

**RESIDENTIAL PROPERTY TRIBUNAL SERVICE  
LEASEHOLD VALUATION TRIBUNAL for the  
LONDON RENT ASSESSMENT PANEL  
LANDLORD AND TENANT ACT 1985, AS AMENDED  
SECTIONS 27A and 20C**

**LON/OOAU/LSC/2007/0387**

---

**Premises:** 43D Milner Square London N1 1TW, 14 Crayle House, Malta Street, EC1V OBT and 25 Mulberry Court, Tompion Street, EC1V OHP

**Applicants:** Mr M Read (43D Milner Square)  
Mr O Hart (14 Crayle House)  
Mr D Hyams (25 Mulberry Court)

**Respondent:** London Borough of Islington

**Appearances**

Mr F Davey of Counsel  
Mr M Read  
Mr O Hart for the Applicants

Mr C Baker of Counsel  
Ms G Clarke, Assistant Director of Law  
Mr N Freeman, Operations Manager, Home Ownership Unit  
Ms J Davis-Reed, Principal Partnerships Officer  
for the Respondent

**Dates of hearing** 29 November 2007

**Date of Tribunal's decision** 10 December 2007

**Tribunal:** Mrs J S L Goulden JP  
Mr C Kane FRICS  
Mrs J Clark JP

**REFERENCE: LON/OOAU/LSC/2007/0387**

**PROPERTIES: 43D MILNER SQUARE, LONDON N1 1TW; 14 CRAYLE HOUSE, MALTA STREET, EC1V 0BT and 25 MULBERRY COURT, TOMPION STREET, EC1V OHP**

### **Background**

1. The Tribunal was dealing with the following applications, both of which were dated 11 October 2007:-

(a) an application under S 27A of the Landlord and Tenant Act 1985, as amended ("the Act") 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

(b) an application under S20C of the Act to limit landlord's costs of proceedings before the Tribunal.

2. The Applicants are Mr Michael Read (43D Milner Square), Mr Owen Hart (14 Crayle House) and Mr David Hyams (25 Mulberry Court). The Respondent is London Borough of Islington.

3. The Tribunal was provided with a copy of each of the leases of the respective properties. 43D Milner Square N1 is a first floor flat owned by Mr Read and held under a lease dated 27 November 1989 and made between the Respondent (1) and M A Read (2) for a term of 125 years from 25 March 1982. 14 Crayle House, Malta Street EC1 is a third and fourth floor flat owned by Mr Hart and held under a lease dated 23 July 1990 and made between the Respondent (1) and F C Cooper (2) for a term of 125 years from 25 March 1984. 25 Mulberry Court Tompion Street EC1V OMP is a third floor flat owned by Mr Hyams and held under a lease (the copy of which was undated) and made between the Respondent (1) and G and D Hyams(2) for a term of 125 years from 25 December 1987. All the leases were at the rents and subject to the terms and conditions therein contained and the Tribunal was advised that all three leases were in essentially the same form.

4. Although the Tribunal's Directions dated 15 October 2007 indicated that a paper hearing might be appropriate, by a letter dated 8 November 2007, the Respondent requested an oral hearing on the basis that *"this case is of significant importance to the*

*Respondent and potentially to a significant number of Council leaseholders in the borough"*

### **Hearing**

5. The hearing took place on 29 November 2007.

6. Two of the Applicants, namely Mr M Read and Mr O Hart, appeared in person and were represented by Mr F Davey of Counsel. The Respondent was represented by Mr C Baker of Council and Ms G Clarke, Assistant Director of Law. Evidence for the Respondent was given by Mr N Freeman, Operations Manager, Home Ownership Unit. Also attending on behalf of the Respondent was Ms J Davis-Reed, Principal Partnerships Officer.

7. At the commencement of the hearing, Mr Baker was asked if it was intended to place landlord's costs of proceedings before the Tribunal on the service charge account. Mr Baker, on behalf of the Respondent, said that the leases did not permit such costs to be placed on the service charge account. In the circumstances, no determination is required of the Tribunal under S20C of the Act and the consequence of this was explained to the Applicants who were present.

8. The issues in dispute and which required the determination of the Tribunal were as follows:-

**The liability to pay a levy for the formation of a leaseholders' association as part of a service charge.**

**Reimbursement of fees**

9. In view of the nature of the dispute, the Tribunal considered it unnecessary for an inspection of the property to be made.

10. After discussions between the Tribunal and both sides, and after a short adjournment, it was accepted that the Tribunal was to be asked to make a determination in respect of one issue only at this stage, namely whether, as a matter of construction, the Applicant's leases made provision for the recovery of a service charge in respect of the costs of the proposed borough wide Islington Leaseholder Association (ILA).

