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**HM Courts
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Service**

LEASEHOLD VALUATION TRIBUNAL

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

**Schedule 11 of the Commonhold and Leasehold Reform Act 2002
("the 2002 Act") (Administration charges)**

Case Number:	CHI/21UD/LSC/2012/0113
Property:	Flats 5 & 6 8, Ellenslea Road, St Leonards on Sea East Sussex TN37 6HY
Date of Application:	22 July 2012
Applicant:	Ellenslea Property Limited
Respondents:	Mr K. Hollidge - Flat 5 Mr & Mrs Graham - Flat 6
Appearances for Applicant:	Mr Flannigan of Counsel
Date of Hearing:	25th February 2013
Tribunal:	Mr R. Wilson LLB (Lawyer Chair) Mr R. Wilkey FRICS (Surveyor Member) Mr T. Wakelin (Lay member)
Date of the Tribunal's Decision:	15th March 2013

The Applications

1. The Applicant landlord applied under S.27A (and 19) of the Act for a determination of the Respondent tenant's liability to pay service charges for service charge years 2009 -2012 inclusive and advance service charge for 2013.
2. The Tribunal also had before it an application under the provisions of S.158 and Schedule 11 to the Commonhold and Leasehold Reform Act 2002 to determine whether the Respondent had a liability to pay administration charges in respect of the legal costs incurred by the Applicant in relation to the attempted recovery of service charges for the period 2005 -2008.
3. The Tribunal may also consider, pursuant to regulation 9 of the Leasehold Valuation Tribunal (England) Regulations 2003, whether the Respondent should be required to reimburse the Tribunal fees incurred by the Applicant in these proceedings.
4. Finally the Tribunal also had before it an application by the Respondent under S.20C of the Act that the Applicant's costs of these proceedings should not be recoverable through future service charges.
5. Although Mr & Mrs Graham are named as Respondents, they played no part in the proceedings and the Tribunal was advised by the Applicant at the hearing that they had paid all disputed sums. Accordingly all references herein to 'Respondent' are to be taken as referring solely to the first named Respondent Mr Hollidge.

Summary of Decision

6. The service charges recoverable by the Applicant are as follows:

Year	£
2009	10,355.00
2010	5,037.00
2011	3,943.00
2012	5,920.00
2013 budget only	4,000.00

7. The proportion recoverable from the Respondent is 12.5% of the above sums.
8. No order is made under S. 20C of the Act.
9. The legal costs incurred by the Applicant in seeking recovery of the outstanding service charges from the Respondent have not yet been demanded by way of administration charges and accordingly no administration charges are currently payable by the Respondent.
10. The Tribunal determines that the Respondent should repay to the Applicant the Tribunal application and hearing fees totalling £500 within 21 days of the date of this decision.

The Lease

11. The lease for the Respondent's flat is dated 13th January 2005 and is for a term of 125 years from 29th September 2003 at an annual rent of £200 for the first 33 years and rising thereafter. The relevant provisions in the lease may be summarised as follows:
 - (a) By clause 4(1) the tenant covenants with the landlord to pay and contribute the tenants share of the maintenance costs as defined (broadly comprising the company's expenditure in managing the building and in performing and carrying out the obligations set out in clause 5).
 - (b) The tenant's share of the maintenance costs are set at 12.5%
 - (c) Clause 5 sets out the landlord's covenants with the tenant, which includes various maintenance and repairing obligations and insurance of the Property.
 - (d) Surprisingly there is no obligation on the landlord to prepare and serve on the tenant annual service charge accounts.

The Inspection

12. The Tribunal inspected the subject property on the morning of 25th February 2013 immediately before the hearing in the presence of the parties. The property is a substantial building constructed in the Victorian era and standing in mature grounds. The property has been converted to form nine self-contained flats arranged over the basement and three upper floors. The building is constructed of brick and has part tile hung elevations. The exterior looked to be in a neglected condition requiring repairs and redecoration.
13. The Tribunal members made a brief inspection of the internal common ways and inspected the lower ground floor and the ground floor flats both of which were occupied by tenants. The members of the Tribunal were directed to damp patches in both flats.

The Law and Jurisdiction

14. The Tribunal has power under S. 27A of the 1985 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.
15. By S. 19 of the 1985 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.
16. By S. 20 and regulations made thereunder, where there are qualifying works or the landlord enters into a qualifying long term agreement, there are limits on the amount recoverable from each lessee by way of service charge unless the consultation requirements have been either complied with, or dispensed with by the Tribunal.
17. S. 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.
18. Under S. 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.

