12203

FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**BIR/17UF/LIS/2016/0011**
Property	:	**Litton Mill, Millers Dale** **Buxton, SK17 8SW**
Applicants	:	**Mrs. D.E. Wright (Flat 15)** **Mr. P. Mudhar (Flat 9)** **Mr. M. Parikh (Flat 16)**
Respondent	:	**Litton Mill Management Company Limited**
Representative	:	**Mr. K. Perry Chartered Surveyor**
Legal Representative	:	**Laurence Page of Counsel**
Type of Application	:	**s27a and s20c of the Landlord & Tenant Act 1985**
Venue	:	**Chesterfield Justice Centre**
Tribunal Chair	:	**Mrs A J Rawlence M.R.I.C.S** **Judge PJ. Peter Ellis LLB**

DECISION

Preliminary

1. On 3 March 2016 an Application ('the Application') was made under section 27A of the Landlord & Tenant Act 1985 ('the 1985 Act') for a determination of liability to pay and reasonableness of service charges.

2. On 21 March 2016 one the Applicants confirmed that she also wished to make an application under section 20C of the 1985 Act.

3. On 31 March 2016 Mr. P. Mudhar owner of Flat No. 9 and Mr. M. Parikh owner of Flat No. 16 were added as Applicants.

4. Directions were issued on 6 April 2016.

5. Further Directions were issued on 10 and 22 June 2016.

6. Following a Case Management Conference in Birmingham on 26 September 2016, the issues were narrowed and further Directions were issued on 27 September 2016.

7. The issues to be determined are:

   i. Insurance rent payable
   ii. Service charges payable for service charge years 2008 to 2015 (subject to clarification of individual items by the Applicants in accordance with Direction 2)
   iii. Whether the Respondent sent to the Applicants copies of financial budgets, accompanied by a summary of leaseholder's rights and obligations
   iv. Consultation over tendering contracts
   v. Company cost as part of the service charge
   vi. Breaches of the lease

The Relevant Laws

8. The starting point of the Tribunal's consideration is its jurisdiction in respect of service charge applications.

9. Under section 27A (1) of the 1985 Act 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.

10. A charge is only payable by a lessee if the terms of the lease permit the lessor to charge for specific services. The general rule is that service charge 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] 1 EGLR 41).

Section 20 C Application

11. The Applicants had requested that the Tribunal make an Order under section 20C of the Act that the costs of the Respondent in connection with the Tribunal 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.

The Lease

12. The Lease for Flat 15, Litton Mill is dated 16 January 2004 and made between the (then) Landlord James Roger Carlton, Litton Mill Management Company Limited and the Tenants John Wright and Denise Beswick.

13. It is understood that the Leases for Flats 9 and 16 are identical.

14. Under clause 2.21 the definition of the Tenant includes the person for the time being entitled to the Term and where two or more persons are expressed to be the Tenant all covenants entered into by them shall be deemed to be entered into jointly and severally.

15. On 11 May 2007, the freehold was transferred to Litton Mill Management Company Limited.

16. Clause 3.4 of the Lease provides

"The Management Company has been incorporated with the object of providing certain services to and for the Tenant and the owners of other apartments within the Estate and for otherwise managing the Estate and other areas as hereinafter appears to the intent that each and every Tenant for the time being of each Apartment in the Building shall become a member of the Management Company."

17. Under Clause 6 of the Lease the Tenant covenants with the Landlord and as a separate covenant with the Management Company:

"6.1 to pay the Estate Charge and Building Service Charge in the manner set out in the Fifth and Sixth Schedules and to pay the Insurance Rent for the services provided in accordance with Clause 13 of this Agreement"

18. Under Clause 7 of the Lease the Management Company covenants with the Tenant that subject to the payment of the Estate Charge and the Building Service Charge and the Insurance Rent it will provide and perform the Estate Services and the Building Services .....

19. Under Clause 10.3 of the Lease all notices may be served upon the Tenant by post addressed to the Tenant at the Premises or by delivery to the Premises.

20. Under Clause 13 of the Lease the Landlord and the Tenant and the Management Company mutually covenant and agree with each other that:

    13.1 *"(b) whenever reasonably required (but not more than once a year) by the Tenant or the Management Company produce but at their cost a copy summary or extract of the insurance policy"*

21. In the lease under Fourth Schedule Part 1 the Tenant covenants with the landlord to pay the rents ..... and the Insurance Rent on demand without any deduction whatever.

