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HM Courts & Tribunals Service

Residential Property TRIBUNAL SERVICE

LEASEHOLD VALUATION TRIBUNAL

In the matter of Sections 20C and 27A of the Landlord and Tenant Act 1985

Case Nos.	CHI/21UC/LSC/2012/0018
Property:	**1 Ashbourne Court** **Burlington Place** **Eastbourne** **East Sussex** **BN21 4AX**
Between:	**Mr J Manek** **(the Applicant)** and **Ashbourne Court (Eastbourne) Ltd** **(the Respondents)**
Date of hearing:	7th February 2013
Date of the decision:	14th February 2013
Members of the Tribunal:	Mr D Dovar LLB (Hons) Mr N I Robinson FRICS Mr T W Sennett MA MCIEH

DECISION

Introduction and preliminary matters

1. This is an application for the determination of the payability of service charges pursuant to section 27A of the Landlord and Tenant Act 1985 for the year end 2011.

2. The application had originally encompassed previous service charge years. By a preliminary determination made on 29th May 2012, this application was restricted to the year end 31st December 2011.

3. Directions were given on 28th November 2012, noting that the Applicant had filed a statement of case, but had not provided any supporting documentation. The directions required the Respondent to send a statement in reply by 7th January 2013 and that any party wishing to call oral evidence should provide a witness statement to be included in the bundle of documents on which they relied. The said bundle was to be served on the other party and on the Tribunal by 21st January 2013. The Respondent complied and their bundle and evidence was received on 15th January 2013. The directions included the standard information which informs the parties that if they are unable to comply with the timetable set down for the directions they should apply for an extension of time and do so as soon as possible and in any event before the expiration of the period given.

4. Mr Manek produced at the hearing an additional 17 page witness statement and bundle containing 68 pages of documents. He asked the Tribunal to take this evidence into account. He had provided a copy to the Respondents the previous day, albeit he only provided the exhibits at 3.45pm. When asked for an explanation as to why he had failed to comply with the directions, he stated that he had been away from mid-December

until 21st January and that he had been busy with work. He accepted that he had not sought an extension of time so as to be able to comply with the directions at any time. The Respondents objected to the late introduction of this evidence. They considered that it was either irrelevant or consisted of matters that had been raised in previous proceedings. They also suggested that there might be aspects that they could not deal with.

5. On the basis that some of the evidence was relevant and had been disclosed in previous proceedings, the Tribunal considered the evidence would be taken into account. However, its use by the Applicant would be monitored through the hearing, so that only those parts that were relevant were relied upon and so that it did not present difficulties for Respondent due to its late disclosure. As it turned out, it was possible to conclude the hearing without the need for an adjournment as the Respondents were able to address the relevant points made.

6. The Applicant appeared in person. The Respondent appeared through its managing agents, Mrs Pearce as well as one of its directors, Mr Taylor and a shareholder, Mrs Williams. Other tenants were also present (being Mrs Fosh, Mr Hore, Mr Massey and Mr Stroud)

The Property

7. The Property is a three bedroom ground floor flat located within a 1950s block of ten flats situated over five floors ('the Block') which are serviced by a lift running up the central communal area. There are surrounding grounds with 10 garages at the rear.

8. The Tribunal inspected the site and noted that it was maintained to a high standard. The Tribunal's was specifically referred to: the garages and two taps that were located just in front of them; the new uPVC windows in the common parts; the location of plant pots at the front and rear; the position of external lights on one side of the ground floor and the absence of lights on

the other side (adjacent to the Applicant's flat); the gas meters in the basement; the passage that ran from the side of the Applicant's flat and connected the front of the Block with the pavement (albeit obstructed by a low wall) to the rear of the Block and the garages and the open passage beyond and out to another road.

