FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**BIR/00CQ/LIS/2019/0011**
Property	**:**	**Flat 3, Dalton Lodge, 1A Styvechale Avenue, Coventry CV5 6DW**
Applicant	**:**	**Anthony Parrott**
Joining Applicant	**:**	**Stuart Sanderson (Flat 2)**
Respondent	**:**	**Oakbourne Investments Limited**
Type of Application	**:**	**(a) An application upon the liability to pay and reasonableness of service charges under Section 27A of the Landlord and Tenant Act 1985** **(b) An application for the limitation of the Respondent's costs in this application under Section 20C of the Landlord and Tenant Act 1985**
Tribunal Judge	**:**	**Dr Anthony Verduyn**
Tribunal Valuer	**:**	**Mr Vernon Ward FRICS**
Date of Site Inspection	**:**	**22nd July 2019**
Date of Decision	**:**	**30th September 2019**

DECISION

BACKGROUND

1. The Applicant, the long leaseholder of Flat 3 Dalton Lodge, made an application dated 4th March 2019 which was received at the Tribunal on 6th March 2019. The Applicant sought a determination of the liability to pay and reasonableness of service charges, specifically challenging management fees for Dalton Lodge totalling £10,000 in each of 2016, 2017 and 2018, and a prospective fee of £10,008 for 2019. The Joining Applicant is his neighbour, under a similar long lease, of Flat 2, Dalton Lodge.

2. This is not the first time that the service charges in respect of Dalton Lodge have been before the Tribunal. A previous decision was made on 5th December 2013 (BIR/00CQ/LSC/2013/0002, nominally in respect of Flat 1 Dalton Lodge, "the 2013 Decision"). That application was more comprehensive in its scope and arose from rather different circumstances. The relevant law has, however, remained essentially unchanged.

THE LAW

3. The powers of the Tribunal to consider service charges are contained in sections 18 to 30 of the Landlord & Tenant Act 1985 ("the Act").

4. Under Section 27A(1) of the Act, the Tribunal has jurisdiction to decide whether a service charge is or would be payable and if it is or would be, the Tribunal may also decide:-

   a) The person by whom it is or would be payable,
   b) The person to whom it is or would be payable,
   c) The amount, which is or would be payable,
   d) The date at or by which it is or would be payable, and
   e) The manner in which it is or would be payable.

5. Section 18 defines "service charge" and "relevant costs" and provides as follows:

   18.— Meaning of "service charge" and "relevant costs".

   (1) In the following provisions of this Act "service charge" means an amount payable by a tenant of a [dwelling] as part of or in addition to the rent—

   (a) which is payable, directly or indirectly, for services, repairs, maintenance [, improvements] or insurance or the landlord's costs of management, and

   (b) the whole or part of which varies or may vary according to the relevant costs.

   (2) The relevant costs are the costs or estimated costs incurred or to be incurred by or on behalf of the landlord, or a superior landlord, in connection with the matters for which the service charge is payable.

   (3) For this purpose—

   (a) "costs" includes overheads, and

(b) costs are relevant costs in relation to a service charge whether they are incurred, or to be incurred, in the period for which the service charge is payable or in an earlier or later period.

6. Section 19(1) of the Act provides that:

   "Relevant costs shall be taken into account in determining the amount of the service charge payable for a period –

   a) Only to the extent that they are reasonably incurred, and
   b) Where they are incurred on the provision of services and the carrying out of works, only if the services or works are of a reasonable standard:

   and the amount payable shall be limited accordingly."

7. A service charge is only payable if the terms of the lease permit the lessor to charge for the specific service. The general rule is that service charge clauses in a lease are to be construed restrictively, and only those items clearly included in the lease can be recovered as a charge (Gilje v Charlgrove Securities [2002] 1EGLR41).

8. The construction of the lease is a matter of law, whilst the reasonableness of the service charge is a matter of fact. On the question of burden of proof, there is no presumption either way in deciding the reasonableness of a service charge. Essentially the Tribunal will decide reasonableness on the evidence presented to it (Yorkbrook Investments Ltd v Batten [1985] 2EGLR100).

9. In relation to the test of establishing whether a cost was reasonably incurred, in Forcelux v Sweetman [2001] 2 EGLR 173, the Lands Tribunal (as it then was) (Mr P R Francis) FRICS said:

   "39. …The question I have to answer is not whether the expenditure for any particular service charge item was necessarily the cheapest available, but whether the charge that was made was reasonably incurred.

