

**Leasehold Valuation Tribunal for
Eastern Rent Assessment Panel**

File Ref No: CAM/22UJ/LSC/2004/0015

Leasehold Valuation Tribunal: Decision

Landlord and Tenant Act 1985 ("the Act")

Tribunal Members:

Mr John Hewitt	Chairman
Mr Richard Marshall	FRICS, FAAV
Mr John Power	FRICS, FCI Arb

The Premises:

156 Milwards, Harlow, Essex CM19 4SH ('the Flat')

The Applicant:

Ms Shirley Neal

The Respondent:

Harlow District Council

Appearances:

Ms Shirley Neal
Mrs Anne White

Ms Elaine Bell, Solicitor, HDC
Ms Lynn Potter, Manager, HDC
Ms Kathy Conway, Service Charge
Officer, HDC (part time)

Hearing:

11:00 Thursday 29 July 2004, at Old Harlow Churchgate Hotel, Churchgate
Street Village, Essex CM17 0JT

Introduction

1. In April 2004 the Applicant made an application dated 26 April 2004 pursuant to s27A of the Act seeking a determination of the reasonableness of the estimate for service charges for the Flat for the service charge year 2004/5, and an associated application pursuant to s20C of the Act. (pp1-7)
2. The Flat is a [2] bedroom ground floor flat in a block of 4 flats on the Milwards estate, and formerly it comprised part of the Council's housing stock. Under the Right to Buy scheme provided for in the Housing Act 1985, a long lease of the Flat was granted by the Council in July 1989. The lease was assigned to the Applicant in February 2004.
3. Prior to the hearing, the Tribunal was provided with a page numbered trial bundle containing material papers. Later reference in this Decision to a page number, is a reference to the page number of the trial bundle. Some additional papers were provided during the course of the hearing.
4. The lease provides, in paragraph 6 of Schedule G (p31) a provision for arbitration in the event of disputes as to the amount(s) payable in respect of service charges. Both parties waived their respective contractual rights to arbitration and requested the Tribunal to determine the issues between them.
5. The service charge history and current estimate as produced to the Tribunal can be summarised conveniently as follows:

	2000/01 Actual	2002/3 Actual	2004/5 Estimate
Basic Part			
Amenity cleansing, mtce grounds, roads & paths	£104.23	£ 56.96	£ 59.85
Landlord's lighting	£ 21.97	£ 22.84	£ 31.21
Insurance	£ 35.00	£ 50.61	£ 52.77
Management costs	£130.96	£113.94	£143.48

Specific Part

Mtce (Running repairs)	£ 20.81	£ nil	£100.00
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6. The Applicant told us that the amount for the estimate of the cost of insurance was not challenged. Accordingly the Tribunal focussed only on those matters that were challenged.

7. The Tribunal was able to inspect the exterior of the Flat and the Milwards estate shortly prior to the hearing. The Tribunal found the block in which the Flat is located to be generally in good order and well kept with cream painted exterior walls. The Applicant told us that a small grassed area around part of the block was mown by the Council from time to time, but that she had planted and tended the small flower beds around the Flat. The block enjoys a discrete garden/drying area which is tended by the four tenants collectively. A shed has been constructed and flower beds and tubs/window boxes planted. The Applicant said that the Council does not provide any services to this area. This summary of our inspection was explained to Ms Bell at the hearing. It was not challenged.

The Lease Structure

8. The Lease (pp8-32) is dated 24 July 1989 and was granted by the Council to Terry Bryan Brennan and Lesley Ann Brennan. It granted a term of 125 years from 18 April 1988 at a ground rent of £10 pa.
9. Key definitions in the lease, which the Tribunal adopts in this Decision are (pp 9-10)
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|---------------------------|---|
| the Act | <i>the Housing Act 1985 as amended by the Housing and Planning Act 1986</i> |
| the Property | <i>the block of flats...known as 154-157 Milwards...and the associated grounds and outbuildings</i> |
| the Flat | <i>the flat...numbered 156 on the ground floor of the Property...</i> |
| the Estate | <i>the Council's housing estate known as Milwards Harlow</i> |
| the Service Charge | <i>the charge payable by the Purchaser under clause 4(b) of this Lease in respect of services repairs maintenance insurance and the Council's costs of management as detailed in Schedule G to this Lease</i> |
10. Clause 4(b) of the lease (p10) comprises a covenant on the part of the Purchaser
- to pay the Service Charge assessed in accordance with Schedule G...by monthly instalments in advance and on account thereof in such amounts as the Treasurer to the Council may from time to time determine*
11. Schedule B to the lease (pp22-24) sets out a number of rights granted to the Purchaser. [None of these rights are material for present purposes.]
12. Schedule G to the lease (pp29-32) is clearly important. It is divided into six paragraphs. Material to present purposes are the following

