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# Leasehold Valuation Tribunal

case no. CAM/00KG/LSC/2012/0065

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| **Property** | : | **11 Wyvern House, Bridge Road, Grays, Essex, RM17 6RS** |
| **Applicant** | : | **Thames Hamlet Block H-J Management Co Ltd** |
| **Respondent** | : | **Nicholas Johnson** |
| **Date of Transfer** | : | **8 May 2012** |
| **Date of Hearing** | : | **26 July 2012** |
| **Type of Application** | : | **Claim transferred from Barnet County Court pursuant to section 3 of Schedule 12 to the Commonhold and Leasehold Reform Act 2002** |

Members of the Tribunal

Francis Davey (chair)

Judith H. Lancaster (lawyer member)

Stephen E. Moll FRICS (valuer member)

Appearances

Applicant

Peter Butler (Applicant's company secretary)

Respondent

Nicholas Johnson (tenant of flat 11)

## DECISION

The Tribunal finds that of the sum £5225.05 claimed as service charges:

the sum of £1,139.78 is payable

the sum of £4,071.92 is not payable

the remaining sum of £13.35 is not within the tribunal's jurisdiction.

The Tribunal refused Mr Butler's application to join Mr Landau (tenant of flat 24) and Mr Albohayre (tenant of flat 45) as respondents.

The Tribunal also determines that the provisions of Section 20C of the Landlord and Tenant Act 1985 ("the Act") shall apply and any costs that may have been occasioned by the Applicant in these proceedings before the Tribunal shall not be recoverable as a relevant cost through the service charge regime, it being just and equitable for us to reach that determination.

The Tribunal orders that the matter be transferred back to Barnet County Court in order that the court can consider matters not within the jurisdiction of this tribunal and in particular costs within the court proceedings, court fees, interest and enforcement.

## Reasons

### Introduction

1. The Applicant issued a claim against the Respondent in Barnet County Court under claim number 2IR79829. The value stated on the claim was £5781.61.
2. The very brief Particulars of Claim which accompanied the Claim Form described this sum as consisting of:
    a) £5225.05 of "Service Charges"
    b) the remainder being interested pursuant to section 69 of the County Courts Act 1984 for the period from 31st July 2010 until the date of issue.
3. The Particulars of Claim relied on an attached statement of account with 6 substantive entries, which will be detailed later in this decision.
4. The Respondent filed an informal defence which disputed at least some of the sums claimed and asked that the matter be transferred to the Tribunal.

5. By order of District Judge Marin, dated 8 May 2012, the claim was transferred to the Tribunal pursuant to Schedule 12 of the Commonhold and Leasehold Reform Act 2002. The order gave no indication as to the matter or matters to be determined by the Tribunal and so the Tribunal has assumed that it is to decide all matters that fall within its jurisdiction.

**Application to join further parties**

6. At the beginning of the hearing Mr Butler asked if two further tenants: Mr Landau (of flat 24) and Mr Albohayre (of flat 45) could be joined as additional respondents so that their service charges could be determined in the same hearing. He told us that they had told him they were happy for this to be done.

7. In our view, where a tribunal is dealing with a claim transferred from the county court, its jurisdiction is conferred on it by that transfer. It follows that a tribunal can only determine matters that were in issue before the county court and cannot, therefore, determine any issue involving individuals who were not parties to the county court claim.

8. In our view, regulation 6 of the Leasehold Valuation Tribunal (Procedure) (England) Regulations 2003 does not give us a power to enlarge our jurisdiction by adding further parties as respondents.

9. Accordingly we decided that we did not have jurisdiction to do what Mr Butler asked.

10. If we were wrong about that, we took the view that we would not in any case grant Mr Butler's application. The Tribunal would expect to see a written application for joinder, or hear a proposed party in person, before joining them. We were not prepared to make an order merely on Mr Butler's say-so.

**The Applicant's claim**

11. Mr Butler gave evidence on behalf of the Applicant. The Tribunal found him to be a straightforward and honest witness. None of the evidence he gave was disputed by Mr Johnson and, to the extent that he was able, Mr Johnson corroborated points made by Mr Butler.

12. On the basis of Mr Butler's evidence, we accept the evidence he gave on the factual background to the claim and adopt it as a finding of fact.

13. In so doing the Tribunal makes it clear that any findings adverse to John Price & Company are for the purposes of this claim only. John Price was not a party to these proceedings and had no opportunity to put any contrary evidence or to test any evidence put before us by Mr Butler.

