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HM Courts & Tribunals Service

LEASEHOLD VALUATION TRIBUNAL

Case number : CAM/33UC/LSC/2012/0087

Property	:	**5 Primrose Crescent, Thorpe St Andrew, Norwich, Norfolk NR7 0SF**
Applications	:	For determination of liability to pay service charges for the years 2009–10 to 2017–18 inclusive [LTA 1985, s.27A]
Applicant	:	Ms Janet Baker, 20 Lark Rise, Mulbarton, Norwich, Norfolk NR14 8BE
Respondent	:	Wherry Housing Association Ltd, 6 Central Avenue, St Andrew's Business Park, Norwich, Norfolk NR7 0HR

DECISION

following a paper determination

Tribunal	:	G K Sinclair (chairman), G F Smith MRICS FAAV REV & D S Reeve

Summary

1. This application sought to challenge the service charges payable in respect of the subject premises not only for the years from 2009–10 to date but also into the future as far as 2017–18. In each case the question was asked :

   Whether the service charge is fair and reasonable, considering the size and type of property as well as the area in which it is situated.

   In each past year in dispute the Applicant drew attention to the percentage increase over the previous year's amount.

2. In paragraph 2 of its directions dated 12th July 2012 the tribunal explained that it can deal only with interim and final service charge demands already made, ie. for the years 2009–10 to 2012-13 inclusive. Consideration of future years was therefore excluded.

3. The Applicant commented in her application form that this was a simple case that could easily be determined, and she asked that it be dealt with in writing. The tribunal agreed that this case was suitable for a paper determination and the Respondent landlord did not object.

4. Although the Applicant queries the reasonableness of the overall service charge she has not actually identified a specific item with which she finds fault. Having considered the evidence placed before it by the Respondent lessor the tribunal determines that the service charges may appear to be towards the higher end of the scale but the claim must nonetheless be dismissed for the reasons set out below. As none has been brought the tribunal need not concern itself with any application for relief under section 20C of the Landlord and Tenant Act 1985.

Material statutory provisions

5. Section 18 of the Landlord and Tenant Act 1985 defines the expression "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...

6. 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.

7. The tribunal's powers to determine whether an amount by way of service charges is payable and, if so, by whom, to whom, how much, when and the manner of payment are set out in section 27A of the Landlord and Tenant Act 1985. The first step in finding answers to these questions is for the tribunal to consider the exact wording of the 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. The statutory provisions in the 1985 Act, there to ameliorate the full rigour of the lease, need not then come into play.

Material lease provisions

8. The lease dated 1st October 1990 was made between Wherry Housing Association Ltd as lessor and Ms Jacqueline Wilmott as lessee. It grants a lease for a term of 125 years from that date at a rent of £10 per annum plus the sums of service charge payable from time to time in accordance with the provisions of the Third Schedule. The lease is one designed for former council tenants wishing to exercise their right to buy. By clause 5(1) the lessee covenants to pay the rent and service charges; the lessor's covenants being set out in clause 6. Clause 6(2) deals with repairing covenants, and clause 6(3) provides for insurance. More detailed provisions about the service charge and its calculation can be found in the Third Schedule. The Fifth Schedule provides specifically for recovery of the lessor's expenditure and outgoings incurred in respect of which the lessee is to contribute.

Burden of proof

9. In *Schilling v Canary Riverside Development PTD Ltd*[1] His Honour Judge Rich QC had to consider upon whom lay the burden of proof. At paragraph 15 he stated :

> I have felt more difficulty in regard to the question whether a service charge which would be payable under the terms of the lease is to be limited in accordance with s.19 of the Act of 1985 on the ground either that it was not reasonably incurred or that the service or works were not to a reasonable standard, is to be treated as a matter where the burden is always on the tenant. In a sense the limitation of the contractual liability is an exception in respect of which Lord Wilberforce in *Nimmo v Alexander Cowan & Sons Ltd* [1968] AC107 at p.130 stated "the orthodox principle (common to both the criminal and the civil law) that exceptions etc. are to be set up by those who rely upon them"

[1] LRX/26/2005; LRX/31/2005 & LRX/47/2005 (His Honour Judge Rich QC, 6th December 2005)

applies. I have come to the conclusion, however, that there is no need so to treat it. If the landlord is seeking a declaration that a service charge is payable he must show not only that the cost was incurred but also that it was reasonably incurred to provide services or works of a reasonable standard, and if the tenant seeks a declaration to the opposite effect, he must show that either the cost or the standard was unreasonable. In discharging that burden the observations of Wood J in the *Yorkbrook*[2] case make clear the necessity for the LVT to ensure that the parties know the case which each has to meet and for the evidential burden to require the tenant to provide a prima facie case of unreasonable cost or standard.

10. This application having been brought by a lessee, it is for her to identify what is wrong and unreasonable about the amounts demanded.

Evidence

11. As directed, the Respondent lessor provided a Statement in Reply to the application and disclosed substantial documentation supporting the service charges demanded. In its Statement in Reply the lessor sought to explain the specific reasons for increases in the amounts charged year by year. These included increases in VAT and the costs of ground and internal maintenance, plus the addition of catch-up charges for deficits incurred on previous years' estimates or budgets. In 2010–11 there was also a one-off charge for a TV aerial digital upgrade.

12. The tribunal was assisted by the provision of copies of the grounds maintenance plan, a sketch plan of the estate, photographs, and copy consultation documents, invoices and service charge demands.

13. The Applicant submitted nothing other than her application form.

Findings

14. Having considered the information provided the tribunal notes that the sole focus of the Applicant's attention has seemingly been on the percentage increase in the annual service charge. In so doing she is mistaking increases in fixed charges with those variable ones levied for sums actually incurred for works undertaken and services provided. These will fluctuate as a matter of course, so imposing as a single control measure the annual percentage increase in expenditure is no fair guide as to whether the costs have been reasonably incurred. A desire to impose just such a control measure can be the only explanation for the Applicant's request that the tribunal impose limits on future service charges for the next six years as well.

15. In this case there has been no criticism of the quality of the services provided, so the tribunal accepts that the amounts demanded were actually incurred. The frequency of the grounds maintenance and cleaning invoices suggests that the premises and estate generally were maintained to a high standard, and this usually comes at a price.

16. In the circumstances the tribunal considers that the Applicant's challenge to the service

2 *Yorkbrook Investments Ltd v Batten* [1985] 2EGLR 100

charge demands must fail. She has not made out her case. The amounts that have been demanded by the lessor for the various years questioned are therefore determined to be payable in full.

Dated 2nd October 2012

Graham K Sinclair – Chairman
for the Leasehold Valuation Tribunal