



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

Case Reference : **LON/00AX/LSC/2020/0131
CVP Remote**

Property : **Flat 21 Osiers Court, Steadfast
Road, Kingston-Upon Thames, KT1
1PL**

Applicant : **Stephen Raymond Guest**

Representative : **Mr David Sawtell, Counsel**

Respondent : **Osiers Court Properties Limited**

Representative : **Mr Hope (Counsel)**

Type of Application : **For the determination of the
reasonableness of and the liability
to pay a service charge**

Tribunal Members : **Judge Abebrese, Mr Norman
FRICS, Mrs West**

**Date and venue of
Hearing** : **8 October 2020 via CVP Remote**

Date of Decision : **20 October 2020**

DECISION

Decisions of the tribunal

- (1) The tribunal determines that the claims of the Applicant are dismissed on all grounds for the reasons provided below, save for section 20C and fee reimbursement.
- (2) The tribunal makes the determinations as set out under the various headings in this Decision.
- (3) The tribunal makes an order under section 20C of the Landlord and Tenant Act 1985 so that none of the landlord's costs of the tribunal proceedings may be passed to the lessee through any service charge.
- (4) The tribunal further orders that the applicant is entitled to be reimbursed for the cost of the application and hearing amounting to £300.

The application

1. The Applicant seeks a determination pursuant to s.27A of the Landlord and Tenant Act 1985 ("the 1985 Act") as to the amount of service charges and administration charges payable by the Applicant in respect of the service charge years.
2. The relevant legal provisions are set out in the Appendix to this decision. The parties to this application consented to the hearing being conducted by CVP Remote.

The background and issues

3. The appellant seeks a determination under section 27A of the Landlord and Tenant Act 1985 as to whether service charges are payable. The lessee also seeks an order for the limitation of the landlords cost in the proceedings under Section 20c of the Landlord and Tenant Act 1985.
4. Osiers Court is a block consisting of 30 flats. Each lessee owns a share in the Respondents Company. Mr Guest occupies his two bedroom flat pursuant to a lease dated 24 November 1997. He acquired his leasehold interest in June 2007. He has sublet his flat, but currently occupies it. There has been extensive litigation between the parties and these may briefly be set out as follows.
5. On 6th July 2018, a FTT determined an application under Section 27A (Lon/00AX/LSC/2017/0225) and made an order to the applicant under

Section 20C; on 3 February 2019, the FTT determined an application under Rule 13 for cost (Lon/00AX/LSC/2017/0225) and made a further order to the Applicant under Section 20C. On 8th July 2019 the parties agreed a Consent Order in Lon/00AX/LSC/2019/0092, the Order being made by the Tribunal. The applicant in the present application contends that the effect of this order was that the service charge account would have a balance of £1,409.59 as at 31 December 2018 and that this should be credited against the interim service charge that was due on 1 July 2019.

6. On 16 December 2019, the Applicant received a service charge demand dated 1 July 2019. This records that there was an outstanding balance of £540.46 which was payable on 1 July 2019. This was disputed by the Applicant who relies on the Consent Order, dated 8 July 2019.

7. The Applicant disputes the following items in the service charges accounts for 2018

“(a) £13,857.60 (professional and legal cost, shown on the actual 2018 accounts) this according to the Applicant should not be payable in accordance with successive orders of the FTT; (b) £11,331 (debts, shown on the year ending 31 December 2018). These according to the Applicant should not be passed down to leaseholders; (c) 18,828 (bad debt stated as written off as overstated sales at year ending 31 December 2017) these are according to the Applicant again cost that should not be passed down to the leaseholders; (d) £3,476 (bad debt, shown on the year ending 31 December 2018) the Applicant contends that the origins of this figure is not known and it is highly questionable; (e) £645 (service charge debtors shown on account year ending 31 December 2018) The Applicant does not know if this sum is applicable to him and in any event it is at variance with the Consent Order dated 8 July 2019.”