19. The Tribunal may consider, pursuant to regulation 9 of the Leasehold Valuation Tribunals (Fees) (England) Regulations 2003, whether one party should be required to reimburse the Tribunal fees incurred by another party in the proceedings.
20. Under Schedule 12 Paragraph 10 of the Commonhold and Leasehold Reform Act 2002, the Tribunal may order one party to pay another party's costs in a sum not exceeding £500 in circumstances where the paying party has, in the opinion of the Tribunal, acted frivolously, vexatiously, abusively or otherwise unreasonably in connection with the proceedings.
21. The provisions of S. 158 and Schedule 11 to the Commonhold and Leasehold Reform Act 2002 confer upon the Tribunal jurisdiction to determine whether an administration charge is payable, and if it is, as to the person by whom it is payable, the person to whom it is payable, the amount which is payable, and a date by which it is payable.
22. Paragraph 1 of Schedule 11 of the 2002 Act defines an administration charge as an amount payable by a tenant of a dwelling as part of or in addition to the rent which is payable, directly or indirectly-
 - (c) In respect of a failure by the tenant to make a payment by the due date to the landlord or
 - (d) in connection with a breach or an alleged breach of covenant or condition in his lease.
23. Paragraph 1(3) of Schedule 11 states that a variable administration charge means an administration charge payable by the tenant, which is neither a) specified in his lease, nor b) calculated in accordance with a formula specified in his lease.
24. Paragraph 2 of the said schedule states that a variable administration charge is payable only to the extent that the amount of the charge is reasonable and paragraph 5 gives the power to the Tribunal to make a determination as to whether an administration charge is payable and reasonable.

Representation, Evidence, and Procedure at the Hearing

25. Mr Flannigan of Counsel represented the Applicant and Mr G Okines a former managing agent gave evidence. Ms V Knapp, a director of the Applicant, also attended and gave evidence. Statements from both Mr Okines & Ms Knapp had been provided in accordance with the Directions. The Applicant had filed a very detailed statement of case predicated on the basis that the Respondent challenged all expenditure for each year.
26. The Respondent attended the hearing and represented himself. The Respondent's case was primarily set out in his statement dated 26th September 2012. This statement did not conform to the directions of the Tribunal in that it failed to properly particularise his challenges to the amounts demanded of him. The Respondent filed no documents or any written evidence in support of his case.
27. The S.27A application asked the Tribunal to determine the service charges for years 2009-2011, and to determine the payability of on account demands for year 2012. By the hearing date the Applicant had produced an account of actual expenditure for 2012, and with the agreement of the parties the Tribunal dealt with that year on the basis of

actual rather than budgeted expenditure. By agreement of the parties the Tribunal also determined the on account service charges for 2013.

28. The Tribunal first heard the Respondent's objections and challenges to the service charges excluding the legal costs in each year and then heard the Applicant's case in response. At the conclusion of the evidence, both sides were invited to make final submissions on the service charges, and then to make their submissions on the administration charges application and finally on the Respondent's application under S. 20C.
29. At the commencement of the hearing the Respondent was invited to review the annual accounts for each of the challenged years and identify any item of expenditure which he still disputed and tell the Tribunal his reasons for the challenge.
30. The Respondent participated in this exercise and it became apparent that apart from the legal fees, which he challenged in each year, most items of expenditure were agreed. The items which were not agreed are set out in this decision together with the Tribunal's findings and determination.

