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

Case Reference : **BIR/00CT/LSC/2013/0001**

Property : **Properties at Libbard House and Libbard Mews, Stonebow Avenue, Solihull, West Midlands B91 3UP**

Applicants : **Michael J Fahy, E M Stanton, R McCoy and P McCoy, P Meers, N Betts and A Hogarth and G Cook**

Representation : **None**

Respondent : **B Woodward (Harborne) Limited**

Representation : **Ms J Oakey of Crooks Commercial, solicitors**

Type of Application : **(1) To determine liability to pay and reasonableness of service charges under section 27A of the Landlord and Tenant Act 1985 ('the Act') and (2) for an Order under section 20C of the Act**

Tribunal Members : **Judge W J Martin (Chairman)
Mr S Berg F.R.I.C.S
Mrs S Tyrer F.R.I.C.S**

Date and venue of Hearing : **The Tribunal Hearing Room at Priory Court, Bull Street, Birmingham, B4 6AF on 15th August 2013**

Date of Decision : **28 AUG 2013**

DECISION

Decision

- (1) The Accountant's fees for the year-ending 24th June 2011 are reduced to £344.
- (2) The section 20C Application is granted.

Reasons For the Tribunal's Decision

Preliminary

- 1 The Decision recorded in this document was made by the First-tier Tribunal (Property Chamber) rather than the leasehold valuation tribunal, to whom the application had been made, because by virtue of The Transfer of Tribunals Function Order (2013 No 1036) ('the Transfer Order') the functions of leasehold valuation tribunals were, on 1st July 2013, transferred to the First-tier Tribunal (Property Chamber). By virtue of the transitional provisions, applications to leasehold valuation tribunals in respect of which a decision had not been issued before the 1st July 2013, automatically became proceedings before the First-tier Tribunal (Property Chamber). The Transfer Order also amended the relevant legislation under which leasehold valuation tribunals were referred to by substituting the words 'First-tier Tribunal' for 'leasehold valuation tribunal' within the relevant parts of the legislation. The extracts from the legislation applicable to the present applications that appear below incorporate the changes made by the Transfer Order. In this Decision the expression 'the Tribunal' means the First-tier Tribunal (Property Chamber) or, where the context admits, the leasehold valuation tribunal.

Background

- 2 On 3rd January 2013 Michael Fahy ('the Original Applicant') applied to the Tribunal under section 27A of the Landlord and Tenant Act 1985 ('the Act') for a determination as to whether service charges are payable and if so as to their reasonableness in respect of 14 Libbard Mews, Stonebow Avenue, Solihull, B91 3UP ('the Property'). The Lessor is B Woodward (Harbourne) Limited ('the Respondent'). Subsequently, the following persons, who are Lessees of other properties in Libbard Mews and Libbard House contributing to the same service charges, were joined into the proceedings as Applicants.

Edward Michael Stanton	10 Libbard Mews
Raymond McCoy and Patricia McCoy	20 Libbard Mews
P Meers	22 Libbard Mews
N Betts and A Hogarth	26 Libbard House
G Cook	18 Libbard Mews

- 3 The Original Applicant's Lease reveals that the service charge year is 25th June to 24th June in each year. Paragraph 2 of the Seventh Schedule provides that the Lessor's accountant is to provide accounts in respect of each service charge year and to serve a copy on each Leaseholder within three months of the date of the account, along with a Certificate, required by paragraph 1.1 of the Seventh

the proceedings are concluded, to any leasehold valuation tribunal....

(ba) in the case of proceedings before the First-tier Tribunal, to the tribunal

- (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*

The Service Charge Provisions of the Leases

7 THE SEVENTH SCHEDULE

1. The Lessee's proportion means the proportion(s) specified in the Tenth Schedule hereto of the amount attributable to the matters mentioned in parts A and B of the Sixth Schedule hereto in relation to the demised premises

Provided Always as follows:

1.1 The certificate of the accountant for the time being of the Lessor as to the total amount of the Maintenance Expenses for the period to which the account relates shall (subject as hereinafter mentioned) be binding on the Lessor and the Lessee

