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First-tier Tribunal
Property Chamber
(Residential Property)

Case reference	:	**CAM/22UJ/LSC/2016/0089**
Property	:	**Flat 20 Regency Court, Pear Tree Mead, Harlow M18 7DH**
Applicant Represented by	:	**Regency Court (Harlow) Ltd. Elizabeth England of counsel (JB Leitch)**
Respondent Represented by	:	**Carole Janet Dunn Caoimhe McKearney of counsel (Lynch Hall & Hornby)**
Date of Transfer from the County Court at Chelmsford	:	**23rd May 2016 (rec'd 9th November and copy lease rec'd 30th November)**
Type of Application	:	**to determine reasonableness and payability of service charges and administration charges**
The Tribunal	:	**Bruce Edgington (Lawyer Chair) Roland Thomas MRICS John Francis QPM**
Date and place of Hearing	:	**11th April 2017 at Harlow Magistrates' Court, The Court House, Harlow CM20 1HH**

DECISION

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1. The Tribunal determines that of the claim of £4,906.00, the sum of £3,702.48 is reasonable and payable forthwith.

2. With regard to the claim for interest, the lease enables interest to be claimed at the rate of 4% above Lloyds Bank base lending rate. The base lending rate as from March 2009 was .5% and this reduced to .25% on 4th August 2016. Interest is claimable from 31st March 2016 at the rate of 4.5% and then from 4th August 2016 at the rate of 4.25%. Statutory interest is therefore not payable pursuant to section 69(4) of the **County Courts Act 1984**.

3. With regard to administration charges, the lease makes no provision for the recovery of legal expenses and court fees. Thus, any award for costs will be on an *inter partes* basis only.

4. The Tribunal refuses to make an order pursuant to section 20C of the **Landlord and Tenant Act 1985** ("the 1985 Act") as requested by the Respondent.

5. The claim is transferred back to the county court sitting at Chelmsford under claim no. C4CW839J for determination of interest up to judgment and costs. The parties should note that it will be up to them to make any application to the court in relation to those matters.

Reasons

Introduction

6. Court proceedings were issued by the Applicant for the sum stated above plus statutory interest on the 19th February 2016. No formal defence was filed at court but the parties eventually agreed that the matters within this Tribunal's jurisdiction should be transferred. From the correspondence between solicitors included in a hearing bundle of some 440 pages, it would appear that the transfer has been about the only thing the parties have agreed upon.

7. The claim is by a management company for service charges plus interest and costs in respect of a dwelling let on a long 'tripartite' lease in a form which is quite normal nowadays, where the landlord passes over management to a management company which is a party to the lease and covenants to keep the building and common parts in good repair. Service charges are payable to the management company.

8. Save for insurance premiums, the service charge element of the claim is for service charges on account only since November 2008. The Order of District Judge Mitchell dated 23rd May 2016 is for the Tribunal to determine "*whether service charges, administration charges, interest and fees under the Lease are payable by the Defendant to the Claimant and, if it is, as to (a) the amount which is payable, (b) the date at or by which it is payable and (c) the manner in which it is payable*". The Tribunal is not sure what (c) is intended to mean.

9. Part way through the progress of the case through the Tribunal's processes, the Respondent's solicitors attempted to issue a cross application. The basis of this was that as the claim was only for payments on account, there ought to be a determination as to exactly what was due for the relevant period in respect of the actual charges. This application was not issued for 2 reasons. Firstly, the Upper Tribunal has told First-tier Tribunals and Leasehold Valuation Tribunals before them that where cases are transferred from the court, the Tribunal must limit itself to what has been transferred. Secondly, the court has already asked the Tribunal to determine the 'service charges and administration charges' which included the matters raised in the proposed application.

10. Regrettably, the case was delayed for some months because the papers never arrived at the Tribunal. When they did arrive, a directions order was made on the 14th December 2016 timetabling the case to this hearing.

