10287

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**MAN/00BZ/LSC/2013/0017** **MAN/00BZ/LSC/2013/0018** **MAN/00BZ/LSC/2013/0019** **MAN/00BZ/LSC/2013/0020** **MAN/00BZ/LSC/2013/0021**
Property	:	**521, 523, 524, 605 & 702 Lower Hall Street, St. Helens, WA10 1GE**
Applicant **Represented by**	:	**Fairhold Mercury Ltd** **J B Leitch Solicitors**
Respondent(s) **Represented by**	:	**Christopher David Neill, Simon Phillip Neill & Barry Ernest Neill** **Crooks Commercial Solicitors**
Type of Application	:	**Section 27 A (1) of the Landlord & Tenant Act 1985 & Section 20C**
Tribunal Members	:	**H A Khan (Tribunal Judge)** **K Kasambara MRICS**
Date of Decision	:	**14 August 2014**

Decision

Background

1. This matter concerns an application made by the Landlord, Fairhold Mercury Ltd ("the Applicant"). The Applicant has appointed Mainstay Residential Ltd ("Mainstay"). Mainstay are the current managing agents for the development and succeeded a firm called Remus on 1 July 2011.

2. The application relates to five premises, numbers 521, 523, 524, 605 and 702 Lower Hall Street, St Helens, Merseyside WA10 1GF ("The Properties"). The Respondents, all of whom are related, are leaseholders of these properties. Mr Simon Neill owns the properties at 521 and 524, Mr Chris Neill owns the properties at 523 and 605, whilst Mr Barry Neil owns 702. All the properties are subject to long residential leases which commenced on various dates starting around July 2008.

3. The Applicant issued separate part 8 claims in respect of the properties in the High Court. The Applicant had sought a declaration that the service charges and administration charges had been reasonably incurred. The Respondent's representative had filed and served an Acknowledgement of Service dated 13 March 2012, within those proceedings. The witness statements which were filed within those proceedings stated that the Respondents wished to challenge the communal heating charges.

4. On the 15 May 2012, District Judge Wright transferred the case to the Tribunal. The issue that was referred to the Tribunal was set out in the accompanying order and states;

"whether the sums claimed by the claimant in relation to heating bill of the property of which each of the defendants is the leaseholder are reasonable sums, having regard to the price at which the claimant purchases gas and

electricity and the price which the claimant charges for such gas and electricity through the service charge and in the service charge budget."

The Inspection

5. The Tribunal inspected the property on 13th September 2013. The inspection was carried out in the presence of representatives from both the Applicant and the Respondent. The development is situated in a mixed residential/commercial/industrial area on the edge of St Helens town centre and backs onto the Liverpool-St Helens- Wigan railway line.

6. Lower Hall Street is purpose built development for residential use consisting of two blocks, Block A and Block B. In total there are around 200 apartments. Block A is the bigger of the two blocks and is built on 7 floors whereas Block B is built on 5 floors. Each Block has one lift and Block A also houses the caretaker's office and toilet facilities. Both Blocks have basements with car parking, bin store and a boiler room. There were proposals for there to be an additional Block C but due to the economic downturn, this has yet to be completed.

7. The common areas include secure entrance halls, together with lifts and stairs giving access to all floors, the basement and car park area. The Tribunal found the development to be maintained to a reasonable standard. Both Blocks had a modern, high spec and sophisticated metering system.

8. The service charges of the two Blocks are calculated separately. This reflects the greater costs which might be expected to be incurred in respect of Block A, due to its two extra floors. This difference also results in different electricity consumption. Block A also has, according to the Applicant, more day-to-day issues due to the higher number of residents living within that Block.

Transfer from the County Court

9. The provisions relating to the transfer of proceedings from a county court to the Tribunal are contained in Schedule 12 of the Commonhold and Leasehold Reform Act 2002. Paragraph 3 provides:

1. Where in any proceedings before a court there falls for determination a question falling within the jurisdiction of a leasehold valuation tribunal, the court —

a) may by order transfer to a leasehold valuation tribunal so much of the proceedings as relate to the determination of that question, and

b) may then dispose of all or any remaining proceedings, or adjourn the disposal of all or any remaining proceedings pending the determination of that question by the leasehold valuation tribunal, as it thinks fit.

2. When the leasehold valuation tribunal has determined the question, the court may give effect to the determination in an order of the court.

3. Rules of court may prescribe the procedure to be followed in a court in connection with or in consequence of a transfer under this paragraph.

4. Procedure regulations may prescribe the procedure to be followed in a leasehold valuation tribunal consequent on a transfer under this paragraph.

10. Schedule 12 of 2002 Act makes it clear that the Tribunal can only deal with those matters falling within its jurisdiction.

11. The President of the Upper Tribunal (Lands) in *Michael Stanley Staunton, and Norma Kaye and Alfred Taylor* 2010 UKUT 270 (LC) considered the construction of subparagraph (4) of paragraph 3 of Schedule 12 to the 2002 Act and its impact on the jurisdiction of the Leasehold Valuation Tribunal (as it was then) in respect of transferred proceedings. He said at

paragraph 21

"It does not appear that any procedure has been prescribed under sub-paragraph. It is clear that the power of the LVT in determining the questions in the transferred proceedings is no wider than that of the court. The court is limited by the terms of the parties' pleadings, although it can, of course, give permission to a party to amend. The powers of the LVT in transferred proceedings are necessarily limited in the same way, but the LVT has no power to permit the pleadings to be amended and thus to widen the scope of the questions that it is required to determine under the transferred proceedings. The amended defence averred that the demand was invalid and as a consequence the amount claimed was not due for two reasons: firstly because of a failure to comply with section 47 and secondly because of a failure to comply with the consultation requirements. It was not part of the defendant's case in the county court that the amount was not due because the requirements of section 48 of the 1987 Act and/or of section 21B of the 1985 Act had not been complied with. It would not have been open to the LVT therefore to determine that the service charge was not payable because of either of those provisions, and it is not open to this Tribunal to do so either. The only potential bars to the appellant's liability are thus those related to section 47 and the consultation requirements"

12. The implication of the President's judgment is that the Tribunal is limited to considering the Respondent's defence as pleaded in the County Court which was set out in the statement of Christopher David Neill (page 261) and repeated in all the Respondent's statements. The defence stated that;

> *4. "The company who coordinate and service the communal heating bill the residents by way of service charges for the energy used. This company have confirmed that an uplift is created in the price at which the site buys gas and electric and the price at which it is charged out to residents. They have confirmed that a surplus is paid monthly back to the managing agent. This is not shown or credited anywhere in the budget accounts.*

5. The same company have also confirmed that most recent contract signed with managing agent, they reduced their costs, however, the management company have shown an increase in their most recent budget figures for the company.

6. As a direct result of the above, the service charges demanded do not reflect the true position of the energy costs.

13. Section 18 of the Landlord and Tenant Act defines "service charge" and "relevant costs".

14. Section 19 of the same Act limits the amount payable by the lessees to the extent that the charges are reasonably incurred.

15. Section 20 of the Act states:-

"Limitation of service charges: consultation requirements

Where this Section applies to... qualifying long term agreement ..... the relevant contributions of tenants are limited..... Unless the consultation requirements have either been:-

a. Complied with in relation to the qualifying long term agreement or
b. Dispensed with by ..... a leasehold valuation tribunal.

This Section applies to qualifying long term agreement, if relevant costs incurred on carrying out the works exceed an appropriate amount".

"The appropriate amount" is defined by regulation 4 of The Service Charges (Consultation Requirements) (England) Regulations 2003 (the Regulations) as "..... an amount which results in the relevant contribution of any tenant being more than £100."

Section 20ZA (1) of the Act states:-

"Where an application is made to a leasehold valuation tribunal for a determination to dispense with all or any of the consultation requirements in relation to any qualifying works ..... the tribunal may make the determination if satisfied that it is reasonable to dispense with the requirements."

The Hearing

16. An initial hearing took place at HMCTS Tribunals, 35 Vernon Street, Liverpool L2 2BX on 13 September 2013. The Applicant was represented

by Mr Bates, instructed by JB Leitch Solicitors. The Respondents were represented by Crooks Commercial solicitors. The Respondents had sought an adjournment, during the hearing and without any prior warning, in order to obtain further information to support their position. The application was opposed by the Applicant on the grounds that all the information had been provided and there would be additional costs incurred as a consequence of a further hearing. Having heard both parties, it was agreed that the Tribunal would issue further directions and that the matter would be dealt without an oral hearing unless any of the parties requested otherwise.

