FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**CAM/22UC/LSC/2018/0083**
Property	**:**	Flats 1–5, 14–15 Market Hill, Coggeshall, Colchester CO6 1TS
Applicants	**:**	Peter & Bridget Charlesworth Sheila Steptoe Lynne & Kerry Akers Ruth Pain Oliver Barnes
Representative	**:**	Peter Charlesworth
Respondent	**:**	Simon Kleyn
Representative	**:**	Mitchell Hayden-Cooke (counsel)
Type of Application	**:**	to determine reasonableness and payability of service charges for the years 2016–2019 [LTA 1985, s.27A] for an order that the landlord's costs are not to be included in the amount of any service charge payable by the tenants [LTA 1985, s.20C]
Tribunal Members	**:**	G K Sinclair, M E Hardman FRICS IRRV (Hons) & J E Francis QPM
Date and venue of Hearing	**:**	Thursday 25th April 2019 at Colchester Magistrates Court
Date of decision	**:**	5th June 2019

DECISION

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1. In this application the applicant lessees, all of whom are members of the 14–15 Market Hill Residents Association, seek to challenge service charges levied by the respondent lessor for the service charge years 2016–19 inclusive. They also apply for an order under section 20C of the 1985 Act, preventing the lessor from including the costs of these proceedings when calculating the service charge payable by the applicant lessees in this or any future accounting period.

2. At the hearing the respondent, through counsel, applied rather late in the day for dispensation from some or all of the section 20 consultation requirements in respect of a qualifying long term agreement, viz that entered into with Dunwell Property Management Co Ltd.

3. For the reasons set out below the tribunal determines that :
   a. Due to a failure to serve lawful service charge demands nothing is payable at present, and thus no lawful arrears of service charge have accrued due
   b. It will not dispense with the consultation requirements in respect of the landlord's entry into an agreement with Dunwell Property Management Co Ltd to act as managing agent, thus limiting the amount recoverable from any one lessee to £100 per annum
   c. Insofar as concerns the reasonableness of amounts claimed by the lessor way of service charge :
      i. The legal costs claimed are disallowed in full
      ii. The 10% handling fees are disallowed, as there is no basis for them in the lease
      iii. Even if the tribunal had granted dispensation under section 20ZA, the quality of service provided by the lessor's managing agents has been so poor that it would have limited the amount recoverable to a maximum of £100 in any event
      iv. On the issue of apportionment of the electricity bill for the lobby and stairs the tribunal agrees with the lessor. The right to use this area by the commercial tenants is restricted to a right of way to and from the meter cupboard on the ground floor, which no doubt they exercise only occasionally. Apportioning the bill for lighting among the lessees of the flats only is both fair and reasonable
      v. Insofar as the interim fire alarm system is concerned the tribunal considers that this, and implementation of a permanent scheme, could have been handled much better; but it will allow half the cost claimed
      vi. Insofar as the fire safety section 20 process is concerned no cost has yet been incurred, but the managing agent would be advised to ensure that listed building consent, etc for the proposed works has actually been obtained before starting again
      vii. More generally, the means of apportioning costs between each of

the residential and commercial units should be assessed properly, in a manner that is open, consistent and in accordance with good property management practice

d. The application for an order under section 20C be granted, and no part of the lessor's legal or other costs incurred in relation to this application shall be regarded as relevant when calculating any service charge payable by any of the applicant lessees in this or any future accounting period.

Background

4. For more than five years relations between the lessor and the current lessees of flats in the building have been poor, little has been done to improve the state of the building, and – having first met with Mr Clubb with a view to him acting for them under the instruction of a yet-to-be-formed RTM Company – the applicants are in fact responsible for introducing the current managing agent to the lessor.

5. Despite this earlier acquaintance with him, the lessees now challenge the actions of his company, Dunwell Property Management Co Ltd, and its appointment to that role without the lessor having first complied with the section 20 consultation process in connection with qualifying long term agreements. They also dispute liability for legal bills chasing payment of alleged arrears of service charges to which they objected, but which they later (and expressly) paid under protest.

