FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	CHI/00HH/LIS/2019/0048 & 0049
Property	**:**	4 & 5 Marble Court, Parkfield Road, Torquay, Devon TQ1 4DX
Applicant	**:**	Marble Court (Torquay) Ltd
Representative	**:**	Mr Scott Horner
Respondent	**:**	Mr Alistair Michael Dodge & Ms Natalie Immaculate Dodge
Representative	**:**	Mr Charles Shwenn
Type of Application	**:**	Service Charge
Tribunal Member(s)	**:**	Judge D. R. Whitney Judge J. Dobson Mr R. Brown FRICS
Date of Hearing and venue	**:**	20th February 2020 at Newton Abbott Magistrates Court
Date of decision	**:**	23th March 2020

DECISION

Background

1. The Applicant seeks a determination of liability to pay and reasonableness of service charges for the years 2014 to 2018 inclusive.

2. Various sets of directions were issued with the last substantive directions being those dated 16th December 2019. All directions had been substantively complied with.

3. References in [ ] are to page numbers within the bundle supplied. Counsel for each party provided skeleton arguments and copies of various authorities relied upon.

The Law

4. The relevant law is set out in sections 19, 20 and 27A of the Landlord and Tenant Act 1985. Copies of the sections are set out in Annex A to this decision.

Hearing

5. The tribunal sets out a precis of the hearing and the evidence given. The below is not intended to be seen as a full account of everything said at the same.

6. The start of the hearing was delayed at the request of counsel for both parties. At the commencement of the hearing counsel for the Respondent had not had sight of the reply [304-306]. A further short adjournment was allowed so Mr Shwenn had an opportunity to read the reply prior to hearing the evidence of Mr Mansfield.

7. The tribunal explained to counsel for the Applicant that they had identified from the papers that they would need to be satisfied that demands had been issued which complied with the lease and statute. In particular as to whether or not a summary of rights and obligations had been served with each demand.

8. Counsel agreed that the form of lease for both of the subject Properties was the same.

9. Mr Horner called Mr Andrew Mansfield. Mr Mansfield confirmed his witness statement [99-106] was true and accurate. He also confirmed he had produced the reply to Natalie Dodge's statement [304-306]

10. Mr Mansfield was a director of the Applicant company. The company had purchased the freehold in February 2014 from the receivers. The company had managed the development themselves since acquiring the same.

11. Mr Mansfield was then cross examined by counsel for the Respondents.

12. He was taken to [109] being an invoice for the service charges for the year ending 31st March 2015. Mr Mansfield explained these were prepared by him and the bookkeeper. The same approach to preparation of these invoices was undertaken for each of the years subject to this determination.

13. Mr Mansfield stated that the development as a whole consisted of 20 leasehold properties which were a mixture of residential and commercial units. Mr Mansfield said that he prepared the invoices and accounts in accordance with advice he had been given by his accountants. He explained separate accounts were prepared for the commercial and residential parts. Costs are divided by 1/20th save that some costs are charged only to the residential parts. For costs divided equally between all units the accounts for the residential part are prepared on the basis the total cost was divided by 20 and then 12/20ths being attributed and used for the residential accounts. This was on the basis that there were 12 residential units.

14. He accepted that under the lease only one set of accounts should be prepared for the development as a whole and for the future this could be remedied. It was his position the method he adopted did not affect the figures being demanded.

15. Mr Mansfield explained the window cleaning was only charged to the residential units. This was because it was only the residential units who benefitted from the same.

16. Mr Mansfield candidly admitted he had not read the leases for some time and did not know them inside out. He stated he relied upon advice he had been given by his solicitors and accountants when the freehold was purchased as to the way that the company should manage the development.

17. Counsel for the Respondent referred Mr Mansfield to the ICEAW Technical Release Residential Service Charge Accounts and provided him with a copy. Mr Mansfield was not aware of the same.

18. Mr Mansfield stated that all of the invoices for each of the years were contained in the bundle. Those for the year 4 February 2014 to 31 March 2015 were at [111-120].

19. Mr Mansfield explained that the cost of the insurance was more than that on the schedule [111] because they paid by direct debit over the year and also pay a fee to the broker. Details of these costs for the year ending March 2015 were not within the bundle.

20. On certain of the matters Mr Mansfield could not answer questions. He explained he relied on information provided by the bookkeeper who prepared the actual figures. He suggested the bookkeeper may be able

to explain the figures. He accepted that moving forward the presentation of the accounts may need to be changed. He stated that if any invoices are not included within the bundle the bookkeeper must have not included the same.

21. Mr Mansfield stated that the company did not have a dedicated service charge account. He now understands he should and will set one up.

