



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

Case Reference : **BIR/00CW/LIS/2013/0051**

Property : **St Cecelias, Okement Drive,
Wednesfield, Wolverhampton
WV11 1XE**

Applicants : **Elizabeth Ann Hacking (1)
Susan Janet Manning (2)
Sean McShane (3)
Margaret Forrester Atilgan and
Erden Atilgan (4)
Mrs J Cosgrove (5)
Peter Richard Gibbons (6)
L S Jones and P A Jones (7)
Ronald Francis Parker (8)
Denise O'Donnell (9)
P Reid (10)
Mr I Caddy and Mrs P Caddy
(11)
Susan Allsopp (12)
Maureen Pugh (13)
Barbara Ann Fletcher (14)
Karl Garrett (15)
Mr & Mrs Wedge (16)
Mrs Mavis Rutter (17)
Mr P Watkins (18)
David and Sandra Mannion (19)
Glenn Hughes (20)
Jermaine Sanderson (21)
Terry Vincent and Pauline
Vincent (22)
Mr Ian Bennion (23)
Mr Craig Watkins (24)
Robert Varndell (25)
Ian Moore and Anita Moore
(26)
Stuart Weston (27)
Malcolm Cattell (28)
Patricia June Perry (29)
Michael Ridley and Paul Scott
(30)
Irene McDonnell (31)**

Mr & Mrs Connolly (32)
Mr John Hill (33)
Mr & Mrs Williams (34)
Margaret Elizabeth Butler (35)
Shirley Jackson (36)
Janet Ottey (37)
Paul Hammond (38)
David Everett (39)
Mrs L. Christie (40)

Representative : **Mr R M Hacking**

Respondent : **Mr Michael Ryan**

Representative : **S M Properties**

Type of Application : **Application for a determination of liability to pay and reasonableness of service charge under section 27A of the Landlord and Tenant Act 1985**

Tribunal Members : **Judge C Goodall LLB**
Mr Stephen Berg FRICS

Date of Decision : **29th April 2014**

DECISION

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Background

1. St Cecelias ("the Property") is a former Wolverhampton City Council twenty three storey residential tower block with 119 flats. Mr Ryan ("the Respondent") bought the Property in the early 1990's and refurbished it. Nearly all the flats (the Applicants say that 2 of the flats were retained by Mr Ryan and are let on short term leases) were then let on long leases of approximately 125 years, at a premium, and with an annual ground rent. The Applicants are all long leaseholders of one or more flats at the Property.
2. The Tribunal has been supplied with a sample lease of a flat and has been informed that all leases granted are in similar form. The leases contain a covenant by the lessee to pay a defined proportion (which is an equal proportion for each of 119 flats) of the Lessor's Expenses, which are set out in the eighth schedule. Sub-paragraph (14) of the Eighth Schedule sets out the following recoverable expense:

"The costs charges and remuneration of the Lessor and any agent or agents employed by the Lessor to manage and administer the Development and for the collection of rents of the flats in the Building and also any other expenses incurred by the Lessor in the administration or protection of the Development or the amenities thereof but including without prejudice to the generality of the foregoing the expenses of enforcing or attempting to enforce the observance of the covenants on the part of any lessee of a flat forming part of the Development and any Bank charges and interest incurred by the Lessor in connection with the provision of services and compliance with the covenants in accordance with the Lease".

