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FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**CAM/33UG/LSC/2015/0094**
Property	:	4 Picturehouse Court, Dereham Road, Norwich NR5 8UA
Applicant	:	Wherry Housing Association Ltd
Representative	:	Pauline Norman (Property team manager, Norwich) Also Graham Connolly (Assistant Director), Chris Cameron, Elizabeth Matthews, Stuart Jones (Keir) and Matthew Freestone
Respondent	:	Joe Thirtle
Representative	:	Councillor Sandra Bogelein
Type of Application	:	to determine reasonableness and payability of service charges for the years 2015/16 & 2016/17
Tribunal Members	:	G K Sinclair, R Thomas MRICS & D S Reeve MVO MBE
Date and venue of Hearing	:	Thursday 3rd March 2016 at Norwich Magistrates Court

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DECISION

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Summary

1. This application is one brought by the Housing Association landlord against the leaseholders of all 21 flats seeking the tribunal's determination in favour of the service charge sought to be levied in respect of a major works contract for the first programme of external redecoration of a building acquired as a new-build. In his directions dated 3rd December 2015 the Regional Judge decided that as similar issues arose in all 21 cases this case involving flat 4 would be taken as a lead case.

2. Picturehouse Court comprises 21 flats let on shared ownership leases to those whose incomes are below a cap set by the Homes and Communities Agency. The leases provide for a reserve or sinking fund, but as only £100 per flat was charged each year the £73 500 original estimated cost of the first contract for external redecoration (to the extensive rendered panels, and to windows and doors) was discovered greatly to exceed that. With an expected balance owed per flat of around £2 500 the leaseholders, despite two meetings organised by the landlord and various other measures to placate them, remained opposed.

3. The landlord therefore applied to this tribunal and invited it to determine those issues which, from the meetings, appeared to it to be the main concerns of the leaseholders. They included whether, as owners of only a 25% share in their flats, they were liable for the balance; whether they were liable to pay more than the reserve fund set aside for such purpose; whether the cost of the works was excessive; whether some of the works were caused by faults in the original build, for which leaseholders are not responsible; and indeed whether the works were even necessary.

4. In their written response, filed very late, the leaseholders largely confirmed that those were their concerns but also added the broader issue whether, given that only those of limited incomes were eligible for the shared ownership scheme, it was reasonable for a Housing Association – that had failed to make adequate provision through its reserve fund – to impose costs which it knew or ought to have known were wholly unaffordable by the vast majority of the leaseholders.

5. For the reasons which follow the tribunal determines :
   a. That under the provisions of the generic shared ownership lease used on this development the leaseholders are responsible for 100% of the service charge costs
   b. That a reserve fund is designed as a contribution – ideally a substantial one – towards the cost of substantial but periodic expenditure; it is not intended either to pay for it entirely or to limit the contribution required from leaseholders
   c. The redecoration works were necessary
   d. The cost of the works was reasonable
   e. The costs sought from the leaseholders only concern redecoration; not the

cost of roof repairs which were met by the Housing Association from its own funds

f. However, the applicant Housing Association failed to meet leaseholders' reasonable expectations by its inability properly to anticipate the external redecoration costs and to build up a sufficient reserve fund to meet the bulk of the expense. In those respects, and those alone, the applicant's administration fell below the required standard and the tribunal reduces its 10% administration fee for the major works to 5%

g. In doing so the tribunal notes the various offers of help by the applicant to its leaseholders, including its agreement to accept payment of the major works service charge by instalments. While the tribunal has no power to direct that payment terms in the lease be altered it records this agreement as a factor relied upon by the tribunal when determining an appropriate reduction, as above.

6. With a 5% reduction in the landlord's administration fee for the works the net amount payable by each leaseholder for the major works is a total of £2 339.10. This is payable on top of the normal monthly service charge instalment of £85.69.

7. The tribunal also determines that in all the circumstances of this case, and the overall outcome achieved, it is right to order under section 20C that when calculating the service charge liability of all 21 leaseholders the landlord be entitled to recover one half of the application fee (£220), as it has requested, as its costs of and incidental to this application.

