

4937



Residential
Property
TRIBUNAL SERVICE

**LEASEHOLD VALUATION TRIBUNAL
FOR THE LONDON RENT ASSESSMENT PANEL**

**LANDLORD & TENANT ACT 1985, AS AMENDED
SECTIONS 27A & 20C**

Ref: LON/00BG/LSC/2009/0530

Premises: Flat 61
Express Wharf
3 Hutchings Street
London
E14 8JP

Applicant: Ms S C Rolls

Respondent: Swan Housing Association Limited

Appearances: Ms S C Rolls
For the Applicant

Mr R Pearce, Leasehold Manager
Ms G Macdonald, Leasehold Officer
Mr J Dyer, Head of Estates Services
Mr N Mann, Leasehold Officer
For the Respondent

Date of Hearing: 25 February 2010

Members of the Tribunal: Mrs J S L Goulden JP
Mr T N Johnson FRICS
Mrs L Walter MA

Background

1. The Tribunal was dealing with the following applications dated 12 August 2009 which were received by the Tribunal on 17 August 2009:-
 - (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 for limitation of landlord's costs of proceedings before the Tribunal under S.20C of the Act.
2. The application relates to Express Wharf, 3 Hutchings Street, London E14 8JP ("the property"). The Tribunal was advised that the property is a purpose built seven storey block of flats constructed in 2005 comprising a mixture of 1, 2 and 3 bedroom flats. There are 4 long leasehold flats, 10 shared ownership flats and 53 flats occupied by protected tenants. The parties did not consider that an inspection of the property would be of assistance to the Tribunal.
3. The Applicant is the lessee of Flat 61 at the property. Her lease, a copy of which was provided to the Tribunal, is dated 20 October 2006 and made between the Respondent (1) and the Applicant (2) and is for a term of 125 years from 1 April 2005 at the rents and subject to the terms and conditions therein contained. The Tribunal was advised that all the residential leases were essentially in the same form. The Applicant had purchased a 35% share and states that she is charged rent on the remaining 65% and pays 100% of the service charge.
4. The Respondent is Swan Housing Association Limited, a Registered Social Landlord registered with the Housing Corporation and is stated to be a non profit making body whose primary purpose is the provision of social housing to those in need.
5. The service charge year runs from 1 April to 31 March in each year and the years in dispute are 2008 and 2009 and the estimate for 2010.
6. Mediation had taken place at the Tribunal on 16 November 2009 but had proved to be unsuccessful.

Hearing

7. The hearing took place on 25 February 2010. The Applicant appeared in person and was unrepresented. The Respondent was represented by Mr R Pearce, Leasehold manager, Ms G Macdonald, Leasehold Officer, Mr N Mann, Leasehold Officer and Mr J Dyer, Head of Estates Services.
8. The issues in dispute which remain to be determined by the Tribunal are as follows (earlier challenges in respect of fire equipment maintenance, building insurance audit fee and electricity having been withdrawn).
 - Heating
 - Communal cleaning
 - Communal repairs
 - Water/sewerage
 - Management fee
 - Grounds maintenance
 - Reimbursement of fees
9. Although there had been an application for limitation of landlord's costs of proceedings before the Tribunal under S.20C, Mr Pearce said that it was not proposed to place any such costs on the service charge account and accordingly no determination is required of the Tribunal.

Preliminary issue

10. The preliminary issue raised by Ms Rolls was in respect of the apportionment of the service charge costs.
11. Ms Rolls said that she had been charged 1/67th of the costs and considered that this was unfair since (a) there was no such provision in the lease and (b) she was requested to pay the same proportion as the lessees of larger flats in the block
12. Mr Pearce for the Respondent said that the service charge had been apportioned as described by Ms Rolls and was a reasonable method of apportionment, but he conceded that the lease was silent on the method of apportionment and, accepted that the lease was defective in that respect.
13. In the Respondent's Statement of Case, it was stated:-

"The service charge provisions are contained in Clause 7 of the lease.

