

UPPER TRIBUNAL (LANDS CHAMBER)



UT Neutral citation number: [2009] UKUT 105 (LC)
LT Case Number: LRX/35/2008

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – service charges – whether any sustainable reason given by LVT for the imposing of a 5% limit upon the increase in the recoverable costs of cleaning – whether landlord had given sufficient reasons for the increase.

IN THE MATTER OF AN APPEAL FROM THE DECISION OF THE LEASEHOLD
VALUATION TRIBUNAL FOR THE LONDON RENT ASSESSMENT PANEL

BETWEEN

LONDON BOROUGH OF
REDBRIDGE

Appellant

and

ANNEMARIE TUOHY
MALACHY TUOHY (AND OTHERS)

Respondents

Re: Premises at
Heathcote Court,
Clayhall,
Ilford
IG5 0QP

Before: His Honour Judge Huskinson

Sitting at 43-45 Bedford Square, London WC1B 3AS
on 9 June 2009

Mrs Pervinder Sandhu in-house civil litigation lawyer on behalf of the Appellant
The Respondents did not appear and were not represented.

© CROWN COPYRIGHT 2009

DECISION

1. The Appellant appeals, with permission, from the decision of the Leasehold Valuation Tribunal for the London Rent Assessment Panel (“the LVT”) dated 10 December 2007 whereby the LVT made certain determinations in respect of the amount of service charge payable by various tenants of flats at Heathcote Court. The tenants of 21 separate properties were parties to the proceedings before the LVT and they were represented by Mrs A Tuohy, who was herself the tenant of 9 Heathcote Court. The LVT was concerned with the service charge payable for the years 2005/2006 and 2006/2007. The estate itself comprises 57 units set out in 9 blocks, of which I understand 8 blocks contain 6 flats each and the 9th block contains 9 flats.

2. This appeal to the Tribunal is only concerned with the LVT’s decision regarding the amount allowed as an ingredient within the service charge calculation in respect of cleaning, which is described in certain of the Appellant’s documents as cleaning/caretaking. The LVT’s decision dealt with various other matters apart from the amount properly chargeable in respect of cleaning, but there is no appeal in respect of these others matters.

3. The LVT observed that there was a substantial increase in the amount included within the service charges in respect of cleaning for the years 2005/06 and 2006/07 on the one hand as compared with 2004/05 on the other hand. This led the LVT to rule that the amount to be included in respect of cleaning for years subsequent to 2004/05 should be limited to a 5% uplift on 2004/05 and should not extend to the amounts claimed by the Appellant.

4. There are two reasons why the amount for cleaning was significantly more in 2005/06 and subsequently as compared with 2004/05. It is unclear to me as to what extent the second reason mentioned below was explained to the LVT. The two reasons are these:

- (1) In 2004 the Appellant reanalysed the calculation of the service charges including the cost of providing caretaking/cleaning and noted that there were various costs which were being incurred by the Appellant but which were not being recovered at all, such as for transport and bulk waste collection and the costs of stores and supplies and equipment and consumables and the cost of storage and the cost for the management and administration of the caretaking/cleaning services. It was decided that these costs should henceforth be treated as part of the costs of cleaning and should be recovered across the Appellant’s entire residential estate. The amount of these costs, which were described at the hearing before the LVT as “on-costs”, was £377,000 for the year 2005/06. The Appellant had a total of 5826 properties during the relevant year for which cleaning services were provided and accordingly the Appellant contended that the sum of £64.71 (ie £377,000 divided by 5826) should be included as part of the cleaning costs for each property. The reason that these costs had previously not been identified and charged through the service charge was because the finance department had been calculating the service charges until 2004, but then the Appellant’s housing services department took over the calculation of service charges and carried out the reanalysis of costs.

- (2) Quite apart from the question of on-costs, in 2004 there was also carried out a new analysis of the amount of time which was spent by staff in dealing with the cleaning services on each of the Appellant's estates. Previously it appears the Appellant had been proceeding on the basis that the amount of hours work which was required for the purpose of servicing each estate was as given in a schedule which had been prepared in about 1973. In 2004 studies were undertaken as to how long the work actually took. This assessment led to the base figure charged for cleaning (ie quite apart from any question of on-costs) being higher in 2005/06 as compared with previous years.

