



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

Case Reference : **CHI/45UH/LSC/2015/0028**

Property : **Flat 3, 83 Portland Road, Worthing,
BN11 1QG**

Applicant : **Mrs Janet Rose Denyer**

Representative : **-**

Respondent : **Mrs Maureen Napper**

Representative : **Oyster Estates UK Ltd**

Type of Application : **Service Charges : Sections 27A and
20C of the Landlord and Tenant Act
1985 ("the 1985 Act")**

Tribunal Member : **Judge P R Boardman**

**Date and venue of
Hearing** : **Decided on the papers**

Date of Decision : **28 July 2015**

DECISION

Introduction

1. This application is for the Tribunal to decide whether the following items are payable by way of service charge for the year 24 June 2014 to 23 June 2015 :
 - a. major works : £57000 : the Applicant stated that the managing agents, Oyster Estates, had arrived at this figure before seeking the three estimates; all three estimates were less than £50000; the preferred estimate was £47024.76, including £2500 for contingencies and VAT; it also included £702 (£585 plus VAT) for removing and refixing radiators in her flat, but there were no such radiators in existence
 - b. replacement windows : £9000 : the Applicant stated that the actual estimate was £7500
 - c. professional fees : £13068 : the Applicant stated that this was based on a percentage of the major works; however, as the actual estimates were much lower than the £57000, the fees would be lower too
2. The Applicant has also applied for an order under section 20C of the 1985 Act that costs incurred by the Respondent in connection with these proceedings should not be treated as relevant costs to be taken into account in determining the amount of any service charge payable by the Applicant. The grounds for the application were that the managing agents had been unreasonable in wanting an overpayment of approximately £3000 a leaseholder. The repair costs were already exorbitant. They were based on an estimation of costs before seeking estimates. The demand should be for the actual estimated amount. The agents wanted to write off an amount embezzled by a previous managing agent. The freeholder, not the leaseholders, should bear that loss
3. The Applicant stated that the building was a grade 2 listed house, with four flats, one on each floor. Flat 3 was on the second floor
4. The Tribunal has decided the application on the papers before it, without an oral hearing, pursuant to rule 31 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 ("the 2013 Rules"), and the Tribunal's directions dated 1 May 2015, neither party having requested a hearing in the meantime
5. The Tribunal has decided that it is not necessary for the Tribunal to inspect the property in view of the nature of this application

Documents

6. The documents before the Tribunal are contained in a bundle of papers comprising a written statement by Oyster Estates, paginated as A to H, and further papers paginated as 1 to 252 as listed in a table of contents paginated as I to L
7. References in this decision to page letters and numbers are to the page letters and numbers in the bundle

The statement by Oyster Estates (pages A to H)

8. Oyster Estates stated that the Respondent had appointed them to manage the building on 16 May 2013
9. In about March or April 2014, at the request of a leaseholder, Oyster Estates inspected cracking that had appeared. They engaged Future Management & Construction, an Oyster Estates approved contractor, to investigate and provide an estimate for decoration and repair. As a result of concerns about structural stability, they asked Philip Goacher Associates, structural engineers for advice, and, following their initial advice, for a report and for a schedule of works to enable them to obtain competitive tenders
10. On 16 July 2014 Oyster Estates issued a stage-one consultation notice under section 20 of the 1985 Act
11. Mrs Denyer submitted written observations in response, but only in relation to the possibility of making an insurance claim. She did not raise concerns about the proposed work and did not nominate a contractor to provide a tender
12. On 26 September 2014 Philip Goacher Associates submitted a schedule of works. To facilitate the structural works it was necessary to replace the windows, as it was unlikely to be able to reinstall them, although under the lease the replacement of windows was the responsibility of leaseholders
13. On 29 October 2014 Philip Goacher Associates issued a tender invitation package, including a revised schedule of works, and advised that it would be necessary to undertake opening up works
14. On 11 November 2014 Oyster Estates received from Future Management & Construction pre-tender estimated figures for the proposed works to enable Oyster Estates to make an informed decision about the amount of the pending service charge demand, including professional fees
15. On 4 December 2014 Oyster Estates issued a service charge demand for the first half of the period 24 June 2014 to 23 June 2015, which included cyclical running costs and the estimated figures for the major works
16. On 5 January 2015 Oyster Estates issued a service charge for the second

