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Residential
Property
TRIBUNAL SERVICE

EASTERN RENT ASSESSMENT PANEL
LEASEHOLD VALUATION TRIBUNAL

Case Reference: CAM/00KG/LSC/2010/0058

DECISION OF THE LEASEHOLD VALUATION TRIBUNAL ON APPLICATION UNDER SECTION 27A OF THE LANDLORD & TENANT ACT 1985

Address:	2 Brock Green, South Ockendon, Essex, RM15 5QH
Applicant:	Mr J. Jennings
Respondent:	Thurrock Borough Council
Application:	11 April 2010
Inspection:	28 July 2010
Hearing:	28 July 2010

Appearances
Applicant

Mr Jennings	Leaseholder

Respondent

Mr R. McAllister	Counsel
Mr P. Singer	Lands Manager, Europa
Mr M. Jones	Group Finance Manager, Thurrock Council

Members of the Tribunal
Mr I Mohabir LLB (Hons)
Mrs S. Redmond BSc Econ (Hons) MRICS
Mr P. Tunley

DECISION

The sums of £3,253.56 and £331.68 claimed by the Respondent for caretaking and communal lighting respectively in 2008/08 are reasonable and payable by the Applicant.

Introduction

1. This is an application made by the Applicant under section 27A of the Landlord and Tenant Act 1985 (as amended) ("the Act") for a determination of his liability to pay and/or the reasonableness of various service charges claimed by the Respondent for the year 2008/09.

2. The Applicant is the present leaseholder of the property known as 2 Brock Green, South Ockendon, Essex, RM15 5QH having taken an assignment of a lease dated 13 November 2000 made between Thurrock Borough Council and John Charles Milligan ("the lease"). The Respondent is the freeholder.

3. The Applicant did not contend either that the service charges in issue were not recoverable as relevant service charge expenditure under the terms of the lease or that he did not have a contractual liability to pay them. For this reason, it is not necessary to set out here the terms of the lease that give rise to this liability. Each service charge year commences on 1 April in each year and ends on the 31 March in the following year. Where necessary, the relevant lease terms are referred to below as to their terms and effect.

The Issues

4. The Applicant makes two challenges in this application. These are:

   (a) That the caretaking costs have been incorrectly apportioned and/or that the overall expenditure incurred is unreasonable.

   (b) That the expenditure for communal lighting was excessive and unreasonable.

The Relevant Law

5. The substantive law in relation to the determination of this application can be set out as follows:

Section 27A of the Act provides, *inter alia*, that:

> *"(1) An application may be made to a leasehold valuation tribunal for a determination whether a service charge is payable and, if it is, as to-*
> *(a) the person by whom it is payable,*
> *(b) the person to whom it is payable,*
> *(c) the amount which is payable,*
> *(d) the date at or by which it is payable, and*
> *(e) the manner in which it is payable.*
>
> *(2) Subsection (1) applies whether or not any payment has been made."*

Subsection (3) of this section contains the same provisions as subsection (1) in relation to any future liability to pay service charges.

6. Any determination made under section 27A is subject to the statutory test of reasonableness implied by section 19 of the Act. This provides that:

> *"(1) Relevant costs shall be taken into account in determining the amount of a service charge payable for a period-*
> *(a) only to the extent that they are reasonably incurred, and*
> *(b) where they are incurred on the provision of services or the carrying out works, only if the services or works are of a reasonable standard;*
> *and the amount payable shall be limited accordingly."*

Inspection

7. The Tribunal inspected the block and the estate on 28 July 2010.

The property is a ground floor one bedroom flat in a three storey block of 6 flats, one of six similar blocks built circa 1952 of brick and tile construction around a central parking area within the Ockendon Estate. The Tribunal inspected the small basic communal hallway, stairs to upper floors, a locked roof access trap on the top landing. The formerly open front 'porch' had been enclosed and entry phones provided. Outside there are single storey brick built lockable bin stores and some small grassed areas. On the day of inspection the communal areas were reasonably clean and tidy, grafitti had been painted out.

