RESIDENTIAL PROPERTY TRIBUNAL SERVICE
Southern RENT ASSESSMENT PANEL
Ist Floor, Midland House, 1 Market Avenue, Chichester, West Sussex, PO19 1JU
Telephone: 01243 779394
Facsimile: 01243 779389
E-mail:
DX:

Direct Line:

Mr C Dennard
The Bays
12 Dudsbury Avenue
Ferndown
Dorset
BH22 8DU

Your ref:
Our ref: CHI/19UC/LSC/2012/0063

Date: 07 November 2012

Dear Mr Dennard

RE: Landlord & Tenant Act 1985 - Section 27A(1)

PREMISES: Arthur Court, 49 Fitzmaurice Road, Christchurch, Dorset, BH23 2DY

The Tribunal has made its determination in respect of the above application(s) and a copy of the document recording its decision is enclosed. A copy of the document is being sent to all other parties to the proceedings.

Any application from a party for leave to appeal to the Lands Tribunal must normally be made to the Leasehold Valuation Tribunal within 21 days of the date of this letter. If the Leasehold Valuation Tribunal refuses leave to appeal you have the right to seek leave from the Lands Tribunal itself.

If you are considering appealing, you are advised to read the note attached to this letter.

Yours sincerely

Mr Paul Gerard
Case Officer

GUIDANCE NOTE ON APPEAL FROM THE LEASEHOLD VALUATION TRIBUNAL

Introduction

1. The decision of the Leasehold Valuation Tribunal (LVT) is final and there is no power for the LVT to revisit or reconsider that decision. If you are dissatisfied with the decision of an LVT, the statutory remedy is to appeal to the Upper Tribunal (Lands Chamber).[1]

2. The LVT will provide written reasons for its decision. A decision and reasons may be issued together. Alternatively, a decision may be issued and a reasons document sent at a later stage.

Permission to appeal

3. In order to appeal, you must obtain permission to do so. Application for permission must first be made to the LVT. If the LVT refuses permission you may ask the Upper Tribunal (Lands Chamber) for permission to appeal.[2] (See paragraph 8 below for details).

4. The general rule is that your application for permission from the LVT must be made within the period of 21 days starting with the date on which the reasons for decision document was sent to you.[3] (Note that the last mentioned date might differ from the dated reasons document). Notwithstanding the general rule, the LVT has power to extend that 21 day period.[4] However, the LVT is only required to consider your application for an extension if that application is made before the 21 day period expires.[5]

5. Your application for permission to appeal should normally be made in writing. It should signed by you or your representative and
    a. state the name and address of you and any representative;
    b. identify the decision and the tribunal to which the request for permission relates and
    c. state the grounds on which you intend to rely in the appeal.

    An application form is available for this purpose and obtainable from the LVT.

6. On receipt of your application for permission the LVT will serve a copy on every other party to the decision to be appealed. To facilitate the process it would assist if sufficient copies were provided with your application. The LVT will give you and every other party written notification of its decision.

---

[1] Commonhold and Leasehold Reform Act 2002, s 175.
[2] Commonhold and Leasehold Reform Act 2002, s 175.
[3] Leasehold Valuation Tribunals (Procedure)(England) Regulations 2003 (SI 2003/2099), reg. 20.
[4] SI 2003/2009, reg.24(1).
[5] SI 2003/2009, reg.24(2).

7. If permission to appeal to the Upper Tribunal (Lands Chamber) is granted by the LVT your notice of intention to appeal must be sent to the registrar of the Upper Tribunal (Lands Chamber) so that it is received by the registrar within one month after the date that the LVT sent you notice of that permission.[6]

8. If the LVT refuses to give permission to appeal, you may renew your application for permission to the Upper Tribunal (Lands Chamber). Your application must be made in writing and received by the Upper Tribunal (Lands Chamber) no later than 14 days after the date on which the LVT sent you notice of its refusal of permission to appeal.[7] (Details as to the power of the Upper Tribunal (Lands Chamber) to permit a notice of appeal or application for permission to appeal to be made outside the relevant time limit are given in the Upper Tribunal (Lands Chamber) "Explanatory Leaflet: A Guide for Users" obtainable from the Upper Tribunal (Lands Chamber)).

