

7396



**HM Courts
& Tribunals
Service**

Leasehold Valuation Tribunal

Case number BIR/00CN/LSC/2010/0022

Property Flat 33 Moss House Close, Edgbaston, Birmingham
B15 1 HF

Applicant Miss Gunpreet Kahlon

Respondent Optima Community Association

Date of Application: 21st June 2010

Type of Application (1) to determine reasonableness and payability of
service charges
(2) to determine whether or not an order should be
made preventing the Applicant from recovering the
costs of these proceedings as service charge.
Sections 27A (1) and (3) and 20C of the Landlord and
Tenant Act 1985- [The Act]

Tribunal: Mr R T Brown FRICS (Chairman)
Mr P J Hawksworth Solicitor

DECISION

1. The Tribunal determine the service charges for the subject flat to be of a reasonable standard and at reasonable cost for the following years ending 31st March as follows:
2005 £546.13
2006 £656.58
2007 £687.70
2008 £748.22
2009 £732.57
2010 £756.02
2. The Tribunal determine the reasonable estimated cost of services to be incurred for the year ending 31st March 2011 is £727.95.

3. In so far as the costs of these proceedings before the LVT are recoverable under the lease the Tribunal makes no order in accordance with its power under section 20C Landlord and Tenant Act 1985.

REASONS FOR DECISION

The Application and Introduction

4. The Applicant seeks a determination of the reasonableness of standard and cost of services in respect of the service charge years ending 31st March 2005, 2006, 2007, 2008, 2009 and 2010, and to be incurred in the year ending 31st March 2011.
5. The issues before the Tribunal relate to all items in the service charge except the cost of insurance which is not disputed.
6. It is not in dispute between the parties that service charge is payable under the terms of the lease for the services provided.
7. Papers submitted by the Applicant include: The Application and enclosures which included the lease, actual expenditure for the years in dispute and emails to the Tribunal and Respondent dated 6th April and 30th September 2011.
8. Papers submitted by the Respondent include a statement dated 28th March, letters and emails dated 26th April, 9th May, 21st June, 25th August and 3rd October 2011.

The Property

9. The Tribunal inspected the property on the 23rd November 2011 in the presence of the Applicant Miss G Kahlon, Mr J Lellow Director of Financial Services and Mr I Stokes Maintenance Manager for the Respondent, Optima Community Association.
10. The property comprises an estate of 216 self contained flats and 156 garages. Moss House Close which comprises 88 flats is situated within the development.
11. The development originally constructed in the 1970s, underwent major refurbishment in the late 1990s following its transfer from Birmingham City Council to the present Landlord, Optima Community Association.
12. Individual flats are accessed either by the common hallways or by direct access from the walkways.
13. At their inspection the Tribunal noted a generally satisfactory standard of maintenance although they did note:
 - Cracking brickwork to the supporting wall on the southern access fronting Islington Row.
 - Moss growing from the east facing wall of part of Moss House
 - Green moss on east facing roofs, gutters and downpipes
 - Damaged brickwork to the garden wall with the adjoining Synagogue

The Law

14. The relevant law is set out in **Appendix 1** attached.

The Lease

15. The Tribunal were provided with a copy of the lease dated 8th May 2000.
16. Clause 2(a)(xiii) defines and specifies the services to be provided by Optima.

17. Paragraph 1 of the Sixth Schedule says: *'The service charge for the financial year shall be a reasonable proportion as determined by Optima of the aggregate of:-*
- (a) The costs and expenses incurred or to be incurred by Optima in connection with the management and Maintenance of the Estate or the Building and the carrying out of Optima's obligations and duties and providing all such services as are required to be provided under the terms of this lease and as are implied herein by the Act including where relevant the following*
 - (1) the Services*
 - (2) the Repairs*
 - (3) the Improvements*
 - (b)*
 - (c) A management charge equal to 10 per centum of the aggregate of the sums referred to in sub paragraphs (a) and (b) above or £10.00 whichever is the greater'*

The Hearing

18. The Hearing took place at 11.30 am on the 23rd November 2011 at the Birmingham Office of the Residential Property Tribunal Service.
19. The hearing was attended by the Applicant, Miss Kahlon, and for the Respondent, by Mr Lellow and Mr Stokes.