Decision

Caretaking Costs

8. Expenditure of £3,253.56 is claimed by the Respondent as the overall cost of providing caretaking services in relation to the Applicant's block of flats. In the preceding service charge year, the expenditure was £1,783.40. The Tribunal heard evidence from two witnesses called by the Respondent as to why the expenditure has increased.

9. The first witness was Mr Singer, currently employed by Europa as a Lands Manager with responsibility for the calculation of the service charge. Europa is a strategic partner of the Respondent. His evidence was that, in preceding years, the caretaking costs had represented the total actual costs for delivery of this service to all estate blocks. This included the salaries paid, national insurance contributions together with associated costs for pension provision, including materials and an element for overheads such as managers, mobile caretaker, vehicles, office, accommodation and stationery. Apparently, this was considered to be unfair on some estates and a different method of apportioning the caretaking costs as between various estates was adopted in 2008/09.

10. A second witness called by the Respondent was Mr Jones who is currently employed by it as a Group Finance Manager. He is responsible for calculating the rent and service charges for Housing Revenue Account (" HRA") dwellings. He explained the reasons why the Respondent adopted a new methodology in 2008/09 to calculate the caretaking costs for leaseholders. Apparently, the Respondent undertook an exercise to separate certain elements of service charges from the weekly rent charged to tenants. The government of the day had an expectation that local authorities would separate service charges from housing rents in order to ensure that charges for services, such as caretaking, were transparent and fair. This process is known as de-pooling.

11. A decision was taken to apply this revised calculation methodology to leaseholder service charges to ensure a consistent charging policy was in place for all service users. Under the new methodology, leaseholder charges are

calculated in accordance with the charges levied at tenants'. In other words, it was intended to recover the actual cost of caretaking based on the number of hours' service provided to each dwelling. The application of this new methodology had resulted in the increased caretaking costs for the Applicant's block in 2008/09. The Applicant submitted that the new methodology, by increasing his service charge liability, was unfair.

12. By clause 4.2 of the lease, the tenant covenanted with the landlord to pay a service charge contribution for those items of expenditure incurred by the latter in accordance with the Fifth Schedule. The service charge contribution was to be calculated in accordance with the Fourth Schedule. Paragraph 4 of the Fourth Schedule provides the landlord has an absolute discretion to calculate the service charge contribution in one of three different ways. In particular, paragraph 4.2 allows the landlord to recover a fair and reasonable proportion of the expenses incurred in relation to the estate or other estates. Paragraph 4.3 also allows the landlord to adopt such method as it shall specify acting fairly and reasonably in the circumstances and from time to time and at any time (without prejudice to any combination of methods).

13. The Tribunal found that the Respondent was perfectly entitled to adopt a different methodology for calculating the caretaking costs in relation to the Applicant's block for 2008/09. It had an absolute discretion either under paragraphs 4.2 or 4.3 of the Fourth Schedule to do so. In so doing, the Respondent submitted that it was seeking to more fairly apportion the cost of caretaking services as between blocks and estates on the basis of benefit derived. The reason why the Applicant's caretaking costs in this year was greater was that the direct costs incurred, calculated by reference to the number of hours worked, had in fact been greater than the actual costs that the Respondent had sought to recover in previous years. Accordingly, the Applicant's submission that the Respondent could not adopt a different method (or a combination of methods) to calculate his service charge liability, including the caretaking costs, was rejected by the Tribunal.

14. The second submission made by the Applicant was that part of the caretaking expenditure for 2008/09 was unreasonable. The Applicant complained that an additional expenditure of approximately £33,000, excluding salary costs, did not appear to have been reasonably incurred and/or was excessive. If this related to the cost of cleaning materials, he submitted that this figure could not be justified and he put the Respondent to proof.

