9771

FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**CHI/21UD/LSC/2013/0039**
Property	:	**66, Marine Court, St Leonards on Sea, East Sussex TN38 0DX**
Applicant	:	**Marine Court (St Leonards on Sea) Freeholders Limited**
Representative	:	**Miss N Muir, Counsel**
Respondent	:	**Mrs Ann Friedman**
Representative	:	**In person**
Type of Application	:	**Determination of service charges under section 27A Landlord and Tenant Act 1985 and of administration charges under Schedule 11 Commonhold and Leasehold Reform Act 2002**
	:	**Judge E Morrison (Chairman)** **Mr A O Mackay FRICS (Surveyor member)** **Mr P A Gammon MBE MA (Lay Member)**
Date and venue of Hearing	:	**15 November 2013 at Bexhill Town Hall**
Date of decision	:	**3 December 2013**

DECISION

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Subject Matter of the Determination

1. On 19 September 2012, the Applicant freeholder commenced proceedings in the county court for recovery of monies from the Respondent, the leaseholder of Flat 66 Marine Court. Specifically, the Applicant claimed service charge arrears of £4,153.29 and an administration charge in the sum of £54.00. A claim was also made for interest and the costs of the court proceedings. The Respondent filed a Defence dated 27 September 2012, disputing the claim on a number of grounds.

2. On 4 April 2013 the District Judge in the Hastings County Court ordered that the "matter" be transferred to the Leasehold Valuation Tribunal. The Tribunal (now the First-tier Tribunal Property Chamber) has jurisdiction to determine disputed service and administration charges. It does not have jurisdiction to determine the claim for interest or to award costs in relation to court proceedings. Nor can it adjudicate on any dispute as to arrangements for payment by the Respondent.

Summary of Decision

3. The service charges recoverable by the Applicant for service charge year 2011 are £784,614.00, of which the Respondent's share is £3,637.47. At the date of commencement of the county court proceedings none of this amount was lawfully due, although the Respondent had already paid £904.02. The charges became due for payment only after valid demands were issued on 26 September 2013.

4. The advance service charges recoverable by the Applicant for service charge year 2012 are £ 777,790.00, of which the Respondent's share is £3606.66. At the date of commencement of the court proceedings the sum of £1,775.44 covered by the demand dated 1 July 2013 was lawfully due and unpaid (the sum of £1,831.22 previously demanded on 1 January 2012 having already been paid).

5. The administration charge of £54.00 dated 30 April 2012 is not recoverable.

6. No order is made under section 20C of the Act.

The Lease

7. The Tribunal had before it a copy of the original lease for Flat 66. The lease was for a term of years from 19 June 1972 expiring on 24 March 2050, at a yearly ground rent of £10.00. By a Deed of Variation dated 20 August 2002 the term was extended to 24 March 2105, and the rent increased to £100.00 p.a.

8. The relevant provisions in the lease, which are unaffected by the Deed of Variation, may be summarised as follows:

(a) The tenant is liable to pay a service charge in respect of the landlord's expenditure on the matters set out in clause 5(5). The recoverable heads of expenditure include repair and maintenance of the main structure and common parts of the building, insurance of the building, employment of managing agents, employment of porters and other staff, and may include provision for future costs (a reserve).

(b) The tenant's service charge contribution is 0.4636% of the overall expenditure.

(c) The service charge year runs from 1 January – 31 December, and a Basic Service Charge ("BSC") is payable in advance on 30 June and 31 December in each year. The amount of the BSC, set at £100.00 at the start of the term, may be increased by Notice served in accordance with the provisions of the Fifth Schedule.

(d) The tenant must also pay an Additional Service Charge ("ASC") if a certificate is served requiring such payment. The ASC will be for the tenant's share of the amount of landlord's expenditure in any year which has not already been met through the BSC or through other credits. Payment is due within 14 days of service of the certificate.

(e) If an ASC certificate is served after the end of a service charge year, because there is a deficit to be met, then during the year in which the certificate is served, the landlord may also serve a Notice of Increase of the BSC on the tenant.

The Inspection

9. The Tribunal inspected the property immediately prior to the hearing in the company of Miss N Muir, Counsel for the Applicant, and Mrs A Friedman, the Respondent. The inspection was limited to a view of the building from the outside at ground level, together with an inspection of some of the building's internal common parts, the basement boiler rooms, and the interior of Mrs Friedman's one-bedroom flat, Flat 66 on the first floor of the building.

10. Marine Court comprises a comparatively large building arranged on basement, ground and 12 upper floors, located on the seafront in St Leonards immediately facing the English Channel. The front elevation is rendered and painted, the rear elevation is in brickwork and there is a flat top design roof. The building was constructed in or about 1935 in the Art Deco style and comprises 19 shops on the ground floor and 168 flats of varying size and layout on the upper floors. There are 4 separate flat entrances. The basement houses the communal boilers and

electrical switchgear mechanisms. There are electric passenger lift services to all the upper floors. A 24-hour porterage service is provided. Six porters are employed to provide this service. The building is now included on the statutory list of buildings with special architectural or historic interest - Grade II listed; whilst integral to its original design, the far eastern end of the building, now known as Hanover House, does not form part of Marine Court for service charge purposes, being held on the balance of a separate 999 year lease.

