11642

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/00AE/LSC/2015/0469**
Property	:	**Flat 6, 1-24 New Crescent Yard, Acton Lane, London NW10 8SJ**
Applicant	:	**New Crescent Yard (Management) Limited**
Representative	:	**Mr Graham Jones** **Ms Agata Ribik** **Both with Michael Richards & Co – Managing Agent**
Respondent	:	**Mr Carlos Martyn Burgos-Bryant**
Representative	:	**Mr Carlos Burgos – Father** **Ms Sandra Ospina - Girl friend**
Type of Application	:	**Court referral – section 27A Landlord and Tenant Act 1985 – determination of service charges payable**
Tribunal Members	:	**Judge John Hewitt** **Mrs Evelyn Flint DMS FRICS IRRV**
Date and venue of Hearing	:	**18 March 2016** **10 Alfred Place, London WC1E 7LR**
Date of Decision	:	**13 April 2016**

DECISION

Decisions of the tribunal

1. The tribunal determines that:

   1.1 The service charges payable by the respondent to the applicant in respect of the year 2014/15 is £1,359.60 as shown in column 6 on Appendix A attached hereto;

   1.2 The amount of the half-yearly instalment on account payable by the respondent to the applicant on 25 March 2015 was £837.88 made up as shown in column 9 on Appendix A attached hereto;

   1.3 As a consequence of adjustments to the respondents account made by this tribunal and by virtue of payments made by the respondent to the applicant generally on account, the whole of the arrears of service charge claimed by the applicant in the court proceedings have been paid in full – details are set out in paragraph 42 below;

   1.4 It will not make an order pursuant to section 20C Landlord and Tenant Act 1985 – details are set out in paragraphs 45-49 below;

   1.5 The court file and this decision shall now be sent to the County Court at Willesden for the court to determine the outstanding issues which appear to be:

      1. The claim to statutory interest. (Whilst this is a matter for the discretion of the court it may be of assistance if we draw attention to the terms of the lease which make contractual provision for payment of interest – see paragraph 19 below.)

      2. The court fee of £185.00

      3. Legal Representative's costs of £80.00

2. The reasons for our decisions are set out below.

NB Later reference in this Decision to a number in square brackets ([ ]) is a reference to the page number of the hearing file provided to us for use at the hearing. Prefix 'A' = applicant's file; Prefix 'R' = respondent's file

Procedural background

3. The applicant is the registered proprietor of the freehold of the development known as New Crescent Yard.

   The development comprises a number of self-contained flats which have been sold off on long leases.

The members of the applicant comprise most, if not all, of the long lessees (including the respondent) of the flats within the development.

The long leases oblige the landlord to insure the development, keep it in repair and to provide a number of services. The leases impose an obligation on the lessee to make a contribution to the costs incurred by the landlord in respect of those services mentioned in the fourth schedule to the leases.

On 8 November 2001 the then landlord granted the respondent (Mr Burgos-Bryant) a lease of flat 6 for a term of 125 years starting on 29 September 2000 at a ground rent of £100 per year and an insurance rent of 4.167% of the sums spent by the landlord in insuring the estate and the building and on the other terms and conditions therein set out.

Further details of the lease will be set out shortly.

4. On 11 May 2015 the applicant commenced court proceedings against Mr Burgos-Bryant – Claim No. B1QZ26C5 [A15] and claimed:

Arrears of service charges	£3,938.56
Interest pursuant to section 69 County Courts Act 1984	£ 182.88
Further such interest at £0.82 per day	
Court fee	£ 185.00
Legal Representative's costs	£ 80.00
Total	£4,386.44

5. A defence was filed.

6. By an order made by District Judge Middleton-Roy sitting at the County Court at Willesden on 29 September and drawn 26 October 2015 [A22] the claim was stayed and the action was transferred to this tribunal for: *"determination of the reasonableness of the service charges."*

7. In addition to the above Mr Burgos-Bryant has made an application pursuant to section 20C Landlord and Tenant Act 1985 in respect of any costs which the applicant might incur in connection with these proceedings.

