



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

Case Reference : **CHI/43UC/LSC/2020/0002**

Property : **13 Hunter Court, Sandy Mead
Epsom, Surrey, KT19 7NG**

Applicant : **Victor Edney Gale**

Respondent : **Hunter Court RTM Company Ltd**

Type of Application : **Section 27A,
Landlord and Tenant Act 1985**

Tribunal Members : **Judge D Dovar**

Date of Decision : **1st April 2020**

DECISION

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Introduction

1. This is an application for the determination of liability to pay service charges under s.27A of the Landlord and Tenant Act 1985, for the years ending 31st August 2014 to 31st August 2018.
2. Both parties have consented to this matter being dealt with on the papers without an oral hearing.
3. The Tribunal has been provided with two bundles, one from each party. The Applicant's bundle contains: the application, the directions of the Tribunal of 24th January 2020, a succinct statement of what the Applicant seeks a determination on; an introductory statement; the report of Michael Butler FCA; the on account demands and service charge accounts for the years in question; a copy lease, correspondence and the Applicant's Reply. The Respondent's bundle contains their statement of case and a detailed rebuttal of the Applicant's case with supporting documentation.
4. In Attachment 2 to the Application, the Applicant requests the following determinations:
 - a. That the Respondent failed to prepare the accounts for the year ended 31 August 2018 in accordance with the terms of the lease, with the result that the service charges for the year end 31st August 2018 were excessive and not calculated in accordance with the terms of the lease;

- b. that the Respondent should calculate the accounts in accordance with the terms of the lease to correct:
 - i. the charging of the full cost of garage insurance to block and estate;
 - ii. the allocation of gutter repair to parking spaces;
 - iii. the excessive balance of funds in the reserve;
 - c. that the Applicant is entitled to a credit of £1,471 arising out of incorrect service charges paid for the years ending 31 August 2018.
5. The Tribunal's jurisdiction is limited to dealing with matters of payability under s.27A of the Landlord and Tenant Act 1985. Ultimately it can only decide how much the Applicant should pay by way of service charge for the years in question.
6. Directions were given on 24th January 2020 and included a summary of the issues for determination. Neither party has objected to that summary which helpfully approached the Applicant's request from the perspective of the Tribunal's jurisdiction. The issues identified were:
- a. a failure to comply with the lease provisions for on account charges, balancing charges and credits;
 - b. non service chargeable costs being added to the service charge; being garage repairs and insurance;
 - c. a failure to adhere to the provisions in the lease for reserves.

Background

7. The Property is one of 32 flats in a residential block known as Hunter Court, which had been the site of a hospital, until it was converted into residential use in 2002. As well as the block there are associated grounds and garages, the latter being let to some of the residents.

Lease Terms

8. The Tribunal has been provided with a lease of Plot 45, Hunter Court, dated 29th April 2002; which is understood to be the lease of the subject flat, number 13. It is a tri-partite lease, Landlord, Tenant and the Manager; with the latter's role now being undertaken by the Respondent RTM Company. The lease contains the following material provisions:

- a. The Lessee's Proportions of the Maintenance Expenses are set out in the Particulars as:

“Part A Proportion 2.93% (Block & Estate Costs)

Part B Proportion (*if applicable*) 5.38% (Internal Common Area Costs)

Part C Proportion (*if applicable*) 0.00% (Garage Costs)

Part D Proportion (*if applicable*) 1.20% (Surface Parking Space Costs)

Part E Proportion (*if applicable*) 1.56% (Electrical Vehicle Entry Gate Costs).

SAVE THAT any of the said Proportions may be subject to variation from time to time in accordance with the provisions of clause 7.11 hereto”

- b. By clause 6, the Manager covenants to observe and perform the obligations set out in the Tenth Schedule;
- c. Clause 7.11 allows the Manger, acting reasonably, to recalculate the proportions;
- d. The Sixth Schedule, contains ‘the Maintenance Expenses’ under a number of headings, which in part correlate to those set out in the Particulars and includes:

“PART C (Garage Block Costs),

1. *Insuring and keep insured the Garage Block ...’;*

...

PART G (Costs applicable to Parts A and/or B and/or C and/or D and/or E)

...

9. *Employing a qualified accountant for the purpose of auditing the accounts in respect of the Maintenance Expenses and certifying the total amount thereof for the period to which the account relates*

13. Such sum as shall be considered necessary by the Manager ... to provide a reserve fund or funds for items of future expenditure to be or expected to be incurred at any time in connection with the Maintained Property.”

