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FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**BIR/00CU/LIS/2013/0020**
Subject Property	:	**Flat 80** **The Pinnacle** **50 Gomer Street** **Willenhall** **West Midlands** **WV13 2NW**
Applicant	:	**Linda Owusu-Manu**
Respondents	:	**(1) The Pinnacle (Willenhall) Management Company Ltd** **(2) Peter Hillyard**
Type of Application	:	**Applications (i) under section 27A of the Landlord and Tenant Act 1985 for the determination of reasonable service charges and (ii) under section 20C of the Landlord and Tenant Act for an order for the limitation of costs**
Date of Hearing	:	**16 December 2013**
Tribunal Members	:	**Deputy Regional Judge N P Gravells** **Mr R T Brown FRICS**
Date of Decision	:	**23 December 2013**

DECISION

Introduction

1 This is a decision on two applications made to the Leasehold Valuation Tribunal (now the First-tier Tribunal (Property Chamber)) by Ms Linda Owusu-Manu, leaseholder of Flat 80, The Pinnacle, 50 Gomer Street, Willenhall, West Midlands, WV13 2NW ('the subject property'). The applications, dated 22 May 2013 and received by the Tribunal on 23 May 2013, are, first, under section 27A of the Landlord and Tenant Act 1985 ('the 1985 Act') for a determination of her liability to pay service charges in respect of the subject property for the years 2009 to 2013 and, second, under section 20C of the 1985 Act for an order that the costs incurred by the Respondents in relation to the present applications are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the Applicant.

2 The First Respondent, named in the application, is The Pinnacle (Willenhall) Management Company Ltd ('Pinnacle'). Pinnacle is the management company for The Pinnacle, the block of flats that includes the subject property. Until December 2008 Curry & Partners (Curry) were managing agents for Pinnacle but since then D & B Facades and BHG Chartered Accountants have carried out the management functions on the instructions of Pinnacle. Mr Peter Hillyard is the current freeholder and landlord of The Pinnacle; and, although the First Respondent has primary responsibility for the management of The Pinnacle, under the service charge provisions of the lease the landlord retains residual rights and obligations. Mr Hillyard has therefore been included in the application as the Second Respondent.

3 The Pinnacle is a tower block located on the corner of Gomer Street and Wolverhampton Street in Willenhall. The block contains 93 flats on 16 floors and a caretaker's flat and office. Outside there is car parking and some garden borders. The Applicant's flat is on the fourteenth floor and, like the overwhelming majority of flats in the block, is sublet to tenants.

4 Under clause 8 of, and the Second Schedule to, the Applicant's lease the First Respondent is responsible for the management of The Pinnacle. The services provided have varied but during the period covered by the present application services itemised in the accounts have included:

Management fees
Caretaker costs
Rates and water
Light and heat
Equipment hire
Telephone
Post and stationery
Travelling
Motor expenses
Lightning protection
Licences and insurance
Fire, security and safety

Repairs and renewals
Lift maintenance
Pest control
Car park barriers
Electrical and lighting works
Sundry expenses
Accountancy
Legal fees
Bank charges

5 The accounts also include under the heading 'Expenditure' debits or credits for 'bad debts'. Since these reflect outstanding service charges owed by and recovered from individual leaseholders, they are not properly included as an item of *service charge* expenditure and have therefore been disallowed.

6 The services itemised in the budget for 2013 budget appear under different headings; but the substance of the services appears to be similar except that provision for a reserve fund has been added.

7 Under clause 7 of the lease the Applicant covenants to pay 1.0612 per cent of the service charge costs to the Respondents. The service charge year is the calendar year. Payments on account, based on the budget for each service charge year, are payable on 1 January and 1 July. Under the terms of the lease, where the payments on account exceed the actual expenditure, the Respondents can elect whether to refund the surplus to the leaseholders or to carry it forward to the following service charge year. Where the actual expenditure exceeds the payments on account, the Respondents can demand the shortfall from the leaseholders; but during the period covered by the present application the Respondents have issued no such demands.