6. Of particular and long-term concern was the alleged secrecy in which liabilities have been calculated, with each of the flats being charged a headline figure but without proper explanation. Later enquiries revealed that costs were in part apportioned between the flats – but rarely the commercial units on the ground floor – on an allegedly "historic" basis which relied upon deemed valuations for each flat. To that was added a "suck it and see" approach to specific cost items such as the structural repair of a chimney stack, depending on the party whom the managing agent considered would benefit from carrying out the work.

7. A further complication is that, despite all the flat leases commencing in January 1994, the reference to six flats is wrong. It appears that one stand-alone unit in the rear yard was sold off separately on a date unknown, so now there are five. Although the lessor has owned the development since 2005 no further light was shone on this at or before the hearing, but the shares in which the service charge is now apportioned reflect this reduction in number.

The lease

8. Very unusually, the hearing bundle contained copies of two leases – although only the second included the plans mentioned. Even more unusually, although the wording of each is similar and the lessor is the same company, the first [at page 278] bears the name of solicitors Thompson Smith & Puxon of Colchester while the second [page 333] – in a different font – names Gepp & Sons of Chelmsford.

9. The first lease, relating to flat 1, is dated 25th November 1994. The second, dated 18th August 1995, concerns flat 4. In this decision all references (save for plans) shall be to the earlier lease.

10. In the Particulars the development is identified, at 1.2, as 14 and 15 Market Hill

Coggeshall for the purpose of identification only edged blue on the plan. At 1.3 the number of units on the development is said to be six residential units and two shops. In each residential lease the term granted is 999 years commencing on 1st January 1994, at a fixed annual rent of £50 payable on 1st January.

11. Materially, the service charge is described at 1.9 as :

> the contributions equal to the tenant's proportion of the expenditure described in sub-clause 9.1 and in the Second Schedule.

At 1.10 the tenant's proportion is then defined as :

> ...such proportion of the expenditure described in sub-clause 9.1 and in the Second Schedule as the landlord may from time to time determine or in the event of dispute as shall be determined by a surveyor to be appointed by the President for the time being of the Royal Institution of Chartered Surveyors at the instance of any person entitled to seek or obliged to make payment of any such expenditure the decision of the surveyor (who shall also determine the question of costs) to be final.

12. By sub-clause 9.1 the tenant covenants with the landlord and as a separate covenant with each of the tenants for the time being of the other flats and shops in the building :

> to pay contributions by way of service charge to the landlord equal to the tenant's proportion of the amount which the landlord may from time to time expend and as may reasonably be required on account of anticipated expenditure on rates services repairs maintenance or insurance being and including expenditure described in the Second Schedule AND to pay the service charge not later than 28 days of being demanded the contributions being due on demand...

13. The Second Schedule then lists in more detail what may be included within the definition of service charge expenditure. In particular, at paragraph 1(2) :

> in the payment of the expenses of management of the development of the expenses of the administration of any management company under the control of the tenants of a majority of the flats and shops in the building and responsible for the administration of the building of the proper fees or surveyors or agents appointed by the landlord in connection with the performance of the landlord's obligations and powers and with the apportionment and collection of those expenses and fees between and from several parties liable to reimburse the landlord for them and of the expenses and fees for the collection of all other payments due from the tenants of the flats in the building not being the payment of rent to the landlord

14. At paragraph 1(3) the service charge may also include the costs incurred :

> in the provision of services facilities amenities improvements and other works where the landlord in the landlord's absolute discretion from time to time considers the provision to be for the general benefit of the development and the tenants of the flats and shops and whether or not the landlord has covenanted to make the provision

15. Paragraph 2 provides a mechanism for the calculation and arranging for payment

of the service charge, stating that a written summary (or "Statement") shall be produced as soon as is convenient after the expiry of each accounting period setting out the expenditure in a way that shows how it will be reflected in demands for payment, and showing money in hand. Crucially (for the applicants) it goes on to say that this statement shall be certified by a qualified accountant as being in his opinion a fair summary and sufficiently supported by accounts, receipts, etc.

16. Paragraph 4 notes that the accounting period may from time to time be varied, paragraph 5 provides for how surpluses or deficits shall be treated, and paragraph 6 confirms for the avoidance of doubt that the charge may include provision for a reserve fund or funds.

