10429

FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**CHI/21UF/LSC/2014/0002**
Properties	**Flats 1,9 & 12 Villandry Fort Road Newhaven East Sussex BN9 9GD**
Applicant	**Richbusy Limited**
Applicant's Representative	**Susan Massingham**
Respondent	**Villandry Property Limited**
Respondent's Representatives	**Chris Hudson, Gareth Knox and Glenda Ravell**
Type of Application	**S.27A Landlord & Tenant Act 1985 (as amended)("the Act")(Service Charges)**
tribunal Members	**Judge R.T.A. Wilson (Chair)** **Judge M Tildesley OBE (Lawyer Member)** **Andrew Mackay FRICS (Surveyor Member)**
Date and Venue of Hearing	**18th August 2014** **Lewes Combined Courts**
Date of Decision	**11th September 2014**

DECISION

The Application

1) This was an application made by the lessee of Flats 1,9 & 12 at the Property under Section 27A of the Act, for a determination of its liability to pay service charges to the Respondent freeholder for the years 2012, 2013 and 2014.

The Decision in summary

2) No service charges are recoverable from the Applicant for 2012.

3) The expenditure set out in the draft accounts prepared by Friend James for the year ending 31st December 2013 is reasonable in amount and recoverable when properly demanded save for the following items:

   - Accountancy fees - Reduced from £1,518 to £750.
   - Professional fees £6,023.24 – Not allowed as service charges.

4) The amended 2014 service charge budget prepared by Pepper Fox Limited claiming £24,582 is reduced by £3,090 to exclude legal fees so that the annual on account figure recoverable from the Applicant is based on projected expenditure on the Property of £21,500 (rounded up.)

5) By consent, an order is made under Section 20C of the Act so that, to such extent as they may otherwise be recoverable, the Respondent's costs in connection with these proceedings, if any, are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the Applicant.

6) The tribunal application and hearing fees paid by the Applicant in the sum of £440 are to borne by the parties in equal shares so that the Respondent is to reimburse the Applicant £220.

The law

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 service charge is payable.

8) Payments on account for service charge fall to be dealt with under Section 19(2) of the Act. This legislation expressly contemplates the payment of service charges on account. Where a service charge is payable before relevant costs are incurred, no greater amount than is reasonable is so payable and there is a mechanism in Section 19 (2) for adjustments to be made by repayment reduction or subsequent charges, or otherwise, once the relevant costs have been incurred.

9) Section 21B of the Act requires demands for service charges to be accompanied by a summary of rights and obligations of tenants in relation to service charges.

10) Section 20B of the Act provides that costs incurred more than 18 months before a demand is made for their payment will not be recoverable unless within that period 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.

The leases

11) The tribunal was provided with a copy of the lease relating to Flat 12 and was told that the leases of the other flats in the building were in similar terms and the service charge liability arose in the same way. In general terms the Respondent is responsible for the upkeep of the building and its common parts and the leaseholders contribute to the costs incurred by the Respondent by payment of a service charge. There is provision for the leaseholders to make on account service charge payments twice a year with an obligation on the Respondent to produce annual accounts showing actual service charge expenditure in the previous year. Balancing payments or credits are due or given following service of those accounts. The relevant service charge provisions are in part contained in clause 3.1 and the Second Schedule.

12) Clause 3.1 (a) reads as follows, *to pay on the signing hereof the sum of £250 on account of the tenant's proportion of the service charge for the year ending 31st December 2006 (b) to pay on 1st January 2007 and on the succeeding 1st July and 1st January in each year such sum on account of the tenants proportion of the service charge as the management company may reasonably demand (c) to pay the tenants proportion within 28 days of the same being demanded following the production of the accounts in accordance with the provisions of the Second Schedule, credit being given for all sums on account paid under the provisions of the foregoing clauses.*

13) The Second Schedule contains the service charge mechanics and paragraph 2 reads, *'as soon as convenient after the expiry of each accounting period of not more than 12 months commencing with the accounting period now current they shall be prepared and submitted to the tenant a written summary (the statement) setting out the service charge expenditure in a way showing how it is or will be reflected in demands for payment of the service charge and showing money in hand. The statement will be certified by a qualified accountant as being in his opinion a fair summary complying with this requirement and sufficiently supported by the accounts receipts and other documents produced to him.*

The Factual Background

14) The factual background is as the tribunal found it on the basis of its inspection and the written submissions of the parties. The subject property is a development comprising 6 shops on ground floor and nine self-contained residential flats over two floors. There are three entrances. It was constructed in 2007 by developers Oakdene Homes Plc. (Oakdene). Before construction had been completed

Oakdene experienced financial difficulties and sometime in 2009 it went into liquidation. The freehold was subsequently acquired by the Respondent who appointed Qube Management to manage the Property. Qube was responsible for managing between 2009 to September 2012.

15) It is common ground between the parties that Qube did not perform their management obligations in a satisfactory manner and in 2012 the Respondent dismissed Qube and appointed the current managing agents, Pepper Fox Limited.

16) The tribunal was told that a number of the leaseholders had subsequently acquired shares in the Respondent as a result of which it was now a tenant owned freehold. However neither the Applicant nor anyone on its behalf had participated in the acquisition.

17) There has been a longstanding and at times bitter dispute between the parties concerning the service charge as a result of which in 2012 an application to the tribunal had been made by the Respondent for a determination of the Applicant's liability to pay service charge for the period 2007 to 2011. That application was settled by agreement made during the course of a tribunal hearing as a result of which no tribunal decision had been issued. The tribunal was told that the terms of settlement included an agreed cap on legal charges to be debited to the service charge account and other credits awarded to the Applicant as compensation for and in recognition of what the Applicant describes as the toxic accounting presided over by Qube. The tribunal was not party to this settlement and this decision takes no account of the settlement terms.

18) It is unfortunate that the parties again have been unable to reach agreement in respect of the service charge payable for 2012, 2013 & 2014 resulting in the Applicant bringing an application to the tribunal for a determination of its liability to pay service charges for these years.

The Procedural Background Evidence and Representation.

19) Following a case management hearing in February 2014, the tribunal issued directions for the application, which included: a timetable for disclosure; the filing of statements of case; and for the exchange of evidence. At the hearing the Applicant complained that the Respondent had been in breach of the directions in that it had failed to serve its statement of case in time and had included in the hearing bundle documents, which had not been revealed at the disclosure stage of the application. As a result the Applicant had been ambushed.

20) Mr Knox confirmed that he had been responsible for preparing the bundle but he was unwilling to accept any failings in the hearing bundle and neither was he prepared to accept that there had been any failure to comply with the directions timetable. The tribunal reviewed the directions again and found that the Respondent had missed a number of dead lines as set out in the directions even though extensions to dead lines had been granted. In particular the Respondent's statement of case had been sent to the Applicant nearly a month late and indeed only a few days before the hearing. There had also been a failure on the part of the Respondent to exchange witness statements, and the hearing bundle, which

was the responsibility of the Respondent, contained a number of documents that had not been previously disclosed. Furthermore the hearing bundle failed to include some basic documentation such as a copy of the lease and the 2014 budget.

21) In view of these failures the tribunal offered the Applicant an adjournment of the hearing. In the event Ms. Massingham declined the offer and she confirmed that despite her objections the Applicant was in a position to respond to all of the late evidence. She further confirmed that the Applicant did not require time to take legal advice and that the Applicant wished to proceed provided its bundle of documents could be used to supplement the Respondent's bundle and that the witness statement of Mr Carl Turpin be admitted. The Respondent agreed and accordingly the hearing continued.

22) Both parties had prepared statements of case, which were supported by documentary evidence contained in their individual hearing bundles. There was considerable overlap in the content of the bundles and neither party had drafted its statement of case in a manner which was easy to understand. The Applicant's statement focused primarily on the amounts of monies paid by it during the challenged years whilst the Respondent's case amounted to little more than a general statement defending the lateness of the annual accounts and highlighting in general terms the historic problems associated with the previous managing agents. The Respondent's statement failed for the most part to address the specific challenges made by the Applicant.

23) The tribunal had before it more than 700 pages of documentary evidence much of which was not referred to at the hearing and which proved to be not relevant to the issues that the tribunal had to determine. The tribunal records that it has had regard to all of the relevant evidence contained in the bundles whether or not referred to in this decision and it has also had regard to the oral evidence adduced. Its decisions have been made on the balance of probabilities, which is the required standard of proof.

24) At the hearing Ms. Susan Massingham represented the Applicant and the Respondent was represented by Mr Gareth Knox of Pepper Fox Limited who was himself assisted by Mr. Hudson, a director of the Respondent. In the afternoon Mrs Glenda Ravell took over from Mr Hudson who had had to leave to attend a funeral.

