7820.

HM Courts & Tribunals Service

LEASEHOLD VALUATION TRIBUNAL

Property:	**4 and 35 Marine Gate Mansions, Promenade, Southport. PR9 0AU**
Applicants:	**Robert Twitty and Patricia Twitty (Flat 4)** **John Herbert Mills (Flat 35)**
Respondents:	**Marine Gate Southport RTM Company Limited**
Case Number:	**MAN/00CA/LSC/20011/0110**
Date of Application:	1st November 2011
Type of Application:	Application under the Landlord and Tenant Act 1985, Section 27A(1) and Section 20C and Schedule 11 Commonhold and Leasehold Reform Act 2002
Tribunal:	Mr G C Freeman Mr J Rostron FRICS Ms C Roberts
Date of Hearings:	20th March and 23rd April 2012
Date of Decision:	14th May 2012

ORDER

For the purpose of calculating the service charge payable by the Applicants for the years in question the Respondent is not obliged to calculate the amount standing to their credit in the accounts of the Marine Gate Management Company (Southport) Limited.

The Tribunal makes no order under section 20C of the Landlord and Tenant Act 1985.

The Tribunal makes no order for costs or the re-imbursement of the Application fee.

No service charge is payable for the periods ended 31st January 2010 and 31st January 2011 until the certificates referred to in paragraph 9 have been provided to the Applicants.

Application

1. The Applicants seek a determination of the liability to pay and reasonableness of service charges for the above properties where costs have been incurred, for the service charge years 2006 to 2012 inclusive. The Applicants named Blackthorn Estates Limited in the application as their landlord.

2. The Applicants included in their application an application to limit the costs of the Respondent under Section 20C of the Act.

3. The Applicants represented themselves. The Respondents were represented by Mr Matthew Hall of Counsel and Mr R.Fowler of MBW Developments Limited.

4. At a pre trial review held on 13th December 2011, the Tribunal identified the following issues to be determined:

   4.1 Prior to 2nd November 2009 the Property was managed by a company known as Marine Gate (Southport) Management Company Limited. ("MGSMC") From that date the Property has been managed by the Respondent.

   4.2 The Applicants do not dispute the actual expenditure incurred in managing the Property during the periods in question.

   4.3 Mr and Mrs Twitty state that the sum of £2314.06 which they allege is standing to their credit in the accounts of MGSMC as at 31st January 2007 should be brought forward by the Respondent and credited to their service charge account for subsequent years.

   4.4 As at 31st January 2008, the cumulative balance was £2431.88.

   4.5 As at 31st January 2009, the cumulative balance was £2636.49.

   4.6 As at 31st January 2010, the cumulative balance was £2906.74.

5. Mr Mills stated that as at 2007 the cumulative balance standing to the credit of his account was £389.04. He did not produce figures for any subsequent years stating that this was probably as a result of the developer, Blackthorn Limited, going into receivership. (Para 13 of his Statement of Case)

The Lease

6. Mr Twitty produced a copy of his Lease. It is dated 21st December 2000 and is made between Blackthorn Estates Limited of the first part, Marine Gate (Southport) Management Company Limited ("the Company") of the second part and Robert Twitty and Patricia Ann Twitty ("the Lessee") of the third part. Mr Mills produced a copy of his lease. He also produced a copy of the register entries for his ownership of Flat 35. His lease is dated 8 November 2002. Mr Mills' lease is in similar form as that of Mr and Mrs Twitty.

7. Both leases grant the respective flats to the respective Applicants for the term of 999 years from 1 January 1997. A nominal rent is reserved. The service charge attributable to Mr and Mrs Twitty's lease is 2.98% of the expenses as determined by clause 10 of the Fourth Schedule. Mr Mills proportion is 2.94%. Clause 1.3 of this Schedule provides for the payment of an "Interim Service Charge" which is to be a sum which the Company considers to be fair and reasonable in its absolute discretion. Clause 1.1.4 provides for a sinking fund as follows:-

"1.1.4. At its absolute discretion if considered to be appropriate or necessary by it to set aside such sums of money as the Company shall in its absolute discretion require to meet such future costs as the Company shall in its absolute discretion expect to incur of replacing maintaining and renewing those items which the Company covenants by this Lease to replace maintain and renew such sums of money to be held by the Company upon trust for the Lessee and owners or lessees of dwellings and to be applied solely in accordance with the provisions of this Lease"

