FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**CHI/45UC/LSC/2019/0061**
Property	**:**	**Batworth Park House, Crossbush, Arundel, West Sussex BN18 9PG**
Applicant	**:**	**Various lessees**
Representative	**:**	**Mr D Joiner**
Respondent	**:**	**Fountain Retirement Housing Association Ltd**
Representative	**:**	**Mr D Barker**
Type of Application	**:**	**S27A and s20C Landlord and Tenant Act 1985**
Tribunal Members	**:**	**Judge F J Silverman Dip Fr LLM** **Mr K Ridgeway MRICS**
Date and venue of Hearing	**:**	**Havant Justice Centre** **23 October 2019**
Date of Decision	**:**	**06 November 2019** **Reissued 27 November 2019**

DECISION AND ORDER

1 The Tribunal determines that the Respondent landlord was not entitled to make a charge to the tenants under the service charge provisions of the lease or otherwise in respect of rent allegedly payable in respect of accommodation provided free of charge by the landlord for a resident warden at the premises.

2 The sums in question for the years 2013 to 2018 inclusive amounting in total to £50,105 and prospective charges for 2019 of £9,070 as set out in paragraph 18 below ought to be repaid or re-credited to the Applicant tenants in the proportions in which they respectively contributed to those payments.

3 The Tribunal makes an order under s20C Landlord and Tenant Act 1985 in favour of Caroline Hamilton Green, Royston John Gamble, Hilary Ann Dickinson, Peter Andrew Watson, Carolyn Margaret Watson, Brian Pulley, Beverley Dawn Pulley, Francis John Mason, Beverley Clark, Graham John Irwin, Jacqueline Diane Irwin, Cherry Patricia Kirkwood Martin, Peter Leslie Montgomery Gray, Jennifer Mary Gray, Jennifer Ann Spencer and Richard Stephen Robinson.

4 The Tribunal orders the Respondent within 28 days of the date of this decision to repay to the Applicants the sum of £300 representing their application fee (£100) and hearing fee (£200).

We exercise our powers under Rule 50 to correct the clerical mistake, accidental slip or omission at paragraph 17 of our Decision dated 06/11/2019. Our amendments are made in bold.
Signed: Judge F J Silverman
Dated: 27 November 2019

REASONS

1 The Applicants are tenants and long leaseholders of the property known as Batworth Park House, Crossbush, Arundel, Sussex BN18 9PG (the property) of which the Respondent is the landlord and reversioner. The property comprises twenty residential units of sheltered housing plus a flat occupied by a resident warden.

2 The application was dated 28 May 2019 and Directions were issued by the Tribunal on 16 July and 16 August 2019.

3 In view of the restricted nature of the issue to be decided by the Tribunal an inspection of the property was not considered to be necessary or proportionate.

4 A bundle of documents was presented for the Tribunal's consideration and had been read by the Tribunal prior to the commencement of the hearing. At the hearing the Applicants were represented by Mr D Joiner and the Respondent by Mr D Barker.

5 At the commencement of the hearing the Respondent made an application to adduce additional documents and a supplementary witness statement. The Respondent said he had recently received documents from the Applicants and that there were documents missing from the bundle. The Tribunal explained to the Respondent that the Applicants' skeleton argument which had been served at the end of the previous week did not contain evidence but was merely a legal summary of the Applicants' case to which the Respondent was free to respond orally. The Tribunal was not minded to admit additional documents given that the date for delivery of the bundle had been 23 September 2019 which would have given the Respondent adequate time in which to check it and to make an application to file additional material if necessary. It was not fair to the Applicants to introduce extra documents on the day of the hearing. Having heard the Tribunal's comments the Respondent withdrew his application.

6 The sole issue before the Tribunal related to the validity of the charges demanded by the Respondent for rent allegedly payable in respect of accommodation provided free of charge for a resident warden at the property. The issue concerned service charge years 2013-2018 and potential charges for 2019.

7 The Applicants hold their respective properties under leases the terms of which are to all extents and purposes the same as those contained in a lease dated 31 March 1987 and made between the Respondent as landlord and Mr & Mrs H Quilter as tenants (page 21) which describes the landlords as the estate owners of (inter alia) 21 self-contained units of accommodation ....[and].. a warden's flat. Clause 5 of the lease contains the landlord's repairing obligations and its covenant '(d) to employ a warden who shall be resident in the Property' (page 29). Clause 4 (page 25) sets out the tenant's covenant to pay the service charge the details of which are contained in the Schedule (page 35).

