

10626



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

**Case Reference** : **MAN/16UG/LSC/2014/0122**

**Property** : **Flat 2, Rohan House, Compston Road,  
Ambleside, Cumbria, LA22 9DR**

**Applicants** : **Dr Keith & Mrs Hilary Goodall**

**Respondent** : **Willow City Estates plc**

**Type of Application** : **Application for a determination of  
liability to pay and reasonableness of  
service charges**

**Tribunal Members** : **Judge P J Mulvenna  
Ms J A Jacobs MRICS**

**Date of Decision** : **20 February 2015**

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**DECISION**

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## **DETERMINATION AND REASONS**

### **DECISION**

- 1. That the service charges for the year ended 31 March 2014 are not payable by the Applicants to the Respondent unless and until the Respondent complies with Section 21(1) of the Landlord and Tenant Act 1985 by serving a demand accompanied by the summary of the rights and obligations of tenants of dwellings as prescribed by The Service Charges (Summary of Rights and Obligations, and Transitional Provision) (England) Regulations 2007.**
- 2. That the repayment of the loan by the Respondent to the management account is not payable by the Applicants and shall not be included in any service charge demand.**
- 3. That the Applicants' charged contribution to the cost of the repairs to the guttering shared by another, neighbouring property has not been calculated in accordance with the Lease and is not payable by the Applicants until the contribution has been properly calculated.**
- 4. That management charge for the year ended 31 March 2014 be reduced from £96.85 to £50.00.**
- 5. That no order be made for the award of costs to either party.**
- 6. That the Respondent reimburse the Applicants the application fee of £65.00.**
- 7. That an order be made under section 20C of the Landlord and Tenant Act 1985 that the costs incurred, or to be incurred, by the Respondent in connection with the proceedings before the Tribunal should not be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenants.**

## **INTRODUCTION**

1. Dr Keith and Mrs Hilary Goodall ('the Applicants') made an application to the Tribunal on 17 October 2014 for the determination of the reasonableness and payability of the service charges for the year ended 31 March 2014 demanded by Willow City Estates plc ('the Respondent') in respect of Flat 2, Rohan House, Compston Road, Ambleside, Cumbria, LA22 9DR ('the Property') on behalf of Barbisol Limited ('the Landlord').

## **THE PROPERTY**

2. The Property is a one bedroom, first floor apartment in a converted Victorian building comprising a shop, two one bedroom apartments (including the Property) and two bed-sits (together 'the Premises'). The Applicants have a leasehold interest in the Property for the unexpired residue of a term of 999 years from 1 January 1990 granted by a Lease made between (1) Barbisol Limited and (2) Alan Evans and Joyce Evans on 22 July 1992 ('the Lease'). The Landlord has a freehold interest in the Premises. The Respondent manages the Premises on behalf of the landlord. The Tribunal has not seen the terms under which the Respondent manages the Premises.

## **DIRECTIONS & PROCEEDINGS**

3. Directions were issued by Judge L Bennett, sitting as a procedural chairman, on 31 October 2014. The parties have complied with the Directions sufficiently to enable the Tribunal to determine the matters before them.
4. Neither the Applicants nor the Respondent requested a hearing and the Tribunal proceeded by considering the matter on 20 February 2015 by reference to the papers placed before them. The Tribunal determined that, having regard to the nature of the matters to be determined, there was no need to inspect the Property.

## **THE LAW**

5. The material statutory provisions in this case are as follows.

(i) The Landlord and Tenant Act 1985

Section 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... (c) the amount which is payable'.

Section 27A (3) provides that an application may also be made 'if costs were incurred.'

Section 19(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.

Section 21(1) provides that a demand for the payment of a service charge must be accompanied by a summary of the rights and obligations of tenants of dwellings in relation to service charges. Pursuant to Section 21(2) the Secretary of State has made The Service Charges (Summary of Rights and Obligations, and Transitional Provision) (England) Regulations 2007 which prescribe the matters which must be included in the summary. Section 21(3) provides that a tenant may withhold payment if there is non-compliance and Section 21(4) renders ineffective any provision in a lease with regard to non-payment or late payment where a tenant withholds payment under these provisions.

Sections 22 and 23 make provision for the inspection by a tenant of accounts and documents.

