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HM COURTS & TRIBUNALS SERVICE

LEASEHOLD VALUATION TRIBUNAL

Case number:	BIR/37UJ/LSC/2011/0037
Property:	166 Manor Road, Keyworth, Nottinghamshire, NG12 5LR
Applicant:	John Rooksby Esq
Respondent:	Metropolitan Housing Partnership
Represented by:	Mr Alastair Redpath-Stevens
Application:	Application for the determination of liability to pay and reasonableness of service charges under s27A and s19 Landlord and Tenant Act 1985
Hearing date:	2 February 2012
Hearing venue:	Jury's Inn, Water Front Plaza, Station Street, Nottingham
Tribunal:	Mr C Goodall MBA LLB (Chairman) Mr C Gell FRICS
Date:	29 FEB 2012

Background

1. This is an application for a determination of the liability to pay, and the reasonableness of service charges charged to Mr John Rooksby (the Applicant) by Metropolitan Housing Partnership (the Respondent) for services at the Applicants flat at 166 Manor Road, Keyworth, Nottinghamshire NG12 5LR (the Property).

2. The Applicant became a secure tenant of the property about 17 years ago when it was owned and managed by Rushcliffe Borough Council (the Council), and an assured tenant of the Respondent or their predecessors in about 2003 when the Council transferred their housing stock to the Respondent or their predecessors.

3. From April 2011, the Respondent has been charging the Applicant for services in addition to rent. Those services are a grounds maintenance service, and cleaning of the communal areas. The Respondent says it is entitled to impose these charges under the terms of the Applicant's tenancy. The Applicant disputes that, and says that if this is incorrect, the cleaning service charge is unreasonable. He has applied to the Tribunal for a determination of these issues.

Inspection and hearing

4. On 2 February 2012, a hearing, preceded by an inspection of the Property, took place at Jury's Inn Hotel, Station Street, Nottingham. The Applicant represented himself. The Respondent was represented Mr Redpath-Stevens of Counsel.

5. The earlier inspection showed that the Property is one of 12 flats in a U shaped three storey block. The Property itself is on the top floor, accessed by a communal, partly enclosed staircase. There are communal pathways to the block, and there is a bin store on each floor. The communal areas were not particularly clean and tidy on the day of inspection; certainly a good sweep around and removal of a small amount of rubbish would have been desirable. However, the Tribunal was not told how recently the last clean had taken place, and the standard of cleaning expected by the Applicant seemed to the Tribunal to exceed what might reasonably be expected for an external area.

The history

6. The following history sets the scene, and the Tribunal understands that it is not in essence disputed. In about 2003, the Council transferred some (or possibly all, but certainly including the Property) of their housing stock to an arms length organisation called Rushcliffe Homes. At that time, new tenancy terms were introduced, as all transferring tenants were transferring from secure tenancies to assured tenancies.

7. Nobody can find a copy of a tenancy agreement signed by the Applicant when he originally took his tenancy of the Property. However, both parties accept that, though the Applicant did not sign the new terms in 2003, these are the terms that govern the tenancy arrangement. The Tribunal

heard submissions on the question of whether the Applicants original tenancy terms were better than the unsigned 2003 terms, as if so, there would be an issue over whether the 2003 terms could be imposed unilaterally upon the Applicant. In respect of the key issue in this case, however, which is the ability to vary the terms of the contract, the Tribunal accepts (and the Applicant did not dispute) that the 2003 terms are more restrictive upon the Respondent than the provisions of any previous tenancy from a local authority because the provisions of s103 Housing Act 1985 allowing a local authority to vary a tenancy are not available to the Respondent.

8. In 2010, the Respondent decided to seek to change the arrangements for provision of external grounds maintenance, and for the cleaning of the communal areas. Previously, the grounds maintenance (which essentially comprised lawn cutting) had been undertaken by the Respondents direct labour unit on an ad hoc, voluntary basis, and there had been no cleaning of the communal area by the Respondent; the residents had done this work on an informal basis.

9. To effect this change, the Respondent undertook a consultation exercise, and following this introduced service charges, which it has collected by direct debit from the Applicant since April 2011. The amounts taken from the Applicant since that date are 83p per week for cleaning, and £1.49 per week for grounds maintenance.