The Lease

9. By an undated lease, Ashbourne Court (Eastbourne) Limited demised the Property to Ms Probert for a term of 999 years from 29th September 1999. The material terms are as follows:

   a. The Particulars to the lease specify that for the purposes of the lease 'the Property' means Ashbourne Court '*more particularly delineated and shown edged red on the attached plan*'. The plan shows not only the block itself but the surrounding land including what appear to be 10 parking spaces at the rear.

   b. The recital to the lease provides that (at paragraph 1 (5)) 'The expression 'the Building' shall mean the building of which the Premises shall form part and (where the context so admits) shall include all garage blocks ancillary buildings boundary walls gardens ground and paths thereof';

   c. Clause 3 provides for the service charge mechanism.

      i. By clause 3 (1) and the particulars, the tenant covenanted to contribute and pay 1/10th of the Annual Maintenance Cost;

      ii. Clauses 3 (2) and (3) provide for the Landlord to set a yearly budget and for the Tenant to pay quarterly sums on account and for further sums to be demanded;

      iii. Clause 3 (4) provides for an end of year reconciliation of actual expenditure against budgeted expenditure;

iv. Clause 3 (6) sets out what the Annual Maintenance Cost are, being

'all sums actually and reasonably spent by the Landlord ... in connection with the management and maintenance of the Property'.

It goes on to set out some examples such as:

> *'(b) The costs of and incidental to the performance and observance of each and every covenant on the Landlord's part contained in sub-clauses (2)(3)(4)(5)(6) and (7) of clause 4 ...*
>
> '(f) *All fees charges and expenses payable to any solicitor accountant surveyor valuer or architect or other professional or competent adviser whom the landlord may from time to time employ in connection with the management or maintenance of the Property (but not in connection with lettings or sales of any of the premises comprised in the Building or the collection of arrears of rent or maintenance charges payable by any tenant thereof) ...*
>
> *'(h) All charges levied upon the Landlord and all such other expenditure as may properly be incurred by the Landlord in maintaining the land shown shaded green and yellow on Plan A';*

10. Clause 4 (2) sets out the Landlord's repairing obligations which include obligations in respect of 'the Building'. It also expressly excludes any obligation in relation to the repair and renewal of the window frames and the glass within the window frames save where they are communal. Further clause 4 (2) (f) places an obligation on the Landlord to maintain repair cleanse and renew the 'paths gardens ground and forecourts'

11. Clause 4 (3) requires the Landlord to keep the gardens entrances passages and grounds clean and in a reasonably tidy condition.

12. The Respondent landlord company is owned by the flat leaseholders, each leaseholder, including the Applicant, has 10 shares out of 100 in the company.

The Statutory Provisions

13. Section 18 of the Landlord and Tenant Act 1985 defines service charges as those amounts payable by a tenant as part of or in addition to rent, which are payable directly, or indirectly for services, repairs, maintenance or insurance or the landlord's costs of management and the whole or part of which vary or may vary according to the relevant costs. Relevant costs are defined as the costs or estimated costs incurred or to be incurred by the landlord in connection with matters for which the service charge is payable.

14. Section 19 places a statutory limit on service charges by only allowing their recovery to the extent that they are reasonably incurred and where the service or work is to a reasonable standard.

15. Section 27A confers jurisdiction on the Tribunal to determine whether a service charge is payable and if so, (amongst other matters) the amount which is payable and the date at or by which it is payable. The determination can be made whether or not any payment has been made and also in respect of anticipated expenditure.

The sums in dispute

16. By his statement of case dated 21st November 2012 (and his additional evidence provided at the hearing), Mr Manek identified the following sums that were disputed: sums spent on garden pots; management fees; his contribution to the garages; the new communal windows and legal fees. The Tribunal will deal with each of those items in turn.

Garden Pots £257.40 / £668

17. Mr Manek disputes the sum of £257.40 on the basis that there was no power for the landlord to provide these pots and because he does not get any benefit from them. He disputed that sums were recoverable under clause 4 as the benefit received was not equal. He relies on the absence in his lease of any discretion given to the landlord to provide such items. In his submissions,

18. Mr Manek clarified that he was really disputing the pots placed at the rear of the Block as they had only been put outside flat 2 and not his. He said that that was deliberate and that he required them for security purposes. He also complained that pots he had placed at the rear for security purposes had been removed. He also challenged the sum under section 19 in that it was not reasonable to have incurred the cost of the pots as there was no equal benefit.

