



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

Case Reference : CHI/21UC/LBC/2018/0013

Property : Flat 3, 33 Enys Road, Eastbourne BN21
2DH

Applicant : Mr David Tomkins & Ms Natalie Hartley

Representative :

Respondent : Rat Records Limited

Representative : Dean Wilson LLP

Type of Application : Determination of liability to pay and
reasonableness of service charges and
administration charges

Tribunal Member(s) : Mr D Banfield FRICS

Date of Directions : 9 April 2019

DECISION AND FURTHER DIRECTIONS

Decisions of the Tribunal

The Tribunal determines the following amounts are reasonable and payable;

a. Due on 20/3/2018	£2,244.40
b. Due on 25/3/2018	£2916.64
Total	£5,161.04

Administration Charges of £936 is payable once demanded.

[Both sums have been paid by the Applicants' lender]

Section 20C Order not to be made.

Reimbursement of the application fee is refused.

Further Directions

If the Respondent wishes to make an application for costs under Rule 13 they must submit an application with a copy to the Applicant by 23 April 2019.

If the Applicant receives such an application they may make submission to the Tribunal with a copy to the Respondent by 7 May 2019.

The Application

1. The Applicants have made an application inviting the tribunal to determine the Applicants' liability to pay and the reasonableness of certain administration charges. Further the Applicants have made an application for an Order under Section 20C of the Landlord and Tenant Act 1985 and request an Order under Schedule 11 of the Commonhold and Leasehold Reform Act 2002 (as amended). Finally, the Applicant seeks recovery of the fees paid to the Tribunal in bringing their application.
2. A case management hearing was held on 31 October 2018 at which it appeared that the issues raised by the application also fell under Section 27A of the 1985 Act.
3. I stayed the matter pending receipt of an application under Section 27A and made further directions on 28 November 2018 once received.
4. An application was then received from the landlords to make a determination that a breach of lease had occurred and directions were made on 27 December 2018 that the two applications would be heard at the same time. The determination of this application under reference (CHI/21UC/LBC/2018/0031) is also dated 9 April 2019.
5. The service charge years at issue are said to be 2017 to 2020 and the sum of £4,386.04 made up of an overpayment of service charge of £3,250.04 plus reimbursement of tribunal fees of £200 and legal costs of £936.00.
6. The section 20 consultation procedures are challenged together with the lack of access to receipts, whether they are being charged the correct proportion of costs and the necessity of incurring legal costs.
7. The Directions indicated that the matter would be determined on the papers without a hearing in accordance with Rule 31 of the Tribunal's Procedural Rules 2013 unless a party objected in writing. No objection has been received and the application is therefore determined on the bundle prepared by the Applicants.

The Parties' Positions

The Applicant

8. In their statement of case the Applicants refer to a failure to provide a breakdown of service charge demands, a refusal to provide copies of quotes received during the Section 20 process, late provision of the annual maintenance accounts, supporting documents for claimed expenses not provided and legal costs unnecessarily incurred.
9. Multiple attempts were made to try and resolve the issue were made but the Respondents were unwilling.
10. The disclosure ordered by the Tribunal was wholly inadequate and no further details or breakdown were provided. All entries are disputed.
11. Particular challenges are made to;
 - General Repairs/Maintenance where £2,000 has been included under "Amounts Charged for both 2017/18 and 2018/19.
 - Loan Financing at a cost of £600 in the Certified Schedule of Maintenance Expenditure – Not permitted by lease
 - Under the Service Charge Estimate for a period ending 25/3/2018 invoices requested for General Repairs/Maintenance, Management Charge and Reserve/Sinking Fund
 - The same items are also challenged for the following year
 - Proof that other leaseholders have paid their share of service charges
 - Charges for guttering which had not been completed
 - Legal expenses improperly added
 - Ground Rent demanded from lender when not in arrears and had to be returned
 - Para 4(7) of the lease states that the landlord is required to maintain the service charge at the "lowest reasonable figure"
 - Para 4(5)(f) concerns restrictions over charging legal fees to the Service charge.

The Respondent

12. In a statement on behalf of the Respondent it is pointed out that the Applicant's statement does not comply with Directions and that the direction for disclosure was complied with in full.
13. The Respondent became the freeholder on 3 July 2017 and is unable to provide submissions on matters before that date.
14. The lease requires the Applicants to pay 40% of the annual expenditure and make payments on account on 25 March and 29 September in an amount to be determined by the Respondent. Once the Annual Maintenance Account has been prepared and served on the Applicants

and the Respondent has certified the actual amount of the Applicant's liability any overpayment may be credited to the next accounting period and any shortfall demanded.

