

LEASEHOLD VALUATION TRIBUNAL**THE LANDLORD AND TENANT ACT 1985****(AS AMENDED BY THE COMMONHOLD AND LEASEHOLD REFORM ACT 2002)**

PROPERTIES:	Flats at St. Ann's Close Newcastle upon Tyne NE1 2QS being identified in the first column of the Schedule (‘the Flats’)
APPLICANTS:	As listed in the second column of the Schedule
RESPONDENT:	Newcastle City Council
MEMBERS OF THE TRIBUNAL :	Mr B Wake, LL.B. (Chairman) Mr J N Morris Mrs. A K Usher

Background and Interpretation

1. In this document:

‘the Act’ means the Landlord and Tenant Act 1985 as amended by the Commonhold and Leasehold Reform Act 2002

‘lessee’ means a lessee under a long tenancy as defined in section 26(2) of the Act

‘YHN’ means Your Homes Newcastle

‘s125’ means section 125 of the Housing Act 1985

‘Leases’ means the leases under which the Applicants hold their respective flats.

‘St. Ann’s means St. Ann’s Close

‘the Estate’ means the area bounded by Breamish Street, Crawhall Road, Coquet Street and Tarsset Street.

‘The 2008 Decision’ means a decision of the Leasehold Valuation Tribunal relating to flats at St. Ann’s under reference number MAN/00CJ/LIS/2008/0002 dated 12th December 2008.

‘Due Proportion’ has the meaning in respect of each Lease specified in Part 3 of the Tenth Schedule to the Leases.

- On 13th November 2009 an Application was made to the Leasehold Valuation Tribunal pursuant to section 27A of the Act for a determination of liability to pay and reasonableness of service charges for the years 2008/09 and 2009/10 in respect of the Flats and for an order pursuant to section 20C of the Act.
- Certain lessees, originally subscribers to the Application, have since withdrawn and others joined as Applicants. Those named in the second column of the Schedule were Applicants at the date of the hearing and were lessees of the Flats the numbers of which are given in the first column opposite their names.
- A pre-trial review was held on 4th February 2010 at the offices of the Social Security and Child Support Service, Manor View House, Kings Manor, Newcastle upon Tyne, Tyne &

Wear NE1 6DA as a result of which Directions were made on 5th February 2010 which identified the issues to be considered by the Tribunal.

5. It was agreed at the pre-trial review that, save as to the Due Proportion, the leases of the Flats were identical in all relevant respects with that relating to flat 40, a copy of which was supplied with the Application.

The Flats

6. The Flats form part of the Estate within which are nine blocks of flats, each of five storeys, a small all weather sports pitch, a small children's playground and an estate heating plant. There is off street parking reserved for those who have bought residents' permits. Between and around the blocks are landscaped areas of grass, shrubs and trees intersected and bordered by footpaths which the Respondent confirmed were maintained at no cost to the lessees and not included in the service charge, though it was not clear whether they had been formally adopted. There are 258 flats in all. Some are single bedroom studio flats, some flats have two bedrooms and some three. Some are maisonettes. The upper storey flats and maisonettes are accessed via balcony corridors with common staircases at each end of the blocks and a lift at one end of all but three.

The Leases

7. All the Applicants were lessees because they or their predecessor(s) had exercised a right to buy their tenanted flat from the Applicants pursuant to the relevant provisions of the Housing Act 1985.
8. All the Leases are for a term of 125 years from various dates, the earliest being in 1990, at an unchanging ground rent of £10 per annum and the Respondent continues to be the lessor in each case.

