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

Case Reference : **CAM/11UF/LSC/2012/0122**

Property : **21 Mahoney Court, Oakridge Road,
High Wycombe, Bucks
HP11 2 NH**

Applicant : **Jennifer Robertson**
Unrepresented

Respondents : **(1) Red Kite Community
Housing Limited
(2) High Wycombe D.C.**
**Represented by Trowers
and Hamlin LLP**

Date of Application : **8th October 2012**

Type of Application : **Section 27A of the Landlord and
Tenant Act 1985 (“the Act”)**

Tribunal : **Judge J. Oxlade
Mr. D. Banfield FRICS
Mr. A. Kapur**

Paper Determination : **19th January 2015**

DECISION

For the following reasons the Tribunal finds that the costs incurred for estate warden services in the service charge years 2011/12 and 2012/13 were not reasonably incurred, and finds that the sum of £225 per annum for 2011/12 and 2012/13 is reasonably incurred and payable.

REASONS

Background

1. On 29th March 2013 the Tribunal made a decision as to the reasonableness and payability of service charges in respect of the premises, pursuant to section 27A of the 1985 Act, in respect of various costs incurred in service charge years 2007/8 to 2011/12 inclusive, and to be incurred in 2012/13 (with service charge years running from 1st April to 31st March each year). The application had been made by the Lessee, against both the First and Second Respondents, the latter of whom had made a transfer of housing stock to the former on 11th December 2011 (which therefore straddled service charge year 2011/12). For ease of reference, this decision will continue to refer to the parties in the same way.
2. The Tribunal had found that these charges (for “cleaning” and encompassing “caretaking”) were reasonably incurred as demanded by the Second Respondent at £177.32 in the year 2007/8, £182 in the year 2008/9, £191.88 in the year 2009/10, and £192.92 in 2010/11. However, in the years 2011/12 and 2012/13 the Tribunal found that the sums incurred or to be incurred by the First Respondent of respectively £321.14 and £338.12 were not reasonably incurred, but that £225.00 for each year was reasonable for the estate warden services provided.
3. However, the First Respondent sought leave to appeal the Tribunal’s findings in respect of those charges entitled “estate warden charges” in the First Respondent’s service charge demands; these had previously been seen in the Second Respondent’s accounts against an entry for “cleaning”, below which was a reference to “caretaking”, against which no figure was entered. Though the terminology used by the First and Second Respondent was different, there was no suggestion by the Respondents that that the tasks had changed since handover, and both listed in identical terms (at pages 172 at 10.2.7 and page 492 at 10.2.6) the tasks performed, though the First Respondent had made a decision to increase the amount of time taken for this list of tasks to be completed to three days a week from the two days a week taken by the Second Respondent.
4. On 28th August 2013 leave to appeal was granted by Deputy President Rodger QC who directed that the appeal be dealt with by way of review. For ease of reference the parties will be referred to as they appeared before us on the first occasion.

The Review

5. On 7th January 2014 the appeal came before the Chamber President of the First-Tier Tribunal, Judge McGrath sitting as a Judge of the Upper Tribunal, at which hearing the First Respondent was represented, but the Applicant was neither represented nor took part, save for filing a

short letter dated 25th October 2014. The Second Respondent took no part in the appeal.

6. The appeal was allowed to the extent of remittal to the same Tribunal for reconsideration of the limited issue of the payability of the service charge costs claimed by Red Kite for estate costs for the period December 2011 to April 2013.
7. At paragraphs 25 and 26 of the decision (“the review decision”) it was held that the Tribunal had fallen into error, as follows:
 - by “failing to afford the parties an opportunity to comment on its view of the estate charges based on its knowledge and experience”, namely that annual costs of £225 for 2011/12 and 2012/13 were a reasonable sum for the standard provided, and
 - that the reasons given for its decision did not deal adequately with the evidence presented by Red Kite; so the First Respondent was left not knowing whether the service was adequate but too expensive or inadequate and therefore too expensive.
8. Further, the Tribunal ought to have articulated its view of the evidence produced by Red Kite and explained its reasons for rejecting that evidence if indeed it did so; it would have been helpful for the Tribunal to have been clear about the extent of the lease obligations to which they had regard in deciding that the costs were not reasonable.