11. Generally speaking the property is in a poor state of repair reflecting both the absence of regular maintenance, coupled with the building's original design and construction and its exposed position immediately adjoining the English Channel. The freeholders have, in the recent past, embarked on the first phases of a long term external planned maintenance programme - known as Phase 1 to Block A at the eastern end of the building and Phase 2 to Block D at the western end of Marine Court. Works were ongoing at the time of our inspection. Eventually the intention is that the whole of Marine Court is to be repaired in accordance with the planned maintenance programme.

12. Particular attention was drawn to poorly executed rendering and paintwork, both of which were subject to correction by the appointed contractors. Internally we were shown loose or damaged thermo plastic tiles on the floor treads in the public ways, worn carpeting which had been repaired and held down by duck tape, plaster damage as a result of water penetration failure to make good around emergency light fittings, and the absence of cleaning to the communal windows in the back staircases.

13. It was plain to the Tribunal from both the current state of disrepair and its original nature that Marine Court presents many challenges from an estate management point of view.

Representation and Evidence at the Hearing

14. The Applicant was represented by Counsel, Miss Nicola Muir, at the hearing. A Bundle, including a statement of case, witness statements and supporting documentation, had been prepared in accordance with the Tribunal's Directions. After Mrs Friedman had filed her Reply, the Applicant obtained the Tribunal's permission to file supplementary submissions and evidence in response to various issues raised in the Reply that had not been raised in the original Defence to the county court claim. An adjournment of the hearing was requested by and granted to the Applicant specifically to enable this to be done. This additional material was also before the Tribunal.

15. Two directors of the Applicant, Mr Tony Martin and Mr John Cardall, attended the hearing, both of whom had provided witness statements. They gave brief oral evidence during the hearing to supplement their written statements.

16. Mrs Friedman represented herself. She had filed a Reply to the Applicant's case, along with supporting documentation, and also a response to the Applicant's supplementary material. Although there was no direction providing for admission of the latter response, the Applicant made no objection and the Tribunal has accepted it as part of the Respondent's case.

17. To assist Mrs Friedman, issues were taken in turn, giving each side an opportunity to address the Tribunal on one issue before moving on to the next one.

The Law and Jurisdiction

18. The tribunal has power under section 27A of the Landlord and Tenant Act 1985 ("the 1985 Act") to decide about all aspects of liability to pay service charges and can interpret the lease where necessary to resolve disputes or uncertainties. The tribunal can decide by whom, to whom, how much and when a service charge is payable. Under section 27A(3) the tribunal may determine whether a service charge is payable for costs that have not yet been incurred.

19. By section 19(1) of the Act a service charge is only payable to the extent that it has been reasonably incurred and if the services or works for which the service charge is claimed are of a reasonable standard. By section 19(2), where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable.

20. An administration charge is defined in paragraph 1 of Schedule 11 to the Commonhold and Leasehold Reform Act ("the 2002 Act") and includes an amount payable by a tenant of a dwelling which is payable directly in respect of a failure by the tenant to make a payment by the due date to the landlord or in connection with a breach (or alleged breach) of a covenant or condition in his lease. Under paragraph 5 of Schedule 11 an application may be made to a tribunal for a determination whether an administration charge is payable. If the amount of the charge is not specified in the lease, it is payable only to the extent that it is reasonable.

21. Under section 20C of the 1985 Act a tenant may apply for an order that all or any of the costs incurred by a landlord in connection with proceedings before a tribunal 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.

22. Under section 21B of the 1985 Act a demand for 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. The wording of the summary is prescribed. A tenant may withhold payment of a service charge if the summary is not provided.

23. Section 47 of the Landlord and Tenant Act 1947 requires that any written demand given to a tenant of a dwelling contains the name and address of the landlord, and if that address is not within England and Wales, provides an address within England and Wales where notices may be served. If a service charge demand does not include this information the sum demanded "shall be treated for all purposes as not being due from the tenant to the landlord at any time before that information is furnished by the landlord by notice given to the tenant".

Background matters

24. After a very prolonged and disputed enfranchisement process, the freehold of Marine Court was purchased on 31 August 2010 by the Applicant, a company formed and owned by a majority of the residential lessees of the block. There are now 93 lessee shareholders.

25. It is not disputed that the building, which is Grade 11 listed, was in a very poor state of repair at that time. Hastings Borough Council had previously served Notices requiring work to be carried out on the exterior, which had not been complied with. In 2011, the Applicant embarked upon the work required, planning "cyclical expenditure" to spread the very substantial cost. Cyclical expenditure for the first four years, starting in 2011, is being used to repair the exterior of the building. The Applicant accepts that work is also required on the other parts of the building, including the common parts, but regards work on the structure as the priority.

