

9553



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

Case Reference : **LON/00BK/LSC/2013/0295 and
0444**

Property : **Flats 69 & 70 Raynham. Norfolk
Crescent, London W2 2PQ**

Applicant : **Raynham Freehold Company
Limited**

Representative : **Mr S Unsdorfer, Parkgate-Aspen
Managing Agents**

Respondent : **Mr Abdul Dambha**

Representative : **In person**

Type of Application : **For the determination of the
liability to pay a service charge –
Transferred from the Central
London County Court**

Tribunal Members : **Miss A Seifert FCI Arb
Mr N Maloney FRICS
Mr L Packer**

**Date and venue of
Hearing** : **10 Alfred Place, London WC1E 7LR
on 14th October 28th October 2013**

Date of Decision : **19th December 2013**

DECISION

Decisions of the tribunal

- (1) The Tribunal makes the determinations as set out under the various headings in this Decision.
- (2) The Tribunal makes an 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. These matters were transferred to the Tribunal by Orders of the Central London County Court (for case 0295 17th April 2013 and for case 0444 18th June 2013) for determination by the Tribunal as to the amount of service charges payable by the respondent, Mr Dambha to the applicant Raynham Freehold Company Limited.
2. The relevant legal provisions are set out in the Appendix to this decision.

The hearing

3. Mr S Unsdorfer FRIPM, of Parkgate-Aspen, the managing agents, represented the applicant at the hearing. He made submissions and gave oral evidence. Mr N Shah and Mr D Weil of Parkgate-Aspen also attended the hearing. Mr Shah and Mr Weil gave oral evidence.
4. The respondent, Mr Dambha attended the hearing, made submissions and gave oral evidence.
5. In the course of and following the hearing, the parties provided additional evidence and further written submissions.
6. Neither party requested an inspection of the property. The Tribunal did not consider one was necessary, nor would it have been proportionate to the issues in dispute.

The background

7. The applicant commenced proceedings in the Northampton County Court, which were transferred to the Central London County Court. The proceedings were allocated claim numbers 3YJ1059 for Flat 70 and 3YJ51464 for Flat 69. Both matters were subsequently consolidated and transferred to the Tribunal to determine what service charges were payable.

8. An oral pre-trial review took place and directions were drawn up in consultation with those attending.
9. The respondent holds long leases Flats 69 and 70 under which the landlord is required to provide services and the tenants to contribute towards the costs by way of a variable service charge.

The issues

10. The parties identified that the issue to be determined was:

The sums payable by the respondent in respect of contributions to the Reserve Fund for the service charge years 2009-2010, 2010-2011, 2011-2012 and 2012-2013 up to the issue of the County Court proceedings (23rd January 2013).

11. 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.

The Tribunal's decision

12. The Tribunal determines that the amount due and payable by Mr Dambha to the applicant as at 23rd January 2013 (date of issue of the County Court proceedings) in respect of the service charge years 2009-2010, 2010-2011, 2011-2012 and 2012-2013 to be:

Flat 69: £ 2724.82

Flat 70: £ 2832.75

If and in so far as these sums have not already been paid by Mr Dambha at the date of this decision.

The above figures and breakdown are those shown on Parkgate-Aspen's schedules for Flat 69 and Flat 70, sent under cover of Parkgate-Aspen's letter to Mr Dambha dated 18th October 2013, attached to this decision and marked 'A' and 'B' respectively.

Reasons for the Tribunal's decision

13. Flat 69 and Flat 70 Raynham are each the subject of a lease dated 23rd September 2005 ("the leases") made between the Raynham Freehold Company Limited as lessor and Stargazer Investments Inc. as lessee for the term of 999 years at a peppercorn rent (plus service charge).