Material statutory provisions

17. Section 18 of the Landlord and Tenant Act 1985 defines the expression "service charge", for the tribunal's purposes, as :

> 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…

18. The overall amount payable as a service charge continues to be governed by section 19, which limits relevant costs :

a. only to the extent that they are reasonably incurred, and
b. where they are incurred on the provision of services or the carrying out of works, only if the services or works are of a reasonable standard.

19. The tribunal's powers to determine whether an amount by way of service charge is payable and, if so, by whom, to whom, how much, when and the manner of payment are set out in section 27A of the Landlord and Tenant Act 1985. The first step in finding answers to these questions is for the tribunal to consider the exact wording of the relevant provisions in the lease. If the lease does not say that the cost of an item may be recovered then usually the tribunal need go no further. The statutory provisions in the 1985 Act, there to ameliorate the full rigour of the lease, need not then come into play.

20. Section 21(6) provides that if if the service charges in relation to which the costs are relevant costs are payable by the tenants of more than four dwellings, the summary shall be certified by a qualified accountant as in his opinion a fair summary of the costs incurred, essentially in the same terms as in paragraph 2 of the Second Schedule to the lease. By section 28 such qualified accountant must be independent of the landlord.

21. Two further provisions, concerning demands for payment of service charge, have been put in issue or are relevant to this case. First, by section 47 of the Landlord and Tenant Act 1987, where any written demand is given to a tenant of premises for rent or other sums payable under the lease (which expression would include a demand for payment of service charge), the demand must contain the name and address of the landlord.

22. Secondly, since 1st October 2007 section 21B of the 1985 Act provides that a

demand for the payment of a service charge must be accompanied by a summary of the rights and obligations of tenants of dwellings in relation to service charges. The content of that summary is prescribed by the Service Charges (Summary of Rights and Obligations, and Transitional Provision) (England) Regulations 2007.[1] The document must contain the prescribed heading and text and must be legible in a typewritten or printed form of at least 10 point.[2]

23. Insofar as qualifying long term agreements are concerned, ie those in respect of which the annual contribution of any tenant liable to pay towards the service charge will exceed £100, then section 20 provides that the relevant contributions of tenants are limited to that amount unless the consultation requirements have been either complied with in relation to the works or dispensed with by (or on appeal from) the appropriate tribunal. For the purposes of that section – and section 20ZA – the consultation requirements prior to entry into a qualifying long term agreement are those appearing in Schedule 1 to the Service Charges (Consultation Requirements) (England) Regulations 2003[3] (as amended).

24. Although no formal application was made in advance of the hearing, and no fee paid, as counsel raised the possibility of his client doing so during the course of his submissions it is right to make reference at this point to section 20ZA of the Landlord and Tenant Act 1985, which provides that :

> Where an application is made to the appropriate tribunal for a determination to dispense with all or any of the consultation requirements in relation to any qualifying works or qualifying long term agreement, the tribunal may make the determination if satisfied that it is reasonable to dispense with the requirements.

25. When determining whether it is satisfied that it is reasonable to dispense with the requirements the Supreme Court stated in *Daejan Investments Ltd v Benson & others*[4] that the emphasis should be on any prejudice suffered by the tenants. In the context of this case the tribunal considers it unnecessary to set out in greater detail the guidance provided by the Supreme Court on this subject.

Inspection and hearing

26. The tribunal inspected the exterior and internal common parts of the building and development at 10:00 on the morning of the hearing. Also present were a representative of the applicants, the respondent and his counsel and, for the managing agent, Mr Clubb. The tribunal was accompanied by an observer.

27. Situate at a road junction in the historic heart of the town of Coggeshall, the subject premises comprise a listed building in a conservation area. Viewed from the Market Hill direction (i.e. the north and west) the premises appear to be two adjoining buildings in a terrace which wraps around the corner from Church Street and Market Hill into East Street. Number 14 comprises a two storey building with a textile museum on the ground floor and a flat above under a

1 SI 2007/1257

2 *Op cit*, reg 3

3 SI 2003/1987

4 [2013] UKSC 14; [2013] 2 All ER 375

steeply pitched tiled roof, suggesting that it may once have been thatched. To its right is number 15, a three storey building with a more gently sloping pitched tiled roof. The main entrance door for the flats is to its left side and an optician's shop to the right, wrapping around the corner on the ground floor. Above are two floors comprising residential units.

