



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

Case Reference : **CHI/45UC/LIS/2019/0081**

Property : **39A Arundel Road, Littlehampton,
West Sussex BN17 7BY**

Applicant : **Mr M W Davis**

Representative : **Mr J Dobbs, Parsons Son & Basley**

Respondent : **Ms Jean Wallace**

Representative : **-**

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

Tribunal Members : **Judge E Morrison
Mr R A Wilkey FRICS**

**Date and venue of
Hearing** : **5 October 2020 by video conference**

**Date of written
decision** : **8 October 2020**

DECISION

Background

1. On 7 October 2019 the Applicant lessor commenced proceedings in the county court against the Respondent lessee claiming the principal sum of £9307.72, plus interest and costs (Case No. F3QZoY1R). The sum alleged to be owed was comprised mainly of service charges and the entire claim was transferred to the Tribunal by court orders dated 6 December 2019 and 31 December 2019, the county court issues to be decided by a tribunal judge sitting as a judge of the county court.
2. Accordingly this decision of the Tribunal determines the issues relating to the service charges, for which it has jurisdiction. It also decides the applications made in the course of the proceedings by the Respondent for orders that the Applicant's costs of the tribunal proceedings should not be recoverable through future service or administration charges (the applications being made under section 20C of the Landlord and Tenant Act 1985 ("the Act") and paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002).
3. The claims by the Applicant for a money judgment (based on the Tribunal's findings) along with interest and court costs have been decided separately by the tribunal judge sitting as a judge of the county court.

Summary of decision

4. The service charges recoverable by the Applicant from the Respondent are as follows:

Year	£
Up to 31 December 2013	Nil
2014	938.59
2015	2405.63
2016	1245.13
2017	1315.97
2018	1444.52
2019 (on account only)	1581.66

The lease

5. The Tribunal had before it a copy of the lease for the ground floor flat at 39 Arundel Road, which is the subject property. It is dated 10 February 1988 and is granted for a term of 99 years from 29 September 1987.

6. The relevant provisions in the lease may be summarised as follows:
- (a) By clause 4 (4) the lessee covenants to pay service charges as provided in the Fifth Schedule;
 - (b) In clause 5(4) the lessor's obligations relevant to the service charge are set out. These include maintaining and repairing the structure and common parts and insuring the building. Managing agents may be employed to manage the building and collect the rents and service charges;
 - (c) The lessor is required to set aside "such sums of money as the Lessors shall reasonably require to meet such future costs as the Lessors shall reasonably expect to incur of replacing repairing maintaining and renewing those items which the Lessors have hereby covenanted to repair replace maintain or renew", and these sums shall be part of the expenditure recoverable from the lessee through the service charge (Clause 5(4)(n));
 - (d) The Fifth Schedule provides that the service charge payable by the lessee is one-third of the costs incurred by the lessor pursuant to clause 5(4), including the costs of employing managing agents and accountants;
 - (e) The lessee is required to make interim payments in advance and on account of the annual service charge on 24 June and 25 December in each year. If during the year the actual costs exceed the sums demanded on account, a further interim payment can be demanded;
 - (f) At the end of each year the lessor must serve the lessee with a certificate noting the total expenditure, the sums paid an account plus any surplus carried forward from the previous year, the total service charge, and the amount of any excess or deficiency;
 - (g) If there is a deficiency, the lessee shall pay this within 28 days of receipt of the certificate. If there is a surplus this shall be carried forward and credited against the service charge payable for the following year.

The law and jurisdiction

7. The Tribunal has power under section 27A of the Act to decide about all aspects of liability to pay service charges and can interpret the lease where necessary to resolve disputes or uncertainties. The Tribunal can decide by whom, to whom, how much and when a service charge is payable.
8. By section 19 of the Act a service charge is only payable to the extent that it has been reasonably incurred and if the services or works for which the service charge is claimed are of a reasonable standard. When service charges are payable in advance, no more than a reasonable amount is payable.

9. Section 20B provides that costs incurred more than 18 months before a demand is made for their payment will not be recoverable unless, within 18 months of being incurred, the tenant was notified in writing that those costs had been incurred and that he would subsequently be required under the terms of his lease to contribute to them by the payment of a service charge.
10. Under section 20C of the Act a tenant may apply for an order that all or any of the costs incurred by a landlord in connection with proceedings before a tribunal are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application.
11. Under paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 a tenant may apply to the Tribunal for an order which reduces or extinguishes the tenant's liability to pay an administration charge in respect of litigation costs.

