10349

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**CAM/00KG/LSC/2014/0059**
Property	:	**3a Garage Villas, High Street, Aveley RM15 4BJ**
Applicant	:	**Regisport Limited**
Representative	:	**Mr Maxwell Green – Countrywide Estate Management**
Respondent	:	**Mr Adam Ozbek**
Representative	:	**Mr Ozbek In Person**
Type of Application	:	**Section 27A Landlord and Tenant Act 1985 - determination of service charges payable; and Schedule 11 Commonhold and leasehold Reform Act 2002 – determination of administration charges payable**
Tribunal Members	:	**Judge John Hewitt** **Mr Stephen Moll FRICS** **Mr David Cox**
Date and venue of Hearing	:	**Tuesday 30 September 2014** **The Thurrock Hotel, Ship Lane, Thurrock RM19 1YN**
Date of Decision	:	**17 November 2014**

DECISION

Decisions of the tribunal

1. The tribunal determines that:

   1.1 The applicant has not given to the respondent any valid demands for the contributions to service charges claimed in the court proceedings;

   1.2 As at the date when the court proceedings were issued there were no service charge arrears payable by the respondent to the applicant;

   1.3 At the time when the court proceedings were issued there were no variable administration charges payable by the respondent to the applicant;

   1.4 The file shall be returned to the County Court at Basildon for the court to determine the claims to court fees, fixed costs and statutory interest which this tribunal does not have jurisdiction to determine.

   The tribunal notes that the respondent accepts that some service charges and a recharged amount ought to be paid by him to the applicant amounting to £1,374.90 as set out on Appendix B to this decision;

2. The reasons for our decisions are set out below.

NB Later reference in this Decision to a number in square brackets ([ ]) is a reference to the page number of the hearing file provided to us for use at the hearing.

Procedural background

3. On 28 September 2013 the applicant commenced court proceedings against the respondent – Claim No. 3YS01395 [54].

   In those proceedings the applicant claimed:

Service charges	£3,216.36
Administration charges	£ 468.00
Insurance	£ 190.87
Recharged expenditure	£ 269.20
Legal costs	£ 983.00
Court fee	£ 245.00
Fixed costs	£ 100.00

Interest (Section 69 CCA)	£	754.70
Further interest	£	0.91 per day

4. A defence was filed.

5. By an order made 15 May and drawn 20 May 2014 District Judge Humphreys sitting at the County Court at Basildon the claim was transferred to this tribunal.

6. The subject Property is a flat within a small development of two flats, one being a ground floor flat and the other a first floor flat, numbered 3A and 3B. It is adjacent and connected to a neighbouring property, the freehold of which is also owned by the applicant and which has been converted and adapted to provide four self-contained flats, numbered 1A,1B, 2A and 2B.

7. The lease vested in the respondent is dated 14 February 1989 [27] and granted a term of 99 years from 25 December 1988 at a ground rent of £40 pa rising to £120 pa during the term, and on other terms and conditions therein set out.

   Clause 3(4) of the lease is a covenant on the part of the tenant to pay one half of the costs, expenses outgoings and matters mentioned in the Third Schedule. The Third Schedule sets out number of matters to which the tenant is to contribute including such matters as repair and redecoration of the main structure, cleaning and lighting the common areas, insurance and professional fees reasonably incurred in connection with the maintenance, repair and proper and convenient management and running of the building. The building referred to is that containing flats 3A and 3B.

   Clause 4(2)–(5) of the lease includes covenants on the part of the landlord to insure the building and to carry out repairs and redecoration and to provide services as therein set out.

   It is to be noted that there is no provision in the lease for the preparation of a budget or estimate of expenditure, payments on account and for annual accounts and balancing debits or credits as the case may be.

   The service charge regime is simply that the landlord is to provide the service, incur the expense of a given item and then it may demand of the tenant his one half contribution.

8. We have not seen any of the leases of the four adjacent flats. We have been told that those leases make provision for the payment of a service charge but we do not know what the scheme is.