19. The Respondent claims that these sums are payable under clause 4 (2) (f), being part of the general maintenance of the grounds. Further, they stated that the pots had been put temporarily outside flat 2 in order to pot some plants and that they would be moved at a later date. The sums appear in the accounts under the garden maintenance expenses of £668

20. It appeared to the Tribunal that the Applicant had not appreciated that this was the position and had taken the failure to put pots outside the rear of his flat as a personal slight. This was consistent with his general views that the only benefit he received from the work done by the Respondent was incidental to benefits conferred on other tenants; for example there was no lighting on his flats side of the Block whereas there was on the other side.

21. The Tribunal considers that the expenses of the pots falls within the sums payable by way of service charge under clauses 3 (1), (6), 4 (2) (f) and 4 (3). Whilst the Tribunal does not consider that Mr Manek had been unfairly

treated in the positioning of the pots, even if he had, it does not detract from his liability to pay service charges; there is no requirement of equal benefit to all the tenants. Mr Manek correctly volunteered that he paid for the maintenance of the lift, even though his flat was on the ground floor. This was a good example of the fact that equal benefit was not a pre requisite of liability. The Tribunal noted that he had been required to remove pots he placed on communal areas, but considered that he was not being asked to pay for those pots. The charge related to pots that had been placed around the Block, including outside the front of his own flat. For those reasons the Tribunal determines that section 19 does not prohibit the recovery of the total sum claimed.

22. Finally, by way of comment, the Tribunal considered that the lighting arrangement was not an example of discrimination against Mr Manek, but reflected the fact that on the other side of the Block lighting had been placed where there was a path way open to the street leading to the garages at the rear. On Mr Manek's side, although there was a passage at the side of the Block, there was no intended pathway as there was a low wall between the garden at the front and the pavement.

Managing Agents Fees £2,280

23. Mr Manek disputes this figure on the basis that the agents have done nothing to assist him and in fact have been insulting and obstructive to him. He stated that he does not query the quantum per se (i.e. that in different circumstances £2,280 would be a reasonable fee) he objects on the basis that all of their services are provided for the benefit of the other leaseholders and whenever he does benefit, that is purely incidental to benefits being incurred on others. In support of this view he relied on the agents refusal to carry out his requests for various works as well as their strict enforcement of his covenants and their failure to enforce other

leaseholders covenants. This was a challenge both under section 19 and under the terms of the lease.

24. Mr Manek also raised an allegation that the managing agents had a conflict of interest in relation to their connection with a building contractor, Blue Ice, who had been used to clear some items from the Block at a cost of £40. He asked the Tribunal to infer from the fact that Mrs Pearce, the Respondents' managing agent, was the officer of a company to which the sole trader behind Blue Ice, Mr Hedges, was also director meant that there was a conflict of interest which put her in breach of the RICS code of practice for managing agents. He also suggested that there may be similar conflicts with other contractors employed to undertake works to the Block. He referred to the list of contractors set out in the service charge accounts, but stated that he had not made any enquiries as to any specific connections.

25. Mr Manek candidly accepted that in terms of what the Tribunal considered to be the core functions of a managing agent, there were no issues; these being: arranging insurance; arranging for cleaning of common parts and maintenance of the property, the garden and the lift.

26. The managing agents fees are based on £228 per unit per annum. The Respondent claims that these fees are reasonable and refutes the various allegations made by Mr Manek. In respect of Blue Ice, Mrs Pearce explained that she is the company secretary for many landlord companies and it happened that Mr Hedges (of Blue Ice) had a flat in a block which she managed and in respect of which she was a company secretary of the landlord company. Mr Hedges as a flat owner became a director of that company.