The issues

10. There are two clear issues raised in this application. The first main issue is whether the Respondent has a legal basis for imposing a service charge upon the Applicant under the terms of the tenancy. This issue actually raises three separate issues. Firstly, can the words of the tenancy agreement be construed in such a way that allows the Respondent to introduce a new charge? Secondly, if so, has the Respondent properly consulted on the introduction of those services? Thirdly, if so, does the Respondent have a reasonable opinion that it is appropriate to introduce such charges?

11. The second main issue, which only falls for determination if the Respondent succeeds on the first main issue, is whether the charges imposed for cleaning are reasonably incurred. The Applicant says not, as the standard of the cleaning is unsatisfactory. Whilst the reasonableness of the grounds maintenance charge are technically raised on the Applicant's application form, he has not pursued this issue in argument or in his statements, and the Tribunal understands that if it decides the Respondent may make a charge for grounds maintenance, the amount of £1.49 is not challenged.

(1) Can the words of the tenancy agreement be construed in such a way that allows the Respondent to introduce a new charge?

12. The Respondent seeks to justify the introduction of a service charge on the basis that the existing tenancy terms allow this charge to be introduced.

13. The relevant clauses are:

Payments for your home

1.1 You must pay the rent and any service charge in advance on or before Monday of each week.

...

Service Charge (where applicable)

1.4 We may increase your service and support charges (if it applicable) at any time if we give you at least one month's notice in writing, but not more than once a year unless there is a change in the services provided.

1.5 Each year we will estimate the sum we are likely to spend in providing services to you over the coming year. That will be the service charge we will ask you to pay for the year.

1.6 At the same time, we will work out how much we have actually spent on providing services for you in the previous year. If we have overcharged you, we will reduce your service charge for the coming year. If we have undercharged you, we will increase your new service charge.

1.7 We will give you a certificate showing what is included in your service charge. When you receive your certificate, you have the right, within six months of receiving the certificate, to examine the service charge accounts, receipts and other documents relating to them and to take copies or extracts from them. We will make a small charge to cover the cost of copying.

1.8 We can only make reasonable service charge demands and the services or work provided must be of a reasonable standard. If you believe that your service charge is unreasonable (in terms of the amount charged or standard of work) you may be able to apply to a Leasehold Valuation Tribunal for a decision as to what is reasonable. Further details are given in your Tenants' Handbook.

...

Altering the agreement

1.15 Except for changes in rent or service charge (as detailed in clauses 1.3 to 1.8), the tenancy agreement and these tenancy conditions may be altered only if both you and we agree in writing.

...

Services

2.15 We will provide the services (if any) listed in Schedule A. However, after consultation with you we may increase, add to, remove or vary any of the services if, in our reasonable opinion, it is appropriate. Any change in the services we provide may affect the amount of any service charge you pay.

...

Right to consultation

5.6 We will consult you before making changes in matters of housing management or maintenance which are likely to effect you substantially. We agree to give you the right to be consulted as if Section 105 Housing Act 1985 applied to this agreement.

This means we will:

(a) inform you of proposals; and
(b) give you a chance to tell us what you think of our proposals before we make a decision on whether to go ahead with them.

...

SCHEDULE A
Service charge items charged in addition to weekly rent for your home

[	]	£[ ]
[	]	£[ ]
[	]	£[ ]
[	]	£[ ]

Total for service charge items
Subject to review under Clauses 1.5 and 2.15

14. The crucial clause is of course clause 2.15, which allows the Respondent "...after consultation with you [to] increase, add to, remove or vary any of the services if, in our reasonable opinion, it is appropriate". The Applicant urged a highly literal meaning to these words. He pointed out that prior to April 2011, no services were being provided at all under the tenancy agreement. Schedule A is blank and no charges were being made for services. Hence, if there is nothing there, what is there to increase, add to, or vary? He argues that as there is no service charge to change, under clause 1.15, introducing a service charge is only possible with his agreement. The Applicant submitted that "add" means "the process of combining two or more numbers", or alternatively "increas[ing] a number or quantity by another number or quantity", or "joining something to something else in order to increase it in size, quantity, effect, or scope".