1.2 [relating to arbitration]

1.3 The amount of the Maintenance Expenses shall be adjusted to take into account any sums received by the Lessor as contributions towards the cost of the work mentioned in the Sixth Schedule hereto from the owners Lessees or occupiers of any adjoining or neighbouring properties and the Lessee shall use its best endeavours to recover the contributions (if any) due from such persons

2. An account of the Maintenance Expenses (distinguishing between actual expenditure and reserve for future expenditure) for the period ending 24th June next following the date when construction of the Buildings shall have been completed and for each subsequent year-ending on 24th June during the said term shall be prepared and the Lessor and shall within three months of the date of each such account serve on the Lessee a copy thereof and of the accountant's certificate PROVIDED THAT the Lessor shall not be under any obligation to deliver to the Lessee a copy of the any such account or accountant's certificate before 24th June 1985 or as soon thereafter as may be practicable when the actual costs of the Lessor in relation to the matters and services herein provided for have been established

3 The Lessee shall pay to the Lessor the Lessee's Proportion of the Maintenance Expenses in the manner following that is to say:-

3.1 In advance on 30th June and 25th December in every year throughout the term one half of the Lessee's Proportion of the amount estimated by the Lessor or its managing agents as the Maintenance Expenses for the

year-ending on the next 25th December the first payment to be apportioned (if necessary) from the date hereof Provided That for the first yearly period there shall be substituted the period from the date hereof to the 25th December next following the date when the construction of the Buildings shall have been completed and the payments on account shall be adjusted accordingly

3.2 Within twenty one days after the service by the Lessor on the Lessee of the copy of the account and certificate referred to in paragraph 2 of this Schedule for the period in question the Lessee shall pay to the Lessor or be entitled to receive from the Lessor the balance by which the Lessee's Proportion respectively exceeds or falls short of the total sums paid by the Lessee to the Lessor pursuant to paragraph 3.1. of this Schedule during the said period

Submissions and the Hearing

- 8 In accordance with the Directions of the Tribunal, a Scott Schedule was produced by the Original Applicant, in which the issues upon which a determination by the Tribunal was sought were identified. In the event, although there were two separate Scott Schedules, there was only one monetary adjustment sought by the Applicant. This was in respect of the Accountant's fees of £444 for the year 25th June 2010 to 24th June 2011.
- 9 Following the change of managing agents on 1st May 2011, Centrick decided to use a different Accountant to that employed by Pennycuick Collins. Gravestock and Owen Limited prepared the 2010 accounts, and those prior to that year. For 2011 and 2012, Centrick have employed J W Hincks LLP, who are Chartered Accountants. The Accounts for 2011 were prepared by J W Hincks LLP using a closing financial statement from Pennycuick Collins, covering the period from 25th June 2010 to 1st May 2011 and for the remainder of that service charge year, the actual figures obtained from Centrick.
- 10 The Applicants maintain that the 2011 accounts are deficient in a number of respects. These defects are referred to in more detail below, but the Applicants' submitted that the best solution would be for Pennycuick Collins to arrange for the preparation of the accounts to 30th April 2011, and that Centrick should prepare accounts for the period from 1st May 2011 to 24th June 2011. The period in respect of which the accounts would be prepared is 55 days, and a fair figure for the accountant's fees would therefore be £100. The Applicant's recognised that a separate fee would have to be paid to Pennycuick Collins's accountant.
- 11 A Hearing was held on 15th August, at the Tribunal's hearing room in Birmingham. This was attended by Mr Fahy and Mr Stanton on behalf of the Applicants. Ms Joy Oakey of Crooks Commercial, solicitors, represented the Respondent. Also present were Ms Jhutti, Mr Pemperton and Ms Smiley from Centrick, and Mr Ashmore and Mr Rushworth from J W Hincks LLP.
- 12 It became apparent that, at a meeting or meetings which took place after the Pre Trial Review, some of the issues surrounding the accounts had been agreed. One of these was the question of allocation between the Flats and Houses.

However, the Applicants were still not satisfied in respect of the following items relating the to 2011 accounts.

