FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00BK/LSC/2018/0398**
Property	**:**	**Flat 20, 115 Westbourne Terrace, London W2 6QT.**
Applicant	**:**	**Owlcastle (Holdings) Limited**
Represented by	**:**	**Sloan Block Management**
Respondent	**:**	**Mr. Rashid Hussain**
Represented by	**:**	**Crown Office Chambers.**
Type of application	**:**	**Application under S.27A Landlord & Tenant Act 1985 for a determination of liability to pay service charges**
Tribunal	**:**	**Ms. A. Hamilton-Farey** **Mrs. H. Bowers**
Date and venue of hearing	**:**	**18 February 2019** **10 Alfred Place, London WC1E 7LR.**
Date of decision	**:**	**25 March 2019.**

DECISION

We determine that the following sums are payable by the respondent, Mr. Rashid:-

- £750.00 in relation to the reserve fund from 1/4/17 – 28/9/18 inclusive;
- £4,500.00 in relation to the estimated service charges for the period from 1/4/17 to 28/9/18 inclusive.
- £1,647.24 in relation to actual service charges for the period 1/10/16 to 31/3/17.

- The tribunal dismisses the claim under Rule 13 on the part of the respondent in relation to the costs of defending this application.
- The tribunal makes no Order under S.20c of the Landlord & Tenant Act 1985 with the result that the respondent is liable for the landlord's costs of these proceedings, which the tribunal was told, amounted to £908.00.
- These sums are payable within 28 days of this decision.

The Application:

1. By Order of District Judge Wright dated 15 October 2018, the County Court transferred a claim, numbered E3OLV370 to the tribunal. The claim relates to alleged arrears of service charge totalling £6,897.24.

2. The alleged arrears relate to the service charge years from 1 October 2016 until 28 September 2018 inclusive. The majority of the charges from 1/4/17 to date relate to estimated figures for the financial years. Although Mr. Berkin requested that we deal with the actual figures for those periods, we are unable to do so because the figures transferred to us were those estimated for the service charges years in question. The tribunal can only deal with the matters actually transferred and cannot make any amendments, unless an amended claim is received. In this instance therefore we are dealing with the estimated charges for the years 2016 – 28 October 2018 inclusive.

3. The tribunal issued directions on 2 November 2018 which required the parties to agree a bundle of documents to be used at the hearing. The applicants confirmed that a bundle had been sent to the respondent at the property address. The applicants also confirmed that, although the respondent lived abroad for some periods, no alternative address for service of documents had been given by the respondent, and they therefore addressed all correspondence to him at the unit, or alternatively, where possible, corresponded by e-mail at an address also given to them by the respondent. The tribunal did not receive a bundle from the respondent.

4. At the hearing, the applicants were represented by Mr. Mark Chapman of Sloan Management. The respondent did not attend but was represented by Mr. Martyn Berkin of Counsel. Mr. Berkin had not received the bundle, presumably due to the fact that the respondent had not been in London to receive it, and the tribunal therefore gave a short adjournment so that Mr. Berkin could read the documents supplied by the applicants.

Facts:

5. The applicants are the owners of the freehold reversion of the properties known as 113-115 Westbourne Terrace, London W2 5QT. The company is owned by the leaseholders, and therefore the respondent is both a leaseholder and one of the freehold owners of his property.

6. The respondent is the long leaseholder of Flat 20 and holds that property under a lease for a term 999 years from 1 January 2000. The lease is registered under title NGL 796803.

7. It is not disputed by the respondent that the lease provides for the applicant to provide services for which a service charge is levied.

8. It is not disputed by the respondent that those services have been provided, however the respondent claims that S.20 consultation under S.20 of the Landlord & Tenant Act 1985 may not have been complied with in relation to works to the boiler

The Applicant's case:

9. The applicant says the respondent paid all service charges claimed but had stopped paying in 2016 without any explanation. The applicants say that the directors of the company had agreed the quarterly service charge of £750.00 and the reserve fund contribution of £125.00 per annum, and this formed the basis of the demands made and the sums not paid by the respondent. Mr. Chapman confirmed that invitations to attend the AGM and copies of minutes had been sent to the respondent, but he had not responded and not attended any of the meetings.

10. Mr. Chapman said the directors adjusted the service charges slightly each year, but not the demands because they waited until the end of year figures were available, and if necessary, they would either demand or refund any sums in accordance with Clause 3(2)(5)(a) and (b) of the lease. In past years it appeared that there had been a surplus at the end of the financial year, and it had not been necessary to make any further demands. The tribunal was also informed that it had been agreed by the directors that the financial year would change to 1 April from the 5 April noted in the lease.

11. The tribunal was provided with copies of the demands for service charges, together with the certified accounts and copies of invoices and receipts in relation to the expenditure incurred in running the buildings.