26. Although the lease provides for the lessee to pay a specified percentage service charge contribution towards the recoverable costs incurred in respect of the entire building, in reality there is an apportionment of cost between the shops and the flats, and the flat lessees only pay their percentage of the sums attributed to the flats.

The Issues before the Tribunal

27. On 3 September 2013 the Applicant requested an adjournment of the hearing, then scheduled for 20 September 2013. The request was on two grounds, firstly the unavailability of a witness on 20 September, and secondly that "in order for the proceedings to be fair, the Applicant ought to be allowed to file further evidence to address the new points" in the Respondent's Reply submission to the Tribunal. The request was granted, and a direction given that the Applicant had "permission to file and serve by 4pm on 27 September 2013 a supplementary statement of case and/or witness statements strictly limited to responding to issues raised by the Respondent in her statement of case

dated 30 July 2013 that were not previously raised in her Defence dated 27 September 2012".

28. At the hearing, Miss Muir submitted that the Tribunal's jurisdiction was limited to the matters raised in the Defence, relying on *Staunton v Kaye and Taylor* [2010] UKUT 270(LC). This case considered the Tribunal's powers when questions were transferred to it by the county court for determination pursuant to paragraph 3 of Schedule 12 to the Commonhold and Leasehold Reform Act 2002. It was held in *Staunton* that "the LVT has no power to permit the pleadings to be amended and thus to widen the scope of the questions that it is required to determine under the transferred proceedings" (para. 21).

29. This point was re-considered by the Upper Tribunal in *Lennon v Ground Rents (Regisport) Ltd* [2011] UKUT 330 (LC). While following *Staunton*, the Judge Huskinson went on to consider ways in which issues not raised in the county court pleadings might otherwise be considered by the Tribunal. At paragraph 23 he said:

It would have been open to either party, had they chosen to do so, to make a separate application to the LVT under section 27A of the 1985 Act for the LVT to decide certain matters in dispute between the parties regarding service charge or administration charge... Similarly it would seem to me, as presently advised, that it would have been open to the parties to have agreed to request the LVT to extend the scope of the hearing in the foregoing manner and to dispense with the formality (which otherwise would be required by the relevant procedural rules) of making a written application to the LVT – in which circumstances the LVT could have decided that it should accede to this request by the parties for an extension.

30. If the Tribunal does not deal with issues that clearly arise, but which have not been raised in the county court pleadings, a party may still raise them when the case returns to the county court, which may well lead to further delay. In this case the District Judge did not identify the specific questions to be determined by the Tribunal, so all the issues raised at that point were transferred. When Mrs Friedman filed her Reply raising further issues, the Applicant could have simply adopted the position that it did not need to deal with those issues. Instead, the Applicant specifically requested an adjournment in order to address the new issues raised by Mrs Friedman in her Reply. The hearing was delayed by two months to accommodate this request. In these circumstances, the only sensible construction to be placed on the request is that the Applicant was thereby agreeing that the scope of the hearing before the Tribunal should be extended to deal with the new issues, without the need for any formal application. Accordingly the Tribunal finds that the issues to be determined include those raised for the first time in the Reply. Such an approach is also in accordance with the overriding objective of dealing with cases justly.

31. The primary issues to be determined are (a) the amount of the actual service charge for 2011 and (b) the amount of the on account service charge for 2012. These are the only service charges claimed by the Applicant in the county court, the proceedings having been commenced in September 2012, part-way through the 2012 service charge year.

32. In order to reach a determination on these issues, the Tribunal must consider:

i) The validity of the demands
ii) Whether the Applicant had served any appropriate certificates and Notices under the Lease in order to effect an increase in the BSC for 2012
iii) Whether there was any failure to consult under Section 20 of the 1985 Act
iv) Whether any of the amounts charged for specific heads of expenditure are unreasonable, the Respondent having challenged the amounts for management fees, staffing costs, gas and electricity, and cyclical (major works) expenditure.

33. The administration charge of £54.00 is also before the Tribunal.

34. Certain other issues raised by Mrs Friedman will not be considered either because they are outside the Tribunal's jurisdiction or are not relevant. These include her concerns about disrepair of the common parts (because she has not been charged anything for their repair), and her argument that the Applicant was estopped from issuing court proceedings by virtue of an agreement as to payment, which is a matter for the county court. Arguments as to lack of affordability of the service charges, or their high amount compared with the low value of the flats at Marine Court, will likewise not be considered as these matters cannot avoid liability for a service charge– see *Garside & Anson v RFYC Ltd* [2011] UKUT 367(LC).

The validity of the demands

35. The position with respect to the demands has been confused by the fact that two of the invoices exhibited to the Particulars of Claim were in fact already paid, and another demand which might have been relied upon instead was not exhibited or referred to at all.

