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

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| **Case reference** | : | **LON/00AM/LSC/2014/0491** |
| **Property** | : | **39 Bamboo Court, Woodmill Road, E5 9GJ** |
| **Applicant** | : | **Mr Michael Spencer** |
| **Representative** | : | **None** |
| **Respondent** | : | **Altius One (Hackney) Management Company Limited (1)**<br>**George Wimpey East London Limited (2)** |
| **Representative** | : | **None** |
| **Type of application** | : | **For the determination of the reasonableness of and the liability to pay a service charge** |
| **Tribunal members** | : | **Tribunal Judge R Percival**<br>**Mr M Cairns MCIEH** |
| **Date and venue of hearing** | : | **10 Alfred Place, London WC1E 7LR**<br>**19 January 2015** |
| **Date of decision** | : | **23 January 2015** |

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**DECISION**

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## The application

1. The Applicant seeks a determination pursuant to section 27A of the Landlord and Tenant Act 1985 ("the 1985 Act") as to the amount of service charges payable by the Applicant in respect of the service charge year 2012, encompassing both advance and deficit service charges.

2. The relevant legal provisions are set out in the Appendix to this decision.

3. With the consent of the parties, the application was considered on the papers without a hearing or an inspection.

## The background

4. The property which is the subject of this application is a one bedroom flat in a purpose built block. It is part of a wider estate including two other blocks (Aster Court and Walnut Court).

5. The Applicant holds a long lease of the property which requires the landlord to provide services and the tenant to contribute towards their costs by way of a variable service charge. The specific provisions of the lease and will be referred to below, where appropriate.

## The issues

6. The applicant contends:

   (i) That the demands for service charge relating to 2012 (both prospective and as a deficit charge) are not payable because the notices did not comply with sections 47 and 48 of the Landlord and Tenant Act 1987; and

   (ii) That historic electricity charges included in the service charge for that year are not payable as a result of the limitation on recovery of costs incurred more than 18 months before demand contained in section 20B in the 1985 Act.

## Sections 47 and 48 of the Landlord and Tenant Act 1985

7. The respondent concedes that the two notices in issue (dated 20 January 2012 and 13 September 2013) did not comply with the requirements of sections 47 and 48, bearing either no name and address or an incorrect name and/or address for the landlord.

8. The Tribunal finds that the notices were not compliant and are accordingly ineffective. The Applicant argues that the effect of non-compliance is that his underlying liability to pay the service charge identified in the notices is thereby entirely extinguished. The Respondent describes the effect as being to "suspend" the Applicant's obligation to pay the service charge, and that if and when they are correctly re-issued in a compliant form, the Applicant will become liable to pay them.

9. The Respondent is indeed entitled to re-issue compliant notices. This is clear from the wording of sections 47 and 48, which clearly relate to the sums as demanded in the notice (and, in section 47, the relief from liability is expressly limited to any time before the correct details are provided). As the Respondent states in its statement of case, this point is noted in both *Betov Properties Limited v Ellston Bentley Martin* [2012] UKUT 0204 (LC), [13] and in *Triplerose Limited v Grantglen Limited and Cane Developments limited* [2012] UKUT 133 (LC) , [15].

10. The Applicant contends that the freeholder is, and at all times since the lease was agreed, has been, George Wimpey East London Limited. The Respondent has not denied this.

**Section 20B of the Landlord and Tenant Act 1987**

11. In a strict and narrow sense, our conclusion in respect of sections 47 and 48 of the 1987 Act disposes of this application. However, as we have indicated, the applicant's success is itself of a narrow and technical nature, given the ability of the Respondent to serve a corrected service charge demand. It is therefore clearly appropriate for the Tribunal to also rule on the substantive question before us under section 20B of the 1985 Act.

12. Section 20B is set out in the appendix to this decision.

13. The letter accompanying the service charge notice dated 13 September 2013 explained that "Scottish Power had historically been sending invoices for the Aster Court meter, from the point of build, to Taylor Wimpey's address. In turn there was a large debt on that particular meter when were notified. The previous Property Manager for the development set up a payment plan with Scottish Power to reduce the debt on a monthly payment plan, hence the extremely high amount that was reflected in the end of year accounts."

14. Aster Court is another of the blocks on the estate. The Applicant does not contest his liability for expenditure in relation to other blocks under the lease.

15. The submissions of the parties have concentrated on when various individuals within a succession of managing agents responsible for the estate knew, should have known or must have known about the error in not paying for the electricity. In particular, the Applicant has engaged in a minute and detailed forensic analysis of the events and the available documents to support his case. For reasons that will become apparent, we do not consider it necessary to engage with these factual disputes.

16. It is not contested that invoices for the electricity consumed in Aster Court were issued by the electricity supplier from 2006, when the estate was completed. When the managing agent was aware of the invoices was contested; and we have no evidence as to when the electricity bills for Aster Court started to be paid. However, it is clear that the contested deficit payment is attributable to unpaid bills going back to 2006.