The Service Charge Provisions

9. Payments due pursuant to clause 3(A) of the Leases are defined as additional rent payable on 1st April in each year in advance.
10. Clause 3(A) in summary requires the lessee to pay in advance before 1st April in each year the due proportion of the estimated amount needed to be spent by the Applicant in fulfilling its obligation under Clauses 5 and 7 and the 9th schedule (defined as 'the Management Charges' but here referred to as 'service charge(s)' to distinguish them from the management element of the service charge) for the year commencing on 1st April. The Respondent covenants to make a contribution equal to the Due Proportion multiplied by the flats not yet sold.
11. 'The 9th schedule contains covenants on the part of the Respondent relating to 'the Building' which is defined in the 2nd schedule as the block of flats in which the relevant flat is situated.
12. Clause 3(B) requires the lessee on demand to pay any shortfall between the estimated amount and the 'total moneys properly and reasonably expended or retained by [the Respondent] constituting the service charge for such financial year'. Clause 3 (C) requires any overpayment to be credited to the lessee's account.
13. Clause 5 requires the Respondent to carry out the obligations in the 9th Schedule which is set out verbatim in the Appendix.
14. Clause 7 is an agreement and declaration that the Respondent is to manage the block of flats in which the individual flat is situated 'in proper and reasonable manner' and is allowed:
 - a. to appoint and remunerate managing agents
 - b. to employ and pay various professionals contractors and gardeners etc. 'in connection with or for the purpose of (*sic*) or in relation to the [block]'
 - c. to arrange insurance and retain any commission etc.

- d. to delegate any of its relevant functions. The Applicant had in fact delegated those functions to an arm's length management organisation, YHN.

The Inspection and hearing

15. The Tribunal inspected the Estate externally on 25th May 2010 in the company of representatives of both the Applicants and the Respondents.
16. A hearing was held on the same day at The Lit. & Phil., 23 Westgate Road, Newcastle upon Tyne NE1 1SE.

Representation

17. The Applicants were represented principally by Mr J Diamond, evidence being given by Mr James Diamond, Mr Joel Byers and Mr. Simon Key.
18. The Respondent was represented by Mrs Yvonne Donaldson, a senior solicitor employed by the Respondents who called as witnesses Mrs Jeanette Elizabeth Johnson, the leasehold manager of YHN and Mr Andrew Forsyth Lister, finance manager – financial business support of YHN, and Miss Helen Garbutt Concierge Service Manager of YHN.

The Issues

19. At the pre-trial review there were identified as section 27A issues:
- Issue 1 Whether the Flats, being situated on the ground floor, should pay a service charge discounted because their lessees are not able to take advantage or full advantage of those elements relating to the concierge, the lifts, the communal lighting and the door entry system.
- Issue 2 The amount of the overall service charge for those elements
20. At an early stage of the Hearing the Applicants, the Hearing having been adjourned to enable them to consider the matter, decided not to pursue Issue 1.

Evidence on behalf of the Applicants

21. The Applicants agreed with the view of the Leasehold Valuation Tribunal in the 2008 Decision that it was reasonable for the estate to have two caretakers/concierges and one part time cleaner. The Respondent had said in February 2010 that there was a resident caretaker and 74 hours per week of day shift staff (equating to a service charge element of £401 per flat) and when challenged had altered that to 21 day shift hours (equating to a service charge element of £201 per flat). The Applicants took the view that the charge per flat should be only £190 based on an estate of 250 flats and showed how that was made up. The service charge invoice for 2008/09 for flat 40 showed a charge for the concierge of £431.74. That ignored the earlier Tribunal's decision. They noted that the equivalent estimated charge for that year was £107.94
22. The concierge cost was still being calculated on a city wide basis and not on an estate basis as it should be. On the basis of the city wide figures given the Applicants suspected that they were subsidising a deficit in the housing revenue account.
23. The concierge/cleaner did not do any cleaning for the ground floor flats as they did for the first floor flats, but they did clean the public footpaths and litter pick over the Estate and it had been noticed that he did some work at Breamish House which was not part of the Estate so that the Applicants were paying for services that the concierge should not be carrying out.
24. In theory there was 24 hour cover but this was not necessary because the lessees all had their own 'phones so as to be able to summon help in case of emergency. In any case there was nowhere on the Estate which gave an emergency telephone number. The Applicants were paying for a service which they neither needed nor got.
25. The Applicants considered that a 3% uplift for 2008/09 was reasonable, giving a charge per flat of £201 for the concierge service.

26. They questioned whether they were getting the benefit of any refund of VAT paid by the Respondent.
27. No specific evidence was offered in relation to the cost of the lifts, the communal lighting or the door entry system.