36. The demands issued for 2011 and 2012 up to the date of proceedings being commenced were as follows:

1 Jan 2011 – Although the invoice was for a total of £1,831.22, only £452.01 BSC was in fact payable under the lease at that point, the balance of £1,379.21 being only "requested". This distinction is made clear by the wording of the invoice itself, and was in any event conceded by the Applicant before the Tribunal. The sum of £452.01 had been paid prior to issue of proceedings.

1 July 2011 - For the same amount and the same points apply. The sum of £452.01 had been paid prior to issue of proceedings.

1 January 2012 – No copy of this invoice in its original form was produced by either party. It was not relied on or exhibited by the Applicant in the court proceedings because it had been paid in full by August 2012. Based on a recent re-issue of all invoices it appears that it would have been a demand for a BSC of £1,832.22, as a half year advance service charge for 2012.

17 May 2012 – An ASC certificate was issued in respect of service charge year 2011. The total service charge payable by Mrs Friedman for 2011 was calculated at £3,637.47, being her 0.4636% contribution towards total expenditure of £784,614.00. She was given credit of £917.39 for monies received on account (including the BSC of £904.02 which she had already paid) and the balance of £2,720.08 was demanded. The Tribunal was shown a cover letter from the managing agents which referred to the enclosed ASC certificate and an invoice. However no copy of the actual invoice was produced, and neither the certificate nor the invoice was exhibited or relied on by the Applicant in the county court Particulars of Claim.

1 July 2012 - The sum of £1,832.22 was invoiced as the BSC advance service charge for the second half of 2012.

Lack of section 21B Summary

37. In her Defence Mrs Friedman contended that none of the demands relied on had been accompanied by a Summary of Tenant's Rights and Obligations as required by section 21B of the 1985 Act, and therefore the monies demanded were not payable until the non-compliance had been remedied. In her oral evidence before the Tribunal she said she had sometimes received the Summary, but sometimes not. She could not identify which demands had no accompanying Summary.

38. The Applicant contended that a Summary had always been served. However the only evidence of this was a witness statement from the current managing agent (appointed November 2012) which stated he had "been advised by the previous managing agents" that a Summary had been served. Furthermore, the Applicant relied on a re-issue of all the demands on 27 September 2013 with accompanying Summaries, which remedied any earlier default. Mrs Friedman acknowledged receipt of these.

39. The Tribunal has to weigh the competing evidence. To support her position, Mrs Friedman could have produced the original demands she received, but she did not do so. Her position also changed, and she was unable to point to any specific demand that lacked an accompanying Summary. The Tribunal notes that the Applicant's Specification for managing agents, produced in 2011, required all demands to be

accompanied by a Summary and the then managing agents, Strutt & Parker, were a large concern who should have been well aware of this statutory requirement. Doing the best it can on this scant evidence from both parties, the Tribunal finds, on a balance of probabilities, that a Summary did accompany the demands, and therefore they are not invalid on this ground.

Non compliance with section 47 Landlord and Tenant Act 1987

40. In her Reply Mrs Friedman raised the question of whether the January 2011 and July 2011 invoices had provided the landlord's address as required. She referred to section 48, but clearly meant to refer to section 47 of the 1987 Act. The address given for the Applicant on the 2011 invoices was c/o Strutt & Parker, 201 High Street, Lewes. Mrs Friedman produced evidence that the Applicant's registered office had been 176 Marine Court until 31 January 2012, when it was changed to c/o Strutt & Parker's address. Therefore she submitted that the address on both the 2011 invoices was not compliant and the sums demanded were thus not payable. However she accepted that the July 2012 invoice contained the correct address.

41. At the hearing, the Applicant accepted that its registered office had only been changed on 31 January 2012, but said that any default had been remedied when all the invoices were re-issued on 27 September 2013 with the correct address for the landlord as at that date.

42. The Upper Tribunal decision in *Beitov Properties v Martin* [2012] UKUT 133 (LC) confirms that the address of the landlord for the purpose of section 47 is the place where the landlord is to be found. In the case of a company it is the company's registered office or the place from which it carries on business.

43. The Applicant did not contend that it had carried on business from 176 Marine Court at the relevant times, and the registered office was not changed from that address until 31 January 2012. Therefore, the Tribunal finds that until 27 September 2013, section 47 had not been complied with as regards the invoices of 1 January 2011 or 1 July 2011. However Mrs Friedman had in fact paid these invoices before court proceedings were issued. As to whether the ASC demanded on 17 May 2012 was section 47 compliant, the ASC certificate itself contains no address at all for the landlord and there no accompanying invoice was produced in evidence. Accordingly the Tribunal also finds that the monies demanded by the ASC certificate were not payable until 14 days after Mrs Friedman was served with the re-issued demands dated 27 September 2013. This means that only one invoice, that dated 1 July 2012, was section 47 compliant and payable at the date that court proceedings were commenced. (It should be noted that Mrs Friedman had by then actually paid more than the amount demanded by that invoice, being payments on earlier invoices that technically were not yet payable due to non-compliance with section 47).