Material lease provisions

8. As a shared ownership lease the document is longer and more complex than is usual. The generic lease in the hearing bundle grants a term of 125 years from the commencement date of 1st April 2008, and the leaseholder has an initial 25% share in the equity and a one twenty first share in the overall service charge liability. By clause 3(2) the leaseholder covenants to pay the service charge in accordance with clause 7, the latter setting out in detail the accounting year, the authorised person nominated by the landlord to estimate the cost of provision, the service provision (i.e. what costs are included within the service charge), and the charge payable by each leaseholder.

9. By clause 7(4) the service provision shall comprise :

a. The expenditure estimated by the authorised person as likely to be incurred in the accounting year upon the matters set out in clause 7(5), and

b. An appropriate amount as a reserve towards those matters in clause 7(5) as are likely to arise only periodically, and not annually throughout the term, but

c. Reduced by any unexpended reserve already made in respect of any such expenditure.

10. The service charge is payable in advance against an estimate of that year's expenditure at the times and on the dates that the rent is payable, viz by direct debit or such other means as the landlord shall from time to time require on the 1st day of each month. As soon as practicable after the end of each accounting

year the landlord must determine whether the amount paid in advance exceeds or falls short of actual expenditure, whereupon an adjustment is required by way of credit or additional payment.

11. In clause 7(8) the lease specifically declares that the provisions of sections 18–30 of the Landlord and Tenant Act 1985 apply to the above provisions.

Material statutory provisions

12. Section 18 of the Landlord and Tenant Act 1985 defines the expression "service charge", for the tribunal's purposes, as follows :

(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.

13. 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.

14. 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.

15. 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. Where qualifying works are the subject (whether alone or with other matters) of a qualifying long term agreement to which section 20 applies, the consultation requirements for the purposes of that section and section 20ZA, as regards those works, are the requirements specified in Schedule 3 to the Service Charges (Consultation Requirements) (England) Regulations

2003[1] (as amended).

16. Paragraph 1(1) of Schedule 3 provides that the landlord shall give each tenant notice in writing of his intention to carry out qualifying works. Sub-paragraph (2) prescribes that such notice shall:
    (a) describe, in general terms, the works proposed to be carried out or specify the place and hours at which a description of the proposed works may be inspected;
    (b) state the landlord's reasons for considering it necessary to carry out the proposed works;
    (c) contain a statement of the total amount of the expenditure estimated by the landlord as likely to be incurred by him on and in connection with the proposed works;
    (d) invite the making, in writing, of observations in relation to the proposed works or the landlord's estimated expenditure;
    (e) specify –
        (i) the address to which such observations may be sent;
        (ii) that they must be delivered within the relevant period; and
        (iii) the date on which the relevant period ends.

17. Please note that Schedule 3 does not require the landlord to invite submissions as to who should undertake the major works, as they shall be undertaken by the contractor already engaged under a qualifying long term agreement which was itself the subject of prior statutory consultation under the same regulations.

Inspection and hearing

18. The tribunal inspected the exterior of the subject premises at 10:00 on the morning of the hearing. They comprise 21 flats in a 3-storey L-shaped block on the corner of Dereham Road and Marlpit Lane, on the principal western exit from Norwich and about 2.5 miles from the city centre. The block is largely rendered and painted on the elevation facing Dereham Road, with the other elevations part rendered and part yellow brick. The roof comprises one large high level single pitched section and two slightly lower sections (at each end of the L), all sloping on the same shallow plane roughly from southwest to northeast. In addition there is a small narrow section of roof, with a similar pitch but behind a parapet, above a brick panel projecting slightly on the Dereham Road side. It was this small section of roof that had been leaking and required repair.

19. To the east of the block are a communal car park, a bike store, refuse bins, and paths leading to the three separate entrances to the building. To the Dereham Road and Marlpit Lane sides of the building the site is laid out to grass, sloping towards the building, but with french drains close to each elevation. Vehicular access is via the "old" Dereham Road, parallel and just to the north of the main road.