The Applicant's case

2012

25) It was the Applicant's case that it did not receive a service charge demand for 2012 or the annual accounts relied upon by the Respondent until the beginning of August 2014. In these circumstances Ms. Massingham contended that the Applicant was not liable to pay any service charge for 2012 by virtue of Section 20B of the Act. Section 20B (1) of the Act applied with the result that the expenditure was now statute barred and irrecoverable. In short, the Respondent was now time barred from recovering any service charge for this year.

26) If the above argument was not accepted the Applicant accepted (after the production of an insurance invoice) that all of the expenditure had been reasonably incurred in 2012 save for legal and professional fees, accountancy fees, an invoice rendered by Colt services for £497 and any part of the management fee for this year paid to Qube.

27) Ms. Massingham asserted that none of the legal or professional fees had been properly or reasonably incurred. She had asked the Respondent on a number of occasions as to what legal services had been provided in 2012 but had not received a satisfactory response. There was a large and un-explained discrepancy between the figure for legal fees contained in the first 2012 annual account of £2,155 and the figure of £6,252 contained in the revised 2012 annual account.

28) As to the invoice from Colt, it was the Applicant's case that Colt had never attended at the property and their invoice related to another property managed by Qube.

29) The Applicant disputed the accountancy fees on the basis that the invoice disclosed by the Respondent related to services provided in 2010.

30) Finally, Ms. Massingham asserted that any part of the management fee attributable to Qube should be disallowed because Qube had provided no beneficial management.

2013

31) The Applicant challenged the fees of the accountant on the basis that there was no supporting invoice and because the draft accounts bore little relationship to the charges being demanded as service charge.

32) The legal fees were challenged firstly because they had not been reasonably incurred and secondly because there was no provision in the lease that allowed these costs to be recovered as part of the service charge.

2014

33) The Applicant challenged some individual heads of anticipated expenditure as being too high with some being too low. The cleaning estimate of over £5,000 was too high as was the figure reserved for legal costs of over £3,000. The budget for general repairs at over £5,000 was also challenged bearing in mind that the budget also included a general reserve figure of £2,000.

The Respondent's case

2012

34) Mr Knox accepted that his firm had not made a demand for payment of service charge for 2012. This was because he had been told that the Respondent's accounts for this year were in solicitor's hands and they were seeking forfeiture of the Applicant's leases. For these reasons he had received instructions not to send

out service charge demands for 2012. He did not know if the former managing agents had served an interim demand for 2012 but could not point to the existence of any such demand in the Respondent's hearing bundle.

35) In May 2013 he received instructions that service charge demands should be sent to the Applicant for 2013 and thereafter he had issued service charge demands twice yearly in January and July. He had not kept copies of these demands but confirmed that they would have been in the same format as the copy demands, which were contained in the Respondent's bundle.

36) On being questioned by the tribunal, Mr Knox confirmed that for the service charge year ending 31st December 2012 the Respondent relied upon the accounts prepared by Friend James a copy of which appeared at pages 3-9 of the Respondent's bundle. These had been signed off by his firm on the 16th July 2014. Mr Knox initially argued that there was little difference between the figures contained in the original annual account for 2012 and the revised account. However when questioned about the increase in legal fees, Mr Knox could not provide an explanation even after he had consulted with a director of the Respondent.

37) Mr Knox offered no evidence in relation to the other challenges made by the Applicant for this year because his firm had not been instructed until September and therefore had no direct knowledge of the service charge account prior to their instructions.

2013

38) Mr Knox told the tribunal that for this year the Respondent relied upon the draft accounts that had recently been prepared by Friend James. He accepted that there had been a delay in the preparation of these accounts but this was because there had been a problem with the 2012 accounts and there was a need to have the 2012 accounts reviewed independently before the 2013 accounts could be prepared. The 2013 accounts would be signed off following the tribunals ruling on this application.

39) He contended that the fees of the accountant at £1,518 were reasonable in amount and recoverable in full.

40) Mr Knox was not able to assist the tribunal as to the legal fees of over £6,000 despite being given an opportunity to consult with his clients. Initially he suggested that they related to legal costs incurred in collecting arrears of service charge. However, on being questioned by the tribunal, he accepted that these types of costs were more akin to administration charges, which should not feature in a service charge account. No further explanations were forthcoming either to what services had been provided or the clause in the lease under which legal costs were recoverable as service charge.

2014

41) Mr Knox defended the budget as being reasonable based as it was on actual expenditure incurred in the two previous years. He told the tribunal that the

estimate of £3,000 for legal fees had been included at the request of the freeholder and that he did not know what legal services would be required in the year. Otherwise he contended that overall the figure of £24,000 was a reasonable budget and it should be upheld.

The Discussion

2012

41) Section 20B(1) of the Act states that if any of the relevant costs taken into account in determining the amount of any service charge were incurred more than 18 months before a demand for payment of the service charge is served on the tenant, then the tenant shall not be liable to pay so much of the service charge as reflects the costs so incurred. This is a significant provision because a failure to comply will mean that expenditure, which is not demanded in time, will become altogether irrecoverable.

42) The limitation does not apply, however, if within the period of 18 months beginning with the date when the costs were incurred, the tenant was notified in writing that those costs had been incurred and that he/she would subsequently be required under the terms of his/her lease to contribute to them by the payment of a service charge. Therefore, a landlord who knows that he has incurred costs which he will seek to recover by way of service charge but cannot, for whatever reason, serve a demand in respect of those costs within 18 months, can protect his position by serving a notice under Section 20B (2) notifying the tenant that costs, to which he/she will be required to contribute, have been incurred.

43) The requirements of a valid notice were discussed in the case *Brent London Borough Council v Shulem B Association Limited [2011] 1 WLR 3014.* In that case, Morgan J held that a demand for payment of the service charge under Section 20B(1) of the Act required a valid demand for payment under the relevant contractual provisions. He also held that a written notification under Section 20B(2) must state a figure for the costs, even if the costs that the lessor later put forward were for a lesser amount; a statement that, in advance of the work, the lessor expected to incur a particular cost, did not give the necessary information and neither did a budgeted figure. Finally, it was also a requirement of a valid notice that it had to tell the lessee that he would subsequently be required under the terms of the lease to contribute to those costs by payment of a service charge.

44) The tribunal carefully reviewed all of the documents relied on by the Respondent in its hearing bundle. It could find no reliable evidence of the existence of interim service charge demands for 2012 and no documents that satisfied the requirements of a valid Section 20B(2) notice. The tribunal noted a letter from the Respondent's then solicitors Messrs. Guillames dated the 25th January 2012 addressed to the Applicant in which it is alleged that arrears had reached a little under £9,000. Accompanying this letter is a statement that purports to itemize the alleged arrears for the properties owned by the Applicant. This statement includes an entry, possibly relating to interim service charge, covering the period commencing 01/01/2012. However neither the letter nor the statement nor any

other document in the bundle of documents include the required statement that the lessee would subsequently be required, under the terms of his lease, to contribute to the costs by the payment of a service charge. This is perhaps not surprising, as the Respondent was, on its own admission, seeking to forfeit the Applicant's leases and presumably did not want to undertake any action which might be construed as acknowledging the continued existence of the leases. In short, the tribunal concludes that none of the documents brought to their attention for 2012 come anywhere close to constituting either an advance service charge demand or a valid Section 20B(2) notice to the Applicant.

45) Reviewed in the round, the tribunal found that since 2012 the Applicant has been sent a confusing array of invoices, conflicting statements of account and conflicting annual accounts. For example the Respondent has sent to the Applicant two certified annual accounts for 2012, which contain significantly different figures both in terms of expenditure and reserves. The first is dated the 13th December 2013 and the second is dated 15th July 2014. Whilst the Respondent told the tribunal that it relied upon the more recent accounts, these are not consistent with demands previously made and they lack the content required by the terms of the lease at paragraph 2 of the Second Schedule or the requirements of Landlord and Tenant legislation.

46) For these reasons, the tribunal determines that the provisions of Section 20B are not satisfied as to the expenditure for 2012 with the result that no expenditure is recoverable from the Applicant as service charges for costs incurred in this year.

47) In the event that the tribunals findings on the application of Section 20B are successfully appealed, the tribunal finds that the legal fees incurred in this year are not recoverable as service charge as the Respondent's evidence to support these charges was not coherent or understandable. The Respondent was not able to describe what legal services had been carried out and neither was it able to quote a clause in the lease, which allowed recovery. It may be that these charges are recoverable from individual leaseholders as administration charges but it is not for this tribunal to determine this question. It will require a fresh application to the tribunal.

48) The tribunal also disallows the accountancy fees for this year as the original accounts prepared have proved to be unreliable and revised accounts have now been prepared. The Applicant should not be penalized for this shortcoming.

49) The tribunal also disallows the invoice from Colt as a copy of this invoice contained in the Applicant's bundle shows that the services were indeed provided not to the subject property but to a property in Eastbourne.

