1505

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

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| **Case Reference** | : | **LON/00AG/LSC/2015/0471** |
| **Property** | : | **College Court, College Crescent, London NW3 5LD** |
| **Applicants** | : | **Tenants of flats 1-7, 9, 11, 13, 14** |
| **Representative** | : | **Justin Barrington (tenant of flat 3)** |
| **Respondent** | : | **City & Country Properties Limited** |
| **Representative** | : | **Freshwater Group Legal Services Limited** |
| **Type of Application** | : | **Payability of service charges (s27A Landlord and Tenant Act 1985)** |
| **Tribunal Members** | : | **Francis Davey (legal member)**<br>**Mr A Lewicki FRICS (professional member)** |
| **Date and venue of Hearing** | : | **10 Alfred Place London WC1E 7LR**<br>**4th March 2016** |
| **Date of Decision** | : | **28th April 2016** |

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**DECISION**

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1. The service charges in issue are payable, subject to the following reductions:

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|---|---|
| Aerial | £10,164 |
| Tap | £551.50 |
| Retaining wall | £62,165 |
| Boilers #1 and #2 | £3,261 |
| Boiler #3 | £25,289 |
| Boiler #4 | £2,996 |
| **Total** | **£104,426.50** |

2. Costs in connection with these 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 applicants.

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**REASONS**

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*Unless otherwise stated, all references to section numbers are to the Landlord and Tenant Act 1985*

**The Property**

**Aerial**

3. While there was some mention of the condition of the aerial system in the papers, this did not seem to be a central part of the applicant's case. The key issue between the parties was the cost of the system itself.

4. The respondent's evidence is that the communal aerial system was leased under a contract entered into in 1982. The respondent's did not, despite having been ordered to do so, disclose a copy of that contract, but it seems to be agreed that (i) it could be terminated with six month's notice after 10 years (i.e. in 1992); and (ii) it did not include repairs or call-outs.

5. The fees payable under the aerial contract were index linked and increased annually from £888 in 2002 to £1,191 in 2011 – a total of £11,664.

6. The tenant submits that an entirely new system would cost a few thousand pounds and exhibited quotes from £1,500 to £2,562 for a new system. Paying a one-off fee for a new system would pay for itself very quickly. Certainly on that evidence by 2011 a new system should pay for itself within 3 years at the most.

7. The respondent did not contradict the tenant's evidence, but submitted that it had no duty to keep the contract (or its value) under review. It said:

   *"The Respondent organisation manages thousands of properties and it is submitted that it is not reasonable to expect it to carry out such exercises for relatively minor contracts in relation to each and every property."*

8. In the tribunal's view that is a most surprising suggestion. Good management practice is to keep costs under review every year. The size of the respondent's organisation is not an excuse for a failure to control "small" costs (at least costs which are small to it).

9. The statutory question the tribunal must answer under section 19 (via section 27A) is whether these costs are reasonable. In answering that question a tribunal may consider what a landlord, spending their own money, might have done.

10. In our view, no reasonable landlord would have left a contract, under which it was paying a recurring fee, unexamined for 20 years. By 2002, a reasonable landlord would have considered that a fee for £888 for that year, that was likely to increase, and certain to recur, in the years to come, was high compared with the cost of replacing the system.

11. We have no evidence of what such a system would have cost in 2002, but the tenant's uncontradicted evidence as to the cost of a new system some 10 years later does provide, allowing for inflation, a basis for estimating that a landlord, in 2002, might have spent at most £1,500 on a new system.

12. We therefore assess the service charge payable for the aerial from 2002 to 2011 to be £1,500 (this reduces the tenant's service charge for that period by £10,164.

**Tap**

13. The second issue concerns the installation of a tap.

14. In order to understand the issue concerning the tap, it is first necessary to describe the rough layout of the property. College Court is set back from College Crescent with a triangular area of front garden. Behind College Court is a mostly grassed-over area – for the sake of this decision we will refer to as the "rear garden" – behind which is located New College Court which in turn fronts onto Finchley Road.