14. Wyvern House, consists of 47 units, with a mixture of studio, one and two bedroom flats. The freeholder is Gradehurst Management Limited. The Applicant is another party to all 47 leases, described in the lease of Flat 11 ("the lease") as "the Company".

15. The lease imposes the usual obligations to manage, repair and so on onto the Applicant. They are listed in Part IV of the schedule to the lease. The Respondent is required to contribute a fraction of 3/91 of the total sums spent by the Applicant in carrying out its obligations.

16. For approximately 7 years before April 2010, the Applicant had discharged its duties through managing agents known as John Price & Company. We were told that a letter, dated 16th April 2010, had been given to John Price indicating the appointment of Abbeystone Management Ltd as new managing agents. We were not shown a copy of the letter.

17. Mr Butler works for Abbeystone.

18. Both Mr Butler and Mr Johnson's evidence was that, at no time during their period as managing agents, had John Price ever served any demand for service charges, let alone one that complied with the requirements of section 21B of the Landlord and Tenant Act 1985.

19. Mr Butler's inference from his discussions with a number of leaseholders was that John Price had simply continued to collect any sums that were being paid by standing order, but had otherwise failed to carry out any proper process of notifying leaseholders that service charges were due, or collecting charges from them.

20. Mr Butler told us that litigation between the Applicant and John Price was on-going – although delayed, he said, by applications for adjournments originating from John Price's indemnity insurers. He candidly admitted that the proceedings before us were intended to establish whether or not their failure had resulted in service charges accruing which could no longer be collected from service charges because of Section 20B of the Landlord and Tenant Act 1985 or otherwise.

21. Mr Butler was keen that we consider evidence consisting of communications with Mr Landau (tenant of flat 24) which supported his contention that no demands had been served. In our view it was probably unnecessary to produce further evidence of John Price's failures – there being no disagreement between the parties on any matters of fact – but we did feel able to consider the correspondence with Mr Landau.

22. One document, in particular, was useful. It is on John Price headed paper and addressed to Mr Landau. It is titled "Rent Application", but is in substance a claim for service charges from 2003 to 2010 on behalf of the Applicant. It is dated 7th March 2011 – nearly a year after John Price had ceased to have authority to act as agents on the Applicant's behalf.

23. It was suggested by Mr Butler, and it seemed clear to us, that this was an attempt by John Price to remedy their earlier failures in the light of the litigation brought against them.

24. The statement attached to the claim form set out the following charges:

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| INV Opening balance | £3,109.95 |
| INV #11. Service Charge 1.8.10 – 30.4.11 | £621.99 |
| INV #63. Service Charge 1.5.11 – 31.7.11 | £207.33 |
| INV #169. Service Charge 1.8.11 – 31.7.12 | £889.78 |
| INV # 127. Buildings insurance for the year 01.07.11 to 30.06.12 | £328.00 |
| INV #228. TO ALTERNMANS | £68.00 |

25. All invoices were endorsed with statements conforming to s.21B – importantly this was confirmed by Mr Johnson.

26. Mr Butler told us that the first 3 invoices were sent at some point after Abbeystone Management had taken over management of Wyvern House. He had no recollection as to when they were sent. In any event they were based on sums that were "deduced" from the little information he had been able to glean from John Price.

27. He admitted that he had no evidence that any money was in fact spent, or even that money was due. He certainly had no evidence that any of the statutory formalities (where relevant) had been complied with.

28. Invoice number 169 referred to the current year and was based on a budget estimate that, Mr Butler told us, had been projected from what little information he had obtained from John Price and from conversations with contractors to discover what had been paid in the past. He described them as "best guesses". They did not represent actual expenditure.

29. A copy of the budget for 2011/12 was in the Tribunal's bundle. Most of the items were self-explanatory, but, in answer to questions from the Tribunal, Mr Butler explained certain of the items:

"Company Expenditure" – was sums of money incurred in the running of the Applicant as a company, including the filing of Companies House returns.

"Directors & Officers Insurance" – was an annual indemnity insurance for the 3 officers of the Respondent: one company secretary (Mr Butler) and two directors. We were given no further details of the insurance or documentary evidence (such as an insurance policy or statement) to explain what it was that it insured.

"Door Entry System and Aerial". Mr Butler told us that he had no idea what this sum referred to. He assumed it had been budgeted for in the

past to cover maintenance of the door entry systems. He had not seen a contract for such maintenance and there had been no demands for payment of any kind in respect of this item.

