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MAN/00CG/LSC/2009/0128

**NORTHERN RENT ASSESSMENT PANEL  
acting as  
LEASEHOLD VALUATION TRIBUNAL**

**LANDLORD AND TENANT ACT 1985, Section 27A as amended by the  
COMMONHOLD AND LEASEHOLD REFORM ACT 2002**

**Application for determination of liability to pay service charges**

**Property:** 99 Hawley Street, Sheffield, S1 2EA  
**Applicant:** Ms Nichola Clayton  
**Respondent:** Sheffield City Council  
**Tribunal:** P J Mulvenna LLB DMA (Chairman)  
M G A Hope BSc FRICS

**Date of Hearing:** 23 March 2010

**INTRODUCTION**

1. By an application dated 27 November 2009, the Applicant applied for the determination of the reasonableness and fairness of certain charges included in an invoice served upon her by the Respondent following the execution of repair works.
2. The Respondent has the freehold interest in the Property and is responsible for the management of the building within which the Property is situated.

**THE PROPERTY**

3. The Property is a second floor, two bedroom, self-contained flat in a purpose built three storey block of 6 flats constructed in the early 1900's and situated in the Sheffield City Centre Conservation Area. The block is linked to a neighbouring block with a further 50 flats and, together with a second block, is part of a larger development having a total of 94 flats.

**THE HEARING**

4. Directions were issued by Mrs E Thornton-Firkin, procedural chairman, on 15 December 2009.
5. The substantive hearing of the application was held at the Panel's offices, 5 New York Street, Manchester, on 23 March 2010 at 10.00a.m. The parties had agreed to a determination on papers and neither was present nor represented.
6. The Tribunal had before them the written evidence and submissions of the Applicant and the Respondent.

**THE ISSUE FOR DETERMINATION**

7. The Respondent had served an invoice dated 24 June 2008 on the Applicant for the payment, under the provisions contained in the Lease for the recovery of service and

estate charges, of a proportion of costs incurred by the Respondent in having executed major works to the 94 flats on the entire neighbouring estate.

8. The invoice sought to recover the sum of £6,301.28, being 1/94<sup>th</sup> of the costs considered to be recoverable by the Respondent. The Applicant challenged the reasonableness of the apportionment of the costs generally and the reasonableness both of the cost of and the apportionment of scaffolding and of the 'on-costs' applied to the final account.

#### **THE LEASE**

9. The Property is held for a term of 125 years from 18 February 1991 under a Lease ('the Lease') made on 18 February 1991 between The Sheffield City Council (1) (referred to in the Lease as 'the Council') Karen Burgin (2) (referred to in the Lease as 'the Lessee'). The applicant is the Lessee's successor in title.
10. The Tribunal has read and interpreted the Lease as a whole but in reaching its conclusions and findings has had particular regard to the following matters or provisions contained in the Lease:
  - (a) Recital 1, in effect, defines 'the Building' as 'the block of dwellings...including therein' the Property.
  - (b) Clause 1(B) provides:

'In addition to the rent a service charge (hereinafter called "the Service Charge") to be determined and levied in accordance with the provisions contained in Part III of the said Schedule hereto'
  - (c) Clause 1(C) provides:

'In addition to the rent a charge (hereinafter called "the Estate Charge") being such reasonable contribution as the Council shall from time to time require (hereinafter referred to jointly as "Contributions" and individually as a "Contribution") to the costs expenses and outgoings lawfully incurred or to be incurred by the Council in respect of the upkeep or regulation for the benefit of the locality (that is to say the Housing Estate of the Council) of which the Building forms part or any part of such locality of any land building structure works ways or watercourse such Contributions to be made in respect of such of the benefits to the said locality or part thereof of the type described in the column headed "The Benefit Referred to" of the SCHEDULE OF BENEFITS hereto annexed as are indicated by means of a tick or the word "Yes" or other affirmative indication in the column headed "Where applicable or not" thereof as being applicable to such locality or part thereof and such Contributions to be determined in accordance with Part IV of the said Schedule hereto and collected by the City Treasurer or other duly authorised officer of the Council'
  - (d) The Schedule of Benefits has affirmative indications in respect of –
    - (i) provision and running costs of community rooms/community centres;
    - (ii) provision of city wide alarm facility;
    - (iii) admin charge.