Remittal

9. On 14th April 2014, in light of paragraphs 25 and 26 of the review decision and in order to be in a position to reconsider the matter, the Tribunal issued directions for the filing of further evidence. The First Respondent was invited to list the services provided within the definition of “estate costs”, to identify the lease provision(s) in respect of each service provided and the Applicant’s liability to pay, to specify the costs per heading, and to adduce evidence of comparable costs (“comparable market evidence”) in the market at the relevant time. The Appellant was invited to file a response, including the filing of comparable market evidence, and to clarify whether it was her case that the service provided was adequate but too expensive, or whether the service provided was inadequate and therefore too expensive.
10. The Tribunal indicated that it would consider the matter on the papers, unless the parties considered otherwise; neither party objected to determination on the papers.

Parties responses

11. In due course the First Respondent filed a statement of case dated 16th May 2014. No new evidence was filed and reliance was placed on those documents already filed within the bundles of documents which was before the first hearing before the Tribunal; in respect of each direction

the First Respondent referred to the place at which the evidence could be found within the existing statement of case and witness statements of Jonathon Radcliffe, and terms of the lease.

12. As to the filing of comparable market evidence the First Respondent declined to do so, on the basis that as the Applicant brought the application she bore the burden of proof and that it was not for the First Respondent to do so. Reliance was placed on the dictum of HHJ Rich QC in Schilling v Canary Riverside Developments PTD Limited (Lands Tribunal) [2005]. Further, that any comparable market evidence would have to reflect the costs of a mobile warden, which had been the First Respondent's chosen method of delivery: this was to employ someone on a full-time basis - though costs were apportioned in accordance with the time split between different sites - and there were onward employment costs.
13. The Applicant filed a letter dated 6th June 2014 saying that she had adduced conclusive evidence that the services provided were not of a reasonable standard and that the First Respondent had an obligation to provide a reasonably priced service; £28,000 for a cleaner was a ridiculous wage, and for one who does not clean. Attached to the response were the following:
 - two "missed you" cards from Jonathan Radcliffe (the project manager),
 - a service charge invoice issued on 1st April 2012 showing estate warden charges of £338.12, and then the actual costs of £358.56 for 2012/13,
 - an account statement issued to the Applicant and email correspondence as to credits to some leaseholder accounts and a letter dated 30th April 2013 showing a credit transferred to the Applicant's service charge account of £773.95, then reflected in an account statement,
 - a service charge invoice for the year 1st April 2014 to 31st March 2015 and which shows estate warden service of £219.69, grounds maintenance of £25.69, and cleaning contract of £1.93,
 - an email dated 6th June 2014 from the Applicant to Douglas Rhodes with j.png attachments of various photographs, several of which had been filed with the original bundle.
14. The First Respondent filed a witness statement in reply by Jonathan Radcliffe, asking the Tribunal to note that the Applicant had not filed any comparable market evidence and that it be further noted that the estimated costs were £28,816 for 2012/13 including onward costs (pension contributions, national insurance, agency fees in the event of a temporary warden). In tabular form the total costs of the Estate warden service were itemised, and those apportioned to Mahoney Court were listed. The First Respondent referred to the large volume of quality control documents exhibited to the statement of case filed on 3rd December 2012 to show that a reasonable standard of service had been provided.

