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# FIRST - TIER TRIBUNAL

**PROPERTY CHAMBER**
**(RESIDENTIAL PROPERTY)**

| | | |
|---|---|---|
| **Case References** | : | **(1) BIR/31UC/LIS/2015/0063**<br>**(2) BIR/31UC/LBC/2015/0011** |
| **Property** | : | **19 Delisle Court**<br>**Windleden Road**<br>**Loughborough**<br>**Leicestershire**<br>**LE11 4PP** |
| **Applicant** | : | **Longhurst and Havelock Homes Ltd** |
| **Representative** | : | **Capsticks LLP** |
| **Respondent** | : | **Mr Andrew Rowe**<br>**(Personal Representative of**<br>**Barbara Arden-Rowe)** |
| **Type of Application** | : | **(1) Application under section 27A of the Landlord and Tenant Act 1985 for the determination of the reasonableness and payability of service charges**<br>**(2) Application under section 168(4) of the Commonhold and Leasehold Reform Act 2002 for a determination that a breach of covenant has occurred** |
| **Tribunal Member** | : | **Deputy Regional Judge Gravells** |
| **Date of Decision** | : | **18 July 2016 (Paper determination)** |

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**DECISION**

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## Introduction

1 This is a decision on two applications made to the First-tier Tribunal (Property Chamber) (Residential Property) by Longhurst and Havelock Homes Ltd ('the Applicant'), the freeholder of 19 Delisle Court, Windleden Road, Loughborough, Leicestershire LE11 4PP ('the subject property'). The applications are (i) under section 27A of the Landlord and Tenant Act 1985 ('the 1985 Act') for a determination of the reasonableness and payability of service charges in respect of the subject property and (ii) under section 168(4) of the Commonhold and Leasehold Reform Act 2002 ('the 2002 Act') for a determination there have been various breaches of covenant contained in the lease of the subject property'.

2 The named Respondent to both applications is the personal representative of Barbara Arden-Rowe, the former leaseholder of the subject property, who died on 7 October 2014. It appears that the personal representative is Mr Andrew Rowe, the son of Mrs Arden-Rowe: see paragraph 14 below.

3 The subject property is part of a leasehold scheme for the elderly comprising 26 units. A 99-year lease of the property from 1 June 1988 was assigned to Mrs Arden-Rowe on 20 November 2000. She occupied the property until 2012, when she moved into a residential care home.

4 Under the terms of the lease, the Applicant covenanted to provide the standard range of services to the subject property; and the leaseholder covenanted to pay a service charge in return.

5 By the first application, dated 2 December 2015 and received by the Tribunal on 4 December 2015, the Applicant seeks a determination that unpaid service charges for the service charge years 2012/2013, 2013/2014, 2014/2015 and 2015/2016 are reasonable and payable by the Respondent from the estate of Mrs Arden-Rowe.

6 By the second application, dated 14 December 2015 and received by the Tribunal on 15 December 2015, the Applicant seeks a determination that both Mrs Arden-Rowe and, subsequently, Mr Rowe breached various covenants in the lease. The application identified four covenants alleged to have been breached –

(i) To use the demised premises as a single private residential dwelling by a qualifying person and for no other purpose (clause 2(6));

(ii) Not to underlet or part with possession of the demised premises or any part thereof save as hereinafter mentioned (clause 2(7)(a)(i));

(iii) Not to charge the demised premises without the previous consent in writing of the lessor (clause 2(7)(a)(ii));

(iv) Not to assign the demised premises or any part thereof except to a qualifying person previously approved in writing by the lessor (clause 2(7)(b)).

7 The Applicant alleges (i) that Mrs Arden-Rowe had permitted a family friend to reside in the property rent-free; and (ii) that Mr Rowe subsequent sublet the property.

8 The Applicant (in the application forms) indicated that it was content for the applications to be determined without an oral hearing and on the basis of written representations. Pursuant to rule 31 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the Tribunal wrote to Mr Rowe, indicating that it intended to dispose of the proceedings without a hearing. No objection was received from him.