8. Directions were given on 10 December 2015 following an oral case management conference attended by Mr Jones on behalf of the applicant and Mr Burgos-Bryant on behalf of himself.

On that occasion and in agreement with the parties the hearing was set for 18 March 2016.

Pursuant to those directions the parties have provided us with a comprehensive Scott Schedule setting out their respective contentions on the service charges in issue plus detailed statements and copies of supporting documents. The applicant's hearing file runs to 190 pages. Mr Burgos-Bryant's hearing file runs to a further 230 pages. Both files are helpfully illustrated with colour photographs.

9. It is clear that unfortunately Mr Burgos-Bryant is in very poor health and his conditions include chronic fatigue syndrome (ME) which causes him to suffer recurrent episodes of muscle pain and fatigue which in turn causes him have difficulties in completing tasks according to deadlines – see Mr Burgos-Bryant letter to Mr Jones dated 14 January 2016 and the note from Dr Patel dated 15 January 2016. The time limits set out in the directions were varied and extensions of time were granted in order to accommodate Mr Burgos-Bryant's medical conditions.

10. Shortly prior to the hearing Mr Burgos-Bryant made a written application to postpone the hearing due to his ill-health. No supporting medical evidence was filed with the application. The application was refused by the Regional Judge but Mr Burgos-Bryant was informed that it was open to him to renew the application at the commencement of the hearing.

11. The reference came on for hearing before us at 10:00 on 18 March 2016.

The applicant was represented by Mr Jones and Ms Ribik from Michael Richards & Co, the managing agents. Mr Jones is a building surveyor and the property manager. Ms Ribik is the financial controller.

Mr Burgos-Bryant did not attend in person but was represented by his father, Mr Burgos, and by his girl-friend, Ms Ospina.

12. The application for a postponement of the hearing was renewed. Mr Burgos handed in some documents relating to Mr Burgos-Bryant's medical conditions. Some of this material was dated but it served to show that Mr Burgos-Bryant condition was long standing and was not going to improve significantly any time soon. The evidence suggests that unfortunately Mr Burgos-Bryant will never fully recover from the condition; there will be days when he is affected by it to a serious extent; tempered by days when he can manage or cope with it to a greater or lesser extent. Evidently the condition manifests itself by severe back spasm due to degenerative osteoporosis of the back.

Mr Burgos hoped that if a postponement of 21 days was granted his son might then be well enough to attend a hearing.

13. The application was opposed by Mr Jones. He said that he did not wish to appear unreasonable in view of the medical recurrence of a chronic condition. The applicant had spent time and resources in preparation for the hearing which would have to be repeated if there was a postponement. The issues were straightforward and clearly set out in the papers.

14. We considered the application carefully and decided to refuse it. On balance we preferred the submissions made on behalf of the applicant, which is a leaseholder controlled company and which is not a substantial commercial landlord. Such costs as the applicant incurs have to be paid for by the lessees either by way of service charges or by way of cash calls on them as members of the company. The proceedings to recover service charges were issued as long ago as May 2015.

15. We were sympathetic to the condition of Mr Burgos-Bryant but concluded we have to take into account that his condition is permanent and progressive. There is no prospect of a significant improvement in the short term and whilst Mr Burgos-Bryant does have good days when he would be able to travel to the tribunal and take part in the hearing there will always be a risk of a sharp and unexpected deterioration which might lead to another last minute inability on the part of Mr Burgos-Bryant to attend. Whilst Mr Burgos had the hope that his son would able to attend on the next occasion; that was just a hope.

16. In arriving at our decision we had regard to the issues in the case and the substantial and detailed documents and photographs filed by Mr Burgos-Bryant. The tribunal is an expert tribunal and is entitled to exercise an inquisitorial role in appropriate and proportional circumstances. We considered that we would be able to give careful consideration to the issues which Mr Burgos-Bryant wished to ventilate.