Year ending 25 March 2018

15. The demands due on 25 March 2017 and 29 September 2017 were sent to the Applicants on 20 March 2018. The Annual Maintenance Account has been disclosed as part of the proceedings but not formally sent to the Applicants as the Respondent was at all times maintaining the right to forfeit the lease.
16. On account service charges were calculated at £2,244.40 and actual expenditure as shown on the Annual Maintenance Account totalled £6,173.64 giving a liability of £2,469.46 being 40%. The Respondent is entitled to the balance.
17. In disputing the estimates, the Applicants appear to suggest that the sums represent actual expenditure rather than estimates.

Year ending 25 March 2019

18. The demand for on account service charges due on 25 March 2018 were sent on 20 March 2018 and a further demand was sent on 25 April 2018. The demand for charges due on 29 September 2018 has been disclosed as part of these proceedings but not formally sent again due to maintaining the right to forfeit the lease.
19. On account service charges were calculated at £2,916.64 for the period 25 March 2018 to 28 September 2018 and £975.20 for the period 29 September 2018 to 24 March 2019. The Annual Maintenance Account has not yet been prepared but invoices incurred to date total £2,545.20 of which the Applicants' 40% share is £1,018.08.

Year ending 25 March 2020

20. No demands for service charges raised or Annual Maintenance Account has been prepared.
21. The Applicants' mortgage lender made a payment of in respect of the on-account sums due on 25 March 2017, 29 September 2017 and 25 March 2018 in the total sum of £5,161.04 on 11 June 2018.

Further Issues

22. Finance was required to pay for major works until the landlord could collect the sum due from the Applicant.
23. All receipts and invoices have been appended.

24. The purpose of a managing agent is to ensure a professional approach is brought to the management of the property
25. The Respondent is entitled to collect a reserve fund on account of future maintenance.
26. Evidence of payment by other lessees is not relevant to the Application.
27. The legal fees of £144 included in the account for year ending 25 March 2018 were incurred by the Respondent when the Applicant raised questions on the section 20 consultation process. The variable administration charge has not been demanded although it is payable under clause 4(5)(f) of the lease in connection with the performance or observance of the Applicants and their obligations and liabilities (it has been paid by the mortgage lender)

Section 20 consultation

28. The consultation requirements have been complied with as they do not include the provision of copies of the quotations. In any event they were sent to the Applicants by email on 24 April 2018.

Administration Charges

29. A total of £945 in respect of variable administration charges as defined by Schedule 11 to the Commonhold and Leasehold Reform Act 2002 was paid by the mortgage lender.
30. The charges were incurred in respect of unpaid service charge arrears and court proceedings were drafted although not proceeded with due to the payment by the mortgage lender.
31. Following payment further fees were incurred in respect of the breach of lease for failing to carpet the flat and the right to forfeit was established and has been maintained ever since hence a written demand has not been served on the Applicants.
32. The use of a solicitor was necessary and the administration charges were incurred as a preliminary step to forfeiture of the lease and recoverable under clause 3(15) of the lease. Dean Wilson pointed out to the Applicants on 20 March 2018, 16 April 2018 and 24 April 2018 that costs were being incurred and if payment was not made proceedings for forfeiture would be issued.

Costs

33. Although applications have been made under section 20C of the Landlord and Tenant Act 1985 and Paragraph 5A of Schedule 11 of the Commonhold and Leasehold Reform Act 2002 the Applicants' statement does not contain any submissions.

34. The Respondent should not be required to bear the cost of the various applications when they stem from lack of understanding of the lease terms. Explanations were given on a number of occasions why the service charges and administration charges were payable and it is noted that the Applicants do not appear to take issue with the actual amounts or provide alternative quotations.
35. The managing agent attempted to resolve the initial queries but was obliged to seek legal advice to seek recovery.
36. The Applicants refused to correspond with Dean Wilson LLP which necessitated additional costs of liaising with the client or Pepper Fox.
37. A schedule of costs incurred in respect of the application totalling £2,646.00 has been provided with a grade C solicitor utilised to keep them to a minimum.

