

9509



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

Case References : **LON/00BE/LSC/2013/0427**

Property : **Flat 54 Latimer Beaconsfield Road
London SE17 2EN**

Applicant : **London Borough of Southwark**

Representatives : **Miss A Mills Income Enforcement
Officer, Mr G Dudhia Accountant
and Ms O Wybraniec, assistant, all
of L. B. Southwark**

**Respondents
(Applicants for the
Section 20ZA
application)** : **Ms Shafitun Bibi who attended**

Representative : **Mr E Hussain, Accountant.**

Type of Application : **For the determination of the
reasonableness of and the liability
to pay a service charge**

Tribunal Members : **Charles Norman FRICS (Valuer
Chairman)
Michael Taylor FRICS
Mrs Rosemary Turner JP BA**

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

Date of Decision : **2 December 2013**

DECISION

Decisions of the Tribunal

- (1) The Tribunal makes the determinations as set out under the various headings in this Decision.
- (2) The Tribunal makes an order under section 20C of the Landlord and Tenant Act 1985 so that none of the landlord's costs of the Tribunal proceedings may be passed to the lessee through any service charge. The Tribunal makes this order by consent of the parties (see below).
- (3) Since the Tribunal has no jurisdiction over county court costs and fees, this matter should now be referred back to the Lambeth County Court.

The application

1. The Applicant seeks a determination pursuant to s.27A of the Landlord and Tenant Act 1985 ("the 1985 Act") as to the amount of service charges payable by the Applicant in respect of the service charge years 2011/12.
2. Proceedings were originally issued in the Northampton County Court under claim no. 3YK69705. The claim was transferred to the Lambeth County Court and then in turn transferred to this Tribunal, by order of District Judge Zimmels on 12 June 2013.
3. A pre-trial review was held on 16 July 2013 at which both parties were represented. The Tribunal identified the following issues for determination:
4. The payability of service charges totalling £1,278.86 demanded in 2011/12 and in particular:
 - (i) Whether the calculations of arrears from 2011/12 was correct;
 - (ii) The reasonableness of charges for fuel/gas costs as these have increased by 39% and
 - (iii) The reasonableness of the apportionment of service charges for non-boiler repairs.
5. The relevant legal provisions are set out in the Appendix to this decision. Bundle page references are shown in square brackets.

The hearing

6. The Applicant was represented by Miss A Mills Income Enforcement Officer, Mr G Dudhia Accountant and Ms O Wybraniec, assistant at the hearing. The Respondent who was in attendance was represented by Mr E Hussain, Accountant.

The background

7. The property which is the subject of this application is a one bedroom purpose built flat in Latimer House which is located on the Aylesbury Estate, Walworth, one of the largest public housing estates in the country. The estate and subject property is served by a district heating system which supplies heating and hot water.
8. Neither party requested an inspection and the Tribunal did not consider that one was necessary, nor would it have been proportionate to the issues in dispute.
9. The Respondent holds a long lease of the property which requires the landlord to provide services and the tenant to contribute towards their costs by way of a variable service charge. The specific provisions of the lease will be referred to below, where appropriate.

The issues

10. At the start of the hearing Mr Hussain explained that he was now satisfied that the accounting of arrears was correct. It transpired that the Applicants had inadvertently described payments demanded on account as "interest" in their particulars of claim and this had understandably led to confusion. It follows that the Tribunal was only concerned with items at 4(ii) and (iii) above.

The Lease

11. The Respondent holds the property by a lease from the London Borough of Southwark dated 31 January 2005 for a term of 125 years from that date at a fixed annual ground rent of £10. By clause 2(3)(a) the lessee covenants to pay the service charge contributions as set out in the Third Schedule. By clause 4(5) the Council covenants to provide the services to or for the flat and to ensure so far as practicable they are maintained at a reasonable level and to keep in repair any installation in connection with the provision of those services. The definition of services is set out on page two of the lease. This definition is "services provided by the Council to or in respect of the flat and other flats and premises in the building and on the estate and more particularly (when and where applicable) central heating, hot water supply, unitemised repairs."