14. Raynham Freehold Company Limited is the registered owner of the building known as Raynham. Stargazer Investment Inc. was the nominee purchaser appointed by the majority of leaseholders of flats in the building in exercise of the rights conferred on them by Part 1 of the Leasehold Reform Housing and Urban Development Act 1993 as amended and acquired the freehold of the building on 22nd October 2004. At the hearing Mr Dambha said that he is and was at all material times the head lessee of Flat 69 and Flat 70.
15. The grant of the lease of Flat 69 and the lease of Flat 70 was subject to the existing leases of Flat 69 and Flat 70 dated 19th July 2001 (Flat 69) and 6th October 1992 (Flat 70).
16. The leases included provisions for the payment of variable service charges. This included contributions to a Reserve Fund.
17. There was no dispute between the parties in respect of the reasonableness or payability of the service charges, save for the Reserve Fund contribution element limited to 2009-2010, 2010-2011, 2011-2012 and 2012-2013. The parties confirmed that there was no issue in respect of the Reserve Fund contributions for 2007 -2008 and 2008-2009.
18. During the hearing, explanations were sought by Mr Dambha in respect of notices under Section 20 of the Landlord and Tenant Act 1985, which were provided by the applicant. However, subject to this, there was no challenge to the reasonableness of the cost or the extent of the works.
19. The leases contained provisions for the lessee to make contributions to the services charge. The percentage at which this contribution was to be made was set out in the Second Schedule to the leases. In respect of Flat 69 the percentage was 0.992% of expenses Outgoings and costs (referred to in that lease as "the Outgoings") estimated from time to time by the Surveyor as likely to be incurred by the lessor in connection with the Services (as defined in the Sixth Schedule to the lease and Additional Matters (as defined in the eighth Schedule to the lease) in respect of the yearly service charge period, written notice of which was to be served from time to time on the lessee. In respect of the lease of Flat 70 the percentage was 1.491% of the estimated Outgoings. The relevant percentages are not in dispute.
20. The Additional Matters under the Eighth Schedule to the leases included:
 10. *Such provision (if any) for past present or anticipated expenditure in respect of any of the Services or any of the functions duties or matters referred to in this Schedule as the Lessor shall in its absolute discretion consider necessarily desirable or appropriate.*

21. The Second Schedule to the leases provided:
- (a) *if the actual cost (as determined in accordance with the provisions hereof and as certified by the Auditor (as defined in the Third Schedule to this Lease) to the Lessor of the Outgoings shall for any period ending on the Service Charge Period Date in any year be in excess of the Surveyor's estimate thereof then the Lessee will immediately following service of a written demand from the Surveyor in that behalf pay to the Lessor an amount equal to the difference between the proportion as aforesaid of such actual cost and the further or additional rent already paid by the Lessee in respect of the period*
 - (b) *if the actual cost (as defined in accordance with the provisions hereof and as certified by the Auditor) to the Lessor of the Outgoings shall for any period ending on the Service Charge Period Date in any year be less than the Surveyors estimate therefore then the Lessor will hold to the credit of the Lessee on account of future demands for the said further or additional rent an amount equal to any difference between the further or additional rent already paid by the Lessee in respect of that period and the proportion as aforesaid of such actual cost.*
22. Mr Dambha explained that in service charge years prior to those in issue, if there was a deficit on the service charge account, the applicant took this out of the Reserve Fund. However, this practice had stopped for the service charge years in dispute as the applicant had wanted to build up the reserves to fund the anticipated major works. He submitted that the applicant should have continued with the previous practice. He provided his version of the service charge accounts in which he sought to apply the old practice. Mr Dambha's position was that the lessor should be consistent in that it should either keep the Reserve Fund intact or use it to defray expenditure.
23. Mr Dambha referred to his defence in the County Court proceedings. Amongst other matters he had submitted that, *'Reserve funds demanded have not been paid due to no details and accounting given time after major works completed. A normal agreed reserve fund is acceptable and in this case there has been no accountability given for the major works done and completed after a section 20 was issued..... Leaseholders are entitled for a spread sheet showing each flat for the shortfall and also for the current reserve fund in order to budget. In this case a demand is just made without any explanation'*.
24. At the hearing Mr Dambha submitted that the Reserve Fund should be monies kept in trust for emergencies. He considered that the applicant's dealings with the Reserve Fund had not been explained to him properly. He contended that his queries to Parkgate-Aspen had not been dealt with property.
25. Mr Dambha's schedule headed 'Major Works expenditure Account' referred to four sums that 'No section 20 issued for'. Amongst his concerns was that the applicant has provided insufficient information to the lessees.

