FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**CHI/45UC/LSC/2019/0016**
Property	**:**	**Flat 6A Pier Road, Littlehampton, West Sussex BN17 5BA**
Applicants	**:**	**Matthew Joseph Bergin and Jessica Fowler (nee Parrish)**
Representative	**:**	**Ms Sarah Rigby**
Respondents	**:**	**Margaret Vermette and Personal Representative of Wendy Mavis Pearce deceased**
Representative	**:**	**Mr Matthew Tonnard of counsel, instructed by PDC Law**
Type of Application	**:**	**Determination of service charges: section 27A Landlord and Tenant Act 1865**
Tribunal Members	**:**	**Judge E Morrison** **Judge J Dobson** **Mr B HR Simms FRICS**
Date and venue of Hearing	**:**	**28 February 2020 at Havant Justice Centre**
Date of decision	**:**	**18 March 2020**

DECISION

The applications

1. By an application made on 4 January 2019 Mr Matthew Bergin applied under section 27A of the Landlord and Tenant Act 1985 ("the Act") for a determination of his liability to pay service charges for service charge years ending 30 June 2013, 30 June 2014, 30 June 2015, and 30 June 2016. The respondents are the freeholders of the block.

2. The Tribunal also had before it an application under section 20C of the Act for an order that the respondents' costs of these proceedings should not be recoverable through future service charges.

3. On 19 November 2019 Mr Bergin's co-lessee of Flat 6A, Mrs Jessica Fowler, was joined as an applicant.

Summary of decision

4. The service charges recoverable by the respondents from the applicants upon payment of a valid demand are as follows:

Year ending	**£**
30 June 2013	1617.58
30 June 2014	827.24
30 June 2015	1332.55
30 June 2016	1699.18

These demands referable to these service charges became valid once reissued on 21 January 2020.

5. An order is made under section 20C of the Act.

The lease

6. The Tribunal had before it a copy of the lease for Flat 6A. It is for a term of 99 years from 24 June 1977.

7. The relevant provisions in the lease may be summarised as follows:

   (a) The lessee is required to pay ¼ of the lessor's costs of complying with its covenants under sub-clauses(2),(4) (5) and (6) of clause 4 of the lease, and is required to pay 1/6 of the lessor's costs of complying with its covenants under sub-clauses (1) and (3) of clause 4 of the lease (these are discussed further below);

   (b) On account payments are payable on 24 June and 25 December in each year; any balance payable is due 21 days after the lessor serves notice requiring payment of expenditure which has been certified by the lessor's surveyors or accountants;

(c) Surplus monies in the hands of the lessor shall be credited against the lessee's future liability but this does not prevent the lessor "opening a sinking fund out of such monies towards the future cost of replacing major items of equipment or repairs and decoration";

(d) Sub-clauses (1),(3) (4) and (6) of clause 4 make reference to "the Block", which is defined in clause 1 as "the block of flats and shops comprising Shops No. 5 and 6 and Flats No. 5a and 6a 5B and 6b Pier Road Littlehampton.

The inspection

8. The tribunal inspected the subject property on the morning of Friday 28th February 2020, immediately before the hearing, when the parties' representatives were also in attendance. 6a Pier Road is a first floor self-contained flat in a 3 storey block at the edge of Littlehampton town centre, close to the sea front and harbour. The property adjoins retail and commercial premises with residential properties to the south and east. The tribunal briefly inspected the common parts and the exterior generally, and the interior of Flat 6a where black mould discoloration to some of the internal walls in some corners and to the window reveals was seen. Flat 6a is presently let out by Mr Bergin.

9. The block has two retail shops on the ground floor with a separate central entrance to common hallways and stairs leading to four flats on the first and second floors. The building has brick elevations with balconies to the flats at the front under a flat roof (not inspected). The flats have replacement plastic double-glazed replacement windows, and the timber casements to the common parts are overdue for redecoration. The fascia is of timber and is in poor condition with peeling paintwork. The tribunal was asked to note replacement and repaired lintels over some of the flat windows at the rear and wet surfaces to the East flank brick wall.

10. At the rear is a yard storage/garages for the shops and 4 parking spaces accessed from a driveway at the side leading to Pier Road. The access drive is heavily pot-holed.

Representation and evidence at the hearing

11. The applicants did not attend the hearing, but were represented by Mr Bergin's aunt Sarah Rigby, who had also made the application on his behalf, attended the earlier case management hearing, and dealt with the case preparation. The tribunal has been told that Mr Bergin now works abroad in Vietnam. Mrs Fowler has not lived at the property for some years and lives in Bristol.

