First-tier Tribunal
Property Chamber
(Residential Property)

Case reference	**:**	**CAM/00KF/LIS/2018/0025**
Property	**:**	**Flat 6, 1 Britannia Road, Westcliff-on-Sea. SS0 8BS**
Applicant	**:**	**Abacus Land 4 Ltd.**
Represented by		**Elizabeth England (counsel) (JB Leitch Ltd.)**
Respondent	**:**	**Justin Robert Isaac Power**
		Self representing with assistance from James McKee
Date of Transfer from Southend County ct.	**:**	**28th September 2018**
Type of Application	**:**	**to determine reasonableness and payability of service charges and administration charges**
The Tribunal	**:**	**Bruce Edgington (Lawyer Chair)**
		Stephen Moll FRICS
		Mary Hardman FRICS IRRV (Hons)
Date and place of hearing	**:**	**21st January 2019 at The Court House, 80 Victoria Ave., Southend-on-Sea, SS2 6EU**

DECISION

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1. Of the claim for service charges of £4,332.52 and administration charges of £624.00 in the county court proceedings the Tribunal determines that the service charges claimed are not payable and the administration charges are both unreasonable and not payable. However, this does not necessarily mean that some service charges will not be due for some or all of the period in question, if the correct demands are served.

Reasons

Introduction

2. This is a county court claim by the landlord of the property for judgment in respect of a claim for service charges and administration charges plus a declaration that there has been a breach of the terms of the lease so that the said landlord can serve a forfeiture notice under section 146 of **The Law of Property Act 1925**.

3. When transferring this case from to county court to this Tribunal, District Judge Ashworth ordered that "*The claim shall be heard by a Judge of the First Tier Tribunal authorised to sit as a District Judge in the County Court for the purpose of exercising County Court jurisdiction*". The parties were invited to apply to set aside that order if they wanted to, but no such application was made. The Tribunal chair, Judge Edgington, is authorised to sit as a District Judge in the County Court.

4. A directions order was made by the Tribunal on the 16th October 2018 timetabling the case to a final hearing and a bundle of documents was duly lodged. Both parties have provided statements of case and supporting documents.

5. The Respondent's case is not very detailed but pages 55, 209 and 268 indicate in fairly clear terms that the Respondent has been confused by all the claims received and wants to see detailed accounts for the last 10 years. He believes that he has overpaid. The Applicant has been fairly dismissive of these comments but at least the Respondent is now able to see end of year service charge accounts.

6. The Respondent also suggests that the Tribunal appoint another managing agent. However, no formal application has been made with a named proposed manager with details of experience and terms of service. If that is what the leaseholders want, then they must make a formal application to this Tribunal.

The Lease

7. A copy of the original lease is in the bundle. It is dated the 7th April 1989 for a term of 99 years from 1st March 1989 with a yearly ground rent of £50.00. The lease provides that the landlord shall insure the property and keep the building in repair with the leaseholder paying a "*fair proportion according to rateable value*" of the costs incurred. There are no provisions allowing the landlord to claim payments on account of service charges or for a reserve fund. This is a crucial issue and will be referred to later.

8. As to the proportion of costs, the lease is not clear and there is no mention of the application of rateable value anywhere in the evidence. However, the Respondent and Mr. McKee agreed that there were 8 flats in the building known as 1 Britannia Road and there appeared to be no dispute that 12.50% of the total service charge bill per flat was appropriate.

9. The building is defined in clause 4 as "*the Building known as 1 Britannia Road, Westcliff On Sea, Essex (hereinafter called 'The Building')*". The lease plan at page 32 refers to "*Five flats in a pleasant residential locality*" and then identifies on the plan, and lists, flats 2, 4, 5, 6, 7 & 11 i.e. 6 flats. The proportion of service charges claimed is 12.5% i.e. one eighth. Eight flats are set out on page 165 in the bundle which is a document prepared by the managing agents and headed "*Schedule 1 Estate*". Finally, eight leases are mentioned in the Land Registry entry on the freehold title at page 13.

10. It should also be mentioned that some of the annual service charge accounts refer to "*Estate Charges*" without saying what they relate to. Pages 176, 179, 182 and 185 are examples.