- e. The Seventh Schedule sets out the service charge mechanism, in particular it provides for payment by the lessee of their proportion:

“6.1 In advance on the First day of September and the First day of March in every year throughout the Term one half of the Lessee’s Proportion of the amount estimated from time to time by the Manager or its managing agents as the Maintenance Expenses for the year ...

6.2 Within twenty one days after the service by the Manager on the Lessee of a certificate in accordance with Paragraph 9 of Part E¹ of the Sixth Schedule for the period in question the Lessee shall pay to the Manager the balance by which the Lessee’s Proportion received by the Manager from the Lessee pursuant to Sub-Paragraph 6.1 of this Schedule falls short of the Lessee’s Proportion payable to the Manager as certified by the said certificate during the said period and any overpayments by the Lessee shall be credited against future payments due from the Lessee to the Manager.”

¹ This should read G, as that refers to the certificate, whereas there is no paragraph 9 in Part E.

- f. The Tenth Schedule sets out the Managers obligations, which include:

“1 ... to carry out the works and do the acts and things set out in the Sixth Schedule as appropriate to each type of dwelling ...

3 The Manager shall ensure that the reserve fund or funds referred to in the Sixth Schedule shall be kept in a separate trust fund account ... and shall only be applied in connection with the matters detailed in the Sixth Schedule”

On account demands

9. For the years in question, the same sum has been demanded on account from the Applicant, being £1,449.13 per annum in two half yearly instalments of £724.57 on 1st March and 1st September.
10. This figure is based on the following budget which accompanied the first demand (the figures in parenthesis appears on the later demands, but the amount claimed from the Applicant remains the same):
- a. Estate and Block, £37,195.20 (£37,202.65)
 - b. Internal Areas, £4,861.50 (£4,846.44)
 - c. Garages, £535.50 (£535.80)
 - d. Parking Spaces, £210 (£210.12)

- e. Gates, £2,100 (£2,096.64)
11. The budget shows that those figures included a total of £2,138.22 for reserves, split as to: £1,771.20 for Estate and Block; £231.50 for Internal Areas; £25.50 for Garages; £10 for Parking Spaces; and £100 for Gates.
12. Applying the Lessee's Proportions to those figures, the Applicant should have been paying £1,386.64 per annum. At some point, prior to the first demand being considered by the Tribunal, those proportions were changed so that the Property contributes: 2.94% of Block and Estate; 5.77% of Internal Areas; 4.55% of Parking Spaces; and 3.12% of Gates. When those are applied, they produce the figure levied.

Accounts

13. Accounts for the years in question have been provided by various accountants, each expressly stating that they have not carried out an audit.
14. Each year shows a varying surplus of total estimated expense over total actual costs with that surplus being transferred into reserves. Five reserve funds are shown on the accounts, one for each of the heads of expenditures. The amount transferred into each fund correlates to the surplus for that particular item of expenditure. For all years, save that of 2015, the reserve for Garage Costs has been in deficit, ranging from £11 to £1,886.60.

Failure to comply with the lease provisions for on account charges, balancing charges and credits

15. Whilst the Applicant only contends that there has been an excessive charge for the year ending 2018, the application requires an examination of all the years in question and how the sums claimed have been arrived at and dealt with.

On account charges

16. The first complaint is that the on account demands are not proper estimates in accordance with the lease terms.
17. Paragraph 6.1 of the lease requires the Manager to estimate 'from time to time' the Maintenance Expenses for the forthcoming year. There are two points to note:
 - a. That includes not only the costs for the forthcoming year, but also an element for the reserves (as permitted by paragraph 13 of Part G of the Sixth Schedule);
 - b. although the on account demand is paid in advance in September and May each year, the only stipulation as to when it is set is 'from time to time'.
18. The on account sum demanded for each of the years in question is based on an estimate drawn up for the year end 2014. That made modest provision for the reserve, it also produced a surplus of £4,444. The demands were maintained at the same level for the following years with the intention of building up the reserves and smoothing the service charges for the leaseholders.