30. Mr Butler told us that existing contractors, such as cleaners (who also carried out the gardening) had been retained. He also explained that uncertainty due to the pending litigation against John Price had made the Applicant reluctant to embark on substantial works that year, so none had been planned and none had, to date, been carried out.

31. Mr Butler told us that Invoice 127 related to the insurance of the block. The lease requires the Applicant to insure with an insurer nominated by the freeholder. During the year he had been contacted, by chance, by a representative of the freeholder and had been told that a premium of about £9,000 was due on 1st July 2010 and that a sum of £6,000 had was overdue in respect of past insurance.

32. In Mr Butler's view, the Applicant had no option but to pay this sum. Regrettably Mr Butler was unable to give us any further information about the insurance. He told us that information was sent out to leaseholders but he had not brought any documentation relating to the insurance to the hearing.

33. In response to the Respondent's S20C application, Mr Butler said that his costs of attendance at the Tribunal would not be covered by his contract with the Applicant – and therefore would have to be recovered as an additional item.

34. He submitted that his application was not the normal situation of a freeholder at odds with its leaseholders making an application to the Tribunal and being found wanting. Rather, he said, he was appointed by the leaseholders in their capacity as members of the Respondent. He was therefore acting in the interests of all the leaseholders and appeared here for their benefit.

35. He told us that he had spent some 16 to 18 hours in preparation for the hearing.

**The Respondent's position**

36. Mr Johnson confessed that he had not been prepared to deal with the invoice items in the detail which we had treated them. He was not ready, he said, to challenge any item of the service charge budget, particularly because of the lack of supporting evidence supplied by the Applicant. Apart from expressing his concern that the overall figure seemed rather high – taking into account that it did not include insurance and that Mr Butler had indicated that there had been an overspend, to date, of at least £5,000 – he had nothing specific to say.

37. On the insurance, he told us that he owned a flat in Thames Hamlet B – a block in the same development, predating Block H-J, with the same mix of flats, built by the same developer. It had only 31 units and an overall insurance bill of £4,400, giving a price per unit of £142.

38. His suggested that, on this basis, and in his more general experience with property in the area, a contribution to the insurance premium of £328 for a flat of his kind was surprisingly high.

**The Law**

39. It is the Applicant who claims service charges and so it is for the Applicant to show that any service charges fall due and in particular that they are payable pursuant to a specific term of the lease and that all relevant statutory formalities have been complied with.

40. Section 18 of the Landlord and Tenant Act 1985 provides, so far as is relevant, that:

"(1) In the following provisions of this Act "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 costs."

41. Section 19 of the Landlord and Tenant Act 1985 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 they are incurred on the provision 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."

(2) Where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable, and after the relevant costs have been incurred any necessary adjustment shall be made by repayment, reduction or subsequent charges or otherwise.

42. There is no presumption either way as to reasonableness – *Yorkbrook Investments v Batten* (1986) 18 HLR 25. The requirement that costs be "reasonably incurred" does not mean that the relevant expenditure must be the cheapest available. On the other hand, the landlord may not charge a figure that is grossly out of line with the market norm – *Forcelux v Sweetman* [2001] 2 EGLR 173.

43. Section 20B of the Landlord and Tenant Act 1985 provides:

"(1) If any of the relevant costs taken into account in determining the amount of any service charge were incurred more than 18 months

before a demand for payment of the service charge is served on the tenant, then (subject to subsection (2)), the tenant shall not be liable to pay so much of the service charge as reflects the costs so incurred.

(2) Subsection (1) shall not apply if, within the period of 18 months beginning with the date when the relevant costs in question were incurred, the tenant was notified in writing that those costs had been incurred and that he would subsequently be required under the terms of his lease to contribute to them by the payment of a service charge"

44. Section 20C of the Landlord and Tenant Act 1985 provides:

"(1) A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a court, residential property tribunal or leasehold valuation tribunal, or the Upper Tribunal, or in connection with arbitration proceedings, are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application.

(2) The application shall be made—

...

(b) in the case of proceedings before a leasehold valuation tribunal, to the tribunal before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to any leasehold valuation tribunal;

...

(3)The court or tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances."

45. Section 21B of the Landlord and Tenant Act 1985 provides:

"21B Notice to accompany demands for service charges

(1) A demand for the payment of a service charge must be accompanied by a summary of the rights and obligations of tenants of dwellings in relation to service charges.

(2) The Secretary of State may make regulations prescribing requirements as to the form and content of such summaries of rights and obligations.

(3) A tenant may withhold payment of a service charge which has been demanded from him if subsection (1) is not complied with in relation to the demand.