17. The Tribunal reconvened on 23 January 2014 in order to determine the matter. The Tribunal noted that an additional issue had been raised in relation to whether or not the Billing Service Proposal and the draft Service Provider Agreements were qualifying agreements pursuant to section 20ZA. Given the effect of the case referred to above, the Tribunal referred the matter back to Court to determine whether or not it should consider this issue, in addition to the specific question set out in the earlier order.

18. On 17 March 2014, a letter was received, confirming that District Judge Wright had agreed that the Tribunal could consider the additional issue. On 10 April 2014, the Applicant's solicitors requested further directions from the Tribunal. A case management conference was held in Liverpool on 3 June 2014. Following some discussion between the parties, the directions recorded that the following issues would be determined by the Tribunal;

a) The question as set out by District Judge Wright, namely, whether the sums claimed by the Applicant in relation to the communal heating bill of the property of which each of the Respondents is a leaseholder are reasonable sums, having regard to the price at which the Applicant purchases gas and electricity and the price which the Applicant charges for such gas and electricity through the service charge in the service charge

budget. The period for which determination (a) covers is 5 March 2011 to the 29 February 2012.

b) Whether any part of the service charge referred to above comprises charges arising pursuant to a qualifying agreement under s20ZA of the Landlord and Tenant Act 1985. If so, whether such charges are in any event payable to the Applicant having regard to the reasonableness of the charges.

c) The Respondents Section 20C application.

19. Further submissions were received by the Tribunal from the Respondents and the Applicant. The submissions from the Respondents were somewhat brief and referred to further submissions being filed outside the time limits allowed under the directions. However, no further submissions were filed. As the parties had indicated that the matter may be dealt with as a paper determination and in the absence of any objection, the Tribunal reconvened on 14 August 2014 and determined the matter.

The Lease

20. The Tribunal had before it copies of leases which have been read and interpreted as a whole. In reaching its conclusions and findings, the Tribunal has had particular regard to the terms of the lease and the majority of which was not the subject of dispute or argument by or on behalf of all the parties. Essentially, there was no dispute that these sums were payable under the lease, the issue related to whether or not they were reasonably incurred

Issue 1 –Communal Heating Charges.

21. The first issue was whether the sums claimed by the Applicant in relation to the communal heating of the property of which each of the Respondents is a leaseholder are reasonable sums, having regard to the price at which

the Applicant purchases gas and electricity and the price which the Applicant charges for such gas and electricity through the service charge in the service charge budget. The relevant period was 5 March 2011 to the 29 February 2012.

22. The Applicant informed the Tribunal that the amount payable in respect of service charges covering gas and electricity of the communal areas for the period 5 March 2011 to the 29 February 2012 was as set out below.

Premises	**Amount Payable for Gas**	**Amount Payable for Electric**
521 Lower Hall Street	£129.15	£179.48
523 Lower Hall Street	£129.15	£179.48
524 Lower Hall Street	£129.15	£179.48
605 Lower Hall Street	£127.24	£176.74
702 Lower Hall Street	£128.75	£178.84

23. The Applicant informed the Tribunal that with regards to electricity, it used an independent company called Group Energy to ensure that they obtained a reasonable quotation. Furthermore, the Applicant used an independent energy consultant to obtain a reasonable quotation in relation to the gas. Switch 2 were responsible for the apportionment of gas for each individual apartment's usage and issued bills accordingly.

24. The Respondent's position was that there was a difference in the price at which the site buys gas and electric and the price at which it is charged out to residents. The Respondent alleged that this surplus is paid monthly back to the managing agent. This, according to them, is not shown or credited anywhere in the budget accounts. As a direct result of the above, the service charges demanded do not reflect the true position of the energy costs.

25. The first issue was these charges were payable under the leases. The Tribunal determined that they were. There were no submissions to suggest that they were not payable. The Sixth Schedule and Seventh Schedules make reference

to recovering costs in relation to the electricity and communal heating of the common parts.

26. The Tribunal then determined that the charges incurred for the gas and electricity were reasonably incurred. The Tribunal took into account the price paid and the price charged to the leaseholders. Whilst the Respondent made various allegations in relation to the uplift, little persuasive evidence was provided to the Tribunal to support their position. In fact, there was very little evidence provided by the Respondent to suggest that this was the case. The Tribunal also noted that the witness statement, prepared for court proceedings had been produced in 2012, over 2 years ago. The witness evidence filed with the court suggested that there was evidence by way of correspondence or otherwise relating to this uplift, but no evidence supporting their assertion was produced to the Tribunal. For example, there was a reference to the existence of an email dated 3 May 2013 from Joy Oakey to Switch 2 referring to correspondence with the Respondents. However, that correspondence was not produced.

27. The Respondents constantly made reference to obtaining additional information, or with difficulties obtaining it, but could not, despite being given a number of opportunities identify exactly what it was they were seeking. It appeared to the Tribunal that the Respondents were hoping for something to materialise to support their assertion made in the Court proceedings. At one point, they indicated an intention to instruct a forensic accountant but no permission was sought to do so from the Tribunal pursuant to the Tribunal Procedure rules. Furthermore, no alternative quotes were provided that would suggest that the sums charged were unreasonable.

28. The Tribunal accepted the Applicants position that this could not proceed indefinitely and that a determination had to be made on the basis of the information before the Tribunal.

29. The Tribunal determined that sums claimed in relation to the communal

heating bill were appropriate for the property of this size and when spread out over the period, equated to between 10 and £11 per month for the gas and £14 - £15 for the electricity. In the view of the Tribunal, these were reasonably incurred and were reasonable sums for a development of this size and makeup. The Tribunal also noted that going forward, the Applicant was in the process of changing provider to EON.

Issue 2 - Qualifying Agreements

30. The second issue was whether any part of the service charge referred to above comprises charges arising pursuant to a qualifying agreement under s20ZA of the Landlord and Tenant Act 1985. If so, whether such charges are in any event payable to the Applicant, having regard to the reasonableness of the charges.

31. The agreements in question included a debt Management Agreement dated March 2010, Services Proposal dated August 2018 and a Meter Operation and Billing Services Proposal dated September 2007. These agreements were signed by the previous management company, Remus and it was *"presumed"* (by the Respondent) that these agreements had rolled over. The Respondents alleged that no section 20 consultation process had been undertaken in relation to the agreements.

32. The Applicant referred the Tribunal to the case of Daejan Investments Limited v Benson and Others [2013] UKSC 14 and submitted that consultation was not required on some of the agreements as they were below the statutory threshold and, where they were above it, there was no prejudice and accordingly a dispensation should be granted. The Applicants view was that no prejudice had been suffered by the lessee due to the nature of the work that Switch 2 undertake. In their view, there are very few companies who undertake this work and therefore using Switch 2 did not cause any prejudice. Therefore, the lessee have not suffered prejudice because the section 20 consultation had not been followed

33. The Tribunal had regard to the Daejan case. The Court in that case had said that section 20ZA is part and parcel of a network of provisions (i.e. ss. 19 - 20ZA) which are directed to ensuring that tenants are not required to pay for (i) unnecessary services or services, which are provided to a defective standard and (ii) to pay more than they should for services which are necessary and are provided to an acceptable standard. The consultation requirements are part of that framework. Therefore when entertaining a section 20ZA application the Tribunal should focus on the extent, if any, to which the tenants were prejudiced in either respect by the failure of the landlord to comply with the consultation requirements.

34. The Tribunal adopted the analysis of the Applicant as set out in the reply to the Respondent's statement of case. The Applicant submitted that the Debt Management Agreement and the Service Proposal dated August 2008 did not require any consultation as it was below the required threshold. They calculated that the Debt Management Agreement equated to £25 per flat and the Service Proposal equated to £96.53 per flat. Tribunal accepted the Applicants submissions on this point and concluded given that the relevant threshold had not been met, these did not therefore require any consultation.

35. The Tribunal determined that the Meter Operation Billing Services Proposal and the Draft Service Provider Agreement were both subject to the section 20 consultation. This was due to the fact that they were above the legal threshold of £100. This was accepted by both the Applicant and the Respondent. However, The Tribunal could not identify a specific prejudice to the Respondent in the circumstances. In fact, other than saying that they were prejudiced, the Respondent did not explain what the prejudice entailed. For the purposes of this determination the Tribunal assumed that that the prejudice was paying more for the gas and electric than was necessary.

36. The Tribunal, having considered the matter, concluded it reasonable in accordance with Section 20ZA(1) of the Act to dispense with the consultation

requirements specified in Section 20 and contained in Service Charges (Consultation Requirements)(England) Regulations 2003 (SI 2003/1987). The administration of gas and electricity is an essential part of running of the development and it is not disputed that it has to be provided in the communal areas under the terms of the lease. Therefore, it was necessary for Switch 2 to be instructed. The Tribunal noted that the Respondents earlier arguments had focused on the charging of an uplift rather than relating to the principle of using Switch 2. Furthermore, no the Respondent had not produced any persuasive evidence that an uplift had been charged. The Tribunal have therefore not identified a specific prejudice to them in the circumstances.

S20C Application

37. The Tribunal then considered the Respondents s20c application. The Respondents asked the Tribunal to make an order that the Applicant is not be entitled to claim its legal fees through the service charge account. The Respondents refer to previous correspondence in relation to making payment of the outstanding service charges. They had asked for additional time to make the payments as they were waiting for information in relation to details of previous fees paid from their mortgage company before making payment of the service charges. They also referred to the difficulties they had in getting information from Switch 2 Energy Company.

38. The Applicant had opposed the Respondents section 20C application as they had issued Court proceedings in response to the Respondent's non-payment of the service charges. The Applicant refers to the Respondents statements that it is a proportion of the service charge that is disputed. However, there has been no attempt to pay the portion of the service charge that is not. The Applicant therefore believes it reasonable to charge the costs incurred in dealing with the Tribunal application to the service charge account. It has incurred litigation expense due to the Respondent's non-payment of the service charges and delays in stating the reasons for non-payment of the

service charges. The Applicant contends that they provided sufficient opportunity for the Respondent to speak with the mortgage lender. However, as no substantive response was received, they had no option but to issue proceedings. The Applicant submits therefore they are entitled to recover the costs of the Tribunal proceedings.

39. The Tribunal determined that this application should not be granted. The Applicant has succeeded on the majority of the points raised before the Tribunal and it consequently determined that the Applicant shall be entitled to treat the costs of dealing with this application before this Tribunal as relevant costs for the purposes of determining the amount of service charge payable by the Applicant. These proceeding arose as a consequence of the non-payment of the service charge. There was ample opportunity for the Respondents to produce the evidence they had stated they had, but they never did. The Tribunal accepts the arguments raised by the Applicant in relation to the issue and notes that even in the proceedings before the Tribunal, the Respondents were less than forthcoming in producing the evidence they stated they had. The effect of that is that this matter has taken longer to resolve than would have otherwise been the case. However, the Tribunal would like to place on record that nothing in this determination or order shall preclude consideration of whether the Applicant may recover by way of service charge from the Respondents any or all of the cost of the work undertaken or the costs of this application should a reference be received under Section 27A of the Landlord and Tenant Act 1985.

40. The Tribunal does not have jurisdiction to award costs of the County court proceedings. This is a matter for the County Court.

41. The matter will now be referred back to the County Court.

Summary of the Decision

42. The Tribunal therefore determined that:

a. The sums claimed by the Applicant in relation to the communal heating bill of the property of which each of the Respondents is a leaseholder were reasonably incurred and as such are payable by the Respondents. The sums payable for each property, for the period was 5 March 2011 to 29 February 2012, are as set out below.

Premises	Amount Payable for Gas	Amount Payable for Electric
521 Lower Hall Street	£129.15	£179.48
523 Lower Hall Street	£129.15	£179.48
524 Lower Hall Street	£129.15	£179.48
605 Lower Hall Street	£127.24	£176.74
702 Lower Hall Street	£128.75	£178.84

b. The Tribunal determined that the Meter Operation Billing Services Proposal and the Draft Service Provider Agreement were both subject to the section 20 consultation. The administration of gas and electricity is an essential part of running of the development and it is not disputed that it has to be provided in the communal areas under the terms of the lease. The Tribunal have not identified a specific prejudice to them in the circumstances. The Tribunal conclude it reasonable in accordance with Section 20ZA(1) of the Act to dispense with the consultation requirements, specified in Section 20 and contained in Service Charges (Consultation Requirements)(England) Regulations 2003 (SI 2003/1987).

c. The Tribunal determined that the Respondents section 20C application should not be granted. However, the Tribunal would like to place on record that nothing in this determination or order shall preclude consideration of whether the Applicant may recover by way of service

charge from the Respondents any or all of the cost of the work undertaken or the costs of this application should a reference be received under Section 27A of the Landlord and Tenant Act 1985.

d. The Tribunal does not have jurisdiction to award costs of the County court proceedings. This is a matter for the County Court.

e. The matter will now be referred back to the County Court.