The Applicant's Case in respect of all service charge years in dispute

20. The Applicant's case stems from a general dissatisfaction with the standard and cost of the service provided. The Tribunal noted that she had generally failed in the case preparation stage to particularise her complaint as directed by the Tribunal. This had made it difficult for Optima to know the precise nature of the case it had to meet.

Communal area cleaning

21. Miss Kahlon said the area cleaned was too small to justify a charge of £334.89; hardly any cleaning was actually carried out and in any event there were no carpets in the common areas.
22. The development was not a privately owned block such as Jupiter at Five Ways. If the communal areas were heated, carpeted and had the benefit of a concierge then £334.89 would be justified.
23. The subject flats were not 'top spec' but the same as council flats.
24. In her submission she produced an invoice for a years' service charge at 88 Ruston Street, Birmingham B16 8BB a property owned by Birmingham City Council where she owned leasehold flat and the service charge for the year to 31st March 2011 was only £82.23. She contended that 88 Ruston Street was a comparable property in assessing the level of services and service charge which would be reasonable at Moss House Close.

Communal area maintenance

25. Miss Kahlon objected to paying for 'bulk refuse removal' because it should be included in the rates paid to Birmingham City Council.

Electricity

26. Miss Kahlon's flat did not benefit from the communal area lighting.

Gardening and grounds

27. The grounds are not very clean with un-swept leaves particularly at this time of year.
28. Asked by the Tribunal how often she visited the estate, she explained that she had been away for a year but previously visited approximately 3 times per week.
29. In her evidence bundle Miss Kahlon produced 'black and white' digital photographs which showed some rubbish outside garages and leaves needing sweeping up. After establishing that these photographs were taken in September 2011 by a third party and that one may have been of the grounds to the adjoining synagogue the Tribunal ruled that as they were not taken by the Applicant, were unsigned and undated, with no witness statement in support they would not be admitted in evidence.
30. Miss Kahlon expressed concern about the appointment of "Sheldon Industrial (Holdings) Ltd" to perform these maintenance contracts. After considering information provided by Optima she was concerned that the other two companies who tendered (Herefordshire Jarvis and Connaught) were no longer on the Companies House website. She was not clear what tender process (if any) had been undertaken which resulted in the appointment of Sheldon.

Day to day repairs

31. The structure was always damp, and bathrooms were not ventilated.
32. Miss Kahlon did not know what work had been done and to which property. She owns 4 properties on the estate and has never seen anyone on site.

Management charge

33. Miss Kahlon contended that the Respondent should not be charging for management; it should be free.

Questioned by Mr Lellow Miss Kahlon responded:

34. That the Ruston Street flats were 'walk up' maisonettes with communal gardens. She was not sure if there was a communal staircase.

Section 20C application

35. The Applicant seeks an order from the Tribunal that the costs of these proceedings are not to be treated as relevant costs but makes no submission on this point.
36. In summing up Miss Kahlon said the motive behind her application was to have an 'external ruling' on these charges. She could not understand why they were so high and was not convinced they were the real charges.

The Respondent's Case in respect of all years in dispute

Communal area cleaning

37. Mr Lellow explained that the estate was maintained to a high standard.
38. The service standard was agreed and the original tendering had complied with European Union tendering procedures because of the size of the contract

(involving some 2000 properties in the ownership of the Landlord). The contract was for a period of 7 years commencing in June 2005. Section 20 consultation procedure (*for Qualifying Long Term Agreements*) had been undertaken prior to the contract being awarded.