15. The Tribunal were due to convene on 27th June 2014, but this was vacated because the First Respondent had not filed bundles of documents. Not unreasonably the First Respondent had assumed – without actually clarifying that it was so – that the Tribunal would have retained their original bundles of documents. However, this was not the case, and so the Tribunal recalled from secure storage the original files.
16. There was then something of a delay in re-listing because of the commitments of the Tribunal members. However, on 13th October 2014 the Tribunal did re-convene, and were concerned to note that the First Respondent had not provided comparable market evidence – despite having been given leave to appeal partially on the basis of saying that it was deprived of the opportunity to and would want to do so, which point had been renewed before the Chamber President (paragraph 17).
17. Accordingly, on 13th October 2014 the Tribunal issued further directions:
- “In light of the Tribunal's earlier decision made on 29th March 2013 in which it (a) indicated that in light of its knowledge and experience as an expert tribunal, the reasonable costs of providing cleaning services are approximately £225 per annum for 2011/12 and 2012/13 and (ii) found that the Local Authority's costs (rising from £177 p.a. to £192 p.a. from 2008 to 2011 in those sums) were reasonable in the two earlier years, would the Respondent please re-consider its decision not to comply with paragraph 1(d) of the directions order made on 14th April 2014 (asking for comparable market evidence) particularly in light of the Regulations which require the parties to co-operate with the Tribunal. The Tribunal meets on 23rd October 2014 and so invites the Respondent to respond by 4pm on 22nd October 2014. The Respondent has in correspondence referred to the burden of proof being on the Applicant to prove that costs charged were not reasonable; the Respondent shall by 4pm on 22nd October 2014 file submissions to this effect setting out the case law on which it relies”.
18. On 22nd October the First Respondent made additional submissions, declining to file comparable market evidence, and emphasising that it did not wish to be uncooperative but that it was not appropriate for the First Respondent to do so, save by way of response to the Applicant. It relied on the case of Arrowdell [2007] for the proposition that the Tribunal must reach its decision on the basis of evidence before it and not on that to which the parties have not been exposed. Further, it relied on the Schilling case to the effect that the tenant had the evidential burden of requiring the tenant to provide a prima facie case of unreasonable cost or standard; she had not done so and the First Respondent had adduced evidence as to the reasonableness of the manner in which costs have been incurred. Further, it was the First Respondent's belief that the Applicant was focussed on the standard, not cost, other than the standard was inadequate and therefore too expensive. Finally, the point was made that the costs charged by the Second Respondent could not be considered a suitable comparator

because they (for the reasons outlined in their statement of case) had undercharged.

19. The Applicant was given 10 days to file a response and by letter of 13th November 2014 said that the Tribunal had inspected the premises, and that the Tribunal's earlier decision was reasoned. She added that the service is not reasonable as the standard of work is abysmal – shown in the photographs – and the costs are unreasonable. Further, £28,000 for a mobile warden p.a. is an outrageous amount for a terrible service. The tenders for the work should have been supplied.
20. The Tribunal reconvened to re-consider its decision.

Evidence

Documentary

21. In addition to the evidence filed in response to the above directions, and summarised above, the Tribunal had before it the following documentary evidence which had been filed in the trial bundle before the hearing on 21st January 2013.
22. For the Applicant there was a copy of the application, to which was appended considerable documentation, including:
 - a copy of the lease,
 - a leaseholders' handbook,
 - letters passing between the Applicant and Second Respondent concerning complaints made in May 2005 and November 2011, and with the First Respondent in July 2012 making detailed complaints about cleaning (pages 113 to 118) and in August 2012 about staff members,
 - correspondence concerning the digital switchover and section 20 consultation over block repairs,
 - correspondence from the First and Second Respondent concerning estimated service charges and actual service charges, FAQ's, invoices and statements of costs,
 - Schedule of works issued by the First Respondent, listing caretaking works to take place weekly, monthly, quarterly, and as required.
23. Further, there was a letter of clarification from the Applicant dated 12th November 2012, setting out the list of disputes and a witness statement dated 11th January 2013 to which were attached a series of photographs. There were witness statements from Mr. Vickery dated 11th January 2013 (leaseholder of flat 17) and Mr. John Chapman-Smith (leaseholder of flat 26).
24. For the First Respondent there was a detailed statement in reply (pages 163 to 184). The statement of reply set out the history of housing stock transfer, the relevant service charge provisions in the lease and

