

9245



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

**Case Reference** : LON/00AY/LSC/2012/0828

**Property** : Clevedon Court, Clive Road,  
London, SE21 8BT

**Applicant** : Clevedon Court (Dulwich) RTM Co  
Ltd

**Representative** : Sterling Estates Management Ltd

**Respondents** : (1) The Lessees  
(2) Mr and Mrs Gibbs

**Representative** : Mr Balmforth, Stapleton Long

**Type of Application** : For the determination of the  
reasonableness of and the liability  
to pay a service charge

**Tribunal Members** : Judge I Mohabir  
Mr I Thompson  
Mr P Clabburn

**Date and venue of  
Hearing** : 25 March 2013  
19 June 2013  
10 Alfred Place, London WC1E 7LR

**Date of Decision** :

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**DECISION**

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## ***Introduction***

1. This is an application made by the Applicant company for a determination under section 27A of the Landlord and Tenant Act 1985 (as amended) (“the Act”) for a determination of the Respondents’ liability to pay and/or the reasonableness of various service charges in respect of the property known as Clevedon Court, Clive Road, London, SE21 8BT (“the property”).
2. The property is described as a purpose built block of flats comprised of 23 residential flats located on the first and second floors. They are all demised by residential leases granted on the same terms. The lessees are the First Respondents. In 2007, 7 further self-contained flats were built on the third floor by the freeholder, Mr and Mrs Gibbs, who are the freeholders and Second Respondents. They have not granted leases in respect of these flats. Instead, they are let under tenancy agreements by the Second Respondents.
3. This is not the first application that has been made by the Applicant to the Tribunal against the Second Respondents regarding service charges. It is, therefore, important in the context of this case to set out the background against which this application is made.
4. The Applicant acquired the right to manage the property on 13 February 2010 and appointed Sterling Estates Management Ltd (“SEM”) to carry out the management on its behalf.
5. SEM adopted the same methodology used by the Second Respondents to calculate the service charge liability of the 30 flats in total. This is 2.735% for 1-bedroom flats and 3.68% for 2-bedroom flats and is agreed by the Second Respondents.
6. By a decision dated 29 March 2011, the Tribunal determined that the estimated service charges proposed by SEM for the year ended 24 December 2010 was reasonable.

7. By a further application dated 7 February 2012, the Applicant applied to the Tribunal for a determination of the Second Respondents liability in respect of a number of matters. However, the parties were able to reach agreement on the substantive issues, the terms of which are expressly set out at paragraph 16 of the Tribunal's decision dated 10 July 2012. The Tribunal also determined that the liability for the costs of repairing and maintaining the lift, which was constructed at the same time as the 7 flats on the third floor, remained solely with the Second Respondents.
8. On 14 December 2012, the Applicant made this application to the Tribunal. By Directions dated 20 December 2012, the Tribunal identified the issues to be determined are the Respondents' liability to pay and/or the reasonableness of the actual service charge expenditure for the years ended 24 December 2010 and 2011 and the estimated service charge expenditure for the years ending 24 December 2012 and 2013. The costs in issue are set out at pages 35-37 in the Applicant's first hearing bundle. Further details about the costs are to be found in the Scott Schedule that appears at pages 65-80 of the same bundle. It is, therefore, not necessary for the Tribunal to repeat the figures in this decision, as they are self-evident and they were not challenged by the Second Respondents as being incorrect.
9. The only Respondents who have responded to the application are the Second Respondents.

### ***The Relevant Law***

10. The statutory provisions that apply to this application are set out in the Appendix annexed to this decision.

### ***Hearings***

11. The initial hearing in this matter took place on 25 March 2013. The Applicant was represented by Mr Ahmed and Mr Sherreard, both from SEM. The Second Respondents were represented by Mr Balmforth,

FRICS, a Chartered Surveyor and Partner in the firm of Stapleton Long, Chartered Surveyors. He was accompanied by Mr Gibbs. The First Respondents did not attend and were not represented.

