FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**MAN/00FF/LSC/2019/0026 and 0027**
Property	**:**	**Apartments 15 and 22, Merchant Exchange, Skeldergate, York YO1 6DG**
Applicant	**:**	**ANDREW GEORGE WHITNEY**
Respondent	**:**	**MERCHANT EXCHANGE MANAGEMENT COMPANY LIMITED**
Type of Application	**:**	**Section 27A, Landlord and Tenant Act 1985**
Tribunal Members	**:**	**A M Davies, LLB** **J Jacobs, MRICS**
Date of Decision	**:**	**24 January 2020**
Date of Determination	**:**	**6 February 2020**

DECISION

DECISION

1. For Flat 15 Merchant Exchange the Applicant shall pay service charges as follows:

for the year ended 31 December 2011	£1675.52
for the year ended 31 December 2012	£1744.52
for the year ended 31 December 2013	£2006.88
for the year ended 31 December 2014	£2205.93

after deduction of payments made by the Applicant and retained by the Respondent on account of such sums.

2. For Flat 22 Merchant Exchange the Applicant shall pay service charges as follows:

for the year ended 31 December 2011	£2846.30
for the year ended 31 December 2012	£2963.89
for the year ended 31 December 2013	£3409.68
for the year ended 31 December 2014	£3747.86

after deduction of payments made by the Applicant and retained by the Respondent on account of such sums.

REASONS

BACKGROUND

1. On 15 May 2018, the Applicant obtained a determination pursuant to s.27A Landlord and Tenant Act 1985 ("the Act") by a differently constituted tribunal to the effect that service charge demands issued by the Respondent's professional property management agents J H Watson Property Management Limited ("Watsons") did not comply with the requirements of the lease, and were therefore ineffective. The service charge years to which this ruling related were those ending on 31 December 2011 to 31 December 2015 inclusive.

2. The Respondent caused the defect to be corrected. This involved having the existing accounts audited and certified by an accountant, and then early in 2019 serving fresh service charge demands on the leaseholders. In the course of the audit, the service charge figures for the year ended 31 December 2015 were slightly increased.

THE APPLICATION

3. The Applicant applied on 1 March 2019 for a determination
   (a) as to whether he was given valid notice under s.20(B)(2) of the Act that the relevant costs for each of the years ended 31 December 2011 to 31 December 2014 inclusive had been incurred and that he would subsequently be required to contribute to them by payment of a service charge; and if not

(b) whether the Applicant is liable for the service charges demanded by the Respondent;
(c) whether an administration charge relating to the costs of these proceedings should be reduced or extinguished in the service charge account specific to the Applicant, pursuant to paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 ("Paragraph 5A"); and
(d) whether pursuant to s.20C of the Act the Respondent should be prevented from adding the costs of this application to the service charge account.

4. The Applicant claimed that he was not required to pay service charges for the years 2011 to 2014, because he had received no notice of those charges within 18 months of their being incurred, contrary to s.20B of the Act. Further, he acknowledged that he had had notice of the service charge costs for the year ended 31 December 2015 within 18 months of their being incurred, but sought an order that he should not be required to pay the amount by which the service charge claim produced in the 2019 audited accounts exceeded the figure he had originally had notice of.

5. The 2015 service charge account was subsequently agreed between the parties. The service charge demands challenged by the Applicant (as at 1st March 2019) reflected the amended accounts recently served on him, the figures for each year in question being:

	Apartment 15	Apartment 22
Year ended 31 December 2011	£1669.08	£2835.76
Year ended 31 December 2012	£1844.31	£3133.47
Year ended 31 December 2013	£2059.66	£3499.35
Year ended 31 December 2014	£2047.62	£3478.90

6. The application was listed for directions on 17 June 2019. At the directions hearing, Watsons' employee Ms Riaz representing the Respondent made a formal admission, recorded in the directions order, that in respect of the years 2011 to 2014 inclusive no notice of service charges compliant with s.20B(2) had been sent to the Applicant within 18 months of those charges being incurred.

