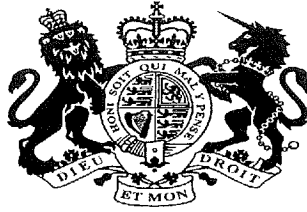


8009

Case Number: CHI/18UB/LIS/2012/0024



HM COURTS & TRIBUNALS SERVICE

LEASEHOLD VALUATION TRIBUNAL

PROPERTY: 34 Bradham Court, Exmouth, Devon EX8 4AN

Applicant: Ms J Bashforth

and

Respondent: Remus Management Limited

In The Matter Of

**Section 27A and 20C of the Landlord and Tenant Act 1985
(Liability to pay service charges)**

**Tenant's application for the determination of reasonableness of
service charges for the years 2005 to 2012.**

Tribunal

Mr A Cresswell (Chairman)

Mr W H Gater FRICS ACI Arb

Date of Hearing: 25 June 2012

Appearances: Mr A H Bashforth for the Applicant
Ms F J Barnett for the Respondent

DETERMINATION

The Application

1. On 10 February 2012, Ms J Bashforth, the owner of the leasehold interest in Flat 34, made an application to the Leasehold Valuation Tribunal for the determination of the reasonableness of the service charge costs claimed by

the landlord, Sarum Properties Ltd, for the years ended 31 December 2005 to 31 December 2012.

Preliminary Issues

2. The Tribunal records that there was a lack of detail to the application; that the Applicant only at the hearing clarified that she had meant "Professional Fees" when using the term "Estate Costs" in her application; that the Respondent produced detailed accounting documents only at the hearing and did not appear to have the supporting documentation for a number of the areas under consideration; that the accounts for the year 2011 had only become available in the week before the hearing and that there were no supporting documents available for that set of accounts. It was clear that the Respondent was surprised by the clarification of the term Estate Costs and clear too that the Tribunal required further information so as to be able to make a considered judgement, with the consequence that the parties were instructed to make written representations following the hearing in relation to three of the items in dispute: Professional Fees, Tree Work and Risk Assessment.
3. In the event, written representations and relevant documents were received from the parties running to some 184 pages.
4. Figures used in this determination reflect costs for the property unless it is explained that the costs are per tenant or per block.

Inspection and Description of Property

5. The Tribunal inspected the property on 25 June 2012 at 1000. Present at that time were the Applicant and Ms Barnett. The property in question consists of a flat within a purpose built block of 12 flats forming part of a development of three blocks and a common area mostly consisting of gardens.

Summary Decision

6. This case arises out of the tenant's application, made on 10 February 2012, for the determination of liability to pay service charges for the years 2005 to 2012 inclusive. Under Sections 19 and 27A of the Landlord and Tenant Act 1985 (as amended) service charges are payable only if they are reasonably incurred. The Tribunal has determined that, subject to exceptions which are detailed below, the landlord has demonstrated that only part of the charges in question were reasonably incurred and payable by the Applicant.
7. The Tribunal allows the tenant's application under Section 20c of the Landlord and Tenant Act 1985, thus precluding the landlord from recovering its cost in relation to the application by way of service charge.

Directions

8. Directions were issued on 22 March 2012. These directions provided for the matter to be heard at an oral hearing, under the provisions of Regulation 13 of the Leasehold Valuation Tribunals (Procedure)(England) Regulations 2003, as amended by Regulation 5 of the Leasehold Valuation Tribunals (Procedure)(Amendment)(England) Regulations 2004.
9. The Tribunal directed that the parties should submit specified documentation to the Tribunal for consideration.
10. This determination is made in the light of the documentation submitted in response to those directions and the oral evidence and submissions made

orally at the hearing and in writing thereafter and documentation submitted with the later submissions.

