

9705



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

Case Reference : **MAN/30UP/LSC/2013/0101**

Properties : **Various properties in the Borough of West Lancashire (as listed in the Schedule hereto)**

Applicant : **West Lancashire Borough Council**

Respondents : **As listed within the Application, those participating in the proceedings being listed in paragraphs 13 to 23 herein**

Type of Application : **Section 27A Landlord and Tenant Act 1985 – Application for a determination of liability to pay and reasonableness of service charges**

Tribunal Members : **Mr J R Rimmer
Mr J Faulkner
Mr L Bottomley**

Dates of hearing : **1st November and
19th December 2013**

Date of Decision : **22nd January 2014**

DECISION

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Order : The service charges which are the subject of the application have been reasonably incurred at reasonable cost and are payable by the respective leaseholders of the relevant properties.

Application and background

1. The Applicant is the Borough Council responsible for the management of its own housing stock throughout the Borough. It is not one that has divested itself of that stock to a Housing Association. Within that stock there are a large number of properties let on long leases under the "Right to Buy" scheme, rather than let on shorter term Secure Tenancies. Those properties let on long leases that are the subject of this application have an obligation within the relevant lease to pay a service charge for services provided to the developments within which they are situated.
2. The properties are spread throughout the Borough and range from small units of two-storey flats to more complex developments involving significant common parts and more complex service requirements. They are located in places ranging from large traditional estates in Ormskirk, through smaller, more isolated rural communities where housing was once required to satisfy local industrial, or agricultural need, to large new town development in Skelmersdale where there is now considerable social deprivation. It would appear that having established a basic starting point for each leaseholder at the time of the sale of a particular property the same amount has been charged year on year at a relatively low level, notwithstanding the actual work required.
3. The common thread connecting all the properties that are subject to the application is the problem of arrears that have arisen over time in respect of payment of the service charges. The applicant would appear to have accepted that it has not hitherto pursued those arrears with the fullest vigour, but is now under the same financial pressures in the current recession that affect us all greatly. It therefore has a need to maximise its legitimate revenue sources.
4. Given the number of properties within the application, only a relatively small number of leaseholders responded to the application in so far as it related to their particular properties. Two overarching themes were discernible: that many of the leaseholders had not appreciated either the existence or extent of service charge liabilities once they had purchased a long lease under the Right to Buy Scheme, or the difficulties that might follow for them also in times of difficult financial circumstances. It is common for Tribunals to find that leaseholders have not appreciated the extent to which service charge costs hid within the all-inclusive rents previously paid as Secure Tenants.

5. The purpose of the application for the Applicant is to have a determination as to the reasonableness of the charges that have been levied and then to pursue such amounts as the Tribunal determines to be reasonable through civil proceedings in the County Court, even to the point of seeking forfeiture of any relevant lease should the situation then merit it. It is clear that this will be the ultimate step for the Applicant, should it be required, from the Statement of case provided by the Applicant (and considered in greater detail below). There have therefore been continuing negotiations between the Applicant and individual leaseholders both before and during the period of the Tribunal's consideration of the matter and some properties that were originally comprised within the application have since been the subject of requests for their consideration to be terminated following satisfactory agreements being reached. The Tribunal is happy to record that this determination directly relates now to those properties that remain.
6. As with many applications to the Tribunal it is never immediately clear how many Respondents wish to participate in the proceedings, nor how they see that participation as happening. The Tribunal therefore made arrangements to inspect a number of properties in the morning of 1st November 2013 and then convening for a hearing at the Liverpool Civil Justice Centre later the same day. It was clear then that although a number of issues could be dealt with there were others requiring further investigation either by the Applicant in response to matters raised by those Respondents in attendance, or by the Tribunal itself. Further directions for the progress of the matter were therefore given by the Chairman and the matter re-listed for further hearing on 19th December, following another inspection of additional properties by the tribunal members on the afternoon of 18th December.
7. It is not proposed within this decision to outline what was seen on the inspections at any length. Paragraph 2, above, outlines the disparate nature of the various properties and their environments and to a very considerable extent the service charges in question related matters relating to the exterior of the properties, or, where relevant, their common parts. A very small number of Respondents did raise matters pertinent to services which related to matters within their particular flats and these are dealt with below, where appropriate. Evidence and hearing.