19. Therefore the Respondent has, for the years in question, deliberately maintained the same level of on account demand. That approach has led to a varying surplus in each year; being £4,444.48 in 2014, £11,899.67 in 2015, £15,172 in 2016, £4,825 in 2017 and £14,321 in 2018.
20. The Respondent states in their Statement of Case that *'There is only one reserve fund intended to cover large unexpected repairs as and when they occur. We try to plan expenses so that there is not a deficit against any of the Schedules'*. However, 'unexpected repairs' are not the purpose of the reserve fund, it is for 'expected' items of future expenditure. This is not how the reserve funds are described in the accounts, there it is said *"The general fund has been established to meet the cost of large, non-regular repairs and maintenance work."*
21. The issue is therefore whether this is an approach that is permitted by the lease? The Applicant contends that the Respondent should have considered the budget both for the forthcoming years as well as what specific future items of expenditure it was necessary to build up reserves in respect of. The Respondent contends for a more relaxed approach. In terms of reserves, they had a general target based on 18 months annual expenditure. Despite the Applicant's current objection, in his letter of 26th April 2018, he supported in principle building a reserve fund of £48,000.
22. In most cases an on account demand is arrived at by consideration of the last known actual expenditure adjusted for known likely additional costs or omitted costs. In addition where a reserve is permitted, a further

adjustment can be made to take into account the need to build up a reserve to meet the cost of non-annually recurring expenditure. This lease certainly permits that type of exercise, but does not prescribe it.

23. In terms of the reserve fund, it does not prescribe that individual items of future expenditure must be identified at the outset, but is broader, it is 'such sum as shall be considered necessary ... for items of future expenditure'. Further paragraph 3 of the Tenth Schedule not only ensures that the reserve fund is held on trust in a separate account but specifically limits its application to the matters set out in the Sixth Schedule. That last prescription would not be necessary if in order to build up a reserve in the first place it was necessary to identify the items.
24. In the Tribunal's view, the approach taken by the Respondent in drawing up its on account demands is one that is permitted by the lease. Firstly, having regard to each previous year, the sum demanded is sufficient to meet the annual costs. Although for the recent years it has been based on a historical budget, it has been sufficient to meet the annual needs. Secondly it is permissible to build up the reserves, which has been done, and justifies the fact that for some years there has been a significant surplus. Finally, it is not necessary to identify particular items of future expenditure (although it would be sensible to do so) in order to build up reserves. The reserves are prescribed by both what is considered necessary and by the fact that they can only be defrayed in respect of the matters set out in the Sixth Schedule. Finally, as to the level of the reserve fund, the Respondent's target has been endorsed by the Applicant.

25. Accordingly, save for Garage Costs (dealt with below) the Tribunal finds that each of the on account demands for the years in question were valid and the sums levied under them payable by the Applicant.

Failure to audit

26. The next complaint is that the Respondent has not complied with the lease requirements as to audit and balancing charges.
27. As the ICAEW Technical Release 03/11, relied on by the Applicant, states in its foreword

“There is no statutory requirement for the routine preparation and content of service charge accounts but the accounts should comply with the provisions of the lease/tenancy agreement as otherwise there may be difficulty in recovering expenditure”.

28. Paragraph 6.2 of the Seventh Schedule sets out the mechanism for working out the balancing charge. A key element is the service of the certificate on the Lessee; which can in cases of a deficit, trigger an obligation on the leaseholder to pay additional sums. The lease stipulates that that certificate is the one referred to at paragraph 9 of Part G of the Sixth Schedule. That is therefore a certificate prepared by a qualified accountant.
29. The accountant is employed to audit the accounts in respect of Maintenance Expenses and to certify the total amount of the Maintenance Expenses. The accountant therefore has two roles; the audit and the certificate.

30. Although the accountant has two roles, the Tribunal considers that they are related and that when the accountant certifies the expenses, that is after they have carried out an audit of the same. The wording of the provision strongly suggests that the certification was of the Maintenance Expenses as contained in the audited accounts.
31. For each of the years in question, an accountant has been employed to provide accounts, which they have done and they have reported on their factual findings; which could be considered a certificate of the total amount of Maintenance Expenses. The Applicant asserts that this is not sufficient and that they should be audited and that any certificate should show both the total amount of the Maintenance Expenses for each year and the amount payable by each leaseholder.
32. The Respondent has not, until recently, had the accounts audited because it does not consider it needs to. Whilst it may be correct that it does not need to for the purpose of complying with company legislation, that does not abrogate the need to comply with the terms of the lease, to which it is a party.
33. The Tribunal does not consider that the certificate needs to show the amount payable by each leaseholder, as contended by the Applicant. That is not borne out by the wording of either paragraph 6.2 or paragraph 9. The certificate is only by reference to total expenditure and therefore the total surplus or deficit under each expenditure heading. The Respondent can then apply the Lessee's Proportion to calculate any additional sum owed by or credit to an individual leaseholder.