8 It is not disputed that the Applicant has not paid any service charges since 2008. Demands for payments on account have been issued for the service charge years 2009 to 2013 but apparently the Applicant did not receive those demands because they were sent to her previous address and not forwarded to her current address. Copies of the demands were eventually sent to her current address on 25 March 2013, when the Respondents traced her to that address.

9 On receiving the copies of the service charge demands, the Applicant made the present applications to the Leasehold Valuation Tribunal (now the First-tier Tribunal (Property Chamber)).

10 On 17 June 2013 the Tribunal issued Directions, requiring the Applicant to provide a written statement setting out the details of her challenge(s) to the service charges and then requiring the Respondents to respond to that statement. Following the receipt of the parties' statements, the Tribunal held a case management conference on 20 September 2013. The Tribunal offered mediation to the parties but exchanges between Ms Owusu-Manu and Mr Hillyard led the Tribunal to conclude that mediation was unlikely to lead to a settlement.

Directions were therefore reissued on 23 September 2013. In fact the parties subsequently started negotiations and the Tribunal suspended the timetable in the Directions. However, the negotiations failed to produce a settlement and the Directions were reinstated.

11 The Applicant challenges the service charges on four grounds –

(i) That, by virtue of section 20B of the 1985 Act, she is not liable to pay service charges in respect of costs incurred before 25 September 2011;
(ii) That the insurance premiums are unreasonable;
(iii) That the caretaker costs are unreasonable;
(iv) That the management fees are unreasonable.

Inspection and hearing

12 On 16 December 2013 the members of the Tribunal inspected The Pinnacle. Present were (i) Mr Ajay Passap, of ASR Ltd, the Applicant's managing agent, representing the Applicant, and (ii) Mr Barry Simpkiss, resident caretaker at The Pinnacle, representing the Respondents.

13 Immediately following the inspection a hearing was held at Priory Court in Birmingham. The hearing was attended by Ms Owusu-Manu and by Mr Peter Hillyard, representing the Respondents.

Representations of the parties

14 So far as relevant to the determination of the Tribunal, the representations of the parties are referred to below.

Determination of the Tribunal

15 In determining the issues in dispute between the parties the Tribunal took account of all relevant evidence and submissions presented by the parties.

Liability to pay and reasonableness of the service charges

Section 20B of the 1985 Act

16 Section 20B of the 1985 Act provides –

(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.

17 The Applicant submits that since she received no demands for payment in respect of the service charge years 2009 to 2013 (nor section 20B(2) notifications) until 25 March 2013, she is not liable to pay service charges that reflect costs incurred more than 18 months before that date, that is before 25 September 2011.

18 For the Respondents Mr Hillyard stated that service charge demands (and other follow-up correspondence) were sent to the Applicant at her address as recorded at the Land Registry on 25 November 2005, namely 84 Verney House, Jerome Crescent, London NW8 8SQ. He stated that that was also the address notified to the Respondents by Curry, their managing agents until December 2008. He referred the Tribunal to the following documents: (i) an extract from Curry's accounting reports, dated 21 August 2006, showing the Applicant's address as 84 Verney House, (ii) an email from Curry to D & B Facades, dated 25 May 2010, referring to various accounting reports, and (iii) what appears to be a single page from a list of leaseholders of flats at The Pinnacle, again showing the Applicant's address as 84 Verney House. The page is undated. He stated that none of the correspondence sent to the Applicant at 84 Verney House had been returned undelivered.

19 The Applicant stated that she left 84 Verney House and moved to her current address (89 Linton Avenue, Borehamwood WD6 4QY) in October 2006. She stated that she notified Curry of her change of address and she referred the Tribunal to a number of documents sent by Curry to her new address: (i) letters dated 21 December 2007, 4 February 2008 and 12 February 2008, and (ii) service charge demands dated 22 February 2008, 25 April 2008, 29 May 2008 and 20 June 2008.

20 The Tribunal was of the view that the oral evidence of the parties on this issue, in particular their evidence on events five or more years ago, was not wholly reliable.