The Upper Tribunal (Lands Chamber) may be contacted at:

Upper Tribunal (Lands Chamber)
43-45 Bedford Square
London
WC1B 3DN

DX : 149065 Bloomsbury 9

Tel: 020 7612 9710
Fax: 020 7612 9723
Email: lands@tribunals.gsi.gov.uk
Website: www.landstribunal.gov.uk

Typetalk: 18001 020 7612 9710

June 2011

[6] The Tribunal Procedure (Upper Tribunal)(Lands Chamber) Rules 2010 (No. 2600 (L.15) rule 24 .
[7] The Tribunal Procedure (Upper Tribunal)(Lands Chamber) Rules 2010, rule 21.

Case Number: CHI/19UC/LSC/2012/0063

HM COURTS & TRIBUNALS SERVICE

LEASEHOLD VALUATION TRIBUNAL

PROPERTY: Arthur Court, 49 Fitzmaurice Road, Christchurch, Dorset BH23 2DY

Applicant: Mr R Chivers and 3 other Tenants

and

Respondent: Lakeside Developments Ltd

In The Matter Of

Section 27A and 20C of the Landlord and Tenant Act 1985 (Liability to pay service charges)

Tenants' application for the determination of reasonableness of service charges for the years 2005 to 2012.

Tribunal

Mr A Cresswell (Chairman)

Mr T E Dickinson BSc FRICS

Mr J Mills

Date of Hearing: 25 October 2012

Appearances: Mr C Dennard for the Applicants
Mr B Mire for the Respondent

DETERMINATION

The Application

1. On 24 April 2012, Raymond Chivers on behalf of the owners of the leasehold interest in the 4 Flats at the property, made an application to the Leasehold Valuation Tribunal for the determination of the reasonableness of the service charge costs claimed by the landlord, Lakeside Developments Ltd, for the years 2005/06 to 2011/12.

Inspection and Description of Property

2. The Tribunal inspected the property on 25 October 2012 at 1000. Present at that time was Mr R Chivers. The property in question consists of a modern purpose-built block of 4 flats on 2 floors.

Summary Decision

3. This case arises out of the tenants' application, made on 24 April 2012, for the determination of liability to pay service charges for the years 2005 to 2012 inclusive. Under Sections 19 and 27A of the Landlord and Tenant Act 1985 (as amended) service charges are payable only if they are reasonably incurred. The Tribunal has determined that, subject to exceptions, the landlord has not demonstrated that all of the charges in question were reasonably incurred, and so those charges identified as not being reasonably incurred are not payable by the Applicants. A summary schedule follows:

Asbestos Survey	The charge of £458.85 is not payable.
Fire and Health and Safety Risk Assessment	Allowed in full
Management Fees	The Respondent was entitled to charge only half of the sums charged during the years 2005/12.

Building Surveyor's Fees	Allowed in full.
Insurance	Allowed in full
Accountancy Fees	£200 plus VAT should be allowed for the years 2005/06 2006/07 and 2009/10. £250 plus VAT should be allowed for the year 2008/09. The fee for 2010/11 is allowed in full.

4. The Tribunal allows the tenants' application under Section 20C of the Landlord and Tenant Act 1985, thus precluding the landlord from recovering its cost in relation to the application by way of service charge.

