

**RESIDENTIAL PROPERTY TRIBUNAL SERVICE  
LEASEHOLD VALUATION TRIBUNAL**

**Case number : CAM/33UG/LSC/2007/0007**

**Property** : 5 West Pottergate, Norwich NR2 4BN

**Application** : For determination of liability to pay service charges for the years 2002–07 [LTA 1985, s.27A]

**Applicant** : Richard Marshall, 5 West Pottergate, Norwich NR2 4BN

**Respondent** : Norwich City Council, City Hall, Norwich NR2 1NH

**DECISION (PAPER DETERMINATION)**

Handed down 10<sup>th</sup> May 2007

**Tribunal** : G K Sinclair (Chairman), B Collins BSc FRICS

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**Introduction and decision**

- In this application the tribunal is asked to determine whether the terms of the lease permit the landlord to levy the “Leaseholder Management Fee” element as part of the annual service charge. The application seeks a determination in respect of each service charge period from 2002/03 to date, but also projecting into the future as far as the period 2010/11. Although the tribunal’s decision renders that rather academic, it is not an approach which a Leasehold Valuation Tribunal is ever likely to adopt save perhaps in respect of staged contributions towards a specifically sanctioned building contract which has yet to commence. It would be entirely inappropriate for a tribunal to attempt to assess what a reasonable management fee might be for work of an unknown nature and quantity to be performed some years in the future.
- Upon its interpretation of the relevant provisions in the lease the tribunal determines that

no amount is payable by the leaseholder, in any of the periods in question, in respect of the landlord's management time and effort because the lease (which is in the standard format adopted by Norwich City Council) does not so provide. The argument advanced by the landlord that such a provision should be "read in" to the lease to fill a gap in the express provisions in Schedule C is politely but firmly rejected.

### **The lease**

3. The lease in the instant case is dated 29<sup>th</sup> June 1987, between the City Council of Norwich and Miss Barbara May Brown as lessor and lessee respectively, for a term of 125 years from 29<sup>th</sup> June 1987. It is very much in standard form for flats sold off by the council under the right to buy provisions of the Housing Act 1985. The "building", for service charge purposes, is shown on the plan as comprising flats 1 to 6 West Pottergate. It forms part of the council's larger estate bounded by the roads known as Heigham Road to the west, Earlham Road to the south, the Grapes Hill dual-carriageway to the east and side streets leading from the south side of Dereham Road to the north.
  
4. The service charge provisions appear in clause 4(3), clause 6, and Schedule C. Clause 4(3) is one of the lessee's covenants, and it reads as follows :

without prejudice to the provisions of Paragraphs 16B C and D of Schedule 6 of the Act<sup>1</sup> and Sections 18 to 30 of the Landlord and Tenant Act 1985 to pay such sums of Service Charge as are payable in accordance with the provisions of Schedule C.

Paragraphs 16B, C and D are of no immediate concern. One must then turn to Schedule C. This is subdivided into three parts, with the following entries in the left column :

  - a. The Council's Expenditure
  - b. Service Charge
  - c. Service Charge Statement.
  
5. The first part, "the Council's Expenditure", states which items of expenditure may be included in the service charge, a proportion of which is recoverable from the lessee. As the proper interpretation of this provision is of critical importance to this enquiry I shall quote it in full :

<sup>1</sup> Meaning the Housing Act 1985

the reasonable expenditure of the Council (including interest paid on any money borrowed for that purpose) :-

- (a) in complying with its obligations set out in clause 6 (1) (2) and (9) and excepting expenditure incurred in carrying out repairs as amount to the making good of structural defects except structural defects already notified to the Lessee or of which the Council does not become aware earlier than 10 years from the date of this Lease
- (b) in respect of any improvements for which the Lessee is required to make an improvement contribution as defined by Section 187 of the Act and
- (c)
  - (i) in keeping the Property insured in its full re-instatement or replacement value against loss or damage by fire tempest flood subsidence or any other cause against the risk (except against structural defects) of which it is normal to insure or
  - (ii) if the Council shall not for the time being insure the Property a sum equal to the amount which the Council would in the opinion of the Council's Housing Manager or such other officer of the Council as shall be appropriate have paid by way of a reasonable premium under (c)(i) if it had so insured against the same risks with an insurer of good repute

