



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

- Case References** : MAN/30UF/LSC/2014/0009 (Flat 1)
MAN/30UF/LSC/2014/0026 (Flat 6)
- Property** : Flats 1 and 6 Cartmell Court,
139 South Promenade, Lytham St
Annes, FY8 1NG
- Applicant** : Cartmell Court (Lytham St Annes)
Limited
- Respondents** : Mr Michael Randolph Wright (Flat 1)
Mr Nigel Thomas Openshaw (Flat 6)
- Type of Application** : Application for a determination of
liability to pay and reasonableness of
service charges
- Tribunal Members** : P J Mulvenna LLB DMA (chairman)
J Rostron MRICS
- Date and venue of
Hearing** : 9 June 2014 on the papers
- Date of Decision** : 9 June 2014

DECISION

DETERMINATION AND REASONS

DECISION

1. **That the service charges levied by the Applicant for the years ended 31 December 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011 and 2012 are not reasonable and, consequently, are not payable by the Respondents.**
2. **That the service charges levied by the Applicant for the year ended 31 December 2013 are reasonable and payable by the Respondents.**

INTRODUCTION

1. Cartmell Court (Lytham St Annes) Limited ('the Applicant') made applications to the Tribunal on 22 January 2014 and 5 March 2014, respectively, for the determination of the reasonableness and payability of the service charges for the years ended 31 December 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012 and 2013 demanded from Mr Michael Rudolph Wright ('the First Respondent') in respect of Flat 1, Cartmell Court, Lytham St Annes, FY8 1NG and for the years ended 31 December 2010, 2011, 2012 and 2013 demanded from Mr Nigel Thomas Openshaw ('the Second Respondent') in respect of Flat 6, Cartmell Court, Lytham St Annes, FY8 1NG. The First and Second Respondents are together hereinafter referred to as 'the Respondents' and Flats 1 and 6, Cartmell Court, Lytham St Annes, FY8 1NG are together referred to as the Property.
2. The applications were linked and determined together because of common features, including location, Applicant and evidence.
3. The Applicant, which is the management company established to manage the development within which the Property is situated, has responsibility for providing services and has an entitlement to recover the cost of such provision by way of service charges. The Applicant engaged Homestead Consultancy Services Limited ('Homestead') on 11 January 2013 to act as managing agents. Homestead has conducted the proceedings before the Tribunal on behalf of the Applicant.
4. The Respondents have leasehold interests in their respective flats which comprise the Property for terms of 125 years from 1 January 2004. The First Respondent's interest was granted by a Lease made on 3 April 2004 between (1) Claverdon Consultants Limited (2) Michael Randolph Wright and (3) Cartmell Court (Lytham St Annes) Limited; The Second Respondent's interest was granted by a Lease made on 10 May 2004 between (1) Claverdon Consultants Limited (2) Chaim

Jehuda Alexander Kaufman and Rose Kaufman and (3) Cartmell Court (Lytham St Annes) Limited (together 'the Leases').

5. The Property comprises two self-contained flats (Flats 1 and 6) in a purpose-built block of nine flats, constructed in or around 2003.

DIRECTIONS & PROCEEDINGS

6. Directions were issued by Judge L Bennett, sitting as a procedural chairman, on 10 March 2014. The parties have complied with the Directions sufficiently to enable the Tribunal to determine the matters before them.
7. Neither the Applicant nor the Respondents requested a hearing and the Tribunal proceeded by considering the matter on 9 June 2014 by reference to the papers placed before them. The Tribunal determined that, having regard to the nature of the matters to be determined, there was no need to inspect the Property.

THE LAW

8. The material statutory provisions in this case are as follows.

- (i) The Landlord and Tenant Act 1985

Section 27A (1) An application may be made to the appropriate tribunal for a determination whether a service charge is payable and, if it is, as to... (c) the amount which is payable'.

Section 27A (3) provides that an application may also be made 'if costs were incurred.'