8 Clause 2(a) of the Schedule (page 35) allows the Respondent to recover by way of service charge: 'the cost of the warden's salary and the cost of accommodation for the warden at the property and all other costs in connection with the provision of the warden's service'.

9 The Respondent said that the 'pre-purchase information' supplied to prospective tenants (said to be page 53 although this page appears to be part of the budget for 2019) contains an item headed 'manager's flat rent' and the corresponding service charge accounts (eg page 45) contain an entry for rent under the heading 'Expenditure'. These documents therefore suggest to the tenants that the Respondent has paid rent for the warden's flat which would then be recoverable from the tenants through the service charge provisions of the lease.

9 The Applicants challenged this sum because they said that the warden's accommodation was supplied free of charge and no rent had been paid or was payable in respect of it.

10 The Respondent accepted that no rent had been paid in respect of the warden's flat but argued that they were entitled to recover a sum in lieu of rent as 'rent foregone'. He argued that the words 'costs' 'expenses' and 'outgoings' used variously in the Schedule to the lease (page 35) could be construed to include this type of non-payment and referred to the unreported case of Agavil Investment Company v Corner (1975) where such a notional payment had been allowed. He also stated that all the tenants were aware of the rent provisions because they were told about them in prior to purchase literature (see para 9 above) and that the practice of charging the non-payment had been existence for many years so that the tenants were estopped from denying that it was a valid service charge item.

11 For the Applicants it was argued that the words 'costs' 'expenses' and 'outgoings' could not logically be interpreted to mean anything other than money expended and in this case no money had been spent because the warden lived in the accommodation rent free, the freehold of the property being owned by the Respondent. The tenants had therefore been overcharged by several thousand pounds for each of the years in question. Further, they submitted that foregoing an expense could not amount to a 'cost' within the statutory definition in s18 Landlord and Tenant Act 1985. They rejected the Respondent's reliance on the Agavil decision saying that the wording in the lease in that case had been different from that in the lease under discussion and that in contrast to the present case the requirement in Agavil had been for the landlord to pay for the warden's accommodation wherever it was situated. In the present case the landlord's covenant required it to accommodate the warden on the premises in a flat specifically provided for that purpose.

12 The Applicant relied on Gilje v Charlgrove Securities Ltd [2001] EWCA Civ 1777 where a similar argument put forward by a landlord to support its claim for a rent foregone was dismissed. It was said in that case that '*implication is not sufficient to support [the landlord's] case. The landlord seeks to recover money from the tenant. On ordinary principles there must be clear terms in the contractual provisions to entitle him to do so. The lease, moreover, was drafted or proffered by the landlord. It falls to be construed contra proferentum. It is noted that there are no provisions for the calculation or revision of the notional rent..... I do not consider that a reasonable tenant or prospective tenant... would perceive that paragraph obliged him to contribute to the notional cost to the landlord of providing the caretaker's flat.*'

13 Having considered the cases put forward by both parties the Tribunal dismisses the unreported Agavil decision primarily because the wording of the lease in that case was significantly different to the clause contained in the lease under discussion here. It agrees with the Applicant that the authority of the Court of Appeal decision in Gilje is preferable and should be followed because its facts are very similar to

those in the present case, in particular the Tribunal notes that there is no reference in the present lease for any calculation of a notional rent.

14 On the basis that the Tribunal chooses to adopt the Gilje decision it is not necessary for it to consider the landlord's argument that he should be allowed to charge a notional rent for the use by the warden of his flat on the basis that the warden's occupation deprived the landlord of the income which he would otherwise receive by letting the flat on the open market or how much that rent should be. For the sake of completeness the Tribunal did consider this aspect of the case and finds the Respondent's arguments to be flawed. Firstly, the Respondent was seeking to recover an open market rent for the property and purported to present quotations from a local estate agent to demonstrate the potentially achievable level of rent which appeared to be around £10,000 per annum. He was unable to produce evidence of the instructions he had given to the estate agents in respect of the valuation. The Tribunal, using its own experience and expertise considered that the quoted potential rent had probably been assessed on an open market basis without regard to the fact that the use of the flat in question was restricted both by planning conditions (page 62) and by the lease itself which would have resulted in a significantly lower estimate of the potential rent. Three of the four quotes cited by the Respondent related to flats in one development in Arundel. It is unlikely that all three were wardens' flats and unknown whether they shared the same size or facilities as the subject property. They were not therefore reliable comparables.

