



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

Case Reference : CHI/29UL/LIS/2014/0023,0047,
0056,0077, 0078
CHI/29UL/LIS/2015/0004-6

Property : Flats 2,3,5-7,9,10 and 19B, 19-21
Rendezvous Street, Folkestone, Kent,
CT20 1EY

Applicant : Mrs Vairavan Valliammai

Representative : Mr Vairavan

Respondents : Mrs Denise Jorgensen (Flat 2)
Ms Roberts (Flat 3)
Mr and Mrs Gorham (Flat 5)
Mr Anthony Paul Hallett (Flat 6)
Mr and Mrs Smith (Flat 7)
Ms Andrews (Flat 9)
Mr Samuels (Flat 10)
Mr Blackett and Ms Bushell (Flat 19B)

Representative : In person

Type of Application : s27A LTA85

Tribunal Members : Judge D Dovar
Mr C C Harbridge
MR P A Gammon

**Date and venue of
Hearing** : 13th April 2015, Dover

Date of Decision : 12th June 2015

DECISION

Introduction

1. This is an application for the determination of the payability of on account service charges for the years ending 31st March 2008, 2009, 2010 and 2011.
2. These matters were transferred from various County Court proceedings following the Applicant's claims against the Respondents for outstanding ground rent and service charges in December 2013. Those claims were defended.
3. The parties were directed to file statements of case and for the Applicant to provide copies of all service charge accounts and estimates in dispute.
4. The directions given on 29th September 2014 and 2nd February 2015 identified the issues for determination as:
 - a. Whether s20B of the Landlord and Tenant Act 1985 ('the 1985 Act') precludes recovery of the sums claimed; and if not,
 - b. Whether the cost of certain items were reasonably incurred or carried out to a reasonable standard;
 - c. whether an order under section 20C of the 1985 Act should be made.
5. In the course of proceedings it became apparent that the sums claimed were on account demands and that there was a significant issue in respect of recoverability of service charges under the terms of the underleases. The parties were given an opportunity to address the Tribunal on these points both at the hearing and afterwards in the form of written submissions. In addition the parties were given an opportunity to consider the issue, set out below, as to whether an on account demand can be levied after the actual costs have been ascertained.

Background

Headlease

6. The Applicant was assigned the headlease of the first to third floors of the Property and in turn granted long residential leases out of her interest in 2006.
7. The headlease provides for payment on account of service charges by the Applicant and for an end of year reconciliation of budget and actual expenditure. It also provides for the Applicant to pay 75% of the total service charges for the Property.
8. Clause 2 obliges the tenant to pay

'by way of further or additional rent an annual sum being the Tenant's Proportion of the Maintenance Charge and being made up of the Interim Maintenance Charge paid on the first day of January in each year ... which charge shall be payable on account of the Maintenance Charge as set out under the provisions of the Proviso to Clause 4 hereof.'

9. Clause 4 (iv) (a) provides for certification of actual expenditure and (b) deals with the situation where the interim maintenance charge is greater than actual expenditure. It provides that the surplus

'shall be carried forward by the Landlord and credited to the account of the Tenant in completing the Maintenance Charge in succeeding Accounting periods.'

Underleases

10. The underlease of flat 6 (which is representative of the Respondents' leases) is dated 9th May 2007 and is for a term of 125 years from 1st January 1989.
11. 'Service Charge' is defined as

'the proportion of the Service Charge payable to the Landlord in respect of the demised premises and referred to in Clause (h) of the Particulars'.

12. The particulars of the underlease at (h) provide for the Respondent to pay 7.8% of the 'annual maintenance cost'.

13. By Clause 3, the Tenant covenants

'to observe and perform the covenants on the part of the tenant contained in the Head Lease other than the payment of rents and other monies so far as they relate to the Demised Premises ... and to indemnify the Landlord against all damages claims costs and expenses arising from any breach of those covenants by the Tenant but not further or otherwise ...'

14. By Clause 4.1 the tenant covenants to pay the Service Charge. There is no express provision setting out what the 'Service Charge' covers nor the manner in which it is to be demanded or paid.

