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LEASEHOLD VALUATION TRIBUNAL

**Sections 19, 27A and 20C of the Landlord and Tenant Act 1985 (as amended)
("the Act")**

Case Number:	CHI/21UC/LSC/2012/0124 and 0125
Property:	Flats 1 & 3, Greystoke, 22 Carlisle Road, Eastbourne, East Sussex BN20 7EN
Date of Applications:	12 September 2012
Applicant:	Mr Anthony B Burton
Respondents:	Mrs Nanette Hopkinson (Flat 1) Mr Trevor J Menezes (Flat 2) (both present)
Appearances for Applicants:	Mr Burton in person, supported by Mrs Burton
Appearances for Respondent:	Dr C Criper for Mrs Hopkinson Mr Menezes in person
Date of hearing:	7 January 2013
Tribunal:	Ms E Morrison LLB JD (Lawyer Chair) Mr N I Robinson FRICS (Valuer Member) Mr T W Sennett MA FCIEH (Professional Member)
Date of the Tribunal's Decision:	16 January 2013

The Applications

1. The Applicant freeholder applied under section 27A (and 19) of the Act for a determination of service charges. In the case of Flat 1 a determination was sought covering the period from 30 September 2005 to 25 March 2012. For Flat 3 the determination was sought from inception of alleged arrears in 2009.
2. At the conclusion of the hearing, both Respondent leaseholders made an oral application under s 20C of the Act that the Applicant's costs of these proceedings should not be recoverable through future service charges.

Summary of Decision

3. The service charges for each period have been determined as set out at the table on page 9 of this decision. Mrs Hopkinson of Flat 1 is responsible for 36.5% of these sums. Mr Menezes of Flat 3 is responsible for 28.5% of these sums as from the date he became a leaseholder in March 2006. However no further monies will be payable until the Applicant has complied with section 47 of the Landlord and Tenant Act 1987 and (for the periods specified below) section 21B of the Act.
4. An order is made under section 20C of the Act.

The Leases

5. The original lease for Flat 1 is dated 4 September 1965 and is for a term expiring in 2064 at a yearly ground rent of £60.00. A new lease dated 16 May 1994 substituted a new term expiring on 15 November 2078 at the same rent.
6. The original lease for Flat 3 is dated 28 September 1965 and is for a term expiring in 2064 at a yearly ground rent of £30.00. A new lease dated 4 February 1994 substituted a new term expiring on 24 December 2092 at a rent of £1.00 per annum
7. The service charge provisions in the original leases were incorporated into the new leases and may be summarised as follows:
 - (a) Each tenant is liable to pay a proportion of the landlord's costs as set out in paragraph (b) (2) of the Third Schedule, which include the following:
 - (i) Of repairing rebuilding and maintaining in good and substantial and decorative repair as occasion shall require the external parts of the building (including the main walls the roof the floor joists the main structural timbers the boundary walls and those portions of the drain pipes wires and cables serving more than one flat) the staircase passages entrance and all parts used in common by the landlord or the tenant with any other person
 - (ii) Of insuring the building ...
 - (iii) Of maintaining repairing and from time to time renewing the water tanks pipes and all other apparatus connected with the supply of water for domestic purposes but excluding the water tanks and water pipes in the demised premises

- (iv) Of all fees commissions and expenses incurred by the landlord in employing solicitors, accountants, estate agents and other agents and tradesmen in connection with the management of the property.
 - (b) The tenant's contribution is payable within 14 days after delivery of a half yearly statement of costs made up to 25 March and 29 September in each year.
 - (c) The tenant's proportion is ascertained by dividing the rateable value of the flat by the total rateable value of the three flats in the building.
 - (d) Any dispute over a statement of costs is to be referred for audit by a competent chartered accountant.
 - (e) The Landlord covenants with the tenant to repair and maintain in good and substantial and decorative repair the parts of the building set out at (a) (i) above.
8. There are separate leases for the garages at Greystoke. The Applicant freeholder owns and lives in Flat 2, for which there is no lease.

