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HM COURTS & TRIBUNALS SERVICE

LEASEHOLD VALUATION TRIBUNAL

In the matter of applications under Sections 27A and 20C of the Landlord & Tenant Act 1985 (Service Charges)

Case No.	**CHI/29UG/LSC/2011/0082**
Property:	**Flat H 6-8 Lansdowne Square Gravesend Kent DA11 9LX**
Between:	**Mr. J. McFarlane and Mr. K. Marley ("the Applicants") and BM Samuels Finance Group PLC ("the Respondent")**
Dates of Hearing:	**19th August 2011 and 1st December 2011**
Members of the Tribunal:	**Mr. R. Norman Mr. R. Athow FRICS MIRPM**

FLAT H, 6-8 LANSDOWNE SQUARE, GRAVESEND, KENT DA11 9LX

Decision

1. The Tribunal made the following decisions:

(a) Mr. J. McFarlane and Mr. K. Marley ("the Applicants") are liable to pay to BM Samuels Finance Group PLC ("the Respondent") the following sums:
(i) £1,654.66 in respect of service charges to 29th September 2011.
(ii) £117.50 in respect of recovery charges
(iii) Financial charges (interest) to be recalculated by Hurford Salvi Carr ("HSC") in respect of sums outstanding on demands made after the receipt by HSC of the letter dated 21st June 2010 from Mr. McFarlane.

(b) An order is made under Section 20C of the Landlord and Tenant Act 1985 ("the Act") in respect only of the accounting costs involved in recalculating the accounts for this case.

Background

2. The Applicants are lessees of Flat H, 6-8 Lansdowne Road, Gravesend, Kent DA11 9LX ("the subject property") and the Respondent is in the position of freeholder of the subject property as mortgagee in possession. Mr. J.D. Thornton is the managing director of HSC the managing agents and represents the Respondent.

3. The Applicants made the following applications:

(a) For a determination of liability to pay and reasonableness of service charges for 2008, 2009, 2010 and 2011 under Section 27A of the Act and
(b) For an order under Section 20C of the Act.

4. On 19th August 2011 there was a hearing attended by Mr. McFarlane and Mrs. McFarlane, who stated that Mr. Marley would not be attending as he was on holiday, and Mr. Thornton.

5. At that hearing evidence was given and submissions were made and it was decided that the case would be adjourned and the Tribunal would make a decision on whether the service charges should be charged on an estate basis as had been the case or on a building by building basis as the Applicants submitted would be correct. The Tribunal came to the conclusion that the service charges had been charged incorrectly in that they had been charged on an estate basis rather than on a building by building basis. Accordingly the parties were notified of that and the following directions were issued:

> "1. By 26th September 2011 the Respondent is to recalculate the Interim Charges and Service Charges in respect of the subject property and to produce accounts dealing with the matters required by paragraphs 5 and 6 of the Seventh Schedule to the Lease (pp 38 and 39) and by the same date to provide copies to the Tribunal and the Applicants.
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> 2. By 26th September 2011 the Respondent is to list any other charges being made against the Applicants, for example, for the recovery of Interim Charges and Service Charges with details of how such charges are calculated and the justification for making such charges.
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> 3. By 17th October 2011 the Applicants are to notify the Tribunal and the Respondent of the charges which they still dispute.
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> 4. The Tribunal will notify the parties of the date for the adjourned hearing to resume.
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> 5. The parties have leave to apply to vary these directions, but any application to extend any of the time limits in them must ordinarily be made before the expiration of the time limit in question. It must be accompanied by an

explanation of the reasons for seeking the extension and by a reasoned estimate of the amount of additional time that will be required."

Hearing 1st December 2011

6. The hearing resumed on 1st December 2011 and was attended by Mr. J. McFarlane and Mrs. McFarlane who stated that Mr. K. Marley would not be attending but that they had authority to deal with this matter on his behalf and Mr. J.D. Thornton the managing director of HSC, the managing agents representing the Respondent.

