-First-tier Tribunal
Property Chamber
(Residential Property)

Case reference	**:**	**CHI/19UE/LSC/2021/0093**
Property	**:**	**15 Home Farm,** **Iwerne Minster,** **Blandford,** **DT11 8LB**
Applicants **Represented by**	**:**	**Peter Wintle and Penelope Wintle** **Mr. Mallinson (lay)**
Respondent **Represented by**	**:**	**Cognatum Estates Ltd.** **Hannah Laithwaite of counsel (RKW Goodman LLP)**
Date of Application	**:**	**7th October 2021**
Type of Application	**:**	**to determine reasonableness and payability of service charges relating to the estate known as Home Farm**
The Tribunal	**:**	**Bruce Edgington (Lawyer Chair)** **Colin Davies FRICS ACIArb**
Date & place of hearing:		**17th May 2022 as a video hearing from Havant Justice Centre in view of Covid pandemic restrictions**

DECISION

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1. The Tribunal determines upon the evidence before it that the service charges demanded for 2019 and 2020 are reasonable and payable.

2. The Tribunal refuses to make orders either (a) under Section 20C of **The Landlord and Tenant Act 1985** ("the 1985 Act") i.e. that any costs incurred by the Respondent in these proceedings are to be excluded from any service charge or (b) under Paragraph 5A of Schedule 11 of the **Commonhold and Leasehold Reform Act 2002** ("the 2002 Act") preventing the Respondent from recovering costs of this litigation from the Applicants.

3. In the application form, the Applicants also apply for a general order that their costs "*in regard to this application*" by paid by the Respondent. However, at the commencement of the hearing the Tribunal was told that this application was withdrawn.

Reasons

Introduction

4. The property is a 2 bedroom apartment on an estate of retirement homes consisting of 23 cottages and 4 apartments built almost 20 years ago. The Applicants acquired their interest in number 15 on the 8th July 2013 and, sadly, appear to have been in dispute with the Respondent over service charges in recent years. This application is limited to service charges claimed for 2019 and 2020.

5. The application is by joint long leaseholders for determinations on many issues set out in the form of application and in large amounts of correspondence contained in the bundle lodged with the Tribunal for the purpose of the hearing which has been considered in detail by the Tribunal members. However, the only substantive matters which the Tribunal considers that it has the power to determine are the payability and reasonableness of the service charges in question. Section 27A of the 1985 Act says that this Tribunal can determine "*whether a service charge is payable*" and, in accordance with section 19 of that Act, "*to the extent that they are reasonably incurred*".

6. It should be said at the outset that the Tribunal was very concerned to note from the bundle, for example at page 99, paragraph 88, and page 100, paragraph 100, that other proceedings are either in being or contemplated against the Respondent for, amongst other things, service charges. The parties should note that the rule in *res judicata* prevents anyone from asking a court or tribunal from making a decision about something which has already been considered and determined by another court or tribunal.

7. At the outset of the hearing the Tribunal chair asked both parties whether there had been any prior determination relating to the payability or reasonableness of these service charges. The answer from both sides was that there had been none. However, if there should be a subsequent hearing dealing with the reasonableness and/or payability of the 2019 and 2020 service charges, the parties are under a legal obligation to disclose this decision to the subsequent court or Tribunal.

8. Directions orders were made by the Tribunal on the 30th November 2021, 11th January and 28th March 2022 timetabling the case to a determination and a bundle of documents was duly lodged. Both parties have provided statements of case, witness statements and supporting documents. Any references to page numbers in this decision are references to the page numbers in that bundle.

The Lease

9. The term is 999 years from the 24th March 1984 with no ongoing ground rent. As to service charges, there are references to them in various parts of the lease. The obligations on the landlord to provide services are substantial and are basically set out in the Fifth and Sixth Schedules. In essence the landlord has to insure and maintain the estate and the obligation on the leaseholders (or, the 'owners' as described in the lease) to pay service charges and the services to be provided are set out in the Eighth and Ninth Schedules.

