

Leasehold Valuation Tribunal
London Rent Assessment Panel
Landlord and Tenant Act 1985 sections 27A and 20C

LON/00BD/LIS/2006/0087

Address: 72 Meadowside, Cambridge Park, Twickenham, Middlesex TW1 2JQ.

Applicant: Mr Steve Roberts

Respondent: Shellpoint Trustees Ltd

Represented by: Mr S Unsdorfer, Parkgate-Aspen Property Management

Tribunal members:

Mr T Powell LLB (Hons)

Mr L Jacobs FRICS

Mrs A Moss.

Application dated: 18th June 2006

Oral pre-trial review: 12th July 2006

Hearing: 19th October 2006

Decision: 20th November 2006

Decision

- (1) The Tribunal determines that that the provisions of the Lease allow the Lessor to recover through the service charge the legal costs it incurs in relation to the enforcement of covenants in Leases forming part of the Meadowside estate;
- (2) The Tribunal leaves the determination of the Respondent's final legal costs in respect of the injunction proceedings against Flat 24 to the agreement of the parties or, failing that to an assessment by the County Court;
- (3) The Tribunal determined that the Lessor was entitled to employ temporary staff to cover the sickness of a full-time member of staff (i.e. the resident porter);

- (4) The Tribunal determined that the full cost of the temporary staff was not reasonably incurred and therefore reduces the overall salary cost of the temporary staff by £3,133.83, which sum should be deducted from the 2005 portage charge;
- (5) The Tribunal determined not to disturb the 2005 figure for the cost of telephone charges, which formed part of the overall portage costs;
- (6) For the reasons set out below, the Tribunal orders the Respondent to reimburse the Applicant the sum of £175 being half of the Tribunal fees which he has incurred within 28 days of the service of this Decision;
- (7) The Tribunal decides that the Respondent's costs in connection with these proceedings may not be charged through the Service Charge.

Background

1. This was an application by Mr Roberts the Leaseholder of 72 Meadowside about the recoverability of legal costs included in the Statement of Annual Service Charge Expenditure for the year ended the 31st December 2005, the amount and reasonableness of alleged administration fees and the reasonableness of the additional costs of portage incurred by the Respondent when the resident porter became ill on a long-term basis.
2. The issues were identified at the oral pre-trial review on the 12th July 2006 before a procedural chairman and confirmed by the Applicant at the subsequent hearing. Initially the parties had intended that this matter would be dealt with as a paper application but on the application of the Respondent the matter was listed for an oral hearing. Unfortunately, this meant that there was no paginated bundle of documents at the hearing. However, the Tribunal ensured at the outset of the case that both parties had copies of all of the relevant documents, which had been copied between them and lodged with the Tribunal. At the hearing Mr Unsдорfer produced a further bundle of documents. The Tribunal adjourned for half an hour to enable the Applicant to consider these new documents and he confirmed to the Tribunal after the adjournment that he wished the hearing to proceed.
3. This dispute has been affected by recent events on the Meadowside estate. First of all, the Leaseholders at Meadowside served an initial notice for collective enfranchisement of the freehold in about November 2004, with their company Meadowside Freehold Ltd acting as the nominee purchaser. There had been several delays progressing the enfranchisement but Mr Unsдорfer gave evidence that contracts had eventually been exchanged at the beginning of October 2006, with possible completion at the end of this month.
4. Secondly, during 2005 the current Lessor issued proceedings in the Central London County Court against the Applicant in his capacity as Leaseholder of Flat 24 Meadowside, which he owns alongside Flat 72, seeking an injunction in relation to the nuisance, annoyance and damage caused by his sub-tenants. There had been a hearing in those proceedings on the 5th August 2005. The Tribunal was shown a copy of a hand

written consent order drafted by the parties' respective counsel on that date, by which the Applicant gave various undertakings. The order stated in terms that the proceedings against the Applicant would be stayed save for the carrying out of those undertakings and that the Applicant's liability for the costs of those proceedings was adjourned with liberty to restore on 7 days' notice. The Applicant gave evidence that the issue of costs was still currently being negotiated between the parties' respective solicitors.