12. After taking instructions from Mr Gibbs, Mr Balmforth told the Tribunal that the estimated service charges for 2012 and 2013 were agreed, save for the management fees claimed in respect of both years. He also said that Mr Gibbs had agreed that he was liable for the entire cost of the lift insurance.
13. Save for the issue of the management fees, Mr Gibbs agreed that his service charge liability for his 7 flats, using the methodology set out at paragraph 5 above, was as follows:

**2012**

6 x 1-bedroom flats	£984.05 each
1 x 2-bedroom flat	£1,324.06 each
<b>Total for all 7 flats</b>	<b>£7,228.36</b>

**2013**

6 x 1-bedroom flats	£943.44 each
1 x 2-bedroom flat	£1,269.42 each
<b>Total for all 7 flats</b>	<b>£6,930.06</b>

14. Mr Gibbs agreed that the Second Respondents' liability agreed above would be payable in two instalments of £7,228.36 and £3,465.03 (the latter figure being the half yearly instalment payable in respect of 2013) by 8 April 2013 to SEM.
15. Despite the failure by Mr Gibbs to comply with the Tribunal's Directions, the hearing commenced but had to be adjourned part heard because the Tribunal was satisfied that to proceed would result in significant prejudice to the Applicant. The Tribunal gave further Directions in relation to the remaining issues.

16. The adjourned hearing took place on 19 June 2013 and the same parties and representatives appeared before the Tribunal. Mr Ahmed told the Tribunal that Mr Gibbs had failed to comply with the terms of the agreement set out at paragraph 13 above.
17. Mr Balmforth then made an application for permission to admit the Second Respondents' supplemental statement dated 14 June 2013, despite its disclosure being out of time. The application was refused because the previous hearing had in fact been adjourned as a result of their non-compliance with the Tribunal's earlier directions and there were no good reasons for their failure to include this evidence in the statement of case dated 8 April 2013.
18. The heads of expenditure that fell to be determined by the Tribunal are dealt with below.

### ***Decision***

#### ***Management Fees (All Years)***

19. Essentially, Mr Balmforth submitted that the Second Respondents' liability was limited in two ways. Firstly, their liability to pay management fees only arose after 13 February 2010 when the Applicant acquired the right to manage the property. Secondly, by virtue of the terms of the agreement set out at paragraph 16 of the Tribunal's earlier decision dated 10 July 2012, the Second Respondents are obliged to repair and maintain all of the 7 flats owned by them and, therefore, they should only have a liability of 75% of the management fee of £200 per flat claimed by SEM.
20. The Tribunal did not accept the submission made by Mr Balmforth as being correct. It was clear to the Tribunal that the terms set out in paragraph 16(a) of the Tribunal's decision dated 10 July 2012 is limited to the cost of repairing and maintaining the 7 flats owned by the Second Respondents and nothing else. The only effect of this is that the

Applicant is relieved of the burden of maintaining the flats. It does not relieve the Second Respondents of the liability (whether in part or otherwise) to pay a service charge contribution in respect of the management fee at the agreed rates. The Second Respondents enjoy the amenities afforded by the management carried out to the common parts of the building.

21. Indeed, paragraph 16(c) of the decision dated 10 July 2012 expressly states that “...it was also agreed that the (Second) Respondents would continue to contribute towards all other outgoings associated with the property...”. At the time of the agreement, the Second Respondents did not seek to take any point about the apportionment of the management fee. In the Tribunal’s judgement the clear and express wording of the terms of the agreement reached by the parties included the entire management fee and the Second Respondents cannot now resile from that agreement and are bound by it. They did not challenge the unit rate of £200 for the management. Accordingly, the management fees of SEM in respect of 2010 to 2013 inclusive were found to be reasonable and payable by the Second Respondents at the agree rates set out above.