Mrs. Johnson's evidence

28. She identified those parts of the Leases which allowed the cost elements in issue to be charged to lessees by way of a service charge.
29. In accordance with the 2008 Decision a process of 'un-pooling' was under way so that costs were apportioned on the basis of the block as required by the Leases rather than on a city-wide basis.
30. Also in accordance with the 2008 Decision no discounts were now being made to ground floor lessees although in certain cases, because of what was said in the relevant notices under s125, ex gratia discounts (i.e. discounts which the Respondent was not required to give by law) were being made for certain lessees.
31. Because it was acknowledged that the Due Proportions specified in the Leases were inconsistent, steps were being taken to make an application to vary the Leases.
32. As to the door entry systems, there was a contract (copy supplied) in force providing for a 24 hour repair/emergency response service.
33. As to the lifts, maintenance contracts (copy supplied) were in force providing for monthly service visits and a 24 hour repair/emergency response service.
34. A contract provided for quarterly checks on the communal lighting including time clock settings/operation, electrical connections, control gear, renewing bulbs. The concierges were trained to carry out minor repairs and report need for major repairs.
35. Because YHA were now seeking to recoup costs fully and eliminate what had effectively been a subsidy from the housing revenue account, there had been increase in service charges

Mr. Lister's evidence

36. He explained the difficulties involved in the un-pooling process. However the actual (as opposed to the estimated) charges for 2009/10 would be calculated on an 'un-pooled' basis.
37. He provided breakdowns of costs for the elements in issue and a summary of them for the years 2008/09, 2009/10 for each of the Flats.
38. He also stated that no VAT was being charged to the Applicants and why this was.

Miss Garbutt's evidence

39. In 2006/07 the concierge service for St Ann's comprised a resident concierge working a 37 hour week Monday to Saturday along with 12.5 hours of additional cleaning by Neighbourhood Services. Cleaning and other duties were listed. Changes were made in 2006 and subsequently. Currently the 37 hour resident concierge was supported by two day shift staff working 12 hour shifts in rotation – 4 days on and 4 days off. Further changes were expected to see a reduction in the overall cost of the service but with tenant's charges remaining approximately the same.
40. Cleaning standard inspection scores on a roughly quarterly basis between September 2005 and October 2009 were mostly at a level of 4, with a few at 3 and at 5 (5 being the highest possible). There had been 3 formal complaints over the last three years – 2 about refuse disposal and one about the level of concierge service.
41. Concierge duties had not reduced since the 2008 Decision.
42. She described the functions of concierge service supervisors and co-ordinators

Breamish House

43. It was only at the hearing that the Applicants raised the allegation that the concierge was doing work at Breamish House. Mrs Donaldson then made enquiries about this and told the Tribunal that (a) YHN did not manage Breamish House and (b) apparently the St. Ann's concierge on a voluntary basis put out the Breamish House rubbish for collection once a week, involving perhaps some ten minutes work.

The Relevant Law

Section 18 of the Act provides as follows:

Meaning of "service charge" and "relevant costs"

- (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 of the Act provides as follows:

Limitation of service charges: reasonableness

- (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.*

Section 20C of the 1985 Act provides as follows:

Limitation of service charges: costs of proceedings

- (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 leasehold valuation tribunalare not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant....*
- (2) [omitted]
- (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.*

Consideration of the section 27A Issues

General

44. The Tribunal found that the relevant provisions of the Leases created a service charge within the meaning of section 18 of the Act.
45. The Tribunal regretted that the un-pooling had not yet been achieved and still bedevilled the ascertainment of the service charge for the lessees. Because, again regrettably, variation of the Leases had not taken place particularly in relation to the Due Proportions, the Tribunal gives below the total figures for each of the elements in issue, leaving the Due Proportion to be applied for each of the Applicants. For illustration purposes the average for each lessee is given.

Concierge

46. The Tribunal found that the extent of and arrangements for caretaking and cleaning were reasonable. It found that neither whatever the concierge did at Breamish House nor the incidental cleaning of the two-foot strips or any incidental litter picking prejudiced the concierge's prescribed duties.
47. The Applicants thought that an average charge (on the basis of 250 flats – slightly fewer than there actually are) of £190 per flat, namely a total of £49,020, would be reasonable for 2008/09. They did however agree that an average charge of £201 per flat, a total charge of £52,000, would be acceptable. This was only slightly higher than the figure of £51,929. given by Mr.Lister in his evidence. That last figure also came close to the total figure estimated by the Tribunal in the 2008 Decision. In those circumstances, the Tribunal accepted that the total cost of this element of the service charge for 2008/09 was £51,929 to which would need to be applied the Due Proportion to calculate the amount to be paid by each Applicant.
48. In considering the likely cost for the year 2009/10, the Tribunal took account of government policy that, in general, salaries in the public sector should not see any increase and that efficiency savings in that sector should be made. They also took account of Miss Garbutt's evidence that proposed changes were expected to lead to reduction in expenditure in relation to this element. In the light of those considerations it decided that there should be no material increase in respect of this head of expenditure. The overall figure would be set at £52,000.00.

