First-tier Tribunal
Property Chamber
(Residential Property)

Case reference	**:**	**CHI/29UC/LSC/2019/0024**
Properties	**:**	**135 and 137 Station Road, Herne Bay, Kent CT6 5QA**
Applicants	**:**	**135 – Maurice Hunt, Anne Smith, Louise Beverley Wright, Stuart Harwood 137 – Brian William Cox, Gillian Covell, Neermal Seenundun, Sumit Gupta, Anne Smith**
represented by		**Sumit Gupta – lay representative with Warwick Road Management Ltd.**
Respondent represented by	**:**	**Kimmeridge Estates Ltd. Carol Cherriman – lay representative with Michael Richards & Co.**
Type of Application	**:**	**To determine reasonableness and payability of service charges and administration charges**
The Tribunal	**:**	**Bruce Edgington (Lawyer Chair) Nigel Robinson FRICS**
Date and place of Hearing	**:**	**23rd October 2019 at Canterbury Magistrates' Court, Broad Street, Canterbury CT1 2UE**

DECISION

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1. The Tribunal determines that the Applicants have not provided sufficient evidence that any of the service charges they challenge are so unreasonable as to warrant their being reduced.

2. Further, and in the alternative, a number of the long leaseholders of flats in the properties have paid most or all of such charges in such a way as to agree or admit them at the time of payment which would bring them outside the jurisdiction of this Tribunal.

3. Any charges outstanding prior to January 2019, including insurance premiums, are not payable until notices requiring payment which comply with the **Landlord and Tenant Acts 1985 and 1987** have been served.

4. The Tribunal has insufficient evidence to come to a decision about whether the charges incurred by the Respondent in dealing with the right to manage process are reasonable or not. On the face of it they do not seem to be outside the usual range of reasonableness.

5. The Respondent's representative informed the Tribunal that none of the Applicants would be charged for the costs of representation before this Tribunal. However, for the avoidance of doubt, an order is made made pursuant to section 20C of the **Landlord and Tenant Act 1985** ("the 1985 Act") preventing the Respondent from recovering its costs of representation before this Tribunal as part of any service charge.

Reasons

Introduction

6. In early 2019, the management of the properties was taken over by 2 right to manage companies ("RTMs"). This application challenges many service charge claims for the years ending 2014, 2015, 2016, 2017, 2018 and 2019. For those years and prior to the RTMs taking over management, the 2 properties had been managed as 1 unit. The application also mentions a lease extension dispute which has now been withdrawn. However, the Applicants now challenge the reasonableness of the costs claimed by the Respondent for dealing with the RTMs on handover.

7. The Tribunal has not seen any accounts or service charge demand for 2019 and were told that none had been served. When asked by the Tribunal whether any demands would be served, Ms. Cherriman said that the only charges outstanding were management fees and accountant's charges incurred prior to January 2019 which could not be discharged as there were insufficient funds to meet them at the time they were incurred. Further, they were awaiting the outcome of this application.

8. At a telephone case management hearing on the 3rd April 2019, the Applicants' representative confirmed that the service charge disputes were in respect of management fees, repairs and maintenance charges and insurance costs. As far as RTM costs were concerned, it was ordered that these should be the subject of separate submissions including a separate application form.

9. Various orders were made requiring the parties to disclose their cases. It transpires that the Respondent's managing agents, Michael Richards & Co., passed over all their management files to the RTMs on the 29th April 2019 and thus they have no documents available to them. However, there are copies of the end of year accounts and invoices in support for the years in question save for 2019 in the bundle provided for the Tribunal.

10. Despite the fact that the Applicants were ordered to file and serve a bundle of documents by the 24th July 2019, the bundle served and filed was incomplete. An application was lodged after close of business on the 21st October seeking permission to rely on 10 pages of further documents. The Respondent's representative did not see these until the morning of the hearing.

The Lease

11. The bundle produced for the hearing included what appeared to be a copy of a lease of the flat 'situate on the Top Floor of the Building know (sic) as 135-137 Station Road, Herne Bay…'. On the front sheet, it is dated 5th December 1985 although the lease itself is dated 5th December 1905. The Tribunal presumes that 1905 (rather than 1985) is an error as the length of the term is 99 years from 29th September 1981.

