FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00BK/LSC/2019/0065**
Property	**:**	**Flat 69 and 70 Raynham, Norfolk Crescent, London W2 2PQ ("the flats")**
Applicant	**:**	**Raynham Freehold Company Ltd ("the landlord")**
Representative	**:**	**Dale & Dale Solicitors Ltd**
Respondent:	**:**	**Abdul Razak Dambha**
Representative	**:**	**Amphlett Lissimore Solicitors**
Type of application	**:**	**Liability to pay service charges**
Tribunal members	**:**	**Judge Angus Andrew** **Andrew Lewicki BSC (Hons) FRICS FCABE**
Date and venue of hearing	**:**	**27 June 2019** **10 Alfred Place, London WC1E 7LR**
Date of decision	**:**	**8 July 2019**

DECISION

Note: in this decision figures in [ ] are reference to page numbers in the document bundle.

Decision

1. In respect of Flat 69 Mr Dambha is liable to pay the claimed service charges of £30,293.45 in respect of the service charge years from 2012/2013 to and including 2018/2019.

2. In respect of Flat 70 Mr Dambha is liable to pay the claimed service charges of £41,159.76 in respect of the service charge years from 2012/2013 to and including 2018/2019.

The application and the hearing

3. In the County Court the landlord claimed service charge arrears and interest from Mr Dambha. In respect of flat 69 the landlord claimed £30,293.45 whilst in respect of flat 70 it claimed £41,159.76. The claims were based on running accounts going back to 2004 [39-43 & 76-80]. On 29 November 2018 Deputy District Judge Shakespeare by consent ordered that: -

> *"The question as to the amount of service charges and/or administration charges due (if any) from the Defendant to the Claimant is transferred to the First-tier Tribunal (Property Chamber) ("FTT") for determination for the periods subject of this claim".*

4. By the consent order the remainder of the claim was stayed and consequently the claimed interest on the disputed service charges is not before us.

5. We heard the transferred applications on 27 June 2018. The landlord was represented by Martin Comport and Mr Dambha was represented by Justin Bates. Mr Comport is a solicitor and Mr Bates is a barrister. Paul Smith and Solomon Unsdorfer gave evidence on behalf of the landlord. Both are employed by the managing agents, Parkgate Aspen Ltd. Mr Smith is a credit controller and his statement is at [135-141]. Mr Unsdorfer is a director of Parkgate Aspen and his statement is at [214-224]. Mr Dambha gave evidence on his own account and his statement is at [363-369].

Background

6. Raynham is a large block of flats that comprises, on the basis of the official copy entries at [226-232], more than 70 flats. The landlord acquired the reversion in 2004 following a collective enfranchisement claim. It is apparent from the official copy entries of the freehold title that following the landlord's acquisition of the reversion the lessees surrendered their existing leases and were granted new 999-year leases from 22 October 2004. That is the new extended leases were granted by a company controlled by the then lessees. All the lessees including Mr Dambha

have a share in the landlord. The lease of flat 69 is at [7-37] and we were told that the lease of flat 70 is in the same form. Mr Dambha also owns a third flat in Raynham but the landlord had not claimed arrears in respect of that flat.

7. Regrettably there is a long running dispute between the landlord and Mr Dambha concerning his liability for payment of the service charges. The dispute came before a differently constituted tribunal in October 2013 when, on another transferred application, the landlord claimed service charge arrears in respect of the years from 2009/2010 *"up to the issue of the County Court proceedings (23 January 2013)"*. The Tribunal decision of 19 December 2013 is at [147-156] and we refer to it as "the previous decision".

8. The conclusion at paragraph 47 of the previous decision is as follows:

> *"Accordingly, the Tribunal concludes that the amounts payable by Mr Dambha to the applicant in respect of 2009-2010, 2010-2011 and 2011-2012 are*
>
> *Flat 69: £2724.82*
>
> *Flat 70: £2832.75*
>
> *(If and in so far as these sums have not already been paid by Mr Dambha at the date of this decision)"*.

9. Mr Dambha paid £2,724.82 on 7 March 2014 and £2,832.75 on 26 March 2014 [42 & 79].

10. It has to be said that there is a slight discrepancy between the tribunal's conclusion at paragraph 47 and a summary of its decision to be found at paragraph 12 where the service charge years are said to include 2012/2013. The explanation for that discrepancy, given by the parties, is that the sums found to be due and payable by Mr Dambha included the first two on account payments for the year 2012/2013 and the omission of that year from the tribunal's conclusion at paragraph 47 was simply a mistake. It is an explanation that we accept because two statements annexed to the previous decision include the first two on account payments for that year.

11. As the sums claimed in the County Court were based on running accounts going back to 2004 it was impossible to ascertain the disputed service and administration charges that we are required to determine. Consequently, by letter of 25 June 2019 Judge Andrew directed the landlord to send to the tribunal and the tenant by e-mail a schedule clearly showing for each year from and including 2012/2013:

    a. The service and administration charges claimed from the tenant for that year
    b. The sums paid by the tenant in respect of those charges
    c. The charges said to be outstanding for that year.

12. The schedules provided by the landlord in response to that direction are set out in the following two tables:-

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Year	Total service charges	Service charges	Amount paid	Balance
2012/2013	722,590.00	7,168.09	4,644.90	2,523.19
2013/2014	705,436.00	6,997.93	3,518.28	3.479.65
2014/2015	699,186.00	6,935.93	3,492.02	3,443.91
2015/2016	664.165.00	6,588.52	0.00	6,588.52
2016/2017	681,746.00	6,762.92	1.567.20	5,195.72
2017/2018	711.267.00	7,015.77	1.567.20	5,488.57
2018/2019	720,542.00	3,573.89	0.00	3.573.89
				30,293.45

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Year	Total service charges	Service charges	Amount paid	Balance
2012/2013	722,590.00	10,773.82	8,670.69	2,103.13
2013/2014	705,436.00	10,518.05	5,342.77	5.175.28
2014/2015	699,186.00	10,424.86	7,876.59	2,548.27
2015/2016	664.165.00	9,902.70	0.00	9,902.70
2016/2017	681,746.00	10,164.83	2,355.54	7,809.29
2017/2018	711.267.00	10,604.00	2.355.54	8,249.45
2018/2019	720,542.00	5,371.64	0.00	5.371.64
				41,159.76

13. The service charges for the first five years (2012/2013 to 2016/2017) relate to costs actually incurred with the service charge accounts being at [238-266]. The service charges for the last two years (2017/2018 and 2018/2019) relate to estimated costs with the budgets being at [268-272].

14. In answer to our question Mr Comport told us that the amounts paid in respect of 2012/2013 included the first two on account payments for that year referred to above and that was not challenged by Mr Bates. It is self-evident that notwithstanding the wording of the transfer order the landlord did not claim any arrears of admisntration charges.

Issues in dispute

15. By the time that the case came before us Mr Dambha had withdrawn a number of his challenges to the disputed service charges that were set out in his defence to the County Court claim. His remaining challenges, at the start of the hearing, are those contained in the Scott schedule at [91-96]. However, during the hearing Mr Dambha either abandoned or withdrew the following challenges: -

a. That the budgets for 2017/2018 and 2018/2019 did not comply with the requirements of the leases.

b. The 2017/2018 and 2018/2019 estimates of £310,000 and £320,000 for the porters' wages.

c. The telephone and the internet costs of the resident porters for various years.

d. The utility costs and estimates for various years.

16. Mr Dambha's remaining challenges are again set out in the Scott schedule and are encapsulated in the following questions: -

a. Did the previous decision determine the arrears at 23 January 2013 being the date of the issue of the County Court proceedings?

b. Had the service charge accounts for the first five years (2012/2013 to 2016/2017) been certified in accordance with the terms of the leases?

c. Did the leases permit the recovery through the service charge of any insurance excess or uninsured loss?

d. Could legal costs incurred by the lessor be recovered under the terms of the leases?

Reasons for our decisions

Did the previous decision determine the arrears at 23 January 2013 being the date of the issue of the County Court proceedings?

17. In essence Mr Dambha's case as put by Mr Bates was that the landlord *"cannot prove what my client owes: it might be nothing, it might be a lot"*. This was the crux of Mr Dambha's case and as Mr Bates rather engagingly accepted: *"if I lose on the first point the rest is not worth a candle"*.

