

12/23



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

**Case Reference** : **LON/00AF/LSC/2016/0342**

**Property** : **Flat 3 Urquhart Court,  
109 Park Road,  
Kent BR3 1QL**

**Applicant** : **Mrs J Burgess**

**Representative** : **In person**

**Respondent** : **Urquhart Court (Freehold) Ltd**

**Representative** : **Ms Y Yasseri of Counsel  
Instructed by Rradar Ltd solicitors**

**Type of Application** : **For the determination of the  
reasonableness of and the liability  
to pay a service charge**

**Tribunal Members** : **Judge J E Guest  
Mrs L West  
Mr M Mathews FRICS**

**Date and venue of  
Hearing** : **23/02/2017  
10 Alfred Place, London WC1E 7LR**

**Date of Decision** : **27/03/2017**

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**DECISION**

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## **Decisions of the Tribunal**

- (1) The Tribunal makes the determinations as set out under the various headings in this decision.
- (2) The Tribunal does not make an order under section 20C of the Landlord and Tenant Act 1985, so the landlord's costs of the Tribunal proceedings may be passed to the lessees through any service charge.
- (3) The Tribunal refuses the Applicant's application in respect of the reimbursement of the Tribunal fees.

## **The application**

1. The Applicant seeks a determination pursuant to section 27A of the Landlord and Tenant Act 1985 (*"the 1985 Act"*) as to the amount of service charges payable by the Applicant in respect of the service charge years: 2013/14; 2014/15; 2015/16; and the estimated service charges for the current year 2016/17. The service charge year ends 23 June.
2. The relevant legal provisions are set out in the Appendix to this decision.

## **The hearing**

3. The Applicant appeared in person at the hearing. The Respondent was represented by Counsel, Ms Y Yasseri. A director of Urquhart Court (Freehold) Ltd, Mr M Proudfoot, attended and gave some oral evidence. Ms C Manton, the senior property manager of PMMS Limited (the current managing agents) was also present.
4. In addition to the bundles prepared by the Applicant, the Tribunal also considered a copy of the Memorandum and Articles of Urquhart Court (Freehold) Ltd (*"Memo and Arts"*), which was handed to the Tribunal during the course of the hearing. The Applicant confirmed that she was familiar with this document and raised no objection.

## **The background**

5. The property which is the subject of this application is a flat situated in a small estate, known as Urquhart Court. The estate comprises: a 4 storey purpose building containing 32 flats; two garage blocks consisting of a total of 21 garages; 11 parking spaces; and landscaped areas. The Tribunal was told that the estate was constructed in 1969.

6. Neither party requested an inspection and the Tribunal did not consider that one was necessary, nor would it have been proportionate to the issues in dispute.
7. The Applicant acquired the leasehold interest in 2001. The original lease was granted on 24/03/1970 for a period of 99 years commencing on 24/06/1969. This lease was surrendered and a new lease granted on 15/12/2004 for a term of 999 years from 25/09/2001. The lease requires the landlord to provide services and the tenant to contribute towards their costs by way of a variable service charge. The lease requires the tenant of each flat to make a contribution of 1/32<sup>nd</sup> contribution to the service charges (with the garage owners paying a separate contribution of 1/21<sup>st</sup>).
8. The freehold owner is Urquhart Court (Freehold) Ltd, a tenant owned freehold company. The Tribunal heard that 31 of the 32 flat owners hold a share of the company. There have been various changes in the directorship. The Applicant was a director from January 2009 to October 2011.

### **The issues**

9. The application was first considered by the Tribunal at a case management hearing on 18/10/2016 when various directions were made. As the current managing agents, PMMS, had only been appointed on 01/08/2016, the Tribunal directed two former managing agents, VFM Management (agents from 24/06/2013 to 20/07/2016) and Moonstone Property Management (agents from July 2012 to June 2013) to provide disclosure. At the case management hearing, the Tribunal also explained the Tribunal's jurisdiction under the 1985 Act and informed the Applicant that this did not extend to matters of company law.
10. In accordance with the directions made on 18/10/2016, a schedule was completed in which the parties set out their respective positions in relation to the matters disputed by the Applicant. This document is at page 76 of the bundle (and any further page reference relates to the relevant page of the bundle). As the schedule sets the position of each party in relation to the disputed items, it will not be repeated here.
11. The parties agreed at the start of the hearing that the Tribunal would deal with each disputed item in turn and give each party an opportunity to give oral evidence and make oral submissions on each point. In addition, it was agreed that the witness statements exchanged between the parties included in the bundles would stand as the evidence in chief.