(ii) The Commonhold and Leasehold Reform Act, Schedule 11, Paragraph 5, provides for applications to be made to the appropriate tribunal for a determination whether an administration 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.

## **THE LEASE**

6. The Tribunal had before it a copy of the Lease which has been read and construed as a whole. In reaching its conclusions and findings, the Tribunal has had particular regard to the following matters or provisions contained in the Lease, none of which were the subject of dispute or argument by or on behalf of the parties, save as particularly mentioned in the Tribunal's determination of the issues below. In the Lease, the Property is referred to as 'the property' and the Premises are referred to as 'the building'.
7. Clause 2.1 reserves a rent of £100.00 per annum which (pursuant to clause 3.1) is payable annually in advance on 1 June. There is no provision in the Lease for the formal demand of the rent, but there is provision (at clause 3.3) for the payment of interest if the rent is overdue for seven days, and (at Clause 5.1) for forfeiture of the Lease if the rent is fourteen days late 'even if it was not formally demanded.'
8. Clause 3.4 contains a covenant by the tenant:  

'To contribute one fifth of all costs and expenses incurred by the Landlords in carrying out their obligations under and giving effect to the provisions of Clause 4 and the Third Schedule of this lease.'

9. The interest and forfeiture provisions referred to in paragraph 7 above apply equally to arrears of service charge payments.
10. Clause 4 contains a Landlord's covenant:  
'To provide the services, listed in the Third Schedule for all the occupiers of the building, and in doing so  
(i) the Landlords may engage the services of whatever employees, agents, contractors, consultants and advisers the landlords consider necessary  
(ii) the Landlords shall not be liable for any failure or delay caused by industrial disputes, shortage of supplies, inclement weather, and other causes beyond the control of the Landlords.'
11. Schedule 3 sets out the Landlord's obligations:  
'1. Repairing the roof, outside, main structure and foundations of the building and the grounds and parking spaces;  
2. Contributing a fair proportion of the cost of repairing maintaining and cleaning any building driveway property pipes cables or structures of any kind of which the benefit is shared by occupiers of the building and occupiers of other buildings;  
3. Decorating the outside of the building once every three years;  
4. Repairing and decorating the common parts every three years;  
5. Repairing and when necessary replacing any appliances provided for the use of the occupants of the building and providing an area in which the dustbin shall be kept in common with the dustbins of other owners;  
6. Heating lighting and cleaning the common parts;  
7. Repairing and maintaining those services in the building, which serve both the property and other parts of the building...'
12. Paragraphs 9, 10 and 11 of the Third Schedule provide for insurance by the Landlord; paragraph 12 provides for the provision of a reserve fund; and paragraph 13 makes provision for keeping accounts of service costs and the preparation of service charge statements.
13. Clause 3.12 provides:  
'If occupiers of the property and occupiers of other property share the benefit of any of the following:  
party walls, party structures, driveways, drains, sewers, pipes, conduits, wires and cables or other structures.  
to contribute a fair proportion (fixed by a surveyor nominated by the Landlords) of the cost of their repair, maintenance and cleaning on demand. This obligation does not restrict any other obligation imposed by this lease.'

## THE MATTERS IN ISSUE

14. The Applicants challenged and sought guidance on the following matters in relation to the service charges demanded for the year ended 31 March 2014:
- (a) a demand for the repayment of a portion (£125.00) of a 'loan' made by or on behalf of the Landlord to the management account;
  - (b) the Landlord's obligation to carry out repairs and decoration despite a shortfall in the management account;
  - (c) the Landlord's obligation to show outstanding monies in the management accounts given to the leaseholders;
  - (d) the Landlord's obligation to contribute to repairs to guttering shared with a neighbouring property;
  - (e) the reasonableness of a 10% management charge on insurance, ground rent and bank charges; and
  - (f) the Landlord's obligation to supply a summary of leaseholders' rights and obligation with demands for payment.

## THE EVIDENCE, SUBMISSIONS & THE TRIBUNAL'S CONCLUSIONS & REASONS

15. The Tribunal has considered the issues on the whole of the written evidence and submissions now before them and, applying their own expertise and experience, has reached the following conclusions on the issues before them.
16. The service charges demanded by the Applicant for the period in question were as follows:

	£
Electricity	37.81
Water	38.16
Cleaner	99.00
Repairs/maintenance	314.30
Bank charges	14.32
Management charge	96.85
Insurance	560.51
Alarm	40.44
Ground rents	100.00
Total	1,301.39

### **(a) Loan to the management account**

17. No reference is made in the service charge demand before the Tribunal for the repayment of a portion (£125.00) of a 'loan' made by or on behalf of the Landlord to the management account. It appears from the Respondent's submissions that the loan was credited to the Applicants'

account on 16 October 2014. It is likely, therefore, that it will appear in the demand for the year ending 31 March 2015.

18. The Applicants' obligation under Clause 3.4 contains a covenant by the tenant:

'To contribute one fifth of all costs and expenses incurred by the Landlords in carrying out their obligations under and giving effect to the provisions of Clause 4 and the Third Schedule of this lease.'

The loan is not a cost or expense incurred in carrying out those obligations, it is a means of funding any cost or expense. The Respondent should include the cost and/or expense of the discharge of any function or service in the service charge demand by reference to the actual expenditure. It would be permissible to repay the loan from the contributions thus obtained. In that way, the demand will clearly and transparently disclose what the payment is for and remove the risk of a double charge being made: one for the payment of the cost or expenditure funded by the loan and one for repayment of the loan.

19. The Tribunal finds that the loan is not repayable by the Applicants and orders that the repayment of the loan shall not be included in any service charge demand.

#### **(b) Landlord's obligations on shortfall in management account**

20. The Landlord's obligation to carry out repairs and decoration remains despite any shortfall in the management account. There will always be cash flow problems if some leaseholders withhold payment of service charges and the Landlord's ability to discharge the obligations will become impaired. That does not remove or diminish the obligation but it might, depending on the circumstances, provide a mitigating factor in any action for breach of covenant or any challenge to the reasonableness of service charges.

21. There appears to be a dispute between the parties as to whether the Landlord has, in fact, complied with the obligations under the Lease. The nature and extent of the alleged failures have not been particularised and there is no quantification of any charges which might be challenged on that basis. The Tribunal is unable, in the absence of evidence in relation to such matters, objectively to assess the position and accordingly makes no order in relation to the issue.

#### **(c) Landlord's accounting obligations**

22. The Landlord's obligation under paragraph 13 of the Third Schedule to the Lease is:

'to keep accounts of service costs and prepare service charge statements...and to produce them to the Tenant on demand...and to serve on the Tenant a notice stating the total expenditure incurred in

the year and the proportionate amount due from the Tenant to the Landlord.’

The obligation comprises two separate requirements: (i) the keeping of accounts and the preparation of service charge accounts; and (ii) the service of a notice stating the total expenditure incurred and the amount due. The demand for the service charge meets the second of these requirements. In relation to the first requirement, the Applicants are entitled, on demand, to a copy of the accounts which should reveal all income and expenditure. There is no suggestion that they have demanded a copy of the accounts and been denied the same. In addition, the Applicants are entitled under Sections 22 and 23 of the Landlord and Tenant Act 1985 to inspect accounts and documents.

23. There appears to be no failure of the Respondent in respect of these obligations and, accordingly, the Tribunal makes no order on the issue, although the parties are reminded of their rights and obligations as set out above.

#### **(d) Repairs to guttering**

24. The Applicants’ obligation to contribute to the cost of the repairs to the guttering shared by another, neighbouring property is subject to the provisions of Clause 3.12 of the Lease which is set out in paragraph 13 above. Guttering is of the same nature as the specific words set out in that clause (party walls, party structures, driveways, drains, sewers, pipes, conduits, wires and cables) and is thus to be construed (under the ejusdem generis rule) as being contained in the general words ‘or other structures’.
25. The clause requires the contribution to be ‘a fair proportion (fixed by a surveyor nominated by the Landlords) of the cost of their repair, maintenance and cleaning...’ There is no evidence before the Tribunal that a fair proportion has been fixed by a surveyor. In carrying out that exercise, the surveyor should assess and determine the degree of benefit of all persons having an interest in the Premises, including the Landlord whose freehold interest gives reversionary rights, together with a present right to receive rents. In the absence of that exercise, the charges demanded by the Respondent have not been calculated in accordance with the Lease and are disallowed. The Applicants will, of course, be liable to pay their contribution once it has been properly calculated.

#### **(e) Management charge**

26. The Lease contains no express provision for the recovery of management charges. The Tribunal find, however, that management is a cost and expense incurred by the Landlords in carrying out their obligations under and giving effect to the provisions of Clause 4 and the Third Schedule of the Lease. Moreover, the Third Schedule gives the landlord power to engage the services of agents. The Tribunal finds that



the inclusion of a management fee in the service charge is reasonable, but must go on to assess the reasonableness of the actual charge.

27. The Tribunal has had regard to the RICS Code of Practice 'Service Charge Residential Management Code' (second edition), which has been approved by the Secretary of State for England under section 87 of the Leasehold Reform, Housing and Urban Development act 1993. In particular, the Tribunal has considered Part 2 'Appointment and charges of managing agents'. It provides, at paragraph 2.3:

'Your charges should be appropriate to the task involved and be pre-agreed with the client whenever possible. Where there is a service charge, basic fees are usually quoted as a fixed fee rather than as a percentage of outgoings or income. This method is considered to be preferable so that tenants can budget for their annual expenditure. However, where the lease specifies a different form of charging, the method in the lease will be used by the managing agents.'

28. The management costs in the present case have been demanded at 10% of the total service charge which might be seen as a relatively modest percentage. It is, however, applied to the ground rent, which is not a charge for a service but a separate charge reserved under the Lease. It is applied to bank charges for which no management is required. It is applied to insurance costs which are significant and represent a disproportionate charge having regard to the level of management required in securing insurance. In these circumstances, the Tribunal finds that a fixed fee would be a preferable and more appropriate method of charging in this case.
29. The Tribunal finds that, having regard to the nature and extent of managing the services required in the present case which, excluding the costs referred to in the preceding paragraph, cost a total of £3,132.80, a fixed fee of £50.00 per unit (a total of £250.00) would be a reasonable and proportionate charge. If the parties feel that it is necessary to have an approach which is flexible, it is open to them to negotiate and agree a fee (or a basis of fee calculation) in advance each year.

#### **(f) Summary of rights and obligations**

30. Section 21(1) of the Landlord and Tenant Act 1985 provides that a demand for the payment of a service charge must be accompanied by a summary of the rights and obligations of tenants of dwellings in relation to service charges. Pursuant to Section 21(2) the Secretary of State has made The Service Charges (Summary of Rights and Obligations, and Transitional Provision) (England) Regulations 2007 which prescribe the matters which must be included in the summary. Section 21(3) provides that a tenant may withhold payment if there is non-compliance and Section 21(4) renders ineffective any provision in a lease with regard to non-payment or late payment where a tenant withholds payment under these provisions.

31. The Tribunal had before them the service charge demand for the period in question which do not appear to comply with The Service Charges (Summary of Rights and Obligations, and Transitional Provision) (England) Regulations 2007. In those circumstances, the service charges in their entirety are not payable by the Applicants unless and until a demand is served which complies with the requirements.

## **COSTS**

32. The Tribunal has power to award costs and/or reimburse fees under Rule 13 of The Tribunal Procedure (First Tier Tribunal) (Property Chamber) Rules 2013 which provides, insofar as it is material to the present case:

‘(1) The Tribunal may make an order in respect of costs only –

... (b) If a person has acted unreasonably in bringing, defending or conducting proceedings in –

... (ii) A residential property case...

(2) The Tribunal may make an order requiring a party to reimburse to any other party the whole or any part of the amount of any fee paid by the other party which has not been remitted by the Lord Chancellor.

(3) The Tribunal may make an order under this rule on an application or on its own initiative.’

33. No applications for the award of costs were made by the parties. The Tribunal has determined that, on the basis of the evidence at the time of their decision, there was no circumstance or particular in which any of the parties had acted unreasonably. The Tribunal concluded that it would not be appropriate or proportionate to award costs to either party.
34. The Tribunal found that the need for the proceedings could have been avoided if the Respondent had engaged in mediation as suggested by the Applicants. The Tribunal have decided, therefore, to make an order for the reimbursement by the Respondent to the Applicants of the application fee of £65.00.
35. The Applicants requested that an order be made under section 20C of the Landlord and Tenant Act 1985 that the costs incurred, or to be incurred, by the Respondent in connection with the proceedings before the Tribunal should not be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenants. For the same reasons recorded in the previous paragraph, the Tribunal have determined that it would be reasonable and proportionate to make an order.