

9066



**HM Courts
& Tribunals
Service**

LEASEHOLD VALUATION TRIBUNAL

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

Case Number:	CHI/21UD/LIS/2013/0047
Property:	Flats 1,2 & 3, 2 Boscobel Road St Leonards on Sea East Sussex TN38 OLU
Applicants:	Claire Garton & Kie Smith (Flat 1) Andrew Harston (Flat 2) John & Stephanie Carter (Flat 3)
Respondents:	Richard Investment Properties Limited
Date of hearing	18th June 2013
Tribunal:	Mr R T A Wilson LLB (Lawyer Chairman) Mr R Wilkey FRICS (Surveyor Member)
Date of the Tribunal's Decision:	28th June 2013

The Applications

1. The Applicant leaseholders applied under S.27A (and 19) of the Act for a determination of their liability to pay to the Respondent freeholder on account interim service charges for service charge year 2012/2013.
2. The Tribunal also had before it an application under S.20C of the Act that the Respondent's costs of these proceedings should not be recoverable through future service charges.

Summary of Decision

3. The advance service charges recoverable by the Respondent for the year ending 24th June 2013 are as follows:

Service charge item	Amount claimed (£)	Amount allowed (£)
Buildings insurance	636.84	Nil
Fire assessment	238.80	238.80
Accountants fees	100.05	100.05
GLL expenses	191.61	Nil
Fire alarm and secondary lighting	600	600
Building inspection	1,800	Nil
Scaffolding	1,500	Nil
Electrical safety inspection	240	240
GLL expenses	382.50	Nil
Accountants fees	116	116
Management fees	1,161.16	225

4. An order is made under S.20C of the Act.

The Lease

5. The Tribunal had before it copies of the leases for Flats 1,2 & 3. The leases are all in similar form and are for terms of 125 years at a yearly ground rent of £150 for the first 25 years and rising thereafter.
6. The relevant provisions in the leases may be summarised as follows:
 - (a) Each tenant is liable to pay a specified proportion of the maintenance expenses incurred by the landlord in the upkeep of the building and the

common parts as more particularly described in the Sixth Schedule of each lease.

- (b) An on account payment being an estimate for the whole year is to be paid by each tenant twice yearly on the 24th June and the 25th December.
- (c) The landlord is to prepare and supply to each tenant an annual account of actual maintenance expenditure within three months of the 24th June in each year together with an accountants certificate.
- (d) Within 21 days of service of the annual account and accountants certificate the tenants are to pay any excess having received due credit for on account amounts paid by them in the previous year.
- (e) The Sixth Schedule of the lease provides that the landlord may set up a reserve fund against future expenditure.

Inspection

- 7. The Tribunal inspected the subject property immediately before the hearing, when the lessees of flats 1 & 2 were also in attendance. More particularly, we were shown the outside of the property, the public ways, and the interiors of flat 2 and 3.
- 8. The subject property is a semi detached Victorian building constructed of sandstone under a tiled roof. It is thought to have originally been built to house workers from the near by coaching inn but has now been converted into three self-contained flats. It is constructed over four floors including a basement which at the time of inspection appeared to be in a derelict state. The Tribunal's attention was drawn to the following matters in the property: -
 - The derelict state of the basement flat.
 - Damp patches in flats 2 and 3 (some of which appeared to be historic).

Procedural matters and Representation and Evidence at the Hearing

- 9. The Applicants of flats 1 and 2 attended the hearing and gave evidence. The Respondent did not attend the hearing and was not represented.
- 10. The Tribunal had given directions for the case providing for the Applicants to file their statements of case and evidence by the 30th April 2013 and for the Respondent to file and serve its statement of reply with evidence by the 28th May 2013 with the case being set down for hearing with a target date of the 18th June 2013. Whilst the Applicants complied with these directions, the Respondent did not. Instead they had sent a letter to the Tribunal dated the 12th June 2013 in which they stated that due to a change in the registered office and correspondence address they had only just received a variety of correspondence relating to the matter and were not able to attend the hearing. Rather than ask for an adjournment they informed the Tribunal office that they were content for the hearing to proceed and would provide a full written response which would be with the Tribunal by the hearing date at the latest.