8. Clause 5 allows for there to be a balancing charge if there is any shortfall or excess found after each accounting period *"PROVIDED ALWAYS that the Company may in its sole and absolute discretion at any time and from time to time . . . recover the whole or any part of any such excess by withdrawing the same from any sum set aside by the Company pursuant to Clause 1.1.4 . . . at any time after service on the Lessee of the relevant certificate [referred] to in the following Clause and provided that the Company shall have first notified the Lessee in writing that it intends to recover the relevant excess or part thereof in such manner"*

9. Clause 6 of the Fourth Schedule provides:-

"As soon as practicable after the expiration of each Accounting Period there shall be served upon the Lessee by the Company or its agents a certificate signed by the Company or its such agent s containing the following information:

6.1 The amount of the Total Expenditure for that Accounting Period

6.2 *The amount of the Interim Charge paid by the Lessee in respect of that Accounting Period together with any surplus accumulated from previous Accounting Periods.*

6.3 *The amount of the Service Charge in respect of that Accounting Period and of any excess or deficiency of the Service Charge over the Interim Charge*

Inspection and Hearing

10. The Tribunal inspected the property on the morning of 20th March 2012. Marine Gate Mansions are situated at the northerly end of the Promenade in Southport and to the west, overlook the Marine Lake and Liverpool Bay. It is a development of 133 self contained apartments part of which was the former Promenade Hospital. It is set in a predominately residential area close to the main shopping area of Lord Street. A number of private hotels are located in nearby roads. There are two underground communal car parks serving the Development, access to which is via a roller shutter door which is remotely controlled from the outside. Apartment owners are allocated car parking spaces within the garage, the roofs of which are landscaped and form part of the garden ground. There are also a number of open car parking spaces.

11. Hearings were held at the Liverpool Employment Tribunal Service, Cunard Building, Liverpool L3 1TS on 20th March and 23rd April 2012. The Applicants represented themselves. The Respondent was represented by Mr Matthew Hall of Counsel.

The Facts

12. Until the 2nd November 2009 ("the takeover date") the Property was managed by agents on behalf of the Company. On that date, Marine Gate Southport RTM Company Limited ("the Respondent"), a company incorporated on 20th April 2009 under the Commonhold and Leasehold Reform Act 2002 ("CLARA") took over management of the development.

13. The sum of £60,084.79 standing to the credit of the Company in various accounts was subsequently transferred to the Respondent. The Company was dissolved on 31st August 2010. The Respondent has not acquired the freehold to the development.

The Applicants' Case

14. The Applicants did not question the expenditure incurred by the Company or the Respondent during the periods in question. Their case may be summarized as follows. They contend that sums were held to their credit in the service charge accounts of the Company prior to the takeover date; that these sums were held on trust for the Applicants in accordance with the leases: that the Respondent should

be required to investigate the Company's accounts to ascertain what sums were held on behalf of the Applicants, and that the Respondent should give credit for these sums in the current accounts of the Respondent thus reducing the amount of any future payment to the Respondent for service charge. The cumulative balances said by the Applicants to be credited to their accounts are as set out in paragraphs 4 and 5 above. As evidence in support of the amounts standing to their credit, they produced correspondence from the Company's former accountants and a copy of the accounts of the Company for the year ended 31st January 2007, audited by Harrison Latham. This showed a surplus, as at that date, for Flat 4 of £2,314.06, and for Flat 35 of £359.04. Financial statements for the years ended 31st January 2008 and 2009 for the Company were produced. These comprised a Profit and Loss Account and a Balance Sheet but they did not apportion service charges between the various properties at Marine Gate Mansions. No accounts for the Company for the period from 1st February 2009 to the takeover date were produced.

The Respondent's Case

15. The Respondent's case is that although the Applicants may well have "overpaid" service charges in the years prior to the takeover date, there is no clear information as to who is owed what as at that date. They aver that the expense of investigating such of the records of the Company in the Respondent's care and control in order to certify the figures would far outweigh the balance found to be due to the Applicants. No evidence was produced by either party as to what would be the cost of forensically examining the records of the Company, assuming they are complete, in order to produce the relevant figures for the periods after the year ended 31st January 2007.

16. The Respondent accepts that the Company had funds at the bank, but there was no "fund" which exactly equalled the debts owed to all flat owners. When the Respondent took over management on the takeover date, the Company was obliged by law to hand over the surplus fund as being "accrued uncommitted service charge"

The Law

Service Charges Generally

17. Section 18 of the Landlord and Tenant Act 1985 ("the 1985 Act") provides:

> (1) In the following provisions of this Act "service charge" 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 the relevant costs.

