

Southern Rent Assessment Panel
Leasehold Valuation Tribunal

Applications under Section 27A and Section 20C of the Landlord and Tenant Act 1985

Case Number: CHI/45UH/LSC/2009/0025

Property: Guardian Court, Rogate Road, Worthing,
West Sussex BN13 2EE

Applicant: Mr James Wilson & Others (tenants)

Respondent: Guardian Management Services (Anchor Trust)

Appearances: For the Applicant:
Mr J Wilson, Secretary of Residents Association
Mr Ransom, Chairman of Residents Association

For the Respondents:
Mrs T Wilkinson, Operations Manager
Mrs W Martin, Area Manager
Ms C Brodigan, Head of Guardian

Pre Trial Review: 3 March 2009

Directions issued: 4 March 2009

Hearing: 3 June 2009

Decision: 13 July 2009

Tribunal

Ms J A Talbot MA (Chairman)
Mr B H R Simms FRICS
Ms Tat Wong

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Background

1. This was an application made on 13 February 2009 by Mr James Wilson on behalf of the tenants of Guardian Court pursuant to Section 27A of the Landlord & Tenant Act 1985 for a determination in respect of future service charges for the year 2009/10. The respondent landlord is Guardian Management Services for the Anchor Trust.
2. A Pre-Trial review was held on 3 March 2009 attended by Mr Wilson and Mr Ransom for the applicants, and Mrs Wilkinson and Mrs Martin for the landlord. The following issues were identified as being in dispute:
 - (i) Heating (gas) £20,349
 - (ii) Water charges £10,176
 - (iii) Light & power (electricity) £ 5,756
 - (iv) Deficit figure of £9,409
 - (v) Whether the contract for utilities entered into by the respondent was a Qualifying Long Term Agreement such that the statutory consultation procedure under Section 20 of the Landlord & Tenant Act 1985 should have been followed.

Law

3. The tribunal has 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 payable by a tenant to a landlord for the cost of services provided under the terms of the lease and within the meaning of Section 18 of the 1985 Act. The tribunal can also decide by whom, to whom, how much and when a service charge is payable. A service charge is only payable insofar as it is reasonably incurred and the works and services to which it relates are of a reasonable standard. The tribunal therefore also determines the reasonableness of service charges.

Lease

4. The tribunal had a copy of the lease of No.2 Guardian Court. The lease is dated 24 November 1992 and is for a term of 99 years from that date. The provisions relating to the calculation and payment of service charges are to be found at Clause 3.1 and 3.2. The service charge is defined as "a contribution towards the costs and expenses of running the estate and the maintenance thereof and the other matters more particularly specified in Part I of the Third Schedule".
5. The service charge is payable monthly on the 15th of each month, based on "Guardian's estimate of the costs and expenses of providing the said services during the service charge year to which the same relates. Such estimates shall be based on the actual costs and expenses of providing the said services for the previous service charge year ... together with provision for any expected increase or decrease of costs for the succeeding year". Audited accounts are to be provided showing a summary of expenditure as soon as practicable after the end of the service charge year which runs to 31 March.

6. The tenant's proportion of the service charge under this lease, for a one bedroom flat, is 2.931%. The other leases are in similar form but the proportions vary according to the sizes of the flats. The tribunal was told that there are 21 flats paying 2.931%, 10 at 3.715% and 1 at 4.218%.
7. The landlord's obligations are to be found at Clause 5.1 and include the maintenance and repair of the main structure of the estate; which is; to keep the common parts clean and reasonably lighted; to maintain the lifts and separate heating installation within the dwellings; to employ a warden; and to insure. Under the Third Schedule the service charges include the costs of carrying out those obligations, together with professional fees and at paragraph 7 "all other expenses (if any) incurred by Guardian in and about the maintenance and proper and convenient management and running of the estate ... and services serving the estate". The estate is defined as the gardens, grounds and all buildings. The dwelling is defined as the flat.

Inspection

8. The members of the tribunal inspected the property before the hearing accompanied by the parties. It comprised a 3 storey purpose built block of sheltered flats constructed in the 1970's of brick under a tiled mansard roof around landscaped grounds, with 32 flats including estate manager's accommodation. The facilities include a communal lounge, guest room and laundry. The upper floors are accessed by a lift. The entrance hall and internal corridors are permanently lit. The members also accessed the boiler room on the 3rd floor and saw several modern boilers providing hot water and heating to the individual flats and communal areas. All communal areas were in good order although 2 letters were missing from the name display at the entrance.
9. The members inspected flat 2 internally and were shown radiators in the living room, bathroom and bedroom. There was a modern wall mounted thermostat which had been installed a year ago controlling the central heating. Other flats had newer thermostats replacing previous faulty ones.

