



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

Case Reference : BIR/OOCN/LIS/2015/0052
BIR/OOCN/LAC/2015/0005

Property : 813B Warwick Road,
Tyseley, Birmingham
B11 2EL

Applicant : Contratree Limited

**Applicants
Representative** : Bude Nathan Iwanier Solicitors

Respondents : Mr R Parmar, Mr R Parmar,
Ms K Parmar and Ms J Parmar

Type of Application : Application under Section 27A (and
19) of the Landlord & Tenant Act 1985
for determination of the liability to
pay and reasonableness of service
charges and an Application under
paragraph 5 of Schedule 11 of the
Commonhold and Leasehold Reform
Act 2002 for the determination of
reasonable administration charges

Tribunal Members : Mr G S Freckelton FRICS (Chairman)
Judge P Ellis

Date and venue of : Tuesday 2nd February 2016 at the
Panel Office, Birmingham

Date of Decision : 16th February 2016

DECISION

BACKGROUND

1. These Applications were transferred to the First-tier Tribunal by Birmingham County Court.
2. Application BIR/OOCN/LIS/2015/0052 is for a determination of liability to pay and reasonableness of service charges under Section 27A (and 19) of the Landlord & Tenant Act 1985 (“the 1985 Act”) in respect of 813B Warwick Road, Tyseley, Birmingham.
3. Application BIR/OOCN/LAC/2015/0005 is for a determination of reasonable administration charges under paragraph 5 of Schedule 11 of the Commonhold and Leasehold Reform Act 2002 (“the 2002 Act”) in respect of 813B Warwick Road, Tyseley, Birmingham.
4. Directions were issued by the Tribunal following which detailed submissions were made by both parties.

THE LEASE

5. The Tribunal has received a copy of the lease dated 30th November 1986 between Contratree Ltd and Sylvia Diane Keyte (“the Lease”). Clause 2 details the Lessee’s covenants with the Lessor and in particular to pay ‘*a reasonable proportion....of the costs expenses and outgoings and matters mentioned in the Sixth Schedule*’. The Sixth Schedule details the costs, expenses and outgoings in respect of which the Lessee is to make a contribution.

THE LEGAL FRAMEWORK

6. Under Section 27A of the 1985 Act, the Tribunal has jurisdiction to decide whether a service charge is payable and if it is, the Tribunal may also decide:-
 - (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
7. Section 19 of the 1985 Act provides that service charges must be reasonable for them to be payable.

“Relevant costs shall be taken into account in determining the amount of the service charge payable for a period –

- (a) *Only to the extent that they are reasonably incurred, and*

- (b) *Where they are incurred on the provision of services and the carrying out of works, only if the services or works are of a reasonable standard:*

And the amount payable shall be limited accordingly.”

8. Section 21B of the 1985 Act provides, in so far as it is relevant to these proceedings:
- i. *A demand for the payment of a service charge must be accompanied by a summary of the rights and obligations of tenants of dwellings in relation to service charges.*
 - ii. *A tenant may withhold payment of a service charge which has been demanded of him if subsection (i) is not complied with.*
 - iii. *Where a tenant withholds a service charge under this section any proceedings relating to non-payment or late payment of service charges do not have effect in relation to the period for which he so withholds it.*
9. A charge is only payable by the Lessee if the terms of the Lease permit the Lessor to charge for the specific service. The general rule is that service charge clauses in a lease are to be construed restrictively, and only those items clearly included in the Lease can be recovered as a charge (*Gilje v Charlgrove Securities* [2002] 1EGLR41). It was also stated in *Gilje* above “The Lease moreover, was drafted or proffered by the Landlord. It falls to be construed contra proferentum”.
10. If the Lease authorises the charges, they are only payable to the extent that they are reasonably incurred; and where they are incurred, only where the services for which they are incurred are of a reasonable standard.
11. The construction of the Lease is a matter of law, whilst the reasonableness of the service charge is a matter of fact. On the question of burden of proof, there is no presumption either way in deciding the reasonableness of a service charge. Essentially the Tribunal will decide reasonableness on the evidence presented to it (*Yorkbrook Investments Ltd v Batten* [1985] 2 EGLR 100).

THE PROPERTY INSPECTION

12. The Tribunal did not inspect the property on the day of the Hearing as it had previously carried out an inspection on Tuesday 24th November 2015 in relation to applications regarding 813C and 813D Warwick Road.
13. At the earlier inspection the Tribunal found the property to be situated on the first floor above a retail shop. The flat was approached via a pedestrian door leading to the communal hallway and landing areas directly from Warwick Road. A concrete staircase led to the first and second floors.

14. The Tribunal understands that there are four flats in total above 813 Warwick Road. At the time of the Tribunal's inspection there was noted to be scaffolding to the rear elevation and the Tribunal understands that repairs are being carried out to the gutters and downpipes. There is no outside space available to any of the leaseholders and the Tribunal therefore limited its inspection to the common internal areas.
15. The Tribunal noted that the staircase area required redecoration.