15. The respondent's evidence was that the tap was installed in order to keep wet new turf which had been laid on the rear garden.

16. As the legal basis for its recovery of the cost of installation the respondent relies on paragraph (viii) of the service charge provisions which permit recovery for:

"The cost of keeping any communal gardens and areas in and about the Buildings in good order whilst the same shall be made available for use by the Lessee."

17. as well as paragraph (xi) which is a general clause permitting recovery for:

"The cost of any other service or facility which the Lessor may in its absolute discretion provide for the comfort or convenience of occupiers of the buildings or for their proper maintenance safety amenity and administration."

18. The applicants had two objections to the cost of the tap.

19. The first was that £1,103 was rather expensive for the installation of a single tap.

20. At first the figure did seem high to us, but the respondent gave evidence, which we accept, that (i) the work was quite complicated and involved running new pipes for a distance of 10 – 11m and (ii) there was no other, better, way to bring a water supply to the rear garden.

21. We find that the sum of £1,103 was reasonable for the work. But was it payable?

22. Here the second of the applicants' objections comes into play. The applicants say that they do not gain any enjoyment from the rear garden. It benefits, they say, New College Court and not College Court and therefore they should not have to pay for it.

23. The respondents disputed this point. On hearing oral evidence from both parties ,the following points seem really not to be capable of argument:

a) It is possible to access the rear garden from the front of College Court either by going through one part of the building, or by passing along a (rather narrow) passageway to the Northwest side of the building;

b) A number of occupants of New College Court also had access to the rear garden: one commercial unit had a rear door which opened onto the garden (and staff appear to use the rear garden during the working day); and a series of residential units had windows that opened onto the garden at a level that allowed entry and exist. We saw a photograph that showed evidence that at least one resident used the rear garden for the drying of washing.

24. There was some dispute about the extent to which the occupants of either property did, in fact, use the rear garden. The respondent's witness suggesting that he not seen substantial use by occupants of New College Court, the applicant's witness saying that he had.

25. Both witnesses admitted that they were not present on the property throughout a typical day (or week) and therefore could not give a complete picture of its usage. It seems to us that both are giving an accurate picture of what they saw. The reality seems to be that the rear garden is used by occupants of New College Court, but that it may also be used by occupants of College Court.

26. It seems to us that actual use of the garden is not the key issue. Under paragraph (viii) the question is whether the rear garden was "made available for use" of the occupants of College Court or, if paragraph (xi) were relied on whether it was "provided for..." those occupants.

27. In support of the proposition that the rear garden was "made available for use...", the respondent directed the tribunal's attention to paragraph 4 of the first schedule to the lease which gave the tenant:

"The right in common with the Lessor and the other lessees of the Buildings to use the communal garden areas or land forming part of the common parts ..."

28. Here there is a problem. The term "communal gardens" is nowhere defined in the lease. Although the lease has a plan attached, there is no marking on it to indicate where the communal gardens might be or any indication as to whether it refers to all or only a part of the rear garden.

29. The freehold ownership of College Court and New College Court is peculiar and, for our purposes, entirely unhelpful. The land is divided into two titles: 62281 and 428923. The line separating the titles runs almost exactly at right angles to the Finchley Road so that both College Court, New College Court and the rear garden appear (roughly half and half) in both titles. Both titles are owned by the respondent.

30. There are, however, two pieces of evidence that may assist:

a) College Court is contained in title number NGL1911265 registered on 17 June 2010. The title plan's boundary runs through the rear garden and encloses about one third of the area that is nearest to College Court.

b) Plans, associated with a planning application made in the early 1930's, show the same boundary line. On one (entitled "block plan") the word "Garden" appears on the College Court side of the line.

31. This evidence – over a period of some 80 years – suggests that there may have been a practice of treating roughly one third of the rear garden as "belonging" to College Court and the other two thirds as forming a part of New College Court.