17. We also took into account rule 34 which enables a tribunal to proceed with the hearing in the absence of a party if satisfied that the party has been notified of the hearing and that it is in the interests of justice to do so.

18. Having informed the parties of our decision we adjourned for a short while to enable Mr Burgos and Ms Ospina to refresh themselves on the papers prepared by Mr Burgos-Bryant and to enable them to speak with him on the telephone which they wished to do.

The lease

19. The lease is dated 8 November 2001 and was granted by London & Brent Developments Limited as landlord to Mr Burgos-Bryant as tenant for a term of 125 years starting on 29 September 2000. A copy is at [A30].

    A ground rent of £100 pa is defined as the 'basic rent'.

An insurance rent at 4.167% is payable as mentioned in paragraph 3 above.

By clause 3.1 the tenant covenants to pay the basic rent by equal half yearly payments in advance on 25 March and 29 September in each year.

By clause 3.2 the tenant covenants to pay the service charge calculated in accordance with the third schedule.

By clause 3.4 the tenant covenant to pay interest on any rent paid more than seven days after it falls due. The interest rate is defined to be four per cent above the published base rate of Barclays Bank Plc compounded on each quarter day.

20. The service charge regime is set out in the third schedule [37].

'Service costs' are defined to mean the amount the landlord spends in carrying out all of the obligations imposed under the lease (save as regards the covenant for quiet enjoyment) and include the cost of borrowing money for that purpose and an appropriate sum as a reserve fund in respect of the matters mentioned in the Fourth Schedule.

'tenant's proportion' is defined to be 4.167%. We were told that that proportion was based on their being 24 flats in the development. Evidently subsequently a 25th flat was added and for a number of years the landlord has adjusted the proportion and seeks recovery of 4% from each lessee. Mr Burgos-Bryant has not made any complaint about that change.

'final service charge' is defined to be the tenant's proportion of the service costs

'interim service charge instalment' is defined to be a half-yearly payment on account of the final service charge. For present purposes that is defined to be one-half of the final service charge on the latest service charge statement. The applicant does not appear to adopt this practice. Instead the landlord prepares an estimate or budget ahead of each the commencement of each service charge period and the two equal half-yearly payments calculated by reference to that budget. We can see why it can be argued that the 'budget' system offers greater flexibility to the benefit of both landlord and tenant and avoids over collection in subsequent years after a year in which major works have been carried out or some other abnormal once-off substantial expenditure incurred. Mr Burgos-Bryant has not made any complaint about that change.

Paragraph 2 provides that landlord must:

(a) keep a detailed account of service costs;
(b) have a service charge statement prepared for each period ending 31 December in each year which must include:
    (i) state the service costs for that period with sufficient particulars to show the amount spent on each major category of expenditure;
    (ii) state the amount of the final service charge;
    (iii) state the total of the interim service charge instalments paid by the tenant;
    (iv) state the amount by which the final service charge exceeds the total of the interim service charge instalments ('negative balance'), or vice versa ('positive balance');
    (v) be certified by a member of the Institute of Chartered Accountants in England and Wales that it is a fair summary of the service costs and is sufficiently supported by accounts, receipts and other documents which have been produced to him.

We pause to make a couple of observations. The applicant has adopted a service charge period of 1 April to 31 March. Mr Jones was unable to explain how or why this had come about.

The applicant does not issue to the tenant one document which encapsulates all of the information mentioned in paragraph 2(b). Instead it issues a series of documents which when read together appear to capture most if not all of the required information.

Mr Burgos-Bryant has made any complaint about these changes.

Paragraph 3 provides that on each day on which rent is due the tenant is to pay to the landlord an interim service charge instalment. For ease of reference those days are 25 March and 29 September.