22. He confirmed that Mr Howard, his co-director, was a director of Meridian New Homes. This company purchased materials for the Applicant to use for certain works and then charged the Applicant [141]. The reason for this was they were able to achieve trade discounts which ultimately benefitted all the leaseholders in keeping the costs to a minimum. He accepted that he could now see that there was a conflict of interest here but it was a genuine purchase.

23. Mr Mansfield confirmed that Wellswood Property Care was a business he set up with Mr Howard to undertake property maintenance. It was not a limited company. He has used this to do some works which were required at short notice in 2015. It had undertaken no works at Marble Court since then.

24. Mr Mansfield explained they had tried to set up a contingency fund. He did not think there was anything specifically in the bundle but had used money from contingency due to non-payment by the Respondent.

25. Upon questioning by the tribunal Mr Mansfield explained he had no trade or profession as such but helped with developments. He accepted he was effectively the manager for the Property. He had done some property management many years ago. He was not aware of the ICAEW guidance and had never seen the RICS Residential Service Charge Code. As he had said he had not read the lease recently.

26. He explained that he issued proforma invoices at the start of the year which people pay upon. An example was in the extra documents filed on behalf of the Respondents in accordance with the directions dated 16th December 2019.

27. The level of the contingency fund had been decided on the advice of the accountant who suggested £2000 per year for the residential units was a reasonable figure. There was a separate contingency for the commercial units.

28. Mr Mansfield confirmed there were no separate service charge accounts. He relied upon the invoices within the bundle such as at [109] as being the accounts.

29. Mr Mansfield confirmed the company is VAT registered. Those items marked in the accounts with * are net of VAT and so VAT is charged.

30. As to the management charge there is no separate invoice but is to cover his time. The amount remains in the company account and from time to time the directors may draw upon it.

31. In respect of the insurance he confirmed that the Applicant does not get a commission. He does not know if the broker does.

32. This concluded the evidence for the Applicant.

33. Mr Shwenn for the Respondent called Mrs Dodge.

34. Mrs Dodge confirmed her statement [78-81] was true. Certain paragraphs being numbered 1-3 were not within the bundle. Mr Horner helpfully read these out for all to hear but they did not contain any material information.

35. Mr Horner then cross examined Mrs Dodge.

36. She now accepted that not all occupiers of units may pay service charge as it is the leaseholder who is responsible for payment.

37. Mrs Dodge stated that the lease says she should pay 1/20th yet the statement says 1/12th and the service charges should be as set out in the lease. Further she was not satisfied in the way that the Applicant seemed to pick and choose what was charged to the residential units such as with the window cleaning.

38. Mrs Dodge accepted invoices had been produced for materials but her challenge to these was that there was no evidence that the materials purchased had been used solely in respect of Marble Court. Further she was not satisfied that the invoices produced matched the figures being charged in the various invoices.

39. Mrs Dodge felt it was improper for Mr Mansfield to use companies connected to him or his co-director for undertaking works at Marble Court. Further it was for Mr Mansfield to have done his homework to know what he was required to do.

40. In respect of the contingency Mrs Dodge accepted the need for the same but felt the amounts claimed were unreasonably high. Further she could not understand why there was currently only about £4,500 in the same [307] given the amounts for her properties had been paid.

41. The tribunal adjourned for lunch at 1pm.

42. The tribunal resumed at 2pm. Mr Shwenn relied upon his skeleton argument.

43. He stated that the lease was clear [16-35] as to the mechanism and that all charges should be one pot for the development as a whole and that

each of the two dwellings should pay 1/20th as per the defined proportion within the lease.

44. Whilst Mr Mansfield suggests that the residential parts pay 12/20ths equally and so each is only paying 1/20th this is not what the lease provides. Further the figures do not bear this out. Mr Shwenn gave a number of examples but in particular looking at the invoice for year ending March 2016 [122] this provides that the Accountancy costs should be £705.60. The invoices within the bundle for these items total £1063.50 and so 12/20ths should be £638.10.

45. Mr Shwenn suggests that the accountancy is not transparent and does not comply with the ICAEW guidance. This is the minimum a leaseholder can and should expect.

46. Mr Shwenn suggests that not all items of expenditure are evidenced by invoices and the like. Mr Mansfield had been given ample opportunity to explain and had no credible evidence. The bookkeeper had not been called to give evidence and the Applicant could have done so.

47. Mr Mansfield had no experience. He was unaware of the RICS Code, ICAEW technical release and had not read the lease recently. He consistently blamed his accountants and others.

48. In his submission the Applicant has failed to prove their case. Further it would appear all monies are not held in a ring-fenced account and there are no proper records relating to the contingency fund.