32. Doing the best we can with a poorly drafted lease, we find that it is more likely than not that "communal garden" in the lease refers to the one third of the rear garden area closest to College Court.

33. It seems to us that the installation of the tap by the respondent represents work that benefits it – in so far as it owns New College Court – as well as the occupants of College Court. That is it provides a benefit for land belonging to the respondent other than the communal gardens.

34. That benefit falls outside paragraphs (viii) and (xi) of the service charge provisions and so the respondent should give the applicants credit for it.

35. For that reason we disallow one half of the relevant costs for the tap on the basis that that is a fair division between College Court and New College Court.

**Retaining wall**

36. The applicants dispute a sum of £62,165, representing the cost of replacing a retaining wall.

37. The respondent says in evidence that, prior to the construction of New College Court, the rear garden was slanted down at an angle of approximately 20 degrees away from College Court. As a part of the work in constructing New College Court, a retaining wall was constructed to prevent that garden collapsing towards New College Court.

38. As a basis for recovering the cost of repairing the wall, the respondent relies on paragraph (ix) of the service charge provisions, which reads:

> "The cost of maintaining repairing and rebuilding (a) all the boundary walls and fences which enclose the Buildings and its grounds and (b) all party structures and roads whose use is common to occupiers of the Buildings and others including occupiers of any garages included therewith."

39. This is again difficult because the phrase "the Buildings and its grounds" is not defined. "The Buildings" is defined as "the Block of flats and all structures ancillary thereto known as College Court Finchley Road Hampstead". No reference is made to the plan for this definition.

40. Clearly the "Buildings and its grounds" must end somewhere. It cannot, for example, include New College Court itself. In our view, and for the reasons we gave in considering the extent of the "communal gardens" the boundary must be found along the Southern edge of the leasehold title.

41. The retaining wall is found entirely outside "the Buildings and its grounds". It is not even a party or boundary structure. As a result the respondent cannot recover for repair work under this heading.

**Boilers**

42. The story of the boilers is an unhappy one. In this decision the installed boilers will be referred to by number with the first new boiler being referred to as "boiler #1".

43. Unfortunately neither party supplied a detailed chronology and the lack of most relevant invoices or receipts makes reconstructing such a chronology difficult. Doing the best that we can, the following account appears to be factually agreed.

**Boiler #1**

44. The original boiler in the building failed in August 2008. A temporary boiler was installed by ISS Advance pending the installation of a new boiler.

45. In order to avoid delay and additional cost, the respondent applied to the (then) Leasehold Valuation Tribunal for a dispensation from the consultation requirements of section 20 for the installation of a new boiler.

46. In their decision (LON/0000AG/LBC/2008/0060), dated 13 November 2008, the tribunal said that the hire cost of boiler #1 was "some £6,000 per month". That figure does not agree with the figure of £4,570 for hire give in the year ended 31 March 2009 accounts, where you would have expected a much larger hire figure. gave dispensation.

47. The respondent was able to find a small amount of paperwork that had not been submitted to the tribunal in advance as it should have been. Some of this related to the hire period of 13 August to 2 September 2008 and including an invoice of £7,166.80 described as "charge for the hire of Temporary Boiler, being supplied and installed..." for that period.

48. That figure appears nowhere in the service charge accounts as one would have expected for an item of expenditure of that size. Nor is it possible to relate that figure to the accounts.

49. It is odd that the respondent did not ask, and has never asked, for a dispensation from section 20 consultation requirements for the installation of boiler #1.

**Boiler #2**

50. The LVT gave a dispensation to the respondent for the installation of a subsequent boiler. It did not endorse any particular contractor for the installation of a new boiler, nor did it make any finding as to reasonableness of service charges.

51. For some reason the respondent's statement of case says "Following the LVT's dispensation, the Respondent installed a temporary boiler in 2009. The function of the temporary boiler was to provide the leaseholders of College Court with hot water until a permanent boiler could be installed." Clearly that is wrong on two counts: the dispensation was given after the temporary boiler was installed and it was in 2008, not 2009.

