FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**CAM/38UE/LSC/2019/0007**
Property	**:**	**13 Philips Court,** **Lombard Street,** **Abingdon,** **OX14 5EY**
Applicant	**:**	**Belinda Herbert** **Unrepresented**
Respondents	**:**	**(1) Philip and Joanna Barwick** **(2) Philips Court Management Co. Ltd** **Unrepresented**
Date of Applications	**:**	**1st February 2019**
Type of Applications	**:**	**Section 27A Landlord and Tenant Act 1985 ("s27A"), and Schedule 11 Commonhold and Leasehold Reform Act 2002 ("the 2002 Act")**
Tribunal	**:**	**Judge J. Oxlade** **M. Krisko BSc. FRICS** **R. Wayte**
Date and venue of Hearing	**:**	**21st May 2019** **Hawkwell House Hotel,** **Oxford**

DECISION

Upon hearing from the Applicant, and the Managing Agents for the Second Respondent,

AND UPON the Applicant agreeing to pay to the Second Respondent the total sum of £1246.97, demanded on account by the Second Respondent as the Applicant's fair proportion of service charge for the years 2015 to 2017, (calculated as the sum of £479.21 in 2015, £1447.21 in 2016, and £155 in 2017,

less (i) the overpayment made by her in respect of gas in the sum of £725.45 and (ii) £109 in respect of the telephone entry system),

And Upon the Second Respondent acknowledging that the Applicant had already discharged liability for the service charges demanded on account for the service charges years 2018 and 2019,

For the following reasons, the Tribunal makes the following Orders:

The Second Respondent shall pay to the Applicant the sum of £300 by way of reimbursement in respect of the application and hearing fees incurred by her in making the applications under section 27A of the 1985 Act and Schedule 11 of the 2002 Act, in accordance with Regulation 13(2) of the Tribunal Procedure (First-tier)(Property Chamber) Rules 2013, ("the 2013 Regulations"),

The Second Respondent shall not be permitted to recover against the Applicant any administration charge recoverable under the lease in respect of their litigation costs incurred by it, pursuant to paragraph 5A of Schedule 11 of the 2002 Act,

The Tribunal refuses to make an Order pursuant to section 20C of the 1985 Act,

The Tribunal refuses the application made by the Applicant pursuant to regulation 13(1) of the 2013 Regulations.

REASONS

Background

1. The Applicant is the lessee of Flat 13 Philips Court, Abingdon, Oxon (variously also referred to in the lease as "Phillips Court"), which consists of a development of 20 residential and 4 commercial units.

2. The Applicant's lease made on 28th March 2008 is a tripartite lease, between her and the two Respondents. The lease provides that Second Respondent is responsible for the insurance, maintenance and repair of the residential units, and collection of service charges.

3. The Applicant's lease provides that she pays a fair proportion of sums expended by the Second Respondent on the maintained property, shared facilities, and utilities.

4. The lease sets out the mechanism for payment: clause 5(i), says that each month the lessee will pay in advance the fair proportion of the amount estimated by the Second Respondent, to cover the maintenance charges for that year and a reserve. Then by 5(iii) within 3 months of the calendar year end (or as soon as reasonably practicably thereafter) the Second Respondent shall supply the lessee

with a statement certifying the maintenance charge ("the certificate") and the lessees proportion of it for that year; there shall then be an equalisation for the current year in progress. The sum payable for utilities is payable on demand.

Applications

5. The Applicant made applications for determination of the reasonableness and payability of service and administration charges for the years 2012 to 2023, together with ancillary applications.

6. These arose from a general sense of discontent felt by the Applicant, arising from repeated changes of managing agents (5 in 5 years) and lack of general maintenance internally and externally.