20. The hearing followed the inspection, at Norwich Magistrates Court. Ms Norman was the principal speaker for the applicant landlord, with most but not all of those who had made witness statements also being present and able to answer questions put to them by the respondent and the tribunal. Mr Thirtle, the respondent, was accompanied and assisted by Ms Bogelein, a local city councillor.

[1] SI 2003/1987

21. The tribunal had before it the hearing bundle prepared by the applicant and also a small bundle comprising the respondent's submissions, received only a matter of days before the hearing. As it helped clarify matters and did not really add any new aspect to the dispute the tribunal was prepared to admit the latter.

22. The applicant explained that the service charges for cyclical maintenance had been in dispute since 2014, when it had issued s.20 notices. These were met with concern and as a result the Housing Association held two residents' meetings; the first on 21st August (near the end of the statutory consultation period), and the second in January 2015. It was unable to reach agreement with the majority of leaseholders and met with considerable opposition, but it explained that there was the recourse of taking advice from other parties and of taking the case to this tribunal. At the August meeting the landlord said that this would be a good way of resolving differences. The leaseholders had a range of reasons for refusing, which in the application the landlord had tried to cover.

23. The works were completed and the leaseholders have been billed. An offer was put forward to the leaseholders in the hope of trying to resolve the disagreement, but it was not deemed acceptable. The leaseholders put forward a counter-offer, but the landlord felt that it had no option but to take the matter to the tribunal.

24. On the subject of the reserve fund the applicant agreed that it was inadequate, indeed clearly inadequate, but if asked the question whether the leaseholders were still liable to pay the answer was Yes. Asked how the annual figure of £100 per leaseholder had been calculated no-one present was able to say that they had been responsible for assessing when maintenance would have to take place and what the cost would be. Normally the applicant would work on a 6-year cycle, but this had been delayed partly to allow for the s.20 consultation process.

25. The applicant acquired the development just before completion, but after the builder had gone into receivership. It was not like most of Wherry's core stock, from Broadland transfers, which comprised properties built between the 1920s and 1970s, of masonry construction with no render or cladding. This block is unusual because it has so much render on it. Today, for planning reasons, it was said that properties have more render to break up the expanse of brick. With a new build it was likely assumed that there would be little by way of maintenance required initially, so rather than actually assess the likely cost it was probable that a low figure was simply included in the service provision. The applicant acknowledged that it should be increased, but there was a fine line because if it is too much and people move they can't take their share with them. In this case the reserve fund contributions should have been around £40–50 per leaseholder per month.

26. On the actual expense of the works, the NHBC was not really of any practical assistance so far as the roof repairs were concerned (because of the size of the excess) but the applicant had agreed to bear that itself and not include it in the service charge. As for the rest of the cost, a significant part of which would be for scaffolding, there was some discussion about the possible use of cherry-pickers, and the feasibility of getting them round the block due to the soft and sloping ground. Mr Jones, of the contractors Keir, commented on the need when using a cherry-picker for a banksman, and when you start to cost those factors in it is

not much cheaper. By contrast scaffold is safe and can be inspected weekly, and as the landlord was keen to get the work done as quickly as possible with scaffold one can have many staff working on different things at the same time.

27. On the subject of affordability, in the context of shared ownership, it was put to the applicant that with the income capping of potential leaseholders and potential costs long-term it must have known the type of clientele it had, and that such costs could make the flats too expensive for their income bracket. In response Ms Norman said that capping is set by the HCA. The salary level for this property was set at £28 000. The argument was that anyone with a salary higher than that should be able to buy a property outright. The limit is put on to limit the number of those going into shared ownership. A "rent" is payable on that part of the property that the leaseholder does not buy, but in a shared ownership lease all of the upkeep liability falls on the leaseholder.

28. In this case the applicant had offered free referral to an independent financial advisor. It will sometimes buy back property, but this was not appropriate for Picturehouse Court, and it can sometimes help with cheaper mortgages. To show that the work proposed was really necessary the applicant had commissioned an independent surveyor to report, and during the work an offer was made to sit down with whichever surveyor the leaseholders cared to appoint and go over the costings. The leaseholders did not take up this opportunity.