11. In the event the Tribunal office received four hearing bundles prepared by the Respondent one day prior to the hearing. They had not been served on any of the Applicants.
12. Prior to the commencement of the hearing these hearing bundles were handed to the lessees of flats 1 and 2 who requested and were granted a short adjournment to consider their position in relation to the very late production of the Respondent's statement of case and evidence. At the commencement of the hearing the Applicants applied to the Tribunal to have the hearing bundle excluded from consideration on the grounds that it had been filed out of time and had caught them completely by surprise. In addition, the statement contained a number of factual inaccuracies, which they wished to challenge and as the Respondent had chosen not to attend the hearing they could not be cross examined on their evidence. This was unfair and put the Applicants at a disadvantage.
13. The Tribunal then adjourned to consider whether the hearing bundles should be admitted or excluded. The reasons given by the Respondent for the late production of the bundle was that there had been a change of correspondence and registered office. On this point the Applicants evidence was that they had served their statement of case and evidence on the most recent address that had been given to them by the Respondent and therefore there had been no fault on their part. The Tribunal was shown a number of letters that the Applicants had received from the Respondent and their managing agents which supported the Applicants position.
14. The Tribunal noted that on the Respondent's admission it had received notification of the hearing on the 12th June nearly a week before the scheduled date. Accordingly even if they were unable to attend they had had ample opportunity to brief a representative to attend the hearing on their behalf. However they choose not to do so and instead served their evidence so that it had only become available to the Applicants on the day of the hearing.
15. The Tribunal found that any delay in the Respondent receiving the application and directions was substantially of its own making and that it was at fault in failing to ensure representation at the hearing itself. The Tribunal accepted that the Respondent's hearing bundle caught the Applicants and indeed the Tribunal entirely by surprise and that in these circumstances it would be manifestly unjust to the Applicants to allow the hearing bundle to be admitted. Accordingly the Tribunal held that the bundle would not be admitted.
16. The evidence considered was therefore restricted to the application and supporting documents and the Applicants statement of case, which consisted of a letter written by them to the Tribunal dated the 26th April 2013.

The Law

The relevant parts of the provisions in the Act are as follows:

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 purposes—

- (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 provisions 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.

20C. 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 court, residential property Tribunal or leasehold valuation Tribunal, or the Upper Tribunal, or in connection with arbitration 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 tenant or any other person or persons specified in the application.

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

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 ...*

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

The Applicants' Case

17. The Applicants complained that they had not been supplied with annual accounts in accordance with their leases detailing service charge expenditure, balances held, or details of any reserve fund. Accordingly the Applicants did not know how the money they had paid on account had been spent, or the state of their individual accounts with the Respondent. This was of particular concern as the freeholders had changed on three occasions in the last year and there had also been changes to the managing agents. Also of concern was whether service charge monies paid to the previous freeholders had been accounted for by the new freeholders and managing agents. Although they had received assurances that they would receive a full credit for all monies paid, they had nothing in writing to demonstrate that this had happened. The advance service charge demand made under cover of a letter sent to them on the 24th December 2012 seemed to be prepared in insolation to previous years and the demand had been made before the annual statement for the year ending 24th June 2012 had been sent to them.
18. The Applicants were also critical of the standard of management and professionalism of the current managing agents and they felt that obvious repair work was being ignored. The advance maintenance request seem to be concentrating on building up a reserve fund for long term work at the expense of short term work. Administrative expenses were far too high and that the estimated costs for the building inspection and scaffolding were excessive and not recoverable under the leases. They were being asked to pay for property insurance for a second time as the insurance policy had been cancelled by the current freeholder when they acquired the freehold and a new policy taken out. There was no evidence that they were being allowed a credit for the monies that they had paid to the previous freeholder for insurance which covered the period until July 2013.

The Determination – General Points

19. There has to date been no valid advance demand for 2012/2013 which complies with the service charge provisions of the leases and statutory requirements. The invoice of 24th December 2012, which purported to demand payment for the 2012/13 budget figure, was sent to the lessees even though the 2012 annual certified account

had not been served on the Applicants. In the judgment of the Tribunal the terms of the leases make the serving of an annual certificated account a precondition of being able to validly demand an on account figure for the next year.

20. The new freeholders and the managing agents have not understood what is required in this regard. To that extent they have let the Applicants down and are responsible for these proceedings. They are referred to the RICS Service Charge Residential Management Code. Nor was there any evidence before the Tribunal that the demand complied with S.47 of the 1987 Act. Whilst the demand does contain a name of a company and address there is no express information containing the name and address of the landlord as required by S.47 of the Landlord & Tenant Act 1987. Accordingly the provisions of S.47 (2) apply and the demand will not be payable until the above omissions are rectified. The interim advance service charge for 2013 will be payable only when a demand is served which complies with S.47 and if it is accompanied by a summary of rights and obligations as required by S.21B of the 1985 Act. It is also necessary for the Respondent to prepare and serve the annual certificated service charge account for the year ending the 24th June 2012.
21. The disputed items are identified in the table appearing at paragraph 3 of this decision and the third column of that table contains the amount determined by the Tribunal as being payable. The Tribunal sets out below its reasons for its determination.