## **The liability to pay a levy for the formation of a leaseholders' association as part of a service charge**

### **The background**

11. A statement by Mr N Freeman, Operations Manager Home Ownership Unit, Homes for Islington dated 20 November 2007 was submitted on behalf of the Respondent, and he was questioned by the Tribunal.

12. Homes for Islington (HFI) had inherited from the Respondent a leaseholders forum which was a consultative body on which leaseholders' views were sought on the Respondent's policies and procedures but it was stated *"the Respondent became aware that leaseholders wanted an organisation/body that had a degree of independence and resources to provide services to leaseholders in the borough. As a result discussions took place between the Respondent and HFI and it was decided to ballot leaseholders to test whether leaseholders were in favour of setting up an independent association. HFI was tasked with delivering what the Respondent decided... The purpose of the Association is to bring together all residential leaseholders of Islington Council to develop and improve leasehold management services. The aim of the Association is to support all Islington Council leaseholders and to represent their views to the Council and HFI and to scrutinise the way services are provided and by offering a mediation function"*.

13. A ballot was conducted by the Respondent after writing to all leaseholders with information on the proposed association and answers to frequently asked questions. These were provided to the Tribunal, as was a draft constitution. From a note of the minutes of a meeting held on 14 March 2007, it appears that of the 2120 leaseholders who did vote, (of approximately 10,000 leaseholders), 76% were in favour. There was a turnout of 22%.

14. Mr Freeman said that the initial sum to be placed on the service charge was £20.80 per annum and he had collected £10.40 from each leaseholder in the estimated service charges for 2007/2008. In the Frequently asked Questions sent out with the ballot, it was stated that the charge would be 40p per week, The amount collected was £110,000. This sum had not been spent since the organisation did not yet exist and the set up costs would be paid by the Respondent. He accepted that the sum would be paid to the organisation once set up. The amount to be collected had been agreed between the steering group and the council.

15. Mr Freeman said that the idea of setting up this type of association was leaseholder led. Certain leaseholders had made the suggestion to elected members of the council who had discussed the same with the Director of Housing. He denied that it was a money making exercise and said that the association can control funds to assist the council with management of properties. It was independent in the sense that the terms of reference would not be constrained . The Respondent would decide how much had to be collected.

### **The Applicants' case**

16. The Applicants stated that the intention of the Respondent to levy a recurring service charge (initially at £20.80 per annum) on Right to Buy tenants to fund a borough wide leaseholders' association was not permitted under the terms of their leases.

17. In the Applicants' statement of case, it was stated, *"The charge has been imposed by our landlord, the London Borough of Islington, on all of its 11,300 leaseholders from 1 October 2007. The annual charge has been set initially at £20.40. The charge is thought to be unique and unprecedented in the UK. No other landlord in either the social or private sectors has ever attempted to creatively interpret a lease in this manner to justify such a charge, to our knowledge. We assert that the lease must be restrictively interpreted. It is what it says it is. And no more"*.

18. In support of the Applicants' contention, a copy of an email dated 5 December 2006 from Mr A Essien, a Principal Legal Advisor at LEASE (a leasehold advisory service) to Mr Hart and an Advice (undated) from Mr F Davey of Counsel, also to Mr Hart were provided.

19. In his skeleton argument, Mr Davey argued that service charges arise as a result of a private covenant between landlord and tenant and whether or not they were payable depended on the construction of a particular lease and should be construed restrictively. Mr Davey rejected the cases referred to by the Respondent (as detailed in paragraph 25 below). He said the cases, which referred to the powers of a local authority to manage its social housing stock and statutory management powers *"can have no conceivable relevance to the interpretation of a service charge clause within a lease"*. He said that the proper question for the Tribunal is whether either party to a lease *"would have contemplated that "management" would encompass the creation of an independent organisation for the benefit of all leaseholders of the borough...it is immaterial whether such an organisation would be beneficial to leaseholders"*

### **The Respondent's case**

20. Mr Baker, for the Respondent said Clauses 1(2) and 3(1) in the leases made provision for the leaseholder to pay a service charge, and the service charge was defined, so far as material, in Clause 5(2), and it was this clause only on which Mr Baker relied and was as follows:-

**"A proportion of the expenses and outgoings incurred or to be incurred by the Council of those items set out in the Third Schedule hereto and which**

comprise.....(ii) the provision of services for the Building [and the Estate (if any)], and (iii) other heads of expenditure"

21. In respect of Clause 5(2), the words "**and the Estate (if any)**" as shown in square brackets above are included in Mr Hart's lease of 14 Crayle House and Mr Hyams' lease of 23 Mulberry Court but are excluded from Mr Read's lease of 43D Milner Square.

23. The Third Schedule in each lease contains the following provision under the heading "Management Element":-

**"(c) General Management Costs**

**Supervision and management of the Building [and the Estate] including liaison with technical staff within or without the Council concerning repairs maintenance renewals and decorations and all other matters referred to in this Schedule"**

24. In respect of the Third Schedule, the words "**and the Estate**" as shown in square brackets above are included in Mr Hart's lease of 14 Crayle House and Mr Hyams' lease of 23 Mulberry Court but are excluded from Mr Read's lease of 43D Milner Square.

