HM COURTS AND TRIBUNALS SERVICE
LEASEHOLD VALUATION TRIBUNAL

Case No: CHI/'45UH/LIS/2011/0031

Between:

Oakland Court Worthing Residents Association

(Applicant)

and

The Oakland Pension Fund

(Respondent)

In the Matter of Sections 27A and 20C Landlord and Tenant Act 1985

Premises: Oakland Court, Gratwicke Road, Worthing, West Sussex BN11 4BZ ("the Premises")

Date of Hearing: 23rd April 2012

Tribunal: Mr D. Agnew BA LLB LLM Chairman
Mr M. Greenleaves
Mrs J. Herrington

Appearances: Ms S.Smith, counsel for the Applicant
Mr. J. Bates, counsel for the Respondent

In attendance: Mr J. Fenwick (Secretary) Mr A. Stopp and Mr G. Arnold (Committee Members) of the Applicant Residents' Association.
Ms Mitchell (trainee solicitor with the Respondent's solicitors) and Mr P. Hussey a representative of the Respondent pension fund.

DETERMINATION AND REASONS

Background

1. On 28th April 2011 the Applicant submitted an Application to the Tribunal under Section 27A of the Landlord and Tenant Act 1985 ("the 1985 Act") for a determination as to the liability to pay service charges going back to the inception of the leases of the flats at the Premises in 1987 in respect of a notional rent for the warden's flat which said service

charges had been levied on the lessees and paid.

2. The Respondent responded by making certain applications which the Tribunal directed should be decided as preliminary issues to the substantive determination of the case. Those issues concerned whether or not the Tribunal should accept jurisdiction to deal with the case, whether all or part of the claim should be dismissed and whether, in any event, the scope of the application should be limited to the period of six years preceding the date of the application. They were heard on 2nd November 2011 and the Determination and Reasons were issued on 30th November 2011. Further Directions were then given for the hearing of the substantive application on 23rd April 2012.

3. The following facts were not in dispute:-

a) Oakland Court is a block of 45 flats. One flat is reserved for use by a resident warden and the remaining 44 are let on long leases. Planning permission for the development was given in January 1985 on the basis that there would be 44 flats plus warden accommodation and on the basis of the plans submitted to the planning authority. Those plans had shown the location of the warden's flat in the development.

b) The leases of the flats were granted from 1986 onwards. The lessees are elderly as would be expected where there is provision for a warden. The leases are tri-partite, the original landlord being the developer,Oakland Limited. Four named individuals together known as the Oakland Pension Fund (the Respondent) were the party of the second part to the lease. The developer and subsequently the Respondent (as successor) covenanted, inter alia, to employ a resident employee or employees for the general supervision of the premises, answer emergency calls by the tenants and for "rendering good neighbourly assistance as the tenants may reasonably require." The duty did not extend to the provision of medical or personal care to the lessees.

c) The recitals to the leases state:-
" (2) The Landlord has built upon the land Retirement Homes and communal facilities and accommodation for a warden known as "Oakland Court" together with ancillary premises for the purposes of providing retirement homes"
.....
" (6) The Landlord and the Fund intend (but without incurring any legal obligation to do so) that when leases of all the dwellings shall have been granted or at such sooner time as shall be deemed advisable to the Landlord and the Fund the Landlord will convey to the Fund gratuitously the freehold of the Entire Property....."

d) The premises were transferred to the Respondent in 1988 although the Respondent's title was not registered at the Land Registry until November 1993.

e) From 1986/7 until approximately March 2010 the managing agents for Oakland Court were Countrywide Property Management. Fryzer Property Services took over the management of the premises thereafter.

f) Since 1987 the service charges for Oakland Court have included an amount (initially £4576 which rose to £5776 in 1993) for the notional rent of the warden's flat, although at various times this has been described misleadingly and erroneously by the managing agents and in service charge accounts as either "rent of communal parts" or "rent of demised premises".

