9036

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**MAN/00BP/LSC/2013/0016**
Property	:	**16 and 17, Fairbourne Walk, Oldham OL1 4QQ**
Applicant	:	**Miss B Hoey and Miss D Murray**
Respondent	:	**Guinness Northern Counties Housing Association**
Type of Application	:	**Landlord & Tenant Act 1985 – Section 27A**
Tribunal Members	:	**Mr J R Rimmer** **Mr D Bailey** **Mr L Bottomley**
Date of Decision	:	**3rd July 2013**

DECISION

Order:

1. **The service charges payable by the Applicant to the respondent which have been incurred under terms of the headlease and underlease have been reasonably incurred at reasonable cost except:**

2. **The Respondent shall re-assess the management fees for each year in accordance with the management agreement and the starting amount of £10,500.00 plus VAT for the year 2006.**

3. **The Respondent shall assess the service charges overpaid by the Applicants in respect of services provided to the blocks of flats and present that assessment to the Applicants for agreement, in the absence of which any party may re-apply to the Tribunal for such an assessment.**

4. **The Respondent shall reimburse to the Applicants the application fee of £100.00 and hearing fee of £150.00 paid by them in this matter.**

A. Application and background

1. The Applicants are the leasehold owners of 2 shared ownership houses on the development at Fairbourne Way, Oldham. This appears to be known as the Stonleigh Development. They hold underleases of their respective properties derived from headleases between the head landlord of the site, William Hargreaves Limited, the management company, Stoneleigh Management Company (Oldham) Limited and Northern Counties Housing Association. By way of example the headlease for the property at 17, Fairbourne Walk is dated 30th November 2006 for a term of 999 years from 1st January 2006 at a starting rent of £150 a year. This increases by £25 every 20 years. Ms Murray's underlease is dated 20th April 2007 for 125 years from 1st January 2006 at a premium and an initial rent (reflecting the shared ownership nature of the property) of £2222.40 a year.

2. Encore Homes Limited are a wholly owned subsidiary of Guinness Northern Counties Housing Association Limited. It provides the services required for the development under a management agreement with Stoneleigh Management Company (Oldham) Limited. A copy of the agreement was provided by Encore Homes. It is dated 1st December of an unstated year.

3. The Applicants' underleases contain provisions relating to the service charges at several points in the leases:

- In clause 3(4) the leaseholder covenants to pay a contribution
  (a) To reimburse the landlord on demand of all payments of service charge made under the headlease
  (b) To reimburse the landlord on demand of all payments of ground rent made under the headlease
  (c) To make additional payments a fair proportion of professional fees incurred in pursuing debts owed by leaseholders to the landlord and further reasonable allowances for work done by an employee
- The landlord covenants at clause 4(2) to insure the property against the usual risks (the premium being recoverable from the leaseholder as rent) and to pay the service charge and ground rent due under the headlease.

4. It is then useful to refer to the headlease to find the headlessee's obligations in respect of the service charge under that lease
   - In clause 4(c) there is a covenant with the landlord and the management company to observe and perform the covenants in Part 3 of Schedule 6
   - Paragraph 27 in Part 3 of Schedule 6 is a covenant to pay to the management company or its authorised agent the proportion of the service charge at the times and in the manner herein provided as calculated pursuant to Schedule 5
   - Paragraph 1 of Schedule 5 provides for the tenant to pay a due and fair proportion of the costs incurred by the management company in maintaining the common parts in accordance with the provisions of the lease
   - "Common Parts" are defined in Clause 1 of the lease as meaning all the grounds, parking space, underpass, bin and cycle store and the area coloured yellow within the red edging on plan A in the lease
   - "Service Charge" is defined in the same clause as meaning the costs and expenses as defined and detailed in Schedule 4 of the lease.

5. There are two issues raised in the Application to the Tribunal. The first is that the managing agents have effected an apportionment of the service charges for the development that the Applicants do not consider fair and reasonable. There are a number of charges that are apportioned equally between all the properties on the development notwithstanding the differing benefits that accrue from the provision of the services as between the different types of property. Secondly the Applicants are of the view that the management charges levied by the managing agents are too high given the tasks and duties they perform and fulfil. These issues have been raised in the application for the years ending 31st December 2010 onwards.

