



**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)**

Case Reference : CAM/22UJ/LSC/2016/0031

Property : 5, 6, 8, 9 & 10 Newstead Way, Harlow CM20 1BW

Applicants : Helen Reeve (5), Amy Thomas (6), Alan Dean (8),
Giovanna Cirillo (9) & Ms N Bastin (10)

Representative : Neil McEleny CIHM

Respondent : Swan Housing Association

Representative : Hafsa Begum (Service Charge Accountant) and
Gill Macdonald (Snr Leasehold Management Officer)

Type of Application : For determination of reasonableness and payability
of service charges for the years 2012-13, 2013-14,
2014-15, 2015-16 & 2016-17 [LTA 1985, s.27A]

Tribunal Members : G K Sinclair, N Martindale FRICS & J E Francis QPM

**Date and venue
of hearing** : Wednesday 31st May 2017 at Cambridge County Ct

Date of Decision : 2nd June 2017

DECISION

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Summary

1. On 9th May 2016 an application for determination of service charges was received at the tribunal office. On behalf of five lessees of the above building (that word being used in its usual dictionary sense) raised a very large number of issues arising in service charge years from 2012–13 onwards. Directions were issued on 18th May 2016.
2. Neither party is or was legally represented. After an inspection of the site the hearing began at a venue in Harlow. Due to the volume of documentary material adduced at the last minute and the number of issues contested the management of the hearing on Wednesday 17th August 2016 proved rather unwieldy and it was adjourned part-heard, following which the tribunal issued additional directions on 22nd August for the production of further specific information concerning the respective legal titles so that the tribunal, at the parties’s request, could assist by determining various points of construction of the lease and thus narrow the range of the factual dispute between them and, if settlement could not then be achieved, reduce the volume of documentary evidence required at any further hearing.
3. Waters had been muddied by the summary determination of certain points by a previous tribunal in 2013,¹ as a result of which the landlord had purported to amend the service charge proportions payable by each of the Newstead Way flats as from the year 2014–2015 (i.e. from part-way through the period currently under challenge by the applicants) by serving upon them a letter pursuant to clause 7(9) dated 1st May 2014.
4. By its decision dated 1st November 2016 this tribunal determined a number of preliminary points of construction of the lease, finding (contrary to the decision of a previous tribunal in 2013) that the term “Building” means each and every building or inhabited structure on the land and property within the boundaries shown in the plan to title EX799066, divided into 22 units of accommodation; this being commensurate with a block specified proportion of service charge costs per unit of 4.55%. On a further point, concerning the correct interpretation of the term “the Public Areas”, the tribunal by a decision dated 30th January 2017 reviewing its earlier substantive decision corrected the wording of paragraph 5. c.i. so that the areas shown hatched green on a poorly coloured transfer plan are determined not to be the private roadways giving access to individual car parking areas and a footpath running between two facing rows of houses between Parish Way and Newstead Way but instead are those parts shown on the diagram in the top left part of the plan, all of which comprise green open area maintained by the main developer’s management company (OM/Firstport).
5. The tribunal’s substantive decision on points of principle concluded with further

¹ See CAM/22UJ/LSC/2013/0064

directions, inviting the parties to attempt to settle the dispute or at least narrow the issues between them. To that end further extensions of time were granted at the parties' request. While the matter could not be settled entirely the tribunal was pleased to receive, shortly before the final hearing, a short agreed schedule comprising 8 points, the last two of which dealt with the costs of this application and of a possible variation of each relevant lessee's lease. That left six points of dispute which the tribunal was able to deal with methodically in a morning session.