44. However, any non-compliance as respects section 47 at date of commencement of proceedings is primarily a matter for the court to consider when it deals with the issue of costs. At the current time, due to the default having been remedied on 27 September 2013, there is no longer a defence to payability based on section 47.

45. For the avoidance of doubt, the Tribunal has not considered any issue of non-compliance with section 48 of the Landlord and Tenant Act 1987.

Increase of the Basic Service Charge

46. Mrs Friedman contended that the BSC had not been increased in accordance with the lease. The provisions for effecting an increase are set out in the Fifth Schedule (see para. 8 above). Her written submissions indicated she denied receiving any ASC certificate and/or a Notice of Increase of the BSC.

47. The Applicant relied on the following documents to establish that the correct procedure had been followed:

- On 23 May 2011 an ASC certificate had been issued for service charge year 2010
- On 12 December 2011 a Notice of Increase of BSC had been issued raising the BSC to £3,622.44, being 0.4636% of £790,000.00
- The 1 January 2012 and 1 July 2012 on account demands were each for 50% of the increased BSC.

48. Before the Tribunal, Mrs Friedman did not dispute receiving any of these documents, or raise any other specific objection.

49. The Tribunal is satisfied that in the course of 2011 an ASC certificate was issued for the previous year. Under the lease, this triggers the possibility of serving a Notice of Increase of the BSC. That is precisely what was done in December 2011, and the Tribunal therefore finds that there was a valid increase of the BSC, taking effect on 1 January 2012.

Breach of section 20 Consultation requirements

50. Although her documentation had raised an issue on consultation relating to the appointment of Strutt & Parker as managing agents in 2010, the only consultation issue that Mrs Friedman wished to pursue at the hearing was that relating to Phase 1 of the major works. Her challenge was limited to an assertion that the detailed specification of the proposed works had not been available for inspection 24 hours a day at the porter's office, contrary to the Section 20 Notice sent to lessees dated 3 March 2011. She did not provide details of any specific

dates or times when the specification was unavailable, but said it had been unavailable on at least one occasion.

51. Miss Muir for the Applicant relied on the Notice and the applicable regulations in the Service Charges (Consultation Requirements) (England) Regulations 2003. Under paragraph 8(2) of Part 2 of Schedule 4 to the Regulations, the Notice shall "describe, in general terms, the works proposed to be carried out or specify the place and hours at which a description of the proposed works may be inspected". Under paragraph 9, if a place and hours for inspection are specified, they must be reasonable, and a description of the proposed works must be available for inspection, free of charge, at that place and during those hours.

52. Miss Muir said that the Notice in this case had adequately described the works. Therefore the Regulations did not require the description to be available for inspection. By making it available, the Applicant had gone further than required by the Regulations, and there had therefore been no breach.

53 The Tribunal notes that the Notice explained that the planned works were to the exterior of the east end of the building, and went on to identify 9 specific aspects of the work. The wording was clear and would have been readily understandable to a layman. It is identical to the section of the detailed Specification headed "Description of the Work". It meets the requirement of a description in general terms of the work proposed, and therefore there was no need for the Specification to be made available to the lessees. Accordingly the Tribunal determines that the consultation requirements in this regard have been met.

The Reasonableness of the service charge expenditure

Managing Agents Fees in 2011

54. In 2011 the fees of Strutt & Parker, the managing agents, for the management of the Marine Court flats were £61,770.00. This figure equates to £51,475 + VAT. The average fee for each of the 168 flats was therefore £306.40 + VAT. Mrs Friedman's 0.4636% share for her one-bedroom flat was £238.64 + VAT. She contended that Strutt & Parker's fees were excessive, and referred to the fact that the previous managing agents' fees for the first 8 months of 2010 were £25,032.33. She also relied on a summary of quotes provided by other firms of managing agents in late 2012 (when Strutt & Parker resigned) which appeared to range between £32,208.00 and £66,528.00 inclusive of VAT. When asked by the Tribunal to indicate what she felt a reasonable level of fee would be, she tentatively suggested £40,000.00.

55. Although it was not entirely clear whether she was referring to 2011 and/or 2012 Mrs Friedman felt that Strutt and Parker had "mis-

managed the building". Their fees were too high even if they had done what they were supposed to. Their office was too far away to deal with the many emergencies at Marine Court.