12. The lease provides that the landlord shall insure the property and keep the building and grounds in repair. It can then recover one twelfth of the costs from the leaseholder and the provisions allow for payments on account to be recovered.

13. Clause 1 defines the service charges and clause 2 is the tenant's covenant to repay. There is a very generously worded provision allowing the landlord to recover such costs and expenses as such landlord shall deem necessary.

The Law

14. 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'.

15. 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.

16. Section 20C of the 1985 Act enables a Tribunal to make an order preventing a landlord from recovering its costs of representation before the Tribunal as part of a service charge.

17. In **Schilling v Canary Riverside Development PTD Ltd** LRX/26/2005; LRX/31/2005 & LRX/47/2005 His Honour Judge Rich QC had to consider upon whom lay the burden of proof in this sort of case. At paragraph 15 he stated :

"If the landlord is seeking a declaration that a service charge is payable he must show not only that the cost was incurred but also that it was reasonably incurred to provide services or works of a reasonable standard, and if the tenant seeks a declaration to the opposite effect, he must show that either the cost or the standard was unreasonable. In discharging that burden the observations of Wood J in the Yorkbrook4 case make clear the necessity for the LVT to ensure that the parties know the case which each has to meet and for the evidential burden to require the tenant to provide a prima facie case of unreasonable cost or standard."

18. In this case, it is the tenants who are seeking to show that service charges and some costs are unreasonable and it is therefore for them to show, on the balance of probabilities, that the cost or standard of work has been unreasonable.

19. It should be said that they are also saying that the service charges were "*improperly demanded*" and refer to a "*sample for insurance and SC*", which the Tribunal has not seen. At the hearing this point was clarified. Ms. Cherriman said that all service charge demands sent by the managing agents were compliant with the law but she could not say whether the insurance premium demands were compliant as they came direct from the insurance brokers. Mr. Gupta agreed that it was the insurance premium demands which were not compliant because they did not have the necessary statement of rights as proscribed by the 1985 Act.

The Inspection

20. The members of the Tribunal inspected 135 and 137 Station Road which is a pair of adjoining terraced 3 storey houses in a longer terrace. These properties are of brick construction under what appear from the street to be slate roofs. The whole of the outside was inspected from street level.

21. The road is in a mainly residential area and is a short distance from the sea front and the High Street. There is an Indian restaurant next door and a major bus stop outside the front doors. There is no off street parking and on street parking appears to be at a premium.

22. The Tribunal members were also invited into the common parts of 135 and, in particular, the top flat, to see the attic over the top floor. They were shown what was said to be a gap in the roof with plastic water proofing sheets, and were told that the slates around the gap kept moving. They also saw that the roof to the rear part of 135 had been re-covered in resin tiles which had the appearance of slate tiles. This was said to have occurred about 2 years previously.

23. From the road, the roof of 135 appeared to be in a worse condition to that of 137 at the front. There were 2 broken ridge tiles and at least one slate tile appeared to be missing. At the back, the reverse was the situation because the rear roof to 135 had been replaced and the rear of 137 showed some signs of work required.

The Hearing

24. The hearing was attended by Ms. Cherriman for the Respondent and then Mr. Gupta with his assistant Miss. Raikar plus Brian Cox from flat 1, 135 Station Road and Mike Kuschell who is Anne Smith's father. The Tribunal chair commenced the hearing by introducing everyone and then asking some questions to clarify some inconsistencies in the bundle of documents.

25. These questions clarified that the Applicants were as stated above including Mr. Gupta himself as a long leaseholder. He said he is the operator of Warwick Road Management Ltd. which appears to manage the properties on behalf of the RTMs.

26. It was also confirmed that there were no valuations for the new insurance policy. Mr. Gupta said that he organised the insurance with more or less the same values as before and had asked for such insurance to be on the same terms as before. The Tribunal did not have a copy of the full insurance policies arranged by the landlord but even with the documents available it appeared clear that the terms were not the same either as to value or excesses. Further, the new policy prohibited occupation by students or people receiving local authority support.