4. It is the Applicant's case that there is no contractual right in the leases for the Respondent to recover the notional rent for a resident warden as a service charge. The Respondent says that this is to misunderstand the terms and effect of the lease and that the leases do not permit such a charge to be made. The nub of this case therefore is the true construction of the lease as to who is right and the If the Applicant is right it follows that the various lessees have been wrongly charged for and have paid this item in their service charge demands since 1987. Altogether this amounts to something in the region of £137,000 which is not an inconsiderable sum. If the Tribunal construes the lease as the Applicants contend then prima facie the lessees would have a claim in restitution to reclaim the monies wrongly paid by them and/or possibly a claim for breach of the trust established by Section 42 of the Landlord and Tenant Act 1987 on the part of the Respondent and/or a right to an equitable set-off against current outstanding service charges or future service charges. All these remedies are not within the jurisdiction of the Tribunal but would be a matter for the County Court. If and when these matters come before the County Court other issues are likely to be required to be determined by the court before a judgment can be given as to what the lessees may recover. These issues would include the question of limitation of actions (how far back the lessees or any particular one of them may go in seeking recovery) and also whether the current lessees can recover moneys paid by their predecessors in title before they themselves acquired their leases. Although the Tribunal does have jurisdiction to determine how far back any claim may go and also as to whether or not an applicant may seek to have determined matters relating to service charges levied before the applicant acquired his or her lease, the parties in this case both requested that the Tribunal leave those issues undetermined and that those matters would be argued out later before the County Court if necessary.

5. The Applicant produced an updated list of the names and addresses of lessees on whose behalf they make this application and that list is appended to this Determination. To that list must be added the name of Mr Alan Wingfield who has recently purchased Flat 36. He wrote to the Tribunal asking to be added as an Applicant. Mr Bates had no objection

to the updated list or to Mr Wingfield being added as an Applicant and this was therefore effected.

6. Ms Smith mentioned two other matters that had been included in the Applicant's original statement of case filed before the hearing of the preliminary issues but which were not addressed in the Directions issued after that hearing. The two issues were a) an allegation that the Respondent is estopped from denying that the service charges described as 'rent for communal parts" or "rent for demised premises" is anything other than that, and b) that the Respondent has not produced any certification as required by the lease as to any cost of provision of accommodation to the warden. As these items were not covered by the Directions neither party was in a position to proceed with them on 23rd April 2012 and Ms Smith asked to be able to reserve her position with regard to those two matters if the Tribunal found against her on the construction of the lease. The Tribunal agreed.

The lease terms

7. By clause 4(a) of the lease the Respondent covenanted to "perform and observe... the covenants contained in the Sixth Schedule...." As previously noted above this included the obligation to provide a resident warden.

8. By clause 2(b) the tenant covenanted "To pay such proportion of the maintenance cost as is defined in Part 1 of the Seventh Schedule hereto in manner set out in Part 3 of that Schedule."

9. Part 1 of the Seventh Schedule defines Maintenance Cost as:-
"... the total of all sums actually expended by [the Respondent] in connection with the management and maintenance of the Entire property and in particular but without prejudice to the generality of the foregoing shall include the following:-
1. The cost of complying with the [Respondent's] covenants contained in Clause 5 of this Lease and in the Sixth schedule hereto
2...
3... the cost of the provision of accommodation to any warden... employed in the Entire Property.... And the General and Water Rates and other outgoings payable in respect of such accommodation and the repair and decoration thereof."
8. The Fund will use its best endeavours to maintain the Maintenance Cost at the lowest reasonable figure consistent with the due performance and observance of its obligations....."

10. In paragraph 2 of Part II of the Seventh Schedule it states:-
"As soon as practicable after the end of each... twelve monthly period and in any case within 6 months thereof the Fund shall render to the Tenant a Maintenance Account showing the Maintenance Cost actually

expended during the twelve monthly period and shall certify the actual amount of the Tenant's liability in respect of the Maintenance Cost for that twelve monthly period."

11. By Part III of the Seventh Schedule it is provided that "The Tenant shall pay 2% per cent or such other proportion of the Maintenance Cost in the following manner....."

The Law

12. By section 27A(1) of the Landlord and Tenant Act 1985:-
"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
As stated above, the Tribunal is being asked to determine at this stage only whether a service charge is payable for the notional cost of the warden's flat.

The Applicant's case

13. Ms Smith referred the Tribunal to the relevant clauses in the lease which constitute the tenant's liabilities with regard to the payment of service charge and in particular to Part I of the Seventh Schedule which states that the Maintenance Cost shall be the total of all sums actually expended (emphasis added) by the Fund in connection with the management and maintenance of the property. The words "actually expended" do not cover notional expenditure because notional expenditure is not actual expenditure. She referred to this part of the Schedule as the "umbrella" provision under which the clauses that followed were encompassed. Those further clauses were expressed to be "without prejudice" to the umbrella provision and could not therefore detract from it. She referred to the authority of Earl Cadogan v 27/29 Sloane Gardens Ltd [2006] L & T R 18 where HH Judge Rich QC at paragraph H12 said:

a) it is for the landlord to show that a reasonable tenant would perceive that the underlease obliged him to make the payment sought;

b) such conclusion must emerge clearly and plainly from the words used;

c) thus, if the words used could reasonably be read as providing for some other circumstance the landlord will fail to discharge the onus upon him;

(d) this does not however permit the rejection of the natural meaning of the words in their context on the basis of some other fanciful meaning or purpose and the context may justify a " liberal" meaning; and

(d) if consideration of the clause leaves an ambiguity then the ambiguity will be resolved against the landlord as proferror."