7. In response to the directions given after the hearing on 19th August 2011, the accounts had been recalculated and as a result the Applicants in a letter dated 31st October 2011 (with 19 pages of documents attached) set out the following items, which Mr. and Mrs. McFarlane confirmed at the hearing, are the only items which are still disputed:

(a) Surveyor's invoice PM50837 dated 31st August 2010 for £377.90

(b) Administration charges for 2009 and 2010:

Invoice FC12. Finance charges on overdue balance. Total £7.99 but credit £7.99 and balance therefore £0.00 (but still shown on Customer Balance Detail produced at the hearing on 1st December 2011 as outstanding).
Invoice H219/141. Initial costs of referral to London Debt Collection Ltd for non-payment of service charge and/or associated fees. £75.20.
Invoice H219/150. To cover the cost of the attached invoice. Re London Debt Collectors Ltd No. 927. £115.00
Invoice FC26. Finance charges on overdue balance. Total £19.71.
Invoice FC37. Finance charges on overdue balance. Total £15.88.
Invoice FC48. Finance charges on overdue balance. Total £19.18.
Invoice H220/531. Initial costs of referral to London Debt Collection Ltd for non-payment of service charge and/or associated fees. £75.20.
Invoice H220/564. To cover the cost of the attached LDC invoice. Re: 1560 (Preliminary charge for referral). £117.50.
Invoice FC53. Finance charges on overdue balance. Total £19.22.
Invoice H220/669. To cover the cost of the attached LDC invoice. Re: 1827 Writing to and liaising with Lessee and Mortgagee. £117.50.
Invoice FC123. Finance charges on overdue balance. Total £61.10.

8. In the letter dated 31st October 2011, the Applicants pointed out that they had made the following payments without prejudice on account pending clarification of the services they had been charged for:

22nd November 2010	£400.00
28th April 2011	£400.00
5th September 2011	£500.00.

9. Mr. Thornton agreed that those payments had been made and produced a Customer Balance Detail on which they were shown. However they were shown as being credited against service charges and he accepted that £300 of those payments should have been credited against ground rent. He also accepted, as pointed out by Mrs. McFarlane, that the sum of £19.18 in respect of invoice FC 48 dated 14th May 2010 was incorrectly shown in the service charges column and should have been shown in the Financial Charges column. There was also a credit note dated 21st October 2010 as the balancing charge for 2009 which Mr. Thornton said should not be shown as a credit of £68.53 and that was agreed.

10. The revised accounts for 2009 and 2010 had still not been audited but Mr. Thornton stated that now the accounts had been redrawn they would have to go back for certification. However, the accounts had been run past the auditor and there would not be errors. The figures for expenditure would not change unless the Tribunal made a determination to change them.

Surveyor's invoice PM50837 dated 31st August 2010 for £377.90

11. On this invoice it is stated that it is in respect of "Flat B, 6-8 Lansdowne Sq. Attend site to investigate reported leaking flat roof to bedroom. Document and report to block manager of remedial works required." It is indicated that the charge is £300 (4 hours @ £75 per hour) and there are "Building Surveyor Expenses for the month of August 2010 Travel 22.40 + QE2 bridge 3.00" adding £25.40 to the bill and £52.50 VAT making a total of £377.90.

12. Mr. McFarlane's submission was that if there is a leaking flat roof then it makes sense to call out a roofing contractor to deal with the problem. He questioned the need to send a surveyor, as all the surveyor would do would be to look and give a cost for the repair. He had no doubt that that was what happened in this case. He did not know what was done to cure the problem but if a surveyor was needed he also questioned the need to have a surveyor travel all the way from HSC's offices in Hertford to Gravesend to look at the flat roof.

13. Mr. Thornton stated he could not produce the chartered surveyor as a witness as she was no longer with HSC but read from her report in which it appeared that the cause of the problem could be vandalism and she recommend an order to replace the flashings with lead or with a synthetic substitute. She also noted rubbish outside the property and took photographs of it. A property manager has to make a judgement as to whether to just send a roofing contractor or a surveyor to look at the problem. There may be an insurance claim involved and the decision to send a surveyor is not taken lightly. The in house surveyors know the buildings managed by HSC and specialise in the consultation procedure under Section 20 of the Act. Mr. Thornton considered that £75 per hour was cheaper than the cost of instructing a local surveyor. Given the failure of past repairs and the insurance excess it was decided not to make a claim. Mr. Thornton could not find a single bill to say what happened as a result of the survey. He had a copy of a works order to J.R Roofing in Hitchin to do the work but could not find an invoice for the work.

There is a plan to do redecorate as major works and he thinks the decision was taken to stop the immediate leak and wait for major works to deal with flashings.

14. Mr. McFarlane had no further questions for Mr. Thornton but he disagreed with him and submitted that local surveyors would charge less and that a property manager should have the names of local surveyors at his finger tips.