(e) Clause 3 contains covenants by the Lessee, including:

(i) at (1)(b):

'To pay upon demand being made therefor by the Council the Service Charge and the Estate Charge at the times and in manner hereinafter provided'

(ii) at 29:

'Subject (so far as applicable) to the provisions of paragraphs 16A to 16D and 18 of Schedule 6 of the 1983 Act to pay to the Council from time to time as part of the Service Charge a reasonable part of the costs and expenses which the Council may from time to time incur or estimate to be incurred in carrying out repairs and improvements to the structure and exterior of the demised premises and the Building (including drains gutters and external pipes) and making good any defect affecting that structure and keeping in repair'

(f) Clause 4 contains covenants by the Council, including at (3):

'To keep in repair (the definition of repair where appropriate including decorative repair) and (if desirable in the opinion of the Council) to improve (a) the structure and exterior of the demised premises and of the Building (including drains gutters and external pipes) and to make good any defect affecting that structure.'

(g) Part III of the Schedule to the Lease contains the following provisions in respect of the service charge:

1. The Service Charge payable by the Lessee shall be a fair proportion to be determined by the City Treasurer or other duly authorised officer of the Council (in accordance with such formula as the City Treasurer or other duly authorised officer of the Council shall determine) of all costs expenses and outgoings incurred or estimated to be incurred by the Council in respect of or for the benefit of the Building (such fair proportion representing that part of the said costs expenses and outgoings incurred or to be incurred by the Council in complying with their obligations contained or implied herein for the benefit of the Lessee insofar only as such costs expenses and outgoings may lawfully be recovered from the Lessee)

2. The aforementioned obligations on the part of the Council in respect of which the Service Charge shall be attributable and paid by the Lessee in respect of the demised premises are (but not by way of limitation) as follows:-

(A) Keeping in repair and improving the structure and exterior of the demised premises and the Building (including drains gutters and external pipes) and the making good of any defect affecting that structure

(B) Keeping in repair and improving any other part of the Building and any other property over and in respect of which the Lessee has been granted rights under or by virtue of the provisions herein contained Provided that the foregoing paragraphs (A) and (B) shall only apply insofar as such costs expenses and outgoings may be recovered from the Lessee in accordance with the provisions of the 1985 Act

(C) The obligation implied herein by virtue of paragraph 14(2)(c) of Part III of Schedule 6 of the 1985 Act to ensure as far as practicable that any services which are hereby to be provided by the Council and to which the Lessee is hereby entitled (whether by the lessee alone or in common with others) are maintained at a reasonable level and to keep in repair and (if desirable in the opinion of the Council) to improve any installation connected with the provision of those services

(E) The administrative costs (including accounting audit and management costs) of managing the Building including the costs of employing and paying employees of the Council or professional advisers agents or contractors in and about the performance of any of the obligations on the part of the Council in this Lease contained or implied'

(h) Part IV of the Schedule has the following provision in respect of the estate charge:

'(iii) Each Contribution shall be determined by the City Treasurer or other duly authorised officer of the Council before the commencement of each accounting year as being a reasonable amount of the said costs expenses and outgoings referred to in Paragraph (C) of the reddendum of this lease which the said City Treasurer or other duly authorised officer of the Council shall prior to each such determination estimate to be incurred by the Council in the forthcoming accounting year

AND such reasonable amount shall be determined by the City Treasurer or other duly authorised officer on the basis indicated in the column headed "Basis of Charge" of the said SCHEDULE OF BENEFITS'

## **INTERPRETATION OF LEASE**

11. Three aspects of the Lease call for particular interpretation in relation to consideration of the Application:

(a) The service charge payable by the Applicant is 'a fair proportion ...of all costs expenses and outgoings incurred or estimated to be incurred by the Council in respect of or for the benefit of the Building...' The Tribunal has determined that this means the immediate building (89-99 Hawley Street), comprising six dwellings, within which the Property is situated. Any other construction of the provision would render the Lessee liable to contribute to costs which provide little or no direct benefit. Accordingly, 'a fair proportion' means 1/6<sup>th</sup> of the 'costs expenses and outgoings incurred or to be incurred by the Council in complying with their obligations contained or implied herein for the benefit of the Lessee insofar only as such costs expenses and outgoings may lawfully be recovered from the Lessee.'

