

UPPER TRIBUNAL (LANDS CHAMBER)



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Case Number: LRX/64/2010

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

*LANDLORD AND TENANT – service charges – portage services – whether costs to be included in service charge – construction of lease – appeal allowed*

**IN THE MATTER OF AN APPEAL WITH PERMISSION AGAINST A  
DECISION OF THE LEASEHOLD VALUATION TRIBUNAL FOR  
THE LONDON RENT ASSESSMENT PANEL**

**BETWEEN**

**MARK TUNSTILL**

**Appellant**

**and**

**PRIMROSE MANSIONS LIMITED**

**Respondent**

**Re: 33 Primrose Mansions,  
Prince of Wales Drive,  
London, SW11 4EE**

**Before: The President**

**Sitting at: 43-45 Bedford Square, London, WC1B 3AS  
on 14 July 2011**

*Peter-John White* instructed by Tunstill & Co for the appellant  
*Carl Fain* instructed by Charles Russell for the respondent

No cases are referred to in this decision

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## DECISION

### Introduction

1. This is an appeal with leave given by me against the decision of the Leasehold Valuation Tribunal for the London Rent Assessment Panel on an application made to it by the present appellant under section 27A of the Landlord and Tenant Act 1985. It concerns the service charges payable by him on a flat of which he is the tenant at Primrose Mansions, Prince of Wales Drive, London SW11. Primrose Mansions is an apartment block consisting of 154 flats with 8 separate entrances and with communal areas. The respondent is an owner-managed company with approximately 136 shareholders, all of whom are leaseholders in the block. The appellant is one of them.

2. Before the LVT there were four items of the service charge that were in issue in terms of whether they were payable and reasonable. The appeal concerns just one of these: the salaries that are paid to the two porters who provide portage service at the block. One porter is on duty during the day and the other is on call during the night. Each of them has a flat in the building which he occupies rent-free. They have a long list of duties set out in a document entitled “Primrose Mansions Schedule of Duties for Porters”. The “General tasks carried out daily” are specified as:

“Maintain a constant and vigilant watch on the security of Primrose Mansions (PM),  
Report to the Managing Agent (MA) any item requiring further action,  
Release keys to the common parts to approved persons/contractors,  
Record activities and presence of PM contractors in the estate diary,  
Ensure as far as possible that all contractors comply with the rules of the building,  
Instruct resident’s contractors to clean any mess left in the common parts,  
Receive deliveries on behalf of residents during normal duty hours (9am to 5pm Monday to Friday, and 9am to 12 noon Saturday) and alert those residents accordingly,  
Operate the internal mail system excluding Sundays and Public Holidays,  
Ensure one porter is available and on site during normal duty hours – the mobile phone is to be on at all times and messages responded to within 30 minutes,  
Ensure the porter on duty sign at each entrance is correctly set at all times,  
Assist to expediently resolve minor maintenance issues,  
Ensure notices posted on the notice boards are current and relevant and remove those which are not.”

In addition the schedule set out also a large number of specific tasks.

3. The LVT recorded the appellant’s case as being this:

“The Applicant was concerned about the level of the porters’ salaries and again had offered a comparison with Overstrand Mansions. If one added the benefit to the porters of their being provided with free accommodation then the aggregate salary was considered by the Applicant to be above the market rate. Counsel for the Applicant understood that the Applicant also felt that perhaps only one porter was needed.”

4. The LVT’s conclusions under the heading “Porters salaries” were as follows:

“41. No credible evidence on this point was provided by the applicant. The comparison with Overstrand Mansions was not explained in a meaningful way. The comment on the reference in the Lease to ‘normal working hours’ is not considered to be very persuasive. Whilst there are arguments either way as to what the phrase ‘normal working hours’ actually means, the phrase occurs in the section of the Lease containing lessor’s covenants to provide services and there is nothing to indicate that the lessor does not have the power to charge for wider services if they are covered by the Third Schedule.

42. The salaries do not seem to the Tribunal to be manifestly unreasonable. Again, the respondent has taken the trouble to present counter-arguments in written submissions and has referred to them at the hearing. Mr Pickering and Miss Jeal have also given credible evidence in relation to portage issues.

43. The reasonable cost of paying porters is covered by the Lease, in particular paragraph 3 of Part I of the Third Schedule. It is noted that paragraph 3 of Part I does refer to “porter” in the singular but this is not considered problematic if one takes the paragraph, and what the Tribunal considers to be its intended meaning, as a whole.

44. In the Tribunal’s view, based on the evidence provided, the cost of the porters’ salaries was reasonably incurred and is payable in full in respect of each year of challenge.”

5. The appellant holds the flat under a demise for 125 years from 25 December 1973 contained in a deed of surrender and lease dated 30 April 1993. The surrender was of a lease dated 16 January 1985 (referred to as “the Principal Lease”) granted by National Provident Institution for the same term, and the new lease, granted by Primrose Mansions Limited, was subject to the same lessor’s and lessee’s covenants as in the principal lease. Certain variations were made to those covenants. Clause 4 in the Principal Lease contains the lessee’s covenant to pay the service charge. The amount payable is:

“a proportionate part of the expenses and outgoings incurred by the Lessor in providing the services set out in the Third Schedule hereto.”

6. The Third Schedule is headed “The Lessor’s expenses and outgoings and other heads of expenditure in respect of which the lessee is to pay a proportionate part by way of service charge”. It is divided into two parts. Part I includes these paragraphs:

“3. The cost of employing paying maintaining and providing a porter or other staff (if any) and the provision of uniforms and boiler suits and other protective clothing.