15. The Respondent argues that clause 2.15 allows it to "add" a service, even if there is no service being provided before, if it considers it appropriate to do so. The argument is that if there is a list of services (as there is in Schedule A) with no services presently shown, and you add a service, then you end up with a list which **does** have a service. That is all that the Respondent is trying to do, Mr Redpath-Stevens suggested. It is simply operating clause 2.15 in a straight-forward way and adding a service for the tenants, which it is then entitled to charge for pursuant to clauses 1.1, 1.4, and 1.15. He says the Respondent is not seeking to change the tenancy terms; simply to operate clause 2.15 of those terms. He also argued that the tenancy agreement should be looked at as a whole, and should be construed as a document which was intended to operate in such a way that if the Respondent considered it appropriate, and followed the correct procedures, would allow flexibility to make changes to the services being provided.

16. The Tribunal considered these competing views of the meaning of clause 2.15 carefully, and decided that the correct view is that the clause does allow the Respondent to introduce services. Although the word "introduce" is not included in clause 2.15, the word "add" is, in the opinion of the

Tribunal, sufficient to allow this interpretation. The normal and natural meaning of the word "add" is not stretched if it is taken to include adding something to nothing so as to make something. Applying the definitions of "add" proposed by the Applicant in paragraph 14 above, the Tribunal is satisfied that even when there is no service previously existing, if a service is added, after that addition, there is a now a service. In other words, 0+1=1, as 0 is of course a number on its own account, so that this equation is a good example of "the process of combining two numbers".

17. Further, an agreement should be construed so as to give effect to the intention of the parties, so far as that can be ascertained, and the inclusion in this tenancy agreement of the provisions of clauses 1.1, 1.4 to 1.8, 1.15, 2.15, and Schedule A all indicate to the Tribunal that the agreement is designed to cater for the inclusion of services in the agreement if they should be added in the future. The introduction of cleaning and grounds maintenance services is not an alteration of the tenancy agreement under 1.15. It is the operation of clause 2.15.

(2)Has the Respondent consulted properly on the introduction of the services

18. Our view on whether the tenancy agreement itself allows the introduction of services does not end the matter. Clause 2.15 and 5.6 only allow the addition of a service after consultation. And the consultation has to be sufficient to meet the standards set in s105 Housing Act 1985. Bearing in mind that the applicability of s105 is not in doubt here, the material provision of s105 which must be met is contained in subsection (1) which provides:

(1) A landlord authority shall maintain such arrangements as it considers appropriate to enable those of its secure tenants who are likely to be substantially affected by a matter of housing management to which this section applies-
(a) to be informed of the authority's proposals in respect of the matter, and
(b) to make their views known to the authority within a specified period;
And the authority shall, before making any decision on the matter, consider any representations made to it in accordance with those arrangements,

19. So the Respondent must do three things; it must firstly inform the tenants of the proposals, then secondly it must arrange for the tenants views to be communicated back to the Respondent, and thirdly it must then consider those views. There is a bundle of documentation available to the Tribunal showing the consultation process in this case. There are letters from the Respondent to the Applicant dated 11 Jan 2010 (about the grounds maintenance proposal) and 9 Nov 2010 (about the cleaning service proposal). There is a response from the Applicant dated 30 Nov 2010, which was certainly considered by the Respondent, because there is a detailed response to that letter dated 14 December from the Respondent, and there are then further letters from the Respondent to the Applicant dated respectively 8 Nov 2010 (about the grounds maintenance) and 10 Jan 2011 (about the cleaning) which essentially summarise the

consultation and give the Respondents decision about the introduction of the service following that consultation.

20. During the hearing, the Applicant submitted that the responses received to the cleaning consultation may not have shown as clear a majority in favour of the introduction of the service charge for cleaning as the Applicant felt had initially been claimed. It may indeed be the case that the Respondent over-claimed the consultation results (though we make no finding on this). But the consultation exercise does not require a majority vote in favour of the proposals; indeed, it does not require a vote at all. The Respondent's obligation is simply to take the views of those responding into account. In the end, only the Applicant maintained out and out opposition to the proposal to the last, and the total strength of opposition does not seem to the Tribunal to have been so substantial that their decision to proceed with the proposal was irrational.