12. The salient points of the Third Schedule are as follows. The service charge year runs from 1 April to 31 March. Time is not to be of the essence in relation to any notice [i.e. demand]. Before the commencement of each year the Council is to make a reasonable estimate of the amount which will be payable by the Lessee and shall notify the Lessee of that amount. The Lessee shall then pay on account and in advance the amount of the estimate by four equal payments on 1 April 1 July 1 October and 1 January each year. As soon as practicable after the year end the Council shall ascertain the actual service charge for the year and notify the Lessee. There is then a balancing charge (or credit) mechanism. By Para 6 of the Third Schedule, the service charge shall be a fair proportion of the costs and expenses set out at Para 7 of the Schedule. By 6(2) the "Council may adopt any reasonable method of ascertaining the said proportion and may adopt different methods in relation to different items of costs and expenses". Para 7 states that the costs and expenses are all costs and expenses of or incidental to inter alia (2) providing the services as defined in the lease (see Para 11 above for the definition).

The Applicant's Case

13. The Applicant's case was that its apportionment basis was reasonable. It apportioned liability by means of a bed-weighting method. Each flat within Latimer was given 4 units plus additional units for each bedroom. Consequently, the Respondent's apportionment was 5 units out of the total units in Latimer of 435 units.
14. As to the cost of fuel/gas the Applicant's case was that these were reasonable costs incurred as a result of increased gas and electricity prices. A formula was applied to properties depending on the level of services they received. The subject property received both hot water and heating and the factor was therefore 4.52. The Council purchased large quantities of fuel/gas via an intermediary named Corona via flexible procurement contracts. These contracts run for four years enabling Corona to forward buy when conditions are favourable. These enable the market fluctuations to be smoothed out. The Cabinet office has advised that all public sector energy procurement should be via flexible frameworks. The Applicants also referred to a copy of Corona's pricing letter noting a 47% increase in the energy content of the bill which forms some 60-70% of the total bill [141]. The point is made that the scale of this increase reflects the low price of the previous portfolio. The Applicants also refer to the Applicants Annual Performance Report [145-9]. Table 3 on page 4 which shows that the Aylesbury Estate pays the least for its electricity (£1.6063 per kWh).
15. For non-boiler repairs the Applicant's case was that apportioning costs by block was reasonable. These costs relate both to individual properties and communal pipework. The Applicants stated that it would not be fair only to apportion costs to the flat where the problem

occurred because the cause of the problem may lie elsewhere. The property reference number on the "iWorld" [recording] system was only an indicator as to the source of the problem.

16. Ms Mills called Mr Gulam Dudhia who is the Accountant for the Applicants Home ownership Unit. Mr Dudhia had served a witness statement verified by a statement of truth. Mr Dudhia explained that he was responsible for the service charge accounting of some 15,000 properties. He had been in his present role for 9 years. Mr Dudhia explained the process by which the apportionment was undertaken and the accounting processes and timing of estimates.

The Respondents Case

17. In her defence in the County Court the Respondent sought clarification that the fuel charges had actually been incurred. The Respondent stated that where costs cannot be directly attributed to a specific property the lease allows the council to use a reasonable basis of apportionment to recover a "fair proportion of costs"; the Council is also allowed to adopt different methods in relation to different elements of costs to ensure "fair distribution/ apportionment" of costs. However, the Respondent contended that where costs can be directly attributed to specific properties such as non boiler repair costs as demonstrated by the Councils own reports, the fair/reasonable basis would be for leaseholders to pay actual costs in respect of repairs within their respective flats. .
18. In her statement of case in the Tribunal the Respondent stated that the gas expenditure had increased from £1.245m in 2010/11 to £1.727m in 2011/12. Her share had increased from £408 to £567. The Respondents complaint was that having established that the root cause was an increase in the unit price of gas from £1.0987 /kWh in 2010/11 this had now risen to £2.3646 / kWh. The respondent was dissatisfied with the explanations received which were generic.
19. As to the non-boiler repairs, the Respondent's case was that it could not be reasonable for her to have to contribute for expenditure far in excess of that actually incurred on her flat (according to Council records). Where the council can establish a direct link between cost and a flat it is not appropriate to use methods of apportionment. Further, the current method of apportionment is not reasonable because it results in a significant disparity between spend on the subject flat and the apportioned cost.