11. A bundle of documents was duly lodged on time and virtually everything is in dispute. A brief appraisal of the points raised by the Respondent is:

- The extent of 'the development' is disputed although it was agreed at the hearing that this issue was not for determination by the Tribunal
- As the sole director of the Applicant and the managing agent are the one and the same, it is said that there is a conflict of interest although it was again agreed at the hearing that this was merely a matter to be taken into account if the Tribunal was satisfied that there is a conflict which affected any decision made by the Applicant
- Any legal costs and disbursements in relation to litigation cannot be claimed as administration charges because the Applicant is not the landlord
- The Applicant is not entitled to statutory interest – only to contractual interest
- None of the demands for service charges were served on the dates suggested. The first time the Respondent says she saw them was with a solicitors' letter dated 31st March 2016 i.e. after the court proceedings had been started.
- In view of the last point, the claim is limited by the 18 month rule set out in section 20B(1) of the 1985 Act
- The demands are for payments on account of service charges whereas the lease only allows 'estimated' charges based on the accounting period to be demanded as interim charges
- There has been no reconciliation at the end of the accounting period by the service of a certificate of service charges actually incurred. This was conceded at the hearing by the Applicant.
- The statutory summary of rights and obligations was not served with any demands for payment and the Respondent can therefore withhold payment under section 21B(3) of the 1985 Act
- The demands contain items which are not recoverable i.e. auditor's fees, company secretarial costs, charges for filing annual returns and bank charges

The Lease

12. The bundle produced for the hearing included a copy of a certified copy of the lease which is dated for the 11th December 1985 and is for a term of 99 years from 25th December 1984 with a ground rent of £100 per annum. The lease provides that the management company, the Applicant in this case, shall insure the property and keep the building and grounds in repair. It can then recover 2.7% of the cost of so doing from the leaseholder.

13. As to administration fees relating to litigation costs, there is no provision in the lease for them to be recovered in any situation other than in contemplation of the proceedings under sections 146 and 147 of the **Law of Property Act 1925** i.e. for forfeiture. Even then, it is only the landlord's costs which are recoverable. The claim form in this case says

specifically that it is the first step in contemplation of forfeiture. However, the Applicant is not the landlord and cannot forfeit.

14. Clause 4(4) and the Fifth Schedule deal with service charges. They are payable to the Applicant "*as rent in arrear*". Interest can be claimed on unpaid Interim and Further Interim Charges at the rate of 4% above Lloyds Bank PLC base lending rate. The Applicant's covenant to keep the building and common parts in repair and maintained is subject to payment by the leaseholder of interim service charges.

15. Clause 6(j) enables the Applicant to employ managing agents, Chartered Accountants, surveyors or anyone else "*as may be necessary or desirable for the proper maintenance safety and administration of the Building*". The Fifth Schedule confirms this and also says that interest charged on bank accounts can be recovered as part of the service charges.

16. The Applicant can claim interim service charges which are defined as being "*such sum to be paid on account of the Service Charge in respect of each Accounting Period as the Company or its Managing agents shall specify at their discretion to be a fair and reasonable interim payment*". In fact a further interim payment can be claimed if actual costs exceed interim costs. Interestingly the wording refers to "*the costs to the Company of performing the obligations of the Company hereunder...*". Certainly those words could be said to include the administrative costs of keeping the company going.

17. Finally, it is said that "*as soon as practicable after the expiration of each Accounting Period there shall be served upon the tenant by the Company or its agents a certificate*" setting out what service charges have actually been incurred with a reconciliation statement. The leaseholder is then given the right to inspect supporting vouchers and receipts much along the lines of section 22 of the 1985 Act.

The Law

18. Section 18 of the 1985 Act defines service charges as being an amount payable by a tenant to a landlord as part of or in addition to rent for services, insurance or the landlord's costs of management which varies 'according to the relevant costs'.

19. Section 19 of the 1985 Act states that 'relevant costs', i.e. service charges, are payable 'only to the extent that they are reasonably incurred'. This Tribunal has jurisdiction to make a determination as to whether such a charge is reasonable and, if so, whether it is payable.

