



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

<b>Case Reference</b>	<b>CHI/OOML/LSC/2013/0091</b>
<b>Property</b>	<b>53 Brunswick Place, Hove, East Sussex BN3 1NE</b>
<b>Applicants</b>	<b>Falcon Heath Limited</b>
<b>Applicants Representative</b>	<b>Ms A Gourlay of counsel</b>
<b>Respondent</b>	<b>D A Jones K Rourke R J Bunbury K L McConway C Shimwell C/o Michael Joseph Estates S J Thetford S M Heinemann</b>
<b>Respondents Representative</b>	<b>Mr Duke Cohen solicitor</b>
<b>Type of Application</b>	<b>Sections 19, 27A &amp; 20C Landlord &amp; Tenant Act 1985 (as amended) ("the Act")</b>
<b>Tribunal Members</b>	<b>Judge RTA Wilson (Chairman) P D Turner-Powell FRICS (Surveyor Member) J K Morris (Lay Member)</b>
<b>Date and Venue of Hearing</b>	<b>25th February 2014 Lewes Combined Court</b>
<b>Date of Decision</b>	<b>17th March 2014</b>

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**DECISION**

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## **The Applications**

1. This application required the Tribunal to make a determination under S.27A (and 19) of the Act of the Respondents liability to pay actual service charges for 2012 and estimated service charges for 2013. ('The Contested Charges').
2. The Tribunal also had before it an application under S.20C of the Act that the Applicant's costs incurred in these proceedings should not be recoverable as service charges.

## **Summary of Decision.**

3. The Respondents are liable to pay all of the Contested Charges (if any) subject to a set off in respect of any overpaid charges for buildings insurance.
4. No order is made under S.20C of the Act.

## **Background & Preliminary matters.**

5. By an application dated the 5<sup>th</sup> August 2013 the Applicant applied to the Tribunal for a determination of service charges for 2012 and 2013. The Tribunal gave directions on the 13<sup>th</sup> August 2013, following which statements of case, with supporting documentation and witness statements, were filed by the Applicant and then by the Respondents.
6. A hearing took place on the 25<sup>th</sup> February 2014. The Applicant was represented by Ms Gourlay a barrister and the Respondents were represented by Mr Duke Cohen a solicitor.
7. On the day of but prior to the hearing a lengthy review of the Respondents' statement of case was conducted by the parties representatives, following which the Respondents' conceded a number of issues that had originally featured in their opposition to the application. The conceded issues were as follows: (a) the cleaning costs (b) internal decoration charges (c) failure to comply with S21 b of the Act (statutory notices) (d) S.8 of the Landlord and Tenant Act 1985 (fitness for human habitation) (e) S.11 of the Act (repairing obligations) (f) the correct percentage of service charge applicable to flat 2.
8. The issues for determination were further limited by the decision of the Tribunal not to hear any evidence concerning the Respondents' allegations of historic neglect on the grounds that the County Court would be the appropriate forum for this claim to be tried. The Respondents' claim (if any) in this respect is thus preserved.
9. The issues for determination were therefore identified as (a) insurance costs (b) management charges (c) administration charges.

## **The Inspection**

10. The Tribunal inspected the Property prior to a hearing of a linked Section 20Za application on the 27<sup>th</sup> January 2014. The Property is a substantial mid terrace building originally constructed in the early Victorian era as a single residential house and now converted into 9 self contained residential flats arranged over five floors including the basement.

