10872

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

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| **Case Reference** | : | **CAM/12UD/LSC/2015/0034** |
| **Property** | : | Flats 42a, c & d Norwich Road, Wisbech PE13 2AP |
| **Applicants** | : | Ms Marjorie Blake [flat 42c]<br>Ian Taylor, FMT Lettings Ltd [flat 42d]<br>Samuel Obaiza & Olurotimi Ashaye [flat 42a] |
| **Respondent** | : | Elyar Properties Ltd |
| **Type of Application** | : | determination of liability to pay advance service charge for the year 2014–15<br>[LTA 1985, s.27A |
| **Tribunal Members** | : | G K Sinclair, D S Brown FRICS and<br>D S Reeve MVO MBE |
| **Date and venue of hearing** | : | 26th June 2015, at<br>Rose & Crown Hotel, Wisbech |
| **Date of decision** | : | 14th July 2015 |

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**DECISION**

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## Summary

1. This is an application ostensibly brought by the leaseholder of flat 42c, but in section 1 of the form the names and addresses of the two other leaseholders are given. At the hearing it became clear that each had contributed their share of the application and hearing fees and assumed that they were all joint applicants. The tribunal so treats them, so this decision is binding on all. Number 42b is in fact a freehold house which it is believed was sold off separately by the previous landlord, Mr Housden. Having done so, however, he failed to seek an adjustment of the service charge liabilities of the other three flats, with the result that each applicant's share remains specified in their leases as one quarter – producing a significant deficit.

2. For the reasons which follow the tribunal determines that, after adjusting the budget to reflect legitimate expenditure in the previous financial year, the base figure from which the sum payable in advance for the current year is calculated is £1742.60. The amount determined as payable by each leaseholder is therefore £435.65. Pursuant to rule 13(2), and in view of the findings made, the tribunal considers it just and reasonable to order that the respondent shall reimburse the tribunal application and hearing fees totalling £440 paid by the applicants. As the leases exclude set-off only in the case of rent they may each set off £146.66 from the above service charge liability, producing a net amount due of £288.99.

3. The tribunal notes that in the 2014 application brought by Ms Blake the tribunal also ordered that the respondent reimburse her issue fee of £90. This, she informs the tribunal, has not been complied with. Her remedy may be by way of a further set-off from the net service charge liability mentioned above.

4. The tribunal further orders, pursuant to section 20C of the Landlord and Tenant Act 1985, that the respondent landlord's costs incurred in respect of 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.

## Material lease provisions

5. The sample lease before the tribunal is dated 17th May 2007, between David Lloyd Housden as landlord and Marjorie Rose Blake as tenant, and grants a lease of flat 42c on the lower ground floor for a term of 99 years from 4th October 2004 at an initial annual rent of £250, subject to upward review after the 33rd and 66th years.

6. By clause 2.5 the tenant covenants to perform and observe the covenants in clause 3 and observe the restrictions in Schedule 5. The tenant's covenants include paying the basic rent by yearly instalments in advance on 24th June in each year [3.1]; paying the service charge calculated in accordance with Schedule 3 on the dates stated there [3.2]; not to reduce any payment of rent by making any deduction from it or by setting any sum off against it [3.3]; etc. The Schedule defines the terms "service costs", "final service charge" and "interim service charge instalment". "Service costs" means the amount spent by the landlord in carrying out all the obligations imposed by the lease. "Final service charge" means one quarter of the service costs and "interim service charge instalment" an annual payment on account of the final service charge, which is £100 until the landlord gives the tenants the first service charge statement, and after that is the final service charge on the latest service charge statement. The service charge is

not declared to be payable "as rent".

7. By Schedule 3, paragraph 2(b) the landlord must have a service charge statement prepared for each period ending on the 25th December during the lease period. The particulars of its content are set out in detail. By paragraph 3 on each day on which rent is due under the lease (i.e. 24th June) the tenants are to pay the interim service charge instalment. Of importance is paragraph 4, which provides that if the service charge statement shows a positive balance then the surplus must be repaid to the tenants, and if negative then any balance due is payable to the landlord within 14 days. There is therefore no provision for any reserve fund.

