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RESIDENTIAL PROPERTY TRIBUNAL SERVICE

**LEASEHOLD VALUATION TRIBUNAL
of the NORTHERN RENT ASSESSMENT PANEL**

DETERMINATION WITH REASONS

LANDLORD AND TENANT ACT 1985 – SECTIONS 27A & 20C

Property: 26 Chapel Road, Sale, Cheshire M33 7EG
Applicants: Mr A Baldwinson and Ms L Gradwell
Respondent: Waterside Sale Management Company No. 3 Ltd
Tribunal Members: Mr J W Holbrook LL.B (Chairman)
Mr D Pritchard FRICS

DETERMINATION

The service charge payable by the Applicants to the Respondent in connection with their tenancy of the Property is £614.83 for the service charge period which commenced on 1 October 2007 and ended on 30 September 2008.

REASONS

Background

1. On 27 April 2010 the Applicants, Mr Anthony Baldwinson and Ms Lorraine Gradwell of 26 Chapel Road, Sale, Cheshire M33 7EG ("the Property") applied to the Leasehold Valuation Tribunal ("the Tribunal") under section 27A of the Landlord and Tenant Act 1985 ("the 1985 Act") for a determination of their liability to pay service charges in connection with

their tenancy of the Property. The application related to the service charge period which commenced on 1 October 2007 and ended on 30 September 2008 ("the disputed period").

2. A hearing took place on 12 November 2010 at the Tribunal's offices at 1st Floor, 5 New York Street, Manchester M1 4JB. The Applicants appeared in person and the Respondent, Waterside Sale Management Company No. 3 Limited, was represented by Mr P Latham, Regional Manager of Residential Management Group Limited, the Respondent's managing agent.
3. The Tribunal inspected the Property and the development of which it forms part on the morning of the hearing in the presence of the Applicants and Mr O'Brien, a representative of the managing agents.

Description of the Property and the Development

4. The Property is a residential apartment situated on the ground floor of a purpose built block of 33 apartments ("the Building"). The Property has direct external access to both front and rear, with use of a small canal-side patio area to the rear. To the front, access is to a private residents' car park. There are also some landscaped common areas and there is gated access to the Building from the road. The Tribunal found the Building to be in fair condition.
5. The Building is of brick construction under a pitched tiled roof. It is about five years old and forms part of a larger development. For service charge purposes, however, services are provided to the Building by the Respondent, which is a dedicated management company for the Building alone.

The Lease

6. The Applicants hold the Property as tenants under a lease dated 4 October 2005 and made between Crosby Homes (North West) Limited (1) the Respondent (2) and the Applicants (3) ("the Lease"). The Lease was granted for a term of 999 years at a peppercorn rent. It was not in dispute that the Lease obliges the Respondent to provide a range of services to the Building. Nor was it disputed that the Applicants are liable to contribute to the costs incurred by the Respondent in this regard, the service charge machinery being set out in the Second Schedule to the Lease.

7. The following provisions of the Lease were of particular relevance to the matter to be determined by the Tribunal:
 - a) The "Service Charge" is effectively defined in clause 1.12 as the Tenant's Proportion of itemised costs and expenses relating to the Building and common parts.

 - b) The "Tenant's Proportion" is defined in clause 1.13 as 1/33 part of the total of those costs and expenses.

 - c) The "Payment Days" are defined in clause 1.23 as the first day of each month.

 - d) The "Estimated Service Charge" for each Accounting Year other than the first one (being each year from 1 October to 30 September) is defined in clause 1.25 as "... such sum as shall be certified by the [Respondent] as being a reasonable estimate of the expenditure likely to be incurred by the [Respondent] by way of Service Charge during such Accounting Year."

- e) Clause 6.1 obliges the Applicants "to pay the Estimated Service Charge to the [Respondent] on the Payment Days".
- f) Paragraphs 2 – 4 of Part III of the Second Schedule provide as follows:

"2. The [Applicants] shall pay the Estimated Service Charge by equal instalments in advance on the Payment Days.