(b) References to the 1985 Act are references to the Housing Act 1985 (see Recital (2)). The Lease does not qualify or limit the application of the Act wherever it is referred to, as it does not use such words, for example, 'as amended from time to time' or 'for so long as the same might remain in

force'. The intention of the parties must, therefore, have been to be bound by any provisions expressly included in the Lease as they stood at the time the Lease was completed. The Tribunal rejects the Respondent's submission that, because the Act has been repealed, the provisions expressly included in the Lease no longer apply. Any other construction, particularly in respect of the provisions mentioned above, would be to dilute the Respondent's obligations. It could not have been intended that such consequence would follow.

- (c) The estate charge does not apply to the matters included in the Application. It is clear from the Schedule of Benefit that none of the affirmative indications in that Schedule relate to the works included in the challenged invoice.

#### **THE DETERMINATION AND DECISION**

12. The Tribunal considered the evidence and relied on its own knowledge and expertise to construe the Leases and decide, upon a proper construction, as regards what costs could properly be recovered as part of the service charge.
13. The Tribunal first considered the nature and extent of the works executed by or on behalf of the respondent to determine the fairness of the challenged costs generally and their apportionment between the occupiers. The Tribunal had regard to two aspects in this respect: the need for the works and the context within which they were planned and undertaken.
14. In relation to the need for the works, the Tribunal found, on the basis of the evidence before it, that the need for works of such a major and expensive scope had arisen as a direct result of the negligence of the Respondent in failing to comply with the Council's covenants under the Lease. The covenant is 'to keep in repair ... and (if desirable in the opinion of the Council) to the Building (including drains gutters and external pipes) and to make good any defect affecting that structure.' The covenant is a contractual obligation which gives rise to a duty to act reasonably and in a way which safeguards the financial interests of the parties.
15. The memorandum dated 7 February from Dr M Seaton, Structures Section, Design & Project Management, Development Services, to Mr M Beesley, Building Maintenance Unit, Sheffield Homes, says that,

'The main concern with the chimneys is durability. There is considerable vegetation growth, which if left unchecked, will cause mechanical damage to the brickwork...It is anticipated that the scope of remedial work will consist of raking out and re-pointing the mortar joints, new flaunching to the top of the stacks, re-bedding cowls if necessary and removal of all vegetation.'

In the event, the damage was worse than anticipated and chimney stacks had to be demolished and rebuilt.
16. A diligent lessor, aware of the contractual obligations should have had systems in place which would have identified the vegetation growth at an early stage, recognised the deterioration and been pro-active in dealing with the remedial work. There is no evidence that this was the case. It appears that, in order to cause the measure of deterioration present, the vegetation must have been growing for some time. It should

have been addressed earlier and, if it had been, continuing care could have been achieved by the use of more modest means, such as a scaffold tower.

17. The works were undertaken under the aegis of the Decent Homes programme. Insofar as relevant to these proceedings, the Department for Communities and Local Government publication 'A Decent Home: Definition and guidance for implementation June 2006 – Update' explains the programme in the following terms:

'1.2 Tremendous progress has been made in delivering the Decent Homes programme, with over half the task being completed and with the last few local authorities putting in place their programmes for delivery. The Decent Homes programme has already made a real difference to the lives of tenants by not only making improvements to social housing but also through improved services....

