

10195



26 AUG 2014

**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)**

Case Reference : CAM/33UF/LSC/2014/0024

Property : Flat 14, Dormy House, 2 Cromer Road, Sheringham,
Norfolk NR26 8RP

Applicant : Fairfield Rents Ltd

Respondent : Bryan Alan Parsons

Type of Application : Determination of reasonableness and payability of
service charges from a date unknown and falling due
on or before the issue of the claim on 26th September
2013 [LTA 1985, s.27A]

Determination of reasonableness and payability of
administration charges from a date unknown and
falling due on or before the issue of the claim on 26th
September 2013 [CLRA 2002, s.158 & Sch 11]

Tribunal : G K Sinclair, G F Smith MRICS FAAV REV, and
D S Reeve OBE MVO

**Date and place
of Hearing** : 10th June 2014, at The Dales Country House Hotel,
Upper Sheringham

Date of Decision : 9th July 2014

Date of this certificate : 18th August 2014

CERTIFICATE OF CORRECTION

Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, rule 50

I hereby certify that, due to an accidental error, the decision handed down on the 9th July 2014 in respect of Flat 14, Dormy House, 2 Cromer Road, Sheringham, Norfolk NR26 8RP and which was signed by me was inaccurate in the following particulars, namely that in paragraph 31(a) and (b) the figures mentioned refer to the cost attributable to the whole of Dormy House and not merely to the 8.1664% proportion payable in respect of Flat 14. In the schedule on page 9, however, those entire sums are deducted when calculating the amount payable by the respondent. Applying the correct percentages, the net amount payable by the respondent increases to £16 514.80.

The correct figures, and the adjusted total payable by the respondent, appear in the revised Schedule below.

Dated 18th August 2014

Graham Sinclair

Graham Sinclair
Tribunal Judge

REVISED SCHEDULE – AMOUNT PAYABLE

Item	Page	Claimed	Allowed	Comment
Balance brought forward at 1/1/07	79	£6,640.39	Nil	Limitation Act
Service charges 1/1/07 – 30/6/13	79	£25,218.53	£25,218.53	Less items below
Survey fee incorrectly calculated	113	(£109.61)	(£109.61)	Conceded by applicant
Surveyor's fee for tender procedure	234		(£94.13)	Irrecoverable – s.20B
Less May 2008 payment	79	(£8,500.00)	(£8,500.00)	Part-payment
Total payable			£16,514.79	

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Norfolk NR26 8RP

Applicant : Fairfield Rents Ltd

Representative : James Davies, instructed by Fairfield Rents Ltd; with
Iain Capjohn & Ashraf Sardar (Urbanpoint Property
Management Limited)

Respondent : Bryan Alan Parsons

Representative : in person; with him his brother Ray Parsons

Type of Application : Determination of reasonableness and payability of
service charges from a date unknown and falling due
on or before the issue of the claim on 26th September
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of Hearing** : 10th June 2014, at The Dales Country House Hotel,
Upper Sheringham

Date of this Decision : 9th July 2014

DECISION

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•	The lease	paras 7–8
•	Applicable law	paras 9–16
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Summary

1. This application, originally started as a money claim on-line in the County Court, concerns a flat within a converted building on the main coastal A149 road near the western edge of the town of Sheringham, Norfolk. This is not the first time that the management of the building has been considered by this tribunal (albeit in its earlier guise as a leasehold valuation tribunal). A copy of that earlier tribunal decision [Case ref CAM/33UF/LSC/2004/0054] is annexed to the applicant's Statement of Case at page 89 in the hearing bundle.
2. In Mr Davies' skeleton argument on behalf of the applicant two principal issues are identified as emerging from the rival statements of case :
 - a. Limitation, and
 - b. Whether the existence of a Right to Manage Company alters to whom any arrears are payable.
3. In addition, the tribunal had to consider the usual issues of reasonableness, the cost of the annual insurance, and whether proper consultation had been carried out in respect of major works.
4. Although the subject of administration charges is mentioned in the original claim form, which sought payment of "arrears of service charges, ground rent and/or administration charges" in the total sum of £32 425.35, it played no part in the detailed statements of case required by the tribunal's directions or in the hearing.
5. For the reasons which follow the tribunal determines that :
 - a. The Limitation Act applies to prevent recovery of all pre-2007 debts
 - b. The part-payment by the respondent of £8 500 was appropriated to the major works account by both himself and, on receipt, by Urbanpoint
 - c. The challenge to the insurance premiums is rejected
 - d. The cost of the major works is allowed, save for minor adjustments for :
 - i. Survey fees that had been calculated incorrectly, and
 - ii. An amount irrecoverable under section 20B
 - e. The cost for repairs and maintenance is allowed in full.
6. The tribunal therefore determines that the sum of £14 223.61 is payable by the respondent to the applicant, together with such interest and on such terms as the court may later decide.