12. The respondents did not attend the hearing but were represented by Mr Matthew Tonnard of counsel. Mr Tyrone Hillary of the managing

agents Hobdens had provided a witness statement and was in attendance.

13. The parties had prepared statements of case and supporting documents and these were before the tribunal.

The law and jurisdiction

14. The tribunal has power under section 27A of the Act to decide about all aspects of liability to pay service charges and can interpret the lease where necessary to resolve disputes or uncertainties. The tribunal can decide by whom, to whom, how much and when a service charge is payable.

15. By section 19 of the Act a service charge is only payable to the extent that it has been reasonably incurred and if the services or works for which the service charge is claimed are of a reasonable standard. When service charges are payable in advance, no more than a reasonable amount is payable.

16. Under section 20C of the Act a tenant may apply for an order that all or any of the costs incurred by a landlord in connection with proceedings before a tribunal 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.

17. Section 47 of the Landlord and Tenant Act 1987 requires that any written demand given to a tenant of a dwelling contains the name and address of the landlord, and if that address is not within England and Wales, provides an address within England and Wales where notices may be served. If a service charge demand does not contain this information the sum demanded "shall be treated for all purposes as not being due from the tenant to the landlord at any time before that information is furnished by the landlord by notice given to the tenant".

The issues

18. Ms Rigby had clearly identified the issues that she wished the tribunal to consider and the respondents did not add to these. They were as follows:

    (i) Whether the service charge demands were valid
    (ii) Whether various costs had been correctly apportioned
    (iii) Whether various costs had been reasonably incurred
    (iv) Whether the sums shown for reserves in the end of year statements had been correctly calculated
    (v) Whether the sums charged for insurance were all payable.

(i) Whether the service charge demands were valid

19. Ms Rigby contended that none of the service charge demands as originally made contained the landlord's name and address as required by section 47 of the Landlord and Tenant Act 1987. Thus no service charges were due.

20. The respondents did not dispute non-compliance with section 47 but relied on demands re-issued on 21 January 2020 which provided the required information.

21. The tribunal therefore finds that the service charges covered by these demands, dating back to June 2011, were not validly demanded until 21 January 2020.

(ii) Whether various costs had been correctly apportioned

22. Ms Rigby submitted that various items of expenditure had been incorrectly apportioned, requiring the four flats lessees each to pay ¼ of the cost, instead of apportioning the cost 1/6 each between the flats and the two commercial units in the block. Some of the challenged expenditure arose in every year; other costs were one-offs. The respondents conceded certain points in Mr Hillary's witness statement; other items were conceded by both sides at the hearing. Others were not agreed and the tribunal therefore determines them.

Insurance

23. In every year the cost of buildings insurance for the block had apportioned on a ¼ basis for the flats to pay, instead of a 1/6 basis as specifically provided by clause 4(3) of the lease. The respondents conceded this was incorrect, but did not explain why the error had occurred. Accordingly a credit must be applied so that flat lessees pay, between them, only 2/3 of the total cost.

Fire alarm costs

24. Ms Rigby originally contended this cost should also be split 6 ways instead of 4 ways as she had assumed the alarm system served the whole building. However it emerged at the inspection that it served only the flats and their common parts. She therefore withdrew this challenge.

Management Fees

25. Clause 4(5) of the lease is a covenant by the landlord which covers the employment of managing agents "subject to payment of the Lessee's one fourth part (or one sixth where appropriate)…". Ms Rigby said the management should cover the entire building and therefore the flats should pay 1/6 instead of 1/4 of the cost. Mr Hillary replied that it was only recently that his firm had taken on management of the commercial

units and that was why more recent service charges split the cost six ways; however, during the years in question Hobdens had dealt only with the flats.

26. There being nothing to contradict Mr Hillary's evidence it is accepted and the charge remains payable ¼ by each lessee.

Bank charges

27. On the same basis these were challenged by Ms Rigby. The tribunal raised a further issue as to whether they were payable at all under the lease. Mr Hillary said they were charges incurred by the landlord. Mr Tonnard was given time to consider this point; he accepted there was nothing in the lease that might cover the charges except possibly clause 4(6) which covers costs of persons employed by the landlord. However, without any evidence that these were costs incurred by an employee or agent that the landlord was liable to reimburse (in addition to any management fee), the tribunal finds that they are not payable under the lease.