Service charge year 2009

Preparation and service of annual accounts

31. The Respondent contended that despite a number of requests made by him he had not received audited accounts for any of the challenged years until very recently. It was not until he had received the trial bundle that he had been able to see how his service charge demands had been made up. This was the case even though he accepted that he had regularly received service charge demands. It was just the letters which contained the annual accounts which he denied receiving.
32. Mr Flannigan contended that in every year annual accounts had been given to the Respondent and all other lessees and he called Mr Okines who confirmed that accounts had been sent to the Respondent each year by post and that Royal Mail had never returned any of the letters containing the accounts to his office. The address used for sending the accounts was the same address as was used for rent and service charge demands and there had not been any suggestion that these demands had not been received. Based on this evidence Mr Flannigan submitted that the Applicant had, on the balance of probabilities, proved that the accounts had been given to the Respondent.
33. Determination: Where a notice or document is sent by post, it is a question of fact when the notice or document arrives. In the normal course of events a notice or document is not given unless it arrives at the place where it is addressed. Where an Act authorises service by post, where a letter is properly addressed, pre-paid and posted, there is a statutory presumption that it has been sent, and a statutory presumption that it is delivered in the ordinary course of post. The presumption is rebuttable. Whether or not the statutory presumption applies in this case (a point on which neither side made submissions), the Tribunal finds that the Applicant has proved, on a balance of probabilities that the accounts were given in each year to the Respondent. The Applicant's evidence was sufficient to shift the evidential burden to the Respondent and there was no probative evidence from the Respondent to establish non-delivery. A mere denial by the Respondent that he had received the accounts was of insufficient weight to establish non-delivery to the Respondent's address.
34. The Tribunal further noted that somewhat unusually there was no contractual requirement for the landlord to produce annual accounts and that therefore the absence of the accounts was not a justifiable reason to dispute payment of the demanded service charges.

Communal Electricity

35. £130 had been charged which seemed to Mr Hollidge to be excessive and there was no supporting invoice.
36. Valerie Knapp said that the electricity for the common parts came from her flat as there was no separate meter and that a nominal charge of £30 had been debited to the service charge account. The figure of £130 was not correct as the £100 was in respect of a witness fee for previous court proceedings against the Respondent. She considered the charges for communal electricity not to be excessive.
37. Determination: The electricity charge of £30 is upheld there being no evidence that the figure was unreasonable.

Surveyors Fees

38. The charge was £460 vat inc. for surveyor's fees for the preparation of consultation documents. Mr Hollidge said that whatever had been incurred on surveyors fees was wrong and the amount payable should be zero. This was because the service provided by the surveyor had been negligent and had had to be repeated at a later date.
39. Mr Okines denied that the work had been wasted and that the reasons the building work had not been carried out was because of a lack of funds.
40. Determination: there was no evidence to support the allegation of negligence and no evidence that the figure charged was unreasonable. The figure is therefore upheld.

Service charge year 2010

41. Determination: Mr Hollidge confirmed that all expenditure for this year was agreed with the exception of the legal charges, which are dealt with below. There were therefore no contested service charges for the Tribunal to review.

Service charge year 2011

42. The only challenged service charge was expenditure of £903 under the heading Repairs and Maintenance. Initially Mr Hollidge queried the costs of waste removal but after receiving an explanation from Mr Okines this challenge was abandoned. This left one challenge relating to the managing agents call out charges to investigate leaks to a number of flats. No particulars of this challenge had been contained in the Respondent's statement and Mr Hollidge led no credible evidence to support his contention that the call out charges should in effect be paid for by the defaulting lessees. No legal argument was provided to support this challenge and the Tribunal was not persuaded that this claim had any merit.
43. Determination The Tribunal upholds all the service charge expenditure contained in the 2011 account.

Service charge year 2012.

44. Mr Hollidge challenged four items contained in the 2012 accounts:
 - Reserve fund expenditure of £600,

- repairs and maintenance of £941,
- HMO licence application fee £1,444 and
- legal and professional fees of £350.