12. Clause 3(2)(v) of the lease requires that '*as soon as practicable after the end of the Lessor's financial year the Lessor shall furnish to the Lessee an account of the service charge payable by the Lessee for that year, PROVIDED ALWAYS and it is hereby agreed and declared that –*

    (a) *if the actual cost to the Lessor of the Service Charge payable in any year be in excess of the Lessor's estimate thereof then the Lessee will immediately following service of a written demand from the Lessor pay to the Lessor any balance found payable and all such sums due and payable under this clause being recoverable as rent in arrear.*

(b) *If the actual cost to the Lessor of the Service Charge payable in any year be less than the Lessor's estimate thereof then due credit against future Service Charge will be given to the Lessee.*

13. Mr. Berkin interpreted this to mean that the respondent was entitled to an actual personalised account setting out his liabilities. He said that this was the usual practice with service charge accounting and was not difficult to achieve.

14. From the documents supplied in the bundle, it is evident that the landlord does not operate the service charge accounting strictly in accordance with the lease. The service charge clauses are, in the tribunal's view, open to interpretation. It may be as Mr. Berkin says the respondent is entitled to a personalised account, but he has not raised this issue in the past, and he has received copies of end of year accounts from which he could calculate his liability. Without any evidence we do not know why the respondent has now decided to challenge the method of accounting, but to prevent further challenges the tribunal would advise the landlord to provide individual statements to each leaseholder to comply with the lease and provide a greater element of transparency. We do not find that the way in which the landlord operates the accounts prevents them from recovering the sums due, with the result that we find the respondent liable for all sums contained within the claim.

The Respondent's Case:

15. Mr. Berkin was at some disadvantage because he had not been provided with the bundle before the hearing, and although he was given time to read the contents of the bundle, he was not able to address any of the actual expenditure, but only the presentation of the accounts.

16. From the evidence supplied in the bundle it does not appear the respondent actually disputes any of the expenditure, with the exception of the possible non-compliance with S.20 consultation but disputes the fact that the same amount is demanded each quarter, and he believes this should vary according to expenditure. Mr. Chapman informed us that the directors had agreed the same amount would be demanded each quarter and then reconciled at the end of every financial year. From the service charge accounts provided in the bundle, it did not appear that a deficit had occurred at the end of any financial year and therefore it was not necessary for any further demand to be made. It also appeared that when works were necessary, the landlord had demanded separate payments, and these had been paid by the respondent in any event.

17. Within the bundle the tribunal noted that the S.20 notices had been issued to the respondent and sent to him at his flat in the building, as well as being sent by e-mail. It may well be that the respondent did not receive these documents because he was not in the country at the time, but until the respondent provides an alternative address, there is no requirement for

the landlord to serve documents on any other address than the one actually used.

18. We found notices of intention and proposals in relation to the external decorations contract in 2016, the boiler works in 2017 and the lift works in 2018. It appears that the landlord has therefore complied with the requirements to consult under S.20, and no further issues were raised by the respondent with respect to these works.

Decision:

19. The respondent has not raised any issue regarding the actual reasonableness of the expenditure, and although the landlord has not exactly complied with the lease terms, we are dealing with estimated charges and the landlord may still therefore comply with the lease requirements when dealing with the actuals at the end of the financial years, as we have suggested above.

20. In the circumstances we conclude that the amounts claimed are payable by the respondent as estimated charges.

Costs and fees:

21. At the hearing Mr. Berkin applied for costs. The tribunal directed that he make that application in writing, and the applicants be given sufficient time to address the issues raised. Mr. Berkin's application under Rule 13 of the tribunal's procedure rules was received on 1 March. An application under S.20c of the Landlord & Tenant Act 1985 had also been made. On 6 March the tribunal received the response on behalf of the applicants in relation to both claims.

22. Mr. Berkin considered that his client should be awarded costs because, if the applicants had complied with the terms of the lease and claimed against actual charges the matter may not have proceeded to Court and then on to the tribunal with a saving of costs.

23. The applicants responded to say that it was incorrect they had to rely on actuals because the lease provided that service charges be paid on account and their claim dealt with on account charges. The applicants also said that the respondent had not complied with any of the directions issued by the tribunal, had not produced a bundle and had not engaged with the applicant in any way prior to the hearing, and it was therefore necessary for the landlord to recover the unpaid amounts by way of Court proceedings. They confirmed that the respondent had not paid his service charge for two years, and that an additional burden was placed on the other freeholders to meet any shortfall whilst the claim proceeded. The applicants say that the Rule 13 costs application by the respondent should be dismissed, that no S.20C Order should be made and that they be able to recover the costs of proceedings from the respondent. The applicants confirmed that instead of instructing solicitors to represent them at the

hearing, the managing agents had done so, and had saved approximately £2,000.00 in costs.

24. The tribunal dismisses the claim for Rule 13 costs made by the respondent. The tribunal finds that, had the respondent engaged in the process, then this matter may not have proceeded to litigation and he would not have incurred any costs in defending the claim.

25. The tribunal makes no Order under S.20c limiting the landlord's costs of proceedings because it considers that, had the respondent engaged in the process the landlord would not have incurred the costs it did. The tribunal therefore considers the respondent should meet the landlord's costs of £908.00 incurred in making the claim and presenting the case to the tribunal.

Name: Aileen Hamilton-Farey **Date:** 25 March 2019.