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Residential
Property
TRIBUNAL SERVICE

RESIDENTIAL PROPERTY TRIBUNAL SERVICE

DECISION BY THE LEASEHOLD VALUATION TRIBUNAL for the

LONDON RENT ASSESSMENT PANEL

LANDLORD AND TENANT ACT 1985, as amended, Sections 27A and 20C

Ref:LON/00BD/LSC/2007/0335

Property:	**28 Essex Court Station Road London SW13 0ER**
Hearing date;	**7 November 2007**
Applicant:	**Richmond Housing Partnership Ltd**
Represented by:	**Miss S Blackmore (Counsel)**
Respondent:	**Mr P G Tustain**
Represented by:	**Mr O Radley-Gardner (Counsel)**

Members of the Tribunal:

Mr C Leonard (Chairman)

Mrs J McGrandle BSc(EstMan) MRICS MRTPI

Mr E Goss

Introduction

1. The Respondent is the leaseholder of 28 Essex Court, Station Road, London SW13 0ER ("the flat"). The Applicant is the landlord. The flat is one of 21 long leaseholds in a total of 48 flats numbered 9-56 in Essex Court. The remaining 27 flats are held on short-term tenancies. For ease of reference this decision shall refer to long leaseholders as "leaseholders" and to short-term tenants as "tenants".

2. This matter concerns a demand for the Respondent's share of the estimated service charge for 2006-7 (£926.99). The Respondent disputed the demand and the Applicant sued in the Brentford County Court. On 21 August 2007 District Judge Plaskow referred the dispute to the Tribunal for determination in accordance with the provisions of Schedule 12 to the Commonhold and Leasehold Reform Act 2002.

3. The Tribunal is grateful to Counsel for both parties for their extensive submissions.

Statutory Regulation of Service Charges

10. Section 18 (1) of the Landlord and Tenant Act 1985 defines a service charge as "...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 costs..."

11. Section 18 (2) provides that "The relevant costs are the costs or estimated costs incurred or to be incurred by or on behalf of the landlord...in connection with the matters for which the service charge is payable".

12. Section 19 provides that

"(1) Relevant costs shall be taken into account in determining the amount of a service charge payable for a period—

(a) only to the extent that they are reasonably incurred, and

(b) where they are incurred on the provisions of services or the carrying out of works, only if the services or works are of a reasonable standard;

and the amount payable shall be limited accordingly.

13. Section 27A of the Act provides that

"(1) 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, and

(e) the manner in which it is payable...

(3) An application may also be made to a Leasehold Valuation Tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs and, if it would, as to—

(a) the person by whom it would be payable,

(b) the person to whom it would be payable,

(c) the amount which would be payable

(d) the date at or by which it would be payable, and

(e) the manner in which it would be payable".

(4) 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 determination by a court..."

14. In exercising this jurisdiction it is necessary for the Tribunal to consider the terms and the proper interpretation of the relevant lease.

The Lease

4. The Respondent's lease is dated 19 July 1982 and runs for a term of 125 years from 15 March 1982. The whole of Essex Court, including its substantial grounds, garages, roads and boundaries, is defined as "the Estate". 9-56 Essex Court are defined as "the Property" and the structure and common parts of the Estate as "the Reserved Property".

5. Clause 3 (a) of the lease requires the Respondent to pay a service charge in quarterly instalments for a service charge year running from April to March. The amount to be paid is the reasonably estimated amount required to cover the costs and expenses incurred or to be incurred by the Respondent in carrying out the obligations or functions contained or referred to in clauses 3, 4 and 6 of the lease and in the covenants in the Ninth Schedule to the lease.

6. Clause 4 of the lease requires the Respondent to meet the obligations set out in the Ninth Schedule. The Ninth Schedule contains standard repairing, maintenance and insurance obligations in relation to the Estate.

7. The Ninth Schedule provides at paragraph 3 that the Respondent shall "...keep adequately lighted all such parts of the Reserved Property as are normally lighted or should be lighted and the light fittings suitably maintained and keep clean and tidy the said common halls staircases landings steps passages doors windows areas forecourts and courtyards employing caretaking services where deemed necessary by the lessor in its own absolute discretion", and at

paragraph 6 that the Respondent shall "...manage the estate for the purpose of keeping it in a condition similar to its present state and condition".