## **The Lease**

11. The Tribunal was provided with a copy of the Lease for flat two which is dated the 25<sup>th</sup> January 1991. The Lease is for a term of 99 years at a yearly rent of £75. It was agreed that this lease was in similar form to the leases of the other flats.
12. So far as material to the issues in this case the relevant provisions in the Lease may be summarised as follows:
  - (a) On the 24<sup>th</sup> June and 25<sup>th</sup> December in each year the tenants are to pay their proportion of the landlords estimate of the annual cost to be incurred by the landlord in complying with its maintenance and other obligations as set out in clause 4.2 and in the Fourth schedule of the lease. The Fifth Schedule contains a description of the heads of expenditure to which the tenants are to contribute.
  - (b) As soon as possible after the 31<sup>st</sup> December in each year the landlord's costs incurred in complying with its obligations under the leases are to be calculated and if the tenants interim payments fall short of the amount due the tenant is obliged to make up the difference on demand or if there is a surplus then that surplus is to be repaid to the tenant.
  - (c) The tenant's liability to pay any balancing charge is to be certified by a chartered accountant.

## **The Relevant Law**

13. The Tribunal has power under S.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. However, no application can be made in respect of a matter which has been admitted or agreed by a tenant.
14. By S.19 of the Act service charges are only payable to the extent that they have been reasonably incurred and if the services or works for which the service charge is claimed are of a reasonable standard.

15. Under S.20C of the Act a tenant may apply for an order that all or any of the costs incurred in connection with the proceedings before a Leasehold Valuation Tribunal are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application.
16. S.21B of the Act requires demands for service charges to be accompanied by a summary of rights and obligations of tenants in relation to service charges.

## **The Applicant's case**

### General points

17. Ms Gourlay relied on the statements of case that had been filed together with the witness statements from Mr Brotherton and Mr Wheeler. She produced a skeleton argument at the hearing and developed her arguments in her oral submissions. In particular she contended that the Respondents had brought to the Tribunal little or no evidence to rebut the submissions which were contained in her skeleton argument. For these reasons she had little to add to what was already set out in her skeleton. All of the amounts demanded on the 24<sup>th</sup> June and 25<sup>th</sup> December 2012 and the 19<sup>th</sup> February and 24<sup>th</sup> June 2013 were, in her submission, reasonable in amount and she maintained that the Respondents had led no probative evidence or legal argument to the contrary.

### Management fees

18. The Applicant relied upon the evidence of Mr Wheeler to substantiate these charges. His evidence was that the actual charges for 2012 and estimated charges for 2013 were based on a figure of £150 plus vat per flat. These fees were less than the average amount charged in the Brighton and Hove area by comparable managing agents and the charges were very reasonable. The fees covered all the basic tasks involved in routine management as set out in the RICS code for residential management to which his firm adhered. He denied that there had been a failing in insurance claim handling and suggested that Ms. Bunburys complaints in this regard were a contractual matter between her and the insurance company.

### Buildings insurance

19. Ms. Gourlay argued that there had been no double counting as alleged by the Respondents. The Respondents had not appreciated or understood the fact that the service charge year and the annual building insurance year did not coincide. It was for this reason that adjustments were due in the closing statement. In relation to the allegations of poor insurance claims handling, the Applicant relied upon the evidence of Mr Wheeler who denied that his firm had been negligent in the handling of insurance claims. All claims had been handled properly.

### Administration charge

20. Once again the Applicant relied upon the evidence of Mr Wheeler. Mr Wheeler told the Tribunal that the fees had been set at 10% of the costs of works, which he contended was industry standard. The fee included taking clients instructions, inspecting the site, drawing up a specification, selecting contractors and coordinating the tender process, carrying out the consultation process, and placing the contract. Thereafter supervising and inspecting the works and paying the contractor on a phased basis. He denied that he had been negligent in not erecting scaffolding for the inspection and maintained that it was quite normal for a specification to be drawn up following a ground inspection only and allowing PC sums which would be adjusted once the true extent of work had been ascertained.

### 2013 budget

21. Ms. Gourlay reminded the Tribunal that there had been no suggestion that the work estimated for, fell outside of the landlords covenants to repair. Neither had there been any evidence adduced to rebut the need for the work to be carried out. As to the figure contained in the budget for future works the Tribunal had the benefit of the consultation documents, copies of which were contained in the hearing bundle. There were three independent estimates that had been obtained during the tender process all of which were very close to the amount demanded on account. In the event the work had been carried out in budget.
22. For these reasons she contended that the whole of the budget for 2013 was reasonable in amount and she invited the Tribunal to so find.