Ms Smith contended that no reasonable tenant would perceive from reading the lease that he had to pay a notional rent but if the clause is ambiguous then it should be construed against the landlord.

14. Ms Smith then referred to one of the probanda set out by Lord Hoffman in the case of Investors Compensation Scheme v West Bromwich Building Society reported in the Weekly Law Reports for 22nd May 1998 at page 896. The interpretation of the lease concerns the "ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably been available to the parties in the situation in which they were at the time of the contract." Ms Smith points out that no mention is made of a notional charge for the warden's flat in the sales brochure or the estimated running costs produced by the estate agents at the time of the initial sales of the flats or pre contract enquiries.

15. Ms Smith relied on a number of cases in support of her case. In particular she cited Gilje v Charlgrove Securities Limited [2001] EWCA Civ 1777. In that case there was a covenant by the tenant to pay "all monies expended by the lessor in carrying out all or any of the works and providing the services and management and administration called for under clause 5(4)....." The issue in the case was whether the tenants were required under the lease to pay a notional rent for a caretaker's flat. It was held that they were not. Laws LJ at paragraph 27 said that "On ordinary principles there must be clear terms in the contractual provisions said to entitle [the landlord] to do so. The lease, moreover, was drafted or proffered by the landlord. It falls to be construed contra proferentem." At paragraph 28 he said: " I do not consider that a reasonable tenant or prospective tenant, reading the underlease .... would perceive that paragraph 4 (2)(1) obliged him to contribute to the notional cost to the landlord of providing the caretaker's flat. Such a construction has to emerge clearly and plainly from the words used. It does not do so." Ms Smith points to the similarities between that case and this. Indeed, she says that the provision in the Oakland Court leases is even clearer than in Gilje because it refers to actual expenditure and not simply "expenditure". She contends that the Respondent's interpretation of the lease renders the words "actual expenditure" as surplusage.

The Respondent's case

16 Mr Bates contended that what the lease means is not to be decided by decided cases because the same words have different meanings

depending upon the context in which they are used. He submitted that the key contextual point in this case was that the Respondents received nothing for the grant of the leases. The developer took the premium. The pension fund took on the liability of maintaining the block including the warden's flat and including the liability for providing that facility. It is unlikely that a pension fund would take on that sort of liability if it were to be unfunded. The crucial factor in the background factual matrix is that the lessees or prospective lessees know that all the services including the warden are being provided by a pension fund and they know that the pension fund is getting nothing other than ground rent and the amount it can recover through the service charge. Any reasonable tenant would have expected the pension fund to be able to recover the cost to it of providing the service of the use of the warden's flat, he asserted.

16. Mr Bates's argument continued that if, as is the case, the Applicant accepts that even if the lease is construed as the Applicant contends there are ways under the lease that the Respondent can legitimately recover a rent for the warden's flat (for example by granting a lease to an intermediate tenant who would charge the warden a rent and increasing the warden's wages to cover the rent paid) then what is being disputed is merely the method by which the end result is achieved and not the end result itself.

17. With regard to the wording of Schedule 7 part 1 itself, Mr Bates accepted that if the wording of the pre-amble to the Schedule had stopped after the words "Entire Property" he would stand little chance in persuading this or any other tribunal that only actual expenditure and not notional expenditure could be claimed as service charge. However, he asserted that paragraphs 1 and 3 were sufficiently drafted to include notional rent for the warden's flat because it was a "cost" of the respondent complying with its covenants and it was a 'cost" of the provision of accommodation to any warden. He maintained that paragraphs 1 and 3 were the important ones in construing the lease, not the preamble to those paragraphs. He pointed out the words "in particular" and the word 'shall" signifying that the latter wording is mandatory and that the expenses referred to in paragraphs 1 and 3 must therefore be included in the Maintenance Costs.