10. The accounting period in the lease is said to be ending on the 31st March each year (clause (1)(b) of the Eighth Schedule) although it seems from the accounts supplied that the accounting period has changed so that it ends on the 31st December each year. There seems to be no dispute about this.

11. As soon as practical after the end of each accounting period, the landlord has to supply "*a summarised account of the total income and expenditure….and an estimate of the anticipated expenditure in respect of the Services in respect of the following Accounting period*". The Tribunal has seen accounts for 2019 dated 12th January 2021 (page 163) and 2020 dated 28th June 2021 (page 171). Paragraph (2)(c) of the Eighth Schedule says that "*The Owner (*Leaseholder*) shall be entitled at his request to receive details of how such account has been calculated*".

The Law

12. Section 18 of the 1985 Act defines service charges as being an amount payable by a tenant to a landlord as part of or in addition to rent for services, insurance or the landlord's costs of management which varies 'according to the relevant costs'. Under section 27A, this Tribunal has the jurisdiction to determine whether service charges are reasonable or payable including service charges claimed for services not yet provided. Schedule 11 of the **Commonhold and Leasehold Reform Act 2002** ("the 2002 Act") makes similar provisions with regard to administration charges.

13. Section 22 of the 1985 Act says that a leaseholder may, by notice in writing, require a landlord to afford him reasonable facilities for inspecting accounts, receipts or other documents relevant to the service charge accounts. The landlord must also permit facilities for copying them at the leaseholder's expense. The lease itself also sets out a similar contractual right to supply details of how such account has been calculated.

14. Section 20C of the 1985 Act gives the Tribunal the power to order that any costs incurred by a landlord in presenting a case before the Tribunal can be excluded from any service charge. Paragraph 5A of Schedule 11 of the 2002 Act allows a Tribunal to make orders preventing a landlord from recovering costs of litigation from a tenant.

The Inspection

15. With the present pandemic, Tribunals do not usually inspect properties and as the Applicants have not suggested that the property or the estate has not been maintained properly and in accordance with the terms of the lease, it was not felt that an inspection would have really assisted the members in making this determination.

The Hearing

16. Those attending the hearing were Mr. Wintle and Ms. Hannah Laithwaite of counsel for the Respondent. As the Respondent had instructed counsel quite late in the day, Mr. Wintle asked whether he could be represented by a Mr. Mallinson who was another leaseholder of the Respondent. This was objected to by Ms. Laithwaite because, it was alleged, Mr. Mallinson had been active in other disputes with the Respondent. The Tribunal took the view that it would

allow Mr. Mallinson to be the Applicants' lay representative but would withdraw such permission if he went beyond his function as a representative.

17. A Tribunal case officer introduced the attendees. The Tribunal chair then introduced himself and the other Tribunal member. He then said that he had some questions to raise on the papers filed. He would do that and then ask the parties to put their cases. He would ask the other Tribunal member to ask any questions he had. That is in fact how the hearing was dealt with.

18. The questions raised can be summarised as follows i.e. (1) whether the *res judicata* rule was being breached – see above, (2) whether the parties were aware of the case of **Schilling v Canary Riverside Development PTD Ltd.** [LRX/26/2005, LRX/31/2005 and LRX/47/2005] and they did not seem to be and (3) the basis on which the Applicants' wanted their costs to be paid. They confirmed that they were not pursuing this. The paragraph from **Schilling** quoted below was read out to the parties so that they would understand its significance.

19. Mr. Mallison was then asked to set out Mr. Wintle's case. Initially he said that he wanted to set out a case summary. He was told that the Tribunal members had read the case papers in detail and he then said that he was not going to add any points and did not see any reason to simply repeat what had been said. He said that he wanted to ask questions of the Respondent's witness, Mr. Lavin.

20. Mr. Lavin was called and was cross examined. He was asked about the costs of management and why he had simply put generalisations in his statement rather than specific costs i.e. salaries of staff etc. His evidence was very clear in that he stood by his written statement.