### Section 20C Application.

23. Ms. Gourlay argued against a S.20C order. The application had occupied a great deal of time and there had been a wholesale failure on the part of the Respondents' representative to prepare the application in an orderly manner and in accordance with the directions of the Tribunal. No witness statements had been filed despite the very clear directions of the Tribunal and therefore it had not been possible to ascertain with any clarity what the Respondents' case was. In the event a very considerable number of complaints had fallen outside of the Tribunal's jurisdiction and had been conceded on the day. In these circumstances she invited the Tribunal not to grant the application.

## **The Respondents' case**

### Management Fees

24. Mr Duke Cohen contended that the management fee for 2012 and the estimated management charges for 2013 were excessive and that the

management had been conducted in a negligent manner. For example in 2012 the Agents had been negligent in the way they had gone about organising repair works to the rear of the building. They had prepared a specification that failed to accurately identify the true extent of the necessary work. This had come about because the specification had been drafted on the basis of a ground floor inspection only together with a cursory inspection from the window of flat 6. The inspection should have been carried out with the benefit of scaffolding, which would then have revealed the extent of the disrepair. Mr Duke Cohen contended that in the event the limited work carried out was designed solely to allow the Applicant to sell flat 6, which it had been able to repossess. The agents had ignored the fact that flat 2 was in a very poor state of repair and that the leaseholder of flat 2 had been complaining that the damage to her flat was caused by the poor state of the rear elevations of the building. Mr Cohen also contended that the Applicant had been negligent in insurance claim handling, specifically in relation to a claim for damage to flat 2. These factors warranted a reduction in the fees for 2012 and 2013.

#### Buildings insurance

25. Mr Cohen's submissions were not easy to follow. As far as could be ascertained his clients' complaint was not directed at the cost of buildings insurance rather that there had been double counting in the closing account following the leaseholders successful RTM claim. He contended that his clients were due a rebate of approximately £992, which was a debit figure that had been erroneously included in the closing statement of account.

#### Administration fee

26. Mr Cohen contended that the administration fee which amounted to 10% of the cost of the major works carried out in 2012/13 was unreasonable because it was in excess of the market figure and because the agents had been negligent and superficial in the preparation of the specification. He pointed to the grossly inadequate allowance for the amount of rendering necessary. The specification had allowed for 15 square meters whereas in the event over 55 square meters had been required. This amounted to unprofessional conduct. During questioning from the Tribunal he accepted that he was not able to adduce evidence to support these allegations.

#### 2013 budget

27. Mr Cohen contended that the 2013 budget was not reasonable because the budget included a figure of £17,000 for future works. This figure was based on a highly selective program of work to be carried out to the rear of the property. It was his clients' case that the work failed to adequately address all of the repairing issues that the Respondents had repeatedly raised with the Applicant. In fact the work to be carried out was simply designed to enable the Applicant to sell flat 6, which it had secured following a repossession case. What was needed was a comprehensive program of works addressing all

external repairs. He contended that the Applicant had had absolutely no intention of listening to or acting on any legitimate concerns of the Respondents and was intent on only carrying out works that it would benefit from.

28. On being questioned by the Tribunal Mr Cohen accepted that a comprehensive program would cost more than £17,000 but his point was that the overall cost would have been cheaper in the long run. He referred the Tribunal to the case of *Forcelux Ltd v Sweetman* [2001] 2 EGLR in which it was held that in the context of insurance premiums, Section 19 (2) of the Act is not concerned with whether costs are “reasonable” but whether they are “reasonably incurred”. He contended that on the facts of this case the budget demand was in respect of costs that would not be reasonably incurred.

