



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

Case Reference : CHI/00ML/LSC/2016/0081

Property : Flat 3, 43 Grand Parade, Brighton
BN2 9QA

Applicant : Mario Matthew Alexander

Representative : Elza Alexander

Respondent : Powell & Co Investment Ltd

Representative : Sean Powell

Type of Application : Determination of service charges:
section 27A Landlord and Tenant Act
1985

Tribunal Members : Judge E Morrison
Mr N I Robinson FRICS

**Date and venue of
Hearing** : 4 September 2017 at Citygate House,
Brighton

Date of decision : 11 September 2017

DECISION

The Applications

1. By an application dated 20 August 2016 the Applicant lessee applied under section 27A of the Landlord and Tenant Act 1985 ("the Act") for a determination of the lessee's liability to pay service charges for service charge years 2014/15, 2015/16 and the estimated service charge for 2016/17. The Respondent is the freeholder of the building¹.
2. The Tribunal also had before it an application under section 20C of the Act that the Respondent's costs of these proceedings should not be recoverable through future service charges.
3. At the end of the hearing, the Applicant requested an order that the hearing fee of £200.00 be reimbursed to him by the Respondent.

Summary of Decision

4. The recoverable service charges from the lessee of Flat 3 are as follows:

Year	£
2014/15	421.31
2015/16	599.42

5. No order is made under section 20C of the Act.
6. No order is made for reimbursement of the hearing fee.

The Lease

7. The Tribunal had before it a copy of the lease for Flat 3. It was originally granted for a term of 99 years from 9 June 1987, but on 6 July 2007 a Deed of Variation substituted a term of 999 years from that date, in place of the original term.
8. The relevant provisions in the leases may be summarised as follows:
 - (a) The lessee is liable to pay a specified proportion of the service charge, being the costs incurred by the lessor in complying with the repairing, insuring and other obligations as set out in the 4th Schedule and in connection with other costs as set out in the 5th Schedule;
 - (b) Flat 3's proportion of the entire service charge is 18%.

¹ The original applicant was Elza Alexander. Her son was substituted as applicant once it emerged that the lease had been assigned to him. The original respondent was Mark Chinman. Powell & Co Investment Limited was substituted as respondent after Mr Chinman sold the freehold reversion to that company in December 2016.

- (c) On account sums in a fair and reasonable amount are payable on 24 June and 25 December in each year;
- (d) The lessor is to produce an account of service charge expenditure as soon as possible after 24 June in each year, and the amount of the lessee's liability must be certified by a chartered accountant;
- (e) The lessee must then pay any balance due or be refunded any excess paid;
- (f) The service charge may include reasonable provision for a reserve fund towards future expenditure which is not of a recurrent nature;
- (g) The service charge expenditure may include:
 - “(a) 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)
 - (b) Accountants' fees for the preparation of yearly statements and any other work necessary in connection with the expense accounts...(Fifth Schedule, para. 4).

The Inspection

9. The Tribunal inspected 43 Grand Parade immediately before the hearing, accompanied by the Applicant, and the parties' representatives. It is a terraced building built circa 1870, situated in a city centre location adjacent to a controlled traffic intersection on a busy main road. The property is arranged over basement, ground and three upper floors and comprises five flats, one on each floor, formed as the result of a conversion. The property has a frontage at rear to Circus Street. The front elevation is rendered and painted and incorporates a square bay with a number of relatively complicated architectural features. The external maintenance, repair and decoration of the property has been neglected, with clear evidence of disrepair. The internal common parts are in need of complete redecoration and refurbishment. Inside the Applicant's flat the Tribunal was shown a number of ceiling and wall cracks, some of which had been filled, and flaking and bubbling paint together with some black mould beneath the bay window of the front room.

The Law and Jurisdiction

10. The tribunal has power under section 27A of the 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.
11. By section 19 of the 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.
12. Section 20B of the Act 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.
13. Under section 20C a tenant may apply for an order that all or any of the costs incurred by a landlord in connection with proceedings before a 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.
14. Under Rule 13 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the Tribunal has a general discretion whether to make an order for reimbursement of tribunal fees.

Background

15. This is the third tribunal application concerning service charges for Flat 3. In all three cases the lessee has been the applicant.
16. In Case No. CHI/00ML/LSC/2011/0171 the Tribunal's decision dated 2 July 2012 determined the recoverable service charges for years 2007/08, 2008/09, 2009/10 and 2010/2011. During these years the managing agents were Graves Jenkins.
17. In Case No. CHI/00ML/LIS/2014/0064 the Tribunal's decision dated 13 April 2015 determined the recoverable service charges for years 2011/12, 2012/13 and 2013/14. During these years the managing agents were Pepper Fox, who produced a "tenant transaction" ledger through their computerised accounts system, showing credits, debits and a running balance. The Tribunal noted at paragraph 25 of its decision that this ledger was in error in that no credits had been given when actual service charge expenditure for a particular year was less than the sums demanded on account.