21. In particular, he denied that the lease required him to give the specific details and documents claimed by the Applicants or that the code of conduct of the Association of Retirement Housing Managers ("ARHM") made the supply of such details mandatory. He was referred to the nominal ledger and asked why a copy that could not be provided as it had allegedly been done before. He said that this would be very expensive and, in any event, he was being asked to authorise the release of highly confidential information about staff members such as salaries, which he was not prepared to do.

Discussion

22. In **Schilling**, His Honour Judge Rich QC had to consider upon whom lay the burden of proof. At paragraph 15 he stated :

> *"If the landlord is seeking a declaration that a service charge is payable he must show not only that the cost was incurred but also that it was reasonably incurred to provide services or works of a reasonable standard, and if the tenant seeks a declaration to the opposite effect, he must show that either the cost or the standard was unreasonable. In discharging that burden the observations of Wood J in the Yorkbrook4 case make clear the necessity for the LVT to ensure that the parties know the case which each has to meet and for the evidential*

burden to require the tenant to provide a prima facie case of unreasonable cost or standard."

23. In this case, the Applicants challenge the payability of some services charges rather than suggesting that the cost or standard of a particular service was unreasonable. In fact the allegation is very specific i.e. that the Applicants are not actually challenging the amount of the service charges claimed. They are simply saying that as the Respondent has not provided specific documentary evidence of each service charge, such service charge is not payable (page 102, paragraph 114) because the leaseholders do not have sufficient information to enable them to say whether the claims are reasonable.

24. The Respondent's answer to this is to simply say that the service charges have been incurred. They provide Financial Statements endorsed by Mercer Lewin Limited who describe themselves as Chartered Accountants. Their endorsements say, in effect, that (1) they have checked the figures in the Financial Statements from the accounting records maintained by the managers and confirm that such figures have been extracted correctly and (2) that, based on a sample, such records were supported by receipts, other documentation and evidence that they inspected.

25. The Respondent has also supplied evidence of the costs of management for other retirement home estates (page 132) together with the rates for managing agents recommended by ARHM. The amounts charged in the service charge accounts seem to the Tribunal to come reasonably within those amounts. Details of the overall costs of management are set out in Mr. Lavin's statements.

26. The legal authorities kindly supplied by the parties and included in the bundle did not actually assist this decision. Apart from anything else, previous First-tier Tribunal decisions are not binding on this Tribunal.

27. As to whether there has been a breach of section 22(b) of the 1985 Act, the Tribunal does not accept the Respondent's case that payments on account negate liability as the 18 month rule is the period after service charges have actually been incurred. However, the Tribunal has little, if any, evidence as to when the relevant service charges were actually incurred, and as the Applicants knew what service charges were budgeted for through the relevant period, the Tribunal does not consider that any relevant order can be made.

Conclusions

28. Taking all these matters into account and doing the best it can, the Tribunal's conclusions are that (1) the Applicants' interpretations of the lease and the ARHM code of practice as to the documentation landlords are required to provide are wrong, (2) the Applicants have provided no evidence as to what management charges are other similar developments and (3) that the Respondent has provided such evidence in addition to their own breakdown of the figures.

29. The Tribunal therefore determines that on the evidence provided, the service charge claims for the Home Farm estate for 2019 and 2020 are reasonable and payable.

30. The Tribunal cannot see that the Applicants' multitude of other allegations and criticisms of the Respondent set out in their representations, statements and correspondence have any relevance to the actual decision the Tribunal has the power to make. The Tribunal has made the positive decision not to become embroiled in those issues.

31. A requirement to supply documents is contained in Section 22 of the 1985 Act which says that after a summary is served, the landlord is required to offer facilities to inspect and agree to copies being taken of "*the accounts receipts and other documents supporting the summary*". The lease provides that the leaseholder "*shall be entitled at his request to receive details of how such account has been calculated*". The ARHM code makes suggestions but only becomes operative as a requirement if the law makes it a requirement.

