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FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**CHI/45UG/LSC/2013/0018** **CHI/45UG/LSC/2013/0019** **CHI/45UG/LSC/2013/0020**
Property	:	**3 Bryon Court, 7 Kipling Court and 9 Chaucer Court, Winnals Park, Paddockhall Road, Haywards Heath, RH16 1ET**
Applicant	:	**(1) Mr R Long (2) Mr and Mrs Paice (3) Mr and Mrs Campbell**
Representative	:	**In person**
Respondent	:	**Winnals Park Haywards Heath Residents Co. Ltd**
Representative	:	**Ms M Knowles, Solicitor from Griffith Smith Farrington Webb LLP**
Type of Application	:	**For the determination of the reasonableness of and the liability to pay a service charge**
Tribunal Members	:	**Judge I Mohabir** **Ms C Barton**
Date and venue of Hearing	:	**20 June 2013** **11 July 2013** **The Hickstead Hotel, Haywards Heath**
Date of Decision	:	**13 September 2013**

DECISION

Introduction

1. These are consolidated applications made by the Applicants for a determination under section 27A of the Landlord and Tenant Act 1985 (as amended) ("the Act") for a determination of their liability to pay and/or the reasonableness of various service charges for the properties known as 3 Bryon Court, 7 Kipling Court and 9 Chaucer Court, Winnals Park, Paddockhall Road, Haywards Heath, RH16 1ET ("the flats"), of which they are the lessees.

2. The flats form part of 96 residential flats in 6 separate purpose built blocks of flats, which comprise the estate the estate known as Winnals Park. The Respondent is the freeholder, having acquired that interest in 1989. The leases granted in respect of all of the flats on the estate, including those held by the Applicants, were on the same terms.

3. It is not necessary to set out the relevant contractual terms that give rise to the Applicant's service charge liability because they did not contend that the service charge costs in issue are not recoverable under the terms of their respective leases. The challenge they made was limited to the reasonableness of those costs.

4. At the time of issue of these applications, the service charge costs in issue related the actual expenditure for the years 2011 and 2012 and the estimated expenditure for 2013.

5. At the first hearing the Applicants withdrew their applications in relation to 2013 and reserved their position to challenge the actual expenditure for this year when it became known and if they considered one or more heads of expenditure to be unreasonable.

6. At the same hearing, the Respondent conceded that the expenditure claimed in respect of 2011 was caught by the provisions of section 20B of the Act (see below) and was irrecoverable.

7. Consequently, the only year that fell to be considered by the Tribunal was the actual expenditure incurred in 2012. In addition, to challenging the reasonableness of various heads of expenditure, the Applicants also took two specific legal points regarding the recoverability of the expenditure in this year. Firstly, it was submitted that all of part of the expenditure was also caught by section 20B of the Act. Secondly, that the Respondent had failed to carry out statutory consultation under section 20 of the Act in relation to the major works costs incurred in that year. The Respondent had conceded that section 20 consultation had not taken place and had issued an application under section 20ZA seeking retrospective dispensation from the requirement to consult. Each of these issues is considered in turn below.

9. In the context of this case, it is important to set out the background against which these applications have been made.

10. The Respondent is a "tenant owned" company. Since it acquired the freehold in 1989, it has been run by the lessees for their mutual benefit, albeit in an amateur fashion. It seems that service charge accounts have not been prepared historically and the lessees paid a monthly service charge contribution by direct debit to meet the estimated expenditure in any given year.

11. The Tribunal was told, and it was not challenged by the Applicants, that they became Directors of the Respondent company in 2001. From then on, Mr Long took an active interest in the management of the estate in tandem with the managing agent. Mrs Paice eventually became the Company Secretary and Treasurer and assisted with the financial management of the estate with Mr Long, who came to be regarded as the "lead" Director.