29. Mr Thirtle said that there had been a lot of discussion since this started, but it had narrowed down to the fact that the leaseholders were told there was money available for maintenance, but that has not happened. It is in their handbook [Appendix C, under the heading *Reserve fund*]. It was such a huge sum of money and the leaseholders had insufficient income to meet it. A bill of £2 500 seemed unacceptable. He could not understand why the required contribution level to the reserve fund should not have been thought about. When he had been shown around his flat the fact that there was a maintenance fund stuck in his mind. Many leaseholders would have said they could not take it on if they had known that they faced such a huge expense. They are now all struggling to see how they are going to find this money. Asked what his reaction might have been if told that his annual reserve fund contribution was £400–500, he said that it was a matter for each leaseholder. He loved the flat, but it was now expensive. Three have sold already. He did remember his solicitor saying that the cost could be on top of the amount in the reserve fund, but he had not imagined it would be that high.

Discussion and findings

30. The tribunal is satisfied that under the terms of the lease each leaseholder is liable for one twenty first share of the whole of the service provision, subject to questions of reasonableness, etc. The fact that leaseholders may have only a 25% equitable interest does not entitle them to pay only 25% of the service charge expenses.

31. The works proposed were validated by an independent surveyor appointed and paid for by Wherry to alleviate leaseholders' concerns. They were also given the chance of checking the contractor's figures, although they did not do so. In these circumstances the tribunal considers that the works were both necessary and of reasonable cost. The observations about the relative cost of using scaffolding as

against a cherry-picker, and the respective time required to complete the job, are noted.

32. However, although of part-cavity brick and part rendered appearance under a large but relatively simple roof, the building is not of such unusual construction that the Housing Association was incapable of making a proper estimate of periodic redecoration costs. This it should have done, even if of new build. With large areas of exterior paintwork periodic redecoration at least should have been anticipated.

33. The tribunal determines that leaseholders would reasonably expect that a reserve fund should build up to an amount sufficient to meet the majority of the cost of significant but periodic expenditure – say 60% as a minimum. Here the final cost (including the landlord's administration fee of 10%) was £65 582.58, against which the reserve fund covered only £13 480.32 – or 20.55%.

34. While recording the landlord's agreement to accept the cost of the repairs to the roof, its payment for an independent surveyor, Woodfellows LLP, to confirm the need for the proposed works, and its willingness to defer payment of the balance by instalments, the tribunal nevertheless considers that the landlord knew that its leaseholders are – as a condition of the shared ownership scheme – limited to a comparatively low income and therefore in a poor position to meet unusually large cash calls. It should therefore have taken care to assess a realistic sum to be put aside as a reserve so that the vast bulk of the cost could be met relatively painlessly.

35. For this failure the tribunal determines that the only scope it has to mark its displeasure is to challenge the reasonableness of the administration fee. It therefore reduces the 10% added by Wherry to the contractor's final account in the sum of £59 620.44, or £5 960.04, by half. A fee of £2 981.02 is substituted, or £141.95 per flat.

36. The service charge payable by each leaseholder for the major works is therefore reduced as follows :

Item	Total amount	Per leaseholder
Final project cost (per Keir)	£59,620.44	£2,839.07
Add Wherry's administration fee @ 5%	£2,981.02	£141.95
Less reserve fund	(£13,480.32)	(£641.92)
Balance payable	£49,121.14	£2,339.10

37. The above is payable in addition to the normal monthly instalments of £85.69 for the years 2015/16 and 206/17, in such instalments as the landlord may agree.

38. In his letter to the leaseholders dated 30th September 2015 Mr Connolly, on behalf of the applicant, stated that it would ask the tribunal to allow Wherry to recover one half of the cost of the fee of £440 through the service charge as part of its application. In his response to the application Mr Thirtle asks the tribunal

to make an order under s.20C, preventing the landlord from recovering any of the cost by way of service charge. As the landlord has largely succeeded the tribunal determines that the fairest outcome is that sought by it in Mr Connolly's letter. No lawyers were involved in this dispute and all the witnesses (save for Mr Jones of Keir) are officers of the Housing Association in receipt of their normal salary.

Dated 21st March 2016

Graham Sinclair

Graham Sinclair
Tribunal Judge