PROVIDED that any dispute as to the necessity or reasonableness of such expenditure referred to in (a) or (b) or the amount referred to in (c)(ii) shall be settled by arbitration in accordance with the Arbitration Act 1950 (as amended or re-enacted from time to time)

6. Clause 6 records the various covenants on the part of the lessor. Clause 6(1), (2) and (9) refer respectively to the Council's obligations (1) to repair the structure and exterior of the building, etc; (2) to keep in repair any other property over which the lessee has rights as specified in Schedule A (easements); and (9) to ensure so far as practicable that the services to be provided by the Council as specified in Schedule D are maintained and to keep in repair any installation connected therewith.
7. Schedule D refers to some additional services (communal lighting and gardening) which benefit the whole estate and to which the tenant must contribute a proportion of the cost.
8. The second part of Schedule C is entitled "Service Charge". It deals with the proportion of the total expenditure for which the lessee is liable to be charged. It does not do so by reference (as is most usually the case) to a fixed percentage or several fixed percentages for different elements of the total expenditure. Instead, the matter is expressed as "such percentage as shall from time to time be a fair share as determined by the Council's

Housing Manager or such other officer of the Council as shall be appropriate...”, with the proviso that any dispute over the fairness of the share shall be determined by arbitration, again in accordance with the Arbitration Act.

9. The third part of Schedule C is not relevant to this enquiry.
10. Save for those costs incurred in connection with or in contemplation of the service of a section 146 notice<sup>2</sup> the lease does not appear to provide for the recovery of legal costs as part of the service charge.
11. Nowhere is there any express mention of the lessor’s ability to employ (and recover the cost of) a managing agent or surveyor for the proper management of the estate, nor of an entitlement to recover an amount (calculated as a percentage of actual expenditure or otherwise) if the lessor were to carry out these functions in-house.

#### **Applicable law**

12. Section 18 of the Landlord and Tenant Act 1985 defines service charge, for the tribunal’s purposes, as :
  - 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...
13. The overall amount payable as a service charge continues to be governed by section 19, which limits relevant costs :
  - 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.
14. The tribunal’s powers to determine whether an amount by way of service charge is payable and, if so, by whom, to whom, how much, when and the manner of payment are to be found in section 27A of the Landlord and Tenant Act 1985.<sup>3</sup> The first step in finding answers to these questions is for the tribunal to consider the exact wording of the

<sup>2</sup> See clause 4(12)

<sup>3</sup> As introduced by the Commonhold and Leasehold Reform Act 2002, section 155(1)

relevant provisions in the lease. If the lease does not say that the cost of an item may be recovered then usually the tribunal need go no further.<sup>4</sup> The statutory provisions in the 1985 Act, there to ameliorate the full rigour of the lease, need not then come into play.

### Written submissions

15. The Applicant having posed the question whether management fees are recoverable under the lease, the Respondent duly filed a Statement in Reply dated 21<sup>st</sup> March 2007. In paragraph 6 Mr Johnson, the council's solicitor, concedes that there is no specific reference in the lease to a leaseholder management fee but argues that the true question for determination is "Do the terms of my lease allow the landlord to include within the service charges costs relating to administration and management howsoever these costs are described?"
  