21. The Applicant criticised the Respondent's decision to deem failure to respond to the consultation as approval of the proposal. The Tribunal can see some strength in this argument where a proposal is highly contentious, as it might appear to be trying to swing a decision one particular way. In this situation, however, it is the view of this Tribunal that the proposal was well within the bounds of being a sensible and appropriate approach to an issue of good property management, and the inclusion of the "deemed approval" statement does not in any way make the consultation ineffective or invalid.

22. The Applicant also suggested that when in s105 it is stated that the Respondent must "consider any representations made to it in accordance with those arrangements", the words "in accordance with" should be read as meaning "in agreement with" such that there is an obligation in s105 for the Respondent to follow the views of the tenants expressed in the consultation. The Tribunal does not agree with this suggestion. The words "in accordance with" refer back to the process of the consultation, which must communicate proposals and allow the tenants to express their views. So long as there has been a consultation that complies with these two requirements, the Respondent will have received representations which it must "consider". There is no obligation for the Respondent's final decision to be one that the tenants agree with, as long as the Respondent has considered their views.

23. In the opinion of the Tribunal, the Respondent has properly complied with its obligations to consult on the introduction of grounds maintenance and cleaning services.

(3)Does the Respondent have a reasonable opinion that it is appropriate to introduce such charges?

24. This is a final requirement for the Respondent to comply with before it can lawfully introduce services. This is to be found in clause 2.15, which requires the Respondent to hold the reasonable opinion that it is appropriate to introduce the service.

25. In the view of the Tribunal, it is prima facie good property management to have a grounds maintenance and cleaning arrangement in place. It must

be of benefit to both the tenant and the landlord of premises for them to be kept in a clean and tidy condition.

26. The Applicant suggested that it was essentially unreasonable for the Respondent to introduce a paid for service, as the tenancy agreement obliges the tenants to do the cleaning themselves, and a better and cheaper solution for the tenants would have been to make the tenants do the cleaning themselves.

27. The clause on which the Applicant relies is clause 3.40 of the tenancy agreement, which provides:

> 3.40 You and everyone who lives with you must help make sure that any communal areas are kept clean, tidy and clear of any obstruction.

28. Precisely what this clause obliges the tenants to do, and how it can be enforced (particularly if there are non-tenants living in the flats) was the subject of much discussion at the hearing.

29. With respect to the arguments of both parties on this issue, the Tribunal declines to reach any conclusion on the issue, as in the view of the Tribunal it is not arguable that this clause **obliges** the Respondent to make the tenants clean the communal areas themselves. It is one thing to say what the tenants must do (and each party held different views on what this was). It is quite another to say that the Respondent must then **make** the tenants do that, if they fail to comply with the clause. Nothing in the wording of clause 3.40 imposes any such obligation upon the Respondent at all. The Tribunal has looked carefully at clause 2 of the tenancy agreement, which contains the Respondents obligations. There is no clause that requires the Respondent to enforce the individual tenant's obligations to the absolute letter and without any discretion to be lenient, though they obviously may fully enforce covenants if they wish.

30. If the Respondent holds a view that the cleaning of the communal areas is unsatisfactory, it will consider a range of options. If there is a clause which requires the tenants to carry out the cleaning themselves (which the Respondent here does not accept anyway), one option would be to seek to enforce that clause. But it is not necessarily the right option, and certainly not the only option. How would the tenants react to a demand? Would it be just as costly to monitor and enforce as buying in that service?

31. Irrespective of the correct interpretation of clause 3.40, in the view of the Tribunal, the Respondent cannot be criticised for selecting the option that the better solution to the concern about the cleaning provided at the Manor Road flats was to introduce a cleaning service, and to charge the tenants the cost of that service, rather than either to leave the communal areas uncleaned, or to seek to make the tenants provide that service, or any other option it might have considered.

32. The Tribunal therefore takes the view that it was reasonable for the Respondent to introduce charges for grounds maintenance and cleaning services.

Are the service charges reasonable?

33. Bearing in mind that we have concluded that the Respondent is able to impose a service charge upon the Applicant, the second main issue is whether the charges actually made are reasonable. In respect of the Applicant's challenge to the service charges, the Applicant has applied for review of service charges for the years 2011 to 2017 (7 years).