The Lease

5. The Tribunal was provided with copies of the Leases to both Flats 72 and 24 Meadowside, which were in near-identical terms. The Lease to Flat 72 was dated the 22nd of November 1977 and ran for 99 years from 29th September 1975. The Lease to Flat 24 was dated the 17th July 1981 and ran for 125 years from 29th September 1975. In each case Clause 2 of the Lease contained a covenant by the tenant to observe and perform the obligations on the part of the tenant set out in the Fourth and Sixth Schedules.
6. The Fourth Schedule in each Lease contains the provisions for the payment by the tenant of the service charge being a stated percentage of the expense to the landlord of performing its obligations and covenants and providing services and amenities specified in the Seventh Schedule. In each Lease the Seventh Schedule refers to the costs and expenses and outgoings and matters in respect of which the tenant is to make a contribution, amongst other things to the cost to the landlord of carrying out the matters mentioned in the Fifth Schedule of the Lease.
7. The Fifth Schedule contains the covenants on the part of the landlord. These include the covenant in paragraph 8 (in the Lease relating to Flat 24) and in paragraph 9 (in the Lease relating to Flat 72): "to enforce the covenants and regulations similar to those contained in Schedule 4 and Schedule 6 thereof respectively entered into or to be entered into by the tenants of the other flats comprised in the block of flats."
8. The Seventh Schedule (the costs and expenses in respect of which the tenant is to make a contribution") includes:
 - (a) Paragraph 6: "the cost of employment of any managing agents agents legal or professional fees or of any other company or person for the collection of rents of the flats in the blocks of flats or in connection with the general management or maintenance thereof or to estimate carry out or supervise or arrange for the estimation carrying out execution or supervision of any or all of the above services or any or all of the landlord's rights or obligations hereunder;"
 - (b) Paragraph 7: "The cost of providing any housekeeper porters refuse collectors or other staff... including the payment of ... the current market rent of the flat in which the resident housekeeper or porter resides and his telephone expenses provided such expenses are in fact disbursed by the landlord;" and

- (c) Paragraph 15: “The cost to the landlord of enforcement of any or all of the covenants herein contained other than payment of the rents hereby reserved.”

The Law

9. Service charges and relevant costs are defined in section 18 of the 1985 Act. The amount of service charges which can be claimed against the Applicant is limited by a test of reasonableness which is set out in section 19 of the 1985 Act.

Inspection

10. 72 Meadowside comprises one of 77 flats on the estate. None of the issues considered by the Tribunal appeared to require a site inspection and neither of the parties requested one.

Evidence and the Tribunal’s findings

Recovery of legal fees through the service charge

11. The Statement of Annual Service Expenditure for the year ended 31st December 2005 included provision for legal fees totalling £15,287, of which £13,428.92 related to the court action against Flat 24 and that the remaining £1,858.08 related to other minor matters.
12. The Applicant submitted that these legal costs were only included in the annual statement because of an agreement between the Lessor and Meadowside Freehold Ltd referred to in the Second Report on Acquiring the Freehold of Meadowside (apparently dated the 7th April 2006). However, the Tribunal preferred the evidence of Mr Unsorfer, who said that the Statement of Annual Service Expenditure had been prepared by the accountants in the usual way (simply on the basis of vouchers for actual disbursements incurred by the Lessor for the previous year) and that the inclusion of legal fees had no relation to the enfranchisement process at all.
13. The Applicant confirmed that the Lessor had now removed all legal costs from the 2005 service charge demand and credited Leaseholders’ accounts. However, he was worried that the legal costs would be re-applied to the service charge by Meadowside Freehold Ltd after completion of the enfranchisement.
14. Mr Unsorfer stated that the Respondent had decided to waive £1,858.08 of those legal fees once and for all (to save time at the Tribunal) and that since the remaining claim for £13,428.92 legal fees had now been removed from the 2005 annual service demand, the question of payability no longer fell to be decided by the Tribunal.
15. The Tribunal disagrees with that argument. The £13,428.92 legal costs were incurred in 2005 and they were paid to the Lessor's solicitors Bell Denning in 2005. The

Leaseholders' liability to pay those legal costs through the service charge remains, even though a debit of the service charge account has apparently removed them from the 2005 service charge demand (and the Leaseholders' individual service charge accounts have been credited) for the purpose of enfranchisement.