12. In October 2010, Mr Long resigned as a Director and subsequently Mrs Paice resigned as the Company Secretary and Treasurer in or about October 2012

The Relevant Law

13. The statutory provisions that apply to this application are set out in the Appendix annexed to this decision.

Hearings

14. The initial hearing in this matter took place on 20 June 2013. The Applicants appeared in person. The Respondent was represented by Ms Knowles, a Solicitor from the firm of Griffith Smith Farrington Webb LLP.

15. At this hearing, the Tribunal heard evidence as to the heads of service charge expenditure challenged by the Applicants. The legal issues regarding section 20B and 20ZA were adjourned and heard on 11 July 2013 when the same parties appeared before the Tribunal.

Decision

2012

Section 20B

16. Each service charge year ends on 31 December of each year. It was conceded by Ms Knowles that no formal section 20B(2) notice had been served on the lessees in relation to this year. However, draft service charge accounts had been delivered to each lessee on 19 March 2013, albeit without the statutory notice setting out the tenants' right and obligations. A second set of accounts was delivered on 23 June 2013. The Applicants contended that both sets of accounts were in fact company accounts.

17. Ms Knowles submitted, firstly, that the first set of accounts amounted to sufficient notice under section 20B(2) of the Act. They had been served with a caveat that they might be subject to amendment.

Furthermore, section 20B(2) does not require tenants to be provided with any specific information. There was no material difference if separate service charge accounts had been prepared and the draft account complied with the contractual requirement set out in clause 6(D)(iv)(b) of the leases.

18. Secondly, and in the alternative, Ms Knowles submitted that the accounts fell within the 18-month time limit prescribed by section 20B(1) as the calculation of time has to be done on an invoice basis and, therefore, a degree of apportionment would have to take place. She relied on the authority of ***O M Property Management Ltd v Burr*** [2013] EWCA Civ 479 where the Court of Appeal held that the 18 month time limit does not begin to run until an invoice is presented or payment is made by the landlord.

19. Understandably, the Applicants, as lay persons, did not make any specific submissions in reply.

20. The first issue the Tribunal had to decide was whether the covering letter from the managing agents dated 21 June 2013 and served with the second service charge accounts on 23 June 2013 amounted to sufficient notice under section20B(2) of the Act. The Tribunal concluded that it was. The letter made it express and clear that if there was any future liability for the 2012 expenditure, then the letter was to be treated as a notice served pursuant to the section. In the Tribunal's judgement, this satisfied the requirements of section 20B(2) and the Respondent was, in principle, entitled to recover the expenditure incurred in 2012, subject to the point below. It was, therefore, not necessary for the Tribunal to go on to consider when the 18-month time limit imposed by section 20B(1) might commence.

Section 20ZA

21. The Tribunal then turned to consider the Respondent's section 20ZA application. It was made in relation to the cost of major works in 2012

regarding porch replacements on various blocks and the installation of a door entry system. A stated earlier, it was conceded by the Respondent that it had not carried out the statutory consultation required by section 20 in relation to the major works.

22. The Tribunal granted the application to retrospectively dispense with the requirement on the Respondent's part to carry out statutory consultation regarding the major works.

23. As Ms Knowles correctly submitted, the test that the Tribunal had to apply to any such application was set out in the Supreme Court judgement in ***Daejan Investments Ltd v Benson & Ors*** [2013] UKSC 14. The Tribunal had to establish whether any real prejudice had accrued to the tenants by the landlord not have carried out consultation.

24. In the present case, the Tribunal was satisfied that the Applicants had not suffered any real prejudice. It was clear from the body of correspondence when, certainly, Mr Long was a Director of the Applicant company that he was proactive in seeking to have all of the porches to the various blocks on the estate replaced and the door entry system installed. He wanted to do so to *"modernise and improve the fabric of the estate"*. The Tribunal, therefore, concluded that it was not open to the Applicants to argue that the scope of the porch replacements was excessive, that the door entry system was an improvement under the terms of the lease and additional cost incurred amounted to prejudice.