The lease

7. The lease for Flat 14, Dormy House, dated 23rd January 1978, was made between Brownrow Investments Ltd as lessor and Bernard Warnes and Eric Bernard Warnes as lessee, for a term of 99 years from 24th June 1979 at an annual ground rent of £10, rising in 2010 to £20 and again in 2043 to £30. The following provisions are worth noting :

- a. "Maintenance year", in preamble H, means every period of 12 months falling within the term of the lease and ending in each year on 24th March
 - b. "The Maintenance Contribution", in preamble I, means a sum assessed by the lessor as being fair and reasonable
 - c. By clause 2 the tenant covenants to observe and perform the obligations and stipulations in the Second Schedule
 - d. By clause 3 the lessor covenants to comply with those in the Third Schedule
 - e. "The Property" (Dormy House) and "the Premises" (the flat) are described in the First Schedule. The latter is identified on a plan (not copied) but not the former. The demised premises include, at paragraph 1(c), the interior and exterior walls between the levels mentioned in paragraph 1(a) and (b); at 1(d) all internal and external glass windows window frames sashes and skylights; and at 1(e) all doors and door frames, etc. (whether internal or external)
 - f. Paragraph 9(i) of the Second Schedule sets out the tenant's repairing obligations; and at 9(ii) the requirement to pay the maintenance contribution in two equal instalments and such amount (if any) by which this has fallen short of the costs and expenses for the maintenance year as certified in accordance with the Fourth Schedule, this additional amount to be paid on the half yearly instalment date falling due next after the amount due has been certified
 - g. In the Third Schedule paragraph 1 concerns the lessor's obligation to insure the property including the premises and paragraphs 5, 6 & 7 its maintenance and repair, cleaning and redecorating obligations. The obligation to redecorate the exterior includes the doors and window frames.
 - h. By the Fourth Schedule all the lessor's costs and expenses, outgoings and matters mentioned in paragraphs 1, 5, 6 & 7 in the Third Schedule, as certified by the lessor's chartered surveyor or chartered accountant, are recoverable by way of additional maintenance contribution (service charge).
 - i. The above costs and expenses may also include the costs reasonably incurred in preserving or improving the property, including a sinking fund for the purpose of ironing out as far as possible fluctuations in the annual amounts due.
8. As noted in the earlier tribunal decision in 2005, other parts of this building are subject to other leases. Since then a discrete group of three flats has collectively purchased their freehold reversion. Both factors affect the proportionate share of the cost of works to the structure or exterior payable by each of the Dormy House tenants.

Applicable law

9. Section 18 of the Landlord and Tenant Act 1985 defines service charge, for the tribunal's purposes, as :
- an amount payable by a tenant of a dwelling as part of or in addition to the rent... (a) which is payable, directly or indirectly, for services, repairs, maintenance, improvements or insurance or the landlord's costs of management...

10. The overall amount payable as a service charge continues to be governed by section 19 of the same Act, which limits relevant costs :
 - a. only to the extent that they are reasonably incurred, and
 - b. where they are incurred on the provision of services or the carrying out of works, only if the services or works are of a reasonable standard.