5. As will be seen from the passage cited below from the LVT's decision, the LVT decided that the cleaning services on the estate were undertaken as set out in the Appellant's specification and were undertaken to a reasonable standard. The LVT also decided that the amount of the on-costs were reasonable and that the on-costs were, in principle, recoverable from the tenants. However the LVT decided (see paragraph 74) that the method of apportionment of the on-costs, ie by dividing the total figure of £377,000 by the total number of flats namely 5826, was not the appropriate method of apportionment and that instead the on-costs should be apportioned pro-rata by reference to the actual costs of cleaning for each particular tenant, such that if the basic cleaning costs for the tenant of estate A was twice as much as the basic cleaning costs for a tenant estate B, then the on-costs should be allocated accordingly so that each tenant paid an equal percentage uplift on their base cleaning costs (ie such that the tenant of estate A would pay twice as much towards the on-costs as would the tenant on estate B).

6. However having reached the foregoing conclusions, the LVT went on to decide that the amount to be included within the service charge for cleaning services for 2005/06 should be limited to 5% more than was charged for cleaning in 2004/05. The relevant passage in the LVT's decision is as follows:

- “72. The Appellant complained to the Tribunal about the cost of the cleaning and the standard of cleaning at the property. The Tribunal having inspected the property consider that the cleaning undertaken at the property was as set out in the specification and was undertaken to a reasonable standard. There was evidence that the windows and ledges at the property were cleaned albeit infrequently. The Tribunal also found that the bin stores were cleaned and were in a reasonable condition.
73. The Tribunal also finds that the on-costs are reasonable, although the Tribunal make specific findings about the appropriate proportion of on-cost.
74. The Respondent informed the Tribunal that the on-costs were divided between all of the properties managed by the Respondent. The Tribunal finds that it is not reasonable to pro-rata the cost in this way. The Tribunal finds that such apportionment does not take account of the actual cost associated with the cleaning for each block which may be of different types and configurations. The Respondent in answer to a question by the Tribunal informed the Tribunal that some estates needed more cleaning than others, the on-cost of the cleaning

should be pro-rata on the basis of the actual cost of the cleaning so that the percentage of the on-cost reflect the service received.

75. The Tribunal noted that the cost of the cleaning (in the case of flats 4, 7, 9, 10, 23) had risen in the following way:-

2003/04	2004/05	2005/06	2006/07
£99.69	£114.35	£268.46	£276.52
actual	estimated	actual	estimated

76. We have not been informed of any increase in the level of service and even taking the on-cost into account the Tribunal finds that the cleaning cost has increased without justification being provided to the Tribunal. The Tribunal find that the cost of cleaning should be capped at the 2004/05 level and that the increase in 2005/06 and 2006/07 should be no more than 5% on the previous years figure (an allowance for the on-cost).”

7. The Appellant challenges the capping of the cleaning costs in this manner. The President of the Lands Tribunal granted permission to the Appellant to appeal in the following terms:

“It appears that the LVT may have misunderstood the evidence relating to cleaning costs. Permission is limited to the LVT’s decision capping these costs as set out in paragraph 76 of the decision.”

8. None of the Respondents has given notice of intention to respond to the present appeal nor was any Respondent present or represented at the hearing.

9. At the hearing Mrs Sandhu called Mr Ian Jardine, the Environmental Services Manager for the Appellant who was responsible for the caretaking/cleaning services over the relevant period, to give oral evidence. Mr Jardine and Mrs Sandhu were unclear as to the extent to which the point in paragraph 4(2) above was developed before the LVT. Accordingly I initially concentrate on the way the LVT dealt with the question of on-costs.

10. Before doing this I should, however, emphasise that the Tribunal is not concerned with anything other than the question of the amount properly to be included within the service charge calculation in respect of cleaning (by which I mean cleaning/caretaking as referred to by the Appellant). In particular I am not concerned with:

- (1) The reasonableness of the £377,000 on-costs – the LVT expressly found that this was reasonable.
- (2) The question of whether the items of costs represented within this £377,000 are items which can properly be charged for as part of the service charge having regard to the terms of the various leases. I read the LVT’s decision as being to the effect that in principle such on-costs are recoverable. There has been no

cross-appeal by the Respondents in respect of this. Also the leases have not been produced to the Lands Tribunal. I therefore proceed upon the assumption (but without deciding) that all of the items included within the on-costs can properly be treated as part of the cost of providing the cleaning services and can properly be included within the service charge having regard to the terms of each of the Respondents' leases.