7. The application was listed for a paper determination, and the parties lodged their respective arguments in writing. Because of the Respondent's admission on 17 June, the Applicant did not address the issue of whether s.20B(2) compliant notices had been given by the Respondent for the relevant years, and the Respondent's argument rested on res judicata and abuse of process.

8. On receipt of the parties' documents (including service charge accounts and correspondence from 2012 – 2015) and statements, a draft decision dated 18 September 2019 was issued by the Tribunal, with a case management note requesting that the parties submit representations as to whether s.20B(2) compliant notices had been served on the Respondent.

9. In error, the draft decision of 18 September 2019 as sent to the parties was headed "Preliminary Decision". It was, however a draft subject to finalisation following receipt of the parties' further representations. This was apparent from the Case Management Note which referred to the Tribunal's "provisional view" and to the accompanying document as a "draft" of a "proposed order"

10. In response to the draft decision and Case Management Note, the parties requested a hearing, and the matter was listed in Leeds on 24 January 2020.

THE LAW

11. S.20B of the Act provides as follows:

"(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."

PRELIMINARY ISSUE 1

12. At the hearing the Respondent was represented by Ms Zanelli, solicitor, of PM Legal Services, and the Applicant was represented, as in previous hearings, by Mr Warren, AssocRICS, formerly an associate director of Watsons but now in business under the style Leasehold Debt Recovery Limited of which he is sole member and director. Since prior to 2011 Watsons have been the Applicant's managing agents, and during his employment by the company Mr Warren personally oversaw the management of Merchant Exchange and advised the Applicant regarding the matters now before the Tribunal.

13. On 22 January 2020 Ms Zanelli wrote to the Tribunal requesting that the hearing be adjourned for one month, to allow the RICS and the IRPM to investigate a report, submitted by Ms Zanelli on 22 January, of Mr Warren's perceived conflict of interest in representing the Applicant against the Respondent. The Tribunal refused that request but it was dealt with as a preliminary issue at the hearing.

14. Having heard Ms Zanelli and Mr Warren, the Tribunal determined not to adjourn, and permitted Mr Warren to continue to represent the Applicant for the following reasons:

14.1 the Tribunal was unable to ascertain any specific harm or prejudice to the Respondent arising out of the alleged conflict of interest. It followed that no breach of natural justice would occur;

14.2 the Respondent's application was made extremely late in the proceedings. An adjournment on these grounds would not further the overriding objective to deal with the case fairly and justly and in line with the considerations listed at Rule 3(2) of the Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013 ("2013 Procedure Rules").

PRELIMINARY ISSUE 2

15. The Respondent had included in the hearing bundle a brief undated Skeleton Argument prepared by Watson's Miss Riaz. On 23 January 2020 a more detailed skeleton argument was served and filed by Ms Zanelli. Mr Warren objected and sought an order from the Tribunal that the arguments in the more recent skeleton – including consideration of the case law cited there - be rejected, on the grounds

15.1 that he had received it only at around 6.30 pm the previous evening and had not had an opportunity to consider it properly, and

15.2 that as a lay person, he was unfamiliar with the cases cited by Ms Zanelli and should have been given time to study them.

Mr Warren did not seek an adjournment for this purpose.

16. After hearing both parties on the matter, the Tribunal determined that Ms Zanelli's skeleton argument and the case law copied with it would be accepted but excluding paragraphs 2 to 21 which dealt with Mr Warren's alleged conflict of interest. The grounds for this determination were

16.1 the Tribunal had already made a determination on the Respondent's application for an adjournment arising out of Mr Warren's alleged conflict of interest;

16.2 it is not unreasonable or at all unusual for a skeleton argument to be presented very shortly before a hearing in the absence of directions to the contrary;

16.3 the case law cited by Ms Zanelli consisted solely of leading cases on the points in issue, and Mr Warren, holding himself out as a professional adviser and representative on such matters, may be assumed to be reasonably familiar with those judgments;

16.4 it would be impossible for the Tribunal to deal with the matter effectively without regard to relevant prior decisions.