Representation at the hearing

12. The Applicant did not attend the hearing or provide a witness statement, but was represented by Mr Justin Dobbs, with some assistance from Mrs Pamela Edinburgh, both of Parsons Son & Basley ("PS&B"), the Applicant's managing agents, who had prepared the Applicant's case and compiled the bundle as directed by the Tribunal.
13. The Respondent represented herself at the hearing.

The issues

14. The sum claimed in the county court included administration charges totalling £63.00, demanded in 2015. When the Tribunal queried under what provision in the lease these were demanded, Mr Dobbs said this aspect of the case would not be pursued.
15. The remainder of the claim related to service charges, there being two discrete issues:
 - (h) Whether the service charges arrears said to have accrued over several years in the sum of £5727.25 as at 31 December 2013 were recoverable from the Respondent, and
 - (i) Whether the Respondent was liable to pay the reserve fund contributions demanded in service charge years 2015-2019, this being the only aspect of the demands in dispute.

Service charges accrued up to 31 December 2013

16. During this period the property was managed by Welbeck Properties, and the bundle contained service charge accounts for 2011 – 2013, which noted accumulating deficits due from the Respondent, totalling £5727.25 as at 31 December 2013. PS&B took over the management at the end of 2013 and began to issue half yearly demands for payments on account. The first demand in the bundle relating to any pre-2014 arrears is as part of a demand from PS&B for £5790.25 (which also included some administration charges said to date from January and February 2015). The copy of this demand in the bundle has an issue date of 27 January 2020 (clearly incorrect) and a due date for payment of 24 June 2015. It notes £5727.25 as a “deficit from Welbeck Properties”. A further demand issued on 19 May 2015 noted a brought forward balance of £6415.25 and also required payment by 24 June 2015.
17. The possible impact of section 20B of the Act had been raised by the Tribunal at a case management hearing on 7 April 2020. In his statement of case Mr Dobbs said that the other two lessees had paid during the years in question, which supported the argument that demands must have been issued at that time. At the hearing Mr Dobbs amended his evidence, saying that only one of the other lessees had paid. He had no other evidence to suggest there was any formal demand made prior to the demand which noted a due date of 24 June 2015.
18. Ms Wallace said that she had been in dispute with the Applicant regarding service charges for some years, never receiving adequate responses to her queries, and did not receive any demands for the service charges said to be owing up to 31 December 2013 until she received PS& B’s demand for an interim service charge due 24 June 2015 which also mentioned a brought forward balance of £6415.25. In the Defence she sent to the county court she also says “There was no mention of arrears until May 2015 when an entry “Deficit from Welbeck Properties” appears in my account”. On 31 May 2015 she wrote to PS&B querying the position and noting that she had no copies of the accounts for years ending 2012, 2013 and 2014. She subsequently met with Mr Dobbs on 27 July 2015, raising a number of queries and stating that she had not received any demands for years ending 2012 and 2013.

Discussion and determination

19. Section 20B is intended to protect lessees from stale or late service charge demands. A lessor must, within 18 months of incurring the cost, either demand it as a service charge or notify the lessee in writing that the cost has been incurred and that the lessee will subsequently be required to contribute by way of the service charge under the lease. If this is not done, the lessee does not have to pay the service charges.

20. The service charge year for 39 Arundel Road runs from 1 January -31 December. This means that in relation to costs incurred in 2011, there must have been a demand or section 20B notification by 30 June 2013. In relation to 2012 costs, the time-limit is 30 June 2014, and in relation to 2013 the time-limit is 30 June 2015.
21. The first demand in the bundle requires payment by 24 June 2015. It is unclear exactly when this demand was issued, but doing the best it can on the available evidence the Tribunal finds that it was around 19 May 2015, the same time as a separate demand was issued for an on account service charge also said to be due on 24 June 2015. This is consistent with the fact that Ms Wallace queried the situation in a letter of 31 May 2015. There is no evidence that Ms Wallace was asked to pay any of the pre 2014 arrears prior to this. Although she did not specifically deny receiving any demands for 2011, she did not admit to receiving them either, and the Tribunal has no idea what sums might have appeared in any such demands. The Tribunal cannot accept the assertion that one other lessee paid for the years in question as sufficient proof that demands were sent to the Respondent. Mr Davis has been the landlord throughout. According to Ms Wallace, Mr Davis owned and ran Welbeck Properties. If demands had been issued at any earlier time, there is no good reason why they could not have been obtained and produced in evidence. Nor is there any evidence that the second limb of section 20, written notification (see para. 19 above) has ever been satisfied.
22. This means that the only costs that are not precluded from recovery by the impact of section 20B are costs incurred between 19 November 2013 and 31 December 2013. There is no evidence that any of the costs listed in the 2013 accounts were incurred in that period. Accordingly, the Tribunal determines that no part of the service charges said to be due up to and including 31 December 2013 are payable by the Respondent.