Paragraph 4 provides that if a statement shows a positive balance, the landlord will credit that sum to the tenant when giving the statement. If a statement shows a negative balance, the tenant must pay that sum to the landlord within 14 days after being given the statement. Upon enquiry Mr Jones explained to us that the applicant does not follow this procedure. In practice in each of the past few years at year-end there has been a small surplus or balancing credit. This has not been credited to or returned to the tenant, but has instead been credited to the reserve fund.

We can see why this practice may be seen to have mutual benefits to both parties. If the year-end credits had not been made the applicant may have considered it necessary to increase the budget allocation to the reserve fund to compensate. In money terms there is no financial disadvantage to the tenants where the practice is applied to all 25 tenants.

Mr Burgos-Bryant has made any complaint about these changes.

Paragraphs 5 and 6 are not material to what we have to determine.

21. The fourth schedule [38] sets out the services to be provided by the landlord. The list is fairly standard for a development of this type and age and includes:
    1. Repair of the roof, main structure and foundations of the building;
    2. Repairing, maintaining cleaning of access ways and sewers, drains and similar installations used in common by the tenants;
    3. Decorating the outside of the building;
    4. Repairing, decorating and furnishing the common parts;
    5. Lighting, maintaining and cleaning the common parts;
    6. Repairing and maintaining services such as lifts and electric or other gates;
    7. Public liability and employer's liability insurance;
    8. Rates and taxes payable on or in respect of the common parts;
    9. Obtaining building insurance valuations from time to time;
    10. Employing managing agents and a surveyor to carry out such services as may be assigned by the landlord or are otherwise imposed by the terms of the lease; and
    11. Keeping accounts of service costs, preparing and rendering service charge statements and retaining accountants to certify those statements.

22. Finally for the sake of good order we record that by clause 4, so far as material to what we have to determine, the landlord covenants to effect buildings insurance, to produce on demand the insurance policy and evidence of payment of the last premium and to provide the services listed in the fourth schedule.

The service charges in issue

23. We attach to this decision marked 'Appendix A' a spreadsheet which captures a good deal of data.

    The blue column (2) is the 2013/14 actual costs. These are not in dispute in these proceedings but are included for comparison purposes.

    The yellow columns (3-7) show the several respective positions in relation to the year ended 31 March 2015.

    The green columns (8-9) show the applicant's budget for 2015/16 and the amounts we have determined are reasonable for the budget for that year.

    Both parties have set out their respective positions in the Scott Schedule. During the course of the hearing Mr Jones supplemented his evidence in response to points put to him by Mr Burgos and/or members of the tribunal.

Notes on Year ended 31 March 2015

24. Cleaning and gardening.

These services are provided by a contractor, Vista Landscape Management Limited (Vista Landscape) which is a company owned or controlled by the chairman of the board of directors of the applicant.

Mr Burgos-Bryant was very critical of the level of service provided and complained that on occasions rubbish and dumped materials were allowed to accumulate and that the development had a scruffy appearance. He provided some photographs to illustrate his point. He also queried why the contract is always placed with Vista Landscape.

Mr Jones said that he had not received complaints about service levels from other tenants. He said that several directors lived on the development and if service levels were not as they should they would let him know quite quickly.

In terms of service level cleaners are on site twice per week, Mondays and Fridays. There are no internal common parts to clean; the upper walkways are external as can be seen in several photographs, e.g [R150-152].

Mr Jones also explained that the contract was first placed with Vista Landscape in April 2009 [A82] and modest price increases had taken place over the years but only to reflect inflation. He further said that those increases had been discussed by and approved by the applicant's board of directors. The original contract sum for cleaning was £6,240.45 + VAT and the sum for horticultural maintenance was £2,624.02 + VAT. Mr Jones was unable to explain how those sums had risen to a total of £12,494 for 2014/15 but was certain they had been approved by the directors, although he did not have to hand any documentary evidence to support that.