Directions and Procedure

5. Directions were issued on 30 April 2012, and on 9 July 2012 following a Pre Trial Review. At the Pre Trial Review the issues were identified and the parties were directed to provide documents relative to the issues for this one-day hearing. At the hearing, the Tribunal agreed the issues with the parties at the outset. The Applicants had helpfully produced a summary of their claim, which the Tribunal, following an agreed refinement of the list so as to accord with what was agreed at the Pre Trial Review and to exclude matters which were not relevant to the service charge, used to guide the procedure. Excluded from the list provided by the Applicants were two elements which related to the Right to Manage procedure and which could not form part of a service charge. Neither party had submitted witness statements. Evidence was given to the Tribunal by Mr Mire and Mr Dennard. At the conclusion of the hearing, the parties agreed that all relevant matters had been covered.

6. This determination is made in the light of the documentation submitted in response to the directions, the evidence of the parties and the oral submissions made at the hearing.

The Law

7. The relevant law is set out in sections 18, 19 and 27A of Landlord and Tenant Act 1985 as amended by Housing Act 1996 and Commonhold and Leasehold Reform Act 2002.

8. The Tribunal has the power to decide about all aspects of liability to pay service charges and can interpret the lease where necessary to resolve disputes or uncertainties. Service charges are sums of money that are payable – or would be payable - by a tenant to a landlord for the costs of services, repairs, maintenance or insurance or the landlord's costs of management, under the terms of the lease (s18 Landlord and Tenant Act 1985 "the 1985 Act"). The Tribunal can decide by whom, to whom, how much and when service charge is payable. A service charge is only payable insofar as it is reasonably incurred, or the works to which it related are of a reasonable standard. The Tribunal therefore also determines the reasonableness of the charges.

9. The relevant law is set out below:

Landlord and Tenant Act 1985 as amended by Housing Act 1996 and Commonhold and Leasehold Reform Act 2002

18 Meaning of "service charge" and "relevant costs"

(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.

19 Limitation of service charges: reasonableness

(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.

(2) Where a service charge is payable before the relevant costs are incurred, no greater

amount than is reasonable is so payable, and after the relevant costs have been incurred any necessary adjustment shall be made by repayment, reduction or subsequent charges or otherwise.

27A Liability to pay service charges: jurisdiction

(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 amount which is payable,
(d) the date at or by which it is payable, and
(e) the manner in which it is payable.

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

(4) No application under subsection (1) or (3) may be made in respect of a matter which—
(a) has been agreed or admitted by the tenant,
(b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,
(c) has been the subject of determination by a court, or
(d) has been the subject of determination by an arbitral tribunal pursuant to a postdispute arbitration agreement.

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

(6) An agreement by the tenant of a dwelling (other than a post-dispute arbitration agreement) is void in so far as it purports to provide for a determination—
(a) in a particular manner, or
(b) on particular evidence,
of any question which may be the subject of an application under subsection (1) or (3).
(7) The jurisdiction conferred on a leasehold valuation tribunal in respect of any matter by virtue of this section is in addition to any jurisdiction of a court in respect of the matter.

Ownership and Management

10. The Respondent was the freeholder of the property (at the material times) and the property was managed for them by Trust Property Management Limited ("Trust"). Mr Mire is the managing director of Trust. Since 1 March 2012 the property has been under the management of Arthur Court Right to Manage Company Limited.

The Lease

11. The bundle of documents contained a copy of a lease which the parties agreed was representative of the leases for all four flats. No point was taken by the Applicants in relation to the wording of the lease insofar as it affects the ability of the landlord to demand a service charge.

12. Clauses of the lease contain covenants for the landlord, inter alia, to maintain the Common Parts, to decorate the exterior within the year 2008 and every

third year thereafter and to decorate the internal Common Parts within the year 2010 and every fifth year thereafter and to maintain a reserve fund.