Removal of external rubbish, drain clearing, external signs, gardening, bin cleaning, fence panels, and ground maintenance etc relating to rear yard

28. Ms Rigby had submitted that all costs relating to the outside ground area should be split 1/6 instead of ¼ as charged, and the respondents agreed. The costs are payable under clause 4(1) of the lease which clearly provides for a 1/6 split for costs relating to maintenance of "the yard at the rear…". It is noted that at paragraph 5 of his witness statement Mr Hillary sets out tables of agreed credits which indicate an acceptance that the flat lessees should not be paying anything at all towards these costs. However, this is contradicted by the opening words of paragraph 5, and by the clear position taken at the hearing, and we accept that the figures in the tables are therefore a mistake.

Exterior decorations in 2012/13 and 2013/14

29. Ms Rigby said that none of the invoices showed what work had been done and she therefore queried whether the costs should have been split 1/6 instead of ¼. Mr Tonnard referred the tribunal to the works specification which explicitly stated that no works to the ground floor apart from the communal entrance doors to the flats were included. Clause 4(4) of the lease requires the landlord to redecorate the exterior "excluding the two shops", subject to the lessee's ¼ contribution. The tribunal therefore finds that the lessees are only being asked to pay for work to which they are required to contribute ¼, and no adjustment is required.

Nosings

30. Having been shown the nosings on the communal stairs during the inspection, Ms Rigby withdrew her challenge to this item.

Electrical repairs

31. Various minor electrical repairs were carried out. The tribunal was referred to the invoices to consider whether the cost should have been split six ways instead of four. Only one invoice for £60.00 at page 47 to the exhibits to Mr Hillary's statement is found to have been wrongly apportioned, the other charges all relating to works in or relating to the flats' common parts electricity.

No smoking sign/asbestos testing/front and back door locks

32. Having heard the respondents' submissions, Ms Rigby accepted that a ¼ apportionment was correct.

Health and Safety risk assessment

33. Having heard the respondents' explanation that this was only carried out for the flats, that outside experts were employed, and that the work was not covered by Hobdens' management fee, Ms Rigby did not further dispute a ¼ apportionment.

Major works in 2014/15 and 2015/16

34. These were works to the exterior balconies, lintels and drains of the building for which clause 4(1) of the lease provides a 1/6 apportionment. At the hearing Mr Tonnard accepted that 1/6 was right and that a credit should be given. It should be noted that for 2015/16 Ms Rigby had only specifically mentioned the lintel repairs but having considered the parties' written submissions on the issue, invited after the hearing, the tribunal concludes that a 1/6 apportionment should extend to all these major works, which fall within clause 4(1) of the lease.

Land Registry fees

35. It was unclear what these fees were for. Mr Tonnard relied on clause 4(6) of the lease but without evidence that that they were costs properly incurred by persons employed to perform the lessor's covenants or for the proper management of the block the tribunal cannot be satisfied that they are recoverable through the service charge.

Building inspection costs

36. This expense was the cost of a revaluation for insurance purposes. Mr Tonnard accepted that 1/6 was the correct apportionment.

(iii) Whether various costs had been reasonably incurred

Communal cleaning

37. Over the four year period the fortnightly charge varied but was in the range of £22.64 - £28.48 + vat per fortnightly visit. Ms Rigby submitted these costs were unreasonably high. She said that Mr Bergin had offered to do the cleaning himself (although it was unclear when) and that the cleaning should only take an hour. Recently Hobdens had engaged a cheaper contractor who charged £20.00 per visit.

38. Mr Tonnard said the charges were reasonable; Mr Hillary said they were minimal, and that professional contractors with liability insurance etc. were required.

39. Landlords are entitled to use professional contractors. In our view, bearing in mind time to travel to the site and to clean the common areas, and provision of equipment, it cannot possibly be said that the sums charged are unreasonable. Landlords do not have to use the cheapest contractor. The charges are allowed in full.

Door entry system

40. Ms Rigby withdrew her challenge to this expenditure.

Fire alarm maintenance contract

41. Without any expert evidence or comparable quote, Ms Rigby said that the number of visits (weekly tests, three quarterly an one annual inspection) was excessive, and that an annual inspection should be sufficient. The costs were too high.

42. Mr Tonnard referred to a recent fire risk assessment in which the independent assessors, while not querying weekly testing, had said there should also be monthly emergency lighting tests. Mr Hillary said that weekly alarm tests were the norm in the many properties managed by Hobdens.

43. There is no evidence that the work or costs carried out under the fire alarm maintenance contract are unreasonably incurred and the costs are allowed.

General repairs charges

44. Ms Rigby suggested that the costs of three attendances to change a fuse in the communal cupboard (£35.00 + VAT) change fire alarm batteries (£70.00 + VAT) and change four common parts light bulbs (£50.00 + VAT) were too high.

45. Mr Tonnard noted that Ms Rigby had provide no comparable quotes. All three invoices covered labour and materials. Mr Hillary mentioned that the costs covered any call out charge, labour, parts and disposal of materials.