6. For the reasons which follow the tribunal determines that :
- a. The freeholder's managing agents' (First Port) estate and sub-estate costs passed on by Swan to its lessees have not been challenged adequately until recently. For failing adequately to monitor First Port's charges, but simply passing them on to lessees, the amount recoverable by Swan in respect of the management fee under the estate charge is reduced to a nominal £5 per annum per lessee.
 - b. Window cleaning – the ineptitude of the cleaning contractor in billing only occasionally has benefited the applicant lessees. They must pay the full amount now billed, the tribunal recording the promise by Swan that if any backdated invoices are received by it for work done by Crystal Clear that has not previously been invoiced then such additional cost shall not be passed on by it to the lessees.
 - c. Block electricity charges : 2012–13 & 2013–14 – although based on a mixture of estimated and actual electricity meter readings the tribunal has determined that the cost incurred by all 22 flats within “the building” must be shared amongst the service charge payers equally. The sums claimed are payable.
 - d. Bulk refuse disposal : 2012 onwards – this is calculated not by reference to this particular estate or building but by Swan's portfolio of properties across East London and Essex generally and is therefore not payable.
 - e. Audit/accountancy fee : 2012 onwards – this is allowed for by clause 7(5)(c) of the lease and the cost is considered reasonable and payable
 - f. Prelim fees : 2012 onwards – here again this tribunal disagrees with the finding (based on a lack of evidence or explanation provided) of the tribunal in 2013. Upon the basis of far greater detail concerning the s.20 exercise concerning the 14-year long term agreement for maintenance and repair entered into by Swan in 2008 the tribunal considers that this cost, as a proportion of the overall package entered into with main contractor Axis, is reasonable and payable.
 - g. While Swan has not sought to add its costs incurred in dealing with this application the tribunal, for the avoidance of doubt, makes an order under section 20C preventing it from including such costs in the calculation of the service charges payable for this or any future service charge period.
 - h. How the parties approach the issue of varying all relevant leases, and for what purpose, are matters not for determination in these proceedings.

Relevant lease provisions

7. Most of the relevant lease provisions are set out in great detail in the tribunal's previous decision dated 1st November 2016. To that the tribunal needs add only the following.

8. Clause 7(5) sets out the expenditure reasonably incurred by the landlord in connection with the repair management maintenance and provision of services for the block that is to be included in the Block Service Provision. Specifically, clause 7(5)(c) provides that it includes :

all reasonable fees charges and expenses payable to the Surveyor any solicitor accountant surveyor valuer architect or other person whom the Landlord may from time to time reasonably employ in connection with the management or maintenance of the Block including the computation and collection of rent (but not including fees charges or expenses in connection with the effecting of any letting or sale of any premises) **including the cost of preparation of the account of the Service Charge and if any such work shall be undertaken by an employee of the Landlord then a reasonable allowance for the Landlord for such work** [emphasis added]

Material statutory provisions

9. Section 18 of the Landlord and Tenant Act 1985 defines the expression “service charge”, for the tribunal’s purposes, as :
- 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...
10. The overall amount payable as a service charge continues to be governed by section 19, which provides that relevant costs shall be taken into account in determining the amount of a service charge payable for a period :
- only to the extent that they are reasonably incurred, and
 - 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.
11. The tribunal’s powers to determine whether an amount by way of service charges is payable and, if so, by whom, to whom, how much, when and the manner of payment are set out in section 27A of the Landlord and Tenant Act 1985. The first step in finding answers to these questions is for the tribunal to consider the exact wording of the relevant provisions in the lease. If the lease does not say that the cost of an item may be recovered then usually the tribunal need go no further. The statutory provisions in the 1985 Act, there to ameliorate the full rigour of the lease, need not then come into play.

The hearing

12. With the reduction in issues requiring determination having been substantially reduced to the six issues (plus costs) set out in the agreed schedule the tribunal was pleased also to be able to deal with the remaining points of dispute by reference to the first bundle of documents and not those submitted late on the first occasion August 2016.
13. The tribunal took each of the six points in turn, inviting first Mr McEleny and then Ms Begum to state their respective cases on each before moving onto the next.
14. *Managing agent’s estate and sub-estate charges* – Mr McEleny directed the

tribunal's attention to the schedule marked "services 4" on page xxvii, which concerns the amounts passed by First Port (as agent for the freeholder) to Swan in respect of the management and maintenance of the green hatched area and other parts for which it is responsible. These in turn were added by Swan to the service charges payable by the lessees. Mr McEleny pointed out what he called a massive increase in the service charges between 2012–13, when the figure per flat for both the estate and sub-estate totalled £44.96, and 2016–17, when they had risen to £428.88. There was no explanation for this dramatic increase. He said that lessees had recently received a letter from First Port demanding this money, the Swan was not paying it. If the lessees are paying Swan why was First Port not being paid and why the figures going up?