34. It does follow that in failing to have an audit carried out, the Respondent has failed to comply with the provisions of paragraph 6.2. However, that does not mean that the on account demands are not valid. If there had been any shortfall, the Respondent would have found itself in difficulty in that it would not have been able to make any deficit demand. However, there has not been any shortfall in the period in question, with the result that although the Tribunal finds that the lease terms have not been adhered to, there is no impact on the sums payable for the years in question, they remain as set out the on account demands. Any surplus held by the Respondent is held on trust under s.42 of the Landlord and Tenant Act 1987.

£1,471 overcharge

35. In Mr Butler's report dated 22nd December 2019 he states at paragraph 9.1 that *'it is estimated that Mr Gale has been overcharged by approximately £1,471 for the five years ended 31 August 2018.'* Reference is then made to a calculation in the appendix. That appendix states that

'ACTUAL FIGURES CAN AND WILL ONLY BE DETERMINED WHEN THE SERVICE CHARGE ACCOUNTS ARE PREPARED IN ACCORDANCE WITH THE PROVISIONS OF THE HUNTER COURT LEASE'.

36. The Tribunal has found it hard to follow how the Applicant has arrived at his figure of £1,471. The Tribunal cannot and does not make any deduction in respect of the overcharge as:

- a. this is an estimated figure;
- b. it is said to be reliant on audited accounts being provided and certified, which has not been done;
- c. it appears to be based on anticipated future expenditure; and
- d. the Tribunal has endorsed the on account demands and in the absence of any balancing exercise, there cannot have been any overcharge.

Garage Insurance

37. This point is a little more straightforward. Indeed the Respondent accepts that it has wrongly charged the garage insurance to the Block and Estate costs. This has occurred because one insurance was taken out which covered both the building and the garages. The Respondent has said that in future it will allocate £100 to Garage Costs to allow for this and that an adjustment has been made for prior years. The Respondent has provided a copy letter to their accountants along these lines. The basis for arriving at this figure is unclear, save that it considers that it achieves economies of scale by including it with the insurance for the remainder of the estate.
38. The Applicant contends that the adjustment should be £300 per annum. He relies on historical charges of £285 in 2010 and anticipated charges of £333 for 2011 for garage insurance and a 2014 budget which indicated £300.

39. The evidence on this issue supports the Applicant and the Tribunal determines that for each of the years in question, £300 should be moved from Block and Estate to Garage Costs with the result that for each of the years in question, the Applicant is entitled to a reduction of £8.82 (i.e. 2.94% of £300).

Guttering

40. A figure of £318 is challenged in the year end 2018 accounts. However, this is based on the actual expenditure contained in the year end accounts which show that this item was moved from Garages to Parking Spaces; wrongly as the Applicant contends. Given the determination above on the reconciliation, the actual expenditure does not fall to be considered and the focus is on the on account demands. Those demands do not include the £318 entry and so this issue does not presently fall for determination.

Section 20C of the Landlord and Tenant Act 1985 and Paragraph 5A, Schedule 11 of the Commonhold and Leasehold Reform Act 2002

41. The Applicant applies under s.20C to limit the recovery of any costs incurred by the Respondent in this application through the service charge. A similar application is made in respect of any administration charges.
42. The Tribunal declines to make an order under either provision. The reduction achieved by the Applicant has been slight. Whilst he has

pointed out a deficiency in the manner in which the reconciliation has been carried out, practically, in respect of this block, that is unlikely to secure any positive outcome for the leaseholders, but will entail the additional costs of an audit. Further, although there was a failure to adhere to the audit provisions, there is no suggestion that the sums have not been expended as recorded in the accounts. Additionally there was some support for the level of reserves now achieved.

Conclusion

43. The Tribunal determines that for each of the years in question, the full amount demanded on account is payable, less £8.82 per year. No order is made under s.20C or paragraph 5A of Schedule 11.

A handwritten signature in black ink, appearing to read 'D. Dovar', with a long, sweeping horizontal flourish extending to the right.

JUDGE D DOVAR

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 time 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.