



**FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)**

Case Reference : CHI/00HE/LIS/2013/0102

Property : 9 Park House, Bridge Road, St Austell, PL25
5HD

Applicant : Mr R Hayton (lessee)

Respondent : Ocean Housing
Represented by Mr Simon Lane of counsel

Date of Application : 22nd September 2013

Type of Application : Section 27A and 20C of the Landlord and
Tenant Act 1985 (The Act).

Tribunal : Mr R T Brown FRICS
Mr W M S Tildesley
Mr P G Groves

Date and venue of : 28th March 2014

Hearing : The Key, Cornwall College, Tregonissey Road,
St Austell, PL25 4DJ.

Dated : 16/04/14

DECISION ON SUBSTANTIVE ISSUES

DECISION

1. The Tribunal determined that the expenditure incurred by the Respondent (excluding those items conceded and set out in paragraph 8 below) in the service charge years ending 31st March 2004 to 31st March 2013 is reasonable and payable.
2. The Tribunal concludes that after the concessions made by the Respondent including the fact that no service at all is payable by the Applicant in 2010 a significant rebate in the charges will be due to the Applicant. A balancing statement will be required a copy of which should be lodged with the Tribunal within 28 days of this decision.
3. By consent of the parties the Tribunal makes an order, under Section 20C, that in so far as the costs of these proceedings may be recoverable under the Lease they are not recoverable.

REASONS FOR DECISION

The Application and Introduction

4. The Applicant seeks a determination of certain items of service charge incurred in the years ending 31st March 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012 and 2013.
5. An application is also made under section 20C of the Act that the costs of these proceedings may not be recovered by way of the service charge provisions of the lease.
6. Directions were issued on 4th October 2013. The Parties substantially complied with those Directions enabling the matter to proceed
7. The application is about whether or not under the lease the Respondent is entitled to recover its costs in respect of certain items and does not challenge the standard of service provided. The only issue where cost is challenged is the management fee incurred in the years in dispute.
8. Following the application the Respondent undertook a review of the lease and as a result of that review acknowledged that the Applicant's position was correct in respect of certain items. The Respondent concedes that, in relation to the items of service charge listed below, it is not entitled to recover its costs under the terms of the Lease. Those items are therefore no longer in dispute and not the subject of this determination. This means that the Applicant will not have to pay for these charges, and as a result will receive a reduction in the amount of service charges payable. Evidence submitted in relation to those items is not summarised in this decision.
 - (a) 2004: Television system upgrade, safety roof guardrails and replacement central heating
 - (b) 2005: Fire extinguisher maintenance, caretaking and replacement central heating
 - (c) 2006: Caretaker and fire extinguisher maintenance
 - (d) 2007: Caretaker, fire extinguisher maintenance and laundry
 - (e) 2008: Caretaker and fire extinguisher maintenance

- (f) 2009: Caretaker, fire extinguisher maintenance, fire enforcement notice works and external ramp access
- (g) 2010: Caretaker and fire extinguisher maintenance
- (h) 2011: Caretaker and fire extinguisher maintenance
- (i) 2012: Caretaker and fire extinguisher maintenance
- (j) 2013: Caretaker, fire extinguisher maintenance, door entry system, fire alarm replacement and day to day costs of running: door entry, fire alarm and fire extinguishers.
- (k) At the hearing Mr Lane conceded that no invoices had been raised for the year ending 2010 and the Respondent was therefore unable to recover service charge in that year.

9. The Tribunal assumes the Respondent will issue an appropriately amended annual Summary of Service Charge for all the years in dispute and a revised service charge statement showing the correct amount due from and paid by the Applicant.

The Property and the Tribunal’s inspection

- 10. The members of the Tribunal attended the property on the 28th March 2014 and met Mr and Mrs Hayton, who elected not to attend the inspection of the common parts. The Tribunal inspected the Common Parts in the presence of Mrs S Parkyn Leasehold Officer, Mr G Fitzpatrick Income and Leasehold Manager (both of the Respondent Ocean Housing) and Mr Simon Lane.
- 11. The property comprises an 11 storey block of purpose built flats constructed circa 1960. The property is serviced by two lifts and has limited communal gardens.
- 12. Adjoining is two storey car park, spaces in which may be licensed separately from the Respondent. The Applicant does not have a parking space.

