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**HM COURTS AND TRIBUNAL SERVICE**

LEASEHOLD VALUATION TRIBUNAL

CASE NO CHI/00HN/LSC/2013/0042

**Application:** Section 27A Landlord & Tenant Act 1985 as amended ('the 1985 Act')

**Applicant/Lessor:** Mark Waldron

**Respondent/Lessee:** Karen Lesley Davis

**Property:** 99 Malmesbury Park Road, Bournemouth, Dorset, BH8 8PS

**Date of Application:** 17 April 2013

**Date of Directions:** 18 April 2013

**Member of Tribunal:** Mr N P Jutton BSc (Chairman)

**Date of Tribunal's Reasons:** 27 June 2013

- 1 **Introduction**
- 2 The Applicant applies under section 27A of the 1985 Act to determine the following issues:
  - i. The Respondent Lessee's liability to pay and the reasonableness of a service charge in relation to the erection of a fence in the sum of £483.51.
  - ii. Whether the Respondent should pay 100% of the costs of the erection of the fence if the responsibility for the maintenance of the fence rests with the Respondent.
  - iii. Whether the Respondent should pay the Applicant's costs incurred in making his application to the Tribunal.
- 3 Directions were made by the Tribunal on 18 April 2013. They provided as follows:
  - i. That the Tribunal proposed to determine the matter pursuant to Regulation 13 of the Leasehold Valuation Tribunal's (Procedure) (England) Regulations 2003 (as amended) on the basis only of written representations and without an oral hearing. The Tribunal notified the parties of that proposal and of both parties' rights to ask that the matter be determined at a hearing. Neither party made such a request and accordingly the Tribunal will proceed to determine the matter without a hearing.
  - ii. That the Applicant file and serve a Statement of case setting out the clauses in the Respondent's Lease upon which he relied and exhibiting relevant documents.

- iii. That the Respondent file and serve a Statement of case setting out why she challenges the amount of service charge being claimed, exhibiting any documents upon which she wished to rely.

4 **Summary of Tribunal's Decision**

5 That the sum of £481.53 which the Applicant seeks to recover from the  
6 Respondent by way of a service charge payment is not payable by the  
7 Respondent.

6 **Documents**

7 The documents before the Tribunal were:

- a. The Applicant's application form dated 17 April 2013.
- b. The Respondent's Lease dated 11 April 2011 which incorporated the terms of a previous Lease dated 29 July 1982 and made between Mrs J B Munroe (1) and Mr and Mrs P F J Kirby (2) (the Lease).
- c. The Applicant's Statement of case together with an attached bundle of documents.
- d. The Respondent's Statement of case together with an attached bundle of documents.

8 **The Law**

9 The statutory provisions primarily relevant to applications of this nature are to be found in Sections 18, 19 and 27A of the Landlord and Tenant Act 1985 (The Act). They provide as follows:-

- 18 (1) *In the following provisions of this Act "service charge" means 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, and*
  - (b) *the whole or part of which varies or may vary according to the relevant costs.*
- (2) *The relevant costs are 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.*
- (3) *For this purpose -*
- (a) *"costs" includes overheads, and*
  - (b) *costs are relevant costs in relation to a service charge whether they are incurred, or to be incurred, in the period for which the service charge is payable or in an earlier or later period.*
- 19 (1) *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.  
(2) 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.

27A (1) 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

(2) Subsection (1) applies whether or not any payment has been made.

(3) An application may also be made to a leasehold valuation tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs and, if it would, as to –

- (a) the person by whom it would be payable,
- (b) the person to whom it would be payable,
- (c) the amount which would be payable,
- (d) the date at or by which it would be payable, and
- (e) the manner in which it would be payable.

(4) No application under subsection (1) or (3) may be made in respect of a matter which –

- (a) has been agreed or admitted by the tenant,
- (b) has been, or is to be, referred to arbitration pursuant to a post dispute arbitration agreement to which the tenant is a party,
- (c) has been the subject of determination by a court, or
- (d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.