15. Mr. Thornton had nothing to add except that property managers have to make such decisions every day of the week and often bring in local contractors but there may be other concerns. It was a professional call and it was easily sorted out. He said he could take the Tribunal to buildings where it had taken years to sort out. He considered that the bill for the remedial work may have been accidentally charged to another building.

Finance charges and recovery charges

16. Mr. Thornton submitted that Clause 32 of the lease permits interest to be charged on late payment and that there will have to be a final calculation at the end of the day on what is to be charged.

17. Mr. McFarlane submitted that arrears arose originally because HSC were sending literature to the wrong address. When he did receive the bills he started to enquire. He asked for breakdowns of the charges but they did not appear. He even got a solicitor involved and he asked for breakdowns but did not get them. It was only when on his solicitor's advice he went to the offices of HSC to photocopy various bills and got more involved in what was being charged. He had asked for breakdowns and had asked questions and was querying the bills but all he got were debt collectors. He paid some money on account until he fully understood what was happening.

18. Mr. Thornton referred to a letter (page 14 of the documents attached to the Applicant's letter of 31st October 2011) dated 29th July 2009 from Mr. McFarlane to HSC in which he stated that:

"I understand that our representative at Church View Estates has some issues with regard to the services provided by yourselves during the months leading up to June and I will endeavour to get this matter resolved to the satisfaction of all parties as quickly as possible.
"In the meantime I trust you will accept this payment in good faith until a satisfactory solution has been achieved."

The amount of the payment was not stated in the letter but in the Customer Balance Detail the receipt of a payment of £326.20 (£50 ground rent and £276.20 service charges) is recorded as received on 31st July 2009. On the basis of the letter dated 29th July 2009 Mr. Thornton waited to hear from the Applicants but received nothing and almost a year later in May 2010 referred the matter to a debt collector. A letter dated 21st June 2010 (page 15 of the documents) was received from Mr. McFarlane in which he stated:

"I am writing with regard to the arrears of service charges and rent on the above mentioned following your recent communication with my representative from Church View Estates, Neil.
"As I understand it he has requested written confirmation from yourselves of the maintenance work you advised has been carried out at the property during 2009 and to date. Until that has been clarified we do not feel able to settle the invoices for service charges that you have sent us.
"In the meantime I enclose a cheque for £659.21 in respect of the following invoices for insurance and rent:

H220/63	£ 50.00
H220/248	£180.72
H220/215	£100.00
H220/317	£ 50.00
H220/396	£ 50.00
H220/464	£178.49
H220/496	£ 50.00

"I look forward to hearing from you by return with regard to the information requested in order to resolve this matter without further delay and recourse to Debt Collection Agencies.
"I would add that although you were aware of my current address above following my letter to you on 29th July 2009 you appear to still have my old address at New Barn on your file. Since writing to you last year I have not received any written correspondence or invoices from you in this regard and neither has the co owner of the property, Mr. K. Marley.
"Kindly confirm that all future correspondence will be sent to the correct address with a copy to Church View Estates."

That letter was marked "ccCVE Ltd 167 High St Street ME2 4HT"

19. It would have been explained to Mr. McFarlane and no doubt Church View Estates ("CVE") would also have explained to him that that is not how the lease works; he has to pay service charges on account. He cannot pick which items he wishes to pay.

20. Mr. McFarlane explained that CVE were looking after the flat and dealing with any matters with HSC. He was assured that something was being done. Mrs. McFarlane spoke on the telephone to someone at HSC about the matter. Then the Applicants took the work away from CVE and consulted a solicitor.

21. Mr. Thornton referred to a letter dated 11th October 2010 (at p. 57 of the bundle of documents produced for the hearing on 19th August 2011) written by Rachel Chambers of HSC to the Applicants at Mr. McFarlane's present address in Shorne. It refers to a letter from the Applicants dated 6th October 2010 and apologises for not responding to the Applicants' letter dated 21st June 2010. Enclosed with Ms Chambers' letter were a copy of the unaudited expense accounts from January 2009 to date as requested and a breakdown of the Applicants' service charge account. Even by October 2010 still no

legitimate grounds for non payment were received and there was no specific allegation about what was wrong. The Applicants were just saying they did not agree. Even when they went to a solicitor and the solicitor wrote on 9th November 2010 no grounds for non payment were given. In that letter it was stated "We are instructed by our Clients that all charges are substantially challenged and any action taken by your Clients to recover through the Courts or from the Mortgagees will be heavily defended and counter-claims will we understand be made against your Clients." It was not until the application was made to the Tribunal that the Applicants stated what the problems were. Mr. Thornton referred to the Scott Schedule which he had prepared for the hearing on 19th August 2011. He said that from that Schedule it was quite clear that the Applicants, for whatever reason, had not understood how the lease works. The Tribunal had to explain and the Applicants now understand. The only service charge item still in dispute is an invoice for surveyor's fees. If the Applicants had substantial questions about that why did they not state that earlier. The application to the Tribunal was the first time the Applicants made the Respondent aware of the challenge and therefore the so Respondent was not wrong to charge interest and to take recovery action.