9 Directions were issued on 8 February 2016, requiring each of the parties to prepare a statement of case.

10 The Applicant provided further documentation in relation to the service charge application but submitted that Mr Rowe admitted both the service charge claim and the breach of covenant. In a very brief statement Mr Rowe questioned the payability of the unpaid service charges and denied any breach of covenant.

11 Following a review of the Applicant's documentation, it became clear that there were discrepancies in the documentation relating to the service charge claim that required explanation and/or clarification before the Tribunal could make a conclusive determination. The Tribunal therefore decided to hold a case management conference to assist in clarifying the precise amount of the claim.

12 Accordingly, a case management conference was held on 26 May 2016 at Loughborough Magistrates' Court. The case management conference was attended by Ms Bridget Stark-Wills, of Capsticks LLP, representing the Applicant. (Capsticks LLP had replaced Shakespeare Martineau LLP, who had conduct of the initial stages of the present applications.) Mr Rowe also attended.

13 At the conclusion of the case management conference the Tribunal gave oral directions for the submission of supplementary documentation.

## Determination of the Tribunal

*Preliminary issues*

The appropriate Respondent

14 At the date of the application the Applicant believed that Mrs Arden-Rowe had died intestate and that there has been no grant of letters of administration to Mr Rowe (or any other person). However, at the case management conference Mr Rowe confirmed (i) that his mother had left a will and (ii) that she had appointed Mr Rowe as executor. The Tribunal therefore determined that Mr Andrew Rowe was the appropriate Respondent to the present applications.

The Applicant's dilemma

15 As noted above, in its initial statement of case the Applicant submitted that Mr Rowe has admitted that the unpaid service charges are reasonable and payable and that there has been a breach of covenant in the lease.

16 At the case management conference the Tribunal pointed out the dilemma posed by that submission. Both section 27A(4) of the 1985 Act (in relation to the service charge application) and section 168 of the 2002

Act (in relation to the breach of covenant application) make it clear that, where the substance of the Applicant's claim has been admitted by the Respondent, an application to the Tribunal is unnecessary (and indeed precluded by the relevant statutory provisions and arguably an abuse of process).

17 However, in the view of the Tribunal, the dilemma does not arise since it was clear from Mr Rowe's initial statement of case that he challenged the service charge claim and that he did not admit that there had been a breach of covenant.

*The service charge application*

18 Supplementary documentation submitted by the Applicant following the case management conference indicates that, in respect of the subject property, the service charge costs for 2012/2013, 2013/2014 and 2014/2015 and the estimated service charge costs for 2015/2016 are as follows:

| | 2012/13 | 2013/14 | 2014/15 | 2015/16 |
|---|---|---|---|---|
| Caretaking services | 74.92 | 76.88 | 75.38 | 113.52 |
| Emergency call service | 58.04 | 58.04 | 58.04 | 58.04 |
| Garden maintenance | 216.92 | 304.38 | 225.69 | 237.72 |
| Window cleaning | 22.65 | 27.50 | 30.00 | 30.00 |
| Electricity | 0.73 | 0.73 | 0.73 | 0.73 |
| Repairs and maintenance | 60.69 | 78.85 | 27.19 | 90.36 |
| Insurance | 44.73 | 44.73 | 49.23 | 49.20 |
| Boiler maintenance | 156.00 | 163.80 | 172.19 | 180.00 |
| Reserve fund | 125.96 | 113.69 | 113.69 | 136.54 |
| Management fee | 215.84 | 227.62 | 242.11 | 251.03 |
| Audit fee | 10.50 | 10.50 | 15.00 | 15.00 |
| | | | | |
| **Total** | **986.98** | **1106.72** | **1009.25** | **1162.14** |

19 Subject to the matters referred to in paragraph 20, the above figures are distilled from paragraphs 19-20 and 34 of Ms Stark-Wills' Supplemental Statement, dated 13 June 2016, and from the audited service charge accounts for 2012/2013, 2013/2014 and 2014/2015 and the service charge budget for 2015/2016.