9. In 2009 the respondent made an application to the Leasehold Valuation Tribunal (LVT) to determine the amount of service charges

payable by him. The application was allocated reference CAM/00KG/LSC/2009/0125. At the hearing of that application on 15 April 2010 the landlord, Regisport, was represented by a solicitor, Mrs S Wisdom and by two senior representatives of its managing agents, Countrywide, Miss Moon and Miss George. The decision on that application is dated 29 May 2010 (the Previous Decision) [64] and should be read in conjunction with this decision.

10. Paragraph 5 of the Previous Decision records that it was agreed by the parties that the lease vested in Mr Ozbek does not oblige him to pay sums on account in advance of expenditure being incurred.

11. The Previous Decision determined that at the date of the hearing the service charges payable by Mr Ozbek to the landlord amounted to £665.47. This sum included insurance that was claimed in the year 2005/6 £340.60 and insurance claimed in the year 2007/8 £202.32.

12. Having regard to the terms of the Previous Decision it was to be expected that the landlord and its managing agents, Countywide, would have amended their internal practices and to cease to demand of Mr Ozbek sums on account of expenditure and to make balancing debits and credits and instead to follow the regime set out in the lease and to make demands for contributions once expense had been incurred and at such intervals as considered convenient. This appears not to have been the case. The documents filed with the court purporting to support the claim include numerous demands for payments on account of service charges up to and including a demand dated 1 April 2013. Also included is a cash account running from 24 March 2007 through to 29 September 2013. That account purports to show that as at 25 March 2010 there was a debit balance of £3,165.99. The Previous Decision of the LVT determined that as at that date the debit balance was £665.47. The cash account does not appear to have been adjusted to reflect and to give effect to the Previous Decision.

13. The particulars of claim filed in the court proceedings claim service charges alleged to have accrued over the period 29 September 2008 to date. Sums that were claimed prior to 25 March 2010 have already been the subject of a determination by the LVT and thus this tribunal may not have jurisdiction to determine them afresh. Further the current claim includes a claim for insurance of £190.87 said to have fallen due on 25 March 2007. The Previous Decision included determinations on the contributions to insurance which had been claimed. Again there is an issue in relation to jurisdiction as regards this item.

14. This tribunal does not have jurisdiction to determine service charges which were incurred prior to 15 April 2010. Attention is drawn to section 27A (4) of the Act. Attention is also drawn to Rule 9(2)(a) which requires that a claim or part of a claim must be struck out if the tribunal does not have jurisdiction to deal with it. Pursuant to Rule 9(4) the applicant was given notice that the tribunal proposed to strike out part of the claim and in the directions dated 23 June 2014 [43] the applicant

was given the opportunity to make written representations on the proposed striking out. No representations have been filed with the tribunal.

15. This tribunal does not have jurisdiction to determine the claim to statutory interest made pursuant to section 69 County Courts Act 1984, or the claims to the fixed costs and the court fee and these claims will be referred back to the court for determination in due course, however given our findings that as a matter of law there were no service charge arrears or variable administration charges payable by the respondent to the applicant at the time when the court proceedings were issued, the applicant may consider it inappropriate to pursue those claims.

Inspection and hearing

16. On the morning of 30 September 2014 we had the benefit of an inspection of the subject development. Present was Mr Ozbek, and two representatives of Countrywide, Mrs Rebecca Hewitt and Ms Samantha Sandford.

17. At the hearing the applicant was represented by Mr Maxwell Green who told us that he was a paralegal employed by Countrywide Group.

18. It was clarified that the service charges now claimed by the applicant were those set out on the attached schedule marked 'Appendix A', which also records the dates of the demands relied upon by the applicant. It will be noted that in respect of the years ending 24 March 2010, 2011 and 2012 the applicant seeks one sixth of the total expenditure said to have been incurred. The accounts for 2013 claim one half of the expenditure said to have been incurred.

19. During the course of the hearing Mr Green made three concessions in respect of the expenditure said to have been incurred as set out on Appendix A. The first is that in respect of 2011 there was no obligation on the respondent to contribute to general repairs and maintenance costs of £80.95. The second was that in 2012 there was no obligation on the respondent to contribute to a reserve fund. The third was that in 2013 the professional fees were reduced to £100 because in error there had been included a fee invoiced by the applicant for its approval of the 2013 budget and the lease vested in the respondent does not require a budget to be prepared.