52. The service charge accounts for the year ending 31 March 2010 have two lines relating to boiler maintenance contracts. One, ending on 31 May 2009 is described as "boiler maintenance contract" and the other, starting on 1 October 2009 is described as "new boiler maintenance contract". So one may infer that boiler #2 was installed around that time.

53. Boiler #2 was then installed by ISS Advance, the same contractors as had installed boiler #1.

54. Unfortunately boiler #2 was inadequate for the purposes of providing hot water and heating to College Court. This appears to be the common position of the parties.

55. It was also the view of the respondent's Regional Executive, a Mr Steven Thomas, a fully qualified gas heating engineer. ISS Advance appear to have accepted that they were substantially at fault because they agreed to settle with the respondent for the sum of £27,000 which sum has been credited to the leaseholders' service charge account.

**Conclusion on boilers #1 and #2**

56. The only sensible conclusion for boilers #1 and #2 is that the service charges spent on them were unreasonably incurred. The boilers were not right for the job and were eventually replaced. The company that supplied them settled on favourable terms with the respondent. The respondent's own expert thought that they were not adequate. It is hard to see how the contrary could be argued.

57. We therefore find that the leaseholders should not have to pay for these costs. It will already be clear that it there is great difficulty deducing what costs, referred to in the service charge accounts, relate to boilers #1 and #2.

58. When giving evidence, Mr Thomas was unable, on being questioned by the tribunal, to give a consistent and coherent explanation that satisfactorily explained all the line items that had been challenged by the applicant.

59. His explanation for this was that the accounts department would have written up the accounts according to criteria of their own which might not match at all the work on the ground as Mr Thomas saw it. This may be true, but it did not assist us.

60. One item challenged by the applicant which clearly should not be disallowed is the cost of oil and filling the temporary boiler with oil, for the rental period. We were presented with no evidence that the amounts charged were unreasonable and it seems to us unanswerable that it was reasonable to incur fuel cost for a heating system on site that was needed.

61. The sums we do disallow are:

| | |
|---|---|
| Installation of new boiler | £18,515 |
| Hire | £4,570 |
| Renewing gas valve | £1,560 |
| Fitting valve | £991 |
| Draining down heating system | £705 |
| Rectifying bad connection | £632 |
| Filling up temporary boiler | £219 |
| Refilling temporary boiler | £193 |
| Filling up heating system | £157 |
| LVT dispensation costs | £2,719 |
| **Total** | **£30,261** |
| Less compensation received | £27,000 |
| **Total reduction** | £3,261 |

62. Boiler #3

63. The respondent appears to have resolved to install a new permanent boiler which would resolve the difficulties that had been faced with boiler #2. As with the installation of boiler #2 their first step was the hire of a temporary boiler (boiler #3).

64. Again, the evidence before us was not entirely satisfactory. The respondent's statement of case says that boiler #3 was hired from 1 April 2011 to 23 June 2011.

65. The service charge accounts for the year ending 31 March 2011 contradict the respondent's statement of case. A line item there is for "hire of temporary boiler" from 22nd April 2011 to 30th June 2011.

66. An invoice (dated 15 July 2011), submitted to the tribunal at the hearing, if for a period from 16 June to 30 June 2011, giving a day rate of £107.28 which is consistent with the fee of £9,012 charged against the hire of temporary boiler in the service charge accounts if the period stated in the accounts is correct.

67. We therefore find that boiler #3 was hired from 22 April 2011.

68. What the respondent has not been able to give a satisfactory account of is why it was hired. The previous boiler, though inadequate, was functioning and had been in place since 2009. There has been no reasonable explanation for the decision to hire a replacement in April 2011, either in its written evidence or in Steve Thomas's testimony.