The Law

- 13. The relevant law is set out below:

Landlord and Tenant Act 1985

Section 18 Meaning of “service charge” and “relevant costs”

- (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, improvement 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*
- (2) *The relevant costs are the costs or estimated costs incurred or to be incurred by or on behalf of the landlord or a superior landlord in connection with the matters for which the service charge is payable.*
- (3) *for this purpose*
 - (a) *costs includes overheads and*

- (b) costs are relevant costs in relation to a service charge whether they are incurred or to be incurred in the period for which the service charge is payable or in an earlier period

Section 19 Limitation of service charges: reasonableness

- (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.

Section 20C Limitation of service charges: costs of proceedings

- (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 or leasehold valuation tribunal, or the Lands 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—
 - (a) in the case of court proceedings, to the court before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to a county court;
 - (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;
 - (c) in the case of proceedings before the Lands Tribunal, to the tribunal;
 - (d) in the case of arbitration proceedings, to the arbitral tribunal or, if the application is made after the proceedings are concluded, to a county court.
- (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.

Section 27A Liability to pay service charges: jurisdiction

- (1) An application may be made to the appropriate 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.

- (2) Subsection (1) applies whether or not any payment has been made.
- (3) An application may also be made to the appropriate 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.

The Lease

14. The Tribunal is informed that there are several different versions of the lease to the building. Mr and Mrs Hayton's lease is described as the 1st Lease. No other sample leases were presented to (nor are such leases required by) the Tribunal.
15. Mr and Mrs Hayton purchases a leasehold interest in the property under the Right To Buy legislation (Housing Act 1985).
16. The Tribunal was provided with a copy of the Lease dated 15th October 1984 between Restormel Borough Council and Raymond Hayton and Elizabeth Hayton.
17. Clause 1 of the recitals to the lease says:

'..... together with a sum by way of further rent equal to a sixty seventh of the amount of the costs which the Council shall have incurred since the preceding twelve months in keeping the Flat and the building in which it is situated including drains gutters and external pipes in repair but excluding repairs which would amount to making good structural defects except the structural defects described in the Schedule of dilapidations hereafter and any structural defects of which the Council shall first become aware after the 15th October one thousand nine hundred and ninety four and of insuring against risks involving such repairs or the making good of such defects and also by way of further or additional rent from time to time a sum or sums of money equal to one (sixty seventh) part of the amount which the Council may expend in effecting or maintaining the insurance of the building against loss or damage by fire and other such risks (if any) as the Council think fit in accordance with its obligations under clause 3(2) hereunder'

18. The Schedule headed 'Dilapidations' is left blank.

The Hearing

19. The hearing was held after the inspection.
20. The Applicant appeared in person with his wife Mrs Hayton
21. The Respondent was represented by Mr Simon Lane of counsel who called Mrs S Parkyn Service Charge and Leasehold Officer at Ocean Housing as witness.

The Applicant's Case

22. *Tribunal's Note: This summary of the Applicant's evidence excludes reference to all matters conceded by the Respondents (see above).*
23. The Applicant seeks determination that the following matters (for all years) are not recoverable under the terms of the lease:
 - (a) 2004: Lift maintenance, fire alarm maintenance and management fee
 - (b) 2005: Lift maintenance, fire alarm maintenance, lightning conductor earthing and management fee
 - (c) 2006: Lift maintenance, fire alarm maintenance, lightning conductor earthing, TV aerial maintenance and management fee
 - (d) 2007: Lift maintenance, fire alarm maintenance, lightning conductor earthing, TV aerial maintenance and management fee
 - (e) 2008: Lift maintenance, fire alarm maintenance, lightning conductor earthing, TV aerial maintenance and management fee
 - (f) 2009: Lift maintenance, fire alarm maintenance, lightning conductor earthing, TV aerial maintenance and management fee
 - (g) 2010: Lift maintenance, fire alarm maintenance, lightning conductor earthing, TV aerial maintenance, external decoration consultancy, external decoration and management fee
 - (h) 2011: Lift maintenance, fire alarm maintenance and management fee
 - (i) 2012: Lift maintenance, fire alarm maintenance and management fee
 - (j) 2013: Lift maintenance, fire alarm maintenance and management fee
24. The Applicant does not dispute that, if such costs (listed above) are recoverable, the standard of the work or the costs thereof are unreasonable.
25. The Applicant does, however, seek determination that, if management costs are recoverable, the amount of such management costs. In particular the Applicant referred the Tribunal to the decision of Restormel Borough Council (in a letter dated 2nd March 2001) to reduce the fee from 12.5% to 8% in 2001. The Respondent had then increased the fee to 10%.
26. The Applicant's case in support of this interpretation of the Lease is the statement from the then Borough of Restormel following a meeting with Leaseholders in May 1997. *'it became apparent that the Lease agreement was inadequate that it did not allow recharges to be made to Leaseholders for items other than "repairs and maintenance" further 'It did not, for instance, provide any facility for recharging for the electricity usage in common areas, which is considered to be a service rather than a maintenance item'*
27. This is further supported by the use of 'N/A' in the Summary of Service Charges under the previous ownership (Restormel Borough Council).
28. Further the Applicant points to 'glaring errors' (*not all identified*) in the figures provided. There had been no consultation about the repair and redecoration work carried out in 2010. When questioned, Mr Hayton agreed he had not always been able to attend residents meetings.

