10331

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**MAN/00BM/2014/0075**
Property	:	**19 St James Court, Bury**
Applicant	:	**William Ritchie** **Iain Hurrell**
Respondent	:	**Westgate House Management Company Ltd**
Type of Application	:	**Section 27A and Section 20C Landlord and Tenant Act 1985**
Tribunal Members	:	**Sarah Greenan** **W Tudor M Roberts FRICS** **Jean Howell**
Date of Hearing	:	**1.10.14**

DECISION

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Background

1. On 4th May 2014 the Property Chamber (First Tier Tribunal) received an application from William Ritchie in relation to the payability of service charges in relation to a ground floor leasehold flat at 19 St James Court, Bury pursuant to section 27A of the Landlord and Tenant Act 1985. In addition, Mr Ritchie sought an order under section 20C of the same Act.

2. The Respondent to the application is Westgate House Management Company Ltd ("WHMC").

3. The basis of Mr Ritchie's claim was that he had not been served with any detailed service charge demands.

4. The years which were the subject of Mr Ritchie's challenge are from 2006 to 2015 inclusive.

5. Directions were given on the application by a procedural judge on 1st July 2014. The timetable set in those directions was subsequently amended following correspondence with the parties.

6. On 20th July 2014 Iain Hurrell, the owner of another property in the same development St James Court, informed the Tribunal that he wished to be treated as an applicant, and the Tribunal notified that parties that this request was accepted on 27th August 2014. It became apparent at the hearing that Mr Hurrell had not in fact wished to be made a party, did not play any part in the proceedings or file any evidence, and had declined to pay any part of the hearing fee. The Tribunal therefore discharged him as a party on 1.10.14.

The lease

7. 19 St James Court is the subject of a lease in favour of Mr Ritchie commencing on 1st January 2005. There is a rent reserved of £150 per annum.

8. Clause 3 of the lease requires the lessee to pay the rent and clause 3.4 requires the lessee to pay "within 14 days of demand by way of further or additional rent Advance Payment and the Lessee's Proportion". The Lessee's Proportion is "the proportion of the Maintenance Expenses payable by the Lessee in accordance with the provisions of the Seventh Schedule".

9. The Seventh Schedule defines the Lessee's Proportion with reference to the Sixth Schedule. As the issue in this case is not as to whether works carried out fall within the service charge, it is not necessary to set out these provisions in detail. In relation to maintenance expenses and to the costs set out in Schedule 6 Part C the lessee is required to pay 6.25% of the costs for the development, and in relation to entry systems, fire protection equipment and CCTV the lessee is required to pay 8.34% of the cost.

10. Paragraph 2 of the Seventh Schedule provides that an accountant's certificate in relation to the Maintenance Expenses shall be binding on the Lessor and Lessee "save where there is manifest error". Paragraph 5 of the Schedule provides that on 31.1.06 and on the 31st of January of each year "the Lessor shall serve on the Lessee a certificate in writing signed by a director or its secretary of the Advance Payment to be made by the Lessee on account of the Lessee's Proportion for the year commencing on First March (the Advance Payment being such sum as the Lessor shall reasonably determine as being likely to be the Lessor's Proportion for such year...) and the Lessor shall serve the like certificate on the lessee of each other dwelling in the development."

11. Paragraph 7 provides that "The Lessee shall pay the Advance Payment by equal instalments on the First day of March and the First day of September in each year."

12. Paragraph 8 provides that:

"An account of the Maintenance Expenses together certificates as mentioned in paragraph 8 [this should refer to paragraph 9] of the Sixth Schedule for the period ending on the Twenty-eight day of February Two Thousand and three and for each subsequent year ending on Twenty-eight day of Febuary ... during the Term shall be prepared as soon as practicable thereafter and the Lessor shall serve a copy of the accountant's certificate on the Lessee and (if it so decides or if requested by the Lessee to do so) a copy of such account.

9. Within twenty-one days after the service by the Lessor on the Lessee of the certificate in accordance with paragraph 9 of Part C of the Sixth Schedule for the year in question the Lessee shall pay to the Lessor the balance by which the Advance payment ... falls short of the Lessee's Proportion ... and any overpayment shall be credited against future payments."

