FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**CAM/12UE/LSC/2018/0052**
Property	**:**	17 Lavenham Court, Peterborough PE2 7ZF
Applicant	**:**	Mr A C Mathieson & Mrs I D Mathieson
Representative	**:**	Andrew Mathieson
Respondent	**:**	Holding & Management (Solitaire) Ltd
Representative	**:**	Rebecca Ackerley (counsel), instructed by J B Leitch LLP
Type of Application	**:**	for determination of reasonableness and payability of service charges for the years 2014–2018 [LTA 1985, s.27A] for an order limiting liability for the landlord's costs incurred in connection with these proceedings [LTA 1985, s.20C]
Tribunal Members	**:**	G K Sinclair, G F Smith MRICS FAAV REV & C Gowman BSc MCIEH MCMI
Date and venue of Hearing	**:**	Monday 26th November 2018 at Peterborough Magistrates Court
Date of decision	**:**	22nd February 2019

DECISION

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1. In this application the applicant lessees seek to challenge service charges levied by or on behalf of the respondent in respect of the accounting years 2014 to 2018. Recognising that the 2018 accounting year was as yet incomplete and that no final account could be prepared for some months, the challenge to that year was abandoned.

2. For the reasons which follow the tribunal determines that the service charge provisions in the lease are defective and the amounts payable for the years 2014–2017 shall be reduced in part, in accordance with the findings recorded in paragraphs 35–42 inclusive.

Background

3. The subject premises comprise a flat in a mixed development of flats and houses perhaps started in the late 1980s on the western edge of Peterborough. Mr & Mrs Mathieson, who reside in Edinburgh, are the lessees of a one bedroom flat which they sub-let. Mr Mathieson, being a retired Scottish chartered quantity surveyor, considers that the estate has been mismanaged by the respondent and that he has consistently been overcharged; his submissions to the tribunal making regular use of the term "fraudulent".

4. In this application he and his wife challenge the service charges for maintenance years 2014 to 2018. Unfortunately their application did not set out precisely which aspects they disputed and why, so directions were issued on 10th September requiring them to state what exactly they are asking the tribunal to determine.

5. In response a statement of case was produced listing a number of items, many by reference simply to correspondence engaged in with the respondent's managing agent, Mainstay Residential. Against each is recorded the disputed figure. The respondent filed its own statement of case dated 12th October 2018, setting out what it considered the material provisions in the lease and confirming that each year's service charge account had been properly budgeted and accounted for.

The lease

6. The subject premises are held under a lease dated 19th August 1992 made between Beazer Homes (Central) Ltd (1), Holding & Management (Solitaire) Ltd (2) and S E Speechley Esq (3). The premises[1] are situate above a garage block, being one half of the upper floor and accessed via an external door at one end leading to a private staircase included within the demised premises. The term of the tenancy is 125 years from 25th July 1990.

7. There are a number of problems and inconsistent provisions in this lease. For example, clause 3.3 (a lessee covenant) obliges the lessee to pay any adjustment under paragraph 3 of Part III of the Fourth Schedule, but also refers to paying a due proportion of the current service charge specified in paragraph 10 of the

[1] Described in Particular 4 as "Number 35 on the ground/first floor of Block B to be known as Number 17 Lavenham Court"

Particulars. Unless a page is missing, the lease provided stops at paragraph 7.

8. Clause 1.7 defines the Service Charge as follows :

> "the Service Charge" means the percentage proportion appropriate to the Flat as set out in Part I of the Fourth Schedule or such other proportion as may be determined pursuant to Part III of the Fourth Schedule) of the aggregate Annual Maintenance Provision for the whole of the Block for each Maintenance Year (computed in accordance with Part III of the Fourth Schedule) [Plots 42–53 inclusive] and in addition a sum equal to one twelfth (or such other proportion as may be determined pursuant to Part II of the Fourth Schedule) of so much of the aggregate Annual Maintenance Provision as relates to the provision of the services specified in paragraphs 2(a) and 2(b) of the Fifth Schedule [and in respect of any garage let on a long lease on the Estate which may at any time be vested in the Lessee to pay .25% of the aggregate Annual Maintenance Provision as aforesaid]

9. The expression "the Estate" is defined in paragraph 5 of the Particulars as :

> the land edged blue on plan number 1 annexed to the lease[2] and the houses and the Blocks of flats A and B (comprising in total twenty one flats) erected or in the course of erection thereon.

10. However, one should note that in the definition in clause 1.7 the obligation to pay a percentage as set out under Part I of the Fourth Schedule is by reference to plots 42–53 inclusive. The subject premises do not come within that category.