The Law

11. Section 18 of the **Landlord and Tenant Act 1985 (**"the 1985") Act defines service charges as being an amount payable by a tenant to a landlord as part of or in addition to rent for services, insurance or the landlord's costs of management which varies 'according to the relevant costs'. Under section 27A, this Tribunal has the jurisdiction to determine whether service charges are reasonable or payable including service charges claimed for services not yet provided. Schedule 11 of the **Commonhold and Leasehold Reform Act 2002** ("the 2002 Act") makes similar provisions with regard to administration charges.

12. Section 21B of the 1985 Act says that every demand for service charges must be accompanied by a summary of the rights and obligations of tenants as set out in the **Services Charges (Summary of Rights and Obligations, and Transitional Provision)(England) Regulations 2007**.

13. Section 22 of the 1985 Act says that a leaseholder may, by notice in writing, require a landlord to afford him reasonable facilities for inspecting accounts, receipts or other documents relevant to the service charge accounts. The landlord must also permit facilities for copying them at the leaseholder's expense.

The Inspection

14. Two of the members of the Tribunal inspected the property on the 15th January 2018 when a Tribunal dealt with an application for the appointment of a Right to Manage company which failed on technical grounds. This decision is **CAM/00KF/LRM/2017/0007** ("the earlier decision"). As is stated in that decision, several long leaseholders were present at the inspection. The Tribunal members did notice that the state of the property was extremely poor and, in particular, an outside staircase at the rear appeared to be loose and in a dangerous condition. The following description is largely taken from the earlier decision.

15. The 'building' in that case was a pair of semi-detached houses called 1 and 2 Britannia Road built on the early/mid 20th century of brick/block construction under a pitched roof which may have been slate but is now tiled. Very extensive conversion works had been undertaken over the years so that both 1 and 2 Britannia Road now consist of flats and it appears that there has been a substantial extension to the rear of both plus another extension to the side of number 1 (flats 12 and 14) and what was the rear garden is now a car park. The front part of the building has extensions into the roof with substantial dormer windows.

16. The most important part of the inspection, in that Tribunal's view, was the hallway, which contained the entrances to many of the flats. When 1 and 2 Britannia Road were 2 semi detached residences it was clear that they each had an entrance door at the front, there was a vertical party wall and each part of the building was self contained. Although there was no direct evidence about

this, it appeared to the Tribunal that the entrance door to number 1 had been blocked in when one or more of the conversions took place. People wanting to enter number 1 now have to go through the front door of number 2.

17. There is then access to 3 flats in number 1 Britannia Road and various of the flats in number 2 with a staircase serving both. The Tribunal was told that the long leaseholders of number 2 pay for the maintenance and upkeep of this hallway and staircase. The legal basis for this was not disclosed although it was said that the leaseholders of number 1 had an easement to use the entrance and stairs.

18. On the day of the hearing for this case, there was a further inspection. It was clear that work had been done to parts of the exterior, the garden and parking areas. The Respondent said that the leaseholders had done this work to assist them in the sales of their flats. This was not contested by those appearing for the Applicant. It was noted that much of the paintwork was still in bad need of decoration; a balcony had been removed as it was unstable which causes an obvious hazard; some gutters and downpipes were missing and/or inadequate; some of the rendering was missing and the staircase at the rear still needs attention. Some leaseholders had also installed uPVC windows and doors.

The Hearing

19. The hearing was attended by those who attended the inspection i.e. Elizabeth England, Deborah Cain and Emir Kahn for the Applicant, the Respondent, Justin Power and James McKee.

20. The Tribunal chair then asked Ms. England to clarify one or two issues arising from the papers. She agreed that all the service charges claimed going back to the beginning of the claim i.e. 2015, were for payments on account. No reconciliation accounts, as such, were prepared, but the full accounts sent to the leaseholders for 2014 and 2015 plus those prepared for 2016, 2017 and 2018 in the bundle set out the claim for service charges on account, those actually incurred and then set out that any surplus was put into the reserve account which, according to the 2018 accounts stands at £46,132.

21. The claim for administration charges was limited to £624. There was no explanation for the extra £25 claimed in the proceedings. The interest claim was limited to £676.26 as in the proceedings plus £1.09 per day until the date of the hearing. The chair asked several times if a calculation of the total amount could be produced and it could not.

22. Ms. England said that she relied upon the statements and papers produced and, at that stage, the Respondent and Mr. McKee were asked what their case was. They said that they had been asking for details of the claims against them for service charges but had not received them. They wanted to know why over £1,000 per year was being claimed for a property where the landlord was not authorising maintenance and repair work and where there was a substantial sinking fund, to pay for it. When it was explained that annual accounts had now been produced, they said that these did not given the detail they wanted.

