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MAN/00BZ/LSC/2009/0076

RESIDENTIAL PROPERTY TRIBUNAL SERVICE

LEASEHOLD VALUATION TRIBUNAL
of the NORTHERN RENT ASSESSMENT PANEL

DTERMINATION WITH REASONS

LANDLORD AND TENANT ACT 1985 – SECTIONS 27A & 20C

Property:	85 Lingmell Avenue, Moss Bank, St Helens, Merseyside WA11 7AX
Applicant:	Mrs L Bilous
Respondents:	Helena Partnerships Limited
Tribunal Members:	Mr J W Holbrook LL.B (Chairman) Mr I James FRICS Ms C Roberts

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DETERMINATION

A. **Due to the absence of invoices properly certified in accordance with the Lease, no service charges have ever become payable under the Lease in respect of the service charge period which commenced on 1 April 2005 and ended on 31 March 2006, or in respect of any subsequent annual service charge period, and no sums are currently payable by the Applicant in that regard.**

B. **Had properly certified invoices been provided, the following amounts would have been payable by the Applicant to the Respondent by way of service charges under the Lease:**

For the period 1/04/05 – 31/03/06	**£474.75**
For the period 1/04/06 – 31/03/07	**£488.86**
For the period 1/04/07 – 31/03/08	**£481.77**
For the period 1/04/08 – 31/03/09	**£549.57**

C. **The costs incurred by the Respondent in connection with these proceedings are not to be regarded as relevant costs (within the meaning of section 18(2) of the Landlord and Tenant Act 1985) to be taken into account in determining the amount of any service charge payable by the Applicant.**

D. **Within 14 days of the date on which this determination is sent to the parties, the Respondent shall reimburse the Applicant for the application and hearing fees which she has paid in respect of these proceedings in the sum of £250.00.**

REASONS

Background

1. On 17 August 2009 the Applicant, Mrs Linda Bilous of 85 Lingmell Avenue, Moss Bank, St Helens, Merseyside WA11 7AX ("the Property") applied to the Leasehold Valuation Tribunal ("the Tribunal") under section 27A of the Landlord and Tenant Act 1985 ("the 1985 Act") for a determination of her liability to pay service charges in connection with her tenancy of the Property. The application related to the service charge period which commenced on 1 April 2005 and ended on 31 March 2006, and to each subsequent annual service charge period ("the disputed periods"). The Applicant also applied to the Tribunal under section 20C of the 1985 Act for an order preventing the Respondent, Helena Partnerships Limited, from recovering costs incurred in connection with the proceedings before the Tribunal under section 27A as part of the service charge.

2. A hearing took place on 25 February 2010 at Premier Inn, Garswood Old Road, St Helens. The Applicant appeared in person and the Respondent was represented by its solicitor, Mr J Halliday. The Tribunal had been provided with a bundle of documentary evidence, and oral evidence was given by Mr K Corcoran, the Respondent's accountant. The Tribunal

adjourned the hearing in order for the Respondent to comply with its directions to produce further documentary evidence. The re-convened hearing took place on 6 August 2010 (at the same venue), when the Applicant again appeared in person. On this occasion, the Respondent was represented by Mr A Vincent of counsel. Once again, Mr Corcoran gave oral evidence.

3. The Tribunal had inspected the Property immediately prior to the original hearing. It did so in the presence of the Applicant and Mr Halliday.

Description of the Property

4. The Property is a residential flat situated on the first floor of a two-storey building ("the Building") which contains three other flats of similar size and character – two at ground floor level and two on the first floor. The first floor flats are accessed by means of external staircases to either side of the Building (and these were noted to be worn). There are no internal common parts although the flats share a pathway from the road. There are gardens to front and rear, which are poorly maintained, although the Tribunal found the Building itself to be in fair condition. It is of brick construction under a pitched, tiled roof. It was observed that the roof had been replaced in recent years and that plastic fascias, soffits and gutters had been fitted.

5. The Building is located on the Moss Bank estate in St Helens ("the Estate"), which is a large housing estate comprising, as the Tribunal understands, numerous other properties in the ownership of the Respondent, the overwhelming majority of which being let on assured tenancies. Indeed, of the Respondent's housing stock of 13,000 units across St Helens, only 103 (including the Property) are subject to long leases.