15 Any letting of the flat to a person other than the warden would also constitute a breach covenant by the landlord (Clause 5 (d), page 29) which would reduce the attractiveness of the flat to any potential tenant and might also reduce the value of the other flats which would thereby lose one of the most significant benefits of their present accommodation, namely twenty four hour on-site assistance.

16 The Collins dictionary definition of 'cost' ('the price paid…') and 'expense' ('a particular payment of money') were read out to the Respondent's representative who agreed that both involved an outlay of money. He was asked whether the item for £8,425 headed 'rent' included under the expenditure column of the 2016 accounts (page 45) had ever been paid and he said it had not. He agreed that it was a fictitious entry. When asked what had happened to that money (which when paid by the tenants had the effect of creating an overpayment of £8,425 on the year's expenditure) he said that it was transferred to the landlord's account but that 10% was later re-transferred to the sinking fund. It is noted that the Respondent charges management fees of £4,665 separately as part of its expenditure. The justification for this additional amount of £8,425, disguised as rent is unclear.

17 The Tribunal also considered and rejected the Respondent's argument that the Applicants should be estopped from denying the 'rent' payment because they had known about it and had always paid it without complaint. Estoppel had not been pleaded or raised by the Respondent prior to the hearing. Before hearing the parties' submissions the Tribunal adjourned briefly to allow the **Respondent** time to consider the **Applicant**'s **authorities relating to estoppel**.

When asked by the Tribunal to do so the Respondent was unable to explain any legal argument in favour of his contention. The Tribunal accepts that some literature supplied by the Respondent (see eg page 54) referred to rent for the warden's flat but considers that the tenants, as lay persons and possibly also as vulnerable adults (the property is question is sheltered accommodation) could have been misled by that literature into thinking that money was actually paid by the Respondent for the rent of the warden's accommodation whereas in reality no money was ever paid by the Respondent but was treated by them as profit in their hands save for a small percentage said to be repaid into the sinking fund. An estoppel requires consent to have been given in full knowledge of the true facts. In this case the Applicant tenants were not in possession of the true facts and their consent cannot be assumed. No estoppel can be implied in this situation.

18 In conclusion the Tribunal finds the Respondent's arguments unfounded and determines that the sums in question for the years 2013 to 2018 inclusive as set out below and amounting to £50,105 in total ought to be repaid or re-credited to the Applicant tenants in the proportions in which they respectively contributed to those payments. The prospective charges for 2019 (£9,070) should not be demanded.

2013 - £7,905
2014 - £8,065
2015 - £8,225
2016 - £8,425
2017 - £8,635
2018 - £8,850

19 A s20C application was made by the Applicants. The Respondent made no submissions relating to this. Although the Respondent no longer has responsibility for the management of the major part of the property (see CHI/45UC/LRM/2018/0008, /0009 and /0010) the Tribunal considers that it is appropriate to protect the Applicants as named above and makes such an order in their favour.

20 The Tribunal also orders the Respondent to repay to the Applicants the sum of £300 representing the application and hearing fees paid by them.

21 **The Law**

Landlord and Tenant Act 1985 (as amended)

Section 18

(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.

Section 19

(1) Relevant costs shall be taken into account in determining the amount of a service charge payable for a period -
(a) only to the extent that they are reasonably incurred, and
(b) where they are incurred on the provisions of services or the carrying out of works, only if the services or works are of a reasonable standard;
and the amount payable shall be limited accordingly.

(2) Where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable, and after the relevant costs have been incurred any necessary adjustment shall be made by repayment, reduction or subsequent charges or otherwise.

Section 27A

(1) An application may be made to the appropriate tribunal for a determination whether a service charge is payable and, if it is, as to -
(a) the person by whom it is payable,
(b) the person to whom it is payable,
(c) the amount which is payable,
(d) the date at or by which it is payable, and
(e) the manner in which it is payable.

(2) Subsection (1) applies whether or not any payment has been made.

(3) An application may also be made to the appropriate tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs and, if it would, as to -
(a) the person by whom it would be payable,
(b) the person to whom it would be payable,

(c) the amount which would be payable,
(d) the date at or by which it would be payable, and
(e) the manner in which it would be payable.

(4) No application under subsection (1) or (3) may be made in respect of a matter which -
(a) has been agreed or admitted by the tenant,
(b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,
(c) has been the subject of determination by a court, or
(d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.

(5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.

Section 20

(1) Where this section applies to any qualifying works or qualifying long term agreement, the relevant contributions of tenants are limited in accordance with subsection (6) or (7) (or both) unless the consultation requirements have been either—
(a) complied with in relation to the works or agreement, or
(b) dispensed with in relation to the works or agreement by (or on appeal from) the appropriate tribunal .