27. Ms. Cherriman said that she had never seen a professional landlord's block policy having such a provision because properties such as this, where all flats except one were sublet, such a provision would be impossible to monitor. Indeed, whilst such a provision would undoubtedly involve a cheaper premium, both Ms. Cherriman, and the Tribunal members, thought it would be exceedingly dangerous. One lessee subletting to a student could revoke the whole policy.

28. Mr. Gupta and the other tenants present made submissions, as did Ms. Cherriman. The 2 representatives were then invited to ask questions which they did, as did the Tribunal.

29. It was unfortunate that Mr. Gupta and some of the other leaseholders rather distorted the evidence. The descriptions of the disputed invoices commencing at page 85 in the bundle were brief. When the invoices were actually examined, they set out much more than the description given. There was much criticism of the need to maintain the roof each year by replacing tiles etc. It is a fact that roof replacement on a 3 storey block is expensive and it is usual practice to try to effect repairs for as long as possible. The Tribunal noted, for example, that in the 9 or 10 months since the RTMs took over management, there seems to have been little work done to the roof, despite the complaints about leaks.

Discussion

30. The first task for the Tribunal was to determine whether the additional late written evidence should be considered. Ms. Cherriman was clearly unhappy about this and said that she had had little time to consider it. The Tribunal decided to look at the additional documents but attach little weight to them. For example, they included 2 single page certificates of insurance for 10 High Street, Herne Bay for 2 recent years but that property consisted of an office plus 5 flats over. There was no full description of the property or details of the policies. They did not help the Tribunal at all.

31. As has been pointed out by the Respondent, the main problem in this case is the lack of evidence to support the Applicants' cases. Many of the criticisms of individual items are phrased thus "*Disputed: This seems high and unnecessary*". It is also of concern that it has taken so long to challenge the charges in this Tribunal which, of necessity, (a) makes the 'evidence' as such very old and (b) suggests that perhaps some of the tenants treated some of the earlier claims as having been agreed or admitted at the time which would prevent this Tribunal having jurisdiction (sub-section 27A(4)(a) of the 1985 Act). Indeed, Ms. Cherriman said that all the service charges she was aware of had been paid save for the balance management fees and accountant's fees mentioned above. She was unaware of what, if any, insurance premiums were outstanding.

32. As far as **management fees** are concerned, these have been claimed as £235 per unit per annum for 2014 rising over the years to £264.30 per unit per annum in 2018. In fact, these figures do not include VAT, so that the figures including VAT range from £282.00 per unit in 2014 to £317.42 in 2018. The Applicants simply refer to a Tribunal case in 2003 which said that at that time any fee over £60 per unit per annum was unreasonable. No evidence has been produced from either side to assist the Tribunal as to the market rate for managing properties in Herne Bay or district.

33. Mr. Gupta's company charges '£144 inclusive per annum per leaseholder'. The Tribunal noted that the evidence of this was dated 21st October and was filed at the very last minute. To his credit, Mr. Gupta accepted that this was unsatisfactory and could clearly amount to a conflict of interests. The Tribunal did not consider that this amounted to evidence of what local agents charged in the marketplace.

34. It is noted that accountancy fees have also been claimed for the provision of service charge accounts. Ms. Cherriman stated that her company followed the RICS Code of Practice: Service Charge Residential Management Code which sets out what is included in a fixed fee management charge regime e.g. provision of service charge accounts. She said that her company prepared the accounts down to a trial balance and merely asked the accountants to certify them. As has been said, the lease terms are wide and do allow for accountancy charges to be claimed. The Tribunal considered that the charges themselves were a little on the high side but were not outside the range of reasonableness. Mr. Gupta provided a quote from someone called Yaser Mumtaz from Wimbledon who said that he was willing to provide accounts for £250.00 plus VAT i.e. a total of £300 as opposed to the £348 claimed in 2018 and 2017.