As the Clause does not state how the service charge should be apportioned the decision was made to calculate the apportionment as an equal split between the 67 properties in the block irrespective of tenure.

Although this is an accepted method the Respondent has reviewed the apportionment and will consult with the leaseholders in the block with a view to varying the leases to apportion the 2009/2010 Actual Expenditure Statement and all future charges on a floor area basis."

14. No application for variation of the lease had been lodged by the Respondent under Part IV of the Landlord and Tenant Act 1987 but Mr Pearce said that it was intended to lodge an application for variation unless all fourteen lessees in the block agreed to their leases being varied. The Tribunal queried why no application for variation had been lodged since Mr Rolls' application under S.27A was dated as long ago as August 2009. Mr Pearce said that they had other cases progressing in the LVT and insufficient members of staff.
15. In view of the circumstances, it was explained to both sides that the Tribunal was only able to make limited determinations and would be unable to deal with the issue of apportionment unless and until that issue had either been agreed between all fourteen lessees and the Respondent or a determination was made in respect of the lease variation by the Tribunal. The parties accepted this was the case.
16. Ms Rolls said that she had already paid some £5,000 in service charges since she purchased the property in October 2006 and requested the Tribunal to order the Respondent to repay that sum. The Tribunal said it was unable to do so and pointed out that the contract between the parties was the lease entered into between them. In that lease Ms Rolls had covenanted to pay service charges and the only bar to that, at present, was the method of apportionment.

Evidence

17. The burden is on the Applicant to prove her case with such relevant evidence as is sufficient to persuade the Tribunal of the merits of her arguments. The Tribunal is not permitted to take into account the personal circumstances of the parties when making its decision.
18. The salient points of the evidence and the Tribunal's determination is given under each head but the Tribunal considers that it might be helpful to the parties if it sets out the basis on which its considerations are made.
19. The Tribunal has to decide not whether the cost of any particular service charge item is necessarily the cheapest available or the most reasonable, but whether the charge that was made was "**reasonably incurred**" by the landlord i.e. was the action taken in incurring the costs and also the amount of those costs both reasonable.

20. The difference in the words "reasonable" and "reasonably incurred" was set out in the Lands Tribunal case of **Forcelux Ltd –v- Sweetman and Parker (8 May 2001)** in which it was stated inter alia,

"....there are, in my judgement, two distinctly separate matters I have to consider. Firstly the evidence, and from that whether the landlord's actions were appropriate, and properly effected in accordance with the requirements of the lease, the RICS Code and the 1985 Act. Secondly, whether the amount charged was reasonable in the light of that evidence. This second point is particularly important as, if that did not have to be considered, it would be open to any landlord to plead justification for any particular figure, on the grounds that the steps it took justified the expense, without properly testing the market. It has to be a question of degree...."

Heating

21. The block charges under this head were £28,081.88 (2008) £20,803.73 (2009) and £21,144.59 (estimate for 2010 based on invoices paid between April and December 2008 with an uplift for inflation of 4.4%).
22. The Applicant's challenge was that there was no provision for these charges under the lease and, even if the Tribunal found that there was such a provision, the apportionment was challenged. There was no challenge to the costs per se. Ms Rolls accepted that the issue as to apportionment could not be dealt with by the Tribunal unless and until the admitted deficiencies in the lease had been corrected.
23. Ms Rolls relied on Clause 7.5 of the lease and said she was "a green person" and did not require the heating on constantly. She would prefer to have heating individually controlled. The sales brochure had indicated that the flats had individual heating and she would like to install her own heating.
24. Evidence for the Respondent was provided by Mr J Dyer, Head of Estate Services, who said that there was one main boiler serving the whole of the Barkantine Estate which provided heating 24/7 to the block. There was a boiler in the basement of the property which was serviced annually. There were no separate meters in the flats, but one meter only for the block. The costs were allocated on a block basis.
25. In a letter to Ms Rolls dated 30 June 2009 from a Leasehold Services Manager, it was stated:-

"Barkantine confirm that their heat tariff is derived from the gas prices which are agreed with the London Borough of Tower Hamlets. They seek to secure gas prices which are competitive & only have contracts for a period

of 1 year to allow flexibility.