#### ***Gardening & Cleaning (2010 & 2011)***

22. The Second Respondents complained that the gardening and cleaning were not being carried out monthly and to a reasonable standard and drew the Tribunal’s attention to the photographic evidence in support. They contended for a 50% discount on the sums claimed in respect of each year.
23. The Tribunal accepted the explanation given by Mr Ahmed that the garden maintenance could not be carried out as often as was desirable because of the cash flow difficulties caused by the overall service charge arrears, for which the Second Respondents bore a significant responsibility. It follows, therefore, that the costs claimed were only in respect of the costs that had actually been incurred. It was material

that each visit by the gardening contractor had been signed off by an officer of the RTM company. The Tribunal was satisfied that, as a tenant owned company, they would not have done so unless the work had in fact been carried out to a reasonable standard. The Tribunal accepted the evidence of Mr Ahmed that the cleaning of the common parts had been done on a weekly basis regardless of the cash flow problems.

24. As to the photographic evidence relied on by the Second Respondents, they were of limited evidential value and represented no more than a snapshot in time. It was clear to the Tribunal that the property is subject to a high levels of occupation, with a significant number of flats being sub-let by investors. Inevitably, this leads to higher levels of litter and the dumping of household items and rubbish.
25. Accordingly, the Tribunal found the gardening and cleaning costs were reasonable and payable by the Second Respondents without deduction.

### ***Fire Safety Equipment***

25. This was agreed by the Second Respondents as being reasonable and payable.

### ***Minor Repairs (2010 & 2011)***

26. The Second Respondents sought to challenge many individual invoices relating to minor repairs carried out to the property in 2010 and 2011. These are set out at pages 5-8 and 20-26 of their statement of case. In the main, the Second Respondents either put the Applicant to proof and/or make broad assertions raising issues as to whether the cost had been reasonably incurred and was reasonable in amount or simply highlighted, they argued, discrepancies on the face of various invoices.
27. The Applicant's case in relation to each of those matters is to be found in the evidence set out in the supplemental witness statement of Mr

Ahmed dated 18 April 2013 together with copies of any relevant invoices attached to his statement and also in the Applicant's bundles.

28. The Tribunal took the view that the Applicant had established a *prima facie* case in relation to expenditure challenged by the Second Respondents that it was reasonable where it had been able to produce a copy of the relevant invoice and an explanation had been provided by Mr Ahmed in his evidence. There was then a reverse burden of proof on the Second Respondents to prove otherwise. The Tribunal was satisfied that they had been unable to do so, save for the following items of expenditure.
29. In relation to 2010, all of the expenditure for minor repairs was found to be reasonably incurred and reasonable in amount apart from the following invoices. The page and paragraph references are those appearing in the Second Respondents statement of case dated 8 April 2013)

Invoice No.90914 (page 5, paragraph 3)

The Applicant had been unable to establish that the leak in Flat 10 was recoverable through the service charge account.

Invoice dated 1 December 2010 (page 7, paragraph 7)

The Applicant had been unable to establish that the extension of a washing machine waste pipe to an individual flat was recoverable through the service charge account. Of the total cost, £96.94 was disallowed.

30. In relation to 2011, the expenditure for minor repairs was allowed on the same basis as the preceding year, save for the following invoices:



Invoice MLS1380 (page 21, paragraph 3)

The Applicant had been unable to establish that the electrical works to Flats 2, 10 and 18 were recoverable through the service charge account. The sum of £180 was disallowed.

Invoice MLS11302 (page 21, paragraph 4)

The sum of £414 was disallowed for the same reason set out above.

Invoice 92111 (page 23, paragraph 1)

Agreed by the Second Respondents.

Invoice 92293 (page 23, paragraph 2)

Agreed by the Second Respondents.

Invoice 92293, 92342 & 92216 (page 24, paragraphs 8, 9 and 10)

Agreed by the Second Respondents.

Invoice 91750 & 91596 (page 26, paragraphs 14 and 15)

Agreed by the Second Respondents.