8. By clause 2.6 the landlord covenants with the tenant to perform and observe the covenants in clause 4 of the lease. These covenants include insuring the property [4.2], paying all rates, taxes and outgoings on the common parts [4.3], to provide the services listed in Schedule 4 [4.4], etc. The services to be provided include repairing the roof, outside, main structure and foundation of the building; lighting, cleaning, repairing and maintaining the access to the property; external decoration; obtaining insurance valuations from time to time; and keeping accounts of service costs, etc.

**Material statutory provisions**

9. Section 18 of the Landlord and Tenant Act 1985 defines the expression "service charge", for the tribunal's purposes, as follows :

(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.

10. The overall amount payable as a service charge continues to be governed by section 19, which limits relevant costs :

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

11. The tribunal's powers to determine whether an amount by way of service charges is payable and, if so, by whom, to whom, how much, when and the manner of payment are set out in section 27A of the Landlord and Tenant Act 1985. The first step in finding answers to these questions is for the tribunal to consider the exact wording of the relevant provisions in the lease. If the lease does not say that the cost of an item may be recovered then usually the tribunal need go no

further. The statutory provisions in the 1985 Act, there to ameliorate the full rigour of the lease, need not then come into play.

12. Insofar as major works are concerned, i.e. those in respect of which the contribution of any tenant liable to pay towards the service charge will exceed £250, then section 20 provides that the relevant contributions of tenants are limited to that amount unless the consultation requirements have been either complied with in relation to the works or dispensed with by (or on appeal from) the relevant tribunal. The consultation requirements, in the instant case, are those appearing in Part 2 of Schedule 4 to the Service Charges (Consultation Requirements) (England) Regulations 2003[1] (as amended).

**Inspection and hearing**

13. The tribunal inspected the property at 10:00 on the morning of the hearing. Also present were Ms Blake and Mr Taylor (both applicants) and a young man who had taken photographs of the roof repairs carried out in late 2014. Nobody was present on behalf of either the landlord or its managing agents. The subject property, viz 42a, c & d Norwich Road, essentially comprises a large terraced building with flat 42a on the top floor (accessible via the side alley and up an external concrete staircase with a single 90° turn), 42c on the lower ground floor (accessible via the same alley and then down a flight of steps and across the back garden), and 42d on the ground floor (accessible from the street). Flat 42c is described on the application form as being a 4 bedroom flat while 42a and 42d are each 2 bedroom flats. Apart from a brief look inside 42d the tribunal did not inspect the interior of the flats, as – save perhaps for gaining access to the loft to see the daylight through the recently repaired roof – this was not material to its enquiry.

14. Missing from this list is 42b, which must formerly have been part of the same freehold unit but is now a freestanding house in separate ownership immediately to the right of 42d (when viewed from the street) and to the left of the door leading to the side alley mentioned above. As one walks past the bottom section of the external staircase towards the rear garden and flat 42c there is a rather poor, blue painted door with a frosted glass panel that has been shattered – the glass held together with battens, etc. It was suggested on enquiry by the tribunal that this door belongs to 42b, which would create an interesting flying freehold involving the steps to 42a above.

15. The door to the alley has a latch but no lock, although there is evidence of a Yale-type rim lock at some time in the past. Two screws have recently been used to tighten the latch in place. Inside the door the tribunal noted where electric cable for the external lights had been cut both to the right of the door (viewed as if from the street) where it had once passed from a switch or time controller over the top of the door and high up the gable wall, where a lamp may have been fitted or the supply emerged from the building. (However, this would have been from 42b Norwich Road, now in separate ownership). The alley was therefore completely unlit, as were the staircase up to flat 42a and the garden steps down towards 42c.

16. The rear garden was subdivided by low (perhaps 6 inch high) fences, as part was owned by 42b and almost as much part of 42c, leaving only a small area of lawn

[1] SI 2003/1987

across the rear as shared garden (unless this is part of the 42a demise). To the rear and left (east) side of the garden is a continuous wooden panel fence. There is no rear gate.

17. With no access via the top floor flat the tribunal could only attempt to inspect the roof from the street. As the front is concealed from view by a parapet little could be seen. The photographs in the bundle were therefore essential.

18. The hearing began at 11:00. Ms Blake and Mr Taylor attended for the applicants but, although it had filed a short written Statement of Case with supporting accounts and invoices (most of the latter being raised by Moreland Management against its principal), the respondent chose not to be represented at all; whether by director, managing agent or lawyer.

19. Before the tribunal was a bundle, 131 pages long, prepared by the applicants. To that, however, the tribunal also needed to add the original application form and the directions issued by the Regional Judge on 13th April 2015.