- (1) *the Service Charge is payable for:-*
- (i) *the running costs of the services and facilities specified in Schedule B to this Lease;*
 - (ii) *repairs (not amounting to the making good of structural defects) carried out to the Property (including the Flat) by the Council in pursuance of its obligations under this lease;*
 - (iii) *the making good of structural defects specified in Schedule E to this Lease of which the Council does not become aware within five years from the date of this Lease;*
 - (iv) *maintenance (not amounting to repair) by the Council pursuant to its obligations under this Lease of*
 - (1) *those parts of the Property which the Purchaser may use (in common with others) by virtue of Schedule B;*
 - (2) *the structure and exterior of the Property (including the Flat);*
 - (v) *the repair and maintenance of installations connected with the provision of the services and facilities specified in Schedule B to this Lease;*
 - (vi) *the Council's costs of management of the Property;*
 - (vii) *insurance against risks... etc [not in dispute]*
 - (viii) *further insurances...etc [not in dispute]*
 - (ix) *maintenance replanting and reconstruction of the grounds associated with the Property;*
 - (x) *the repair maintenance and replacement by the Council of any of its fixtures or fittings in the Flat;*
- (2) *The Service Charge shall relate to the Council's financial year and in this Schedule 'year' shall mean the Council's financial year [evidently the year runs from 1 April to the following 31 March]*
- (3) (i) *The Service Charge shall be calculated in three parts namely the basic part, the specific part and the advance payments part*
- (ii) (1) *The basic part shall consist of those costs of the Council which relate not only to the Property but also to other properties held by the Council under Part II of the Act*
 - (2) *The identification calculation and apportionment of costs the calculation of the basic part shall be carried out by the Treasurer to the Council*
 - (iii) *The specific part shall consist of those costs which relate only to the Property and are specifically identifiable within the accounting system employed from time to time by the Council*
 - (iv) (1) *The advance payment...etc [not material]*
- (4) *As soon as practicable after the end of each financial year the Council shall calculate the Service Charge for that year and any necessary adjustments shall be made to reflect the difference between the Service Charge and the total paid by the Purchaser under clause 4(b) in respect of that year*

(5) - (6) [not material]

The Sums in Issue

The Basic Part

Amenity Cleansing and maintenance of grounds	£ 59.85
Landlords lighting	£ 31.21
Management costs	<u>£143.48</u>
Total	<u>£234.54</u>

Amenity Cleansing and maintenance of grounds

13. The Applicants case is that this relates to ad hoc cleaning of council estates and properties throughout the town, to include costs of steam cleaning, heavy cleansing, provisions of bins/skips, collection of overflow refuse, litter picking etc. She says that this has no bearing to the Flat or to the Property and the costs claimed are not covered by the lease. The Applicant said that she gets no benefits from these services provided to other parts of the town and she does not see why she should contribute to the cost of them. She said that she pays for street cleaning through her council tax. She should not have to pay twice over. The Applicant acknowledged that a small amount of grass cutting to the area immediately outside the Property is carried out by the Council and also she has seen some litter picking carried out on the Estate. The Applicant says that she has never seen the streets on the Estate being swept. The Applicant is disabled, does not go out to work and it at home for most of the time. She says that precious little is actually done to the Flat or to the Property. The grass cutting is poorly carried out, cuttings are not collected and weeds within the grass allowed to flourish.
14. Ms Bell for the Council acknowledged that amenity cleansing was not expressly mentioned or referred to Schedules B or G to the lease. Ms Bell submitted that the expenditure was covered by paragraph 3(ii)(1) of Schedule G as it was '*costs... which relate to other properties held by the Council under Part 11 of the Act*'.
15. Ms Potter gave evidence on behalf of the Council. Ms Potter confirmed that her witness statement dated 30 June 2004 (pp41-43) was true. Ms Potter told the Tribunal that the total housing stock in Harlow, both public and private was approximately 28,592. Of these 21,674 are or were in the public sector. The Council originally had 6,281 flats, of which 2,328 have been sold off under the Right to Buy scheme.
16. Ms Potter produced the Council's published estimate for the Flat for expenditure for the year 2004/5 (p73-74).