12. Having considered the evidence, the submissions from the parties and all of the documents provided, the Tribunal made the following determinations on the disputed items:

**Disputed service charges for the year ending 23 June 2014**

**(1) Other management fees £4,363**

**Tribunal's decision**

13. The Tribunal decided that the fees were reasonable and allowed the item in full.

**Reasons**

14. The managing agents at this time were VFM Procurement Ltd. The agreement commencing on 24/06/2013 is at page RE10. The contract was for a fixed charge of £4,640 pa and 12.5% of the chargeable items set out in clause 1 plus additional services and disbursements charged at an hourly rate or as a fixed fee or charge. The 'other' management fees related to the additional services.
15. Clause 1 of the agreement included *receiving* routine enquires from leaseholders (paragraph 1.10) and *attending to* routine enquiries from the client or auditor (para. 1.11) [emphasis added]. This meant that dealing with routine enquires was part of the additional service, i.e. not covered by the fixed fee.
16. The relevant invoices were included in the bundle and showed that the charges had been levied in accordance with the agreement. It was noted that some of the additional charges related to dealing with the Applicant's enquiries, although on occasion the additional fee was waived, thereby demonstrating some goodwill.
17. The Applicant did not dispute the actual time spent by the agents dealing with additional matters.
18. The Tribunal noted the Applicant's concern that the agreement did not follow the Code of Guidance in place at that time, which refers to '*attending to*', rather than just *receiving*, routine enquires. The Tribunal also noted that the current agreement with PMMS includes dealing with routine enquiries as part of the fixed charge.
19. The Tribunal heard the landlord appointed VFM after the Board of Directors interviewed various agents and decided that VFM was the most suitable. The Tribunal considered that the appointment of VFM had followed a reasonable process to select a manager and that it was

likely that the Board (themselves all leaseholders with a financial interest) had obtained the best deal available, particularly in the context of the high turnover of managers in recent years (there were a total of 4 different agents prior to VFM).

20. The Tribunal noted that the management fees for each flat amounted to £310 per year including the additional fees. This differs little from the overall charge now made by PMMS. The Tribunal considered that this overall charge was not unreasonable.

**(2) Painting garage doors £1,110**

21. The Respondent acknowledged that this had been charged to the flats in error, which was corrected in the 2015/16 accounts. It was, therefore, unnecessary for the Tribunal to make any determination on this item.

**(3) £180 paid to previous agent**

**Tribunal's decision**

22. The Tribunal decided that these fees were reasonably incurred and the item was allowed in full.

**Reasons**

23. In 2012, the previous agents, Moonstone, arranged for roof works to be undertaken by P&A Roofing. Additional works were carried out to guttering. P&A's invoices for the costs were produced by the Respondent (at pages RE59 and RE60).
24. Mr Proudfoot explained that P&A had done patch repairs to the flat roof of the block and, at the same time, the contractor did some works to the guttering, which gave rise to the charges of £180.
25. The Applicant disagreed and submitted that the two invoices must have related to works to the garage roofs, as the contractor would not have been able to gain access to the roof of the main building, which is 4 storeys.
26. The Tribunal accepted Mr Proudfoot's evidence that the works had been undertaken to the main roof and not the garages. This was because the problem of roof leaks seemed, on the evidence, to have been fixed for a period of time before re-occurring, which indicated that some patch repairs and works to the guttering had probably been undertaken.

**(4) Legal fees £327**

**Tribunal's decision**

27. The Tribunal decided that these fees had not been reasonably incurred so disallowed the item in full.

**Reasons**

28. The Respondent stated that these fees related to 'general advice' for a 'lease extension'. The solicitor's invoice (at page RE63) was produced. This included disbursements for a company search and another search fee.
29. According to information obtained by the Applicant (page JB4A), 16 leaseholders have now been granted a new 999 year lease. The provision of a new lease is not an uncommon event.
30. Any costs incurred by the freeholder in granting a new lease should be borne by the leaseholder of the flat concerned. It is not a cost that should be borne by all leaseholders so the charge was not reasonably incurred.