Evidence and hearing

8. The Applicant provided a comprehensive bundle of documents, contained in 7 lever arch files, for the purposes of the hearing on 1st November. Within them they contained the same essential application in relation to each of the Respondents.
 - Details of the sale of each of the properties
 - A copy of the lease relating thereto

- The invoices for the services provided in respect of the period over which it was alleged arrears had arisen
 - Correspondence in relation to the outstanding amount
 - Payment records
 - Statement of the original service charge budget/charges at the time of sale.
9. The leases for the properties contain provisions relating to the service charge at different places in the lease.
- Clause 2 is the reddendum to the lease and refers to payment of the appropriate proportion of certain charges and the insurance premium for the buildings insurance on all the buildings on the development. The charges referred to are what are usually referred to as service charges and relate to the provision what might be termed as usual services relevant to the property in question . The obligation within Clause 2 is to pay a fair proportion of the charges budgeted for the current year (with provision thereafter to payment of any balance, one way or the other, after the final amounts are known).
 - Clause 3 contains the covenant by the lessees to pay the relevant payment.
 - There is no corresponding covenant in the lease whereby the landlord/Applicant covenants to provide the services for which the leaseholder covenants to pay and must necessarily be implied into the lease.
 - All the leases relating to all the properties within the application appear to be identical in their terms so far as the service charges are concerned.
10. A lengthy and comprehensive statement of case was provided by Ms Parmar of Counsel setting out the background to the Application and outlining those matters that the Tribunal should properly take into account in coming to its conclusions. Those observations related to the relevant law and the matters that the Tribunal might consider assistive in considering the reasonableness of the service charges. Some of those observations may be more relevant than others, but the statement concluded with a useful summary of the Applicant's position:
- The leaseholder(s) have an obligation to pay service charges
 - To the extent that those charges are reasonable
 - And have been reasonably incurred
 - That the leaseholder(s) might reasonably understand that charges are payable for services
 - And that the lease imposes such an obligation on leaseholder(s).

11. Given the number of properties that are the subject of the Application it was perhaps surprising that there were only a limited number of Respondents wishing to make some sort of case to oppose the Applicant and resist its demands in respect of some or all of the amount being sought in his or her particular case. Indeed it was apparent from all those who attended either or both of the hearings (or in one case made written submissions only) that there was no general complaint as to the services provided or the cost being recovered for them. Rather, complaints related to the time taken by the Applicant to seek to recover outstanding amounts, the manner in which the Applicant collected, collated, retrieved and accounted for information as to work leaseholders considered to be required and then the timescale over which work was then carried out. A number of particular concerns over discrete aspects of particular services were highlighted and are discussed further in paragraphs 13 to 23, below
12. It is, however, appropriate to consider the observations that those leaseholders have made as a number of the issues raised do relate to the overarching obligation upon the Tribunal to determine the reasonableness of the charges that the Applicant is now seeking to recover. It is best to deal with them in the order that the relevant leaseholders appear within the supporting documents provided by the Applicant as set out below.
13. Mrs A Maguire, 22C Waverley, Skelmersdale.

This lady occupies a ground floor flat in a three-storey interconnecting complex of small flats. She is the only person appearing before the Tribunal who has the heating to the property supplied on a communal basis and for which the charge is within the service charges being levied. The arrangement is somewhat peculiar in that the ground and first floor flats have this communal heating supplied from a single gas boiler installed on the second floor with flats that are not connected to that system but have separate electric storage heating. It not easily controlled by individual occupiers, particularly on the ground floor with the associated security issues if windows are opened. On its inspection the Tribunal noted the warmth, even on a chilly December afternoon, and this in a flat were many radiators are disconnected or turned off. The situation has become more acute for Mrs Maguire in the light of the inexorable rise in heating costs and the apparent slowness of the Applicant to respond in any realistic way to complaints. That latter view was raised by other leaseholders and is addressed later herein.
14. It is the Tribunal's view that unfortunately this heating problem is not easy to resolve given the age of the property and the system installed at the time of its construction. Whilst the Tribunal would hope that some steps could be taken to deal with the issues raised it does not consider the charges raised as unreasonable or unreasonably incurred against that background.