18. At or shortly after the start of service charge year 2015/16 the lessor Mr Chinman again changed managing agents, this time to Austin Rees. When Powell & Co Investment Limited acquired the freehold interest from Mr Chinman on 15 December 2016, its director Mr Powell instructed a "sister" company, Powell & Co. Management Limited, to take over the management of the building.
19. In the meantime, the current tribunal application had been made in August 2016. Mr Powell informed the tribunal in early 2017 that he was not in possession of much of the service charge documentation relating to the relevant years. With the involvement of Mr Chinman, Pepper Fox and Austin Rees then purported to have made available all their paperwork. However, as will be noted below, this was incomplete.
20. The hearing of this application was attended by the current lessee Mr Mario Alexander, represented by his mother Ms Elza Alexander (the lessee during the years being determined), and by Mr Powell representing the Respondent. Mr Chinman also attended at Mr Powell's request and provided information on certain matters.
21. The procedural directions had required the Applicant, amongst other things, to identify each service charge item in dispute and to provide copies of any alternative quotes. Ms Alexander prepared a long statement of case raising many issues. The Respondent was required to respond to each issue raised by the Applicant. The bundle was prepared by the Applicant. It included various documents, some supplied by the Applicant and some by the Respondent.
22. Although the application made in August 2016 asked the Tribunal to determine the reasonableness of the on account 2016/17 service charge demand(s), the Tribunal was told that the end of year accounts for 2016/17 had just been prepared and served. The lessee has recently made a further application to the tribunal, which is concerned with the actual 2016/17 service charge, including a major works demand. Both sides accordingly accepted that there was no point in considering the on account demand(s) within the present application. Our determination is therefore limited to service charge years 2014/15 and 2015/16.

Service charge year 2014/15

23. The end of year account notes total service charge expenditure of £3197.63, considerably less than the £6244.00 demanded on account. Flat 3's 18% share of the overall expenditure is £575.57, compared with £1123.92 demanded on account. Although Ms Alexander did not pay in response to the on account demands, on 5 August 2016, she sent Austin Rees a cheque for £575.57 endorsed as payment for 2014/15.
24. Notwithstanding payment of the sum due, certain elements of the service charge expenditure are challenged.

Pepper Fox fees - £687.00

25. The invoice dated 27 November 2014 simply reads “Interim major works management charge”. Ms Alexander submitted that this charge was irrecoverable by virtue of section 20B of the Act. She noted that no major works have been carried out. In July 2012 Pepper Fox procured a Specification of Works and in November 2012 tenders were received. However nothing had been done since which, Ms Alexander submitted, meant that any sums due to Pepper Fox for managing the works would have been incurred before the end of 2012. However, she had never been told about the cost until it appeared in the service charge account produced after 24 June 2015.
26. Mr Chinman confirmed that the works had not gone ahead. However Mr Powell submitted that Pepper Fox would have “continued to work in the background” and understandably only invoiced for their services when it became clear that the works were not going to happen. He did not challenge Ms Alexander’s assertion that she was unaware of the charge until after June 2015.
27. Determination:
- (i) The amount of the invoice was not challenged, so the only issue is the impact of section 20B. The first question is to decide *when* the costs were incurred. If incurred when services were rendered in 2012, then section 20B precludes recovery. If incurred in November 2014 when the invoice was created, or if incurred later when the invoice was paid, section 20B will have no application.
- (ii) Although reported cases have held that costs are not incurred for the purposes of section 20B until either an invoice is presented or the sum paid (see e.g. *OM Property Management v Burr* [2013] EWCA Civ 479), the costs in those cases were payable to third parties at arms length who controlled the timing of the invoice. In this case, by contrast, Pepper Fox was entirely in control of when they chose to prepare an invoice relating to their own costs, and also in control of when they included that invoice in the service charge account they were responsible for producing. There is no evidence that Pepper Fox carried out any services in relation to the proposed major works after 2012, yet they chose to delay submitting an invoice for almost two years.
- (iii) The purpose of section 20B is to avoid lessees being faced with stale charges of which they have been given no forewarning. Managing agents should try to avoid such a situation occurring, rather than create such a situation. In this case, knowing that there had been no progress on the proposed major works since 2012, a lessee would not expect to be faced with a charge in relation to them more than two years later. Pepper Fox could easily have informed Ms Alexander that they would be raising an invoice in due course which would be recovered through the service charge, and thus avoided any potential problem under

more work was required in 2014/15 than in the previous year, the recoverable fees are reduced to £204.00.