3. As soon as convenient after the expiry of each Accounting Year ... there shall be prepared and submitted to the [Applicants] a written summary ("the Statement") setting out the Service Charge in a way showing how it is or will be reflected in demands for payment of the Service Charge and showing money in hand. ...

4. A surplus of payments of the Estimated Service Charge in excess of the Service Charge shall be refunded or carried forward as the [Respondent] may think fit. A shortfall in payments shall be made good by the [Applicants] and be due on demand."

The Law

- 8. Section 27A(1) of the Landlord and Tenant Act 1985 provides:

"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."

- 9. The Tribunal has jurisdiction to make a determination under section 27A of the 1985 Act whether or not any payment has been made.
- 10. Subsection (1) of section 20C of the 1985 Act provides:

"A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a court or leasehold valuation tribunal ... are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application."

11. Section 20C(3) gives the Tribunal power to "make such order on the application as it considers just and equitable in the circumstances".

The service charge payable in respect of the disputed period

12. The Respondent says that the service charge payable in respect of the disputed period is £614.83. This figure comprises four quarterly advance payments of £142.36 (totalling £569.44), plus a one-off sum of £45.39 to make up the shortfall between the advance payments demanded during the disputed period and the Applicants' actual service charge liability for the period. Mr Latham was able to demonstrate to the Tribunal's satisfaction during the hearing how the amount of £614.83 could be reconciled with the annual service charge accounts for the disputed period.
13. The Applicants did not dispute the amount of any of the individual heads of expenditure detailed in the accounts. Instead, the dispute in this matter concerns the shortfall mentioned above and, in particular, the timing and manner in which it was demanded. The Applicants pointed to the fact that, in addition to demands for the four quarterly advance payments (representing the Estimated Service Charge provided for in the Lease), they received an ad hoc demand for an additional payment of £250.00 on 5 August 2008 – that is, part way through the disputed period and before the annual service charge accounts for the period had been drawn up. They considered this to be excessive, and were concerned that insufficient information had been provided to explain why it was necessary.

14. At the hearing, Mr Latham explained that the additional payment was required so that the Building insurance premium could be paid when it fell due. He noted the fact that, once the annual accounts had been prepared, much of the additional payment (£204.61) was re-credited to the Applicants' service charge account.

15. The question for the Tribunal, therefore, was whether the service charge for the disputed period should include the shortfall amount of £45.39. The Tribunal found that this amount could indeed be properly recovered as part of the service charge – paragraph 4 of Part III of the Second Schedule to the Lease clearly provides for any shortfall in advance service charge payments to be made good. However, the Tribunal also found that this shortfall did not become payable until after the end of the service charge period, when the Respondent was in a position to demonstrate the amount of the shortfall by reference to the accounts. Although the Tribunal fully recognised the practical difficulties inherent in managing a development where there is a shortfall in service charge income, the fact remains that the provisions of the Lease do not entitle the Respondent unilaterally to vary the Estimated Service Charge during the currency of a service charge period.

16. For this reason, the Tribunal had sympathy with the Applicants' concern that the demand for £250.00 on 5 August 2008 was not properly made. Although the Respondent was entitled to demand the shortfall of £45.39 once the service charge period had ended and the accounts had been drawn up, it was not entitled to do what it actually did – which was to demand £250.00 on 5 August 2008. To the extent that the Respondent has sought to recover debt collection costs in respect of the demand for £250.00, the Tribunal's view is that it should discontinue any action to do so.

The application under section 20C of the 1985 Act

17. Mr Latham undertook that the Respondent would not be seeking to recover any costs incurred in these proceedings through additional service charges imposed on the residents of the Building. Consequently, the Tribunal did not further consider whether to make an order under section 20C of the 1985 Act.

Mr J W Holbrook
Chairman

10 December 2010