26. Mr Dambha was asked at the hearing whether he receive copies of the accounts. He confirmed that he had not raised questions at the time. After the major works started the lessors had asked for more money and the lessees started raising queries.
27. As previously stated, as part of his case, Mr Dambha provided copies of schedules for the service charge years ending 24th March 2008 onwards showing balances, which he claimed should have been in the Reserve Fund account had the lessor adopted a his different method of calculation.
28. By way of background, Mr Unsdorfer explained that the subject building is a large block of flats. This had been enfranchised in about 2006 when the building was in a dilapidated state. The residents' board decided to refurbish the common parts of the building and replace the old lifts. The works started with replacing the lifts. Notices under section 20 of the Landlord and Tenant Act 1985 were served. When the lessor moved on to the internal refurbishment, a number of lessees, including Mr Dambha, (who has three flats in the building) took the matter to the Tribunal in about 2010. A copy of the Tribunal's decision in case no: LON/00BK/LSC/2009/0275 was included in the bundle of documents for the current hearing.
29. Mr Unsdorfer submitted that Mr Dambha had in effect written his own set of accounts. Where there was a shortfall in the amount of estimated service charge, it was open to the lessor to make a demand for an additional amount from the lessees to make up the shortfall in each year. There was no obligation to meet the shortfall from the Reserve Fund, although it was open to the lessor to so.
30. There was no obligation under the leases to use the Reserve Fund to meet the balance, and there were good reasons for the change from the earlier approach of meeting expenditure out of the Reserve Fund. The current approach was consistent with the leases. The applicant had discretion to build up the Reserve Fund and it was not unreasonable for the applicant to do so, once the major works were about to start. In 2008-2009 under the previous practice, the deficit had been taken out of the reserves because the applicant was not ready to do the works.
31. Mr Unsdorfer provided background information in respect of meetings held in respect of the works. He provided a satisfactory explanation of the sums referred to. Some items were not individual items requiring section 20 notices. Some items were not in the section 20 notices but were below the threshold.
32. Mr Khan is an accountant. In his oral evidence he gave an explanation of the applicant's accounts for the years in dispute stating from 2009-2010. At the beginning of each service charge year, the amount required for the Reserve Fund contribution is calculated by the lessor' surveyor.

Mr Unsdorfer explained that the accounts would have been available at the AGM. The lessees are provided with a set of accounts together with covering letters from the managing agents. During the course of the refurbishment works the Reserve Fund amounts were reconsidered. For example he referred to an email dated 29th July 2010. This illustrated that the deficit for the year of £140,880 needed to be charged to lessees, but this did not include an additional £100,000 for cash flow stage payments in respect of the major works.

33. In his evidence at the hearing, Mr Weil said that he did not recall receiving any queries about the service charge accounts or estimates from Mr Dambha.
34. Having considered the evidence and submissions, the Tribunal found that the applicant had in principle acted in accordance with the terms of the lease of Flat 69 and Flat 70 in respect of building up a Reserve Fund for anticipated future expenditure. The Eighth Schedule to the leases of Flat 69 and Flat 70 included under paragraph 10 as part of the sums for which the lessees contribute, such provision for past, present of anticipated expenditure in respect of any of the services, functions, duties or other matters in the Eighth Schedule as the lessor considered necessarily desirable or appropriate.
35. The mechanism for the collection of the service charge was included under the Second Schedule to the leases. Mr Weil described how and when estimated service charge for each service charge year was determined. This estimated amount could include provision for past, present or anticipated expenditure. Further, in the event of a shortfall, an additional amount was due from the lessees in their percentages, on written demand.
36. Having considered the evidence, the Tribunal considers that if there was a shortfall between the actual cost and the estimated charges, it was open to the lessor either to utilise credit balances in the Reserve Fund or make appropriate additional demands to meet a shortfall. This decision was guided by the anticipated costs for future years, for example the major works. If the actual cost was less than the estimate, the lessor could hold the balance in the Reserve Fund as a credit against future expenditure. In essence the Tribunal determined that the method adopted by the lessor and charges for the service charge years 2010-2011, 2011-2012 and 2012-2013 to be in accordance with the leases.
37. For the avoidance of doubt, although some of the evidence at the hearing sought to challenge the ambit of the section 20 notices, this was satisfactorily explained by the evidence on behalf of the applicant, and the Tribunal does not consider that this affects the sums claimed in respect of the Reserve Fund contributions.