22. Mr. McFarlane said that he believed that the first he knew there was a problem was when Mr. Marley was contacted by a debt collector, but he did not know the date. Mr. Thornton suggested it may have been June 2009. Mrs. McFarlane said there was some confusion at the beginning of 2009 about the management of the development and that the Applicants were not fully aware until some way through 2009 as to HSC's involvement. There were telephone conversations and just as Mr. Thornton could not get a statement from his surveyor, the Applicants could not get a statement from CVE. The Applicants were being charged and no work was being done on site. That was why the letter was written on 29th July 2009. The Applicants' representative at CVE said he was in dialogue with HSC. Mr. Thornton said this was where the Applicants were under a misapprehension. They were talking about being charged for work done whereas the lease provides that they pay in advance and if no work is done they get the money back. A welcome letter had been sent to everybody on 18th December 2008. From a Land Registry search in March 2009 it was found that the Applicants had purchased in August 2008 but at the hearing on 19th August 2011 it was stated that the Applicants bought in 2009 and had not heard anything.

23. Mr. McFarlane asked what address letters had been sent to. Mr. Thornton's reply was that if no address was given then HSC would write to the flat. If the Applicants had not notified HSC of an address all HSC could do was to write to the Applicants at the flat. Asked by Mr. Thornton, who had been notified of the address, Mr. McFarlane said it was not Mr. Thornton, he was not there but the landlord knew. Mr. Thornton said that if the landlord knew the address he would have given it to HSC. The Applicants bought the flat in August 2008 and knew they had to pay ground rent and service charges. If the Applicants did not tell HSC of an address, HSC would write to the flat and asked, if there was a tenant, what instructions the tenant had to deal with mail, Mr. McFarlane said there was no tenant there for many months so if correspondence was sent to the flat there would be nobody to deal with it. He did not know what the representatives CVE did but the Applicants did not get the mail. In the letters dated 29th July 2009 and 21st June 2010

he had given his Shorne address and in the letter dated 21st June 2010 had stated that although following his letter of 29th July 2009 HSC were aware of his new address it appeared that HSC still had the New Barn address on file. Since he had written to HSC the previous year (presumably the letter dated 29th July 2009) he had not received any written correspondence or invoices from HSC and neither had Mr. Marley. He asked for confirmation that all future correspondence would be sent to the correct address with a copy to CVE. Mr. Thornton said that HSC only send out a demand to one party.

24. Asked by the Tribunal what address HSC had for the Applicants, Mr. Thornton replied by submitting that the issue of the wrong address falls away early in 2009, but accepted that he did not know the address he had and that that information might not be in his office records as the address would have been updated and probably no record kept of old addresses. He referred to an invoice FC26, at p 6 of the Applicants' documents and p 135 of the documents produced for the hearing on 19th August 2011, which was dated 17th November 2009 and had the Shorne address but, fairly, pointed out that if copies of documents were printed out at his office, as opposed to being photocopied, the printed copy may well have the latest address and not the address to which the original document was sent. In any event the Applicants had the responsibility to inform HSC of a new address. Mr. McFarlane stressed that in his letter dated 21st June 2010 he had given his new address and had drawn attention to the fact that the old New Barn address was still being used by HSC. In Mr. Thornton's view the address was then changed. He suggested that the employment of inadequate agents had not helped.

25. Mr. Thornton asked how Mr. McFarlane was aware that the old address was still on the HSC file. Mrs. McFarlane explained that she was told this in a telephone conversation with someone at HSC.