5 But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.

## 10 **The Lease**

11 The relevant provisions in relation to service charge payments are as follows:

- a. The Lease dated 11 April 2011 provided for a surrender of an existing Lease dated 29 July 1982 (the Lease) and the contemporaneous granting of a new lease on identical terms as those contained in the Lease save as varied by the lease of 11 April 2011. The provisions in the Lease relating to service charge

- payments were not varied and therefore the provisions in the Lease in relation thereto still apply.
- b. By clause 2(a) of the Lease, the lessee covenants to pay “rents”. Rents are described as ground rent and a sum equal to one half of the amount which the Lessor shall expend in complying with the Lessor’s covenants contained in clause 3(c) and 3(d) of the Lease and in insuring the Building (defined as the building shown edged red on the plan to the Lease).
  - c. By clause 2(d) of the Lease, the Lessee covenants to “contribute and pay one equal half part of the costs, expenses and outgoings and matters mentioned in the second schedule hereto”.
  - d. By clause 3(c) the Lessor covenants as follows: “That (subject to contribution and payment by the Lessee as hereinbefore provided) the Lessor shall maintain and renew (i) the roof, external walls, foundations, chimney stacks, gutters and rainwater pipes of the Building (ii) the gas and water pipes, tanks, drains and electric cables and wires in, under or upon the Building or the gardens and curtilages thereof and enjoyed or used by the Lessee in common with the Lessor or the owners or occupiers of the remainder of the Building and (iii) the said forecourt and pathways shown edged yellow on the said plan”.
  - e. The second schedule to the Lease sets out the costs and expenses in respect of which the Lessee should contribute a one half share pursuant to clause 2(d). It mirrors the wording of clause 3(c) and (d).

12 **The Applicant’s Case**

- 13 The Applicant seeks to recover from the Lessee one half of the costs that he has incurred in replacing a fence. It is a fence which divides the Applicant’s garden from the Respondent’s garden (the Respondent’s garden is marked edged in blue to the plan to the Lease, a copy of which plan is contained in the bundle of documents produced by the Respondent).
- 14 The Applicant says that he has incurred costs of £963.06 in replacing the fence. There is a receipted invoice for that sum from a company called BPS Builders Ltd at page 29 of the Applicant’s bundle. He seeks to recover from the Respondent by way of service charges half of that sum being £481.53.
- 15 The Applicant relies upon the wording contained in the second schedule and in section 3(c) of the Lease.
- 16 In particular, the Applicant relies upon the wording which requires the Lessee to contribute towards the costs of maintaining repairing and renewing “... the gas and water pipes, tanks, drains and electric cables and wires in, under or upon the Building or the gardens and curtilages thereof and enjoyed or used by the Lessee in common with the Lessors or the lessee or owners or occupiers of the other flat comprised in the Building ...”
- 17 The Applicant also refers to emails sent to his conveyancing solicitor (pages 6 and 7 in his bundle) whereby he asks the solicitor to advise whether or not he was able to charge the Respondent 50% of the costs of

- maintaining and replacing the fences at the property. He says that his conveyancing solicitor then telephoned him to confirm that he could.
- 18 There are exhibited to the Applicant's Statement of case (for example at pages 18, 20 and 25 of the Applicant's bundle) forms of demands for payment sent to the Respondent.
- 19 There is also attached to the Applicant's Statement of case (page 33 in the Applicant's bundle) a letter from Jacobs & Reeves Solicitors dated 10 October 2011 addressed to the Applicant's conveyancing solicitors Dodd Lewis which the Applicant says was written in response to queries raised by his conveyancing solicitors regarding the responsibility for the fencing at the property. It contains the statement "*Our client reports that both flats replaced the fencing to the right of the property and that the ground floor flat paid for the rendering for the wall to the left*".