45. Mr Okines gave evidence that the £600 had been his firm's fee in relation to the production of a specification for a work programme to be carried out to the building. The fee had included meeting the independent surveyor on site, agreeing the specification, producing the consultation documentation, and accompanying builders around the property. The fee also included the charges made by the independent surveyor Phillip Hall.
46. Mr Hollidge contended that the consultation process had been flawed and that the most that should be charged to the service charge account for the work was £250.
47. Determination. The Tribunal is satisfied that the amount charged was reasonable and the Tribunal was not persuaded that the consultation documentation had been flawed. Mr Hollidge's concern was that the description of the intended work set out in the notice of intention was too brief and prevented any lessee being able to make worthwhile observations. The Tribunal rejects this argument and is satisfied that the description of the intended works set out in the notice of intention namely *External redecoration and associated repairs* was compliant with legislation. In particular the description did not prevent a lessee from commenting on the proposed scope of the work and the lessee could reasonably have nominated a contractor to be included on the list for tender documents.
48. Mr Hollidge made various observations on the charges of £941 for repairs and maintenance. Generally he considered that there had been too many call-out charges and that the lessees who had necessitated the call outs should pay for them. Mr Hollidge also contended that some of the charges were too high.
49. Mr Okines denied that the charges were too high and told the Tribunal that in many cases the work had been carried out in-house, which was more cost-effective than instructing outside contractors. He contended that all the call-outs were necessary and that the amounts charged were reasonable. The supporting invoices were contained in the hearing bundle.
50. Determination. The Tribunal carefully considered the expenses report included in the bundle, which provided a breakdown of the £941. Entries included call-outs for electrical work, blocked drains, reported problems with the lighting in the common ways and the removal of rubbish and other sundry items. The hearing bundle contained invoices for the work. The Tribunal was satisfied that all the charges were properly recoverable under the lease and there was no evidence to suggest that the amounts charged were unreasonable. The charges are upheld.
51. Mr Hollidge's case on the HMO licence application fee and the associated legal and professional fees of £350 was that the charges had not been reasonably incurred, as there was no requirement for the building to be registered as an HMO. As there was no requirement for registration there could be no justification for any charge.
52. Mr Okines told the Tribunal that he had been contacted by the Hastings Borough Council and requested to provide information on the building in relation to HMO legislation. Subsequently he had received a letter from the Council advising that there was a requirement for the building to be registered as an HMO. He saw no reason to doubt the Council were right and bearing in mind the very large fines that could be imposed by the Council for failure to obtain a licence, he had made the application and the property had been granted a licence. He confirmed that the licence fee amounted to £1,444 and the legal and professional fees of £350 related to the completion of the licence application. He contended that the Applicant had no option other than to apply for the licence and on this basis he invited the Tribunal to uphold the charges.

53. Determination. The Tribunal reviewed the evidence of both parties and on balance prefers the evidence of the Applicant. Whilst it is a pity that the Applicant did not produce a letter from the Council confirming that the building required an HMO licence, the Tribunal saw no reason why the Applicant would have applied for a licence and indeed be granted one, if none was required. Whilst Mr Hollidge's assertion that Mr Okines had not provided the Council with up-to-date building regulation history is noted by the Tribunal, it accepted Mr Okines reply that the Council themselves would have had the history and taken this into account when assessing the need for a licence. The Tribunal is satisfied that the application for an HMO licence was a reasonable one to make and that the legal and professional fees of £350 were reasonably incurred and accordingly upholds both the licence fee itself and also the legal and professional fees of £350.

Service charge Budget year 2013

54. Determination. Mr Hollidge told the Tribunal that he agreed the budget of £4,000 for this year and on the basis of this admission there were no matters for the Tribunal to determine in this year.

Administration charges

55. The Applicant seeks a determination that Mr Hollidge should reimburse the Applicant for all or a substantial part of legal and associated costs which were incurred in its successful litigation against the Respondent for the recovery of unlawfully withheld service charges which was concluded by an order of the County Court in April 2010. That order provided for Mr Hollidge to pay £3,479 in respect of unpaid charges for the period 29th September 2005 to 28th December 2008. The Applicant states that the sums incurred by it in legal and associated costs have now risen to just short of £12,000 and copies of each of the relevant invoices making up this total is included in the hearing bundle. These costs were included in the annual service charge accounts for 2009, 2010 & 2011.
56. The Applicant relies upon clause 3(15) of the lease for recovery where the Respondent covenants with the Applicant to pay all costs and charges and expenses (including legal costs and fees payable to the lessors surveyor) incurred by the lessor in or in contemplation of any proceedings under S.146 and 147 of the Law of Property Act 1925 in respect of the premises notwithstanding forfeiture is avoided otherwise than by relief granted by the Court.
57. It is claimed by the Applicant that the County Court proceedings and the costs incurred after the County Court hearings were all incurred in contemplation of forfeiture of the lease. They say that in default of receipt of payment from the Respondent following the judgement, the Applicant's solicitors served a forfeiture notice under S.146 of the Law of Property Act dated 7th June 2010.
58. In support of their contention that legal costs can be claimed against Mr Hollidge alone pursuant to clause 3(15) they rely upon the Court of Appeal case Freeholders of 69 Marina, St Leonards on Sea v Oram [2011] EWCA Civ1258. In that case it was held the costs incurred by a landlord in bringing proceedings in the Leasehold Valuation Tribunal and County Court for determination of, and non-payment of, service charges were payable by the tenant under the relevant terms of the lease. The relevant terms of the lease were in the Applicant's submission in all material respects the same as clause 3(15) in the Respondent's lease.
59. Mr Hollidge denies that clause 3(15) of his lease enables the Applicant to recover the legal costs from him in the form of administration charges. He disputes that when the