15. Mr M T Givernan, 46, Whitburn, Skelmersdale

This gentleman's concern was the despatch of the Tribunal papers following the issue of the application to what he considers to be the wrong address, having otherwise no concerns as to the service charge, but having not had the opportunity earlier of reaching a satisfactory compromise with the applicant and avoided additional expense. It is the Tribunal's view that Mr Givernan should check carefully with the Applicant the address that it has for service of the application and whether the Tribunal Office posted it to that address. If the delay arose only because of a breakdown in the channel he should have left open for communication between himself and his sub-tenant then the fault may lie with him. If however the address to which papers were sent was wrong by reason of an error on the part of the Applicant or the Office then Mr Givernan should carefully track how this occurred and address appropriate observations accordingly.

16. Mr Alan Billington, 62, Whitburn, Skelmersdale

This gentleman did not attend the hearing but did address correspondence to the Tribunal between the first and second hearing. Again no direct criticism or challenge to the service charge costs, but again concern was expressed as to the speed and manner of response to complaints by the Applicant, in Mr Billington's case defective guttering (still present at the time of the Tribunal's inspection on 18th December) and nuisance in and around a vacant garage below his flat. Again this situation, as in paragraph 13, above, is considered later.

17. Mr & Mrs B Smith, 208, Uppingham, Skelmersdale

The primary concern for these joint leaseholders was the disagreement between the Applicant and them as to what amounts had been paid in respect of the service charges and what the arrears outstanding were, on the premise that if these respondents had paid more than was alleged it would be easier for them to agree a rate of repayment within their current means and forestall the prospect of forfeiture proceedings, or other means of recovering the debt. Notwithstanding the efforts made by the parties, both before and after the first hearing, to reconcile payments allegedly made with payments apparently recorded by the Applicant this had not proved possible by the time of the second hearing on 19th December.

18. It is the Tribunal's view that, subject to its determination as to what charges are reasonable and have been reasonably incurred, whatever the outstanding charges may be it is for the parties to determine, to each other's satisfaction, what payments have been made and what is owing. Failing that, it will be within those further proceedings that a determination will be required as to the amount of the outstanding debt, given that once again there was no challenge raised to the amount of the charges levied.

19. The Tribunal did note however from the information before it that the outstanding debts generally had accumulated over some time in respect of many of the properties within the application and that the Applicant had been content to roll debts over from year to year, attributing such payments as were made to the earliest outstanding amounts in terms of age of debt. It may well be that with respect to some of those properties the lack of payment of any amount may raise issues of limitation, even in respect of debts secured by deed. Again these are matters for such future proceedings as may take place. Reference will be made below to the time taken by the Applicant to commence these proceedings in relation to the reasonableness of the charges.

20. Mr P Cooper 178, Beechtrees, Skelmersdale

This gentleman also had concerns about the Applicant's response to complaints and reports of disrepair and nuisance, rather than the level of the charges themselves. It is probable that he has suffered more directly in view of problems elsewhere in his block having a direct contribution to disrepair in his flat because of flooding and nuisance from immediate neighbours. It was clear from the Tribunal's external inspection on 18th December that even within Skelmersdale itself the immediate locality is one of the most striking in its social deprivation and that this is a considerable challenge for both the Applicant as landlord and those individual tenants who strive to combat the problem rather than succumb to its constant presence.

21. Mr Jason Rowley, 40D, Carfield, Skelmersdale

In correspondence this gentleman makes two observations. Firstly, with no further supporting evidence or comment, that the charges are "obscene". Secondly that there has been little, or no pursuit of these debts by the Applicant over a number of years. This echoes the point made in paragraph 19, above.