Has the applicant demanded any of the service charges claimed?

20. Mr Green submitted that in each of the years in question the applicant made demands for on account payments and subsequently issued a year-end balancing credit. He submitted that the combined effect of these documents was that the applicant had thus issued demands which at least equalled the amount the sums now claimed.

21. The applicant has included the year-end accounts in the hearing file. Mr Ozbek told us that they had not been issued to him on an annual basis and the first time he saw them was when he received the hearing

file. Mr Green told us that the routine office practice was to send out the accounts along with a demand, but he was not able to adduce any evidence to support this. We accept and prefer Mr Ozbek's evidence on this point.

22. Thus, taking the year 2010 as an example, it appears that the applicant's case is that Mr Ozbek was sent demands on 25 March [84] and 29 September 2009 [85] each demanding payment of £255.75 and that on 27 September 2010 he was sent a credit note [86] which simply said:

"27/09/2010	*Service charge – Balancing*	
	25/03/2009 – 24/03/2010	
	Refund Service Charge	*-£220.91"*

23. Mr Green accepted that the provision in the lease: *"To contribute and pay one half only of the costs expenses outgoings and matters mentioned in the Third Schedule hereto"* was to be read as imposing an obligation on the tenant to effect payment promptly on receipt of a clear and unambiguous demand for a contribution to the sums said to have been incurred.

24. It was not in dispute that Mr Ozbek was not obliged to make any payments on account. Thus we find that Mr Ozbek was entitled to ignore and put to one side the demands for on account payments sent to him. Further at the time of the 25 March demand the applicant will not have incurred any expenditure. Some expenditure may have been incurred by the time of the 29 September demand but no details of any expenditure said to have been incurred were given to Mr Ozbek. The balancing credit note does not give any details of any expenditure said to have been incurred. It does not even give details of the amounts of the two on account demands, the total expenditure incurred and thus how the balancing credit has been arrived at. Thus, we find that taking 2010 as the example the only way in which Mr Ozbek would have known that the actual expenditure for the year was claimed to be £1,743.53 was if he had retained the two on account demands (which he was entitled to ignore), added them up and then, in September in the following year deduct the amount of the balancing credit. That exercise may have enabled Mr Ozbek to ascertain the net amount he might have to pay but it did not give him any detail of the sums said to have been incurred and how his one half contribution had been arrived at. We find that the documents relied upon by the applicant cannot be regarded as being clear and unambiguous demands for the payment of a contribution to costs alleged to have been incurred.

25. In addition for the years 2010, 2011 and 2012 the sums demanded were not based on one half of expenditure incurred on that part of the development containing flats 3A and 3B, but were based on one sixth of expenditure incurred across the whole development.

26. Mr Green said that the management fees, audit fees and out of hours emergency services charges were all based on a unit charge per flat so that in accounting terms it did not matter if the charge was one half of two or one sixth of six. Mr Green did however accept that as regards some expenditure, including the general repairs and maintenance the total expenditure claimed was across the whole of the development and that Mr Ozbek was not obliged to contribute to any costs associated with that part containing the four flats.

27. Mr Green was not able to give us any explanation as to why it was that Countrywide continued to manage the development as if it were one of six flats, with each flat contributing one sixth of expenditure and why it was that Countywide continued to send Mr Ozbek demands for on account payments when it was clear from the Previous Decision that those were not the correct things to do.

28. We find that the documents relied upon by the applicant do not amount to clear and unambiguous demands for a contribution to the sums said to have been incurred. Thus we find that at the time the court proceedings were issued the applicant had not made demands for any of the service charges alleged to have been unpaid.

29. This finding is of itself sufficient to dispose of the applicant's case as regards the claims to service charges. However, the actual sums claimed were discussed in some detail during the course of the hearing and Mr Ozbek did agree that some contributions should be paid by him.

In these circumstances and in case it be held elsewhere that the applicant had made valid demands for contributions to costs incurred, we set out below our findings in respect of the disputed sums claimed.