56. The Applicant accepted that Strutt & Parker's fees were high, but put forward many reasons why, in the particular circumstances of Marine Court, it was reasonable to appoint them in late 2010 without obtaining quotes from other firms, and their fees were not unreasonable. These included the following:

- Marine Court is a complex building and had many problems which required to be addressed as a matter of urgency when the Applicant purchased.
- There were only 28 days notice of the actual completion date of the purchase, and managing agents needed to start work immediately following completion.
- Strutt and Parker had assisted the Applicant during the enfranchisement process and were therefore already familiar with the building and its challenges, and had assisted in assessing the books of the previous managing agents, who had been incapable of properly managing the building.
- Strutt & Parker had impressed the Applicant with their work during the enfranchisement process and the Applicant felt really good managing agents were needed. Strutt & Parker, a substantial firm, had the capacity, experience and expertise to take over the management immediately, which smaller firms might not possess.
- The Applicant believed that Strutt & Parker would be effective in collecting service charges and pursuing those in arrears.
- Strutt and Parker waived their fee for the first three months (September – November 2010).
- Strutt & Parker had to cope with a situation where financial records had not been kept properly, and there were numerous disputes about service charges.
- Their fee was all-in, and covered all management work (save major works fee), with no extras such as are sometimes charged by managing agents for various aspects e.g.debt collection, out of hours attendances.
- The managing agents needed to be able to instigate and manage the major works that were urgently needed, and to resolve staffing issues.
- They also had re-negotiate with some suppliers, due to Marine Court having a bad credit rating.
- Mr Martin states in his first witness statement that "S & P greatly impressed the Applicant with their work during their first term in office. They collected hundreds of thousands of pounds in service charges, resolved staffing issues and completed phase 1 of the major works".

57. The Applicant accepted that other managing agents might have been cheaper, but doubted they would have been able to do the job to the standard required.

58. Mrs Friedman did not challenge any of the factual matters referred to at para. 56.

59. The Tribunal notes that Strutt & Parker did not charge an additional set-up fee, which might have been expected on taking over the management of a large and complex building and having to start from scratch. In the opinion of the Tribunal, Marine Court presents managing agents with fullest possible range of estate management functions for a residential building (quite apart from the commercial units). Unusually for these days, there are no less than 6 porters employed at Marine Court, providing 24 hour coverage, and the documents establish that Strutt & Parker were responsible for recruitment and for management of the porters' employment, including payroll duties. Mrs Friedman was critical of Strutt & Parker's performance, but she didn't identify anything specific in 2011 which would indicate that their overall service was not of a reasonable standard as required by section 19 of the 1985 Act.

60. Although, based on the Tribunal's general knowledge and experience, the management fees were high, and at the top end of the range of what could be charged for residential flats in the area, the Tribunal concludes that in the particularly difficult and challenging circumstances presented by Marine Court in late 2010 and 2011 (summarised at para. 56 above), and in light of the breadth of services required, the management fees charged for 2011 are reasonable.

Managing Agents Fees in 2012

61. The Tribunal is only required to determine the reasonableness of the amount demanded on account in 2012 in respect of the management fees (see para. 29 above).

62. The Applicant did not produce a budget to justify or provide a breakdown of the on account demands. All we know is that the overall BSC was set at £790,000.00 for the year and this was the amount demanded, 50% on 1 January 2012 and 50% on 1 July 2012. However, because the Applicant had agreed with Strutt & Parker to re-engage them as managing agents from January 2012 at a fee of £61,500 + VAT for the year, the Tribunal has proceeded on the assumption that the demands are based on this budget figure.

63. At £61,500.00 + VAT, the average fee for each of the 168 flats is £366.07 + VAT. Mrs Friedman's 0.4636% share for her one-bedroom flat is £285.11 + VAT. Overall this is an increase of almost 20% over the 2011 management fee.

64. Strutt & Parker were re-appointed following a section 20 consultation and tendering process in Autumn 2011, in which only one other firm, Clifford Dann, tendered. No representations were made by tenants during the consultation process, and the shareholders of the Applicant,

who are also lessees, voted to approve the re-appointment after hearing presentations from both firms at the company AGM. Strutt & Parker were selected despite the fact that Clifford Dann's tender was for a base fee of £22,680.00 + VAT plus an initial set-up fee of £2,520.00 + VAT. The tender document produced to the Tribunal did not specify that certain services were excluded from this base fee, and would be the subject of extra charges. However Mr Martin told the Tribunal that this was indeed the case, and the Section 20 Stage 2 notice to lessees dated 22 November 2011 set out a list of the duties for which Clifford Dann would make an extra charge. It was therefore not possible to make a direct like-for-like comparison of fees.

65. The Applicant accepted that Clifford Dann's fees, even with the extra charges, would have worked out cheaper than Strutt & Parker's fees. This is confirmed with the benefit of hindsight. The Tribunal was told that for 2013, when Clifford Dann are appointed as managing agents in place of Strutt & Parker, their total fees including extras (apart from the major works fee) will be £41,766.00 inc. VAT. However, the Applicant's case was that the decision to re-appoint Strutt & Parker and pay the increased fee of £61,500.00 + Vat for 2012 was reasonable. They had confidence in Strutt & Parker and felt that an all-in fee was preferable as it made budgeting easier and gave the Applicant more lee-way; more demands could be made of the managing agents without worrying about incurring additional fees. Mr Martin's witness statement records "Ultimately we had to balance the level of S & P's fees against the service we would receive and we considered we would get value for money".