39. There was a 'quality control' procedure in place with residents being invited to accompany the Housing Officer on site visits. Further, there was a 'Scrutiny Panel' made up from residents across Optima properties.
40. Mr Lellow had visited Ruston Street and comparison is inappropriate because the level of service provided for that property is manifestly different to the service Optima have to provide at Moss House Close.
41. As directed by the Tribunal, Mr Lellow had provided copies of invoices for inspection but Miss Kahlon had not taken up the offer of a meeting.

Communal area maintenance

42. This is part of the contract with Sheldon and includes provision for bulk refuse collection, out of hours working and light bulbs.
43. The procedure is that if a 'bulk item' is spotted by a cleaner (or a resident) the cleaners (who are on site 5 days per week) will contact Sheldon who will send a collection team.
44. Residents can telephone the Council who will remove items for a specific resident but will not remove unidentified rubbish from communal areas. Optima are under an obligation to comply with fire safety legislation and best practice.

Electricity

45. The contract for the supply of electricity was similarly tendered on an EU compliant basis through the National Housing Federation.
46. The cost incurred relates to the supply of electricity for internal and external lighting.

Gardening and grounds

47. The contract was procured in the same way as the Communal Area Maintenance.
48. The communal facilities (whether used or not) are available to all residents on the estate.
49. In response to Miss Kahlon's question regarding the fact that Connaught and Herefordshire Jarvis were no longer trading, Mr Lellow confirmed that they were trading at the time of the tender process.

Day to day repairs

50. The contract for responsive repairs is with Axis Europe Plc. This contract was let under an EU compliant process. Other companies provide specialist services, for example door entry and fire safety.
51. While Miss Kahlon had not witnessed any repairs being undertaken, invoices for all repairs carried out in 2009/10 had been provided to her as a 'snapshot'.

Management charge

52. The management charge is set out in the lease at 10% of the total cost of services.

53. Questioned by the Tribunal, Mr Lellow explained that the cost of communal area cleaning had originally (in 2005) been divided equally between all 216 properties on the estate. However, Optima had been able to refine the work involved and it is now divided amongst each individual block (88 units in the case of Moss House). Gardening and grounds maintenance and communal electricity supply are divided equally between all 216 units. Communal area maintenance, day to day repairs and insurance are divided equally between the residents of each block. There are 156 garages, 4 of which are used as stores. The garages do not contribute to the service charge.
54. Mr Lellow confirmed that Optima had no connection to or interest in any of the contractors employed.
55. In summing up Mr Lellow said that the case had been ongoing for some time and that Optima had tried to be helpful and regularly provided information to Miss Kahlon. A meeting would have been useful. He believed Optima could substantiate a transparent procurement process in compliance with EU tendering requirements.

Section 20C application

56. Neither party made submission in respect of the application asking the Tribunal to use its discretion to make an order preventing the Respondent from recovering the costs of these proceedings (in so far as they are recoverable under the lease) by way of the service charge.

The Tribunal's Deliberations

General comment on evidence of the parties

57. The Tribunal considered all the evidence presented.
58. In making its decision the Tribunal considered the importance of the decision in *Schilling v Canary Riverside Developments PTD Ltd* (LRX/26/2005, LRX/31/2005 and LRX/47/2005) in which his Honour Judge Rich stated at paragraph 15:
'If a landlord is seeking a declaration that a service is payable he must show not only that the cost was incurred but also that it was reasonably incurred to provide services or works of a reasonable standard, and if the tenant seeks a declaration to the opposite effect, he must show that either the cost or the standard was unreasonable'.
59. The Tribunal was unconvinced by the evidence of Miss Kahlon that the services were not of a reasonable standard and were not of reasonable cost. They used their expert knowledge and experience to consider whether or not the standard and cost of the service provided was in fact reasonable.

Communal area cleaning, Communal area maintenance, Gardening and grounds

60. The Tribunal considered these three items together because they were carried out by the same contractor.
61. The Tribunal noted the extent of the areas to be maintained and that this included some 31 individual common access halls and stairways, walkways, bin stores, grassed areas and flower borders.

