



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

**Case Reference** : **BIR/OOCN/LIS/2014/0061**

**Property** : **Stonebury and Elmhurst,  
5 and 5a Norfolk Road, Edgbaston,  
Birmingham, B15 3PS and B15 3PR**

**Applicants** : **Mr A Cockram, Mr D Andrews,  
Mr G Davies, Mr M Payne &  
Ms C Shaw**

**Applicants  
Representative** : **Mr G L Davies**

**Respondent** : **The Trustees of the Calthorpe Estates**

**Respondents  
Representative** : **Gateley LLP**

**Type of Application** : **Application under Section 27A (and  
19) of the Landlord & Tenant Act 1985  
for determination of the liability to  
pay and reasonableness of service  
charges and an application under  
Section 20C of the Landlord & Tenant  
Act 1985**

**Tribunal Members** : **Mr G S Freckelton FRICS (Chairman)  
Judge P Ellis**

**Date and venue of  
Hearing** : **16<sup>th</sup> June 2015 at Birmingham. The  
matter was dealt with by a paper  
determination.**

**Date of Decision** : **1<sup>st</sup> July 2015**

---

**DECISION**

---

## **1. BACKGROUND**

- 1.1 This is an Application originally dated 19<sup>th</sup> December 2014 and received by the Tribunal on the same date, for a determination of liability to pay and reasonableness of service charges under Section 27A (and 19) of the Landlord & Tenant Act 1985 (“the Act”). This included an Application under Section 20C of the Act.
- 1.2 The initial Application was made in the name of a right to manage company but following guidance from the Tribunal the names of some of the Applicants were substituted and the Tribunal issued Directions on 23<sup>rd</sup> January 2015. The Applicants requested an extension of time and amended Directions were subsequently issued on 28<sup>th</sup> January 2015.
- 1.3 Following the issue of Directions, submissions were made by the Applicants dated 26<sup>th</sup> February 2015 and by the Respondent dated 27<sup>th</sup> March 2015.

## **2. THE LEASE**

- 2.1 The Tribunal has seen a copy of the Lease dated 15<sup>th</sup> November 1960 in respect of Flat 9, Elmhurst. The Tribunal assumes that all the leases are in a similar form. The Lease was dated 15<sup>th</sup> November 1960 and was for a term of 99 years less 10 days commencing on 25<sup>th</sup> March 1959 with a ground rent of £48 per annum. The Lease was between Pinner Properties Ltd and Vista Flats Ltd.
- 2.2 The Sixth Schedule of the Lease details the Lessor’s expenses; the Seventh Schedule details the Lessee’s proportion of those expenses; the Eighth Schedule details the Lessee’s covenants with the Lessor and the Ninth Schedule details the covenants on the part of the Lessor.

## **3. THE LEGAL FRAMEWORK**

- 3.1 Under Section 27A of the Landlord & Tenant Act 1985, the Tribunal has jurisdiction to decide whether a service charge is payable and if it is, the Tribunal may also decide:-
- (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

3.2 Section 19 the 1985 Act provides that service charges must be reasonable for them to be payable.

*“Relevant costs shall be taken into account in determining the amount of the service charge payable for a period –*

- (a) only to the extent that they are reasonably incurred, and*
- (b) where they are incurred on the provision of services and the carrying out of works, only if the services or works are of a reasonable standard:*

*and the amount payable shall be limited accordingly.”*

3.3 A charge is only payable by the Lessee if the terms of the Lease permit the Lessor to charge for the specific service. The general rule is that service clauses in a lease are to be construed restrictively, and only those items clearly included in the Lease can be recovered as a charge (Gilje v Charlgrove Securities [2002] 1EGLR41). It was also stated in Gilje above “The Lease moreover, was drafted or proffered by the Landlord. It falls to be construed contra proferentum”.

3.4 If the Lease authorises the charges, they are only payable to the extent that they are reasonably incurred; and where they are incurred, only where the services for which they are incurred are of a reasonable standard.

3.5 The construction of the Lease is a matter of law, whilst the reasonableness of the service charge is a matter of fact. On the question of burden of proof, there is no presumption either way in deciding the reasonableness of a service charge. Essentially the Tribunal will decide reasonableness on the evidence presented to it (Yorkbrook Investments Ltd v Batten [1985] 2 EGLR 100).