Hearing

10. A hearing took place in Worthing on 3 June 2009. It was attended by Mr Wilson and Mr Ransom for the applicants, and Mrs Wilkinson, Mrs Martin and Ms Brodigan for the respondent. Several observers were also present to which neither party objected.

Lease terms

11. The tribunal first asked the parties for their comments on the lease terms, as it appeared there was no specific provision requiring the landlord to provide or maintain communal boilers fuelling a centrally supplied heating and hot water system, or a corresponding obligation on the tenants to contribute towards these costs. The reference at Clause 5.1(c) to heating installations within the dwellings arguably referred only to the radiators in the flats.
12. Mrs Wilkinson suggested either that the separate heating installation at 5.1(c) could be inferred to include the central system, or alternatively that the system could be encompassed within the catch-all provision at paragraph 7 to the Third Schedule as part of the "proper and convenient running of the estate" and a service "serving the estate". Mr Wilson had not considered the lease terms or taken advice, but did not seek to argue that there was no liability on the tenants to contribute to the costs. His concern was about the level and proposed steep increase in those costs.

Heating (gas)

13. Mr Wilson's case in relation to projected heating costs of £20,349, i.e. gas fuel charges, was that this represented an unreasonable increase on costs incurred in previous years. His argument was based on a documents headed "Service Charge Account" which was sent to all residents under cover of a letter dated 30 January 2009, prior to an Annual General Meeting for Guardian Court residents which took place on 10 February 2009. This document showed a budget and projected heating costs for 2008/09 at £8,520 and a budget for 2009 of £20,349. Mr Wilson took this to mean that Guardian's actual expenditure for 2008/09 was £8,520 which matched the projected figure. He therefore calculated that the increase would be 139%.
14. Mr Wilson accepted that gas prices had risen in recent times but not to that extent. He quoted evidence from the local and national press to the effect that gas prices in Britain were 12.1% higher in February 2009 than a year earlier, and that costs from energy providers were due to fall by 4% from 30 March 2009. This was not reflected in Guardian's figures. At the AGM many elderly residents were alarmed by the increase, which some could not afford, and sought to challenge it.
15. Mr Wilson contended that until the recent replacement of faulty individual thermostats and valves, the control of the gas central heating inside some the flats was poor, so that some were too hot and others were too cold. This resulted in unacceptable gas wastage, which in his view meant that actual costs from 2006 were too high, despite the fact that new communal boilers had been installed in December of that year.
16. Mr Wilson further contended that Guardian has informed residents that heating costs were expected to reduce by around one third as a result of installing new condensing boilers in place of the 32 year old inefficient existing boiler. However, the new boilers had required repairs from December 2006 to October 2007 of £4,260 paid from estate repair funds. In his view these costs were unreasonable and the fund should be reimbursed by Guardian. As evidence he referred to correspondence in December 2007 between Guardian and Mr Mills of Flat 21, in which Guardian had offered to reimburse boiler repair and survey costs but this had not yet been done.
17. Mrs Wilkinson informed the tribunal that the document relied on by Mr Wilson did not show the actual costs incurred for gas for 2008/09 on which the projections were based. She referred to internal spreadsheets showing a summary of gas used and actual expenditure from 2002/03. These showed that gas consumption (in kWh) had risen from 640,834 in 2002/03 peaking at 721,131 in 2005/06 before the installation of the new boilers, then dropping to 375,465 in 2006/07 and rising gradually to 423,096 in 2007/08 and 457,484 in 2008/09. Costs ranged from £8,682 in 2002/03 to £15,252 in 2005/06, falling to £11,858 in 2006/07, £11,671 in 2007/08, and £10,182 in 2008/09.
18. At the tribunal's request, Mrs Wilkinson produced a copy of the published service charge expenditure accounts for the years ending 31 March 2006, 2007 and 2008. These showed adjusted accounting figures for heating to reflect accruals, caused by matters such meter reading dates. For example, the total heating cost shown in the 2005/06 accounts was £18,718.26, whereas the actual cost was £15,252. This was annotated to show a difference of £3,466 for reversal of a prior year pre-payment.
19. In response to questions from the tribunal, Mrs Wilkinson further explained that the projected cost of £8,520 relied upon by Mr Wilson did not reflect the actual cost of £10,182 in 2008/09, because when Guardian had first set the budget, it was thought that to use the actual figure would have produced a higher monthly service charge for

2008/09, which Guardian had sought to avoid. The budget and projected figures had therefore in essence been kept artificially low. Hence the apparent percentage increase of 139% identified by Mr Wilson was not in fact accurate.