THE PARTIES' EVIDENCE AND SUBMISSIONS

16. For the avoidance of doubt the Tribunal confirms that the same members have previously dealt with applications in respect of 813C and 813D Warwick Road, Tyseley, Birmingham, B11 2EL, reference numbers BIR/OOCN/LIS/2015/0002, BIR/OOCN/LIS/2015/0017 and BIR/OOCN/LAC/2015/0001. The Applicant is the same in all cases and the Respondents in this case are aware of the previous decisions as they are referred to during this Hearing. Indeed, one of the Respondents, Mr R Parmar attended the Hearing in respect of 813C and 813D Warwick Road and gave evidence to the Tribunal in that case.
17. The Decision in respect of 813C and 813D has not been subject to an Appeal by either party.
18. The Tribunal determined to deal with the matters as they appeared on the Scott schedule provided by the parties.

Solicitor's Fees

19. Mr Snell, Counsel for the Applicant, submitted that the legal fees were incurred in contemplation of proceedings under Section 146 of the Law of Property Act 1925 and that as such they were payable under clause 2 (2) of the Lease.
20. Mr Ahmad, Counsel for the Respondent submitted that in the Scott schedule it stated that the fee was due for non-payment of ground rents and service charges and that there was no mention of proceedings under Section 146.
21. It was further submitted that following the Tribunal's decision in respect of 813C and 81D Warwick Road a further amended invoice had been submitted by Bude Nathan Iwanier, solicitors on behalf of the Applicant. This referred to the contemplation of proceedings under Section 146. It was submitted that it was not acceptable for the Applicant's solicitors to amend their invoice after it was originally sent. At the same time it was also submitted that Mr Stern, the Applicant's managing agent, had not produced any evidence that the claim for legal expenses was in contemplation of proceedings under Section 146.

22. Mr Ahmad further submitted that it was within the power of the Applicant to show that the work carried out was in contemplation of proceedings but it had failed to do so.
23. Mr Snell submitted that the important word was 'contemplation' and that it was not possible to determine whether a claim was to be made until the matter had been investigated. Mr Snell further submitted that an amendment to the invoice did not mean that the work invoiced for was not carried out on behalf of the Applicant.

Administration Fee

24. In view of the previous Tribunal decision in respect of 813C and 813D Warwick Road Mr Snell confirmed, on behalf of the Applicant, that the Applicant did not intend to pursue the Administration fee of £200. This was acknowledged by Mr Ahmad.

Insurance

25. Mr Snell submitted that there was an obligation on behalf of the Applicant to insure the property and recover the cost under schedule 6 of the lease. It was further submitted to the Tribunal by Mr Snell that the total cost of the property insurance cover was £2550.00 and that the proportion due in respect of the subject property was £170.00.
26. Mr Ahmad, on behalf of the Respondents, submitted to the Tribunal that the Applicant had acknowledged in the Scott schedule that the building insurance premium should be £170.00 less £12.24 insurance of the rent loss making a total due on £157.80. This was accepted by the Applicant.

Roof Repairs

27. On behalf of the Applicant Mr Snell confirmed that the Applicant had, in September 2012, consulted with the Respondents in respect of the proposed roof repairs. The Tribunal were shown a copy of a letter dated 28th September 2012 confirming the Landlord's Notice of Intention to Carry out Work. This was followed on 7th January 2013 by a Statement of Estimates and confirmation that the Applicant intended to appoint Hi-Tech Roofing to complete the work at a cost of £28,300.00. This equated to £2075.32 per flat. It was subsequently decided that one third of the roof could be repaired at a cost of £11320.00 rather than the whole roof being re-covered. This resulted in the lesser amount of £754.66 being demanded.

28. On behalf of the Respondents Mr Ahmad submitted that an invoice had been provided in the sum of £11,320.00 for the roof repairs and that the work was paid for by Mrs Mary Jinks. It was also submitted that the invoice was made out to Mrs Jinks and not to the Applicants. It was further submitted that the invoice was dated December 2012 confirming that the work was actually completed prior to the Applicants letter of 7th January 2013 confirming a higher cost of £2075.32 per flat.
29. Mr Stern, managing agent on behalf of the Applicant, confirmed that Mrs Jinks owned three flats and that as the roof was leaking above her flats she was anxious for the work to be completed urgently. The leaking roof had resulted in her losing rental income. It had therefore been agreed that Mrs Jinks would pay for the roof repairs and that the Applicant would reimburse Mrs Jinks for the cost of the work.
30. Mr Stern confirmed that the applicant had now reimbursed Mrs Jinks and therefore sought to reclaim the cost of the work from the various leaseholders. Mr Stern also confirmed to the Tribunal that all the leaseholders with the exception of 813B, 813C and 813D Warwick Road had paid their maintenance charges in respect of the roof repair work carried out. Mr Ahmad submitted that whether or not the leaseholders had paid was irrelevant.