Management fees and out of hours emergency services fees

30. Mr Ozbek accepted that a management fee was payable but submitted that the sums claimed were too high given the minimal amount of management actually undertaken. Mr Ozbek said that he had not undertaken any research into the levels of management fees in comparable local developments and he was content to leave determination of a reasonable sum to the expertise and experience of the members of the tribunal.

31. Ms Sandford gave evidence and took us through the menu of services that might be required, if, as and when needed. At [106] is a generic Countrywide management agreement but Ms Sandford was not sure if the applicant and Countrywide had expressly agreed that document.

The menu of services included:

> *"3. (c) ...Preparation of annual accounts in accordance with the Lease terms and liaison with accountants over the provision of audited/certified accounts, as appropriate."*

This provision should be borne in mind when considering paragraph 40 below.

32. Neither Ms Sandford nor Mr Green was able to assist us with an explanation of the basis on which the unit fee increased each year. The unit fees claimed were:

	Management Fees	Out of hours emergency service
2010	£207.40	£21.15
2011	£211.90	£85.05
2012	£215.26	£-
2013	£240.00	£79.20

Mr Green was not aware that the applicant had gone out to competitive tender for management on a regular basis but he accepted that in general terms it was good estate management practice for all services purchased by a landlord to be subject to regular competitive tender.

33. Evidently Countrywide does not offer an out of hours' service. This is bought in from a contractor and charged for separately. We have taken the two charges together because in our experience the unit charges for many local managing agents include some level of out of hours' service and when comparing the fees claimed to the market in general terms both sums claimed have to be looked at.

34. The management for the subject development is without doubt minimal. Even that minimal level of management has been inept with Countrywide unable to adopt and apply the terms of the lease and make proper, valid and clear and unambiguous demands for the contributions payable. The evidence from Mr Ozbek, which we accept, was that Countrywide were not cooperative and responsive when issues were taken up with them.

35. Drawing on the accumulated experience and expertise of the members of the tribunal we find that the reasonable level of management fees for the type and quality of service provided payable per unit would not exceed:

2010	£175.00
2011	£185.00
2012	£195.00
2013	£205.00

Audit fees

36. For reasons which were not clearly explained to us the respondent, or at least Countrywide, chose to prepare annual accounts on an accruals basis and to have those accounts audited by an external auditor.

37. Mr Green submitted that it was beneficial to lessees that accounts be audited and verified by an independent source. He also submitted that this exercise ensured supporting invoices were checked to be correct.

38. Mr Ozbek did not agree.

39. The lease does not require annual accounts, still less audited accounts. Although it was submitted that the audit was to the benefit of the lessees, no evidence to support this was produced. Mr Ozbek confirmed that neither he nor, so far as he was aware, any other lessee was consulted over the question whether audited accounts would be of assistance to them. Moreover the audits carried out were plainly inept and bore no relation to the provisions of the subject lease and the liability of the tenant under it. A glaring example is the inclusion in the 2012 accounts of a reserve fund allocation of £1,000.

40. However, it should be noted that paragraph 2.4 of the Service Charge Residential Management Code 2nd edition published by RICS and approved by the Secretary of State for England recommends that an annual unit fee for management should include:

> *"Produce and circulate service charge accounts and supply information to tenants ... and liaising with and providing information to accountants where required."*

The lease does not impose an obligation on Mr Ozbek to contribute to the costs of an audit of service charge accounts or demands. We find that the costs were not reasonably incurred and Mr Ozbek is not obliged to contribute to them.

General repairs and maintenance

41. The parties were able to reach agreement on the contributions payable, as follows:

2010	One sixth of the £264.38 sum claimed, namely £44.06
2011	Mr Green withdrew the £80.95 sum claimed
2012	One sixth of the £212.00 sum claimed, namely £35.34
2013	One half of the £546.00 sum claimed, namely £273.00

Professional fees

42. Fees of £3,020.80 were incurred in 2011. These were made up as follows:

£411.25	Defects analysis report referable to the whole development [155];

£669.75 Condition survey and insurance valuation referable to the whole development [156]; and

£1,939.80 Preparation of a specification for proposed major works referable to the whole development, invitation of tenders and preparation of a tender report

