



**FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)**

Case Reference : **CHI/43UH/LIS/2018/0030**

Property : **Oakhill Court, Oakhall Drive,
Sunbury on Thames, TW16 7LE**

Applicant : **Jennifer Anne Campbell
& Others**

Respondent : **Grandglobe Ventures Ltd**

Type of Application : **S.27A 1985 Act**

Tribunal Members : **Judge D Dovar**

Date of Decision : **24th January 2019**

DECISION

1. This is an application for the determination of the payability of service charges under s.27A of the Landlord and Tenant Act 1985.
2. There are two broad issues to determine:
 - a. What is the amount of on account costs that can be recovered; and
 - b. Whether there is scope in the leases for a reserve fund.
3. The matter has an added layer of complexity as there are three types of leases relevant to the application; referred to by the parties as type 1, 2 and 3.
4. By directions given on 4th July 2018, Judge Barber notified the parties that the Tribunal intended to deal with this matter without a hearing under Rule 31 of the Tribunal Procedure Rules 2013 unless either party objected. Neither has and this decision has been made on the papers.

Invoices

5. The following demands are in question and are taken as representative of all the demands under scrutiny in this application (they are the demands sent to Ms Campbell):
 - a. On account half yearly demands dated 24th May 2017 and 6th December 2017 in the sum of £636.62 for each of the periods 24th June 2017 to 24th December 2017 and 25th December 2017 to 23rd June respectively;
 - b. A half yearly demand for a reserve fund dated 24th May 2017 and 6th December 2017 each in the sum of £53.55 for the same periods;
 - c. On account half yearly demand dated 23rd May 2018 in the sum of £710.03 for the period 24th June 2018 to 24th December 2018;
 - d. A half yearly demand for a reserve fund dated 23rd May 2018 in the sum of £53.55 for the same period;
 - e. A demand dated 4th June 2018 for 'external decorations pitched roof and water tanks works' in the sum of £3,382.25' with a due date of 20th June 2018.
6. The on account demands are based on anticipated expenditure, which for the year end June 2019, the budget provided anticipates a total of £55,710 will be incurred (including £10,000 for repairs) plus a sinking fund of £4,200.

Lease terms

7. The material provisions are as follows.
8. Type 1 leases:
 - a. By clause 2 (b)(i) the tenant agreed to pay

“a sum being a rateable proportion of the sum of the costs outgoings and matters mentioned in the Second Schedule hereto such part costs expenses outgoings and matters to be certified by the surveyor of the Lessor or his successors in title for the time being whose certificate shall be binding upon the Lessee

and to pay on the signing hereof and on the 25th day of December in every year to the Lessor and its successors in title the sum of FIFTY POUNDS £50 on account of such rateable proportion as aforesaid

PROVIDED that in the event of such total costs expenses outgoings and matters aforesaid amounted to less than a total sum of FIFTY POUNDS £50 in a particular year the Lessee shall be entitled to be credited with the rateable proportion of such excess paid by the Lessee as the surveyor for the time being of the Lessor or its successors in title shall certify is due to them according to be audited accounts and in the event of the aforesaid costs expenses outgoings and matters amounting to more than FIFTY POUNDS £50 in a particular year the Lessee shall forthwith pay to the lessor or its successors in title such further rateable proportion as a certified by the surveyor for the time being the Lessor or its successors in title ...

*(ii) The part of such rateable proportion shall be such proportion of the costs or **estimated costs** of all the matters mentioned in the Second Schedule hereto as is equal to the proportion which the rateable value of the Flat bears to the total rateable value at that time of all the flats and garages and sheds comprised in Oakhall Court.”*

(emphasis added by way of additional breaks in the paragraph and bold typeface)

- b. Clause 3 sets out the obligations of the Lessor which are replicated in the Second Schedule and provide for maintenance repair and redecoration etc. of the Building, cleaning and lighting and insurance.

9. Type 2 Leases:

- a. Clause 4 (2)(a) *“ Pay to the Lessors in addition to the rent hereby reserved such amount as is specified in Part 7 of the Second Schedule hereto of the expenditure incurred by the Lessors in carrying out their obligations as set out in Clause 5 hereof such payment being hereinafter referred to as “the maintenance charges”*
- b. Clause 4 (2)(b) *“The yearly sum so specified in Part 6 of the Second Schedule shall be paid as an interim contribution towards the said maintenance charge and such sum shall be paid to the Lessors on 1st June in advance in each year ...”*
- c. Clause 4 (2)(h) *“ The expenditure incurred by the Lessors in carrying out their obligations as set out in Clause 5 hereof shall be deemed to include not only the actual expenditure incurred during the Lessors’ financial year but also such reasonable anticipated expenditure*

which is of a periodic or recurring nature as the Lessors or their managing agents may in their sole discretion allocate to the financial year in question as being fair and reasonable in the circumstances ...”

