

10574



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

Case Reference : **CHI/43UF/LSC/2014/0071**

Property : **Flat 2, 54 St John's Road, Redhill,
RH1 6DS**

Applicant : **Ms A M McCrea**

Representative : **In person**

Respondent : **Mr J G McMenamin**

Representative : **Ms F Stebrenberger, Company
Legal Adviser from Chatwin
Construction Company**

Type of Application : **For the determination of the
reasonableness of and the liability
to pay service charges and
administration charges**

Tribunal Members : **Judge I Mohabir
Mr N Maloney FRICS**

**Date and venue of
Hearing** : **19 November 2014
Redhill Magistrates Court**

Date of Decision : **12 January 2015**

DECISION

Introduction

1. This is an application made by the Applicant under section 27A of the Landlord and Tenant Act 1985 (as amended) ("the Act") for a determination of her liability to pay and/or the reasonableness of service charges for the years 2005/06 to 2014/15 inclusive.
2. The Applicant is the lessee of the subject property pursuant to a lease dated 13 December 2004 made between the Respondent and Andrea Michelle Lambert for a term of 125 years from 24 June 2004 ("the lease").

Lease Terms

3. The covenant given by the lessee to pay a service charge contribution is found in clause 4(4) of the lease, which provides, *inter alia*, that:

"(b) the Tenant shall pay yearly on account of the Service Charge the sum of Three Hundred Pounds (£300.00) by annual payments in advance on the twenty-fifth day of March in each year....

(c) the Landlord may at any time hereafter on giving the Tenant one month's notice thereof in writing increase the said payment on account to such a sum per annum as would not exceed the Service Charge paid by the tenant for the year immediately preceding such notice (plus ten per centum) and thereafter the payment in advance in each year shall be at such increased figure."

4. Clause 4(4)(d) of the lease deals with surplus payments of service charges, which can be held by the landlord effectively in a reserve fund in respect of future expenditure.

Service Charge Costs in Issue

5. Unless stated otherwise the page references herein are to the relevant pages in the bundle.
6. The service charge costs challenged by the Applicant are as follows:

<u>2005/05</u>	
Service charges	£300 (p. 67)
Buildings insurance	£122.59 (p.68)

<u>2006/07</u>	
Service charges	Unknown. Apparently, a service charge demand was served on the Respondent but was not in the bundle
Buildings insurance	£128.72 (p.71)
<u>2007/08</u>	
Service charges	£315 (p. 73)
Buildings insurance	£135.15 (p.75)
<u>2008/09</u>	
Service charges	Unknown. Apparently, a service charge demand was served on the Respondent but was not in the bundle
Buildings insurance	£99.19 (p.77)
<u>2009/10</u>	
Service charges	£346.50 (p. 78)
Buildings insurance	£98.70 (p.80)
<u>2010/11</u>	
Service charges	£381.15 (p. 81)
Buildings insurance	£102.75 – excluding £100 ground rent (p.82)
<u>2011/12</u>	
Service charges	£400.20(p. 83)
Buildings insurance	£109.25 – excluding £100 ground rent (p.84)
<u>2012/13</u>	
Service charges	A total demand of £730 (excluding £100 ground rent) was made. The Tribunal was told that this included a contribution towards the total buildings insurance premium of £437. The Respondent was unable to particularise what the apportioned figures were (p. 85)
Buildings insurance	
<u>2013/14</u>	
Service charges	A total demand of £705 was made. The Tribunal was told that this included a contribution towards the total buildings insurance premium of £466. The Respondent was unable to particularise what the apportioned figures were (p. 86)
Buildings insurance	
<u>2014/15</u>	
Service charges	A total demand of £7660 (excluding a credit a credit of £156.25) was made. The
Buildings insurance	

Tribunal was told that this included a contribution towards the total buildings insurance premium. The Respondent was unable to say what the premium was.

7. For the avoidance of doubt, the Tribunal is not concerned with the separate demands made for ground rent, as it does not have jurisdiction to deal with this matter.
8. The Respondent told the Tribunal that the service charge demands made had been on an interim basis pursuant to clause 4(4)(b) of the lease and no further demands had been made. The Tribunal understood this to mean that the service charges demanded are payments made in advance and on account for each of the relevant years.
9. The Respondent told the Tribunal that the service charge expenditure actually incurred are set out in the heads of expenditure in the schedules found at pages 90-91 of the bundle. Apparently, all of the expenditure had been incurred by Chatwin Construction Ltd, which is a company solely operated by the Respondent.