- 13 The Lease requires the accounts to be certified by the accountants and that without this certification, the Applicants maintain that arrears from defaulting Leaseholders cannot be legally collected. Originally the 2012 accounts were not certified, but these were subsequently re-issued, with an appropriate certificate. However, the 2011 accounts remained uncertified.
- 14 Upon being questioned, Mr Ashmore of J W Hincks LLP said that he would have no difficulty in certifying the 2011 accounts. However, he then confirmed that this had already been done and produced a copy of the 2011 accounts to the Tribunal (and the Applicants), containing a certificate in a similar form to the 2012 accounts. Quite why the certified version of the accounts had not been produced prior to the Hearing was not explained, when it was clear from the Applicants' submissions that the copy in their possession was not signed, and that this was a point in issue. The dates on both the certified and uncertified versions of the accounts are the same, namely 4th April 2012.
- 15 The Applicants say that it is not acceptable for the accounts to be issued as late as 9 months after the year-end. In fact Mr Fahy said that they were not actually received by the Leaseholders until 28th June 2011, which is over a year after the relevant year-end.
- 16 A further problem with the 2011 accounts related to the failure by the Respondent to collect the shortfall at the end of the year from the Leaseholders as is required by paragraph 3.2 of the Seventh Schedule to the Lease. Instead, the reserves had been used to make up the shortfall, so that the accounts showed no surplus or deficit for the year. Ms Jhutti explained that it is normal practise to apply any surpluses to reserves, but agreed that it was incorrect to have used the reserves to make up a deficit. Mr Fahy said that the same thing had happened in 2012, but upon examination, these accounts revealed that the reverse situation applied. There was a surplus of £1,545.12 in respect of 'All Properties' and £1032.56 in respect of 'Flats' (which pay an additional service charge) of £1032.56. These surpluses had been transferred to the reserves.
- 17 There were other aspects of the accounts with which the Applicants did not agree. However, these relate to the actual figures inserted in the accounts, some of which the Applicants maintain are incorrect. The Chairman explained that the Tribunal has no jurisdiction under section 27A of the Act to conduct an account, and accordingly the Tribunal did not hear submissions made upon these alleged inaccuracies.
- 18 The Tribunal questioned the parties concerning the suggestion by Mr Fahy that there should be two sets of accounts for 2011. Ms Jhutti said it was normal practice, when there is a mid-year handover and where new accountants are appointed, for those accountants to prepare the year-end accounts based upon closing figures provided by the former managing agents. This was confirmed by Mr Ashmore. Mr Fahy remained of the opinion that it would be more logical for there to be a closing set of accounts by the previous managing agents, and for

further set to be prepared by the new managing agents from the hand-over date to the next year-end.

- 19 Ms Oakey did not wish to make any direct submissions relating to the accountant's fees, other than to repeat the entry in the Scott Schedule, to the effect that the sum of £444 is a fair and reasonable fee for the preparation of the accounts. However, she did make submissions regarding the section 20C Application. She said that the Respondent had been put to a lot of expense by the Application, which, in the event was concerned with a single, relatively trivial sum. If the Applicants wish for the managing agents to be replaced, they should make an application under section 24 of the Landlord and Tenant Act 1987. The submissions concerning the Centrick and J W Hincks LLP are not appropriate to an application under section 27A of the 1985 Act and it would therefore not be reasonable for the Order to be made. If the Order is not made she proposed to make a charge of £1,500 against the service charge account for the cost of the proceedings.
- 20 Mr Fahy said that he had misunderstood the position with regard to the section 20C Application and thought that it was in respect of his expenses, which he had put at £100 based upon his personal time in preparing the case, copying postage and attendance at the hearings. This was contained within his written submissions (the letter dated 10th June 2013). The Chairman explained that the Tribunal has power to award costs in certain circumstances and would consider his submission as an application in respect of such costs. Mr Fahy confirmed that he wished for the section 20C Order to be made, as all of the difficulties have been occasioned by the change of managing agents and accountants, and the Leaseholders should not suffer further expense.
- 21 Ms Oakey said that, other than the costs she would wish to charge against the service charge, she did not seek an order for costs against the Applicants. However, it would not be reasonable for the Tribunal to make an order in favour of the Applicants.