20. The method for arriving at the projected figures was a best estimate forecast based on draft accounts after 6 months actual costs, including an element for RPI increases. Thus there could be a difference between the initial budget and the projected costs as shown on the service charge account document relied on by Mr Wilson. The heating costs budget for 2009/10 had now been revised to a projected cost of £18,029 as a more realistic figure than £20,349. The true comparison was therefore between the actual cost of gas of £10,182 in 2008/09 and revised projected cost of £18,029. Mrs Wilkinson accepted that this was a complex calculation not easily understood by a lay person or tenant, but that Guardian's methods were intended to produce accurate forecasts.
21. Mrs Wilkinson further submitted that the gas tariffs for 2008/09 and 2009/10 were obtained at the best available price and were below the prices paid by a typical household. The tariffs were 1.9054p/Kwh for 2008/09 and 3.291 p/Kwh for 2009/10. This inevitably reflected increased energy prices in the wider market. In response to questions from the tribunal, Ms Brodigan explained in detail how Guardian's specialist energy team monitored energy prices daily in order to purchase direct from the energy market at the most competitive price available. The energy purchased in this way served all Guardian/Anchor Trust properties. She submitted that any Guardian estate had the opportunity to elect their own energy supplier if it could demonstrate that it could find a better price.
22. In relation to correspondence with Mr Mills, Mrs Wilkinson explained that this was being dealt with separately as a complaint which was yet to be concluded, hence no refund had yet been made by Guardian to the service charge account, even though this had been offered as long ago as December 2007.

Light & Power (electricity)

23. Mr Wilson's case on electricity costs was similar to that on gas. For 2008/09 the budget was £2,297 and the projected cost was £2,722, whereas the budget for 2009/10 was £5,756. On his analysis this represented an unacceptable increase of 111%. He submitted that some electricity costs were unnecessary, because lighting was on 24 hours a day even in areas such as the entrance hall which had adequate natural light during the day. He pointed out that residents paid their own electricity bills for usage inside their flats and that the service charge element covered common parts lighting and communal laundry.
24. Mrs Wilkinson submitted that the budgeting and purchase of electricity was carried out by Guardian's energy team in the same way as for gas. The actual cost for 2006/07 was £1,852, for 2007/08 £2,102 and for 2008/09 £2,240. The energy consumption figures were fairly stable at 46,813 kWh, 45,747kWh and 45,654 kWh for those years. Guardian had kept the projected figure low for 2008/09 in order to match the budget and avoid a higher service charge for that year. The tariff obtained by the energy team was 6.45p per unit for 2008/09 and 12.76 per unit for 2009/10 which reflected the most competitive price available in the energy market at the date of purchase. The increased cost reflected globally rising prices.
25. It was also submitted that for safety reasons it was necessary to keep all the public ways lit at all times to avoid fall or trip hazards. Also further costs would be incurred to change the phasing of the lighting. Most of the electrical costs related to laundry

facilities along with the lifts, emergency alert system and external lighting. Regarding meter reading, this was done by the energy supplier with a double checking system in place by the estate manager.

Water Charges

26. Mr Wilson's case was similar to that for gas and electricity, namely, that the increased cost for 2009/10 was unexplained and unjustified given that the budget and projected cost of £6,424 was set to increase to £10,176 for 2009/10, an apparent increase of 58%.
27. Mrs Wilkinson's argument was also similar, in that the projected costs for water charges had been matched to the budget figure in order to reduce the impact on service charges. In effect, this meant that the projected costs for 2008/09 should have been set at a higher figure to reflect the actual charges, but instead had been kept artificially low. The differential between the 2008/09 budget and projected costs, and the 2009/10 budget therefore appeared higher than it actually was. Had the correct figure been used, based on actual usage, it would have been £8,200 instead of £6,424, as compared with £10,176. The only local supplier was Southern Water, so competitive price tendering was not possible. The actual usage for the whole estate was metered. Within the last few months an issue had arisen about a leaking pipe, but this had not affected the budget for 2009/10. Invoices from Southern Water were produced in support of the actual costs.