32. It is determined by this Tribunal that there is simply no requirement in law to provide every single document in the landlord's possession. The test would seem to be that the landlord should supply sufficient documents to satisfy any reasonable person that the charges are reasonable. In this Tribunal's opinion, the Respondent has now done this.

33. The allegation that the Respondent failed to comply with section 22 of the 1985 Act by not offering facilities to inspect documents supporting the service charges within the time limited by the section is irrelevant to this determination. That would be an offence to be dealt with by the magistrates' court. The fact is that disclosure has now taken place to the extent that there has been a facility to inspect. Further, the Tribunal and the Applicants have certificates from Chartered Accountants that they have inspected the Respondents books of account and the service charge accounts and that such accounts correctly set out what is in the Respondent's records and supporting invoices.

34. Allegations were made that the accountants' certificates do not say that the service charges are reasonable. They would not do so for the obvious reason that accountants are not estate managers. What they do say, in effect, is that the service charge accounts accurately reflect what the company's books say was spent.

35. The complaint that documents relating to the cost of management have not been disclosed is noted. A service charge includes 'overheads' according to sub-section 18(3) of the 1985 Act. Identifying employees by name or obvious implication – which would have to be done to comply with the Applicants' request – and disclosing their incomes is a contentious issue. Many employees would consider this to be very private and personal information. Certainly when this Tribunal deals with commercial lettings of residential properties, it will look at evidence of a managing agent's fees on the open market to see if they are reasonable, but will not consider the individual salaries of employees of such agents.

36. The allegation was also made that as the Applicants are paying the costs being claimed, they must have access to all the Respondent's records. The Tribunal

does not accept that as a basic premise. The Respondent is a separate entity from the Applicants and is not obliged to disclose confidential information.

37. The Tribunal also notes the submission from the Applicants that they are waiting for this determination before they consider the proportion of the service charges they will pay. At present they are not paying as much as is being demanded. If they have decided not to pay monies claimed, that is a matter entirely for them.

38. The allegations about the sinking fund are noted. In particular it is noted that some work due to be undertaken during the relevant time did not take place, according to the Respondent, because of objections and obstruction from leaseholders, including the Applicants. The Tribunal will simply confirm that it supports the practice of having a sinking fund and notes that the Respondent has obtained a 15 year plan to ensure that any anticipated work is catered for. This avoids leaseholders being asked for substantial monies when such matters as external decoration, replacing roofs etc. have to be undertaken.

Costs

39. The Tribunal has been asked to make orders to ensure that the Applicants do not have to pay for the landlord's costs of representation in this case. The Respondent has indicated that it will be claiming its costs of representation.

40. The Respondent has not made any specific application for the assessment of costs but relies upon the terms of the lease although it must be said that paragraph (10) of the Third Schedule only allows costs to be claimed if they are for or incidental to the preparation of a schedule of dilapidations or a notice under sections 146 or 147 of the **Law of Property Act 1925**. Whether an application by the leaseholders could be included within that definition is a matter for the Respondent to consider. The authority provided i.e. **Kensquare Ltd. v Boakye** [2021] EWCA Civ 1725 related to an application to a Tribunal by the landlord to recover service charges during which a section 146 notice was served. It was evidently clear that the proceedings both before the Tribunal and the court were incidental to the service of a section 146 notice. There was no suggestion within these proceedings that the Respondent had even considered such a proposition.

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Judge Bruce Edgington
18th May 2022

ANNEX - RIGHTS OF APPEAL

i. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application by email to rpsouthern@justice.gov.uk to the First-tier Tribunal at the Regional office which has been dealing with the case.

ii. The application for permission to appeal must arrive at the Regional office within 28 days after the Tribunal sends written reasons for the decision to the person making the application.

iii. If the application is not made within the 28 day time limit, such application must include a request for an extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.

iv. The application for permission to appeal must identify the decision of the Tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal, and state the result the party making the application is seeking.