

9.481



**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)**

Case Reference : **LON/OOBE/LSC/2013/0500**

Property : **Flat 72 Evelina Road, London, SE15
2DY**

Applicant : **London Borough of Southwark**

Representative : **Home Ownership Services**

Respondent : **Mr Omusa Baba Ohyoma**

Representative : **None notified**

Type of Application : **For the determination of the
reasonableness of and the liability
to pay a service charge,
administration charges and
limitation of costs of proceedings
before the Tribunal**

Tribunal : **Judge Goulden
Mr H Geddes JP RIBA MRTPI
Mr A D Ring**

**Date and venue of
Hearing** : **Thursday 31 October 2013 at 10
Alfred Place, London WC1E 7LR**

Date of Decision : **12 November 2013**

DECISION

Decisions of the Tribunal

- (1) The Tribunal determines that, for the year ending 31 March 2012 which were the subject of the County Court Proceedings (Claim No: 3YJ10962), the service charge amount of £864 is reduced to take account of (i) the Applicant's concessions in respect of the entry phone and estate lighting (ii) the reduced amount allowed by the Tribunal in respect of ground maintenance and (iii) the consequent reduction in the administration charge.
- (2) The Applicant is to credit the Respondent's service charge account with the sum of £432.44 due to its failure to carry out statutory consultation in respect of the replacement of the entry phone.
- (3) Administration charges resulting from the Tribunal's determinations are incurred at 10%, the percentage having not been challenged.
- (4) The Tribunal makes the determinations as set out under the various headings in this Decision
- (5) The Tribunal makes an Order under section 20C of the Landlord and Tenant Act 1985 so that the landlord's costs of the Tribunal proceedings may not be passed to the lessees through any service charge.
- (6) The Tribunal declines to make an Order in respect of penal costs.

The application

1. The Applicant seeks a determination pursuant to s.27A of the Landlord and Tenant Act 1985 ("the 1985 Act") and Schedule 11 to the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act") as to the amount of service charges and (where applicable) administration charges payable by the Respondent in respect of the service charge year ending 31 March 2012.
2. Proceedings were originally before the Lambeth County Court under claim No. 3YJ10962. The Particulars of Claim stated that the amounts claimed by way of service charges were for two years, namely the service charge year ending 31 March 2012 in the sum of £417.85 and the service charge year ending 31 March 2013 in the sum of £864.77.
3. Upon hearing a representative for the Applicant and the Respondent in person, judgment was issued for an undisputed amount of £417.85 in respect of the service charge year ending 31 March 2013 and the Tribunal was advised that this sum had been paid by the Respondent.

The balance of the claim in respect of the sum of £864.77 in respect of the service charge year ending 31 March 2012 was transferred to the Tribunal by order of District Judge Zimmels on 11 July 2013.

4. A copy of the Respondent's lease dated 25 August 2003 ("the lease") and made between the Applicant (1) and the Respondent (2) for a term of 125 years from 25 August 2003 had been provided to the Tribunal.
5. The relevant legal provisions are set out in the Appendix to this decision.

The hearing

6. The hearing took place on Thursday 31 October 2013.
7. The Applicant, London Borough of Southwark, was represented by Miss A Mills, Legal Officer and Miss O Wybraniec, Assistant Legal Officer. Evidence for the Applicant was provided by Mr K Cole, Area Cleaning Manager and Mr G Dudhia, Accountant. The Respondent, Mr O B Ohyoma, appeared in person and was unrepresented.

The background

8. It is understood that the property which is the subject of this application is a second floor flat in a two storey purpose built block of nine flats being part of an estate. The estate was referred to in the lease as "*Evelina Road including all roads paths gardens and other property forming part thereof*".
9. Mr G Dudhia, in house Accountant for the Applicant, confirmed that in this particular case, the block cost and the estate cost were one and the same.
10. Photographs of the front of building were provided during the hearing by the Respondent. Neither side had requested an inspection and the Tribunal did not consider that one was necessary, nor would it have been proportionate in respect of the issues in dispute.
11. Under the terms of the lease of the property the landlord covenants to provide services and the tenant to contribute towards their costs by way of a variable service charge. With no further information to the contrary, it is assumed that all the residential leases are in essentially the same form.