28. A location plan appears at [335] in the bundle, and a second plan showing the internal layout of the first and second floors at [336]. The location plan shows that, accessed via a covered passageway some distance along East Street, is a private parking area for the flats and a wide gravel path leading past what presumably was once the sixth flat – which does not even adjoin the rear of either 14 or 15 Market Hill. A private courtyard enjoyed by the flats lurked in a corner, potentially accessed by a rear door that looked like it had not been used in some time.

29. Inside the main entrance is a small lobby, with electricity meter cupboard on the left before the stairs, which wind around and lead to a first floor landing giving access to flats on the west side (left at the top of the stairs) and, behind a fire door to the right, to other flats. One flat is in fact a maisonette with rooms on both first and second floors above the opticians. In the ground floor entrance lobby, stairs and first floor corridors the tribunal identified five smoke detectors.

30. Bearing in mind the relatively modest sums at stake, at the hearing the tribunal had before it an excessively large bundle of documents, with a principal witness statement by Mr Charlesworth for the applicants exhibiting far too much by way of emails and correspondence, a short statement by Sheila Sillitoe concerning the original approach by lessees to and meeting with Mr Clubb, plus subsequent disputes with him and matters irrelevant to this enquiry. Another short witness statement by Mrs Charlesworth comments on a past attempt by the lessor to charge the flat lessees for the replacement of a plate glass window in the opticians (which is not a service charge item) and deals further with the difficulties had in trying to understand the demands being served, and on the fire safety issue. The applicants' case was completed by two letters from lessees Mrs Pain and Mr Oliver about the pressure said to have been exerted by Mr Clubb in order to seek recovery of sums demanded.

31. The respondent's case comprised two witness statements : the first by Mr Clubb and the second by Mr Kleyn. The latter began by referring to himself and his wife buying the freehold interest in the property in approximately 2005. The correct respondent should therefore be Mr & Mrs Kleyn, not Simon Kleyn alone, though in the correspondence exhibited it seems to be Mr Kleyn who is the sole decision-maker. See for example the email dated 21st May 2017 [77] from Robert Clubb to the residents association, informing the lessees of his appointment as managing agent and in which he comments :

> As is Simon's way..... he doesn't want anything to do with the management and has delegated it to a member of his staff. I have emailed her with a view to me having a meeting with her next week.

32. Mr Hayden-Cooke, for the respondent, produced a helpful skeleton argument once at court. In it he sought to argue, by reference to the case of *Scottish Mutual*

Assurance plc v Jardine Public Relations Ltd,[5] that proper compliance with the certification provisions in the lease will not necessarily be regarded as a condition precedent to liability. However, following discussion with the tribunal about the complete failure of the demands issued by the managing agents to identify the landlord's address for service in accordance with section 47 of the Landlord and Tenant Act 1987, and the failure (until eventually pointed out by the lessees) to accompany demands with the required summary of tenant's rights, his client was prepared to concede that no service charge was yet payable. The hearing could therefore concentrate on the issues of reasonableness, the means used by the lessor to apportion the cost as between flat and commercial lessees (and whether 10% handling fees were recoverable under the lease provisions).

33. In doing so, the tribunal made clear that allegations of threats to lessees were not matters which it considered it relevant to explore, as they strayed well beyond the bounds of the tribunal's jurisdiction. The parties were therefore urged to focus upon the following :
    a. Liability to pay for legal costs incurred by the lessor instructing Powell & Co to recover unpaid service charges from individual lessees
    b. Whether the leases entitled the lessor to add a 10% "handling charge" to service charge bills for recovery of unpaid amounts
    c. The liability of the commercial tenants to pay a share of the electricity bill for the internal common parts
    d. Liability to pay for five smoke detectors installed in the internal common parts on an interim basis pending agreement between the parties on a proposal for fire protection works
    e. The proper apportionment of service charge liabilities, as between the flat lessees and the commercial tenants, and as between individual flat lessees.

34. The tribunal heard evidence concerning the instruction by the lessor's managing agents of solicitors Powell and Co to collect unpaid service charges, and of how thereafter there seemed to be little or no liaison between Dunwell and Powell & Co on material points. However, as it had already been conceded that none of the service charge demands were valid this seemed an unnecessary waste of time.