half of that period

17. On 3 February 2015, having received competitive tenders from Philip Gocher Associates, Oyster Estates issued a stage-two consultation notice under section 20 of the 1985 Act with a statement of estimates
18. On 16 April 2015 Mrs Denyer made this application to the Tribunal
19. On 30 April 2015 Adur & Worthing Council stated that the building was a listed building, that listed building consent would be required, and that a planning enforcement notice had been served in relation to a replacement plastic window that had been installed to the ground floor flat
20. Oyster Estates agreed with Mrs Denyer that
 - a. they had arrived at the figure of £57000 for major works before seeking the three estimates
 - b. all three estimates were less than £50000
 - c. the preferred estimate was for £47024.76 including £2500 for contingencies and VAT
 - d. they had allowed £9000 for replacement windows, whereas the actual estimate was for £7500
21. Oyster Estates had made every effort to be reasonable and transparent in trying to forecast the costs of a particularly problematic major works proposal, and considered it unwarranted and unreasonable to veto the Respondent's costs associated with the application
22. Oyster Estates had acted within the constraints of the lease and in accordance with leasehold legislation. They had arrived at a budget for the major works following advice from an approved contractor familiar with the building. They had then included the figures in an estimated service charge, having regard to the reserve provisions in the lease
23. The cost comparison chart at page H showed that the initial amount included in the service charge was indeed too high. Although this had been Oyster Estates' intention, they had never intended the difference to be so much. However, it was preferable for actual costs to be less than forecast. Also, there was a potential for additional costs because of the requirement for further exposure during the construction phase, the fact that the building was a listed building, and "cost creep" to the tenders following the protracted delay in awarding the contract
24. Oyster Estates would refund any surplus to leaseholders as prescribed by the lease
25. Oyster Estates were awaiting clarification from the contract administrator/contractor about anomalies within the schedule of works about removal and reinstatement of radiators, and whether, perhaps, there had been confusion over alternative heat source provision. However, that was a point of fact, and Oyster Estates would clarify it at their pre-

construction meeting between the contract administrator and the contractor

26. When planning any major works, Oyster Estates always applied a percentage to estimate the approximate cost of the professional team, depending on the complexity and degree of involvement forecast for the project. However, those projections were only ever an estimate, and chargeable fees were based on actual time spent and hourly rates as defined in the management agreement or terms of engagement agreed prior to instruction
27. It was necessary to collect for the proposed major works in the service charge budget for 2014/15. At that time it was possible to source a budget only from the contractor who had assisted the surveyor in exposing the faults during the survey. Oyster Estates marginally inflated those estimated costs intentionally to ensure that there would be sufficient funding for the project, as the lease did not provide for extraordinary demands (emergency one-off payments). However, paragraph 6 of the fifth schedule to the lease did provide for a reserve fund for items which were not of a regular recurrent annual nature, and it was on that basis that Oyster Estates had prepared the service charge estimated annual budget. However, if it transpired that there were to be significant excess of funds following the collection of competitive tenders then Oyster Estates would process this balancing charge surplus by refunding the leaseholders in accordance with clause 3(2)(ii)(b) of the lease
28. Oyster Estates were not at liberty to award the contract and commence the works without holding sufficient funding to see the contract through to completion. Oyster Estates considered the actions taken to be the best option to resolve the serious issues at the building
29. The provisions of the lease (pages 206 to 237) upon which the Respondent relied included the following :

Clause 3 [Lessee's covenants]

(2)(i) *Contribute and pay to the Lessor as a maintenance and service charge (hereinafter called "the service charge") twenty five per cent of the annual costs expenses and outgoings incurred by the Lessor in complying with the obligations contained in the fourth schedule hereto.....*

(2)(ii)(a) *On the twenty-fourth day of June and the twenty-fifth day of December in each year the Lessee shall pay to the Lessor or its agents in advance.....such other sum.....as the Managing Agents shall specify at their discretion to be a fair and reasonable interim payment on account of the Lessee's liability.....*

(2)(ii)(b) *On or as soon as possible after the twenty-fourth of June in each year the respective annual costs expenses and outgoings of the*

matters referred to in sub-clause (i) of this clause shall be calculated and if the Lessee's share of such annual costs expenses and outgoings under the provisions hereinbefore contained shall fall short of or exceed the aggregate of the sums paid by him on account of his contribution the Lessee shall forthwith pay to or shall be refunded by the Lessor the amount of such shortfall or excess as the case may be.....