69. The applicant's expert criticised the hiring of a boiler – pointing out that buying a boiler was usually a cheaper option. There was clearly no particular urgency and, in April, Summer was about to begin when the problems with boiler #2 would have been that much less significant.

70. We therefore disallow the cost of boiler #3 in its entirety.

71. Again, putting a figure on the cost of the boiler hire is not easy for much the same reasons as for boilers #1 and #2. Again, doing the best we can, we have the following figures:

| | |
|---|---|
| Hire of temporary boiler | £9,012 |
| Installing temporary boiler | £10,568 |
| Meeting with the landlord's boiler engineer etc | £4,449 |
| Settlement of dispute with heating engineers | £1,260 |
| **Total** | **£25,289** |

**Boiler #4**

72. About boiler #4 there is some dispute. The respondent's argument is that it was adequate, the applicant says no it was not because:

a) There was no separate temperature control for the heating and the hot water system, meaning that the heating had to be at a much higher temperature than needed. This was both unpleasant and costly.

b) The boiler was an atmospheric boiler and not as efficient as a reasonably priced alternative.

c) The pump serving the hot water generator was insufficient to supply sufficient hot water to the flats.

d) Much new pipe work was uninsulated.

73. It is hard for us to make any proper finding on (b) for insufficient evidence. The respondent has fairly wide discretion as to what system to install and the fact it did not install the most efficient system available is not of itself enough to make the expenditure unreasonable. It is quite possible that this, too, was a ground for finding expenditure unreasonable, but we do not think the applicant has proved its case.

74. We do find for the applicant on (a), (c) and (d). For the following reasons.

75. No survey was carried out to produce a specification and no specification was given to the heating installers. Mr Thomas says he assumed that he would be getting a like for like replacement but that was obviously not what he had got.

76. This seems to us the most serious problem. While landlords do have a wide discretion, they have to exercise it rationally. When spending a sum of money of this size it would, it seems to us, be unreasonable not to produce a specification.

77. Given that this was the fifth boiler to be installed on the premises in roughly 3 years and given the problems that had existed with the previous permanent boiler (#2) it seems incredible that the landlord did not take extra care to make sure that this boiler was correctly specified.

78. We also accept the evidence of the applicant's expert, with which Mr Thomas mostly agreed, that the lack of separate temperature controls meant, in the light of steps that had to be taken to avoid the risk of *legionella* in the drinking water, that heating water had to be at an unreasonably high temperature. We find it inevitable that would lead to higher costs and of course be unpleasant for the tenants of the building.

79. The applicants also complain of higher heating bills as a result of the way in which boiler #4 operated.

80. It seems to us that, taken together, there is sufficient evidence to find that boiler #4 was not appropriate and so the service charges payable by the tenants must be proportionately reduced.

81. We adopt, as a very rough estimate, the 35% increase in heating costs alleged by the tenants for the first year of operation of the boiler (after this the tenants could have taken steps to install a replacement through the RTM company).

82. This seems about right. While there may be other factors in the increased cost, the tenants will also have suffered in other ways. It seems to us that this very roughly reflects the extent to which the landlord's expenditure was unreasonable.

83. The year previous year's price for oil was £8,560. That gives a figure of £2,996.

**Section 20C**

84. In the light of the applicants' general success and the failure by the respondent to produce relevant evidence we consider that it would be just to make a s20C order in respect of all costs arising out of these proceedings that may not, now, be treated as relevant costs for the applicants' service charge bills.

Francis Davey
28 April 2016

## ANNEX - RIGHTS OF APPEAL

1. If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber) then a written application for permission must be made to the First-tier Tribunal at the Regional office which has been dealing with the case.

2. The application for permission to appeal must arrive at the Regional office within 28 days after the Tribunal sends written reasons for the decision to the person making the application.

3. If the application is not made within the 28 day time limit, such application must include a request for an extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.

4. The application for permission to appeal must identify the decision of the Tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal, and state the result the party making the application is seeking.