4. The cost of providing accommodation for such porter or porters or other staff (if any) and of repairing maintaining and decorating any flat or other accommodation in the Mansions occupied or used by any resident or other staff and any rates taxes or other outgoings in respect thereof.

5. Payment or provision for pensions annuities or retirement or disability benefits for any porter or other staff on the termination of their employment or for their dependants.”

7. Clause 5 contains the lessor’s covenants. They include: covenants (a) to repair the exterior; (b) to wash and paint the exterior; (c) to repair and maintain the interior; (d) to insure; (f) to supply hot water; (g) to provide lighting; and (h) to maintain the forecourts and other outside areas. Covenant (e) is in these terms:

“(e) to employ during normal working hours such servant or servants as the Lessor shall in its absolute discretion decide to afford the services and perform the duties herein set out.”

8. The appeal raises a short point on the construction of the lease. For the appellant Mr Peter-John White submits that on a proper reading of the lease the expenditure under the Third Schedule for which service charges may be levied is related to, indeed is limited to, the lessor’s obligations imposed by clause 5. Thus, he says, the lessor is not entitled to charge for the costs of porters to the extent that they are employed outside normal working hours nor for services carried out by the porters for tasks that go beyond the fulfilment of the lessor’s obligations in clause 5. Most of the duties listed in the schedule of porter’s duties, he says, go beyond these obligations.

9. Mr White draws attention to this provision contained in the deed of surrender:

“(1) That the following sub-clauses shall be deemed to be added to Clause 5 of the Principal Lease and shall have effect accordingly:

...

(j) If at any time the Lessor shall reasonably consider it would be for the general benefit of the lessees of the Mansions so to do the Lessor shall have power to supply additional services to the Mansions PROVIDED THAT in deciding whether or not it would be reasonable to supply such additional services the Lessor shall first consider the views and wishes of the lessees and if the views and wishes of the majority of the lessees are in favour of such additional services it shall be deemed to be reasonable to supply such services without creating any binding obligation on the Lessor to do so

AND... any such additional service shall be deemed to be added to the Third Schedule to the Principal Lease.”

10. Mr White submits that this provision must have been seen as being necessary because the lessor was limited to recovering through the service charge services that he is obliged to provide under clause 5.

11. The submission of Mr Carl Fain for the respondent is that the lessee's expenses and outgoings for which it may seek payment through the service charge are not limited to the services that he is obliged to provide under clause 5. Thus costs related to porters are not restricted to those incurred in employing porters during normal working hours only or for the purpose of carrying out the lessee's clause 5 obligations. Provided the costs are incurred in providing services that are set out in the Third Schedule, he says, they can be included in the service charge, and it does not matter that such services go beyond those that the lessor is obliged to provide under clause 5.

12. On this short point of construction the appellant is in my judgment correct. There is clearly a relationship between clause 5 and the Third Schedule, and in my view there is an intended correlation between the obligations imposed on the lessor by clause 5 to provide services and the Third Schedule, which specifies the costs of providing those services. Thus covenant (f) in clause 5 to provide a supply of hot water has its counterpart in paragraph 1 of Part I of the Third Schedule ("The cost of periodically inspecting and repairing the boilers and other plant and machinery used for the hot water systems") and paragraph 2 ("The cost of the oil electricity or other fuel required for the boilers supplying any common domestic hot water systems"). Covenant (g) requires the lessor to use its best endeavours to provide and maintain lighting to the common parts but it is extended by the words "and other services specified in the Third Schedule". The Third Schedule includes in paragraph 6 of Part I "The cost of maintaining and replacing any entry phone system" and at paragraph 5 of Part II "The cost of maintaining repairing and renewing any television and radio receiving aerials if any". So, if an entry phone or television aerial is installed the lessor must maintain it. It is to be noted also that paragraph 12 of Part I includes the provision: "All other costs and expenses incurred by the lessor in carrying out its obligations under clause 5(d), (e), (f) and (g)"; and paragraph 7 in Part II does the same for the obligations under Clause 5(a), (b), (c) and (d). Thus these sweeping-up provisions ensure that the Third Schedule embraces all the lessee's clause 5 obligations and that the two sets of provisions sit happily together.

13. The proper construction of these provisions, in my judgment, is that the lessee is liable to pay as part of the service charge a proportionate amount of the costs of providing the services set out in the Third Schedule to the extent that such services are ones that the lessor is obliged to provide. Clause 4 and the Third Schedule do not give the lessor power to charge for services independently of his obligations under clause 5. That this was the view taken by the parties to the deed of surrender and lease is clear, it seems to me, from the insertion of the new paragraph (j) in clause 5. It was not thought sufficient simply to make an addition to the Third Schedule: clause 5 had to be the subject of the addition too (somewhat awkwardly because it adds a power to the list of covenants: but this does not affect the point). While in my view regard to this new provision cannot be had in construing the provisions in the Principal Lease, I take some comfort from the fact that the parties to the deed of surrender and lease took the view that they evidently did on this point. I understand also that the lessor has now sought to operate paragraph (j) in relation to the porters and their duties.

14. The result of this, therefore, is that the costs related to the employment of porters are restricted to those incurred in employing porters during normal working hours only and for the purpose of performing the lessor's other obligations under its clause 5 covenants. The appeal is allowed, and the case is remitted to the LVT to determine what costs should be allowed in the relevant years on this basis.

Dated 18 July 2011

George Bartlett QC, President