46. Again there is insufficient evidence that these costs were unreasonably incurred and they are allowed.

(iv) Whether the sums shown for reserves in the end of year statements had been correctly calculated

47. Although the lease requires the landlord to "keep proper books of accounts" it does not require the landlord to serve formal service charge accounts, simply a certified notice (in effect a statement) of the landlord's expenditure. Within the statements provided for each of the four years under consideration, an amount is shown for "general reserve". Ms Rigby submitted that the amounts were incorrect, and that there were other errors in the calculations.

48. The tribunal explained that its consideration was limited to determining the actual service charge payable for each year. In our view there is no provision in the lease for a reserve or sinking fund to be funded from the service charge. The effect of clause 2(5) of the lease – see paragraph 7 (c) above – is simply that if a lessee has paid more on account than is required to meet actual expenditure, the surplus may be retained as that lessee's forward payment towards future major works. However if a lessee only pays enough to meet actual expenditure, an additional contribution for a reserve or sinking fund, cannot be demanded.

49. Having said that, the statements provided do not appear to be accurate in all respects. For example, the 2013/14 statement gives an end of year surplus in General Reserve of £2573.52. However this sum does not appear to have been brought forward into the 2014/15 statement which is a more formal service charge account.

(v) Whether the sums charged for insurance were all payable.

50. Ms Rigby challenged the insurance costs on the basis that, in the first three years, the sum charged to the lessees was considerably higher than the actual insurance premium, without explanation. Mr Hillary said that in those years the previous landlords had sourced the insurance themselves and charged a fee for this. In 2015/16 Hobdens had taken over this function, as well as claims administration, for which they received a commission that was included as part of the premium. He accepted this commission had not been disclosed as required by the RICS Code.

51. With respect to the first three years, there is no evidence of any actual cost to the landlords in addition to the premium and no clause in the lease which would permit them to recover a fee. In the fourth year, we

note that the premium, inclusive of Hobdens commission, is at a very reasonable level, given that it covers the entire block including the commercial units. Hobdens should have disclosed the commission arrangements, but there is nothing objectionable to such commission being included in the premium if it represents payment for a service that would otherwise be provided by the insurance company: *Williams v Southwark LBC* (2001) 33 HLR 224. The tribunal therefore allows recovery in all four years of the premium but no more, apportioned six ways as previously discussed. It should be noted that the insurance sum charged for 2015/16 is put at £508.53 in the service charge accounts as opposed to the actual premium figure of £663.97. We do not understand how the figure of £508.53 is arrived at. We are allowing the actual premium apportioned on a 1/6 basis and if any adjustment is required (for example due to a time apportionment) this should be made in the current year's service charge account.

Calculation of service charges

52. Appended to this decision is a calculation of the service charge payable by the four flats for each year as determined by the tribunal. Where the expenditure is apportioned on a 1/6 basis, only 2/3 of the total cost has been included, the other 1/3 being attributable to the commercial units.

Section 20C application

53. Ms Rigby applied for an order under section 20C on the ground that the application had been necessitated by the failure of Hobdens, and later PDC Law, to answer reasonable queries first raised by Mr Rigden in December 2017. It was only at the case management hearing that there was some admission that some costs had been incorrectly charged.

54. Mr Tonnard said that on balance the challenges made had been disproportionate; many items challenged had now been accepted as reasonable. Moreover Ms Rigby had been "aggressive" in pursing the application.

55. In deciding whether to make an order under section 20C a tribunal must consider what is just and equitable in the circumstances. The circumstances include the conduct of the parties and the outcome of the proceedings. We accept, from reviewing the correspondence, that the respondents failed to give proper consideration to valid queries raised by Mr Bergin and later by Ms Rigby on his behalf. Although there was some concession of incorrect charging made at the case management hearing, nothing was specified. The respondents then failed to comply in a timely manner with the tribunal's directions for disclosure and service of their statement of case. The applicants were left to "make the running". It was only when Mr Hillary's witness statement was served that there was any specific acceptance that some costs had been incorrectly charged to the lessees. Further concessions

were made at the hearing. It is true that Ms Rigby also made concessions, but she pointed out that this was in response to information disclosed late in the day that could have been made known much earlier. The applicants have succeeded on a number of important aspects, including the invalidity of the service charge demands, apportionment of significant costs, and improper fees charged by the lessors.

56. For these reasons, the tribunal determines it is just and equitable for an order to be made that to such extent as they may otherwise be recoverable, the respondents' costs in connection with these 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 applicants.

Dated: 18 March 2020

Judge E Morrison

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.