25. Furthermore, the Applicants had adduced no evidence as to the condition of the 6 porches that had been replaced in 2012. The Tribunal was satisfied that clause 6(D)(vii) of the leases permitted the installation of the door entry system and that it did not amount to an improvement and that the cost was recoverable as service charge expenditure by the Respondent.

26. Indeed, in carrying out the major works, the Respondent had merely adopted the same contractors used by Mr Long in 2009 to replace porches and in respect of which no statutory consultation had been undertaken by him. No objections had been raised by any of the Applicants at the time as to the nominated contractor or the estimated cost. The only discussion that appears to have taken place between them was the timing of the work.

27. Accordingly, the Tribunal was satisfied that the Applicants could not establish any real prejudice by the Respondent failing to consult in relation to the major works. It follow, that the Tribunal found it reasonable in the circumstances to grant dispensation retrospectively.

Repairs & Maintenance

28. A figure of £93,540 was provided under this head of expenditure, which appeared to be a composite figure relating to various items. Of the total, the following items were challenged by the Applicants:

(a) *Legal Invoices*

Although the Respondent was not able to provide a precise figure for this expenditure, the Tribunal was told that it related to the preparation of the Respondent's company accounts that had to be filed at Companies House. Although it included the service charge expenditure in this year, its primary purpose was to comply with the requirement of the Companies Acts for the filing of annual accounts. The Tribunal found that this expenditure was irrecoverable through the service charge account. It is now settled law, in a number of right to manage decisions, that expenditure incurred in relation to a company such as the Respondent cannot be recovered in this way and is disallowed. It is hoped that the figure can be ascertained and will not prove to be factually contentious.

(b) *Christmas Lights*

This expenditure of approximately £1,000 was disallowed because it is not recoverable as service charge expenditure under the terms of the leases.

(c) *Mr Jarvis*

This gentleman is employed by the Respondent as a handyman to carry out various tasks of repair, maintenance and gardening. Apparently, the sum of £15,800.22 had been paid to him in this regard. Of this amount, the Tribunal made the following determination.

Mr Jarvis had in fact been appointed by Mr Long during his tenure and it was not open to him to now take the point that he had no contract or that his role is unclear.

The sum of £156 was disallowed because "research" done by Mr Jarvis had not been reasonably incurred.

The other costs paid to Mr Jarvis were allowed as reasonable because the Applicants had not been able to prove otherwise.

The Tribunal found that the "contract" under which Mr Jarvis was employed was not a qualifying long-term agreement. It was an oral contract entered in to by Mr Long that was automatically renewed annually.

The Tribunal was satisfied that the other costs falling under this head had been apportioned properly.

Cleaning

29. Again, it seems that Mr Long had appointed Mr Carmody to clean the common parts of the blocks. He is both a lessee and a Director of the Respondent company. His appointment by Mr Long was done orally in

2007 or 2008 and he charged £110 per week, which had also been agreed by Mr Long.

30. The Tribunal found the expenditure of £6,176 to be reasonable. Given that Mr Carmody's appointment and remuneration were agreed by Mr Long, it was not open to them to now argue that the same level of remuneration was unreasonable.

Gardening

31. As mentioned above, this is carried out by Mr Jarvis. The Tribunal rejected the Applicants' submission that the cost of £9,746 was excessive because of the frequency and scope of the work carried out by Mr Jarvis. On inspection, the Tribunal found this was not so. In addition, the Applicants provided no evidence to prove that the costs were excessive, save for a mere assertion otherwise. It is perhaps pertinent to note that the gardening costs were greater during Mr Long's tenure. The issue raised as to whether Mr Jarvis is employed under a qualifying long-term agreement has already been dealt with above. This expenditure was found to be reasonable.

Insurance

32. Of the total expenditure of £5,027, the Tribunal agreed with the submission made by the Applicants that the sum of £159 paid for additional cover for the Directors and Officers of the Respondent company was not recoverable as service charge expenditure. This is solely an item of company expenditure and as such cannot be recovered.