#### Section 20C Application.

29. Mr Cohen argued that a S.20C order was appropriate because the hearing bundle had been poorly prepared and secondly because the Respondents had been right to resist the application. The only reason that the Respondents had been unable to bring evidence to the Tribunal was because of the personal difficulties of their representative, Ms. Bunbury. In any event the Applicant had displayed a cavalier disregard to the legitimate wishes of the Respondents. It had completely ignored the consultation procedure before carrying out the works and this showed that it never had any intention of allowing any input from the lessees.

### **The Tribunal’s Determination**

#### Management fees

30. The Tribunal is not persuaded that there should be any reduction in the managing agents fees for 2012 and is satisfied that the figure in the 2013 budget for management is reasonable. No probative evidence was led by the Respondents to suggest that the basic fee of £150 per unit was too high, for example in the form of estimates from other agents willing to manage the building for less. Relying upon its collective experience gathered over many years, the Tribunal is satisfied that the fee of £150 plus vat per flat is indeed reasonable and it is fortified in this view from hearing Mr Wheeler confirm that his firm adhered to the RICS code for residential management and that the basic annual fee included all the routine management as provided for in the code.

#### Administration fee

31. The Tribunal is satisfied that the supervision fee based on 10% of the cost of the works is contractually payable and reasonable in amount. Relying upon its collective experience the Tribunal is aware that a supervision fee of 10% is routinely charged in the case of a small works contract such as was used in this case. Mr Wheeler’s evidence supported the level of this fee, confirming as he

did that his firm was involved in all stages of the project from beginning to end. The Tribunal rejects the assertion made by Mr Duke Cohen that the agent's involvement in the project was superficial and negligent because it failed to ascertain the correct amount of rendering that was required. It is not unusual for a specification to be drawn up on the basis of an inspection from ground floor level with pc sums being built in to the tender to allow for variations in the scope of work and resultant cost, once the true extent of the remedial work is known. For these reasons the 10% charge is upheld.

Buildings insurance.

32. At the hearing the Respondents confirmed that they did not challenge the amount of the premium and that their case was that there had been double charging in the closing account. On the evidence before it the Tribunal has concluded that the closing service charge account has not been correctly calculated and that the Respondents have been overcharged. The reasons for this conclusion are as follows: The 2012 accounts include a debit figure of £2,126.68 in respect of the annual insurance premium paid in this year. Note two to these accounts is headed "Debtors and expenditure paid in advance" and includes an entry "Buildings insurance to 17.6.2013 of £992." The Tribunal interprets this entry as meaning that in 2012 the insurance had been prepaid until the 17<sup>th</sup> June 2013. However the closing account calculated to the 31<sup>st</sup> August 2013 also includes expenditure of £992 for buildings insurance to the 17<sup>th</sup> June 2013 together with a further figure of £448.72 stated to be for insurance to the 31<sup>st</sup> August 2013. The figure of £992 contained in the closing account thus amounts to a second charge for insurance covering the same period. The Tribunal sets out below its calculations on this issue.

ACTUAL

**P 234 Account 1st January 2012 to 31st December 2012**

Insurance charged £2,126.68

**P193 Closing Account for period 1st January 2013 to 31st August 2013**

Insurance demanded £992.00 (1.1.2013 to 17.6.2013)

Add £448.72 (18.6.2013 to 31.8.2013)

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£ 1440.72

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Calculation based on figures available:

Accounts year ending 31.12.2012



Insurance paid in final accounts £2126.68 (works out at £5.83 per day rounded up) covers dates 16.6.2012 to 15.6.2013)

Current Account 16.6.2012 to 31.12.2012	£ 967.78	
In Advance 1.1.2013 to 15.6.2013	£1160.17	
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	£2127.95	(difference £1.27 due to rounding up)
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Closing account 16.6.2013 to 31.8.2013 (76 days) £448.72

33. As the accounts for 1st January 2012 to 31st December 2012 include an amount of £992.00 paid in advance to 17th June 2013, the balancing figure should be an amount for 18th June 2013 to 31st August 2013 i.e.£448.72 but the closing account also includes £992.00 which was already included in the payment in advance figure in the 2012 year accounts.
34. The Tribunal thus finds on the facts that the Respondents have been over charged in respect of insurance and directs the parties to use their best endeavors to agree the exact figure and that the Respondents are to be given a credit for any overpayment when calculating any amounts payable by the parties as a result of this determination.