Section 19(2) Where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable, and after the relevant costs have been incurred any necessary adjustment shall be made by repayment, reduction or subsequent charges or otherwise.

Section 21(1) provides that a demand for the payment of a service charge must be accompanied by a summary of the rights and obligations of tenants of dwellings in relation to service charges. Pursuant to Section 21(2) the Secretary of State has made The Service Charges (Summary of Rights and Obligations, and Transitional Provision) (England) Regulations 2007 which prescribe the matters which must be included in the summary. Section 21(3) provides that a tenant may withhold payment of there is non-compliance and Section 21(4) renders ineffective any provision in a lease with regard to non-payment or late payment where a tenant withholds payment under these provisions.

Sections 22 and 23 make provision for the inspection by a tenant of accounts and documents.

(ii) The Commonhold and Leasehold Reform Act, Schedule 11, Paragraph 5 provides for applications to be made to the appropriate tribunal for a determination whether an administration charge is payable and, if it is, as to –

- (a) the person by whom it is payable,
- (b) the person to whom it is payable,
- (c) the amount which is payable,
- (d) the date at or by which it is payable, and
- (e) the manner in which it is payable.

THE LEASE

9. The Tribunal had before it copies of the Leases which were in identical terms and have been read and interpreted as a whole. In reaching its conclusions and findings, the Tribunal has had particular regard to the following matters or provisions contained in the Leases, none of which were the subject of dispute or argument by or on behalf of the parties:
- a. covenants to pay service charges in Clauses 4.1 and 4.2;
 - b. the service charge provisions in the Fifth, Sixth and Seventh Schedules.

THE EVIDENCE, SUBMISSIONS & THE TRIBUNAL'S CONCLUSIONS & REASONS

10. The Applicant has asked for a determination of the reasonableness of the service charges the years ended 31 December 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012 and 2013. The Tribunal had before them the service charge demands for the periods in question which complied with The Service Charges (Summary of Rights and Obligations, and Transitional Provision) (England) Regulations 2007.
11. The Tribunal has considered the issues on the whole of the written evidence and submissions now before them and, applying their own expertise and experience, has reached the following conclusions on the issues before them.
12. The service charges demanded by the Applicant for the years in question were calculated by reference to the following statements of expenditure:

| 1 September 2004 to 31 December 2005 | £ |
|--------------------------------------|----------|
| Insurance | 3,843.00 |
| Telephone | 197.00 |
| Household and cleaning | 325.00 |
| Sundry | 106.00 |
| Accountancy | 705.00 |

| | |
|-----------------------------|----------|
| Year ended 31 December 2006 | £ |
| Insurance | 2,272.00 |
| Telephone | 316.00 |
| Repairs and renewals | 4,199.00 |
| Household and cleaning | 98.00 |
| Sundry | 60.00 |
| Accountancy | 646.00 |
| Year ended 31 December 2007 | £ |
| Management charge | 2,500.00 |
| Insurance | 2,269.00 |
| Light and heat | 2,782.00 |
| Telephone | 202.00 |
| Repairs and renewals | 3,374.00 |
| Household and cleaning | 3,449.00 |
| Sundry | 31.00 |
| Accountancy | 705.00 |
| Year ended 31 December 2008 | £ |
| Management charge | 1,825.00 |
| Insurance | 2,486.00 |
| Light and heat | 1,179.00 |
| Telephone | 245.00 |
| Repairs and renewals | 979.00 |
| Household and cleaning | 2,919.00 |
| Sundry | 15.00 |
| Accountancy | 805.00 |
| Year ended 31 December 2009 | £ |
| Insurance | 2,057.00 |
| Light and heat | 1,480.00 |
| Management charge | 1,900.00 |
| Telephone | 257.00 |
| Repairs and renewals | 1,451.00 |
| Household and cleaning | 2,040.00 |