20. Paragraph 1 of Schedule 11 of the **Commonhold and Leasehold Reform Act 2002** ("the 2002 Act") ("the Schedule") defines an administration charge as being:-

> *"an amount payable by a tenant of a dwelling as part of or in addition to the rent which is payable... directly or indirectly in respect of a failure by the tenant to make a payment by the due date to the landlord."*

21. Paragraph 2 of the Schedule, which applies to amounts payable after 30th September 2003, then says:-

> *"a variable administration charge is payable only to the extent that the amount of the charge is reasonable"*

22. Section 20B of the 1985 Act says that if any service charge was incurred more than 18 months before a demand for payment is made, then such service charge is not payable, unless within 18 months of the service charge being incurred, the tenant was notified in writing that the costs had been incurred and he would be expected to pay them.

23. Section 19 of the **Limitation Act 1980** as amended says:-

> *"No action shall be brought and the power conferred by section 72(1) of the Tribunals Courts and Enforcement Act 2007 shall not be exercisable to recover arrears of rent, after the expiration of six years from the date on which the arrears became due"*

24. Section 69 of the **County Courts Act 1984** gives the court wide discretion to award interest. However, sub-section 69(4) says "*interest in respect of a debt shall not be awarded under this section for a period during which, for whatever reason, interest on the debt already runs*".

The Inspection

25. The members of the Tribunal inspected the property in the presence of counsel for both sides, plus Dorothy Cooper from the Applicant and the Respondent and some of her family. The development consists of 37 dwellings built around a quadrangle in about 1984. This appeared to the members of the Tribunal to be a speculative development of mediocre quality built of partly rendered brick/block construction under interlocking concrete tile pitched roofs.

26. Much of the exterior of the building consisting of the rendering, some plastic cladding, the wooden window frames and most of the wood in the common parts needed decoration. Counsel for the Respondent took the Tribunal members around the development and pointed out many examples of what she described as being lack of maintenance. They will not all be mentioned here but they included uneven paths and tree stumps which were said to be trip hazards, bent fencing, loose bricks in a wall, 2 brick walls at the front which had not been re-built and a large section of new fencing which had blown over, it was said, due to lack of maintenance.

27. The windows and frames are part of the demises save for the exterior surfaces. Most had been replaced with uPVC double glazed units. Less than half a dozen, including those in the subject property, were the original wooden ones. It also had the original French doors. All the window frames and the doors were in need of maintenance. Having said that, the building is over 30 years old and these frames and doors would be likely to have needed replacement by now in any event. In her evidence Miss. Janine Dunn referred to a friend of hers whose windows were still fine after a number of years. That may be the case but the lifespan of wood

depends largely on the type of wood, not necessarily the standard and frequency of decoration.

28. Outside the rear of the Respondent's flat, there was a grass area. The french doors needed painting and there were quite a large number of small concrete slabs leaning against the wall under the doors which effectively prevented easy entry and exit from the doors. These were said to have been there for years and it was said to be an example of bad management that they had not been removed. It was not explained why the Respondent or her family had not just moved the slabs away so that the doors could be used.

29. Finally, the Tribunal members were taken to the car parking space and it was alleged that when the spaces were marked with lines and numbered, the gap to the right of number 20 on the lease plan had been removed. It seemed clear to the Tribunal members that the gap had been used to make each parking space larger than would be the case in, say, a supermarket carpark. It was alleged that it was impossible for the Respondent to use the car parking space because she did not have room to swing in and out of the space if someone was parking in space 19. Bearing in mind the width of each space, the members of the Tribunal accepted that the one on the end may be more difficult to use than others, but there seemed to be more than sufficient space to get in and out.

The Hearing

30. The hearing was attended by the Respondent and her 2 daughters, counsel for both sides and Mrs. Cooper. The Tribunal chair went through the points of dispute listed above and it was agreed that they were the points which were in dispute subject to the above comments. He asked why no-one seemed to have considered statutory limitation. Ms. England said that as it was not in the defence, it was not relevant. She was reminded of the wording of the statute which prevents any action being brought for a statute barred debt. Eventually, she conceded that she had not really given the matter any consideration.