The document stated that there were three elements:-

Amenity Cleansing & Maintenance of Grounds	£14.13
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Various ad hoc heavy cleansing works throughout the town, including the placing of skips for overflow refuse, contract steam cleaning of dustbin areas and gully cleaning

Evidently the cost is ascertained by reviewing previous expenditure, estimating the cost for the year and dividing the resulting sum by 21,674. The costs incurred are debited to the Housing Revenue Account ('HRA') The HRA is funded by rental income from Council owned domestic properties, service charges from former council flats now let on long leases and from amortised income from capital payments made by purchasers of freehold houses under the Right to Buy scheme.

Ms Potter agreed that the service was town wide and thus of benefit to all residents, both those on private estates as well as those on council estates. Ms Potter said that the streets on the Estate were swept four times per year. All residents pay (or, at least should pay) council tax. Ms Potter was not able to explain to the Tribunal whether a special levy was made to residents on private estates, or whether the expense was recovered through council tax.

Maintenance of Grounds

£45.72

This charge represents a proportion of the costs incurred by Harlow Council in carrying out normal maintenance to the whole of the estate, not simply within the curtilage of the block

Ms Potter thought, but was not entirely certain if the 'estate' mentioned here was the whole of the Council's estate of properties or just the 'Council housing estate'.

The sum was ascertained by adding together

Litter picking

HRA	£ 37,750
General Fund	£ 19,420

Landscaping

C E C (HRA)	£ 64,340
Grounds Maintenance (HRA)	£752,230
Landscaping general fund	<u>£433,370</u>

Total

£1,307,110

and dividing by 28,592, being the housing stock plus private areas under the contract.

Landlords Lighting

£31.21

A recharge of costs incurred by Harlow Council in lighting communal areas and access ways to the block.

Ms Potter explained that the Housing Accountant estimates the expenditure and it is then divided by the total number of flats (both rented and sold flats) to produce a unit cost.

Ms Potter explained that the Council has over 700 blocks of flats, many are small as the Property, but some are tower blocks. For reasons of economy, the costs are borne centrally and then recharged on a unit basis.

The Applicant explained that the Property has 5 communal lights, but 1 is not currently working. The Applicant accepted that bulbs are changed when required and the units repaired from time to time. The Applicant considered that the cost to the block 4 x £31.21 equals £124.84 per year is excessive for the 4 lights that work.

Management Costs

£143.48

Ms Potter explained the expenditure covered the Council's costs in running the Service Charges system, and contributions to Financial Services Department, Housing Strategic Resources and the Legal and Property services.

The costs are estimated based on staff costs and overheads, the total is then divided between the number of sold flats to give a unit cost. This was then recharged.

The Applicant asserted that the sum estimated was unreasonable. The Property in fact received very little by way of services, limited to some grass cutting, communal lighting and the management of insurance. Given the limited range of services actually provided to the Property, the estimated charge was too high.

Ms Potter accepted that 'actual' costs were not calculated, and that no weighting was given to trouble free blocks, such as the Property. Ms Potter accepted that some blocks were more troublesome, and hence more expensive to manage, than others. She explained that the overhead cost of carrying minute calculations would be very time consuming and would not be cost effective. The Council therefore preferred a broad brush approach which it believes provides a more economic solution for its lessees.

The Specific Part

£100.00

17. This item covers routine maintenance works that might be carried out to the Property during the year. The estimate of £100 is the Council's minimum estimate for small blocks. Ms Potter accepted that historically expenditure on the Property was not substantial, but the figures for 2003/4 were not yet available. She explained that one never knows what work might be required. Ms Potter believed it to be a sensible provision. The balance of any estimate not actually expended was credited back to the lessee in the following year.