22. The Fifth Schedule in the Lease refers to Estate Services and Costs. In particular Part 11 states the following:
"3. The creation of such reserves or sinking funds against any future liabilities of the Management Company as may be reasonable appropriate for the provision of the Estate Services...
5. The costs of employing any surveyor accountant agent solicitor and contractors or other persons in connection with the management of the Estate the preparation and auditing of the account of the Management Company ....."

23. The Fifth Schedule of the lease deals with the preparation of an estimate of Estate Management Costs, payment by the Tenant twice a year and at the expiry of each calendar year the preparation and service on the Tenant by delivery to the Premises an account of actual Estate Management Cost. In particular
"4. In the event of the actual Estate Management Costs in any calendar year exceeding the Management Company's estimate the Tenant shall pay to the Management Company the deficit in the Estate Charge due from the Tenant on demand and if the estimate exceeds the actual Estate Management Costs any excess paid by the Tenant shall be set off against the payments of the Estate Charge to be made by the Tenant for the following year"

24. There are similar provisions in the Sixth Schedule to the Lease

Inspection

25. The property was inspected on 12 December 2016 by the Tribunal in the presence of all three Applicants, Mr. K. Perry, Mr. Laurence Page and several directors of the Management Company.

26. The Mill is situated in the hamlet of Litton Mill at the end of the road. It is built of stone and multi pitched slate roof with double glazing.

27. The property was converted in 2003 to 16 flats and the adjoining buildings were changed to three townhouses. A fourth detached house is part of the complex and is only responsible for the costs of the sewage works and the maintenance of the access road and car parking.

28. The Applicants' properties are all situated within the Mill building where access is by shared entrance hall. Here are the letter boxes and water and electricity meters for all 16 flats, as well as a noticeboard. The communal area includes a sitting area and a lift to the first floor. The electric heaters were out of action at the time of inspection.

29. The property had emergency lighting and a smoke detection system.

30. Flat 15 was inspected internally to view any defective external paintwork and the Tribunal was also informed of a cracked pane in the clock tower window.

31. The Tribunal was informed that there were 8 flats on each floor the subfloor being a 600 mm void acting as both a sound barrier and ducting for services.

32. Emergency access was provided to the outside from each end of the building. The internal stairs led to both the first floor and the undercroft.

33. In the undercroft was parking for one car for each flat or townhouse. This area had not been painted since 2004. Vehicular access was by a roller door and a keypad system had recently replaced the previous fob system. The area was ventilated by both no glass windows and large extractor fans.

34. The garden was on three sides of the building, mainly stone pavers and gravel. At the west end was evidence of the old mill machinery and the mill race still runs under the mill whereas the River Wye runs to the south of the building. The area adjoining the vehicular access to the undercroft is planted with shrubs which conceal the sewage plant.

35. The sewage plant is underground and runs on anaerobic digestion. The works are serviced three times a year when sludge is removed. There is a licence from the Environment Agency for discharge into the river and this is tested periodically.

36. The fourth or north side of the parking has a parking space, not numbered, for each flat or house with planting along the back wall which is constructed of stone gabions.

37. At the west end of the building is a small compound for domestic waste and recycling.

38. The Tribunal noted that all the external woodwork including the doors had been painted very recently. At that time much of the ironwork such as fencing had also been painted.

39. Flat No 15 had evidence of deteriorating paintwork to two sills but it was pointed out that this was common for two other properties facing west.

40. The Tribunal noted areas where the gutters were blocked which had led to staining of the stonework.

41. The Tribunal also noted the condition of the drive and paving.

Hearing

42. The Hearing, which was held at Chesterfield Justice Centre, was attended by the Applicants, Mr. Kevin Perry for the Respondent and Mr. Laurence Page of counsel for the Respondent. During the proceedings the Tribunal was passed six additional bundles of documents which had been copied to the Applicants on 9 December 2016. The bundles were prepared by DAC Beachcroft LLP solicitors who were not on the record as representing the Respondent. The Tribunal was informed the solicitors were instructed by insurers who provided a Directors and Officers policy for the benefit of officers of the Management Company. The Tribunal had also received from Mr Page his skeleton argument late on Friday 9 December and gave the Applicants time to read it prior to resuming the hearing.

43. The Tribunal clarified that the alleged breaches of the lease by the Applicants were to do with the use of the premises for business and holiday lets; also that some flats were unoccupied for long periods of time. The Tribunal determined that it did not have the jurisdiction over any such breaches but noted the Applicants' concerns that this might affect the insurance of the building.