8. The Applicant also made an application at the directions hearing for an order under Rule 20 of the Tribunal Procedure (First Tier Tribunal) (Property Chamber) Rules 2013 (the Tribunal Rules”) to require Mr Andy Russell of Russell & Co Accountants, to produce a narrative witness statement, Russell & Co ceased to act for the Respondent on 31 December 2019. The Application was refused by the Tribunal. The Applicant also on 4 January 2020 made a request for a written summary of relevant cost and to inspect the supporting accounts pursuant to Sections 21 and 22 of the 1985 Act. The information was not supplied. On 25 March 2020, the Applicant sent a detailed pre-action letter to the Respondent and requested a response within 21 days. There was no response from the Respondent.

The hearing and evidence

9. The Tribunal considered a request for an adjournment made by the Respondents in an email to the Tribunal dated 30 September 2020. The respondents requested an adjournment to the first open date with a time estimate of one day and furthermore that Respondents respond to any request for disclosure and or information on the part of the Applicants. The Applicants opposed the application on the grounds that no substantive reasons had been provided by the Respondent for the hearing to be adjourned. The Tribunal considered the submissions of both parties and concluded that no evidence had been provided by the Respondent to support the application and in the circumstances the application could not succeed.
 10. The Applicant in addition to the service charges raised in paragraph seven above expressly states in their application that they require the Tribunal to resolve the following issues: (a) failure of the Tribunal to comply with the consent order dated 8 July 2019, (b) failure of OCPL to comply with Sections 21 and 22 of the 1985 Act, (c) failure of OCPL to provide account certificates for years ending 31 December 2017 and 31 December 2018, (d) breach of covenant of clause 4 of the lease, clause 4 of the ninth schedule of the lease and clause 8 part b of sixth schedule of the lease.
 11. The Consent Order dated 8 July 2019 was agreed by both parties and it covers the period until 31 December 2018. The Consent Order arose following an application under Section 27A of the 1985 Act by the Applicant. Following discussions by the parties the application was withdrawn save for directions provided by the Tribunal under Rule 13. The Tribunal concluded that it was just and equitable that the provisions under Section 20C should apply and that the cost of the proceedings could not be recovered from the Applicant as a service charge. The Applicant was also reimbursed the sum of £300 for the cost of the application and the hearing fees.
 12. The Tribunal have noted carefully the express terms of the Consent Order and note that clause 5 states:

“Thus the total credit due to Mr Guest as at 31 December 2018 is

 - a. total of the payments at paragraphs 2-4 above (£4,580.58)
 - b. Less the liability for the year 2018-2019 £3,170.29
6. It was agreed between the parties that the best way of dealing with this credit was for Mr Guest to be credited with this sum when the July

2019 interim service charges were demanded”. The Consent Order also dealt expressly with previous section 20C costs.

13. The Applicant contends that the July 2019 service charge demand sent on December 2019 showed a balance in debit sum of £540.46 and furthermore there have been unexplained transactions shown in OCPL’s and Thames Water Trust and Management Schemes end of year accounts and that there are references to previous cost orders and the Respondent has refused to provide an explanation
14. The Applicants state further that the Respondents have not provided accounts which have been signed off as required under paragraph 8 of Part B of Schedule 6 of the lease. The Respondents should be required to produce Andy Russell of Russell and Co Accountants to provide evidence of the accounts under Sections 21 and 22 of the 1985 Act. The Tribunal were referred to a letter sent to the Respondents dated 25 March 2020. The Applicant at paragraph 26 of their skeleton argument state that Carter Bells Solicitors for the Respondents received financial instructions on or before 3 August 2020 from Russell and Co and the Applicants were assured by Mr Russell that the information would be forwarded to them. The Tribunal were referred to an email from Mr Russell dated 3 August 2020 confirming this but the Applicant maintain that they never received the information.
15. The Applicant asserts at paragraph 34 of the skeleton argument that the Respondent has: “in some way, used the service charges and/sink fund to fund its cost as a result, as a minimum, the July 2019 service charge was not payable”. The Applicants add further at paragraph 36 of the skeleton: “The difficulty for both Mr Guest and the Tribunal is that the information required to resolve this case is not available.....Given OCPL’s remarkable stance, it is now appropriate for the appropriate for the FTT to use its powers to compel disclosure and to summon witnesses”.
16. The Respondents in their skeleton argument essentially concede on the main issues in this application and at paragraph 2 make the following points: “(a) The 8 July 2019 consent order draws a line between the parties in respect of Mr Guest liability up until 31 December 2018; (b) Mr Guest is entitled to be credited £540.46 mistakenly included in the July 2019 service charge demand ; (c) OCPL accepts that it has not and will not seek to recover from Mr Guest, through service charge”. The respondent concedes that in the circumstances a Section 20C order and reimbursement of the Applicants fees is appropriate.
17. The Respondents accept that due to an oversight their actions did not reflect the terms of the Consent Order of 8 July 2019 because the Applicant as 31 December 2018 was £1,409.59 in credit. The Respondent states that the demand for service charges dated 1 July 2019 mistakenly included a sum of £540.46 and the Applicant is