23. Ms. England was asked whether arrangements had been offered to allow the leaseholders a chance to inspect the invoices and other financial papers bearing in mind the Respondent's statement of case received by the Applicant's solicitors on the 15th November 2018 at page 209 in the bundle which says "*I have requested access to detailed accounts but the management company have not been forthcoming. Summaries are not acceptable*". The service charge accounts are, of course, only summaries. She said that no such arrangements had been offered but she could not say why.

24. She did say that a section 20 consultation had been put in hand and this was complete. The managing agents were simply waiting for the weather to improve before giving instructions to the successful contractor. Mr. Power and Mr. McGee claimed not to have received any specification of works. When Ms. England confirmed that she did not know whether the contractor was aware that works had been undertaken by the leaseholders, it was suggested to her by the Tribunal chair that perhaps these facts exemplified the problem here i.e. a lack of communication.

25. She did not respond when it was further suggested that when the section 20 process was under way, a meeting with the leaseholders would have been a good idea so that (a) they would be under no doubt what work was intended and (b) there would be no doubt what the tender cost was and that it should be covered by the sinking fund. At that stage the leaseholders could be helped to understand everything with a view to their paying their service charges.

26. The main issue as to payability was discussed with Ms. England. The lease does not allow for payments on account or a sinking fund. The lease says that the leaseholder has to pay a proportionate part of the "*costs expenses outgoings and matters mentioned in the Third Schedule*". The actual cost of those matters will not be known until they are incurred. It was put to her that if *contra proferentem* applied, that would mean a decision against any other interpretation. Ms. England's answer was that the regime in place i.e. half yearly payments on account and a sinking fund, had been there for many years with the consent of the leaseholders. *Estoppel* by convention applied.

27. The Respondent's reaction to that was to say that there had been many managing agents over the years and if the property had been maintained and properly managed, he may not have had a problem. The building was in such a poor state that he (and others) wanted to sell but couldn't unless the service charges were paid up to date. Neither he nor any other leaseholders had, so far as he was aware, consented to the method of service charge collection – the regime had just been imposed on them by managing agents in the past.

Discussion

28. As far as the failure of the lease to allow for service charge payments on account or the provision of a sinking fund is concerned, the Tribunal does not believe that the terms of the lease are ambiguous. However, if the landlord should suggest that they are, the Tribunal has considered general rules of interpretation. In order to assist courts (and Tribunals) in these difficult matters, the *contra proferentem* rule was devised many years ago. It is not, of course, the only rule of interpretation but it is, perhaps the most relevant to

this problem. It translates from the Latin literally to mean "against (*contra*) the one bringing forth (the *proferens*)".

29. The principle derives from the court's inherent dislike of what may be described as 'take it or leave it' contracts such as residential leases which are the product of bargaining between parties in unfair or uneven positions. To mitigate this perceived unfairness, this doctrine was devised to give the benefit of any doubt to the party upon whom the contract was 'foisted'.

30. In the case of **Granada Theatres Ltd v. Freehold Investments (Leytonstone) Ltd** [1958] 1 WLR 845, Mr. Justice Vaisey said, at page 851, that "a lease is normally liable to be construed contra proferentem, that is to say, against the lessor by whom it was granted".

31. Thus, if ambiguity could be proved, *contra proferentem* would appear to dictate that a ruling is made in favour of the Respondent lessee. Without any other considerations, the end result of this is that, in law, the leaseholders are not liable to pay service charges on account and there is no provision for a sinking fund.

32. As far as *estoppel* by convention is concerned, this is often linked to arguments about constructive trusts. Ms. England referred to a 2008 High Court case although she could not remember the case name or reference. That case, she said, established that if *estoppel* by convention was proved, it passed on to successors in title.

33. Lord Steyn in **The Indian Endurance (No. 2)** [1998] AC 878 said this:

> "*It is settled that an estoppel by convention may arise where parties to a transaction act on an assumed state of facts or law, the assumption being either shared by them both or made by one and acquiesced in by the other. The effect of estoppel by convention is to preclude a party from denying the assumed facts or law if it would be unjust to allow him to go back on the assumption... It is not enough that each of the two parties act on an assumption not communicated to the other. It was rightly accepted by counsel for both parties that a concluded agreement is not required for an estoppel by convention."*

34. In this case, the Applicant is unable to establish how the process of asking for payments on account was established or by whom. The only leaseholders before the Tribunal i.e. Mr. Power and Mr. McGee said that they certainly did not agree to what was happening. The papers in the bundle tend to support their case that there have been numerous managing agents and numerous landlords over a fairly short space of time.