15. On behalf of the respondent, Swan, Ms Begum stated that the letters concerned the costs for 2017 which were being challenged and had been put on hold on the account. She said that members of her team had spoken to three of the four lessees about this. She said that all the costs on this schedule were based on First Port's budget figures but that it did adjust annually, sometimes producing a credit figure. By way of example she referred to page 394, but there the credit was against block charges which should never have been incurred by First Port in the first place, as this is Swan's property and responsibility.
16. The chairman drew the parties' attention to the managing agent's fee for 2016–17 recorded against the estate charge. The amount claimed, £117.40, was greater than the sum of all the actual costs including an audit fee and contribution to a sinking fund. Those totalled only £107.13. How could a managing agent's fee greater than the actual costs incurred possibly be justified? In the previous year it had been almost as substantial, at £113.98, when recorded estate expenditure was only £74.48. Why has this not been challenged before?
17. *Window cleaning* — The dispute here was that the charges for each property had more than doubled. At pages 615, 616 and 617 were invoices from Crystal Clear dated May, August and November 2013. The first two appear to be quarterly bills although each seems to refer to the work being carried out to specification for a particular month. The November invoice, by contrast, is at a reduced figure of £18 instead of £24 but is the start of monthly billing. On the face of the document it refers specifically to "Monthly Cleans". Ms Begum explained that the lessees had been charged for the bills that had actually been received, even though perhaps there ought to be more of them. Swan had re-negotiated the contract and all future billing was on a monthly basis. Upon the chairman reminding her that the limitation period for contract claims is six years, and that Crystal Clear could at some time in the future issue backdated invoices for work already done but not charged for, Ms Begum confirmed that if that were to be the case such additional cost would not be passed on to the lessees.
18. *Block electricity charges : 2012–13 & 2013–14* — The problem here is that each block of flats has its own electricity meter for the common parts, and the size of the bills for the various blocks which have to be considered as part of the same service charge account are widely divergent. The example given was the year 2012–13, where the cost for the Newstead Way block was £177.70 but for the same period the cost for 17–18 Parish Way was £789.25. For the sake of completeness, the figures shown on page 418 indicate that the cost in the same

year for 19–24 Parish Way was £495.40 and that for 25–30 Parish Way £447.96. Upon enquiry by the tribunal it was explained that apart from the lighting of the common parts there is also one storage heater. The tribunal later wondered whether there might also be a socket for use by cleaners. Mr McEleny queried who exactly was having to pay a share of these electricity bills and was told by Ms Begum that Swan’s assured tenants also pay service charge as well as rent, so they pay a contribution towards the heating. She said that Swan expected the electricity provider to carry out meter readings, but Swan does so as well.

19. *Bulk refuse disposal : 2012 onwards* — While Mr McEleny accepted that the cost was relatively minor it was he said a bugbear for the applicants. It was so wrong that it should be there. This item concerned removal of bulk items and the results of fly tipping. First Port cover this for the entire estate and Harlow Council will do it for the whole of Harlow. In the respondent’s reply in the schedule it is said that the cost is split. He did not see where there was a gap in service and that Harlow can collect such items for free. He said Swan mentioned that they don’t know where it is collected from and so charges all of its estates and apportions on that basis. The tribunal’s attention was drawn to page 971 and onwards, which comprise invoices from Bywaters in April 2014. In each the carrier is identified as Swan Housing Association Limited, the vehicle type and registration are given but, rather unhelpfully there is an item described as “Waste Origin/Destination”. On pages 971, 973, 974, 976, and 979 – 981 the words Waltham Forest appear against that description, while on pages 972, 975, 977 and 978 it is Tower Hamlets. Nowhere is there any reference to Harlow.
20. Referring to a previous case where a local authority landlord had charged for lighting costs on a portfolio wide basis despite both the terms of the lease and the fact that its contractor was able (and required, for audit purposes) to identify the location of every cost item, Ms Begum was asked by the tribunal whether Swan did not have records of reports by its local caretakers and of instructions to waste contractors. She stated that the lorries pick up on regular rounds; it was not a case of specific instructions where to collect. Swan had no way of knowing from where bulk items were being collected.
21. *Audit/accountancy fees* — although the query was in respect of the year 2012 onwards it was quickly established that costs have only been raised for the years 2015–16 and 2016–17. In the service charge it was referred to as an “annual accountancy fee”. Ms Begum referred to clause 7(5)(c) of the lease, which is quoted in paragraph 8 of this decision. This provision entitles the landlord, when employing its own accounting staff, to make an appropriate charge. The item claimed per flat in 2015–16 is £34.60. As both parties agreed that there were around ten thousand units in Swan’s portfolio and Ms Begum stated that she headed a team of six that was the equivalent of £57,006 66 per team member, although that also included a proportion of the time of more senior management. It also allowed for salaries, employer’s national insurance, pension contributions, establishment costs such as provision of office space, furniture, equipment, HR resources and ancillary costs. Ms Begum said that the intention is to recover the actual cost, not to make a profit.
22. *Preliminary fees : 2012 onwards* — Mr McEleny raised this simply on the basis that a decision had been made in the previous tribunal in 2013 that a figure of

