9606

FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**CHI/21UD/LSC/2012/0101**
Property	**Caple Court Albany Road** **St Leonards on Sea** **East Sussex TN38 0LL**
Applicants	**Robina Pooley (Flat 23)** **Bettie Still (Flat 25)** **Audrey Lyons (Flat 15)**
Applicants' Representative	**George Okines**
Respondent	**Caple Court Residents Association Limited**
Respondent's Representative	**Linda Humphreys and David Eglington**
Type of Application	**S.27A Landlord & Tenant Act 1985 (as amended)("the Act")(Service Charges)**
Tribunal Members	**Judge R.T.A. Wilson (Chair)** **Judge E Morrison (Lawyer Member)** **Nigel Robinson FRICS (Surveyor Member)**
Date and Venue of Hearing	**3rd October 2013** **The Horntye Sports Centre** **Hastings**
Date of Decision	**4th November 2013**

DECISION

THE APPLICATION

1) This was an application made by three lessees of the Property under Section 27A of the Act, for a determination of their liability to pay service charges to the Respondent freeholder for the years 2009 - 2012 inclusive.

THE DECISION IN SUMMARY

2) No service charges are recoverable from the Applicants for 2009 or 2010.

3) As a consequence of the Tribunal's findings on the application of Section 20B of the Act, which were announced at the hearing, the parties agreed that the amount of service charge recoverable for 2011 is limited to £4,452.74 with the Applicants' share of this sum being calculated by reference to the service charge percentages set out in their leases.

4) The 2012 service charge recoverable from the Applicants cannot include the fees of Bridgford and Co or the fees of the accountant.

5) An order is made under Section 20 C of the Act so that to such extent as they may otherwise be recoverable, the Respondent's costs, if any, in connection with these 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 Applicants.

THE LAW

6) The Tribunal has power under Section 27A of the Act to decide about all aspects of liability to pay service charges and can interpret the lease where necessary to resolve disputes or uncertainties. The Tribunal can decide by whom, to whom, how much and when service charge is payable.

7) Payments on account for service charge fall to be dealt with under Section 19(2) of the Act. This legislation expressly contemplates the payment of service charges on account. Where a service charge is payable before relevant costs are incurred, no greater amount than is reasonable is so payable and there is a mechanism in Section 19 (2) for adjustments to be made by repayment reduction or subsequent charges, or otherwise, once the relevant costs have been incurred.

8) Section 21B of the Act requires demands for service charges to be accompanied by a summary of rights and obligations of tenants in relation to service charges.

9) Section 20B of the Act provides that costs incurred more than 18 months before a demand is made for their payment will not be recoverable unless within that period 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.

THE LEASES

10) The Tribunal was provided with a copy of the lease relating to Flat 23 and was told that the leases of the other flats in the building were in similar terms and the service charge liability arose in the same way. The relevant service charge provisions are contained in clause 4(19) and clause 5.

11) Clause 4(19) contains a tenant's covenant reading (a) *To pay to the Company and as a separate covenant by the Lessee with the Company a fixed charge of the sum of £24 on the anniversary of each year of the said term the first payment to be paid one year from the date of these presents towards the cost of the Lessee's contribution as hereinafter provided subject however that if the Lessee's contribution shall not exceed the fixed charge in any year the Company shall not be obliged to account to the Lessee for any surplus (b) to pay to the Company and as a separate covenant by the Lessee with the Company 3.9% of all moneys expended or contracted to be expended by the Company (i) in complying with the covenants on the part of the Company hereinafter contained (ii) in insuring in the joint names of the Lessor and the Company against claims made against them or either of them in respect of the common parts of the Estate of Caple Court or the liabilities of the Company or the Lessor in respect of the same and (iii) an amount equal to 10% of the total expenditure (such amount being payable to the Company as a management fee) such moneys to be paid within 28 days of demand therefor by the Lessor or at its option by the Company or at such intervals as the Lessor or at its option the Company shall consider expedient and any sums due under the sub clause if not so paid shall forthwith be recoverable by action by the Lessor or at its option by the Company and carry interest at eight pounds per centum per annum until payment.*

12) Clause 5 contains a landlord's covenant to maintain and decorate the roof, main structure and common parts of the building including the garden areas and the landlord is also responsible for insurance of the areas of the estate retained by the landlord.