Managing Agent's Fee

33. Within the overall expenditure of £5,069, it seems that an amount is paid to the Company Secretary for remuneration of the services provided in that capacity. The Respondent was unable to tell the Tribunal what that figure might be. Nevertheless, it was conceded that it was a company cost and should be borne by the Respondent. Again,

it is hoped that the figure can be ascertained and will not prove to be factually contentious.

Gatehouse Telephone

34. The Tribunal agreed with the Applicants' submission that the expenditure of £274 had not been reasonably incurred because the gatehouse had never been used and this expenditure should have been cancelled and was disallowed.

Audit

35. It was common ground that the total audit fee of £1,800 included the cost of preparing the company accounts, which also included information about the service charge expenditure in this year. Following the Tribunal's reasoning above as to company costs being irrecoverable, the Tribunal determined that there should be a 50% apportionment of the expenditure and allowed £900 as being reasonable.

Accounting

36. For the same reasons set out above regarding audit expenditure, the Tribunal allowed the sum of £900 as being reasonable.

Bank Charges

37. These were agreed in the sum of £90 by the Applicants.

Sundry Expenses

37. The Tribunal accepted the submission made by Ms Knowles that the expenditure of £154 was recoverable under clause 6(D)(viii) of the leases as it had been incurred in relation to the cost of organising the tenants' meetings and was a proper part of the management function of the Respondent. Accordingly, it was allowed as claimed.

Bookkeeping

38. This function was performed by the Company Secretary or Treasurer. The Applicants argued that an element of the overall expenditure of £1,450 was attributable to the cost of collection of ground rents and the payment of the Respondent's expenditure. As such, they submitted it was not recoverable through the service charge account and that 50% of the expenditure should be disallowed.

39. The Applicants' submission failed for two reasons. Firstly, it seems that the remuneration of the Company Secretary and/or the Treasurer for carrying out bookkeeping was introduced by Mrs Paice during her tenure. Historically, this role had been unremunerated. When Mrs Paice performed this function no distinction was drawn by her or any of the Applicants between the various administrative functions performed by her, as they now sought to do. In the Tribunal's judgement, it was not open to the Applicants to now take this point. In addition, they had not adduced any evidence as to what proportion of the expenditure, if any, was solely attributable to the Respondent. Accordingly, it was allowed as claimed.

Kipling Court Lift Insurance/Maintenance/Telephone

40. This expenditure was agreed by the Applicants.

Rent of Garage

41. The sum of £720 paid by the Respondent to rent a garage on the estate for storage purposes was agreed by the Applicants.

Section 20C

42. The Tribunal determined that no order should be made under section 20C of the Act, as it was not just and equitable in the circumstances of this case to do so. The Tribunal came to the inescapable view that the applications made by the Applicants were opportunistic in nature given their long and involved relationship with the Respondent company. They had in effect sought to challenge those costs and practices used by

the Respondent in the management of the estate that they themselves had operated under without complaint and had, in many instances, initiated. Moreover, the Applicants had largely been unsuccessful in the challenges they had brought. In the circumstances, the Tribunal considered that no order should be made.

Fees

43. For the same reasons set out above, the Tribunal also determined that no order should be made reimbursing the Applicants the fees they had paid to the Tribunal to have these applications issued and heard.

Judge I Mohabir
13 September 2013

Appeals :

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application to the First-tier Tribunal at the Regional office which has been dealing with the case.
2. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.
3. If the person wishing to appeal does not comply with the 28-day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28-day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.
4. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking.

Appendix of relevant legislation

Landlord and Tenant Act 1985

Section 18

(1) In the following provisions of this Act "service charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent -

(a) which is payable, directly or indirectly, for services, repairs, maintenance, improvements or insurance or the landlord's costs of management, and

(b) the whole or part of which varies or may vary according to the relevant costs.

(2) The relevant costs are the costs or estimated costs incurred or to be incurred by or on behalf of the landlord, or a superior landlord, in connection with the matters for which the service charge is payable.