8. Clause 6 of the lease reads; "IT IS HEREBY AGREED AND DECLARED that the *(Applicant)* shall at all times...manage the Estate in a proper and reasonable manner. The *(Applicant)* shall be entitled...(ii) to employ architects surveyors solicitors accountants contractors builders gardeners and any other person firm or company properly required to be employed in connection with or for the purpose of or in relation to the Estate or any part thereof and pay them all proper fees charges salaries wages costs expenses and outgoings".

The History

9. The Respondent purchased the lease of the flat in 1994 but has not been resident since 1998. The Applicant became Landlord in 2000 and in 2003, following consultation with residents, introduced a new caretaking service known as "Caretaker Plus". This in turn resulted in an increase in the service charge.

10. The Respondent refused to pay the increased charge for 2003-4 and the Applicant sued in the Brentford County Court in claim number 4BF01169. The Respondent defended the claim, arguing that the service charge was unfairly loaded against leaseholders in favour of tenants, due to a cap imposed upon increases in their rent (through which their contribution to service charge is paid). He also specifically disputed the caretaking charge and administration charges. On 18 July 2005 HH Judge Edwards in the Brentford County Court gave Judgement for the Applicant. He did not accept the Respondent's criticism of the way in which the leaseholders' service charges were calculated. In his judgement he referred to clauses 3, 4 and 6 and to the Ninth Schedule of the lease and he set out a series of headings identifying a number of the Respondent's complaints.

11. Under the heading "Caretaking Plus is not justified under the terms of the defendant's lease", HH Judge Edwards said; "I accept *(the Applicant's)*

evidence that residents were consulted about the level of service to be provided and were given the choice of caretaking or Caretaking Plus. Caretaking was a basic cleaning service of internal communal areas, whereas Caretaking Plus included litter picking, graffiti removal, minor repairs, health and safety risk assessments and cleaning of external or estate areas. The Residents chose caretaking plus...The level of the caretaking service was strongly influenced by the residents association at Essex Court who demanded a high standard of service at the block. All that was decided and agreed between leaseholders and the claimants. I am satisfied that the caretaking service which is provided by the Claimant comes within the terms of the lease."

12. Nonetheless the Applicant had to sue again for the next three years' service charges. The Applicant obtained default judgement for the 2004-5 and 2005-6 service charges in claim number 6BF00719 on 8 March 2006. In the latest County Court action, for the 2006/7 charge, the Respondent defended the claim on a basis that the Tribunal finds indistinguishable from the argument previously considered by HH Judge Edwards, to the effect that the service charge was unfairly loaded against leaseholders in favour of tenants. He also alleged that the Applicant was in breach of an obligation under clause 3 of the lease to make a contribution for the retained or "reserved" parts of the Property. This allegation has never been fully explained but would seem to be based on the same argument.

13. After this latest action was transferred to the Tribunal directions were given on 18 September 2007. The Respondent was required by 2 October, among other things, to send to the Applicant a schedule setting out the charges that were admitted or disputed with the reasons and alternative figures. The Applicant was to serve its comments on the schedule by 16 October and the Respondent his response by 23 October.

14. The Respondent did not produce a schedule but on 2 October produced a "revised statement" maintaining his argument that the charges were unfairly distributed between tenants and leaseholders and "concentrating only on one aspect of the service charges; the cleaning charge". This was a reference to the

"Caretaker Plus" service, in relation to which he argued that a reasonable charge should be limited to the cost of a simple cleaning service at £72 per annum.

15. On about 29 October, the Respondent served a witness statement raising new criticisms of the "Caretaker Plus" service. In this statement he argued that it provides very limited services, duplicates what is done by others and offers little benefit to residents for too high a cost.

16. In response the Applicant served a witness statement dated 6 November 2007 from Kay Simmonds, the Applicant's Leasehold Accounts Manager with responsibility for Essex Court, explaining at some length the extent of the service provided. That extends, in addition to cleaning and the additional services identified by HH Judge Edwards, to the removal and temporary storage of bulk refuse, reporting anti-social behaviour and abandoned cars, clearing leaves outside peak periods, helping residents who are locked out, monitoring visiting contractors and (as an employee of the Applicant) attending team meetings. (That is not intended to be an exhaustive list, nor should it be – the caretaker's duties must vary from time to time). The service is maintained to an ISO standard created by the Applicant by reference to international standards.