entitled to be credited. In light of these concessions the issues raised by the Applicant under Section 27A fall away in respect of liability and payability and there are no live issues to be determined by the Tribunal.

18. The Tribunal also heard oral submissions from the representatives in the main they repeated their positions as stated in the skeleton arguments.
19. The Respondent submitted that in light of their concessions it would be pointless for the Tribunal to make an order requiring them to provide disclosure of documents and that in any event if the information were to be provided the Applicant may find himself in a worse position where he would have to make payments. The Applicants maintained that they do not know how the Respondent arrived at the figures and they were entitled to be provided with the information.
20. The Tribunal after hearing submissions allowed the parties to enter into discussions in an attempt to reach a compromise. The Tribunal were provided with figures by the Respondent following the discussion between the parties. The Tribunal noted that these figures were based on those which formed a part of the Consent Order made on 8 July 2019. The Tribunal raised with both parties' submissions which sought to go behind the Consent Order. Mr Sawtell on behalf of the Applicant accepted that the Consent Order could only be attacked/ challenged/ circumvented/ if there was evidence of fraud or misrepresentation and no such evidence had been presented to the Tribunal in this instance. Mr Sawtell however still maintained that it was appropriate in the circumstances for the Tribunal to make an order compelling the respondent to provide evidence of their accounting processes. The Tribunal has taken into consideration both oral and documentary evidence provided by both parties.

21. **FINDINGS**

Consent Order

22. The Applicant contends that the Respondent has acted in breach of the Consent Order made by the Tribunal on 8 July 2019. The Tribunal finds the terms and conditions of the Consent Order cannot be attacked/ challenged/ circumvented by either party unless there is evidence of fraud or misrepresentation. The parties through the representatives during the course of the hearing accepted that in this case no such evidence has been provided. The effect of this is that neither party may interfere with the settlement in terms of the figures used to conclude the findings in paragraph 5 and 6 of the Consent Order.

23. The Tribunal note that the Respondent has conceded in respect of the main issues in this application. Furthermore, that the consent order draws a line between the parties in respect of the Applicant's liability to pay service charges up until 31 December 2018. The applicant is entitled to be credited the sum of £540.46 which was mistakenly included in the July 2019 service charge demand. The Respondents accept that their service charge demand did not give full consideration to the fact that the applicants account was in credit of £1,409.59.
24. The Tribunal finds that the concessions made by the Respondent referred to above and both parties expressed intention to comply with the terms and conditions of the Consent Order disposes of all the issues before the Tribunal as stated in the Applicants application. Mr Hope offered to concede the disputed amounts which were within the purview of the Consent Order. The Tribunal finds that as the Consent Order binds both parties and is an Order of the Tribunal, that such a course was not open to the respondent within the context of these proceedings.

Miscellaneous Items

The Tribunal also considered claims made by the Applicant in respect of professional and legal fees; debtors and bad debt and service charge debtors which are all listed in his application. The Tribunal finds that all the items listed fall within the Consent Order of 8 July 2019 and cannot be further challenged.