7. Primarily she was concerned to obtain clarity and a determination over whether she was liable to discharge service charges for the period 1st August 2015 to 1st February 2017. Specific points she made were that:

> (i) she had received a Xero report on 20th January 2017 which said that sums were overdue and that she was incurring penalties, fees and/or interest – but without explanation,
> (ii) her requests for a more detailed or itemised breakdown of the charges outstanding had not been met,
> (iii) it could not be right that she was said (by the Xero report) to be liable for payments in 2015, as she had paid, but it did not seem that they were correctly attributed to her account,
> (iv) she questioned the fairness in being liable for service charges during the period that she had to move out of her flat because of its condition in 2016,
> (v) in any event she had not received a demand for the 2016 service charge, and only a copy of it when the Xero report was received,
> (vi) she raised as an issue the Second Respondent's failure to supply the certificates referred to in paragraph 4 herein,
> (vii) she had continued to be invoiced for gas consumption (of £963.85) which could not have accrued as there was no heating in her flat from November 2012, and so no costs could be attributable to her,
> (viii) there were demands made for ground rent, but she had made payment for this, though they had been allocated to historic service charge debt,
> (ix) she had no choice but to make the applications, as she had wanted to make partial payments of what she felt she owed, but was told that she had to make payment of the whole sum.

8. She had other concerns and problems: she wanted to know whether the First Respondents had paid service charges for their 3 residential flats (16, 17 and 18); further, she wanted to know whether she was required to meet the service charges for the year 2016 in light of the poor workmanship by Philip Barwick (one of the First Respondents, and builder who had developed the units) which lead to her having to move out of her flat in 2016 (when the NHBC had to rectify his work as was by then insolvent).

Hearing

9. The applications were listed for hearing before this Tribunal, prior to which we made an inspection of the premises and the development.

10. It was apparent from the beginning that the Applicant's concerns were wide ranging, and beyond the Tribunal's jurisdiction in many respects. We indicated that we had no power to order the managing agents to undertake any specific works that the Applicant wished to have done, nor to remedy the alleged poor work of the First Respondent's development. The Applicant accepted that the Tribunal would not be looking ahead to the years 2019 to 2023 and would look only at 2012 to 2018.

11. It seemed sensible to look at the terms of the lease, and clarify how this was being operated in respect of service charges by the current managing agents, Breckon and Breckon, Ms Leppard speaking on their behalf.

12. We understand that the development consists of 20 residential units and 4 commercial units; Breckon and Breckon do not manage the commercial units. Those commercial units make a contribution towards the overall insurance bill of about 25%; the spreadsheet setting this out was not filed in the bundle. The Tribunal explored whether the insurance costs were apportioned between the phases, and we were told not; so, we pointed out that the insurance clause at 4(ii) provided that as between the Second Respondent and the Applicant the liability to contribute to insurance was for "the property", which was defined as phase 111 in the recital of the lease. So, whilst clearly practical and desirable for the whole development to be insured under one policy, there should be a broker's apportionment.

13. That lead onto a discussion about what was the Applicant's "fair proportion"; we were told 1/20th, which the current managing agents had inherited and were applying. The Applicant said that the flats were all small one bedroom/studio flats; she later said she had not and was not questioning the 1/20th liability, but had been confused by it. We enquired about how this operated in relation to budgets and were told that the insurance cost was reduced by the commercial units contributions, and then the balance was demanded "up front" from the 20 residential units. There was correspondence suggesting that the Applicant would have to pay annually the whole amount up front, but this provided an ideal opportunity to question and then point out that the lease did not permit it; clause 5 (i) provided the mechanism was to set and notify the budget, and for the lessee to pay in /12th portions over the year, monthly.

14. We considered what the lease required at the end of the service charge year. Clause 5(iii) provided that within 3 months of 31st December each year (or as soon as reasonably practicable) the Company would supply to the lessee a statement prepared by the auditors of the Company, to certify the maintenance charge for the preceding year. That would then have a knock on effect for the lessees next payment due for the "on account service charge", as there would need to be an "adjustment". Logically, this could increase or decrease the lessee's

next payment, depending on whether the budget for the preceding year was fully spent or whether money was left over. Ms. Leppard said that this certification process had never been done, and put this down to it being "another expense". We indicated that the lease provided it, so the obligation was there, and that the company accounts (as filed in the bundle) were not a substitute. Having found that to be the case, it became clear that we could not assess the reasonableness or payability of any *final* service charge amounts.

15. The Applicant accepted that the current managing agents had inherited many problems, and ideally the Tribunal could seek to establish what had been paid and not paid and to rule on various side issues which could help the parties move forward.

16. We were asked by the Applicant to look at the issue of gas usage; the Applicant said that she had already paid for gas usage of £963.85 during the period 2012 to 2016, though her gas supply was cut off as dangerous on 22nd November 2012, after which there was no usage and could be no liability. Using the best information we calculated that there was usage for 160 days at £1.49 per day, providing a total usage of £238.40, so that the Applicant would be due a refund of £725.45.