15. By clause 5.1 the landlord covenants to pay 'service charge and insurance premium and other rents reserved by the Headlease at the times and in the manner stated in the Headlease.'

Demands by Headlessor

16. Since at least 1st April 2007 the freeholder had been making a demand for an on account payment from the Applicant. This figure was:

- a. **£5840** on 1st April 2007 for the **year end 2008**,
- b. **£6215.63** on 1st April 2008 (plus additional demands of £225 on 16th September 2008 and £200 on 10th December 2008) for the **year end 2009**;
- c. **£6480** on 1st April 2009 for the **year end 2010**; and
- d. **£6,716.25** on 1st April 2010 for the **year end 2011**.

17. The end of year accounts provided show:
- a. For the **year end 2008**, the actual expenditure was £1,468.48: being £293.28 management and £1,175.20 for repairs; of which the Applicant's proportion was **£1,101.36**. The accounts were prepared in July 2008;
 - b. For the **year end 2009**, the actual expenditure was £9,742.89, being £3,726.13 for insurance, £200 for legal fees, £585.31 management fees, and £5,231.45 for repairs; of which the Applicant's proportion was **£5,567.37**. The accounts were prepared in July 2009.
 - c. For the **year end 2010**, the actual expenditure was £8,682.05: being £3,950 for insurance, £693.75 for management fees and £4,038.30 for repairs; of which the Applicant's proportion was **£4,961.17**. The accounts were prepared in August 2010.
 - d. For the **year end 2011**, the actual expenditure was £6,770.30: being £3,385.84 for insurance, £705 for management fees and £2,679.46 for repairs; of which the Applicant's proportion was **£3,868.74**. The accounts were prepared in August 2010 (this appears to be an error).
18. In each year the actual expenditure was less than the anticipated. No evidence was provided as to whether or how any surplus had been taken into account.

Demands by headlessee

19. The Applicant had, in turn, sought to recover those sums paid by her in respect of the on account demands from the freeholder, from the Respondents. Because of concerns she had over whether the sums demanded were payable in total, the Applicant only passed on those costs which she considered payable and had paid.

20. Until August 2013, a large proportion of the on account sums set out above had not been passed onto the Respondents. Indeed, Maltbys, agents for the Applicant, not only issued on account service charge demands in amounts less than those claimed by the freeholder, but provided running accounts of the Respondents' service charge payments which showed those leaseholders who had paid the sums demanded as having a zero balance outstanding.

Dispute between headlessor and applicant

21. Two disputes had arisen between the freeholder and the Applicant in relation to the payment of service charges. As mentioned above, the Applicant did not consider that all the sums demanded were due to the freeholder and withheld payment.
22. The first was the subject of a hearing on 8th July 2009 ('the First LVT') in relation to the on account demand dated 1st April 2008 for £6,215.63 for the year end 2009. The Applicant did not attend that hearing and a determination was made that she should pay £6,215.63, less the insurance premium already paid of £2,873.69; leaving a balance of £3,341.94. No appeal was raised against that decision.
23. There was a second set of proceedings before the Tribunal on 11th January 2012 ('the Second LVT') in relation to the on account demands for the years ending 2010 and 2011. The Applicant resisted that claim on the following basis (taken from paragraph 12 of the determination in that case):
- a. There was no dispute with the insurance premium, but the Applicant disputed the maintenance, repair and management fees;
 - b. There had been a lot of complaints from the underlessees (the Respondents in this case), that no repairs had been carried out and that all bills were only estimates.

24. The Applicant instructed her managing agent to attend the hearing on her behalf which was on 11th January 2012. At that hearing, the parties reached agreement that the full amount sought of £12,463.19 was payable for service charges to the period 31st March 2011. This agreement was recorded in the determination.
25. However, the Applicant later disputed that agreement and sought to appeal the determination which recorded the agreement to the Upper Tribunal. Permission to appeal was refused on 10th April 2012. It was not until 1st August 2013 that the sums were eventually paid after the freeholder commenced possession proceedings.
26. The Applicant maintains that those sums (or the majority of those sums) are not due to the freeholder, but is unable to take matters any further as she has exhausted her rights of appeal. It seems that the Applicant blames her representative at that hearing for agreeing the figures with which she is now stuck.