The Issues

10. The Applicant accepted that she had been served with the service charge demands for each of the relevant years and, therefore, the time limit imposed by section 20B of the Act did not apply.
11. The Applicant also accepted that the buildings insurance premiums for each of the relevant years were reasonable and payable. As a consequence, the Tribunal did not have jurisdiction to make any determination in relation to the buildings insurance premiums. Her only complaint was that the Respondent had not provided her with a copy of the policy schedule.

12. The Tribunal's determination was, therefore limited to the service charge costs in issue. As stated earlier, these are treated as being payments made in advance and on account pursuant to clause 4(4)(b) of the lease as they were made by the Respondent on this basis. It follows that, as the payments were in effect estimated and made on account, the Tribunal is not concerned that they were reasonably incurred because the lease requires the Applicant to contractually pay the sum of £300 in advance and on account in each year.
13. For the same reason the point taken by the Applicant about statutory consultation under section 20 of the Act in relation to the actual expenditure incurred by the Respondent in each year has no application. In any event, the Tribunal was satisfied that none of the expenditure was in fact caught by section 20. The only issue for the Tribunal to decide is whether the service charge payments were reasonable for the years concerned.
13. In addition, the Respondent accepted that he had not served a notice pursuant to clause 4(4)(c) of the lease. Therefore, as a matter of contract, he was not entitled to demand or be paid any sum greater than £300 for each of the relevant years in any event.
14. Furthermore, the Respondent conceded that none of the service charge demands had been accompanied by a summary of the right and obligations required by section 21B of the Act. Moreover, the Respondent also conceded that none of the demands complied with the requirements of sections 47 and 48 of the Landlord and Tenant Act 1987. Consequently, any of the disputed service charges that Tribunal determines are reasonable are not payable by the Applicant until such time as the Respondent remedies these matters.
15. The Respondent also conceded that the costs relating to the cleaning of windows are not contractually recoverable under the terms of the lease in any event.

16. However, as will become obvious from the Tribunal's determination below, the issues raised in paragraphs 13 and 14 above are somewhat academic.

Relevant Law

17. This is set out in the Appendix annexed hereto.

Decision

18. The hearing in this case took place on 19 November 2014 following an external inspection of the building. The Applicant appeared in person. The Respondent, also in attendance, was represented by Ms Stebrenberger, an in house legal adviser from Chatwin Construction Company.
19. As to the reasonableness of the service charges in issue, the Applicant submitted that there was no evidence of any works having been carried out by the Respondent in any of the relevant years. She had in her application put the Respondent to proof and he had not provided any such evidence in the course of these proceedings. She submitted, therefore, that none of the service charge costs were reasonable.
20. Ms Stebrenberger argued that the service charge costs in issue were reasonable if they are considered in the context of the actual expenditure incurred by the Respondent for each of the relevant years as set out in the schedules of expenditure at pages 90-91 of the bundle. The Tribunal explained to her that if she was going to advance this argument, evidence of that expenditure should have been disclosed and should have been before the Tribunal. There was none and she could not explain why even though she had conducted this case on behalf of the Respondent.
21. In the absence of any evidence upon which it could make a finding that the service charges in issue were reasonable, the Tribunal had little difficulty in concluding that they were not and nothing (as payments in

advance and on account) was payable by the Applicant for each of the relevant years, save for the buildings insurance premiums. Therefore, the appropriate credit should be applied to the Applicant's service charge account for the years 2005/06 to 2014/15. The Tribunal appreciates that its decision may result in an element of unjust enrichment on the part of the Applicant, but it seems that the Respondent's difficulties in this case were largely self-inflicted. It is, of course, open to the Respondent to serve valid and permissible demands (whether under the lease or in law) based on the actual expenditure incurred in any given year.

Administration Charge

22. The Respondent charged the Applicant a Notice of Charge fee of £29.68 when she remortgaged the subject property in 2014. She accepted that the Respondent was contractually entitled to do so under clause 3(7) of the lease and that the amount was reasonable.