The Respondent's Reply

29. *Tribunal's Note: This summary of the Respondent's evidence excludes reference to all matters conceded by the Respondents to the Applicant (see above).*
30. The Respondent's case is set out in the witness statement of Mrs S Parkyn dated 13th January 2014.
31. Service Charge recovery is a matter of contractual entitlement. In this respect the Applicant is required to pay 1/67th of the costs incurred in the preceding 12 months in keeping the Flat and Building in which it is situated, including drains, gutters and external pipes, in repair. The key words being '*in repair*' in clause 1 of the Lease which creates the obligation and leads to the associated costs.
32. The Respondent conceded that that capital expenditure on improvements (Listed above) was not recoverable however once an item had been renewed the Applicant was responsible for his share of keeping the building '*in repair*'.

2010

33. The Respondent conceded that no service charge was recoverable in this year no invoice having been raised. The Applicant states that he still paid the charge for this year. The Respondent has no record of this payment, and has requested the Applicant to provide receipts for the payments made. The Tribunal is confident that the Respondent will resolve the matter promptly.

2004, 2005, 2006, 2007, 2008, 2009, 2011, 2012 and 2013

34. *Lift maintenance.* The Applicant does not dispute the amount of the cost. The lift forms part of the fabric of the building and accordingly falls within the covenant and is recoverable. The maintenance contract with Otis commenced prior to the introduction of Section 20 of the Act the Respondent was not therefore required to consult with lessees prior to entering the contract.
35. *Fire alarm maintenance.* The installation post dates the Applicant's purchase of the flat it was not part of the building at the time of demise. Fire Safety Regulations require fire alarms to be installed. The charge relates not to the cost of initial installation but of ongoing maintenance. It is the Respondent's submission that once installed under the Respondent's statutory obligations it becomes part of the building and in '*keeping*' the building '*in repair*' it becomes an obligation of the Applicant.
36. *Management fee.* The costs which are incurred in keeping the building '*in repair*' must include the Respondent's management and supervision costs. In support the Respondent refers the Tribunal to *Norwich City Council Marshall LRX 114/2007*. In that case the lease required the Leaseholder to pay '*a fair share of the reasonable expenditure*' of the Council's costs in complying with its obligations under the lease. In that case George Bartlett QC the then President of the Lands Tribunal referred to his earlier decision in *London Borough of Brent v Hamilton* and quoting himself:

If repairs are to be carried out or windows painted or staircases cleaned, someone will have to be paid for doing the work and someone will have to be arranged for the work to be done, supervise it, check that it has been done and arrange for payment to be made. Since the Council could only act in these

respects through employee or agents, it will have to incur expenditure on all these tasks, If it does incur such expenditure, a lessee will be liable to pay a reasonable part of it'

37. The Lands Tribunal held that it was '*inescapable*' that supervision and management costs would form part of the overall costs incurred by the Landlord.
38. Mrs Parkyn explained that the management fee of 10% was charged on all blocks in their management and was based on the time spent. No analysis had been possible because so many different people were involved however the charge did not cover the real cost of management.
39. Management fee will be applied at 10% of the costs.