Inspection

6. On the morning of 30th April 2013 the Tribunal inspected Stoneleigh development and its surrounding area, together the common parts appurtenant thereto. The site was originally occupied by a mill that had fallen into disuse. The redevelopment consisted of construction of a total of 73 dwellings, 31 terraced houses, 2 blocks comprising a total of 38 flats and 4 "dormas", being flats that are not within the blocks but are situated at first floor level over the 4 passageways that give access to parking areas within the development. A central roadway, Fairbourne Walk, of block paving construction, gives access to the houses and parking areas at the centre of the development while other houses face onto previously existing roadways. The parking areas accessed from the roadway, with the exception of two small areas, each for two properties, and one house which has its own garage, are accessed by electric gates with keypad coded entry. There are bin stores provided for the flats and the whole development has surrounding walls and iron fences. The houses have small front and rear gardens, the flats have the benefit of communal shrubbed beds. There are a number of trees planted in communal areas and roadways. Local amenities are to be found in Derker. Oldham town centre is easily accessible. The new extension to the Metrolink tramway assists access to Manchester City Centre.

The Evidence and the Hearing

7. The Tribunal had the benefit of two bundles of documents supplied by the Applicants and the Respondent respectively which contained relevant service charge information for the years in question. That from the respondent also contained the service charge accounts and/or budgets for the years in question, including the current budget for the year to 31st December 2013 and indeed much of this was also contained within the bundle provided by the Applicants. The latter also contained a number of documents supporting the general contention of the applicants as to the manner in which the charges were apportioned between the various properties on the development.

8. The Respondent provided a submission in response to the Application and drew the attention of the Tribunal to the following.
   - The service charge provision and apportionment were agreed between the management company and Encore Homes. The Applicants were directors of that company

- The budgets were changed to reflect the completion of phase 2 of the development and to take account of full house sales and rented stockm(which had benefitted from the charges being paid by the long leaseholders)
- There had been a return of some excess income to the leaseholders after auditing of accounts.
- The Respondent had sought independent advice as to how to deal with the apportionment of service charges if the lease was silent as to any clear indication and was encouraging the Applicants to seek clarification from the Tribunal
- The garden maintenance contract related to all communal areas but not private gardens.
- The central roadway (Fairbourne Walk) was earmarked for adoption but currently all repairs and electricity supplies were in the service charge.

9. At the hearing all parties spoke in furtherance of their respective views and provided further information of assistance to the Tribunal as to how the service charges had been dealt with since the construction of the development. Until 2010 the general rented stock was excluded from paying the service charge so that up to that point 61 properties were paying for the services provided to 73 dwellings. Now the Housing Association pays 12/73rds of the total costs on behalf of the rented stock. The Respondent had then taken a decision to review the apportionment of the charges as between the different types of properties and increase the proportion paid by the houses. The Respondent appeared to accept that this involved making payment for some services that had no direct benefit to the Applicants but suggested that indirect benefits were gained from such matters as gated parking and landscaped areas by way of increased security and amenity. It is fair to say that the respondent could not be as clear as to what it perceived as benefits accruing to the houses from the heating, lighting and cleaning of the common parts to the flats.

10. The Applicants also pointed out that 5 houses were more disadvantaged than others. The 4 houses at the end of Fairbourne Walk had smaller, ungated parking areas whilst the 5th had its own garage but they still contributed to the gated areas to which the other houses also had access. To sum up the Appplicants' case, the current apportionment resulted in them subsidising other occupiers and they did not necessarily accept the view that they nevertheless gained significant benefit from the overall service provision.

11. They also pointed out that they had only recently seen a copy of the headlease and the covenant in the underleases to pay the service charges demanded in the headlease referred to a plan delineating the area to which those service charges appeared to be limited. The Tribunal asked

for the appropriate coloured copies to be provided and all parties agreed they would forward them. They were indeed provided very speedily to the office of the Tribunal.

12. The Respondent defended its management charges by reference to them being well below the guidelines set out by the former Tenant Services Authority, now the Homes and Communities Agency. Whilst accepting that these charges may be higher than in the private sector they reflected a greater management input by way of such services as 24hour emergency service cover and response to anti-social behaviour.

13. The Applicants pointed out that from what they had seen in the copy documents supplied in the Respondent's bundle there appeared to be a management agreement between the management company and the Respondent to set the initial management fee for the whole development at £10,500 in the first year and thereafter limiting any increase to 4% a year thereafter (in fact the provision at paragraph 10 on page 5 of the agreement limits the increase to whichever is lower, the RPI inflation rate, or 4%). The Respondent's view was that this was merely an agreement between the management company and the Respondent, not the leaseholders.

14. It was a matter of concern to the Tribunal that the plans in the leases did have a material bearing on its deliberations given that the obligations of the tenants to reimburse the management company were spelt out in the underleases and the coloured plans clearly identified the common parts to which the services charges related and the further views of the parties were sought before the Tribunal reconvened to reach its determination.