Clause 5

The Lessor subject to the contribution and payment by the Lessee of the service charge hereby covenants with the Lessee as follows :

(a) To observe and perform the stipulations and obligations on its part set out on the fourth and fifth schedules

Clause 7(6)(b)

Without prejudice to the covenants on its part contained in clause 5(a) hereof the Lessor shall not in any circumstances whatsoever be liable to pay for or contribute to the cost of repair or maintenance of the Flat or the Building out of its own monies.....

The fourth schedule : Lessor's obligations

Paragraph 3

To keep the main structural parts of the Building.....including the roof roof timbers main walls and external parts thereof and the foundations thereunder the balconies and garden walls.....in good and tenatable repair and condition.....

Paragraph 8

To employ such persons as shall be reasonably necessary for the due performance of the covenants on its part in this schedule contained and for the purposes of management of the Building

The fifth schedule : expenses and matters in respect of which the Lessee is to contribute the proportion of twenty-five per cent

Paragraph 1

The expenses of maintaining repairing and redecorating and renewing.....

(a) The main structure of the Building and in particular the foundations external walls roof balustrading garden walls railings brickwork.....

Paragraph 4(a)

Reasonable fees of the Lessor's Managing Agents for the collection of service charges and general management of the Building (but not including the cost of collecting rents)

Paragraph 6

Such sums as the Lessor's Managing Agents or Surveyors shall reasonably consider desirable to be retained by the Lessor by way of a reserve fund as reasonable provision for such of the costs expenses outgoings and other matters mentioned or referred to in this schedule as are not of a regular recurrent annual nature

Proviso

.....that the Lessor will use its best endeavours to maintain the annual maintenance cost at the lowest reasonable figure consistent with the due performance and observation of its obligations herein as and when the Lessor or its Managing Agents for the time being shall consider such performance and observance to be reasonably necessary

Mrs Denyer's response dated 11 June 2015 (pages 245 to 248)

30. Mrs Denyer referred to the issues about the previous managing agents, and set out her view that it was the responsibility of the Respondent to replace money said to have been taken from the maintenance fund by the previous managing agent
31. Mrs Denyer stated that she had not raised concerns about the proposed work content and had not nominated any contractors because Oyster Estates had given no hint at all at that stage about how much work and cost was involved
32. Mrs Denyer stated she had paid £11556 on 4 January 2015 in relation to the service charge demand issued on 4 December 2014 in relation to the period 24 June 2014 to 23 June 2015. On the following day, 5 January 2015, Oyster Estates sent out a demand for a further £11556. She spoke to Oyster Estates, who said that the estimates had still not come in, but that, because of the element of competition, they could be lower than the amount being requested
33. Mrs Denyer received the statement of estimates on 4 February 2015. The amounts quoted were far less than the amount being demanded by Oyster Estates. She rang Oyster Estates to ask if they were going to reduce the amount demanded. They said they were not, and would not be returning any overpayments to the leaseholders, but would hold them as credit against future payments. Mrs Denyer did not agree with this. She would

have had to borrow the money to pay the second demand and pay credit charges, when Oyster Estates would have been holding the money against future debts

34. Mrs Denyer considered the attitude of Oyster Estates to be unreasonable, and did not pay the second demand
35. In addition, there was the mistake in the costing for Flat 3 about removing and refitting water filled radiators, of which Flat 3 had none. That would reduce the estimate by a further £702 including VAT
36. Oyster Estates had now billed her for late payment charges, which she wanted removed
37. If Oyster Estates had acted reasonably and, as requested, had reduced the second demand to reflect the actual anticipated cost, there would have been no need for Mrs Denyer to apply to the Tribunal. The cost should therefore be borne by the Respondent
38. So far as Mrs Denyer was aware, she was the only one of the leaseholders to have paid anything towards the service charges demanded

