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

Case Reference : **CHI/00HH/LS/2016/0023**

Property : **17 & 23 Castle Lane Torquay TQ1 3AN**

Applicant : **Mr Alan Henderson (lessee)**

Respondent : **Cane Properties Ltd (freeholder)**
Represented by Blenheims Managing Agents

Date of Applications : **15 March 2016 (S27A)**
18 March 2016 (S20c)

Type of Application : **Section 27A and 20C of the Landlord and Tenant Act 1985 (The Act).**

Tribunal : **Mr W H Gater FRICS ACI Arb (Chair)**
Judge Tildesley OBE

Date of hearing : **13th October 2016**

Venue : **Exeter Magistrates Court.**

Date of Decision : **23 November 2016**

DECISION

1. The Tribunal determines that £1509 is payable for 2012/13, £1227 is payable for 2013/14 and £1233 is payable for 2014/15 in connection with the actual service charges. The Tribunal determines that the estimated service charges of £2,277 and £2,310 are reasonable and payable for 2015/16 and 2016/17. The Applicant is liable to pay 50 per cent of the charges determined.
2. The Tribunal makes no order, under Section 20C.

REASONS FOR DECISION

The Application and Introduction

3. The Applicant is the lessee of two flats in a block of four flats. His two flats comprise numbers 17 and 23 Castle Lane which he lets out on assured shortholds.
4. The Applicant seeks a determination of certain items of service charge incurred in the years ending 2010, 2011, 2012, 2013, 2014 and 2015 and for future years 2016 and 2017.
5. By letter dated 4 April 2016 the Applicant amended his application and requested the Tribunal to determine the actual service charges for 2012 to 2015 inclusive and the service charge in advance for 2016.
6. The Applicant also applied for an order under section 20C of the Act that the costs of these proceedings may not be recovered by way of the service charge provisions of the lease.
7. Directions were issued on 6th and 21st April 2016 and there was a telephone case management meeting on 21st April. The Parties partially complied with those Directions enabling the matter to proceed.
8. There have been previous proceedings before the Tribunal when it determined the service charges for 2009/10, 2010/11 and 2011/12 (CHI/OOHM/LSC/2012/0097.)
9. The Applicant argues that he should not have to pay service charges because the freeholder has not carried out repairs to the building despite receiving service charges from the other two leaseholders. The Applicant challenged all the items

included in the service charges on the grounds of reasonableness and the standard of service provided.

10. Mr Holmes for the Respondent disputed the Applicant's claim stating that they had not paid any service charges at all. Mr Holmes submitted that the charges were reasonable and payable by the Applicant.

The Property and the Tribunal's inspection

11. The members of the Tribunal attended the property on the 13th October 2016. The Tribunal inspected the exterior parts of the building, including the rear, by gaining access through one of the ground floor flats in the presence of Ms Marquiss and Ms Gray of Blenheims managing agents and Mr Henderson.
12. The property comprises part of a 2-storey terrace of 4 converted flats. The building was originally a warehouse fronting direct on to Castle Lane and was constructed in Victorian times.
13. It has rendered external walls believed to be of solid stone / brick. The main roof is pitched and covered in slate, with a small area of flat felt roofing visible from the rear.
14. Although not inspected internally it was noted that flat 17 is a first floor flat and 23 is a ground floor flat.
15. The block has no common parts and no shared garden. Each flat has its own entrance door which opens directly onto Castle Lane.
16. The location is mainly commercial being at the rear of Market Street shops near the centre of Torquay. There is a public car park and shopping centre adjacent. There is no onsite parking and street parking is restricted.

The Law

17. The relevant law is set out below:

Landlord and Tenant Act 1985

Section 18 Meaning of "service charge" and "relevant costs"

- (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, improvement 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 include 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 period*

Section 19 Limitation of service charges: reasonableness

- (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 provision 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 20C Limitation of service charges: costs of proceedings

- (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 or leasehold valuation tribunal, or the Lands 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;*
 - (b) *in the case of proceedings before a leasehold valuation tribunal, to the tribunal before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to any leasehold valuation tribunal;*
 - (c) *in the case of proceedings before the Lands 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.*

Section 27A Liability to pay service charges: jurisdiction

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

- (d) the date at or by which it is payable, and*
- (e) the manner in which it is payable.*

(2) Subsection (1) applies whether or not any payment has been made.