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

12. Recoverability is also affected by the provisions of the Limitation Act 1980. This provides that where the service charge is simply payable as a covenant in the lease then the limitation period is 12 years, whereas if it is expressed to be payable as rent then this is reduced to 6 years.¹

13. In order that leaseholders can keep track of what they may owe, and to discourage tardiness by freeholders or their managing agents, section 20B provides that :
 - (1) If any of the relevant costs taken into account in determining the amount of any service charge were incurred more than 18 months before a demand for payment of the service charge is served on the tenant, then (subject to subsection (2)), the tenant shall not be liable to pay so much of the service charge as reflects the costs so incurred.
 - (2) Subsection (1) shall not apply if, within the period of 18 months beginning with the date when the relevant costs in question were incurred, 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.

14. The Court of Appeal has held² that costs would be "incurred" for the purpose of section 20B when the landlord is sent an invoice or on payment by the landlord, as opposed to when the service is actually provided. Whether the costs are incurred on the sending of the invoice or on later payment by the landlord will depend on the facts. For example, where payment of an invoice is delayed by reason of a genuine dispute the latter payment date is likely to be the date on which the cost is incurred.

15. On the subject of insurance the following propositions of law may be distilled from the cases of *Havenridge v Boston Dyers Ltd*³, *Berrycroft Management Co Ltd v Sinclair Gardens Investments Ltd*⁴ and *Forcelux Ltd v Sweetman*⁵ :

¹ Limitation Act 1980, ss 8 & 19 respectively

² *OM Property Management Ltd v Burr* [2013] EWCA Civ 479

³ [1994] 2 EGLR 73

⁴ [1997] 1 EGLR 47

⁵ [2001] 2 EGLR 173 (LT)

- a. A landlord insuring his property may avoid challenge provided he does so with an insurance office of repute, in the normal course of business (*Berrycroft*)
 - b. He must do so competitively, at normal market rates (*Forcelux*)
 - c. However, he is not obliged to shop around the market for the lowest premium available, and can deal with just one underwriter (*Havenridge*)
 - d. If the rate appears to be high in comparison with other rates that are available in the market then the landlord can be called upon to prove that there was no special feature of the transaction which took it outside the normal course of business (*Havenridge*)
 - e. Otherwise, the right of a landlord to nominate the insurer is unqualified, and he is not obliged to give reasons (*Berrycroft*)
 - f. The question to be answered is not, was the insurance the cheapest available, but was the cost reasonably incurred (*Forcelux*).
16. In this case an added twist is provided by the fact that the subject premises are now managed by an RTM company, so Urbanpoint on behalf of the landlord is claiming sums due from before the RTM company assumed control. Section 97 of the Commonhold and Leasehold Reform Act 2002 provides, inter alia, that :
- (4) So far as any function of a tenant under a lease of the whole or any part of the premises –
 - (a) relates to the exercise of any function under the lease which is a function of the RTM company by virtue of section 96, and
 - (b) is exercisable in relation to a person who is landlord under the lease or party to the lease otherwise than as landlord or tenant, it is instead exercisable in relation to the RTM company.
 - (5) But subsection (4) does not require or permit the payment to the RTM company of so much of any service charges payable by a tenant under a lease of the whole or any part of the premises **as is required to meet costs incurred before the right to manage was acquired by the RTM company in connection with matters for which the service charges are payable.** [emphasis added]

Inspection and hearing

- 17. The tribunal inspected the building externally and via the internal common parts on the morning of the hearing. The actual flat was not inspected. The parties or their representatives were present throughout.
- 18. The matter for determination by the tribunal is the amount and payability of arrears of service charge. Further amounts for unpaid ground rent (nominal) and interest (substantial) are for the County Court to resolve unless, before then, the parties can reach agreement. After deducting those final two items the total sum claimed, as set out in paragraph 15 of the applicant's Statement of Case at page [79], is £23 358.92.
- 19. The tribunal had before it a hearing bundle comprising 448 pages, to which Mr Davies for the applicant also contributed a skeleton argument with annexed copies of statutory provisions relied upon and an excerpt from Halsbury's Laws of England concerning appropriation of payments. The bundle included detailed Statements of Case with annexes. One of these was the previous tribunal decision dated 10th June 2005 – 9 years ago.