Service charges from 1 January 2014

23. For years 2014 – 2018 the actual expenditure as noted in the service charge accounts is agreed by Ms Wallace. The figures are as follows:

Year	Total Expenditure	Flat 39A share
2014	2815.77	936.34
2015	3466.91	1155.63
2016	2835.39	945.13
2017	3047.91	1015.97
2018	3433.56	1144.52

24. There were no end of year accounts in evidence for 2019. On account demands for normal service charge expenditure are based on a budget,

totalling £1281.66, and this is not challenged by Ms Wallace. The Tribunal finds this sum is reasonable and payable.

25. In each year from 2015 -2019 the Applicant has also demanded a contribution to a reserve fund. In 2015 the total demand demanded was £3750.00, or £1250.00 per lessee. In subsequent years the sum demanded is £1750.00, or £588.33 per lessee, included in the on account demands issued each June and December. Ms Wallace has failed to pay most of these sums, taking the position that monies can only be demanded if major works are pending for which estimates had been obtained.
26. Mr Dobbs said that when PS&B took over the management, they took the view that a reserve should be built up to provide a fund for future major works. In 2015 roof works were anticipated. Mr Davis's surveyor had already reported on the works required, and had carried out a consultation under section 20 of the Act, the lowest estimate being £3420.00 inc. VAT. The demand for a £3750.00 reserve contribution in 2015 was intended to provide the funds for this work. In subsequent years the sum of £1750.00 reserve contribution was arrived at not as a result of planned works, or any sort of calculation, but bearing in mind that exterior redecoration would be required at some point, the scaffolding for which alone would cost several thousand pounds.
27. Mr Dobbs accepted that the roof works as consulted on had never been carried out. A much more limited repair costing £360.00 was done in 2018, funded from normal service charges. He also admitted that he had never actually inspected 39 Arundel Road, but from photos on his files (not in evidence) he said it was an older property converted into flats with a long single storey outbuilding at the back (which Ms Wallace explained was the third unit of accommodation in the building). Mr Dobbs said someone from PS&B inspected each year, but he had no documentation of this. He also said that recently a section 20 consultation had been carried out for repairs to a box gutter, likely to cost about £2500.00.
28. Ms Wallace said she had not received the section 20 consultation notices regarding the roof works due to a problem with addresses but when she found out about the proposed works she queried them. The property had a brand new roof in 2010 so she asked why repairs were needed, and said she never got a proper reply. So far as external redecoration was concerned, she thought that all the windows except those in the upper flat were upvc, and there was one wooden front door. The sums demanded for the reserve fund were unreasonably high.

Discussion and determination

29. Clause 5(4)(n) requires, as opposed to simply permits, the lessor to build up a reserve fund to meet reasonably expected costs of future maintenance and repair etc. The wording does not require that the

lessor must have specific, costed works in contemplation before a reserve contribution can be demanded.

30. The RICS Service Charge residential management Code 3rd edition, states, at section 7.4:

The level of contributions for simple schemes should be assessed with reference to the age and condition of the building and likely future costs estimates... The usual method of working out how much money is to go into the fund each year, assuming the lease/tenancy does not make any other provision, is to take the expected cost of future works, including an allowance for VAT and fees, and divide it by the number of years which may be expected to pass before it is incurred. The level of contributions should be reviewed annually, as part of the budget process, and the underlying survey information should be reviewed at appropriate intervals.

31. The reasonableness of a service charge has to be assessed as at the time it becomes due for payment, and a reasonable sum required as a payment on account does not retrospectively become unreasonable even if the anticipated expenditure is avoided: *Knapper v Francis* [2017] UKUT 3 (LC). Accordingly the reserve contribution of £1250.00 per lessee demanded in 2015 was reasonable when demanded, bearing in mind the immediately anticipated costs of the roof works and given that there was no existing reserve fund ¹.
32. However, the reserve contribution of £1750.00 pa. (£588.33 per lessee) demanded in subsequent years is unjustified. PS&B do not appear to have ever carried out the sort of exercise recommended by the RICS Code. No doubt external redecoration will be required at some point, but the Tribunal has not been given any idea of when, or what that might cost, except in the vaguest terms. If Ms Wallace is correct in saying that most of the windows are upvc, the costs should not be that high even if scaffolding is needed. The building is old and one might expect that various repairs may be anticipated, but no analysis or plan has been produced. It is unclear whether some or all of the roof works considered necessary in 2014/15 will ever be done. Doing the best we can on very limited evidence the Tribunal determines that a reasonable reserve contribution for the period 2016-2019 would be £900.00 p.a. (£300.00 p.a. per lessee), in order to build up the reserve to a meaningful level. This would mean that each lessee had been required to contribute £2450.00 over the five years of 2015-2019, providing a fund of £7350.00, sufficient to cover the now planned box gutter repair and go at least a fair way to covering redecoration costs.
33. Any contribution requested for future years should be based upon an analysis as recommended by the RICS following a proper inspection of the condition of the property.

