LON/00BG/LSC/2006/0285

Residential Property
TRIBUNAL SERVICE

DECISION OF THE LEASEHOLD VALUATION TRIBUNAL FOR THE RESIDENTIAL PROPERTY TRIBUNAL SERVICE ON AN APPLICATION UNDER SECTION 27A OF THE LANDLORD AND TENANT ACT 1985, AS AMENDED

Applicant: Mr N Haque

Respondent: Poplar HARCA

Address of Property: 4 Carpenter House
Burgess Street
London
E14 7BB

Application date: 15 August 2006

Hearing date: 28 November 2006

Appearances: Mr N Haque

For the Applicants

Mr D Tull
Ms Y Wood
Mr R Brayshaw
Mr N Gray
Ms Roach

For the Respondents

Members of the Residential Property Tribunal Service:

Ms E Samupfonda LLB(Hons)
Mr W J Reed FRICS
Mr D Wilson

In the Leasehold Valuation Tribunal

Applicant	Mr N Haque
Respondent	Poplar Housing & Regeneration Community Association Limited (Harca)
Represented by	Mr Brayshaw, Consultant Accountant Mr Tull, Leasehold Manager
Premises	4 Carpenter House, Burgess Street, London E14 7BB

Tribunal
Ms E Samupfonda LLB(Hons)
Mr WJ Reed FRICS
Mr D Wilson

1. This is an application under section 27A Landlord and Tenant Act 1985 (the Act) for a determination of the reasonableness and liability to pay service charges. The applicant became a lessee to the demised premises, known as flat 4, Carpenter House. The Respondent is the landlord and the Freehold owner.

2. An oral pre-trial review was held on 3rd October 2006.The Tribunal identified that the service charge years in question were 1999/2000-2006/2007 inclusive and the service charge heads were all items for each of the service charge year at issue. Directions for a hearing were made.

3. The hearing of this application took place on 28th November 2006. The Tribunal inspected the premises externally, on the morning of the hearing. It found the premises to be a ground and first floor flat in a 4 storey block known as 4 to 8 and 12 to 16 Carpenter House, situated on an estate known as the Burdett Estate. The Tribunal observed generally that amenities such as estate lighting, gardens and play areas were provided.

4. Mr Haque attended the hearing. Mr Brayshaw, Consultant Account and Mr Tull Leasehold Manager represented the respondent. Ms Wood, Mr Neal Gray and Ms Roach were also in attendance. We were informed that there had been a dispute between the parties that had been settled by way of arbitration. Mr Tull submitted a copy of the arbitrator's award. Both parties submitted very detailed statements of case which they referred to in the course of their evidence. We have therefore summarised the salient points in this decision.

5. Summary of the applicant's case.
The applicant explained that he relied upon the terms of the Fifth Schedule of the Lease to challenge his liability to contribute towards the costs incurred in

respect of the service charge heads. This defines service charge at clause 1(2) as "" Service Charge" means such reasonable proportion of Total Expenditure as is attributable to the demised premises....." He acknowledged that the lessees covenants impose an obligation upon him to contribute to the service charge by virtue of Clause 4 (4). The items that fall under the service charge heads are; Block Caretaking, Communal Energy, Estate Caretaking, Communal Repairs, Horticulture, Maintenance and Administration and Insurance. He contended that the costs incurred in respect of some of these items were not attributable to the demised premises and as such he was not liable to contribute towards to the costs. It was his view that he was only liable to contribute to those services that he directly benefited from such as the block caretaking and communal energy. He described how the demised premises have been "houselike" since the freeholder carried out development works. The development works included the building of flats on previous communal green areas, fencing off the communal greenery situated at the rear of the premises and blocking off the communal entrance for flats 1-3 and 4-8. The only means of access into these flats is now through individual front access way. He concluded that the overall effect of the development work was that "flats 4-8 have no access to the open space and green space behind the block, they do not have the same communal facilities and support as before" thus rendering "the old style service charge obsolete" He said that the council receive communal grants for communal repairs and the caretaking is minimal.

6. With regard to the insurance, maintenance and administration, the applicant was of the view that the cost of the insurance was not recoverable because it was excessive and had risen over the last 7 years. He added that it was higher than the amount that he paid for his other flat in Hackney. He considered that the charge for administration and maintenance was an exploitation of the lease. In essence, he submitted that if he was liable for any costs, he was not liable to contribute to the costs that have been incurred in each service charge because they were too high and therefore unreasonable.

7. He sought to persuade the Tribunal that the case of Billson v Tristrem (1999) [2000] L&TR 220 referred to by the respondent was not relevant in this case because it related to a dispute between a private landlord and tenant.