26. As to the application for an order under Section 20C of the Act, Mr. Thornton submitted that the key point was that HSC were never given the chance to deal with the query about the method of calculating the service charges. The Applicants never mentioned this problem until the application to the Tribunal. Had they done so then the matter could have been discussed and if not resolved then an application to the Tribunal could have been made. As a result, there has been a considerable amount of accounting costs which the Respondent should be able to recover under the terms of the lease. Mr. Thornton said his hourly rate was £125 per hour and that his costs up to the last hearing were £1,800 + VAT. There was also a clerical rate charge of £40 per hour, plus the cost of correspondence. If the Applicants genuinely had an issue at the beginning it would have been sorted out more cheaply. The first he knew of the Applicants query about charging on an estate rather than a building basis was when the application was made to the Tribunal. He expected that probably there was about another £2,000 of accountancy charges to be charged to the service charge accounts. The Applicants have one lease, the missing element is the other lessees and they will be affected by this.

Reasons

27. The Tribunal considered all the documents produced and all the evidence given

and the submissions made by and on behalf of the parties at the hearings and made determinations on a balance of probabilities.

28. It is not disputed that the service charge accounts were prepared on an estate basis and that in this Application the Applicants contended that the accounts should have been prepared on a building by building basis.

29. It is agreed that the ground rent is paid up to date.

30. The Tribunal made a determination that the lease provides for the service charge accounts to be prepared on a building by building basis and the accounts have now been reworked in that way.

31. The Tribunal found that the first that the Respondent or HSC knew of the Applicants' query as to the method of accounting was when they were notified that the Applicants had made this application to the Tribunal. While the terms of the lease did not oblige the Applicants to contact HSC about this, it would have been reasonable to do so and could have saved expense.

32. It appears likely from the letter from HSC dated 11th October 2010 (assuming it is not a printed copy with an updated address) that the correct address was used. It is clear from the apology contained in that letter that no reply to the letter dated 21st June 2010 had been sent and that it was only when HSC received a letter dated 6th October 2010 that a reply was sent.

33. From the evidence produced, the Tribunal found that until after receipt by HSC of the letter dated 21st June 2010, there was a lack of clarity as to the addresses used by HSC for correspondence and it was unlikely that the Applicants were properly made aware of the charges being demanded of them. However, from that date letters were written to the Applicants at Mr. McFarlane's address in Shorne or to the Applicants' agents CVH or both and either the Applicants were aware or should have been made aware by their agents CVH.

34. It follows that the only recovery charges which are payable by the Applicants are those incurred after that date, namely the London Debt Collectors Ltd charge of £117.50 dated 5th November 2010 on the Customer Balance Detail.

35. It also follows that the financial charges shown on the Customer Balance Detail, which are interest charges made on sums outstanding, should not be payable except on demands made after the receipt of the letter dated 21st June 2010 and will need to be recalculated by HSC.

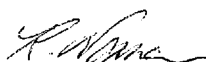
36. As to the Surveyor's invoice PM50837 dated 31st August 2010 for £377.90, the evidence given is set out in paragraphs 11 to 15 above.

37. The Tribunal found that more was required than to simply instruct a roofing contractor to deal with the matter especially as there was the possibility of an insurance claim, there were on-going problems and an anticipated refurbishment. Therefore it was reasonable to instruct a surveyor to visit the property before deciding what to do. However, it was not reasonable to instruct a surveyor to travel all the way from Hertford to Gravesend to inspect the property. The only detail presented to the Tribunal was the invoice and the parts of the report read out by Mr. Thornton at the hearing. There was no invoice for the work done and Mr. Thornton thought it may have been charged by mistake to another property. From the limited evidence it seems that a temporary repair was carried out. It also seems that much of the four hours charged by the surveyor would have been taken up in travel. It would have been reasonable to instruct a local surveyor to visit the property and to advise. At most that should have involved one hour's work resulting in an invoice for £100 + VAT @ 17.5% = £117.50.

38. The service charges column on the customer Balance Detail shows total service charges of £1,565.71. It was agreed at the hearing that to that should be added £68.53, the credit note 21st October 2010 and £300 which should have been credited to ground rent, reducing the ground rent column to 0.00 and there should be deducted £19.18 which should have appeared in the financial charges column giving a figure of £1,915.06.

39. In order to deal with the reduced surveyor's fee it is necessary to deduct from that sum £377.90 and to add £117.50 giving a total of £1,654.66 payable by the Applicants.

40. As to the application for an order under Section 20C of the Act, the Tribunal came to the conclusion that an order should be made in respect of the accounting costs involved in recalculating the accounts for this case because the additional costs would not have arisen if the accounts had been prepared in accordance with the lease in the first place. However, no order is made in respect of reasonable HSC costs in dealing with this application because it would have been reasonable for the Applicants, having found there was a problem with the way the accounts were calculated, to have contacted HSC about it and tried to resolve it before making the application.



R. Norman
Chairman