21 However, largely on the basis of the documentary evidence, the Tribunal is satisfied that the Applicant notified her change of address to Curry, the managing agents at the time. That information should have been transmitted to Pinnacle when Pinnacle took back the management responsibilities in December 2008. Curry may have failed to inform or misinformed Pinnacle as to the Applicant's address; but the documentary evidence on which Mr Hillyard relies is far from compelling. The accounting report predated the Applicant's change of address; and the other document showing the Applicant's address as 84 Verney House is undated and not obviously linked to the email from Curry to D & B Facades. In any event, the Respondents failed to serve any service charge demands on the Applicant until 25 March 2013; and, if that was because Curry failed to inform or misinformed the Respondents as to the Applicant's change of address, the Respondents must look to Curry for any redress.

22 The statutory consequence of the failure to serve any service charge demands on the Applicant until 25 March 2013 is that the Applicant is not liable to pay service charges that reflect costs incurred more than 18 months before that date, that is before 25 September 2011. It follows that the Applicant is not liable to pay service charges in respect of 2009, 2010 and the period 1 January to 24 September 2011.

23 The Tribunal acknowledges Mr Hillyard's more general argument that the subject property had the benefit of the services throughout that period and that the Applicant must have been aware of her obligations under the lease to pay for those services. However, that argument cannot override the clear terms of section 20B of the 1985 Act.

24 It follows from the Tribunal's determination on section 20B of the 1985 Act that it is unnecessary to consider the Applicant's challenges to the reasonableness of the service charges in 2009 and 2010.

Insurance premiums

25 The Applicant's challenge to the insurance premiums appears to be based on a misunderstanding of the relationship between the service charge budgets and the accounts produced by the Respondents. The payments on account demanded from the Applicant are based on the estimated costs set out in the budget for each service charge year; and, subject to any challenge as to the reasonableness of (or liability to pay) those estimated costs, the Applicant is required by the terms of the lease to make the payments on account. However, as noted above (see paragraph 7), the ultimate liability of the Applicant is to pay her share of the actual costs incurred during the service charge year (again subject to reasonableness and liability to pay). Those actual costs appear in the final accounts.

26 Unfortunately, throughout the period covered by the present application the Respondents continued to include in the budget for each successive year a figure for the insurance premium that reflected the premiums paid while Curry was the managing agent, notwithstanding that the final accounts show that the actual premiums paid by the Respondents were less than 40 per cent of the figures in the budget. Nonetheless, the liability of the Applicant is limited to her share of the actual premiums that appear in the accounts; and the Applicant does not challenge the reasonableness of the actual premiums paid.

27 The Tribunal therefore determines that the reasonable figures for insurance premiums for the 2011, 2012 and 2013 service charge years are £8090, £9070 and £9034 respectively.

Caretaker costs

28 The Applicant questions the reasonableness of the caretaker costs on a number of grounds. She argues –

(i) That there is no provision in the lease for the employment of a (resident) caretaker;

(ii) That she was unaware, when she purchased the lease of the subject property, that a resident caretaker was (to be) employed;

(iii) That tasks performed by the caretaker (cleaning and general maintenance of the internal and external common parts) could be performed by non-resident contractors at a lower cost.

29 For the Respondents Mr Hillyard stated that the resident caretaker performed a wider range of tasks than suggested by the Applicant and that his presence on site around the clock provided the residents of The Pinnacle with an immediate point of contact.

30 In response to the Applicant's arguments, the Tribunal determines –

(i) That there is provision in the lease for the employment of a resident caretaker. Paragraph 1(c) of the Second Schedule to the lease authorises expenditure 'in the provision of services facilities amenities improvements and other works where the Management Company in its or the Landlord in the Landlord's absolute discretion from time to time considers the provision to be for the general benefit of the Estate and the tenants of the flats ...';

(ii) That the Applicant (or her legal representatives) would, prior to the Applicant's purchase of the lease of the subject property, have been provided with copies of the service charge documentation, showing that the service charge costs included the costs of a resident caretaker;

(iii) That the caretaker's job description indicates that the tasks performed by the caretaker extend significantly beyond cleaning and general maintenance of the internal and external common parts;

(iv) That the provision of a resident caretaker is reasonable in the circumstances of the present case where more than 90 percent of the flats are sublet by the leaseholders.