covenant to use best endeavours to keep clean the passageways, landings, staircases, and other parts of the retained parts, listing (at 10.2.7) the estate wardens' tasks, and referred to the monthly checklists for the period December 2011 to August 2012 and weekly checklists for the period September to November 2012, referred to the Estate Warden Supervisor and who had provided monthly monitoring sheets and Estate Services Coordinator. The reply set out the annual costs of employing an estate warden for 2012/13 at £28,816, the costs attributed to Mahoney Court on the basis that the Estate Warden spends 18.5 hours per week there of £14,408 p.a., and that this would include materials, electricity, mobile phone, uniforms, and the cost of employing an Estate Warden Supervisor with costs of £2203 p.a. attributable to Mahoney Court. A similar breakdown was provided for 2011/12. The reply responded to the points made in the Applicant's letter of clarification, saying that a decision was made to increase the cleaning services from two to three days per week to ensure that the high standard of cleanliness was met, and logs were kept of the time spent by the Estate Wardens.

25. The First Respondent appended annual service statements for the year 2011/12, estimated service charges for the period 2012/13, a copy of the lease, correspondence concerning digital TV, health and safety (including fire) checklists, and estate weekly health/safety/fire inspections. At appendix 7 the First Respondent provided monitoring sheets referring to litter picking, aspects of cleaning, fire alarm testing, repairs noted as needed and "carding", and a copy of David Mullin's day book entries relating to Mahoney Court, and weekly inspections of the estate and building by way of overview. Further, the basis of division of costs for the estate wardens was set out, and weekly fire alarm tests.
26. Further, a short witness statement of Jonathan Radcliff (Project Manager of First Respondent) which adopted as accurate the reply and annexes. In addition there was correspondence concerning the digital switchover and other correspondence already seen, and invoices for the caretaker, and costs of cleaning equipment and uniforms.
27. Further, a short witness statement of David Mullins (Estate Services Coordinator of the First Respondent) which adopted as accurate the reply and annexes.
28. The Tribunal had a statement of reply from the Second Respondent, which was very similar in the approach taken by the First Respondent, and identical as to the list of tasks for the Estate Warden to complete. The Second Respondent explained that estimated costs were charged in 2007/8 working on the basis of 40% of the time spent on cleaning and 60% on caretaking; this was the blueprint for subsequent years where an increase was applied in accordance with the RPI under a "Price is Right" review; this resulted in actual costs not being charged and the lessees being undercharged. When the stock transfer took place this policy was not adopted, and so this resulted in higher costs being

charged to leaseholders. Attached to this were working costs for 2005/6 and 2006/7, but not subsequent years nor evidence to support the statement as to undercharging.

Oral Evidence

29. The Tribunal's record of proceedings records the oral evidence of the Applicant and Mr. Vickery, who were cross-examined by both the First and Second Respondents. The Respondents did not call oral evidence, though the witnesses were available for examination, and relied on the documents filed. The Tribunal heard very short closing submissions.

Inspection

30. The Tribunal inspected the common parts of the building and grounds, and found as described in paragraphs 9 and 10 of the decision and reasons given on 29th March 2013.

Lease Terms

31. The Respondents in their replies have both set out the relevant lease provisions as to liability to pay service charges and the covenants given the Lessor. Materially, clause 4(7) provides that:

“the landlord will so far as practical use its best reasonable endeavours to keep clean and reasonably lighted the passageways landings staircases and other parts of the retained parts so enjoyed or used by the tenant in common as aforesaid to such a standard as the landlord considers fit and at its sole discretion the landlord may provide a caretaker for the purpose of carrying out its obligations under this sub-clause if it considers the same to be reasonably necessary”.

32. The Tribunal interprets the lease terms providing that there is no obligation on the landlord to make sure that the premises is clean at all times; rather to use reasonable efforts to do so. As to the applicable standard of cleanliness the lease provides that this is “to such a standard as the landlord considers fit” and we find that this means that it is the landlord who shall elect the applicable standard of cleanliness. The standard to which the Respondents have aspired or achieved has not been specifically addressed by them directly, though at page 174 (10.2.12) the First Respondent said that the standard of service delivered was “good” and relies on estate inspections (seen at appendix 7, pages 361 to 378), and that the First Respondent saw fit to increase the cleaning services from two to three days in order to ensure that a “high standard of cleanliness was maintained” (paragraph 11, page 176). The Second Respondent said that it had reports which indicated that the standard of service provided was “good” (10.2.12 page 490).