35. Nothing was said about the validity of seeing to impose a 10% handling charge.

36. On the apportionment of the common part electricity charge between lessees of the flats only, excluding the two commercial tenants, the lessees had expended much effort. The issue hinged on whether the commercial tenants benefited from the use of the ground floor lobby to access their electricity meters. They had no rights, it was said (the terms of the ground floor commercial tenancies never having been revealed to the tribunal), to stray any further than the meter cupboard on the ground floor – the only access route for occupiers of the flats. The common parts electricity bill covered lighting for ground floor and first floor common parts used by occupiers of the flats (but probably not the tenants of the ground floor commercial premises) on a daily basis.

37. There was much discussion about Dunwell's attempts to secure the agreement of Essex Fire and Rescue Service to a programme of works designed to improve fire

[5] [1999] EWHC 276 (TCC)

safety within the building. However, while that body had already approved one out of five different tenders (no single specification having apparently been drawn up) no attempt had yet been made to secure listed building consent for such an approach. In the meantime, as a temporary measure, the lessor had incurred the expense of installing five battery-powered smoke detectors at strategic points on both ground and first floors.

38. A point raised by all the applicants was their puzzlement at how their individual service charge demands had ben calculated, as they had not been provided with any detailed annual statement of account of costs incurred for the building. Instead, they had been provided with an individual figure, with no explanation as to how it had been arrived at. In evidence Mr Clubb stated that he had merely followed what appeared to have been a calculation based on historic values of the individual flats. Despite the issue having been challenged by the lessees since 2016 Mr Clubb said that it was not for him to disturb those apportionments. And yet, when it came to specific items of work, for example to a chimney stack, Mr Clubb took it upon himself to decide, seemingly on an ad hoc basis, whether a particular item of work benefited the commercial tenants, the lessees of flats, or both.

39. Questioned by the tribunal as to his experience in property management, Mr Clubb stated that he had been a property manager for 20 years. Initially he ran that part of his business not through the company (which changed to its present name only in November 2010) but as an adjunct to his practice as a certified accountant, from which he had since retired. Mr Clubb confirmed that none of his staff yet had any property management qualifications, but they were studying for those awarded by ARMA.

Discussion and findings

40. The tribunal takes into account the written evidence before it, the oral evidence of Mr Clubb and Mr Charlesworth, and the concession by counsel that none of the service charge demands already served were complaint with legal requirements.

41. Nothing is therefore enforceable at present, so none of the legal bills incurred in pursuing individual lessees – even if they were a legitimate service charge item – are recoverable. As such, no arrears are due, and no "handling charges" of 10% (or any other per cent) are or were recoverable. The lease makes provision for no such charge. It is surprising that neither the managing agent nor its solicitor spotted this problem.

42. The flat lessees challenge the modest common parts electricity bill on the basis that the commercial tenants have access to the meter cupboard in the ground floor lobby. So far as this tribunal is concerned (and in the absence of any sight of the commercial leases) the commercial tenants have, at best, a right of access to the ground floor for the purpose of reading their meter and for no other purpose. The frequency of such use (if at all) does not justify any apportionment of the electricity bill between both flat lessees and commercial tenants.

43. On the subject of the provision of proper fire safety measures to protect occupiers of the flats it would appear that both parties lack a proper understanding of their respective roles. The lessor and managing agent seem to think that without the

express consent of the lessees progress on the fire safety front is impossible. This is not true. The statutory procedure under section20 is quite prescriptive, but the landlord is only obliged to consult with the lessees before taking responsibility for reaching a decision. Actual consent is not required; the landlord merely has to have regard to any representations made by the lessees.

44. The tribunal judge having informed the parties of a situation within his own knowledge where two local government departments had taken opposite views on essential fire safety precautions, the tribunal determines that it was unwise to have promoted a scheme of works before ensuring that both approval by the local fire service and listed building consent were obtained before proceeding further. Nevertheless, in the heightened interests of ensuring the safety of residents, it was imperative that some measure be introduced on a temporary basis pending the achievement of a long-term solution. Incurring the cost of five smoke detectors to be placed in strategic positions in the common parts was on balance a reasonable service charge expense, but the principal work should have ben progressed much faster. A reasonable compromise is achieved by allowing half the cost of the smoke detectors.