35. As to the other terms of the code, Ms. Cherriman said that her company had arranged for the property to be inspected at least twice a year. This was disputed by some leaseholders. It is a fact that an agent with a key to the common parts, could well inspect the outside and the common parts without being seen or noticed by any leaseholder.

36. Turning now to the **repairs and maintenance charges**, the allegations are that either none or very few of the works claimed for were carried out and that it was bad management to keep replacing roof tiles every year.

The only supporting evidence for these comments is at page 93 in the bundle where there is an e-mail dated 26th July 2018 pointing out that a gutter is blocked. The invoices produced by the Respondent show that monies were paid to a contractor for various repairs and maintenance. The Applicants, on the other hand, produce no witnesses to say whether the work was actually carried out. They just make assertions that, in their view, the work was not undertaken as claimed and it is also said, in so far as it is relevant, that most of the work was done by the same company and was too expensive.

37. Finally, so far as the named issues are concerned, are the **insurance costs**. Whilst the Applicants ask the Tribunal to determine the reasonableness of insurance charges, they have only provided evidence of the landlord's charges for 2017/18 and 2018/19 which means that the Tribunal can really only deal with those years. The service charge accounts provide no evidence of what the charges and coverage have been for years prior to 2017. The problem so far as the Respondent is concerned is that the Applicants have been able to produce the insurance costs for 2017/18 at page 103 in the sum of £3,449.03, the costs for 2018/19 at page 104 in the sum of £3,623.56 and then a copy of an Aviva policy schedule dated 28th January 2019 at pages 94-102 showing a premium of £1,289.98. On the face of it, this does show earlier unreasonable premiums and one must therefore look at the extent of the cover.

38. As no copies of the earlier policies have been produced, the Tribunal cannot see whether comparison is 'like for like'. Mr. Gupta said that it was but he has supplied no evidence to support the reduction in declared value from £871,313 to £854,000 and there are clearly changes in the excesses. The Tribunal also doubts whether there were the same classification of permitted occupier in the earlier policies which would be likely to have had a considerable effect on the premium level. The Aviva policy at page 95 in the bundle is also discounted because it is a long term agreement (3 years). A commercial landlord would not be able to arrange this with a block policy.

39. One point made by the Applicants is that the landlord had a block policy and this should be cheaper. The question of insurance premiums claimed by landlords under long leases has vexed the Leasehold Valuation Tribunal and this Tribunal as its successor for some time. This is a fairly typical application where tenants are charged an insurance premium and, when asking for alternative quotations from other insurers, they find that an alternative quotation is lower.

40. Most commercial landlords insure under a block policy or portfolio policy with one insurer. It is always claimed that this has benefits for both parties in cutting down administration and ensuring that the insurance is actually renewed. With individual policies for each property, there is perceived to be a greater chance of renewal being overlooked. Unless the subject property or other properties covered have bad claims records or are otherwise bad risks, one would normally expect economies of scale.

41. Regrettably, in this Tribunal's experience, this very rarely happens and tenants are not happy when the premium claimed is so much more than quotes they can obtain. The issue has been before the court on a number of occasions. In the case of **Berrycroft Management Co. Ltd. and others v Sinclair Gardens Investments (Kensington) Ltd. [1997] 22 EG 141**, a management company acting for tenants thought that premiums were excessive and applied to the county court for, amongst other things, a declaration that there was an implied term in the lease that such premiums would be reasonable.

42. The county court and the Court of Appeal found no difficulty in deciding that, on a true construction of the lease, this could not be implied. In this case, the insurance provisions are entirely in the discretion of the landlord and this Tribunal has no doubt that a similar application to the court in this case would produce the same result. In **Berrycroft** the court said that provided the insurance was arranged in the normal course of business with an insurance company of repute (as appears to be the case in this matter), the landlord was entitled, under the strict terms of the lease, to insist on insurance through its nominated company.