20 In her Supplemental Statement Ms Stark-Wills does not refer to audit fees, although these are included in the audited service charge accounts. These amount to £10.50 (per unit) for 2012/2013 and 2013/2014 and £15.00 (per unit) for 2014/2015 and 2015/2016; and they have been included in the figures in paragraph 18. In addition, in respect of 2015/2016 there are some minor discrepancies between the figures provided by Ms Stark-Wills and the figures in the service charge budget. The figures in paragraph 18 reflect the figures provided by Ms Stark-Wills and any discrepancy can be reconciled when the audited service charge accounts for 2015/2016 have been approved.

21 Mr Rowe has not challenged the reasonableness of the service charges. However, he has challenged the payability on two grounds. First, he questioned whether service charges were payable in respect of an empty property. Irrespective of whether there has been intermittent occupation of the subject property (see paragraphs 34 to 35 below), in the view of the Tribunal, that argument is misconceived. The service charges are payable under the terms of the lease. Despite the physical absence of the leaseholder, the lease continues and so does the liability to pay service charges. Second, he argued that the Applicant had failed to produce 'any paperwork with [Mrs Arden-Rowe's] signature on confirming she agreed with any term or costs'. In the view of the Tribunal that argument also fails. It is not disputed that the lease of the subject property was assigned to Mrs Arden-Lowe on 20 November 2000. As a result she assumed the rights and obligations under the lease, including the right to receive the services set out in the lease and the obligation to pay for those services through the service charge.

22 In the Supplementary Directions issued for the purposes of the case management conference the Tribunal raised the question of the level of the management fee included in the service charges. Although the Tribunal would not normally raise issues that are not raised by the parties, there may be circumstances where the Tribunal should take the initiative. As was said by HHJ Mole QC in *Regent Management v Jones* [2010] UKUT 369:

> 'The LVT is perfectly entitled, as an expert tribunal, to raise matters of its own volition. Indeed it is an honourable part of its function, given that part of the purpose of the legislation is to protect tenants from unreasonable charges and the tenants, who may not be experts, may have no more than a vague and unfocussed feeling that they have been charged too much. But it must do so fairly, so that if it is a new point which the tribunal raise, which the respondent has not mentioned, the applicant must have a fair opportunity to deal with it.'

23 At the case management conference the Tribunal therefore invited the Applicant to address the reasonableness of the management fees, which, in the four service charge years covered by the application, ranged between 38 and 49 per cent of the cost of the other services and between £316 and £430 per unit per year. The Tribunal indicated its provisional view that such fees were excessive.

24 In principle, the Tribunal is not persuaded that that view was incorrect. Notwithstanding that the management fees are within the limits on fees for private retirement schemes managed by Registered Social Landlords approved by the Homes and Communities Agency, those limits are not targets. The Tribunal believes that there should be some proportionality between the management fee and the value of the other services provided. Moreover, although the Applicant claims that it provides management functions over and above the minimum set out in the Association of Retirement Housing Managers' Code of Practice, a number of the listed functions could be regarded as being for the benefit of the Applicant itself.

25 However, it is not necessary for the Tribunal to determine what would be a reasonable figure for the standard management fee at Delisle Court.

Since the freehold of the subject property was acquired by the Applicant through a stock transfer from Friendship Care and Housing, the leaseholder benefits from an agreed discounted management fee. As indicated in paragraph 18, for the four service charge years covered by the present application, the discounted management fees have been £215.84, £227.62, £242.11 and £251.03 respectively. In the view of the Tribunal, those fees cannot be regarded as unreasonable; and the Tribunal therefore makes no adjustment to the management fees.

26 The Tribunal therefore determines that the service charge figures set out in paragraph 18 (totalling £4265.09) are reasonable and payable.

27 The only remaining issue is the amount already paid. According to statement of account for the subject property, eight monthly payments of £82.32 were made in respect of the service charge year 2012/2013. It follows that £658.56 must be deducted from the total of the service charges set out in paragraph 18. That produces a figure for service charges payable but unpaid of £3606.53. That figure excludes any sums payable in respect of the service charge year 2016/2017.

*The breach of covenant application*

Jurisdiction of the Tribunal

28 It is important to emphasize the limited jurisdiction of the Leasehold Valuation Tribunal under section 168(4) of the 2002 Act – and the consequent limited scope of its determination.