PRELIMINARY ISSUE 3

17. In her original skeleton argument Ms Riaz for the Respondent formally requested that she be permitted to withdraw her own admission on 17 June 2019 that s.20B(2) notices had not been given to the Applicant. In support of this application she claimed (in a witness statement dated 5 November 2019) that at the time she did not understand the requirements of s.20B, but was aware that in 2015 Watsons had adopted the specific wording now incorporated into the service charge information they serve on leaseholders, in an attempt to comply with the subsection. She had therefore assumed that any previous information given to leaseholders did not comply with the requirements of s.20B(2).

18. The Tribunal acceded to Ms Riaz' request to withdraw her admission, in order to further the overriding objective to deal with the case fairly and justly. Moreover, both parties were able at the present hearing to address the application, namely whether effective s.20B(2) information had been served, and if so whether the Applicant was liable to pay service charges for the years 2011 to 2014.

CAUSE OF ACTION ESTOPPEL

19. The Respondent claimed that the application should be dismissed on the ground that non-compliance with s.20B of the Act could and should have been raised by the Applicant in the Tribunal proceedings determined on 15 May 2018 ("the 2018 proceedings"), and that to oppose the service charges on this basis in later proceedings was an abuse of the Tribunal's processes. The Respondent relied on the judgement of Sir James Wigram VC in Henderson v Henderson (1843) 3 Hare 100 at page 114:

"*where a given matter becomes the subject of litigation…by a Court of Competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in context, but which was not brought forward, only because they have, from negligence, inadvertence or even accident, omitted part of their case*".

20. The purpose of this rule is to protect parties from repeated actions relating to the same set of facts. "Special circumstances" has been held to include, for example, the discovery of or access to evidence which was not available in the original proceedings. It was not argued before this Tribunal that there were any such special circumstances.

21. Ms Zanelli argued that this present case sits on all fours with res judicata case law, and that cause of action estoppel prevented the Tribunal from making any determination on the application for the reasons set out in Virgin Atlantic Airways Limited v Zodiac Seats UK Limited [2013]UKSC 46 and Arnold v National

Westminster Bank PLC [1991] 2AC 93. Mindful of Mr Warren's claim that these cases were unfamiliar to him, the Tribunal permitted Ms Zanelli to explain their relevance in some detail. She also referred the Tribunal to

21.1 Section 27A(4) of the Act which reads
"no application under subsection (1) or (3) may be made in respect of a matter which… has been the subject of determination by a court…"; and

21.2 Rule 9(3)(c) of the 2013 Procedures Rules which reads
"The Tribunal may strike out the whole or a part of the proceedings or case if …. the proceedings or case are between the same parties and arise out of facts which are similar or substantially the same as those contained in a proceedings or case which has been decided by the Tribunal…"

22. Ms Zanelli argued that the correct course of action for the Applicant was to have pursued enforcement proceedings in the County Court to ensure that the determination of 17 May 2018 was given its proper effect, rather than to bring new proceedings.

23. In response the Applicant claimed that the present application did not relate to the service charges under discussion in the 2018 proceedings, because the balances in the service charge accounts had been revised since 2018. He said that the service charges now claimed for the years 2011 to 2014 inclusive had not previously been demanded, and relate to service costs which were not known in 2018, and of which the Applicant was then unaware. He referred to Jetha v Basildon Court Residents Company Limited [2017] UKUT58(LC) at paragraph 47, where HHJ Behrens suggested that a procedural error in the collection of service charges could be corrected *"(subject to any rights under the 1985 Act)"*.

24. Ms Zanelli responded, and the Tribunal agrees, that the correction of service charge demands in the Jetha case involved compliance with Deeds of Covenant entered into by the leaseholders in their capacity as members of the respondent company in that case, and that the words in parentheses quoted above are not a basis on which the Applicant could avoid the issue of cause of action estoppel.

25. In considering this issue, the Tribunal has also had regard to the fact that between 2011 and 2014 the Applicant is understood to have been not only a member of the Respondent company but one of its directors, and thus to an extent responsible for taking and accepting Watsons' advice as to how service charge demands were prepared and how leaseholders were notified of the sums due. His present attempt to avoid paying service charges for his two flats on the basis of s.20B – an argument that was undoubtedly available to him in the 2018 proceedings – is invidious and unconscionable, especially given that the shortfall in recovered management costs must presumably be made up by his fellow leaseholders unless it is recovered by the Respondent from Watsons.

26. The Tribunal therefore determines that the issue raised by the Applicant in these proceedings could have been raised in the 2018 proceedings, and that that element of the application that is based on s.20(B) is res judicata and to be dismissed as an abuse of process.

THE SERVICE CHARGES PAYABLE

27. The effect of this decision is that the Applicant cannot challenge the effectiveness of the 2011 - 2014 service charge demands to give leaseholders sufficient notice under s.20B(2) to "stop time running" and preserve the Respondent's entitlement to claim those service charges following correction of the procedural defect identified in the 2018 proceedings.

28. All leaseholders who received service charge demands for the years 2011 to 2014, including the Applicant, became aware of their obligation to make those contributions to the costs of maintaining and managing the building in which they owned flats. The requirements for an effective s.20B(2) notice listed by Mr Justice Morgan in The Mayor and Burgesses of the London Borough of Brent v Shulem B Association Limited [2011] EWHC 1663 (Ch), extensively cited by Mr Warren, were missing from the document under consideration in that case – which was a letter in which service charge figures and their breakdown did not appear. In the present case, the leaseholders received all the information they would normally expect in a service charge demand, the only defect being a failure to certify those figures in accordance with the lease. They cannot be said to have been taken by surprise by the subsequent demand, or to have been denied an opportunity to make provision for the payment.

29. At the hearing, the current status of the Applicant's service charge account was unclear. It appears that the Respondent – still advised by Watsons – had credited some figures and debited others: Ms Zanelli was unable to provide a full explanation. It appears that the costs of audit and certification, for example, have been added to the original (2011 – 2014) service charge figures. If this is so, those costs should appear (if at all) in the account for the service charge year in which they were incurred. Other adjustments to the original figures were unexplained and have therefore not been adopted by the Tribunal.

30. The Tribunal heard argument that s.20B issues do not apply to service charges demanded and paid on account during any service charge year. Such payments on account were made by the Applicant in each of the years in question. Since the application based on s.20B has been dismissed a determination on this is not required. The order has been formulated on the basis of the whole service charge payable by the Applicant in relation to each of his flats for each of the years 2011 – 2014, less amounts already paid by the Applicant (and retained by the Respondent) in respect of those charges.

31. It appears likely that the tribunal hearing the 2018 proceedings made their decision in the expectation that once the 2011 – 2014 accounts had been audited the service charges, then payable in full, would be the same amounts as had originally been demanded. As it is not clear to the current Tribunal why the small variations in cost have occurred, the service charges payable by the Applicant for costs incurred in the years 2011 to 2014 inclusive are as shown in the unaudited and uncertified sets of accounts which were originally formulated to set out the costs of managing Merchant Exchange in those years.

COSTS

32. The Applicant has not identified any "particular" administration charge in respect of which he asks the Tribunal to make a determination under Paragraph 5A, and no determination is made in relation to that application.

33. In view of the Tribunal's conclusions, no order is made under s.20C of the Act.

34. The parties have leave to file and serve written representations on the issue of costs of this application.

Tribunal Judge A Davies
24 January 2020