(2) In this section "relevant contribution", in relation to a tenant and any works or agreement, is the amount which he may be required under the terms of his lease to contribute (by the payment of service charges) to relevant costs incurred on carrying out the works or under the agreement.

(3) This section applies to qualifying works if relevant costs incurred on carrying out the works exceed an appropriate amount.

(4) The Secretary of State may by regulations provide that this section applies to a qualifying long term agreement—
(a) if relevant costs incurred under the agreement exceed an appropriate amount, or
(b) if relevant costs incurred under the agreement during a period prescribed by the regulations exceed an appropriate amount.

(5) An appropriate amount is an amount set by regulations made by the Secretary of State; and the regulations may make provision for either or both of the following to be an appropriate amount—
(a) an amount prescribed by, or determined in accordance with, the regulations, and

(b) an amount which results in the relevant contribution of any one or more tenants being an amount prescribed by, or determined in accordance with, the regulations.

(6) Where an appropriate amount is set by virtue of paragraph (a) of subsection (5), the amount of the relevant costs incurred on carrying out the works or under the agreement which may be taken into account in determining the relevant contributions of tenants is limited to the appropriate amount.

(7) Where an appropriate amount is set by virtue of paragraph (b) of that subsection, the amount of the relevant contribution of the tenant, or each of the tenants, whose relevant contribution would otherwise exceed the amount prescribed by, or determined in accordance with, the regulations is limited to the amount so prescribed or determined.]

Section 20B

(1) If any of the relevant costs taken into account in determining the amount of any service charge were incurred more than 18 months before a demand for payment of the service charge is served on the tenant, then (subject to subsection (2)), the tenant shall not be liable to pay so much of the service charge as reflects the costs so incurred.

(2) Subsection (1) shall not apply if, within the period of 18 months beginning with the date when the relevant costs in question were incurred, the tenant was notified in writing that those costs had been incurred and that he would subsequently be required under the terms of his lease to contribute to them by the payment of a service charge.

Section 20C

(1) A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a court, residential property tribunal or the Upper Tribunal, or in connection with arbitration proceedings, are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application.

(2) The application shall be made—
(a) in the case of court proceedings, to the court before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to a county court;
(aa) in the case of proceedings before a residential property tribunal, to that tribunal;

(b) in the case of proceedings before a residential property tribunal, to the tribunal before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to any residential property tribunal;
(c) in the case of proceedings before the Upper Tribunal, to the tribunal;
(d) in the case of arbitration proceedings, to the arbitral tribunal or, if the application is made after the proceedings are concluded, to a county court.

(3) The court or tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances.

Failure to comply with rules, practice directions or Tribunal directions Rule 8

8.—(1) An irregularity resulting from a failure to comply with any provision of these Rules, a practice direction or a direction does not of itself render void the proceedings or any step taken in the proceedings.

(2) If a party has failed to comply with a requirement in these Rules, a practice direction or a direction, the Tribunal may take such action as the Tribunal considers just, which may include—

1. (a) waiving the requirement;
2. (b) requiring the failure to be remedied;
3. (c) exercising its power under rule 9 (striking out a party's case);
4. (d) exercising its power under paragraph (5); or
5. (e) barring or restricting a party's participation in the proceedings.

(3) In land registration cases, the action that the Tribunal may take includes—

1. (a) where the party who failed to comply was the person who made (or has been substituted for or added to the party who made) the original application, directing the registrar to cancel the original application in whole or in part;
2. (b) where the party who failed to comply was an objector to (or was substituted for or added as an objector to) the original application, directing the registrar to give effect to that application in whole or in part as if that objection had not been made.

(4) In land registration cases, the Tribunal must, if the action taken does not include either of the requirements referred to in paragraph (3), send written notice to the parties of the Tribunal's decision as to what action is taken (if any) and give any consequential directions.

(5) The Tribunal may refer to the Upper Tribunal, and ask the Upper Tribunal to exercise its power under section 25 of the 2007 Act in relation to, any failure by a person to comply with a requirement imposed by the Tribunal—

1. (a) to attend at any place for the purpose of giving evidence;
2. (b) otherwise to make themselves available to give evidence;
3. (c) to swear an oath in connection with the giving of evidence;
4. (d) to give evidence as a witness;
5. (e) to produce a document; or
6. (f) to facilitate the inspection of a document or any other thing (including any premises).

Judge F J Silverman as Chairman
Date 06 November 2019
Revised 27 November 2019

Note:
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.