13. The certificate referred to in paragraph 9 of the Sixth Schedule is an accountant's certificate certifying the total amount of the maintenance expenses for the period to which the account relates, certifying which parts of those expenses fall within Part A, B and C of the Schedule (which determines the percentage payable by the lessee) and certifying the Lessee's Proportion and that of the lessees of the other dwellings in the development.

The inspection

14. The Tribunal inspected the exterior of the property on the morning of 1st October 2014. It is a ground floor one bedroomed flat situated in a purpose built block in a small development of 16 flats a short distance from the centre of Bury. A representative of the managing agents was present during the inspection. To the front of the block in which the flat is situated is a well-maintained parking area. To the rear is a grassy area, with a tall leylandii hedge marking the boundary.

The hearing

15. A hearing took place on 1st October 2014 at the premises of the Tribunal in central Manchester. At the hearing Mr Ritchie attended and represented himself, and WHMC was represented by Mr Neil Cadwallader of counsel. Also in attendance at the hearing was Harold Batty, a director of WHMC.

16. Mr Cadwallader had provided the Tribunal in advance with a very helpful skeleton argument. Unfortunately a copy of that had not reached Mr Ritchie prior to the hearing but he was provided with one at the start and given an opportunity to read it.

17. Mr Ritchie indicated that his case was based primarily not on what was being charged, but on the way in which it was being charged. He did however take issue with an item which appeared to be a charge of £5 per week for cleaning the door of the property.

18. The statement of account produced by WHMC showed that the sums which it alleged were due were as follows:

2008	£500
2009	£600
2010	£600
2011	£600
2012	£600
2013	£600
2014	£600
Total	**£4,100**

£700 had been paid in relation to the property for 2006, and £600 in 2007, but nothing since then.

19. On behalf of WHMC Mr Cadwallader accepted that it was a pre-condition of liability for the Lessee's Proportion that an accountant's certificate be served on the lessee in accordance with paragraph 9 of Schedule 6 of the lease. It was

also accepted that prior to 17th September 2014, no such certificates had been served. Mr Cadwallader indicated that the Tribunal could pay little attention to demand/requests for the Lessee's Proportion made before that date, and concentrate on those made on or after 17th September.

20. In view of that concession it is not necessary to go through the correspondence in detail, but the Tribunal noted that Mr Ritchie had on a number of occasions over the years written to WHMC asking for clarification of the service charges due.

21. Following the making of this application WHMC had served on Mr Ritchie:

    a. Advance payment certificates signed by Mr Batty, a director of WHMC for the years 2007 to 2014, sent on 26th April 2014;
    b. Further advance payment certificates for 2006 to 2014 sent on 5th August 2014;
    c. Yet further advance payment certificates for 2006 to 2014 sent on 17.9.14.

22. WHMC's case was that no specific time was specified for service of an accountant's certificate, and time was not of the essence. The advance payments were therefore recoverable in full.

23. In relation to the Lessee's Proportion, service charge accounts were sent to Mr Ritchie on 14th January 2014 (for 2006 to 2012), on 29th March 2014 (for 2013), and on 17th September 2014 (for 2006 to 2013). It is only the latter version of the accounts which were certified.

The law

24. Section 27A of the Landlord and Tenant Act 1985 provides:

"(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."

25. Section 20B of the Landlord and Tenant Act 1985 provides as follows:

"20B Limitation of service charges: time limit on making demands.

(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.

26. The effect of this provision was considered by the High Court in the case of *Gilje v Charlegrove Securities* [2004] 1 All ER 91, where Etherton J observed: "so far as is discernible, the policy behind s 20B is that the tenant should not be faced with a bill for expenditure of which he or she as not sufficiently warned to set aside provision. It is not directed at preventing the lessor form recovering any expenditure on matters, and to the extent, of which there was adequate prior notice."

27. For the purposes of section 20B costs are incurred when payment is made, not when the services are supplied: *Jean-Paul v LB Southwark* LRX/133/2009.

28. *Gilje* established that section 20B does not apply where payments on account are made by the lessee in respect of service charges, the actual expenditure by the lessor does not exceed the payments on account, and there is therefore no subsequent request by the lessor for further payment. Nothing further is due from the lessee. In *Gilje* the tenant's service charge contribution was made in two ways: by payment on account during the relevant financial year; and by a balancing payment at the end of each financial year. The landlord gave notice requiring payments on account in respect of the accounting periods ending in March 1999 and 2000, but did not supply accounts until October 2001. Nothing further was due from the lessees, as the amounts expended were less than the interim demands. Nonetheless the lessees sought to rely on section 20B on the basis that the expenditure had been incurred more than 18 months "before a demand for payment".

