FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case Reference	:	**LON/00BJ/LSC/2020/0225** **CVP:REMOTE**
Property	:	**Rear Flat 42 Lavender Hill London SW11 5RL ("The Premises ")**
Applicant	:	**Richard Hodgson and Allan Burge ("the Applicants")**
Representative	:	**In person**
Respondents	:	**Gesher Investments Limited**
Representative	:	**Mr Bermant**
Type of Application	:	**s.27A Landlord and Tenant Act 1985**
Tribunal Members	:	**Judge Jim Shepherd** **Evelyn Flint FRICS**
Date of Decision	:	**March 2021**

This has been a remote hearing which has been consented to by the parties. The form of remote hearing was coded as CVPREMOTE - use for a hearing that is held entirely on the Ministry of Justice Cloud Video Platform with all participants joining from outside the court. A face to face hearing was not held because it was not possible due to the Covid 19 pandemic restrictions and regulations and because all issues could be determined in a remote hearing. The documents that were referred to are in two bundles, the contents of which we have recorded and which were accessible by all the parties. Therefore, the tribunal had before it an electronic/digital trial bundle of documents prepared by the parties, in accordance with previous directions.

1. This case started life as a County Court case in which the Respondent freeholder, Gesher Investments Limited was seeking judgement in relation to

service charges which had not been paid by the Applicants, Richard Hodgson and Alan James Burge. The case was heard virtually by the Tribunal over two days on the 28th and 29th January 2021.

2. The Applicants are leaseholders of Rear Flat, 42 Lavender Hill, London SW11 5RL (the premises). In the County Court proceedings it was alleged that they owed sums in excess of £8000 for service charges, reserve fund contributions, major works and administration. In their defence the Applicants denied that the sums were due on various bases: Firstly, they challenged the right to reclaim the major works charges on the basis that proper consultation had not been carried out. Secondly, they challenged the Respondents' failure to provide invoices when requested. Thirdly, they submitted that the lease did not provide for a reserve fund and so they were not liable to pay sums towards such a fund. On the basis of these arguments the Applicants had withheld service charges and ground rent for some time. In passing the tribunal finds this remarkable. Patently some sums were due and it was incumbent on the Applicants to pay the sums that they considered where owing.

3. On 24th September 2020 District Judge Bell at the Clerkenwell and Shoreditch ~~the case in the~~ County Court ~~was~~ transferred claim no. D98YX08 to the Tribunal and consolidated with a separate application made by the Applicants which challenged service charges for 2015 -2020. The total value in dispute was said to be £23,000.36. For each of the years in question the Applicants challenged virtually every aspect of the service charge. The overall challenge was based on various submissions including the following:

a) The service charge machinery set out in the lease had not been correctly applied.

b) The service charges had not been reasonably incurred.

c) There was no provision in the lease allowing collection for a reserve fund (conceded by the Respondents).

d) The lease did not allow the collection of accounting fees.

e) The insurance costs were challenged as were the management fees.

f) The cost of major works, in particular professional fees had not been reasonably incurred.

4. The Tribunal became increasingly frustrated during the preparation of the case for hearing because the parties were unable to agree anything. There were disputes about the redacting of documents, about which documents to include in the bundle and virtually every aspect of the case. As a result of this singular lack of cooperation the Tribunal were presented with two bundles of documents and two Scott schedules rather than one consolidated bundle and one Scott schedule that we could work from. The Respondents had narrowed their Scott Schedule to include only those sums being sought. The Applicants had not done this. The Respondents' Scott Schedule was therefore largely relied upon by the Tribunal.

5. At the start of the hearing the Tribunal sought to narrow the issues and prepare a list of decisions that had to be made. These issues were agreed by the parties. Both parties submitted long witness statements. It became plain during the hearing that there was some animosity between the parties. Mr Burge represented the Applicants with the occasional contribution from Mr Hodgson. The Respondent freeholder was represented by Mr Bermant. It was clear during the hearing that Mr Bermant had become increasingly frustrated by the Applicants failure to pay any contribution towards the service charges.