Cleaning, CCTV of Drainage, Electricity Repairs, Fire Safety Certificate, Communal Lighting and Management Fees

31. On behalf of the Respondents, Mr Ahmad confirmed that there was no dispute over the cost of the various items with the exception of the management fee which has been levied at 10% of expenditure. Mr Ahmad submitted that the 10% management fee should be in respect of the amount of expenditure determined by the Tribunal and not a percentage of the expenditure claimed by the applicant.
32. However, the Respondents further submitted that the amounts claimed were not due as the service charge demands did not comply with Section 21B of the 1985 Act in that they were not accompanied by the Statement of Tenant's Rights. Both parties referred to the previous decision of the Tribunal in respect of 813C and 813D Warwick Road in their submissions.
33. One of the Respondents, Mr R Parmar showed the Tribunal what he stated were the original service charge demands he had received. It was clear to the Tribunal that the service charge demands shown to them did not include all the demands submitted by the Applicant. However in the bundle provided by Mr Parmar the demands dated May 2014 did not appear to include the Tenant's Statement of Rights whereas the demand dated February 2013 did.

34. Both parties acknowledged that this matter had been considered in detail by the Tribunal at the previous hearing respect of 813C and 813D Warwick Road. At that hearing Mr Stern had explained to the Tribunal the procedure within his office for submitting demands. Mr Snell, on behalf of the Applicant, accepted that the demand submitted in August 2013 did not include the Statement of Tenant's Rights, but that this was rectified by a further invoice including the Statements of Tenant's Rights submitted on 10th October 2013 as evidenced by a letter from Effective Management (Mr Stern's firm), a copy of which was provided to the Tribunal.
35. The Respondents submitted that the Tenant's Statements of Rights was not included with their service charge demands and was not stapled to either the demands or the copy invoices provided. Mr Snell submitted that it had never been stated that the Tenant's Statement of Rights was stapled to the service charge demand but was stapled separately and included in the envelope.
36. On the day of the hearing the Respondents' Counsel submitted a written Skeleton Argument to the Tribunal and to the Applicant. The majority of the items referred to were dealt with at the hearing but the following matter was raised, which although not dealt with separately at the hearing, had been determined by the Tribunal at the previous hearing in respect of 813C and 813D Warwick Road.
- a) That clause 2(2) confirms that expense contributions must be '*ascertained and certified in writing by the surveyor for the time being of the lessor by 24 June in each.... Once a year on the 29th day of September commencing on 29 September 1987*'. It was submitted that the lessor and its agents had failed to account for such expenses on an annual basis and had also failed to certify such expenses by a surveyor. It was further submitted that it was not sufficient for such expenses to be certified by the managing agent or agents of the landlord.

THE TRIBUNAL'S DECISION

37. The Tribunal first considered the parties submissions in respect of the inclusion or otherwise of the Statement of Tenant's Rights with the service charge demands. The Tribunal carefully considered the evidence of the parties and determined to follow its decision in the previous case for 813C and 813D Warwick Road in that, on balance, it preferred the evidence of Mr Stern and concluded that the Tenant's Statement of Rights was included with the service charge demands. The only exception was the service charge demand submitted in August 2013 where the Tenant's Statement of Rights was not included although this was rectified by a further invoice including the Statement of Rights sent in October 2013.

38. The Tribunal then considered whether or not it was necessary for the service charge demands to be accompanied by a 'surveyor's certificate'. In this case the Tribunal would expect the landlord's managing agents to qualify as the surveyor. The managing agents have arranged for the work to be undertaken and they have issued the service charge demands together with copies of the accompanying invoices. The Tribunal notes that service charges are demanded in arrears and in respect of works that have already been undertaken. As such the Tribunal does not consider that a separate surveyor's certificate is required.
39. The Tribunal then considered the apportionment of service charges between the various flats. The lease quite clearly states that the service charges are to be apportioned in relation to the rateable values of the various properties although rateable values have been abolished and replaced by Council Tax Bands. In the absence of rateable values it is necessary to determine a new method for apportioning the service charge. Mr Ahmad submitted that all the flats were in Council Tax Band A. His evidence was not challenged on this point. As such the Tribunal considers that the decision by the managing agents to apportion the charges equally between all flats is reasonable. Indeed it is difficult to imagine an alternative practical approach. Therefore, the Tribunal determined that the present arrangement for apportionment of the service charges is fair and reasonable to all parties.
40. In arriving at this decision the Tribunal had regard to the submissions advanced in the skeleton argument on behalf of the Respondents where attention was drawn to the recent Supreme Court case of *Arnold v Britton* [2015] UKSC 36. The Tribunal noted that the decision by Lord Neuberger confirmed that when interpreting a written contract the court was concerned, amongst other things, by reference to 'commercial common sense'. The Tribunal is of the opinion that the apportionment of service charges on an equal basis between all the flats confirmed this approach.
41. Having determined that the Statements of Tenant's Rights was most likely to have been included with the service charge demands (and even if it was not, there was evidence that reminders did include the necessary statement), the Tribunal proceeded to consider the charges made.
42. With the exception of the legal fees amounting to £345.00 and the roof repairs, the Respondents accepted the remaining costs in respect of works carried out and the Tribunal therefore determines that the costs as set out in the Scott Schedule are payable in respect of flat 813B Warwick Road.