The Law

11. The relevant law is set out in sections 18, 19 and 27A of Landlord and Tenant Act 1985 as amended by Housing Act 1996 and Commonhold and Leasehold Reform Act 2002.
12. The Tribunal has the power to decide about all aspects of liability to pay service charges and can interpret the lease where necessary to resolve disputes or uncertainties. Service charges are sums of money that are payable – or would be payable - by a tenant to a landlord for the costs of services, repairs, maintenance or insurance or the landlord's costs of management, under the terms of the lease (s18 Landlord and Tenant Act 1985 "the 1985 Act"). The Tribunal can decide by whom, to whom, how much and when service charge is payable. A service charge is only payable insofar as it is reasonably incurred, or the works to which it related are of a reasonable standard. The Tribunal therefore also determines the reasonableness of the charges.
13. The relevant law is set out below:
Landlord and Tenant Act 1985 as amended by Housing Act 1996 and Commonhold and Leasehold Reform Act 2002

18 Meaning of "service charge" and "relevant costs"

(1) In the following provisions of this Act "service charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent—

- (a) which is payable, directly or indirectly, for services, repairs, maintenance, improvements or insurance or the landlord's costs of management, and
- (b) the whole or part of which varies or may vary according to the relevant costs.

(2) The relevant costs are the costs or estimated costs incurred or to be incurred by or on behalf of the landlord, or a superior landlord, in connection with the matters for which the service charge is payable.

(3) For this purpose—

- (a) "costs" includes overheads, and
- (b) costs are relevant costs in relation to a service charge whether they are incurred, or to be incurred, in the period for which the service charge is payable or in an earlier or later period.

19 Limitation of service charges: reasonableness

(1) Relevant costs shall be taken into account in determining the amount of a service charge payable for a period—

- (a) only to the extent that they are reasonably incurred, and
- (b) where they are incurred on the provision of services or the carrying out of works, only if the services or works are of a reasonable standard; and the amount payable shall be limited accordingly.

(2) Where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable, and after the relevant costs have been incurred any necessary adjustment shall be made by repayment, reduction or subsequent charges or otherwise.

20 Limitation of service charges: consultation requirements

(1) Where this section applies to any qualifying works or qualifying long term agreement, the relevant contributions of tenants are limited in accordance with subsection (6) or (7) (or both) unless the consultation requirements have been either—

- (a) complied with in relation to the works or agreement, or
- (b) dispensed with in relation to the works or agreement by (or on appeal from) a leasehold valuation tribunal.

(2) In this section "relevant contribution", in relation to a tenant and any works or agreement, is the amount which he may be required under the terms of his lease to contribute (by the payment of service charges) to relevant costs incurred on carrying out the works or under the agreement.

(3) This section applies to qualifying works if relevant costs incurred on carrying out the works exceed an appropriate amount.

(4) The Secretary of State may by regulations provide that this section applies to a qualifying long term agreement—

- (a) if relevant costs incurred under the agreement exceed an appropriate amount, or
- (b) if relevant costs incurred under the agreement during a period prescribed by the regulations exceed an appropriate amount.

(5) An appropriate amount is an amount set by regulations made by the Secretary of State; and the regulations may make provision for either or both of the following to be an appropriate amount—

- (a) an amount prescribed by, or determined in accordance with, the regulations, and
- (b) an amount which results in the relevant contribution of any one or more tenants being an amount prescribed by, or determined in accordance with, the regulations.

(6) Where an appropriate amount is set by virtue of paragraph (a) of subsection (5), the amount of the relevant costs incurred on carrying out the works or under the agreement which may be taken into account in determining the relevant contributions of tenants is limited to the appropriate amount.

(7) Where an appropriate amount is set by virtue of paragraph (b) of that subsection, the amount of the relevant contribution of the tenant, or each of the tenants, whose relevant contribution would otherwise exceed the amount prescribed by, or determined in accordance with, the regulations is limited to the amount so prescribed or determined.

27A Liability to pay service charges: jurisdiction

(1) An application may be made to a leasehold valuation tribunal for a determination whether a service charge is payable and, if it is, as to—

- (a) the person by whom it is payable,
- (b) the person to whom it is payable,
- (c) the amount which is payable,
- (d) the date at or by which it is payable, and
- (e) the manner in which it is payable.

(2) Subsection (1) applies whether or not any payment has been made.