Decision

6. The Tribunal intends to take each item of challenge in turn providing its decision and the reasons for its decision on each particular item.

The lease does not allow demands on account

7. Mr Burge referred to this issue as the overarching issue which cut across all of the other issues. His submission was that the lease did not allow demands to be made for costs which have not yet been incurred. Mr Bermant in response said that the lease was not unusual and plainly did allow for costs to be demanded prior to being incurred. The first relevant lease provision was at page A175 of the Applicants' bundle. This states the following:

   Service charge: A fair and reasonable proportion determined by the landlord of the service costs.

   Service costs: the total of:

a) all of the costs reasonably and properly incurred of providing the services…

   b) the reasonably and properly incurred costs fees and disbursements….

8. Mr Burge relied particularly on the word *incurred*. He stated that the lease did not allow costs to be recovered if they had not actually been incurred. The provision relied on by Mr Burge is part of the definitions section in the lease. Mr Bermant said that the relevant section for the Tribunal to look at is the one headed *services and service costs* in Schedule Six (the freeholders obligations). The relevant paragraph states the following:

   To serve on the tenant a notice giving full particulars of the service costs and stating the service charge payable by the tenant and the date on which it is payable as soon as reasonably practical practical after incurring, making a decision to incur or accepting an estimate relating to any of the service costs.

9. Mr Bermant relied on this paragraph with particular reference to the words: *making a decision to incur*. This does clearly suggest that sums may be

demanded prior to costs actually being incurred. The leaseholder's obligations under Schedule 4 cross reference this clause:

To pay to the landlord the service charge demanded under paragraph 4 of Schedule 6 by the date specified in the landlord's notice.

10. In interpreting lease provisions the Tribunal can do no better than make reference to the leading case of *Arnold v Britton* [2015] UKSC 36; [2015] AC 1619. In the now well-known passage from that case Lord Neuberger stated the following:

16. For present purposes, I think it is important to emphasise seven factors.
17. First, the reliance placed in some cases on commercial common sense and surrounding circumstances (eg in Chartbrook [2009] AC 1101 , paras 16-26) should not be invoked to undervalue the importance of the language of the provision which is to be construed. The exercise of interpreting a provision involves identifying what the parties meant through the eyes of a reasonable reader, and, save perhaps in a very unusual case, that meaning is most obviously to be gleaned from the language of the provision. Unlike commercial common sense and the surrounding circumstances, the parties have control over the language they use in a contract. And, again save perhaps in a very unusual case, the parties must have been specifically focussing on the issue covered by the provision when agreeing the wording of that provision.
18. Secondly, when it comes to considering the centrally relevant words to be interpreted, I accept that the less clear they are, or, to put it another way, the worse their drafting, the more ready the court can properly be to depart from their natural meaning. That is simply the obverse of the sensible proposition that the clearer the natural meaning the more difficult it is to justify departing from it. However, that does not justify the court embarking on an exercise of searching for, let alone constructing, drafting infelicities in order to facilitate a departure from the natural meaning. If there is a specific error in the drafting, it may often have no relevance to the issue of interpretation which the court has to resolve.

19. The third point I should mention is that commercial common sense is not to be invoked retrospectively. The mere fact that a contractual arrangement, if interpreted according to its natural language, has worked out badly, or even disastrously, for one of the parties is not a reason for departing from the natural language. Commercial common sense is only relevant to the extent of how matters would or could have been perceived by the parties, or by reasonable people in the position of the parties, as at the date that the contract was made. Judicial observations such as those of Lord Reid in Wickman Machine Tools Sales Ltd v L Schuler AG [1974] AC 235 , 251 and Lord Diplock in Antaios Cia Naviera SA v Salen Rederierna AB (The Antaios) [1985] AC 191 , 201, quoted by Lord Carnwath JSC at para 110, have to be read and applied bearing that important point in mind.