27. The Respondent maintained that it was not the managing agent who refused to carry out certain works that Mr Manek had requested, but that it was the Landlord company who made those decisions. As set out above, the landlord company shareholders are the flat leaseholders, each holding

10% of the company's shares. Mr Manek's proposals are dealt with at either AGMs or EGMs, but had not been approved by the Landlord. Saying this, the Respondent pointed to occasions when it had carried out services to his direct benefit, such as when he reported a rat in his flat, it was said that they promptly instructed pest control to deal with the issue. They also maintained that they had cause to write to other leaseholders in relation to compliance with the terms of their leases and in particular to one leaseholder who was parking inappropriately.

28. The Tribunal considers that this sum is recoverable under the terms of the lease (see clause 3 (6) (f) in particular) and that it is a sum that is reasonably incurred and that the services provided are to a reasonable standard. There was no complaint with the core functions that were being carried out by the managing agents. The Tribunal noted on inspection that the Block was maintained to a good standard. The Tribunal also considered that Mr Manek's complaint lay more with the decision making process of the Landlord company and towards a failure to carry out works that he would like to see done. The Tribunal does not consider that this impacts on the managing agents fees.

29. Finally the Tribunal does not consider that any adverse inference could be drawn from the coincidence of Mrs Pearce being an officer of building specific landlord company which had one of the contractors used on this Block as its director. This was not a joint commercial venture for Mrs Pearce and Mr Hedges, it was not possible to discern how this would compromise Mrs Pearce's ability to act as managing agent or how she was abusing her position or making any material gain vis a vis this Block out of the situation.

Communal Windows £4,454 / £370

30. Mr Manek asserts that there was no need to replace these windows. He also points to a discrepancy in maintenance whereby the upper floors are

maintained to a better standard than the lower floors and considers that this is due to the fact that directors of the landlord company live in the upper floors. He accepted that to a limited extent the previous windows had fallen into disrepair but considered that patch repair (new putty, repainting) should have been carried out rather than total replacement. This is a challenge under section 19 in that it was not reasonable to incur these costs given that patch repair should have been carried out rather than replacement.

31. The Respondent says that this is not a cost falling within this service charge year. However, there is £370 which relates to a planning application for the change of the windows (£170 for the application fee and £200 to the architect). However, in respect of the decision to replace, they considered that this was reasonable given that the existing window had been in situ for 60 years, were metal, contributed to heat loss (and would impact on overall heating costs, both through heat loss and the fact that the thermostat was situated in the communal areas). There would also be savings on the long term maintenance costs.

32. Although only £370 is relevant to this service charge year, the Tribunal considers that whether or not that sum was reasonably incurred will depend on whether it was reasonable to replace rather than repair the windows as this cost was a preliminary step towards replacement. The Tribunal's view is that it was reasonable to replace rather than repair. Whilst it appears repairs could have been carried out, it was equally sensible (if not more so) to replace the metal windows for the reasons set out by the Respondents. The Tribunal noted that all of the flats had replaced their windows years ago (including the majority of those in the Applicant's flat) and took this as a further indication that replacement was reasonable.

33. This determination does not deal with the final cost of the replacement.

Maintenance of Garages

34. Five of the garages at the rear of the Block are held by leaseholders. The remaining five are let out separately.

35. Mr Manek disputed the apportionment of costs relating to the garages that were charged to him under the service charge. Overall he considered that the cost of maintaining the garages at the rear of the block should not be charged to him as there are no provisions to do so under the terms of his lease. There are a number of items of service charge expenditure for which he claims an element covers the garages. He has identified the following items: insurance, water, sewerage, repairs, pest control, management fees, legal fees, LVT hearings, accountants fees. He put forward a suggestion that in respect of those items, the five separate let garages should contribute 0.49% each of the total expenditure for those sums to the service charge account.

36. The Respondent states that this issue has been raised before at a previous hearings on 8th June 2010 and 19th October 2011 (decisions dated 9th July 2010 and 19th December 2011) where it was decided that Mr Manek was liable for costs in relation to the garages, save that deduction (of £50) should be made for electricity and an element of insurance. They also confirmed that the separately let garages contributed one tenth of the maintenance of the garages which are paid into the general service charge for the block as a whole.

