



10672

**First-tier Tribunal
Property Chamber
(Residential Property)**

Case reference	: CAM/22UN/LSC/2014/0112
Properties	: 19 & 23 Shamrock House, Weymouth Close, Clacton-on-Sea, Essex CO15 1XW
Applicants	: Patricia Underwood (19) Neale Herbert (23)
Respondent Represented by	: A J Waite & Co. Ltd. David Bland, Legal Executive
Date of Application	: undated but received on 25th November 2014
Type of Application	: To determine reasonableness and payability of service charges and administration charges
The Tribunal	: Bruce Edgington (lawyer chair) Roland Thomas MRICS John Francis QPM
Date and venue of hearing	: 12th March 2015 at Lifehouse Spa & Hotel, Frinton Road, Thorpe-le-Soken, Colchester, Essex CO16 0JD

DECISION

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1. In respect of the amount claimed by the Respondent from the Applicants for management fees for the years ending 28th February 2006, 2007, 2008, 2009 and 2010, the amount of £148 inclusive of VAT is considered to be fair and reasonable for each of those years and only that amount is payable by each Applicant.
2. In respect of the amount claimed by the Respondent from the Applicants for management fees for the years ending 28th February 2011, 2013 and 2014, the amount of £200 inclusive of VAT, postage and accountancy charges is considered to be fair and reasonable for each of those years and only that amount is payable by each Applicant.

3. In respect of the amount claimed by the Respondent from the Applicant Neale Herbert as fees for the provision of an information pack, the sum of £250 inclusive of VAT is considered by the Tribunal to be fair and reasonable and only that amount is payable.
4. In respect of the amount claimed by the Respondent from the purchaser of Mr. Herbert's interest in his flat for the registration of the transaction, the sum of £100 inclusive of VAT is considered by the Tribunal to be fair and reasonable and only that amount is payable.
5. An order is made pursuant to section 20C of the **Landlord and Tenant Act 1985** ("the 1985 Act") that any costs incurred in these proceedings on behalf of the landlord are not 'relevant costs' to be taken into account when determining any service charge payable.

Reasons

Introduction

6. Following a hearing on the 18th February 2011, a Leasehold Valuation Tribunal determined that "*the management fee payable in respect of the service charge years ended 28th February 2006 to 28th February 2010 should be varied for each of those years to £148 inclusive of VAT for each flat*". The case involved the Respondent in this case i.e. A J Waits & Co. Ltd. and Victor Michael Winterflood from flat 21 Shamrock House.
7. As the hearing related to only one flat but the decision says that the £148 relates to 'each flat', it is clear that the Tribunal intended the determination to apply to all flats in the development including 19 and 23. It is clear from the Respondent's representations in this case that it does not agree. It is equally clear that the lessees took the contrary view and were waiting for a refund.
8. As that has not happened, this new application relates to management fees incurred from 2005 onwards and also to fees charged for the supply of a buyer's information pack and the registration of an assignment of a leasehold interest. It is said in the application that a Tribunal has 'already ruled' on the period 2005-2010, which appears to be the case.
9. As to the period from 2011 to date, the case put forward is that the charges have been £234.41 per flat for 2011, £284 in 2013 plus £497 to an accountant and £200 including VAT for 2014 which is said to be "*still not in keeping with the LVT ruling and adding RPI increases*" (sic). It is said that there were no accounts for 2012.
10. Mr. Herbert says he is selling up and complains about a fee of £360 charged for a buyers information pack and £216 to register the assignment. He says in the application form that he expected to pay fees for these services but his solicitor told him that the charges were excessive. In the letter accompanying the application he said that the fees charged were "*possibly almost double what would be expected*" according to his solicitor.
11. The application form and letter do mention other allegations about service charges but it is said very clearly that this application is not being made to

dispute anything else.

12. The directions order from the Tribunal told the Respondent to file and serve a statement “*setting out its justification in principle and in law for the disputed service charge demands made and the administration fee claimed*”. The statement filed is dated 26th January 2015 and simply says that the amounts charged are ‘properly incurred’ and the burden of proof is on the Applicants. This is the Respondent’s justification for ignoring the Tribunal’s directions order.
13. Despite being ordered to do so, the parties did not cooperate in the preparation of a joint bundle of documents which has caused extra work for the Tribunal. The Applicant’s bundle contains no documentation from the Respondent. However, it is numbered and has an index. The Respondent’s bundle, despite being prepared by a ‘legal executive lawyer’, does not have an index and contains documents which are already in the bundle filed by the Applicants and a section of which are upside down.