The Determination on the disputed items.

22. Buildings insurance

The Tribunal accepts that there appears to have been a significant element of double charging on the costs of the buildings insurance. The Tribunal was told that each lessee had been given a summary of buildings insurance cover from the previous landlord. This confirmed that a policy had been taken out with an expiry date of July 2013 and had been paid by all lessees. When the current freeholders had acquired the freehold they had cancelled the old policy and had taken out a new one which covered much of the same period.

Whilst the Tribunal understands that a new policy would have been necessary following the change in freehold ownership, the lessees should not be prejudiced by the change in the form of paying a higher annual premium. Whilst it is possible that will receive due credit for the costs of the cancelled policy there was no evidence before the Tribunal that credits have been given.

In the absence of this evidence the Tribunal determines that no on account payment for insurance is recoverable for 2013.

23. Fire assessment, accountant's fees x 2, electrical testing, fire alarm testing and secondary lighting

The on account figures demanded for these items are reasonable in the judgment of the Tribunal and the Tribunal is satisfied that their leases allow for this

expenditure to be recovered as service charge. The Applicants led no cogent evidence to support their claim that the amounts are too high. Therefore the amounts demanded will be recoverable when a valid demand is made.

24. GLL Expenses.

It is no longer considered good practice for managing agents to charge out of pocket expenses separately from the amount charged by them to undertake the basic duties as provided for in the RICS code relating to residential management. The Applicants claim that some of the expenses cannot be properly budgeted for in advance and that it is not reasonable to make a charge for petrol and postage and similar items, as there is no provision in the leases for such expenditure to be recoverable.

The Tribunal accepts the evidence of the Applicants on this point. The lease does not contain express language allowing for such expenditure and in any event the Respondent should only instruct managing agents who adhere to the latest RICS code which provides that there should be a set fee per unit covering all basic management tasks with only non routine work being charged for separately according to a scale agreed with the freeholder.

For these reasons the Tribunal disallows the GLL out of pocket expenditure.

25. Building Inspection fee and scaffolding costs

With a degree of reluctance the Tribunal accepts the Applicants case that the terms of the leases are not wide enough to allow the cost of building inspections and the costs of scaffolding (associated with inspection rather than repair) to be charged back to the leaseholders by way of service charge. The only clause which comes close to allowing this is paragraph 13 of the Sixth Schedule but in the judgment of the Tribunal this paragraph is primarily concerned with the appointment of managing agents rather than engagement of a builder surveyor and the erection of scaffolding for inspection purposes.

For the avoidance of doubt the provisions of paragraph 1 of the Sixth Schedule would allow the reasonable costs of scaffolding and if necessary third party professionals which are necessary to repair the structure of the building.

Accordingly the Tribunal determines that no sums are recoverable on account for this proposed expenditure.

26. Management fee

The leases provide for a management fee calculated at the rate of 15% of total expenditure incurred on the building for each financial year. It is therefore not possible to calculate the amount until the end of the year. Doing the best it can with the available evidence the Tribunal considers that expenditure for 2013 is likely to be quite low as it appears that little work has or will be carried out bearing in mind the year end date of the 24th June 2013.

Accordingly the Tribunal determines that the advance recoverable service charge for management is based on anticipated expenditure of £1,500 and therefore the allowable figure is £225 based on 15% of £1500.

Section 20C Application

27. This application was not opposed by the Respondent and as the Applicants have been largely successful in these proceedings, the Tribunal determines it is just and equitable for an order to be made that the Respondent's costs of 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 Applicants.

Concluding Remarks

28. The advance demand issued by the Respondent will now need to be revised to take account of the Tribunal's determination as to the recoverable service charges, and it is suggested that each leaseholder should then receive a full statement of the service charge for his/her flat, accounting for any surpluses brought forward from earlier periods, and itemising all debits and credits (including any interest earned on credit balances), with running and final balances. An annual account for the year ending the 24th June 2012 also needs to be served upon the lessees with an accountant's certificate.
29. In the view of the Tribunal this application would have been avoided if proper accounts had been supplied on a timely basis. The leaseholders are referred to the provisions of S.21 of the Act in the event of future difficulty.

Chairman


Robert TA Wilson.

Dated: 28th June 2013