44. The Applicants' evidence and submissions were given principally by Mrs Wright with occasional contributions from Mr Mudhar. Mrs Wright stated her case as follows:

    a. The Applicants had not received copies of the insurance schedule despite several requests.
    b. The building was shown on the schedule (now received) as both commercial and as being listed under the Planning (Listed Buildings and Conservation Areas) Act 1990. The name of the building was incorrect.
    c. The policy numbers did not match.
    d. The insurance was too high and only one broker had been used to obtain competitive quotes which were not forthcoming. Quotes were sought from the same companies year on year

e. There had been a large claim in 2011 that had affected the risk. Damage had occurred in Flat 2 from Flat 10 which was directly above Flat 2 and was empty at the time of the incident.
f. There was no notice of public liability insurance on the noticeboard in the communal hall.
g. Initially the excess had been £500 per claim but this had increased to £1,000 and now was £3,000.
h. Excesses are paid for via the service charge so every occupier pays.
i. Flooding had occurred in the garage.

45. The Applicants referred to the increases in the service charge over the years with the largest one occurring in 2015; they were notified of the budget figure on 1 July 2015.

46. The Applicants referred to the lack of consultation and meetings to discuss budgets and when expensive works were mooted. The Tribunal will refer to the position of the Applicants as both leaseholders and shareholders of the Management Company in paragraph 91.

47. The Applicants stated that they had not received all the budget letters in the past.

48. The Applicants, using the service charge accounts provide within the company accounts, found that income and expenditure did not always tally.

49. Although the Applicants had now seen all the budgets, if the actual costs were more than the budget, the estimate for the next year had not been adjusted.

50. Contractors had been selected who work monthly. There was no evidence of their capabilities or liability insurance or any issue of minor works certificates. Gardening work was carried out by one of the Directors so again no selection process or liability insurance.

51. Additional concerns were the lack of fire or electrical certificates or any log books on the building. However a recent NICEIC certificate stated that the electrical system was unsatisfactory but did not need a retest for 5 years. The Applicants also stated that the emergency lighting system was not fully operational.

52. The Applicants stated that they had not received any documentation for the consultation process of the external decoration of the Mill.

53. The Applicants asserted there was no heating in the communal areas and had concerns that 15%VAT had been paid on heating bills in the past (rather than 5%) and that the electricity bill was high.

54. The Applicants pointed out that the garage door had been left open for 3 months recently until the door had been replaced. The main gate to the Mill was never closed and the road had not been paved.

55. The Applicants contended that there should have been a tendering process for both the company auditing the annual company accounts (which include the service charges) and for Mr. Perry's firm for the management of the Mill. The current fees being charged are those of a managing agent.

56. Mr. Page for the Respondent then questioned the Applicants.

57. He put it to the Applicants that until the date of the Application there had been no allegations that service charges were unreasonable. He asked the Applicants to identify one figure that was unreasonable.

58. Mrs Wright replied for the Applicants that the figure of £2,950 for the gardening was unreasonable and the work was not done well. The Applicants believed that the annual cost of gardening should be between £1,500 and £1,600. However in reply to further questions from Mr Page the Applicants admitted they did not provide any evidence of this except that in the past one of the leaseholders, an architect, had suggested the figure was too high. The Applicants had not sought quotations themselves.

59. The Respondent turned to the question of insurance.

60. Mrs. Wright for the Applicants pointed out the lower cost of insurance in the current year (2016); down to £13,000 from £18,000 achieved by using a different broker.

61. Mr Page put to the Applicants that 5 years had elapsed since the large claim in 2010 and in actuarial circles this had led to a reduction in the charge as the Mill now had a good claims history.

62. In reply to further questions the Applicants claimed that information including the insurance schedules had been withheld from them and they had not been in a position to seek alternative quotes. They had contacted the insurance company a few years ago to point out vacant properties within the building.

63. The Respondent questioned the Applicants about the accounts and asked them what would have been a reasonable charge.

64. The Applicants mentioned 50% of the figure charged as Mrs. Wright knew someone who could do them for less although she had not actually asked them for a formal quote.

65. The Respondent and the Applicants had some discussion about the cost of a new garage door but as this related to the current final year, it is outside this application.

66. The Respondent turned to the actual income and expenditure and pointed out that these were broadly balanced. He explained to the Tribunal that any surplus was added to the reserve fund. The Applicants accepted the need for a reserve or sinking fund; the Tribunal having pointed out that this was covered in the Fifth Schedule Part 2 paragraph 3 of the Lease. However they wanted to know what the reserve fund was going to be used for and whether there was an existing budget for its use.