11. Part 1 of the Fourth Schedule comprises a list, identifying each plot by number, development style and percentage. Plot 35 is recorded as being one of 7 built to the Somerton design, each with a service charge percentage of 2.50%. Flats built in the Cavenham (6), Kirkham (2) and Henley (2) styles are also charged 2.50%, whereas those (perhaps larger) flats built in the Butley (2) or Kenton (2) designs are each required to contribute 3.14%. The list is completed by a note that houses (in total) contribute 41.94% and the garages (in total) contribute 3.00%.

12. This strongly suggests that the reference in clause 1.7 to the share being of the aggregate maintenance cost for "the whole of the Block" must be wrong, and that what is meant is "the Estate"; because if Block B comprises the complete snake-like structure starting with a terrace of 3 houses in the north west, continuing with one ground floor and 4 first floor Somerton flats, then 3 more houses, and finishing with the 2 over-garage Somerton flats including the subject premises in the south east, a mere 2.50% contribution from each flat would leave the Block service charge account seriously in deficit.

13. Part III of the same Schedule purports to explain the computation of the Annual Maintenance Provision. By paragraph 2 this comprises :

(i) 21/35ths of the expenditure estimated as likely to be incurred in the maintenance year by the company for the purposes mentioned in the Fifth Schedule, together with

(ii) an appropriate amount as a reserve for or towards the matters mentioned

[2] No such plan appears in the bundle; merely plan 2 which identifies plot numbers and parking spaces – whether in the open or in garages

in the Fifth Schedule which are likely to give rise to periodic rather than annual expenditure, including external decoration of the Blocks and repair of the structure and drains, together with

(iii) a reasonable sum to cover the company's administrative and management expenses in respect of the Block (including a profit element).

14. Note that (ii) refers to Blocks plural while (iii) refers to Block in the singular.

15. By clause 4 the respondent company covenants to carry out the repairs and services specified in the Fifth Schedule and also to observe and perform those obligations set out in the Sixth Schedule.

16. The Fifth Schedule, referred to above, sets out the purposes for which the Service Charge is to be applied. It includes maintenance and cultivation of the grounds and the decoration and repair of the structure of the blocks, boundary walls and fences, the decoration and repair of common parts, payment of any rates, employment of staff, and payment of costs incurred in management, insurance, etc. By paragraph 5(d) the management costs shall include those incurred in the preparation and audit of the service charge accounts.

17. In addition the lessee is obliged to pay one twelfth of the aggregate as relates to services provided under paragraphs 2(a) and 2(b) of the Fifth Schedule, which concern decorating the exterior rendering, woodwork and guttering of the block (a) and keeping the interior and exterior walls, ceilings and floors of the Blocks (plural) and the whole of the structure roof foundations and main drains boundary walls and fences of the Blocks (but excluding such parts as are included in the Flat and the corresponding parts of all other flats in the Blocks) in good repair and condition.

Material statutory provisions

18. Section 18 of the Landlord and Tenant Act 1985 defines the expression "service charge", for the tribunal's purposes, as :

> 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…

19. The overall amount payable as a service charge continues to be governed by section 19, which limits relevant costs :

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.

20. The tribunal's powers to determine whether an amount by way of service charges is payable and, if so, by whom, to whom, how much, when and the manner of payment are set out in section 27A of the Landlord and Tenant Act 1985. The first step in finding answers to these questions is for the tribunal to consider the exact wording of the relevant provisions in the lease. If the lease does not say that the cost of an item may be recovered then usually the tribunal need go no further. The statutory provisions in the 1985 Act, there to ameliorate the full rigour of the lease, need not then come into play.

21. Please also note sub-sections (5) & (6), which provide that a tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment, and that an agreement by the tenant of a dwelling (other than a post-dispute arbitration agreement)[3] is void in so far as it purports to provide for a determination in a particular manner or on particular evidence of any question which may be the subject of an application to the Tribunal under section 27A.

22. By section 21 of the same Act 1985 a tenant may require the landlord in writing to supply him with a written summary of the costs incurred over the previous twelve months. The section sets out the requirements of a summary of costs to be supplied under section 21, and if the relevant costs are payable by the tenants of more than four dwellings the summary must be certified by a "qualified accountant".[4] This expression is defined in section 28 as a person who has the necessary qualification, viz eligibility for appointment as a statutory auditor under Part 42 of the Companies Act 2006, but disqualifying anyone who is an officer, partner or employee of the landlord, or the landlord's managing agent of the property or an employee or partner of such agent.

23. Please note that in this case, while section 21 requires only certification of the accounts by a qualified person who is sufficiently independent, the lease goes further and specifies that the accounts must be subjected to a formal audit.

Inspection and hearing

24. The tribunal inspected the site at Lavenham Court at 10:00 on the morning of the hearing. Also present were the applicants, plus counsel for the respondent and Mr Allen of Mainstay Residential, all of whom later attended the hearing.