43. As regards the first two items a reasonable apportionment to reflect that part referable to Flats 3A and 3B would be £68.55 and £111.62 respectively. As regards the third item an apportionment is not quite so straightforward. Only a small part of the overall works was referable to Flats 3A and 3B. The majority of the works were related to lintel repairs to Flats 2A and 2B. Evidently the respondent did not proceed with the works allegedly because it had not been put in funds. It appears to have abandoned the project. In the event the lessee of Flat 2B procured some lintel repairs to be carried out. Mr Green was unable to inform us if and when the respondent proposed to carry out any of the remaining repairs at some future time. If it does so the specification may be of some value. If it does not, most if not all of the expenditure, will be entirely wasted. If an apportioned part of this were to be payable by Mr Ozbek we would have determined it at £55.00

44. We have already determined that Mr Ozbek is not obliged to contribute to these costs because they have not yet been demanded of him. If a contribution had been demanded of him we would have determined the costs were not reasonably incurred. The respondent is obliged to effect repairs whether it is in funds or not. Mr Ozbek is not obliged to make any payment on account or put the respondent in funds. It seems to us it is patently unreasonable for a landlord to incur preliminary costs on a project only to abandon that project later simply because it is not in funds, especially where, as regards Mr Ozbek, he is not obliged to put the landlord in funds.

45. In 2013 fees of £120 were claimed. As mentioned above Mr Green withdrew the claim to £20. The remaining sum of £100 was referable to a further report dated 17 April 2012 [365] in connection with the lintel repairs project mentioned above. For the reasons set out in paragraph 44 we would have determined that Mr Ozbek was not obliged to contribute to the costs claimed.

Health and Safety

46. The supporting invoice is at [252] and the report is at [254]. Mr Ozbek said that he had no knowledge of the report which is dated 15 October 2010. Mr Green confirmed that the report had not been copied to any of the lessees. Mr Green also confirmed that the respondent had not carried out any of the recommendations set out in the report or taken any steps to minimise any of the risks identified by the report. It was not clear to us whether this was due to an oversight on the part of the respondent or the result of a positive policy decision.

47. The clear impression given to us was that the report was commissioned simply so that the respondent could say that a risk assessment had been undertaken. We find it is patently unreasonable for a landlord to commission a health and safety risk assessment at some cost and then simply to ignore it and not even copy it to the lessees affected by it or draw to their attention the risks identified in the report. Thus the respondent did not persuade us that the cost was reasonably incurred.

Drainage and garden clearance

48. The costs were challenged by Mr Ozbek. The supporting invoice for the drainage cost is at [278] but the evidence of Mr Ozbek, which we accept was that he personally had cleared the drains to the rear of the development. On the evidence before us we were not persuaded that the garden clearance and work had been carried out. If the contribution had been demanded of Mr Ozbek he would not have been liable to contribute one sixth of the cost incurred.

Miscellaneous claims

49. In addition to the above service charges the respondent had also claimed in the court proceedings:

Administration charges £468.00

50. Mr Green stated that the applicant had not paid any or incurred any of the fees claimed. Evidently the fees were simply charged or debited by Countrywide to Mr Ozbek's account as part of a credit control process.

51. Mr Green was not aware of any agreement between the applicant and Countrywide to the effect that if the fees were not recovered from the lessee they would be paid by the applicant. Mr Green suggested that there might be an oral agreement between the applicant and Countrywide to the effect that if Countrywide was able to recover such fees from a lessee it would be entitled to keep them. Mr Green further submitted that it was arguable the applicant had incurred the fees even if it has not been and will not be invoiced for them.

52. All of the fees debited related to alleged arrears and debt collection and the efforts made to recover the alleged arrears.

53. Mr Green relied upon the covenant in the lease on the part of the lessee to pay costs incurred in connection with the preparation and service of a notice pursuant to section 146 Law of Property Act 1925. Mr Green also relied upon a standard debt collection letter, a sample of which is at [382], which bears the warning: *"PLEASE BE AWARE THAT FAILURE TO PAY COULD RESULT IN FORFEITURE OF YOUR LEASE AND LOSS OF YOUR HOME."*

54. No evidence was presented to us to support the submission that the letters were written or steps were being taken for the purposes of or incidental to the preparation and service of a section 146 notice. Indeed there was no evidence that the applicant was even aware of the arrears, let alone that it had taken a policy decision to initiate a forfeiture

process. Further it is noted that the court proceedings were simple debt recovery proceedings and there was no claim for a determination or a declaration for the purposes of section 81 Housing Act 1996.