31. Counsel were then asked whether statutory interest was still being claimed bearing in mind the wording of the County Courts Act 1984. Ms. England conceded that if contractual interest was payable, then the claim for statutory interest had to be abandoned.

32. Mrs. Cooper was then called to give evidence for the Applicant. She agreed that she was a director of the Applicant and of the managing agent which she formed in 2007. She conceded that there had been no reconciliation statements as required by the Fifth Schedule to the lease. She said that she had put the demands, budget and a copy of the previous year's profit and loss account through the doors of the dwellings each year. This included the Respondent. All demands had the necessary statutory information attached.

33. She said that the demands for payments on account did not coincide with the end of the accounting year because the Applicant had no money at one stage and the residents agreed that the demands had to be brought forward. She pointed out that at one stage several of the tenants would

not or could not pay their service charges and eventually solicitors had to be instructed. The Tribunal noted from the end of year accounts that in 2013, there was only £2,541 in the bank but in 2016, this had increased to £41,191.

34. Under cross examination she refused to accept that she was rude or that she had effectively 'frozen out' the Respondent by not sending her any documents.

35. Janine Dunn was then called. She is the Respondent's daughter. She had bought a property in this development in 2001 and had lived there until about 2 weeks ago. She referred to the various items such as the fencing, window frames, lack of grass maintenance, lack of cleaning etc. which she said were examples of bad and sometimes complete lack of maintenance. She had called a meeting of tenants in 2010 in an attempt to persuade them to support the formation of a right to manage company. This did not proceed.

36. Under cross examination she said that Mrs. Cooper was always antagonistic and she had the same treatment as her mother. She had replaced her windows and Mrs. Cooper promised to credit the cost against her service charge account and then went back on her promise. She alleged that there had been no cyclical maintenance since 2001.

37. The Tribunal asked her what accounts had been sent to her with the e-mail from the accountant on the 17th July 2014 which was in the bundle. The accountant said that they were accounts. She said that they were abbreviated accounts but could not produce a copy of what she meant. She was then asked whether she was actually alleging fraud against Mrs. Cooper and she agreed that this is what she was alleging.

38. She was asked if the full accounts which had now been produced some time before the hearing were being analysed to see if anything was obviously fraudulent in them. She said that her sister who was sitting behind her was an accountant. She said that they were going to analyse them but could not explain why that had not been done by the time of the hearing. She had always demanded copies of invoices etc. When asked when she had asked to inspect the supporting documents in accordance with section 22 of the 1985 Act, she admitted that as far as she could recall, no such request had been made.

39. The Respondent was then called. She said that she bought her flat in November 2000. She always paid her service charges up to 2008 but then noticed a lack of maintenance. She complained and was then, she said, excluded from everything. This meant that she did not receive any documents from Mrs. Cooper.

40. Under cross examination, she was shown the statutory information notices which were alleged to have been sent to her. She said that she could not remember seeing these before. She was then asked whether she had seen any gardeners or cleaners over the years. She said that she had but one could never rely on them to come at a particular date and time. She even

referred to a cobweb she had seen and made the point that she had had to remove this herself.

41. She was asked why she had not paid at least something to cover those items she knew were being undertaken. She could not say. She was asked why she had not at least paid insurance and she said that she had always paid for her insurance. The Tribunal asked Mrs. Cooper whether insurance had been paid direct to the landlord and she said that she collected the insurance premiums and they had not been paid by the Respondent.

42. At the end of the hearing, Ms. McKearney asked the Tribunal to make an order under section 20C of the 1985 Act preventing the Applicant from including its costs of representation as part of any future service charge demand.

Discussion

43. The evidence produced by the parties in this case is in conflict on almost every point. On balance, the Tribunal preferred the evidence of the Applicant on most of the relevant points. Having said that, it was of the view that Mrs. Cooper could well be antagonistic but she has obviously had severe problems in getting tenants to pay service charges. For this reason alone it is entirely illogical that she would not want to get payment from the Respondent, which is the effect of the Respondent's case.