The Inspection

9. The Tribunal inspected the subject property on the morning of Monday 7 January 2013, immediately before the hearing, when the parties' representatives were also in attendance.
10. The property comprises a mansion house apparently constructed around 1898 and subsequently converted into three very large self-contained flats. The house, the front of which faces south, has brick elevations under a pitched plain clay tiled roof. The roof is a major feature in that it is approximately two storeys high with a double gable ended section on the east side of the property running front to rear and two further gable ended sections, with a central valley, running across the property toward the west. The slopes also contain one smaller gable, various dormers and roof-light windows.
11. The main house is on three storeys with the upper flat (Flat 3) mostly set within the large roof on the second floor but with an additional landing and two rooms in the front / rear gable and southern east west gable ended section on the third floor. The ground floor flat is also understood to have a cellar but this was not seen. The elevations have various square and round bays with a flat roofed two storey addition and flat roofed single garage attached to the house to the east side and a single storey additional building with pitched roof running along part of the rear of the property. At the rear of the land belonging to 22 Carlisle Road is a row of three garages accessed via a driveway on the west side of the house. These garages, whilst forming part of the freehold, are on separate individual leases and therefore not part of the application.
12. Internally, the common part stair carpet was in poor condition with a torn and potentially dangerous section outside the entrance to Flat 3. During inspection of the flats, attention was drawn to a damp patch in the north east facing living room

of Flat 3 in the north west corner. When inspecting Flat 2, mention was made of noise disturbance in the sitting room of the flat from the bathroom of Flat 3 situated immediately above the rear of this room. Attention was also drawn to a damp patch in the north west corner of the main bedroom which is in the south west corner of the building. This was alleged to have been caused by rising damp from the bathroom of Flat 1 below. During inspection of Flat 1, attention was drawn to damp staining on the walls in the en-suite bathroom and in the abutting study, both on the west side of the building. These damp areas were immediately below the damp visible in Flat 2. Again in Flat 1, the tribunal was shown a further area of possible damp, with wallpaper hanging off, in a bedroom on the north east corner of the main building.

13. The house externally was generally noted to be in fairly poor condition with some broken roof tiles, poor pointing to brickwork on chimneys, several defective brick soldier courses over windows and a very poor, potentially dangerous, steel fire escape on the east elevation. The external decorations were also generally in need of attention. Looking at the west wall of the house, there were considerable signs of long term water staining around a square section cast iron downpipe running down the side of the building and associated hopper heads, indicating a problem with this pipe or its fittings. This water staining externally lined up with the damp staining seen in both Flats 1 & 2. Contrary to the view of the freeholder, the damp was not rising from Flat 1 but considered to be caused by a defect the responsibility of the freeholder. Given the ongoing nature of the problem, there must be a risk of an outbreak of dry rot.

Preliminary Matters

14. All parties had filed written statements of case with supporting documentation. The Applicant's submissions contained a substantial amount of material complaining of alleged breaches of covenant, to which the Respondents had replied. It was explained to the parties at the outset of the hearing that the Tribunal would not be addressing these issues as they were outside the scope of the application. The Tribunal also lacked jurisdiction to deal with matters relating to the garage leases.
15. Mrs Hopkinson's submission stated that she wished to claim against Mr Burton for water damage. This was not considered by the Tribunal.
16. Flat 1's contribution to the service charge costs has been set at 36.5% and Flat 3's contribution set at 28.5%. These proportions, based on rateable value, were not disputed.
17. Dr Criper has acted as attorney for Mrs Hopkinson in relation to the lease since 2004.

The Law and Jurisdiction

18. The tribunal has power under section 27A of the Act to decide about all aspects of liability to pay service charges and can interpret the lease where necessary to

resolve disputes or uncertainties. The tribunal can decide by whom, to whom, how much and when a service charge is payable.

19. By section 19 of the Act a service charge is only payable to the extent that it has been reasonably incurred and if the services or works for which the service charge is claimed are of a reasonable standard.
20. Section 20B provides that costs incurred more than 18 months before a demand is made for their payment will not be recoverable unless within that period the tenant was notified in writing that those costs had been incurred and that he would subsequently be required under the terms of his lease to contribute to them by the payment of a service charge.
21. Under section 20C a tenant may apply for an order that all or any of the costs incurred 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.
22. In respect of service charge demands served on or after 1 October 2007, the demand must be accompanied by a summary of the rights and obligations of tenants of dwellings in relation to service charges ("a summary of rights"). Unless and until this is done, a tenant may withhold payment.
23. Under section 47 of the Landlord and Tenant Act 1987 a demand for rent or other sums due under a lease must contain the landlord's name and address. If this is not done, the sums demanded will not be payable until the information is furnished by the landlord by notice given to the tenant.