3. This application, dated 25 November 2013, relates to a single issue. The Applicants challenge the management fee charged by Mr Ryan in the 2012 service charge year (the service charge year is a calendar year from 1 Jan to 31 Dec). The amount charged in that year was £24,637.04, or £207.03 per flat.
4. The Applicants named on the title page were all either named as Applicants in the application, or applied to be joined as Applicants during the course of the proceedings. The application has been led by the first named Applicant, Mrs Hacking, who has submitted all the Applicants' evidence considered by the Tribunal.
5. This Tribunal is not new to the Property or the parties, and has previously determined applications under references BIR/00CW/LIS/2012/0072 and BIR/00CW/LDC/2013/0002. Bearing in mind the nature of this application and the Tribunal's previous knowledge of the Property, it was not considered necessary to carry out an inspection. The matter was determined on the basis of written representations as no party requested a hearing. The Tribunal considered the Applicants' application form, Mr

Ryan's first statement dated 6 January 2014, his second statement dated 3 February 2014, and the statement of Mrs Elizabeth Hacking dated 20 February 2014. The Applicants provided a bundle of documents which was helpful and the contents of that bundle were considered. The Respondent did not provide a bundle of documents.

6. The Tribunal was not willing to take into account a second statement provided by Mrs Hacking dated 28 March 2014. This raised a new issue of whether the income into the service charge accounts in 2012 might have been understated because of receipt of interest and various administration charges not shown in the accounts. The Tribunal considered this issue was a different issue from the quantum of the management fee and had been raised too late.

Law

7. The powers of the Tribunal to consider service charges are contained in sections 18 to 30 of the Landlord & Tenant Act 1985 ("the Act").
8. Under Section 27A of the Act, the Tribunal has jurisdiction to decide whether a service charge is or would be payable and if it is or would be, the Tribunal may also decide:-
 - a. The person by whom it is or would be payable
 - b. The person to whom it is or would be payable
 - c. The amount, which is or would be payable
 - d. The date at or by which it is or would be payable; and
 - e. The manner in which it is or would be payable
9. Section 19(1) of the Act provides that:

"Relevant costs shall be taken into account in determining the amount of the 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 and the carrying out of works, only if the services or works are of a reasonable standard:

and the amount payable shall be limited accordingly."

10. In relation to the test of establishing whether a cost was reasonably incurred, in *Forcelux v Sweetman* [2001] 2 EGLR 173, the Lands Tribunal (as it then was) (Mr P R Francis) FRICS said:

"39. ...The question I have to answer is not whether the expenditure for any particular service charge item was necessarily the cheapest available, but whether the charge that was made was reasonably incurred.

40. But to answer that question, there are, in my judgement, two distinctly separate matters I have to consider. Firstly, the evidence, and from that whether the landlord's actions were appropriate, and properly effected in accordance with the requirements of the lease, the RICS Code and the 1985 Act. Secondly, whether the amount charged was reasonable in the light of that evidence..."

Case reference BIR/00CW/LDC/2013/0002 (“the Previous Case”)

11. The Previous Case, which is one of the previous Tribunal cases mentioned in paragraph 5 above, is significant for the consideration of this case. In the Previous Case, the management fee charged by the Respondent for the service charge years 2009, 2010, and 2011 was in issue. The Tribunal in that case determined that the management fees charged by the Respondent for those years was reasonable. In paragraphs 42 – 45 of that decision, the Tribunal said:

“42. The Tribunal considered the third general issue of management fees. These are, for the years under consideration:

	S M Properties	Ryan Const (inc. VAT)	Total
2009	14,780.10	3,500.00	18,280.10
2010	15,730.93	4,000.00	19,730.93
2011	16,708.19	(391.37)	16,316.82

43. Mr Ryan's statement of 22 January 2013 provides a fuller explanation of the management charges. He employs a managing agent, S M Properties, who perform administrative tasks including preparing budgets and service charge demands and accounts, bookkeeping and credit control, liaison and meetings with flat owners, correspondence and telephone calls, insurance and risk assessments, statutory certificates, and a 24 hour answering system. From the invoices submitted, it appears, and the Tribunal finds, that in addition to paying the managing agents cost, Mr Ryan also charges a fee for himself (via his building company Ryan Construction Ltd) for visits and general liaison with the caretaker. The two components of this management charge are set out above.