17. When the matter came before the Tribunal on 7 November 2007 the Respondent did not pursue his argument about the loading of the service charge against leaseholders, or his allegation that the Applicant was in breach of clause 3. He raised a new argument that the services as described in the latest statement of Miss Simmonds fell outside the lease's service charge provisions. Referring to *Yorkbrook Investments Ltd v Batten* [1985] 2 EGLR 100 he criticised the Applicant for failing to produce this evidence sooner and argued that the Applicant had failed to produce evidence, including market evidence, to justify the "Caretaker Plus" charge in the light of the Respondent's prima facie case that the charge was unreasonable.

18. The terms of the lease are considered below. As to the evidence, the Court of Appeal in *Yorkbrook Investments Ltd,* dealing with the burden of proof, made it clear that a tenant complaining that costs are unreasonable must state the nature of his case and at the appropriate time give evidence establishing a prima facie case. The Applicant cannot be expected to produce evidence at least until it becomes clear what the Respondent's case actually is, and that changed almost completely very shortly before the hearing. Under the circumstances the Applicant did well in the short time available to produce cogent evidence to assist the Tribunal in relation to the Respondent's latest attack on the service, and is not to be criticised.

19. Assuming that meaningful market evidence exists in relation to the "Caretaker Plus" service, which is open to question, the Applicant had not been invited nor given a reasonable chance to obtain such evidence before the hearing, and the Respondent's latest case is not based on any allegation that cost of the service exceeds any market rate. The Tribunal can make a determination without such evidence.

The Tribunal's Jurisdiction

20. The Applicant argues that the Tribunal, whilst empowered by section 27A to determine the reasonableness of the amount of the 2006/7 service charge, may not make a determination in relation to whether the cost of the "Caretaker Plus" service has been reasonably incurred. The reasons are firstly that section 27A (4) (c) of the 1985 Act expressly prevents an application being made in respect of a matter that has been the subject of a determination by the court, and secondly that the matter having been determined between the same parties in a final hearing in the county court, "issue estoppel" prevents it being argued again.

21. As to whether a referral from the County Court is to be treated as an "application" within the meaning of section 27A of the 1985 Act, the Applicant points out that the relevant rules so provide and that if it were not to be so

treated the Tribunal would have no jurisdiction to make a determination. That is clearly correct.

22. The Respondent argues that HH Judge Edwards did not construe the lease, in particular paragraph 3 of schedule 9 limiting (the Respondent argues) any caretaking service to the limited lighting, tidying and maintenance services referred to in it; that the terms of the lease were not raised before HH Judge Edwards; and that the Respondent's complaints in relation to this year's service charge are fresh issues. He also argues that the Judge did not have sight of the extensive evidence now available as to the scope of the service.

23. The Tribunal does not have full and detailed information on the way in which the parties' cases were put to HH Judge Edwards but his judgement indicates quite clearly that he had, prior to giving Judgement on appeal from District Judge Allen, reviewed the terms of the lease. He referred, if succinctly, to clauses 3, 4, 6 and Schedule 9, which contain the relevant terms. The Respondent's suggestion that the lease was not provided at first instance appears to be based upon a misreading of the default judgement in claim number 6BF00719.

24. The Respondent's arguments on construction refer to the limits of the caretaking provisions of schedule 9, paragraph 3. In particular the Respondent argues that the provision for caretaking services in that paragraph must be read as referring only to the basic cleaning and lighting provisions of that paragraph. There is some force in that argument but paragraph 3 is not the only relevant provision. Schedule 9 paragraph 6 requires the Applicant to "...manage the estate for the purpose of keeping it in a condition similar to its present state and condition" and it cannot do so without employing people to undertake the necessary work, whether that is a caretaker or someone else.

25. Further, clause 6 of the lease expressly confers upon the Applicant an obligation to manage Essex Court in a proper and reasonable manner and confers upon the Applicant the power to employ any person properly required for that purpose or in connection with it. There is nothing unclear or ambiguous about that provision and it does, in the Tribunal's view, plainly empower the

Applicant to engage the "Caretaking Plus" service in response to the expressed preference of the residents. That is the Tribunal's conclusion and it would appear to have been that of HH Judge Edwards.

