10104

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**CAM/33UG/LSC/2014/0067**
Property	:	**92 Colegate, Norwich NR3 3DU**
Applicant	:	Suzanna Redford
Representative	:	Kevin Hayes (Norwich Leaseholders Association)
Respondent	:	Norwich City Council
Relevant recognised tenants association	:	Norwich Leaseholders Association, c/o Mrs L M Kirk (secretary)
Type of Application	:	For determination of liability to pay service charges for the years 2006/7 to 2012/3 [LTA 1985, s.27A]
Tribunal	:	G K Sinclair & R Thomas MRICS
Determination date	:	Tuesday 19th August 2014
Date of Decision	:	22nd August 2014

DECISION

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Summary

1. Yet again, this application concerns a discrete aspect of the service charge levied by Norwich City Council ("Norwich") against those of its tenants who have acquired long leasehold interests, either by exercise of the right to buy under the Housing Act 1980 or 1985 or by assignment of existing interests. The issue at stake is whether Norwich is entitled under the terms of the lease to recover the cost of a "caretaker service" for this particular estate and others. The issue for the applicant at this stage is one of principle; not the reasonableness of the actual amounts claimed. The application is brought in the name of the leaseholder of a single flat but is supported and argument is advanced on her behalf by Mr Hayes, an officer of the Norwich Leaseholders Association.

2. For the reasons which follow the tribunal determines that the cost of providing a caretaker service, insofar as the work undertaken extends beyond those matters referred to in the lease (ie. maintenance and repair), may be desirable but is not strictly recoverable under clause 6 and Schedule C.

3. Although the lease does not appear to permit the recovery by Norwich of its legal costs as part of any service charge the tribunal for the avoidance of doubt makes an order under section 20C of the Landlord and Tenant Act 1985 that any legal costs incurred by the landlord in connection with this application shall not be recoverable from the applicant by way of service charge. Norwich shall also reimburse the application fee payable by her to the tribunal.

The lease

4. The lease in the instant case is dated 25th October 1983, between the City Council of Norwich and Clifton Wellington Springer as lessor and lessee respectively, for a term of 125 years from the same date. It is very much in standard form for flats sold off by the council under the right to buy provisions of the Housing Act 1980. The "building", for service charge purposes, is shown on the plan as comprising flats 74, 78, 84, 88, 90 & 94 Colegate, but mysteriously flats 76, 86 & 92 (the latter being the subject premises) are not shown. The building forms part of the "estate" also shown on the plan, comprising what would appear to be 69 flats on the south side of Colegate and east side of Coslany Street. The flats are referred to in other council documents as Colegate, Coslany Street and Barnard's Yard.

5. The service charge provisions appear in clause 4(c), clause 6, and Schedule C. Clause 4(c) is one of the lessee's covenants, and it reads as follows :

   > without prejudice to the provisions of Schedule 19 of the Act [1] to pay such sums of Service Charge as are payable in accordance with the provisions of Schedule C.

   One then turns to Schedule C. This is subdivided into three parts, with the following entries in the left column :

[1] Meaning the Housing Act 1980

a. The Council's Expenditure
b. Service Charge
c. Service Charge Statement.

6. The first part, "the Council's Expenditure", states which items of expenditure may be included in the service charge, a proportion of which is recoverable from the lessee. As the proper interpretation of this provision is of critical importance to this enquiry the material parts shall be quoted in full :

> the reasonable expenditure of the Council (including interest paid on any money borrowed for that purpose) :–
>
> (a) in complying with its obligations set out in clause 6 (a) (b) and (c) and excepting expenditure incurred in carrying out repairs as amount to the making good of structural defects except structural defects of which the Council does not become aware earlier than 10 years from the date of this Lease and
>
> (b) ...
>
> PROVIDED that any dispute as to the necessity or reasonableness of such expenditure referred to in (a) ... shall be settled by arbitration in accordance with the Arbitration Act 1950 (as amended or re-enacted from time to time)

7. Clause 6 records the various covenants on the part of the lessor. Clause 6(a), (b) and (c) refer respectively to the Council's obligations (a) to keep in repair the structure and exterior of the building (including decorative repair), etc; (b) to keep in repair any other property over which the lessee has rights as specified in Schedule A (easements); and (c) to ensure so far as practicable that the services to be provided by the Council as specified in Schedule D are maintained at a reasonable level and to keep in repair any installation connected with the provision of such services.