Mr Jones acknowledged that it was good property management practice to undertake a periodic competitive tender of all goods or services provided. He said that the applicant had not gone out to competitive tender on these services since the contract was placed in 2009, however he had raised that with directors and had been told they did not wish to go to competitive tender because they were content with the cost and service level provided by Vista Landscape.

In general, we accept and prefer the evidence of Mr Jones on the level of service provided. Photographs can only illustrate a snapshot in time. We infer it is significant that some directors live on site and have little doubt that they would raise shortcomings with Mr Jones.

In these circumstances we find that the costs claimed were reasonably incurred and are reasonable in amount.

Whilst it may only be a matter of perception, we suggest that the applicant may wish to review its relationship with Vista Landscape. Where an influential director of a landlord company is also the owner of a contracting company which provides services to the landlord there is a risk of misunderstanding. Perhaps the more so where the services provided constitute around 30 - 35% of the total annual service charges incurred by the landlord.

Transparency is often essential to ensure everything is above board as it should be.

25. **New planting**

It is not quite clear to us why new planting is not included within the gardening budget head.

Mr Burgos-Bryant complains that £995.52 is not reasonable when contrasted with £662.34 for the previous year.

Mr Jones was not able to explain exactly why more had been spent in 2014/15. He speculated that some shrubs might have been replaced or different plants purchased. He told us that there were a total of 21 planters laid out on the walkways over 3 floors. They are illustrated in a number of photographs, including those at [A62 – 65]. On that basis the average cost over the year was £48 per planter.

This figure struck a chord with the members of the tribunal and we find that the cost was reasonably incurred and is reasonable on amount.

26. **Electronic gates**

Mr Jones acknowledged that the actual expenditure was considerably above budget. He explained that was due to an abnormal number of breakdowns. He said that sets of gates – vehicle and pedestrian – were originally installed some years ago and had become unreliable. When a defect occurred it was essential to have a repair carried out both for security reasons and to enable residents to get in and out as required.

We accept Mr Jones evidence on this issue and find that the expenditure was reasonably incurred and is reasonable in amount.

27. **Lift repairs**

Mr Burgos-Bryant makes two points. The first is that he alleges poor standard of service and the second is that his flat is on the ground floor and he does not use the lift.

As to the first point Mr Jones said it was correct that the lift had been out of action for a while. Evidently the original developer sourced the lift from a Greek supplier and it was not the most robust machinery. The maintenance company found it difficult to obtain spare parts and

to maintain an efficient service. Eventually through a contact of one of the directors a new contractor familiar with the make of lift in question was located and in recent times a much more reliable service has been achieved.

We accept Mr Jones' evidence on this point.

As to Mr Burgos-Bryant second point, whether he uses the lift or not is immaterial. The lease structure is that all lessees share all of the fourth schedule expenditure equally.

We find this expenditure was reasonably incurred and is reasonable in amount.

28. **Lift telephone**

Mr Burgos-Bryant makes the same point about not using the lift. That is immaterial, he is obliged to contribute to the reasonable cost incurred.

Mr Jones explained that the lift is required to have a telephone for use in emergency. The line is supplied by BT who bill the rental cost. It is what it is.

We find this expenditure was reasonably incurred and is reasonable in amount.

29. **Entry phone**

Mr Burgos-Bryant has asserted that it is often not working.

Mr Jones disagreed with that. He said the service is provided by BT and a charge is made subject to the usage and the number of calls made on the system. Again the cost is what it is.

We find this expenditure was reasonably incurred and is reasonable in amount.

30. **Administration costs**

These were challenged by Mr Burgos-Bryant who queried whether the lease provided for payment of them.

The costs were billed by Vista Landscape to the applicant. The 2013/14 invoice was submitted late and two year's worth have been included in the 2014/15 accounts:

2013/14	£1,607.54	[A153]
2014/15	£4,389.86	[A154]

Evidently these are said to be costs incurred by Vista Landscape in operating the applicant as a company. Mr Jones explained that the chairman of the applicant runs the applicant from his office at Vista Landscape.