The Applicants' reply

38. In a response the Applicants say that;

- The Tribunal's Directions of 28 November 2018 have not been complied with in that invoices and supporting documents have not been provided for all items disputed
- Although still disputed the Respondent's figures show a service charge liability of less than was demanded.
- 5 invoices for gardening with a value of £722.40 (although not in a period relevant to the dispute) are unreasonable for the amount of gardening required.
- Directions have been breached by the Respondent not sending copies by email and failing to copy all correspondence sent to the Tribunal
- No service charge demands sent to other lessees have been provided
- The use of the Reserve Fund is challenged
- The Applicants has made numerous attempts to resolve the matter and avoid legal costs to either party and any increase in costs due to forwarding emails is absurd
- It was entirely reasonable due to suspicious past communications such as the Applicant receiving Service Charge demands for periods prior to the property's existence for the Applicants to exhibit caution in respect of money demands received about the same time.
- The flooring issue was never credibly a pressing or urgent concern of the Respondent and has been used as a lever to coerce the Applicants to pay unreasonable service charge demands.
- The Section 20 process is invalid due to a failure to permit the applicants' representative to take copies of quotations.

- The Applicants is not referring to estimated expenses as actual expenses as they are all appear under the heading “Actual” in the Respondent’s own financial documents.
39. “We propose to acknowledge all qualifying invoices between the date the Respondent took ownership on 3 July 2017 to the date of the Respondent’s statement and 06.02.19. In doing so we will establish final figures and a cut off at 06.02.09. This will greatly simplify and clarify any other calculations made in the future about service charge demands. The following applies;
- Acknowledge actual expenses only where invoices have been provided
 - The invalid Section 20 process reduces the liability to £250
 - Dean Wilson’s invoices are disputed
 - Simon Fullerton invoices are disputed
 - Garden works invoices are disputed
 - Total value of qualifying invoices between 03.07.17 and 06.02.19 is £2,603.64 of which their 40% is £1,041.46 to which the S.20 £250 should be added totalling £1,291.46 as at 06.02.19
 - Ground rent has been settled separately and therefore the amount of £6,606.04 received from the lender is to be allocated to the service charge balance.
 - The difference of £5,314.58 is too high to be reasonably accounted for by a reserve fund and/or interim payments.

The Lease

40. A copy of the lease for Flat 3 has been provided at page 32 of the bundle and is for a term of 999 years from 29 September 2013.
41. The clauses relevant to this application are;
- The Premises: Flat 3.... shown edged red on the plan
 - Tenant’s Share of the Annual Maintenance Cost: 40% (page 34)
 - Clause 3(15) “To pay all costs ..(including legal costs and fees payable to the Landlord’s surveyor) incurred by the Landlord in or in contemplation of any proceedings under Sections 146 and 147 of the Law of Property Act 1925 in respect of the Premises notwithstanding forfeiture is avoided otherwise than by relief granted by the Court (page 41)
 - Clause 4. (1) The Tenant shall contribute and pay to the Landlord the Tenant’s Share of the Annual Maintenance Cost (page 42)
 - (2) The Tenant shall on the 25 day of March and the 29 day of September ...pay in advance to the Landlord such sum as the Landlord or his managing agents shall in their absolute discretion consider appropriate on account of his contribution
 - (3) As soon as practicable after the 25 day of March in every year...the Landlord or his managing agents shall serve on the Tenant an account (hereinafter called “the Annual Maintenance Account” the Tenant shall forthwith pay to or be entitled to receive from the Landlord the balance (if any) by which the

Annual Maintenance Account ...falls short of or exceeds the sums already paid (page 43)

- (4) If any of the sums which are required to be paid by the Tenantshall not be paid within 21 days.....the same shall forthwith be recoverable by action and the same shall carry interest at 4 per cent over the National Westminster Bank Plc base rate...or the rate of 12 per cent per annum (whichever shall be the higher) until payment. (page 43)
- (5) The Annual Maintenance Cost shall be the total of all sums actually spent by the Landlord during the period which includes at (a) to (g) a list of the items of management or maintenance to which the Tenant must contribute. (44)
- In particular Clause (5)(a) states “The cost of procuring or providing any sums required in connection with the same where they exceed the monies for the time being held by the Landlord as payments on account of annual maintenance charges or as a reserve fund.
- Clause (5)(f) states “All fees charges and expenses payable to any solicitor accountant surveyor valuer or architect or other professional or competent adviser whom the Landlord may from time to time reasonably employ in connection with the management and/or maintenance of the Freehold Property and in or in connection with enforcing the performance observance and compliance by the Tenant and all other tenants of flats in the Freehold Property of their obligations and liabilities.”
- Clause 4(6) allows for the maintenance of a reserve fund. (page 45)
- Clause 5(2) lists the matters which the Landlord must repair etc (page 46 & 47)
- Clause 5(6) requires the Landlord to insure (page 48)
- The First Schedule describes the extent of the flat (page 51)

The Law

42. The tribunal has power under section 27A of the Act to decide about all aspects of liability to pay service charges and can interpret the lease where necessary to resolve disputes or uncertainties. The tribunal can decide by whom, to whom, how much and when a service charge is payable.