THE FACTUAL BACKGROUND

13) It is a feature of this Property dating back to 2009 that the Respondent has sought to recover expenditure incurred on the Property by using powers contained within its memorandum and articles of association rather than by using the service charge provisions contained in the leases. The commercial rationale for this arrangement is apparently to circumvent the deficiencies contained in the leases, which do not allow the Respondent to recover service charge in advance of expenditure or to establish a reserve fund. The Tribunal was told that a majority of the leaseholders favoured this arrangement as it resulted in a fixed charge to pay each year for the upkeep of the building, and this certainty assisted in their personal financial budgeting.

14) Whilst it may be the case that the majority of leaseholders endorse this arrangement, the Applicants do not, and they wish the Respondent to collect service charges in accordance with the service charge provisions set out in the leases. There has been a longstanding and, at times, bitter dispute between the

parties, culminating in the Applicants bringing an application to the Tribunal for a determination of their liability to pay service charges for the years 2007-2012 inclusive.

15) A preliminary jurisdiction hearing took place in January of this year when the Tribunal determined that the application could proceed for the years 2009, 2010, 2011 & 2012, but that the Tribunal lacked jurisdiction for 2007 & 2008.

THE PROCEDURAL BACKGROUND AND EVIDENCE

16) Following the jurisdiction hearing, the Tribunal issued directions for the application. Both parties had complied with these directions and had set out their respective positions in their statements of case. Also before the Tribunal was a hearing bundle from each party containing the parties' documentary evidence. There was considerable overlap in the content of the bundles with duplication of documents. Whilst the parties had clearly gone to some trouble to prepare their hearing bundles, the Respondent, in particular, was not always familiar with what was contained in them. The numbering of the documents varied in each bundle with the result that they were hard to follow and on several occasions the Respondent's oral evidence conflicted with their documentary evidence. In total, the Tribunal had before it more than 500 pages of documentary evidence. In arriving at its decision, the Tribunal has had regard to the evidence contained in the bundles whether or not referred to in this decision and its decisions have been made on the balance of probabilities, the required standard of proof.

17) The hearing of the application finally took place on the 3rd October 2013. Mr George Okines represented all three Applicants and Ms. Humphreys, the secretary of the Respondent, represented the Respondent, assisted by Mr Eglington, a director of the Respondent, who appears to be the chief architect of the scheme described above.

THE APPLICANTS' CASE

2009 and 2010

18) It was the Applicants' case that in 2009 and 2010, they each paid their fixed contribution of £24 on account of service charges and also their percentage contribution to the cost of buildings insurance. However, as regards their contribution due pursuant to clause 4 (19) (b) of the lease, they said that they did not receive a demand for this until March 2013, following the preliminary hearing. In these circumstances they were not liable to pay the balance of the contribution towards the cost actually incurred by the Respondent by virtue of Section 20B of the Act. They contended that Section 20B (1) applied, and further that as they did not receive notification pursuant to subsection (2) within the 18-month period set out therein, the charges are now statute barred and irrecoverable. They pointed to the evidence given by the Respondent at the preliminary hearing, to the effect that the funds needed for the property during these years were not collected as service charge, but collected pursuant to the liability imposed on the members by the articles of association of the Company.

Accordingly, they said that upon the Respondent's own case, at no stage prior to the demands dated 22 March 2013 were the Applicants notified that they would subsequently be required under the terms of the lease to contribute to the costs. In short, the Respondent was now time barred from collecting further service charges for these two years.

2011

19) They repeated these arguments for 2011 in respect of costs incurred by the Respondent prior to 22 September 2011, being 18 months before the demand for payment of a service charge was received. They accepted that costs incurred after 22 September 2011 were not caught by the provisions of Section 20 B.

2012

20) It was the Applicants' case that the fees of Bridgford and Co were not recoverable pursuant to the terms of the lease. This was because Bridgford's brief from the Company was to assist with management issues. Clause 4 (19) of the lease permitted the Respondent to charge a management fee as part of the service charge but limited to 10% of actual expenditure in each year. As the Company had charged this 10% fee, plus the fees of Bridgford and Co, there had been duplication, with the result that the fees of Bridgford and Co were not recoverable.

21) The Applicants challenged the fees of the accountant on the basis that the accounts produced were company accounts and bore little relationship to the charges being demanded as service charge. Furthermore, there were no provisions in the lease that allowed these costs to be recovered as part of the service charge.

THE RESPONDENT'S CASE

22) The Respondent accepted that there has not been a valid service charge demand served on the Applicants until March 2013. However, they contended that a number of communications sent to the Applicants on a regular basis each year, together with the Company annual accounts and supporting documentation sent with them each year, constituted notices served pursuant to Section 20B (2) of the Act. These documents had the effect of negating the 18-month rule. Having regard to the information sent to them each year, the Applicants should have been in no doubt that they would receive a service charge demand based on the 2009, 2010 and 2011 expenditure.