13. **Asbestos Survey**

The Applicants maintain that the asbestos survey conducted on behalf of Trust in the year 2008/09 at a cost of £458.85 was an unnecessary and, accordingly, unreasonable expenditure. They argue that because the building was constructed in 2004/05, some five years or more after the use of asbestos was forbidden by law, such a survey was not needed. Enquiries which the Applicants made with the Health & Safety Executive (HSE) resulted in a response from the HSE: *"You are correct when you state that a property built in 2005 would not need a landlord's asbestos survey, this is because it was illegal by then to construct buildings using asbestos products."*

The Respondent admitted that it was known at the time of the commission of the survey that the building had been constructed in 2004/05. Mr Mire argued, however, that a survey was required even in such circumstances because it had not been possible to gain an assurance at the time of the purchase of the freehold that the building was free of asbestos and because a duty of care was owed to, amongst others, contractors who would work on the building and who would need to know whether there was Asbestos Containing Material (ACM). Mr Mire further submitted that ACM was found during the survey.

The Tribunal finds the expenditure on the asbestos survey to be unnecessary and unreasonable. The Tribunal was disappointed to note that although the Respondent was aware of the date of construction, this was never passed on to the surveyor, who was left to guess as to the date of construction. In fact, the surveyor did not find any ACM, as the report makes clear. What the surveyor did was make a presumption about a material which he could not even see. We have also taken account of the advice which was given to the Applicants by the HSE, which we have recorded above, and of the following guidance given in the following HSE publication, which information was shared with the parties at the hearing:

Managing asbestos in buildings: A brief guide:
Step 1 Find out if asbestos is present
☐ Was the building built or refurbished before 2000?
☐ If Yes, assume asbestos is present.

If No, asbestos is unlikely to be present – no action required.

14. **Fire and Health and Safety Risk Assessment**

The Applicants question the need for a Fire and Health & Safety risk assessment in the year 2007/08 at a cost of £343.10.

The Respondent maintains that there was a legal requirement upon it in accordance with the Regulatory (Fire Safety) Reform Order 2005 to complete a fire safety audit and that the health and safety elements of the survey were part of good management required for the common parts of blocks of flats and that the overall cost was reasonable.

The Tribunal was disappointed to note that the fire safety audit was conducted so long after one had been legally required from 31 October 2006. However, such a survey was clearly a legal requirement and the ancillary elements were aspects of good property management. Whilst the Tribunal accepts that there are elements of the report which are open to some challenge, the report appears to be comprehensive and the cost appears to be a reasonable one having regard to the nature of the work conducted.

15. **Appointment of Trust as Managing Agents**

The Applicants maintain that the Respondent's agreement with Trust to manage the property created a qualifying long-term agreement for longer than 12 months, such that consultation with the tenants was required because of the cost involved.

The Respondent argued that the contract was a fixed term contract for 12 months only, that the contract was renewable and that the contract was indeed renewed each year.

The Tribunal heard Mr Mire's evidence on this issue and had an opportunity to examine the terms of the contract. Whilst accepting that the Applicants might well be suspicious that the contract was not renewed each year, but actually rolled on, and that, because the parties to the contract were so closely associated, it was unlikely that there would be anything other than an annual roll-over, the only actual evidence available to the Tribunal on this issue was that provided by a sample contract and the oral evidence of Mr Mire. On that basis, the Tribunal was unable to find that the contract with Trust was anything other than a renewable fixed term contract which did not constitute a qualifying long-term agreement for longer than 12 months.

16. **Management Fees**

The Applicants submitted that the management fees charged by the Respondent were higher than those charged by comparative suppliers and that the service provided by the Respondent was poor.

The Respondent submitted that the fees charged were reasonable because Trust had to adhere to RICS standards across the range of all its services, whereas the comparator chosen by the Applicants did not appear to be qualified. Mr Mire was unable to provide the Tribunal with any comparative figures of his own for the Bournemouth area and appeared to rely upon comparators in other cities, notably London and Birmingham.

The Tribunal took as its starting point a reasonable figure for management of a four-flat modern block in the Bournemouth area of £250 + VAT per flat or £1000 for the building. We applied our own knowledge of the area and also accepted that there would be a minimum figure expected by a recognised managing agent. We noted that the Respondent had insured the building and had paid invoices and kept accounts and taken other actions relative to its management of the building. However, it was apparent to the Tribunal, not least from our own inspection, that there was a lack of routine maintenance. Examples were ivy on fencing, attention required to the front retaining wall, staining to the external wall (obviously of long standing) and a skylight which appeared never to have been cleaned. That lack of attention was further evidenced by the surveyor's report, with which we will deal more fully later, and which highlighted a number of minor matters which the Tribunal would have expected to have been identified and dealt with earlier as part of routine management. We also note that the fire safety audit was delayed and that not all issues highlighted could be shown to have been followed up.