8. The applicant made an application under section 20C of the Act. He said that the respondents should not be permitted to recover the costs of these proceedings through the service charge because the respondent had only come up with vague responses to his enquiries and had only served two demands for service charges.

9. Summary of the respondent's case
Mr Brayshaw said that the respondent does not receive any grants to maintain the estate from the London Borough of Tower Hamlets. He referred to the lease and highlighted Clauses 1 (10) which defines "the common parts", Clause 5 which sets out the lessor's covenants, the rights of the Lessor to make alterations under the Third schedule and the service charge provisions of the Fifth Schedule. He contended that the applicant is liable to contribute to the costs incurred in respect of all the items under the service charge head

because the premises comprise a maisonette held under a lease, situated in a block on the Burdett Estate. It was not a house. Mr Brayshaw invited the Tribunal to have regard to the judgement in Billson and Trestrem as he argued that it was good law and irrelevant who the parties were. Mr Tull explained that when the freehold was transferred under a stock transfer to Poplar Harca on 23 March 1998, the estate was described as the Burdett Estate. Mr Tull referred to his witness statement and highlighted the method of apportionment as well as the service charge account. He added that apportionment using the floor area was adopted as a policy by the Leasehold Steering Group. Mr Neal Gray addressed the Tribunal. He described how the estate and the block are maintained.

Mr Brayshaw said that he had not prepared submissions on costs. However, he objected to the application under section 20C. He sought to recover the sum of £500.

10. The Law

The Tribunal's jurisdiction to determine the reasonableness and liability to pay service charge is set out under section 27A of the Act.

Section 27A(1) provides -

An application may be made to a leasehold valuation tribunal for a determination whether a service charge is payable and if it is, as to

(a) the person by whom it is payable,
(b) the person to whom it is payable
(c) the amount which is payable
(d) the date at or by which it is payable
(e) the manner in which it is payable

Section 18 of the Act defines the meaning of "service charge" and "relevant cost." Service charge means "an amount payable by a tenant of a dwelling as part of or in addition to the rent-

(a) which is payable, directly or indirectly, for services, repairs, maintenance [improvements] or insurance or the landlord's costs of management and
(b) the whole or part of which varies or may vary according to the relevant cost."

The relevant costs are the costs or estimated costs incurred or to be incurred by or on behalf of the landlord or superior landlord, in connection with matters for which the service charge is payable.

Costs are only recoverable to the extent that they have been reasonably incurred. See S19 of the Act.

11. Decision

In determining the application we have had regard to the relevant law, terms of the lease and the evidence.

The applicant acknowledged that he is obliged to contribute towards the service charge where costs have been reasonably incurred. By clause 3(4) the

Lessee covenants to "Pay the Interim Service Charge at the time and in the manner provided in the Fifth Schedule hereto...."

Clause 1 (1) of the Fifth Schedule provides that "Total Expenditure means the total expenditure incurred by the Lessors in any accounting Period in carrying out their obligations under Clause 5(5) of this lease.....and (a) the cost of employing Managing Agents (b) the cost of any Accountant or Surveyor employed to determine the Total Expenditure and the amount payable by the Lessee hereunder a sum equal to the Lessors reasonable costs and charges in affecting the administration and management of the Building and of the Common parts....."

The lease does not specify a method by which the annual service charge contribution should be calculated. The Fifth Schedule clause 1(2) simply stipulates that the service charge is "a reasonable proportion of the Total Expenditure."

We were not persuaded by the applicant's submission that he is only liable to contribute towards the cost of services and facilities that directly benefit the demised premises. We rejected his construction of The Fifth Schedule clause1 (2) which provides that "the service charge means such reasonable proportion of the Total Expenditure as is **attributable** to the Demised Premises.... " .It is our view that the word attributable in this context does not, as the applicant suggests mean benefit but rather "allocated or apportioned" to the demised premises given that the percentage of contribution is not specified.

In considering the terms of the lease as a whole, we consider that the effect of these provisions is to place an obligation upon the applicant to contribute towards the costs incurred by the respondent in carrying out the Lessor's obligations set out in Clause 5. For the purposes of this application, the relevant Lessor's obligations are -

"(a) To maintain and keep in good and substantial repair and condition :
(i) the main structure of the building .....,
(ii) all such gas and water mains and pipes drains.....ducts....cables....,
(iii) the Common Parts,
(vi) all other parts of the building not included in the foregoing sub paragraphs (i) to (v) not included in this demise not included in the demise of any other flat or part of the Building,
(c) (i) to insure and keep insured the Building .....,
(d) to keep clean and in the opinion of the Lessor where appropriate lighted the common parts and to keep clean the windows in the common parts.....and
(o) without prejudice to the foregoing to do or cause to be done all such works installations acts matters and things as in the absolute discretion of the Lessors may be considered necessary or advisable for the proper management maintenance safety amenity or administration of the Building."