The issues

12. At the commencement of the hearing, the Tribunal went through the disputed items on the Scott Schedule and then afforded the parties a brief adjournment in order to see whether the issues could be narrowed.
13. As a result, it was confirmed that there was no challenge to the percentage rate of 10% stated to be a "*fixed mark-up on total costs*" and Mr Ohyoma accepted that the sum which he would have to pay in this regard was dependant on the service charge amounts either agreed or determined.
14. In addition, although Mr Ohyoma had challenged the sum of £682.44 being his service charge contribution to the replacement entry phone installation, the Applicant had stated, on the Schedule, "*these works should have been charged under a major works contract but were charged under revenue costs. As a section 20 notice should have been issued but was not, the costs should be restricted to £250. A credit of £432.44 will need to be applied to the lessee's service charge account which represents the difference between what was charged and what should have been charged*". Miss Mills confirmed to the Tribunal that Mr Ohyoma would be credited with this amount. Mr Ohyoma was initially of the view that he should not have to make any contribution towards the cost of the entry phone, but subsequently withdrew his challenge in its entirety. Accordingly, no determination is required from the Tribunal under this head.
15. Mr Ohyoma also queried an invoice in the sum of £205.95 but, having heard from Miss Mills that the invoice had not been included within the county court proceedings and was not yet due, the Tribunal declined to hear evidence in respect thereof on the basis that the Tribunal's jurisdiction flows from those matters which were before the County Court, and this issue is therefore outside the Tribunal's jurisdiction.
16. Miss Mills also confirmed that the sum of £9.97, being the Respondent's contribution to the estate charge for lighting and electricity for the year ending 31 March 2012 was not to be charged to him.
17. Accordingly, the relevant issues for determination by the Tribunal were as follows:
 - (i) Estate grounds maintenance
 - (ii) Responsive (minor) repairs
 - (iii) Limitation of landlord's costs of proceedings

- (iv) Penal costs
18. The Tribunal's jurisdiction is limited to the service charge and administration charge issues only. It should be noted that the Tribunal has no jurisdiction in respect of (where applicable) any issues relating to rent, interest, county court fees or solicitors' or managing agents' costs in respect of matters before the County Court.
19. Having heard evidence on behalf of the Applicant and from the Respondent and considered all of the documents provided, the Tribunal has made determinations on the various issues as follows:

Estate grounds maintenance

20. The amount challenged by the Respondent was £239.68 being his contribution for the year ended 31 March 2012. He contended that the block was a stand alone block and no grounds maintenance work was undertaken by the Council. He said that there was no maintainable open space at the front of the block, apart from two very small hedges, and the open space at the rear was maintained by the tenants. He also queried the calculation and said that the number of hours alleged were excessive. Mr Ohyoma produced coloured photographs which showed the front of the block and the hedges, one on each side of the path leading to the communal entrance.
21. The Applicant's case was that the Applicant only charged for 70% of the total hours worked. The arboreal tree costs *"represent the lessee's contribution towards tree maintenance works carried out on the estate which does not form part of the grounds maintenance contract. The total of 18 hours per annum represents the time spent maintaining the hawthorne hedge at the front of the property. 13.5 hours is allocated to 9 months of the year (through spring/summer and autumn). The remaining 4.5 hours is allocated to maintenance through the 3 winter months"*.
22. Oral evidence on behalf of the Applicant was provided by Mr K Cole, Area Cleaning Manager, who spoke to his witness statement dated 16 September 2013. It was contended that the charge under this head covered the costs of the maintenance of communal land on the estate including flowerbeds and grass areas, included a charge for the maintenance of trees on the estate, and was based on the number of hours worked. He said that the correct number of hours had been allocated in accordance with advice given by experienced ground maintenance supervisors. The number of hours allocated was then passed on to service charge managers. The costs included such items as equipment, vehicles, clearing up and removing leaves from the front of the block. He said that the costs were *"in line with Southwark borough wide for maintenance"*.