(3) An application may also be made to a leasehold valuation tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs and, if it would, as to—

- (a) the person by whom it would be payable,
- (b) the person to whom it would be payable,
- (c) the amount which would be payable,
- (d) the date at or by which it would be payable, and
- (e) the manner in which it would be payable.

(4) No application under subsection (1) or (3) may be made in respect of a matter which—

- (a) has been agreed or admitted by the tenant,

(b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,
(c) has been the subject of determination by a court, or
(d) has been the subject of determination by an arbitral tribunal pursuant to a postdispute arbitration agreement.

(5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.

(6) An agreement by the tenant of a dwelling (other than a post-dispute arbitration agreement) is void in so far as it purports to provide for a determination—
(a) in a particular manner, or
(b) on particular evidence,
of any question which may be the subject of an application under subsection (1) or (3).
(7) The jurisdiction conferred on a leasehold valuation tribunal in respect of any matter by virtue of this section is in addition to any jurisdiction of a court in respect of the matter.

Ownership and Management

14. The Respondent is the managing agent for the landlord.

The Lease

15. Ms Bashforth holds Flat 34 under the terms of a lease dated 16 December 1975, which was made between Eagle Investment and Finance Company Limited as lessor and Mr and Mrs Chapman as lessees.

16. Clauses 3(n) and 4 of the lease detail the tenant's obligations in respect of payment of the Service Charge. Broadly, the tenant Applicant is required to pay 1/12 of the relevant costs of maintaining her block and 1/40 of the relevant costs of managing the estate and maintaining the external communal area.

17. Annual Management Fees

The Applicant was concerned that these fees were not reasonable.

The Respondent argued that fees of £135, £141, £129, £147, £150, £159 and £165 per flat for the years 2005 to 2011 respectively were reasonable charges for the administration and management of a property of this type. Ms Barnett told us that the Respondent applies a considerably higher charge within the M25 and a higher charge generally outside the M25; that the Respondent had applied a reduced charge to this property in line with other properties managed by it in a large portfolio in the Exmouth area; and that there had been no other challenges to the level of charge.

The Tribunal, subject to what we say later about Professional Fees, concluded that it could not say, in the face of the evidence of Ms Barnett, in the absence of any evidence of comparative charges and when applying our own experience, that the charges were unreasonable for a property of this type.

18. "Estate Costs" = Professional Fees

The Applicant only at the hearing clarified that she had meant "Professional Fees" when using the term "Estate Costs" in her application. Ms Barnett was taken by surprise and had not prepared fully for this eventuality. The Applicant was concerned as to the level of Professional Fees generally, but with specific reference to the year 2006, when the charges for the property appeared to have "spiked" at £4993.90.

The Respondent explained that there had been no charge for in-house professional fees in the years 2009 to 2011 inclusive. She told us that in 2005,

the charge of £2625.42 was made up of the costs of an in-house surveyor and time charges for the Respondent's staff in preparation for scheduled Major Works due to commence in 2005, which were postponed to 2006. She told us that the 2006 sum of £4993.90 was of a similar source for Major Works due in 2007. She told us that the charge of £2044.51 in 2007 reflected time charges for the Respondent's staff dealing with contractors in relation to Major Works costing £718.62 for the Applicant's block, breaking down to Professional fees of £613.35 for the administration element. She told us that the charge of £1436.98 for 2008 represented surveyor and other staff costs in preparation for Major Works in 2009.

The Respondent publishes a scale of fees for its Professional Fees and a breakdown of the work included and not included within its Annual Management Fees.

The Tribunal accepts that it is permissible to charge for management fees associated with Major Works, being work outside the cover afforded by the Annual Management Fees. Clearly, however, such charges must be reasonable, and they must also be payable in accordance with the terms of the lease. The Tribunal discovered, when studying the documentation submitted by the Respondent following the hearing, that all was not in accordance with what it had been told in evidence on behalf of the Respondent.