(3) An application may also be made to the appropriate tribunal for a determination whether if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs and if it would, as to-

- (a) the person by whom it would be payable,*
- (b) the person to whom it would be payable,*
- (c) the amount which would be payable,*
- (d) the date at or by which it would be payable, and*
- (e) the manner in which it would be payable.*

The Leases

18. The Tribunal was provided with copies of the Leases of 17 Castle Lane dated 30th April 1985 between Cane Properties Limited and Raymond Joseph Hybers and 23 Castle Lane dated 9th August 1985 between Cane Properties Limited and Denis Carnaby.

19. Clause 1 (2) to the lease says:

'..... There shall also be paid by way of further or additional rent such sum or sums to be assessed in manner referred to in this clause as shall be a just and fair proportion of the amount which the landlord may from time to time expend and as may reasonably be required on account of anticipated expenditure.

(a) in performing the landlord's obligations as to repair maintenance and insurance hereinafter contained.

(b) in payment of the proper fees of the surveyor or agent appointed by the landlord in connection with the carrying out or prospective carrying out of any of the repairs and maintenance herein referred to and the apportionment of the cost of such repairs maintenance and collection between the several parties liable to reimburse the landlord for the same and such fees for collection of the rent hereby reserved and the other payments to be paid by the tenant under this clause.

(c) in payment of rents rates taxes water gas electricity and other services charges or outgoings whatsoever in respect of any part of the building not included or intended to be included in this demise or in the demise of any part of the building.

(d) in providing such services facilities and amenities or in carrying out works or otherwise incurring expenditure as the landlord shall in the landlords absolute discretion deem necessary for the general benefit of the building and its tenants whether or not the landlord has covenanted to incur such expenditure or provide such services facilities and amenities or carry out such works.

(e) in complying with any of the covenants entered into by the landlord or with any obligations imposed by operation of law which are not covered by the preceding clauses.

PROVIDED THAT all such sums shall from time to time be assessed by the surveyor or agent for the time being of the landlord and such sums shall be paid by the tenant within twenty-eight (28) days of being demanded”.

The Hearing

20. The hearing was held after the inspection.
21. The Applicant appeared in person.
22. The Respondent was represented by Jonathon Holmes MD of Blenheims supported by Claire Marquiss and Vicky Gray of that firm.
23. In accordance with Directions the Respondent produced a hearing bundle. References to the documents in the hearing bundle are in brackets: [].
24. The parties completed a Scott Schedule in relation to items in dispute [111-117]. This formed the foundation for the Tribunal’s consideration.
25. The following is a summary of the evidence given by the Applicants and Respondents in support of their case. It is not an exhaustive commentary. All evidence heard by the tribunal has been taken into account.

The Applicant’s Case

26. The Applicant set out that service charges totalling over £10,000 for the two flats had been levied against him despite only £125 having been spent in total on repairs.
27. He cited high management and service charges which he claimed were acknowledged as such by the freeholder. In support of this last claim he cites a letter dated 13th February 2014 from Fred Cane of Cane Properties referring to charges by TMS South West Ltd, the previous name of the managing agents [109] .
28. It states, “...To my knowledge they have charged both the occupiers an excess far beyond the expected amount”.
29. He referred to the cost of an asbestos survey which was limited to an external photographic inspection. He questioned the need for such a survey.
30. There had been a Health and Safety Report commissioned and he questioned the need given that the building fronted direct on to the road which is the Council’s responsibility.
31. The Applicant stated that there had been an insurance claim and a flat repossessed. He considered that these funds should be available to the landlord for repairs and maintenance.

32. He claims that the property has never been maintained as it should by the Landlord.
33. The Applicant seeks a determination of certain items of service charge incurred in the years ending 2012, 2013, 2014 and 2015 and for future years 2016 and 2017.

The Respondent's Case

34. The Respondent's case centred on the premise that Service Charge recovery is a matter of contractual entitlement.
35. The Respondent referred to the lease and clause 1 (2) in particular. That clause enabled the landlord to levy service charges for actual and anticipated expenditure as rent. It also allows for recovery of costs of collection for rent and service charge payments.
36. The Tribunal was referred to clause 4 of the lease which sets out the Landlords obligations. In particular he cited the first sentence.

"Subject to contributions by the tenant as herein provided the Landlord hereby covenants with the Tenant as follows...."