The Inspection

14. The members of the Tribunal inspected the common parts of the property in the presence of the Applicants and Mr. David Bland and Mr. Michael Lawton, legal representative and property manager respectively for the Respondent.
15. There is a full description of the property in the previous decision of the Leasehold Valuation Tribunal referred to above which will not be repeated here as all parties have a copy of that. The grounds were neat and tidy with the grass having just been cut. The common parts appeared in good condition and clean.
16. The general standard of maintenance and repair appeared good although it has to be said that with mainly brick walls to the outside, brick walls on the inside with uPVC window frames, the cost of maintenance (and management involvement) is kept to a minimum.

The Leases

17. The Respondent’s bundle contained a copy of the lease to flat 23 which is dated 19th January 1990 and is for a term of 125 years from the 1st April 1989 with an increasing ground rent.
18. Paragraph (7) of the Eighth Schedule allows the landlord to charge managing agents’ fees to the service charge account. Paragraph (3) of Part II of the Fifth Schedule sets out the service charge regime. Payments on account can be claimed and then as soon as practicable after the end of each service charge year, a service charge account shall be sent out with a reconciliation. It is only in the event of a dispute that there is specific provision for a Chartered Accountant to prepare a certificate of liability which appears to be a pre-dispute arbitration agreement which is outlawed by section 27A(6) of the 1985 Act.
19. Part I of the Fifth Schedule establishes what the landlord can claim by way of fees. Paragraph (9) says that on assignment, the landlord can charge “*such reasonable fee as may be required*” as a registration fee. Paragraph (10) allows them to charge “*all costs charges and expenses (including legal costs and fees payable to a surveyor) which may be incurred by the Lessor.....in respect of any*

application to the Lessor made by the Lessee under this lease". This would include the cost of producing the buyers' information pack.

The Law

20. 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'.
21. 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.
22. Section 27A of the 1985 Act says that an application such as this cannot be brought where a service charge has been "*agreed or admitted by the tenant*". However, it also says that "*the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment*". This is particularly relevant in this case because Mr. Bland's submission on behalf of the Respondent landlord is that if there was no clear dispute at the time of payment then such payment is to be taken as an admission or agreement as to the service charge being paid. This seems to be contrary to the wording of the statute which makes it clear that mere payment is not an agreement or admission.
23. Paragraph 1 of Schedule 11 of the **Commonhold and Leasehold Reform Act 2002** ("the Schedule") defines an administration charge as being:-

"an amount payable by a tenant of a dwelling as part of or in addition to the rent which is payable... directly or indirectly for or in connection with the grant of approvals under (the) lease, or applications for such approvals."
24. Paragraph 2 of the Schedule, which applies to amounts payable after 30th September 2003, then says:-

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

The Hearing

25. The hearing was attended by those who attended the inspection. At the outset, the Tribunal chair asked the parties to clarify what the claims for management fees had been for the years following the 2011 hearing. It was agreed that including VAT, accountancy fees and postage the amounts charged per flat were £233.42 for the year ending 28th February 2011, £372.83 for 2013 and 293.83 for 2014. It seems that there was no charge for 2012.
26. Mr. Bland was then asked a number of questions. Those and his responses were:-
 - (a) He was asked why this Tribunal should not follow the previous Tribunal which had determined that the management fees "*in respect of the service charge years ended 28th February 2006 to 28th February 2010 should be*

varied for each of those years to £148 inclusive of VAT for each flat". His response was that this was a dispute relating to one flat only and had no application to the other flats whose management fees had not been reduced to that level.

- (b) He was asked why he had not obeyed the Tribunals clear directions to answer the allegations in the application and justify the management fees and other charges referred to. His answer was that as the Applicants had not set up a *prima facie* case that the charges were unreasonable, he was under no obligation to justify anything. As far as the fees for the information pack and registration were concerned, he said that no application form had been completed challenging those fees as administration fees. When it was pointed out to him that the application forms are not statutory and these fees were specifically challenged in the application form, he just repeated his case.
- (c) He was asked why accountancy fees were being charged in addition to the management fees as the Service Charge Residential Management Code published by the RICS clearly sets out that it is for the managing agent to produce the service charge accounts and include the cost within its fees. The answer was that this was to ensure 'transparency'.