44. Nowhere in the written evidence is there any suggestion that the Respondent felt it necessary to just contact the Applicant to ask whether any service charges were due. The Tribunal is being asked to determine that no service charge demands were made. If that were correct, then surely any reasonable person would ask themselves why and make some enquires to avoid a large bill in the future? At the hearing, the Respondent's case was that she had tried to speak with Mrs. Cooper but the telephone was always put down on her. This would still not prevent her from just making a payment under protest as a gesture of goodwill just to cover such things as insurance. That would still have allowed her to challenge the reasonableness of such charges.

45. The evidence from the Applicant is that demands were sent. Such demands are not exactly clear in their wording but there can be no argument with the fact that they are demanding money. Why would a management company with so many onerous covenants press on without sending demands out to the leaseholders? It is clear that there has been correspondence. At page 40 in section F of the bundle there is a letter from the managing agent to 'Miss. Dunn' in answer to queries raised dated 10th May 2013 i.e. almost 3 years before the proceedings were issued. Janine Dunn says that this letter went to a neighbour but it started 'Dear Miss Dunn' and she had a copy.

46. There is e-mail communication in the same section at page 22 between Janine Dunn and the Applicant's accountant dated July 2014 from which it is clear that sets of accounts have been sent to her for the years 2010, 2011, 2012 and 2013. In her evidence she said that they were 'abbreviated'. She was asked for copies of those accounts but could not produce them.

47. It is clear that there have been no reconciliation certificates. As the annual accounts are available, the Tribunal has calculated 2.7% of the expenditure in each year, to include the bank charges, taken from the second Profit and Loss account in each set of accounts and the following figures emerge:

Item	Date	Claim(£)	due 31st Mar.	Comments
Ground rent	various	125.00		withdrawn
½ yr. Ser. Ch.				
on a/c	15.11.08	290.09		statute barred
Ditto		290.09		statute barred
Ditto	05.12.09	290.09		statute barred
Ditto	30.06.10	290.09		
Ditto	15.11.10	290.09	576.80	£3.38 overcharge
Ditto	30.05.11	290.09		
Ditto	30.11.11	290.09	552.93	£27.25 overcharge
Ditto	30.05.12	290.09		
Ditto	20.11.12	301.72	684.02	£92.21 undercharge
Ditto	30.05.13	301.72		
Ditto	15.11.13	301.72	629.15	£25.71 undercharge
Ditto	30.05.14	301.72		
Ditto	15.12.14	301.00	623.19	£20.47 undercharge
Ditto	30.05.15	301.00		
Ditto	25.11.15	301.00	636.39	£34.39 undercharge
Ditto	30.05.16	301.00		
Insurance	05.06.14	14.39		included above
Insurance	05.06.15	17.93		"
Insurance	05.06.16	17.08		"
		4,906.00	3,702.48	

48. If one adjusts the claim to reflect the actual service charges incurred for the claimable years in question, one reaches a net figure of £3,702.48. The £310 requested on account on the 30th May 2016 post dates the issue of the claim.

49. As to the issue of reasonableness of the service charges, the Respondent puts the Tribunal in an impossible situation. Her case ranges from there being no cyclical maintenance from 2001, to accepting that there had been gardening and cleaners. When Janine Dunn was asked why challenges to the reasonableness of service charges by application to the Tribunal had not been made in 2009, she said that she had no knowledge of any such process. The Tribunal had some doubts about this because she certainly knew about right to manage companies in 2010.

50. She and her mother should understand that this Tribunal deals with this sort of case frequently. The level of service charges in the accounts is actually very modest and the level of management fees is reasonable bearing in mind the management issues encountered by the lack of liquidity in the past. Certainly no evidence was produced by the Respondent to the contrary despite her being ordered to say what she thought would be reasonable figures.