29 In making the present application, the Applicant has commenced the preliminary stage of the statutory procedure for the forfeiture of a residential lease for breach of covenant. That preliminary stage was introduced by section 168 of the 2002 Act. Section 168(1) provides:

'A landlord under a long lease of a dwelling may not serve a notice under section 146(1) of the Law of Property Act 1925 ... in respect of a breach by a tenant of a covenant or condition in the lease unless subsection (2) is satisfied.'

30 Subsection (2) may be satisfied by any of three alternative conditions. The relevant condition in the present case is that 'it has been finally determined on an application [to the First-tier Tribunal] under subsection (4) that the breach has occurred'.

31 By the present application the applicant seeks such a determination from the Tribunal.

32 The Tribunal's jurisdiction is therefore limited to determining the single factual question whether the Mrs Arden-Rowe and/or the Respondent has breached any covenant in the lease. Circumstances and issues of mitigation that do not impact directly upon that factual question are not issues for the Tribunal. If the Tribunal determines that there has been a breach of any covenant, the Applicant will have to decide whether to use that determination as the basis of forfeiture proceedings under section 146 of the Law of Property Act 1925; if it does so, and the matter comes before the court, it is at that stage that the Respondent would be able to raise other issues.

Breach of covenant

33 Although the application alleged breaches of four separate covenants in the lease (see paragraph 6 above), in her subsequent statement Ms Stark-Wills, on behalf of the Applicant, acknowledged that the application turned on clause 2(7)(a)(i), by which the leaseholder covenanted 'not to underlet or part with possession of the demised premises or any part thereof'.

34 Ms Stark-Wills provided details of a number of incidences of occupation of the subject property by persons other than Mrs Arden-Rowe and the Respondent. These are corroborated by documentary evidence, including letters send by the Applicant to the Respondent, pointing out the prohibition on subletting.

35 In letters to the Tribunal, dated 1 April 2016 and 20 June 2016, Mr Rowe admitted that on two occasions other persons were permitted to occupy the subject property as their (temporary) home. However, he argued that in both cases these were 'charitable acts'; that in one case the Applicant was informed any raised no objection; and that in neither case was rent paid. For these reasons, Mr Rowe submitted that there had been no subletting and no breach of covenant.

36 Mr Rowe's response raises a number of issues. First, the payment of rent is not a requirement of a lease (or sublease): see section 205(1)(xxvii) of the Law of Property Act 1925 and *Ashburn Anstalt v Arnold* [1989] Ch 1, 9-10. Second, clause 2(7)(a)(i) is breached not only by subletting but also by parting with possession. Indeed, the Applicant's case only relies on alleged parting with possession. Third, a charitable motive is not relevant to a finding of parting with possession.

37 On the other hand, Mr Rowe's claim that the Applicant was informed of the occupation of one person does raise the question of whether the Applicant consented to that occupation and/or waived any breach of covenant occasioned by that occupation.

38 However, the Tribunal finds that there was at least one instance (and probably more) of parting with possession of the subject property and that there was therefore a breach of clause 2(7)(a)(i) of the lease.

39 As noted above, that is the only issue to be determined by the Tribunal on an application under section 168(4) of the 2002 Act. If the Applicant elects to pursue forfeiture proceedings and the matter comes before the court, it is at that stage that the Respondent would be able to argue that the breach has been remedied or that there are mitigating factors that should lead the court to grant relief from forfeiture.

## Summary

40 The Tribunal determines that service charges totalling £3606.53 in respect of the subject property for the service charge years 2012/2013 to 2015/2016 are reasonable and remain payable.

41 The Tribunal determines that there has been a breach of clause 2(7)(a)(i) of the lease of the subject property.

## Appeal

42 Any appeal against this decision must be made to the Upper Tribunal (Lands Chamber). Prior to making such an appeal an aggrieved party must apply in writing to the First-tier Tribunal for permission to appeal within 28 days of the date specified below stating the grounds on which that party intends to rely in the appeal.

19 July 2016

Professor Nigel P Gravells
Deputy Regional Judge