The Tribunal's decision

23. The total block cost for the service charge year in dispute was £1,848.95 (of which the Respondent's proportion was calculated at £239.68). No challenge has been made as to the method of apportionment (ie bed weighting) by the Applicant.
24. Of the sum of £1,848.95 referred to in the paragraph above, the sum of £1,488.16 was in respect of tree works. No evidence has been produced as to what tree work was carried out. Indeed there was no evidence as to whether there were any trees on which works should be carried out. This sum is therefore deducted.
25. The photographs produced by the Respondent showing the relevant hedges were of assistance. As the Tribunal has stated in paragraph 24 above, it has deducted the sum of £1,488.16 in respect of tree works. This leaves the sum of £360.79 under this head. The Tribunal considers that this sum is reasonable for an annual contract to maintain the front area occasionally trimming the hedges.
26. The Tribunal determines that a sum of £360.79 in respect of estate grounds maintenance for the year ending 31 March 2012 is relevant and reasonably incurred and properly chargeable to the service charge account. The Respondent's contribution is to be calculated in accordance with the relevant method of apportionment in respect of which, as stated above, he made no challenge.

Responsive (minor) repairs

27. The Respondent's contribution in respect of the service charge year in dispute was £112.07. His challenge was in respect of £24 on the basis that included costs for work carried out outside the service charge year disputed, namely 2011/2012. He suspected that there may have been double counting, although he accepted that he had no evidence in support.
28. Mr Dudhia gave evidence on behalf of the Applicant and said that the Applicant worked on a cash basis and when payment was actually made to the contractors. Mr Dudhia said that payments were only due and made once the work had been satisfactorily completed. In respect of the amount challenged, the Applicant's system had noted that the costs were actually incurred on 5 April 2011 and 17 June 2011, both of which dates were within the disputed service charge year. Evidence was produced on behalf of the Applicant in support.

The Tribunal's Decision

29. The Tribunal prefers the evidence of Mr Dudhia, supported by the documentary evidence provided which indicated that the amounts challenged did fall within the service charge year ending 31 March 2012.
30. The Tribunal determines that the Respondent's contribution to responsive (minor) repairs in the sum of £112.07 is relevant and reasonably incurred and properly chargeable to the service charge account.

Application under s.20C.

31. An application for limitation of landlord's costs of proceedings under Section 20C of the 1985 Act was added, at the Respondent's request, at the Case Management Conference held on 13 August 2013, and this was noted at paragraph 4 of the Tribunal's Directions.
32. At the hearing, Miss Mills confirmed that, in the circumstances of this case, the Applicant would not seek to place costs in connection with proceedings before the Tribunal on the service charge account.
33. Accordingly, the Tribunal formally makes an order under Section 20C of the 1985 Act. The Tribunal determines that it is just and equitable that the costs incurred by the Applicant in connection with proceedings before this Tribunal are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable and therefore the Applicant may not pass any of its costs incurred in connection with the proceedings before the Tribunal through the service charge.

Application for penal costs

34. At the end of the hearing, Mr Ohyoma made an application for penal costs against the Applicant. He said that, although he had not incurred any expense, he had experienced great anxiety and, although he accepted that ignorance of the law was no excuse, he now had a County Court judgment which had been entered against him. He said that he had been "*dragged through the courts*" the Applicant had failed to appear at the Case Management Conference and had not agreed to mediation, an avenue which Mr Ohyoma had wished to explore. He said that if the Applicant had been more reasonable, there would have been no need for the hearing before the Tribunal. He said "*they have not behaved responsibly. They made charges they were not entitled to.*"

They refused to bring the matter to a swift conclusion in a reasonable time. This court needs to take a view”.