We were told that some expenses are said to be sums incurred on behalf of the applicant and some costs are said to relate to time spent by employees of Vista Landscape on the applicant's business.

We noted that in both years some specific expenses were remarkably similar, if not identical: some examples include

	2013/14	2014/15
Buzzer replacements	£150.00	£150.00
Courier costs	£ 54.58	£ 54.00
Keys	£105.00	£105.00
Posters	£ 30.11	£ 30.11
Notice boards	£ 10.62	£ 10.62
Photocopy	£ 53.05	£ 53. 06
Car parking	£123.60	£123.60
Telephone costs	£ 79.65	£ 79.65
Ancillary costs	£ 26.55	£ 26.55
Telephone calls	£ 85.95	£ 84.95

Associated with this Mr Jones explained that the applicant had been advised to declare itself a dormant company. That rather surprises us because plainly the applicant is not dormant. It enjoys a ground rental income of around £2,500 per year, it places contracts and it conducts the management of the development, it is pursuing a substantial damages claim against the original developer and/or its insurers and it also undertakes property transactions. For example, in 2006 it proposed to sell off three car parking spaces and sought sealed bids and said it hoped to achieve £18,000 per space. It also stated that it proposed to rent out other spaces [R205].

The applicant has two quite distinct roles. On the one hand it is a property investment company. It owns the freehold of the development known as New Crescent Yard and requires to manage its investment. That is to say the management of its corporate affairs. It must bear the costs of doing that itself.

On the other-hand the applicant is the immediate landlord of the long lessees, it is obliged to provide the services set out in the fourth schedule to the leases and the long lessees are obliged to contribute to the costs incurred by the applicant in doing so.

The long lessees, as lessees, are not obliged to contribute to the costs incurred by the applicant on the conduct of its corporate affairs.

We were informed by Mr Jones that the applicant does not maintain its own bank account from which to transact its corporate business but tends use the service charge account operated by his firm to make payments in connection unrelated to the provision of the fourth schedule services. An example is cited below in paragraph 31. We find this to be an incorrect practice and misuse of the trust funds held by the managing agents.

The applicant ought to have two separate sets of accounts:

The service charge accounts; and
The corporate accounts

The applicant has engaged professional managing agents to deliver the services to be supplied under the fourth schedule and related service charge accounting matters.

There is no evidence before us that the administration costs claimed are in connection with the delivery of services under the fourth schedule. We infer that administration costs claimed all relate to the management of the corporate affairs of the company.

For example, over the two bills submitted there is a claim for letterhead totalling £507.11. In connection with the delivery of the fourth schedule services, all of the correspondence with the lessees is conducted by the managing agents, not by the applicant. The letterhead does not appear to be used in any quantity in respect of delivering the fourth schedule services. Thus for the applicant to get through such a significant quantity of letterhead it must be corresponding with persons on matters that are not service charge related. We infer this is another indicator that the applicant is transacting business and is not dormant.

There is nothing in fourth schedule which concerns the corporate expenditure of the applicant and we find that the applicant is not entitled to pass such expenditure through the service charge.

31. **Legal and professional**

Mr Jones explained to us that the sum claimed £1,983.00 is made up of three items:

£500 sent to solicitors acting on behalf of the applicant on account of costs concerning tidying up the applicant's freehold title and obtaining copies of titles and plans [A155/6];

£1,200 paid to Franklyn Nevard Associates in connection with a planning permission to carry out works on or close to the dividing party fence wall with the adjacent church; and

£6 paid to Land Registry for office copies to follow up recovery of arrears.

As to the £500 paid to the solicitors we find that to be a corporate expense, not a service charge expense for two reasons. First it is not covered by the fourth schedule. Secondly, the costs of a landlord property company tidying up its title or property portfolio is a corporate expense associated with its property investment and is not linked to the provision of services to its lessees. Further the money was sent at the request of a director but no evidence has been produced to show what it was actually used for (if used at all), let alone that it was applied to a fourth schedule service.