1.3 In revising this guidance, the Department for Communities and Local Government is setting out how it sees social landlords building on the success of the programme working more flexibly to go beyond the Decent Homes programme to undertake more radical solutions to transform some of the poorest neighbourhoods into mixed, sustainable communities.

1.4 A number of local authorities and RSLs have already adopted a mixed communities approach. New homes are being built alongside those that are refurbished and landlords are expanding housing opportunities within communities to enable people to move home without moving out of their community. All engaged in this transformation know it takes time to get it right; major change cannot be achieved in a few years. We believe local delivery agencies need to ensure they are pursuing a mixed communities approach alongside decent homes.

1.5 We also want to encourage local authorities ALMOs and RSLs to ensure they are considering the need for new build in their area alongside decent homes, including the use of section 106 and local authority land as well as social housing grants.

1.6 Delivery agencies need to continue to ensure they are getting value for money and meeting the high performance standards expected of the programme. Crucial to this is the continued involvement and empowerment of local tenants.

4.8 The standard applies to all social housing – *except leasehold and shared ownership properties...*

4.9 Although leasehold and shared ownership properties are excluded from the social sector side of the target, they can be included as part of the private sector if the properties are occupied by vulnerable people. Landlords may also choose to include certain properties in the work programme due to special circumstances.

6.26 Vulnerable households have been defined for the purposes of the Decent Homes

standard as a whole as those in receipt of at least one of the principal means tested or disability related benefits.’

18. It is evident that the Decent Homes programme is envisaged as a means by which local authorities (and other social landlords) pursue the discharge of their housing function. It is to be observed that, unless there is vulnerability or special circumstances, leaseholders are expressly excluded from the public sector side of the programme’s target. There is no evidence that the Applicant is vulnerable nor of any special circumstance. The Property should not have been included in the Decent Homes programme.
19. This aspect is central to the issues before the Tribunal. The Respondent’s powers and duties as a Local Housing Authority are different in scope and nature to the contractual obligations of a lessor. First, a Local Housing Authority has an interest in wider matters than merely the structure of property. There is an interest in building cohesive and sustainable communities for which the provision of residential accommodation is integral. The obligations of the Council as a lessor are no different than those of any other landowner. In particular in this respect, the expenditure incurred by a local housing authority is not necessarily reimbursed directly by the tenants who receive the immediate benefit. By capitalising expenditure and spreading costs throughout the housing revenue account, tenants can be protected from extreme rent swings. In relation to the position of lessees, there is no such protection. A local authority must, therefore, in common with all other lessors, act reasonably and responsibly so as not to place an unacceptable burden on lessees.
20. Applying these principles to the challenged expenditure in the present case, it is evident that the Respondent did not exercise the appropriate degree of care. The extent of the scaffolding used should have been avoided for the reasons given in paragraph 16 above. Moreover, the Tribunal is concerned that the appointed scaffolding contractor was the only one who submitted a quotation for the work. There is no evidence of an objective assessment of value for money. If the Respondent had acted responsibly in relation to the obligation to repair imposed by the Lease, the work required would have been localised and could have been undertaken by using a scaffold tower, although the Applicant would have been required to contribute to the earlier but smaller costs of repair. The Tribunal has determined that a fair and reasonable charge would have been in the order of £600.
21. The on-cost is based on a 2004 schedule of rates produced for the Decent Homes programme and includes ‘preliminaries for each phase, partnering fee and a proportionate share of the yearly strategic preliminaries relevant to the Decent Homes contract.’ It appears that the on-cost is so high, at least in part, because of the need to renegotiate the base rates to ensure continuing cost-effectiveness for the contractor and acceptability under the Decent Homes contract. That might be an acceptable stratagem for the Decent Homes programme, but it is not for the calculation of a fair and reasonable proportion of the costs to be borne by a lessee. The Tribunal’s experience is that on-costs for work of this nature are generally in the order of 15-25%. There is no evidence of exceptional or unusual features, other than those that might arise from the Decent Homes programme. The Tribunal considers that an on-cost of 20% would be fair and reasonable.