35. Miss Mills opposed the application and contended that the threshold had not been met. The Applicant’s responses had been reasonable and appropriate concessions had been made. She said that she had not been aware of the Case Management Conference or that the Respondent had wished to mediate.

The Tribunal’s Decision

36. The Tribunal is critical of some aspects of the Applicant’s handling of the case before this Tribunal. No representative appeared at the Case Management Conference which is regrettable since the question of mediation could have been explored. Miss Mills says that she knew nothing of the Case Management Conference or that the Respondent wished to consider mediation. Neither explanation is acceptable. The possibility of mediation was clearly set out in the Tribunal’s Directions of 13 August 2013.
37. However, the threshold in applications relating to penal costs is high. It is suggested that the litigation behaviour complained of must go beyond what is acceptable and, in considering this, there must be a margin of tolerance. Cost powers should not be used to penalise a party or parties who although unsuccessful have acted in good faith.
38. In the circumstances of this particular case, the Tribunal does not intend to exercise its discretion under this head and declines to make an order for penal costs.

Name: J Goulden

Date: 12 November 2013

Appendix of relevant legislation

Landlord and Tenant Act 1985

Section 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.

Section 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 provisions 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.

Section 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.

Section 20

- (1) Where this section applies to any qualifying works or qualifying long term agreement, the relevant contributions of tenants are limited in accordance with subsection (6) or (7) (or both) unless the consultation requirements have been either—
- (a) complied with in relation to the works or agreement, or
 - (b) dispensed with in relation to the works or agreement by (or on appeal from) a leasehold valuation tribunal.
- (2) In this section “relevant contribution”, in relation to a tenant and any works or agreement, is the amount which he may be required under the terms of his lease to contribute (by the payment of service charges) to relevant costs incurred on carrying out the works or under the agreement.
- (3) This section applies to qualifying works if relevant costs incurred on carrying out the works exceed an appropriate amount.
- (4) The Secretary of State may by regulations provide that this section applies to a qualifying long term agreement—

- (a) if relevant costs incurred under the agreement exceed an appropriate amount, or
 - (b) if relevant costs incurred under the agreement during a period prescribed by the regulations exceed an appropriate amount.
- (5) An appropriate amount is an amount set by regulations made by the Secretary of State; and the regulations may make provision for either or both of the following to be an appropriate amount—
- (a) an amount prescribed by, or determined in accordance with, the regulations, and
 - (b) an amount which results in the relevant contribution of any one or more tenants being an amount prescribed by, or determined in accordance with, the regulations.
- (6) Where an appropriate amount is set by virtue of paragraph (a) of subsection (5), the amount of the relevant costs incurred on carrying out the works or under the agreement which may be taken into account in determining the relevant contributions of tenants is limited to the appropriate amount.
- (7) Where an appropriate amount is set by virtue of paragraph (b) of that subsection, the amount of the relevant contribution of the tenant, or each of the tenants, whose relevant contribution would otherwise exceed the amount prescribed by, or determined in accordance with, the regulations is limited to the amount so prescribed or determined.]

Section 20B

- (1) If any of the relevant costs taken into account in determining the amount of any service charge were incurred more than 18 months before a demand for payment of the service charge is served on the tenant, then (subject to subsection (2)), the tenant shall not be liable to pay so much of the service charge as reflects the costs so incurred.
- (2) Subsection (1) shall not apply if, within the period of 18 months beginning with the date when the relevant costs in question were incurred, the tenant was notified in writing that those costs had been incurred and that he would subsequently be required under the terms of his lease to contribute to them by the payment of a service charge.

Section 20C

- (1) 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, residential property tribunal or the Upper Tribunal, or in connection with arbitration proceedings, 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.