- (3) Any question regarding what fraction of what cost can properly be levied against each individual Respondent in the light of the terms of that Respondent's lease coupled with such agreement (if any) that that Respondent may have entered into with the Appellant to vary the terms of the lease. I say this because it is clear from the LVT's decision that in various respects the terms of the leases are thought to be unsatisfactory and a revision of the terms was thought by the LVT to be urgently needed.
- (4) Any question regarding how the on-costs should be apportioned as between the various tenants. The LVT in paragraph 74 concluded that a simple arithmetical division was inappropriate and indicated (as I read the decision) that a different method of apportionment based upon an amount pro-rata to the actual cost of cleaning for each individual tenant (or each block) should be adopted. There has been no appeal by the Appellant against this finding and I was told at the hearing that the Appellant is implementing this method of apportioning the on-costs.
- (5) Whether the cleaning was undertaken to a reasonable standard – the LVT found in favour of the Appellant that this was the case and the Respondents have not cross-appealed against this finding.

11. I therefore approach the matter on the basis that in principle the on-costs are recoverable and also that the amount of the on-costs are reasonable, but that the on-costs should be apportioned as indicated in paragraph 74 of the decision. Bearing the foregoing in mind one then turns to the LVT's decision in paragraph 76, which is to the effect that the cost of cleaning should be capped at the 2004/05 level and that the increase for 2005/06 (and 2006/07) should be no more than 5% on the previous years figure which is stated to be "an allowance for the on-costs".

12. I can, with respect, see no sustainable reason given by the LVT to limit the increase to 5% in this manner. A 5% increase in the figure of £114.35 (given by the LVT as the estimated figure for cleaning for 2004/05) is less than an extra £6. However, the on-costs come to £64.71 per flat, when divided upon the basis (disapproved by the LVT) of simple arithmetical division. It seems to me obvious that an apportionment of the £377,000 on-costs on the different basis favoured by the LVT in paragraph 74 of its decision would necessarily come to substantially more than £6 per flat. Accordingly if in principle (as the LVT has decided) the on-costs are recoverable and if (as the LVT has also decided) the on-costs are reasonable, I conclude that the LVT was wrong in limiting the amount of the increase in the recoverable cleaning costs to 5% of the 2004/05 figure.

13. Having concluded that the LVT's ruling in paragraph 76 cannot stand, the question arises as to what finding I can properly substitute. I drew attention at the hearing to the phraseology in paragraph 76 to the effect that "even taking the on-costs into account" the Tribunal found that the cleaning costs had increased without justification being provided to the Tribunal. As a matter of arithmetic the following may be noted. The service charge account for 1 April 2005 to 31 March 2006, in respect of the various flats in blocks of 6 flats, showed that the caretaking/cleaning costs were £1,222.52 and that each tenant was charged one-sixth of this amount. The document also showed that each tenant's contribution was £268.46 and there was a footnote stating

"Please note that your individual contribution also includes a shared on-cost of: £377,000".

The total cleaning figure for the block of £1,222.52 when divided by 6 gives £203.75 per flat. If £64.71 is then added for on-costs the total comes to £268.46, which is the figure included by the Appellant for cleaning in the service charge account. Accordingly if for the moment one wholly disregards the question of on-costs, the figure for what might be described the basic cleaning cost is £203.75 per flat, which is substantially larger than the figure (estimated) of £114.35 for 2004/05. If no reasons were given for this increase (which does not depend upon the question of on-costs) then I could see some force in the LVT's broad proposition that there should be a percentage limit, anyhow upon this aspect of the cleaning charges.