8. Schedule D (details of services provided) refers in the second paragraph to

> The provision of horticultural planting and maintenance of the communal gardens and/or landscaped areas on the Estate.

9. The second part of Schedule C is entitled "Service Charge". It deals with the proportion of the total expenditure for which the lessee is liable to be charged. It does not do so by reference (as is most usually the case) to a fixed percentage or several fixed percentages for different elements of the total expenditure but is left to the council's Housing Manager to determine what would from time to time be a "fair share". Scrawled to the left of this on the page in the bundle are the words "Based on rateable value". The provenance of this is unknown, but from the tribunal's knowledge of other cases that would appear to be Norwich's current method of apportioning service charge costs between units.

10. Save for those costs incurred in connection with or in contemplation of the service of a notice under section 146 of the Law of Property Act 1925[2] the lease does not seem to provide for the recovery of legal costs by way of service charge.

Applicable law

11. Section 18 of the Landlord and Tenant Act 1985 defines service charge, for the

[2] See clause 4(12)

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...

12. The tribunal's powers to determine whether an amount by way of service charge is payable and, if so, by whom, to whom, how much, when and the manner of payment are to be found in section 27A. 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 this Act, there to ameliorate the full rigour of the lease, need not then come into play.

The application and written submissions

13. Apart from the application, the respondent council's statement of case and that of the applicant in reply the application bundle included a copy of the lease, the service charge statements concerned and some e-mail correspondence between the parties' various representatives.

14. In its statement of case drafted by counsel Norwich lists at para 4 on page 69 the disputed charges as follows. The page numbers in the final column refer to the numbering of the document bundle attached to or served with the respondent's statement of case (not to be confused with the numbering of the application bundle before the tribunal) :

y/e 2007	Estate cleaning	£99.73	(p11)
y/e 2008	Estate cleaning	£95.34	(p15)
y/e 2009	Estate cleaning	£113.84	(p20)
y/e 2010	Estate cleaning	£148.43	(p27)
y/e 2011	Estate cleaning	£101.27	(p33)
y/e 2012	Premises Management[3]	£116.35	(p39)
y/e 2013	Caretaking	£141.67	(p45)

15. At paragraph 9 of its statement of case Norwich states that :

> The services provided include inter alia identifying disrepair, monitoring of estate services, cleaning and monitoring of communal windows, maintaining refuse disposal systems, maintaining drains and gullies, removal of refuse (p52).

16. Page 52 of its attached documents is described as a "Premises Management Service Position Statement" dated January 2011. It refers to two service levels –

[3] As the service charge statements also include an annual Leasehold Management fee there is no suggestion that this is for anything other than the services provided under the description "estate cleaning" or now "caretaking"

static and mobile – and lists twelve items said to be included in both. The static service is provided 37 hours per week and includes additional items such as buffing floors and cleaning windows, toilets and lifts (as required). The mobile service involves a fortnightly attendance (hours unspecified), at just over 30% of the cost per unit. Appendix A to the document (bundle page 133) lists the sites covered by the premises managers service and Appendix B (page 134) sets out in tabular form the service standards expected.

17. At paragraph 10 of its statement of case Norwich contends that those services are in furtherance of its obligation to "keep" the property and building in repair, to keep in repair appurtenant property and to ensure the maintenance of communal areas. That necessarily requires a management service, and the council quotes excerpts from the former Lands Tribunal's decisions in the cases of *London Borough of Brent v Hamilton*[4] and *Norwich City Council v Marshall*[5].