Applicant applied to the County Court that it did so in contemplation of forfeiture proceedings. S.3(15) was narrowly drawn and could only be used where it could be demonstrated that the landlord had formed a clear and demonstrateable intention to serve a forfeiture notice and that they had not done so in his case. On this basis he contended that the legal fees could not amount to an administration charge payable in full by him alone. However, he accepts that the legal fees can be recovered from all of the lessees in the building by way of service charge. This admission is contained at paragraph 7 of his written statement which says, "as the Respondent has no qualms about making a contribution of 12.5% towards these costs, if correctly demanded the application is a waste of time".

60. Determination. The Tribunal has no hesitation in finding that whilst the legal costs can and indeed have been properly demanded as service charges, they have not at this stage been demanded in the form of administration charges. The right to recover the costs as service charge can be found in clause 4(2)(d).
61. The reasons for this finding are that the Tribunal clarified the factual position with the Applicant's counsel who confirmed that the Applicant had up until now sought to recover legal costs as service charges recoverable from all of the lessees in the property. The legal costs had not as yet been demanded from Mr Hollidge alone in the form of administration charges. He accepted that if the Tribunal made a determination that the costs could form an administration charge, then to make an administration charge demand on Mr Hollidge would involve a refund to the other lessees for the amounts paid by them to the service charge account in relation to the legal costs.
62. Having regard to the above, the Tribunal finds that the costs, which have been claimed as service charge, do not on the facts also constitute an administration charge.
63. As to the reasonableness of the legal costs there is no doubt that the amount demanded stated at the hearing to be £10,996.89 is proportionately high bearing in mind that the original debt awarded in the County Court amounted to little less than £4,000. However, as pointed out by Mr Flanagan the test is one of reasonableness. He said that the County Court hearing had taken place over three days. The hearing had resulted in a long and detailed judgement being handed down unusually in writing and this was evidence of the complex nature of the issues raised. The matter had not been straightforward and the Respondent had counterclaimed on three separate issues all three of which had been rejected. Mr Flanagan pointed out that the County Court had awarded every penny demanded by the Applicant. The counterclaims had included allegations of disrepair, malicious prosecution, and breaches of other covenants in the lease. Thereafter substantial costs had been incurred in relation to enforcement because the Respondent had without good cause refused to pay. Mr Flanagan pointed the Tribunal to a letter in the hearing bundle sent by Mr Hollidge to the Applicant in which he had stated that he had no means of paying the judgement and that the prospects of the Applicant being able to recover any money were non-existent and to seek to do so would simply be a case of throwing good money after bad. This demonstrated the cavalier and unreasonable attitude that the Respondent displayed. For all of these reasons he contended that the amounts now claimed were recoverable and reasonable in amount.
64. Mr Hollidge had not commented on the amount of the legal costs in his statement case and at the hearing merely contended that they were unreasonable without giving any reasons. He claimed that the County Court proceedings were subject to an appeal although he appeared to accept that the appeal process was not being actively pursued. He made no comment on any individual invoices and merely contended that the legal costs incurred were not proportionate and that the Applicant had taken a sledge hammer to crack a nut.
65. With a degree of reluctance the Tribunal has concluded that there was no evidence or probative legal argument before it to demonstrate that the legal costs of just under

£11,000 were unreasonable. In contrast it had before it submissions to demonstrate that although high, there were reasons why the costs were so high. For these reasons the amounts claimed are upheld in each of the years and the Respondent is liable for his proportion of the same namely 12.5%.

66. The Tribunal concludes by making it clear that it has made no finding that the legal costs could not in principle be recovered as administration charges under S. 3(15) of the Respondents lease if properly demanded as such.

S. 20C Application and reimbursement of fees

67. In deciding whether to make an order under S.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. As the Respondent has paid no service charges at all for years these proceedings were clearly justified. The Applicant has been able to establish that all of the service charges claimed are recoverable in full and taking everything into account the Tribunal determines that it would not be just and equitable for an order to be made under S. 20C.
68. Bearing in mind the outcome of the proceedings and taking into account that the Respondent has failed to comply with the Tribunals directions and provide a detailed statement of case the Tribunal determines that it should exercise its discretion and make an order that the Respondent should repay the Tribunal fees incurred by the Applicant in these proceedings.

Signed
Chairman:

Robert Wilson LLB

Dated: 15th March 2013