Ms Barnett had told us that there were no Professional Fees in the years 2009, 2010 and 2011, but we discovered that a total of £12,750.49 had effectively been charged to the tenants of the estate for Professional Fees in those 3 years by reason of the Respondent removing from the Reserve Fund £2759.42 in 2009, £4646.42 in 2010 and £5344.65 in 2011. It was clear that the Respondent's case remained unaltered at the time of its subsequent submissions in so far as it was asserting that there were no Professional Fees in the years 2009, 2010 and 2011, because there was no reference to such fees in the further submissions, only in documents referred to as a Balancing Statement for each of the 3 years. No demand had been made for these sums by way of service charge; accordingly they are not payable and should be returned to the Reserve Fund held on trust for the tenants.

Another reason why the £12,750.49 taken by the Respondent in the years 2009 to 2011 is not payable is because it is not a reasonable charge. We tallied up the costs of major works between 2005 and 2011 at some £38,785.71 (i.e. £3740 in 2005, £30,812.14 in 2010 and £4233.57 in 2011). In total, the Respondent was seeking to charge the tenants some £20,814 in Professional Fees for the administration of the works of £38,785.71 over the period 2005 to 2011, which appeared to us to be an excessive charge. Even accounting for the trials and tribulations of a fluctuating requirement and fluctuating values and the Respondent having to re-tender and re-consult when works had to be postponed or were not followed through, we could not see how the Respondent could justify costs over and above the £8,063.51 it had already charged in the years 2005 to 2008 inclusive (£2624.42, £2800, £1204.38, £1436.98). Even then, the charges are levied at nearly 20% of the costs of the building works.

As a note, it would have been more helpful had the Respondent's submission been consistent as to the use of figures which were net or gross of VAT, as appeared to be the case with Insurance work which, amongst other items, we needed to deduct so as to isolate the Professional Fees attributable to the

works. We should further note that it was necessary for the Tribunal to request of the Respondent details of the codes used in its time costings before we could make any sense of them and understand how they were split between the 3 blocks and into various types of charge.

19. **Risk Assessments**

The Applicant sought clarity as to the basis of these charges. Mr Bashforth was also concerned at the apparently high cost in the year 2009.

The Respondent was unable to provide clarity at the hearing as to the nature of the risk assessments. The charges for risk assessment were for £92.55 in 2006, £334.89 in 2007, £1,150.50 in 2009 and £781.20 in 2011.

The Tribunal was able to see that the assessments were properly recorded and to see the detail of what had been involved in each of the years. It appeared to us that the charge in 2006 was probably very reasonable and that the charges for the subsequent years were reasonable. It appeared to us that the charge for the single inspection (fire safety) in 2009, involving the production of reports was reasonable too. We noted that the 2 inspections (fire safety and health and safety) in 2009 had involved some 6 reports. We noted also, that the thorough work undertaken in 2009 was reflected in a consequent lower costing when there were again 2 separate inspections (fire safety and health and safety) of the 3 blocks in 2011.

20. **Gardening**

The Applicant pointed to the disparity between the annual costs and also between the service contracted and that delivered. She was also concerned about the quality of the service provided. The charges for the years 2005 to 2011 were £3535 in 2005 (£10 per hour), £4450 in 2006 (£12.50), £5400 in 2007 (£15), £6500 in 2008 (£17.50), £2822 in 2009 (£9/£10), £3475 in 2010 (£10/£11) and £3470 in 2011 (£10/£11).

The Respondent was at a loss to explain why there was a disparity between the service contracted and that delivered. Ms Barnett explained that the gardening contract was essentially one involving a duty to keep the estate tidy as opposed to one involving specialist gardening skills. There had been concern about the inflating costs of the gardener used for 2005 to 2008 inclusive; the gardener for 2009 to 2011 left as he felt he could not do the job at the cost of the contract; there had been a recent hiatus with the engagement of a new contractor, which explained the relatively poor state of the grounds observed by the Tribunal. Ms Barnett explained that the gardener was expected to perform 8 hours work per week March to October and 4 hours per fortnight November to February.