38. We now turn to the amounts due from Mr Dambha to the applicant. The Tribunal was told that the County Court proceedings for a money judgement were issued on 23rd January 2013. The sum claimed from Mr Dambha in respect of **Flat 69 was £5,141.72**. The sum claimed from Mr Dambha in respect of **Flat 70 was £14,913.39**.
39. At the hearing the Tribunal was provided with statements of account in respect of Flat 69 and in respect of Flat 70. These statements of account did not start at a nil balance. They also included other items not the subject of the service charge such as 'Storage' and separate charges for 'Legal Fees' and 'Professional Fees'. Various credits for payments made by Dambha were included. However it was not clear against what charges these had been credited.
40. During the hearing the Tribunal's attention was drawn to an email from Mr Unsorfer to the Tribunal dated 4th October 2013, copied to Mr Dambha, in respect of Flat 69, Flat 70 and Flat 78 (which latter flat is not the subject of these proceedings before the Tribunal). It was contended in that email that arrears outstanding were **£59,045.72**. No explanation was given of how this sum was made up. The inclusion of this figure added to lack of clarity of the applicant's statements of account for the subject flats.
41. The Tribunal therefore made directions for the applicant to provide a schedule setting out clearly the sums claimed by the applicant in respect of Flats 69 and 70 a contributions to the Reserve Fund, starting from a nil balance and taking into account all payments made by Mr Dambha in respect of the sums claimed.
42. Following the hearing, under cover of a letter dated 18th October 2013 to Mr Dambha copied to the Tribunal, Parkgate-Aspen provided two schedules (attached to this decision marked 'A and 'B'). They submitted that

'... I am sending you herewith statements to quantify the net service charge element of the debt for each flat, excluding ground rent, admin charges and storage.

*The net service charge debt up to the 23 January 2013 issue date of the present proceedings is therefore shown as **£2,742.82 for flat 69** and **£2,832.75 for flat 70**. This is based on the certified accounts of each year 2007 through 2012 and applied by the percentage liable from each flat as shown. You have already been provided with the relevant service charge accounts.*

To comply with the directions, credit has been given for the more recent payments you made as were previously unallocated to your

accounts but without prejudice to the landlord's rights and remedies in forfeiture.'

43. Mr Dambha responded in accordance with the Tribunal's directions, in a letter dated 1st November 2013. He provided a schedule of payments he stated that he had made in respect of Flat 69 and Flat 70. He contended that his account for Flat 69 was in credit in the sum of £1161.58. In respect of Flat 70, he contended the balance due was £1280.25.

44. Parkgate-Aspen responded in a letter dated 18th November 2013. It was stated that:

'...If we were to accept the amounts paid by credit transfer but unallocated (due to the breach proceedings) and the further cheques which have not been banked (for the same reason) the Respondent would in fact be fully current. It would only be necessary to seek a costs order for the proceedings issued at the beginning of the year...'

45. The Tribunal noted that during the hearing Mr Dambha did not submit that he had made payments to the applicant in respect of the sums claimed, which were not shown on the applicants statements of account. However, the position is that he now claims that he should be credited with additional payments made. No evidence was provided to support these payments. However the applicant acknowledged that if in due course these are proved, that Mr Dambha's accounts in respect of the subject flats would be 'fully current'.

46. In the circumstances, the Tribunal prefers evidence provided in the applicant's schedules 'A' and 'B'.

47. **Accordingly, the Tribunal concludes that the amounts payable by Mr Dambha to the applicant in respect of 2009-2010, 2010-2011 and 2011-2012 are:**

Flat 69: £ 2724.82

Flat 70: £ 2832.75

(If and in so far as these sums have not already been paid by Mr Dambha at the date of this decision)

Application under s.20C

48. At the hearing, Mr Dambha applied for an order under section 20C of the 1985 Act.

49. Having heard the submissions from the parties and taking into account the determinations above, the tribunal considers that it was reasonable for Mr Dambha to oppose the applicant's claim. In particular, the applicant's money claim and how this was made up was not clear prior to the service of the schedules ('A' and 'B') following the hearing and at the direction of the Tribunal. These schedules show sums paid by Mr Dambha which were not shown on the schedules initially provided by the applicant, and which have been taken into account in this decision.
50. The Tribunal finds that in all the circumstances it is just and equitable for an order to be made under section 20C of the 1985 Act, so that the applicant may not pass any of its costs incurred in connection with the proceedings before the Tribunal through the service charge.