14. Mr Jardine was able to give evidence upon this point. Bearing in mind that, for the reasons already given in relation to the question of on-costs, I had concluded that the LVT's decision in paragraph 76 could not stand, I considered it right to receive such evidence notwithstanding that the matter may not have been put in precisely the same way on this particular point before the LVT. Mr Jardine explained that as part of the re-analysis of the costs of providing the cleaning services which was carried out in 2004 a study was undertaken as to how much staff time was occupied each week in respect of each block, eg in relation to the cleaning of the communal areas the sweeping of the stairs, the dusting of the wall beading and window ledges etc. An analysis was also undertaken as to the how much staff time was spent each week regarding the cleaning (eg litter picking and sweeping) of the grass areas and the car park and the other communal outside areas. The conclusion that was reached was that 1.75 hours per week was required for each block for the internal cleaning and that 3.75 hours per week was required for the whole estate for the external cleaning. Mr Jardine explained that the cost per hour of providing such cleaning (taking into account total salary costs) came to an hourly rate of £10.96. The following calculation was then performed which indicated:

- (a) 1.75 hours per week at £10.96 per hour for 52 weeks per year equals £997.36
- (b) 3.75 hours per week at £10.96 per hour for 52 weeks, when multiplied by six fifty sevenths (there being six flats in the block and 57 flats on the estate) comes to £224.97.

The total for each block of six flats thus comes effectively to the figure of £1,222.52 for the year, which is the total figure included for the cleaning services (leaving aside any question on-costs) for each block of six flats. Mr Jardine explained that in 2004 it was recognised by the Appellant, when it looked again at the complete service being provided to tenants and at how

much time was actually spent on cleaning each block, that the Appellant had been underestimating how long cleaning had been taking. The Appellant had apparently been proceeding upon the basis of certain schedules of hours required which had been drawn up in 1973 but which were found, in the 2004 re-appraisal, to understate the time required on cleaning. Accordingly the basic cleaning cost (ie leaving aside any question of on-costs) had increased not by reason of any increase in the level of cleaning services but by reason of the Appellant undertaking a full and accurate assessment of the cost of providing the cleaning rather than continuing to work on inadequate and outdated schedules of hours required to perform the cleaning services.

15. I accept Mr Jardine's evidence. I conclude that the figure of £1,222.52 as the total annual costs for the cleaning of a block of six flats for the year 2005/06 does represent costs which were incurred by the Appellant and which were reasonable in amount and were therefore reasonably incurred in providing the cleaning services. The LVT has already concluded that the cleaning services were provided to a reasonable standard.

16. I am ultimately unable to reach a precise conclusion as to how much is recoverable from each of the 21 Respondents in respect of cleaning services for each of the two years with which I am concerned, namely 2005/06 and 2006/07. This is because I do not have the figures for various of the flats (the LVT only deals in paragraph 75 with flats 4, 7 9 10 and 23) and also because I do not know how much should be allocated to each flat in respect of the on-costs if these are apportioned on the basis decided upon by the LVT in paragraph 74 of its decision. However the fact that I am unable to rule on the precise amount recoverable from each of the Respondents for cleaning for the two relevant years does not prevent me reaching the following decisions, namely: the Appellant's appeal must be allowed; the Appellant is entitled to recover the on-costs from the Respondents, such on-costs to be apportioned to the tenants in the manner favoured by the LVT in paragraph 74; the cost of cleaning recoverable through the service charge should not be limited to 5% on the previous year's figures (as decided by the LVT); that so far as concerns the year 2005/06 (which is the relevant year for which actual figures were available before the LVT) the sum of £1,222.52 is reasonable for the block of six flats which includes 9 Heathcote Court. It follows from the foregoing and I conclude that as regards those Respondents whose service charge bill for 2005/06 included £268.46 in cleaning costs, the figure of £203.75 is properly recoverable as the basic cleaning costs and each tenant is in addition liable to pay a proportion of the on-costs, which is to be apportioned as indicated by the LVT in paragraph 74. The figures for any of the Respondents who have a flat in the block of nine flats may be different, but the principle of my decision remains the same. The principle in summary is this, namely that there is no justification for reducing the amount claimed in respect of what I have called the basic cleaning costs (ie disregarding the question of on-costs) and also each Respondent should in addition pay a proportion of the on-costs to be apportioned in accordance with paragraph 74 of the LVT's decision. The cleaning costs recoverable for 2006/07 should also be decided in accordance with this principle.

Dated 11 June 2009

His Honour Judge Huskinson