43. On the question of the discrepancy between premiums claimed and alternative quotations obtained by tenants, a well established line of cases has developed a rule which successive Tribunals have found themselves obliged to follow. As Evans LJ said in **Havenridge Ltd. v Boston Dyers Ltd [1994] 49 EG 111**:-

> *"....the fact that the landlord might have obtained a lower premium elsewhere does not prevent him from recovering the premium which he has paid. Nor does it permit the tenant to defend the claim by showing what other insurers might have charged. Nor is it necessary for the landlord to approach more than one insurer, or to 'shop around'. If he approaches only one insurer, being one insurer 'of repute', and a premium is negotiated and paid in the normal course of business as between them, reflecting the insurer's usual rate for business of that kind then, in my judgment, the landlord is entitled to succeed"*

44. On the other hand, in **Cos Services Ltd. v Nicholson and Willans** [2017] UKUT 382 (LC) His Honour Judge Bridge said this:-

> "*67. It remains a mystery, having heard the evidence adduced by both parties, why there is such a discrepancy between the premiums charged to the tenants under the landlord's block policy and the premiums obtainable from other insurers on the open market. It is a mystery which the landlord has been wholly unable to explain.*
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> *68. It is clear to the Tribunal that the insurance premiums being charged by the landlord to the tenants were excessive, in the sense that considerably lower premiums for similar protection could have been obtained elsewhere. Moreover, insofar as there may have been certain*

advantages with the NIG policy, they were so insubstantial that they could not justify the amount being charged.

69. It follows, applying the reasoning set out above, that the landlord has failed to satisfy the Tribunal that the amounts sought to be charged to the tenants were 'reasonably incurred'. The Tribunal therefore reaches the same decision as the FTT, and the landlord's appeal from that decision must be dismissed.

45. In this case, however, the Applicants have not even been able to get over the first hurdle i.e. provide evidence that the premiums charged by the landlord were, in themselves, unreasonable in the open market. In the **Cos** case, there was considerable cogent evidence.

46. The Tribunal accepts the plain fact that landlords who insure properties in a portfolio or a block policy are at a disadvantage because they can never dictate who is going to occupy a property. This is why courts and the Upper Tribunal have protected professional landlords.

47. Turning now to the claim for **landlord's legal costs** in dealing with the right to manage transfer, the Applicants simply ask the Tribunal to assess a reasonable figure. It is said that "*the landlord had in house solicitor and legal team*". No details of time spent or hourly rates for the work actually done or evidence of what a reasonable figure might be have been put forward. Mr. Gupta suggested that the work should only take a couple of hours but that is not cogent evidence. Further, and in answer to Mr. Gupta's comments about in house staff doing the work, it has long been held that a landlord with an in-house legal team is entitled to recover an hourly rate similar to that of a solicitor in private practice (see, for example, **Sidewalk Properties v Twinn** [2015] UKUT 0122 (LC)).

Conclusions

48. In respect of the points in dispute mentioned above, the Tribunal, having taken all the evidence and submissions into account, concludes that there is insufficient evidence to get over the first hurdle set out in the **Schilling** case mentioned above.

49. On balance, the Tribunal accepted Ms. Cherriman's evidence on the disputed points. It accepted that Michael Richards & Co. follow the RICS code. When asked why no application had been made before now about charges incurred some years ago, Mr. Gupta said that this was because he had provided 'focus'. However, the plain fact of the matter is that the more the Tribunal members heard from both parties, the more it was convinced that many of the complaints about management were not substantiated. For example, as far as the roof is concerned, Michael Richards & Co. had been trying to walk along that very fine line between repair and renewal – the cost of the former being much less than the latter.

50. Finally, the Tribunal notes the accusation that the demands for the insurance premiums did not comply with the technical requirements demanded by the legislation. No demands were produced because Mr.

Gupta accepted that an additional letter was sent by the insurance brokers to each leaseholder. The situation, in reality, is that the landlord, through Michael Richards & Co., sent compliant demands for the majority of the service charges plus this additional letter from the broker asking for the insurance premium. Thus, in each year, each leaseholder received the statutory information. There may have been a technical breach, but, at the time, such breach appears to have been waived by the leaseholders. The Tribunal considers that no point will be served in requiring the landlord to re-serve new demands for insurance premiums.

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Judge Edgington, 25th October 2019

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.