22. Mr & Mrs F Meehan, 2, Tyrer Road, Ormskirk

These joint leaseholders provide a lengthy written response within which they advise that they have experienced difficulty in relation to the insurance of this property within the Applicant's block policy as a result of different information being given to them as to the extent to which alterations carried out by them to the property have affected cover provided. This may once again indicate some concern over communication with leaseholders and it ought to be fairly easy for the applicant to advise in a simple manner how, if at all, such alterations may have affected cover and to what extent. It would also appear that some confusion has arisen in their minds as to what they are required to pay for, compared to all the other different services provided elsewhere by the Applicants and included within the overall application and supporting statement of case. Reference to the appropriate bundle shows that they make payment in respect of external repairs, advance payment fund, ground rent, management fee and insurance premium. They do make points in relation to the adequacy and quality of general repairs, but unsupported by

any relevant evidence, and express the view that they are unwilling to pay the management fee for the limited service they believe they receive.

23. Mr & Mrs M Hopkins, 36, Heyescroft, Bickerstaffe

Mrs Hopkins attended the hearing to support her previous written observations relating to concerns over the state of repair of this property, particularly in respect of regular damp and water penetration, affecting not only number 36, but also the ground floor flat, 34, below. It was clear from the inspection undertaken by the Tribunal on 1st November that there were a number of architectural features about this property, particularly valleys to roof pitching and a peculiar balcony arrangement that would make it prone to such difficulties and a history of required maintenance. Against this would need to be weighed the limited payments requested by the Applicant of £99 per year in respect of day to day repairs to common parts and planned cyclical maintenance. The Tribunal expresses its views in this regard below.

24. One further issue that arises within the application is that of costs relating to the proceedings thus far and in respect of which a summary estimate is provided by the Applicant. It is sought to recover these costs under Clause 3(11) of the respective leases which provides a covenant by the leaseholder(s):

“To pay to the Council all costs charges and expenses (including legal costs and other professional fees) which may be incurred by the Lessor in or in contemplation of any proceedings under Section 146 and 147 of the Law of Property Act 1925 or either of the said sections or any statutory modification or re-enactment thereof.”

It is the Applicant's case, as expressed within its Statement of Case and at the hearings, that these proceedings before the Tribunal are to establish what charges are properly recoverable before it moves to the next stage of county Court proceedings to recover the outstanding amounts up to and including forfeiture of the relevant leases should that be necessary (those forfeiture proceedings being the type of proceedings to which sections 146 and 147 refer.

25. In support of the view that it is for the Tribunal to make such a decision, and to make it in the favour of the Applicant reference is made to the recent decision of the Court of Appeal in the case of Freeholders of 69, Marina, St Leonards-on-Sea [2011] EWCA Civ 1258. Which provides a somewhat comprehensive review of the inter-relationship between Tribunal proceedings to decide the issue of service charge liability as a pre-requisite to forfeiture proceedings, notwithstanding those proceedings are yet only in contemplation, and the recovery of costs for the Tribunal proceedings under the terms of the lease.
26. The Applicant submits that the clause contained within the leases under consideration here is identical in its scope and effect to the relevant part of

that in the above case, which provided at Clause 3(12) a requirement on the leaseholder:

“To pay all expenses including solicitors’ costs and surveyors’ fees incurred by the Landlord incidental to the preparation and service of a notice under Section 146 of the law of Property Act 1925 or incurred in or in contemplation of proceedings under section 146 or 147 of the Act...”

relying particularly upon the determination in that case that the Tribunal proceedings there, as here, were the first step on a road at least contemplating forfeiture proceedings.

27. The Applicant has apportioned its costs here between the various Respondents in proportion to the amount of debt outstanding in respect of each leaseholder. They submit that this is a reasonable approach and have consciously chosen it in preference to apportioning the costs equally between Respondents irrespective of the amount owed.

Tribunal’s Conclusions and Reasons

28. The law relating to jurisdiction in relation to service charges falling within Section 18 is found in Section 19 Landlord and Tenant Act 1985 which provides that a service charge is:

... 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, and
- (b) the whole or part of which varies or may vary according to the relevant costs.

(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;

29. Further section 27A Landlord and Tenant Act 1985 provides:

(1) An application may be made to the appropriate 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.

and the application may cover the costs incurred providing the services etc and may be made irrespective of whether or not the Applicant has yet made any full or partial payment for those services(subsections 2 and 3)

Subsection 4 provides for certain situations in which an application may not be made but none of them apply to the situation in this case.