Response by Oyster Estates (pages 249 to 252)

39. Oyster Estates commented on the question of the money said to have been taken from the maintenance fund by the previous managing agent, but expressed the view that the Tribunal was not the correct forum for this issue
40. Oyster Estates had attached the report from Philip Goacher Associates to the stage-one consultation notice under section 20 of the 1985 Act, and were of the opinion that it was clear evidence that the proposed works would be onerous and expensive
41. Oyster Estates regretted that there was such a delay in sending the service charge demand for the first half of the period 24 June 2014 to 23 June 2015, so that the demand for the second half year arrived so soon after the first. However, they had had to assess and include all expected service charge expenditure, as the lease did not permit extraordinary one-off demands, and, because of problems with access to the flats, there were delays in the preparation of the schedule of works and specification, delays in going to tender, and delays in the contractors being able to tender. Oyster Estates did not receive the budget estimates until about 11 November 2014
42. Oyster Estates had not been in a position to wait for the tenders to be returned before issuing the demand for the second half year. The lease did not permit the second half of the service charge to be adjusted to suit fluctuations in expenditure. However, the lease did facilitate surplus or deficit payments at the end of the period on production of the accounts

43. Unfortunately, they could not administer the lease or manage the building based on ability to pay
44. There were "various levels of exposure to be undertaken", and the potential to identify further defects remained until they had been carried out
45. Oyster Estates apologised for the error about the water-filled radiators, caused by an incorrect assumption made by the structural engineer
46. Oyster Estates would remove the administration fee as a gesture of goodwill, as Mrs Denyer had paid the first half of the service charge and had disputed the remainder
47. The lease did not provide for a reduction in the second half payment of the service charge. Oyster Estates believed that it was unreasonable for the Respondent to bear the cost of the application to the Tribunal, because Mrs Denyer did not comprehend the constraints of the lease
48. Both Mrs Denyer and Oyster Estates were bound by the terms of the lease, and Oyster Estates were "conducting credit control" on all leaseholders who were currently in arrears. However, this did not enable Oyster Estates to authorise any deviation from the lease just because of the actions of those other leaseholders

49. The Tribunal's findings

50. The Tribunal makes the following findings
51. The only issue before the Tribunal in respect of which the Tribunal has jurisdiction is the payability of the elements of the 2014 to 2015 service charge relating to the proposed major works
52. In relation to the other matters referred to in the papers :
 - a. the question of the money said to have been taken from the maintenance fund by the previous managing agent is not a matter within the Tribunal's jurisdiction, and is a matter about which Mrs Denyer might consider taking legal advice before deciding whether or not to pursue the matter through the courts
 - b. the question of administration charges is a matter which Mrs Denyer did not mention in her application (which was in any event an application relating to service charges, not administration charges), and is therefore not an issue before the Tribunal; however, and in any event, Oyster Estates have stated that they will remove the administration charges
53. In relation to the payability of the element of the service charge for the service charge year ending on 23 June 2015 relating to the proposed

major works :

- a. Mrs Denyer has not challenged :
 - the nature or extent of the proposed works, except for the radiator item
 - the validity or effectiveness of the consultation procedure carried out under section 20 of the 1985 Act
 - the amount of the recommended tender from Future Management & Construction Limited, namely £47024.76, except in relation to the radiator item
 - the payability of the first service charge demand dated 4 December 2014
- b. Mrs Denyer has however challenged the reasonableness of the second service charge demand dated 5 January 2015, on the basis that the amount should have been reduced to take account of the tenders sent with Oyster Estates' letter dated 3 February 2015, and in particular the recommended tender from Future Management & Construction Limited
- c. Mrs Denyer's challenge relates to the estimated cost of the major works (including the radiator item), of replacement windows, and of professional fees, but she has not challenged the estimated cost of scaffolding

54. Those service charge demands were each for £11526 (pages 134 and 147), and followed a "service charge estimated annual budget" (page 133) sent with a covering letter from Oyster Estates dated 4 December 2014 (pages 131 and 132) which included the following figures :