#### **4. THE PROPERTY INSPECTION**

4.1 The Tribunal inspected the property on Tuesday 16<sup>th</sup> June 2015 in the presence of Mr G Davies of Flat 9, Elmhurst, Mr A Cockram of Flat 11, Stonebury and Mr T MacDonagh from Mainstay, the current Property Managers appointed by the RTM Company.

4.2 The property comprises of two three storey blocks, ‘Stonebury’ and ‘Elmhurst’ comprising in total 30 flats.

4.3 The properties are purpose built with facing brickwork and flat roofs.

4.4 The two blocks form part of a very attractive development surrounded by well-maintained lawned gardens with numerous mature trees and shrubs together with garages for all the flats and additional car parking.

- 4.5 The Tribunal inspected the common area at 13 – 15 Stonebury and, in particular, the ground floor meter cupboard, which includes meters for the flats in the block and two meters covering the communal electricity supply. It is understood that one is a standard rate meter and one an off-peak meter. The Tribunal noted that the meter box was easily accessible, was not locked and that all the meters could be easily read.
- 4.6 It was explained to the Tribunal that it was the standard rate meter which was faulty and that this served the internal lights around the staircase area together with some external lighting. The Tribunal understands that the communal lighting has fitted dusk to dawn sensors and that there is also a single electricity socket for use by the cleaner.
- 4.7 The Tribunal further understands that the service charges in respect of the two blocks are split equally between the 30 flats with each flat paying 3.726% of the Lessors' expenses.

## **5. THE PARTIES' EVIDENCE AND SUBMISSIONS**

### **The Applicants Submissions**

- 5.1 The Applicants submitted that in the accounts for the service charge year 2012/2013, there was an item "other debtors" in the sum of £16,678.00 and a note in the accounts explaining that this referred to electricity charges.
- 5.2 The Applicants explained that there was incorrect billing by reason of a faulty meter at 13 – 15 Stonebury, which was first identified in October 2010 when estimated bills totalling £16,678.00 were received for lighting to common areas of the block. These were paid by the Managing Agents resulting in considerable overpayment. The Applicants contend there was a failure on the part of the Managing Agents to check meter readings and further failure in that the invoices were paid without questioning the amount demanded.
- 5.3 The Applicants informed the Tribunal that the faulty meter had subsequently been replaced and the consumption checked. This had confirmed that the estimated bills were inflated and the Managing Agents should therefore have negotiated realistic consumption figures and obtained repayment from the electricity supplier.
- 5.4 At the Annual General Meeting held on 31<sup>st</sup> May 2013, the Managing Agents confirmed that they were in negotiation with the electricity supplier (npower) and a refund of approximately £12,000.00 would be made. It was subsequently reported, that rather than obtaining a refund, four credit notes had been issued by npower but, the Applicants submitted, these had not been applied to the electricity account.

- 5.5 The Applicants therefore submitted that the failure by the Managing Agents to secure a refund or obtain physical credit had resulted in the Lessees being expected to shoulder the potential loss. It was submitted that as a refund clearly existed as evidenced by the 'credit notes', the amount should be refunded to the service charge account by either the Landlord or Managing Agent if, as it was now claimed, the amount due was unrecoverable.
- 5.6 The Applicants also submitted that in the service charge accounts for the service charge year 2012/2013, there was an amount of £9,363.08, which was noted under 'liabilities' as being 'other creditors'. The Applicants submitted that they had been unable to obtain from the Respondent supporting documentation explaining how this amount was made up. It was conceded that a substantiating invoice for £1,079.70 had been received but this still left a balance of £8,283.38, which could not be explained. The Managing Agents had provided a further breakdown of costs totalling £2,379.80 but no evidence was provided to support this and the Managing Agents were still unable to provide any further breakdown of the remainder.
- 5.7 The Applicants therefore submitted that without supporting documentary evidence, the sum of £8,283.38 could not reasonably be charged to the service charge account and should be re-credited.
- 5.8 With regard to the service charge accounts for the service charge year 2011/2012, the Applicant submitted that as the electricity issues dated back to 2010, then the accounts for this year should also be questioned and the Tribunal was requested to make a determination of reasonableness in respect of same.