Relevant Law

33. Section 27A of the 1985 Act provides that an application can be made to the Tribunal for a determination whether a service charge is payable, and the amount payable, subject to a limitation provided by section 19(1) which provides that:

“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 service or works are of a reasonable standard;

and the amount payable shall be limited accordingly”.

34. We interpret section 19(1)(b) as meaning that the landlord shall only recover service charges commensurate with the standard of works done.

Discussion

35. The Tribunal has considered all of the evidence adduced: that which was before us when the matter was first heard, before the hearing and given at the hearing, and that which has been subsequently filed, and we have also considered the submissions made. In this decision, we shall endeavour to address the observations made by the Upper Tribunal and which were of concern to the First Respondent.

36. In discharging its obligations under the lease the First Respondent has not specifically said what standard as the landlord considered fit to achieve (using the language of the lease): on the one hand it is said in the context of justifying the move from providing estate wardens from two to three days a week that it was to ensure a “high standard of cleanliness” and on the other hand the monitoring sheets at appendix 7 mark the standard as “good”, which is a subjective assessment, and not “excellent” (there is no pre-marked standard of “high”). The First Respondent produced many observation sheets for health and safety checks, cleanliness within the building and the estate generally, and supervisors checks. Not every type of inspection/checking procedure was produced to cover the whole period, though those which were produced do provide a picture for the whole period from December 2011 to late 2012. The documents at appendix 7 were useful, as they also made additional comments about cleanliness; for example that although walls had been cleaned they still looked poor (page 363), and that dirt had historically been sealed into floor tiles; all of which (it was said) justified a deep clean and that when this was done on the ground floor (page 369) it was said that this did not make a huge difference.

37. The Applicant had a list of complaints which do not suggest that she considered the standard met to be a high standard of cleanliness nor “good”; she thought that it was too much to pay £28,000 to an estate warden, and particularly one who does not clean but spends his time in the car on the ‘phone. However, she did not produce a diary of her observations, detailing how long things were left in a less than good state, and (as to be expected) it was not suggested that the Applicant kept the cleaners under constant observation. The fact that a lessee has seen some mess/dirt/rubbish does not lead to a finding that the estate warden was not doing his job - because it has to be accepted that there will inevitably be dirt/mess/rubbish dumped which is left until the next time the estate warden visits. Many of the Applicant’s observations were one of general “tone”; they were made both in the context of her apparent disbelief at the annual costs of employing an (with onward costs, full-time) estate warden, and in respect of the complaints made in mid-July 2012 appears prior to her knowledge of what it cost. The Applicant produced photographs, but these were not dated and so did not particularly assist because they are a snapshot in time, and do not address the point that the premises will deteriorate between visits.
38. The most accurate barometer of the standard of work was that seen by the Tribunal on the day of the inspection and which both parties had agreed was reasonably representative of the usual standard of cleanliness and repair, as we had recorded at paragraphs [10]¹ and [23]. We noted that the premises were “reasonably clean” (paragraph [10]) but that “dirt is now ingrained, which could reasonably be expected after 30 years heavy user”. We noted that “whilst floor surfaces were reasonably clean there were marked walls, dirty lights and dirt in the gaps between the floor tiles”. This latter observation accords with the monitoring sheets at appendix 7, which refer to dirt having been sealed in by historic process, and that though walls are cleaned they continue to look dirty. The Tribunal does not find that there was a “high level of cleanliness”, nor do we find that the cleanliness could be said to be universally “good”. However, in making this assessment we do bear in mind the difficulties with this site (noted at paragraph [23]) in terms of the heavy and varied user (tenants and lessees and their bicycles), and that the development is open in at least 5 ways for the general public to enter, dump rubbish, and to park their cars. We find that generally the standard provided by the estate warden was to a reasonable standard.
39. The question then is whether the costs were reasonably incurred for that standard provided. There is no challenge to the First Respondent’s claim to have employed an estate warden in accordance with the costs set out in the statement in reply at page 174. Further, it is for the First Respondent to decide how to organise the work and the manpower; the case law makes it clear that there is some latitude in deciding how to do so, and he does not have to choose the cheapest way of doing so. However, the First Respondent adduced no evidence that they had gone out into the market place to undertake an assessment of what work could be provided at what costs and how long would reasonably