15. Mr Jones, for the Respondent, gave evidence that the de-pooling analysis had revealed that a total of 62,448 caretaking hours was worked in 2007 on a borough wide basis at a total cost of £1,632,040. The hourly cost to the Respondent to provide this service was, therefore, £26.13. This hourly rate was then applied on a block by block basis. He submitted that this has resulted in a fairer apportionment of this cost as between blocks in the borough.

16. It was clear to the Tribunal that the hourly rate of £26.13 for the provision of caretaking services had been calculated by the Respondents by reference to the borough wide costs of providing this service. Having regard to paragraph 5 of the Fifth Schedule of the lease, it is beyond doubt that the Respondent may only recover, as relevant service charge expenditure, the cost of employing, maintaining and providing accommodation in the managed buildings for a caretaker or caretakers. Clause 1.21 of the lease defines the managed buildings as meaning the building (the block and common parts) and all other buildings and structures within the estate. Indeed, paragraph 4 of the Fourth Schedule only refers to the calculation of the service charge by reference to the building and/or the estate.

17. It was also beyond doubt that a proportion of the hourly rate adopted by the Respondent included caretaking costs (both direct and indirect) had not been calculated by reference to providing this service to specific buildings and/or estates, such as the Applicant's. It follows from this that an element of the hourly rate was not contractually recoverable by the Respondent and that the apportionment method adopted for 2008/09 is incorrect and needs to be reassessed. However, in the present case, the Tribunal, with considerable

reservation, found that it could not interfere with the sum claimed by the Respondent because there was no evidence upon which it could safely make an alternative finding. The Tribunal accepted the Respondent's evidence that, in previous years, the Applicant had been undercharged for the provision of the caretaking services and to that extent he was not financially prejudiced by the Tribunal's decision on this issue.

Communal Lighting

18. The sum claimed by the Respondent is £331.68 for 2008/09. For the year ended 31 March 2008, the amount claimed had been £243.18. The Applicant asserted that the increased expenditure seemed high even if rising energy prices were taken into account. He submitted that his service charge liability should be limited to £200 based on six flats in each block paying an equal share.

19. Mr Singer, for the Respondent, explained in evidence that previously there had been no charge for electricity as part of the overall service charge expenditure. The reason for this was because of the way information had been provided to Europa by the Respondent. The sum of £331.68 represented the cost of electrical repairs and the cost of providing electricity to the common parts to the block and estate, including the amenity areas.

20. The Tribunal accepted that, contractually, paragraph 4.3 of the Fourth Schedule of the lease allowed the Respondent to amalgamate the block and estate costs for communal lighting. It found it surprising that the Respondent did not make greater efforts to more accurately apportion the expenditure incurred as between blocks and the estate generally. However, the Tribunal was satisfied that the cost involved in this exercise was likely to outweigh any financial benefit derived from so doing. In any event, the Tribunal was satisfied that the increased amount claimed by the Respondent was *de minimis* and it found the sum of £331.68 to be reasonable.

Section 20C & Fees

21. The Applicant had also made an oral application under section 20C of the Act for an order that the Respondent be disentitled from recovering, through the service charge account, all or part of any costs it may have incurred in the proceedings before the Tribunal. The Tribunal has a discretion to make an order when it is just and equitable to do so. The Respondent resisted the application on the grounds that the main complaint referred to a search for information which had been answered in correspondence and considered that there was provision in the lease to recover the Council's costs.

22. Having carefully considered the evidence, including the *inter partes* correspondence, the Tribunal considered it just and equitable to make an order preventing the Respondent from being able to recover any of the costs it had incurred in these proceedings. It was clear to the Tribunal that, prior to the issue of this application, the Respondent had made no real effort to address the Applicant's queries. Furthermore, the Tribunal was satisfied that the making of this order also properly reflected the concerns it had about the calculation and apportionment of the caretaking costs in 2008/09. For the same reasons, the Tribunal also orders the Respondent to reimburse the Applicant the fees of £200 he paid to issue and have this application heard.

Dated the 15 day of September 2010

P.P.

CHAIRMAN.....
Mr I Mohabir LLB (Hons)