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HM Courts & Tribunals Service

**LEASEHOLD VALUATION TRIBUNAL**
**Case number : CAM/33UF/LSC/2012/0061**
**Norwich County Court Claim No 2BE00167**

| | | |
|---|---|---|
| **Property** | : | Flat 5, Furness House, 24 Alfred Road, Cromer, Norfolk NR27 9AN |
| **Application** | : | For determination of liability to pay service charges for the year 2011 [LTA 1985, s.27A] |
| **Applicant** | : | Stephen Mark Watson, c/o pdc Legal, Suites 4 & 5 Tower House, Tower Centre, Hoddesdon, Herts EN11 8UR |
| **Respondent** | : | Adrian Beek & David Quinn, Flat 5, 24 Alfred Road, Cromer, Norfolk NR27 9AN |

## DECISION

| | | |
|---|---|---|
| **Tribunal** | : | G K Sinclair (chairman), G F Smith MRICS FAAV REV & D S Reeve |
| **Hearing date** | : | Wednesday 12th September 2012 at The Links Country Park Hotel, West Runton, Cromer, Norfolk NR27 9QH |
| **Representation** | *Applicant* | Simon Purkis (counsel, instructed by pdc Legal), Charles Thurston (managing agent, Edwin Watson Partnership) |
| | *Respondents* | No appearance or representation |
| | *Also present* | Karen Fearn – Flat 3 |



### Summary

1. The Applicant is the current freeholder of a terraced house at 24 Alfred Road, Cromer and the Respondents are the joint leaseholders of flat 5 within that building. They have refused to pay the service charges levied for the year 2011 by the freeholder's agent, Watsons, as a result of which the Applicant's solicitors issued proceedings in debt against them in the Bedford County Court. The amount claimed was £1 086.09 plus £150 as administration costs [see page 8 of the hearing bundle]. The leaseholders each filed the same Defence, in which five specific items were challenged. They also pleaded poverty and sought time to pay. Upon transfer to the Defendants' home court (Norwich) the District Judge on 27th April 2012 ordered that the issue of the sum due in respect of service charges be transferred to the Leasehold Valuation Tribunal for determination.

2. Upon transfer of that issue to it the tribunal issued its own directions for trial dated 19th June 2012 and an inspection and hearing both took place on 12th September 2012. Although given ample notice in writing the Respondents attended neither the inspection nor the hearing. The tribunal therefore proceeded in their absence.

3. For the reasons set out below the tribunal determines, and reports back to the court, that the sum recoverable from the Respondents is £936. Issues of costs, formal entry of judgment, granting time to pay and enforcement are matters within the jurisdiction of the County Court and not this tribunal. However, the tribunal wishes to record its concern about the following matters :
   a. The landlord's (and agent's) non-compliance with the percentage contributions and provisions in the lease – albeit to the Respondents' advantage. The differing lease provisions should really be sorted out by consent between landlord and all the leaseholders, or by application for variation under the Landlord and Tenant Act 1987
   b. The lack of compliance with the tribunal's directions, especially concerning the provision of evidence to prove both the cost and payment of the various service charge items
   c. The method of charging management fees, which is confusing (the explanation given at the hearing not according with what appears in writing) and does not comply with the good management principles set out in the Blue Book.

**Material statutory provisions**

4. 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...

5. 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.

6. 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.

7. Please also note sub-sections (5) & (6), which provide that a tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment, and that an agreement by the tenant of a dwelling (other than a post-dispute arbitration

agreement)[1] is void in so far as it purports to provide for a determination in a particular manner or on particular evidence of any question which may be the subject of an application to the Tribunal under section 27A.

8. In order that leaseholders can keep track of what they may owe, and to discourage tardiness by freeholders or their managing agents, section 20B provides that :

(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.

9. Insofar as major works are concerned, ie those in respect of which the contribution of any tenant liable to pay towards the service charge will exceed £250, then section 20 provides that the relevant contributions of tenants are limited to that amount unless the consultation requirements have been either complied with in relation to the works or dispensed with by (or on appeal from) a leasehold valuation tribunal. The consultation requirements, in the instant case, are those appearing in Part 2 of Schedule 4 to the Service Charges (Consultation Requirements) (England) Regulations 2003[2] (as amended).