17. We were asked on behalf of the Second Respondent to address whether or not the Applicant would have to pay service charges for 2016 when she was forced to move out of her flat, to enable the works to proceed; having considered the terms of the lease there were no exceptions to her liability to pay, though she had not had enjoyment or benefit from it. The Tribunal found that she was therefore liable to pay the service charges demanded on account for the year 2016.

18.At that stage the Tribunal broke for lunch, and suggested that in light of how the matters had progressed, and the absence of certification (and so final figures) there was a limit to what the Tribunal could determine, and so perhaps to reach an agreement if there was consensus.

19. By 14:30 the parties returned, from which it was apparent that there was agreement that the Applicant had paid for all service charges demanded on account in 2012 and 2013. She was clear that she had paid what was demanded on account for 2014, but had not realised it was in dispute, so had not asked for copies of bank statements back that far. In view of the Applicant's otherwise meticulous records and assertions of having paid throughout that period, and in view of the Second Respondent's admission that they could not prove otherwise (in view of history and changes of managing agents) we found that she had indeed paid the sums demanded on account in 2014. So, in respect of 2014 there is nothing further for her to pay for service charges on account.

20. The Second Respondent accepted that in the service charge year 2018 there was nothing outstanding on the on account sums, and in 2019 the Applicant had already overpaid to date.

21. So the issues were 2015, 2016, and 2017.

22. As to 2015 there was an accord that the Applicant had paid £968 and what was outstanding and payable on account, was £479.21, so the Applicant agreed to pay that sum.

23. As to 2016, the issue raised by the Applicant was the non-receipt by her of the budget for 2016 which demanded £1447.21. She was only able to provide a copy to the Tribunal as it had been copied to her, and first notified on 27th January 2017 as part of the zero reports. It was not suggested by the Second Respondent that the Applicant was not telling the truth about that; indeed there was no evidence before us as to service. The Applicant was meticulous in all other matters and we accept that she did not receive it when it should have been/was sent. Having determined that she remained liable to pay it though not living there at the time the Applicant raised the question of notification within 18 months, section 20B of the 1985 Act applies. The Tribunal found that the section 20B point did not act as a limitation on service charges payable on account; further, in any event section 20B(2) would have operated against her, as she was notified of it within those 18 months - albeit not in the ordinary way, but during the course of litigation. The Applicant agreed to pay £1447.21 on account of service charges demanded for 2016.

24. As to 2017 there was an issue as to whether the Applicant's payment of service charge was wrongly attributed by the Second Respondent to the First Respondent's ground rent. The Applicant said that it was, and took us to the documents; her bank statements showed that at the time of making the payments she had annotated the payment specifically as either service charge or ground rent; that being so, we found that the Managing Agents had no power to decide that it should be attributed elsewhere. So, the Tribunal found that when correctly allocated, the Applicants shortfall in 2017 was £155. It will be for the Managing Agents (who are paid separately to collect ground rent for the First Respondent) to now repatriate the funds to the correct account.

25. We explored the Second Respondent's apparent demands of administration charges by way of legal fees and interest (page 83); we find that it is a "demand" in light of the wording of the Solicitors letter, which reads "the Claimant's claim is for charges as detailed in the attached summary and statement of account together with legal costs and interest which will continue to accrue on a daily basis until the monies have been repaid". The Tribunal notes that the lease makes no provision for payment by this lessee of interest on late payments, and so that part of the demand for interest should not have been made. Further, whilst the lease provides by clause 2(xxix) that the Applicant could be liable for costs/charges/expenses (including legal and surveyor's) incurred preliminary to forfeiture, that was not what was forecast in this letter and the Second Respondent did not issue a section 146 notice. At the hearing it was agreed by the Second Respondent to rescind all demands for interest and legal costs. The Tribunal finds that these are not payable under the lease.

26. By the end of the hearing the parties had settled the question of what the Applicant owed by way of services charges on account as follows: a total of £1355.97, demanded on account, as the Applicant's fair proportion of service charge for the years 2015 to 2017, (calculated as the sum of £479.21 in 2015,

£1447.21 in 2016, and £155 in 2017), less an overpayment made by her in respect of gas in the sum of £725.45. Further that there was nothing to pay on account before 2015 or after 2017.