27. Mr. Herbert then gave evidence about areas of management where he felt that the Respondent's agents had not done their job properly. These can be described as follows:-

- (a) The front door to the block had been defective since 2006 despite continuous complaints which had caused real security problems for the lessees. He said that after this application had been made, the new door had arrived but it was fixed to the adjoining block in error in December 2014. This was corrected. The door now works. On behalf of the Respondent, Mr. Lawton explained that the door had been ordered in November, before the application had been made.
- (b) The car park lighting has not worked since 2006. After the Right to Manage Company had taken over management in 2011, they had repaired their lights some years ago but the lights to this block were not repaired until March 2015
- (c) A communal window by the first flight of stairs has been broken since at least 2002 and remains broken despite requests for action.
- (d) The Respondent agreed to change the light fittings in the common parts, which it did in December 2014. The fittings can only take bulbs which are of such low wattage that they are ineffective. The electrician who did the work was alleged to have told the lessees that he was leaving the brighter emergency lighting on for health and safety reasons.
- (e) An engineer had turned up at 7.30 am that day to repair the intercom system at the front door. The equipment was seen by the Tribunal. It is the usual panel with buttons for each flat so that a caller can press the button for a particular flat and then speak to the occupier. This had not worked for a long time. The engineer is alleged to have said that the equipment was so old it could not be repaired but the maintenance contract had been cancelled some years ago. Mr. Lawton then produced an invoice dated 1st December 2014 which showed that this equipment was owned by Interphone and leased to the Respondent. The Tribunal could not understand this as the equipment should be maintained by its owner unless there is an agreement to the contrary. Mr. Lawton is to investigate.

- (f) The gardening and cleaning had been undertaken by the lessees for 2 years. They had not been charged for this but it still reduced the management.
28. Mr. Bland continued with his case that as the Applicants had produced no evidence of comparable costs, this application could not succeed. Mr. Herbert then produced the service charge account for flats 1-18 which showed that those lessees were being charged £236 per annum per flat for all management fees including fees for administering the Right to Manage company. This would involve arranging directors and members meetings, filing accounts with Companies House and generally complying with all the procedures to prevent the company being struck off the register. Mr. Bland's response, without any evidence to support his contention, was to say that the management fees would have been reduced so that the managing agent could secure this extra work.
29. It should be noted here that the reason for the late production of this evidence was that the Respondent had failed to provide its statement of case on time which meant, according to Mr. Herbert, that he had not produced this rebuttal evidence before.
30. There was some evidence about the previous LVT case when Ms. Underwood was a witness for Mr. Winterflood, the other lessee involved. It seemed clear to the Tribunal that Ms. Underwood was complaining about the bad service provided by the managing agent both in that previous case and ever since. Whatever management fees had been paid in the meantime were in the hope that she would get her refund and that things would improve. Indeed, she made the specific point that if the managing agents had just given her a refund for the years 2006-2010 and had done as they were asked to do about the entry door system in particular, then she would probably not be at this hearing.

Discussion

31. 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 service charges cases such as this. 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."*

32. In this case, the Applicants say in their application that a previous Tribunal had determined a reasonable management fee as being £148 per flat including VAT for this building. Whether Mr. Bland is correct or not in saying that such determination was only in respect of flat 21 is, with respect to him, irrelevant.

The fact that such determination was made raises the *prima facie* case that a charge which is more than that is unreasonable for a flat in that building for the years 2006-2010. It also raises a *prima facie* case for subsequent years which could have been rebutted by evidence that the management of the building had improved, thus justifying a higher fee.

33. As far as the fees for providing the buyers' information pack and registration of the assignment are concerned, the application says that Mr. Herbert's solicitor indicated to him that the fees were excessive. In the accompanying letter, this was expanded to saying that the fees were about double what he, the solicitor, would expect. Mr. Bland says that this does not raise a *prima facie* case. However, he does not make any suggestion about how the Applicant could have obtained any direct comparable evidence. What the Applicant has said is that his solicitor, who presumably has experience of other landlord's and their agents charges for these things, advised him that such charges are excessive. The Tribunal does not agree with Mr. Bland's submissions.
34. As far as the managing agent's fees are concerned, the Tribunal concludes that the service provided did not materially change from 2010 to 2014. Mr. Lawton said during the course of the hearing that if people did not pay their service charges, then was the landlord supposed to subsidise the payment of, say, £2,000 for a new front door entry system. Two points arise. Firstly, it is clear to this Tribunal that the door had been defective for a long time and payments on account could and should have been obtained. However, more importantly, why is there no sinking fund as provided in the Eighth Schedule to the lease?
35. Whilst the need to redecorate the interior walls and the brick parts of the exterior walls does not have to be planned, this building is about 25 years old and monies should be set aside for major expenditure. It was noted that some of the pointing needs attention and one of the vertical tiles on the outside of the building has fallen off. The lessees may not want to pay for this, but any good landlord would set aside monies for major expenditure as good management practice.