Disclosure of documents

25. The Applicant states that despite various request the Respondent has failed to provide them with documents which are relevant to the charges that have been claimed. The Respondent at the hearing conceded that he had not provided the information requested by the Applicant despite several request having been made to them. The accounts had been prepared by Russell and Co but they had not provided him with the information. There is correspondence from Mr Russell to the Applicant that he had provided the information and that he expected them to be forwarded to the Applicant this never happened.
26. The Respondents position at the hearing was that the Applicant would not be prejudiced because of their concessions and that the issue of liability is no longer alive in these proceedings. The Applicants representative Mr Sawtell submitted that the Tribunal have the powers to order an 'investigation' in order to ascertain how the figures had been derived and if the Respondent were hiding anything.

27. The Tribunal finds that the Application concerned Section 27A of the 1985 Act and there is no scope under this provision to compel a party to provide information or to order an 'investigation' into the accounting processes of the Respondent. The Tribunal also considered that bearing in mind the overriding objective that in the circumstances it would not be proportionate to direct an 'investigation' or to compel the Respondent to provide further evidence particularly when they have conceded on all of the main issues in the application. The Tribunal in reaching their decision have taken into consideration the applications of the Applicant under Sections 21 and 22 of the 1985 Act.

Application under s.20C and refund of fees

28. The Tribunal makes an order under Section 20C after hearing submissions from both parties. The Respondent did not resist an order under the provision and this was indicated in their skeleton argument provided to the Tribunal.
29. The Tribunal also upon hearing submissions from both parties make an order in favour of the Applicant for the sum of £300 in respect of the hearing and the application.
30. These decisions reflect concessions made by the Respondent which are outside the purview of the Consent Order. The Tribunal did not therefore think it right to interfere with those concessions. However, these decisions should not be taken as any endorsement of the application.

Date 20 October 2020

Judge Abebrese

Appendix of relevant legislation

Landlord and Tenant Act 1985 (as amended)

Section 18

- (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.

Section 19

- (1) Relevant costs shall be taken into account in determining the amount of a service charge payable for a period -
 - (a) only to the extent that they are reasonably incurred, and
 - (b) where they are incurred on the provisions of services or the carrying out of works, only if the services or works are of a reasonable standard;and the amount payable shall be limited accordingly.
- (2) Where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable, and after the relevant costs have been incurred any necessary adjustment shall be made by repayment, reduction or subsequent charges or otherwise.

Section 27A

- (1) An application may be made to the appropriate tribunal for a determination whether a service charge is payable and, if it is, as to -
 - (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.
- (2) Subsection (1) applies whether or not any payment has been made.
- (3) An application may also be made to the appropriate tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs and, if it would, as to -
- (a) the person by whom it would be payable,
 - (b) the person to whom it would be payable,
 - (c) the amount which would be payable,
 - (d) the date at or by which it would be payable, and
 - (e) the manner in which it would be payable.
- (4) No application under subsection (1) or (3) may be made in respect of a matter which -
- (a) has been agreed or admitted by the tenant,
 - (b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,
 - (c) has been the subject of determination by a court, or
 - (d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.
- (5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.

Section 20

- (1) Where this section applies to any qualifying works or qualifying long term agreement, the relevant contributions of tenants are limited in accordance with subsection (6) or (7) (or both) unless the consultation requirements have been either—
- (a) complied with in relation to the works or agreement, or
 - (b) dispensed with in relation to the works or agreement by (or on appeal from) the appropriate tribunal .
- (2) In this section “relevant contribution”, in relation to a tenant and any works or agreement, is the amount which he may be required under the terms of his lease to contribute (by the payment of service charges) to relevant costs incurred on carrying out the works or under the agreement.
- (3) This section applies to qualifying works if relevant costs incurred on carrying out the works exceed an appropriate amount.
- (4) The Secretary of State may by regulations provide that this section applies to a qualifying long term agreement—