Communal Lighting

49. Mr Lister's evidence showed an actual spend of £6196.34 for 2008/09 which he wrongly stated to work out at an average of £42.01 per lessee. As he admitted in cross examination the average figure is in fact £24.00. However since the actual figure was known, since it was not challenged by the Applicants and since the Tribunal had no reason to question it, that figure was accepted by the Tribunal as being reasonable for that year. Bearing in mind that electricity costs were likely to continue to rise, the Tribunal felt that an uplift of 3.3% was appropriate for 2009/10 giving a global figure (rounded down) of £6,400.00 in place of the unreasonably high figure of nearly £12,150.00 which Mr.Lister's evidence of £47.09 per lessee on average would have meant.

Lift

50. According to Mr.Lister's evidence the cost of maintenance of and repairs to the lifts during 2008/09 was £9,673.47. Notwithstanding the 2008 Decision concerning this element, lessees had been charged on average £53.98 which Mr.Lister said was an overcharge of £5.09. In fact it was an overcharge of £16.49. Mr.Lister was unable to explain either discrepancy. For 2008/09 the Tribunal accepted Mr. Lister's total cost figure which again was not disputed by the Applicants. This gives an average charge per lessee of £37.49.
51. The lift maintenance contract covers the three year period starting on 1st November 2007 and sets out the maintenance charges for each lift for each of those years. Those for the year commencing 1st November 2009 for the six lifts at St.Ann's total £4,800.00 net of value added tax and £5,640.00 inclusive of value added tax. That figure does not include the

potential cost of repairs which are charged on the basis of a specified schedule of rates. Based on the cost of repairs for 2008/09 given by Mr.Lister (£4,631.43) the Tribunal took the view that a reasonable global figure for 2009/10 would be £9,900.00, an average per lessee of £38.37.

Door Entry System

52. In the exhibits to his witness statement Mr.Lister showed two different totals for this element for 2008/09 – one was £12,420.12 and the other £15,049.15. It was not clear from the statement itself which was correct because this element had not yet been un-pooled and was still worked out from the city-wide cost but it appeared from the cost per St.Ann's lessee that he gave (£48.14) that the correct figure was £12,420.12. The Tribunal accepted that as the actual total cost for 2008/09. Again it was not challenged by the Applicants.
53. According to Mr.Lister the estimated cost for 2009/10 was £54.60 per lessee on average. This equates to nearly £14,090 allocated to St.Ann's, an increase of some 12%. Mr.Lister gave no justification for such an increase and the Tribunal considered it to be excessive. It could see no reason why there should be an increase of more than 3%. Applying an uplift of 3% gives a global figure of £12,792.16 - say £12,800.00 or £49.61 on average per lessee.

Consideration of the section 20C Application

54. Mrs Donaldson very fairly said that the Respondent did not intend that its costs in connection with the proceedings should be charged to the service charge account as relevant costs. The Tribunal took the view that in all the circumstances of the case it was just and equitable to make a section 20C order in respect of all the Respondent's costs because, despite the 2008 Decision, the Respondent had still not completed un-pooling and had still not made an application to vary the Leases and also because some of the evidence given on behalf of the Respondent was confused and misleading.

The Decision

55. Pursuant to section 27A of the Act it is determined that the overall service charges for each of the elements in issue in each of the relevant years are:

	<u>2008/2009</u>	<u>2009/2010</u>
Concierge/cleaning	£51,929.00	£52,000.00
Communal lighting	£6,196.34	£6,400.00
Lift maintenance	£9,673.47	£9,900.00
Door entry system	£12,420.12	£12,800.00

and in relation to each of the Flats is to be recovered in accordance with the relevant Due Proportion.