We also record breaches of the landlord's covenants for decoration. The Respondent appears wrongly to have assumed that the covenants were a matter of choice rather than obligation; it appears that no internal or external decoration in accordance with the terms of the lease was completed during the management of the building by the Respondent. It is also apparent that no reserve fund was maintained. The Tribunal noted Mr Mire's submission that if there was no sinking fund, there was no cost to the tenants, but that submission ignored the very purpose of a reserve fund, which is to save for a

rainy day rather than have to meet a large bill when that day arrives, all part of sound planning.

The Tribunal also was concerned by Mr Mire's admission that Trust did not maintain satisfactory records until 2011, such that he was unable to give the Tribunal any meaningful assurance that the building had been the subject of regular management visits in accordance with the RICS Service Charge Residential Management Code. The preponderance of evidence on the issue of visits pointed strongly towards an absence of visits, with the Tribunal being satisfied only as to two visits during a six-year period.

Having assessed a reasonable figure of £250 per year per flat at present rates, and having recorded the poor level of service provided here, we have concluded that this Respondent was entitled to charge only half of the sums charged during the years 2005/12.

17. **Building Surveyor's Fees**

The Applicants submitted that the fee of £293.75 charged in the year 2010/11 was unreasonable because such a survey would not have been required had the Respondent maintained the building in accordance with the requirements of the lease and had the Respondent provided a management service which could be justified by the fees charged for that service. The Applicants also submitted that the fee was excessive in any event.

The Respondent submitted that the survey was required. The Respondent was planning major decorative works and it was not unreasonable for the Respondent to use the services of a Chartered Surveyor, given that there would be a need for consultation and a need also to plan for the works and seek tenders. The report, whilst written in simple terms, covered more ground than simply the redecoration required and at £250 + VAT was a reasonable charge, given that the surveyor would in all likelihood have spent three hours in total (travel, survey, writing up) and could have charged £450 + VAT using normal charge-out rates.

The Tribunal was mindful that a lack of routine maintenance by the Respondent inevitably led to the listing of a number of issues within the survey report. However, it would be wrong to castigate the Respondent both for not complying with the covenants in the lease and then for putting a more professional approach towards subsequently complying with those covenants.

Mr Mire correctly pointed out that the comparator produced by the Applicants related to a significantly less extensive survey. The Tribunal had to balance the relevant circumstances and concluded that it was not unreasonable to charge £293.75, given the comprehensive assessment leading to the brief report, and given the various uses to which the report would be put.

18. **Insurance**

The Applicants had obtained comparisons from a local broker as to the premiums required to insure the building. Those comparisons showed a significant saving in relation to the premiums charged via the service charge. Mr Dennard was able to tell the Tribunal that the level of cover offered by the comparator broker was the same as that obtained by the Respondent (which is detailed below).

Mr Mire denied that any commission was received by Trust or to his knowledge by the Respondent in relation to the placing of insurance. A letter from the Respondent's insurance broker pointed to an approach to five insurers in the open market before the particular company was chosen. The Respondent argued that the cover included pre-existing subsidence, unauthorised occupancy, occupancy by high-risk individuals and for non-notified works.

The Tribunal noted that there was disagreement between the parties about the ability of the Applicants' broker to calculate premiums retrospectively, but that particular issue was not determinative.

The Tribunal accepts that there can be a real difference between what might be charged to a Right to Manage Company for a single property and what might be obtainable when a management company places a portfolio of business.