Section 20C & Costs

23. The Applicant had made an application under section 20C of the Act inviting the Tribunal to consider making an order preventing the Respondent from being able to recover all or part of any costs it may have incurred in these proceedings. The Tribunal has a discretion to so do where it is just and equitable in the circumstances of a case.
24. Having regard to the Tribunal's decision, it had little difficulty in concluding that it was just and equitable to make an order preventing the Respondent from recovering any of the costs he had incurred in these proceedings through the service charge account.
25. For the same reason, the Tribunal also orders that Respondent to reimburse the Applicant within 28 days of service of this decision the fees of £315 she has paid to have this application issued and heard.

Judge I Mohabir

12 January 2015

Appendix of relevant legislation

Landlord and Tenant Act 1985

Section 18

- (1) In the following provisions of this Act "service charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent -
 - (a) which is payable, directly or indirectly, for services, repairs, maintenance, improvements or insurance or the landlord's costs of management, and
 - (b) the whole or part of which varies or may vary according to the relevant costs.
- (2) The relevant costs are the costs or estimated costs incurred or to be incurred by or on behalf of the landlord, or a superior landlord, in connection with the matters for which the service charge is payable.
- (3) For this purpose -
 - (a) "costs" includes overheads, and
 - (b) costs are relevant costs in relation to a service charge whether they are incurred, or to be incurred, in the period for which the service charge is payable or in an earlier or later period.

Section 19

- (1) Relevant costs shall be taken into account in determining the amount of a service charge payable for a period -
 - (a) only to the extent that they are reasonably incurred, and
 - (b) where they are incurred on the provisions of services or the carrying out of works, only if the services or works are of a reasonable standard;and the amount payable shall be limited accordingly.
- (2) Where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable, and after the relevant costs have been incurred any necessary adjustment shall be made by repayment, reduction or subsequent charges or otherwise.

Section 27A

- (1) An application may be made to a leasehold valuation tribunal for a determination whether a service charge is payable and, if it is, as to -
 - (a) the person by whom it is payable,
 - (b) the person to whom it is payable,
 - (c) the amount which is payable,

- (d) the date at or by which it is payable, and
 - (e) the manner in which it is payable.
- (2) Subsection (1) applies whether or not any payment has been made.
- (3) An application may also be made to a leasehold valuation tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs and, if it would, as to -
- (a) the person by whom it would be payable,
 - (b) the person to whom it would be payable,
 - (c) the amount which would be payable,
 - (d) the date at or by which it would be payable, and
 - (e) the manner in which it would be payable.
- (4) No application under subsection (1) or (3) may be made in respect of a matter which -
- (a) has been agreed or admitted by the tenant,
 - (b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,
 - (c) has been the subject of determination by a court, or
 - (d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.
- (5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.

Section 20

- (1) Where this section applies to any qualifying works or qualifying long term agreement, the relevant contributions of tenants are limited in accordance with subsection (6) or (7) (or both) unless the consultation requirements have been either—
- (a) complied with in relation to the works or agreement, or
 - (b) dispensed with in relation to the works or agreement by (or on appeal from) a leasehold valuation tribunal.
- (2) In this section “relevant contribution”, in relation to a tenant and any works or agreement, is the amount which he may be required under the terms of his lease to contribute (by the payment of service charges) to relevant costs incurred on carrying out the works or under the agreement.
- (3) This section applies to qualifying works if relevant costs incurred on carrying out the works exceed an appropriate amount.
- (4) The Secretary of State may by regulations provide that this section applies to a qualifying long term agreement—

- (a) if relevant costs incurred under the agreement exceed an appropriate amount, or
 - (b) if relevant costs incurred under the agreement during a period prescribed by the regulations exceed an appropriate amount.
- (5) An appropriate amount is an amount set by regulations made by the Secretary of State; and the regulations may make provision for either or both of the following to be an appropriate amount—
 - (a) an amount prescribed by, or determined in accordance with, the regulations, and
 - (b) an amount which results in the relevant contribution of any one or more tenants being an amount prescribed by, or determined in accordance with, the regulations.
- (6) Where an appropriate amount is set by virtue of paragraph (a) of subsection (5), the amount of the relevant costs incurred on carrying out the works or under the agreement which may be taken into account in determining the relevant contributions of tenants is limited to the appropriate amount.
- (7) Where an appropriate amount is set by virtue of paragraph (b) of that subsection, the amount of the relevant contribution of the tenant, or each of the tenants, whose relevant contribution would otherwise exceed the amount prescribed by, or determined in accordance with, the regulations is limited to the amount so prescribed or determined.]