- (2) The application shall be made—
 - (a) in the case of court proceedings, to the court before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to a county court;
 - (aa) in the case of proceedings before a residential property tribunal, to that tribunal;
 - (b) in the case of proceedings before a residential property tribunal, to the tribunal before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to any residential property tribunal;
 - (c) in the case of proceedings before the Upper Tribunal, to the tribunal;
 - (d) in the case of arbitration proceedings, to the arbitral tribunal or, if the application is made after the proceedings are concluded, to a county court.
- (3) The court or tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances.

Leasehold Valuation Tribunals (Fees)(England) Regulations 2003

Regulation 9

- (1) Subject to paragraph (2), in relation to any proceedings in respect of which a fee is payable under these Regulations a tribunal may require any party to the proceedings to reimburse any other party to the proceedings for the whole or part of any fees paid by him in respect of the proceedings.
- (2) A tribunal shall not require a party to make such reimbursement if, at the time the tribunal is considering whether or not to do so, the tribunal is satisfied that the party is in receipt of any of the benefits, the allowance or a certificate mentioned in regulation 8(1).

Commonhold and Leasehold Reform Act 2002

Schedule 11, paragraph 1

- (1) In this Part of this Schedule “administration charge” means an amount payable by a tenant of a dwelling as part of or in addition to the rent which is payable, directly or indirectly—
 - (a) for or in connection with the grant of approvals under his lease, or applications for such approvals,

- (b) for or in connection with the provision of information or documents by or on behalf of the landlord or a person who is party to his lease otherwise than as landlord or tenant,
 - (c) in respect of a failure by the tenant to make a payment by the due date to the landlord or a person who is party to his lease otherwise than as landlord or tenant, or
 - (d) in connection with a breach (or alleged breach) of a covenant or condition in his lease.
- (2) But an amount payable by the tenant of a dwelling the rent of which is registered under Part 4 of the Rent Act 1977 (c. 42) is not an administration charge, unless the amount registered is entered as a variable amount in pursuance of section 71(4) of that Act.
- (3) In this Part of this Schedule “variable administration charge” means an administration charge payable by a tenant which is neither—
- (a) specified in his lease, nor
 - (b) calculated in accordance with a formula specified in his lease.
- (4) An order amending sub-paragraph (1) may be made by the appropriate national authority.

Schedule 11, paragraph 2

A variable administration charge is payable only to the extent that the amount of the charge is reasonable.

Schedule 11, paragraph 5

- (1) An application may be made to a leasehold valuation tribunal for a determination whether an administration 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) Sub-paragraph (1) applies whether or not any payment has been made.
- (3) The jurisdiction conferred on a leasehold valuation tribunal in respect of any matter by virtue of sub-paragraph (1) is in addition to any jurisdiction of a court in respect of the matter.
- (4) No application under sub-paragraph (1) 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.
- (6) An agreement by the tenant of a dwelling (other than a post-dispute arbitration agreement) is void in so far as it purports to provide for a determination—
- (a) in a particular manner, or
 - (b) on particular evidence,
- of any question which may be the subject matter of an application under sub-paragraph (1).

Schedule 12, paragraph 10

- (1) A leasehold valuation tribunal may determine that a party to proceedings shall pay the costs incurred by another party in connection with the proceedings in any circumstances falling within sub-paragraph (2).
- (2) The circumstances are where—
- (a) he has made an application to the leasehold valuation tribunal which is dismissed in accordance with regulations made by virtue of paragraph 7, or
 - (b) he has, in the opinion of the leasehold valuation tribunal, acted frivolously, vexatiously, abusively, disruptively or otherwise unreasonably in connection with the proceedings.
- (3) The amount which a party to proceedings may be ordered to pay in the proceedings by a determination under this paragraph shall not exceed—
- (a) £500, or
 - (b) such other amount as may be specified in procedure regulations.
- (4) A person shall not be required to pay costs incurred by another person in connection with proceedings before a leasehold valuation tribunal except by a determination under this paragraph or in accordance with provision made by any enactment other than this paragraph.