23) However, the Respondent had some difficulty in identifying to the Tribunal precisely what documents they were relying on. For 2009, they referred to a number of documents sent to the Applicants on various dates during 2009, but all of these referred only to the *anticipated* costs to be incurred during that year. They also relied on a document entitled Summary of Relevant Costs for 2009, which they said was sent to all lessees on 15 September 2010, which included a

list of service charge expenditure dated 21 June 2010 (page 151 of their Bundle), and a detailed breakdown of what appeared to cover all (not just service charge) receipts and expenditure for 2009 (page 92-93). The Respondent maintains that these documents were sent to all lessees with the Company accounts in 2010. For 2010 the Respondents rely on a document headed Receipts and Payments account for 2010 (page 204) and another more detailed breakdown of Company expenditure for that year (pages 167-8), both of which they say were sent to the Applicants in 2011. For 2011, similar documents (pages 208-9 and 214), sent out with the Company accounts in April 2012, were relied upon.

24) Based on this evidence, Ms. Humphreys argued that the Respondent had proved that valid Section 20B(2) notices were sent to the Applicants and therefore the 18-month rule did not apply to the 2009, 2010 and 2011 expenditure, with the result that it was all recoverable.

25) For 2012, it was contended that the fees of both the accountant and Bridgford and Co were recoverable under clause 5(ii) of the lease, which entitled the Company to employ such persons as shall be reasonably necessary for the performance of the covenants contained in sub-clause (i) of this clause. It was contended that the fees of both the accountant at £372, and the fees of Bridgford and Co at £2,912, were reasonable in amount and recoverable in full.

THE DISCUSSION

Years 2009 and 2010

26) Section 20 B (1) of the Act states that 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 the tenant shall not be liable to pay so much of the service charge as reflects the costs so incurred. This is a significant provision because a failure to comply will mean that expenditure, which is not demanded in time, will become altogether irrecoverable.

27) The limitation does not apply, however, if within the period of 18 months beginning with the date when the costs were incurred, the tenant was notified in writing that those costs had been incurred and that he/she would subsequently be required under the terms of his/her lease to contribute to them by the payment of a service charge. Therefore, a landlord who knows that he has incurred costs which he will seek to recover by way of service charge but cannot, for whatever reason, serve a demand in respect of those costs within 18 months, can protect his position by serving a notice under Section 20 B (2) notifying the tenant that costs, to which he/she will be required to contribute, have been incurred.

28) The requirements of a valid notice were discussed at length in the case Brent London Borough Council v Shulem B Association Limited [2011] 1 WLR 3014. In that case, Morgan J found that a demand for payment of the service charge under Section 20B (1) of the Act required a valid demand for payment under the relevant contractual provisions. Secondly, a written notification under Section 20 B (2) must state a figure for the costs, even if the costs which the lessor later put

forward, were for a lesser amount. A statement that, in advance of the work, the lessor expected to incur a particular cost, did not give the necessary information. A lessor who found that he would not be able to make a service charge demand within the 18 month period had the right to stop time running, by giving a notice for the purposes of Section 20 B (2). However, it was a requirement of that notice that it had to tell the lessee that he would subsequently be required under the terms of the lease to contribute to those costs by payment of a service charge.

29) In this case, the Respondent accepted that it had not made a valid demand for payment of service charge for these years until March 2013. However, it contended that the annual accounts and accompanying documents relating to expenditure were regularly sent to each Applicant every year and that these accounts and other documents constitute valid notices for the purposes of Section 20B (2). This meant that they had successfully stopped time running and that the expenditure was still recoverable.

30) The Tribunal carefully reviewed all of the documents relied on by the Respondent and concluded that none satisfied the requirements of a valid Section 20B (2) notice as provided for in the Act and as applied in the Shulem case. In most cases the expenditure mentioned in the documents was clearly based on budgets of anticipated expenditure, which fails the test set out in Shulem. In other documents, although actual Company expenditure is stated (but not always limited to service charge expenditure), the documents all failed to include the required statement that the lessee would subsequently be required, under the terms of his lease, to contribute to the costs by the payment of a service charge. This is perhaps not surprising, as the Respondent was, on its own admission, deliberately seeking to avoid the service charge provisions in the lease, in favour of a monetary call on the lessees in their capacity as shareholders. In short, the Tribunal concludes that none of the documents brought to their attention come anywhere close to constituting a valid Section 20B(2) notice to the Applicants.