62. The Tribunal found from the evidence presented and with the benefit of the inspection, that the communal areas and grounds were cleaned and maintained to a good (i.e. above a reasonable) standard.
63. The Tribunal was not presented with any evidence that EU compliant tendering had not been undertaken or that section 20 of the Landlord and Tenant Act 1985 had not been complied with.

Electricity

64. Similarly, the Tribunal was not presented with any evidence that EU compliant tendering had not been undertaken or that section 20 of the Landlord and Tenant Act 1985 had not been complied with.

Day to day repairs

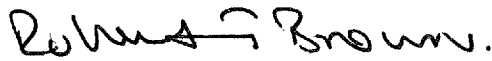
65. The Tribunal was not presented with any evidence that day to day repairs had not been undertaken or when they had been undertaken, that they were below a reasonable standard.
66. As noted in paragraph 13 above there are maintenance issues on the estate. However, in the Tribunal's experience, an estate of this size will always have ongoing maintenance work. In this case it was not consider that the issues identified evidenced any long term neglect by the Landlord.

Management charge

67. The Tribunal prefers to see management charges based on the actual cost of management in relation to the time expended by the various personnel involved and the costs of administration. The Tribunal would have expected to see a much higher charge based on this method of calculation.
68. The Tribunal generally does not consider that the application of a percentage charge based on the total expenditure leads to conscientious and efficient management. In this case however, and considerably to its disadvantage, the Landlord is bound by the terms of the lease.

Section 20C

69. As regards the application under section 20C the Tribunal notes that neither party provided any evidence or made any further submissions on this point and concludes that, given its determination on the substantive issue, it is not appropriate to make an order.

Robert Brown 
Chairman

- 9 DEC 2011
Dated.....

Appendix 1 – The relevant law

Landlord and Tenant Act 1985

Section 18 Meaning of “service charge” and “relevant costs”

- (1) In the following provisions of this Act “service charge” means 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, improvement or insurance or the landlord’s costs of management, and
 - (b) the whole or part of which varies or may vary according to the relevant costs
- (2) The relevant costs are the costs or estimated costs incurred or to be incurred by or on behalf of the landlord or a superior landlord in connection with the matters for which the service charge is payable.
- (3) for this purpose
 - (a) costs includes overheads and
 - (b) costs are relevant costs in relation to a service charge whether they are incurred or to be incurred in the period for which the service charge is payable or in an earlier period

Section 19 Limitation of service charges: reasonableness

- (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 of works, only if the services or works are of a reasonable standard; and the amount payable shall be limited accordingly.
- (2) Where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable, and after the relevant costs have been incurred any necessary adjustment shall be made by repayment, reduction or subsequent charges or otherwise.

Section 27A Liability to pay service charges: jurisdiction

- (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.
- (3) An application may also be made to a leasehold valuation tribunal for a determination whether if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified

description, a service charge would be payable for the costs and if it would, as to-

- (a) the person by whom it would be payable,
- (b) the person to whom it would be payable,
- (c) the amount which would be payable,
- (d) the date at or by which it would be payable, and
- (e) the manner in which it would be payable

Section 20C Limitation of service charges: costs of proceedings

- (1) A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a court or leasehold valuation tribunal, or the Lands Tribunal, or in connection with arbitration proceedings, are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application.
- (2) The application shall be made—
 - (a) in the case of court proceedings, to the court before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to a county court;
 - (b) in the case of proceedings before a leasehold valuation tribunal, to the tribunal before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to any leasehold valuation tribunal;
 - (c) in the case of proceedings before the Lands Tribunal, to the tribunal;
 - (d) in the case of arbitration proceedings, to the arbitral tribunal or, if the application is made after the proceedings are concluded, to a county court.
- (3) The court or tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances.