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HM Courts & Tribunals Service

## LEASEHOLD VALUATION TRIBUNAL

Application for a determination of liability to pay and reasonableness of service charges under sections 27A of the Landlord and Tenant Act 1985 "the Act".

## DECISION AND REASONS

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| **Case Number:** | CHI/00HG/LSC/2012/0178 |
| **Property:** | 17 Gascoyne Place Greenbank Plymouth PL4 8DF |
| **Applicant:** | 17 Gascoyne Place (Plymouth) Limited |
| **Respondents:** | Mr Nathan Fulcher<br>Mr Keith Granger<br>Ms Robin Kayser |
| **Date of Application:** | 5 December 2012 |
| **Date of Hearing:** | 20 March 2013 |
| **Appearances:** | Paul Bean (Director of the Applicant Company) and Donald Gerrard of Freehold Management Services Ltd for the Applicants<br>Mrs Jeanette Fulcher for Mr Nathan Fulcher |
| **Tribunal Members:** | Robert Batho MA BSc LLB FRICS FCIArb (Chartered Surveyor) Chairman<br>W H Gater FRICS ACIArb (Chartered Surveyor) |
| **Date of Decision:** | 4 April 2013 |

## DECISION

1. It is determined that:-
   a. The service charge costs in relation to the managing agents' fees are unreasonable as, on the evidence, the agents have not dealt with the service charge monies in a proper fashion, and their charge is limited to £600 in each of the years in question.
   b. The other service charge costs as claimed are reasonable.

c. The service charge demands for the years in question are payable subject to the limitation on the managing agents' fees, but only when it has been confirmed by the presentation of proper accounts that the costs have actually been incurred.

2. No application was made under section 20C of the Act by any of the Respondents and the Applicant's right to recover the costs of the application in accordance with the service charge provisions of the lease is accordingly confirmed.

**Background**

3. The Application was made by Mr P M Bean in his capacity as director of the Applicant company. Following its receipt by the Tribunal, directions were issued on 13 December 2012 whereby it was determined that the matter proceed on the fast track and that a hearing would be necessary. A target date for that hearing was set as Monday 18 March 2013.

4. The directions provided for the submission of documents by the Applicant to the Respondents within twenty-one days of 13 December 2012, and the Respondents individually or collectively to provide a written statement in reply within twenty-one days of receipt of the Applicant's documents. The Applicant submitted a bundle of documents which was received by the Tribunal on 21 January 2013. No written statement was received from any of the Respondents.

5. On the day of the hearing but before it, the Tribunal Members inspected the exterior and common internal parts of the Property accompanied by Mr Bean, Mr Gerrard and Mrs Fulcher.

6. The Property is located close to the Plymouth city centre and university campus. It comprises a mid terraced five storey property apparently originally constructed for occupation as a single dwelling but subsequently (and, from the date of the sample lease provided, probably in the mid-1970s) converted to provide five self-contained flats.

7. Flat 1, at basement level, is held by a Mr and Mrs Wilson; Flat 2 by Mr Fulcher; Flat 3 by Mr Bean; Flat 4 by Mr Granger; and Flat 5, the top floor flat, by Ms Kayser.

**Inspection**

8. At the inspection various matters relating to the common parts were pointed out to the Tribunal members, these being:-

   a. The lack of any fire alarm system;

   b. The poor decorative condition and cleanliness of the common parts generally;

   c. Dampness and plaster deterioration around the one half landing window;

   d. The need for exterior decoration, which was said not to have been undertaken for some seven years in respect of the front elevation and ten years in respect of the rear elevation.

**Hearing**

**Applicant's case**

9. For the Applicant, Mr Bean explained that although there were five flats the landlord company had four shareholders, Ms Kayser having decided not to become a member of the company. Although section 4(ii) of the leases imposed an obligation on each leaseholder to pay the service charge sums which were set annually, there had been continuing problems with recovery of payments due from Ms Kayser and, more recently, there had been issues with payments from Mr Fulcher and Mr Granger.

10. The issues with Ms Kayser had resulted in on-going legal proceedings, and although there was supposed to be a sinking fund to cover larger items of expenditure, that money had been used to pay the associated legal fees and to fund emergency repairs. There were issues with Mr Knapper, the company secretary and legal adviser, over this but as he was the solicitor dealing with the action against Ms Kayser, and had the detailed knowledge necessary to pursue those proceedings, they had decided to continue his instructions until those matters were resolved.

11. In the meantime, the service charges were discussed and agreed by the company, as evidenced by the minutes of the meeting held on 7 September 2012, and money needed to be paid if necessary work to the property was to

be undertaken. It was acknowledged, however, that although the charges had been accepted by the company they had not been agreed as such by the tenants who were not present at the relevant meeting.

12. Dealing with the different heads of expenditure, Mr Bean said as follows.

13. *Managing Agents*. There was the unusual background history to the management of the property and Mr Bean had agreed to serve as a director in the hope that he would manage to sort matters out. Freehold Management Services (FMS), the current agents, were successors to Hartley Property Management, a company of which Mr Knapper had been a director, and in all the circumstances it was felt that having agents who were familiar with the history of the building was advantageous, at least until the present issues were resolved. FMS might not be the cheapest, but their continued involvement at the fees of £900 per annum for the years to which the application relates and £1,000 per annum which had been agreed last September was reasonable in the circumstances.

14. In answer to questions from the Tribunal about the terms of FMS's appointment, Mr Gerrard stated that there was no written management contract but that the fee charged covered matters including issuing service charge demands, running the accounts and chasing arrears; it allowed for regular inspections at half yearly intervals, but more regularly with a property such as this, and recommending what works were required as a result; investigating alternative quotations for insurance (as evidenced by the fact that the policy had been moved in 2010); reviewing bank charges; and preparing the company AGM agenda. The fee now charged was £200 per lease per annum, a sum which was not subject to VAT, and there were no additional charges.

15. *Insurance*. Mr Gerrard stated to the Tribunal that he saw it as part of his management responsibility to investigate the market and recommend the insurance cover to be taken out for the year. Whilst there was no documentary evidence to that effect, Mr Bean confirmed that the insurance quotes were referred to him for approval. Attention was drawn to the fact that,

as a result of this process, cover had been moved from Allianz to Aviva in 2010.

16. *Accountancy.* Again, other quotations had been obtained by FMS and referred to the company, but the company had resolved to continue using Harold Duckworth and Co. In response to questions from the Tribunal it was said that this firm produced short form accounts for the company. Although no accounts had been submitted with the documentation before the Tribunal, a copy of the Report and Accounts to 30 June 2012 was produced at the hearing. The Tribunal noted, however, that the profit and loss account was prefaced by the statement that

> The company has no income or expenditure in its own right. All transactions in the year relate to maintenance of the common parts in accordance with the lease. Income and expenditure arising from these transactions is shown in separate service charge accounts for the property that do not form part of annual accounts of the company and are not filed at Companies House. All service charge monies received from the residents are held in trust for the residents.

17. Attached to these accounts there was a service charge account for the year ended 30 June 2012 and marked "for the information of the director only." It was Mr Bean's evidence that copies of this complete document, including the service charge account so marked, had been provided to each tenant.

**Respondents' Case**

18. Mrs Fulcher, speaking on behalf of her son Nathan Fulcher, stated that he had held his lease since 2002 and that there had been problems with Ms Kayser throughout his period of ownership. He had got into arrears with his service charge payments not through any unwillingness to pay the charges, which he considered reasonable, but as a result of employment difficulties since leaving the armed forces. Nevertheless, he was now in secure employment and would pay what was due.

19. Mrs Fulcher had attended one meeting with Mr Knapper and had concerns over where the money paid as service charge had gone. The issues with Ms Kayser had not been resolved, and a court order had not been pursued, but the money continued to be used up

**Lease Provisions**

20. The papers submitted by the Applicant include a sample lease. Under clause 3 the tenant covenants to pay

    a. the yearly rent of £25.00 until 2001 and then from 2001 until 2006 the rent of £50.00
    b. by way of further or additional rent at an annual sum to calculated in accordance with the third schedule of the lease for each and every year of the term by two equal instalments in advance on 24th June and 25th December in each year.

21. The Third Schedule of the lease provides as follows:

    a. The managing agents shall estimate the amount of additional rent payable at the commencement at the end of each financial year and estimate the proportionate amount payment up to the end of the landlord's current financial year and notify the tenant of such amount in writing.

    b. As soon as practical after the end of each financial year the landlord shall ascertain the amount of the service charge which shall be certified annually by certificate signed by the accountants for the time being nominated by the management agents and a copy of the certificate for each such financial year shall be forwarded to the tenant and shall be available for inspection by the tenant at the offices of the management agents.

    c. At the end of each financial year the estimated amount of the additional rent paid by the tenant under clause 1 shall be set against the actual amount of the additional rent certified in accordance with clause 2 and in the event of any deficiency the amount of the deficiency shall immediately be payable by the tenant to the landlord and shall be due from the tenant to the landlord recoverable as rent in arrear and in the event of any excess the amount of excess shall be retained by the landlord and put towards the estimated amount of the additional rent for the next landlord's financial year.

    d. In calculating the amount of the additional rent at the end of each financial year under clause 2 and in estimating to the amount thereof at the commencement of each landlord's financial year under clause 1 the landlord and management agents may include and make provision not only for the actual expenditure incurred or to be incurred during the landlord's financial year but also for the creation or maintenance for such general or specific reserves and/or sinking funds as the landlord or the managing agents shall in their absolute discretion think fair and reasonable in respect of periodic payments of (a) the furnishings and common parts of the property (b) the future repairs of the structure of the property and all external parts not comprised in any of the leases.

    e. In the event that there shall be any balance of any reserve and or sinking fund after the relevant and appropriate replacement and or repairs have been effected such balance shall be carried forward for part of a new reserve or sinking fund for such replacement and or repairs as aforesaid.

    f. Each certificate provided to the tenant under the provisions of clause 3 above shall contain a fair summary of the landlord's expenditure and outgoings incurred during the landlord's current financial year as well as an account of

the said reserves and or sinking funds to the end of the landlord's preceding financial year and the certificate shall be finding and binding upon the tenant.

g. In the event of non-payment by the tenant of any additional rent or any estimates or instalment thereof the amount due to the landlord shall be a debt due from the tenant to the landlord and shall be recoverable as rent in arrear.

22. By clause 4 of the lease the tenant covenanted with the landlord and with and for the benefit of the owners and tenants from time to time of the other flats in the property

a. To repair and maintain and keep the flats so as to afford all necessary support shelter and protection to all other parts of the property and

b. To pay to the landlord in addition to the rent reserved the additional rent referred to in clause 3 being one equal fifth share of the annual expenditure incurred or to be incurred by the landlord in carrying out the obligations specified in clause 5 which shall be estimated in accordance with the details set out in the third schedule and shall be paid by the tenant in advance on 24th day of June and 25th day of December in equal payments in each succeeding year.

23. By clause 5 of the lease the landlord covenanted that subject to the tenant paying the maintenance charge referred to in clause 4 (ii) he will

a. insure and keep and keep insured the property against insured risk (as defined)
b. Maintain and keep in good and substantial repair and in clean and proper order and condition
   (i) The main structure of the property including the exterior walls and foundations and the roof thereof with main drains gutters and main water pipes.
   (ii) All such gas and water mains and pipes drains waste water sewage ducts and electrical cables and wire in under and upon the property.
   (iii) The main entrance passages landings and staircases of the property.
c. In every third year to paint the whole of the outside of the property with two coats of good quality paint.
d. In every third year to paint with two coats of good quality paint the interior parts of the common parts of the property.
e. Keep clean and properly lighted passages, landings, staircases and other common parts.
f. Pay and discharge any rates and taxes in respect of the property.
g. Employ a firm of managing agents to maintain the building and discharge all proper fees charges and expenses payable to such agents.

**The Law**

24. Section 27 of the Act gives the Tribunal jurisdiction to determine issues in relation to service charges. In this case the only dispute appears to be in relation to the reasonableness of the service charges demanded for the years 2011 and 2012.

25. Extracts from section 27A of the Act are set out below

**S27A Liability to pay service charges: jurisdiction**
(1) An application may be made to a leasehold valuation 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.

26. Section 27A should be read in conjunction with section 19(1) of the 1985 Act which provides:-

> **S19 Limitation of service charges: reasonableness.**
> (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.

27. As the Applicant has raised to matter of recovering the cost of the application to the Tribunal as part of the service charge, an extract from Section 20C of the Act is set out below too.

> **S20C Limitation of service charges: costs of proceedings.**
> (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 or leasehold valuation tribunal, or the Lands 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.

## The Decision

28. The Tribunal recognises that there have been issues over the management of the property for some time, and the need for those issues to be resolved.

29. With regard to the *management fee*, the Tribunal notes the range of services provided by FMS, although Mr Gerrard's statement that there are no additional charges is contradicted by the inclusion within the papers submitted of an invoice from his company dated 7 December 2012 for "Preparation of LVT Application (20 hours @ £10 per hour)." Nevertheless, that charge does not come within either of the financial years to which this application relates and the Tribunal accepts the charges of £900 per year for the financial years

ending in June 2011 and June 2012 would have been reasonable had FMS done what was required of them.

30. Unfortunately, as is explained in more detail below, whilst proper operation of the service charge account is fundamental to a situation such as this, it is clear that that firm's accounting procedures fall significantly short of what was required. In those circumstances the Tribunal cannot conclude that their charges can have been reasonable. They simply did not do the job that they were engaged to do. In that failure they may have been continuing the past failings of others, but the Tribunal is concerned only with the 2011 and 2012 financial years. It would accordingly allow a managing agents fee of £600 for each of those years.

31. The Tribunal is also satisfied, on the evidence before it and in the light of its own knowledge of relative cost levels, that the *insurance* premiums referred to are reasonable for a building of this size and type.

32. The *Companies House filing fee* is not a cost which can be varied, and the Tribunal accepts that it is necessarily reasonable. The cost of *bank charges* and the communal *electricity* supply are small, and it is unlikely that significant savings could be made on either. The Tribunal therefore accepts that these elements of charge are reasonable.

33. The *accountancy charges* are also considered reasonable for the work which appears to have been done, but it has to be said that the Tribunal concludes on the basis of the evidence before it that the accounting procedures generally fall significantly short of what the lease requires, or of what might reasonably be expected of a managing agent dealing with a property such as this.

34. Paragraph 21 above details the procedure laid down in Schedule Three of the lease. It involves a process whereby demands are based on estimates of anticipated expenditure and there is an annual reconciliation by which the amounts actually due can be determined in the light of actual expenditure, as certified by the firm of accountants nominated by the managing agents (and, in practice, approved by the company). The evidence is that there has been no such certification, nor any attempt at the required reconciliation.

35. This may be seen as being particularly important in light of the fact that the lease provides for the accumulation of a sinking fund, and the evidence is that sinking fund payments have been sought and, but for the arrears issues, paid but there is no record of any such transactions. A sinking fund should form a discrete account to which the nominated contributions can be related, but there is no evidence that such an account exists in this case: rather, the evidence is that it does not, and that what should properly have been sinking fund money has been treated as general income which has then been expended without explanation. It is impossible to say for how long this approach has been adopted, but it is clear that it is one which has been perpetuated by the managing agents, whose Client Ledger Listing produced in evidence makes no mention of it.

36. The Service Charge Account appended to the company accounts perpetuates this unsatisfactory situation. Here the problem is exacerbated by the fact that not only is there no reference to a sinking fund but there is not even any reference in the company accounts to the ground rents which the leases provide for. In these terms the accounts are incomplete and so at least potentially misleading. Unfortunately the scope for confusion is widened by the fact that although the service charge year referred to on the service charge demands runs from 23 June in one calendar year to 24 June in the next, the service charge account appended to the company account is for a year ending on 30 June.

37. That may be either cause or result of the fact that, for example, the FMS fees due on 24 June 2011 (but, on the evidence, not invoiced then or in any year) were not paid until 28 June 2011, i.e. in the next service charge year. It does not, however, explain why the payment of £157.16 to Gary Craig Carpet Cleaning Services on 24 February 2012, but based on a series of ticket numbers which are not otherwise explained, does not appear to feature in the accounts at all. That in turn may explain why careful comparison between the company accounts, the service charge demands and the client ledger all show different figures under some heads of expenditure.

38. The Tribunal is thus faced with a situation in which, although the charges referred to appear reasonable in themselves, there is no formal accounting

evidence that those charges have been incurred, despite the clear requirement of the lease that that formal evidence should be provided. Mr Bean told the Tribunal that he was a novice in these matters, seeking to resolve matters: it does not appear to the Tribunal that FMS or their predecessors can reasonably advance any such argument, and in administering the service charge account, which is part of what they have been employed to do, they should have been careful to ensure that all relevant requirements were met. They have not done that, and that may be seen as giving some substance to Mrs Fulcher's questioning "where the money has gone."

39. In these circumstances the Tribunal cannot conclude that the managing agents fees are reasonable, and the sum payable to them is limited accordingly. Although the other items of expenditure in respect of which recovery is sought are considered reasonable, the Tribunal concludes that they should not be considered payable until proper accounts for each of the years in question have been produced in accordance with the lease, and the sums reconciled and verified by that procedure.

Robert Batho
MA BSC LLB FRICS FCIArb
Chartered Surveyor
Chairman

4 April 2013

*Informative*

*Any party to this decision may appeal against it with the permission of the Tribunal to the Upper Tribunal (Lands Chamber). The provisions relating to appeals are set out in Regulation 20 of the Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003. A request to the Tribunal for permission to appeal to the Lands Tribunal must be made within 21 days of the date on which this document setting out the Tribunal's decision is sent to the party in question and state the grounds on which the Appellant intends to rely. A copy of any such application shall be served on this Tribunal and on every other party.*