The Tribunal 's decision

20. The Tribunal determines that the amount payable in respect of [service charge item is £1,278.86 as demanded.

Reasons for the Tribunal's decision

21. The Tribunal finds in favour of the Applicant landlord.
22. The Tribunal finds that the basis of apportionment based on a bed-weighting system is reasonable and a method that is properly open to the Applicant. The Tribunal accepts the evidence of Mr Dudhia whom it found to be a credible and reliable witness.
23. The Tribunal accepts the Landlord's evidence that the reason for the large increase in fuel costs is that the price of fuel has substantially increased. The Tribunal notes that the procurement approach adopted has been approved by the Cabinet Office. The Tribunal considers that this is a reasonable approach to procuring the gas supply. It also notes that the historic gas price for the estate was low.
24. With regard to the non boiler repairs, the lease contains clear covenants (see above) by which the Lessee must pay a fair proportion of all costs and expenses of or incidental to inter alia providing the services to or in respect of the flat and other flats and premises in the building.... The Tribunal finds that this clearly envisages a proportionate contribution to the total costs in respect of the building. The Tribunal accepts the Applicant's case that it is frequently impossible to attribute a fault to a single cause. The Tribunal also considers that it would be wholly impracticable to require the Applicant to divide repairs between those wholly within a flat and those partially within a flat and partially elsewhere. The Tribunal does not consider that that impractical approach accords with the wording of the lease.

Application under s.20C and refund of fees

25. At the end of the hearing, the Applicant made an application for a refund of the fees that it had paid in respect of the hearing¹ of £150. The starting point is that the refund of fees should follow the event which would result in full liability against the Respondent. However, although the Tribunal found no error on the Applicants part as to the merits of the case, there should have been more effective early communication by the Applicant to the Respondent. In addition, the pleadings caused confusion (see above). Having regard to these factors and having heard the submissions from the parties, the Tribunal orders the Respondent to refund half of the fee (£75) to the Applicant within 28 days of the date of this decision.
26. At the hearing, the Respondent applied for an order under section 20C of the 1985 Act. By consent of the parties and with the agreement of the Tribunal the Tribunal makes this order in accordance with rule 35 of

¹ The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 SI 2013 No 1169

The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013.

The next steps

27. The Tribunal has no jurisdiction over county court costs. This matter should now be returned to the Lambeth County Court.

Right to seek Permission to Appeal

28. The Tribunal is required to set out the right of appeal against its decisions and these matters are addressed in the appended Guidance.

**Charles Norman FRICS
Valuer Chairman**

Appendix of relevant legislation

Landlord and Tenant Act 1985 (as amended)

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 the appropriate 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 the appropriate 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) the appropriate 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.

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 the appropriate 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 the appropriate 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).

1. By section 20 of the 1985 Act, consultation requirements are imposed
on landlords as follows:

“(1) Where this section applies to any qualifying works ...the relevant
contributions of tenants are limited ...unless the consultation requirements
have been either—

(a) complied with in relation to the works..., or
(b) dispensed with in relation to the works or agreement by...a leasehold
valuation Tribunal”

(3) This section applies to qualifying works if relevant costs incurred on
carrying out the works exceed an appropriate amount.”

By s.20 (5) an appropriate amount is an amount set by Regulations, which by
Article 6 of the Regulations is £250.

The Regulations insofar as relevant are as follows:

“Schedule 4 Part 2

“Notice of intention

8.(1) The landlord shall give notice in writing of his intention to carry out
qualifying works—

to each tenant;

(2) The notice shall—

describe, in general terms, the works proposed to be carried out
state the landlord’s reasons for considering it necessary to carry out the
proposed works;

Estimates and response to observations

(5) The landlord shall, in accordance with this sub-paragraph and sub-
paragraphs (6) to (9)—

(a) obtain estimates for the carrying out of the proposed works;

(b) supply, free of charge, a statement (“the paragraph (b) statement”)
setting out—

(i) as regards at least two of the estimates, the amount specified in the
estimate as the estimated cost of the proposed works; and

(ii) where the landlord has received observations to which (in accordance
with paragraph 3) he is required to have regard, a summary of the
observations and his response to them; and

(c) make all of the estimates available for inspection.

(8) Where the landlord has obtained an estimate from a nominated person,
that estimate must be one of those to which the paragraph (b) statement
relates.

(9) The paragraph (b) statement shall be supplied to, and the estimates
made available for inspection by—

(a) each tenant;

(10) The landlord shall, by notice in writing to each tenant ... specify the place and hours at which the estimates may be inspected; invite the making, in writing, of observations in relation to those estimates;

(c) specify—

the address to which such observations may be sent; that they must be delivered within the relevant period; and (iii) the date on which the relevant period ends.

Duty to have regard to observations in relation to estimates

12. Where, within the relevant period, observations are made in relation to the estimates by... any tenant, the landlord shall have regard to those observations.”

(3) The notice shall also invite each tenant ...to propose ...the name of a person from whom the landlord should try to obtain an estimate for the carrying out of the proposed works

Duty to have regard to observations in relation to proposed works

10. Where, within the relevant period, observations are made, in relation to the proposed works by any tenant or recognised tenants’ association, the landlord shall have regard to those observations