The Tribunal's Determination

- 22 Although it is clear that in some respects the Applicants have misunderstood the powers of the Tribunal under section 27A of the Act, there is nevertheless some justification for the sense of frustration that the Applicants felt after the appointment of Centrick. Both Mr Fahy and Mr Stanton made the point that the change was presented to them as a *fait accompli*, and that there had been no prior warning or consultation regarding the change. However, it is also clear that the Respondent acted within its powers in doing so.
- 23 The evidence also shows that there were some teething problems following the appointment, not least the issuing of duplicate invoices in respect of the second half year's estimate, which had already been sent by Pennyquick Collins, causing understandable consternation to the Leaseholders. This was compounded by the allocation error referred to in paragraph 12 above. However, more seriously, the Tribunal find that there were the following ongoing deficiencies surrounding the 2011 accounts:

01. The accounts were dated more than 9 months after the year-end. The Tribunal considers that accounts should be presented to the Leaseholders no more than six months after the year-end. In this case they were not sent to the Leaseholders until over one year had passed. The Tribunal accepts that the preparation of the first year's accounts following a mid-year handover are likely to present more problems than would be normal, but the delay in this case is still unacceptable.
02. J W Hincks LLP should have certified the accounts from the outset. If they were not instructed to do so, this is a failing of the managing agent. The Applicants are correct that the certificate is a condition precedent of the Leaseholders' liability to pay the service charge.
03. The transfer from reserves to make up the shortfall was not in accordance with the provisions of the Lease, as was admitted by the Respondent at the Hearing.

- 24 The Applicant had requested that the total fee for 2011 be reduced to £100, on the basis that the Respondent would only be preparing accounts for 55 days. The Tribunal finds that the provisions of the Lease only provide for one set of accounts, and that the suggestion that, at extra expense, Pennycuick Collins are instructed to prepare accounts for the period of their management, to be both unworkable and outside of the provisions of the Lease. The Tribunal accepts the Respondent's evidence that it is the norm, in cases where there is a handover mid-year, that the new managing agent's appointed accountant prepares the account for the whole year. Accordingly, the Tribunal makes its determination on the basis of the actual charges of J W Hincks LLP for 2011, on the basis that it was proper for them to be instructed to prepare the accounts for the whole year.
- 25 Taking the above factors into consideration, the Tribunal determines that the accountant's fee of £444 for the year-ended 2011 is to be reduced by £100 to £344. The Tribunal considers that, but for the defects listed in subparagraphs 23 01, 23 02 and 23 03 above, the sum of £444 is a reasonable sum for the production of the accounts. In 2012 the figure was slightly higher at £456, and, although this was not specifically challenged in the Scott Schedule, the Tribunal, for the sake of clarity, confirms that this sum is reasonable.
- 26 The Tribunal considered carefully the submissions of both parties with regard to the Section 20C Application. The Respondent makes the point that a great deal of time and effort has gone into the preparation of the Respondent's case, but that when it came down to it, the only issue within the jurisdiction of the Tribunal was the relatively trivial matter of the accountant's fee. However, the Tribunal, after due consideration, considers that it is appropriate to make the Order. The Tribunal considers that the conduct and circumstances of the parties as well as the outcome of the case are material factors. In the present case there has been a reduction in the service charge, and there has clearly been failings, particularly surrounding the 2011 accounts, but also involving the issue of the duplicate invoices, which ought to be taken into consideration. As a matter of judgement, the Tribunal finds in the present case that it is just

and equitable to make the Order. Accordingly, the Tribunal orders that none of the Respondent's costs in connection with these proceedings are to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the Applicants.

- 27 The Tribunal does not consider that it is appropriate to exercise its powers to make an award of costs against the Respondent.
- 28 In making its determinations the Tribunal had regard to the submissions of the parties, the relevant law and its knowledge and experience as an expert tribunal, but not any special or secret knowledge.
- 29 If any 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 within 28 days of this decision (regulation 52 (2) of The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013.

Judge W.J. Martin – Chairman

28 AUG 2013