20. Fourthly, while commercial common sense is a very important factor to take into account when interpreting a contract, a court should be very slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of wisdom of hindsight. The purpose of interpretation is to identify what the parties have agreed, not what the court thinks that they should have agreed. Experience shows that it is by no means unknown for people to enter into arrangements which are ill-advised, even ignoring the benefit of wisdom of hindsight, and it is not the function of a court when interpreting an agreement to relieve a party from the consequences of his imprudence or poor advice. Accordingly, when interpreting a contract a judge should avoid re-writing it in an attempt to assist an unwise party or to penalise an astute party.

21. The fifth point concerns the facts known to the parties. When interpreting a contractual provision, one can only take into account facts or circumstances which existed at the time that the contract was made, and which were known or reasonably available to both parties. Given that a contract is a bilateral, or synallagmatic, arrangement involving both parties, it cannot be right, when interpreting a contractual provision, to take into account a fact or circumstance known only to one of the parties.

22. Sixthly, in some cases, an event subsequently occurs which was plainly not intended or contemplated by the parties, judging from the language of

their contract. In such a case, if it is clear what the parties would have intended, the court will give effect to that intention. An example of such a case is Aberdeen City Council v Stewart Milne Group Ltd 2012 SC (UKSC) 240 , where the court concluded that "any … approach" other than that which was adopted "would defeat the parties' clear objectives", but the conclusion was based on what the parties "had in mind when they entered into" the contract: see paras 21 and 22.

23. Seventhly, reference was made in argument to service charge clauses being construed "restrictively". I am unconvinced by the notion that service charge clauses are to be subject to any special rule of interpretation. Even if (which it is unnecessary to decide) a landlord may have simpler remedies than a tenant to enforce service charge provisions, that is not relevant to the issue of how one interprets the contractual machinery for assessing the tenant's contribution. The origin of the adverb was in a judgment of Rix LJ in McHale v Earl Cadogan [2010] HLR 412 , para 17. What he was saying, quite correctly, was that the court should not "bring within the general words of a service charge clause anything which does not clearly belong there". However, that does not help resolve the sort of issue of interpretation raised in this case.

11. There are other cases that have looked at the question of whether notional costs are recoverable under particular leases. All of these cases pre-date *Arnold v Britton* and therefore some caution needs to be applied also each case depends on its facts.

12. The relevant provision for the Tribunal to consider must be the one relied upon by Mr Bermant because that is the clause under which the freeholder is able to demand service charges from the leaseholder. Although the definition section of the lease relied upon by Mr Burge suggests on one reading that costs have to be incurred in order to be recovered as service charges this is in the context of a general requirement that the costs are required to be reasonably and properly incurred. This is not an unusual provision in leases and reflects the statutory protection provided under the Landlord and Tenant Act 1985. It is not considered however that the definition was intended to exclude any notional

costs or future costs that will be incurred by the freeholder. Indeed it would be surprising if this was the intention when the operative service charge section of the lease at para 4.2 of the Sixth Schedule requires the Freeholder to serve on the tenant notice giving full particulars of service costs which are going to be incurred but have not yet been incurred.

13. Accordingly, applying the *Arnold v Britton* criteria in relation to the *overarching* consideration, as characterised by Mr Burge the Tribunal finds that the parties intended that the Freeholder was entitled to recover future costs under the lease. Whilst there is apparently no provision in the lease for reconciliation between estimated and actual costs this is not conclusive in leading the Tribunal to decide that future costs cannot be recovered. It is true that most leases do contain a reconciliation provision but the absence of such a provision does not prevent reading the lease in the way the Tribunal has.

14. As far as possible the Tribunal sought to deal with the remaining challenges in bands of challenge where similar issues were brought in each year.

Insurance costs

15. The Applicants challenged insurance costs generally. Specifically, they challenged the apportionment of these costs claiming that they should pay a lower apportionment and that the bulk of the insurance costs should be met by the commercial unit below the premises.

16. Mr Bermant submitted said that the insurance costs were reserved as rent and therefore did not come within the definition of a service charge. If he was correct and the insurance costs were not part of the service charge then the Tribunal potentially would not have jurisdiction to consider the reasonableness of those costs. Under the lease the tenant is required at clause 2.3 to pay the landlord the following sums as rent:

    the rent;

the insurance rent;

the service charge;

all interest payable under this lease; and

all other sums due under this lease.

17. Section 18 of the Landlord and Tenant Act 1985 defines service charge as:

> *an amount payable by a tenant of a dwelling as part of or in addition to the rent which is payable directly or indirectly for services repairs and maintenance improvements or insurance or the landlords costs of management*

18. The Tribunal does not consider that the parties who agreed the lease intended to exclude insurance from consideration as a service charge merely because they used the term *insurance rent*. Indeed, if one considers clause 2.3 in full all of the sums there referred are potentially reserved as rent including the service charge. This would mean that none of those charges would come within the jurisdiction of the tribunal on Mr Berman's analysis.

19. There was apparently no demand made for insurance in 2015 and therefore those sums cannot be due. Other than that the insurance charges appear to the tribunal to be reasonable. The Applicants did not put forward any comparable to support their proposition that the insurance charges were not reasonable.

Apportionment

20. The Applicants were concerned that the landlord had changed the method of apportioning costs which were to be "a fair and reasonable proportion". They said this required the process to be discernible and predictable. Mr Berge said that the building had been remeasured and the apportionment amended.

Originally the costs were split 50% residential, 50% commercial. Following representations from the lessee of the commercial premises he had changed the apportionment so that 40% was allocated to each of the two flats and 20% to the commercial premises. He had not considered any weighting of the premium despite the ground floor shop being occupied by a Pizza parlour with a large high temperature pizza oven in situ.

21. The Tribunal determines that backdating a new method of apportionment is unreasonable. Any alteration to the method should not be retrospective. The method of apportionment should be reviewed when the loft is converted to habitable accommodation.

Management fee

22. The Applicants argued that the management fee was excessive in 2015 - 2016 this was £1440. They said the managing agents had provided minimal service. Mr Bermant on the other hand argued that the fee was recoverable and reasonable throughout the period in question. ABC, the managing agents had carried out site visits to the premises on a number of occasions and there were a number of documents which supported the work that they carried out. The Tribunal consider that the management fee was reasonable throughout the period. The Applicants failed to provide any comparables to suggest otherwise.

Repairs and maintenance

23. The applicants again argued that the apportionment between them and the commercial unit and the other residential unit was not reasonable. They also argued that the amount of the charges were unreasonable in light of the fact they said that very little works have been carried out. Mr Bermant again took the tribunal to a number of documents which supported the fact that works had been carried out. It is the Tribunal's determination that the repairs and maintenance charges were reasonable.

Contingency

24. The applicants argued that there was no express provision for a contingency in the lease and that in effect a contingency was a reserve fund. Mr Bermant challenged this interpretation saying that in fact a contingency was a short-term budgeting tool and a reserve fund was something quite different. The Tribunal is willing to accept Mr Berman's interpretation. A contingency is in fact a *just in case* amount. It is not unusual for such sums to be collected as part of the service charge. In this case the service charge provisions are wide enough to include contingency sums.

Administration charges.

25. The applicants challenged the administration fees of £75 in relation to chasing arrears of service charges in 2015-2016. It is fair to say that the Applicants were themselves trying to clarify the costs and in light of this it is considered unreasonable for the freeholder to charge an admin fee. The sum of £75 should therefore be deducted from the amount due.

Accounting fees

26. The applicants challenged the fees incurred by the freeholder for accounting. Again Mr Bermant was able to show that the fees were reasonable in comparison to other comparables. Further the lease provisions are wide enough to include accountancy fees as part of the service charge.