24.5% was too high and that 10% plus VAT should be imposed instead. This had not been a point taken by the lessees but by the tribunal members themselves. The facts had not changed, though he accepted the tribunal is not bound by the decision of a previous tribunal.

23. Ms Begum stated that the contract in force at that time is still ongoing. It was a fourteen year contract that commenced in 2008 following the carrying out of a full section 20 consultation exercise. She referred to the detailed points made in the respondent's statement of case at pages 40–41, including how the definition of "preliminaries" was apportioned into three common elements : site overheads, central overheads, and profit. When tendering the three companies concerned – Axis, Enterprise and Osborne – apportioned amounts differently within their tender documents. Thus Enterprise had a profit element of £361 000, Axis had one of £306 000 and Osborne £103 000. The latter's schedule of rates was £1.56 million whereas that for Axis was £1.487 million and Enterprise £1.675 million. Axis was in the middle, but expensive compared with Osborne. It turns out in the middle for value, but another thing taken into account was the contractor's capacity to do all of the work.
24. *Tribunal costs* — It was confirmed by Ms Begum that Swan agrees to pay the applicants' application and hearing fees. There appears to be no provision in clause 7 of the lease entitling Swan as landlord to recover any costs that may have incurred in connection with this application. There was certainly no indication of any intention to impose such a charge.

Discussion and findings

25. The tribunal considered that each party had some valid points in their favour. Taking the issues one by one the tribunal finds as follows.
26. The freeholder's managing agents' (First Port) estate and sub-estate costs passed on by Swan to its lessees have not been challenged adequately until recently. In particular it is difficult to see how managing the open areas of the freehold estate (largely grounds maintenance) can possibly justify First Port in seeking to levy a management fee which has risen steadily in the relevant years so that by 2016–17 its fee of £117.40 exceeded the actual estate costs incurred of £107.43. As a proportion of expenditure the previous year's management fee was even worse. For failing adequately to monitor First Port's charges, but simply passing them on to lessees, the amount recoverable by Swan is reduced to a nominal £5 per annum per lessee. In reaching this figure the tribunal acknowledges that First Port has arranged for the carrying out of some work for which it deserves payment, and that First Port is not and cannot be a party to these proceedings. Its claim is for payment under a rent charge. Despite the similarity in concept of a rent charge and service charge the tribunal regrets that it has no jurisdiction over the former. The deduction imposed on recovery by Swan of the managing agent's fee only is intended to reflect the tribunal's dissatisfaction with Swan's lack of response (apparently until very recently) by properly challenging First Port's invoices but instead merely passing them on for payment by lessees.
27. So far as window cleaning is concerned the lessees appear to benefited from some rather inept billing by the contractor. When Crystal Clear finally introduced monthly billing at a lower rate the lessees started to be charged for the work

actually and reasonably done stop there has been no challenge to the quality of the work the tribunal considers the price is reasonable. This item is payable.