The Law

18. One of the issues raised is whether the landlord is entitled to recover, through the service charge, expenditure proposed in respect of the basic part, especially amenity cleansing. To resolve this requires the relevant provisions of the lease to be construed.
19. We believe it is trite law that a lease has to be construed in the same way as any other commercial contract. Words used must be given their ordinary natural meaning in the context, and when the transaction was entered into. It is also trite

law that a tenant is only obliged to pay what the lease provides for him to pay. See *Riverplate Properties Ltd v Paul* [1975] Ch 133.

The well known passage of Taylor LJ in *Sella House Limited v Mears* [1989] 1 EGLR 65 in the context of discussing an obligation on the part of a tenant to contribute to landlords costs, is as follows

'For my part, I should require to see a clause in clear and unambiguous terms before being persuaded that that result was intended by the parties.'

The approach to construction of a service charge provision in a residential lease was reviewed in *Gilje v Charlesgrove Securities Ltd* [2001] EWCA 1777, where ambiguous provisions were looked at in respect of a notional rent on the caretaker's accommodation. Laws LJ said

'On ordinary principles there must be clear terms in the contractual provisions said to entitle him to do so. The lease, moreover, was drafted or proffered by the landlord. It falls to be construed contra proferentem.'

In the same case Mummery LJ said

'First, I note what is stated in paragraph 55 on page 71 of the 5th Edn of the Encyclopaedia of Forms and Precedents Vol 23 on Landlord and Tenant in the section relating to the drafting of provisions in leases for services charges. It is stated as follows:

'The draftsman should bear in mind that the courts tend to construe the service charge provision restrictively and are unlikely to allow recovery for items which are not clearly included.'

He went on to say

'The proposition is obvious. ...Indeed the proposition reflects a particular application of the general principle of construction in the contra proferentem rule.'

20. Ms Bell for the Council accepted that for a service obligation to be binding on a lessee, it must be in clear and unambiguous terms.
21. Applying the appropriate test, it seems to the Tribunal that the service charge regime in the subject lease was that the items of recoverable expenditure were set out in, or alluded to clearly in, para (1) of Schedule G. Paragraphs 2, 3 & 4 of the Schedule then went on to provide the process by which the recoverable expenditure would be calculated and paid by the lessee and any overpayment/underpayment dealt with.

Accordingly if 'amenity cleansing' was intended to be included and to be recoverable expenditure we would have expected to see clear reference to it in para (1) of Schedule G. There is no such reference to it.

Ms Bell submits that it is recoverable expenditure by the words '*costs of the Council... which relate... to other properties held by the Council under Part II of the Act*' to be found in paragraph 3(ii)(1) of Schedule G. We reject this submission for following reasons:-

1. It is not at clear what 'costs' are referred to in para 3(ii)(1).
2. It limits such costs - whatever they might be - to costs associated with 'other properties'. These properties have not been identified. It is clear that such properties must be housing properties to come within Part II of the Act.
3. The expression is so vague that it could not possibly have been in the contemplation of the original parties to the lease when it was negotiated in 1989, that costs might be included in relation to unspecified services to unspecified properties across the town.
4. The Tribunal concludes that the correct interpretation is that when calculating the costs of recoverable expenditure the Council may include costs of other properties, as e.g when it calculates a unit charge for sharing management costs or lighting. We do not consider that the expression can be used to bring into account costs which are not specifically recoverable costs under paragraph 1 of Schedule G.

Findings

22. Before setting out our findings the Tribunal wishes to make it clear that this is an application under s27A (3) of the Act as to the reasonableness, or otherwise of the estimate of costs likely to be incurred. We make our findings on the basis of the evidence before us and our knowledge and expertise in service charge matters. We are considering only the reasonableness of the estimate. In due course, at the end of the service charge year the actual costs will be claimed by the Council. At that time further information may be available about them. If there is a challenge to them, another Tribunal, hearing different evidence may well come to a different conclusion.

The Basic Part

23. Amenity Cleansing

£14.13

In the light of our construction of the lease we do not consider this to be a recoverable head of expenditure and therefore it ought not be included in the estimate. We therefore disallow it.

If we are wrong on our construction of the lease, we would have grave doubts about the reasonableness of the charge. The Council's evidence was not at all clear on the difference between street cleaning carried out by the Council and paid for through council tax, and the cost of the street cleaning it seeks to put through the service charge account. The Applicant is a council tax payer and is entitled to the benefit of the general services available to all council tax payers. We would therefore urge the Council to review this question in any event and clarify it for the benefit of the Applicant.