The Tribunal concluded that there was a problem both with the accounting for this work and with its cost. The contract involves some 312 hours per year (8 hours x 8 months x 4.33 weeks plus 2 hours x 4 months x 4.33 weeks). However, the Respondent was, apparently without realising, paying for 353, 356, 360, 371, 297, 331 and 331 hours in the years 2005 to 2011 inclusive. This mistake is the responsibility of the Respondent, such that the Applicant should not be expected to pay for the hours paid in excess of the contract. The Tribunal concluded that the actual costs per hour were reasonable for all years but 2007 and 2008, when the charges appeared to have spiked for no apparent sound reason. Charges above £12.50 per hour for 2007 and £13 for 2008 were not reasonably incurred. The Respondent must, therefore, account

to the Applicant for the unreasonable element of the charge for gardening for those two years.

21. **Trees**

The Applicant believed that the costs involved, some £1875 in 2006, were not a reasonable cost.

The Respondent argued that the costs were reasonable, involving the removal of an ash tree, a crown lift of a mature oak and removal of waste (£1200) and the removal of a holm oak and removal of waste (£675). The additional documentation submitted after the hearing showed that £756 had been paid to a tree surgeon for work on 5 trees.

The Tribunal was mindful that tree work is a relatively expensive service, involving, as it does, health and safety aspects with costly insurance and costs of waste disposal. We concluded, taking account of those factors and having seen the detail of the work conducted, that the charges for this work were reasonable charges.

22. **General Repairs**

The Applicant withdrew her challenge to these costs.

23. **Out of Hours Charges**

The Applicant withdrew her challenge to these costs following Ms Barnett's explanation of their basis.

24. **Year to 31 December 2012**

The Respondent is yet to compile its charges for this year.

The Tribunal was unable to reach any conclusions as to charges for this year because of a lack of information as to the nature of and likely level of charging. Clearly, the Respondent will be guided by the comments and findings we have recorded above when finalising the Service Charge account for the year.

General

25. The Tribunal finds it unfortunate that this matter should have had to be brought before it. It is somewhat surprising that the Appellant would make her claim for matters going back some 6 to 7 years at such a late opportunity. It also appears that there was a lack of communication by the Appellant of her concerns over the time period and her actual claim was scant and lacking detail. There was, however, some lack of both clarity and consistency in the Service Charge accounts, which the Respondent may wish to deal with for future accounts. Some of the Respondent's charges were "hidden" within Professional Fees, and it would be advisable for the Respondent to adopt a more transparent method of accounting. Of more seriousness, however, is the fact that the Respondent appears to have removed monies from the Reserve Fund, which were neither payable nor reasonable and for which there was no demand in accordance with the requirement of a formal Service Charge demand. We found it particularly of concern that we should be told in evidence that there were no Professional Fees in 2009, 2010 and 2011 (which surprised us), for there then to be no mention of such fees in the written submissions following the hearing, but for us to then find that such fees had been taken from monies held by the Respondent in trust for the tenants; there

was not here the transparency advocated by the RICS Service Charge Residential Management Code.

Section 20c Application

26. The Applicant has made an application under Section 20C Landlord and Tenant Act 1985 in respect of the Respondent's costs incurred in these proceedings. The relevant law is detailed below:

Section 20C Landlord and Tenant Act 1985: Limitation of service charges: costs of proceedings

(1) A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a ... leasehold valuation tribunal, ...are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application.

(3) The ... tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances.

27. Because of the concerns we had about the discoverability of the Professional Fees (some of which were clearly management fees under a name more usually reserved for work by those regarded as being Professionals, e.g. surveyors, accountants, solicitors, etc), and because such relatively large sums appear to have been removed from funds held in trust without any or any reasonable charge being made of the tenants, the Tribunal does allow the application under Section 20c of the Landlord and Tenant Act 1985. It directs that the landlord's costs in relation to this application are not to be regarded as relevant costs to be taken into account in determining the amount of the service charge for the current or any future year.

Andrew Cresswell (Chairman)

Date 2 August 2012

A member of the Southern Leasehold Valuation Tribunal

Appointed by the Lord Chancellor