The issues for determination

24. Having heard submissions and evidence from Mr Burton (assisted by Mrs Burton), and from Dr Criper on behalf of Mrs Hopkinson, and from Mr Menezes, the issues for determination were as follows:
 - (a) The payability of the annual agent's fee
 - (b) The payability of additional charges demanded by the agent
 - (c) The payability of legal costs
 - (d) The payability of charges for pruning conifer hedges
 - (e) The payability of charges for work done by A J Fisher
 - (f) Whether s 21B of the 1985 Act and/or s 47 of the 1987 Act have been complied with.

The Annual Agent's Fee

25. Since 2005 an annual charge of an amount, varying between £385.00 and £500.00 but usually £420.00, has been included in the service charge demands. Both Respondents contested all such charges. The agent raising the fee is Mrs Jane Burton, the Applicant's wife, who lives with him in Flat 2 and who issues the demands.

26. Dr Criper submitted that the appointment of Mrs Burton as agent was simply a device to provide income for Mr Burton, her appointment having come about after the county court had disapproved the use of a Mr Fisher (Mrs Burton's daughter's partner) as managing agent. Mrs Burton was not independent, not a professional, and was simply a spokesperson for her husband. There was no arms length arrangement between Mr and Mrs Burton. He did not think Mr Burton actually paid Mrs Burton anything. No invoices from Mrs Burton had been seen. Furthermore the charges were excessive in years where the only matter dealt with was collecting the insurance premium contributions.
27. Mr Menezes said that he had asked for a copy of Mr Burton's agreement with Mrs Burton for her work as agent, but nothing had been provided. If there was a long term agreement there had been no consultation and therefore charges should be limited to £100.00. He referred the Tribunal to one letter he had sent to Mr and Mrs Burton in 2009 asking for details of the work carried out by Mrs Burton as agent. No proper information had been provided. He said there was no proof that Mrs Burton was employed by Mr Burton or had any expertise in property management. Mrs Burton carried out no independent function as agent but simply supported Mr Burton in everything, including acts of harassment. Her letters were unprofessional, personal and aggressive. Reasonable requests from the leaseholders were ignored.
28. Mr Burton said that as freeholder he had the right to appoint an agent of his own choosing. There was no long term agreement and therefore no requirement to consult. Mrs Burton's charges were reasonable and were recoverable as a service charge pursuant to paragraph (b) (2) (iv) of the Third Schedule in the lease. He said he was not obliged to provide copies of receipts. He had not provided the Tribunal with copies of any invoices issued by Mrs Burton to him for her fees. Mrs Burton, who was present, said nothing on this point.
29. Determination: The lease refers to recovery of costs "incurred by the landlord". There was no evidence whatsoever before the Tribunal that Mr Burton has actually incurred the agent's fees which the leaseholders are being asked to pay. The mere fact that Mrs Burton has charged the leaseholders a fee in the demands sent out in her name does not of itself mean that she has charged the same (or any other) amount to Mr Burton. The Tribunal was not shown a single invoice or bill of any description from Mrs Burton to Mr Burton, or any evidence of payment by Mr Burton. While Mr Burton is correct in stating he is not prohibited from appointing a connected person as agent, the arrangement must be a genuine commercial agreement and not a sham: *Skilleter v Charles* (1991) 24 HLR 421. In this case there is no evidence of any commercial arms-length agreement between Mr and Mrs Burton. To the contrary, it was plain to the Tribunal from their interaction and submissions during the hearing that they spoke with one voice. Accordingly, none of the annual agent's fees are payable.

Additional Agent's Charges

30. A number of the service charge demands sent to Mrs Hopkinson included charges for "Invoice dated ..." which she was required to pay in full (not just 36.5%). The charges totalled several thousand pounds. No copies of these invoices were

supplied to the Tribunal but it was accepted that they were invoices issued by Mrs Burton for her time spent undertaking research and writing letters, charged at £35.00 per hour. The highest bill was for £1750.00 in July 2006. Mr Burton submitted that such charges could be raised under the service charge provisions in the lease and that they were also payable as administration charges under the Commonhold and Leasehold Reform Act 2002. He also asked the Tribunal to determine that further fees totalling £2096.85 for work said to have been done by Mrs Burton between November 2007 and September 2009 should be paid, although they had not yet been demanded.