Maintenance of Grounds**£45.72**

We find that the expenditure is recoverable in principle because it comes within paragraph (1)(ix) of Schedule G. The Applicant accepts that the grass around the Property is cut from time to time and litter is picked up. We find that costs incurred across the wider estate of the Council can be brought into account by reason of paragraph 3(ii)(1) of Schedule G. The accounts presented by the Council were complex and difficult to follow. It is not easy to ascertain exactly what historic expenditure has been brought into account to make the current estimate. When presenting final account figures to justify the actual expenditure, we would urge the Council to present them in a more readily understandable way. We consider that this would enable lessees to more easily consider the justification of the sums claimed.

Landlords Lighting**£31.21**

We find that the expenditure is recoverable in principle and that it falls within paragraph 4(vi) of Schedule B and paragraph (1)(i) of Schedule G. We have sympathy with the Applicant's argument. At first blush £140 for the Property for the year might seem to be a little on the high side for 4 working lights. The Applicant accepts that bulbs are changed and repairs carried out to the units from time to time.

The figures produced by Ms Potter in her evidence support the estimate. We consider that the unit cost approach is reasonable and appropriate to provide a cost effective way to apportion the costs incurred. We find the estimate to be a reasonable estimate. We allow it.

Management Costs**£143.48**

We find that the expenditure is recoverable in principle and comes within paragraph (1)(vi) of Schedule G. We accepted the financial information provided by Ms Potter was reasonable for the purposes of preparing an estimate. Again however, the information was presented in a complex format. Moreover, it seems to us that some of the historic expenditure used to support the estimate might not be properly included. For example there seems to be included 'House sales & Leaseholders'. This was not broken down for us. It is not clear to us if the 'costs of negotiating current sales' is included. If it was we doubt it would constitute recoverable expenditure within the terms of the lease of the Flat. We would not normally expect that the cost of selling stock is a cost of management of previously sold stock. The potential for argument is not so significant as to affect the reasonableness of the current estimate. We would urge to Council to review critically the components that go into establishing costs of management to ensure that only costs payable within the terms of the lease are included. We would also urge that when final accounts are prepared the supporting materials are presented in a clear and readily understandable format.

The Applicant considered the estimated cost to be unreasonably high having regard to the minimal services actually provided to the Property. In our experience this is not so. A commercial managing agent asked to take on a small block of 4 flats is unlikely to do so at a unit cost of less than £125 plus VAT. Such an agent is unlikely to take on a block on the basis of a percentage

of annual expenditure. In any event such an approach does not always operate to the tenants benefit as there is little incentive to minimise expenditure. We accepted Ms Potter's evidence that the unit cost of management approach is more cost effective across the board, rather the incurring the substantial cost of detailed accounts to establish actual costs of management of a particular block. Inevitably there must be winners and losers of such an approach. The Applicant would seem to be a loser in that the Property is well kept by the four tenants and needs little external management from the Council. Whilst we allow the sum claimed as an estimate, we would suggest that the Council might review its policy to see whether some form of weighting might be awarded to those blocks which historically receive modest services or management input.

The Specific Part

£100

24. It was not in dispute that this was a recoverable item of expenditure within paragraph (1) of Schedule G. We acknowledge and accept the Applicant's evidence that historically the actual costs incurred have been modest. The costs for 2003/4 are not yet available. We also accept the evidence of Ms Potter that £100 is a standard minimum estimate which is reasonable given that it is unknown what costs might be incurred and that there is potential for a significant sum to be incurred. We also note that this sum is just an estimate and that if it is unspent the Applicant will be credited. In all of the circumstances, we find that the sum of £100 is a reasonable estimate.

Summary

25. To summarise we find that the reasonable estimate for the Service Charge payable by the Applicant for the year 2004/5 is as follows:-

Basic Part

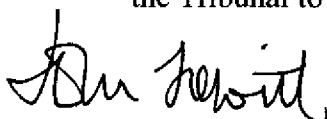
Maintenance of grounds	£ 45.72
Landlord's lighting	£ 31.21
Management costs	£143.48
Insurance	£ 52.77

Specific Part

Maintenance	£100.00
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Section 20C Application

26. The Applicant withdrew the application and therefore it was not necessary for the Tribunal to make any determination on it.



John Hewitt
Chairman
10 August 2004