On the evidence of Mr Jones we were satisfied that the fees paid to the architects were proper estate management costs associated with repairs and maintenance and thus within the fourth schedule. Similarly, the costs of obtaining office copies from Land Registry fall within the fourth schedule.

For these reasons we have allowed expenditure of £1,206.00.

32. **Reserve fund**

Mr Burgos-Bryant was critical of the demand for £600 pa to the reserve fund. In his objection he appears to assert that the reserve fund was supposed to be funded by the rental of parking spaces. Mr Burgos-Bryant has not provided any evidence to support that assertion.

Mr Jones said he was not aware of rental income from parking spaces and he did not collect such income on behalf of the applicant.

Mr Jones went on to explain that for some years the policy of the applicant is to allocate £600 pa per lessee into the reserve fund. That equates to £15,000 pa in total. As at 31 March 2015 the balance on the reserve fund was £80,489.

Mr Jones said that substantial expenditure on the building is required. The directors hope to recover significant sums from the original developers/insurers but it is uncertain if the claim will be successful. He said the development was carried out poorly with low quality materials and poor workmanship. Now some 15 years on the need for major works has emerged.

We accept the evidence of Mr Jones on this point and find that it was reasonable for the applicant to have allocated £600 to the reserve fund for the year in question.

The budget 2015/16

33. The budget is set out on Appendix A. It can be compared and contrasted with the actual expenditure claimed/allowed in the two prior years, namely 2013/14 and 2014/15.

34. Mr Jones took us carefully through the methodology employed in the preparation of the budget. As can be it is largely based on the budget for the previous year.

35. Mr Jones readily accepted the point raised by Mr Burgos-Bryant that the amount allowed in respect of Electricity was unrealistically high. We have reduced that item from £1,530 down to £250.

36. We have also deleted the amount entered in respect of administration costs. We find these are not payable by the lessees for the reasons set put in paragraph 30 above.

37. The remaining items we find to be reasonable in amount for a budget. Inevitably the sums in a budget can only be a guess, even though that might be an educated guess. We endorse as being reasonable the general policy of the applicant that at the end of the year the total of actual expenditure should be slightly less than the total of the budget.

The consequences of the above determinations

38. We have found that for the year 2014/15 Mr Burgos-Bryant has been billed £1,828.00 on account. His actual liability is £1,259.60, a positive balance £468.40. If all 25 lessees were entitled to such a positive balance and if that balance for all 25 lessees was transferred into the reserve fund then, in cash terms in a broad sense justice will have been done. However, we are only concerned with Mr Burgos-Bryant's account. We do not know what action, if any, the applicant will take as regards the other 24 lessees.

39. In these circumstances we find that the just and equitable outcome is that Mr Burgos-Bryant account should be credited with £468.40.

40. As regards the budget for 2015/16, we have found that a reasonable budget would be £41,894.00. The lessees' share at 4% each equals £1675.76 which is payable by way of two equal instalments on account of £837.88. At the time of the issue of the court proceedings Mr Burgos-Bryant' account had been debited with one half-yearly instalment of £940.00. That is a difference of £102.12. For the same reasons as set out above we find that that Mr Burgos-Bryant' account should be credited with that £102.12.

41. A helpful up to date version of Mr Burgos-Bryant' cash account with the applicant is at [A164/5].

In the court proceedings the applicant claimed £3,938.56 alleged arrears. At the hearing Ms Ribik agreed that in error an administration charge of £180 had been included in that sum and should thus be removed.

Since the issue of the court proceedings Mr Burgos-Bryant has made a number of payments generally on account of his arrears. Mr Ribik said that the policy was to allocate such payments to the oldest debits on the account. Thus these payments were applied to the account to reduce the amount claimed in the court proceedings. As at 18 February 2016 (the last sum received prior to the hearing) those payments totalled £3,340.60. Details are set out on [A165].