16. The Applicant's main argument was that these legal fees were not recoverable through the service charge in any event, because the Lease contained no provision for the Lessor to recover its legal fees. However, the Tribunal determined that the provisions of the Seventh Schedule of the Lease (which are set out above) do allow the Lessor to recover its legal costs through the service charge. This includes the legal costs incurred by the Lessor in relation to the enforcement action against Flat 24. The Tribunal determined that this power to recoup legal costs through the service charge was unaffected by provisions in the Lease whereby a Lessor could seek prior indemnity for costs, before enforcing covenants in other Leases.
17. With regard to the amount of the legal costs, the Applicant drew attention to a discrepancy between a Statement of Costs for Summary Assessment in the sum of £6,703.57, prepared by the Lessor's solicitors for the hearing on 5th August 2005, and the totality of the legal costs charged by the solicitors to the Lessor in the sum of £13,428.92. The Respondent could not provide an explanation for the discrepancy and the evidence in relation to the current negotiations between the parties' respective solicitors on the question of costs was equally unclear.
18. However, the Applicant did not challenge the amount of the total legal costs paid to Bell Denning during 2005 and the burden is on him to provide evidence that costs are unreasonable.
19. The Applicant was concerned that once enfranchisement has been completed the new freeholder may decide to apply the total legal costs once again to the service charge, presumably in the current service charge year. The Tribunal can foresee that this might happen and accepts that such a step would of course affect all Leaseholders. However, as against this, when the costs liability of the Applicant in his capacity as the Leaseholder of Flat 24 has been assessed by the County Court, any sums recovered from him by the new freeholder or its agents will result in a future credit being applied to the service charge account, which will then benefit Leaseholders as a whole.

Administration charge

20. The Applicant was unable to provide evidence that any administration charge had been made and he withdrew this part of his application.

Additional portorage costs in 2005

21. The Notice of Application in this case challenged the payability and reasonableness of the additional costs of portorage incurred by the Lessor during the 2005 service charge year and the Tribunal's decision is limited to that year. The Tribunal makes no decision as to any additional costs which may be incurred during 2006, because they have not yet

been finalised. The Applicant questioned not only the amount of the additional costs of portage - complaining that the Respondent had refused to divulge information to him before the hearing - but also whether the Respondent had done enough to minimize these additional costs.

22. At first glance according to the Statement of Annual Service Expenditure, the increase in the overall portage costs in 2005 as compared with 2004 appeared to be £11,498, though as appears below, this figure masks the true cost of temporary staff in 2005.
23. The Tribunal accepted evidence that the full-time residential porter, a Mr Philip Warnham, had been employed on the estate for the past 20 years. Apparently he was a well-respected and effective porter. Not only did he undertake several tasks on the estate but he was present there at all hours, providing a degree of security and a point of contact in case of emergency.
24. The situation described to the Tribunal by Mr Unsдорfer on behalf of the Respondent was that Mr Warnham had fallen ill and had been certified as unfit for work by his GP from 3rd August 2005 onwards. The certificates showed that he was suffering from nervous anxiety and depression. The Applicant queried the validity of the first certificate, but in the absence of evidence to suggest anything untoward, the Tribunal accepted the certificate as genuine.
25. Mr Unsдорfer produced a time chart showing that the porter had been certified off work for 39 weeks and that he had received 28 weeks' statutory sick pay (as a matter of contractual entitlement).
26. The Tribunal determined that the Respondent as employer was entitled to engage temporary staff to cover the sickness of a full-time member of staff. While the Tribunal is satisfied that there was little more that the Respondent could have done during 2005 in relation to the continued employment of the sick porter, the position during 2006 is much less clear. However, the Tribunal did have concerns about the cost of the temporary staff and the Respondent's failure to provide a proper breakdown of the staff costs in advance of the hearing.
27. A closer examination of the documentation showed that the total expenditure on temporary staff for 2005 came to some £20,564.26. This figure covered the last 5 months of 2005 and seemed very high to the Tribunal, especially when compared with the total £23,599.18 spent on wages for Mr Warnham and his assistant porter Mr John Penney for the whole year.
28. At the hearing Mr Unsдорfer was unable to explain why the Respondent appeared to have employed 2 temporary people to cover the sickness of the one resident porter. Indeed he was taken by surprise by this fact himself, saying that the arrangements had not been made by him but by his property manager, who had recently left his firm. He did argue however that where temporary staff is engaged, it will rarely be possible for them to cover all of the duties of a full-time, resident member of staff who knows the job inside out.