Professional fees

27. The freeholders had sought to recover various fees for surveyors during the relevant period. These included a fee of £3000 invoiced by Finnegan. The Applicants had various complaints about this fee. First of all, they said the charge have not been demanded and therefore section 20B should apply. Secondly, they said the costs were not reasonable because there were no works that followed after the survey. Finally they argued that the consultation process was not properly carried out in relation to these fees. Mr Bermant stated that

the works were taken forward in a specification and so the survey was necessary. He also said that the surveyor's fees were part of the general repair and maintenance costs at the premises and were not separate fees which required a section 20 notice. Usually, *qualifying works* under s.20 are limited to contractor's costs and so will not include related professional fees by surveyors etc unless those fees are an integral part of the actual physical works. In this case of course there were no physical works. The surveyor's fees were regarded as investigative. To that extent it is correct that there was no requirement to consult.

28. A further fee was charged by Mason Navarro structural engineers at a cost of £1848.They were engaged by AJ Murphy a local surveyor. They reached the view that the building was structurally safe and recommended further monitoring. Mr Bermant again argued that these costs formed part of the general repair and maintenance costs recovered under the service charge. Further professional fees were incurred in paying Finnegan and Earl Kendrick. These firms merged to form a company called Momentum who conducted site visits wrote a report and turned this evaluation into the Section 20 paperwork which was used to issue service charge demands and tender out the work.

29. Overall the Tribunal considered that Mr Bermant was able to justify incurring fees at the premises and those fees appear reasonable. The tribunal does not accept the proposition put forward by the Applicants that because no work resulted from some of the fees, the charges were necessarily unreasonable.

Roof and drainage costs

30. The freeholder carried out urgent roof repairs at a cost of £2160. They sought and obtained dispensation from the Tribunal. The applicants raised a number of issues about the roof repairs. They say that the costs were not recoverable because they were not sought or demanded within an 18 month period pursuant to section 20 B of the Landlord and Tenant Act 1985. In response to this Mr Bermant said that the works were part of the general repair costs for which an individual demand would not be required. The Applicants also challenged the

reasonableness of the cost of the works specifying that the invoice contained no hourly rates etc. They state that the Respondents relied on a third-party's word that the work had in fact taken place. The Tribunal does not accept these criticisms. Mr Berment was able to satisfy the Tribunal that works had been carried out and the charges were reasonable.

31. Similar criticisms were made by the Applicants in relation to the drainage works carried out by Kresco drainage at a cost of £176.40. They say that there should have been a separate demand for this cost under section 20B. The tribunal again does not accept this. The costs were clearly incurred as part of the general repair and maintenance items in the service charge. The Applicants also criticise the Respondents because they should have used Thames Water rather than Kresco. It is for the landlord to decide how works are carried out at the premises. In any event the Applicants provided no evidence that Thames Water would have carried out this work. The cost of the work is recoverable and reasonable.

Company secretary fees

32. The Tribunal does not consider that these sums are properly recoverable from the lessees and therefore these fees should be deducted from the total outstanding cost.

Default interest

33. The Applicants conceded these sums were recoverable

Summary

34. All of the costs incurred and recorded in the Respondents' Scott schedule are payable and reasonable save for those identified at paras 19 and 30 above subject to~~. The parties should also note~~ the Tribunal's findings on apportionment at paras 20 and 21 above.

Section 20 C of the Landlord and Tenant Act 1985

35. The Applicants asked the Tribunal to exercise their discretion discretion under section 20C. The Respondents opposed this application on the basis that the Applicants had blanket challenged all of the service charge contributions without proper arguments to support that challenge. The Tribunal has some sympathy with this argument. In addition the Applicants have not sought to make any payment towards their service charges for some time. They have caused the Respondents considerable work in dealing with the multiple challenges they have brought. The Applicants have largely been unsuccessful in this application. Nonetheless it is considered that both parties behaved unreasonably during the course of these proceedings. There is clearly some animosity between them and they have used the litigation to attack each other.

36. At one stage the County Court proceedings were stayed so that settlement negotiations could take place. It does not appear that either side adopted a sensible approach. In the round and doing the best it can the Tribunal will exercise its discretion under s.20C but only to the extent that the Respondents will not be entitled to recover 25% of their costs.

Judge Shepherd

March 2021

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).