- a. "major works for front bay elevations, floor joists replacement and reducing future water ingress via roof" £57000
- b. "professional fees forecast for structural engineer, surveyor and contract administrator based on 10% of the probable tender to be selected" £13068
- c. "replacement windows" £9000
- d. "scaffold hire/licence and signage/lighting for duration of major works project and the pre-major works contract" £9000

55. That service charge budget itself followed internal Oyster Estates e-mails as follows :

- a. 10 November 2014 (page 128) : "I have spoken to Pete and said I need budget costs and I would rather he over estimated what was needed"
- b. 11 November 2014 (page 127) : "following your advice from James/Pete :
 - major works £47.5K
 - windows £7.5K
 - scaffold £6K (this assumes project doesn't start until May)all the above are plus VAT, on top will be us and Goacher have worked with these figures for the prospective professional fees and these are identified on the attached spreadsheet, totalling circa £15K"

- c. The e-mail dated 11 November 2014 makes it clear that VAT had to be added to the estimated figures received from "Pete/Dave", and the Tribunal calculates those VAT figures to be as follows :

| | |
|-------------|--------|
| major works | £47500 |
| VAT @ 20% | £9500 |
| total | £57000 |

| | |
|-----------|-------|
| windows | £7500 |
| VAT @ 20% | £1500 |
| total | £9000 |

| | |
|-----------|-------|
| scaffold | £6000 |
| VAT @ 20% | £1200 |
| total | £7200 |

56. The Tribunal accepts the statement by Oyster Estates that the estimated figures received from "Pete/Dave" referred to in the e-mail dated 11 November were from Future Management & Construction, and the Tribunal finds that it was reasonable for Oyster Estates to :

- a. seek from Future Management & Construction, as an Oyster Estates approved contractor, estimated figures, albeit reasonably "over estimated" figures, to enable Oyster Estates to prepare the service charge budget figures for the leaseholders, including Mrs Denyer, and to rely upon those estimated figures when doing so
- b. include in the service charge budget the figures of £57000 for major works and £9000 for windows, being the figures estimated by Future Management & Construction in each respect, including VAT, accordingly
- c. include in the service charge budget the figure of £9000 for scaffolding, being the figure estimated by Future Management & Construction in that respect, including VAT, plus an additional £1800, which the Tribunal finds to be a reasonable addition as a budgeted figure in all the circumstances of this case
- d. include in the service charge budget the figure of £13068 for professional fees, based on 10% of the estimated costs
- e. seek payment from the leaseholders by way of service charge in advance of the carrying out of the proposed works as a reserve fund under paragraph 6 of the fifth schedule to the lease
- f. demand from Mrs Denyer the sum of £11526 for service charge for each half of the service charge year ending on 23 June 2015, accordingly

57. However, the subsequent tenders were only for the following sums :

- a. South Coast :

| | |
|--------------------------|-----------|
| major works (page 166) : | £41204.40 |
| VAT (page 166) : | £8240.88 |
| total : | £49445.28 |

64. The Tribunal finds that it is not appropriate to make a further deduction in respect of the cost of the proposed window works, because, although the sum of £7500 in the tender from Future Management & Construction is £1500 less than the £9000 in the service charge budget in that respect, it is clear from the wording of item 3.10 in their tender ("Allow here extra over figure, not to be included in total price, for replacement timber windows.....) that VAT should be added to the sum of £7500. £7500 plus VAT at 20% amounts to £9000

65. Section 20C of the 1985 Act

66. The Tribunal finds that the Applicant has substantially succeeded in her application to the Tribunal, and that it was reasonable to make the application, and, having considered all the circumstances of this case in the round, the Tribunal orders, under section 20C of the 1985 Act, that costs incurred by the Respondent in connection with these proceedings are not to be taken into account in determining the amount of any service charge payable by Mrs Denyer

67. Appeals

68. A person wishing to appeal against this decision must seek permission to do so by making written application to the First-tier Tribunal at the Regional office which has been dealing with the case

69. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision

70. If the person wishing to appeal does not comply with the 28-day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28-day time limit; the Tribunal will then decide whether to extend time or not to admit the application for permission to appeal

71. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result which the person is seeking

Dated 28 July 2015

.....
Judge P R Boardman