| | |
|-----------------------------|-----------|
| Gardening | 1,041.00 |
| Sundry expenses | 139.00 |
| Accountancy | 411.00 |
| Year ended 31 December 2010 | £ |
| Insurance | 2,879.00 |
| Light and heat | 1,636.00 |
| Management charge | 1,970.00 |
| Telephone | 253.00 |
| Repairs and renewals | 2,226.00 |
| Household and cleaning | 1,968.00 |
| Gardening | 932.00 |
| Sundry expenses | 164.00 |
| Accountancy | 432.00 |
| Professional fees | 588.00 |
| Year ended 31 December 2011 | £ |
| Insurance | 3,181.00 |
| Light and heat | 2,643.00 |
| Management charge | 1,970.00 |
| Telephone | 274.00 |
| Repairs and renewals | 2,467.00 |
| Household and cleaning | 2,061.00 |
| Gardening | 1,190.00 |
| Sundry expenses | 15.00 |
| Accountancy | 444.00 |
| Year ended 31 December 2012 | £ |
| Telephone | 288.00 |
| Electricity | 1,213.00 |
| Landscaping | 1,070.00 |
| Insurance | 3,182.00 |
| Repairs and renewals | 11,099.00 |
| Cleaning | 897.00 |
| Window cleaning | 1,170.00 |

Sundry expenses 388.00

Accountancy 288.00

13. The service charges for the year ended 31 December 2013 are based on a detailed schedule of budgeted projections of expenditure produced on behalf of the Applicant by Homestead.

14. The First Respondent has challenged the reasonableness of the service charges, with the exception of those for the year ended 31 December 2013, in the following terms:

'The reason for non payment of the service charges in question was clear and simple, because the services for which we were being billed were never provided. Nor were annual statements of accounts, a projection or forecast for the coming year. After several attempts by letter and telephone with the previous service company to resolve this matter, it was then decided by the landlords and residents of Cartmell Court to remove these original service providers and replace them with Homestead Consultancy Services limited.

I now see myself in a position where insult is added to injury, and the original arrears are now being claimed by the replacement service company.

I see no evidence whatsoever of any works being carried out during the years in relation to the arrears, when Homestead Consultancy Services were not even the provider of the said services. They have merely sent copies of the previous company's accounts which are obviously available on request from Companies House. This proves nothing...gives little in relation to the relevant Service Charges, or an explanation of how these amounts have been calculated.'

15. The First Respondent also raised other issues in his response, including a request for an explanation as to why others had not been included in the application and an indication of a potential counterclaim. The Tribunal has taken account of the decision in *Birmingham City Council -v- Keddie & Hill [2012] UKUT 323 (LC)* in which it was held that a tribunal had no jurisdiction to determine issues not raised by the application. The Tribunal has, accordingly, limited its consideration to the reasonableness and payability of the service charges for the periods specified, although other aspects have been taken into account insofar as they might impact on the assessment of reasonableness and payability. In particular, the Tribunal has not considered the Respondent's request for explanations or potential counterclaim.

16. The Second Respondent has not responded to the application.

17. The Tribunal has had regard to *Yorkbrook Investments Limited -v- Batten (1986) 18 HLR 25* in which it was held that there is no presumption for or against the reasonableness of standard or of costs as regards service charges. If a defence to a claim for maintenance costs

is that the standard or the costs of the service are unreasonable, the tenant will need to specify the item complained of and the general nature – but not the evidence – of his case; once the tenant gives evidence establishing a prima facie case, it will be for the landlord to meet those allegations.