17. The letter dated 13 September 2013 quoted above stated that the electricity invoices had been sent to "Taylor Wimpey". In its statement of case, the Respondent says the invoices "had been sent to the freeholder instead of the Respondents". It is clear that in this statement, the author means by "the Respondents" the managing agents. However, the freeholder clearly is a party to this dispute. The entity he considered was the freeholder is named by the Applicant in his application to the Tribunal (George Wimpey East London Limited); and the same was named as second Respondent in the Tribunal's directions. The Respondent has not claimed that the electricity invoices were sent to the wrong entity.

18. Accordingly, we find as a fact that the electricity invoices were, as the Respondent states, sent to "the freeholder"; that the freeholder is a party to these proceedings; and its interests are represented by the succession of managing agents involved in the management of the estate.

19. It is clear that "costs" are *not* "incurred" for the purposes of section 20B when a service – in this case electricity – is supplied or used: *OM Property Management Limited v Burr* [2013] EWCA Civ 479, [2013] 1 WLR 3071. To the extent that the Applicant argues otherwise, we find against him.

20. In *Burr*, both the Court of Appeal ([15]) and the Upper Tribunal ([23], quoted by the Court of Appeal at [8]) expressly declined to find whether costs were incurred when payment was made or when an invoice was presented.

21. On our findings so far, the electricity invoices were, from 2006 onwards, sent by the supplier to the freeholder and that in doing so the electricity supplier was not in error. Subsequently, in 2012, modified

arrangements were agreed between the electricity supplier and the Respondent to pay what were by then considerable arrears.

22. In *Burr*, unlike this case, the gas supplied had been wrongly invoiced by a company that had not, in fact, supplied it. In such circumstances, the "costs" could not have been "incurred" until payment was, later, made to the right supplier.

23. In this case, therefore, unlike *Burr*, we have to decide whether the "costs" were "incurred" when the invoices were presented, or when (in some cases, years later) the invoiced sums were paid.

24. Although that question was not decided in Burr, this passage in the Upper Tribunal was quoted by the Court of Appeal with apparent approval:

> "... 'costs' are 'incurred' on the presentation of an invoice or on payment; but whether a particular cost is incurred on the presentation of an invoice or on payment may depended upon the facts of the particular case. It is possible for foresee that where, for example, payment on an invoice has been long delayed, the decision as to when the cost was actually incurred might be different depending on the circumstances; it might be relevant to decide whether the payment was delayed because there was a justified dispute over the amount of the invoice or whether the delay was a mere evasion of device of some sort. In the former case the tribunal of fact might find that the costs were not incurred until a genuine dispute was settled and the bill paid. In the latter case the tribunal might be very reluctant to allow deliberate prevarication to postpone the running of the time limit imposed by section 20B."

25. We consider that this passage, although technically not a binding part of the judgment, is a correct statement of the law. The question for us thus becomes whether the facts of this particular case favour the conclusion that the costs were incurred on invoice or payment.

26. We conclude that the costs were incurred on the presentation of the original invoices. While it would be wrong to characterise the events leading to the non-payment as being "a mere evasion or device", there was certainly no genuine dispute. Rather, we would characterise the non-payment a result of incompetence on the part of the Respondent. It was incompetent on the part of the freeholder, the principal, not to take cognisance of the invoices and (as no doubt would have been the sensible practice) to pass them to the managing agent. It was also arguably incompetent of the (various) managing agents not to have noticed that a third of the estate was not paying for its electricity.

27. The legislative intention behind section 20B was clearly to ensure that landlords act with reasonable dispatch when recouping costs imposed on them by the lease by way of service charges. Sub-section (2) provides an exception where notice is given that costs had been incurred that would subsequently be recouped. The landlord in this case did not act with reasonable dispatch after the costs were properly invoiced. Even if the legislative intention of the section is construed more narrowly to reflect only the exception to the general rule, the Applicant in this case was not on notice that he would have to pay for electricity which had been consumed and invoiced in some cases several years earlier.

28. The result of this conclusion is that, for the purposes of section 20B, a cost was incurred when an invoice was first presented by the electricity supplier to the freeholder; and accordingly any element of service charge in the demand dated 13 September 2013 which is attributable to an invoice so presented on or before 12 March 2012 is not payable.

29. It is not possible for us to calculate what the proper liability of the Applicant is, given this finding. This is so for two reasons. First, the materials before us are not sufficient for us to be able confidently to distinguish between demands for service charges for electricity that were first demanded in one of the invoices ignored by the freeholder, then repeated as part of the later arrangement and those that arose at a later date and was properly dealt with by the managing agent. Secondly, it may be that our finding in respect of sections 47 and 48 of the 1987 Act may have an effect on what is or is not claimable by the Respondent, in this or in other respects.