### **The Respondents Submissions**

- 5.9 With regard to the service charge accounts for the service charge year 2012 – 2013, the Respondent submitted that the amount of £16,678.00 was shown as a debtor balance on the account for the period ended 25<sup>th</sup> March 2013. The Respondent submitted that the amount was misleading as it was inaccurate and it was submitted that the correct debt was £3,312.38 owed to the service charge account by npower. It was further submitted that responsibility for recovery of the debt lies with the Stonebury and Elmhurst RTM Management Company Ltd which took over the management on the Service Charge Fund on 20<sup>th</sup> November 2013 and not with the Respondent.
- 5.10 By way of explanation, the Respondent submitted that a new meter was fitted in 2000 but it was not until 2010 that it was noted that the meter reading had not moved. Therefore estimated invoices were sent in the interim period.

- 5.11 The Respondent submitted that the credit notes issued cancelled out the payments made but that npower had refused to reimburse the erroneous payment. Instead, they insisted that the credit notes should be used to offset the replacement invoices. When the consumption had been checked and an analysis carried out by the accountants, it had been assessed, by the accountants, that the actual amount owed by npower amounted to £3,312.38, although npower had refused to make a cash settlement.
- 5.12 With regards to the item of 'other creditors' in the sum of £9,363.08, it was submitted that this sum represented the amount the service charge account owed to various creditors, although in reality, there were no creditors seeking payment from the service charge account at the present time.
- 5.13 The Respondent submitted that this was an historical balance and that the Managing Agents were unable to explain why the sum of £9,903.58 remained on the accounts.
- 5.14 The Respondent therefore submitted that there was no obligation for the Respondent to put the Applicants in funds and therefore no basis on which the Tribunal could make an order. It was submitted that when the management was handed over to the RTM Company, no funds were withheld to cover anticipated creditor claims. Therefore, if the Respondent paid this amount to the Applicants, then the sum of £5,903.58 would not be used by the Applicants to pay creditors as there were none.
- 5.15 The Respondent further submitted that there was no reason for the Tribunal to review the electricity charges for the years ended 2011 or 2012 as there was no case to answer.

## **6. THE TRIBUNAL'S DELIBERATIONS & DETERMINATION**

- 6.1 The Tribunal determined that there was an obligation on the Landlord through the Management Company or Managing Agents to arrange for the communal electricity supply. In 2010, that was the responsibility of The Trustees of the Calthorpe Estate through their Managing Agents, Lambert Smith Hampton.
- 6.2 It therefore followed that there was an obligation on the part of Lambert Smith Hampton or the Trustees of the Calthorpe Estate to ensure that the communal electricity supply was provided at a reasonable cost. It was common ground between the parties that there was a faulty meter which went undetected for some years, resulting in overpayments.
- 6.3 The Tribunal noted that the credit notes in respect of the electricity charges were all dated 28<sup>th</sup> April 2011 in the sums of £4,252.72, £4,439.72, £4,720.10 and £3,265.46 making a total of £16,678.00.

6.4 The communal electricity was therefore overcharged in the sum of £16,678.00 from which the Tribunal can only determine that the Managing Agents were not performing their duties to a satisfactory standard.

6.5 The Tribunal noted that the credit notes in respect of the electricity charges apparently covered several years including the service charge year 2011/2012. Having determined that the credit notes were due to be credited to the service charge account, it was not reasonable to consider the electricity charges for the service charge year 2011/2012 in isolation.

6.6 The Tribunal understands from the service charge accounts that electricity charges have still been applied to the service charges as follows:

2010	£5,468.16
2011	£7,722.16
2012	(£4,328.12)
2013	£4,942.35

6.7 The question therefore arises as to how any refund is made to the leaseholders. The evidence from the parties confirms that npower stated that they would not issue a refund but make allowances against future invoices. Npower no longer supply electricity and have declined to refund the overpayment. Although the Tribunal has no jurisdiction in this matter, it considers that this is unfair to any leaseholders who may decide to sell their property while there is a substantial amount outstanding.

6.8 There is no evidence presented in the service charge accounts of any credit against the electricity charges except in 2012 where the Tribunal assumes that the electricity charge of £4,328.12 which is shown in the accounts in brackets, was not applied to the leaseholders.