18. The First Respondent appears to have misunderstood his continuing liability in relation to the payment of service charges. The charges for the periods prior to 2013 are not due to the former managing agents and those after 2013 are not due to Homestead. They are all due to the Applicant (that is, Cartmell Court (Lytham St Annes) Limited) who is responsible for the provision of services and the calculation and collection of the resulting charges. The Applicant acts through the appointed managing agents but does not transfer rights and obligations to them. The Tribunal is satisfied, nonetheless, that the First Respondent in the present proceedings has established a prima facie case.
19. The Applicant has not addressed any of the issues raised by the First Respondent and has not produced any evidence that the services in question have been commissioned or that payments have been made. In this connection, the Tribunal observe that the First Respondent has been denied his right under Sections 22 and 23 of the Landlord and Tenant Act 1985 to inspect accounts and other documents. The Applicant's inability to provide the relevant documentation to the Tribunal suggests that it was unable to produce the material. Moreover, the Applicant has not produced any detailed outturn accounts or supporting documentation for the periods under consideration from which the actual expenditure can be assessed.
20. The Tribunal observed that the disputed service charges relate to the period before Homestead took over responsibility on 11 January 2013. The Tribunal has not been told of the reasons for the previous managing agent's replacement by Homestead, but it is evident that the Applicant and Homestead have not been successful in obtaining the missing material and it is not, therefore, within the Applicant's control.
21. The Tribunal recognises that that these circumstances disadvantage the Applicant quite considerably, but can see no sustainable reason to assist by proceeding by way of making assumptions or drawing inferences which are not evidence-based. In *Schilling & Others -v- Canary Riverside Development PTD Limited (LRX/26/2005 LRX/31/2005 LRX/47/2005)*, it was held that the burden of proof was upon an applicant, although His Honour Judge Michael Rich QC went on to say that

'In civil cases, where the standard of proof is only the balance of probabilities, the burden matters only where either there is no evidence or, in the very unusual circumstance that, having heard all the evidence, the tribunal is unable to make up its mind.'
22. Having regard to the absence of any evidence at all that the services were actually commissioned and paid for or as to any breakdown of the costs involved, coupled with the First Respondent's unchallenged

statement that 'the services for which we were being billed were never provided', the Applicant has not discharged the burden of proof. The Tribunal have concluded that the services charges demanded by the Applicant for the periods in question, other than for the year ended 31 December 2013, were not reasonable.

23. It is reasonably likely that some services were provided in the periods in question, but there is no evidence as to the nature, extent or unit costs of such services. The Tribunal has not, therefore, made any decision as to what might have been reasonable charges for such periods.
24. In relation to the service charges for the year ended 31 December 2013, there has been no challenge by the Respondents. The Tribunal is aware from their own experience and knowledge that the service charges for the Property are not substantially different from those of other, similar developments in the immediate area or in the wider area of the Residential Property Tribunal's Northern Region. The Tribunal finds, therefore, that they are reasonable and payable by the Applicant.
25. The Tribunal would emphasise that this decision is not intended to cast doubt on the current ability of the Respondent to provide services through Homestead who were appointed after the periods in dispute. The Tribunal is fortified in this view by the reasonableness of the service charges for the year ended 31 December 2013, being the only year in which Homestead acted as managing agents.

COSTS

26. The Tribunal has power to award costs and/or reimburse fees under Rule 13 of The Tribunal Procedure (First Tier Tribunal) (Property Chamber) Rules 2013 which provides, insofar as it is material to the present case:
 - '(1) The Tribunal may make an order in respect of costs only –
 - ... (b) If a person has acted unreasonably in bringing, defending or conducting proceedings in –
 - ... (ii) A residential property case...
 - (2) The Tribunal may make an order requiring a party to reimburse to any other party the whole or any part of the amount of any fee paid by the other party which has not been remitted by the Lord Chancellor.
 - (3) The Tribunal may make an order under this rule on an application or on its own initiative.'
27. The Tribunal has considered the whole of the evidence and has determined that there was no circumstance or particular in which either of the parties had acted unreasonably. This is particularly so because the evidential difficulties faced by the Applicant (and, consequently, by Homestead) lie in the failings of the original managing agents. The Tribunal concluded that it would not be appropriate or proportionate to award costs to either party or to make an order for the reimbursement of any fees.