37. Mr Manek accepts that this issue has been raised before, yet he claimed that he was entitled to revisit it for this year end. Further, whilst he states that whilst he may have raised some of these items before, he did not pursue them then.

38. In relation to the items of expenditure he had identified as relating to the garages, he conceded that the water tanks, if they serviced the Block alone they should not be included. He also accepted that in relation to the

maintenance of the garages that if a contribution was made by the five leaseholders that that would be acceptable.

39. The Tribunal considers that although the charge relates to a new service charge year, this issue has already been determined by the Tribunal in its decision dated 19th December 2011, wherein it was recorded that Mr Manek had put forward the same arguments in relation to apportionment. Accordingly as the issue as to the general right of the Respondent to recover service charges for expenses in relation to the garage has already been determined, this Tribunal is not able to revisit the matter. Therefore the Tribunal determines that the sums payable are as set out in the accounts for the year end 2011 as they reflect the previous decision. In particular, that a deduction is made of £50 for the garages and additional £45 for insurance contribution.

40. If the Tribunal had not been so constrained, it would have found that the lease does provide clearly for the leaseholder to pay 10% of the Annual Maintenance Charge which includes the cost and expenses of the garages. That charge is paid in respect of the costs incurred in relation to 'the Property' which according to the particulars of the lease include the garages as they are within the area marked red on the lease plan (see clause 3 (6) and, the particulars of the lease and the lease plan).

Legal Costs £14,998

41. On the whole these related to costs incurred in the previous proceedings between the parties. There was one amount of £1,800 that pre dated that application, but related to Mr Manek's complaints and allegations.

42. The Applicant challenged these costs on two grounds. The first was that the Respondent had caused the litigation by its refusal to negotiate or attempt to settle the matter. Mr Manek claimed that he had sent a letter in

2009 inviting negotiation, that offer had remained open ever since, but had not been taken up.

43. He suggested that there was a racial motivation behind the Respondent's refusal to deal with him (and indeed he suggested that that was the reason or part of the reason for all of the uncooperative actions towards him). He relied on letters he had written in 2009 in which he recorded a racially insulting comment he had overheard one of his neighbours say. That neighbour had also been a director of the Respondent company. That director resigned in 2010. He also made reference to his car window being smashed and cigarette burns in his awning. He did not however, make any particular allegation as to who had done either of these acts or why.

44. The Second ground of challenge was that the fees claimed were absurd and that the Respondents had engaged solicitors who charged too much and had recourse to them far too often. Further, he maintained that they should have dealt with the previous Tribunal hearing without the assistance of solicitors as they had done now.

45. Finally he relied on clause 3 (8) which directed the Landlord to use its best endeavours to keep the Annual Maintenance Costs as the lowest reasonable figure consistent with observing its obligations under the lease.

46. The Respondent said that there was an impasse with Mr Manek which meant that unfortunately litigation had become unavoidable. It also pointed to the fact that he had instigated the proceedings. It was also said that it was Mr Manek who refused to negotiate, instead threatening litigation if his demands were not met and had even called EGMs which he then failed to attend causing inconvenience to the other leaseholders who had attended.

47. As for the specific costs, the Respondent stated that they were the costs of the previous proceedings before the Tribunal and that they had instructed a solicitor who charged an hourly rate of £220 per hour. They maintained that

there were complex issues which justified a solicitor and it is noted that the Tribunal in refusing to make a section 20C order, did comment that '*These are complex issues which merit its representation and professional advice*' (paragraph 77). The Respondents had chosen to represent themselves and with their managing agents on this occasion in an attempt to keep costs down, but also because they considered that the more complex issues had been dealt with at the previous hearing.