51. The Applicant's case is that tenants simply did not pay service charges which is why cyclical maintenance could not be carried out. The figures in the accounts would support this. Having said that, there is now clearly enough money to decorate and maintain the building and this should be done as soon as possible.

52. There is an allegation that a large section of fencing had to be replaced because of bad maintenance. The replacement was paid for by insurance and must have cost a considerable amount bearing in mind the quantity seen by the Tribunal. Insurance companies do not pay out that sort of sum without checking that lack of maintenance was not the cause of the damage rather than a storm.

Conclusions

53. Of the points in dispute mentioned above, the Tribunal, having taken all the evidence and submissions into account, determines the points in issue (listed above) as follows:

- In terms of this dispute, the Tribunal cannot see that there is any relevant conflict of interest in having one person as director of the Applicant and the managing agent.
- No legal costs and disbursements can be claimed contractually as the Applicant is not the landlord - (a) there is no evidence from such landlord that forfeiture is contemplated and (b) the relevant clause refers only to the landlord's costs.
- Whether the Applicant is entitled to statutory interest is governed by section 69 of the **County Courts Act 1984** as stated above which means that no statutory interest is payable in this case as contractual interest is payable.
- On balance the Tribunal accepts that service charge demands were sent to the Respondent on or about the dates stated
- Whether the 18 month rule applies depends on whether the end of year accounts were sent to the Respondent on an annual basis. The Tribunal is satisfied that the profit and loss accounts setting out the actual service charges were served each year. They were clearly going to be payable and the exception to the 18 month rule is established.
- The demands for payments on account do comply with the lease. The difference in wording identified by the Respondent is a matter of semantics only. The demands are in accordance with the intentions of the parties who entered into the lease.
- There have been no reconciliation statements but it was an easy task for the Respondent leaseholder to work out 2.7% of the service charges incurred as set out in each year's profit and loss account.
- As far as the statutory summary of rights and obligations are concerned, the Tribunal's view is that they were not served at the time but they were served on the 31st March 2016. The demands themselves refer to the budget and profit and loss account being enclosed but no reference is made to any statutory notice being enclosed The service charges therefore did not become payable until that date and interest can only run from the 31st March 2016.

- The claims for auditor's fees and company administration expenses which had to be incurred by the Applicant company, are payable. It must have been in the contemplation of the parties when the lease was created that a company set up solely to keep the building and grounds maintained and in repair plus administer the service charge regime, would be able to recover the basic cost of keeping the company in existence. It would be unreasonable for some third party to have to pay those expenses without recovery from the beneficiaries of the services of that company i.e. the leaseholders. If the Respondent is right, the company would have been struck off the register at Companies House.

54. In addition, the Tribunal determines that as the service charges are defined in the lease as 'rent', the limitation period for recover is 6 years. The proceedings were issued on the 19th February 2016 which means that nothing is recoverable for service charges payable before 20th February 2010.

55. It is very difficult for a Tribunal to try to assess how an estate has been consistently managed over many years with the limited evidence of a small number of photographs and general comments from witnesses. It is, perhaps, a legacy of leaseholders just refusing to pay rather than challenging things in the Tribunal at the time.

56. The Tribunal concludes that based on the evidence, there is little to suggest that the Applicant has not done all it could, given the circumstances. Just refusing to pay anything is never a good response because it just tends to make things worse and start a downward spiral.

57. Bearing in mind the result of this case and the decisions about the recovery of legal costs, the Tribunal does not consider it just and equitable to make a section 20C order.

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Bruce Edgington
Regional Judge
13th April 2017

ANNEX - RIGHTS OF APPEAL

i. If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber) then a written application for permission must be made to the First-tier Tribunal at the Regional office which has been dealing with the case.

ii. The application for permission to appeal must arrive at the Regional office within 28 days after the Tribunal sends written reasons for the decision to the person making the application.

iii. If the application is not made within the 28 day time limit, such application must include a request for an extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.

iv. The application for permission to appeal must identify the decision of the Tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal, and state the result the party making the application is seeking.