31 The Tribunal finds that it would be difficult to attract a suitable person to the position of caretaker of The Pinnacle at a lower salary than that paid to Mr Simpkiss and without the provision of free accommodation. Subject to paragraph 32 below, the Tribunal therefore determines that the costs included in the service charge in respect of the caretaker are reasonable.

32 The accounts for the service charge year 2011 include the figure of £32,400 for rent for the caretaker's flat. Mr Hillyard explained that that figure included rent for previous service charge years, which the Respondents had omitted to include in the budget or the accounts in those years. As already determined, in so far as that figure includes costs incurred before 25 September 2011, by virtue of section 20B of the 1985 Act those costs cannot be recovered from the Applicant.

33 The Tribunal therefore determines the reasonable figures for caretaker costs for 2011 and 2012, and estimated costs for 2013, as follows:

Service charge year	Wages	Rent	Total
2011	18627	4800	23427
2012	18564	4800	23364
2013			23705

Management fees

34 The Applicant's challenge to the management fees appears to be based in part on the same misunderstanding of the relationship between the service charge budgets and the accounts identified in relation to the insurance premiums (see paragraph 25 above) and in part on a failure to differentiate between (i) the provision of services and (ii) the management of that provision.

35 Although the figure in the budgets for the service charge years 2009 to 2013 is a constant £18575, the accounts show that the actual costs were £13200 plus VAT in 2009 rising to £14400 plus VAT in 2010, 2011 and 2012. Inclusive of VAT the figures are £15180 in 2009, £16890 in 2010, £17250 in 2011 and £17280 in 2012. Those figures reflect a fee per flat of £163 in 2009, £182 in 2010, £185 in 2011 and £186 in 2012.

36 For the Respondents, Mr Hillyard stated that the management fee covers (i) the costs of managing the provision of 'physical' services at The Pinnacle and (ii) the costs of office-based administration such as the preparation of accounts, processing of payments, etc. Moreover, the high incidence of non-payment of service charges involves significant management input.

37 The Applicant still argues that those fees are unreasonable. She referred to a block of flats in Corby ('the Corby flats'), in which she owns the lease of a flat, where the management fee is £144 (inclusive of VAT) per flat.

38 The Applicant provided some details of the block of flats in Corby but they suggested that the block could not be compared to The Pinnacle. The Pinnacle contains 93 flats (compared with 46 Corby flats) and the services provided at the Pinnacle are more extensive than those at the Corby flats. Although there was no evidence as to the incidence of subletting at the Corby flats, as noted, there is an exceptionally high incidence of subletting at The Pinnacle, which almost inevitably creates more management problems.

39 Applying its general knowledge and experience as an expert Tribunal, the Tribunal determines that the management fees included in the accounts cannot be regarded as unreasonable.

Quantification of service charges payable by the Applicant

40 The following table sets out for the service charge years 2011 and 2012 the costs of heads of service charge expenditure properly included in the accounts that were not challenged by the Applicant and the reasonable costs (as determined by the Tribunal) of those heads of service charge expenditure that were challenged by the Applicant.

Head of Service Charge Expenditure	2011	2012
Management fees	17250	17280
Caretaker wages	18627	18564
Caretaker rent	4800	4800
Rates and water	766	766
Light and heat	5160	4504
Telephone	491	456
Post and stationery	121	181
Lightning protection	215	220
Licences and insurance	8090	9070
Fire, security and safety	2555	4931
Repairs and renewals	805	360
Decorating and cleaning	6824	207
External works	997	150
Lift maintenance	4087	4322
Pest control	1800	1800
Car park barriers	2124	795
Electrical and lighting works	1369	717
Sundry expenses	1	(1)
Accountancy	5788	4452
Legal fees	31732	0
Bank charges	185	210
Total	113787	73784

41 Under the terms of the lease the Applicant is liable to pay 1.0612 per cent of those costs. For the full service charge year 2011 she would therefore be liable to pay 1.0612 per cent of £113787, which is £1208. However, as noted, by virtue of section 20B of the 1985 Act, she is not liable for any costs incurred before 25 September 2011. In the absence of any evidence as to the actual pattern of service charge expenditure during the year, the Tribunal is of the view that the fairest approach is to apportion the costs evenly throughout the year. On that basis the Applicant is liable to pay 98/365ths of £1208, which is £324.