Fire alarm repairs and maintenance - £192.06

32. Yet again no supporting invoice was in evidence, and so Ms Alexander challenged payability. She also alleged that the fire alarm “didn’t work for the whole year” but there was no corroboration of this. Mr Powell told the Tribunal that the lessor had a legal obligation to service the fire alarm twice a year, and he suggested the charge, which the accountants had certified, probably represented two service visits.
33. Determination: The Tribunal notes that in the previous year £742.06 was charged under this head and was not challenged by Ms Alexander. In the following year there are invoices supporting expenditure of £768.00. There is no reason to conclude that service visits did not take place in 2014/15 or that the cost is unreasonable. In all the circumstances, the absence of an invoice is more likely to be attributable to failings of the managing agents to hand over all the paperwork, than to its non-existence. The cost is accordingly allowed.
34. It follows from the above findings that the sum of £857.00 (£687.00 + £170.00) falls to be deducted from the overall service charge for 2014/15 so that the total recoverable is £2340.63. Flat 3’s 18% share is £421.31 (against £575.57 actually paid).

Service charge year 2015/16

35. The end of year account notes total service charge expenditure of £3330.14, less than the sum of £4700.00 demanded on account. Flat 3’s 18% share of the overall expenditure is £599.42, compared with £846.00 demanded on account. Ms Alexander did not pay in response to the on account demand and no payment specifically relating to this year has been made.

Fire alarm repairs and maintenance - £768.00

36. There are four invoices from Brighton Fire Alarms Limited confirming this figure. Ms Alexander accepted the largest invoice of £456.00, said to cover 2 inspections and 50 weekly test visits under a maintenance agreement for the period 1.11.15 – 31.10.16, negotiated by Austin Rees. She objected to the other invoices, stating that if there was a “maintenance agreement” in place, it should also cover the work covered by those invoices.
37. Mr Powell said that the maintenance agreement only covered inspections and weekly tests, not the supply of equipment or any other work required.

38. Determination: The invoice dated 14.10.15 pre-dates the maintenance agreement. It deals with an attendance to deal with a fault on the control panel, and the supply of a log book. It is allowed in full. The remaining two invoices dated 1.2.16 and 11.4.16 relate to supply of replacement equipment, at a total cost of £252.00. Although the maintenance agreement was not in evidence the Tribunal is satisfied from the information in the invoice for the annual fee that it covered only inspections and testing. There being no evidence that any of the further costs were unreasonably incurred, they are allowed in full.

Austin Rees management fees - £787.50

39. Once again, the bundle contained no supporting invoice. Ms Alexander said that in its absence she did not accept that Austin Rees were the managing agents. (This was in contrast to her written statement of case, where her argument was that the charges should be reduced to £100.00 per flat on the ground of failure to consult, a point not pursued at the hearing).
40. Determination: It is beyond any doubt, from the various documents in the bundle (including numerous invoices addressed to them, ledger records, and accounts prepared on their instructions) that Austin Rees acted as managing agents for the vast majority if not all of service charge year 2015/16. The charge of £787.50 is modest (see comments in paragraph 29 above) and is allowed in full.

Insurance - £299.38

41. Although the sum of £299.38 is the lowest amount charged for insurance to date, Ms Alexander challenged it on the ground that she had not been shown any evidence that the insurance actually existed. Alternatively, she referred to an invoice in the bundle from a broker, R t Williams, sent to Austin Rees and dated 15.4.16, for the sum of £1796.30, or alternatively £1942.00 with loss recovery included as an extra. She said these amounts were too high, and represented a much higher premium than paid in earlier years.
42. In the course of the hearing Mr Chinman visited the offices of Austin Rees and managed to obtain a copy of an insurance schedule, establishing that the premium was £1796.30 for a policy commencing in April 2016. Mr Powell surmised that the premium had been paid by monthly direct debit, which explained why only £299.38 had been charged to the 2015/16 service charge account. Mr Powell also expressed the view that the sums charged for insurance in 2013/14 and 2014/15 (£611.50 and £568.04 respectively) were very low.
43. Determination: The Tribunal calculates that £229.38 represents exactly 2/12ths of £1796.30 and accordingly accepts that £299.38 relates to that part of the premium for the new policy which fell due for payment in 2015/16. There is no doubt that this policy, arranged through Austin

Rees, attracted a much higher premium than the policies in place during Pepper Fox's management. Relying on its expertise, the Tribunal is of the view that the previous premiums were surprisingly low. In the absence of any evidence of the sufficiency of the previous insurance cover, or the excessiveness of the new cover, or any comparative quotes, the Tribunal cannot find that the cost of the new policy was unreasonably incurred. The sum of £299.38 is allowed.