26. The fact that the service may have changed in some aspects since 2004 - which is inevitable - or that, in response to new allegations of shortcomings in the service, the Applicant has produced further evidence as to its precise current extent is beside the point. HH Judge Edwards considered the lease and determined that it allowed a caretaking service that extended beyond basic caretaking to the general management of Essex Court to a good standard. His judgement does not limit the service to the specific matters he mentioned-hence his use of the word "includes". Any differences in the service between 2004 and 2007 are immaterial. The essence of the service is the same.

27. It therefore appears to the Tribunal that the issue of whether the "Caretaking Plus" charge falls within the terms of the lease must be determined in favour of the Applicant, for three reasons. The first is that, the point having already been decided against the Respondent in the County Court, the matter has been determined by a court within the meaning of section 27A (4) (c). The second is that even if that section did not apply the Respondent would be prevented from considering the point again by the principle of issue estoppel.

28. The third reason is that the Tribunal, having been obliged to reconsider the point, has come to the same conclusion. Insofar as it is open to the Tribunal to make any determination to that effect, it does so.

29. It does not follow that the Applicant may not challenge the service charge for any new service charge year. What he may not do is run the same argument of principle year after year, when that argument has already been fully addressed and determined.

The Reasonableness of the Service Charge

30. It remains for the Tribunal to determine whether the 2006-7 service charge has been reasonably incurred and whether it is reasonable in amount. The only item in issue is the "Caretaker Plus" charge, of which the Respondent is charged 4.26%. The charge to the Respondent on that basis was £253.38 for 2003-4 and HH Judge Edwards found that to be reasonable. The estimated charge to the Respondent for service charge year 2006-7 was £262.35 and the final figure £261.46, representing 4.26% of a total £6,130.63 caretaking charge.

31. The Respondent says that he has been charged the following sums for cleaning, subsequently caretaking services, since 2000.

1999-2000	£26.69
2000-2001	£28.08
2001-2002	£68.95
2002-2003	£260.15
2003-2004	£253.38
2004-2005	£250.54
2005-2006	£267.80
2006-7	£261.46

32. The Respondent submits that this represents an increase of 903% over the 6 years to 2006. That does not compare like with like, as the increased charge followed the introduction of "Caretaker Plus" which not only widened the range of services provided but also embraced charges previously brought under other heads. In fact, allowing for inflation the cost of the "Caretaker Plus" service has decreased from the figure considered reasonable by HH Judge Edwards for 2003-4.

33. In evidence the Respondent confirmed that he had been present at the vote taken by residents to choose "Caretaker Plus" in place of the previous, less costly cleaning service and had voted against it. He described the vote as unfair

because the change was voted for by a majority of tenants (who he said would not have to meet the extra cost) over leaseholders, who would. However he admitted that he had no idea of how many of those who voted for the service were tenants or leaseholders, and he admitted that Essex Court benefited from the service. Nor did he produce evidence from other leaseholders who, he said, strongly agreed with him on the issue. If such support existed the Tribunal would have expected at least one other witness to have been available to give evidence to that effect. The Applicant produced an email from the Chair of the Residents' Association confirming a high degree of satisfaction with the service.

34. The Respondent's complaint that the "Caretaker Plus" service has added to the service charge without bringing commensurate benefits is not supported by the evidence. The service charge has increased because the "Caretaker plus" service provides a standard of care that the old basic cleaning service did not. It would not be reasonable to expect the extra cost to be balanced in savings elsewhere; that was not the basis upon which the service was chosen.

35. The Respondent's suggestion that the Caretaker is underemployed is not based upon any close observation of what is done. The Respondent visits Essex Court about 12 times a year and in any event cannot be described as an impartial observer. His position to date, repeated in his evidence, has consistently been that he simply does not want to pay for the service, however good it is. He bought a flat with a low service charge and did not want that to change. The Caretaker's time records (though not well maintained) together with the evidence of Miss Simmonds and the Residents' Association Chair Ms Elrhaz, do give a clear impression of a varied and busy job, performed to a good standard.