66. Mrs Friedman made the same general challenges as for 2011. In addition, she drew attention to a directors' report prepared in November 2012, following Strutt & Parker's resignation, which criticises them for failing to make the board aware of service charge overspend. She was also unhappy about various minor incidents, including an occasion during 2012 when her toilet was overflowing and she felt there was an inadequate response from Strutt & Parker.

67. The Applicant's case before the Tribunal was that Strutt & Parker's performance during 2012 was competent and reasonable.

68. The parties did not appreciate that the actual standard of service from Strutt & Parker during 2012 will be relevant only if a challenge is made to their fees as an element of the final service charge for that year. This Tribunal is only considering whether the on account BSC demands were for a reasonable amount when demanded.

69. In the course of the hearing, the Applicant produced a letter from Strutt & Parker dated 1 November 2010. After referring to their fee for their initial fixed term until 31 December 2011, it went on to say: "Should we be appointed to continue after that date the fee will reduce to £42,000.00 plus VAT". This is a clear indication that Strutt & Parker expected the volume of work to decrease after the first year. This is

what one might expect; by January 2012 the initial set-up tasks such as establishing financial records and ledgers, and creating management systems, should have been long completed by Strutt & Parker. Indeed, there was no suggestion that these tasks had not been done by the end of 2011.

70. Yet rather than decrease, the fee agreed for 2012 increased by almost 20%. The Tribunal is struck by the complete lack of any evidence whatsoever justifying an increase over what was already, in 2011, a very high management fee. Nor was there any evidence that the Applicant even attempted to negotiate the fee downwards on receiving the tender. Taking everything into account, the Tribunal can accept it was reasonable to re-appoint Strutt & Parker because of their proven service in 2011, but cannot accept that any fee increase was reasonable because no explanation or suggested justification has been provided. The budget element for management fees comprised in the 2012 BSC demands should therefore be reduced by **£12,030.00** from £73,800.00 (£61,500.00 + VAT) to £61,770.00, the level of the 2011 fee. Mrs Friedman's 0.4636% share of this decrease is **£55.76**.

71. This determination does not mean that the Applicant may not seek to charge a higher amount for managing agents fees in 2012 at the end of the year. It will remain open to Mrs Friedman to challenge the fees again, and open to the Applicant to seek to justify those fees, based on the services actually provided during the year.

Staffing costs

72. In 2011 the staffing costs excluding cleaning, uniform and telephone were £109,161.00. Essentially these were the costs of employing the porters and a part-time cleaner.

73. There was no evidence as to the budget sum for staffing costs as part of the 2012 BSC demands. The evidence of actual expenditure for 2012 shows that in reality, the costs increased by over £20,000.00, but the Tribunal has no way of knowing whether the budget and the BSC allowed for this.

74. Mrs Friedman said the staffing costs were excessive. She agreed that 24- hour porter cover was needed at Marine Court, because of crime in the building and in the local area. However she referred to a recent proposal which she said would have reduced costs by £20,000.00, only to be dismissed by the managing agents.

75. Mr Martin's witness statement contains details of the employment of the porters. During 2011 and 2012 the Applicant employed a Head Porter, three Assistant Porters and two Night Porters. The Head Porter is full-time and works 5 or 6 days each week and is said to have managerial responsibilities as regards the other porters, reporting etc. In 2011 his salary was £26,000.00; this increased to £28,500.00 in 2012. The Night and Assistant Porters are paid at an hourly rate, with

overtime paid at 1.5 normal rate. From the papers provided it appeared that night Porters were paid about £8.00 per hour, and Assistant Porters up to £7.75 per hour. Mr Martin's statement also went into considerable detail about security and safety concerns, and other duties which rendered necessary this level of porterage cover.

76. Mr Cardall told the Tribunal that a Mr Ford had made a proposal in September 2012 to reduce costs. Strutt & Parker had turned it down as it contravened the porters' contracts of employment. In 2013 Clifford Dann had reviewed the matter again, with the same result, as the porters were not willing to waive their overtime rate.

77. The Tribunal is not persuaded that the 2011 staffing costs are excessive or unreasonable, or that there is any evidence that the amount encompassed for staffing costs in the 2012 BSC on account demands was unreasonable. There is no evidence that the porters are being paid at an unreasonably generous level, or that there is excessive staff cover at the building. Accordingly no adjustment is made to the service charges on this ground.

Gas and Electricity

78. Mrs Friedman disputed the amounts charged for gas and electricity. She noted that the electricity charge had more than doubled, and gas had almost doubled, between 2010 and 2011, with no proper explanation, and she thought that the flat lessees were paying for gas supplied to the shop units.

