

12294



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

Case reference : **BIR/OOFP/LIS/2017/0011
BIR/OOFP/LLC/2017/0008**

Property : **16 Huntsmans Drive, Oakham LE15
6RP**

Applicants : **Mr and Mrs I Smith**

Respondent : **Prime Life Limited**

Representative : **Spearing Waite solicitors**

Type of application : **Liability to pay service charges**

Members of Tribunal : **Judge D Jackson
Mr N Thompson FRICS**

Date of Decision : **13th June 2017**

Decision

1. On 7th March 2017 the Applicants applied to the Tribunal for a determination of liability to pay and reasonableness of service charges for service charge years 2015 and 2016.
2. On 4th April 2017 the Tribunal issued Directions.
3. On 18th April 2017 the Applicants applied to the Tribunal for an order under s20C Landlord and Tenant Act 1985.
4. By letter received on 25th April 2017 the Respondent, for the first time, raised the issue that the service charge payable by the Applicants is fixed and not variable.
5. On 5th May 2016 the Tribunal issued Directions No. 2 in relation to potential strike out under Rule 9(2) (a) of the Tribunal Procedure Rules.
6. Submissions made by the Applicants by way of letters dated 11th, 24th and 25th May 2017 have been considered by the Tribunal.
7. The Tribunal has also considered submissions made on behalf of the Respondent by their solicitors in a letter dated 25th May 2017.
8. Neither party has requested an oral hearing and by Directions No.3 dated 30th May 2017 this strike out application has been determined without an oral hearing.

The Property

9. The Respondent is a provider of assisted living accommodation. The Property is one of 30 similar properties on a site which also includes a care home.

The Lease

10. The Respondent holds the Property under the terms of a head lease dated 1st March 2005 and made between The Rutland County Council District Council (1) and the Respondent (2)
11. The Property is held by the Applicants under the terms of a lease ("the Lease") dated 10th October 2006 and made between the Respondent (1) and Harry Gareth Edmonds and Dorothy Edmonds (2) for a term of 125 years less 3 days at a peppercorn rent.
12. Clause 1.20 of the Lease provides:

"the service charge" means the initial sum of £50.00 per week subject to review as set out in the Seventh Schedule.

13. Clause 6.7 contains Tenant's further covenants:

To pay the Landlord the Service Charge in advance on the 1st day of each month of the Term (and such increased Service Charge as set out in the Seventh Schedule)

14. The Fifth Schedule provides a detailed list of the Services (see definition at clause 1.17) to be provided by the Landlord in accordance with the Landlord's covenant at clause 7.8 of the Lease.
15. The Seventh Schedule deals with Service Charge Review. The clauses relevant to this application are:
 - 1.1 "First Review Date" means the 1st April 2009
 - 1.3 "Review Date" means the First Review Date and every third anniversary thereafter and reference to relevant Review Date shall be construed accordingly.
 - 2.2 Prior to a review date the Landlord shall review the cost of providing Services and shall give written notice to the Tenant of the amount of the Landlord's proposals for the revised amount of Service Charge (and so that such proposed figure will be fair and reasonable in the circumstances)
16. The remaining clauses 2.3 – 2.9 of the Seventh Schedule to the Lease make provision for the tenant to respond in writing within 21 days. If the tenant does not respond he/she is deemed to have accepted the Landlord's proposals. In default of agreement as to the revised amount provision is made for the appointment of an arbitrator.
17. Submissions on behalf of the Respondent indicate that although there has been informal increase of the Service Charge to its current level of £70 the review mechanism set out in the Seventh Schedule has never been implemented.

Landlord and Tenant Act 1985 ("the Act")

18. Section 18(1) of the Act provides:

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.
19. It is the Respondent's case that the application should be struck out as the Tribunal does not have jurisdiction under section 27A of the Act because the Service Charge contained in the Lease is not a variable service charge for the purposes of section 18(1) (b).

23. In **Chand v Caldmore Area Housing Association Ltd** HHJ Reid QC adopted the reasoning in **Home Group v Lewis**.
24. **Re: Southern Housing Group Ltd** is a decision of the Upper Tribunal (Lands Chamber) decided by The President. The facts of that case are wholly different to the matter before us. In particular clause 1.9 of the tenancy agreement considered in **Re: Southern Housing Group Ltd** made specific provision for "Surpluses and deficits" (see page 5 and paragraph 12 of the decision of the Upper Tribunal). George Bartlett QC, President held that on those facts that s18(1) applied and dismissed both appeals:

"17. The difference between the provisions of the tenancy agreements in **Home Group** and **Chand v Caldmore Area Housing Ltd** and those of the leases in the present cases is that in the former there was nothing in the agreements indicating that any altered rent was to be calculated in any particular manner, or linking an alteration in rent (including service charge) with an alteration in the costs of providing any relevant services; whereas in each of the present cases there is provision enabling the landlord to vary the service charge but imposing a limit to any increase by reference to the costs of providing the services.

18. In my judgment, therefore, each LVT came to the correct decision in determining that section 18(1) applied. Both appeals are dismissed."

25. We find that although clause 2.2 of the Seventh Schedule to the Lease provides that "the Landlord shall review the cost of providing the Services" there is nothing within the Seventh Schedule that links the proposed increase to a calculation of the actual or estimated costs. There is no provision for a balancing charge dependent on whether there is a surplus or deficit of actual costs against budget or estimate.
26. The protection afforded to the leaseholder under the Seventh Schedule is that in considering the Landlord's proposals "such proposed figure will be fair and reasonable in the circumstances". In the event that there is no agreement as to the revised Service Charge the matter shall be determined by an arbitrator appointed by the President of the Royal Institution of Chartered Surveyors. To adopt the reasoning of HHJ Huskinson, although the RICS appointed arbitrator may well take into account the reasonably estimated amount of service charge for the next three year review period that is "at least one remove from a situation where a rent varies or may vary according to the relevant costs"
27. Most importantly once ascertained under the provisions of the Seventh Schedule the service charge as reviewed remains fixed for the entirety of the subsequent three year review period. It cannot sensibly be said that the service charge varies or may vary according to the relevant costs incurred or to be incurred by the Respondent over such a lengthy period. The very fact that the Service Charge remains fixed for three years leads inevitably to our finding that the service charge provisions within the Lease do not fall within section 18(1) of the Act.
28. We find that the provisions of section 18(1) (b) are not satisfied and therefore the Tribunal does not have jurisdiction to determine the application made under section 27A of the Act.

29. The Tribunal must therefore strike out these proceedings under Rule 9(2) (a) of the Tribunal Procedure Rules.
30. Consequent upon strike out the application under s20C must inevitably fail. However as the Applicants are paying a fixed sum by way of Service Charge there is no opportunity for the Respondent to seek to recover its costs through the service charge which are fixed, according to the Respondent, until 1st April 2018.

Decision

31. The application is struck out.
32. No order is made under s20C of the Act.

D Jackson
Judge of the First-tier Tribunal

Either party may appeal this decision to the Upper Tribunal (Lands Chamber) but must first apply to the First-tier Tribunal for permission. Any application for permission must be in writing, stating grounds relied upon, and be received by the First-tier Tribunal no later than 28 days after the Tribunal sends this written Decision to the party seeking permission.