34. Under Section 27A(1) of the Landlord & Tenant Act 1985 (1985 Act), the Tribunal has jurisdiction to decide whether a service charge is payable and if it is, the Tribunal may also decide:-

(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

35. Under s27A(3) of the 1985 Act, the same issues as are set out in S27A(1) can be adjudicated upon by the Tribunal in respect of future costs.

36. Section 19 of the 1985 Act provides that:

"Relevant costs shall be taken into account in determining the amount of the 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 and the carrying out of works, only if the services or works are of a reasonable standard:

and the amount payable shall be limited accordingly."

37. If the tenancy agreement authorises the charges (and here we have decided that it does), they are only payable to the extent that they are reasonably incurred; and where they are incurred, only where the services for which they are incurred are of a reasonable standard.

38. In this case, the Applicant has asked for a determination of the reasonableness of the charges for each of the seven years from 2011 to 2017 inclusive. He says that the amount being charged is £0.83 per week for cleaning and £1.49 per week for grounds maintenance. These sums accord with those contained in the witness statement of Mr Tim Clarke for the Respondent. We do not have any demands for service charges in the documents prepared for the hearing. We assume these sums are simply

being collected by the Respondent claiming them under its direct debit mandate.

39. These charges are not necessarily the actual sums that the Respondent will ultimately ask the Applicant to pay. In accordance with the tenancy agreement, these are estimated charges under clause 1.5. In due course, under clauses 1.6 – 1.8, the actual charges will be disclosed, and the Applicant will be able to examine the invoices for those charges, and challenge the amount under 1.8 if he wishes.

40. At the hearing, the Respondent conceded that it would not require the Applicant to pay the estimated or actual service charge for communal cleaning for 2011/12 in any event. By agreement, therefore, any communal cleaning charge for 2011/12 is not reasonable and not payable by the Applicant.

41. The Respondent did not concede the reasonableness of the grounds maintenance charge, and the Applicant did not provide any evidence challenging the reasonableness of this charge. However, the Tribunal has been given no documentation showing any tenders, estimates or contracts in respect of the grounds maintenance contract, nor any evidence showing the amount actually payable by the Respondent. Using its expert knowledge of such contracts, the Tribunal decides that the sum of £1.49 per week is a reasonable pre-estimate of the anticipated charge for ground maintenance for 2011/12. When, however, in accordance with clause 1.6 and 1.7 of the tenancy agreement, the Respondent notifies the Applicant of the actual amount expended, the Applicant will still have the opportunity to ask for a review of that charge as set out in clause 1.8.

42. The Tribunal is also asked by the Applicant to consider costs for future years, namely 2012 to 2017. The Tribunal treats this application as an application under s27A(3), as no costs have been requested for these years. Essentially the Applicant is asking "if I am asked to pay the same sums again in future years as I am being asked to pay now, would those sums be reasonable"? In his submissions, the Applicant explained that he had filled in the form for future years because he thought he was meant to, not because he particularly wished to. The Respondent has said little on this point. In its statement of case, it simply makes the point that "as to future years, it is not possible to determine the actual charges going forward in time".

43. The Tribunal should answer the questions it is asked, but in the absence of any information about the scope of any contract for these works in the future (would the services be required weekly, monthly, and what standards would be expected of the contractor), the availability of contractors in the area, the extent to which the Respondent may have any in-house provision, the economic conditions applying at the time, or the views of the Respondent on how it wishes to manage its estate in the future, it declines to determine the reasonableness of service charges for these future years. To make a determination which neither party really requires and which would be based on pure speculation would assist nobody.

Decision

44. The Tribunal determines that:

a. The correct interpretation of the terms of the tenancy agreement between the Applicant and the Respondent is that the Respondent is entitled to charge the Applicant a service charge for cleaning of communal areas and for grounds maintenance at the Property.

b. By agreement, any service charge to the Applicant for cleaning of communal areas at the Property for 2011/12 is not payable.

c. The sum of £1.49 per week is a reasonable pre-estimate of the service charge payable by the Applicant for grounds maintenance for 2011/12, without prejudice to the right of the Applicant to request the Leasehold Valuation Tribunal to review the actual charge incurred when he is notified of it.

d. It declines to make a determination on the reasonableness of service charges for future years in the absence of any evidence to enable it to assess such reasonableness.

Signed

C. Goodall

29 FEB 2012