Clause 1 (9) defines "the Building" as meaning the buildings of which the Demised Premises form part and specified in Paragraph 4 of the Particulars.

Paragraph 4 of the Particulars describes the Building as "all that block known as 4 to 8 and 12 to 16 Carpenter House Burgess Street E14"

The demised premises under the lease constitute "all that ground and first floor maisonette known as 4 Carpenter House Burgess Street E14." The Lease does not define estate. From our inspection we noted that the building was referred to as the Burdett Estate.

We inspected the development works. We concluded that although development works have been carried out, those works did not amount to a change in the nature or description of the demised premises from being a flat to becoming a house. The work did not effect any changes to the demised premises under the terms of the lease. The Tribunal did not accept the applicant's submissions that the changes resulted in the flat becoming house-like since it remained vertically and laterally connected to the block. The works only resulted in changing the approach to the premises by closing up the communal entrance and by fencing off the greens at the rear of the block. We had no reason to disbelieve the respondent's submission that all residents are entitled to use the communal area behind the block by requesting the key from the neighbourhood offices.

Clause 1(10) defines that the common parts means "all main entrances passages landings staircases (internal and external) gardens gates access yards roads footpaths.....and other areas included in the Title above referred to or comprising part of the Lessor's Housing Estate and of which the Building forms part provided by the Lessors for the common use of residents in the Building and their visitors and not subject to any lease or tenancy which the Lessors are entitled to the reversion."

So the effect of the lease is to demise to the applicant the ground and first floor maisonette together with the right to use the common parts. The First Schedule specifically provides that the Lessee has the right
"(a) to go pass and repass on foot only over and through and along the common parts including the main entrances and the passages landings halls and staircases leading to the demised premises PROVIDED ALWAYS the Lessor shall have the right temporarily to close or divert any common parts.....
(d) To use the gardens and pleasure ground (if any) within the curtilage of the Building subject to such reasonable rules and regulations for the common enjoyment thereof as the Lessor may from time to time prescribe."

Billson v Tristrem is still good law. The terms of the lease under consideration in that case were not too dissimilar to the provisions in the lease under determination. In that case, the lease specified the level of contribution at 20% of the total costs and it was found that the tenant was liable "to pay by way of maintenance charge 20% of the cost of the landlord in carrying out maintenance repairs and other works within the terms of clause 5 of the lease to what are normally referred to as the common parts of the building, that is to say all parts which are not the subject of one or other of the demise of the flats within the building, regardless of whether those parts are used by any specific

tenant to any particular ,or indeed any, degree at all." That case can be distinguished on the basis that there were restrictive covenants that prevented the tenant from using certain common parts unlike the application before us. It is therefore clear that the applicant is bound to contribute to the Lessor's costs irrespective of whether he makes use of the services or they benefit the demised premises directly.

The applicant invited the Tribunal to find that the costs incurred in each service charge year in question were unreasonable because they were too high. It is not enough to come before the Tribunal and make allegations that are unsubstantiated or supported by independent evidence. The applicant did not produce any evidence upon which the Tribunal could compare and determine that the costs incurred by the respondent were unreasonably high.

The Tribunal noted that there had been an arbitration award. The material findings are set out in paragraph 135 of the award. "The Claimant has acknowledged that the normal service charge is not in dispute in this arbitration. I therefore find that the Claimant is liable to pay the balance as at 31/10/2005 of £674.61." The applicant was the claimant in those proceedings.

A Leasehold Valuation Tribunal is precluded from making a determination if the tenant has agreed or admitted the matter or if it has been determined by a court. Section 27(4) of the Act provide
No application under subsection(1) or (3) may be made in respect of a matter which-
(a) has been agreed or admitted by the tenant
(b) has been, or is to be referred to arbitration pursuant to a post –dispute arbitration agreement to which the tenant is a party,
(c) has been the subject of a determination by a court, or
(d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.

In the circumstances we are debarred from making any determinations on the reasonableness of the costs incurred prior to 2005 as this was the subject of the arbitral award. Furthermore, the applicant has failed to produce any evidence in support of his contention that the costs incurred were unreasonably high.

We determine that the estimated costs in respect of each service charge head, for the year 2006/7 are reasonable and payable by the applicant.

We make no order under section 20C as there are no provisions within the lease entitling the respondents to recover the costs through the service charge.

Chairman

Dated 15/12/06