Common parts electricity

44. Nowhere in Ms Alexander's lengthy statements of case did she indicate that she wished to challenge this head of expenditure. She sought to raise it for the first time at the hearing, having recently looked at the electricity invoices in the bundle while "on the train". The Tribunal did not permit this to be pursued; the Respondent had been given no notice whatsoever and any challenge could not be responded to without a careful analysis of the various bills. Ms Alexander made her application over a year ago; the hearing was postponed from April 2017 at her request; she has had more than ample time to raise this matter, and it was not fair to the Respondent to mention it for the first time at the hearing. Nor would it have been proportionate to adjourn to consider the issue at a later date.
45. It follows from the above that no deductions are made from the 2015/16 service charge. Flat 3's share of £599.42 is payable in full.

Section 20C

46. An application had been made under section 20C. However Mr Powell confirmed that the Respondent had no intention of seeking to recover any costs of these proceedings through future service charges and accordingly the Tribunal did not have to consider the matter further.

Reimbursement of fees

47. The request that the Respondent should reimburse the hearing fee of £200.00 to the Applicant is refused. Although Ms Alexander is correct in stating that a paper determination was initially requested by the Applicant, and that it was the Respondent who requested an oral hearing, the Tribunal would have required an oral hearing in any event, given the lack of clarity in the documentation provided. The Tribunal also takes into consideration that the majority of charges challenged by the Applicant have been upheld.

Other matters

48. The above paragraphs set out the Tribunal's formal determination. The following paragraphs are not part of that determination, and are included only in an attempt to assist the parties in resolving a separate underlying dispute over alleged service charge and other arrears. It is plain that until this dispute is resolved, the chance of a constructive

relationship between lessee and lessor is greatly reduced, while the likelihood of continuing tribunal applications is increased.

49. Much of Ms Alexander's statement of case was concerned with these alleged arrears, which she hotly disputes. The sum is put by Mr Powell, based on a closing ledger prepared by Austin Rees, at £1626.43, of which £200.00 are alleged ground rent arrears. However Austin Rees have simply carried forward arrears which appeared on the Pepper Fox client ledger. Mention has already been made of errors in this ledger (see paragraph 17 above). Two different versions of this ledger were included in the current bundle. Neither version appears to incorporate all the adjustments required to Flat 3's account as a result of the second decision in Case No. CHI/00ML/LIS/2014/0064. Austin Rees have made some adjustments by way of credit but the amounts appear incorrect. Given that cooperation from the previous managing agents appears limited if not non-existent, it is going to be very difficult if not impossible to resolve the arrears dispute utilising these ledgers, at least without costly expert accountancy assistance.
50. Another simpler method is suggested to the parties. The Tribunal has now determined for every service charge year covering the period 25 June 2007 – 24 June 2016 (9 years) precisely how much is payable by Flat 3. If these sums are totalled up and tallied against all sums paid by the lessee (which do not appear to be in dispute), ignoring sums attributable to ground rent, it should be possible to arrive at an agreed credit or debit balance for the service charges. On account demands and adjustments shown on the managing agents' ledgers can be ignored in their entirety².
51. The dispute over ground rent centres around whether the rent is £40.00 or £80.00 per annum. The original lease provided that the rent was £40.00, rising to £80.00 after 25 years. The Deed of Variation did not adjust the ground rent. The lessee contends that the deed of Variation created a new lease starting on 6 July 2007 and the first 25 years at £40.00 p.a. ground rent re-commenced from that date. The lessor contends that the rent increase took effect in 2011, 25 years after the original lease was granted. The Tribunal does not have jurisdiction to resolve ground rent disputes. The parties should seek legal advice and request those advisors to consider *Woodfall: Landlord & Tenant* Paragraph 17-126.
52. If the end result of this exercise is that monies are owed by the lessee of Flat 3, the Tribunal is reasonably confident that they will be paid. In the event that proceedings for recovery are contemplated, the Respondent will need to consider who can sue/be sued, given that there has been an assignment of both the lease and the freehold reversion. This is a complex area on which legal advice should be obtained; it may depend

² There is one other disputed charge of £184.00 dating from 1 July 2012. This appears to be an administration charge but it has never been considered by the Tribunal and there is no evidence relating to it.

in part whether the Deed of Variation has created a “new tenancy” under the Landlord and Tenant (Covenants) Act 1995.

Dated: 11 September 2017

Judge E Morrison

Appeals

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) 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.
2. 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.
3. 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 allow the application for permission to appeal to proceed.
4. 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 the party making the application is seeking.