(2) The relevant costs are the costs or estimated costs incurred or to be incurred by or on behalf of the landlord, or a superior landlord, in connection with the matters for which the service charge is payable.

(3) For this purpose-

(a) "costs" includes overheads, and

(b) costs are relevant costs in relation to a service charge whether they are incurred, or to be incurred, in the period for which the service charge is payable or in an earlier or later period.

18. Section 19 provides that

(1) 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 a reasonable standard:

and the amount payable shall be limited accordingly.

19. Section 27A provides that

(1) an application may be made to a leasehold valuation tribunal for a determination whether a service charge is payable and, if it is, as to -

(a) the person by whom it is payable

(b) the person to whom it is payable

(c) the date at or by which it is payable, and

(d) the manner in which it is payable.

(2) Subsection (1) applies whether or not any payment has been made.

(3) ....

(4) No application under subsection (1)...may be made in respect of a matter which –

(a) has been agreed by the tenant.....

(5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.

20. No guidance is given in the 1985 Act as to the meaning of the words "reasonably incurred". Some assistance can be found in the authorities and decisions of the Courts and the Lands Tribunal.

21. In *Veena v S A Cheong* [2003] 1 EGLR 175 Mr Peter Clarke comprehensively reviewed the authorities at page 182 letters E to L inclusive. He concluded that the word "reasonableness" should be read in its general sense and given a broad common sense meaning [letter K].

22. Where a tenant disputes items, he need only put forward sufficient evidence to show that the question of reasonableness is arguable. Then it is for the landlord to meet the tenant's case with evidence of its own. The LVT then decides on the basis of the evidence put before it.

Uncommitted Service Charges

23. Section 94 of CLARA states:-

(1) Where the right to manage the premises is to be acquired by a RTM company, a person who is:-

(a) landlord under a lease of the whole or any part of the premises,
(b) party to such a lease otherwise than as a landlord or tenant, or
(c) a manager appointed under Part 2 of the 1987 Act to act in relation to the premises, or any premises containing or contained in the premises,

must make to the company a payment equal to the amount of any accrued uncommitted service charges held by him on the acquisition date.

(2) The amount of any accrued uncommitted service charges is the aggregate of -

(a) any sums which have been paid to the person by way of service charges in respect of the premises, and
(b) any investments which represent such sums (and any income which has accrued on them),

less so much (if any) of that amount as is required to meet the costs incurred before the acquisition date in connection with the matters for which the service charges were payable.

Trust Funds

24. Section 42 of the Landlord and Tenant Act 1987 ("the 1987 Act") states:

(1) This section applies where the tenants of two or more dwellings may be required under the terms of their leases to contribute to the same costs . . . by the payment of service charges; and in this section –

"the contributing tenants" means those tenants . . .
"the payee" means the landlord or other person to whom any such charges are payable by those tenants . . . under the terms of their leases. .
"relevant service charges means any such charges

(2) Any sums paid to the payee by the contributing tenants . . . and any investments representing those sums shall (together with any income accruing thereon) be held by the payee either as a single fund, or if he thinks fit, in two or more separate funds

(3) The payee shall hold any trust fund-
(a) on trust to defray costs incurred in connection with the matters for which the relevant service charges were payable (whether incurred by himself or any other person) and

(b) subject to that, on trust for the persons who are the contributing tenants for the time being, . . .

The Tribunal's Decision

25. The Tribunal has considerable sympathy for the Applicants' predicament. If the Applicants have "overpaid" service charges, it only seems fair that account should be taken for the element of overpayment. The Tribunal also sympathizes with other flat owners at Marine Gate Mansions who may have overpaid, but who have not joined in the application. It seems likely that such flat owners have indirectly subsidized those who have not paid, consisting, probably, of the developer who had unsold flats at the development at the relevant time, and who has now ceased trading.

26. In the Tribunal's view, for this application to succeed, a number of hurdles must be overcome, some of which involve a consideration of English Land Law. It is a settled principle of law that a person seeking to enforce covenants in a lease must establish one of two states. There must either be a contractual relationship between the parties (known as "privity of Contract") or there must be a relationship of landlord and tenant (known as "privity of Estate").