37. In effect the Respondent states that the Landlord is not obliged to carry out any of these duties in the absence of contributions by the Applicant.
38. Mr Holmes submitted the Applicant's persistent non-payment placed the Landlord and Managing Agent in an impossible position. The other tenants have paid their service charges, but the absence of any payment from the Applicant, amounting to 50% of the whole, prevents the provision of services and works.
39. The Respondent seeks a determination that the service charges for the years specified are reasonable.

The Tribunal's deliberations

40. The Tribunal is grateful to the parties for preparing the Scott Schedule which clarifies the issues and dispute.

Administration Charges

41. The disputed charges are £73 and £120 (2012/13) and £36 (2013/14)
42. The first three categories relate to "administrative charges" and debt recovery. The application is in respect of Service Charges under S27A of the Act. Normally, if administration charges are to be challenged or determined as reasonable this requires a separate application under the Commonhold and Leasehold Reform Act 2002.
43. The lease does however, contain unusual clauses at 1.(2). In particular 1.(2) d states:-

“ in providing such services facilities and amenities or in carrying out works or otherwise incurring expenditure as the landlord shall in the landlords absolute discretion deem necessary for the general benefit of the building and its tenants whether or not the landlord has covenanted to incur such expenditure or provide such services facilities and amenities or carry out such works.”

44. Such a clause is often described as a “sweeping up clause” designed to give a broad scope for the landlord’s recovery of service charge costs.

45. Given that the Landlord’s Covenant at clause 4 is subject to contribution by the tenant it may be argued that certain debt recovery and costs in pursuit of service charge arrears are incurred for the benefit of the building and tenants.

46. In addition, clause 1.(2)b states:-

“In payment of the proper fees of the surveyor or agent appointed by the landlord in connection with the carrying out or prospective carrying out of any of the repairs and maintenance herein referred to and the apportionment of the cost of such repairs maintenance and collection between the several parties liable to reimburse the Landlord for the same and such fees for collection of the rents hereby reserved and the other payments to be paid by the Tenant under this clause.”

47. The Tribunal determines that whilst described as Administration charges by the agents, the agents fees in collecting and recovering rent and service charges are captured by clause 1.(2)b of the lease and form part of the service charge account.

48. Dealing with the specific charges therefore the Tribunal’s considerations were as follows.

49. There are no invoices provided but the Respondent’s evidence is that the amount of £73 in 2012/13 comprise £12 for service of a Section 166 ground rent recovery notice under the Commonhold and Leasehold Reform Act 2002 and £61 for obtaining Land Registry documents.

50. The Tribunal adopts the reasoning of the previous Tribunal at paragraph 11 and allows the £12 for the s166 Notice but not the £61 for obtaining Land Registry Documents.

51. The other two charges of £120 and £36 related to the administration work undertaken by the managing agents for debt collection. The Respondents rely on ARMA procedure and the ruling in their favour on this point by the previous tribunal.

52. The Applicant pointed out that there are no receipts for the sums claimed. Mr Holmes was unable to explain the nature of £120 charge. He said the £36 related to a debt recovery letter.

53. The Tribunal is satisfied the Applicant had the authority under the lease to recover the charges. However, in the absence of evidence on the £120 charge the Tribunal determines that this has not been reasonably charged. The Tribunal considers the £36 charge reasonable for a debt recovery letter, particularly as it was not a computer produced letter, and involved manual checking of accounts.

The Legal Fees for debt recovery

54. The disputed charges are £108, (2012/13) and £426 2013/14.
55. The Respondent said the charges related to the costs of instructing solicitors to pursue the collection of unpaid service charges from the Applicant.
56. The previous Tribunal found that legal costs were recoverable under clause 1(2)(b) of the lease which states:
57. “ in payment of the proper fees of the surveyor or agent appointed by the landlord in connection with the carrying out or prospective carrying out of any of the repairs ad maintenance herein referred and the apportionment of the cost of such repairs maintenance and collection between several parties liable to reimburse the Landlord for the same and such fees for collection of the rents hereby reserved and the other payments to be paid by the Tenant under this clause”.
58. Since the publication of the previous Tribunal decision the Upper Tribunal has considered the question of the recovery of legal costs through the service charge in a number of cases: Union Trustees v Mrs Slavin [2015] UKUT 0103 , Geyfords Limited v Ms O Sullivan and other [2015] UKUT 0683 and Sinclair Gardens Investments v Avon Estates [2016] UKUT 371.
59. The question that the Tribunal is required to ask: “Is clause 1(2)(b) sufficiently clear to demonstrate an intention of the parties that the lease as a whole, and the service charge in particular, permits recovery of legal costs incurred by the Landlord”.
60. The Tribunal observes that clause 1(2)(b) makes no mention of legal costs or solicitors. This is in contrast to clause 3(13) which enables the landlord to recover solicitor’s costs directly from the Applicant which have been incurred by the landlord incidental to the preparation and service of a section 146 Notice.
61. The Tribunal is of the view that the wording of clause 1(2)(b) is not sufficiently clear and certain to enable the Respondent to recover the legal costs through the service charge. The Tribunal is of the view that the Respondent should consider whether the requirements of clause 3(13) have been met, and if they have take action to recover the legal costs direct from the Applicant.
62. The Tribunal disallows the legal costs of £108, (2012/13) and £426 2013/14.