31. Dr Criper submitted there was no justification for these extra charges. He didn't know what work had been done that would not be covered by the annual agent's fee.
32. In the case of Mr Menezes, two of the demands included fees for letters and notices and again it was accepted these were fees raised by Mrs Burton. Mr Menezes said he had seen no invoice from Mrs Burton and disputed liability to pay these fees.
33. Determination: The only provision in the lease which might cover the raising of such charges is paragraph (b) (2) (iv) of the Third Schedule, which is a service charge provision. As already explained, this relates to costs "incurred by the Landlord". There was no evidence that Mrs Burton had charged Mr Burton for any of these costs. Nor was there any evidence that the charges were reasonably incurred. Furthermore, such costs, even if recoverable through the service charge, would be apportioned between the flats, and would not be payable by just one leaseholder. The Tribunal was not directed to, and has not identified, any other provision of the lease which might permit recovery of such costs from one leaseholder as an administration charge. Accordingly none of the charges are allowed.

Legal Costs

34. In the demand for March – September 2006, Mrs Hopkinson was asked to pay £58.75 for "legal advise" [*sic*]. Furthermore, although not mentioned in any demand, Mr Burton asked the Tribunal to determine that additional legal costs in a total sum of £3782.12 were payable by Mrs Hopkinson. This figure derived from a piece of paper dated 6 August 2008 listing 6 invoices received from solicitors totalling £6991.96. Mr Burton said that £3782.12 related to work re Mrs Hopkinson.
35. Dr Criper said that other than the demand for £58.75, there had been no previous demand for payment of any legal costs. No details had been provided and it was too late to start making these charges now.
36. Determination: There was no evidence before the Tribunal as to what the charge of £58.75 was for and the Tribunal cannot be satisfied that it was reasonably incurred as required by section 19. As a service charge Mrs Hopkinson's share would be only 36.5% in any event. With respect to the rest of the claimed costs they are all disallowed. There was no evidence as to the nature of the legal costs, whether they were reasonably incurred, or whether they fell within the scope of paragraph (b) (2) (iv) of the Third Schedule of the lease. The Tribunal had been told about continuing county court litigation between the parties over the last 8 years. Furthermore

section 20B of the Act would operate to prevent recovery of the charges, the most recent solicitors' bill listed being dated 6 August 2008. Accordingly none of the charges are allowed.

Hedge Pruning Charges

37. Some of the demands to both leaseholders contained charges for pruning a conifer hedge. The invoices were not produced but Mr Burton explained the cost related to pruning the garage driveway side (not his garden side) of the conifer hedge seen during the inspection. It had been planted with Mrs Hopkinson's agreement and she had contributed to the cost of planting. He said the pruning costs could be recovered under the lease as the hedge was a "boundary wall" as referred to in paragraph (b) (2) (i) of the Third Schedule.
38. Mrs Hopkinson confirmed she had contributed to the planting costs, but Dr Criper argued she had no liability to contribute to maintenance costs under the lease. Mr Menezes said he had no obligation under the lease to pay towards any gardening costs.
39. Determination: The conifer hedge is relatively recent and is not a "boundary wall" as referred to in the lease. It was clear on inspection that the hedge provided a boundary between the private garden of Mr Burton and the driveway leading to the garages at the rear. Neither leaseholder is obliged under the lease to contribute anything towards the costs of pruning the hedge or any other gardening costs.

Invoices of A J Fisher

40. Dr Criper challenged charges made for various work carried out by A J Fisher at the property, as itemised in the demands for September 05 – March 06, September 06 – March 07 and March 07 – September 2007. Dr Criper said this was the same person that the county court had disapproved as a managing agent and he was not a professional. Mr Burton had brought him in to do work for which he was not qualified. He doubted the work had been done properly. However he accepted work had been carried out on the items stated in the demands. In reply, Mr Burton said that Mr Fisher had been competent to do the work charged for.
41. Determination: All Mr Fisher's invoices are allowed. Dr Criper accepted work was carried out and did not produce any evidence to suggest that the work was sub-standard or that the charges (which appear modest) were unreasonable.

Compliance with Statutory Provisions

42. Both leaseholders asserted that no demands were accompanied by a Summary of Rights as required by section 21B of the Act until the most recent demand dated 18 June 2012 covering the period 30 September 11 – 25 March 12. Dr Criper also stated that no demands, all of which were issued in Mrs Burton's name, contained the landlord's name as required by section 47 of the 1987 Act.