44. The 2011 figures require more explanation. In that year, Mr Ryan had also collected fees from flat owners for underletting their properties totalling £6,191.37. His own charge for that year was £5,800.00, which when added to the S M Properties charge totals £22,508.19. The underletting fees were used to partially discharge this liability, leaving the net sum charged to service charge payers of £16,316.82. The Tribunal notes that the underletting fee was the subject of an application to the Leasehold Valuation Tribunal in 2012

under reference number BIR/00CW/LAC/2012/0010 in which it was determined that the imposition of a fee for underletting was not permitted under the terms of the leases of St Cecelias.

45. The Tribunal considers that there is no reason in principle for management charges not to comprise the two elements identified above, as Mr Ryan, it finds, provides some management to St Cecelias that is additional to that provided by S M Properties. But the overall amount must be reasonable. Using its knowledge and experience of property management, the Tribunal considers that the management charges levied are within the bounds of reasonableness, being, at the highest point, no more that £165.80 per flat per year (including VAT). It notes that increases across the three years in question have been considerably above inflation and the sums levied are now reaching the point whereby further above inflation increases might be difficult for Mr Ryan to justify.”

12. The final sentence of paragraph 45 has been cited as the reason that the Applicants have made this application.

The Applicants' case

13. The Applicants' case has been presented in Mrs Hacking's statements. In her statement of 20 February 2014 she expands on the reasons set out in the application for seeking a reduction in the 2012 management fee. In essence her arguments are these:
- a. Mr Ryans budget for 2012 set the management fee at £19,635, or £165 per flat, and the fee should be held at that sum, or possibly even lower;
 - b. The actual figure of £24,637.04 for 2012, at approximately 25% above budget, is not reasonable without there being a good explanation, and no explanation has been provided;
 - c. There was a low level of activity in 2012 that required management input so if anything the budget figure should be lower rather than higher. Mrs Hacking refers to the accounts for 2012 when making this point. These show that total expenditure for repairs was £4,977 against a budget of £14,994, lift repairs were £3,664 against a budget of £11,900;
 - d. A competitive quotation for management fees has been obtained from Pennycuick Collins in the sum of £162 per flat, including VAT;
 - e. There is a caretaker at the Property the cost of which is charged separately and in addition to management fees. That should ease the burden of management;

- f. Mrs Hacking's experience of management by Mr Ryan and his agent, S M Properties, is said to be poor, and she cites (inter alia) difficulties in communicating, failure to give reasons for expenditure decisions, failure to provide sale information to assist sellers of flats, and no regular published visits.

The Respondent's case

14. Mr Ryan accepts the comments of the Tribunal in the Previous Case, but he says the accounts for 2012 had been finalised before he received the determination. He therefore proposed to deal with the issue of the 2012 management fee by making an adjustment in the 2013 accounts. His proposal is to cap the management fee for 2013 to £20,922, and to give a further credit of £300 against 2011/12 management fees, and to "net off" that sum against the 2013 fee so that it reduces to £20,622.
15. Mr Ryan then offers two comparables of management fees in two developments in which Mrs Hacking and her husband have an interest. His case is that in both of these developments, the management fees are above the amount the Applicants are suggesting should be the fee for the Property. These two developments are Albion Street, Wolverhampton, and Wheeler Gardens, Wednesfield.
16. As appears from Mr Ryan's letter to Mrs Hacking dated 1 August 2013, the average management fee at Albion St is said to be £171.03 per flat, possibly with an additional charge for management expenses of £9.48 per flat, making £180.51 per unit.
17. Wheeler Gardens is a 21 unit two storey development managed by Pennycuick Collins. Accounts for the year to 31 March 2011 have been produced showing a total management fee of £4,737.60, or £225.60 per property.
18. At no point in his first statement does Mr Ryan explain why he charged £24,637.04 for management at the Property in 2012, nor why he exceeded the budget of £19,635.00.
19. In his second statement dated 3 February 2014, Mr Ryan gives details of the management activity that takes place for which he makes a management charge. He explains that S M Properties are engaged to deal with the administrative side, and he personally deals with the works side, ie dealing with the caretaker etc.
20. The personal involvement by Mr Ryan is said to require visits to the Property twice monthly and around 200 telephone calls to the caretaker plus numerous other calls to sundry suppliers including lift engineers, fire-check services and lightning conductor engineers. Mr Ryan also has lengthy discussions with his agent.

21. On the administrative side, Mr Ryan says the work involved required preparation and despatch of service charges invoices, banking and receipts, keeping the accounts reconciled, chasing payments, meetings with tenants and the residents association, keeping records of certificates, dealing with telephone messages left on a 24/7 message service and dealing with correspondence. An estimate is given that 454 hours were expended in 2012 on management.
22. There is again no statement in this second statement explaining how the 2012 management fee is calculated.
23. The Tribunal should record that in her statement Mrs Hacking also comments on Mr Ryan's two statements in detail. It is not necessary to set out each point made but it is worth recording her specific comments on the comparables advanced by Mr Ryan in support of the management fee, being the developments at Albion Street and at Wheeler Gardens. These are both developments in which Mrs Hacking or her husband have an interest. Mrs Hacking points out that neither of these developments have a caretaker. Wheeler Gardens is a much smaller development (21 units) and so cannot obtain the same economies of scale as a larger development such as the Property.

The Tribunal's deliberations

24. As an expert Tribunal, the Tribunal is entitled, as a starting point, to take account of its general knowledge of the market level of management costs in the area of Wolverhampton. The Tribunal considers that there is a competitive market in the area of Wolverhampton for professional property management, and fees are normally charged, as recommended by RICS, on a per flat basis. Competitive rates would not normally exceed around £150 per flat plus VAT, equating to £180 per unit, to manage a property such as St Cecelias. With the benefit of a resident caretaker, it would not be unreasonable to consider that a fee for management of St Cecelias would tend to be a little lower than this. The Tribunal is of the view that a management fee charged at £207 per unit seems to be above the level normally considered reasonable in Wolverhampton so that it is reasonable for service charge payers to ask the question whether it might be "unreasonably incurred".
25. From the starting point set out above, the Tribunal has to consider the specifics of this case and the arguments put forward by the parties to arrive at its decision of whether the fee of £24,637.04 is reasonably incurred, and in compliance with section 19 of the Act.
26. The most overriding point that strikes the Tribunal is that there has been no explanation from the Respondent of how he arrived at the figure eventually inserted into the 2012 accounts for management. Where did it come from? How was it calculated? There is nothing in the

evidence that enables the Tribunal to determine that there are circumstances justifying a substantial increase in management fees from previous years. It should be remembered that in the Previous Case, save that 2011 was an unusual year, the Tribunal broadly accepted the management fees proposed by the Respondent. The Tribunal did not cut back the fees claimed, so these were fees that the Respondent considered were reasonable for him in previous years. Why did they need to increase substantially in 2012? There is no explanation of this.

27. Coupled with this, the arguments presented by Mrs Hacking and summarised above in paragraph 13 c, d, and e are strong and persuasive.
28. The Tribunal has not been assisted very much by the comparables produced. Firstly, these appeared to have been selected because Mr and Mrs Hacking had an interest in these developments, rather than to provide market evidence. Secondly, the Tribunal was only given limited information, being one year's accounts for both developments, together with a statement of the number of units in each development, and a photograph of Wheeler Gardens. It is impossible to interrogate those accounts and produce meaningful average management fees per unit without a better understanding of the development, how the costs are split between the different types of unit, and the management challenges existing.
29. So far as Wheeler Gardens is concerned, it is much smaller than the Property, and the quality and nature of the accommodation appears to be substantially different. With regard to the Albion Street development, the accounts appear to show that there are possibly two types of accommodation. They separate costs into Schedule 1 New Build Apartments and Schedule 2 costs. This distinction is not explained.
30. Should the Tribunal adjust the fee to reflect the allegations of poor service made by Mrs Hacking (see 13f above)? On balance the Tribunal is not willing to do so. The evidence in this case is that both parties distrust each other, and that is about as far as the Tribunal can take the issue. It is not possible, in our view, to make a clear determination that the quality of the management service is so poor that there should be a determination that it has not been provided to a reasonable standard.
31. The Tribunal has considered carefully Mr Ryan's proposal to adjust the 2013 management fee because of the concerns expressed by the Applicants in this case. However, this case is an application for a determination of the reasonableness of the management fee for 2012, and the Tribunal has no option but to make a ruling on that application. Mr Ryan's proposal therefore cannot be taken into account by the Tribunal.

32. For the reasons set out in paragraphs 24 to 31 above, the Tribunal determines that the management fee for 2012 of £24,637.04 has not been reasonably incurred. What amount should be allowed in its place? The Tribunal considers that the originally budgeted fee of £19,635 (£165 per flat) is a reasonable management fee for 2012 and determines that that sum would be reasonably incurred for the management of the Property in 2012. It is a fee that came from the Respondent initially, and is a fee that is in line with previous years' fees. The Respondent has undoubtedly performed management services at the Property and is entitled to a reasonable fee for those services.
33. The application form contains an application for an order under section 20C of the Act that any costs incurred by the Respondent in these proceedings should not be treated as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person specified in the application. The Applicants explain why an order is requested in section 9 of the application form by saying:
- “It would not be fair if the Landlord could defray the costs of defending what is considered to be an unreasonably high management charge element of the service charge by passing on his defence costs to the service charge payers.”
34. In her statement dated 20 February 2014, Mrs Hacking repeats the application for an order under section 20C of the Act, asking that the order be made in favour of “the Applicant and any other Lessees of the flats.”
35. The Respondent has not made any comment on the section 20C application.
36. The Tribunal has a wide discretion in making any determination under section 20C. It should be conscious that any order made potentially deprives a landlord of a contractual right contained in the leases. Nevertheless, in this case, the Tribunal is clear that an order under section 20C should be made. The Applicants have succeeded in this application, and it would indeed not be fair if they or the other lessees had to pay the Respondents costs. The Tribunal orders that none of the Respondents costs of these proceedings are to be treated as relevant costs in determining the amount of any service charge to be charged to the Applicants or any other lessees of any of the flats at the Property.
37. The Applicants also seek an order that their fee of £250 be reimbursed pursuant to Regulation 13(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013. Again, as the Applicants have succeeded, it seems just to the Tribunal that it should exercise its

discretion to require the Respondent to reimburse the application fee of £250 to the first applicant, and it so orders.

Summary

38. The Tribunal determines that:

- a. The management fee charged to the lessees of St Cecelias, Okement Drive, Wednesfield, Wolverhampton in the management year 2012 of £207.03 per flat is unreasonably incurred and shall be substituted with the sum of £165 per flat which the Tribunal determines is a reasonable management fee per flat for that year;
- b. None of the Respondent's costs of these proceedings are to be treated as relevant costs in determining the amount of any service charge to be charged to the Applicants or any other lessees of any of the flats at the Property; and
- c. The Respondent must pay the sum of £250 to the first applicant in reimbursement of the fee paid to this tribunal on commencement of these proceedings.

Appeal

39. Any appeal against this decision must be made to the Upper Tribunal (Lands Chamber). Prior to making such an appeal the party appealing must apply, in writing, to this Tribunal for permission to appeal within 28 days of the date of issue of this decision (or, if applicable, within 28 days of any decision on a review or application to set aside) identifying the decision to which the appeal relates, stating the grounds on which that party intends to rely in the appeal, and stating the result sought by the party making the application.

Judge C Goodall
Chair
First-tier Tribunal (Property Chamber)