(3) For this purpose -

(a) "costs" includes overheads, and

(b) costs are relevant costs in relation to a service charge whether they are incurred, or to be incurred, in the period for which the service charge is payable or in an earlier or later period.

Section 19

(1) Relevant costs shall be taken into account in determining the amount of a service charge payable for a period -

(a) only to the extent that they are reasonably incurred, and

(b) where they are incurred on the provisions of services or the carrying out of works, only if the services or works are of a reasonable standard;

and the amount payable shall be limited accordingly.

(2) Where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable, and after the relevant costs have been incurred any necessary adjustment shall be made by repayment, reduction or subsequent charges or otherwise.

Section 27A

(1) An application may be made to a leasehold valuation tribunal for a determination whether a service charge is payable and, if it is, as to -

(a) the person by whom it is payable,

(b) the person to whom it is payable,

(c) the amount which is payable,

(d) the date at or by which it is payable, and
(e) the manner in which it is payable.

(2) Subsection (1) applies whether or not any payment has been made.

(3) An application may also be made to a leasehold valuation tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs and, if it would, as to -
(a) the person by whom it would be payable,
(b) the person to whom it would be payable,
(c) the amount which would be payable,
(d) the date at or by which it would be payable, and
(e) the manner in which it would be payable.

(4) No application under subsection (1) or (3) may be made in respect of a matter which -
(a) has been agreed or admitted by the tenant,
(b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,
(c) has been the subject of determination by a court, or
(d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.

(5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.

Section 20

(1) Where this section applies to any qualifying works or qualifying long term agreement, the relevant contributions of tenants are limited in accordance with subsection (6) or (7) (or both) unless the consultation requirements have been either—
(a) complied with in relation to the works or agreement, or
(b) dispensed with in relation to the works or agreement by (or on appeal from) a leasehold valuation tribunal.

(2) In this section "relevant contribution", in relation to a tenant and any works or agreement, is the amount which he may be required under the terms of his lease to contribute (by the payment of service charges) to relevant costs incurred on carrying out the works or under the agreement.

(3) This section applies to qualifying works if relevant costs incurred on carrying out the works exceed an appropriate amount.

(4) The Secretary of State may by regulations provide that this section applies to a qualifying long term agreement—

(a) if relevant costs incurred under the agreement exceed an appropriate amount, or
(b) if relevant costs incurred under the agreement during a period prescribed by the regulations exceed an appropriate amount.

(5) An appropriate amount is an amount set by regulations made by the Secretary of State; and the regulations may make provision for either or both of the following to be an appropriate amount—
(a) an amount prescribed by, or determined in accordance with, the regulations, and
(b) an amount which results in the relevant contribution of any one or more tenants being an amount prescribed by, or determined in accordance with, the regulations.

(6) Where an appropriate amount is set by virtue of paragraph (a) of subsection (5), the amount of the relevant costs incurred on carrying out the works or under the agreement which may be taken into account in determining the relevant contributions of tenants is limited to the appropriate amount.

(7) Where an appropriate amount is set by virtue of paragraph (b) of that subsection, the amount of the relevant contribution of the tenant, or each of the tenants, whose relevant contribution would otherwise exceed the amount prescribed by, or determined in accordance with, the regulations is limited to the amount so prescribed or determined.]

Section 20B

(1) If any of the relevant costs taken into account in determining the amount of any service charge were incurred more than 18 months before a demand for payment of the service charge is served on the tenant, then (subject to subsection (2)), the tenant shall not be liable to pay so much of the service charge as reflects the costs so incurred.

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

Section 20C

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

not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application.

(2) The application shall be made—

(a) in the case of court proceedings, to the court before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to a county court;

(aa) in the case of proceedings before a residential property tribunal, to that tribunal;

(b) in the case of proceedings before a residential property tribunal, to the tribunal before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to any residential property tribunal;

(c) in the case of proceedings before the Upper Tribunal, to the tribunal;

(d) in the case of arbitration proceedings, to the arbitral tribunal or, if the application is made after the proceedings are concluded, to a county court.

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