16. The Respondent argues :
  - a. (para 4) that the matters in respect of which service charge is payable include the "reasonable expenditure on complying with its obligations", etc; and
  - b. (para 5) that "such expenditure as is referred to in Schedule C comprises not only expenditure referable to the substantive cost of complying with the Respondent's obligations, for example, the "bricks and mortar" cost of repair works but also the cost to the Respondent of maintaining a system for the monitoring and administration of such work the notifications to leaseholders, the ordering of works, the payment of invoices and the handling of queries of such works"; but
  - c. (para 7) that "it does not make specific recharge of such administration costs as are incurred in relation to each leaseholder but charges them at a flat rate to all leaseholders..." and
  - d. (2<sup>nd</sup> para numbered 7) that "the Applicant benefits from the system of service charges described in the paragraphs above and the payment of the sums set out in his service charge statement are well within the ambit of the covenant in the lease being, if anything, an under recovery of the Respondent's costs of complying with its obligations."

<sup>4</sup> A landlord will not normally be able to recover the cost of employing managing agents in the absence of express provision to that effect : *Hill & Redman* para A[4627]

17. The Respondent then includes a breakdown headed "Reasonable Recoverable Costs based on 2006/07 original estimates". Divided by the average number of leaseholders over the course of that year of 2431.5 the end result, a cost per dwelling of £151.16, may not seem much out of line with what a professional managing agent would charge per housing unit for the general administration of a building or estate and the handling of insurance issues, etc. However, amongst the costs are the employment of a Home Ownership Team, Tenancy Services, some senior management, agency and "central services" costs (including £4,608 spent on "publicity/dealing with media") and corporate/professional services including legal services, asset management, financial services (at a cost of £17 per lessee for issuing invoices), office accommodation, employee insurance and transport and consumables.
18. The Applicant, in his reply, tends to deal with the various factual and financial points made by the Respondent, and focuses on what he perceives as an injustice, namely the council's failure to follow the arbitration route set out in the lease. He appends a number of documents and schedules, including one (A) showing the management fee claimed as a percentage of the service charge levied over the years and another (B) comparing the amounts or percentages levied for management or administration fees by Orbit Housing Association and by other councils in the region. The sources for this latter information are not adduced.

### **Discussion and findings**

19. As already stated above, the starting point when considering this question is to look at the express provisions of the lease. A landlord offering a lease to a prospective lessee can make as detailed (and generous – to itself) provision as it wishes as to costs incurred in respect of the building which are to be recoverable from the lessees as a body by way of service charge. The only limit to this generosity is that the costs must be reasonably incurred. However, if no provision is made for a particular type of expenditure then it is not recoverable. The Respondent openly concedes that this lease makes no express provision for the recovery of the expenses of management. Whether it ought to, and whether as a result of this omission the service charge provisions of the lease are not satisfactory, are entirely separate questions which are not before this tribunal for

determination.

20. What the Respondent invites the tribunal to do is to imply into the lease such a provision, but without stating precisely what administrative costs should be included. Should they include legal costs (and if so, for what), public relations, or a notional rent for the office accommodation at City Hall? Should they include expenditure incurred in connection with other leasehold flats outwith this estate, perhaps on the other side of the city?
21. Although the council had the opportunity to draft the service charge provisions in as much detail as it wished the lease includes no express term entitling the landlord to recover management fees. The landlord invites the tribunal to imply such a term into the lease, but without making clear exactly what expenditure such a provision should include. The lease refers to "the Property", "the Building" and "the Estate". Express references to service charge expenditure are also so limited, yet that is not how the landlord chooses to calculate its administration costs. Even were the tribunal to consider implying some such term into the lease on grounds of business efficacy, that argued for by the landlord is too uncertain (and the current method of calculating its administrative costs so at odds with the spirit of the lease) and therefore fails the required test. There is therefore no lawful basis upon which the landlord may include within its annual service charge for the Applicant's property any costs of management or administration.

#### **Section 20C**

22. As the lease does not provide for the recovery of legal costs as part of the service charge this issue is superfluous, and no order is made on Mr Marshall's section 20C application.

Dated 10<sup>th</sup> May 2007



Graham Sinclair – Chairman

for the Leasehold Valuation Tribunal