**Disputed service charges for the year ending 23/06/2015**

**(1) Section 20 consultation re bin stores £660**

**Tribunal's decision**

31. The Tribunal decided that this item had not been reasonably incurred and it was disallowed in full.

**Reasons**

32. The parties were in agreement that neither the old nor the new lease permits the landlord to undertake any improvements.
33. The parties also agreed that the Company's Memorandum requires a vote for any material change of alteration to the design of the estate (clause 16(d)) and that such a vote must be supported by 'at least 36 votes' (clause 16). This was clearly impossible since there are only currently 31 shareholders.
34. As agreed between the parties, no improvements are permitted. This is on the basis of either the lease or the terms of the Company's incorporation.

35. The Tribunal considered that the managing agents should have known the contents of leases and the Company's Memo and Arts, as these are fundamental documents to the service being provided. Therefore, the agents ought to have been aware that the demolition of the bin store and the construction of a new bin store elsewhere were matters outside the scope of the freeholder's powers. This is unaltered by the fact that the Fire Risk Assessment dated 16/09/2014 (page RE71) recommended that the work be undertaken within 3 months since this was a regulatory obligation outside the terms of the lease/Memo and Arts.
36. Given the above, the section 20 consultation was a fruitless exercise and it follows that the costs of the consultation were not reasonably incurred.

**(2) Other management fees £2,824**

37. The Tribunal allowed this sum in full for the same reasons given above.

**(3) Repairs and maintenance budget £2,000**

**Tribunal's decision**

38. The Tribunal decided that this was a reasonable budget and allowed the item in full.

**Reason**

39. There had been a 38% increase in this item of expenditure in the previous year so this budget was reasonable.

**(4) Insurance claims/excesses budget £2,500**

40. The Applicant did not make any submission on this item at the hearing. In the absence of any objection, the Tribunal accepted the Respondent's explanation of this budget item and allowed the amount in full.

**(5) Second stage of the bin consultation budget £1,000**

**Tribunal's decision**

41. The Tribunal considered that this budget was reasonable and allowed the item in full.

### **Reasons**

42. Given that the managing agent was at the time labouring under a false assumption that the improvement works could be undertaken, it was not unreasonable in the circumstances to make an allowance in the budget for this item.
43. The second stage of the consultation was not in the end pursued, but the Tribunal acknowledged that this was a budget item only and that it was reasonable to make some provision for this in the budget, given that the consultation process had been started (albeit incorrectly).

### **(6) New lease management budget £1,000**

#### **Tribunal's decision**

44. The Tribunal decided that this was a reasonable budget and allowed the item in full.

#### **Reasons**

45. As acknowledged above, the agents were entitled to charge separately for dealing with routine enquiries. Given that half the leaseholders have old leases, it was not unreasonable to make some provision for this expenditure in the budget.

### **Disputed service charges for the year ending 23/06/2016**

#### **(1) Insurances claims/excesses budget £1,500**

46. The Applicant did not make any submission on this item at the hearing. In the absence of any objection, the Tribunal accepted the Respondent's explanation of this budget item and allowed the amount in full.

#### **(2) Section 20 consultation re roof budget £1,000**

#### **Tribunal's decision**

47. The Tribunal considered that this was a reasonable budget and allowed the item in full.

#### **Reasons**

48. The Applicant's only objection was that this item was described as 'sundry and administration expenses' in the budget, whereas the section 20 consultation for the bin store had been given a specific



heading. Mr Proudfoot told the Tribunal that none of the other leaseholders had objected.

49. In any event, it was reasonable to make a provision in the budget for such costs, given that there will obviously need to be a section 20 consultation regarding the roof (as the costs of works had been estimated at £90,000).

**(3) Legal fees budget £1,200**

**Tribunal's decision**

50. The Tribunal decided that this was a reasonable budget and allowed the item in full.

**Reasons**

51. The Tribunal heard that this item related to the budget for obtaining legal advice since the Respondent was in difficulties reconciling its obligations under the Regulatory Reform (Fire Safety) Order 2005 with the provisions in lease, which the parties agreed did not permit improvements. The Applicant suggested that legal advice was available free of charge from LEASE, a leasehold advisory service.
52. The Tribunal considered that it was reasonable to allow a budget for this item, given that the Fire Risk Assessment had recommended improvements. The Respondent has duties under the 2005 Order and it could not simply ignore the Fire Risk Assessment even if there had been no actual problems with the bin store in the past.
53. The Tribunal also considered it inappropriate to expect a landlord to seek free legal advice in such circumstances since this was a technical matter on an issue of importance.