Privity of Contract

27. The Applicants have issued their application against the Respondent, a "Right to Manage" company formed under CLARA for the express purpose of taking over management of Marine Gate Mansions. The Respondent is a creature of statute. There was clearly a contract between the Company and Mr and Mrs Twitty. They are both parties to the lease of Flat 4 together with Blackthorn Estates Limited who was the landlord. Similarly there was privity of contract between Mr Mills and the Company in respect of Flat 35. However the Tribunal found no contractual relationship between the Applicants and the Respondent. The Respondent was not a party to the leases of the Applicants' property.

Privity of Estate

28. In order for there to be privity of estate between the Applicants and the Respondent, the relationship of landlord and tenant must exist between them. As we have seen, the lease was granted by Blackthorn Estates Limited. This company was therefore the landlord and therefore privity of Estate existed at the date of the lease between Blackthorn and the respective Applicants as tenants. Does this extend to the Respondent?

29. If the lease of a flat is transferred to another owner, that person becomes the tenant and privity of Estate will continue between the landlord and the new owner. Similarly, if the reversion to the lease is transferred, that person becomes the new landlord and privity of Estate will continue between the new landlord and the tenant. However, the Respondent was not a party to the lease. Furthermore, no such transfer of the landlord's interest to the Respondent has taken place and therefore there can be no privity of Estate between the Applicants and the Respondent.

30. The Applicants seek to enforce the covenants in the lease against the Respondent requiring the Respondent to produce accounts for a period prior to the Respondent's existence. The Tribunal was not convinced, for the reasons stated above, that the Applicants can succeed in respect of the period prior to the Respondent taking over management of the development.

31. The Tribunal also considered the evidence produced by the Applicants of the exact amounts standing to their credit in the accounts of the Company. The Company has now been dissolved so no direct evidence of this was available. The Tribunal considered that the onus of proving the actual amounts standing to the Applicants' credit rested with the Applicants and that they had failed to discharge that obligation.

Does the Respondent hold the balance of service charge transferred to it by the Company on trust for the individual Applicants?

32. The Tribunal considered carefully the wording of section 42 of the 1987 Act. They noted that subsection (3)(b) specifically states that the trust funds shall be

held for the persons who are the contributing tenants. The subsection uses the terms "persons" and "tenants" in the plural and does not say, for example, "for each individual tenant". The Tribunal concluded therefore that such funds were to be held on trust for tenants generally. In their opinion there was no obligation for the landlord to apportion the funds held in separate bank accounts for individual tenants.

33. They further noted the obligation under section 94 of CLARA to pay the uncommitted service charge to an RTM company. The section does not impose any obligation on the payer to allocate such money as between individual tenants, nor does it impose any obligation on the RTM company to assume the obligations to provide service charge accounts for any period prior to the takeover of management.

Can the Applicants enforce the covenants for management against the Respondent for the periods following the takeover date?

34. Section 96(3) of CLARA provides that management functions which a person who is neither a landlord nor a tenant under a lease are functions of the RTM company. This means that at the acquisition date under the Act, the RTM company takes over the management functions previously carried out by the landlord or a management company under the lease. The Tribunal was unable to find a provision which imposes a liability on the RTM Company to assume the liabilities of the former manager under the lease. However the RTM company must comply with the relevant terms of the lease as from the acquisition date.

35. The Tribunal noted that no evidence had been produced that the relevant certificates required by the lease and referred to at paragraph 9 above. The Tribunal therefore determined that no service charge should be payable for the period ended 31st January 2010 and 31st January 2011 until such certificates had been provided.

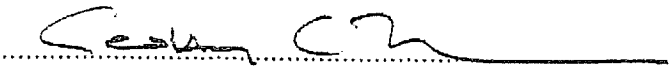
Section 20C application

36. Some leases allow a landlord to recover costs incurred in connection with proceedings before the LVT as part of the service charge. The Applicants make an application under s20C of the Act to disallow the costs incurred by the Respondent of the application in calculating service charge payable for the Property, subject, of course, to such costs being properly recoverable under the provisions of the Lease.

37. The Tribunal determines that, as it has found that the Applicants have largely failed in their application it would not be reasonable to make such an order. For the same reason the Tribunal declines to make an order for the re-imbursement of the application fee.

Costs

38. The Tribunal also has power to order the payment of costs by one party to the other where that party has acted frivolously, vexatiously, disruptively or otherwise unreasonably in connection with the proceedings. The costs awarded must not exceed £500.00. (Paragraph 10 of Schedule 12 of the Commonhold and Leasehold Reform Act 2002. The Applicants made an application for payment of their costs. The Tribunal decided that neither party had acted in such a manner as to warrant a costs order.



Geoffrey C. Freeman
Chairman