   40. But to answer that question, there are, in my judgement, two distinctly separate matters I have to consider. Firstly, the evidence, and from that whether the landlord's actions were appropriate, and properly effected in accordance with the requirements of the lease, the RICS Code and the 1985 Act. Secondly, whether the amount charged was reasonable in the light of that evidence…"

10. In Veena v Cheong [2003] 1 EGLR 175, the Lands Tribunal (Mr P H Clarke FRICS) said:

    "103. …The question is not solely whether costs are 'reasonable' but whether they were 'reasonably incurred', that is to say whether the action taken in incurring the costs and the amount of those costs were both reasonable."

11. And further clarification of the meaning of "reasonably incurred" has been provided by the Upper Tribunal in London Borough of Lewisham v Luis Rey-Ordieres and others [2013] UKUT 014 which said (at para 43):

> "…there are two criteria that must be satisfied before the relevant costs can be said to have been reasonably incurred: the works to which the costs relate must have been reasonably necessary; and the costs incurred in carrying out the works must have been reasonable in amount."

THE LEASES

12. The Leases of the Applicant and Joining Applicant are largely in common form, save that the copy of the former for the Tribunal was incomplete. They each contain a covenant by the lessee to pay a service charge contained in para 2 of the Fifth Schedule. This provides for the lessees:

> "To pay the Management Company the Annual Maintenance charge in paragraph 9 of the particulars in respect of Payment on Account of the services to be provided by the Management Company as set out in the Sixth Schedule such sum to be paid monthly in advance by standing order on the first day of each calendar month PROVIDED THAT:
>
> (a) [not relevant]
>
> (b) [not relevant]
>
> (c) The Annual Payment on Account of Maintenance charges shall remain as specified in paragraph 9 of the Particulars until 30th April 2005 whereupon the same shall be liable to be increased by the Management Company on 1 May and annually thereafter by such amount as it shall in its absolute discretion determine provided that any such increase shall not exceed 15% of that payable in the previous Maintenance Year."

13. Paragraph 9 of the Particulars is missing from the Applicant's lease, but the Joining Applicant's Particulars read:

> "ANNUAL PAYMENT ON ACCOUNT OF MAINTENANCE CHARGES - £82 per week (rising) (reviewed 1st May each year)

14. The first schedule which contains definitions. Relevant definitions for the service charge are:

> "(viii) "The Maintenance Year" is the twelve-month period commencing on the First day of May in any year."
>
> [In the Lease to Flat 3 only]
> ""The Maintenance Charge" is the amount or amounts from time to time payable under clause 2 of the Fifth Schedule."

15. In respect of the lease to Flat 2, it appears that there are pages missing immediately after the words quoted in (viii) above, which may explain the omission of the definition of the "Maintenance Charge", but the lease to Flat 3 has no clause 2 of the Fifth Schedule (it jumps from 1 to 3) and clause 2 of the Fifth Schedule in the Lease for Flat 3 relates to the payment of Council Tax and reads as clause 3 in the lease to Flat 3. It appears clear, however, that Clause 1 of the Fifth Schedule is being referred to (a point also apparent from the 2013 Decision where clause 2 herein is quoted as clause 1 in the Lease for Flat 1).

16. The Sixth Schedule sets out the obligations of the Management Company under its covenants, expressly "Subject to the payment by the Lessee of the Maintenance Charge …" As one might expect, these detail repair, maintenance, decoration and insurance provision, and other expenditure for common benefit. The following is notable:

> "10. To administer the day to day functioning of the Building and to provide a manager of the Property to whom all administrative matters may be referred."

17. As noted by the Tribunal in the 2013 Decision, the leases contain no provisions which set out the proportion of the total costs which are to be borne by each lessee, nor any provisions relating to the provision of accounts, nor a reconciliation of the payments on account and the actual costs. In respect of apportionment, the Tribunal on the last occasion stated the following, at [74]:

> "The Tribunal's determination is that in respect of the four flats never let on long leases, the provisions of the seventh schedule of the leases provide a clear answer. Oakbourne Ltd has covenanted to observe the covenants that would have been imposed upon the lessees. It is therefore liable to pay the service charge in respect of the unlet flats, not the lessees of the let flats. This decision disposes of the difficulties caused by non-payment of the service charge for flat 8 from September 2010. No part of the charges that should have been paid for flat 8 can be charged to the accounts of the applicants in these proceedings."

There was no contention before this Tribunal that the division of any sum charged should not be equal between the flats, seven of which are now held on Assured Shorthold Tenancies from the Respondent, and only two now on long leases (Flats 2 and 3).

INSPECTION BY THE TRIBUNAL ON 22ND JULY 2019

18. Dalton Lodge comprises of nine flats. Of these, eight are located in the principal building which the Tribunal is advised is a converted house. The eight flats are arranged with three on the ground floor, four on the first floor and one on the second floor. A communal hallway and landing provide access to the flats. There is a communal gas fired boiler providing heating and hot water to the flats and the building benefits from softwood framed double glazed window units.

19. The remaining ninth unit comprises a single storey unit which is located in the rear garden.

20. There are 6 car parking spaces to the front of the Property and a communal garden area to the rear.

21. The flats occupied by the Applicant and the joining Applicant, numbers 2 and 3, are both located on the ground floor of the principal building. Each flat is of a studio type with a combined living and sleeping area with kitchen and bath or shower room off.

22. Whilst the Applicant was keen to point out what he viewed to be poor quality materials used in the windows and doors to the flats, there was no obvious decay or disrepair, and the areas the responsibility of the Respondent were all in reasonably good order.

THE MANAGEMENT FEES

23. The application form did not disclose any dispute that management fees were properly payable, but questioned the reasonableness of the sum of £10,000 for 3 years and £10,008 for 2019. There were somewhat opaque references to the management fees representing 43% of management charges (42% for 2019) and pointing to the cap at a 15% increase in any year.

24. Disclosure was directed to be followed by sequential statements of case from the Applicant and the Respondent.

25. As part of disclosure, the Respondent provided a letter dated 2nd May 2019, which was more properly part of its Statement of Case. It explains that the current arrangement of 2 long leases and 7 Assured Shorthold Tenancies has been in place since 2016. Dalton Lodge Management Limited was appointed as property manager under an agreement ("the Agreement") dated 1st December 2014 (i.e. after the 2013 Decision) and £10,000 was chargeable each year under the agreement. No "ancillary fees" have been charged and improvements have been made to laundry room, garden decking and barbecue area, and with the installation of security cameras (CCTV). In July 2018 notice was given of the increase of Maintenance Fees by £25 per month, and appended letters show this taking the monthly sum charged to £241.67 from 1st September 2018.

26. The Agreement refers to 8 units, 2 of which are long leases (the 9th unit is not referred to). The significant part of the Agreement read as follows:

"2. During the Service Period, Dalton will (subject to the overall direction of Oakbourne and its Board of Directors) manage the Business of Oakbourne in a proper and business-like manner and to the best advantage of Oakbourne and whenever so requested by Oakbourne, will undertake the following functions in relation to the Business of Oakbourne:

a) Receive and administer the rent, prepare a statement of account when rent is received and pay the rent less expenses in the bank account nominated by Oakbourne.
b) Handling any maintenance issues, appointing professional contractors / builders as needed.
c) Complying with statutory requirements for gas certificates, EPC's & HIP etc.
d) The arrangement and payment of adequate insurance cover.
e) The management of any litigation relating to the Property.

3. Dalton shall bear the cost of the Business and invoice Oakbourne accordingly, together with a consideration for its services in such amount as shall from time to time be agreed between Dalton and Oakbourne."

27. A list of "Services Provided by Dalton Lodge Management Ltd" accompanied the Agreement and included "Provide on-site Property Manager", the provision of "24/7" emergency contact numbers, and the arrangement or supervision of a large number of tasks. Some tasks are expressed to be done directly, like "remove snow and ice then apply grit to outside walkways and driveway in winter months to make safe" and "provide a post box on outside of building…" and "Maintain cleaning equipment", but the tone of the text suggests that these are also things to be arranged or organised, hence "managed" in its broadest sense.

28. On 14th May 2019 the Applicants produced a joint statement of case and the respondent replied on 5th June 2019. The upshot of these exchanges was that there had been a substantial reduction in service levels since the 2013 Decision: cleaning was now limited to communal areas and 24-hour emergency call system ceased. The Applicants assert that maintenance became irregular. The Respondents assert that management fees fell by £50 per week from February 2015.

29. The Applicants complain that annual accounts have not been provided, and that they have been referred to the statutory accounts for the management company filed at Companies House. They disputed the right to increase fees by (on their calculation by 11.5%) on 1st September 2018 (rather than 1st May). Two Schedules were provided after long delay, they say, and they assert management fees should not exceed about 10% of the total charges. The Respondents assert that the increase in charges was the first in the period of the applications and related to maintenance fees, and the maintenance fee was still only in the order of £3 per flat per day as management fees. This matter is discussed further below in the context of the schedules provided by the Respondent.

30. The Applicants complain that the rent for the flats let on ASTs is inclusive of charges, but the rents are static, so the increased maintenance charge is being borne by them alone. Indeed, they point to income dropping in the schedules provided corresponding with when short let flats were vacant. The Respondent asserts that all pay the same maintenance fee. The Tribunal will touch upon this below, but the effect of an increased maintenance charge component in a static total rent should be the reduction in the actual rent received by the landlord.

31. The Applicants complain that they are paying within the management fee for the collection of the ground rent for the landlord. This is correct from the terms of the Agreement and not within the covenants of the Management Company in the Sixth Schedule of the Lease. The Respondent objects that the ground rents have not been paid, but this is irrelevant if the process of collection is being charged to the Applicants as part of the overall management fees.

32. Finally, the Applicants refer to the cap on increases in fees at 15%, but the Respondent asserts the biggest increase was as long ago as 2001 at 4.1%. The Tribunal notes that there was no apparent increase since 2015, which on the material before it was the year preceding the first year the subject of complaint to it. In those circumstances there is no relevant increase in the fees the subject of the application until 2019, and then it was negligible at £8 only.

33. Turning briefly to the two schedules provided.

34. Appendix A shows income from Flats 2 and 3 as a maintenance charge of £50 per week from each (i.e. £433.32 per month) and the management fee £185.18 (hence 43% of the total charge). It is noted also that printing and stationary, accounts costs and unidentified sundry expenses also appear separately adding £10.96 per month.

35. Appendix B shows the maintenance charge for all flats for the period May 2018 to April 2019, with the management charge now recorded at £834 per month, hence £10,008 for the period. It is notable that the fees received, as the Applicants observe, vary markedly. Costs (labelled "Administrative Expenses" collectively) also vary from month to month, as one would expect, but the result is in fact a cumulative surplus of £1,084.86. It is noted that the leases do not deal with how surpluses are to be credited and deficits debited, and the information provided is unsatisfactory in that respect, because Appendix B assumed a nil balance at the start of the period.

DISCUSSION

36. The Tribunal is mindful that it must limit its considerations to the subject matter of the application, namely the "management charges" or management fees. Such a fee can legitimately be charged (as was noted in the 2013 Decision at [65(g)]. On that occasion a total of £1,500 was allowed or £187.50 per flat (at [65(e)]. That, of course, was also in the context of the provision of more comprehensive services being managed. Even so, this Tribunal must make decisions on the evidence before it now, and also may reasonably have in mind that the former decision was now some 6 years ago.

37. The Tribunal considers that regard must be had to the small number of units at Dalton Lodge. This necessarily means that management fees expressed per unit, will be higher than would otherwise be the case for bigger developments: there are fixed management tasks that are divided over only a few units. Conversely, the lease provides no mechanism for the charges for printing and stationary, nor accounts costs, and so £3.95 pcm per flat appear as separate items which should be added for the purposes of these considerations to the £185.15 pcm management fee (although there is only evidence for these charges in

2017/2018). Furthermore, the Applicants are contributing to the cost of rent collection, which is also no part of the requirements of their leases. The upshot is that the Management Fees are plainly excessive and, to the Tribunal's general knowledge and consistent with the submissions of the Applicants, substantially above the usual rate for the area of Coventry. Taking all these factors into account, the Tribunal considers that the appropriate management fee for each of the years concerned in this application (bearing in mind both low inflation and the evidence from the Respondent that management fees were static in the years concerned) is £2,250 p.a. or £250 per unit p.a. and not the £10,000 or £10,008 pursued by the Respondents. The Respondent's sums bear no relationship to the cost of proper management and are wholly disproportionate to the other expenditure. It is not for the Applicants to bear the burden of a thoroughly bad deal struck between lessor and management company. Further, the sum of £250 per unit includes the £3.95 pcm in printing, stationery and accountancy charges that are properly part of the management fee.

38. Furthermore, pursuant to Section 20C of the 1985 Act, any costs of the landlord in respect of this application should not be added to service charges. There is no basis in the leases for such an addition, and the Applicants having been successive in their complaint should not bear any (of what should be negligible) costs of the Respondent.

39. For the avoidance of doubt, the effect of this decision is that for each year of 2016, 2017 and 2018, the Applicant and the Joining Applicant are entitled to credit or repayment of the bulk of the management fees they have been charged. The calculation would be as follows for each of the three years: £10,000 charged, when £2,250 was due, giving a credit or repayable sum of £7,750 divisible between the 9 flats, hence £861.11 per flat (and Applicant). Each of the Applicant and Joining Applicant is entitled to credit or repayment of £2,583.33. Furthermore, each is to contribute to the service charges for 2019, a sum of £250 for the year in management fees. Further, printing, stationery and accountancy charges levied in 2017/8 (but not 2019) are also to be credited to each flat in the sum of £59.10.

Tribunal Judge Dr Anthony Verduyn

Dated 27th September 2019