**(4) New lease management budget £500**

54. The Tribunal allowed this item in full for the same reasons given above.

**(5) Director's personal tradesman's insurance £106.76**

**Tribunal's decision**

55. The Tribunal decided that this item was reasonably incurred and reasonable in amount so allowed the item.

## **Reasons**

56. The Tribunal heard that one of the directors, Mr Roberts-Tune, undertook general repairs on a voluntary basis. He repaired locks, door closures, plasterwork, etc., thus avoiding the need to incur call out fees. A call out for a minor issue is £65.75 (excluding materials).
57. The directors' insurance was disclosed (page RE98) and this confirms that such voluntary work is not covered.
58. The Applicant herself suggested that Mr Roberts-Tune should be insured when he was cutting trees some years ago.
59. It is entirely reasonable for the director to be insured, given the works he is undertaking, particularly as this is saving the leaseholders the cost of some repairs.

## **Disputed service charge budget for the year ending 23/06/2017**

### **(1) Insurance claims/excesses budget £1,800**

60. The Applicant did not make any submission on this item at the hearing. In the absence of any objection, the Tribunal accepted the Respondent's explanation of this budget item and allowed the amount in full.

### **(2) Legal fees budget £3,000**

#### **Tribunal's decision**

61. The Tribunal decided that this was a reasonable budget and allowed the item in full.

#### **Reasons**

62. The Tribunal heard from the Respondent's Counsel that provision in the budget had been made for legal costs in relation to: (a) this application; (b) the fact that a resolution requires 36 votes when there are only 31 shareholders; and (c) a breach of lease case.
63. The Tribunal rejected the Applicant's assertion that costs would be recovered under the lease for breach of lease, given that any firm of solicitors would require a payment on account of costs and payment for such work, irrespective of whether any costs are recovered from the leaseholder concerned under the terms of their lease.

64. The Tribunal considered that the budget was entirely reasonable given the nature of the legal costs to be incurred.

**(3) Lease management budget £500**

65. This budget item was allowed in full for the reasons given above.

**(4) Contribution to the reserve fund £10,000**

**Tribunal's decision**

66. The Tribunal decided that this was a reasonable provision in the budget so allowed the item in full.

**Reasons**

67. The Tribunal rejected the Applicant's assertion that the directors should borrow money from the shareholders' account to cover this cost. The Tribunal heard that the shareholders' account holds funds from, for example, the grant of new leases, and that it had been used in the past to 'bail out' the freeholder when there was a considerable shortfall in the service charge account.

68. The money in the shareholders account belongs to the shareholders. There is no provision in the Memo and Arts for the account to be used by the Respondent to fund repairs. Instead, the provisions of the lease entitle the Respondent to establish a reserve fund through the service charges.

69. It is, therefore, completely sensible for the reserve fund to be built up so that the freeholder has the funds to carry out works to the roof, particularly given that there were currently insufficient funds in the reserve fund to cover such works (according to the accounts for 2015/6 page R137).

**(5) Roof hatch budget**

70. Counsel for the Respondent explained that it was intended to install a roof access hatch as part of the roof replacement works and this had been added to the section 20 consultation. This item was not being pursued by the Respondent, as it was accepted that it constituted an improvement. Given this, there was no need for the Tribunal to make any determination on this item.

### **Application under s.20C and refund of fees**

71. At the end of the hearing, the Applicant made an application for a refund of the fees that she had paid in respect of the application/hearing<sup>1</sup>.
72. Having heard the submissions from the parties and taking into account the determinations above, the Tribunal does not order the Respondent to refund any fees paid by the Applicant.
73. In a separate application form, the Applicant applied for an order under section 20C of the 1985 Act. Having heard the submissions from the parties and taking into account the determinations above, the Tribunal determines that it is not just and equitable in the circumstances for an order to be made under section 20C of the 1985 Act.
74. The above decisions were made since the Applicant was almost entirely unsuccessful. The Applicant only succeeded in reducing the overall costs by around 3%. As this was a negligible amount, the Tribunal did not make any split order for costs.
75. Further, given the Applicant's position following explanations given by the Respondent, it was understandable that the Respondent had not entered into mediation since this was likely to increase costs and not resolve the issues in dispute.