The Lease

6. The Applicant holds the Property as tenant under a lease dated 10 October 1988 and made between St Helens Borough Council (1) and Mrs R Abbott (2) ("the Lease"). The Lease was granted for a term of 125 years reserving a ground rent of ten pounds per annum.

7. Paragraph 3(a) of the fourth schedule to the Lease contains a tenant's covenant, which is binding on the Applicant, in the following terms:

> *To pay to the Lessor on demand without any deduction a sum equal to 25 per centum per annum of the aggregate costs expenses and outgoings (and any VAT payable thereon) incurred by the Lessor in respect of or for the purpose of repairing maintaining servicing insuring cleansing and managing the Premises and the building hereinafter called "the Services" including without prejudice to the generality of the foregoing the costs expenses or outgoings incurred in:-*
> *(i) keeping the Premises and the building ... in good and substantial repair ...*
> *(ii) insuring against damage or destruction of the building ...*
> *...*
> *(iv) the maintenance of communal areas entrances pathways gardens courtyards grassed areas estate roads and lighting*
> *...*
> *(vii) the proper fees and disbursements (and any VAT payable thereon) of the Accountant and any other individual firm or company employed or retained by the Lessor for or in connection with*
> *(a) The surveying or accounting functions in connection with the management of the building*
> *(b) The management of the Building*
> *...*
> *Such sum (hereinafter called "the Service Charge") being subject to the terms and conditions set out in the immediately following sub-paragraph of this Schedule.*

8. "The Premises", in this context, means the Property. Clause 1(b)(v) of the Lease defines "the Building" as "*the whole of the building or block of flats*

in which the Premises are comprised and curtilage thereof shown edged red on the plan annexed hereto". It is clear from an inspection of the Lease plan that this means the block of four properties which includes the Property, together with front and rear gardens (that is, the Building as that expression is used in this determination). Finally, "the Accountant" is defined in clause 1(b)(xiii) as meaning "*any person or firm appointed by or acting for the Lessor (including an employee of the Lessor) to perform the functions of an accountant for any purpose of this lease*".

9. The mechanism by which the service charge must be ascertained and demanded is set out in paragraph 3(b) of the fourth schedule to the Lease in the following terms:

> *(i) the Service Charge shall be ascertained on the basis of and become payable in respect of each of the Lessor's financial years which shall mean the period from and including the first day of April in each year to and including the thirty first day of March in the following year*
> *(ii) as soon after the end of the Lessor's financial year as may be practicable the Lessor shall supply the Lessees with an invoice certified by the Accountant in respect of the Service Charge (including Value Added Tax) payable by the Lessees for the then immediately preceding Lessor's financial year and the invoice shall contain a fair summary of the Lessor's said costs expenses and outgoings incurred during the Lessor's financial year to which it relates*

The service charges demanded in respect of the disputed periods

10. A breakdown of the service charges demanded under the Lease by the Respondent in respect of each of the disputed periods for which invoices are available (that is, the years 2005 – 06 to 2008 – 09) is set out in Annex 1 to this determination.

11. The Applicant challenged the reasonableness of these charges generally. She pointed to the fact that the level of charges had increased considerably in comparison with charges levied in earlier periods, and disputed whether she should be required to contribute to the costs of maintaining other parts of the estate, or to pay significant contributions to re-roofing and painting costs, or the Respondent's management fees.

The Law

12. Section 27A(1) of the Landlord and Tenant Act 1985 provides:

> *An application may be made to a leasehold valuation tribunal for a determination whether a service charge is payable and, if it is, as to-*
>
> *(a) the person by whom it is payable,*
> *(b) the person to whom it is payable,*
> *(c) the amount which is payable,*
> *(d) the date at or by which it is payable, and*
> *(e) the manner in which it is payable.*

13. The Tribunal has jurisdiction to make a determination under section 27A of the 1985 Act whether or not any payment has been made.

14. In making any such determination, the Tribunal must have regard to section 19 of the 1985 Act, subsection (1) of which provides:

> *Relevant costs shall be taken into account in determining the amount of a service charge payable for a period-*
>
> *(a) only to the extent that they are reasonably incurred, and*
> *(b) where they are incurred on the provision of services or the carrying out of works, only if the services or works are of a reasonable standard;*
>
> *and the amount payable shall be limited accordingly.*

15. Section 19(2) states that "*where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable and after the relevant costs have been incurred any necessary adjustment shall be made by repayment, reduction or subsequent charges or otherwise.*"

16. "Relevant costs" are defined for these purposes by section 18(2) of the 1985 Act as "*the costs or estimated costs incurred or to be incurred by or on behalf of the landlord, or a superior landlord, in connection with the matters for which the service charge is payable.*".