20 **The Respondent's Case**

- 21 The Respondent refers to the wording which appears in the Lease at clause 3(c)(ii). The Respondent says that if that clause is read in its entirety, then no regard can be had to fencing. That it simply provides for the maintenance and renewal of gas and water pipes, tanks and drains, electric cables and wires that pass in or under the building or the garden. That as such, the Applicant cannot rely upon that clause to recover the costs incurred by him in replacing or maintaining fencing.
- 22 The Respondent also refers to clause 2(c) of the Lease. This provides that the Lessee covenants to maintain and keep in good and substantial repair and condition the Lessee's flat and also "*the boundary walls and fences of the demised premises*".
- 23 The Respondent says that if as such she is responsible for maintaining fences on her demise then it is a matter for her to decide upon the type of fence that she might erect in compliance with that responsibility. That similarly, the Applicant is entitled to erect such fence as he wishes on his demise. That if the Applicant takes it upon himself to erect a fence, it does not follow that the Respondent should have to contribute to the cost thereof.


24 **The Tribunal's Decision**

- 25 The Tribunal's jurisdiction is to determine whether or not a sum is payable as service charge and if so, the amount which is payable.
- 26 As both parties quite rightly appear to recognise, the ability of the Applicant lessor to recover payments from the Respondent lessee by way of service charges is governed by the terms of the Lease.
- 27 The Applicant relies upon the wording contained in clause 3(c)(ii) and in the second schedule.
- 28 The Respondent does not dispute that her liability as regards payment of service charges is governed by those provisions.
- 29 The Applicant says that the wording in the second schedule and clause 3(c)(ii) are sufficiently wide to allow him to recover from the Respondent 50% of the costs of replacing the fence. He highlights in his Statement of case the words "*the expenses of maintaining, repairing and renewing ... or the gardens and curtilage thereof ...*".
- 30 The Respondent disagrees with the Applicant's interpretation. The Respondent says that clause 3(c)(ii) does not apply to fencing. That it

merely refers to conduits which are in or pass under the building or garden. That as such, it does not allow the Applicant to recover from her 50% of the costs which the Applicant may incur in maintaining or renewing fences.

- 31 The Tribunal agrees with the Respondent's interpretation. Both clause 3(c)(ii) and the second schedule must be read as a whole. The Applicant is wrong to highlight certain words and to read those in isolation.
- 32 The clear, natural and ordinary meaning and effect of the wording contained in the second schedule and in clause 3(c)(ii) of the Lease is that the Respondent lessee is to contribute 50% of the costs and expenses incurred by the Applicant lessor in maintaining, repairing and renewing gas, water pipes, tanks, drains, electric cables and wires which pass in or under the building or the gardens. That is limited to contributing to the cost of repairing and maintaining those conduits. The Lease does not allow the Applicant lessor to recover by way of service charge contributions the costs of repairing, maintaining or renewing fences.
- 33 Accordingly the Tribunal determines that the sum of £481.53 which the Applicant seeks to recover from the Respondent by way of service charge payments is not payable by the Respondent.
- 34 In his application form, the Applicant further asks the Tribunal to determine whether or not the Respondent should pay the entirety of the cost incurred in replacing a boundary fence if the boundary fence is the sole responsibility of the Respondent. That is a matter which is outside of the jurisdiction of this Tribunal.
- 35 In his application form, the Applicant also seeks a determination that the Respondent should pay the Applicant's costs in making the application.
- 36 There is no application before the Tribunal pursuant to section 20C of the 1985 Act by the Respondent that the costs incurred by the Applicant in connection with this application should not be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the Respondent.
- 37 However, in the hope that it may assist the parties, the Tribunal makes the point that to the extent that a Lessor incurs costs in relation to an application of this nature (and there is no evidence before the Tribunal to show that the Applicant has incurred costs), such costs can only be recoverable by the Lessor by way of service charge contributions from the Lessee if the provisions of the Lease allow. In the Tribunal's view there are no provisions contained in the Lease which would allow the Applicant to recover from the Lessee costs incurred by the Applicant in respect of proceedings before this Tribunal.

Dated the 27th day of June 2013



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N P Jutton (Chairman)  
A Member of the Tribunal appointed by the Lord Chancellor