15. The Respondents accepted that the headlease and plans enabled sufficient identification of the grounds parking space underpass bin and cycle store to which the service charges applied and the area coloured yellow and edged red on "Plan A" were relatively small parking areas adjoining or near the subject properties. In particular the service charge obligation did not include maintenance and repair of either the external or internal areas of the two blocks of flats, nor the services such as cleaning and electricity supply provided to them.

Tribunal's Conclusions and Reasons

16. The law relating to jurisdiction in relation to service charges falling within
Section 18 is found in Section 19 Landlord and Tenant Act 1985 which provides:
(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 the are incurred on the provision of services or the carrying out of works, only if the services or works are of a reasonable standard

Further section 27A landlord and Tenant Act 1985 provides:
(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

and the application may cover the costs incurred providing the services etc and may be made irrespective of whether or not the Applicant has yet made any full or partial payment for those services(subsections 2 and 3)

Subsection 4 provides for certain situations in which an application may not be made but none of them apply to the situation in this case.

17. All of the above provisions need to be applied in conjunction with the lease as that is the principal document regulating the relationship between the parties. The Tribunal therefore gave lengthy consideration to precisely what it was that the Applicants were required to pay for.

18. The Tribunal noted the following:
    - The underleases contain the obligation imposed upon the Applicants to pay the service charge demanded under the headlease (see paragraph 3, above)
    - That service charge payable under the headlease refers to services provided in respect of the "Common Parts" as defined in the headlease. The Tribunal has deliberately inserted commas in the definition which it has set out in paragraph 4, above, to show what it understands to be the common parts i.e. all the ground, parking space, underpass, bin and cycle store and then also the land coloured yellow in the area edged in red upon "Plan A".
    - That definition excludes the 2 blocks of flats and therefore excludes the Applicants from having from making any contribution to the internal or external maintenance, cleaning, decorating, heating and lighting to the flats in those blocks. Those costs must be removed from the amounts payable by the applicants as part of their service charge commitment.
    - The Tribunal believes from what has been provided to it by way of documentation that some of the expenditure should be more easily identifiable by the Respondent than some other aspects.

The Tribunal appreciates that if electricity supply is not separately metered that attributable to the flats may not be as clear as, for example, particular items of repair, or cleaning contracts.

19. The Tribunal is also of the view that the management fees have been wrongly calculated but cannot establish from the information supplied to it quite what the error might be in monetary terms as the starting point out to be a fee of £10,500 + vat in 2006, increasing by whichever is the lower of the average rate of inflation for the year, or 4% whichever is the lower. The amounts claimed within the account do not appear to increase in accordance with the formula set out but may not have started from the amount originally set out in the 2006 management agreement (see exhibit EH14 in the Respondent's bundle). The tribunal was not impressed with the argument that this was a contractual agreement between landlord and Encore Homes. The Applicants' obligation is to reimburse what is paid out and that should be all that the Applicants pay.

20. The Respondent is on stronger ground so far as the Tribunal is concerned in relation to the upkeep of grounds, parking spaces and the provision of security gates to the car parks. The Tribunal is satisfied that there is a communal benefit accruing to all leaseholders from providing secure parking provision for most of the occupiers (and the Tribunal appreciates that it is not provided in respect of nos 16 and 17) adding greatly to the amenity of the development as a whole, as is similarly the case in respect of the grounds surrounding the flats. The way in which the Respondent has allocated the costs, which are not unreasonable, across the development as a whole is reasonable. It might be possible to suggest alternative apportionments of the costs but it is not the role of the tribunal to replace one reasonable solution with another. It follows that if a contribution should be made by house owners it should relate not just to direct upkeep of such items as gates and car parking spaces but such ancillary matters as power for those gates.

21. Similarly the Tribunal is satisfied that it is reasonable to apportion all those costs that properly ought to be incurred (the Tribunal's emphasis) by all the properties on an equal footing, whether flats, "dormas", or houses. Undoubtedly a weighting could have been given to the different types of home to produce a different apportionment, but what the Respondent has done is not unreasonable.

22. For the reasons set out above the Tribunal has made an order in somewhat unusual terms. It hopes that the parties can resolve the matter between themselves. The amounts in question should be ascertainable in most cases and if not there will in all probability be no greater accuracy in any determination that the Tribunal makes than

might be agreed by the parties. Nevertheless in the absence if agreement any party may bring the matter back to the Tribunal for a final determination as to the amount payable for the years in question.

23. In view of the Tribunals findings and the concession made by the Respondent that it had not applied the terms of the leases correctly the Tribunal is of the view that the Respondent shall reimburse the Applicants the application fee of £100.00 and hearing fee of £150.00 paid by them in this matter