Name: A Seifert

Date: 19th December 2013

Appendix of relevant legislation

Landlord and Tenant Act 1985

Section 18

- (1) In the following provisions of this Act "service charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent -
 - (a) which is payable, directly or indirectly, for services, repairs, maintenance, improvements or insurance or the landlord's costs of management, and
 - (b) the whole or part of which varies or may vary according to the relevant costs.
- (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 or later period.

Section 19

- (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 provisions 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 27A

- (1) An application may be made to a leasehold valuation 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 a leasehold valuation 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 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;
 - (a) 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.

" A

MR A DAMBHA

RAYNHAM - Flat Number

Share of Costs

Certified service charge cost per unit

Certified reserve fund cost per unit

TOTAL S/CHARGES:

Transfer to / (from) reserves

less payments received

Opening balance (see schedule)

Balance C/fwd

Amount due as at 23 January 2013

Estimate

59	Yr to March:	Yr to March:	Yr to March:	Yr to March:	Yr to March:	Yr to March:	Yr to March:
0.9918%	2007	2008	2009	2010	2011	2012	2013
	4,043.99	4,247.44	4,618.43	4,425.39	4,425.06	4,539.03	2,297.34
	2,479.56	2,975.46	2,975.46	5,950.91	6,694.79	2,330.78	1,165.36
	6,523.54	7,222.90	7,593.89	10,376.30	11,119.85	6,869.81	3,462.70
	(240.47)	(450.04)			5.06	(82.39)	
Month							
18.07.06	(1,570.76)						
31.08.06	(1,570.76)						
23.11.06	(1,570.76)						
07.02.07	(1,570.76)						
25.06.07		(1,693.20)					
15.11.07		(1,693.20)					
23.11.07		(1,693.20)					
05.02.08		(1,693.20)					
10.04.08			(1,693.20)				
11.06.10					(2,781.99)		
25.06.10					(2,244.71)		
21.07.10					(2,781.19)		
05.11.10					(10,269.25)		
19.01.11					(4,173.44)		
04.05.11						(2,781.19)	
24.02.12						(4,787.19)	
09.08.12							(1,148.67)
10.08.12							(582.68)
16.10.12							(1,148.67)
23.11.12							(1,114.16)
28.11.12							(1,114.16)
		0.03	0.10	5,900.78	16,277.08	5,151.42	4,370.46
	0.03	0.10	5,900.78	16,277.08	5,151.42	4,370.46	2,724.82

2,724.82

" B "

A R DAMBHA

Estimate

RAYNHAM - Flat Number

Share of Costs

70	Yr to March:	Yr to March:	Yr to March:	Yr to March:	Yr to March:	Yr to March:	Yr to March:
1.4914%	2007	2008	2009	2010	2011	2012	2013

Certified service charge cost per unit

Certified reserve fund cost per unit

TOTAL S/CHARGES:

Transfer to / (from) reserves

less payments received

	6,081.06	6,387.01	6,944.87	6,654.60	6,654.10	6,825.48	3,454.58
	3,728.59	4,474.29	4,474.29	8,948.56	10,067.16	3,504.86	1,752.40
	9,809.65	10,861.30	11,419.16	15,603.16	16,721.26	10,330.35	5,206.98
	(361.58)	(676.77)	0.00	0.00	7.62	(123.88)	
Month							
26.07.06	(2,362.00)						
31.08.06	(2,362.00)						
23.11.06	(2,362.00)						
29.01.07	(2,362.00)						
29.06.07		(2,546.11)					
12.11.07		(2,546.11)					
07.12.07		(1,427.56)					
21.04.10					(2,364.09)		
06.05.10					(6,000.00)		
09.07.10					(4,182.17)		
21.07.10					(4,182.17)		
05.11.10					(19,160.05)		
04.05.11						(3,330.86)	
29.03.12							(20,777.38)
Opening balance (see schedule)		0.07	3,664.82	15,083.98	30,687.14	11,527.55	18,403.15
Balance C/fwd	0.07	3,664.82	15,083.98	30,687.14	11,527.55	18,403.15	2,832.75

Amount due as at 23 January 2013

2,832.75