In the face of clear evidence by Mr Mire that no commission was received by Trust or Lakeside Developments Ltd and in the absence of evidence to the contrary, the Tribunal cannot conclude other than that the Respondent placed its business of insurance on a portfolio basis with a reputable insurance company via a reputable broker in the ordinary course of business. The Tribunal reminds itself that a premium above the lowest premium available in the market is not necessarily an unreasonable charge. Taking all of the matters in the round, the Tribunal has concluded that, whilst not the cheapest

available, the insurance charges are reasonable, having been obtained competitively at normal market rates albeit on a portfolio basis (**Berrycroft v Sinclair** (1996) Court of Appeal and **Forcelux Ltd v Sweetman** (2001) 2 EGLR 173 Lands Tribunal).

An issue was also raised about a perceived overcharge in the service charge account delivered on 13 July 2011. Insurance was charged at £895.25, whereas a certificate for the year 12 May 2011 to 11 May 2012 showed a total premium payable of £815.58. The Tribunal was satisfied that the certificate related to a period subsequent to the charge delivered on 13 July 2011, which was stated to cover the period 25 March 2010 to 24 March 2011. The Tribunal also accepted that, given the different accounting periods of service charge and insurance, there would necessarily have to be some reconciliation of the periods for the purpose of charging.

The Tribunal also saw documentation relating to another property managed by Trust where questions had arisen as to the correct fee charged for insurance and as to whether the service charge account correctly reflected the actual payment made by Trust. Whilst the Tribunal can understand the natural concerns of the Applicants, that matter was not relevant to this property and there was insufficient documentation and evidence for the Tribunal to reach any firm conclusions in relation to it in any event.

19. **Accountancy Fees**

The Applicants submit that it was possible for the Respondent to obtain accountancy services at a significantly lower rate.

The Respondent pointed out that the comparator was for work of significantly lower and different input.

The Tribunal accepted that there was not a true comparison between the work required to audit and certify the service charge accounts and what was offered by the comparator in respect of the RTM company's accounts. Indeed, the Flat Management Company letter made no reference to service charge accounts.

The Tribunal noted, however, that the charge made in 2010/11 when the accounts were audited by Trust's in-house accountant (the Group Financial Director) was £216, which contrasted starkly with the charges in the earlier years, 2006/10. The Tribunal also noted that the accounts for the years

2005/06, 2006/07, 2009/10 and 2010/11 failed to certify the accounts as required by the terms of Clause 5.1 of the lease. Taking account of the circumstances detailed and of the Tribunal's own knowledge of costs for accountancy in relation to the audit and certification of service charge accounts, the Tribunal finds that £200 plus VAT should be allowed for the years 2005/06, 2006/07 and 2009/10. £250 plus VAT should be allowed for the year 2008/09. The fee for 2010/11 is allowed in full.

Section 20C Application

20. The Applicants have made an application under Section 20C Landlord and Tenant Act 1985 in respect of the Respondent's costs incurred in these proceedings. The relevant law is detailed below:

Section 20C Landlord and Tenant Act 1985: Limitation of service charges: costs of proceedings

(1) 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 ..... 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.

(3) The ... tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances.

21. Mr Mire indicated that the Respondent would be unable to seek to recover the costs associated with these proceedings by way of service charge because the relationship of landlord and tenant no longer exists. Although that might be the end of the matter so far as the service charge is concerned, the Tribunal formally records that it allows the application under Section 20C of the Landlord and Tenant Act 1985. It directs that the landlord's costs in relation to this application are not to be regarded as relevant costs to be taken into account in determining the amount of the service charge for the current or any future year. Although the Tribunal did determine a number of matters in the Respondent's favour, there remained substantial issues unresolved between the parties in correspondence and negotiation, which the

Tribunal has resolved in the Applicants' favour and the Tribunal concludes that it was necessary for the Applicants to make this application.

Andrew Cresswell (Chairman) **Date 31 October 2012**
A member of the Southern Leasehold Valuation Tribunal
Appointed by the Lord Chancellor