Barkantine's agreement for the planning servicing of the system can be viewed in any of our offices, if you informed me of a date and time when you would wish to view this document."

26. Mr Pearce accepted that there was no specific reference to heating, but relied on Clause 5(3)(b) of the lease.

27. The Tribunal has considered the clauses relied on by both sides.

Clause 7.5(a) of the lease states:-

"The relevant expenditure to be included in the Service Provision shall comprise all expenditure reasonably incurred by the Landlord in connection with the repair management maintenance and provision of services for the Building and shall include (without prejudice to the generality of the foregoing) –

7.5(a) the costs of and incidental to the performance of the Landlord's covenants contained in clauses 5.2 and 5.3 and 5.4."

28. Clause 5(3)(b) of the lease states:-

"That (subject to payment of the rent and service charge and except to such extent as the Leaseholder or the tenant of any other part of the Building shall be liable in respect thereof respectively under the terms of this Lease or of any other lease) the Landlord shall maintain repair redecorate renew and in the event in the Landlord's reasonable opinion such works are required) improve

5.3(b) the pipes sewers drains wires cisterns and tanks and other gas electrical drainage ventilation and water apparatus and machinery in under and upon the Building (except such as serve exclusively an individual flat in the Building and except such as belong to the Post Office or any public utility supply authority)."

29. In the view of the Tribunal, the provision of heating is a service for the building under Clause 7(5)(a) of the lease. Clause 5(3)(b) relied on by the Applicant specifically excludes those items which serve "*exclusively an individual flat*". The provision of heating does not serve exclusively the Applicant's flat but serves all the flats and the common parts.

30. The Tribunal determines that the lease provides for the provision of heating and that this includes heating to the Applicant's flat. The apportionment of

the block costs cannot be determined by the Tribunal at this stage.

31. It is understood that the Respondent intends to lodge an application for variation of the leases if no agreement is reached between the fourteen affected lessees. No doubt, in view of the fact that lease construction has been raised by the Applicant under this head, the Respondent will consider whether to include this issue in any such future application for lease variation.

Communal cleaning

32. The block charges under this head were £24,989.90 (2008), £22,618.92 (2009) and £21,391.50 (estimate for 2010, based on the costs for April to December 2008 with an uplift for inflation).
33. The Applicant's challenge was as to the cost and standard of work carried out.
34. Ms Rolls provided a schedule of complaints made to the Respondent together with photographs in support and said that the basic hourly rate was far too high and the level of service could not justify the charge. She referred to benchmark rates for cleaning services and said that the Respondent was charging almost double. She disputed the number of hours worked. She said cleaning was "poorly spread out" and supervision of staff was lacking.
35. Ms Rolls confirmed that she had gone round the site with Mr Dyer in 2007 but she considered that it had not been productive. Although invited to inspect the site in a letter to her of 27 May 2009 she said she had not accepted the invitation.
36. Mr J Dyer, said that he had held that post of Head of Estate Services for some five years and was responsible for approximately 5,500 properties.
37. Mr Dyer set out in detail the duties carried out in respect of cleaning and said that whilst the cost appeared to be at a high hourly rate, this was somewhat misleading and the true rate to each resident was £6.50 a week. He maintained that the service was excellent.
38. In the Respondent's Statement of Case it was stated, inter alia:-

"The Respondent considers they provide a good service and agree that it may not be the cheapest. The Respondent would point out that the charge is not for cleaning alone but includes caretaking duties such as replacing light bulbs, carrying out minor repairs where possible and reporting the more complex problems to our repairs team. The service also includes

graffiti removal and reporting anti social behaviour....

The block receives a full clean on Mondays which amounts to 2 men cleaning for 6 hours and a 'spot' check on Wednesday which involves 2 men cleaning 2 hours each. A total of 16 hours a week is spent cleaning the block....