25. To the rear and east of the subject premises is a large area laid to grass, with some trees and bushes present. It is separated from the estate by a wooden picket fence with a pedestrian gate at the southern end, at the end of the garage block above which the subject premises are situate, with another gate further north and east, adjacent to the car parking area accessed through the archway behind and to the north of the row of houses next and perpendicular to the garage block.

26. What was noticeable was that the land beyond the fence was unkempt and scrub-like. To the tribunal's surprise those present on behalf of the respondent had no idea who owned the land beyond the fence, nor why the pedestrian gates were located where they were so as to gain access to it. It was also observed that the wooden fence had fairly recently been treated with preservative – but only on the Lavenham Court side, thus rather negating the effectiveness of such treatment.

27. On the other side of the car park, and facing the subject premises, is an L-shaped building which the tribunal presumes must be Block A, in which the properties referred to as plots 42–53 (mentioned above) are situate. as with Block B, these include a mixture of leasehold flats and houses. There was talk of these including a number of shared ownership properties.

[3] Eg. provisions in a lease stating that the landlord's accountant's certificate shall be conclusive, or that any dispute shall be referred to arbitration

[4] See s.21(6)

28. At the hearing the tribunal was provided with a bundle that failed to comply with the directions issued in September 2018. Pages were not numbered, there was no list of contents, and – save for a document handed in at the hearing – there was no proper explanation stating what was being challenged, why, and for what alternative figure the applicants contended. The bundle was a shambles, with no witness statements, yet it contained an over-large amount of *inter partes* correspondence – most of which the tribunal did not find helpful.

29. Mr Allen assisted the tribunal on certain points and Mr Mathieson handed in a document expanding upon his thoughts, which at least had the merit of reducing the potential length of the hearing (which still lasted from 11:10 until 16:48) and avoiding the need for everyone present to try and take a detailed note.

30. In these circumstances the tribunal found it most helpful to take each year in turn and consider each disputed item in the applicant's statement of case, relying upon oral contributions backed up where possible by whatever documentation was available.

31. The parties' respective contentions ranged over such issues as lessees' liability for asbestos surveys and fire risk assessments, whether it was reasonable to require payment for a long-distance contractor's mileage, liability to pay surveyors' fees for work that it was later decided not to carry out, the cost of moss clearance from gutters and for installation of anti-bird netting, etc. The applicants were also very concerned about the cost of painting the garage doors, the quality of which was so poor that the work had to be redone. However, this does not form part of the costs incurred or service charges demanded for any of the years in dispute. If a charge is made at all it will fall into a future accounting period.

32. Mr Mathieson was also keen to draw the tribunal's attention to Mainstay's terms & conditions of business, as disclosed by it. These do not permit certain handling fees to be charged, which Mr Allen said were agreed in Mainstay's private terms agreed in its management contract with the lessor.

33. The respondent submitted, through its counsel, that the application could be considered under three separate heads :
    a. Those costs payable per block rather than as estate costs
    b. Those costs which were not payable at all, and
    c. A few items where the issue was the reasonableness of the figures.

34. The tribunal's consideration of the principal points in dispute, and its findings, appear in the section below.

Discussion and findings

35. As a general point the tribunal determines that on its analysis of the lease the provisions dealing with liability for and apportionment of the service charge are defective and that future clarity may be best achieved by discussion amongst all concerned and variation of the relevant provisions, either by an agreed Deed of Variation or by application to the tribunal under Part IV of the Landlord and Tenant Act 1987.

36. However, the dispute is restricted to one involving the applicants only, so this decision shall not affect other lessees unless they too seek to invoke the tribunal's jurisdiction to determine reasonableness and payability. The tribunal cannot at this stage assume that others would wish to take or limit themselves to the same points or rely upon the same arguments as espoused by Mr & Mrs Mathieson.

37. The next general point to make is that on the strict wording of the lease the block charge is not payable by the applicants' flat. The lease refers to plot numbers relating to premises within the other block only, and it was argued that some costs relate only or partly to that other block – so would be irrecoverable even if the lease referred to plot numbers within the correct block.