56. Pursuant to section 20C of the Act it is ordered that none of the costs of the Respondent incurred in connection with these proceedings are to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by any of the Applicants.

THE SCHEDULE

<u>Number in St. Ann's Close</u>	<u>Name of Lessee Applicant(s)</u>
21	Mrs Joyce Hennesy
23	Mt J Wheldon
27	Mrs K Akinfolarin
33	Mr & Mrs J Byers
34	Mr W Armstrong
37	Mrs A Akinfolarin
40	Mr J Diamond
47	Ms M Forsyth
72	Ms T Hodgson
74	Ms Sylvia Boustead
177	Mr. Simon Key
215	Mr. G A Scott

Brian Wake
Chairman



Date of Decision: 22nd July 2010

APPENDIX

to Decision dated 22nd July 2010

The 9th Schedule to the Leases

THE NINTH SCHEDULE above referred to

Council's covenants to be observed by
the Council at the Lessee's expense

1. To keep in good and substantial repair and condition (and whenever necessary rebuild and reinstate and renew and replace all worn or damaged parts) of:-

(i) The main structure of the Building including all foundations forming part of the Building all exterior and all party walls and structures and all walls dividing the flats comprised in the Building from the common halls staircases landings steps and passages and the walls bounding the same and all electrical and other fittings and windows (but excluding the internal plaster the windows and electrical and other fittings inside any individual flat for which the lessee thereof is responsible under any provisions in his lease corresponding to paragraph 4 of the Seventh Schedule hereto) and all doors therein save such doors as give access to individual flats and including all roofs and chimneys and every part of the Building above the level of the top floor ceilings

(ii) All cisterns tanks boilers sewers drains gutters pipes wires cables ducts and conduits and any other thing installed in the Building for the purpose of supplying water hot water gas electricity and other usual services and for the purpose of draining away water and soil and for allowing the escape of steam and deleterious matter save only such cisterns tanks sewers drains gutters pipes wires cables ducts and conduits and other things as are solely installed or solely used for the purpose of any particular flat and for which the lessee thereof is responsible under any provisions in his Lease corresponding to paragraph 4 of the said Seventh Schedule

(iii) Any wireless and television masts and aerials cables and wires erected on the Building or in or over the roof or roofs of the Building and available for use with the flats or some of them and including the demised premises comprised in the Building

(iv) All such parts of the Reserved Property not hereinbefore mentioned and all fixtures and fittings therein and additions thereto **PROVIDED** that nothing herein contained shall prejudice the right of the Council to recover from the Lessee or any other person the amount or value of any loss or damage suffered by or caused to the Council or the Building by the negligence or other wrongful act of the Lessee or any such other person

2. To insure and keep insured the Building (including the demised premises) against loss or damage by fire and such other risks as are normally contained in a household comprehensive policy for the full rebuilding cost thereof including architects and surveyors fees and to any extent in excess of such amount and against such other risks as the Council may from time to time deem necessary or prudent such policy or policies to be effected and maintained with an Insurance Office of repute and in such agency as the Council shall choose and to pay the premiums on any such insurance upon the due date and in the event of damage by fire or other cause to lay out forthwith all moneys received from any such insurance in rebuilding and reinstating the Building and making good such damage **PROVIDED ALWAYS** that if at the expiration of three years from the date of such destruction or damage the Council shall have been unable through circumstances beyond its control to rebuild and reinstate as aforesaid the insurance moneys and all interest earned thereon shall be shared among the persons having any interest therein in such proportions as shall be just and equitable having regard to the nature of such interests and at the expiration of such said period of three years the Term shall cease and determine

3. To keep adequately lighted all such parts of the Reserved Property as are normally lighted or should be lighted and keep clean and tidy the said common halls staircases landings steps passages doors windows areas forecourts and courtyards

4. Upon the Council's repainting cycle for the Building to repaint and decorate in a workmanlike manner the exterior of the Building and all such parts of the said common halls staircases landings steps passages doors and windows of the Reserved Property as are usually so treated

5. To manage the Building for the purpose of keeping the same in a condition similar to its present state and condition

6. To carry out all such other works (including improvements) to or in respect of the Building or on the Estate as are in the opinion of the Council necessary for its proper maintenance and management