29. The true position was only revealed after the hearing had finished, when Mr Unsдорfer returned to his office and wrote to the Tribunal office to explain that the second temporary member of staff had been needed to replace the assistant porter Mr Penney, who had resigned his post on 9th September 2005. Mr Unsдорfer has not been aware of this fact at the hearing and consequently much of the Tribunal's time had been wasted, not only in taking inaccurate evidence, but also because it then needed to revise its decision in the light of the late information.
30. The Tribunal invited the Applicant to make representations on the letter from Mr Unsдорfer. The Applicant accepted that the cost of the second temporary staff member was reasonably incurred in the circumstances (at least for 2005; he rightly reserved his position for 2006, which may be subject to a further application to the Tribunal in the future).
31. However, overall, the Tribunal remains unhappy about the total costs of temporary staff in 2005, which is significantly more expensive than directly employing full-time staff on the payroll. The Tribunal received no evidence as to why the second temporary member of staff was employed from the end of July 2005, when Mr Penney only resigned his post from 9th September or about the steps (if any) the Respondent had been taking to find a permanent replacement for Mr Penney.
32. As a result, the Tribunal determines that the full £20,564.26 cost of additional temporary staff in 2005 has not been reasonably incurred. The Tribunal determines that this cost should be reduced by £3,133.83, which sum should be deducted from the total sum charged for portage in 2005.
33. During the hearing, the Applicant also challenged the increased cost of telephone charges, which formed part of the increased portage costs for 2005. In 2004 the telephone bills had totalled £461, compared with a total of £691 in 2005.
34. Mr Unsдорfer explained that the bills were in respect of a fixed telephone line and a mobile telephone, both of which were made available to the resident porter, but which could also be used by other staff working on the estate. There was no hard evidence as to why the telephone bills had increased so much in one year and no breakdown of the 2004 calls to allow a comparison to be made. Mr Unsдорfer speculated that the increased bills were due in part to the extra usage by the temporary staff, who were unfamiliar with the estate (i.e. they were making extra calls for instructions on how to undertake various tasks) and in part to calls made by the resident porter during the period of his ongoing illness.
35. Whatever may be the reason for the increase, the Tribunal accepts that the cost of telephone charges form part of the cost of providing a porter under the Lease and are payable through the service charge. On balance it was willing to accept Mr Unsдорfer's explanation for the likely causes of the increased charges. The Tribunal therefore determines not to disturb the 2005 figure for telephone costs.

The section 20C application, reimbursement of LVT fees and costs

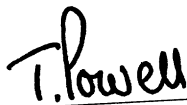
36. The Applicant applied for protection against the Respondent's costs under Section 20C of the 1985 Act and reimbursement of his fees in the sum of £350. The Respondent opposed that application and sought its costs (not quantified) from the Applicant.
37. The Applicant said that he had had to come to the Tribunal because the Respondent had refused reply in full to his queries. Mr Unsдорfer accepted that requests for information had been made about the portage costs but effectively he was unable to provide it for legal reasons.

The law

38. Section 20C of the 1985 Act provides that a Tribunal can make an order preventing the Lessor recovering its costs of proceedings through the service charge, if the Tribunal considers it to be just and equitable.
39. Regulation 9 of the Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003 allows a Tribunal to order a party to reimburse the whole or part of any fees paid by another party.

The Tribunal's decision

40. The Tribunal considered that the legal reasons relied upon by Mr Unsдорfer did not prevent him giving much of the information to be Applicant (except perhaps for the confidential medical information). The Tribunal accepted that in many respects the Applicant did not receive the answers that he wanted until he arrived at the hearing. Even then Mr Unsдорfer's evidence was incomplete and the true picture did not emerge until after the hearing had finished, with the result that much of the Tribunal's and the Applicant's time had been wasted. Accordingly, the Tribunal considers it just and equitable to make an order under section 20C of the 1985 Act preventing the Lessor from recovering its costs within these proceedings through the service charge.
41. The Applicant brought 3 issues to the Tribunal, one of which he withdrew. He succeeded in part in relation to the third issue, being the additional costs of portage. Therefore, the Tribunal orders that the Respondent shall reimburse the Applicant one half of his fees (i.e. £175) within 28 days of the service of this decision.



Chairman: Timothy Powell

Dated: 20th November 2006