20. The principal points taken by the applicants were :
    a. That despite requests Moreland Management had not produced audited accounts to justify its "budget" for the next year and demand for payment
    b. Demands were being made for interim service charge instalments many months before they fell due for payment on 24th June : see Appendix D at page 20, an invoice dated 24th February 2015 for £2 378.33 arrears plus interest of £17.89
    c. The demands for 2015 included a large amount for further substantial repairs to the roof, without any section 20 consultation.

21. The applicants took issue with a number of the claims made by the respondent, either in its Statement of Case or invoices. Amongst the matters in issue, using as a checklist the items appearing on the service charge expenditure statement for 2014, certified by the accountant on 1st March 2015 [page 30], were :
    a. Insurance – the respondent alleged that the higher cost of the insurance was because the insurers had agreed to insure the property despite an escape of water claim and the fact that the roof was in poor condition and required replacement. The applicants (all three) denied that they had made or instigated an escape of water claim. This, they said, was a lie.
    b. Cleaning & gardening –What was done? There are no internal common parts to clean, and tenants did their own gardening
    c. Entry phone – What entry phone?
    d. General repairs & maintenance – 4 separate repairs to a "rear gate latch" – neither done nor asked for
    e. Health & Safety – The fire risk charges were challenged by the landlord's own accountant as lacking any proof, and the nomination of a responsible person does not justify a further fee of £210
    f. Roof repairs – carried out by Mark Harris of Spalding in Lincolnshire – 50-60 slates, some repoint work and new guttering and downpipes – "we left it watertight", with all work guaranteed for four years – invoice at page 47. Budgeted work for 2015 is £3 800, so what are the applicants paying for?
    g. Management fees – excessive.

They also disputed having received copies of the proper year-end accounts.

**Discussion and findings**

22. In 2014 the first applicant applied to the tribunal for a determination of what was payable by her as service charge for that year.[2] Neither the respondent landlord nor its managing agent participated in the proceedings. The tribunal on that occasion concluded, at paragraph 20 of the decision :

> It seems absolutely clear to this tribunal that the respondents have behaved appallingly. The applicant has provided clear evidence that she has discharged all her financial liabilities under the lease. On the other hand, the respondents have failed to obey orders of the tribunal, failed to observe the terms of the lease, probably committed a criminal offence (on the evidence supplied by the applicant only), demanded monies without foundation and have even issued unwarranted court proceedings.

23. On this occasion the respondent did comply with the tribunal's directions but its statement of case contains little by way of explanation of the invoices generated mainly by the managing agents. The tribunal does not therefore know how it justifies four visits in one year – three of them in November 2013, December 2013 and January 2014 – to repair a door latch, even accepting that "side" gate and "rear" gate may refer to the same thing. Nor is an explanation given about testing a lighting circuit when the cable has been chopped off just before one of the applicants had arranged his own contractor to attend and repair it. Where is the mysterious door entry system for which a charge is made? How is a demand that complies neither in amount nor timing justified? On these issues there is complete silence.

24. While the respondent submits that the application is premature, as it should be entitled to six months' grace before producing end of year accounts, that might be true only if it were prepared to wait six months before invoicing. Instead, it seems to think that interim service charge instalments are due at the year end, and that they need bear no relation whatever to the previous year's actual service costs. Thus, on page 20, we have a demand raised against flat 42c for the sum of £2 378.33 in respect of the year 25/12/2014 – 24/12/2015 – plus interest.

25. Where does this figure of £2 378.33 come from? If one considers the year end accounts for 2013 one sees from the helpful table appearing at page 4 that the actual service charge expenditure in that year was £1 850.63. In 2014 the respondent produced a budget of £3 800 (a sensible approach, but completely contrary to the provisions for interim service charge instalments in Schedule 3, paragraph 1). The "actual" service costs for 2014, we see from the certified account on page 30, was £3 664.35, yet on the balance sheet as at 31st December 2014 at page 29 we see that a demand is made for service charges "in advance" totalling £7 134.99. That is £2 378.33 x 3, and again is contrary to what the lease permits. (Incidentally, these service charges demanded in advance are entered on the balance sheet as current liabilities, while as a current asset is shown the figure of £7 648.05 for "amounts due from lessees". This is another mystery.)

