2007 and 2008 could not be recovered because the freeholders had failed to make a valid demand within 18 months of the expenditure being incurred. That being the case the applicants were now precluded from recovering service charge for these years bearing in mind section 20B of the 1985 Act. She asked the tribunal to take into account this legislation when coming to its determination.

THE TRIBUNAL'S CONSIDERATION.

22. The tribunal first had to decide whether or not the 2007 and 2008 service charges had been properly demanded. The tribunal was faced with conflicting and irreconcilable evidence on this issue.

23. The tribunal found that the applicant's bundle of documents was of little assistance in this respect. Although the bundle contained what purported to be copy demands, Mr. Martin had confirmed in his oral evidence that the demands were not copies of originals, merely reconstructions. They had been electronically reproduced by his firm's computer system and on his own admission contained information that would not have featured in the original demands had they been sent. As Mr Martin only took over management of the building in March 2008 he was not able to confirm the position prior to March 2008. Furthermore he thought that the 2007 and 2008 records had now been destroyed.

24. In view of Mr. Martin's evidence the tribunal considered that the electronic reconstructed invoices/service charge demands filed by the applicants had little probative value.

25. Mr Martin's evidence as to the system for sending service charge demands to the lessees was also far from helpful. It pointed to the fact that during 2007 and 2008 there was no consistent practice. Sometimes demands were sent by post and at other times they were hand delivered. Mr. Martin's knowledge of the system prior to

March 2008 was very sketchy and as a consequence the tribunal could not be satisfied that there was a reliable and consistent system for the service of demands.

26. The tribunal is surprised that the applicant's case failed to adequately deal with these facts bearing in mind the respondent's statement of reply, which should have put the applicants on notice that service of the demands would be an issue at the hearing. It is not possible for the applicants to claim that they have been caught by surprise by this technical but basic point. They have had adequate time to assemble evidence to demonstrate to the satisfaction of the tribunal that effective service of service charge demands on the respondents took place in 2007 and 2008.

27. The tribunal is also surprised that Mr Martin's firm do not keep copies of service charge demands especially as they do not consistently use the primary method of service as set out in the lease namely either recorded delivery or hand delivery. This failure to keep records or copies of demands means that they are not in a position to prove service of demands if, as in this case, the need should arise.

28. The respondent's defence is straightforward. They simply deny having received the 2007 and 2008 demands and their case is that the freeholders have failed to serve valid and timely service charge demands for 2007 and 2008. They also contend that the applicants have not supplied them with annual accounts on a timely basis. They say that they saw these documents for the first time when they were served with the applicants bundle in December 2009.

29. The tribunal noted that the lease stipulates a primary method of service for service charge demands. This is contained in clause 8 (2) which states that any demand or notice requiring to be made upon or given to the lessee shall be well and sufficiently made or given if sent by the lessors through the post by registered letter addressed to the lessee at the demised premises or left for the lessee at the demised premises.

30. Had the applicant relied on this clause and provided reliable evidence that all the demands had been correctly addressed to the respondents and then delivered to them either by registered post or alternatively by hand then the onus of proof in respect of service would have shifted to the respondents. In that case what amounts to a bold denial by the respondents might not have carried much weight with the tribunal. As it is, the onus of proof is on the applicants to prove service and the tribunal considers that this burden has not been discharged. Mr. Martin's evidence in this respect, upon which the applicants rely, was not sufficiently robust or certain for the tribunal to be satisfied that the demands had been properly delivered.

31. However, even if the applicants could establish service of demands, the tribunal is also not satisfied that the amounts demanded can be sustained. The service charge provisions in the lease provide for demands to be made based on actual expenditure incurred in the previous year. Mr Martin confirmed in evidence that this is not what happens in practice. Instead demands are made on the basis of the director's estimate of what will be needed in the forthcoming year. Accordingly in 2003 the amounts set were £325 per quarter and this figure continued in 2004. In 2005 the standing orders were increased to £435 and then in the second half of the year further increased to £500. It appears that the figure of £500 payable quarterly has continued since 2005. It is clear to the tribunal that these are arbitrary figures, which are not calculated in accordance with the provisions or formula set out in the lease. This is not satisfactory.

32. Neither is the tribunal satisfied that adequate annual service charge accounts are, as a matter of course, served on the lessees. The applicant's bundle contains company accounts but these contain expenditure which cannot be collected as service charge. An example of this irrecoverable expenditure is depreciation and corporation tax. Furthermore it is not clear that these were sent to the respondents in 2007 and 2008. All of this results in the respondents claim that they do not receive straightforward

information linking service charge demands with annual expenditure. There is no annual reconciliation of payments demanded on account with the lessees' actual liability. Although the lease provides for 5 yearly reconciliations of the reserve account, there was no evidence before the tribunal that this has happened. At a practical level this means that the demands sent out by the applicants do not enable a lessee to establish when service charge expenditure on the building has been incurred and how much. This is a critical shortcoming.

33. Taking all these factors into account the tribunal is drawn to the conclusion that the applicants have not validly demanded any service charge from the respondents for either 2007 or 2008.

34. The tribunal then considered the provisions of section 20B of the 1985 Act and assessed how these provisions might relate to the current situation. Section 20B reads as follows:-

(1) If any of the relevant costs taken into account in determining the amount of any service charge were incurred more than 18 months before a demand for payment of the service charges is served on the tenant, then subject to subsection 2, the tenant shall not be liable to pay so much of the service charge as it reflects the costs so incurred.

(2) Subsection 1 shall not apply if, within the period of 18 months beginning with the date when the relevant costs in question were incurred, the tenant was notified in writing that those costs had been incurred and that he would subsequently be required under the terms of this lease to contribute to them by the payment of a service charge.

35. The tribunal concluded with reluctance that section 20B (1) of the 1985 Act did apply to this case. The tribunal then considered if the saving provisions of section 20B(2) might apply. It looked closely at the applicants bundle to see if it included any letters or other documents that could be construed as a statement in accordance with section 20B(2). Section 20B(2) is a saving mechanism which enables landlords to collect service charge when it has not been demanded within 18 months of expenditure. However, the tribunal could find no such statements in the hearing bundle and this being the case finds none of the service charge expenditure for the years ending 31st March 2007 and 2008 is now recoverable from the respondents as it is all caught by the 18 month rule.

36. This of course is in many ways an unsatisfactory result as it is clear that maintenance and repairs are being carried out to the building. However, the casual system adopted by the applicants for collecting service charge can only work for so long as there is no dispute. Once a dispute has arisen it is essential that the terms of the lease have been properly adhered to, particularly as far as service charge collection is concerned. The applicants must therefore update their system for service charge demands and ensure that it is consistent with the terms of the lease. If this is not done there is the danger that further expenditure will become irrecoverable by virtue of the 18 month rule.

37. For the reasons stated above the tribunal therefore concludes that no service charges are payable by the respondents for the service charge years ending 31st March 2007 or 31st March 2008.

Signed _____
Robert Wilson LLB Solicitor

Dated 12 February 2010