**Material lease provisions**

10. The lease dated 24th February 1984 is made between (1) Florence Lutton as lessor, (2) Furness Management (Cromer) Ltd as management company[3], and (3) John Bertram Balcer as lessee. It provides at clause 5 a. (sic) that :

> The lessee hereby covenants with the lessor and the management company to contribute and pay (a) thirty per cent of the costs and outgoings of the management company in complying with their obligations under clause 8 of this lease in connection with the maintenance of the common entrance porch entrance hall stairways and landing (b) 18.15 per cent in connection with the maintenance of the structural walls roofs sewers drains and exterior decorations and (c) to 18.5 per cent[4] of the amount which the lessor may expend from time to time in maintaining the insurance of the estate against loss or damage by fire storm damage subsidence third party risks and such other risks as the lessor

1 Eg. provisions in a lease stating that the landlord's accountant's certificate shall be conclusive, or that any dispute shall be referred to arbitration

2 SI 2003/1987

3 However, clause 1(d) provides that "the management company" shall mean the firm partnership or company (whether limited by shares or guarantee or unlimited) to whom the lessor has delegated the management of the estate

4 This sub-clause therefore provides for four separate charging elements of the total service charge : 30%, 18.15%, 18.5%, and again 18.15%. Whether the 18.5% is an error is unknown, as is the reasoning for these various percentages where there are now six flats

thinks fit such last mentioned rent to be paid without any deduction on demand and (d) 18.15 per cent in connection with the cost of maintaining the conduits and any other expenses properly incurred by the lessor or the management company in and about the maintenance and proper and convenient management and running of the estate including administrative and finance expenses and the cost of a firm of surveyors as managing agents as required.

11. The next sub-clause is 5(b). It deals with payment and provides that :

> The contribution under paragraph (a) of this clause for each year shall be estimated by the management company or their managing agents (whose decision shall be final) as soon as practicable after the beginning of the year and the lessee shall pay the estimated contribution by two instalments in advance on the first January and the first June in each year. The contribution shall include an appropriate amount as a reserve for or towards any matters as are likely to give rise to expenditure after such maintenance year and are likely to arise either only once during the then expired term of this lease or at intervals of more than one year during such expired term...

12. Clause 8 sets out the management company's covenants with respect to maintenance, repair and decoration, etc and clause 9(b) concerns the lessor's covenant to insure.

**Inspection, hearing and evidence**

13. The tribunal inspected the exterior and the internal common parts of the building in the presence of Mr Thurston and Ms Karen Fearn, lessee of flat 3. Although the tribunal clerk knocked loudly on the door of flat 5 there was no answer, and neither Respondent was present while the party examined the entrance hall and staircase and the front and rear elevations of the building. Although tribunal members were able to glimpse some of the new rear section of roof through a rear window from the top of the stairs outside flat 5 (the top flat) it was otherwise not possible to see from street level what had been undertaken by way of roof repairs.

14. Externally, the front of the building is largely painted and rendered, and is approached by four concrete steps. Between the street and the steps is a small patch of concrete. From the joints between horizontal and vertical surfaces (steps and low retaining walls) weeds were seen growing. There is no garden as such. To the rear, the tribunal was informed, the occupants have access (but not through the building) to a series of refuse bins to one side. The adjoining parking area is apparently within the rear flat's demise.

15. Internally, the hallway and staircase had a generally shabby look about them. Lighting was time-controlled, but there were only two bulbs; one outside flat 5 and another in the ground floor entrance hall. Also in the entrance hall was an electric storage heater which had evidently been bought secondhand and, the tribunal later learnt, fitted only in March 2011. At the hearing the tribunal was told that there had been a serious damp and mould problem to the ceiling and wall outside flat 5 due to the lack of heating. The installation of this heater had cured that. Evidence of former damp and mould were noted outside flat 5.