18. However, in an e-mail dated 14th March 2014 from Shaun Edwards, Leasehold officer, to Mr Hayes (at bundle page 55) he describes the mobile service thus:

> The Mobile team attend this site every 2 weeks usually on a Thursday. They are a 3 man team and their duties are to sweep all walkways and stairways, remove cobwebs from railings and light fittings, dust window ledges and sweep shed areas when required. They also report bulky items on walkways to the Neighbourhood housing officer and report any repairs in the communal areas. They also litter pick the Colegate/Barnards yard area and report any fly tipping and any problems with bins. They clear up any sharps they may find and remove any vomit/excrement they may find on walkways.

19. At paragraph 8 of its statement of case the council argues that the services specified in Schedule D of the lease include:

> the maintenance of the communal gardens and/or landscaped areas on the estate.

That is not correct. The precise wording in the second paragraph refers to:

> The provision of horticultural planting and maintenance of the communal gardens and/or landscaped areas on the Estate.

20. The applicant, in reply, argues that repairs are not "caretaking", and that when decorative repairs are required specialist contractors are engaged and the cost identified separately in the relevant service charge statement. Of the two items mentioned in Schedule D – lighting and gardening – each involves a contractor and the cost is again identified separately. So too, says the applicant, is window cleaning; and collection of rubbish is a cost covered by the Council Tax. "Keeping tidy" may be a caretaking task but it is not maintenance or repair. In addition, the council does charge a separate leasehold management fee, which in the year 2012/2013 was at a unit cost of £70.25 : see bundle page 119 (respondent's own document page 47). That should cover periodic inspections by a property manager.

[4] LRX/51/2005

[5] LRX/114/2007

Findings

21. As a basic proposition the landlord may in principle (and subject to such issues as quality and reasonableness) recover by way of service charge the cost of carrying out such works and providing such services as the lease specifies. In this case that includes keeping the building and any appurtenant parts over which the leaseholder enjoys rights maintained and in repair.

22. As confirmed by the Lands Tribunal in *London Borough of Brent v Hamilton*[6] and *Norwich City Council v Marshall*[7], and by the Chancellor of the High Court, Morritt C, in *Wembley National Stadium Ltd v Wembley London Ltd*[8], the cost of arranging for such specified works and services may also be recovered. As Morritt C said in *Wembley* at [44] :

> The principal dispute in this context was whether the costs of management might be included and if so to what heads of expenditure they might extend. For WNSL it was contended that provisions relating to service charges are restrictively interpreted, see per Mummery LJ in *Gilje v Charlgrove Securities Ltd* [2002] 1 EGLR 41, para 32. No doubt, too, it is appropriate for the interpretation to be more restrictive in the case of residential tenancies as opposed to a commercial transaction between two substantial parties. At all events I can find nothing in the wording of this Lease in general and the definition of 'Expenditure' in particular to confine the relevant services to the actual service to the exclusion of any management cost incurred in its provisions. Why, for example, should the wages of the employee who actually applied the tarmac to the surface of the car park be included but the salary of he who arranged for the employee to do it and for the tarmac to be available for such application be excluded. In my judgment the wording of the definition embraces both...

23. However, in *Norwich City Council v Marshall* while the President of the Lands Tribunal agreed that the cost of managing the task as well as the cost of the task itself could be recovered, he disagreed that the landlord could recover all that it wanted :

> The "reasonable expenditure" incurred in providing the specified services can be included in the service charge, but other management costs cannot be included.

24. In this tribunal's determination the service charge provisions in the lease have been drafted rather restrictively. For residential leaseholders the provision of a caretaker service, cleaning grime from window frames, removing dog mess and sweeping up leaves and rubbish, and having a regular supervisory presence on site may be highly desirable and the cost of all these activities would be provided for. But that is not what this lease says. It provides for recovery of the cost of keeping in repair and maintenance : not cleaning or tidying up.

25. Insofar as the tasks undertaken by the mobile cleaning service go beyond that narrow remit the cost of employing staff to undertake them is not recoverable.