Deficit figure

28. The service charge document relied upon by Mr Wilson showed a deficit figure of £9,409. The deficit had increased year on year, and in his view this suggested ineffective financial management by Guardian. He also believed that Guardian should reimburse certain sums to the account in order to reduce the deficit. For example, Guardian had agreed in principle to refund £3,000 spent on redecoration costs for the resident manager's flat. The repair costs for the new boilers of £4,260 should also be refunded. This would serve to reduce the deficit figure. Further potential savings could be achieved by having a visiting manager instead of a resident manager whose post was currently vacant.
29. Mrs Wilkinson accepted that the deficit figure had accumulated over the years and been carried over rather than charged as service charges. The figure increased from £2,247 in 2002/03 to £9,901 for 2008/09. This reflected various accounting factors, such as the difference between some forecast figures and actual costs, for example, heating costs in 2005/06 (before the new boilers were installed), estate manager salary, cleaning and electricity. The figure was further increased by £1,060 as a result of an HMRC decision on tax on interest in reserve funds, which would have to be met by service charges.
30. Ms Brodigan confirmed that £3,000 for work to the estate managers flat had been credited and would be reflected in the accounts in due course. The boiler repair costs were still subject to the complaints procedure, but this was being actively pursued to resolve the complaint, and she assured the tribunal that any agreed refund would be honoured. Ms Brodigan accepted that the ongoing and increasing deficit was unsustainable, but in effect the figure represented the difference between historic under-budgeted costs and actual costs, and to this extent would have to be recovered at some point as service charges, but this could be done over a period of time. Guardian was mindful of the impact this would have on residents, and had therefore rolled over the deficit rather than increase the service charges.

Qualifying Long Term Agreement (QLTA)

31. This issue was raised by the tribunal at the Pre Trial Review. This was because if the contracts for procurement of energy supplies were for a term of more than 12 months, the landlord would be required to follow the statutory consultation procedure under Section 20 of the Landlord & Tenant Act 1985 and the attendant Regulations, failing which the amount that could be recovered as service charges would be limited to £100 per tenant.
32. Mr Wilson had not sought advice on this issue and made no representations, but sought confirmation that any procedures to protect residents had been correctly followed. Ms Brodigan submitted that Guardian's arrangement for procurement of energy supplies did not amount to a QLTA. This was because Guardian did not enter into any contracts exceeding 12 months. There were review dates in place with the energy suppliers which were closely monitored by the energy team. The last purchase date for Anchor Trust as a whole was 11 October 2008, when the energy team achieved the most competitive rate available in the market during that window to purchase 20-30% of the Trust's total anticipated energy usage. The agreement with the contracted supplier was that the 70% remainder of gas and electricity purchased would be at an average daily rate, monitored by the energy team, and therefore not subject to further fluctuations in the market. The revised projected figure of £18,029 for Guardian Court (see paragraph 20 above) was based on a formula set by the energy team, using average daily consumption and meter readings.

Decision

33. The tribunal reminded itself, as it had reminded the parties, that the scope of the application was limited to the identified future service charges for 2009/10, and it was not dealing with costs incurred for any previous years. Hence it was not determining the reasonableness of gas and electricity costs from 2006 or any dispute concerning the efficiency of the new condensing boilers.
34. The tribunal first considered the lease terms. It concluded that although the lease did not explicitly require the landlord to provide a communal boiler and central heating system, the wording of paragraph 7 to the Third Schedule was sufficiently wide to include the system as a service serving the estate "for the proper and convenient management of the estate". This reflected the practical reality at Guardian Court which had obviously been constructed with the communal system. Neither party disputed that the tenants had a liability to contribute to the centralised heating, lighting and power costs.
35. Turning to the gas and electricity budget costs for 2009/10, the tribunal accepted the evidence from Guardian on the bulk procurement of energy supplies. It was evident that the energy team closely monitored the market to achieve the most competitive price across all Anchor Trust properties, at a time of global rises in energy costs. This method was standard practice amongst large social and public sector landlords. The tribunal recognised that in reality it would be difficult, if not impossible, for residents of individual estates to propose alternative suppliers at a cheaper price, but there was no evidence to suggest that the prices obtained by Guardian were unreasonably high or out of line with the market at the date of purchase.
36. The tribunal also accepted Guardian's explanation of its setting of the budget and the projected costs, the latter being essentially a revised half year forecast based on actual expenditure after 6 months of the accounting year. Again this was standard

practice. However, unfortunately on closer examination of the figures in the light of the evidence, it was apparent that the projected costs for 2008/09 for the items in dispute in the service charge document relied on by Mr Wilson were not accurate. This was because Guardian had in effect suppressed them, or to use its phrase matched the projected costs to the budget, rather than using the actual costs. Their reason for this was that the true projected cost would be too high and would have led to increased service charges for 2008/09 in light of steeply rising energy costs.