43. By section 19 of the Act a service charge is only payable to the extent that it has been reasonably incurred and if the services or works for which the service charge is claimed are of a reasonable standard. Section 19 (2) concerns where a service charge is payable before the relevant costs are incurred no greater amount than is reasonable is payable.

Discussion and Decision

44. It is first necessary to examine how the service charge mechanism in the lease operates.
45. Clauses 4(5) and 4(6) lists the items of landlord's expenditure to which the tenant must contribute, the tenants' share of which is 40%.
46. Clause 4(2) requires the tenant to pay service charges in advance based on the landlord's estimate of the forthcoming year's expenditure.
47. Clause 4(3) says that after the year end the landlord will serve on the tenant an account of the actual expenditure for the past year and if this exceeds the estimate the tenant will pay the balance or if it is less than the estimate the difference may be retained and set against the next year's demand.
48. These clauses in some form or other are found in most leases. It enables the landlord to obtain funds for the expenditure over the following year which otherwise would have to be funded from borrowing. Once the actual expenditure is known the difference is either demanded from or credited to the tenant.
49. It is the responsibility of the landlord to determine how much is required in advance subject only to the protection provided by section 19(2) that the sum must be "reasonable".
50. The Tribunal's jurisdiction is in respect of sums that have been demanded. In this application these are the on account demands for 2017/18 and the first instalment for 2018/19 only and are the freeholder's estimate of future costs. Whilst some actual costs and supporting invoices are contained in the bundle none have these have been scrutinised and do not form part of this decision save where they give an indication as to whether the estimates made were reasonable.
51. The Tribunal will determine whether at the time the estimate was made the sum was reasonable.
52. In this case £2,244.40 was the tenants' 40% share of estimated expenditure for 2017/2018 which unless it was shown to be unreasonable was payable. Although the lease requires payments in advance on 25 March and 29 September of each year inexplicably the demand for 2017/2018 was not sent to the applicants until 20 March 2018 almost a year after the date the first payment was due, but at which point the full sum of £2,244.40 became payable.
53. Whilst the tenants appear to have attempted to negotiate a lower figure and payment regime this does not absolve them from the obligations set out in the lease to pay the estimated charges on the prescribed dates.
54. Although the Service Charge Account has not been served on them as required by the lease its production as part of these proceedings

indicates that total expenditure for the year was £6,173.64, 40% of which is £2,469.46 (page 98)

55. The difference between the estimated and actual charges for 2017/18 is £225.06 and this sum becomes due when the Annual Maintenance Charge is served on the tenants in accordance with Clause 4.3 of the lease.

56. For 2018/19 the March demand of £2,916.64 for estimated service charges was sent on 20 March 2018 (page 106). No demand has been made for the on-account services due on 29 September 2018 but which disclosed as part of these proceedings to amount to £975.20.

57. No challenge has been made to the on-account sums.

58. No demands for service charges have been made for 2019/20.

59. With regard to the issue of the validity of the S20 consultation procedures in respect of the refusal to allow copies of quotations to be made I draw the applicants' attention to the requirements of sections 11(9) and 11 (10) of the Service Charges Consultation etc) (England) Regs 2003, Sch4 Part 2

11(9) The paragraph (b) statement shall be supplied to, and the estimates made available for inspection by-

(a) each tenant

11(10) The landlord shall by notice in writing to each tenant and the association (if any).

(a) specify the place and hours at which the estimates may be inspected;

(b) invite the making, in writing, of observations in relation to those estimates

56. Nothing in the regulations requires the landlord to permit copies of the quotations to be made, simply to permit their inspection.

57. Turning now to the other matters raised by the Applicant in paragraph 11 above together with the Tribunal's comments on each highlighted in bold.

- General Repairs/Maintenance where £2,000 has been included under "Amounts Charged for both 2017/18 and 2018/19.

- **These are estimated figures only for and do not require invoices.**

- Loan Financing at a cost of £600 in the Certified Schedule of Maintenance Expenditure – Not permitted by lease

- **Permitted under Clause 5(a)**
- Under the Service Charge Estimate for a period ending 25/3/2018 invoices requested for General Repairs/Maintenance, Management Charge and Reserve/Sinking Fund
 - **Invoices are not required where sums are “on account”**
- The same items are also challenged for the following year
 - **See comment above**
- Proof that other leaseholders have paid their share of service charges
 - **This is irrelevant to determining the Applicants’ liability**
- Charges for guttering which had not been completed
 - **This does not refer to either estimated charges or the years in question.**
- Legal expenses improperly added
 - **Clause 5(f) of the lease permits recovery of legal expenses through the service charges where “...in connection with enforcing the performance observance and compliance by the Tenant and all other tenants of flats in the Freehold Property of their obligations and liabilities”**
- Ground Rent demanded from lender when not in arrears and had to be returned
 - **Noted, but not a matter for this application.**
- Para 4(7) of the lease states that the landlord is required to maintain the service charge at the “lowest reasonable figure”
 - **Noted**
- Para 4(5)(f) concerns restrictions over charging legal fees to the Service charge.
 - **See comment regarding the operation of clause 5(f) above.**

56. In summary of those matters over which the Tribunal has jurisdiction in this application the amounts determined as reasonable and payable are;

a. Due on 20/3/2018	£2,244.40
b. Due on 25/3/2018	<u>£2916.64</u>
Total	<u>£5,161.04</u>

57. The sum of £5,161.10 has been paid by the lender leaving nothing due to be paid.

58. It is emphasised that this determination is in respect of on account charges only. Once the Service Charge Accounts have been served on the tenants in accordance with the terms of the lease a further application may be made in respect of the actual as opposed to the estimated expenditure.

Administration Charges

59. Some £936 (Inc. VAT) plus £9.00 Land Registry disbursement has been paid by the applicants' lender by way of variable administration fees although the sums have not been formally demanded. The respondent asks us to determine that, subject to the demands being formally served the sums are payable.

60. In support they exhibit at Tab 3 of the bundle two letters and 8 emails sent to the applicants in respect of the breach of covenant referred to at paragraph 4 above and unpaid service charges. Also exhibited at Tab 4 is a printout detailing the tasks undertaken for which charges have been made.

61. In determining that this sum is payable once properly demanded from the tenant (although the sum has already been paid by the lender) the Tribunal has taken into account the unsuccessful attempts to explain the tenants' obligations under the lease both as to the payment of on account service charges and in respect of the floor coverings and the necessity of obtaining funds to meet the service charge expenditure.

62. It is unfortunate that the tenants, by misunderstanding the terms of the lease in respect of on account payments and the requirements of section 20 of the Landlord and Tenant Act 1985 have withheld service charge payments. This has caused the landlord to incur costs which it is only reasonable that the tenants should bear.

Costs including Section 20 C

63. For the reasons set out in paragraphs 62 and 63 above the application for the landlord to reimburse the costs of the Application is refused.

64. The Applicants ask the Tribunal to make an Order under Section 20C preventing the cost of these proceedings being charged to the service charge.

65. This is an application by the tenants which had to be defended by the landlord and on which the tenants have been wholly unsuccessful. Whilst the outcome of the proceedings is not the determining factor in deciding such an application it cannot be right that the landlord has to bear the costs of these proceedings. **The application to make an Order under S.20C is therefore refused.**

Landlord's costs

66. Further costs incurred by the landlord of £2,646 in respect of dealing with the application and detailed in a document dated 6/2/19 at Tab 5 are referred to in the Respondents' statement of case at paragraphs 45 to 47.

67. It is not clear however whether the landlord is asking the Tribunal to simply confirm that they may be added to the service charge account; whether it is an application to award costs against the Applicant under Rule 13 of the Tribunal's procedural rules; or whether it is to be treated as a variable administration charge.

68. The Respondent's reference to the case of Avon Ground Rents v Child does not shed light on the matter as this case is in respect of the treatment of costs in cases transferred to the Tribunal from the County Court where the Tribunal is exercising powers both as a Tribunal and a County Court. This is not the case here and it is emphasised that the only cost awarding powers of the Tribunal is under Rule 13.

69. Given the lack of clarity regarding these costs and that they have not as yet been demanded either direct from the Applicants or through the service charge.

Further Directions

70. If the Respondent wishes to make an application for costs under Rule 13 they must submit an application with a copy to the Applicant by 23 April 2019.

71. If the Applicant receives such an application they may make submission to the Tribunal with a copy to the Respondent by 7 May 2019.

72. On receipt of both parties' submissions the Tribunal will make its determination within 21 days.

D Banfield FRICS
9 April 2019

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.