12137

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	:	**LON/OOAE/LSC/2016/0446**
Property	:	**5 Bell House, Ainsworth Close, London NW2 7EE**
Applicant	:	**Kim Darby – 5 Bell House B. Ghelani – 6 Bell House Lorenzo Wilson and Virgina Campbell – 7 Banting House Margaret McNally – 18 Banting House E. Farrugu – 24 Banting House Karen Tomkins – 33 Banting House Deepika Thakar – 51 Banting House Sheriff Majid – 57 Banting House Janet Scott – 62 Banting House Lee Powell – 34 Comber Close Patricia Galler – 35 Comber Close Kerri Darby – 48 Comber Close**
Representative	:	**Miss Darby in person**
Respondent	:	**London Borough of Brent**
Representative	:	**Mr Hoar of Counsel**
Type of application	:	**For the determination of the reasonableness of and the liability to pay a service charge**
Tribunal members	:	**Tribunal Judge S O'Sullivan Mrs A Flynn MA MRICS**
Venue	:	**10 Alfred Place, London WC1E 7LR**
Date of decision	:	**7 April 2017**

DECISION

Decisions of the tribunal

(1) The tribunal finds that the Frankham invoice numbers 1,2 and 3 in the total sum of £24,433.05 plus Vat are not payable by virtue of section 20B.

(2) The tribunal finds that the first Niblock invoice in the sum of £68,968.23 plus Vat is not payable by virtue of section 20B of the Act.

(3) The tribunal finds that the remainder of the invoices are not caught by section 20B and are payable in full.

(4) The landlord having consented to the same the tribunal makes order under section 20C of the Landlord and Tenant Act 1985 so that none of the landlord's costs of the tribunal proceedings may be passed to the lessees through any service charge.

The application

1. The applicants seek a determination under section 27A of the Landlord and Tenant Act 1985 as to whether service charges are payable, and the only issue for determination by the tribunal is whether any or all of the disputed major works service charges are recoverable from the applicants by virtue of s.20B of that Act.

2. The tenants also seek an order for the limitation of the landlord's costs in the proceedings under section 20C of the same Act.

3. The leaseholder applicants have authorised Ms Kim Darby to act as their representative in these proceedings.

4. The relevant legal provisions are set out in the Appendix to this decision.

The hearing

5. Ms Darby appeared for the Applicants. She was assisted by Ms Hopkins, a former Councillor for Brent. The Respondent was represented by Mr Hoar of Counsel. Ms Burgess and Ms Bond, a legal assistant and leasehold manager respectively in the employ of the Respondent also attended.

6. At the commencement of the hearing Counsel for the Respondent handed in further documents, namely an extract of the relevant law and a copy of a case report in *OM Property Management Ltd v Burr [2013] EWCA Civ 479*. The lead Applicant was given a short adjournment to read through these documents during the hearing and confirmed she was happy to proceed.

The background

7. The properties which are the subject of this application are various purpose built flats contained within an estate of four blocks.

8. Neither party requested an inspection and the tribunal did not consider that one was necessary, nor would it have been proportionate or relevant to the issues in dispute.

9. Directions were made in this matter on 28 November 2016 further to which the parties both filed bundles of documents. The application was heard at an oral hearing on 16 February 2017.

10. The applicants each hold a long lease of a flat which requires the landlord to provide services and the tenant to contribute towards their costs by way of a variable service charge. The specific provisions of the lease and will be referred to below, where appropriate.

The issues

11. The issue between the parties is whether service charges are payable, and it was confirmed by the parties that the only issue for determination by the tribunal is whether any or all of the disputed major works service charges are recoverable from the applicants by the respondent by virtue of s.20B of that Act (the leaseholders are invoiced different amounts in accordance with the terms of their leases). In relation to the lead applicant, Miss Darby, the amount in issue is £6418.88, although that amount differs between the applicants depending on their contribution due under the terms of their leases.

12. Having heard evidence and submissions from the parties and considered all of the documents provided, the tribunal has made determinations on the various issues as follows.

13. The invoice in dispute relates to a charge for major works dated 31 March 2014. This relates to major works carried out to the property in the period around 2012/13.

14. A Notice of Intention was first served on 20 April 2011. A Notice of Estimates was then served on 30 April 2012 further to which Ms Darby

made representations and the Respondent replied. An amended notice of intention was served on 4 March 2013 containing additional works and a further Notice of Estimates was served on 4 March 2013. The leaseholders were invoiced on 31 March 2014. The applicants accept that they were served with the relevant notices under section 20 of the Act and make no point on the consultation.