**Name:** Judge J E Guest

**Date:** 27/03/2017

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<sup>1</sup> The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 SI 2013 No 1169

## Appendix of relevant legislation

### Landlord and Tenant Act 1985 (as amended)

#### Section 18

- (1) In the following provisions of this Act "service charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent -
  - (a) which is payable, directly or indirectly, for services, repairs, maintenance, improvements or insurance or the landlord's costs of management, and
  - (b) the whole or part of which varies or may vary according to the relevant costs.
- (2) The relevant costs are the costs or estimated costs incurred or to be incurred by or on behalf of the landlord, or a superior landlord, in connection with the matters for which the service charge is payable.
- (3) For this purpose -
  - (a) "costs" includes overheads, and
  - (b) costs are relevant costs in relation to a service charge whether they are incurred, or to be incurred, in the period for which the service charge is payable or in an earlier or later period.

#### Section 19

- (1) Relevant costs shall be taken into account in determining the amount of a service charge payable for a period -
  - (a) only to the extent that they are reasonably incurred, and
  - (b) where they are incurred on the provisions of services or the carrying out of works, only if the services or works are of a reasonable standard;and the amount payable shall be limited accordingly.
- (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 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 -
  - (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.
- (2) Subsection (1) applies whether or not any payment has been made.
- (3) An application may also be made to the appropriate tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs and, if it would, as to -
- (a) the person by whom it would be payable,
  - (b) the person to whom it would be payable,
  - (c) the amount which would be payable,
  - (d) the date at or by which it would be payable, and
  - (e) the manner in which it would be payable.
- (4) No application under subsection (1) or (3) may be made in respect of a matter which -
- (a) has been agreed or admitted by the tenant,
  - (b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,
  - (c) has been the subject of determination by a court, or
  - (d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.
- (5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.

## **Section 20**

- (1) Where this section applies to any qualifying works or qualifying long term agreement, the relevant contributions of tenants are limited in accordance with subsection (6) or (7) (or both) unless the consultation requirements have been either—
- (a) complied with in relation to the works or agreement, or
  - (b) dispensed with in relation to the works or agreement by (or on appeal from) the appropriate tribunal .
- (2) In this section “relevant contribution”, in relation to a tenant and any works or agreement, is the amount which he may be required under the terms of his lease to contribute (by the payment of service charges) to relevant costs incurred on carrying out the works or under the agreement.
- (3) This section applies to qualifying works if relevant costs incurred on carrying out the works exceed an appropriate amount.
- (4) The Secretary of State may by regulations provide that this section applies to a qualifying long term agreement—

- (a) if relevant costs incurred under the agreement exceed an appropriate amount, or
  - (b) if relevant costs incurred under the agreement during a period prescribed by the regulations exceed an appropriate amount.
- (5) An appropriate amount is an amount set by regulations made by the Secretary of State; and the regulations may make provision for either or both of the following to be an appropriate amount—
- (a) an amount prescribed by, or determined in accordance with, the regulations, and
  - (b) an amount which results in the relevant contribution of any one or more tenants being an amount prescribed by, or determined in accordance with, the regulations.
- (6) Where an appropriate amount is set by virtue of paragraph (a) of subsection (5), the amount of the relevant costs incurred on carrying out the works or under the agreement which may be taken into account in determining the relevant contributions of tenants is limited to the appropriate amount.
- (7) Where an appropriate amount is set by virtue of paragraph (b) of that subsection, the amount of the relevant contribution of the tenant, or each of the tenants, whose relevant contribution would otherwise exceed the amount prescribed by, or determined in accordance with, the regulations is limited to the amount so prescribed or determined.]

### **Section 20C**

- (1) A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a court, residential property tribunal or the Upper Tribunal, or in connection with arbitration proceedings, 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.
- (2) The application shall be made—
- (a) in the case of court proceedings, to the court before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to a county court;
  - (aa) in the case of proceedings before a residential property tribunal, to that tribunal;
  - (b) in the case of proceedings before a residential property tribunal, to the tribunal before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to any residential property tribunal;

- (c) in the case of proceedings before the Upper Tribunal, to the tribunal;
  - (d) in the case of arbitration proceedings, to the arbitral tribunal or, if the application is made after the proceedings are concluded, to a county court.
- (3) The court or tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances.



## **Rights of appeal**

Rule 36(2) of the Tribunal Procedure (First-tier Tribunal) Property Chamber Rules 2013 requires the Tribunal to notify the parties about any rights of appeal they may have.

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

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.

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.

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 reference number), state the grounds of appeal and state the result the party making the application is seeking.

If the Tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).