67. The Respondent asked the Applicants if it was reasonable for a management company to have a manager. The Applicants believed that the leaseholders could do the work themselves. They had the right to manage. She agreed that they had not offered to do so.

68. The Respondent asked what would be a fair price for doing the book-keeping which has been Mr. Perry's task since 2010.

69. The Applicants felt it was too high especially as Mr. Perry was only a financial administrator. They questioned whether the accountants could do the same job.

70. The Respondent asked the Applicants to confirm that they had seen the consultation documents for the external redecoration of the Premises for both June and December 2012. The Applicants replied that these had not been received.

71. The Respondent referred to this external decoration and asked the Applicants if they had accepted that the works were completed in October 2013 and the cost was reasonable. The Applicants agreed.

72. The Applicants pointed out that the audited service charges were included with the accounts of the Management Company of which Mrs. Wright was a shareholder/member. The last AGM was in 2013. On enquiry from the Tribunal it transpired that Mrs. Wright and 7 other Tenants were members of the Management Company but Mr. Carlton (the original Landlord) had retained the remaining 12 shares.

73. The Respondent pointed out that letters prior to 2013 and since then had been sent to all leaseholders (KP2 of the Respondent's bundles being the evidence in reply from Mr Perry) and service accounts and budgets had been delivered as well (KP7).

74. The Respondent affirmed that Mr. Perry had provided evidence in chief. The following was stated:

- In the Respondent's written statement at 14.c.111 the budget stayed the same; any deficit was taken out of the reserve fund.
- Directors were doing managing works without making a charge.

This followed a decision taken in 2010 although it was unclear how the decision was made and how this information was disseminated.

- There was no legal requirement to hold an Annual General Meeting.
- Via a circular leaseholders had been informed of what decisions the Directors had made.

75. The Tribunal noted the Applicants' comment and queries:

- There was not common ground on the consultation procedure with regard to the external decorations.
- No quotations had been received for the managing agent.
- The Applicants queried why they were paying for financial administration as well as for accountancy.
- What was the role of the Company Secretary and why the charge of £200 for Companies House?
- Was it appropriate for the Company Secretary to also be the financial administrator? (Possible conflict of interest.)
- Some directors were providing a service and this was a conflict of interest.

76. The Respondent submitted that only Mr. Milner had been both a Director and a supplier of garden services when he became a Director in 2014. He had carried out gardening in the period 2011 to 2015.

77. The Respondent further pointed out that when Mr. Cutts carried out re-instatement works following a fire, he was not a Director at that time.

78. The Respondent turned to the insurance rent and stated that the Management Company had been able to use new brokers as 5 years had passed since the last big claim. He was unable to say why the building was called commercial and confirmed it was a block of flats. There was some confusion as to whether the 3 townhouses were included.

79. The Respondent accepted that there had been no consultation on sewage and gardening costs/contracts.

80. The Respondent concluded that company administration costs were covered by Part 11 paragraph 6 of the lease with the sweep up statement at paragraph 8.

81. The Respondent turned to the limitations of seeking reasonableness of service charges back to 2007. He accepted that this had not been resolved by a higher court so did not seek a formal decision on the age of these complaints. However going back over eight years had been problematic in providing evidence.

82. The Respondent referred to the jurisdiction under s27 of the Act and stated that the Applicants had to show the service charges were either

unreasonably incurred or unreasonable in amount. This was not a forum for forensic accountancy; positive allegations needed to be made and lower figures supported by evidence should be put forward.

83. The Respondent referred to the legal structure of the Management Company. It was clear that Mr. P. Mudhar and Mr. M. Parikh were not members of the Management Company.

84. The Respondent asserted that the lack of an Annual General Meeting had no impact on the provisions or requirements of s27a of the Act. This did not impinge on the legal ability of the Respondent to seek service charges from the Applicants.

85. The Respondent, in summary, stated that the Applicants had failed to meet the burden of proof that any items had been unreasonably incurred or unreasonably sought. The Respondent had endeavoured to keep service charges low and until last year these had been under £2,000 per flat by the careful administration of Mr. Perry and the voluntary work of the Directors.

86. The Respondent asserted that breaches of covenants by other leaseholders were outside the remit of the Tribunal (paragraph 8.3 of the Lease) and it would be for the Directors of the Management Company to take action through the route of the lease with other shareholders.