2006, 2007, 2009, 2011, 2012

40. *Day to day maintenance.* These costs relate to works in keeping the flat and building in repair and are therefore recoverable.
41. *TV aerial servicing.* These costs are recoverable as maintenance of the building. The aerial had to be converted to digital following the demise of analogue transmission.

2005, 2006, 2007, 2008

42. *Lightening Conductor earthing.* The lightening conductor forms part of the fabric of the building and costs were incurred in keeping the building in repair and are therefore recoverable.

2013

43. The Tribunal is asked to find that sums for day to day maintenance, lift maintenance and management being the only costs incurred are recoverable as shown on the revised Service Charge Summary.

Major Works –invoiced March 2010

44. In 2008 the building was 'netted' after reports of falling concrete. Michael Dyson was commissioned to prepare a structural survey following which Stage 1 Section 20 Notice was issued on 19th February 2009 and Stage 2 on 19th May 2009. Consultation meetings were held with residents on 18th March 2009 and 1st July 2009.
45. The Applicant's query appears not to be in relation to the reasonableness of cost or standard of work but in relation to whether not the cost is recoverable. The Respondents' say that the Lease makes express provision for the Applicant to contribute to costs of keeping the flat and building in repair.

Ocean Services

46. The Respondent uses the group's in-house maintenance contractor. The Respondent maintains control over the costs through a formal contract which is based on a schedule of rates for all day to day work. The Respondent benchmarks the services provided annually to ensure repairs are undertaken for best value and at the best possible rates.

The Tribunal's Deliberations

47. The Tribunal considered all the relevant written and oral evidence presented and summarised above in its deliberations.

The interpretation of the Lease

48. The jurisdiction of the Tribunal under Section 27(1) is to determine '*whether service charge is payable*'. In doing so it is necessary for the Tribunal to construe the terms of the Lease. In considering this aspect the Tribunal looks at the lease which the contract between the parties determining the responsibilities and liabilities of each party.

49. There is no statutory guidance on how such documents should be interpreted, there is however volumes of case law.

50. In arriving at their decision the Tribunal approached the exercise by considering the guidance set out in two particularly important cases.

51. *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 W.L.R. Lord Hoffman stated:

"The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have understood it to mean"

52. Again in *Investors* above, Lord Hoffman states:

"The rule that words should be given their "natural and ordinary meaning" reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand if one would nevertheless conclude from the background that something must have gone wrong with the language the law does not require judges to attribute to the parties an intention which they plainly could not have had"

53. In *Antaios Compania Naviera SA v Salen Rederierna AB* (1985) AC 191 it was stated that commercial contracts must be construed in a business fashion and there must be ascribed to the words a meaning that would make good common sense. Indeed in *Antaios* above, Lord Diplock stated that:

"if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense"

54. For the purposes of construing what the parties to the documentation must have meant, the Tribunal consider that the documentation should be construed so that service charge arrangements which have existed and have been operated in practice for many years should continue to apply in the absence of compelling evidence to the contrary and that thus, the Lease should be construed on such basis.

55. The Lease is narrowly drawn. The Tribunal accepts Mr Lanes' interpretation of Clause 1 of the Recitals to the Lease in so far as items of capital expenditure are not recoverable but that the ongoing maintenance in respect of those expenditures is recoverable in so far as such expenditure relates to the replacement of obsolete equipment (TV aerials) or the compliance with current regulation (fire alarm and lift maintenance).

The disputed items of Service Charge

56. The Tribunal were told at the hearing by the Respondents that service charges for the year 2008/2009 had not been demanded and accordingly were not recoverable.
57. However this is a variance with the documentation submitted in the bundle which indicates that it was in fact the year 2009/2010 when no service demands were raised.
58. On this basis the Tribunal finds that the Respondent is 'out time' (Section 20B of the Act) to issue an invoice for the service charge year 2009/2010. There is therefore no liability to pay the amount in the summary.
59. The Tribunal agree with the Respondent's interpretation of the lease in respect of the major works. However these works fell into the 2009/2010 service charge year but do not appear on the Service Charge Summary for that year and, on the evidence before the Tribunal, were not invoiced. There is therefore no liability on the Applicant to pay
60. Applying those principles to the disputed items of Service Charge the Tribunal concludes that the expenditure incurred by the Respondent (excluding those items conceded above) is reasonable and payable. A schedule of those charges determined as payable by the Applicant is attached.