Accounts for 2014

38. Following the order of items set out in the applicants' statement of case :
    a. Asbestos survey — There had been two previous surveys carried out and the building had not been altered in any material way since. Mainstay may have been ordered to obtain a report by the freeholder, but that is no reason why the lessees and not it should pay for it. In any case, this would also be a block charge : Disallowed
    b. Brass Facilities — £1 548 is payable as an estate charge. A block charge of £1 072 has been wrongly posted : Allow £1 548
    c. Bin store — This is an estate charge : Allowed
    d. Gutters — £1 660 is claimed, but it is mostly a block charge : Allow £742
    e. Electricity charge — The late payment charge imposed by EDF should not be passed on to service charge payers as they have paid in advance; and while the lessor claims that this was credited in the 2016 accounts there is no explicit reference to this at all : This is poor accounting practice, and the charge is disallowed
    f. Accountancy charges — These are recoverable, as they are fees charged by an independent accountant. However, the lease does not allow for the recovery of a handling charge by the managing agent, and neither does its terms & conditions relating to this estate and provided to the applicant on request. What the managing agent's confidential contract with the lessor says is irrelevant if inconsistent with the evidence disclosed : Disallowed in part
    g. Professional fees of £3 503 for preparing a specification for work not yet undertaken (a 2nd specification was later done but has not been charged for) — This did not form part of Mr Mathieson's statement of case, nor was it in his further written submissions handed in on the day, although during the hearing he claimed this as "fraudulent" because no work was ever done : Allowable as preparatory work and a cost actually incurred, even if the work was not later implemented.

39. As another general point, the tribunal considers that poor accounting practice has been adopted concerning the bland reference to deductions from the sinking fund instead of showing cost items and then a balancing transfer from the fund to the annual service charge account. This should be rectified in future.

Accounts for 2015

40. As above :
    a. The first item refers to the repayment or crediting of an overpayment of

£109.75 : There is no live issue here

b. Mr Mathieson alleges a discrepancy of £309 in the general repairs invoices sent to him : His allegation is not proven

c. Bin store : Allowed

d. Fire risk assessment, etc. — This is a general risk assessment under the estate charge and is separate from the ordinary management charge : £302 is payable as claimed in the accounts

e. Dispute concerning £510 charge : challenge abandoned, so payable

f. EDF electricity charge — This is a block charge not applicable to the applicants : Disallow

g. Brass Facilities travel cost — This complaint concerning a sum stated by the applicants to be £400 is not explained. The travel cost is legitimate – see invoices 2986 & 2779 : Challenge dismissed

h. Accountancy handling fee : Disallowed as per paragraph 38 f. above.

Accounts for 2016

41. As above :

a. Charge by LANDS in sum of £1 598 for cleaning gutters and moss — the applicants say that this should be a block charge, that the cost is excessive for the work done. The tribunal queries the time involved, but agrees that this is a block charge : Disallowed

b. Fire risk assessment and general risk assessment — the charge for carrying out a general risk assessment is the only estate charge element. This is part of the tasks included within the tasks forming part of the general management of the property, for which the normal management fee is incurred : Disallowed

c. Accountancy charge – as before, the independent accountant's fee has been properly incurred but not the managing agent's handling fee : disallowed in part

d. LANDS invoice for £5 220 against the estate account — The tribunal finds that £3 900 should be ignored, as it should be allocated as a block charge. In any case, the invoice is excessive, with the contractor overcharging for signs, treating the fence only on the one side, and in the cost of installing a small area of bird netting. This had ben recognised by the managing agent and the contractor was sacked. The tribunal finds that there had been insufficient supervision or monitoring : Allowed in the applicants' figure of £1500 only

e. Electricity charge — Mr Mathieson alleges that this charge is for the cost of his outside light, powered from his flat's own metered supply. Had this been so then no charge could have been raised save by extrapolation form his own electricity bill – to which Mainstay could have no access. This is misconceived. The charge is for an external estate lighting supply metered separately by a meter located in a sheltered position on a side wall of one of the two covered passageways within this block : This is a valid estate cost and is allowed in full.

Accounts for 2017

42. As above :

a. Fire risk assessment, etc — As before, the estate charge element is only £363 (for the general risk assessment), and the cost of this forms part of normal management and the annual fee levied by Mainstay : Disallow

b. Communal estate electricity charge — As in paragraph 41 e, this complaint is misconceived : Challenge dismissed
c. Accountancy — As in paragraph 41 c. above : accountant's fee allowed, but Mainstay's handling fee is disallowed
d. Window cleaning — This is a block charge : Disallow
e. Rubbish clearance — This is a legitimate estate charge : Allow.

2018 accounting year

43. A challenge to this year having been abandoned as premature, the tribunal wishes to record only that the cost for painting the garage doors was incurred in 2018 and the available evidence, including an email dated 18th October 2018 from Wayne Cocker of 5 Lavenham Court to the applicants [part of document 40 at the back of the bundle] confirms that LANDS did not do a good job and had to return more than once to rectify matters. No doubt this will be borne in mind when Mainstay is preparing the 2018 service charge accounts.

Dated 22nd February 2019

Graham Sinclair

Graham Sinclair
First-tier Tribunal Judge