49. In respect of any matters of costs the Respondent seeks an order pursuant to Section 20C of the Landlord and Tenant Act 1985 and also paragraph 5A of Schedule 11 of the Commonhold and Leasehold Reform Act 2002. This is on the basis that in his submission the application brought by the Applicant does not stand up to even basic scrutiny and it would be unjust for the costs to be met by the Respondents.

50. Mr Horner relied upon his skeleton argument.

51. Mr Mansfield, he states accepted some failings. The company took over a block of 20 units, took advice and now with the benefit of hindsight this was not ideal. Mr Mansfield tried to go about matters in a fair manner and distributed the costs in a fair manner. He attempted to do so in a way that may not strictly be in accordance with the lease but in an honest and reasonable way.

52. As to Mr Mansfield's fee for management this is he suggests at the lower end of what would be considered reasonable. He is entitled to charge a fee and has come along and explained everything today.

53. As to costs in his submission his client is entitled to recover their costs as a matter of contract under the lease and it would be just and

equitable to allow recovery of the same. Mr Horner confirmed to the tribunal he is happy for the tribunal to determine the costs on the submissions made and papers before it.

54. Mr Horner accepted that there was no evidence that a Summary of Rights and Obligations had been given with any of the demands.

Decision

55. The tribunal thanks both counsel for their submissions. The tribunal in reaching its determination has had regard to all of the papers within the bundle, the additional papers filed by each party in accordance with the directions dated 16th December 2019 and the parties counsel's skeleton arguments.

56. The tribunal notes that it found both witnesses to be truthful. Both presented their evidence in a clear and truthful manner in so far as they were able, making concessions where appropriate.

57. The tribunal records that Mr Mansfield has little experience of managing a development of this type. He readily accepted certain of his shortcomings including knowing little about the actual leases or the RICS Service Charge Code which has been approved by the Secretary of State. He appeared to rely on advice from third parties which if it was as given is less than helpful. Mr Mansfield also explained how he relied upon a bookkeeper Ms Pintilie and on a day to day basis had little involvement in the accounting.

58. The tribunal was not satisfied any valid demands have been issued by the Applicant for any of the years in dispute being the service charges for the year ending 31st March 2014 to 31st March 2018 inclusive. As a result none of the funds claimed are properly due and payable by the Respondents.

59. The tribunals reasons are that the demands included within the bundle and relied upon by the Applicant and by way of example [109] were not accompanied by a summary of rights and obligations required pursuant to Section 21B of the Landlord and Tenant Act 1985. This is a fundamental requirement and without, no demand is valid.

60. Further the demands are not in accordance with the lease. The lease [13-35] has a clear service charge mechanism. This provides that the Applicant is required to pay 1/20th of the total maintenance charges for the Property. The Property is said to be Marble Court as a whole and does not differentiate between commercial and residential. The Eighth Schedule sets out the amounts which may be charged by way of Maintenance Fund and the Fifth Schedule Part I sets out how this should be paid. The lease provides that the year end is 31st March in each year.

61. The Applicant has created his own accounting method. The accounts do not relate to Marble Court as a whole but are purely for the 12 residential dwellings. The Applicant contends this makes no difference as each is effectively only paying 1/20th of the total cost but on the Applicants own evidence certain items are charged solely to the residential dwellings. The lease does not allow this and the result is that the demands are invalid in that they do not follow the terms of the lease.

62. The tribunal has considered what if anything is reasonably due and payable.

63. Turning firstly to the management fee. This is not reasonable. The tribunal is not satisfied that this is payable to the Applicant itself. In any event even if we are wrong on that we are not satisfied that the fee claimed has been reasonably incurred. Mr Mansfield being the person supplying the service has no experience or expertise. Further it is unclear as to exactly what he has done. We have found no valid demands have been issued. The management has not been undertaken in accordance with the lease and has, in that way, been fundamentally flawed. Turning to the evidence as a whole it is just and equitable to determine that the management fee claimed for each of the various years has not been reasonably incurred.

64. What is clear is that some accountancy work has been undertaken by bookkeepers. The costs claimed are modest for a development of 20 units. Using the invoices supplied within the bundle the tribunal determines for each of the years the total fee for the development, of which if and when a valid demand is issued the Respondent would be liable for 1/20th for each of their dwellings is:

Year ending 31 March 2014	NIL
Year ending 31 March 2015	£92
Year ending 31 March 2016	£487.50
Year ending 31 March 2017	£408.75
Year ending 31 March 2018	£191.25

65. The tribunal is not satisfied any of the bank charges claimed are payable or reasonable as a service charge item. These are expenses of the Respondent company for maintaining its own bank account and are not service charge items.

66. Likewise we are not satisfied that any of the sundry items claimed which appear to be postage and similar are costs properly payable as a service charge and we determine that all such sums are not payable.