36. In summary it was not unreasonable for the Applicant to put into effect the expressed wishes of the majority of Essex Court residents (whatever the balance of leaseholders to tenants voting) in instituting the "Caretaker Plus" service. The cost of the service was reasonably incurred. As for the amount, in 2003-4 a larger sum in real terms was found to be reasonable by HH Judge Edwards. The charge remains reasonable.

Section 20C

37. Both parties have made submissions in relation to section 20C of the 1985 Act which empowers the Tribunal to order that the costs of this application are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge.

38. The Respondent has resisted paying his service charge for years, forcing the Applicant repeatedly to sue him. Given the Tribunal's view on the merits of the Respondent's case it would be quite wrong for the Tribunal to make an order under section 20C of the 1985 Act.

39. However the Respondent has also argued that the terms of the lease do not permit the costs of these Tribunal proceedings to be recovered through the service charge in any event.

40. The Respondent relies upon *Sella House Ltd v Mears* [1989] 1 E.G.L.R. 65 and *St Mary's Mansions Ltd v Limegate investment Ltd* [2003] 1 E.G.L.R. 1 (in which case, the Respondent argues, the wording of the clause relied on by the Landlord was materially the same) in arguing that clause 6 of the lease relates to the ability of the Applicant to manage the Estate and so does not extend to the cost of litigation before this Tribunal. Further, the Respondent argues, the provisions of Clause 15 of Seventh Schedule to the lease make provision for the recovery of legal costs and do not apply to these proceedings.

41. Clause 15 is a standard clause providing for the Respondent to pay the Applicant's costs in connection with service of a section 146 notice. It does not follow that the Applicant must be unable to recover legal costs under any other clause.

42. Clause 6 differs from the clauses relied upon by the Landlords in *Sella House Ltd v Mears* and *St Mary's Mansions Ltd v Limegate investment Ltd* in two material respects. First, Clause 6 refers to the obligation of the Applicant to

manage the Estate, but in empowering the Applicant to employ other persons does not limit itself to management in any narrow sense. It authorises the Applicant to employ any person properly required "in connection with or for the purpose of or in relation to the Estate or any part thereof".

43. Second, Clause 6 makes specific reference to solicitors, making it clear that the costs which may be added to the service charge may include legal costs (there is no meaningful distinction to be drawn between the fees of solicitors and counsel for these purposes, although in most cases counsel's fees will fall within the disbursements to be billed by a solicitor).

44. Clause 6 is broader in its scope than the terms relied on successfully by a Landlord in *Iperion Investments Corporation v Broadwalk Residents Ltd* [1995] 2 E.G.L.R 47 CA, with the added clarity of a specific reference to solicitors.

45. The necessity to sue the Respondent, year upon year, to make his contribution to the service charge has led in turn to the necessity to instruct solicitors and to incur legal costs. This necessity has arisen "in connection with" or "for the purpose of" the Estate within the meaning of Clause 6. It follows that such costs, insofar as reasonable in amount and not recoverable directly from the Respondent in the county court, may be taken into account when calculating the amount of service charge. Those costs include the costs of this application. It is both reasonable and proper for the Applicant to have incurred them.

46. As and when an amount representing such costs is included in a service charge it shall be open to the Respondent to argue that they are unreasonable in amount. The Tribunal is not in a position to make any determination upon that issue. Any such challenge would have to be the subject of another application.

Summary

47. In summary, the matter of whether the cost of the "Caretaker Plus" service may be recovered under the terms of the lease has been determined by HH Judge Edwards in the county court and is not open for redetermination in the absence of some material change to the service, which has not occurred. The matter of whether the cost of the "Caretaker Plus" service has been reasonably incurred, given its nature and the fact that it was introduced in response to the wishes of Essex Court residents, has also been determined by HH Judge Edwards in the county court and is not open for redetermination in the absence of some material change to the service, which has not occurred. To the extent that it might be open to the Tribunal to make a determination on either point it finds in favour of the Applicant.

48. The cost of the service for service charge year 2006-7 has not varied materially from previous service charge years and is reasonable.

49. The Tribunal declines to make any order under section 20C of the 1985 Act and finds that the Applicant's legal costs of pursuing the Respondent for his share of the service charge, insofar as reasonable in amount and not recoverable from the Applicant directly, may be taken into account in determining the amount of any service charge.

Dated 5 December 2007

Colum Leonard

Chairman