18. There were two limbs to this challenge. The first was that the tribunal's conclusion at paragraph 47 of the previous decision determined not the arrears owed by Mr Dambha at 23 January 2013 (being the date of issue of the County Court proceedings) but the total service charges payable by him in respect of the service charges years 2009/2010 to and including 2011/12.

19. The second was that the landlord has not given credit for payments made by Mr Dambha in respect of period prior to 23 January 2013 as foreshadowed by the words in parenthesis in the conclusion of the previous decision (see paragraph 8 above). In particular, Mr Bates drew our attention to schedules prepared by Mr Dambha [395 and 403] that purport to show sums paid by Mr Dambha that were not taken into account in the previous decision.

20. It can be seen from the tables at paragraph 12 above that the annual service charge runs consistently at about £7,000 per year. In that context the suggestion that the previous decision determined service charges of less than £3,000 for three and a half years is not tenable. That is especially so when one reads the previous decision in its entirety, in particular at paragraph 17 where it records that there was no dispute in respect of the reasonableness or payability of the service charges save for reserve fund contributions.

21. We find ourselves in the invidious position of having to interpret a 6-year-old tribunal decision to which there was at the time no appeal or objection. We are nevertheless satisfied and find that the previous decision did indeed determine the arrears at 23 January 2013 and that the words in parenthesis were simply included to cover the possibility that Mr Dambha may have made further payments between the hearing date and the decision date.

22. Turning to the second limb of Mr Dambha's challenge the most obvious point to make is that he did not appeal the previous decision and paid the sums found to be due from him. It is unlikely that he would have paid those sums without objection if, at that time, he had considered that either the landlord or the tribunal had failed to take into account payments previously made by him.

23. That apart it is apparent that Mr Bates overlooked a Schedule of Unallocated Funds at [164]. The schedule was sent under cover of Mr Dambha's solicitor's letter of 9 January 2018. It is clear that the schedule represented Mr Dambha's assessment in January 2018 of the payments made by him prior to 1 February 2013 that he believed had not been credited to his account.

24. We went through every payment on that schedule with the parties. A payment of £500 had been paid to the landlord's solicitors in part payment of legal fees that were outwith the service charge. The other payments had either been credited on the running accounts to which we have referred or the cheques upon which Mr Dhamba relied for proof of payment had, by his own admission, never been presented for payment.

25. Returning to Mr Dambha's more recent schedules at [395 and 403] Mr Bates placed particular reliance on a further payment of £7,910.76 that he said had not been credited on the running accounts. That payment was supported by Mr Dambha's bank statement. However, it became apparent that the payment was again made to the landlord's solicitors in payment of their legal fees and was outwith the service charge, their account being at [210]. The remaining additional payments on these schedules were unsupported by any documents and appear to be arbitrary apportionments of larger sums that have no doubt been credited to the running accounts of either the flats or the third flat owned by Mr Dhamba that was not the subject of this dispute.

26. We do not doubt Mr Dambha's sincerity but his belief that the landlord has failed to credit payments made by him has become an idée fixe unsupported by any tangible evidence. We hope that Mr Dambha can now put it behind him.

Had the service charge accounts for the first five years (2012/2013 to 2016/2017) been certified in accordance with the terms of the leases?

27. Again, there were two limbs to this challenge. The first was that the chartered accountants Kybert Carroll had *"provided a fair summary of the costs of complying with Section 21(5) of the Landlord and Tenant act 1985"* [238] instead of certifying the *"actual cost"* as required by paragraph 2(a) of the second schedule to the leases [13].

28. The second was that the certification had been given by a company and not by an individual. Mr Bates' argument relied on the requirement that the accounts must be certified by *"the Auditor"*, a term defined in the leases as *"a qualified accountant as defined in the landlord and Tenant Act 1985"* [16]. That definition is to be found in section 28 where it states that *"a qualified accountant"* is *"a person who……. has the necessary qualification and is not disqualified from acting"*, Mr Bates point being that a company cannot be such *"a person"*.

29. Given Mr Bates' assessment of the worth of this and the remaining challenges we take them in relatively short order.

30. Kybert Carroll's letter at [238] contains two distinct statements. In concentrating on the second statement that refers to compliance with section 21(5) of the 1985 Act Mr Bates overlooks the first statement that they have *"examined the Statement of Service Charge Expenditure……and certify that the costs……. are sufficiently supported by accounts, receipts and other documents which have been produced to us"*.