35. In mid 2006, the agent was Hayward's Property Services (page 360); in late 2006 it was DGA (page 313); in mid 2009, it was Residential Management Group (page 315) and in late 2009, it was South East Property Services (page 310). The correspondence produced simply had samples of letters and the Tribunal has no doubt that others were

involved as the current agents only took over in 2016. The freehold title seems to have changed hands a number of times and is now owned by an off shore company in Guernsey.

36. How and why the practice of claiming money on account and setting up a sinking fund came about is simply not known from the evidence and submissions made. It is clearly a practice giving potential advantages to the Applicant. Ms. England said that this was, financially, a standalone property and work could not be done to it until service charges were paid. That, with respect to her, is entirely wrong as a legal principle. The lease sets out covenants on the part of both parties which have to be complied with. The landlord's covenant to repair and insure do not contain the wording in modern leases that such covenant is subject to the service charges having been paid.

37. The fact is that this lease is an old-fashioned lease which has disadvantages so far as the landlord is concerned. They would have or should have been known to this landlord when it obtained the freehold. Equally, the lack of ability to obtain payments on account or set up a sinking fund would have been known, which should have alerted someone to find out how this regime arose. Yet there is no evidence at all to support the suggested *estoppel* by convention i.e. no evidence of an assumption of facts or acquiescence by leaseholders.

38. The Tribunal's conclusion is that a managing agent or landlord, some years back, decided to try to correct the failings in the lease by claiming service charges on account and setting up a sinking fund. The end result is that 5 of the leaseholders have now refused to pay, mainly because the landlord has failed to comply with repairing covenants but partly because of the whole service charge regime. It is trite law to say that a party seeking an equitable relief must come 'with clean hands'. This landlord does not, and the Tribunal is satisfied that there is no convention in the technical sense to support an *estoppel* argument.

Conclusions

39. Taking all these matters into account and doing the best it can, the Tribunal's conclusions are that the lease terms apply and there is no power for the landlord to seek payment of service charges on account or set up a sinking fund. As it is accepted that all the monies claimed as service charges are monies payable in advance, none are in fact payable. Accordingly, none of the administration charges are payable either. The remaining matters are in the jurisdiction of the county court.

The Future

40. The Tribunal apologies to the Respondent for having to use such technical legal language, but the whole case has turned on what are quite complicated legal principles which could not really have been described any other way. The Applicant will no doubt be disappointed with the decision but, as has been said, both its and the managing agent's communication skills have been sadly lacking. As has also been said, there should be a meeting with all the leaseholders to discuss the future. Even this Respondent seemed to accept that a sinking fund was reasonable which means that there could well be room

for agreement. For what it is worth, the Tribunal agrees that a properly planned sinking fund is a good idea for leaseholders.

41. There needs to be an agreement. Assuming that there is evidence that the annual or half yearly budgets were sent to the leaseholders with a statement or letter saying that last year's expenses had been incurred, the defence to the 18 month rule will probably be activated (section 20B(2) of the 1985 Act). In other words, reasonable service charges could still be payable for the past years subject to a proper demand being sent.

42. The work undertaken by the leaseholders to maintain the property is an expense to be taken into account when deciding how much should be paid for the proposed work as is any extra expense which may have been caused by the landlords' neglect. It may be that taking the cost of the works out of the sinking fund will leave sufficient to reimburse those leaseholders who have been put to expense. Not an ideal solution as some will be out of pocket, but it could form the basis of a settlement.

43. If the leaseholders agree to a revised service charge regime to meet modern standards, this needs to be reflected in varying the terms of the leases and the landlord should pay for all the legal work needed. There also needs to be a proper consideration of the service charges claimed. A number of issues are evident, such as the estate charges, the duplication of health and safety reports in 2017 and 2018, the gardening costs, the bank administration charge, the lack of any real interest on the sinking fund and the accountancy fees etc. are just some. The managing agents need to look at the RICS Code of Practice: Service Charge Residential Management Code which sets out what is included in a fixed fee management charge regime e.g. provision of service charge accounts.

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Bruce Edgington
Regional Judge
23rd January 2019

ANNEX - RIGHTS OF APPEAL

i. 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.

ii. 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.

iii. 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.

iv. 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.