30. It is also necessary to note the provisions of Section 81(1) Housing Act 1996 which provides:

A landlord may not, in relation to premises let as a dwelling, exercise a right of re-entry or forfeiture for failure by a tenant to pay a service charge...unless

- (a) It is finally determined by (or on appeal from) the appropriate tribunal...that the service charge is payable by him, or
- (b) the tenant has admitted that it is so payable

31. In its consideration of the above issues and applying the appropriate law the Tribunal has reached the following conclusions:

- There is no general objection on behalf of the Respondents to the general proposition that the service charges are reasonably incurred and at reasonable cost. This has influenced the Tribunal to a considerable extent given the relatively low charges in respect of certain aspects of the services
- A small number of respondents do raise concerns in respect of some aspects of the service charges as they apply to them.
- In most of those cases there is merely a general observation, unsupported by independent evidence, that there are deficiencies in relation to certain aspect of some charges.
- The Tribunal does not consider that the insurance premiums re-charged to the leaseholders are unreasonable. Indeed the experience of the Tribunal is that individual policies, if negotiated by individual leaseholders in respect of the usual risks would be likely to be considerably higher.
- The cost of both general repairs and the contribution to the advance payment fund is, in the Tribunal's experience reasonable given that the amounts charges are unlikely to match the actual amounts expended on such repairs over the years the charges have been levied.

- There are two threads of concern common within those responses that have been made, both written and verbal, to the Application:
 - (a) The manner in which the Applicant deals with its body of long leaseholders, and
 - (b) The length of time the Applicant has allowed for the overdue debts to accumulate.

Both are worthy of more detailed consideration, given the observations made by all those Respondents referred to in paragraphs 13 to 23 above.

32. It is clear to the Tribunal that those leaseholders who have appraised the Tribunal of difficulties in making effective contact with the Applicant have little or no connection with each other and indeed were, in the main part, unaware of each other's existence, yet they tell similar stories of difficulties in arranging repairs, obtaining a clear decision as to whether they are Applicant's responsibility or not and a feeling that their concerns are not the main priority for the Applicant. This Tribunal is aware that this appears to be a fairly common concern when dealing with large public sector landlords with their vast and varied housing stocks, together with a tradition that leans towards what are now secure tenants rather than owner-occupiers.
33. It is also clear that the Applicant has, in years where the financial pressures have not been as great as they are now, allowed arrears to accumulate over considerable periods of time when a more proactive approach to debt management might have avoided some of the concerns now being expressed by some of those leaseholders who have joined in these proceedings. The Tribunal has some, limited, sympathy in this regard for those leaseholders who have similarly let the grass grow under their feet and avoided either by design, although more usually by accident or lack of appropriate knowledge of how to deal with such an issue. It is however a matter that strikes the Tribunal as not unrelated to that in the preceding paragraph concerning how the Applicant relates to its leaseholder
34. The Tribunal therefore considered very carefully whether there was an element of unreasonableness in the management charges levied which should be reflected in a reduction in the amounts payable by the leaseholders attributable those difficulties referred to above. The Tribunal, however, considered that the amounts charged reflected a balance between the service provided and the extent of the charge and that it was not appropriate to effect any reduction. The manner in which the Applicant manages services and relates to the leaseholder body is, however, a matter which the Tribunal believes might usefully be the subject of review in the immediate future.

35. The Tribunal also draws the conclusion that in relation to the costs of these proceedings whatever the usual situation may be concerning the very limited power that this Tribunal has to award costs as between the parties (limited to small amounts up to £500 where one of the parties has behaved in a manner which is vexatious, frivolous or otherwise an abuse of the tribunal process) this may be overridden by a particular provision in the lease, here clause 3(11), and in the light of the similarity between that clause and that considered in the 69, Marina St Leonards-on-Sea case considered in paragraphs 24 to 26 above it would appear that should the applicant to take advantage of the clause they are entitled to do so. In so far as the Applicant has apportioned the costs between Respondents in the manner outlined in paragraph 27 then although there may be other ways of effecting an apportionment the Tribunal does not consider that chosen to be other than reasonable and it is certainly not the Tribunal's role to search for one that might be considered any more reasonable.