25. In Mr Baker's view, the Respondent's case was that the costs of the proposed organisation fell within the scope of management. In support, he referred to two cases, **Akumah v Hackney LBC [2005] UKHL 17** and **A-G v Crayford UDC [1962] Ch575, CA**.

**The Tribunal's Determination**

26. The contract between each of the Applicants and the Respondent is set out in the lease between them, and this must be the starting point for the Tribunal in its considerations. In this case there is no specific clause providing for the proposed organisation to be set up.

27. When construing service charge provisions, the Tribunal seeks to determine the intentions of the parties to the lease by taking into account its words, read in the context of the underlying purpose of the parties in entering into a lease containing a service charge provision.

28. Where a service charge clause is ambiguous and is not one which requires either correction or rectification, it is to be construed contrary to the interest of the party who put the clause forward. In this case, the Respondent. In the case of **Gilje v Charlgrove Securities [2001] EWCA Civ.177**, Laws LJ stated "*The landlord seeks to recover money from the tenant. On ordinary principles there must be clear terms in the contractual provisions said to entitle him to do so. The lease, moreover, was drafted or proffered by the landlord. It falls to be construed contra proferentem....At the end of the day, I do not*

*consider that a reasonable tenant or prospective tenant, reading the underlease which was proffered to him would perceive that clause... obliged him to contribute... Such a construction has to emerge clearly and plainly from the words that are used".*

29. The Tribunal has considered carefully the case law provided on behalf of the Respondent, but agrees with Mr Davey's contention that these refer to the local authority's powers to manage its social housing stock and statutory management powers. This Tribunal does not consider that these cases are of assistance in respect of the construction of a private contract between a landlord and a tenant. From the guidance as set out in the **Gilje** case above, the Tribunal does not consider that a reasonable tenant reading the lease which was proffered to him would perceive, from Clause 5(2) of the lease (the only clause on which the Respondent seeks to rely), that it would oblige him to contribute to the formation of the organisation proposed. In this particular case, it is noted that there is already a leaseholders' forum, in which they can air their views.

30. The Tribunal has also considered the present aims and objectives as set out in the draft constitution. In the view of this Tribunal, they do not encompass management by the Respondent (and therefore fall outside Clause 5(2)) but ways in which the tenants can manage issues themselves.

31. Further, it may of course be entirely reasonable to set up the ILA, but there is no such specific provision in any of the leases and a term in favour of either party cannot be implied on the grounds of reasonableness. In the case of **Berrycroft Management Co. Ltd v Sinclair Gardens Investments (Kensington) Ltd [1997] EGLR 47**, the Court of Appeal declined to imply a term on the grounds of reasonableness stating "*It is axiomatic that a court will not imply a term which has not been expressed merely because, had the parties thought of the possibility of expressing that term, it would have been reasonable for them to have done so. Before a term which has not been expressed can be implied it has got to be shown not merely that it would have been reasonable to make that implication, but that it is necessary in order to make the contract work that such a term should be implied*".

32. Accordingly, the Tribunal determines that, as a matter of construction, the terms of the Applicants' leases do not make provision for the recovery of a service charge in respect of the costs of the proposed association and no such term can be implied.

### **Reimbursement of fees**

33. The fees under this head amounted to £200 in total, being £50 application fee and £150 hearing fee.

34. Mr Davey contended that it had been difficult to try and find out the legal basis on which the service charge on this issue was to be demanded. The opinion of Mr Essien had been sent to the Respondent in December 2006 and the Advice of Mr Davey had been

sent to the Respondent in October 2007. Mr Davey said that the Applicants had only learned on which clause the Respondent intended to rely on or about the 22 November 2007. In his view *"we could have avoided some of this"*. Mr Baker did not wish to make oral representations in view of the sum involved.


**The Tribunal's Determination**

35. In accordance with paragraph 4 of Directions issued by the Leasehold Valuation Tribunal on 15 October 2007, the Tribunal considered whether to exercise its discretion under Regulation 9 of the Leasehold Valuation Tribunals (Fees) (England) Regulations 2003.

36. The Tribunal acknowledges that both sides have incurred costs which are irrecoverable. It is felt that, in the particular circumstances of this case, to make an order for the Respondent to reimburse any part of the application and/or hearing fees would be punitive.

37. The Tribunal does not intend to exercise its discretion under this head and declines to make an order for reimbursement by the Respondent to the Applicants of the application and/or hearing fees or any part thereof.

**The Tribunal's determinations as to service charges are binding on the parties and may be enforced through the county courts if service charges determined as payable remain unpaid.**

CHAIRMAN.....

DATE.....10 December 2007.....