29. Etherton J noted that the lessees' case required the supply of accounts and certificates to be treated as a "demand for payment", but it was not, as there was nothing to demand.

30. The logic of *Gilje* was followed in the case of *Holding & Management (Solitaire) Limited v Sherwin [2010] UKUK 412* where advance service charges were demanded and paid, and balancing charges were made within 18 months of the end of the service charge year for the lessee's share of the excess. The Upper Tribunal allowed the landlord to recover costs more than 18 months old, where they had been paid in advance, but held that section 20B still applied to a demand for the balance , if the demand was made more than eighteen months after the costs were incurred.

The Tribunal's findings on this issue

31. It is a pre-condition of liability for the Lessee's Proportion due under the lease that an accountant's certificate be served on the lessee.

32. No such certificates were served on Mr Ritchie prior to 2014.

33. The Tribunal did not accept WHMC's argument that service of a director's certificate was not a pre-condition of liability for an Advance Payment. Paragraph 5 of Schedule 7 (set out in paragraph 10 above) imposes the requirement of service of a director's certificate each year on 31st January and it would render the provision otiose if the failure to provide such a certificate had no effect on the payability of the advance payment. Indeed clause 1 of the lease defines the Advance Payment as being "the sums provided for or determined under paragraphs 5 .... of the Seventh Schedule". Thus the Advance Payment is the sum determined in accordance with paragraph 5. If it is not so determined, by provision of a director's certificate, it cannot be payable. It remains an inchoate figure until a certificate is provided.

34. No director's certificates were provided until April 2014.

35. Mr Cadwallader on behalf of WHMC with eloquence and persistence sought to persuade the Tribunal that the decision in *Gilje* applied to the facts of this case and that the Tribunal should treat this as a case in which advance payments had been sought, and that, as there was not in any year an additional balancing sum due, the sum sought as an advance payment and as the lessee's proportion in each year being the same, section 20B did not apply.

36. The Tribunal could not accept this argument. Although the Tribunal noted that letters had been sent to Mr Ritchie at intervals requesting payment, on no occasion had a figure for the advance payment been set by a certificate under Schedule 7(5) of the lease. On 22nd March 2007 WHMC had written to owners of flats in the block indicating that it intended to charge £50 per month as a service charge from then on. Thereafter WHMC adopted an approach of not sending any form of bill or notification of the advance payment, but writing to Mr Ritchie after the due date for payment (1st March) telling him that he was in arrears. WHMC did not explain why it had such difficulty complying with the terms of the lease.

37. It was the view of the Tribunal therefore that, other than in 2006, when the service charge figure was set in the lease at £600, and this sum had been paid, on no occasion had WHMC properly set an Advance Payment which Mr Ritchie was liable to pay.

38. WHMC served accountant's certificates in relation to the Lessee's Proportion on 17.9.2014. No such certificates having been served prior to that date, it follows that section 20B(1) applies to any costs incurred more than 18 months before that date.

39. The Tribunal therefore found that WHMC was entitled to recover service charges only in so far as they related to costs incurred after 16.3.2013.

40. WHMC conceded that there had been no notice given under section 20B(2) so the Tribunal did not have to consider any issue arising under that section.

Evidential matters

41. The Tribunal heard evidence in relation to the nature of the services provided from Mr Batty, director of WHMC, and from Mr Ritchie. Although Mr Cadwallader had sought, in his skeleton argument, to suggest that the tribunal did not have sufficient information to deal with the question of the reasonableness of the costs, and that WHMC could not deal with this issue, it was accepted during the hearing that Mr Batty had the requisite knowledge to deal with the limited concerns raised by Mr Ritchie in evidence.

42. Mr Batty explained that the contractor carrying out most of the cleaning and maintenance on site, Teamwood, charge on a "per door" basis. They do not clean the doors; the door is simply a unit of charge. They cut the grass, clean and tidy the car park, cut the hedges twice per annum, and carry out general cleaning. There had been some problems with flytipping, with items of furniture and other rubbish being thrown over a fence into the car park. There were extra charges incurred for removing items of this nature.