6.9 As at 21<sup>st</sup> March 2012, there was still a debt owing from npower in respect of electricity payments. The initial credit notes totalled £16,678.00 and charges of £4,328.12 levied in 2012 have not been charged. This leaves a credit owing to the leaseholders of £12,349.88.

6.10 It is quite clear to the Tribunal that the Lessors have continued to be charged for electricity in the other service charge years and there is therefore no evidence that a full credit has been made against the amount paid.

- 6.11 The Tribunal considered the spreadsheet provided by the Respondent who submitted that the amount outstanding as at March 2012 was approximately £3,119.15. Having regard to the credit notes issued by npower in the sum of £16,678.00, the Tribunal does not accept such a small sum remains to be credited to the leaseholders. Neither does the Tribunal accept the assertion by the Respondent in paragraph 10 of its submission that *"The responsibility for pursuing payments of this debt lies with the Applicant acting by Stonebury and Elmhurst RTM Company Ltd. The responsibility for collecting this debt does not lie with the Respondent."* Quite clearly, the error arose prior to the formation of the RTM Company and as such, the RTM Company has no standing to pursue a claim. Moreover as the supply of metered electricity to the common parts was the responsibility of the Respondent it is the Respondent who is the party responsible for seeking reimbursement of the overpayment.
- 6.12 The Tribunal therefore accepts that the total amount of the credit notes total £16,678.00 as evidenced by copies of the credit notes provided and also accepts that payment of electricity charges in the sum of £4,328.12 had not been charged to the leaseholders in 2012. This leaves a balance of £12,349.88 as a credit being due to the service charge account and the Tribunal directs that this amount should be credited to the service charge account by the Respondent. The Tribunal therefore determines that the total allowable expenditure for the service charge year ending 25<sup>th</sup> March 2012 is reduced by this amount to £49,975.53 in total.
- 6.13 With regard to the item of 'other creditors', as far as the Tribunal can determine, this is an historic figure and difficult to quantify.
- 6.14 The Tribunal is of the opinion that the standard of accountancy is below that which would be expected but is prepared, on balance, to accept the Respondent's evidence that there are no creditors represented by the balance and that if the amount was repaid, the Applicant would be receiving a 'windfall'. The Tribunal therefore determine that this amount is not due to be paid by the Respondent to the service charge account.

## **7. SECTION 20C APPLICATION**

- 7.1 The Applicants submitted that in their opinion, the Application was only made to the Tribunal as the Managing Agents had failed to deal with matters in a professional manner and the Applicants had been unable to obtain full details of how charges were assessed when requests were made. As such, it was unreasonable for the landlord to be allowed to reclaim fees in respect of the Application to the Tribunal.



- 7.2 The Respondent submitted that as, in the Respondent's opinion, there were no sums, which the Tribunal could reasonably order the Respondent to pay and as the Respondent had explained as far as it was able how the balances had arisen, then it would be inequitable for the Tribunal to make a cost limitation order.
- 7.3 The purpose of an application under Section 20C is to prevent a landlord from recovering his costs in Tribunal proceedings through the service charge. The guidance in previous cases is to the effect that an order under Section 20C is to deprive the landlord of a property right and it should be exercised sparingly (see for example, *Veensa -v- Chong*: Lands Tribunal [2003]1EGLR175).
- 7.4 On balance, the Tribunal considers that it would be in the interest of justice to make an order under Section 20C preventing the Respondent from recovering its costs of these proceedings through the service charge in this case.
- 7.5 In reaching its decision on Section 20C, the Tribunal had regard to the fact that the Respondent had not succeeded in persuading the Tribunal of the merits of its arguments in respect of the electricity charges. In addition, although the Tribunal had not ordered a refund in respect of the amount listed under 'other creditors', the Tribunal was of the opinion that this amount should have been rectified in the accounts by the accountants at an earlier date.

## **8. APPEAL**

- 8.1 Any appeal against this Decision must be made to the Upper Tribunal (Land Chamber). Prior to making such an appeal the party appealing must apply, in writing, to this Tribunal for permission to appeal within 28 days of the date of issue of this Decision, (or, if applicable, within 28 days of any decision on a review or application to set aside) identifying the decision to which the appeal relates, stating the grounds on which that party intends to rely in the appeal, and stating the result sought by the party making the application.

Mr G Freckelton FRICS  
Chairman  
First-Tier Tribunal Property Chamber (Residential Property)