20. Mr Davies opened the applicant's case by directing the tribunal to Schedule B at [110], which shows how the service charge for the final period prior to handover to the RTM company is calculated. The respondent had replied to that in his schedule starting at [129] in his Statement of Case. Against many elements of the claim is noted "Not contesting", whereas many are challenged as "Statute barred" or "Section 20". Against "Insurance charge" are recorded not only the last two challenges but also "50% overcharge". In each case the reader is directed to a particular numbered paragraph in the respondent's Statement of Case.
21. Mr Davies took the tribunal through what he considered to be the major points in dispute – the major works, insurance and repairs and maintenance. He noted relevant documents for the first two but, as nothing concerning the last had really been challenged in the respondent's Statement of Case, no documents had been included.
22. Mr Parsons told the tribunal that he was challenging various items of repairs and maintenance as they really ought to have been included within major works and the cost shared between Dormy Court and other parts of the building. However he conceded that section 20 notices would not have been required.
23. His challenge to the costs of major works related to :
 - a. Quality of the work
 - b. The selection of a contractor with no known track record, which he had opposed from the outset, instead of re-tendering
 - c. Cost, which was higher than that of Blyth & Sons, the company which had won the tender in 2007 but had then pulled out in 2008. Blyth's figures should be used as the guide price
 - d. The apportionment of costs between the different parts of the building.
24. Insofar as insurance was concerned he initially sought to argue that there had been a failure to consult under section 20, but it was pointed out to him that as an insurance contract is annually renewable it does not qualify as a "long term agreement". His emphasis therefore shifted to his other points, that insurance had been provided by the same company (Genavco) without interruption, and that in the previous tribunal's decision the insurance element had been reduced by 50%. This, he argued, should continue to be applied to the figures claimed.
25. On limitation Mr Parsons produced relevant correspondence from Urbanpoint about demands for payment in advance of contributions to the cost of the major works, which would be placed in a special bank account and not released to the contractor without prior approval from the surveyor. He argued that his part-payment of £8 500 in May 2008 was made in respect of these major works and accepted as such by Urbanpoint, which paid the cheque into this special account. It had no authority to remove funds and set them off against other alleged debts, especially those which are now statute barred.
26. Mr Capstick of Urbanpoint assisted by giving evidence to confirm what was set out in the various documents and by answering questions from the respondent.
27. For the applicant it was said that following the previous tribunal decision there had been a proper consultation exercise leading to two contractors tendering. The

contract was awarded to the lower bidder (the respondent's preference) but when a group of three flats enfranchised some adjustments were required. At that stage the winner reconsidered, supposedly due to downsizing of the business, and withdrew in September 2008. As only two of those invited to submit a tender had done so the applicant awarded the revised contract to the second bidder rather than waste further time and effort by embarking on a fresh tender exercise. As at practical completion the applicant still held a retention and, as the contractor is no longer trading, a local firm has been engaged to complete snagging works.

28. Although the previous tribunal had made its own rough assessment how the cost of work to the structure and exterior should be apportioned between Dormy House and Highwayman Court the surveyor, Mr Lewicki, had actually carried out an item by item analysis of how the cost should be divided and the outcome was slightly different – increasing the burden falling on Highwayman Court from 32% to 36%. Service charge costs were calculated on this revised basis.
29. On insurance Mr Davies pointed to the specialist nature of the insurance cover required, observing that the Norwich Union estimate which the respondent relied upon was subject no doubt to disclosure of the claims history, which in this case was significant. A schedule of claims made, some of which were paid and others not pursued, appears at [171]. Insurance is placed with AXA, but the broker regularly tests the market.
30. On limitation, having now seen the documents disclosed by the respondent (but which Urbanpoint should have had in its own files), he now agreed that the sum of £8 500 was physically put in the special major works account.
31. Two further matters were explored at the hearing. One was very properly raised by Mr Davies and the other by the tribunal :
 - a. On page [113] the survey fees apportioned between Highwayman Court and Dormy House were incorrectly calculated. That for Highwayman was not £1 342.36 plus VAT but should have been £2 684.76. The figure for Dormy House should therefore be reduced by £1 342.24.
 - b. At [234] is an invoice raised by the surveyor, Mr Lewicki, (then trading as Alderman Stone) dated 9th August 2010. In the bottom right hand corner is an office stamp suggesting that it may have been processed in November 2012 but not paid until 20th January 2013. On [65] the service charge statement for the year ending 31st December 2012 shows this as a cost referable to that year. It clearly was not. Did section 20B apply?