As part of the Respondent's internal complaints procedure the Applicant met with the Head of Estate Services in August 2007 to 'walk' the block and highlight any cleaning issues. The cleaning schedule was explained at this time. A further invitation was extended to the Applicant to 'walk' the block in a letter dated 27 May 2009.

In the Respondent's letter of 15 June 2009 – part of the internal complaints procedure – the Applicant was sent copies of the Estate Inspection Reports for 22/01/2009, 26/03/2009 and 07/05/2009....”

39. A breakdown of the hourly rate was provided together with a cleaning schedule and cost of tasks to be carried out.
40. It is noted that an in-house service was used and no competitive tender had been sought. The cost appears high although evidence was given as to the superior standard achieved, and it is noted that the duties exceed those normally associated with cleaning.
41. The invitation from Mr Dyer to Ms Rolls to walk round the site and point out where she felt the service was poor had been rejected on the basis that she worked, but the offer to her was for a meeting “at any time”.
42. The Tribunal determines that, in respect of communal cleaning, the block charges of £24,989.90 (2008), £22,618.92 (2009) are relevant and reasonably incurred and properly chargeable to the service charge account and the estimate for 2010 of £21,391.50, if incurred, would be reasonable. The Tribunal makes no determination as to apportionment.

Communal repairs

43. The block charges under this head were £Nil (2008) £1,922 (2009) and £982.17 (estimate for 2010 based on invoices paid between April and December 2008 with an uplift for inflation).
44. The Applicant's challenge was in respect of the standard of work carried out.
45. Ms Rolls provided a schedule of complaints made to the Respondent and photographs in support. She said that when she had purchased the flat, the block had been in a pristine condition which was not now the case. Light

fittings had been replaced with inferior fittings and floor tiles had not been replaced with like for like tiles.

46. Mr Pearce said that he had not expected the new floor tiles to be so different and after several meetings, the contractors had agreed to replace the same with tiles as similar as possible to those originally laid. The light fittings were also to be replaced at no extra charge.
47. Where no sum is placed on the service charge account, as in 2008, then obviously there is no determination to be made by the Tribunal. The costs incurred in 2009 and the estimate for 2010 are considered to be de minimis.
48. The Tribunal determines that, in respect of communal repairs, the block cost of £1,922 (2009) is relevant and reasonably incurred and properly chargeable to the service charge account and the estimate of £982.17 (2010), if incurred, would be reasonable. The Tribunal makes no determination as to apportionment.

Water/sewerage

49. The block charges under this head were £2,641.14 (2008), £14,480.51 (2009) and £20,809.88 (estimate for 2010) based on previous invoices up to December 2008 with an uplift of 4.4% for inflation.
50. The Applicant's challenge was as for the heating issue, namely that there was no provision for these charges in the lease and, even if the Tribunal found that there was such a provision, the apportionment was challenged.
51. The arguments of both sides were as previously stated, with the Applicant relying on Clause 7.5(a) and the Respondent relying on Clause 5(3)(b) of the lease, both of which are set out in the paragraphs 27 and 28 above.
52. In respect of apportionment, the Tribunal repeats its views as set out in paragraphs 29 and 30 above. The Tribunal considers that the lease provides for the provision of water/sewerage.
53. The Tribunal makes no determination as to apportionment. The Tribunal's comments as set out in paragraph 31 above are repeated.

Management fee

54. The management fee was a fixed sum per unit across the Respondent's housing stock. The unit fee for 2008 was £72.80 and for 2009 was £77.70. It was intended to charge a unit fee of £81.00 for 2010. The increase was governed by the rate of inflation, being 4.1% (2006/2007), 4.4% (2008/2009) and 5.2% (2009/2010).