31) Reviewed in the round, the Tribunal found that the Applicants were sent a confusing array of invoices, revised invoices, and replacement invoices, each one for a different amount and purporting to cover the same period. Company accounts were available but these were not wholly consistent with demands made and contained expenditure not recoverable as service charge. It is clear that these accounts were not designed to be service charge accounts conforming to Landlord and Tenant legislation

32) For these reasons, the Tribunal determines that the provisions of Section 20B are not satisfied as to the expenditure for 2009, 2010 and in respect of 2011 up to the 22nd September 2011, with the result that no expenditure is recoverable from the Applicants as service charges for costs incurred in these periods.

33) This confusing picture has undoubtedly come about because of the Respondent's ill-conceived decision to ignore the service charge provisions of the leases and rely instead upon a complicated and artificial collection system based on the Respondent's memorandum and articles of association. Mr Eglington told the Tribunal that neither he nor the board had obtained qualified legal advice before implementing the arrangement. If this is the case then it is regrettable and it should be said that the board of directors have let the leaseholders down in pursuing an arrangement, which has resulted in expenditure on the building

being rendered permanently irrecoverable from the Applicants as a service charge.

2011

34) The Tribunal was not required to make a determination on this year, as following the findings of the Tribunal in relation to the application of Section 20B, announced at the hearing, the parties agreed the recoverable service charge for the period 21st September to the 31st December 2011 in the sum of £4,452.74.

2012

35) Section 20B has no application for 2012 as the 18-month period has not yet expired. The challenged items during this year are the accountant's fees and the fees of Bridgford and Co. At the hearing the Applicants withdrew their challenge to the satellite TV upgrade costs.

36) The Tribunal concluded that on a true construction of the lease, neither of these costs are recoverable. In both cases the Respondent relies upon clause 5(ii) of the lease as permitting the recovery of third party professional fees. However, in the judgment of the Tribunal, clause 5 (ii) only allows third party fees to be recovered in so far as they relate to the reasonable costs of matters set out in clause 5(i). Clause 5 (i) covers the maintenance and repair of the building and does not make any reference to the costs of management. This is not surprising as there is a specific provision in the lease, allowing an annual management fee of 10 % of actual expenditure. For this reason, the Tribunal determines that the costs of management and the costs incurred in the production of annual service charge accounts must be included in the 10% management charge and there can be no duplication or additional charges for these services. For these reasons, the Tribunal determines that the accountant's costs and the costs of Bridgford and Co are not recoverable from the Applicants as service charge.

THE SECTION 20C APPLICATION COSTS

37) In deciding whether to make an order under Section 20C of the act, a Tribunal must consider what is just and equitable in the circumstances. The circumstances include the conduct of the parties and the outcome of the proceedings.

38) The Tribunal agrees with the Applicants that had the Respondent adhered to the terms of the leases then this application would not have been necessary. It is very regrettable that, without first taking competent legal advice, the Respondent has abandoned the service charge mechanism contained in the leases.

39) Be that as it may, the Applicants have been to a large part successful in their application. For these reasons, the Tribunal determines it is just and equitable for an order to be made that, to such extent as they may otherwise be recoverable, the Respondent's costs, if any, in connection with these 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 Applicants.

CONCLUDING REMARKS

40) The decision in this case rests firmly on the terms of the leases. As discussed with the parties at the hearing, it is recognized by all concerned that the current form of lease has a number of shortcomings which pose real difficulty in the efficient management of Caple Court, and which may affect marketability of the flats. The Respondent has sought to overcome these shortcomings by a mechanism, which it was hoped would avoid the restrictions of the lease. However, as has been seen, the leaseholders are entitled to rely on the provisions of the lease notwithstanding. Consideration would usefully be given to a new lease, either by consent or through an application for variation made under the Landlord and Tenant Act 1987.

Signed _____
Judge R.T.A Wilson (Chairman)

Dated 4th November 2013

APPEALS

A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application to the First-tier Tribunal at the Regional office, which has been dealing with the case.

The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.

If the person wishing to appeal does not comply with the 28-day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28-day time limit; the Tribunal will then decide whether to extend the time limit, or not to allow the application for permission to appeal to proceed.

The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking.

If the First-tier Tribunal refuses permission to appeal, in accordance with section 11 of the Tribunals, Courts and Enforcement Act 2007, and Rule 21 of the Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rules 2010,the Applicant/Respondent may make a further application for permission to appeal to the Upper Tribunal (Lands Chamber). Such application must be made in writing and received by the Upper Tribunal (lands Chamber) no later than 14 days after the date on which the First-tier Tribunal sent notice of this refusal to the party applying for permission.