18. He pointed out that the case of Agavil Investments Ltd v Corner an unreported case in the Court of Appeal Cairns LJ had held that the loss to the landlords by giving up a flat for the occupation of a caretaker and being unable to let the flat to a tenant falls reasonably within the words "costs or expenses incurred". He said that foregoing an advantage may be included in costs incurred in the provision of accommodation which is the case with regard to Oakland Court. The Agavil case would have been the leading authority at the time the leases were granted and should therefore have been taken into account by any solicitor advising the prospective tenant at the time of entering into the lease. In Lloyds Bank v Bowker Orford [1992] 31EG 68 the cost of housing a caretaker included a notional rent being money foregone by providing the

accommodation. He submitted that the pension fund were foregoing money or at least an advantage by having to make the flat available to the warden.

19. Mr Bates posed the rhetorical question: "If Schedule 7 Part 1 does not provide for recovery of a notional rent, what does it deal with? He asserted that the Applicant's interpretation denudes paragraph 3 of schedule 7 Part 1 of any meaning. The Tribunal should lean against surplusage in construing this lease.

The Determination

20. The Tribunal determines that on a true construction of the leases of Oakland Court Worthing, the Respondent is not entitled to charge a notional rent for the warden's flat by way of service charge, whether that charge be described as such or "rent of communal parts" or "rent of demised premises".

21. In reaching that conclusion the Tribunal first considered the five probanda set out in the speech of Lord Hoffman in the Investors Compensation Scheme case referred to at paragraph 14 above and set out fully in the Respondent's amended Statement of Case at paragraph 13. The Tribunal decided that in their view a reasonable person having the background knowledge which would have been reasonably available to the parties at the time of the contract would not have understood that the landlord could seek a payment of a notional rent for the warden's flat. Why is that? First, the prospective tenant would read the lease. The Tribunal considered that the reasonable person reading the wording of the preamble to Part 1 of the Seventh Schedule would consider that the words contained in the preamble governed the rest of the Schedule. They come first and the numbered paragraphs that appear subsequently are expressed to be without prejudice to the preamble. In other words, they do not cut down the meaning and effect of the preamble.The wording of the preamble states that only sums actually expended comprise the Maintenance Cost. This can hardly be clearer. It is straining language too far to say that "actual" can also mean "notional". Mr Bates did not try to suggest otherwise and conceded that if matters stopped there there would be no way in which he could persuade any tribunal to the contrary. The Tribunal did not agree with Mr Bates, however, in his contention that it was paragraphs 1 and 3 which were the more important provisions and preferred Ms Smith's view that the preamble forms the "umbrella" provision to which the subsequent paragraphs are subject . It is true that if the preamble had not been there a construction of paragraphs 1 and 3 could admit to an inclusion of a notional cost for the warden's flat rent if the "cost" of complying with the Fund's covenants and the "cost" of the provision of the warden's accommodation is construed as in the Agavil case referred to at paragraph 18 above and if notional rent or an advantage foregone is construed, again as in Agavil, as a "cost incurred". With regard to the former the case of Agavil illustrates that the word "cost" means different

things in different contexts. Whilst it might be extended to include notional costs in some contexts, such as those in Agavil itself, in other contexts it might not. In the context of the Oakland Court leases where the wording of the preamble restricts the Maintenance Cost to sums actually expended, it would be perfectly consistent with that if the word "cost" in paragraphs 1 and 3 of the Schedule were to be construed as meaning actual and not notional costs. With regard to the latter the Tribunal did not agree that the Respondent had "foregone" anything as the provision of a warden's flat was a term of the planning consent and not an option and the reasonable person reading the lease would not, in the Tribunal's view, have concluded differently.

22. This takes one to the second of Lord Hoffman's probanda, namely the background factual matrix. Mr Bates says that a prospective lessee would have known that the freehold and hence the Landlord's obligations under the lease were to be acquired by a pension fund and that they would know that no pension fund, which owes a duty to its beneficiaries to maximise the return on its investments and assets would intend a situation whereby it acquired an unfunded liability. The reasonable person contemplating entering this contract as lessee would therefore have known that the pension fund would be seeking to recover a notional rent for the warden's flat. That potential lessee would also see that the pension fund was to take on the liabilities under the lease for no consideration and the only source of income for the pension fund from this investment was to be the ground rent and the service charge. The Tribunal considered that to invest the potential lessee with the realisation that the pension fund would be taking on an unfunded liability if it did not seek a notional rent for the caretaker's flat is unrealistic and expecting too much knowledge and sophistication on the part of the ordinary reasonable potential lessee. It would also be expecting too much of his or her solicitor acting on the purchase to enquire into the circumstances of the particular intended lessor and what they might or might not require from their investment. On the other hand the prospective lessee or his solicitor might reasonably be expected to take the view that the pension fund in this case intended to acquire a substantial freehold asset and ground rent income for nothing and that its liabilities involving actual expenditure are capable of being recovered via the service charge. The Tribunal did not consider that the reasonable person contemplating this would reasonably think that on top of this the landlord would be able to seek a rent for part of the property which he was unable to let to anyone else (cf the situation in Agavil) due to the terms of the planning consent. In that respect the Tribunal could not see what the Landlord was supposed to be foregoing by making the flat available to the warden.