43. Mr and Mrs Burton were both insistent that every single demand had been set out with a covering letter and, since October 2007, with a Summary of Rights. No copies of covering letters were produced, save for that dated 18 June 2012. The Tribunal was told this letter was the same as previous covering letters. One sentence of the letter referred to "Tony" (Mr Burton's first name). The demands were all headed with the 2 Greystoke address.
44. Determination: None of the paperwork seen for this period refers to a Summary of Rights. The lack of supporting documentation for most of the disputed service charges in issue in this case detracts from Mr Burton's reliability. For these reasons, the Tribunal prefers the evidence of the Respondents, and finds that there has been no compliance with section 21B of the Act with respect to demands covering the period 30 September 2007 – 29 September 2011. The Tribunal also determines that there has been a failure to comply with section 47 of the 1987 Act. None of the demands seen specifically state the landlord's name. His address is given but only as the agent's address.

Application of Determinations to Individual Demands

Service charge period	Amount allowed (subject to comments below)
30 Sept 05 – 25 March 06	1314.88
26 March 06 – 29 Sept 06	0
30 Sept 06 – 25 March 07	1489.37
26 March 07 – 29 Sept 07	270.00
30 Sept 07 – 25 March 08	1069.24
26 March 08 – 29 Sept 08	90.00
30 Sept 08 – 25 March 09	1140.98
26 March 09 – 29 Sept 09	0
30 Sept 09 – 25 March 10	1246.48
26 March 10 – 25 March 11	1341.08
26 March 11 – 29 Sept 11	0
30 Sept 11 – 25 March 12	1511.26

45. No other service charges are allowed. However, it is noted that Dr Criper did not object to certain small charges made for photocopying which had been included in some demands. These are not service charges.
46. Mrs Hopkinson's proportion of the above service charges is 36.5%. Mr Menezes's proportion of the above service charges is 28.5% as from the date he became a leaseholder.
47. In respect of service charge periods 30 September 2007 – 29 September 2011 any unpaid service charges may be withheld until fresh demands are served which are accompanied by a Summary of Rights.
48. In respect of all service charge periods up to 25 March 2012 any unpaid service charges will not be payable until section 47 of the Landlord and Tenant Act 1987 is

complied with. (The Applicant's attention is also drawn to the provisions of section 48 of the 1987 Act.)

Section 20C Application

49. In deciding whether to make an order under section 20C a Tribunal must consider what is just and equitable in the circumstances. The circumstances include the conduct of the parties and the outcome of the proceedings. Dr Criper and Mr Menezes both criticised Mr Burton for refusing to refer the disputes about the service charges to a chartered accountant in accordance with the lease, and thought this should have been done previously (as they had requested), instead of applying to the Tribunal now. Mr Burton said that in recent county court proceedings the judge had advised putting matters before the Tribunal. Mr Burton also said he had no costs in relation to these proceedings.
50. The dispute resolution provision in the lease pre-dates the provisions of the 1985 Act and the Tribunal agrees that resolution of the dispute by the Tribunal was appropriate. However the outcome of the application is heavily weighed in favour of the Respondents. The vast majority of the disputed charges have been disallowed. The Tribunal therefore finds it is just and equitable to make an order that any costs of the Applicant with respect to these proceedings are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the Respondents.

Concluding Remarks

51. There has been a longstanding and complete breakdown of the relationship between the leaseholders on the one hand and Mr and Mrs Burton on the other hand. Any continued use of Mrs Burton as agent by Mr Burton is likely to be counterproductive for all concerned. Not only is there open hostility and lack of cooperation on both sides, but the clear impression gained by the Tribunal, both from the documentation seen and from the oral submissions, is that neither Mr nor Mrs Burton has a clear understanding of the leases, the relevant statutory provisions affecting service charges, or the proper role and duties of a managing agent. The building has been neglected and necessary repair and maintenance work which is the landlord's responsibility has not been carried out.
52. It is recommended that a professional managing agent, who works in accordance with the Service Charge Residential Management Code issued by RICS, is appointed by the freeholder. A structured programme of maintenance is also required. While this may result in initially higher service charges, as money needs to be spent on the fabric of the building, the Tribunal sees this as a necessary step to preserve the property and the value of the flats.

Signed
E Morrison LLB JD
Chairman
Dated – 16 January 2013