- d. Part 6 of the Second Schedule is headed ‘Contribution towards maintenance’ and states ‘*A fair proportion of the total expenditure incurred by the Lessors in carrying out their responsibilities in accordance with Clause 5 of this Lease.*’

10. Type 3 Leases:

- a. The Fifth Schedule contains the service charge provisions and by paragraph 1 (3) defines the ‘interim charge’ as ‘*such sum to be paid on account of the Service Charge in respect of each Accounting Period as the Lessors or their Managing Agents shall specify at their discretion to be a fair and reasonable interim payment*”
- b. Paragraph 3 “*The first payment of the Interim Charge ... shall be paid to the Lessors by equal payments in advance on the First day of January and the First day of July in each year ...*”
- c. Clause 5 (5)(o) provides that ‘*Subject to legislation permitting to set aside (which setting aside shall for the purposes of the Fifth Schedule be deemed an item of expenditure incurred by the Lessors) such sums of money as the Lessors shall reasonably require to meet such future costs as the Lessors shall reasonably expect to incur of replacing maintaining and renewing those items which the Lessors have hereby covenanted to replace maintain or renew ...*”

Interim Charges

Type 1 Leases

- 11. There is very little room for doubt that in relation to type 1 leases the amount payable each year in respect of interim charges is £50 per annum. An additional sum is payable after sums have been incurred and a reconciliation has been carried out.
- 12. The wording is clear and within that sub clause can sustain no other meaning. The parties’ intention appears that to be to have favoured certainty in respect of the on account payment and the correlative reduction in work required to produce a budget, over ensuring that the landlord is funded before works are carried out.
- 13. The only wording that the Respondent is able to point to in order to argue otherwise is the use of the wording ‘estimate costs’ at clause 1 (1)(b)(ii). It is not clear why estimate has been referred to (although see below on the issue of sinking and reserve funds). Given the clear wording of the previous sub clause, there is no room for estimating costs. Further, clause 1 (1) (b) (ii) is directed at determining the proportion of costs paid by the tenant, not when the costs are paid. In that regard, despite it providing some indication of a role for an estimate of costs to be determined (and therefore possibly for a

greater on account payment to be made), it cannot override the clear wording of clause 1 (1) (b) (i).

14. In the alternative, the respondent argues that there is an estoppel by convention in relation to on account demands and payments in excess of £50. It says they have been demanded and paid since at least 2000.
15. In order to establish an estoppel by convention it is necessary to produce evidence of an agreement or understanding communicated between the parties. As set out in *Republic of India v India Steamship Company Ltd* [1998] AC 878, there must be an assumed state of fact or law with the assumption being shared by both parties, but '*it is not enough that each of the two parties acts on an assumption not communicated to the other*'.
16. The only factor the respondent can point to is that on account demands in excess of £50 have been paid in the past. In my view, this is not sufficient to give rise to any specific assumption having been communicated.
17. Further and more fundamentally, it is difficult to see how there has been any detriment suffered by the Respondent. They have received sums in advance that they were not entitled to and have no doubt spent them on service chargeable items and services. The advantage gained ending when a reconciliation took place.
18. If a tenant has raised the issue before, then there is little they could have done differently other than charge less in advance and shoulder the cost burden until they could reclaim actual expenditure. This is not a case where the landlord has missed out on an opportunity to make a valid demand within time because of an agreed or understood method of operating the service charge mechanism which was at odds with the lease terms.
19. To that end this is not a case, as it was in *Jetha v Basildon Court Residents Company Limited* [2017] UKUT 58 (LC) where the landlord would be precluded from recovering expenditure actually incurred (see paragraph 40 of that case).
20. Briggs J in *HMRC v Bencdollar Limited and Others* [2009] EWHC 1310 (Ch), at para 52 (as endorsed by the Court of Appeal in *Blindley Heath Investments Ltd v Bass* [2017] Ch 389) , said that there needed to be
'some detriment must thereby have been suffered by the person alleging the estoppel, or benefit thereby have been conferred on the person alleged to be estopped, sufficient to make it unjust or unconscionable for the latter to assert the true legal (or factual) position'.
21. To that end, even if an agreement or shared understanding could be drawn out of a long period of payment, this is a case where the lack of detriment or alternatively, fairness, means that there is no estoppel that can be relied upon.

Type 2 and 3 leases

22. The same restriction does not apply in relation to either type 2 or type 3 leases. Both permit in their own way for an on account charge by reference to the lessees proportion of the estimated service charges.
23. The Applicants maintain that under the type 2 lease, the only on account payments that can be demanded relate to 'periodic or recurring expenditure' (the wording being drawn from clause 4 (2) (h)). They therefore say that this does not relate to one off items of expenditure such as roof or water tank replacement.
24. In *St Mary's Mansions v Limegate Investment Co Ltd* [2003] 1 EGLR41, the lease provided for the recovery of '*such reasonable part of all such expenses of a periodically recurring nature*' as well as '*reasonably provision for anticipated expenditure*'. Ward LJ considered that the latter was simply an example of an item that fell within the former and could include '*a sinking fund to provide every five years for the repairs to external doors ... or to make longer-term provision for the greater expenditure ... such as ... replacing the slates on the roof.*' Following that, the tribunal is of the view that the type 2 lease does permit recovery on account of items of expenditure that do not necessarily occur every year, but are anticipated in the future, such a roof and water tank repair.
25. Further, the Applicants maintain that the on account provisions cannot include the item 'repairs' as this is an unspecified item. The budget provides for an estimated sum in respect of repairs. I do not agree with this interpretation. Anticipating that over the next year there will be some repairs required and basing the same on the cost of the previous year is well within the scope of the on account provision and is within what is recoverable on account.
26. An additional ground for limiting on account costs for type 2 leases and the only ground for type 3 leases raised by the applicant is the fact that type 1 leases are limited to £50. It is only fair, they say, that the other leases do not have to pay more.
27. This does not follow from the plain wording of the leases. Type 2 leases specifically allow through clause 4 (2) (b) for an on account payment by reference to Part 6 of the Second Schedule. That refers to the total expenditure and is not limited to a specific amount. Type 3 leases by paragraph 1 (3) of the Fifth Schedule provides for a fair and reasonable payment. Again that is not limited to a specific amount.
28. Further:
 - a. If it was the intention to limit to £50 per annum, then that could have been expressly set out;
 - b. It appears that both type 2 and 3 leases were granted after the type 1 leases were granted, with the result that at the time they were granted, the parties would have been (or would have been taken to be aware) that the type 1 leases were limited to £50. Therefore had these leases

intended to limit to either £50 or to the sum under the type 1 lease, that could have been expressly provided.

Section 20 demands

29. There is no provision in any of the types of leases for ad hoc demands. They each set out the mechanism for demanding service charges, whether on account or after a reconciliation.
30. The demands based on the anticipated major works are no more than on account demands and accordingly can only be demanded in accordance with the on account provisions of each type of lease.
31. Standing as a separate demand from either an on account or a deficit demand, they are not recoverable. In any event, as an on account demand, in respect of the type 1 leases, this type of anticipated cost would fall within £50 limit payable.

Reserve Funds

32. The Applicants maintain that there is no provision in any of the leases for any type of sinking or reserve fund.
33. It is in relation to a reserve fund that I considered that the use of the word 'estimated' in clause 1 (b) (ii) might have arisen. Indeed this is the only assistance the Respondent can draw from the wording of this type of lease. However, despite that ambiguity, my view is that this type of lease does not provide for a reserve fund. Again it must be borne in mind that clause 1 (b) ii) is solely dealing with working out how much the tenant must pay of the total cost. It is not saying what those costs are. That is left to the Second Schedule. That Schedule simply sets out the headings for which costs can be recovered. They are specific items. There is no reference to any sinking or reserve fund.
34. The Respondent repeats its argument that if the lease does not allow than an estoppel by convention has arisen. For the same reason I rejected that argument above in relation to on account costs, so it is rejected in respect of a reserve fund.
35. As with the on account costs, I disagree with the Applicants on their interpretation of the type 2 and 3 leases. These both specifically refer to reserve or sinking fund facilities. The type 2 lease at clause 4 (2) (h), which, in accordance with *St Mary's Mansions* does include non-annually recurring costs. Clause 5(5)(o) of the type 3 lease is even more explicit in its provision for a reserve or sinking fund.

Conclusion on sums recoverable

36. Accordingly, in respect of the type 1 leases the interim charges made (including those demanded on an ad hoc basis pursuant to the s.20 procedure), only £50 per annum is recoverable. There is also no basis for a demand based on contribution to the reserves.

37. In relation to the type 2 and 3 leases, the demands are payable in full.
38. It is noted that the application form also raised a query as to the correct apportionment of each Applicant's service charge contribution. However, this was not maintained in the Applicants' statement of case and not dealt with by the Respondent. Accordingly it appears that it was a point that was not being pursued by the applicant and I have not had sufficient information in any event to determine the point.

Costs

39. The Applicants also seek an order for costs under the Litigants in Person (Costs and Expenses) Act 1975 on the basis that the Respondent has refused to engage with the Applicants on the points raised in this application. In addition they seek an order preventing the respondent from recovering any costs it has to pay.
40. The majority of the leases are type 1 leases, and therefore the Applicants have been substantially successful in this application. Further, I note the reluctance of the Respondent to engage in correspondence, thus forcing an application to be made. In light of those points, I make an order under s.20C of the Landlord and Tenant Act 1985 precluding the recovery of the landlord's costs of this application through the service charge.
41. The 1975 Act does not give me a jurisdiction to award costs. My only ability to make an award of costs in s.27A cases is pursuant to Rule 13 of the Tribunal Procedure (First tier Tribunal) (Property Chamber) Rules 2013. No application has been made in that regard.

Judge Dovar

Appeals

- 1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application to the First-tier Tribunal at the Regional office which has been dealing with the case.**
- 2. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.**
- 3. If the person wishing to appeal does not comply with the 28-day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28-day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.**
- 4. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking.**