55. For all of the above reasons and particularly because we have already determined that there were no service charge arrears to follow up or to collect, we find that none of the variable administration charges claimed are payable by the respondent to the applicant.

Insurance £ 190.87

56. Mr Green submitted that this cost had not been determined by the previous tribunal. The demand is at [402]. It is dated 1 October 2008 but relates to insurance cover for the year commencing 25 March 2007. Mr Green was not able to provide any evidence as to the date on which the cost was incurred or paid by the respondent. We infer that the cost of insurance would have been borne prior to the commencement of the period of cover, namely prior to 25 March 2007. It was not demanded of Mr Ozbek until after 1 October 2008 and hence it was not demanded within 18 months of being incurred. Having regard to the provisions of section 20B of the Act the sum is not payable by Mr Ozbek.

Recharged expenditure £269.20

57. This concerned repairs to a damaged bannister rail which the applicant had effected. Mr Ozbek admitted a liability to pay £262.00 and Mr Green withdrew the balance of £7.20.

Legal costs £983.00

58. These costs were claimed in the court proceedings as being payable pursuant to the terms of the lease but they have not been the subject of a compliant demand for the payment of a variable administration charge. Thus we find that, as at present, these are not payable. If and when they were to be demanded it would be open to Mr Ozbek to challenge them if he wished to do so but it is not appropriate for this tribunal to determine what the outcome of any such challenge might be.

Judge John Hewitt
17 November 2014

Expense		2010 p83		2011 p124		2012 p282		2013 p323
Management Charge		£ 1,244.43		£ 1,271.40		£ 1,291.56		£ 480.00
Audit Fees		£ 213.57		£ 216.00		£ 216.00		£ 128.00
Out of hours Emergency Services		£ 21.15		£ 85.05				£ 79.20
General Repairs & Maintenance		£ 264.38		£ 80.95		£ 477.00		£ 833.60
Profesional Fees				£ 3,020.80				£ 120.00
Health & Safety				£ 317.25				
Drainage				£ 211.50				
Reserve Fund						£ 1,000.00		
Gardening/Estate Maintenance						£ 840.23		
Totals		**£ 1,743.53**		**£ 5,202.95**		**£ 3,824.79**		**£ 1,640.80**
16.67% =		£ 290.59		£ 867.33		£ 637.59		
50% =								£ 820.40
	Demands		Demands		Demands		Demands	
	25.03.2009	£ 255.75	25.03.2010	£ 548.50	25.03.2011	£ 602.10	25.03.2012	£ 455.14
	29.09.2009	£ 255.75	29.09.2010	£ 548.50	29.09.2011	£ 602.10	29.09.2012	£ 455.14
	27.09.2010	-£ 220.91	24.06.2011	-£ 229.84	18.07.2012	-£ 566.73	04.06.2013	-£ 89.88
Totals		£ 290.59		£ 867.16		£ 637.47		£ 820.40

Expense	2010	2011	2012	2013	Grand Total
Management Charge	£ 175.00	£ 185.00	£ 195.00	£ 205.00	
Audit Fees	£ -	£ -	£ -	£ -	
Out of hours Emergency Services	£ -	£ -	£ -	£ -	
General Repairs & Maintenance	£ 44.06	£ -	£ 35.34	£ 273.00	
Profesional Fees	£ -	£ -	£ -	£ -	
Health & Safety	£ -	£ -	£ -	£ -	
Drainage	£ -	£ -	£ -	£ -	
Reserve Fund	£ -	£ -	£ -	£ -	
Gardening/Estate Maintenance			£ -		
Recharged expenditure		£ 262.50			
Totals	**£ 219.06**	**£ 447.50**	**£ 230.34**	**£ 478.00**	**£ 1,374.90**