Management Fee

61. The Tribunal's interpretation of *Norwich* (above) is at variance with that of the Respondent who suggests that the management cost of the entire building is recoverable following the decision in *Norwich*.
62. The Tribunal's conclusion is that *Norwich* is not on 'all fours' with the subject Lease in so far as in *Norwich* there was a clause (albeit limited) allowing the recovery of management fees. There is no such clause in the subject Lease. The Tribunal's interpretation is that the only recoverable part of the management fee is the 'on cost' of organising and supervising the maintenance contracts. The cost of the administration (i.e. for example: property management and administration generally in visiting the building, calculating the service charge, raising invoices etc) is not recoverable.
63. The Tribunal finds for this purpose the use of 'a percentage of cost management fee' to be generally inappropriate and unaccountable to the actual costs of carrying out the function. A further danger lies in the possibility that the more that is spent the more fee is paid by the Applicant without justification as to the true time/cost expenditure.

64. The Tribunal concluded that the fees (which range from £12.95 to £261.19 per lessee per annum) were on average modest and that they could not be considered to be unreasonable in total for the more limited duties the Tribunal considers are recoverable. The Tribunal therefore determines that the actual amounts claimed for management are reasonable and payable.

Tribunal's Conclusions

65. The Tribunal concludes that all those service charge items not conceded but disputed under this application are recoverable under the Lease.
66. The actual management fees charges are reasonable and payable, The Tribunal notes that no management fees were raised in 2013.
67. The Tribunal concludes therefore that after the concessions made by the Respondent including the fact that no service at all is payable by the Applicant in 2010 will lead to a significant rebate to the Applicant. A balancing statement will be required a copy of which should be lodged with the Tribunal within 28 days of this decision.
68. The Tribunal congratulates both parties on the way in which their cases were presented and for the fair approach taken by the Respondents in their review of the Lease and resulting concessions to the Applicant.

Appeal Provisions

69. If either party is dissatisfied with this decision they may apply to this Tribunal for permission to appeal to the Upper tribunal (Lands Chamber). Any such application must be received within 28 days after these written reasons have been sent to the parties (rule 52 of The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013).

Robert T Brown
Chairman

Park House, Brideg Road, St Austell, Cornwall, PL25 2 HD

Service Charge Item	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013
Day to ady repairs	35.27	33.53	140.32	155.45	49.96	75.35	0.00	211.99	33.21	40.71
TV aerial upgrade	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Safety Roof rails	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Lightening Conductor Maintenance	0.00	14.38	10.63	11.22	18.87	0.00	0.00	0.00	0.00	0.00
Lift Maintenance	40.60	54.75	43.98	108.58	87.39	129.29	0.00	0.00	75.83	124.81
Fire Alarm Maintenance	8.15	3.37	1.68	10.81	9.65	40.80	0.00	25.46	19.85	30.43
Fire Extinguisher maintenance	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Caretaker	0.00	0.00	0.00	0.00	0.00	0.00	0.00	o	0.00	0.00
TV aerial maintenance	0.00	0.00	11.16	11.16	4.80	11.44	0.00	12.60	14.50	0.00
Electricity to communal areas	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Fire Enforcement Notice Works	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
External Ramp access	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Replacement Heating System	<u>0.00</u>	<u>0.00</u>	<u>0.00</u>	<u>0.00</u>	<u>0.00</u>	<u>0.00</u>	<u>0.00</u>	<u>0.00</u>	<u>0.00</u>	<u>0.00</u>
Total for services	84.02	106.03	207.77	297.22	170.67	256.88	0.00	250.05	<u>143.39</u>	195.95
Management Fee 10%	<u>8.40</u>	<u>10.60</u>	<u>20.78</u>	<u>29.72</u>	<u>17.07</u>	<u>25.69</u>	<u>0.00</u>	<u>25.01</u>	<u>14.34</u>	<u>19.60</u>
Total Payable by Mr Hayton	92.42	116.63	228.55	326.94	187.74	282.57	0.00	275.06	157.73	215.55