Section 20B

- (1) If any of the relevant costs taken into account in determining the amount of any service charge were incurred more than 18 months before a demand for payment of the service charge is served on the tenant, then (subject to subsection (2)), the tenant shall not be liable to pay so much of the service charge as reflects the costs so incurred.
- (2) Subsection (1) shall not apply if, within the period of 18 months beginning with the date when the relevant costs in question were incurred, the tenant was notified in writing that those costs had been incurred and that he would subsequently be required under the terms of his lease to contribute to them by the payment of a service charge.

Section 20C

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

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

- (2) The application shall be made—
 - (a) in the case of court proceedings, to the court before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to a county court;
 - (aa) in the case of proceedings before a residential property tribunal, to that tribunal;
 - (b) in the case of proceedings before a residential property tribunal, to the tribunal before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to any residential property tribunal;
 - (c) in the case of proceedings before the Upper Tribunal, to the tribunal;
 - (d) in the case of arbitration proceedings, to the arbitral tribunal or, if the application is made after the proceedings are concluded, to a county court.
- (3) The court or tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances.

Commonhold and Leasehold Reform Act 2002

Schedule 11, paragraph 1

- (1) In this Part of this Schedule “administration charge” means an amount payable by a tenant of a dwelling as part of or in addition to the rent which is payable, directly or indirectly—
 - (a) for or in connection with the grant of approvals under his lease, or applications for such approvals,
 - (b) for or in connection with the provision of information or documents by or on behalf of the landlord or a person who is party to his lease otherwise than as landlord or tenant,
 - (c) in respect of a failure by the tenant to make a payment by the due date to the landlord or a person who is party to his lease otherwise than as landlord or tenant, or
 - (d) in connection with a breach (or alleged breach) of a covenant or condition in his lease.
- (2) But an amount payable by the tenant of a dwelling the rent of which is registered under Part 4 of the Rent Act 1977 (c. 42) is not an administration charge, unless the amount registered is entered as a variable amount in pursuance of section 71(4) of that Act.

- (3) In this Part of this Schedule “variable administration charge” means an administration charge payable by a tenant which is neither—
- (a) specified in his lease, nor
 - (b) calculated in accordance with a formula specified in his lease.
- (4) An order amending sub-paragraph (1) may be made by the appropriate national authority.

Schedule 11, paragraph 2

A variable administration charge is payable only to the extent that the amount of the charge is reasonable.

Schedule 11, paragraph 5

- (1) An application may be made to a leasehold valuation tribunal for a determination whether an administration 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) Sub-paragraph (1) applies whether or not any payment has been made.
- (3) The jurisdiction conferred on a leasehold valuation tribunal in respect of any matter by virtue of sub-paragraph (1) is in addition to any jurisdiction of a court in respect of the matter.
- (4) No application under sub-paragraph (1) 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.
- (6) An agreement by the tenant of a dwelling (other than a post-dispute arbitration agreement) is void in so far as it purports to provide for a determination—
- (a) in a particular manner, or

(b) on particular evidence,
of any question which may be the subject matter of an application
under sub-paragraph (1).

Schedule 12, paragraph 10

- (1) A leasehold valuation tribunal may determine that a party to proceedings shall pay the costs incurred by another party in connection with the proceedings in any circumstances falling within sub-paragraph (2).
- (2) The circumstances are where—
 - (a) he has made an application to the leasehold valuation tribunal which is dismissed in accordance with regulations made by virtue of paragraph 7, or
 - (b) he has, in the opinion of the leasehold valuation tribunal, acted frivolously, vexatiously, abusively, disruptively or otherwise unreasonably in connection with the proceedings.
- (3) The amount which a party to proceedings may be ordered to pay in the proceedings by a determination under this paragraph shall not exceed—
 - (a) £500, or
 - (b) such other amount as may be specified in procedure regulations.
- (4) A person shall not be required to pay costs incurred by another person in connection with proceedings before a leasehold valuation tribunal except by a determination under this paragraph or in accordance with provision made by any enactment other than this paragraph.