79. The Applicant said there had been no change of supplier. Initially a poor credit rating made it impossible to change supplier; current enquiries indicated it would not make much difference. All the meter readings were checked by the porters. The gas supplies hot water to the flats and also to the basins in some shared toilets behind the shops. A small part of the gas bill is therefore charged to the shops, and of the balance each flat pays its relevant service charge proportion. Any gas supply to the shops themselves has nothing to do with the central supply and is paid by the shops on an individual basis. The electricity relates to the common parts lighting and lifts. Mr Martin said the 2010 service charge account figures for gas and electricity were not necessarily accurate as the books kept by the previous managing agents were a mess. The lessees might have been charged less than was actually due.

80. Mrs Friedman offered no evidence to contradict the Applicant's explanation. The Tribunal calculates that in 2011 Mrs Friedman was charged an average of £5.17 inc. VAT p.w. for gas and £1.72 inc. VAT p.w. for electricity. There being no evidence that any of the gas or electricity charges are incorrect, no adjustment is made to the service charge on this ground.

Cyclical (major works) expenditure

81. Mrs Friedman made general allegations that the cyclical expenditure charges to fund the major works, were too high, especially compared with the low market value of the flats. In relation to work carried out, she referred the Tribunal to defective paintwork seen during the inspection. She complained that the common parts required repair, including redecoration and re-carpeting.

82. The Applicant said that the contractors would be attending to remedy the paintwork. There had been full section 20 consultation with competitive tenders for the major works, which were urgently required to save the crumbling exterior of the building.

83. There is no evidence before the Tribunal that the sums charged for major works are unreasonable or that the works have not been (or will not be) completed to a reasonable standard. The value of the flats is immaterial in this regard, but it should be appreciated that the works are clearly needed to save the building, and once completed the value of the flats should recover. As regards the common parts, Mrs Friedman has not been charged anything, and lack of repair in one area cannot justify a deduction of charges for work done on another area. Accordingly, the Tribunal makes no adjustment to the service charges on this ground.

84. Mrs Friedman also queried why she should have to pay for repairs to someone else's balcony, when she only owned a small flat. She felt the major works charges were distributed unreasonably. The answer is that her lease specifies the percentage she is required to pay. The percentage clearly takes the relative size of the various flats into account because she pays less than 1/168th of the costs. The Tribunal has no power to vary this percentage, which is what she agreed to when she purchased the lease.

Administration charge of £54.00

85. In April 2012 the Applicant's solicitors wrote to Mrs Friedman about monies she allegedly owed. The original letter was not in evidence but it is clear from the second letter dated 10 April 2012 that although it was originally claimed that Mrs Freidman owed £4,226.27, in fact the true figure was only £1,481.22 (because the 2011 ASC certificate had not yet been issued). This comprised a balance of service charges demanded on 1 January 2012, plus £100.00 ground rent.

86. On 30 April 2012 the managing agents then invoiced Mrs Friedman for the solicitors' charge of £54.00.

87. The original demand of 1 January 2012 was not produced to the Tribunal. There is no way of knowing whether it complied with section

47 of the Landlord and Tenant Act 1987, but assuming it contained the same address for the landlord as the previous and successive invoices, it would not have so complied. In that case, the monies demanded would not have been lawfully due when the solicitors wrote to Mrs Friedman in April 2012.

88. Without being able to establish the validity of the demand on which the solicitors' letter was based, the Tribunal is not satisfied that the administration charge is reasonable and it is disallowed.

89. There is therefore no need to go on to consider whether the charge would have otherwise fallen within the scope of clause 3(10) of the lease, the only clause under which such a charge might be made

Section 20C Application

90. Mrs Friedman applied for an order under section 20C. She submitted that the Applicant should not have taken her to court, and thus to the tribunal. She was paying what she owed, and matters should never have got this far.

91. Miss Muir said that the Applicant was a lessee-owned company, which was doing its best to put Marine Court back into good order. The directors put in a huge amount of unpaid work. The only income was service charges, and if those were not paid in full and on time the company could not run. The Applicant had had to produce a huge amount of documentation to guess what the Respondent might raise at the hearing, and she had dropped some issues. Whatever the outcome, the costs of the proceedings should be met through the service charge.

92. In deciding whether to make an order under section 20C a Tribunal must consider what is just and equitable in the circumstances. The circumstances include the conduct of the parties and the outcome of the proceedings. In this case, there has been no unreasonable conduct by either party but the Applicant has largely prevailed. The service charge for 2011 has been upheld in its entirety and the overall budget demands for 2012 adjusted only to a minor extent. For this reason the Tribunal decides that no order should be made under section 20C.

93. However, this decision is not a determination that the costs of the proceedings are indeed recoverable as a service charge under the lease (and it is not obvious that they are so recoverable). Nor is it a decision that it was reasonable for the Applicant to have commenced court proceedings in September 2012, which will be a matter for the court to consider.

94. This matter is now remitted to the county court.

Dated: 3 December 2013

Judge E Morrison (Chairman)

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.