¹ [] square brackets denote paragraphs in the decision of 29th March 2013

be needed to complete the list of tasks. Further, it is something of a mystery as to how or why the First Respondent decided to increase the number of hours spent from two days under the Second Respondent's management to three days under the First Respondent's management. It is noteworthy that the First Respondent did not adduce any direct evidence from lessees commenting on how good was the service provided by the estate wardens (and only indirectly that which was written in the estate wardens sheets) nor that it had been improved by the First Respondent's implementing an increase in the number of days worked from two to three each week.

40. The Tribunal as an expert Tribunal gathers generalised knowledge about what sum could reasonably be charged for a particular task or set of tasks in the market place. The Tribunal has had the benefit of inspecting this site, the number and length of the corridors, landings serving the levels floors of accommodation, and fire doors; that there are painted walls, ageing floor tiles, and painted ceilings; the openness of the stair spindles; that the site is one open to traffic, people, mess and rubbish; that there are different types of occupants who will place different types of stress and strains on the building. We have also had regard to location: it is not the West End of London or a "high-end" location; rather it is a bustling, light industrial area on the edge of town, in a dated block which has ageing fittings and ingrained dirt. The parties are now aware from our last decision that we considered that costs of £225 per annum would be reasonably incurred for estate warden services for this building, in this location, with this type of user. We did not and do not have specific comparables to draw up or to cite and are not operating on the basis of "secret" knowledge, as termed in Arrowdell – rather it arises from professional experience of having seen other costs charged generally. It was not suggested by the First Respondent before the Upper Tribunal nor by the Upper Tribunal that it was impermissible for the Tribunal to use its expert skill and knowledge – rather that there should have been clarity over whether the knowledge was general or specific and that as a matter of fairness the parties should have been invited to comment on such a view.
41. Neither party has assisted the Tribunal in obtaining comparable market evidence, though the First Respondent had said in the grounds of appeal and before the Upper Tribunal that had the Tribunal raised the point as to £225 per annum it may well have chosen to obtain market evidence but had been deprived of the chance of doing so. The Tribunal does not accept that it is operating in a strict territory of one party bearing the burden of proof before the other party needs to call evidence in rebuttal. Neither has the First Respondent taken the opportunity now, of which it was deprived at the hearing, to comment on the Tribunal's view of what sum would reasonably be incurred for this reasonable standard of work. To put it simply the First Respondent's position is that if the works are to a reasonable standard and that it cost x to deliver that standard, then the costs were reasonably incurred. However, the Tribunal does not agree that is it as

simple as that, and have sought to address this position in this decision. To be clear that we have concluded that the service provided was reasonable and adequate, but the costs were too high.

42. The First Respondent argued at the hearing that the Tribunal could not be guided by the Second Respondent's charges, because there was an historic undercharging. The Second Respondent repeated the same point in their submissions, but no evidence was adduced to support the point, nor what should actually have been charged dependant on actual costs. In fact it now fully appreciated – which it was not at the first hearing - that as the First Respondent's charges are on the basis of three days a week and the Second Respondent's on the basis of two days a week no exact comparisons can be made.
43. Having considered the totality of the evidence and taking into account its general knowledge and experience as an expert Tribunal, the Tribunal finds that whilst the First Respondent delivered a reasonable standard of estate services, the costs incurred were not reasonable, and finds that the sum of £225 per annum for 2011/12 and 2012/13 is reasonable and payable.

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J. Oxlade

Judge of the First Tier, Property Chamber (Residential Property)

19th January 2015