***Survey Costs (2010 & 2011)***

31. The sums of £998.75 and £3,780 had been spent by the Applicant in obtaining survey reports.
32. The Second Respondents accepted the need to obtain the 2010 report. However, they submitted that the cost was not reasonable because of the shoddy nature of the report. Shortcomings included a reference to emergency lighting when the property does not have any. As to the 2011 report, the Second Respondents submitted that the cost was not recoverable as service charge expenditure because it had been prepared in contemplation of litigation against them.
33. The Tribunal was satisfied that the cost of the 2010 survey report was reasonable. It accepted the Second Respondents' criticism of the report

to the extent that the covering letter was not professional. However, the survey sheet, being the material document, was competently prepared. Furthermore, the Second Respondents had not adduced any evidence to demonstrate that the cost was unreasonable. Accordingly, it was allowed as claimed.

34. As to the 2011 report, the Tribunal accepted the evidence of Mr Ahmed that it had not been obtained with the prospect of litigation against the Second Respondents, but for management purposes. Neither the relevant invoice nor report makes mention of proposed litigation being the basis of the instruction given. Accordingly, it was allowed as claimed.

### ***General Materials***

35. The expenditure of £64.55 in 2011 was agreed by the Second Respondents.
36. The expenditure of £572.81 in 2010 related to the cost of a noticeboard. The Second Respondents conceded that the expenditure was reasonably incurred. However, they argued that the cost was excessive and contended that a figure of £225-270 plus VAT was reasonable.
37. The Tribunal was satisfied that the 2010 expenditure was reasonable and allowed as claimed. The Second Respondents had provided no evidence to prove that it was unreasonable save for an assertion otherwise, which is not evidence.

### ***Miscellaneous Credit***

38. The Second Respondents argued that insurance monies of £3,290 had not been fully applied as a credit to the service charge account, thereby potentially increasing their overall liability.
39. The Tribunal found that there had not been a fraud on the Respondents. It accepted the evidence of Mr Ahmed that, for example,

the cost of a survey fee had mistakenly been entered under this heading in the service charge accounts.

40. He went on to say that there was no separate heading for legal expenses and administration charges, so it had been entered in the accounts under this heading. Mr Ahmed submitted that the costs were recoverable under paragraph 4 of the Third Schedule of the leases. Having carefully considered this provision, the Tribunal concluded that it did not permit the Applicant to recover either legal costs and/or administration charges as it had sought to do and that these amounts had to be credited to the service charge account.

### ***Costs***

#### ***Schedule 12, Paragraph 12***

41. At the initial hearing on 25 March 2013, the Applicant had made an application under the above provision of the Commonhold and Leasehold Reform Act 2002 for an order that the Second Respondents pay a maximum contribution of £500 towards its wasted costs of that hearing.
42. The test of unreasonable conduct to be applied when considering an application such as this is a high one, which had not been satisfied in this instance. The Tribunal was, on balance, satisfied that the failure on the part of the Second Respondents to comply with the Tribunal's directions was not deliberate and that Mr Gibb had personal difficulty understanding what the directions required him to do. At the time he was acting in person and, it seems, that Mr Balmforth had been instructed late in the day.

#### ***Section 20C***

43. The Tribunal concluded that it did not have jurisdiction to make an order under section 20C of the Act against the Second Respondents because, in these proceedings, they were in effect acting as tenants and not as the landlord. As such, it appears that they have no contractual

entitlement to recover any costs they have incurred through the service charge account.

***Fees***

44. The Tribunal does, however, make an order that the Second Respondent reimburse the fees paid by the Applicant to have this application issued and heard. Given the history of the relationship between the parties, the Second Respondents have serially failed to pay their service charges over a number of years and this has resulted in substantial arrears accruing. The Tribunal had little doubt that continued demands by the Applicant for payment would have met with little or no success and that there was no basis to obtain payment from the Second Respondents other than by making this application. Indeed, they even had failed to pay the Applicant the sums agreed at the last hearing.
45. Accordingly, the Tribunal orders that the Second Respondents reimburse the Applicant the sum of £500 within 28 days of this decision being served on the parties.

Judge I Mohabir  
11 September 2013

## **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 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.

**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.