15. The invoice comprises charges made by Frankham Consultancy Group Ltd ("Frankham") and Niblock (Builders) Ltd ("Niblock"), the contractors.

The Applicants' case

16. Ms Darby had set out her challenge to the works in a statement contained in her bundle. Ms Hopkins presented the case on her behalf and informed the tribunal that she had been involved in the consultation meetings in her capacity as a local Councillor and was fully aware of the major works.

17. By way of background she explained that the estate had been neglected for the past 20 years or so and that there had been a long history of mistakes and omissions in the service charges. Residents had, she said, also seen reducing service levels. She also asked the tribunal to note that although the retention had been paid to the contractors before the end of the snagging period the items requiring snagging had not been remedied and as a result many of those works had been repaired as part of subsequent and unrelated major works projects on the estate. She accepted that there was an issue with resources and that many of the staff involved with the major works contract had now left the Respondent's employment.

18. The invoice dated 31 March 2014 was criticised as it contained the following statement made by an Assistant Director of Strategic Finance;

"I certify (as the Council's nominated Officer) that the Council incurred the above expenditure during the 2012/13 financial year in undertaking the above works in fulfilment of the lease obligations".

19. The applicants say however that this was plainly wrong as the sum of £392,943 was incurred outside of the accounting year and submitted that this was poor accounting practice. It was not suggested that this affected the liability to pay the invoice but was rather an example of how the respondent had failed to follow a proper accounting process and failed in its duty of case to leaseholders and tax payers.

20. The applicants' main complaint is that they were never served with any notices under section 20B of the Act. It appeared to be their position that if such notices were not served the charges were not recoverable

and that the requirement for section 20B notices was automatic. However Ms Hopkins emphasised that she was not a solicitor and was not able to counter the legal arguments made by the respondent. She said however that she had been involved in other major works programmes where section 20B notices had been served. She submitted that there was no reason why the notices could not have been served. It was also submitted that for the purposes of the Act the time ran from the date of the first Notice of Intention of April 2011 although MS Hopkins was unable to explain why.

21. The applicants also point to the fact that there are missing certificate for payments and that the extracts from the respondent's accounting system provide dates that do not accord with the invoice dates.

The Respondent's case

22. Counsel for the respondent took the tribunal through the relevant invoices. We were informed that Frankham and Niblock presented a total of 23 invoices to the respondent between 28 July 2011 and 20 December 2013. Ms Bond, a leasehold manager made a witness statement dealing with the invoices.

23. Counsel submitted that it could be seen that all but four of the invoices were presented within 18 months of the demand dated 31 March 2014 save two exceptions as follows.

24. The first exceptions are the Frankham invoices 1, 2 and 3 totalling £24,433.05 plus Vat across the whole estate. These were all presented and paid before 1 October 2012. It is accepted that parts of the invoices therefore that relate to the applicants' property are irrecoverable by virtue of the Act. The Borough calculated that the sum of £76.33 should be deducted from the invoice (this will differ slightly for the various leaseholders).

25. The second exception is the first Niblock invoice for £68,968.23 plus Vat again across the whole estate which was presented on 4 September 2012 and paid on 15 October 2012. This represents £215.46 of Ms Darby's demand. This was not conceded and a matter for the tribunal to decide if this was caught by section 20B. Counsel relied on the Court of Appeal decision in *OM Property Management Ltd v Burr [2013] EWCA Civ 479*. In giving his judgement Lord Dyson held that costs can only be *"incurred"* for the purposes of section 20B *"after the amount of the costs has been ascertained"* and that this may only be on presentation of an invoice for the costs or on payment. Counsel sought to convince us that costs crystallise on payment as the use of the word "incurred" suggested payment could only be demanded once the sum has been paid. He also pointed to the fact that a landlord may wish to contest an invoice and an invoice may be reduced. He submitted on this basis that it was not caught by section 20B.

26. It was confirmed that the respondent would calculate the equivalent credits to be applied to each of the applicant's accounts. Counsel also confirmed that the respondent would apply the credits to all affected leaseholders not confined to those who had been party to the application.

The tribunal's decision

27. The tribunal notes that it is conceded that the 3 Frankham invoices numbered 1, 2 and 3 and totalling £24,433.05 plus Vat were presented or paid before 1 October 2012 and thus fall foul of section 20B of the Act and are not payable.

28. In relation to the first Niblock invoice presented on 4 September 2012 in the sum of £68,968.23 and paid on 15 October 2012 the tribunal finds it is not payable by virtue of section 20B.

29. In relation to all other invoices making up the major works the tribunal finds they are payable and do not fall foul of section 20B.