30. It will therefore be for the Respondent, in the first place, to determine what can properly be charged when and if the Respondent makes a substituted demand for the service charge. In advance of that exercise (which may be better conducted in dialogue with the Applicant), we make it clear that our finding in respect of when the electricity costs were incurred for the purposes of section 20B is confined to the particular context provided by the delayed payment of the invoices which were ignored. Whether costs (for electricity supply or otherwise) fall to be considered as incurred on invoice or on payment outside that particular factual context remains on open question.

## The Applications for an order under section 20C of the 1985 Act and for refund of the tribunal fees

31. The Applicant argues that, first, the managing agents should have complied with sections 47 and 48, and accordingly should not be permitted to pass on their legal fees to the tenants. Further, he makes the point that he has repeatedly communicated with the Respondent in an attempt to make clear his case in respect of sections 47 and 48. The managing agent effectively forced his hand in applying to the Tribunal

by ignoring his letters and threatening to pass his account to debt collectors.

32. The Respondent says that the managing agent is a leaseholder owned company whose only source of income is through service charges. Preventing legal fees being recovered through the service charge "could lead to the company being dissolved". The Respondent also submits that it has not acted unreasonably or vexatiously.

33. The Applicant's response is that the Respondent should look to the previous managing agent to make good a deficiency arising from meeting his costs. He further rehearses his efforts to engage the managing agents, and – summarising the effect of his narrative – what he would characterise as their inefficiency and obstructiveness. He also asserts that allowing the Respondent to pass on the costs of the application to the Applicant would create a significant disincentive to applicants asserting their rights before the tribunal.

34. There are two relevant clauses in the lease. The first is the covenant by the leaseholder in clause 12 of the third schedule

> "to pay all expenses ... incurred by the Company or the Management Company in the recovery of any arrears of Maintenance Charge or incidental to the preparation and service of any notice under Section 146 of the Law of Property Act 1925 (or any statutory modification re-enactment or replacement thereof) notwithstanding that forfeiture is avoided (otherwise than by relief granted by the Court)"

"Maintenance charge" is the term used to describe the general variable service charge in the lease.

35. The second clause (sixth schedule, part I, clause 9) allows the landlord to recover through the service charge

> "the costs incurred by the Management Company in bringing or defending any actions or other proceedings against or by any person whatsoever."

36. We entertain some doubts as to whether these proceedings would fall within the definition of proceedings covered by clause 12 of the third schedule. However, we will assume for the purposes of the section 20C application that they do.

37. The principle on which the Tribunal will consider an application under section 20C is to determine what is just and equitable in all the circumstances (*Tenants of Langford Court v Doren Ltd* (LRX/37/2000). There is no automatic expectation of an order in

under section 20C in favour of a successful tenant, but the outcome of an application is clearly relevant. In this case, the Applicant has been successful in respect of both of his primary submissions (albeit that the effect of success in relation to sections 47 and 48 is not that for which he contended). We also take into account the fact that the Applicant has consistently sought to engage the Respondent in correspondence in relation to the matters before the Tribunal in order, in part, to avoid litigation if possible. On the other hand, the landlord has not behaved unreasonable in defending these proceedings, although deficiencies in the conduct of the landlord in managing the property lie at the root of our findings in relation to the application of section 20B of the 1985 Act. We must also have regard to "the practical and financial consequences for all those who will be affected by the order": *Conway v Jam Factory Freehold Ltd* [2013] UKUT 0592.

38. Our conclusion is that, first, it would not be just and equitable for the Applicant to bear the full costs of the Respondent in defending this case. He did not seek this litigation and has conducted it appropriately. He has been successful in the outcome.

39. Secondly, however, the circumstances of the managing agent are relevant, and we consider the danger that undermining any means of collecting the costs by a leaseholder owned managing agent would have unfortunate effects to be a real one. If we were to order that the cost should not be charged under clause 9, Part I of the Sixth Schedule, that order could only apply to this Applicant, with the result that he alone of all the tenants would be excused payment. However, this conclusion would be subject to other tenants making applications to the Tribunal under section 20C, causing, at the very least, significant administrative difficulties for the managing agent. We have therefore concluded that it would not be just and equitable to require the Respondent to forgo charging its costs of the proceedings to the maintenance charge under this head.

40. We therefore order under section 20C of the 1985 Act:

    (i) That the costs which may be incurred by the landlord in connection with these proceedings are not to be regarded as relevant costs in relation to the service charge created by clause 12 of the Third Schedule to the lease;

    (ii) We make no order in respect of the maintenance charge provided for in the lease, thus not preventing the costs incurred by the landlord in connection with these proceedings being recovered from the leaseholders under clause 9 of Part I of the Sixth Schedule to the lease.

41. For the same reasons as set out above in connection with our order in respect of clause 12 to the Third Schedule, we order that the Respondent should reimburse the fees paid to the Tribunal by the Applicant.

**Name:** Tribunal Judge Richard Percival **Date:** 23 January 2015

## Appendix of relevant legislation

### Landlord and Tenant Act 1985 (as amended)

### 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 the appropriate 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 the appropriate 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 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.