16. At the hearing Mr Thurston explained how his firm had originally been invited to take

over management of the building by the majority of the leaseholders (four of the six flats) because of problems with the then freeholder – Justified Properties, of London – which was also purportedly managing the building. This company was in a delicate financial position and raised no objection to the Edwin Watson Partnership assuming control. The freeholder later sold the building to the current owner, Stephen Mark Watson, who is no relation whatever to the firm but accepted it (or "inherited" it) on purchase. The demands in this case have been issued by the Edwin Watson Partnership expressly as agent for the freeholder, although there is considerable consultation with the majority lessees. The Respondents have never involved themselves with maintenance issues, or attended any meetings or voted.

17. On behalf of the lessor Mr Purkis took the tribunal through each of the five issues that he had identified from the Defence : cleaning, gardening, day to day maintenance, electricity, and the charge for fire risk assessment. The tribunal also identified another, not mentioned in the Defence but appearing on the Schedules of actual and estimated expenditure : the cost of an asbestos report. No issue was taken on the consultation undertaken in respect of major works to a rear roof valley shared between this and the adjoining building, or the amount claimed for such works.

18. Mr Purkis was not assisted by the fact that, despite quite explicit directions to that effect, the hearing bundle contained no copy invoices, electricity bills, etc. Instead, Mr Thurston referred from time to time to some list or schedule which he had in front of him, culled from the firm's files, but which was not shared with the tribunal. But for the relatively modest sums involved, and the view taken by the tribunal on certain issues, the tribunal could have taken the more robust approach of finding none of the service charge items proven, determining that nothing was payable. The tribunal flags this issue up so that on the next occasion that this managing agent has to prepare a case it does not make the same mistake again.

19. *Cleaning* – On this subject evidence was led, corroborated by Ms Fearn, that when the lessees had first approached the Edwin Watson Partnership they asked that internal cleaning, including to the stair carpet, be carried out only once per year. As the cleaners shampoo the carpet and undertake a thorough clean the charge per visit is high.

20. *Gardening* – There is no gardening as such, but again Mr Thurston confirmed that at the request of the lessees once a year the cleaner also deals with external weed killing and spraying. This is dealt with under the cleaning bill, with no extra cost involved.

21. *Day to day maintenance* – This includes the changing of light bulbs by a local firm, work to the intercom, having keys cut, changing switches on the stair lights, etc. The fitting of the Dimplex storage heater is included in the £568 actual maintenance charge on page 76 of the bundle.

22. *Electricity* – in 2011 the actual cost was £87.36, while in 2010 it was £351. This figure, on page 75, was in fact a combination of actual usage plus £266.55 arrears. Nothing had been paid or handed over by the previous owner and manager, as Ms Fearn said that red bills were not being sent to Justified Properties' London office but were coming through the front door of the premises.

23. *Fire risk assessment* – the actual expenditure for 2011 was nil [page 76], but the forecast on page 72 was £100. It was put to Mr Thurston by the tribunal that legislation requires that this take place once in 10 years unless there is a significant change in the building.

24. Mr Thurston believed that an asbestos report had been carried out, by BNW Asbestos, although his firm uses as number of different contractors.

25. Asked about the fire alarm not being activated until this year - a point made in the Defence – Mr Thurston said that the alarm was on, but there were issues and a faulty panel and smoke detector had been replaced in May. A battery was replaced in January 2012.

26. *Management fee* – This is described both in the statement of actual expenditure and the schedule of estimated expenditure as follows :

| | |
|---|---|
| Management fee 10% of expenditure (total minimum £1 000) | £700.00 |
| Plus £50 per flat | £300.00 |
| VAT @ 20% | £200.00 |
| | £1,200.00 |

Adding £1 850 actual expenditure plus a further £3 706 for reserve funds produces a total of £5 506, so the stated 10% of expenditure would not produce a fee of £700. In fact the minimum fee which the firm charges for management is a minimum £1 000 per property, so the items purporting to add up to £1 000 were utterly misleading.

27. *Percentage share* – Mr Thurston explained that it was not known how the building was configured in 1984, when the lease was signed, but different flats had leases expressed in very different terms. None were produced in evidence. Although the material lease apportions liability for various maintenance costs by different percentage shares these have not been applied by the lessor and his managing agent. Instead of 30%, 18.5% and 18.15% the costs have been divided equally between the six flats, or 16.66% each.