Conclusions

36. It is clear to this Tribunal that all the fees complained of were properly raised by the Applicants in the application form and they provided a *prima facie* case for suggesting that such fees were excessive. As to the management fees, those for the years 2006-2010 should be £148 per flat per annum including VAT, accountancy fees and postage. If more was charged and a refund has not been made, it should be, forthwith. As to the period 2011-2014, the Tribunal considers that as the £148 was a fixed fee for several years going back to 2006, the fee should be more from 2011 onwards bearing in mind that nothing appears to have been charged for 2012. £200 per flat per annum including VAT, accountancy fees and postage is considered to be a reasonable fee for 2011, 2013 and 2014. When the lack of proper management continued and there was some time when not even gardening and cleaning was being arranged.
37. In coming to this figure, the Tribunal used its own knowledge and experience of these matters. For the avoidance of doubt, the Tribunal chair did put it to Mr. Bland during the hearing that one would expect management fees in the open market to be in the range of £150-250 inclusive per flat per annum and this

property would not be at the high end of that scale in view of the fact that it appeared to be an easy building to manage compared with some others. Neither he nor Mr. Lawton disagreed.

38. The management issues save for the lighting in the common parts have now been resolved. That issue clearly needs to be resolved quickly because the expenditure of electricity must be very high until the emergency lighting is turned off. Thus, the management fee for 2015 onwards could be raised by a small amount on the basis that good management practice continues. The lessees would also be well advised not to agree any budget which did not include a contribution to a sinking fund.
39. As far as the other fees are concerned, it is the Tribunal's view that the provision of the buyer's information pack and the registration of the assignment are service charges. As has been said, the lease provides for a charge to be made in respect of any application to the lessor by a lessee, which is what these are. It is indirectly a cost of management covered by section 19(1)(a) of the 1985 Act and varies according to the relevant cost. It is nothing to do with a grant of approval, as asserted by Mr. Bland.
40. In any event, it does not really matter as these fees were clearly disputed in the application and are within the jurisdiction of the Tribunal. The Respondent has deliberately disobeyed the Tribunal's directions by not providing any information about how these charges are calculated. It would have been very easy just to assess them at 'nil'. However, the Tribunal will use its own expertise and assess reasonable figures.
41. As far as the information pack is concerned, a copy is in the bundle. It is quite a long document but much of it is template information. Also, it is not at all helpful to have comments such as "*please confirm this with A J Wait & Co. Ltd.*" as appear on pages 117 and 119 of the Respondent's bundle. A schedule of charges is at page 145 in the same bundle which sets £205 plus VAT for the full pack including information about payment of ground rent, which this one did not. Charging £25 for each additional question is clearly excessive. As no information about ground rent was provided, the Tribunal considers that £250 inclusive is a reasonable figure because it would probably take about an hour to collate the information including details of any arrears etc. and prepare the pack.
42. For registration of the assignment and the provision of a deed of covenant with standard wording covering just over half a page of double spaced print, the standard charge would appear to be £90 plus £170 plus VAT. This would involve typing in the names of the assignor and assignee plus a brief description of the property and the date and parties to the original lease. Registration is no more than amending the records of the landlord and its agent and possible notifying insurers. These would take no more than half an hour including the time of the person typing in the details. The Tribunal considers that £100 inclusive of VAT is more than sufficient and is a reasonable figure.
43. As far as the application for an order pursuant to section 20C of the 1985 Act is concerned, the Tribunal was disappointed that the Respondent's advisors failed to comply with directions orders and put forward a case which was, at best,

extremely speculative, particularly when they knew that they were dealing with lay Applicants. The Tribunal considers it just and appropriate for such an order to be made. Indeed, if any other tenant had made such an application, the Tribunal would have made such order to cover the whole building.

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Bruce Edgington
Regional Judge
13th March 2015