55. Ms Rolls accepted that there was a cost involved in managing the property and the unit fee was not high, but she complained about the service provided. She also challenged the increase as being more than the rate of inflation. She said that on several occasions, the Respondent had blamed shortcomings on vandalism or criminal activities, but she had not witnessed this and the Respondent had not provided her with a list of incidents reported to the police as she had requested. Ms Rolls suggested a deduction of 30% - 50% was appropriate.
56. Mr Pearce said that the fee was for all back office costs for management and administration of the Respondent's housing stock. This included salaries and formed no part of the work involved in managing the rented sector. He said that there were approximately 1,400 long lessees or shared owners liable for this fee, which was fixed. It covered a head office, two London area offices and an office in Essex. The true cost when compared with local authorities should be in the region of £200 per owner in London and £180 per annum in Essex. The fixed fee charged was under review and a decision would be made in April 2010.
57. The Tribunal considers that the fixed fee per unit is modest and Ms Rolls suggested reduction is rejected. In a letter to Ms Rolls from a Leasehold Services Manager dated 30 June 2009 it was stated "*we only aim to cover our cost and do not make a surplus*". The Tribunal considers that this is a correct assessment. Even if increased after the review, Mr Pearce has confirmed that any increase would not be back dated.
58. The Tribunal determines that, in respect of the management fee, the unit costs of £72.80 (2008), and £77.70 (2009) are relevant and reasonably incurred and properly chargeable to the service charge account and the unit cost of £81.00 (2010), if incurred, would be reasonable.

Grounds maintenance

59. The block charges under this head were £Nil (2008), £1,005 (2009) and £1,439.83 (estimate for 2010) based on invoices paid between April and December 2008 with an uplift for inflation.
60. The Applicant's challenge was in respect of cost and standard.
61. Ms Rolls sought a reduction of 25% and said in her witness statement, inter alia:-

"The gardening requirement extends to two plain lawn areas at the front and rear of the property. The landscaping plan allowed for shrubs/trees in the front garden but the Respondent has never completed the planting

arrangement, which was a condition of planning permission.... at the rear of the property there are several raised brick planters that are supposed to contain various shrubs.

By the Respondents own admission, grass cutting was not carried on occasions during the summer of 2009. The front garden grew over to weeds.

I am certain that the brick planters have never been tended to during the entire time I have lived at the property and only contain weeds/rubbish.

The garden contains a seated area. When I purchased the property I thought maybe it would be nice to sit out there with friends and neighbours on a summer evening. However it is just weeds, a poor condition lawn and rubbish from the paladin bins spilling out. The Respondent has erected a cheap larch panel 'B&Q style' fence to try and hide the paladin bins and the rubbish.

The RICS states in its publication 'Service Charge Residential Management Code, 2nd Edition' 7.15: Unless it is a tenant's obligation you should keep shared garden areas consistent with the quality of the property. The gardening service should normally include: a) grass cutting and lawn maintenance; b) weeding and pruning; c) appropriate replacement of shrubs, trees and plants'.

The actual cost of service is very low, but then the standard of work is poor/non-existent."

62. Mr Pearce said that replanting was to take place "this week or next". The work had been carried out in-house since April 2008 by the Estates Services Team fortnightly between April and October and on a monthly basis for the remainder of the year.
63. Where no sum has been placed to the service charge account, as in 2008, then obviously there is no determination to be made by the Tribunal. The costs incurred in 2009 and the estimate for 2010 are considered to be de minimis.
64. The Tribunal determines that, in respect of ground maintenance, the block charge of £1,005 (2009) are relevant and reasonably incurred and properly chargeable to the service charge account and the estimate of £1,439.83 (2010), if incurred would be reasonable. The Tribunal makes no determination as to apportionment.

Reimbursement of fees

65. The Applicant had requested the Tribunal to consider her application for the application and hearing fees totalling £250 to be reimbursed. However Mr Pearce confirmed that the Respondent would reimburse the Applicant in the sum of £250 and therefore no determination is required under this head. Further, although Ms Rolls indicated that she wished to make an application for penal costs against the Respondent, she formally withdrew that application during the hearing.

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:

.....23 March 2010.....