22. The Respondent has recalculated the service charge based on a proportion of the costs incurred in relation to 89 – 99 Hawley Street (the basis upon which the Tribunal finds that the calculation should have been made) as being £4,774.13. The Tribunal calculates this as including £2,023.95 as a contribution to the scaffolding costs and £1,157.36 representing 32% on-cost. These amounts should be deducted and replaced, in accordance with the Tribunal's findings above, i.e., by £600 in respect of scaffolding and an on-cost of 20% (£443.56). A fair and reasonable service charge for the works on that basis would have been £2,636.38.
23. The Tribunal would add that there is no evidence that the invoice which is in the nature of a service charge demand, complies with The Service Charges (Summary of Rights and Obligations, and Transitional Provision) (England) Regulations 2007. It is arguable that there is no obligation to pay, although the defect could be remedied by the issue of a fresh demand in compliant form.
24. The Tribunal is aware of the wide implications of this decision for the Respondent, but there are also significant, and potentially expensive, implications for those who have exercised the right to buy flats, maisonettes and apartments. The Respondent should recognise the distinct and separate obligations of a freeholder relative to those of a social housing provider and, in each case, review the exercise of those obligations, take account of any failure in the duty of care and ensure that any recharges do not include contributions to expenditure incurred in the pursuance of policies, such as the Decent Homes programme, which have wider application than the maintenance, repair or renewal of the fabric or relevant internal features of the building to which the lease relates.

## **COSTS**

25. Neither party asked for an order for costs to be awarded against the other. The Tribunal did, however, consider the power to award costs under paragraph 10 of Schedule 12 to the Commonhold and Leasehold Reform Act 2002 which provides:
- ‘(1) A leasehold valuation tribunal may determine that a party to proceedings shall pay the costs incurred by another party in connection with the proceedings in any circumstances falling within sub-paragraph (2).
- (2) The circumstances are where—
- (a) he has made an application to the leasehold valuation tribunal which is dismissed in accordance with regulations made by virtue of paragraph 7, or
- (b) he has, in the opinion of the leasehold valuation tribunal, acted frivolously, vexatiously, abusively, disruptively or otherwise unreasonably in connection with the proceedings.
- (3) The amount which a party to proceedings may be ordered to pay in the proceedings by a determination under this paragraph shall not exceed—
- (a) £500, or
- (b) such other amount as may be specified in procedure regulations.
- (4) A person shall not be required to pay costs incurred by another person in connection with proceedings before a leasehold valuation tribunal except by a

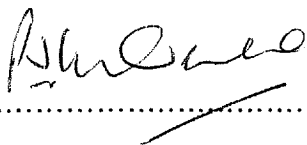


determination under this paragraph or in accordance with provision made by any enactment other than this paragraph.’

26. The Tribunal did not consider that any of these circumstances arose in this particular case and concluded that it would not be appropriate to award costs to either party.
27. Regulation 9 of the Leasehold Valuation Tribunals (Fees) (England) Regulations 2003 provides:
  - ‘(1) Subject to paragraph (2), in relation to any proceedings in respect of which a fee is payable under these Regulations a tribunal may require any party to the proceedings to reimburse any other party to the proceedings for the whole or part of any fees paid by him in respect of the proceedings.
  - (2) A tribunal shall not require a party to make such reimbursement if, at the time the tribunal is considering whether or not to do so, the tribunal is satisfied that the party is in receipt of any of the benefits, the allowance or a certificate mentioned in regulation 8(1).’
28. The Tribunal has reviewed all the evidence in this case and is satisfied that the Respondent should have reviewed the position properly and fully on receiving the various representations from the Applicant. In choosing to continue to pursue the matter in the way they did, the Respondent left the Applicant with no choice other than to make the application. In these circumstances, the Tribunal directs that the Respondent reimburse the Applicant’s fees in full.

**ORDER**

1. That the disputed service charge be reduced to £2,636.38.
2. That the Respondent reimburse the whole of the fee paid by the Applicant in respect of this reference.

Signed.....

P J Mulvenna

Chairman

6 April 2010