31. As far as we are aware the term "*actual cost"* is not a term of art in contrast for example to the term *"audit"*. The first statement in the accountant's letter complies with the lease requirements: it contains both the words *"certify"* and *"costs"* and the second word is self-evidently a reference to actual costs rather than estimated costs.

32. Turning to Mr Bates second argument, Mr Unsdorfer's unchallenged evidence [221] was that the certificate contained in the letter was given by Mr John Carroll FCA who is a certified accountant and a director of Kybert Carroll. The certificate was indeed given by a person and it complies with the lease requirements.

Did the leases permit the recovery through the service charge of any insurance excess or uninsured loss?

33. Although Mr Dambha did not identify any excesses and losses, Mr Bates said that they could not be recovered through the service charge under the terms of the leases. He principally relied on two lease provisions. The first at paragraph 5 of the seventh schedule [32] that requires the landlord to use any insurance monies in the reinstatement of the building and to make good any shortfall *"from its own resources"*. The second at paragraph 12 of the fifth schedule [30] requires the lessee to indemnify the lessor against *"any act omission or negligence of the Lessee"*.

34. As Mr Dambha failed to identify the excesses and losses to which he objects no deduction falls to be made to the claimed service charges. This is a hypothetical point. That apart we do not agree with Mr Bates' reasoning. He drew our attention to Arnold v Britten [2015] UKSC 36. In that case Lord Neuberger offered the following guidance on lease interpretation: -

> *"That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but disregarding subjective evidence of any party's intentions."*

35. These leases were granted following a collective enfranchisement claim. The parties to the leases would have known that the landlord's only reasonably foreseeable income would be that derived from the service charge contributions: it has no other resources. Given those facts and circumstances the direction to make good any shortfall *"from its own resources"* can only be interpreted as a direction to recover the shortfall through the service charge.

36. Equally the lessee's indemnity does not assist Mr Dambha. It is, as Mr Bates acknowledged, an obligation on the lessee to pay and not an obligation on the landlord to collect. The indemnity does not prevent the landlord from recovering any loss through the service charge if the indemnity is not honoured, although as Mr Unsdorfer explained the landlord does pursue claims arising from lessee negligence, such as allowing bathwater to overflow.

<u>Could legal costs incurred by the lessor be recovered under the terms of the leases?</u>

37. The invoices substantiating legal costs were contained in the hearing bundle at [100-118]. The majority relate to the cost of proceedings with Mr Dambha. Others relate to breaches of covenant by other lessees. On a cursory inspection they are all solicitor's costs.

38. It was common ground that to the extent that legal costs can be recovered they can only be recovered under paragraphs 1 – 3 of the eighth schedule to the leases. The thrust of Mr Bates' argument was that whilst those paragraphs refer specifically to the fees of Surveyors and Auditors they do not expressly refer to the fees of solicitors or indeed legal costs. In the absence of an express provision such fees and costs are not recoverable. This is again an issue of lease interpretation.

39. The paragraphs must again be considered in the context of Lord Neuberger's guidance and the grant of the leases following a collective enfranchisement claim. The parties would have envisaged that legal costs would be incurred in recovering arrears and enforcing the lease terms and that such costs would be recoverable through the service charge for the reasons previously given.

40. That apart, paragraph 1 (a) allows for the recovery of the fees of not just the auditor and surveyor but also of *"any other individual firm or company"* in amongst other things *"the management of the Lessors' Property"* and "*the assessment collection*

and verification of the rents and all other sums due to the Lessor …from the lessees or tenants of any part of the Lessor's Property".

41. Again paragraph 1(b) permits the recovery of the fees of not just the auditor and surveyor but also of *"any other individual firm or company employed or retained by the Lessor to perform (or in connection with the performance of) any of the Services or any of the functions duties or matters referred to in this schedule".*

42. These paragraphs are in themselves sufficiently wide to permit the recovery of legal costs or fees incurred in the proceedings against Mr Dambha for the recovery of service charge arrears and in the enforcement of the other lessees' covenants.

Conclusion

43. All of Mr Dambha's remaining challenges having failed it follows that the claimed service charges are payable in full.

Name: Judge Angus Andrew Date: 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).