67. In respect of the repair items and maintenance items the tribunal accepts the evidence of Mr Mansfield that work was undertaken. Whilst disputed by Mrs Dodge that any work had been undertaken we

are conscious she does not live at her units. The amounts claimed are relatively modest and on a balance of probabilities we accept the work was undertaken. The tribunal agrees it would be reasonable to claim 1/20th of the total sum set out in the accounts for the various years [109, 110, 122,123, 152, 153 and 183].

68. Likewise the tribunal agrees that the cleaning costs claimed in the accounts produced for the various years are reasonable save that each unit should pay only 1/20th of the cost claimed. By example for the year ending March 2016 the sum claimed is £811.20 and 1/20th of this is £40.56.

69. The tribunal does not find any of the accountancy costs (other than bookkeeping costs we have previously dealt with) are due and payable. The costs claimed in the main relate to the Respondent company and its requirements to file documents with Companies house and Tax Returns. We note there are no proper service charge accounts and certainly nothing that has been or should be certified. As a result none of these costs have been reasonably incurred as a service charge.

70. In respect of the building insurance we have been provided with various schedules. No alternative quotes were provided or substantive challenge to these and so we accept these sums are reasonable. Mr Mansfield refers to additional charges being levied for expenses claimed by the broker and for paying by direct debit. For some years details have been found but not for all. Looking firstly at the brokers fees there was no evidence as to whether or not they would receive commissions. In this tribunals opinion such fees are not reasonable. In respect of the direct debit and increased costs given the limited evidence we have determined in this case this was not reasonably incurred. We allow the following amounts for each of the relevant years ending on 31st March for which each unit should contribute 1/20th:

2015	£3643.75
2016	£3785.33
2017	£3955.11
2018	£4561.11

71. This leaves the question of the contingency. The tribunal determines the methodology adopted by the Applicant is not reasonable. No proper consideration had been given for calculating the amount required having regard to the likely future costs of the development. Mr Mansfield stated he relied on a figure suggested by his accountants. It also appears from the evidence that there is one reserve fund (which the Applicant calls contingency) for the residential parts and one for the commercial. As we have already stated the Applicant should have one set of accounts for the whole development. This is equally true of the reserve. Whilst the lease does allow a reserve fund to be set up under the lease (Eighth Schedule paragraph 10 [32 & 33]) the amount

claimed must not exceed 30% of the maintenance costs in each of the previous years.

72. The tribunal is satisfied that it would be reasonable to include reserve fund contributions but the Applicant needs to have a proper methodology and such sum must not exceed 30% of the previous years' service charge cost.

73. We note that at page 307 there was a sheet supposedly setting out what was within the "Residential Contingency Fund". This referred to debits for non-payment by Units 4 & 5 although we were told, and it did not appear to be disputed, that the Respondents had paid the sums owed. This tribunal does not have jurisdiction to order monies to be returned. We have however already determined that the Applicant has not properly demanded any monies for the period we have determined and so any monies paid were not required to be paid by the Respondents.

74. For the avoidance of doubt any amounts save those that we have addressed are not reasonable or payable for any of the years we have adjudicated upon being the years ending 31st March 2014 to 31st March 2018. It is now for the Applicant to see if they are able to issue valid demands for any sums and we would urge the parties to work together to agree such matters including any return of monies.

75. This leaves the questions of costs. The Applicant indicates that they wish to recover their costs on the basis of the contractual rights under the lease to recover costs incurred in contemplation of forfeiture. It is not necessary to look in detail at the clauses of the lease. Even if the lease allows recovery of such costs we have determined that none of the sums claimed are properly payable. As a result the Respondent cannot be in breach of their lease.

76. The Respondent via their counsel has sought an order pursuant to Section 20C and Paragraph 5A. We are satisfied that it is reasonable to make an Order pursuant to section 20C that none of the costs of this application may be recovered from the Respondents as a service charge item. Likewise we determine that it is reasonable for an Order pursuant to Paragraph 5A to be made that none of the costs of this application may be recovered for the Respondents as an administration charge under the lease.

77. For both our reasoning is the same. The Applicant has made the application and has almost wholly failed. We determined that none of the amounts demanded are currently payable. It is also clear that the Applicant has failed to manage the property in accordance with the lease terms and also we have reduced the amounts claimed. Compliance with the lease terms is a basic requirement and the Applicant could and should have satisfied itself as to those requirements prior to issuing the application given they have been professionally represented throughout. As a result we are satisfied that it is not reasonable to allow the Applicant to recover any costs from the

Respondent either directly relying upon the lease terms or as part of any service charge.

Judge D. R. Whitney

RIGHTS OF APPEAL

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