Reasons for the tribunal's decision

30. The only issue before the tribunal was whether the costs in issue were payable by virtue of section 20B.

31. Section 20B of the Act provides as follows;

"(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 of, 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".

32. A landlord is under no automatic obligation to serve a notice under section 20B. Rather, section 20B(2) acts as a limitation on a landlord's right to recover costs 18 months after a charge has been incurred. Where a landlord serves a valid section 20B notice within the initial 18 month period after costs have been incurred, limitation to recover those charges is extended beyond the 18 month period. Section 20B is therefore a useful tool for a landlord unable to serve an invoice within 18 months of the costs being incurred. Where charges fall outside the 18

month period (as in relation to the first 3 Frankham invoices) they are caught by section 20B and are irrecoverable. In relation to the remainder of the invoices in question, all save the First Niblock invoice (which we comment on below) were presented and paid within dates within the 18 month period, that is, after 1 October 2012. All of these invoices therefore are payable and as they fell within the 18 months before the invoice was issued did not require the service of a section 20B notice.

33. As far as the first Niblock invoice in the sum of £68,968.23 was concerned this was presented on 4 September 2012 and paid on 15 October 2012. We had to decide whether the costs were incurred for the purposes of section 20B when the invoice was presented or paid, if the former the invoice would be caught by section 20B and not be payable. Counsel relied on the Court of Appeal decision in *OM Property Management Ltd v Burr [2013] EWCA Civ 479*. In giving his judgement Lord Dyson held that costs can only be *"incurred"* for the purposes of section 20B *"after the amount of the costs has been ascertained"* and that this may only be on presentation of an invoice for the costs or on payment. Counsel sought to convince us that costs crystallise on payment as the use of the word "incurred" suggested payment could only be demanded once the sum has been paid. He also pointed to the fact that a landlord may wish to contest an invoice and an invoice may be reduced. In his judgement Lord Dyson adopted the decision of HH Judge Mole QC who held that *"whether a particular cost is incurred on the presentation of an invoice or on payment may depend on the facts of a particular case"*. He went on to give examples of when payment might be justifiably delayed due to dispute or whether a delay was a mere evasion or device of some sort and a tribunal might find costs were incurred on the date of payment. We had no evidence as to any reason why there had been a delay in payment in this case and why the date of payment should be preferred to the date of presentation of the invoice. In our view on presentation of the invoice on 4 September 2012 the respondent incurred the costs as a liability to pay arose and the respondent was aware of the amount of costs incurred and that time for the purposes of section 20B starting running from this date. As a consequence it is caught by section 20B having been incurred more than 18 months before the demand was made to the leaseholders. As a result the first Niblock invoice in the sum of £68,968.23 is not payable.

34. As the tribunal's consideration was confined to section 20B it was not considering whether the costs were reasonable and whether the snagging works were carried out. However if the applicants consider that there may be an element of duplication in works being charged they may raise a challenge to any subsequent charges under section 27A of the Act.

35. The applicants also complained of a failure to properly account and pointed out errors in invoices such as the reference to the charges

having all been incurred during the year 2012/13. Although the tribunal has noted such failures as unfortunate and falling below the desired standards they do not affect the issue of liability.

Application under s.20C and refund of fees

36. In the application form the applicants applied for an order under section 20C of the 1985 Act. The respondent consented to an order being made under section 20C on the basis that it had no intention of passing any if its legal costs in connection with this application through the service charge.

Name: S O'Sullivan **Date:** 7 April 2017

Rights of appeal

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any right of appeal they may have.

If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber), then a written application for permission must be made to the First-tier Tribunal at the regional office which has been dealing with the case.

The application for permission to appeal must arrive at the regional office within 28 days after the tribunal sends written reasons for the decision to the person making the application.

If the application is not made within the 28 day time limit, such application must include a request for an extension of time and the reason for not complying with the 28 day time limit; the tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed, despite not being within the time limit.

The application for permission to appeal must identify the decision of the tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal and state the result the party making the application is seeking.

If the tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).

Appendix of relevant legislation

Landlord and Tenant Act 1985 (as amended)

Section 27A

(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.

(4) No application under subsection (1) or (3) may be made in respect of a matter which -

(a) has been agreed or admitted by the tenant,
(b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,
(c) has been the subject of determination by a court, or
(d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.

(5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.

Section 20B

(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.

Section 20C

(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 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—
- (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;
- (aa) in the case of proceedings before a residential property tribunal, to that tribunal;
- (b) in the case of proceedings before a residential property tribunal, to the tribunal before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to any residential property tribunal;
- (c) in the case of proceedings before the Upper 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.