¹ The accounts for previous years show a notional reserve of £4500.00 but in fact no cash was held.

34. Thus the amounts payable towards the reserve fund are:

Year	Flat 39A share
2015	£1250.00
2016	£300.00
2017	£300.00
2018	£300.00

The accounting exercise

35. What follows is not part of the Tribunal’s formal decision but is stated as guidance in the hope it may assist in reducing future queries and disagreements. The service charge accounts have been produced in varying formats over the years. The most recent accounts, for 2018, contain the most detail, but note a “service charge reserve”, said in the Notes to represent “the accumulation of surplus and deficits of previous years service charge income and expenditure accounts”.
36. It is the Tribunal’s view that there should be no such fund. Paragraphs 5 and 6 of the Fifth Schedule to the lease explain that any end of year deficit should be paid by the lessee, and any end of year surplus should be credited to the lessee’s account, reducing the service charge payable for the following year. These provisions have not been followed. Instead on account demands are made each year, and although actual expenditure (ignoring the reserve contribution) has been less than demanded, no adjustment has been made in the lessee’s favour for the following year, instead building up the “service charge reserve”.
37. Similarly, in the statement of account which appears at pages 125-126 of the bundle, no credit has been given for amounts paid in excess of actual expenditure.
38. Once the Respondent has paid the sum found due from her pursuant to the county court order which accompanies this decision, she will have paid all services charges due up to 31 December 2019 (those for 2019 being only on account), and will have £2420.00 in the reserve fund under clause 5(4)(n) of the lease. She will not have any monies in a “service charge reserve”.

Costs applications

39. Ms Wallace asked the Tribunal to make orders under section 20C of the Act, and paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002, preventing the Applicant from recovering the cost of the tribunal proceedings from her either via future service charges, or via an administration charge. She submitted that she had tried over the years to engage in discussions with Welbeck Properties and then PS&B with regard to her queries, but had never got any

response. She had done all she could to avoid proceedings. Mr Dobbs responded that attempts had been made to collect the monies due, but had encountered resistance especially with regard to the reserve fund. He wanted to find a way forward.

40. An order under either section 20C or para. 5A only has significance if there are provisions in the lease which allow the costs of the tribunal proceedings to be recouped through a service and/or administration charge. It should be noted that the Tribunal makes no finding on this issue.
41. In deciding whether to make an order under either section 20C or paragraph 5A the Tribunal must consider what is just and equitable in the circumstances. The circumstances can include the conduct of the parties and the outcome of the proceedings. The result of the application is that the Respondent has been found liable to pay some service charges which she has disputed, but not liable to pay others. However, the key factor affecting our decision is that, over the course of at least five years, neither the Applicant nor PS&B have made any attempt to respond to the Respondent's reasonable queries, or to justify their stance either with regard to the pre-2014 arrears, or to the reserve fund. Apart from some correspondence in 2015 relating to the proposed roof works at that time, there is absolutely nothing from PS&B which seeks to explain the basis for the demands to the reserve fund. Indeed it was not until the hearing, and in response to questions from the Tribunal, that any attempt was made to justify the reserve contributions demanded. It was not unreasonable for the Respondent to expect to be satisfied about this before making payment. In the view of the Tribunal there should have been much more engagement by the Applicant/PS&B before issuing proceedings. If that had occurred and real consideration been given to the points made by Ms Wallace, it is quite possible that proceedings could have been avoided. She was paying all the other sums demanded on account, so clearly was not just seeking to avoid any payment.
42. The Tribunal therefore determines that it is just and equitable for orders to be made that:
 - (i) to such extent as they may otherwise be recoverable, the Applicant's costs, if any, in connection with these 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 Respondent, and
 - (ii) the Respondent shall not be liable to pay an administration charge in respect of those costs.

Appeals

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application to the First-tier Tribunal at the Regional office which has been dealing with the case.
2. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.
3. If the person wishing to appeal does not comply with the 28-day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28-day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.
4. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking.