FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**CHI/29UC/LSC/2019/0029**
Premises	**:**	**111 Sturry Road, Canterbury, Kent CT1 1DA**
Applicant	**:**	**Mr David Carroll**
Representative	**:**	**None**
Respondent	**:**	**Mrs Heidi West**
Representative	**:**	**None**
Type of Application	**:**	**Service Charges - Sections 27A and 20C of the Landlord and Tenant Act 1985**
Tribunal Members	**:**	**Mr R Athow FRICS MIRPM – Chair** **Judge W M S Tildesley** **Judge R Cooper**
Date of Hearing	**:**	**19th August 2019**
Date of Decision	**:**	**16 September 2019**
Date of Publication	**:**	**23 September 2019**

DECISION

Decision

1. The Tribunal decides that legal costs of £1,763.40 (£881.70, Mr Carroll's contribution) are not recoverable through the service charge.

2. The Tribunal determines that the surveyors' fees of £540 (£270 Mr Carroll's contribution) are reasonable and payable by Mr Carroll.

3. The Tribunal determines that the insurance premiums of £203.84 and £168.97 (£186.41) are reasonable and payable by Mr Carroll.

4. The demands for payment of service charge made on dates other than on 6th March are recoverable under the terms of the lease.

5. No order made under section 20C of the 1985 Act.

6. Mr Carroll has paid £100 application fee and a £200 hearing fee. In cases such as this where each party has been successful in part, the Tribunal's normal approach is to split the fees between the parties. In this instance the Tribunal is minded to order Mrs West to reimburse Mr Carroll with £150. This order will take effect unless Mrs West makes representations within 14 days from the date of the decision.

Background

7. The Applicant is the Leaseholder of the ground floor flat known as 111 Sturry Road, Canterbury (the premises). The Respondent is the Freeholder of the building and owner of the first floor flat known as 111a Sturry Road.

8. The Applicant sought determination of reasonableness of service charges demanded in 2019 in the sum of £1,338.11, as well as other matters.

9. A telephone case management hearing (CMH) was held on 17th April 2019 in which the Applicant, the Respondent, and counsel for the Respondent, Melanie Mackintosh were all participants.

10. At the CMH the Tribunal identified the following issues to be determined:

    a. Whether the Landlord's legal fees in respect of Section 20 consultation advice is recoverable under the lease?
    b. Whether the survey fee of £540.00 is recoverable and/or whether Section 20 consultation should have occurred in respect of it?
    c. Whether the buildings insurance premium is reasonable and payable?
    d. Whether demands for payment of service charge other than on 6th March in every year may be made pursuant to the lease?

11. Directions were issued on 17th April 2019. [R43]

12. Following various applications by the parties, the Tribunal ordered each party to prepare their own bundle, to be submitted by 17th July. The Tribunal indicated it would decide on the day which documents are to be admitted in evidence. Further, both parties would be permitted to make oral representations as to relevance of documents included in the bundles and also the issue of wasted costs if appropriate.

13. The Hearing was set down for 19th August 2019 following an inspection of the property.

14. References to the page number of the parties' documents are marked [ ] in the decision.

Inspection

15. The Tribunal inspected the premises before the Hearing commenced. Both parties were present. The weather on the day was fine and sunny.

16. The exterior of the property was inspected as far as was possible bearing in mind the confined site and busy main road. The Respondent suggested the Tribunal may wish to view a damp patch in one of the rooms to the first floor flat, but the Tribunal declined this offer as the matters at issue did not directly relate to that area.

17. The property is a semi-detached two storey house situated close to the City centre on the main A28 trunk road. This part of Canterbury has, like much of the city, been developed over recent years to provide accommodation and facilities for the various universities and colleges of further education which now exist within Canterbury. The City is very much geared towards student life as well as its traditional attractions of the Cathedral and tourism.

18. The property was built about 100 years ago of traditional brick and slate construction. The roof appears to be the original one, with many repairs observed, and there are several slipped slates to both the front and rear. There is a modern single storey addition at the rear of the property which is within the ownership of the ground floor flat. Externally the property is in poor decorative condition, especially to the upper levels. There is a garage space on the rear boundary.

The Lease

19. The Applicant holds the ground floor flat under the terms of a lease made the 6 March 1975 between Patrick Joseph O'Regan of the one part and Gerald Henry Claridge and Olga Claridge of the other part. The lease was varied on 8 November 2013 which extended the term

of the lease for 189 years from 6 March 1975, and inserted a clause giving the leaseholder peaceable enjoyment.

20. Under the lease the tenant is required to pay ground rent of £10 per annum and …. *by way of further rent a sum equal to one half of the sum or sums which the Landlord shall from time to time pay by way of premium …….. for keeping the whole of the Building insured against loss or damage …… the said further rent to be paid on the quarter day next following the date of such premium."*

21. Under clause 3(b) the tenants jointly and severally covenant with the Landlord and each other:

> "That they will contribute and pay to the landlord on demand a proportionate part of all reasonable costs charges and expenses from time to time incurred in performing and carrying out the obligations under Clause 4 hereof in connection with the building and premises together with any other expenditure reasonably incurred in connection with the management of the building and premises including the cost of employing any professional or other persons to supervise or perform the execution of the landlords obligations or such professional fees incurred by the landlord (if any) in certifying the amounts to be paid to be paid by the tenant or in recovering the amounts so due such proportionate part to an amount equal to one half of the costs as herein defined and to pay to the landlord on account of such costs charges and expenses the sum of fifty pounds (50) or such increase as shall be required by the landlord on the sixth day of March in every year".

22. Under clause 4 The Landlord covenants with the Tenant subject to the payment of ground rent and service charge to repair the main structure of the building, to decorate the exterior of the building and to keep insured the whole building.

Hearing

23. The Hearing took place at the Canterbury Magistrates' Courts where Mr Carroll was assisted by his wife, Ms Paula Soria. Mrs West was assisted by her husband, Mr Chris Cox. There were other members of the public present, but they took no part in the proceedings.

24. The Tribunal explained the only purpose of the Hearing was to consider the items listed as a result of the CMH and that the other issues would not be dealt with as the application was not relating to them.

Applicant's Case

25. Mr Carroll set out his case in his bundle [A21].

Respondents' Case

26. Mrs West set out her case in her witness statement [R112]

The Issues

27. The issues in this application concerning legal costs and surveyor's costs related to the Respondent's decision to embark on major works.

Legal costs

28. In respect of the legal costs Mr Carroll referred to the analysis of the sums claimed [A21]. Under this heading were three invoices from the Respondent's solicitors, Gardner Croft, £240.00 [A51], £830.10 [52] and £693.30 [A53], for which he had been charged 50%, in the total sum of £881.70.

29. Mr Carroll submitted there was no clause in the lease which allowed the recovery of the legal costs. He referred to the wording of the invoices which stated that the costs were in relation to advice on service charge and covered the period from 26 April 2019 to 3 January 2019. Mr Carroll then referred to the letters of Gardner Croft on 24 August 208 and 6 November 2018 [R91 & R93] which raised a wide range of matters including the section 20 consultation and alleged failures to comply with the terms of the lease.

30. Mrs West submitted that the costs for legal advice on Section 20 consultation were recoverable under the lease, she having issued the Notice of Intent on 19th March 2018 [A141]. No real response was forthcoming from Mr Carroll until 20th April which was the last day for responses. Mr Carroll instructed Comptons solicitors to make the reply which covered several issues resulting in Mrs West taking legal advice. These issues included the claim that much of the work was classed as improvements, such as the under-felting which did not exist, but was required in order to comply with current building regulations.

31. Mrs West submitted that clause 3(b) was capable of wide interpretation and the invoice for £240.00 from Gardner Croft were fees that were recoverable since they came about as a result of the S20 Consultation Notice.

32. Mrs West said that the other invoices were for seeking advice on further queries raised on the proposed works and other issues, including the difficulties she was experiencing gaining access for herself and her contractors.

Survey Fees

33. The disputed fees were those of Price Lilford, building surveyors in the sum of £540 for inspecting and reporting on the roof including

provision of a schedule of works dated 5 October 2018 [A 54]. Mr Carroll's contribution was £270.

34. Mr Carroll submitted they were unreasonably incurred as Mrs West had previously engaged the services of Bill Wilkie FRICS to carry out a Homebuyers Survey and Valuation before she bought the Freehold and first floor flat.

35. His solicitor had raised queries once the Wilkie report had been seen, but the Respondent did not answer the points raised.

36. Mr Carroll considered the report from Price Lilford was unnecessary and superfluous to the Wilkie report and did not need to be undertaken. Mr Wilkie should have given answers to the questions Mr Carroll had raised through his solicitor. Mr Carroll felt the surveyor's fees should have been subject to S20 consultation.

37. Mrs West said she had been advised that the surveyors fees were not subject to Section 20 consultation. The survey of Price Lilford was restricted to the roof and upper areas and was necessary to enable a specification of works to be prepared. Once this was to hand, she could seek competitive tenders and move to the next phase of the consultation process.

38. Mrs West submitted that the surveyor's fee was recoverable under 3(b) of the lease.

Insurance Premium

39. The disputed insurance premium for the period 12 December 2018 to 12 December 2019 comprised two elements: £216.41 dated 26 November 2018 [A 55] and £168.97 dated 31 January 2019 [A56]. The premium of £216.41 included an amount of £12.57 for contents which Mrs West deducted to give a figure of £203.84. 50% of this together with 50% of the £169.97 equalled £186.41, and this was demanded by Mrs West.

40. The reason why Mrs West paid two premiums for the insurance was because the first amount paid on 26 November 2018 provided cover for the building to the value of £159,650, which was the insurance valuation given in the Home Buyer's Report. Unfortunately, Mrs West made a genuine error and had not realised, until it was pointed out by Mr Carroll, that the valuation related only to the first floor flat and not the whole building. As soon as the error was pointed out Mrs West contacted the insurers to increase the value to £313,000 which resulted in the additional premium of £168.97.

41. Mrs West insured the property with the National Landlords Association (NLA).

42. Mr Carroll accepted that the lease states he is required to pay a proportionate and reasonable amount towards the insurance of the

building. Mr Carroll asserted that Mrs West had chosen to take out cover for additional items such as Landlord's fixtures & fittings, malicious damage and vandalism, unoccupancy if over 90 days, contents, loss of rent, public liability in connection with letting of flats, and employer's liability. Mr Carroll said he should not pay for these.

43. Mr Carroll argued that the premium was excessive. He had been on-line and obtained quotes from 64 different sources and all were significantly less than the premium charged by Mrs West.

44. Mr Carroll, having paid the sum of £186.41 as per the original demand asked the Tribunal to determine if a partial repayment was due.

45. Mrs West stated the lease allowed her to recover 50% of the insurance premium. She had gone on-line and obtained some quotes but ended up with NLA as her insurer. She explained that legally she did not need to take the cheapest quote, merely to have regard to the premium. The policy she was advised to take was a comprehensive blocks of flats policy with the usual aspects of cover included. The quotes obtained by the Applicant were not like-for-like. Items such as loss of rent are normally included in this type of policy at a nil premium.

46. Mrs West also reminded Mr Carroll that she had not asked him to pay the insurance premium for the first year she owned the freehold.

47. Mrs West also confirmed that she had offered to have a professional insurance appraisal carried out if Mr Carroll would agree to pay half the cost, but she had not received a reply.

Timing of service charge demands

48. In respect of the demand for service charge Mr Carroll read out paragraph 3(b) of the lease and submitted that it restricted the amount the Landlord could charge as the interim service charge was £50 and was due on 6th March.

49. Mr Carroll said the lease only permitted the Landlord to demand £50 on account on 6th March each year.

50. Mr Carroll submitted that, if the Landlord wished to charge any more than £50, she must consult before the expense was incurred.

51. He had been advised that, after the year end, the Landlord could recover any amount above the £50 which had been spent on the Landlord's obligations under the lease.

52. He stated that the Landlord had billed more than once in each year and these subsequent demands were not due at the time they were demanded.

53. The demands issued by Mrs West required payment within 14 days, which he felt was an unreasonably short period of time, especially the demand issued on 6th December 2018 [A49] as it was very close to Christmas.

54. The Landlord had not provided any budget in advance of the start of the financial year, nor was a year-end statement provided.

55. He stated he would be willing to pay £50 per year interim service charge as per the lease.

56. Mrs West stated Mr Carroll had misunderstood the terms of the lease. Mrs West pointed out the £50 payment was made on account and was not the only sum payable by Mr Carroll under the lease. Mrs West maintained that Mr Carroll was required to pay half the sums expended by the Landlord in complying with the Landlord's obligations under Clause 4.

The Tribunal's consideration

57. The Tribunal was aware there had been a breakdown in communications by both parties and this had resulted in matters not being dealt with in as clear a way as would normally occur between freeholder and lessee.

58. During the process of the Hearing it became clear the dispute was, in part, caused by a lease which was almost 45 years old and not worded as clearly as a lease would be today. It envisaged an informal but workable arrangement between Landlord and Lessee, but both parties had misinterpreted the lease to a certain degree and, as a result, found themselves before the Tribunal to establish a settlement of their dispute.

59. The dispute between the parties primarily concerned the proper construction of the lease. In this regard the Tribunal is guided by the decision of the Supreme Court in *Arnold v Britton* [2015] UKSC 36; [2015] AC 1619.

60. Lord Neuberger in *Arnold v Britton* at paragraph 15 set out the approach that courts and tribunals should follow when interpreting a lease:

> "When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to 'what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean', to quote Lord Hoffmann in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] AC 1101, para 14. And it does so by focussing on the meaning of the relevant words … in their documentary, factual and commercial context. 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 (vi) disregarding subjective evidence of any party's intentions".

61. Lord Neuberger at paragraph 23 was unconvinced by the notion that service charge clauses are subject to any special rule of interpretation, and in particular whether they should be construed restrictively.

62. The Tribunal is determining a question of law when deciding the correct construction of the lease which is confirmed by *Woodfall* at para 7.163.1:

> "The construction of a lease is a matter of law and there is no evidential burden on either party: thus, it was held to be incorrect for a leasehold valuation tribunal to determine that the relevant leases were uncertain and therefore that the landlord and a management company had failed to discharge the onus of showing that the service charges claimed were recoverable under the terms of the leases." [Footnoted to Redrow Regeneration (Barking) Ltd v Edwards [2012] UKUT 373 (LC); [2013] L & TR 8.]".

Legal costs

63. Mrs West relied on clause 3(b) as the authority to recover the legal costs through the service charge, and in particular the following part:

> " any other expenditure reasonably incurred in connection with the management of the building and premises including the cost of employing any professional or other persons to supervise or perform the execution of the landlords obligations or such professional fees incurred by the landlord (if any) in certifying the amounts to be paid to be paid by the tenant"

64. Mrs West said the legal costs were incurred in connection with the management of the building and it was necessary for her to engage a professional, namely a solicitor, to deal with the dispute with Mr Carroll.

65. The Tribunal starts with the ordinary and natural meaning of the clause 3(b). The Tribunal construes the said clause as limiting the costs that can be recovered through the service charge to the costs of those professionals who are directly involved in the management of the building by assisting the landlord to meet his obligations under clause 4. The obligations under clause 4 are confined to "repair maintain and insure the property". The Tribunal considers the legal advice given by Mrs West's solicitors did not relate directly to the management of the building and fell outside the ordinary and natural meaning of clause 3(b).

66. The Tribunal's conclusion is supported by the absence of a reference to solicitor's costs and/or legal costs in the said clause. The Tribunal notes that solicitors' costs are mentioned elsewhere in the lease at 2(i)(b). The Tribunal infers from the specific mention of solicitors' costs at 2(i)(b) that if the parties to the lease had intended to include solicitor's costs in 3(b) they would have said so.

67. The Tribunal would describe the lease, as a whole, as a typical repairing and insuring lease of yesteryear where the intentions of the parties are to restrict the costs recoverable through the service charge to the costs of repair and insure. In the Tribunal's view such an interpretation does not offend commercial common sense. The parties adduced no evidence of the circumstances and facts known to the parties at the time of the execution of the lease.

68. The Tribunal having considered the terms of the lease against the relevant factors identified in *Arnold v Britton* decides that a reasonable person would conclude that the parties did not intend to recover legal costs through clause 3(b).

69. The Tribunal decides that legal costs totalling £1,763.40 (£881.70, Mr Carroll's contribution) are not recoverable through the service charge.

Survey Fees

70. The Tribunal is satisfied that fees of Price Lilford, building surveyors, in the sum of £540 are recoverable under clause 3b as service charges. The Tribunal finds that the fees were directly incurred for the purpose of enabling the landlord to meet the repairing and maintenance obligations under clause 4.

71. The next question is whether it was necessary for Mrs West to incur these costs. The Tribunal finds that it was necessary because Mr Carroll raised questions about the scope of the works proposed and that those questions were proper ones for a building surveyor to evaluate. In this regard the Home Buyers survey was not sufficient. Mr Wilkie was approached but he was not in a position to carry out the required additional survey at that time.

72. The Tribunal explained in the hearing that such fees were not caught by the requirements for section 20 because the survey was not an integral part of the physical works and did not fall within the definition of qualifying works [1].

73. The Tribunals determines the surveyors' fees of £540 (£270 Mr Carroll's contribution) are reasonable and payable by Mr Carroll.

[1] See 13.05 of Service Charges and Management Tanfield Chambers 4th edition .

Insurance Premium

74. The Tribunal explained there were two clauses under the lease referring to the payment of insurance;

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i. "PAYING THEREFOR[sic] by way of further rent a sum equal to one half of the sum or sums which the Landlord shall from time to time pay by way of premium …….. for keeping the whole of the Building insured against loss or damage …… the said further rent to be paid on the quarter day next following the date of such premium."

Clause 4(c) –

ii. "To keep insured at all times throughout the term the whole of the building against loss or damage by risks normally covered from time to time under comprehensive policies…. In the full insurable value thereof …"

75. It would appear from the lease the landlord can choose the scope of the insurance cover. In this case Mrs West opted to insure the property under clause 4(c) which enables the costs of the premium to be recovered through the service charge.

76. Mr Carroll argued that he should not have to pay for the cover relating to landlord's fixtures and fittings, malicious damage and vandalism, unoccupancy up to 90 days, contents, loss of rent, public and employers' liability in connection with the letting of premises. Mrs West explained that she had deducted the amount of the premium attributable to contents for the upstairs flat (£12.57) and that there was no additional premium for the loss of rent cover.

77. The Tribunal is satisfied that, under clause 4 (c), the landlord is obliged to take out a comprehensive policy of insurance covering all the risks associated with the building. The fact that some of the cover may not benefit Mr Carroll is immaterial. Mr Carroll's obligation under the lease is to contribute 50 per cent of the costs of the comprehensive policy not 50 per cent of the cover that is directly applicable to his flat.

78. Mr Carroll adduced evidence of online quotations for house insurance with a rebuild cost of £301,000 to £350,000 from the "Compare the Market" platform. The quotations ranged from £158.95 to £263.50 for no excess specification, 2-3 years no claims and no landlords' benefits except for property owner's liability [A140].

79. Mrs West had tested the market before she purchased the policy with NLA. Mrs West produced a quotation from Saga in the sum of £381.06 [R410] . In June 2019 Mrs West carried out another online search using the Compare the Market platform for landlord

insurance which produced two quotations for premiums of £765.02 (ARO) and £1,677.48 (AXA). Mrs West acknowledged that these quotations included an element for contents insurance.

80. The Tribunal is satisfied that the quotations obtained by Mr Carroll were for regular household insurance and did not reflect the risks associated with building. A "block policy" such as that obtained by Mrs West is typical for buildings containing a number of leasehold properties. On the evidence before it the Tribunal is satisfied that the premiums paid by Mrs West for comprehensive policy from NLA were reasonable.

81. The Tribunal determines the insurance premiums of £203.84 and £168.97 (£186.41) are reasonable and payable by Mr Carroll.

Timing of service charge demands

82. The lease is a very old-fashioned one, and Clause 3(b) sets out the terms for raising demands. The first interim service charge payment falls due on 6th March and is £50 per annum unless the Landlord decides it to be otherwise. This leaves the Landlord the ability to collect funds in advance of an expected expenditure, (which may be subject to Section 20 consultation if it is for major works to the building). Over and above that, the Landlord can demand a 50% share of any costs of expenditure permitted under the lease, as soon as it has been incurred.

83. In respect of the insurance premium, the Landlord can recover 50% of the premium on the next quarter day after the premium has been paid if it is under the rent clause. If it is under clause 4c, the landlord is entitled to recover the costs as soon it has been incurred.

84. During the Hearing Mr Carroll accepted these findings, and that they were payable on demand.

Section 20C

85. There is no authority under the lease to recover the legal costs of these proceedings through the service charge. In those circumstances there is no power to make an order under section 20C of the 1985 Act.

Reimbursement of Tribunal Application and hearing fees.

86. Under rule 13(2) of the Tribunal Procedure Rules 2013 the Tribunal has a discretion to require a party to reimburse to any other party the whole or part of the fee paid by the other party.

87. The Tribunal's power under rule 13(2) is not caught by the provisions of rule 13(1) under which the Tribunal operates as a no costs forum unless one of the parties has acted unreasonably.

88. Mr Carroll has paid £100 application fee and a £200 hearing fee. In cases such as this where each party has been successful in part, the Tribunal's normal approach is to split the fees between the parties. In this instance the Tribunal is minded to order Mrs West to reimburse Mr Carroll with £150. This order will take effect unless Mrs West makes representations within 14 days from the date of the decision.

Costs Application

89. The Tribunal explained that this would not be considered today, but if the parties wished to pursue the matter, they should do so within 28 days of the publication of this decision.

90. The Tribunal reminds the parties that it operates as a rule a no costs forum and can only consider costs if a party has acted unreasonably in the conduct of the proceedings. **The Tribunal's initial view is that this high threshold of unreasonable conduct in relation to the proceedings has not been reached**. The parties may wish to bear this in mind when considering whether to make an application under rule 13(1).

Richard Athow FRICS MIRPM

Chairman

Appeals

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.

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.

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.

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.