48. In the Tribunal's view the Respondents were justified in seeking legal representation during the course of the previous proceedings. As the Tribunal then noted, the matter was complex and justified professional advice. The Tribunal also considers that the Respondents were not unnecessarily relying on legal advice and that this was demonstrated by their decision not to use such advice in these proceedings. They were able to be selective in that regard. Further in respect of the amount, the Tribunal considers that although it is a substantial figure, it does include preparation and attendance at a pre trial review and a hearing. The Tribunal therefore determines that this sum is recoverable under the terms of the lease (clause 3 (6)(f)), that clause 3 (8) is no bar to its recovery as it was necessary and that it was reasonable to incur these costs and the services provided were to a reasonable standard for the purposes of section 19.

General complaint

49. Mr Manek raised during the course of the hearing his view that there were a number of tenants who were voiceless at the AGM's and EGM's and that the Landlord company was only able to make its decisions (and decisions adverse to Mr Manek) because a number of leaseholders, although disagreeing with those decisions, wanted a quiet life.

50. Unfortunately, even if this was the case, there was little that the Tribunal could do. At best the Tribunal could have taken that into account in considering whether or not sums had been reasonably incurred. However,

as discussed during the hearing, the Tribunal approached the matter on the basis of the particular sums challenged not on generalised dissatisfaction.

51. In any event, the Tribunal did not see any positive evidence of the voiceless tenants. Indeed, the inferences could be drawn the other way, as a significant number of the leaseholders attended the hearing in support of the Respondent and the Tribunal noted that no other leaseholder had written in support of the Applicant let alone joined in the application.

52. At pargraph 75 of the Tribunals decision dated 19th December 2011, the Tribunal stated '*Many of the Applicant's concerns might well relate to the management of the Company rather than the service charge issues, and his proper route in those cases would therefore be at general meetings of the Company and not via the LVT*'. Unfortunately, this still appears to remain the case and be the cause of the continuing difficulties between the parties.

Section 20 C and refund of application fee and costs order.

53. The Applicant made an application for an order under section 20C to limit the recovery of the costs incurred in these proceedings under the service charge and for a refund of his application fee. The Respondents resisted both those and made an application for costs under paragraph 10 of Schedule 12 of the Commonhold and Leasehold Reform Act 2002.

54. The Applicant stated that despite all their legal advice, the Respondent still failed to appreciate his right to challenge the service charges and that he was experiencing real problems with his property because of the refusal to do the works he requested. The Respondent relied on the fact that Mr Manek was repeatedly going over the same items and causing them to incur more costs. They also referred to the futility of his actions given that he was a 10% shareholder and therefore even if sums were not recoverable under the service charge, he could be called to contribute in his capacity as shareholder.

55. The Tribunal declines making an order under section 20C or for refunding the application and hearing fee. As set out above, the Applicant has lost on each point raised, some of them being issues that had previously been determined by the Tribunal. It also appears to remain the case that the Applicant's problems are to do with the decision making process of the Landlord Company rather than the costs incurred in carrying out works.

56. The Tribunal does make an award of costs of £100 in favour of the Respondent under paragraph 10 of Schedule 12. It does so for the following reasons. Firstly, the Tribunal was unimpressed with Mr Manek's reason for the very late delivery of evidence to this Tribunal. His statement that he was busy at work appeared flippant and frivolous and undoubtedly caused disruption in the course of these proceedings. Further, the issues, in particular, in relation to the garage had already been dealt with by the Tribunal and was therefore vexatious and an abuse of process.

Summary

57. In summary the Tribunal makes the following determination in respect of the sums challenged for the year end 2011:

    a. The sum of £668 for garden maintenance is payable;

    b. The management fees of £2,280 are payable;

    c. £370 is payable in respect of the application for planning permission for the new communal windows;

    d. No adjustment should be made for the garages save for that already determined by the Tribunal in its decision dated 19th December 2011;

    e. The sum of £14,998 is payable for legal fees incurred.

58. In addition the Tribunal makes no order under section 20C of the 1985 Act, makes no order in relation to the application fee and makes an award of £100 in respect of costs against the applicant.

SIGNED .

Daniel Dovar LLB (Hons)

Chairman

14th February 2013