(4) Where a tenant withholds a service charge under this section, any provisions of the lease relating to non-payment or late payment of service charges do not have effect in relation to the period for which he so withholds it."

**Conclusions**

46. It seems to us that the Applicant's claim for sums in respect of previous years – that is the first unnumbered invoice and invoices 11 and 63 – was utterly hopeless and doomed from the start.

47. Mr Butler's admission that he had no information as to whether any costs had actually been incurred would, in our view, prove fatal to his claim.

48. Furthermore, the effect of s20B of the Landlord and Tenant Act 1985, is that, in order to succeed, the Applicant would have to show that a demand for service charges had been sent within 18 months of costs being incurred, or that the Respondent had received notification pursuant to s20B(2).

49. We found that no demands had been sent prior to 16th April 2010. Although Abbeystone had sent out demands in the form of invoices 11 and 63 for costs assumed to have been incurred in the past, Mr Butler was unable to tell us when they were sent – except that they must have been sent after 16th April 2010. There was no way for us to tell whether they could – even assuming any work had been done – have complied with s20B.

50. For these reasons we had no difficulty finding that service charges in the first three invoices were not payable.

51. For invoice number 169, two items seemed to us to cause difficulty.

52. The item "company expenditure" was incurred by the Applicant in its capacity as a company, rather than in its management capacity. While it is quite right to say that those costs will have to be paid, and that since the leaseholders are its members, they will have to be paid by the leaseholders, that does not mean that those costs are service charges.

53. Section 18 of the Landlord and Tenant Act 1985 confines the meaning of "service charge" to charges payable for services, repairs, maintenance, improvements or insurance or the landlord's costs of management.

54. Of these only the "landlord's costs of management" could cover the company charges but in our view they cannot be said to be costs of *management* by the landlord, rather they are the costs of the landlord *existing*.

55. Furthermore, these costs do not appear to be covered by any term of the lease.

65. While it might be possible to imply a power to raise some legal costs for certain specific purposes, the lack of any evidence as to the nature of the costs incurred makes it impossible for us properly to do so. Clearly the Applicant has been involved in litigation, but it seems doubtful to us that pursuing a previous managing agent for negligence could possibly be covered by any term of the lease.

66. It seems to us that the Applicant has failed to discharge its burden of proof in demonstrating that invoice 228 represents sums payable in respect of service charges. We therefore disallow this item.

67. The Respondent, in his communications to the Tribunal, challenged the payability of interest claimed in the county court claim. While there is provision in the lease for the recovery of interest on unpaid service charges, the Applicant does not claim interest on that basis.

68. Rather, the interest is claimed pursuant to the County Courts Act 1984 and therefore is not a "service charge" within the meaning of section 18. For this reason, we cannot make any determination of what that interest should be due. That is entirely up to the court.

69. We gave considerable thought to the Respondent's section 20C application.

70. While we have a great deal of sympathy with the Applicant's position, it remains the case that the Applicant has lost on the bulk of its claim. Much of the claim was wholly misconceived and never had any possibility of succeeding.

71. We reject Mr Butler's suggestion that he needed to bring the claim in order to establish what outstanding sums were recoverable so as to buttress the Applicant's position in litigation with John Price. That, in our view, is an entirely improper way to use the machinery of the Court or Tribunal.

72. John Price did not attend the hearing and were not in a position to challenge any of the evidence put forward. For that reason it seems to us that our findings would not assist the Applicant in its dispute with John Price.

73. In considering the section 20C application we were also mindful of the unfairness of asking the Respondent to answer a claim where no supporting evidence was presented by the Applicant.

74. It seems astonishing to us that an experienced professional like Mr Butler should have such an off-hand approach to tribunal proceedings. He was aware that the reasonableness of service charges had been put in issue by the Respondent, but brought no supporting evidence to the hearing.

75. For the insurance claim he could, and should, have been able to present what documentary evidence he did have, but he chose not to do so. Again for the service charges claim, his produced no evidence of actual expenditure, despite his assertion that the budget had already overrun.

76. This is completely the wrong way to conduct tribunal litigation. The Applicant will have to do much better in future.

77. On balance we consider that it is unfair to ask the Respondent to contribute to the costs of a claim where nothing useful was decided and where scarcely any supporting evidence was produced by the Applicant in defiance of the Tribunal's case management order.

78. We therefore make an order under s20C.

**Francis Davey**

**Chair – for the Leasehold Valuation Tribunal**

**6th August 2012**