42 In respect of 2012 the Applicant is liable to pay 1.0612 per cent of £73784, which is £783.

43 The following table sets out for the service charge year 2013 the estimated costs of heads of service charge expenditure properly included in the budget that were not challenged by the Applicant and the reasonable estimated costs (as determined by the Tribunal) of those heads of service charge expenditure that were challenged by the Applicant.

Head of Service Charge Expenditure	2013
Accountancy fee	575
Buildings insurance	9034
Caretaker expenses	23705
Company administration	411
Directors'/officers' insurance	525
Electricity	8400
Ground maintenance	1000
Legal fees	100
Lift maintenance	4500
Maintenance agreements	3500
Management fee	17280
Professional fees	1000
Repairs	9500
Reserve fund	9500
Total	89030

44 In respect of 2013, pending the ascertainment of the actual service charge costs, the Applicant is liable to pay 1.0612 per cent of £89030, which is £945.

45 The following table summarises the Applicant's liability:

Service charge year	Sum due from Applicant
2011	£324
2012	£783
2013	£945
Total	**£2052**

Application under section 20C of the 1985 Act

46 Section 20C of the 1985 Act provides (so far as relevant):

(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 ... the First-tier Tribunal ..., 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.

(3) The ... tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances.

47 The section is concerned with the costs incurred by the Respondents in dealing with the present application; and the issue is whether the Tribunal should order than some or all of those costs, which the Respondents could otherwise include in the service charge, should be disallowed.

48 The Applicant argues that, when she first saw the service charge budgets, demands and accounts, she had no option but to question the apparent year-on-year discrepancies between the figures in the budgets on which the demands were based and the figures that appeared in the accounts.

49 For the Respondents Mr Hillyard submitted that the Applicant acted somewhat precipitately in making the present applications without discussing her concerns with the Respondents.

50 The Tribunal agrees that the financial statements prepared for Pinnacle, including the trading and profit and loss accounts, while perfectly proper as company accounts, are not wholly transparent *as service charge accounts*. Allowable heads of expenditure are located in different sections of the accounts and the 'Expenditure' section includes 'bad debts', which are not an allowable head of expenditure. Moreover, the accounts do not show the surplus/deficit carried forward from one service charge year to the next. The format of the accounts may well have created some difficulty for leaseholders in reconciling the estimated costs in the budget and the payments on account with the actual costs.

51 On the other hand, the Tribunal agrees that the Applicant did act somewhat precipitately. Following receipt of the service charge demands in March 2013, she requested and was provided with further documentation. However, rather than seek explanation and clarification, she almost immediately made the present applications. Moreover, the Tribunal held a Case Management Conference at which it sought to address the Applicant's apparent misunderstandings and encouraged the parties to reach a negotiated settlement.

52 More generally, in the view of the Tribunal, the wider merits of the present case lie with the Respondents. The Applicant has failed to establish any substantive unreasonableness in the service charges. Although she has succeeded on the section 20B argument, she has deployed that argument to avoid paying for services which she must have known were being provided to the subject property and for which she must have known that she was required to pay under the terms of her lease.

53 In the circumstances, the Tribunal determines that it is just and equitable not to make an order under section 20C.

Summary

54 The decision of the Tribunal may be summarised as follows:

(i) The Applicant is not liable to pay service charges for the subject property in respect of the service charge years 2009 and 2010 nor in respect of the period 1 January to 24 September 2011.

(ii) The Applicant is liable to pay service charges of £324 and £783 for the subject property in respect of the period 25 September to 31 December 2011 and the service charge year 2012 respectively.

(iii) The Applicant is liable to make a payment on account of £945 for the subject property in respect of the service charge year 2013.

(iv) The Tribunal makes no order under section 20C of the 1985 Act.

Appeal

55 Any appeal against this decision must be made to the Upper Tribunal (Lands Chamber). Prior to making such an appeal an aggrieved party must apply in writing to the First-tier Tribunal for permission to appeal within 28 days of the date specified below stating the grounds on which that party intends to rely in the appeal.

23 December 2013

Professor Nigel P Gravells
Deputy Regional Judge