50) The management fees are allowed in full on the basis that there was insufficient evidence before the tribunal to support the allegations of a failure to manage.

2013

51) Section 20B has no application for the majority of expenditure incurred in 2013 as the 18 month period has not yet expired. The challenged items during this year are the accountant's fees and the legal fees.

52) The tribunal determines that the legal fees are not recoverable as service charge for this year for the same reasons as applied to the 2012 legal fees.

53) The tribunal determines that accountancy fees for the preparation of the annual accounts are recoverable as service charge but the amount claimed at over £1,500 is too high and not indicative of market rates. Moreover the hearing bundle did not include a supporting invoice. Applying its collective expertise, the tribunal determines that a reasonable fee for the production of these accounts should not exceed £750.

2014 Budget

54) The Respondent's bundle failed to include a budget for 2014, but by consent Mr Knox handed one up to the tribunal at the hearing. The tribunal noted that this differed from a 2014 budget included in the Applicant's bundle. The one handed up to the tribunal set the budget at a little over £24,500 including a figure of £3,090 reserved for legal fees. With the exception of the figure of £3,090 for legal fees, the tribunal upholds the budget as being reasonable in amount, based as it is on actual expenditure incurred in the previous two years. In coming to this decision the tribunal has also applied its collective expertise. The development is in an exposed location close to the sea and from its inspection it is clear that planned external repair and redecoration work is required and without adequate funding the block will deteriate quickly.

55) The Tribunal does not allow a reserve for legal fees as in its experience it is rare for service charge budgets to include such an amount. There must be clear charging provisions in a lease for legal fees to be recoverable as service charge and the Respondent will no doubt bear in mind that on the basis of its evidence and submissions in this application, the legal fees claimed for 2012 and 2013 have not been allowed. At the hearing Mr Knox conceded that a budget reserve for legal fees was unusual and he said that it had be included at the request of his client and that the Respondent would be guided by the tribunal on whether the figure was reasonable or not. The tribunal therefore determines that the 2014 budget recoverable from the Applicant is to be based on projected expenditure of £21,500.

The Section 20c application and the tribunal fees.

56) In deciding whether to make an order under Section 20C of the Act, a tribunal must consider what is just and equitable in the circumstances. The circumstances include the conduct of the parties and the outcome of the proceedings. In this case Mr Knox confirmed that the Respondent had not incurred professional fees and therefore the Respondent did not oppose the application.

57) In these circumstances the tribunal makes an order that to such extent as they may otherwise be recoverable, the Respondent'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 Applicant.

58) The tribunal considered the Applicant's request that the Respondent repay the tribunal application and hearing fee. The tribunal accepts that it was reasonable for the application to be have been made as there is clear and unchallenged evidence that the original service charge accounts for 2012 were not reliable and they have had to be significantly revised. This has had an adverse effect on the service charge accounting going forward. There has been reluctance on the part of the Respondent's advisors to accept the historic toxic accounting or its impact going forward and this reluctance has more than likely prolonged and embittered the dispute. Taken in the round the tribunal considers that the parties should share the tribunal fees equally and it so determines. This means that the Respondent must pay to the Applicant the sum of £220.

Concluding remarks

59) The Respondent will now need to serve on the Applicant a revised service charge demand, which takes into account and reflects the tribunal's determination as to the recoverable service charges for 2012, 2013 & 2014. It is suggested that the Applicant should receive a full statement of the service charge covering each flat, accounting for any surpluses brought forward from earlier periods, and itemising all debits and credits with running and final balances. An annual account for the year ending the 25thDecember 2013 also needs to be served upon the Applicant with an accountant's certificate. The Respondent should take care that the format and content of this account accords with the contractual provisions of the leases.

60) The parties could usefully accept that as a result of the poor book keeping which characterised the early years of this development, the true service charge position has not been easy to determine. However, these shortcomings have not all been of the making of the Respondent who has been let down in the past by the previous managing agents.

Signed _____
Judge R.T.A Wilson (Chairman)

Dated 11th September 2014

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 the time limit, 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.

If the First-tier tribunal refuses permission to appeal, in accordance with section 11 of the tribunals, Courts and Enforcement Act 2007, and Rule 21 of the tribunal Procedure (Upper tribunal) (Lands Chamber) Rules 2010,the Applicant/Respondent may make a further application for permission to appeal to the Upper tribunal (Lands Chamber). Such application must be made in writing and received by the Upper tribunal (lands Chamber) no later than 14 days after the date on which the First-tier tribunal sent notice of this refusal to the party applying for permission.