27. Finally, the lessee raised as an issue whether or not the lease permitted recovery from her (and other flats in Phase III) the costs of maintaining/repairing the "telephone entry system" which appear in the 2016 budget (page 123 bundle) in the sum of £1090. The notes also indicate that the same was budgeted for in 2015, though a copy of the 2015 budget was not included in the bundle. The Applicant's point was that phase III was not linked up to the telephone entry system, and had never been. At the inspection, we observed that lessees of the flats in phase 111 would access the premises through the main gates, but that they were not linked up to the intercom. The Second Respondent did not dispute that this was the case. The lease provides that the Second Respondent can only make a demand for service charges spent on the "maintained property" as defined in (g) which includes "entrance gate.. and other parts of the building forming part of the Property which are used in common by the owners and occupiers of any two or more of the Flats". "Property" and "Flats" are defined as relating to Phase III only. It follows that as Phase III is not connected to the entry phone, it cannot be used by any of the occupiers and therefore costs in connection with the upkeep of the entry phone cannot be demanded from the Phase III leaseholders. This applies equally to estimated costs and therefore the Applicant is due a refund of £54.50 in respect of the 2016 budget, and additionally an equivalent sum in respect of the 2015 budget. This has the effect of reducing the Applicant's overall liability for service charges on account for the years 2015, 2016 and 2017, to £1246.97.

Ancillary Orders

28. The Applicant sought a refund of the fees paid by her as she had no choice but to make the applications, having otherwise made reasonable endeavours to settle in other ways; she was told that she could not part-pay what she believed was due but had to pay £9000 or nothing. At the hearing she was undecided as to what to do over the section 20C and part 5A costs.

29. The Tribunal finds that the Applicant's application and hearing fees should be paid by the Second Respondent in full in the sum of £300 pursuant to regulation 13(2) of the 2013 Regulations as the Applicant had made attempts to resolve matters other an issuing proceedings, and there was no realistic alternative but to make the applications. Whilst we acknowledge the point made that the Applicant had service charges outstanding, we accept that she did try to make part-payment of what she believed was outstanding, and this was rejected; there was a considerable amount about the demand which was wrong, legal costs, interest are obvious points. Further, the failure by the Second Respondent to follow the certification process means that all of these charges are on account charges, and until final reckoning has taken place, there can be no section 27A assessment of reasonable service charge costs. However, the Respondent's conduct is not within the scope of what could meet the high hurdle for wasted costs, under regulation 13(1) of the 2013 Regulations and so we refuse to make that order.

30. The Second Respondent has conceded that interest and legal costs cannot be charged under the lease, and we find that they cannot be recovered as administration charges against the Applicant, and so make orders under paragraph 5A of Schedule 11 of the 2002 Act preventing the Second Respondent doing so.

31. Finally, the Applicant made an application under section 20C for the costs of these proceedings incurred by the Respondents to not be added to her service charge account. The First Respondent played no part in these proceedings, has not said that they have incurred any charges, and would not in any event be able to add them (whilst the service charge account is managed by the Second Respondent) to the service charge account, and so no order is necessary. As for the Second Respondent's costs incurred in these proceedings, these are recoverable against the service charge fund, under clause 4 (vii) of the lease, which permits the Second Respondent to "employ and engage such servants agents contractors as the Company considers necessary or desirable for the performance of its obligations under this clause and pay their commission fees and charges". These will need to be met by someone; they simply cannot be left unpaid; to be pragmatic, they should not be borne by one lessee (i.e. the Applicant) but should be shared by all 20 flats

32. That being so we refuse to make a section 20C order.

Judge J. Oxlade

8 July 2019

Rights of appeal

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any right of appeal they may have.

If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber), then a written application for permission must be made to the First-tier Tribunal at the regional office which has been dealing with the case.

The application for permission to appeal must arrive at the regional office within 28 days after the tribunal sends written reasons for the decision to the person making the application.

If the application is not made within the 28 day time limit, such application must include a request for an extension of time and the reason for not complying with the 28 day time limit; the tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed, despite not being within the time limit.

The application for permission to appeal must identify the decision of the tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal and state the result the party making the application is seeking.

If the tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).