28. So far as block electricity charges are concerned the problem may be caused by the over excessive use of a storage heater in some buildings rather than others. By clause 5(4) of the lease the landlord covenants to clean and light the common parts. There is no reference to heating. The tribunal can well understand how the lessees one block of flats who choose to heat the common parts economically, if at all, may come to resent the more profligate attitude adopted by those in another block who can be confident that the overall cost will be shared between all four blocks. If a more uniform and economical approach cannot be adopted then there is no reason why, in the interest of equity, the landlord does not simply disconnect the storage heaters in each block. That will solve the problem of exorbitant electricity bills because the only other element is lighting. The amounts claimed are payable.
29. The tribunal was dissatisfied with the arrangements for collection of bulk refuse and items fly-tipped on property for which Swan is responsible. If Swan is bearing the cost on its own then it is perfectly entitled to have various lorries driving around on a regular basis and simply picking up what they see and taking it to a waste facility. However if it wishes to charge the lessees undertaking this task, if Harlow Council will not do it for free, then it must change its approach so that it can identify items removed from the estate to which lessees must contribute and charge on the basis. A portfolio wide method of charging does not comply with the wording of the lease. This item is not recoverable.
30. The audit/accountancy fee claimed is for one year only. Whilst it may be said that in many cases this cost falls within the overall management fee, in this case the management fee per unit is quite low and clause 7(5)(c) in the lease specifically allows for it. Having heard evidence of how it is calculated the tribunal considers that it is a reasonable cost for employing staff involved, with overheads, and this item is allowed in full.
31. The preliminary fees were challenged simply because the tribunal in 2013 had raised the point itself and taken the view that 24.5% was too high and that 10% plus VAT was more in accord with their experience. However it is worth quoting the material passages from that decision to understand why. They appear on pages xiii and xiv at the front of the bundle, at paragraphs 35 and 36 :
 35. At the hearing the Respondent's representatives were unable to explain to us why such a substantial markup at 24.5% had been agreed. This is very much more than members of the Tribunal had come across during their professional careers. Moreover, in our experience a markup usually applied to the net cost before the additional VAT rather than being applied to the gross amount of the invoice which access seems to do.
 36. On the limited evidence before us we were not persuaded that it was reasonable to incur the expense of a 24.5% markup on the gross amount of invoices submitted by subcontractors. We find that a reasonable markup would not exceed 10% that she applied to the net cost before the addition of VAT.

32. This tribunal heard much more evidence about the section 20 consultation exercise undertaken prior to awarding this fourteen year long-term agreement to Axis. It is unfortunate that the documentation was disclosed at the last minute, but Mr McEleny was given the opportunity consider it and left the matter in the hands of the tribunal. The only point he did make was that it was unusual to total of items, add VAT and then add a further management charge on the gross figure, again adding VAT to the final total.
33. On the evidence before it this tribunal can see how different tenderers have subdivided their costs and that, while 24.5% may seem high for this item, other items within the overall package are more reasonable. The tribunal has not seen the full tender document; nor has seen the contract. It does consider that in the circumstances 24.5% is reasonable but it does query the suggestion that it is added to a VAT-inclusive subtotal instead of being levied prior to the addition of VAT. With the size of Swan's portfolio and the figures mentioned in the tender it is extremely unlikely that any of the parties to repair and maintenance contracts are not VAT registered and therefore able to deduct input tax. Subject to this one point which Swan's accounts department should look at the tribunal finds in its favour of this issue.
34. On the subject of costs the parties have agreed that, under rule 13(2), Swan will reimburse the tribunal application and hearing fees of £250 and £190 paid by the applicants. On the application form the applicants ticked the box concerning section 20C. Although the lease appears to make no provision for the recovery of any legal or other costs incurred by Swan in connection with such proceedings, and Ms Begum made no mention of the possibility of including such costs in the service charge payable for this or any future year the tribunal, for the avoidance of doubt, makes an order to the effect that no such costs may be taken into account in the calculation of any service charge payable by any of the applicants.
35. The only remaining matter arising from these unusually lengthy proceedings is that it may be necessary or desirable for certain provisions in the leases to be varied. The first thing to be done is for the parties to work out precisely what they wish to do. Is it to separate the costs so that they pay only those incurred for the specific physical building? Is it to amend the percentages payable for block or estate costs? Is the freeholder's concept of a "sub-estate" to be adopted and how will it really relate to the intended chargeable unit? As a result of the tribunal's decision made on 1st November 2016 the chargeable unit is the twenty-two flats within this title. If that is to be changed then all twenty-two, or at least the majority required by section 37 of the Landlord and Tenant Act 1987, will be required to agree. Asking them to pay for this exercise is unlikely to enhance the prospects of success. The tribunal wishes the parties good luck.

Dated 2nd June 2017

Graham Sinclair

Graham Sinclair
Tribunal Judge