Further Demands

27. Following her payment on 1st August 2013, the Applicant sent out further demands to the Respondents on 13th August 2013, seeking their contribution to the payment made. From each Respondent, their proportionate share of the service charge was demanded, so for example, Mrs Jorgensen, of Flat 2 received a demand for services charges in the sum of £728.98, which included service charge on account costs spanning as far back as the demands made by the freeholder in April 2007 for the year end 2008 and in April 2008 for the year end 2009.

Construction of lease terms

28. There was a preliminary point which troubled the Tribunal with regard to the recovery of service charges under the leases. The underleases are not clear in the manner in which the Applicant was to pass on her service charge liability under the headlease, but it seemed clear that there was an intention to do so.

29. The Respondents accepted and understood that they had to pay service charges under the terms of the lease and were only challenging recovery on the specific facts of this case. The Applicant stated that her understanding was that the underleases were drafted so that the tenants had to perform her obligations in the headlease; including the payment of service charges.
30. In that context, the Tribunal considered that the reference in the underlease to service charge was a reference to the service charge in the headlease, so that when the Respondents covenanted to pay the service charge, that was a covenant to pay their proportion of the service charge payable by the Applicant under the headlease.
31. These remain service charges for the purposes of ss18 to 27A of the Landlord and Tenant Act 1985 and the statutory restrictions on recovery apply.

Recovery of on account charges

32. The Respondents' central complaint in this case is that the Applicant now seeks payment of sums many years after they had been demanded from her. Further, even after those demands had been made of the Applicant, the Applicant continued to show a nil balance as outstanding for these sums on their statement of account. At no point prior to the 13th August 2013, did the Applicant notify the Respondents that there were additional sums claimed by the freeholder or that she would seek to pass them onto the Respondents if she had to pay them or that some of those sums were the subject of Tribunal proceedings.
33. Whilst the Applicant was unable to show the Tribunal how it was that these particular demands were recoverable under the terms of the underleases, the Applicant was clear that they were demands for payments on account for the years in question. Indeed it was on that basis that the Applicant resisted claims that they were subject to an enquiry as to what cost was actually incurred and whether it was reasonable to incur those costs and/or whether the services provided

were to a reasonable standard (under s19(1) of the Landlord and Tenant Act 1985).

34. It follows that on the Applicant's case, she was making an on account demand for the periods 2008 to 2011 for the first time in August 2013.
35. Once an accounting period has passed and certainly after the actual costs for that year have been ascertained, the Tribunal's view is that it is not possible to serve an on account demand. There is no room for estimating costs when the actual expenditure is known. Accordingly, the Tribunal considers that the demands made by the Applicant in August 2013 were not valid demands in that they were not permitted by the underleases (or for that matter by the headlease).
36. Further, the Applicant still maintains that the money paid to the freeholder was not due. The Respondents claim that therefore the Applicant cannot claim those sums from them. This was a difficult position for the Applicant to maintain. On the one hand saying that she should not have had to pay this money to the freeholder, but on the other hand saying that she is entitled to recover it from the Respondents. The Tribunal considers that if, contrary to the view above, the demands were valid, the Applicant could not assert a case that they were only payable to the freeholder because of an unwise agreement made on her behalf in the Second LVT and at the same time maintain that they were recoverable as service charges from the Respondents.
37. In that event, the Tribunal considers the Applicant's case is consistent with a conclusion that the sums challenged in the 2012 proceedings were unreasonable estimates for the purpose of s19(2) of the 1985 which restricts on account demands to a sum that is 'no greater amount than is reasonable'. This only relates to the two years which were the subject of the Second LVT. The Applicant did not make the same challenges to the first two years.

Section 20B

38. Given the conclusion as to the ability of the Applicant to recover on account sums after the accounting period had passed (or at least after the reconciliation had been carried out), it is not necessary for the Tribunal to consider the impact of s20B. However, both sides dealt with the impact of section 20B on the claim and if the Tribunal is wrong about the first issue, this will be relevant to recovery.

39. Section 20B provides

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.

40. The term 'relevant costs' is a reference to section 18 which provides the following definitions:

Meaning of "service charge" and "relevant costs".