43. Mr Batty was asked why WHMC was incurring charges for a PO Box, when it had a registered office to which correspondence could be sent. He indicated that the same address was used for six sites managed by WHMC, and the post was all sent on to WHMC's office at 1 Westgate Avenue, Bolton.

44. Buildings insurance in accordance with the lease was put in place by WHMC via a block policy covering other blocks managed by the company. In 2012 the total premium figure for St James Court was £2,283.75, of which 6.25% is £142.73.

45. The Tribunal was of the view, having considered carefully the invoices filed by WHMC, that with two exceptions, the charges included in the service charge figure were reasonable.

46. The first exception was the use of a PO Box. The Tribunal did not regard this as reasonably incurred for two reasons: first, no satisfactory explanation was provided as to why a PO Box was necessary when WHMC had an office address to which post could be sent; second, the invoice for this service (p 354 of the bundle) was addressed to a limited company called Engleford Ltd which had no connection with St James Court. No adequate explanation was provided as to why the invoice, if it was payable by WHMC, was not addressed to the company.

47. The second exception was window cleaning: the lessees of St James Court are under an obligation in their lease to clean the inside and outside of the windows, and the provision of this service was therefore unnecessary.

48. Eliminating those items from the figures charged produces the following result:

16.3.13 to 1.3.14	£506.41 (daily rate of £1.69, minus £2.36 in relation to the PO Box)
1.3.14 to 1.3.15	£535

49. Mr Ritchie raised an issue in relation to the nature of the accounting carried out by Cowgill Holloway LLP. He noted that the accountant's basis of report (as set out for example at p84) indicated that checks whether entries were based on receipts were carried out on the basis of samples, and the procedures used did not constitute an audit in accordance with International Standards on Auditing (UK and Ireland).

50. It was the view of the Tribunal, having considered the accounts that they constituted an adequate review of the service charge accounts for the purpose of ascertaining whether these relatively simply accounts were being kept accurately by WHMC.

Section 20C

51. Section 20C of the 1985 Act provides:

(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 First Tier 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.

(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."

52. The Tribunal reminded itself that this is not a results-drive jurisdiction, but also had regard to the words of Peter Gibson LJ in *Iperion Investments Corpn v Broadwalk House Residents Ltd* [1994] 71 P & CR 34 :

"To my mind, it is unattractive that a tenant who has been substantially successful in litigation against his landlord and who has been told by the court that not merely need he pay no part of the landlord's costs, but has had an award of costs in his favour should find himself having to pay any part of the landlord's costs through the service charge"

53. In this case Mr Ritchie was largely successful in his claim and it was WHMC's failure to comply with the terms of the lease as to the appropriate manner in which to levy the Advance Payment and Lessee's Proportion which had made

it necessary for him to make this application. Until less than a month before the hearing WHMC's response to his application had been shambolic and there remained substantial gaps in its case when the hearing took place.

54. In the circumstances the Tribunal took the view that it would be appropriate to make an order under section 20C of the Act.

Reimbursement of fees

55. The Tribunal additionally considered whether WHMC should be ordered to reimburse the fees paid to the Tribunal by Mr Ritchie in order to bring this claim.

56. Rule 13(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules provides:

"(2) The Tribunal may make an order requiring a party to reimburse to any other party the whole or part of the amount of any fee paid by the other party which has not been remitted by the Lord Chancellor."

57. Mr Ritchie had paid fees totalling £315 to the Tribunal.

58. Mr Ritchie's claim had as set out above been largely successful and WHMC had not dealt with the claim adequately until a late stage in the proceedings.

59. The Tribunal was therefore of the view that it would be appropriate to make an order that WHMC reimburse the fees paid by Mr Ritchie.

Decision

60. The decision of the Tribunal is therefore:

a. No service charge is payable by Mr Ritchie for the years 2006 to 16.3.2013;

b. Mr Ritchie is liable to make the following payments:

16.3.13 to 1.3.14 £506.41 (daily rate of £1.69, minus £2.36 in relation to the PO Box)

1.3.14 to 1.3.15 £535

c. None of the costs incurred by WHMC in relation to this application may be taken into account as relevant costs in determining any amount of service charge payable by Mr Ritchie.
d. WHMC shall pay to Mr Ritchie within 21 days of the receipt of this decision the sum of £315 in respect of Tribunal fees.