Health and Safety.

63. The disputed charges are £180 (2012/13) and £225 (2013/14).
64. The charges were substantiated by invoices [118 and 119].
65. Mr Holmes relies on clauses 2d and e in the lease as the authority to recover the costs connected with the health and safety reports because they were incurred for the general benefit for the building.
66. The Applicant considers that no costs should be incurred because the building is fully demised to tenants and the exterior fronts direct on to Council maintained land.
67. The Tribunal is satisfied that the costs of the health and safety report are authorised by clauses 1(2)(d) of the lease.
68. The Tribunal, however, finds that the scope of the health and safety risks which falls under the landlord's responsibility are extremely limited because of the nature of the building and the absence of common areas. The flats themselves are all demised to tenants.
69. Given the above findings the Tribunal decides the sum of £180 has been reasonably incurred but that the further cost of £225 for the following year is not.

Asbestos Survey

70. There were no charges incurred on asbestos survey during the years in questions 2012 to 2015 .

Repairs

71. The only charge incurred on repairs was one of £125 incurred in 2012/13.
72. The charge related to the fitting and supplying of a downpipe and clearing the gutters.
73. The Applicant disputed that the works had been done. The Respondent showed the Tribunal and the Applicant photographs of the works. The Respondent also produced an invoice from "Ask Kev" substantiating the expenditure [170]
74. The Tribunal is satisfied that the works had been done. The Applicant produced no alternative quotations for the works.
75. The Tribunal finds that the costs in connection with the downpipe and guttering have been reasonably incurred, and that the works were to a reasonable standard.

Insurance

76. The disputed costs are £693 (2012/13), £711 (2013/14) and £753 (2014/15).

77. The Respondent supplied invoices to substantiate the payments in 2012/13 and 2013/14 [177 & 178]. The amount paid in the 2014/15 was recorded in the draft service charge accounts [99].
78. The Tribunal notes that the Respondent arranges and pays the building insurance from his own funds because of the lack of funds in the service charge accounts.
79. The Applicant said that he could arrange building insurance for around £340. The Applicant also questioned whether the conditions of the insurance policy had been met. He pointed out that the Respondent had declared that there were working people resident at the property at the time when two flats were unoccupied.
80. The Respondent referred to a Minutes of a Meeting on 16 December 2014 with the Applicant where it was agreed that the Applicant would provide details of the broker offering the cheaper insurance to the managing agent [172]. The Tribunal places weight on the facts that the Applicant has not provided those details to the managing agent and did not bring evidence of alternative insurance quotations to the hearing.
81. The Respondent contended that it was the leaseholder's responsibility to inform the freeholder of any changes in the occupation of the flats. The Respondent referred to a letter dated 8 January 2013 from the Respondent to leaseholders asking them to report any un-occupancy to the insurance broker without delay [173].
82. Using our expert knowledge and experience and given the evidence provided the Tribunal finds that the insurance cover is adequate for this type of property and the costs incurred are reasonable .

Management Fees

83. The disputed charges are £625 (2012/13), £643 (2013/14 and £473 (2014/15).
84. The Applicant submitted that the charges were excessive for the work involved on the property.
85. The previous Tribunal determined that a management charge of £100 per flat plus VAT was reasonable.
86. The Tribunal finds that the scope of the management function is limited because of the nature of the building and the number of leaseholders involved. This Tribunal agrees with the previous decision and fixes the management fee of £100 plus VAT for each flat (£480) for each of the three years in question.

Accountancy

87. The disputed charges are £310 (2012/13) , £320 (2103/14) and £300 (2014/15).
88. The payments are substantiated by invoices at [120], [121] and [122].