26. The landlord is entitled to recover as interim service charge only one quarter of the actual service charge shown on the last statement. That must be because the

[2] CAM/12UD/LSC/2014/0091 – A copy of the decision appeared at bundle pages 92–95

leases ignore the fact that 42b has been sold off, so there are only three flats liable to make a contribution to expenditure. This is one of those practical items that conveyancing solicitors acting for a purchaser seem to overlook. Further, the interim amount payable is not due until halfway through the year and is capped at the previous year's actual costs, so one cannot make provision for anticipated major works – even if the landlord had taken the trouble to undertake a section 20 consultation exercise. With an unreformed lease major expenditure can only be funded by borrowing, or following specific agreement with each leaseholder.

27. However, the tribunal does not take at face value the "actual" costs appearing on page 30. Of the specific cost items listed the tribunal determines as follows :

a. Accountancy fee – £287.50 : the accountant does not seem to understand the lease terms and is remarkably trusting of invoices largely generated in-house by the managing agents – with few external ones. The accounts do not comply with the lease and the fee is disallowed entirely.

b. Building insurance – £740.10 : the actual premium incurred in 2014, at page 57, was in fact £986.80. The policy contains a number of standard items such as common parts contents of £20 000. Despite noting the dispute about whether a claim had been made for a leak the cost claimed is reasonably good value and is allowed in full.

c. Cleaning & gardening - £408.00 : the tribunal can see no justification for this. The invoices are raised by Moreland Estate Management. Did the managing agent really drive all the way from north London to Wisbech to undertake cleaning and gardening? Very unlikely. What is there to clean, and what gardening is required given the size and proportion of garden within specific devises?

d. Entry phone – £25.00 : There is no entry phone. This is a fiction.

e. General repairs & maintenance – £100.00 : Did the managing agent really drive all the way from north London to Wisbech for £15 .00 to repair a latch, and why were repairs necessary for three consecutive months? It is clear that two screws have been fitted by someone in the recent past. The leaseholders seem to agree that it is reasonable for the outside lighting circuit to be tested (although it has now been chopped up). The tribunal allows this item at £25 and one repair of the gate at £15, making £40.00 in total.

f. Health & safety – £335.00 : There is no invoice to satisfy the landlord's own accountant that a fire risk assessment took place in December 2013 at a cost of £125.00, yet the item appears in the account at page 30. As for the invoice for providing a "responsible person", that is a standard aspect of property management which is undeserving of a separate fee. The tribunal allows nothing under this head.

g. Roof repairs - £700.00 : the invoice at page 47 claims that the work is guaranteed for 4 years, so Mr Harris should be invited back to replace slipped tiles and seal the holes visible from inside the roof [see photos at Appendix C, pages 15–18]. However, this actual cost is quite reasonable if Mr Harris did the work claimed, including downpipes and guttering. The tribunal was told that he used no scaffolding. The precise means of access was left vague, and would doubtless cause anxiety to any Health & Safety Officer, but the effect has probably been to substantially reduce the cost to a figure conveniently below the section 20 threshold. It is allowed.

h. Management fees – £1 068.75 : this increase against a budget figure for

the year of only £750 is nowhere explained by the respondent. Had all the work been carried out competently then in the Wisbech area of north Cambridgeshire a manager might charge about £175 per unit; not £300. As the managing agents have arranged for some minor and roofing repairs as well as the insurance the tribunal applies the lower figure and then discounts it by 50%, producing a net total of £262.50 for the three flats.

28. The legitimate service costs are therefore :

| | | |
|---|---|---|
| a. | ..... | Nil |
| b. | ..... | £740.10 |
| c. | ..... | Nil |
| d. | ..... | Nil |
| e. | ..... | £40.00 |
| f. | ..... | Nil |
| g. | ..... | £700.00 |
| h. | ..... | £262.50 |
| | **Total.....** | **£1 742.60** |
| | of which one quarter share is ..... | £435.65 |

29. Pursuant to rule 13(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, and in view of the findings made, the tribunal considers it just and reasonable to order that the respondent reimburse the application and hearing fees totalling £440 paid by the applicants to the tribunal.

30. Further, pursuant to section 20C of the Landlord and Tenant Act 1985 the tribunal orders that the respondent landlord's costs incurred in respect of 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.

Dated 14th July 2015

*Graham Sinclair*

Graham Sinclair
Tribunal Judge