45. How the budget should properly be apportioned as between lessees, and different classes of lessees, was a matter on which Mr Clubb opined that he had merely followed the historic apportionment based on the supposed values of the various flats at a specified date now long past, and it was not his business to disturb them. This "historic" approach ignored the existence of the sixth residential unit entirely, resulting in these shares[6] :

1 = £55K	55/378	=	14.55%	)	
2 = £108K	108/378	=	28.57%	)	
3 = £50K	50/378	=	13.23%	)	100%
4 = £55K	55/378	=	14.55%	)	
5 = £110K	110/378	=	29.10%	)	

46. The method of apportionment employed also ignored the commercial tenants entirely, despite sharing the same building.[7] In the case of repairs to a chimney stack the managing agent assumed, for reasons not explained, that it affected one flat in particular, so loaded the bulk of the cost on to that individual and let the commercial tenants off entirely. In another case prior to the engagement of Mr Clubb's company as managing agent the lessor had sought to include within the flat lessees' service charge expenditure the cost of repair of a plate glass window in the opticians. As that was held to form part of the demised premises rather than the common parts the cost could not be regarded as a valid service charge item, ruled an earlier tribunal.

47. The tribunal accepts the applicants' argument that the rationale for apportioning the costs between units within the building has in the past been secretive, and to an extent Mr Clubb as managing agent has done what he regarded as his best to divide one-off costs between those he thought actually benefited from them. It

[6] per Robert Clubb, page [24], para 8

[7] Without disclosure of the leases or tenancy agreements for the two ground floor units it is not possible for the tribunal to say what their contractual obligations are concerning the maintenance of the building's structure

is not good enough to say that he has been applying a means of apportioning costs that is of long standing, as it clearly ignores the once presence of a sixth residential unit and the two ground floor commercial units. The various shares may bear some relation to net internal floor area, or the respective values of the flats, but this should be made crystal clear and the shares indicated on an annual service charge statement listing the global costs and the respective percentages (not 378ths). The shares attributable to the two commercial units – whether specified in their tenancies or otherwise – need also to be included. Certain limited costs are relevant only to the flats, such as internal lighting and periodic decoration, but maintenance and repair of the main structure benefits all. This may require that costs be split into separate schedules, with commercial units liable only for their shares of one while the flats are liable for both.

48. Finally the tribunal turns to the quality and recoverable cost of management. It has not been impressed by the fact that the managing agent, despite an alleged 20 years experience in property, lacks any property management qualifications or established membership of any standard-setting organisation within the sector. The failure to ensure that demands issued on behalf of the lessor complied with recognised legal requirements, and the instruction of solicitors to recover sums not due (and when queried by lessees), was surprising.

49. So too was the delay following the section 20 consultation concerning fire safety works, apparently because the lessees had commented on the proposals but not offered their support (although there was some doubt whether Mr Clubb had even seen comments submitted by Mr Charlesworth that had been addressed, as required in the notice, to the lessor's solicitors rather than to Dunwell directly). As mentioned already, neither the lessor not Mr Clubb seemed aware that section 20 consultation is not to be confused with the right to withhold approval, and that – having consulted – it was for the lessor to decide (within the bounds of reasonableness) what work to undertake and which contractor to employ.

50. The lessor engaged Mr Clubb's company with little discussion about terms, and unusually for a period of more than 12 months. Given the cost that should have triggered the consultation procedure for qualifying long term agreements, but it did not. Absent an application for dispensation the cost recoverable in respect of management fees is therefore restricted to a maximum of £100 per unit. In the course of the hearing Mr Hayden-Cook made an attempt to apply under section 20ZA, but the tribunal rejects that. It would be futile, as the tribunal's views on the quality of management would result in the cost being capped at the same £100 per unit anyway.

51. It follows from all the above that the tribunal does not consider that it would be either reasonable or appropriate for the lessor's costs of and occasioned by this application to be taken into account (even if, which it doubts, legal costs are recoverable under the terms of the lease) in the calculation of the service charges payable by any of the applicants in this or any future accounting period.

Dated 5th June 2019

Graham Sinclair
First-tier Tribunal Judge