[6] LRX/51/2005

[7] LRX/114/2007

[8] [2008] 1 P & CR 3 (quoted and relied upon in *Norwich v Marshall*)

26. What does that mean in practice? Of those items listed in Appendix B – Service Standards at page 134 in the bundle in the column headed "Mobile premises manager service" some might, as a question of fact and degree, fall either side of the line while others are rather more straightforward. In the determination of this tribunal, however, the following costs are recoverable or not recoverable :

Item	Determination
Report all communal repairs	Recoverable, subject to there being no duplication of effort under the leasehold management fee
Remove all offensive graffiti or report to the GRAFF OFF team	Recoverable as maintenance or keeping in repair
Inspect all communal areas for hazards	Recoverable in the case of want of repair; not otherwise
Remove all bulky items (not domestic or trade waste)	Not recoverable
Sweep and mop floors and stairs	Not recoverable
Clean skirting, landing doors, and frames, walls, surrounds and white panelling (where applicable)	Not recoverable
Check rubbish chutes (where applicable)	Not recoverable
Wash and paint interior walls	Cost of washing not recoverable; but painting communal walls is keeping in decorative repair and recoverable
Sweep leaves from pathways	Not recoverable (but does it form part of the gardening contract?)
Litter pick communal areas including footpaths, gardens and surrounding areas	See immediately above
Monitor communal window cleaning contract	Recoverable only as part of general leasehold management cost
Conduct a deep clean of communal areas	Not recoverable
Steam clean communal pathways and other paved communal areas	Not recoverable

27. The list of tasks performed, as set out above, differs from those in e-mails from Shaun Edwards (14th March 2014, at bundle page 55) and Gemma Mitchell (18th March 2014, at page 56) to Kevin Hayes. The overall impression gained by the tribunal is that the caretaker tasks involve looking after the place so that it is an attractive place to live rather than the monitoring or carrying out of repairs. As the applicant has established that Norwich is not entitled in principle to charge leaseholders with the cost of providing a caretaker service the applicant must be

treated for costs purposes as being the winner overall.

28. Although the lease does not appear to permit the recovery by Norwich of its legal costs as part of any service charge the tribunal for the avoidance of doubt makes an order under section 20C of the Landlord and Tenant Act 1985 that any legal costs incurred by the landlord in connection with this application shall not be recoverable from the applicants by way of service charge. It also directs, under rule 13 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 that Norwich reimburse the applicant for the application fee payable by her.

Epilogue

29. In its original decision in *Norwich City Council v Marshall* as long ago as May 2007 the leasehold valuation tribunal had noted, at paragraph 19, that:

> The Respondent openly concedes that this lease makes no express provision for the recovery of the expenses of management. Whether it ought to, and whether as a result of this omission the service charge provisions of the lease are not satisfactory, are entirely separate questions which are not before this tribunal for determination.

30. This is the latest of many disputes between Norwich City Council and members of the Norwich Leaseholders Association where the poor drafting of the basic "right to buy" leases under the 1980 and 1985 Acts and the manner in which Norwich calculates its costs (sometimes on a city-wide basis rather than based on actual costs for the particular estate, as the leases require) have not helped the parties to reach a sensible accommodation. The tribunal recognises that there may also be a tension between the interests of "residential" leaseholders, who are usually keen that their premises and surrounding areas are well managed and looked after, and non-resident "investor" leaseholders interested in maximising their rental income and minimising their outgoings by way of service charges.

31. However, the tribunal can only encourage all those concerned to find a solution which enables Norwich to manage its property portfolio effectively, with leases that set out clearly what each party's obligations are, how the landlord's duties are to be funded, and the mechanism for calculating the leaseholder's due share. This may require constructive engagement and negotiation by representatives of each side, leading to an application to the tribunal for variation of all the council's leases under section 37 of the Landlord and Tenant Act 1987.

Dated 22nd August 2014

Graham Sinclair

Graham Sinclair
Tribunal Judge