43. With regard to the roof repairs the Tribunal determined that the roof repairs were required and that the eventual cost was considerably less than was originally anticipated. The Tribunal therefore confirmed its earlier decision in the case of 813C and 81D Warwick Road that the roof repair charges were reasonable and were allowed.
44. The Tribunal therefore determined that the cost for the Service Charge Account due on 13th May 2014 was as follows:-

Roof repairs	754.66
Clearing of overgrown rear	32.80
Insurance	157.80
CCTV to drainage	26.00
Electricity repairs	243.75
Fire safety certificate	212.50
Communal lighting	12.70
<u>Management fee</u>	<u>144.01</u>
Total	£1584.12

45. The above service charge calculation includes a management fee of 10% of the expenditure determined by the Tribunal.
46. The Tribunal considers the management charge reasonable in this case and although this matter was not challenged by the Respondents, Part 2, and in particular clause 2.3 of the 'The *Service Charge Residential Management Code*' produced by the Royal Institution of Chartered Surveyors states that '*charges should be appropriate to the task involved and be pre-agreed with the client whenever possible. Where there is a service charge, basic fees are usually quoted as a fixed fee rather than as a percentage of outgoings or income. This method is considered to be preferable so that tenants can budget for their annual expenditure.*'
47. The Tribunal then considered whether or not the legal fees amounting to £345.00 were reasonable and chargeable under the terms of the lease.
48. In this matter the Tribunal agrees with the Respondents. The terms of the Lease do not give a general right to charge solicitors fees and the Tribunal considers that the initial pursuit of arrears is a matter that should have been dealt with by the managing agents.
49. The Tribunal also considers that the additional wording on the revised invoice produced by Bude Nathan Iwanier to include work '*in pursuit of a claim under section 146*' is unacceptable, particularly as the Scott Schedule only refers to non-payment of ground rent and service charges.

50. It is clear to the Tribunal that this invoice was re-issued in an amended form following the Decision in respect of 813C and 813D Warwick Road. The Tribunal considers this to be unacceptable. No indication to either the leaseholders or to the Tribunal of the actual work undertaken has been given and the Tribunal therefore determines that the legal fees are not payable.
51. The Tribunal then considered the question of the Administration Fee. Although the Administration Fee of £200.00 had been conceded by the Applicant as being unrecoverable the Tribunal confirmed that the Lease did not provide for Administration Charges to be levied.

SECTION 20C APPLICATION

52. At the Hearing the Respondents confirmed that they reserved their position in relation to an application for costs pending the Tribunal's Decision. At the same time the Respondents applied for an order under Section 20C of the 1985 Act preventing the Applicant from recovering its costs incurred in the Tribunal proceedings through the service charge.
53. The purpose of an application under Section 20C is to prevent a landlord from recovering his costs in Tribunal proceedings through the service charge. The guidance given in previous cases is to the effect that an order under Section 20C is to deprive the landlord of a property right and it should be exercised sparingly. (See for example, *Veenasa v Chong*; *Lands Tribunal [2003]1 EGLR 175*).
54. The Tribunal considers that under normal circumstances it would not be in the interests of justice to make an order under Section 20C preventing the Applicant from recovering its costs of these proceedings through the service charge in this case. The Tribunal in reaching this decision had regard to the fact that the Respondents were substantially unsuccessful in their application under section 27A (and section 19) of the 1985 Act. However, in this case the Tribunal is satisfied that the recovery of such costs is not authorised under the terms of the Lease and therefore they cannot make or consider making an order under Section 20C.

APPEAL

55. Any appeal against this Decision must be made to the Upper Tribunal (Lands Chamber). Prior to making such an appeal the party appealing must apply, in writing, to this Tribunal for permission to appeal within 28 days of the date of issue of this Decision, (or, if applicable, within 28 days of any decision on a review or application to set aside) identifying the decision to which the appeal relates, stating the grounds on which that party intends to rely in the appeal, and stating the result sought by the party making the application.

Mr G Freckelton FRICS
Chairman
First-Tier Tribunal Property Chamber (Residential Property)