42. Thus, in the light of findings the amount of arrears claimed in the court proceedings should be adjusted as follows:

Arrears claimed		£3,938.56
Less:		
Admin fee included in error	£ 180.00	
Credit for 2014/15 actuals	£ 468.40	
Credit for 2015/16 budget	£ 102.12	
Cash payments	£3,340.60	£4,091.12
Credit balance		**£ 152.56**

43. Two are two further points the court and the parties will wish to bear in mind.

The first is that since the court proceedings were issued further sums will have fallen due for payment, e.g. 29 September 2015 and 25 March 2016 half-yearly contributions to service charges and the reserve fund.

The second is that since 18 February 2016 Mr Burgos-Bryant may have made further payments generally on account.

44. We hope that given the detailed information we have recorded above it should not prove too difficult for the parties to agree an up to date reconciliation of the account.

The section 20C application

45. We gave careful consideration to the application. It was opposed by Mr Jones. Mr Jones said that the applicant will incur costs in connection with these proceedings. He said they would amount to £2,940 inclusive of VAT. A breakdown is at [A79]. Mr Jones submitted that the costs were recoverable through the service charge and relied upon paragraph 10 of the fourth schedule. That paragraph reads:

"10. Employing managing agents and a surveyor to carry out such duties as from time to time may be assigned to him by the Landlord or are otherwise imposed by the terms of this Lease"

46. It is usually essential for a landlord to collect service charges and to be in funds in order that it can function properly and insure the development and provide the services it is obliged to provide and which

the lessees, or most of them, want provided. That is generally more critical where the landlord is owned and controlled by the lessees and where such a landlord may not have ready access to other funds or assets. In some circumstances a lessee controlled company may only have access to the service charge income.

47. The lease falls to be construed as at the time it was granted. At that time the landlord was a commercial developer. Whether or not it was a substantial concern we do not know.

Now the landlord is lessee controlled. It appears to enjoy a ground rent income and to have some property rights and interests. We do not know the scale of them, but we infer they may be modest.

The reality is that costs have been incurred and the applicant has to pay them. If they are not paid for through the service charge, the applicant will have to dip into its ground rent income or such other reserves it may have (but not the service charge reserve fund). If it does so Mr Burgos-Bryant's interest in such funds as a member of the company will be reduced, probably in the same or very similar proportion of his contribution to the service charge. If the applicant does not have the funds available to discharge the costs incurred it may be entitled to make a cash call on members. If it cannot do that it may be at risk of insolvency, which is not an outcome advantageous to anyone.

Thus, in effect, one way or another Mr Burgos-Bryant will end up making a contribution to the costs incurred on these proceedings.

48. We find that paragraph 10 of the fourth schedule of the lease properly construed entitles the landlord to instruct its managing agents to represent it in proceedings such as these. Thus the reasonable and proper costs incurred with such representation are recoverable through the service charge. We stress that such costs are recoverable through the service charge (whereby each lessee will pay their 4% share) and not separately from Mr Burgos-Bryant directly. We also stress that we make no finding as to the reasonableness of the amount of the costs incurred or to be incurred as indicated by Mr Jones. If such costs are included in a future service charge statement it will be open to Mr Burgos-Bryant (and any other lessee) to challenge them as to the amount in the usual way.

49. For the reasons set out above we decline to make an order on the section 20C application.

John Hewitt
Judge John Hewitt
13 April 2016

ANNEX - RIGHTS OF APPEAL

1. If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber) then a written application for permission must be made to the First-tier Tribunal at the Regional office which has been dealing with the case.

2. The application for permission to appeal must arrive at the Regional office within 28 days after the Tribunal sends written reasons for the decision to the person making the application.

3. If the application is not made within the 28 day time limit, such application must include a request for an extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.

4. The application for permission to appeal must identify the decision of the Tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal, and state the result the party making the application is seeking.