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FIRST - TIER TRIBUNAL

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**PROPERTY CHAMBER  
(RESIDENTIAL PROPERTY)**

**Case Reference** : **CHI/24UF/LSC/2015/0026**

**Property** : **22 Isaac House, 99 Heritage Way,  
Gosport, PO12 4WE**

**Applicant** : **Ms Colleen Parkinson**

**Representative** : **In person**

**Respondent** : **Affinity Sutton Homes Ltd**

**Representative** : **In person**

**Type of Application** : **Liability to pay service charges**

**Tribunal Members** : **Judge N Jutton and Mr P Turner-  
Powell FRICS**

**Date** : **28 August 2015**

**Date of Decision** : **3 September 2015**

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**DECISION**

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the only issues before the Tribunal relate to the service charges for the years 2013/14 and as to whether an Order should be made pursuant to section 20C of the 1985 Act.

8 The Directions further provided that the application would be determined on the papers without a hearing in accordance with Rule 31 of the Tribunal Procedure Rules 2013 unless a party objected in writing within 28 days of receipt of the Directions. Neither party has objected and therefore the Tribunal has proceeded to determine the application on the papers without a hearing.

## 9 Documents

10 The documents before the Tribunal were a bundle of some 360 documents comprising the Applicant's Application form, the Directions, the Lease, the Super Lease, various forms of account, invoices, the parties' Statements of Case and completed Schedules of disputed service charge items. References to page numbers in this Decision are references to page numbers in that bundle. In addition, at the end of the bundle was a document headed 'Respondent's Skeleton Argument'.

## 11 The Law

12 The statutory provisions relevant to the Applicant's application are to be found in sections 18, 19, 20C and 27A of the 1985 Act. They provide as follows:

18 (1) *In the following provisions of this Act "service charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent –*

- (a) *which is payable, directly or indirectly, for services, repairs, maintenance, improvements or insurance or the landlord's costs of management, and*
- (b) *the whole or part of which varies or may vary according to the relevant costs.*

(2) *The relevant costs are the costs or estimated costs incurred or to be incurred by or on behalf of the landlord, or a superior landlord, in connection with the matters for which the service charge is payable.*

(3) *For this purpose –*

- (a) *"costs" includes overheads, and*
- (b) *costs are relevant costs in relation to a service charge whether they are incurred, or to be incurred, in the period for which the service charge is payable or in an earlier or later period.*

19 (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 provision 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.*

- (2) *Where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable, and after the relevant costs have been incurred any necessary adjustment shall be made by repayment, reduction or subsequent charges or otherwise*

- 27A (1) *An application may be made to the appropriate 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*

- (2) *Subsection (1) applies whether or not any payment has been made.*

- (3) *An application may also be made to the appropriate tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs and, if it would, as to –*

- (a) *the person by whom it would be payable,*
- (b) *the person to whom it would be payable,*
- (c) *the amount which would be payable,*
- (d) *the date at or by which it would be payable, and*
- (e) *the manner in which it would be payable.*

- (4) *No application under subsection (1) or (3) may be made in respect of a matter which –*

- (a) *has been agreed or admitted by the tenant,*
- (b) *has been, or is to be, referred to arbitration pursuant to a post dispute arbitration agreement to which the tenant is a party,*
- (c) *has been the subject of determination by a court, or*
- (d) *has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.*

- 5 *But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.*

- 20C (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, residential property tribunal or leasehold valuation tribunal, or the First-Tier 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.*

- (2) *The application shall be made –.....*
- (b)(a) *in the case of proceedings before the First-Tier Tribunal, to the Tribunal.*
- (3) *The court or tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances.*

13 **The Lease and the Superior Lease**

14 **The Superior Lease**

15 The Lease is dated 26 April 2006. It is for a term of 155 years less 3 days from 25 March 2005 at a rent (subject to review) of £150 per annum.

16 The Lessor (the Superior Lessor) covenants to carry out various works of maintenance (defined as ‘the Maintenance Expenses’) including the provision of insurance as are more particularly set out in the 6<sup>th</sup> Schedule. The Lessee covenants to pay to the Superior Lessor a defined proportion of the Maintenance Expenses. In particular, the 7<sup>th</sup> Schedule provides:

“6 *The Lessee shall pay to the Lessor or the Manager (if appointed) the Lessee’s Proportion of the Maintenance Expenses in the manner following, that is to say:*

6.1 *In advance on the First day of January and the First day of July in every year throughout the Term one half of the Lessee’s Proportion of the amount estimated from time to time by the Lessor or the Manager (if appointed) or its managing agents as the Maintenance Expenses for the forthcoming year ...*

6.2 *Within 21 days after the service by the Lessor or the Manager (if appointed) on the Lessee of a Certificate in accordance with Paragraph 5 of this Schedule for the period in question, the Lessee shall pay to the Lessor or the Manager (if appointed) the balance by which the Lessee’s Proportion received by the Lessor or the Manager (if appointed) from the Lessee pursuant to Sub-Paragraph 6.1 of this Schedule falls short of the Lessee’s Proportion payable to the Lessor or the Manager (if appointed) as certified by the said Certificate during the said period and any overpayment by the Lessee shall be credited against future payments due from the Lessee to the Lessor or the Manager (if appointed).”*

17     **The Lease**

18     The Lease is dated 10 May 2007. It is a form of shared ownership sub-Under-Lease. It is for a term of 125 years from 1 August 2006. Clause 2 provides that in addition to the rent the Lessee shall pay:

*“... all of the sums payable by the Landlord under the terms of the Superior Under-Lease which shall include (without prejudice to the generality of the foregoing) the Rent, the Insurance Contribution, and various proportions and other payments, and THIRDLY the Landlord’s administration fee (or ‘Management Charge’ being such sum per annum as may be notified to the Leaseholder from time to time by the Landlord) by equal monthly payments in advance on the first day of each month or at such other intervals as the Landlord shall require from time to time ...”*

19     By clause 3(1) of the Lease, the Lessee covenants:

*“... to pay the Specified Rent and all other monies due hereunder at the times and in the manner mentioned above without deduction ...”*

and at clause 3(3):

*“To observe and perform the covenants given by the Landlord as Lessee pursuant to the Superior Under-Lease as if the same were herein repeated and given by the Leaseholder to the Landlord and the Lessor and the Manager as appropriate save that all payments due shall be paid by the Leaseholder to the Landlord by way of further rent”*

20     Clause 7 of the Lease provides:

*“The Leaseholder hereby covenants with the Landlord to pay during the term the rents, service charges and all other monies payable by the Landlord as lessee under the Superior Under-Lease”.*

21     **The Applicants’ Case**

22     The Applicant says that historically she has had difficulty in obtaining from the Respondent details of the works to which the service charge claim relates, together with copies of accounts, receipts and other relevant documents. Further, that as the Respondent’s service charge year runs from April to March but the Superior Lessor’s financial year runs from January to December, there is created what she describes as a ‘structural flaw’ in the accounting process which makes it impossible to properly reconcile the figures.

23     Further, the Applicant says that much of the invoices provided in relation to service charge demands made by the Superior Lessor to the Respondent and which are in effect passed on to the Applicant are

estimated charges, that is demands for payments in advance of repair and maintenance costs being incurred, and there is no reconciliation subsequently between the actual charges incurred and the estimated charges demanded. Indeed it was not until after these proceedings had started that the solicitors for the Respondent produced by letter dated 13 July 2015 (page 271), a balancing adjustment for the calendar year ending 31 December 2014 to reflect the degree to which actual expenses and costs incurred by the Superior Lessor exceeded the estimated demand for that year in the sum of £43.42 (that being the Applicant's share).

24 The Applicant says that no documents in support of the service charge in the form of receipts, invoices etc, were provided for the year ending 31 December 2014 until after these proceedings were started. Further, that the failure of the Respondent to provide a statement of account of actual charges within 6 months of the end of the accounting period to which the charges relate is a breach of section 21 of the 1985 Act. That as a consequence, the Applicant says, the Respondent is out of time for trying to recover service charges that relate to the period 1 January 2013 to 30 April 2013.

25 **Respondent's Case**

26 The Respondent has filed a Statement of Case and a Skeleton Argument. The Respondent makes the point that the terminology 'Managing Agent's fee' is simply a reference to the service charge demands that the Respondent receives from the Superior Lessor. That all the Respondent is doing is under the terms of the Lease, is passing on to the Applicant those charges. That a difficulty arises because the Superior Lessor's financial year runs from 1 January to 31 December whilst the Respondent's from 1 April to 31 March. What the Respondent describes as a 'mismatch'. That as such, there is a difficulty in reconciling the figures for the two different financial years. That the way this is addressed by the Respondent is by way of an apportionment. In any given year, for the months April to December inclusive, it will charge  $\frac{3}{4}$  of the demand received from the Superior Lessor for that year (1 January to 31 December), and then for the period 1 April to 31 March,  $\frac{1}{4}$  of the charges received from the Superior Lessor for the next year (the following 1 January to 31 December period). That the demands it sends out to the Applicant are made within 18 months of receiving demands from the Superior Lessor and as such are within the time limits set out in section 20(B) of the 1985 Act.

27 The Charge for the year 1 April 2013 to 31 March 2014 of £1101.36 is simply a charge the Respondent says that it has incurred for that period with the Superior Lessor and which it passes on down to the Applicant pursuant to the indemnity contained in the Applicant's Lease. That where subsequently a balancing credit is received from the Superior Lessor (to reflect the actual costs incurred by the Superior

Lessor as against the estimated charges that it initially sends to the Respondent), that credit is given by the Respondent to the Applicant on a like-for-like basis in the next financial year. For example, the credit note of £43.42 referred to in the letter from the Respondent's solicitors to the Applicant dated 13 July 2015 (page 271) will be reflected in the service charge demands made by the Respondent to the Applicant for the year 1 April 2014 to 31 March 2015.

28 The Respondent says that the sum of £1101.36 for the period 1 April 2013 to 31 March 2014 represents the actual costs that it in turn has paid to the Superior Lessor and therefore is the actual service charge for that period payable by the Applicant. The Respondent acknowledges that the mismatch in financial years between those of the Superior Lessor and those of the Respondent does cause confusion. It says it continues to look at ways at which this mismatch may be avoided in the future. It is apologetic for the confusion that has been caused but concludes that nonetheless the service charge payable by the Applicant for the year 1 April 2013 to 31 March 2014 is £1101.36.

29 **The Tribunal's Decision**

30 The Tribunal has a bundle of papers before it of 360 pages. It has not found this matter easy. Clearly and understandably, it seems to the Tribunal that there is confusion and misunderstanding on the part of both parties. That arises for a number of reasons. Firstly and primarily, by reason of the different financial years operated by the Superior Lessor and the Respondent. Secondly, the terminology used. The service charge demand supplied to the Respondent seeks to recover the 'managing agent's fee' or 'managing agents charges'. What it in fact seeks to recover is the amount of service charge demands received from the Superior Lessor by the Respondent. Thirdly, there is confusion between the terms 'estimated' and 'actual'. Because the Respondent has received demands from the Superior Lessor and has thus incurred a liability, it in turn describes those demands when passed on to the Applicant as 'actual' sums. Where the Applicant has paid an estimated service charge and the Respondent subsequently receives a demand from the Superior Lessor, it describes that demand as an 'actual' charge and then seeks to recover the difference from the Applicant. For example, there is a document headed 'Certificate of Actual Annual Service Charges for 1 April 2013 to 31 March 2014' dated 1 October 2014 in the bundle (page 221). Under the heading of 'Managing Agent's Charge' there is given an estimated cost of £350.23, an actual cost of £1101.36 and therefore a difference or shortfall of £751.08.

31 In fact the figure of £1101.36 is not an 'actual' charge. It represents the Superior Lessor's estimated service charge calculated by reference to its estimated charges for the years ending 31 December 2013 and 31



December 2014 and then apportioned to fit into the Respondent's financial year of 1 April 2013 to 31 March 2014.

32 It is an estimated service charge for the following reasons. It is a charge made by the Superior Lessor broken into two parts. Anticipated expenditure in relation to what are called 'estate costs' and estimated charges for what are called 'block costs'. There is with the papers a demand from the Superior Lessor addressed to the Respondent's predecessors in title dated 31 December 2012 for service charges due for the year 2013 (page 142). It is a demand for charges on account; estimated charges. On the demand, there is highlighted 'Isaac House' and a figure of £24,296.59. On the next page (page 143) that figure is then apportioned between the individual properties at Isaac House. The cost per unit ie per flat in respect of the Applicant's property is shown as a total of £943.85.

33 Similarly, there is with the papers a demand from the Superior Lessor to Dowland Housing Association dated 22 January 2014 (page 147), which provides a total figure for Isaac House of £25,075.48. On the next page (page 148) the figure per unit applicable to the Applicant's property is shown as £973.88.

34 Both the figures accordingly of £943.85 and £973.88 represent estimated service charges.

35 The Respondent then apportions those figures to make them fit with the financial year of 1 April 2013 to 31 March 2014. It does that by reference to what it describes as a 'time line' (page 279). The calculation in effect is as follows:

i. For the period 1 April 2013 to 31 December 2013:  $9/12ths \times £943.85 = £707.89$ .

ii. For the period 1 January 2014 to 31 March 2014:  $3/12ths \times £973.88 = £243.47$ .

Total £951.36

To that is added ground rent under the Superior Lease (which is passed on to the Respondent): £150

Total £1101.36

(Just to confuse matters further, the ground rent element of £150 appears to relate to the period 21 April 2013 to 20 April 2014 (pages 149 and 150).)

36 There is no evidence before the Tribunal that the sum of £1101.36 for the year ending 31 March 2014 as an estimated service charge demand is unreasonable. Clearly, in the event that the actual service charges

incurred by the Superior Lessor and which were passed on to the Respondent and in turn to the Applicant are less than that sum for that period (which would appear to be at least in part the case given the reference to the credit adjustment of £43.42 referred to in the letter from the Respondent's solicitors to the Applicant dated 13 July 2015 (page 271)), there would be a credit due to the Applicant.

37 The Applicant makes reference in the papers to section 21 of the 1985 Act and the Respondent to section 20(B) of the same Act. To the extent that the Applicant seeks to argue that the demands for payment are out of time or made too late and thus cannot be recovered by the Respondent, the Tribunal dismisses that contention. The Tribunal has determined that the service charge demand for the year ending 31 March 2014 is for an estimated service charge. An estimated service charge which it would appear may be greater than the actual service charge. In such circumstances, section 20(B) of the 1985 Act has no application (for example, see **Gilje & Others v Charlegrove Securities & Another** (2004) 1 All ER 91).

38 The Tribunal therefore determines that the sum of £1101.36 to be reasonable and payable by the Applicant (credit will be given for any payments made on account) as an estimated service charge for the year ending 31 March 2014 being that part of the service charge that represents estimated service charges received by the Respondent from the Superior Lessor.

#### 39 **Section 20C Application**

40 Given the confusion that is caused by the Respondent adopting a different financial year to that of the Superior Lessor, the terminology used and the inconsistent and misleading use of the term 'actual', it was in the view of the Tribunal perfectly reasonable and indeed sensible for the Applicant to make this application to the Tribunal, not least in the hope that some clarity might be achieved.

41 In the circumstances, the Tribunal considers that it is reasonable and appropriate to make an Order pursuant to section 20C of the 1985 Act that all or any of the costs incurred by the Respondent in connection with this application 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.

#### 42 **Summary of the Tribunal's Decision**

43 The Tribunal notes that the Respondent intends to look at ways in which the issues caused by the 'mismatch' in the accounting periods adopted by the Respondent and the Superior Lessor can be avoided in the future. That clearly is to be encouraged. It may be that the Respondent decides to change the accounting year adopted by it to coincide with that of the Superior Lessor, or otherwise might perhaps

persuade the Superior Lessor to change its accounting year to coincide with that of the Respondent's. The Respondent might wish to consider carefully the terminology that it uses. It is understood that the Applicant works in the Housing Sector and the Respondent is an Housing Association but notwithstanding the expertise and experience that both parties no doubt have, for the reasons stated in this Decision confusion and misunderstanding has arisen on both sides. That is something which both sides will no doubt wish to avoid moving forward.

- 44 The Tribunal determines that the sum of £1101.36 is payable by the Applicant to the Respondent as a reasonable estimated service charge for the year 1 April 2013 to 31 March 2014.
- 45 The Tribunal orders that the costs incurred by the Respondent in connection with these proceedings are not to be regarded as relevant costs to be taken into account in determining the amount of service charge payable by the Applicant.

Dated this 3<sup>rd</sup> day of September 2015

## **Judge N Jutton**

### 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.