17. Subsection (1) of section 20C of the 1985 Act provides:

> *A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a court or leasehold valuation tribunal ... are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application.*

18. Section 20C(3) gives the Tribunal power to "*make such order on the application as it considers just and equitable in the circumstances*".

Determination of the payability of the service charges

19. During the course of the hearing, the Respondent acknowledged that none of the invoices which had been issued to the Applicant in respect of the disputed periods (and copies of which were included in the hearing bundle) had been certified by the Accountant in the manner required by paragraph 3(b)(ii) of the fourth schedule to the Lease. It therefore follows, as a simple matter of contract, that no service charges have ever become payable under the Lease in respect of those periods and that no sums are currently payable by the Applicant in that regard.

Determination of the reasonableness of the service charges

20. Although the Tribunal's determination on the question of payability disposes of the application under section 27A of the 1985 Act for immediate purposes, the Tribunal recognises that the Respondent may now seek to re-issue invoices that do comply with the requirements of the Lease. The Tribunal therefore considered the reasonableness of the costs which the Respondent has sought to recover. It did so for each of the disputed periods for which figures are available (namely, the years 2005 – 06 to 2008 – 09) and its conclusions are summarised in Annex 2 to this determination. The Tribunal did not make a determination in respect of the 2009 – 10 service charge period, or in respect of the current period, as the necessary financial information was unavailable. It will be open to the Applicant to make a further application in respect of those periods should she wish to do so.

21. In reaching its conclusions on the question of whether individual heads of cost within the service charge were reasonably incurred, the Tribunal took the following matters into account:

Insurance

22. The Respondent insures the Property under a blanket buildings insurance policy issued by Zurich Municipal insurance company. Sample home insurance schedules for the Property were produced to the Tribunal showing that the proportion of the global premium attributable to the Property accorded with the amounts claimed for insurance under the service charge. The Tribunal was satisfied that these amounts were reasonable.

Day to day maintenance

23. Small amounts had been claimed in respect of two of the disputed periods in respect of day to day maintenance. A breakdown of these costs was produced to the Tribunal (they related to the re-levelling of a metal post and to cleaning areas adjacent to the front and side of the Building) and the Tribunal was again satisfied that the amounts of the costs in question were reasonable.

Landscaping / Grass cutting / Grounds maintenance

24. It was agreed that works for which charges were made under the above heads in each of the disputed periods were not works which had been carried out to the Building, but related instead to the wider estate. In fact, it appears that the works in question related to the maintenance of grassed areas and parking bays around the estate. The Applicant challenged her liability to contribute to the costs of such works.

25. In its written submissions prior to the hearing, the Respondent had maintained that the Applicant was contractually obliged to contribute to such costs under the terms of the Lease. It relied, in particular, on paragraph 3(a)(iv) of the fourth schedule which refers to the "*maintenance of communal areas entrances pathways gardens courtyards grassed areas estate roads and lighting*" as a basis for this contention. However, this interpretation of the service charge provisions of the Lease is erroneous – and the Respondent accepted this to be so during the course of the hearing.

26. The itemised list of services (in paragraph 3(a) of the fourth schedule to the Lease) is ancillary to, and must be read in the context of, the introductory provision of that paragraph which provides that the

Applicant's obligation is to contribute to various costs "*incurred by the Lessor in respect of ... the Premises and the building*". It is not an obligation to contribute to costs incurred in respect of the wider estate or the Respondent's housing stock generally. It is clear from the fact that the Applicant's obligation is to contribute 25% of the relevant costs that the Lease envisages a service charge that is limited in scope to services provided for the direct benefit of the four flats within the Building. Sub-paragraph (iv) must be limited to such communal areas, gardens etc. (if any), as are comprised within the Building, as the same is defined in the Lease. Given that the works for which the Respondent has sought to charge under this head do not fall within this category, the costs of carrying them out are irrecoverable from the Applicant.

Re-roofing scheme

27. The Building was re-roofed in 2004 – 05. The Respondent has sought to recover a contribution towards the costs of the work involved from the Applicant. The total contribution which has been sought in this regard is £2,637.40. The Respondent offered to spread this cost equally over five years (including each of the four years in dispute). So, while the costs of the re-roofing work were incurred prior to the periods in dispute, it was necessary to consider whether they were reasonably incurred in order to determine whether contributions demanded in subsequent periods were themselves reasonable.

28. The re-roofing of the Building was not carried out in isolation, but in fact formed part of a major scheme to re-roof some 296 properties owned by the Respondent. Even though the service charge provisions of the Lease operate by reference to works to the Building only, there is nothing to prevent the Respondent from carrying out such works as part of a larger project and then recouping appropriate costs through the service charge.

This, however, is subject to some important qualifications. First, given the cost of the works, the Respondent would have been obliged to comply with the statutory consultation procedure (and it appears to have done so in this case). Second, the costs of the works undertaken to the Building must be ascertainable, bearing in mind that the Applicant is liable to contribute to the cost of those works in particular, and not to the cost of works carried out further afield. Finally, of course, the costs in question must have been reasonably incurred.

29. The Respondent argued that the costs of re-roofing the Building were indeed ascertainable, and that they were also reasonably incurred. It produced a copy of the global contract specification showing that the overall project cost was £829,548.04. It also produced a detailed spreadsheet showing an apportionment of costs between the properties which were included in the scheme. This spreadsheet shows that the total costs attributable to the Building were £10,549.51 (thus making the Applicant's 25% contribution £2,637.38). However, the spreadsheet also indicated that of the total costs attributable to re-roofing the Building, £9,425.71 related to the cost of scaffolding, leaving a mere £1,123.80 as the cost of the re-roofing work itself.

30. The Tribunal expressed its concern as to the credibility of these figures. It put it to the Respondent that the overall cost which has been attributed to the Building is considerably in excess of that which (based on the Tribunal's own knowledge of such matters) one could reasonably expect to pay to re-roof a property of the size and character of the Building. It seemed very unlikely that the cost of the scaffolding required for the job would have been nearly as high as that stated or, indeed, that the cost of the re-roofing work itself would have been as low. This cast additional doubt on the reliability of the Respondent's apportionment of the overall contract price.

31. In answer to the Tribunal's concerns, the Respondent was only able to say that the costs represented the costs which it had actually expended on the project, that it had tendered for the work prior to placing the contract, and that the statutory consultation procedure had not resulted in any cheaper estimates being put forward. Nevertheless, these arguments do not allay the Tribunal's concerns that the attribution of costs to the Building fails to identify reliably the actual costs of re-roofing the Building or to demonstrate that those costs were reasonably incurred. The Tribunal concluded that, in 2004 – 05, one could reasonably have expected to be able to re-roof the Building for considerably less than £10,549.51. In the Tribunal's view, an inclusive price of approximately £6,000.00 would have been a reasonable figure. This would translate into a contribution of £1,500.00 for the Applicant (or £300.00 per annum over five years).

32. The Tribunal noted that, whilst it had not been asked to determine the amount of the service charge payable in respect of the 2004 – 05 service charge period, implementation of its decision on the issue of re-roofing charges will require the Respondent to credit the Applicant's service charge account by £227.48 to allow for the overpayment on the first of the five annual payments of £300.00.

Pre-paint charge

33. The service charge for 2007 – 08 includes a cost of £243.83 in respect of a "pre-paint charge". This appeared to be a standard charge which the Respondent applied to numerous properties and, as the label suggests, was intended to recover the costs of works preparatory to external painting. The Applicant challenged this charge on the basis that no such works had been carried out.

34. There was some uncertainty on the Respondent's part as to what work had in fact been carried out in this regard. Initially it maintained that the exterior of the Building had been re-painted (and so pre-paint works had been required), but Mr Corcoran later said it was his understanding that the work involved was limited to cleaning the gutters. The Applicant was adamant that no work had been done and, on balance, the Tribunal accepted her version of events given the Respondent's lack of clarity. Certainly, from its inspection of the Building, it did not appear to the Tribunal that external painting or preparatory works had been carried out since the roof was replaced. The soffits, gutters and downspouts, and the windows in the Building, are all of plastic manufacture and so would not require painting. Accordingly, the pre-paint charge should be disallowed.

Management fees

35. The Applicant challenged the reasonableness of the management fee for each of the disputed periods, noting the very considerable increase in these fees in comparison with the nominal management fees charged in previous periods.

36. It is clear from the Lease (paragraph 3(a)(vii) of the fourth schedule) that the Respondent is entitled to recover its reasonable management costs through the service charge. However, it must again be borne in mind that the Applicant's contractual liability is to contribute to the costs of managing "the Building". It is not a more general liability to contribute to the Respondent's overall costs of managing the long leasehold properties within its housing stock. Yet this is how the Respondent has interpreted the obligation.

37. The Respondent provided evidence as to the manner in which management fees have been calculated. Essentially, this involves

calculating the notional cost of managing all the long leasehold properties and then dividing the total by the number of such properties (at the time of the hearing there were 103 of them). The notional cost is arrived at by apportioning the notional cost of various staff overheads (including staff in the Respondent's 'response centre', legal and finance teams) between the long leasehold managed properties and the bulk of the Respondent's (assured tenancy) housing stock. Whilst the calculations required to achieve this are detailed and complex, it is far from clear that the end result accurately or fairly reflects the true cost of managing the long leasehold properties.

38. It is generally accepted that, in setting the level of a management fee, the actual costs incurred represent a reasonable starting point. However, the Respondent's approach (based, as it is, on a number of hypothetical assumptions) does not, in reality, identify the actual costs of managing its long leasehold properties. It certainly does not identify the actual cost of managing the Building. Nor does it pay sufficient regard to the question of whether the individual fees produced by the application of this approach are reasonable charges for the management services actually provided. In the Tribunal's opinion, they fail this test.

39. Given the difficulties in calculating the actual cost to the Respondent of managing the Building, the Tribunal concluded that a better approach would be to base the management fee on the amount which a professional managing agent could reasonably be expected to charge for managing premises similar to the Building. Based on its own knowledge of the management of residential property, the Tribunal concluded that £500.00 per annum would be a reasonable and realistic fee in this regard. The Applicant would be liable to pay 25% of that fee, of course, and the Tribunal therefore concluded that it would be reasonable for her service

charge to include a management fee of £125.00 in respect of each of the disputed periods.

The application under section 20C of the 1985 Act

40. Given that the Tribunal has determined the service charge payable by the Applicant to be an amount significantly less than that claimed by the Respondent, it considers it to be just and equitable to grant the application under section 20C of the 1985 Act. There is no reason why the Applicant should effectively be asked to bear a part of the Respondent's costs in this matter.

Reimbursement of fees

41. Finally, the Tribunal considered whether it should exercise its power under regulation 9(1) of the Leasehold Valuation Tribunal (Fees) (England) Regulations 2003 to require any party to the proceedings to reimburse any other party for the whole or any part of any fees paid by him under those Regulations in respect of the proceedings. In the present case the Applicant has paid an initial application fee of £100.00 and an additional hearing fee of £150.00.

42. The Tribunal decided that it was appropriate to order the reimbursement of these fees in full. In coming to its conclusion on this issue, the Tribunal took into account not only the fact that it had found the service charges demanded by the Respondent to be unreasonable in significant respects (including, in relation to the pre-paint charge, charging for works which it appears were never carried out in the first place), but also that the Respondent had failed to operate the service charge in accordance with the terms of the Lease or to recognise the limits of the Applicant's contractual liability to pay service charges.

J W Holbrook

Mr J W Holbrook
Chairman

13 September 2010

Annex 1: Service charges demanded in respect of the disputed periods

	2005 – 06	2006 – 07	2007 – 08	2008 – 09
	£	£	£	£
Insurance	49.75	53.86	56.77	59.45
Day to day maintenance charge		10.00		65.12
Landscaping / Grass cutting / Grounds maintenance	22.00	23.46	24.48	25.00
Re-roofing scheme	527.48	527.48	527.48	527.48
Pre paint charge			243.83	
Management fee	174.65	199.39	235.46	238.45
TOTALS	**773.88**	**814.19**	**1088.02**	**915.50**

Annex 2: The amounts which the Tribunal determines to be reasonable

	2005 – 06	2006 – 07	2007 – 08	2008 – 09
	£	£	£	£
Insurance	49.75	53.86	56.77	59.45
Day to day maintenance charge		10.00		65.12
Re-roofing scheme	300.00	300.00	300.00	300.00
Management fee	125.00	125.00	125.00	125.00
TOTALS	**474.75**	**488.86**	**481.77**	**549.57**