23. The third of Lord Hoffman's probanda is not relevant to this case as there have been no declarations of subjective intent.

24. As for the fourth probandum neither party tried to persuade the Tribunal to adopt dictionary definitions of the words used in the lease.

25. The fifth of Lord Hoffman's probanda is that words should be given their "natural and ordinary meaning" unless from the background something must have gone wrong with the language. In this case the Tribunal did not consider that there was anything in the background that would lead inevitably or even on a balance of probability that something had gone wrong.

26. In both Earl Cadogan v 27/29 Sloane Square and Gilje v Charlgrove Securities Limited it was stated that when construing leases the conclusion that a tenant is obliged to make the payment sought must emerge clearly and plainly from the words used and if they do not then the landlord has failed to discharge the onus on him and will not succeed in recovering the item in question. The Tribunal did not consider that the Respondent had shown that it emerged clearly and plainly from the lease that the landlord could recover from the tenant a notional charge for rent for the warden's flat and therefore the landlord is not entitled to recover that item from the tenant.

27. The Tribunal was urged to construe the clauses of the lease in issue in the context of the lease as a whole. In so doing, the Tribunal found nothing in the rest of the lease that would support the Respondent's construction of the clauses in question in this case. On the other hand the Tribunal noted that in paragraph 2 Part II of the Seventh Schedule the Landlord is required to render a Maintenance Account "showing the Maintenance Costs actually expended" and by Part III of the Schedule it is 2% of the Maintenance Cost that is paid by the tenant as the service charge. Here again, therefore, the words "actually expended" are used reinforcing the Tribunal's view that it was the intention of the parties to the lease that it was only actual and not notional expenses that were to be recovered by the landlord under the lease.

28. It may be that for the future the Respondent can get round the problem resulting from the Tribunal's decision as to the true construction of the lease. This is not a reason, in the Tribunal's view, for ignoring what it considers the lease to mean on the basis that what is being argued over is merely the methodology of achieving the same end. It is the Tribunal's task to construe the lease which is what it has done, not to speculate on what may or may not be done by the party adversely affected by its decision in an attempt to remedy the situation.

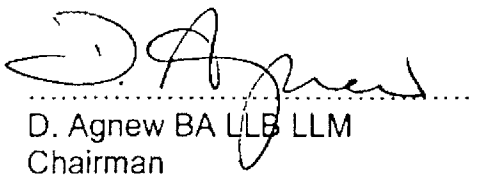
29. This decision is binding on the parties to these proceedings. As stated at paragraph 4 above it deals only with the payability of the charge for a notional rent for the warden's flat and, at the express request of the parties, does not go on to deal with paragraphs (a) to (e) of section 27A(1)of the 1985 Act. It does not preclude previous lessees from taking proceedings for a determination in their favour if they so wish, although the matter having been decided in these proceedings the Tribunal would hope that any such proceedings would be unnecessary. This decision does not quantify the amount that any particular lessee may seek to recover from the Respondent or make any determination as to how far

back any lessee may go in seeking recovery from the Respondent and all arguments with regard to these matters are at large and will be matters for the County Court.

30. The Applicant made an application under section 20C of the 1985 Act for an order that the costs of these proceedings should not be capable of being added to any future service charge demand and also an application that the application fee be refunded by the Respondent. Both counsel accepted that the decision in respect of each of these applications would follow the event. As the Applicant has succeeded in full in its application the Tribunal considers that it would be just and equitable to make an order under section 20C and that it is fair and reasonable for the Respondent to reimburse Mr Fenwick personally the application fee (the Applicant Residents Association having no funds or bank account and he having personally paid the application fee from his own pocket).

31. The Tribunal wishes to thank both counsel for the way they conducted the case and the assistance given to the Tribunal and particularly Ms Smith who was acting pro bono.

Dated this 11th May 2012



D. Agnew BA LLB LLM
Chairman