37. However, the knock on effect for 2009/10 was that those projected costs appeared to represent a higher percentage increase than was actually the case. It was not surprising that Mr Wilson had taken those figures at face value when calculating the difference between the stated budget/projected costs for 2008/09 and those for 2009/10; his analysis had been based on a reasonable misunderstanding, based on the document supplied by Guardian that the actual cost of gas for 2008/09 had been £8,520. This document was far from self-explanatory and potentially misleading, it was understandable, though regrettable, that concern was caused to the residents by what looked at first sight to be a very high percentage increase. The documentation sent to residents was not self-explanatory, and indeed had required detailed explanation by Guardian's representatives at the hearing.
38. Having heard this explanation, the tribunal was satisfied that the current accurate projected figure for gas for 2009/10 was £18,029, which should be compared to the actual cost for 2008/09 of £10,182. This increase reflected the reality of global rising energy costs at the time of purchase, and the gas consumption. For the same reasons it was satisfied in relation to electricity that the projected costs for 2009/10 were not unreasonable. It accepted that the common ways needed to be permanently well lit for health and safety reasons, especially in a property of this type. Water costs were metered, supported by invoices and again costs had risen generally. The tribunal noted that the pattern of energy consumption since 2006/07, on the energy team's written evidence derived from meter readings, showed a steady and consistent use of electricity, and a steep drop in gas after the installation of the new boilers, rising gradually thereafter. There was no reason to suggest that these figures were inaccurate or represented anything other than actual consumption of energy at Guardian Court.
39. The tribunal considered Mr Wilson's points on previous wastage of gas due to inefficient thermostats and valves, and the cost of repairs to the new boilers. Service charge costs in previous years were not within scope of the Application before the tribunal, as explained to the parties at the Pre Trial Review, as it concerned only the projected future energy costs for 2009/10. Having accepted Guardian's consumption figures, forecasting procedures, and explanation for the revised projected costs, the tribunal concluded on balance that overall any problems caused by the thermostats were unlikely to have affected consumption to such an extent that the projected costs were unreliable. The most significant elements in the increase were the global rise in energy prices, faced by all consumers, and the previously suppressed projected costs for 2008/09 at Guardian Court.
40. It appeared to the tribunal to be inevitable that the increased costs would have to be met by service charges spread out over the monthly payments provided for in the lease. This would equally inevitably have to include at some stage the deficit figure, which had accumulated as Guardian had sought to reduce the impact of increased actual costs, and had under-budgeted, it would seem for some years. The tribunal agreed that this was not sustainable in the long term and the residents' concern was understandable. In effect, service charges had been kept artificially low in previous years, which was arguably historically of some benefit to the residents, but this had

the unfortunate effect that not only had the deficit increased, but also the residents faced an overall steep increase in service charges which some could ill afford. That said, the tribunal recognised the complexity of budgeting for a property of this type and accepted that it would not always be possible for the actual costs to meet the budget and forecasts set in advance.

41. The tribunal accepted Guardian's explanation of the timing and purchase of energy in bulk across its property portfolio by its energy team and found that there was not in place a contract of more than 12 months. Hence there was no Qualifying Long Term Agreement within the meaning Section 20 and no requirement for statutory consultation under the Regulations.
42. Under the terms of the lease, Guardian sets the monthly service charge payments in light of actual costs in the previous year and any expected increases. As explained above the tribunal concluded that this was accurately done on the evidence. However, to assist the parties it would observe that it might be preferable, given the double impact of the deficit and increased energy costs, to gradually phase any recovery of the deficit. Also, the tribunal noted that the disputed boiler repair costs from 2006/07 and cost of redecoration to the manager's flat were due to be refunded to the service charge account as soon as the complaints procedure was concluded and that Ms Brodigan assured the tribunal this would be honoured. Given the delay in dealing with these matters (the correspondence being from December 2007) the tribunal expresses the hope that this will be resolved as soon as possible for the benefit of the residents and the property as a whole. Finally, the residents might be better informed if the accounts, budgets and projected costs more accurately reflected the true position and were explained by Guardian in clear and straightforward language.

Determination

43. In conclusion, the tribunal found that the total budget for 2009/10 at Guardian Court was £85,884.22 taking into account the reduced projected gas costs and determined that this was payable by the tenants as monthly service charges in the percentage contributions in accordance with the terms of the lease.

Section 20C

44. Mr Wilson applied for an order under Section 20C preventing the landlord from seeking to recover costs incurred in connection with the proceedings before the tribunal as part of the service charge. At the hearing Ms Brodigan assured the tribunal that Guardian would not seek to recover any costs and therefore it was not necessary to make the order sought.

Dated 13 July 2009

**Ms J A Talbot MA
Chairman**