28. *Insurance* – The tribunal was puzzled by the fact that one critical item did not appear anywhere in the service charge documentation, viz the annual insurance premium. Was the building properly insured? Mr Thurston explained that this was a matter which the new freeholder reserved to himself. It was not a management task delegated to his firm.

**Findings**

29. Having considered the limited evidence in the bundle and that given orally at the hearing the tribunal makes the following determination in respect of sums falling due in 2011.
    a. *Cleaning* – the tribunal considers that the £500 estimate is reasonable, given that the work involved has all to be undertaken thoroughly just once per year.
    b. *Gardening* – No cost has been incurred in respect of gardening since the present managing agent took control, so there is no justification for including an amount as forecast expenditure. None is allowed as reasonable.
    c. *Day to day maintenance* – Based on the evidence given of the types of items

included under this head the estimate of £500 is allowed.

d. *Electricity* – The bulk of the electricity charge concerns arrears, but as evidence in the form of statements of account, reminders, or a statement of explanation by the utility provider has not been disclosed the tribunal is in no position to say whether these costs were incurred within the 18 months prior to demand being made. Neither is there any evidence that liability for an unspecified amount was disclosed within the required 18 months. In the circumstances the tribunal determines that the cost of the stair lighting and an estimated sum for the recently installed storage heater are all that is recoverable. The tribunal assesses this amount as £150.

e. *Fire risk* – A fire risk report was obtained in 2010, so there is no need for any further report for the foreseeable future. This item is disallowed in full.

f. *Asbestos report* – This was included in 2010 but not undertaken. Although it is said that this has now been done no evidence was produced as to when, by whom or at what cost. The item is disallowed.

g. *Major works* – The £276.27 claimed for a share of the roof repairs has not been challenged by the Respondents and is allowed in full. While one might expect that the reserve fund for roof works should cover this, the truth is that there is not yet a sufficient fund with which to do so. By now, in 2012, the actual sum incurred is recoverable.

h. *Management fee* – the tribunal determines that for a building of this age and with only six units a fee of £1 000, or £166 per flat, is reasonable. However, the way in which this is described on the statements is wholly misleading. Further, it is not the best approach to charging for standard items of management work. Mr Thurston and his employers are referred to the *Service Charge Residential Management Code* ("the Blue Book") published by the Royal Institution of Chartered Surveyors, and approved by the Secretary of State under the terms of section 87 of the Leasehold Reform, Housing & Urban Development Act 1993.

30. The final item sought is £150 as "pdc fee", otherwise described in paragraph 9 of the Applicant's Statement of Case as an administration fee. However, an examination of the lease reveals no provision entitling the lessor to recover any such sum. The closest one gets to such a charge is the lessee's obligation in paragraph (d) to the Fourth Schedule to the lease to pay the lessor's costs incurred in connection with the service of a section 146 notice. That does not apply here, and the lessor's ability to serve such a notice has now been severely curtailed by section 168 of the Commonhold and Leasehold Reform Act 2002. This item is therefore disallowed.

31. Any legal costs incurred are recoverable, if at all, at the discretion of the court to which this case is now returned.

Dated 1st October 2012

Graham K Sinclair – Chairman
for the Leasehold Valuation Tribunal

## SCHEDULE

[See bundle pages 72 (forecast), 76(actual) and 8]

| *Item* | *Claimed* | *Allowed* |
|---|---|---|
| Gardening | £100 | £0 |
| Electricity | £350 | £150 |
| Cleaning | £500 | £500 |
| Fire risk assessment | £100 | £0 |
| Asbestos report | £500 | £0 |
| Day to day maintenance | £500 | £500 |
| | | |
| Reserve funds | £1,856 | £1,856 |
| Management fee | £1,200 | £1,200 |
| | | |
| Less surplus balance for 2010 | (£247) | (£247) |
| | | |
| Sub-total | £4,859 | £3,959 |
| | | |
| divided by 6 | £810 | £660 |
| Add one sixth share of major works | £276 | £276 |
| | | |
| **Amount determined due** | | **£936** |