(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.

41. The Respondents claim that the on account costs were incurred when first demanded by the freeholder. As these sums were incurred by the Applicant in excess of 18 months before the sums were sought from them in August 2013, recovery is time barred.
42. Whilst the sums had been demanded of the Applicant many years before 13th August 2013, the Applicant had disputed those sums and remains convinced that sums are not payable. The Applicant therefore maintains that, relying on *Burr v. OM Property Management Ltd* [2013] EWCA Civ 479, the relevant costs were incurred until payment was made on 1st August 2013 or alternatively, when the Upper Tribunal refused permission to appeal in April 2012.
43. The Tribunal does not consider that s20B applies to on account payments. Although 'relevant costs' refers to estimated costs in s18(2), s20B refers to 'relevant costs incurred' which is narrower. Further, on account costs are not incurred, in the sense that the landlord does not incur those costs, but only anticipates such expenditure. This is also consistent with the analysis above in which an on account demand cannot be made once actual costs have been incurred and the relevant accounting year has closed.
44. Even if s20B were to apply to on account costs, the Tribunal considers that in this case some the costs which fell within the Second LVT would not have crystallised until at the earliest when the Upper Tribunal refused permission to appeal in April 2012, as at that point, the Applicant was still contesting the validity of the sums. Given that the demands were sent out in August 2013, they would therefore have been in time.

45. This does not apply to the first two years claimed in this application. The demand for the year end 2008 does not appear to have been challenged and the demand for the year end 2009 was the subject of a determination in the First LVT which was not challenged. Therefore if Section 20B does apply, those demands relating to the years ending 2008 and 2009 would have been time barred.
46. Therefore, if, contrary to the Tribunal's view on the first issue, the sums are recoverable, section 20B does not prevent recovery, save for the Respondents proportionate part of demands for the years ending 2008 and 2009.

Ms Roberts and Mr Samuels

47. In addition to the sums demanded in August 2013, two leaseholders had arrears prior to that date which are claimed by the Applicant.
48. Contemporaneous on account demands were made of Ms Roberts for the three years, '08, '09, and '10, each in the sum of £782. She disputed payment of those amounts on the basis that the Property was in a poor condition. The County Court claim asserted that a total of £2,425.94 was due of which, according to the August 2013 demand, £1,854.50 was claimed for the first time in August 2013. It follows that the historical outstanding arrears prior to August 2013 were £571.44. Given that these arose out of payments on account and that they were demanded at the appropriate times (i.e. prior to the expense having been actually incurred), the Tribunal finds that the sum of £571.44 is payable. Although Ms Roberts had complaints about the quality of the actual service, this figure is for an on account demand and appears a reasonable estimate in the circumstances.
49. The same reasoning applies to Mr Samuels. A total of £3,471.25 was demanded in August 2013 of which £2,006.35 was demanded for the first time. The historical arrears were therefore £1,464.90, which is the sum that is payable.

On account v. actual expenditure

50. Despite the span of the service charge demands in question, they were all claims in respect of payments on account. The figures before the County Court and therefore the figures which the Tribunal has to consider are on account figures. Accordingly, the issue as to reasonableness under s19 of the Landlord and Tenant Act 1985 only arise in respect of whether the estimated sums were reasonable, not whether the actual work carried was of a reasonable standard or whether the cost of the work was reasonably incurred.

Conclusion

51. The Tribunal determines that the only amounts payable in respect of the years 2008 to 2011 are those sums that were demanded prior to August 2013. It follows that the only sums outstanding are those referred to above in respect of Ms Roberts and Mr Samuels. Given that conclusion the Tribunal makes an order under Section 20C of the Landlord and Tenant Act 1985 precluding the Applicant from seeking to recover those sums by way of service charge. It also follows that the Tribunal refuses to make an order that the Respondents pay the Applicant's hearing and issue fee or to pay for any of the costs incurred in these proceedings.

Judge D Dovar

Appeals

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application to the First-tier Tribunal at the Regional office which has been dealing with the case.
2. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.
3. If the person wishing to appeal does not comply with the 28-day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28-day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.
4. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking.