



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

Case Reference : LON/00BK/LSC/2013/0491

Property : Hinde House, 11-14 Hinde Street,
London W1U 3BG

Applicant : Hinde House Management Company
Limited

Representative : Mr Steven Woolf, Counsel instructed
under Direct Access.

Respondent : Caribax Limited
Starclass (Hinde House) No. 2
Limited
Starclass (Hinde House) Limited
London & New York Limited

Representative : Thrings LLP Solicitors

Type of Application : Liability to pay service charges

Tribunal Members : Ms F Dickie
Mr I Thompson, FRICS
Mr J Francis QPM

Date and venue of hearing : 5 March 2014 at 10 Alfred Place,
London WC1E 7LR

Date of Decision : 16 April 2014

DECISION

Decisions of the tribunal

- I. The costs of common parts cleaning have been agreed.**
- II. Service charges as determined below for repairs and maintenance, professional fees and administration expenses, and all other service charges demanded, are reasonable and will be payable upon service of correct certification pursuant to the Fifth schedule of the lease.**
- III. The Applicant shall pay to the Respondent £1500 in costs within 28 days.**
- IV. An order under s.20C of the Act is made in respect of the Applicant's costs of attendance at the hearing on 14 and 15 November 2013 only.**

Introduction

1. The Applicant Hinde House Management Company Ltd. (HHMC) has applied for a determination under section 27A of the Landlord and Tenant Act 1985 (the Act) in respect of service charges for the years 2010 – 2013.
2. The hearing of the application was listed for 14 and 15 November 2013. The tribunal conducted an inspection of the subject premises on the morning of the first day in the company of the parties. The Applicant was represented by Mr Thornton of Hurford Salvi Carr and the Respondents by Mr S Furber QC.
3. At that hearing, a preliminary issue was identified by the tribunal as to whether the scope of the application included certain "Contentious Items" in the sum of £93,415 which had been included in the 2012 accounts after the case management hearing on 13 August 2013 had taken place. The tribunal heard submissions on the preliminary issue, and at the request of Mr Thornton the hearing was then adjourned for the Applicants to take legal advice concerning issues of payability now raised by Mr Furber, who had only been instructed very shortly before the hearing. At that stage, owing to the manner in which the parties had purported to comply with the directions of the tribunal as to statements of case, any other issues in dispute between them were obscured.
4. On 25 November 2013 the tribunal issued a decision on the preliminary issue along with further directions, and the adjourned hearing of the application was listed on 5 and 6 March 2014. At that adjourned hearing the Applicant was represented by Mr S Woolf of counsel, instructed under the Direct Access scheme (instructions having been withdrawn from Hurford Salvi Carr), and Mr Furber again appeared on behalf of the Respondents.

5. The freehold interest in Hinde House is owned by Starclass (Hinde House) Limited, which company acquired it on 19 December 2007 from Starclass Properties Limited subject to a lease dated 30 July 2007 granted to HHMC. By that lease, the area of the building above the ceiling and floor which separated ground and first floor levels was demised for a term of 999 years from 1 January 2007 to HHMC. The lessees of the flats at Hinde House thereby became under lessees, with HHMC as the immediate reversioner to whom service charges are payable. The freeholder is one of the Respondents to this application, in its position as leaseholder of one or more of the subject flats.
6. In its preliminary determination, the tribunal found that the application did not encompass the Contentious Items, except a dispute over common parts cleaning. The tribunal found it had no jurisdiction to determine if the remaining Contentious Items were payable. These comprised items of loss and/or expenditure by the Applicant for which it considered the freeholder liable, but which it sought to recover through the service charge if recovery from the freeholder could not be made. They are not fully specified in this decision but included the cost of works relating to a dispute over compliance with the terms of a Tomlin Order requiring the former freeholder Starclass Properties Ltd. to carry out various works of separation between the commercial premises on the ground floor and the residential premises above. That Tomlin Order, and the grant of the head lease, had formed the settlement of County Court proceedings brought by HHMC in 2007 concerning the purchase of the freehold.
7. The issue concerning the common parts cleaning related to a dispute as to the correct apportionment to the freeholder of the cost of the maintenance of the ground floor common parts (altered as a result of the separation works). However, by the time of the adjourned hearing the parties' experts had met on site to agree measurements, and the apportionment of the common parts cleaning was agreed. Mr Furber confirmed that the Respondents conceded that the costs of cleaning were reasonable and payable.

The Lease Terms

8. In paragraph 2(a) of Part A of the Fifth Schedule the tenant covenants:

“To pay to the Landlord without any deduction by way of further and additional rent a service charge being that percentage specified in paragraph 8 of the Particulars of the expense which the Landlord shall in relation to the Property reasonably and properly incur in each Landlord's Financial Year and which are authorised by the Eighth Schedule hereto (including the provision for future expenditure therein mentioned) the amount of such payment to be certified by the Landlord's independent qualified Accountants acting as experts and not as arbitrators by the quarter day immediately next following the expiry of each Landlord's Financial Year and to include the payment of an appropriate proportion of any substantial expenditure which has to be incurred during the course of the Landlord's Financial Year and

which was not anticipated at the time when the Landlord's estimate was made and FURTHER on the Twenty-fifth day of March and the Twenty-ninth day of September in each Financial Year to pay on account of the Tenant's Liability under this paragraph such amount as in the reasonable opinion of the Landlord fairly represents one half of the service charge for the current Landlord's Financial Year which I shall be the greater PROVIDED THAT such payment first referred to in this paragraph (not being be on Account payments) shall be required to be made by the Tenant only after having received a copy of the Landlord's independent qualified Accountant's certificate hereinbefore referred to PROVIDED THAT immediately upon such certificate being given as aforesaid there shall be paid by the Tenant any deficiency between the amount paid by the Tenant and the Service Charge as certified".

9. The lease provides for the operation of a reserve fund. Pursuant to paragraph 2(b) of the Fifth Schedule Part A, the Applicant as landlord is enabled to collect and retain money intended to pay for future works "which amount shall be transferred to a specially designated trust fund so as to satisfy the requirements of section 42(5) of the Landlord and Tenant Act 1987 (and any legislation which shall amend or replace the same)", and subject to this:

"PROVIDED THAT any expenditure on any such plant, equipment and other items in respect of the repairs, renewals and maintenance of the Building, and decoration thereof during any accounting year shall first be met out of the specifically designated trust fund to the extent of the amount standing to the credit of such trust fund."

Disputed Service Charges

10. By the time of the adjourned hearing the issues in dispute had received much clarification by virtue of the service of supplementary statements of case pursuant to the tribunal's further directions. The hearing in fact concluded on the first day of the two days set aside. The Applicant did not attempt to pursue monies relating to works it described as "Tomlin order works" as part of these proceedings.
11. The application is in respect of annual service charges for the years 2010 - 2013. The certified accounts for the year 2010 were dated 15 June 2011. Certified accounts for the years 2011 and 2012 were produced after the proceedings commenced and the expenditure differs from that relied upon in the application notice relating to the estimated expenditure. Mr Woolf's skeleton argument however referred to a claim for arrears of service charges in specified sums to a date after issue of the proceedings. Mr Furber argued all this was grounds for dismissal of the application.
12. At the hearing, Mr Woolf sought a determination as to actual service charge expenditure for the years 2011 and 2012. Mr Furber has no issue with dealing with the actual figures for 2011 and 2012. Having considered the matter, the tribunal at the hearing ordered the amendment of the

application to deal with actual service charges for 2011 and 2012 as well as for 2010, though 2013 remains an estimate. Such amendment caused no prejudice to the Respondents in light of the disclosed evidence and did not require an adjournment.

13. Notwithstanding comments within the accounts regarding expenditure recovered, it was common ground that the Respondents had not paid the service charges in dispute. The monies recovered as shown in the accounts, explained Mr Woolf, included service charge arrears and reserve fund contributions paid in respect of previous years by other lessees.
14. Issues of law and lease interpretation aside, there were only 3 items in the accounts in contention – administrative expenses, professional fees and maintenance and repairs.

The Issues and Tribunal's Determination

Payability

15. Mr Furber relied on the fact that the Applicant had not produced any witness evidence in support of its case. However, in light of the issues in dispute, the tribunal did not consider this undermined the Applicant's case presented on the basis of documentary evidence.
16. Mr Furber disputed that the certification of the accounts was sufficient to comply with the requirements of paragraph 2(a) of Part A of the Fifth Schedule. The amount of any payments alleged to be due from any Respondent must be certified in any valid certificate, and since this had not been done he argued that the certification relied upon by the Appellant was not valid. Mr Woolf observed that certification as to the amount payable by each leaseholder was just a simple mathematical exercise to apply the correct proportion, the service charge accounts themselves having been certified. Mr Furber objected to the tribunal considering purported further certificates at this stage. However, it was conceded by him that time was not of the essence for the purposes of providing such certification.
17. The tribunal has made its decision on the basis of documents before it. If finds that any actual amounts determined by the tribunal will only be payable when and if service of valid certificates pursuant to the Fifth schedule has taken place.
18. The Applicant has produced each year an estimate of service charge expenditure. Certification is not a prerequisite for liability to pay on account payments. The Applicant produced at the hearing a bundle of the estimated service charge demands. The tribunal noted Mr Furber's objection to their admission in evidence and invited him on the first day of the hearing to inspect the demands so that he could raise any objection as to service or otherwise on the second day, but he declined to do so. Mr Thornton had brought these demands to the first hearing and the Respondents had not sought a direction that they be disclosed to the Respondents, though there was an opportunity to do so. The tribunal,

along with the parties' representatives, examined during the hearing a sample invoice - that for Flat 22, 11 Hinde House. The demand was quarterly with a total for the estimate and a percentage applied and divided by four to produce a quarterly figure. The demands were all in similar form.

19. Mr Furber disputed that the landlord's estimated service charges were payable under paragraph 2(a) of Part A to the Fifth Schedule, which required the landlord to express a "reasonable opinion" as to what fairly represents one half of the service charge the tenant has to pay and to inform the tenant of that and, he argued, demand it in two instalments. He submitted that the landlord had not formed a reasonable estimate of what the service charge would be since such estimates as there were were not based on certified accounts of previous expenditure and that for 2013 had been produced part way through the service charge year and after the commencement of these proceedings.
20. Mr Furber disputed the validity of the demands as they were not half yearly. Instead, he said, the landlord had demanded sums ad hoc up to 12 times each year and left the tenant in complete confusion. The tribunal agrees with Mr Woolf's interpretation of the lease that there is no requirement to demand twice yearly the estimated expenditure, only for the tenant to pay those estimates twice yearly. There is nothing contrary to the lease in providing any number of invoices, since in fact no demands are required by the lease terms (though they were made). The tribunal found nothing invalid in the form of the invoices. The lease places responsibility on the landlord to give in its reasonable opinion what represents one half of the service charge. There is no obligation that requires any estimate to be given. The tenant being notified of the amount the landlord considered reasonable and payable on account, those amounts became due (subject to being payable as a service charge and subject to statutory limitation as to reasonableness).
21. Except as set out above, no real issue was taken about the reasonableness of the estimates, including the estimate for 2013. The tribunal having considered the evidence accordingly finds that all of the Applicant's demands for estimated service charges are payable. Adjustments for actual expenditure are not payable unless and until certification is served according to the provisions of the lease.

Section 20B

22. For the year 2011 only Mr Furber relied on the application of section 20B of the Act in relation to any expenditure incurred more than 18 months before demanded. He argued that since the purported certificate for 2011 was not produced until 3 September 2013, more than 18 months after the year end, section 20B prevented recovery of service charges from the tenants. Mr Furber did not take a s.20B point in relation to any other year, his primary position being that the estimated service charges were not payable and a section 20B issue would arise only once a valid demand for actual service charges had been made on service of valid certification.

23. Since the tribunal is satisfied that the estimated service charge demands were payable, and since the estimated service charge expenditure for 2011 exceeded the actual expenditure as shown in the accounts, then according to the decision in *Gilje v Charlesgrove Investments Ltd* [2003] EWHC 1284 (Ch), s.20B is of no application.

The Reserve Fund

24. Mr Furber relied on the terms of paragraph 2(b) of the Fifth Schedule Part A which require the landlord to transfer the reserve fund to a specially designated trust fund. There are two reserve funds identified in the accounts, though it was conceded for the Applicant that neither was a specially designated trust fund. At the end of 2012 the reserve fund had stood at just over £133,000. Before the date of the adjourned hearing, all reserve fund moneys collected had been refunded to the leaseholders.

25. Mr Furber argued that service charge expenditure for the items of maintenance specified in paragraph 2(b) (broadly speaking, plant and equipment, building repairs and exterior decoration) was not payable as it had not been first “met out of the specially designated trust fund to the extent of the amount standing to the credit of such trust fund”. Mr Furber contended that the fact that it was not within the specially designated trust fund does not mean that it had not been available for the purpose for which it was intended.

26. However, there was now no dispute that such a specially designated trust fund had never been established. Since no such fund existed, the tribunal agreed with Mr Woolf that Mr Furber’s argument that the service charges should be met from that fund was without merit.

27. The tribunal, in common with both counsel, observed there were issues of application with regard to the operation of the reserve fund - if the lease was interpreted as meaning that any expenditure on the specified items should first be met from the reserve fund in each year - since it would not act as a reserve fund year to year unless the contributions were sufficient to meet current year and a contribution to future expenditure. The interpretation of the provisions was not straightforward, however, and since the matter does not require a determination in these proceedings the tribunal has not reached one.

Maintenance and Repairs

28. The schedule of repairs and maintenance expenditure in the evidence was incomplete (only the first of three pages was produced in the hearing bundle). The remaining pages were produced during the course of the hearing and Mr Furber did not object to the admission of this evidence as its omission was clearly simply a mistake. He was afforded a short adjournment to review the two additional pages of the schedule now produced.

29. The total of repairs and maintenance expenditure in the service charge accounts for the years in dispute was £49,773. The total expenditure

evidenced in the schedules was £49,300, but this included certain insured sums, in relation to which insurance payouts were to be credited. The total expenditure after applying the insurance credits was £39,595.04. Whilst Mr Woolf could not produce evidence to show expenditure of the balance he argued that it was not automatically unreasonably incurred if not evidenced since the invoices would have been seen by the accountant who prepared and certified the accounts.

30. In the absence of evidence supporting the balance of expenditure, the tribunal is not persuaded that it is payable. Whilst the accounts were produced on the basis of documentation, that does not demonstrate satisfactorily in the present case that the expenditure was on items recoverable as a service charge under the lease, and was reasonable. Accordingly, the tribunal determines that the following amounts, totalling £39,595.04, are reasonable and payable in respect of the three years:

2010 - £5,165.57

2011 - £12,704.10

2012 - £21,725.37

Administrative Expenses

31. The Respondents contended that these expenses, relating to the running of the Applicant as a company rather than the management of the building, are not recoverable as expenditure within the service charge provisions. Mr Woolf considered these charges were recoverable as they are expenses that fall within the Eighth Schedule, since the running and management of the property is the responsibility of the company. The company has no other interests. Its sole purpose is to run the building.

32. The company's administration expenses for the year 2010 were £1,475 (labeled in the accounts as "sundry expenses"), in 2011 were £9,297 and for the year 2012 were £2603. The 2013 budget did not appear to include anticipated expenditure of this nature. Mr Woolf asked that it be noted that sums of £4,500 and £3000 were being repaid to the service charge account by the directors in relation to 2011 expenditure. Deducting these repayments reduces the amount in dispute to £5,875.00 (£5865.89 in a schedule produced in evidence).

33. The tribunal observes that this was not a case of enfranchisement by statute, and that the landlord is only a subset of the tenants. The tribunal agrees with Mr Furber that the expenses associated with setting up and running of the company are not expenditure on the management of the building. A number of tenants have entered into a commercial arrangement to purchase the head leasehold interest, and must pay their company's expenditure as a cost of their enterprise. Those costs are not referable to the building management and all are disallowed.

Professional Fees

34. Mr Woolf said these were legal fees lawfully incurred pursuant to paragraph 11 of the Eighth Schedule. The covenant in question covered “all legal and other proper costs incurred by the landlord.” However, the Applicant was unable to produce any documents to evidence these professional fees having been incurred. Accounts for 2012 showed £5915 charged for professional fees but it was not clear what they were for. However, Mr Woolf observed that the accounts had been certified by the accountants – who would have seen evidence of the expenditure and, he submitted, this of itself should be sufficient for the purposes of the tribunal’s jurisdiction and on the balance of probabilities. There were no costs under this heading in the 2013 budget.
35. The tribunal was not persuaded that such legal fees as were incurred were recoverable as a service charge under the terms of the lease. Without knowledge of the nature of the matter(s) on which legal advice was sought by the directors, and on the balance of probabilities, the tribunal finds such professional fees are not payable as a service charge.

Costs and s.20C

36. The tribunal’s first directions dated 13 August 2013 required the Respondent to send to the Applicant details of the service charge items which are disputed together with (amongst other evidence) “full reasons as to why each item is disputed, whether the issue relates to the amount of the charge, the quality of the relevant service or is based on any other legal argument;”. In its preliminary determination, the tribunal noted:

“The Respondent’s solicitor’s letter of 24 September in compliance with those directions consisted largely of a list of queries concerning a number of matters. The Applicant’s response, and further correspondence between the parties in relation to the enquiries did not succeed in identifying clearly what was in dispute for the tribunal’s determination. The tribunal experienced considerable difficulty in analysing and eliciting the issues for determination at the start of the hearing. It considered that the issues in dispute had not been sufficiently well defined in compliance with the directions.”

37. And with regard to the parties willingness to mediate, it observed:

“23. Whilst the Applicant was willing to mediate to try to settle the dispute (having been unwilling to do so at the Case Management Conference) the Respondent (contrary to its position at the Case Management Conference) did not now consent to mediation.”

38. Mr Furber made an application for an order for costs against the Applicant in respect of the Respondent’s costs of the November hearing, and intimated that an application for costs of the March hearing would be made, depending on the outcome of the proceedings. He observed that the Applicant had been represented at the previous hearing by chartered surveyors whose application (which sought only a determination as to reasonableness) was flawed and did not take account of the tribunal’s jurisdiction under s.27A to determine service charges payable. Mr Furber

argued that Mr Thornton had had plenty of time to take legal advice on the issues as to payability and to seek an adjournment before the previous hearing (to which the Respondent would have consented as it did at that hearing). Mr Furber therefore sought the costs thrown away. He also sought costs of preparing the enormous bundles which the Applicant had had to copy in relation to the attempt to include the "contentious items" in the application before the tribunal, and solicitor and counsel's time in responding to that argument.

39. Mr Furber had no instructions as to the level of costs, but sought an assessment of some sort. Mr Woolf did not make any positive submissions as to why the costs of including the contentious items should not be paid by the Applicant.
40. Mr Furber made an application for an order under section 20C of the Act in relation to the costs of these proceedings. He argued that they had not been prepared and pursued in a particularly competent fashion and this was clearly not a case in which a landlord should be able to seek to recover a substantial part of its costs against the Respondents.

Decisions on Costs and s.20C

41. The parties' statements of case in purported compliance with the directions of 13 August 2013 were actually in the nature of an exchange of questions and answers, which did not serve to identify the issues in dispute. Before the instruction of Mr Furber, neither Applicant nor Respondents appeared to have appreciated that the issues were obscure, and the difficulty which the tribunal would have in identifying them. That difficulty quickly became apparent upon the commencement of the November hearing. It is simplistic to suggest that the fault in this lay with the Applicant - the tribunal is of the view that it was equally shared.
42. The tribunal was able to conduct the inspection on the first day of the November hearing, and the remainder of that day was useful on any analysis. Had the Applicant not sought to include the Contentious Items in the application, the tribunal takes the view that the second day could have been avoided. The tribunal would consider it appropriate to make an order that the Applicant reimburse the Respondents' costs in attending the second day of the November hearing, and their costs in preparing bundles and argument in response to the unreasonable attempt to bring the contentious items within the application. Insofar as misconceived submissions were made on these items by the Applicant, the Respondents should be reimbursed for their cost in having to address the issues raised. However, in the absence of evidence as to costs, the tribunal has determined that an overall figure of £1,500 is appropriate and makes an order in this amount, payable by the Applicant to the Respondents within 28 days.
43. The tribunal declines to make any award of costs in respect of the Respondents' response to any other aspect of the Applicant's case, both

having been culpable in poorly preparing for the first hearing, meaning an adjournment was inevitable.

44. The Applicant has largely been successful in these proceedings (but for discrete service charge items and the fact that the certificates must now be served). The Respondents have obstinately failed to pay any service charges for a substantial period of time, and without good justification. The challenges raised to the service charges were largely unmeritorious. In all of the circumstances, the tribunal determines that the Applicant should be prevented from recovering its costs of attendance only at the abortive November hearing from being recovered as a service charge, and makes an order under section 20C of the Act to that effect.

Name: F Dickie

Date: 16 April 2014