Discussion and findings

32. The general tenor of the respondent's complaints, and why he had declined to pay anything by way of service charges since his part-payment of £8 500 in 2008, was that he was deeply suspicious of the decision to engage APD as contractor when it was newly formed but seemed linked to another entity known as Angliatron, that the quality of its work could not be relied upon (as was – he said – proved to be the case). He also disputed the calculations used by Urbanpoint, relying upon those mentioned in the earlier tribunal decision instead – especially with regard to a 50% discounting of the insurance premium on that occasion.
33. The tribunal is satisfied that the major works consultation was conducted just as

required by the previous tribunal (which had granted a partial dispensation). It was unfortunate that, perhaps due to requests for information and adjustments following the enfranchisement of a discrete part of the Dormy House site – but perhaps more so due to the downturn in the economy and banks pulling in credit in 2008, Blythe & Sons decided to downsize and pull out of the contract. As only two contractors had bid for the work originally what would be the point of putting the work out to tender yet again? Although as matters have turned out the new contractor's work did suffer from some quality issues there was a sufficient retention to enable the surveyor to engage a local contractor to remedy the snagging items.

34. The tribunal therefore allows the cost of the major works, subject to the matters mentioned in paragraph 31 above. The tribunal is satisfied that the surveyor's invoice would have been delivered to Urbanpoint shortly after the date on it, in August 2010, and not in late 2012. The 18 month rule in section 20B therefore applies and this item is not recoverable. These adjustments reduce the overall cost by £1 342.24 and £1 152.68 respectively.
35. On the subject of buildings insurance the courts grant landlords considerable discretion to manage their estates by selecting a single insurer and insurance date, etc. All that is required is that the landlord can demonstrate that cover was obtained at normal insurance market rates and that regular market testing takes place. It is possible for tenants to mount a successful challenge, but only with good evidence. The challenge in this case does not get off the ground.
36. The challenge to the repairs and maintenance element of the service charge does not come up to muster either. The invoices shown to the tribunal are for items that are in the nature of maintenance. They are not part of the major works.
37. Where the respondent does succeed, however, is on the issue of limitation. In this respect the applicant, through its managing agent Urbanpoint, is very much the author of its own misfortune. The tribunal does not condone the refusal by the respondent to pay anything in respect of service charges since May 2008, when he paid around half of the invoices for major works sent to him during the previous August and September, but it is the applicant that has sat on its hands.
38. The tribunal is satisfied that the applicant encouraged the respondent to pay his share of the money required for the major works into a dedicated account opened in advance for the purpose in April 2007 [346]. Its correspondence in July 2007 [378–379] and August [380–381] confirmed that money placed in that account would be paid out to the major works contractor only against evidence that the surveyor was satisfied and had issued a certificate to that effect. Although it was not until many months later that Mr Parsons forwarded a cheque for £8 500 the applicant placed the funds into the major works account on 20th May 2008 [337].
39. It is therefore incorrect for Mr Davies to argue that the £8 500 had not been appropriated by the debtor or the creditor to that purpose, so that the creditor could later be heard to say that it had appropriated the money to debts that would otherwise be statute barred. It was clear to both parties that the money was paid for a particular purpose and it was accepted as such at the time.

40. The net result is that the pre-2007 debts are not recoverable, and the £8 500 is to be set off against the balance (after also deducting the two items mentioned in paragraphs 31 and 34 above. The net sum payable by way of service charge is therefore £14 223.61, as explained in the schedule below.
41. The tribunal suspects that the minor matter of £27.33 ground rent arrears will be resolved by agreement, leaving only the issues of interest, costs and time for payment of the judgment debt to be dealt with by the County Court.

Dated 9th July 2014

Graham Sinclair

Graham Sinclair
Tribunal Judge

SCHEDULE – AMOUNT PAYABLE

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