87. The Respondent turned to s20c of the Act and explained the consequences to the tenants of the premises. The liability to pay would, however, be reduced by any payments received from an insurance policy. However the costs of responding have been expensive, particularly because of the blanket claim for over 7 years. There has been a lack of focus on what the problems were and a failure by the Applicants to appreciate the nature of their lease. The Respondent had supplied a quantity of evidence and Mr Page maintained that the s20c application should not be granted regardless of the outcome.

88. In closing for the Applicants Mr. Mudhar replied that he had not been supplied with enough documents to work out tendering works, workmanship, the lack of minor works certificate and warranties. There was no process on the use of reserve funds and he queried whether procedures had been followed e.g. had information been correctly disseminated and in a form that tenants could understand.

89. Mrs. Wright stated that when works were required to be done there were delays in effecting these.

Decision

90. The Tribunal considered the Limitations Act argument and, whereas in some cases it might be relevant, in this case as the Applicants' claims

were broadly speaking the same for every year, the Tribunal determined to consider claims based as far back as 2007.

91. It was apparent to the Tribunal that there is confusion in the minds of the Applicants between their position as shareholders in the Management Company and their position as leaseholders of their individual flats, with liability for service charges clearly set out in the lease. The confusion was caused or contributed to by the way in which notices of meetings of the company, its accounts and other company documents were not clearly distinguished from documents relating to service charges. Also, for some reason, having purchased an interest in the leases neither Mr Mudhar nor Mr Parikh had received share certificates or been noted on the register of shareholders as members.

92. The Tribunal determines that the Applicants failed to satisfy the burden of proof required of them and consequently they are liable to pay service charges under the terms of their Leases (see paragraphs 18 and 22 - 25 above).

93. The Tribunal finds that the use of a broker to obtain insurance quotations from reputable companies was good practice and determines that the insurance rent is payable.

94. There was sufficient consultation on external redecoration and other works.

95. The Tribunal finds that consultation was correctly undertaken for the external redecoration. If the Applicants were unhappy with the workmanship this should have been reported to the Management Company for their action.

96. The Tribunal considered which works constituted long term qualifying agreements. The gardening and landscaping works since 2010 had on occasion exceeded a £100 contribution per leaseholder. No consultation had been carried out. The Tribunal finds that, in the service charges years where this exceeded £100 contribution per leaseholder, the amount of the service charge above £100 is not recoverable.

97. The long term agreement for the servicing and emptying of sludge three times a year is less than £100 per leaseholder. The Tribunal finds that repairs are a separate item which varied each year as required. Such sums are payable by the leaseholders.

98. No compelling evidence was provided as to the unreasonableness of the service charges. The Tribunal, therefore, determines that the charges as presented are reasonable.

99. The Management Company, as party to the Lease, is entitled to charge a management fee and the Tribunal does not find the fees unreasonable for the period 2007 to 2010. Since 2010 Mr. Perry has undertaken the role of bookkeeper and the Management Company is entitled to charges

his costs and expenses in line with Schedule 5, Part 11, paragraph 8 to the Lease. The Tribunal finds his fees from 2007 to 2010 and 2010 onwards reasonable.

100. The Management Company has made the decision to have the service charges duly audited, which is good and responsible practice. The Tribunal finds these costs are reasonable.

101. The Management Company, under Part 11 paragraph 6 of the Lease, is entitled to include in the service charge any expense incurred by the Management Company in relation or incidental to the administration of the Management Company's affairs. The Tribunal finds the charge of £200 for the services of the Company Secretary to file accounts chargeable and reasonable.

102. With regard to the section 20(c) Application, the Respondent had failed to prove that the costs of this application should be incorporated into the service charge. The Tribunal found that the lack of documents to the Applicants and the confusion over the role of shareholders and leaseholders had contributed to the Applicants' questions of the reasonableness of the charges. Although the Applicants had not done their case any good by serving a blanket claim for 7 years it was clear that much of the dispute was as a result of confusion over their roles of shareholders and leaseholders. The Company had served company accounts for each year on the leaseholders rather than just audited service charge accounts. Furthermore, at the expiry of each calendar year, there was no account of actual Estate Management Costs showing deficits or credits as per the Lease (Fifth Schedule part III paragraph 4). The Tribunal determine that the section 20(c) therefore succeeds.

103. If either party is dissatisfied with this decision they may apply for permission to appeal to the Upper Tribunal (Lands Chamber). Any such application must be made to the First-tier Tribunal within 28 days of this decision (Rule 52 (2)) of The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013.

Anthea J Rawlence Chairman

9 January 2017