- (a) if relevant costs incurred under the agreement exceed an appropriate amount, or
 - (b) if relevant costs incurred under the agreement during a period prescribed by the regulations exceed an appropriate amount.
- (5) An appropriate amount is an amount set by regulations made by the Secretary of State; and the regulations may make provision for either or both of the following to be an appropriate amount—
- (a) an amount prescribed by, or determined in accordance with, the regulations, and
 - (b) an amount which results in the relevant contribution of any one or more tenants being an amount prescribed by, or determined in accordance with, the regulations.
- (6) Where an appropriate amount is set by virtue of paragraph (a) of subsection (5), the amount of the relevant costs incurred on carrying out the works or under the agreement which may be taken into account in determining the relevant contributions of tenants is limited to the appropriate amount.
- (7) Where an appropriate amount is set by virtue of paragraph (b) of that subsection, the amount of the relevant contribution of the tenant, or each of the tenants, whose relevant contribution would otherwise exceed the amount prescribed by, or determined in accordance with, the regulations is limited to the amount so prescribed or determined.]

Section 20B

- (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.
- (2) Subsection (1) shall not apply if, within the period of 18 months beginning with the date when the relevant costs in question were incurred, the tenant was notified in writing that those costs had been incurred and that he would subsequently be required under the terms of his lease to contribute to them by the payment of a service charge.

Section 20C

- (1) A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a court, residential property tribunal or the Upper Tribunal, or in connection with arbitration 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 tenant or any other person or persons specified in the application.

- (2) The application shall be made—
 - (a) in the case of court proceedings, to the court before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to a county court;
 - (a) in the case of proceedings before a residential property tribunal, to that tribunal;
 - (b) in the case of proceedings before a residential property tribunal, to the tribunal before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to any residential property tribunal;
 - (c) in the case of proceedings before the Upper Tribunal, to the tribunal;
 - (d) in the case of arbitration proceedings, to the arbitral tribunal or, if the application is made after the proceedings are concluded, to a county court.
- (3) The court or tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances.

Commonhold and Leasehold Reform Act 2002

Schedule 11, paragraph 1

- (1) In this Part of this Schedule “administration charge” means an amount payable by a tenant of a dwelling as part of or in addition to the rent which is payable, directly or indirectly—
 - (a) for or in connection with the grant of approvals under his lease, or applications for such approvals,
 - (b) for or in connection with the provision of information or documents by or on behalf of the landlord or a person who is party to his lease otherwise than as landlord or tenant,
 - (c) in respect of a failure by the tenant to make a payment by the due date to the landlord or a person who is party to his lease otherwise than as landlord or tenant, or
 - (d) in connection with a breach (or alleged breach) of a covenant or condition in his lease.
- (2) But an amount payable by the tenant of a dwelling the rent of which is registered under Part 4 of the Rent Act 1977 (c. 42) is not an administration charge, unless the amount registered is entered as a variable amount in pursuance of section 71(4) of that Act.

- (3) In this Part of this Schedule “variable administration charge” means an administration charge payable by a tenant which is neither—
 - (a) specified in his lease, nor
 - (b) calculated in accordance with a formula specified in his lease.
- (4) An order amending sub-paragraph (1) may be made by the appropriate national authority.

Schedule 11, paragraph 2

A variable administration charge is payable only to the extent that the amount of the charge is reasonable.

Schedule 11, paragraph 5

- (1) An application may be made to the appropriate tribunal for a determination whether an administration charge is payable and, if it is, as to—
 - (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.
- (2) Sub-paragraph (1) applies whether or not any payment has been made.
- (3) The jurisdiction conferred on the appropriate tribunal in respect of any matter by virtue of sub-paragraph (1) is in addition to any jurisdiction of a court in respect of the matter.
- (4) No application under sub-paragraph (1) may be made in respect of a matter which—
 - (a) has been agreed or admitted by the tenant,
 - (b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,
 - (c) has been the subject of determination by a court, or
 - (d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.
- (5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.
- (6) An agreement by the tenant of a dwelling (other than a post-dispute arbitration agreement) is void in so far as it purports to provide for a determination—
 - (a) in a particular manner, or

(b) on particular evidence,
of any question which may be the subject matter of an application
under sub-paragraph (1).