#### 2013 budget

35. The Tribunal is not persuaded that any element of the 2013 budget is unreasonable in amount and nor is it persuaded that principles set out in the case of Forcelux Ltd v Sweetman have application on the facts of this case. There is no suggestion here that the proposed works fell outside of the landlords covenant to repair and no suggestion that the work was unnecessary. The complaint made by the Respondents is that the scope of work was too limited and that it primarily benefited flat 6, which had been repossessed by the Applicant. However this allegation was unsupported by any evidence and was rebutted by the evidence of Mr Wheeler, a qualified building surveyor, who maintained that the work involved the whole of the rear elevation and as such benefited the whole of the building.
36. It is established law that where a landlord covenants to keep the structure and exterior of a building in repair and the tenants covenant is to contribute towards the cost of so doing, it is for the landlord to decide how to repair, although decisions must be reasonable. So where the landlord could patch a roof or replace it, it has been held that the tenants could not require him to

patch rather than to carry out a permanent job. It is a matter of landlord's judgment as to when the time has come to repair or replace an item.

37. In this case the Tribunal is satisfied that the budget for 2013, including the estimated figure for the future works, was reasonable and therefore payable as a budget. It is not for this Tribunal to determine if the works were reasonably incurred as provided for in Forcelux. This question will fall to be determined by another Tribunal if in due course the leaseholders make an application to determine if the actual cost of the works (as opposed to the estimated cost) were reasonably incurred and whether the work itself was carried out to a reasonable standard.

### **Application under S.20C**

38. In deciding whether to make an order under S.20C of the Act a Tribunal must consider what is just and equitable in the circumstances. The circumstances include the conduct of the parties and the outcome of the proceedings. Given the outcome of the proceedings and having regard to the conduct of the parties the Tribunal is satisfied that it would not be just or equitable for an order to be made. Nearly all of the Respondents' challenges as originally framed in their response were either conceded on the day of the hearing or rejected by the Tribunal. In addition, the Respondents failed to properly comply with the directions of the Tribunal in relation to the preparation of the hearing bundle.
39. It is regrettable that the Respondents showed a lack of understanding as to the statutory powers and limitations of this Tribunal. The consequences of this lack of understanding are that the Tribunal was unable to hear the majority of their complaints and indeed much time has been wasted. A further feature of this case is the lack of effective preparation by the Respondents. Whilst it may have been the case that this has come about because of the regrettable personal circumstances of the Respondents' representative, the Tribunal expects parties to have taken appropriate advice before making an application and thereby setting in train all the time and expense that may then be required. Whilst the Tribunal accepts that the Respondents did at least instruct a lawyer, these instructions were given far too late in the day. The Tribunal considers that had a lawyer been fully briefed and in receipt of all the facts and evidence at the outset then much time and cost could have been saved.
40. For these reasons, the Tribunal makes no order under S. 20C of the Act. That said, bearing in mind that there is now an RTM in place, it is not clear to the Tribunal that the Applicant is able to charge any of its costs of this application to the service charge account.

Signed \_\_\_\_\_  
Judge R.T.A.Wilson

Date: 17th March 2014

## **Appeals**

*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.*

*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. 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 the time limit, or not to allow the application for permission to appeal to proceed.*

*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.*

*If the First-tier Tribunal refuses permission to appeal, in accordance with section 11 of the Tribunals, Courts and Enforcement Act 2007, and Rule 21 of the Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rules 2010, the Applicant/Respondent may make a further application for permission to appeal to the Upper Tribunal (Lands Chamber). Such application must be made in writing and received by the Upper Tribunal (lands Chamber) no later than 14 days after the date on which the First-tier Tribunal sent notice of this refusal to the party applying for permission.*