89. The Applicant argued that the fees were excessive. In his view there was no need to engage an accountant for four or less flats. He also said that the accountant was connected with the Respondent.
90. The Respondent denied there was any financial connection with the previous accountant. The Respondent pointed out that the managing agents had gone out to tender for the January 2015 accounts with the result that a new accountant had been appointed and charged a fee of £300 rather than £320.
91. The previous Tribunal had determined the accountancy charge of £300 reasonable. The previous Tribunal did not indicate the basis upon which it arrived at its decision.
92. This Tribunal finds that the Applicant's position has merit. The Tribunal considers there is no requirement to have service charge accounts for 4 flats or less prepared by a chartered accountant. Also in the Tribunal's view, the amount of information to be included in the accounts is minimal. The Tribunal considers that the managing agent would be able to prepare at a lower cost income and expenditure statements which would suffice for this property. If authorised by the lease to charge for accountancy, the Tribunal would be minded to reduce the fee by 50 per cent.
93. The Tribunal, however, considers there is a more substantial flaw with the accountancy charge and that there is no authority in the lease which enables them to be recovered as service charges. It would appear that the previous Tribunal did not consider this point.
94. Clause 1(2)(b) does not extend to the fees for preparing accounts. Clause 1(2)(d) is a sweeping up clause which relates to services to the tenants or to the building. The preparation of service charge accounts is primarily for the benefit of the landlord.
95. The Tribunal finds that the costs of the preparation of accounts by a professional accountant is not authorised by the lease

Bank charges

96. This concerned a cost of £19 in 2012/13. The Applicant made no substantive points on this charge. The previous Tribunal decided that bank charges could be recovered through the service charge and the amount of £11 was reasonable.
97. The Tribunal therefore determines that bank charges of £19 have been reasonably incurred

Service Charge for 2016

98. The Respondent issued demands in advance for 2015/16 service charges totalling £2,277 (£569.25 per flat) and £603 (£150.75) for reserves.
99. The Tribunal is concerned with the estimated service charge budget for the year ended 1 January 2016, not with the actual service charge for that period. When

examining a budget the Tribunal has regard to section 19(2) of the 1985 act which provides that:

“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 charge or otherwise”.

100. The Tribunal considers the correct approach for determining the budget for the year ended 1 January 2016 is to assess the reasonableness of the costs at the time the budget is demanded (10 March 2015) having regard to expenditure in previous years. Applying these criteria, the Tribunal is satisfied that the estimated charges service charge of £2,277 is reasonable.
101. The Tribunal finds there is no authority in the lease to hold reserves. The Tribunal, therefore, disallows this amount of £603.
102. The Respondent at the hearing referred to the advance service charge for the year 2016/17. This demand was made on 15th January 2016 and comprised £2310 (577.50 per flat) for service charges and £570 (£142.50 per flat) for reserves. For the reasons stated above the Tribunal finds the advance charge of £2310 reasonable but disallows the £570 for reserves.

Section 20 c Application

103. The applicant requests that no costs in relation to this case should be charged.
104. The Tribunal finds that there is no authority to recover the legal costs as service charge. which means that the Tribunal has no jurisdiction to make such an order. If the Tribunal had jurisdiction to make such an order, it would not have done so. The Applicant has paid no service charge whatsoever, and has ignored the previous order of the Tribunal. The Applicant also did not honour his part of the agreement that was reached with the freeholder at the meeting on 16 December 2016.
105. The Tribunal therefore makes no order under Section 20c.

	2012/13		2013/14		2014/15	
	Charged	Reasonable	Charged	Reasonable	Charged	Reasonable
Administration Charges	73	12	0		0	
Legal fees debt recovery	108	0	426	0	-	-
Administration debt recovery	120	0	36	36	0	
Health and Safety	180	180	225	0		

Asbestos reports	0		0		0	
Repairs	125	125	0		0	
Insurance	693	693	711	711	753	753
Management Fee	625	480	643	480	473	480
Bank	19	19	0		0	
Accountant	320	0	320	0	300	0
Service Charges Payable		£1509		£1227		£1233

Appeal Provisions

106. If either party is dissatisfied with this decision they may apply to this Tribunal for permission to appeal to the Upper tribunal (Lands Chamber). Any such application must be received within 28 days after these written reasons have been sent to the parties (rule 52 of The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013).

William H Gater
Chairman
22 November 2016