



**FIRST-TIER TRIBUNAL PROPERTY CHAMBER**  
**(RESIDENTIAL PROPERTY)**

Case Reference : CHI/00MS/LSC/2019/0068

Property : Flats 1-7, 419-431 Bitterne Road, Bitterne,  
Southampton SO18 5EE

Applicants : The Underlessees

Representative : ---

Respondent (1) : Russell Clarke & Christopher Grayston

Respondent (2) : Fineage Limited

Representatives : (1)RMG  
(2)Brady Solicitors

Type of Application: Section 27A Landlord and Tenant Act 1985 (“the  
1985 Act”) service charge determination

Tribunal Members : Judge P J Barber  
Mr P D Turner-Powell FRICS

Court No. 4, Havant Justice Centre, Elmleigh  
Road, Havant, Hampshire PO9 2AL

Venue & Hearing Date:10 February 2020

Date of decision: 17<sup>th</sup> February 2020

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**DECISION**

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## **Decision**

- (1) The Tribunal determines that none of the Estate Contribution amounts demanded by the Respondents from the Applicants, being totals of £4408.00 for 2017, £5985.00 for 2018, and £5985.00 for 2019, are payable by the Applicant underlessees to the Respondent intermediate landlords.
- (2) The Tribunal determines that the reserve fund amount of £100.00 demanded of each of the Applicant underlessees, by the Respondent intermediate landlords, in each of the years 2017, 2018 and 2019, is reasonable and payable.
- (3) The Tribunal orders, pursuant to Section 20C of the 1985 Act, that none of the costs incurred by the Respondent intermediate landlords in connection with these Tribunal proceedings are to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the Applicant underlessees.
- (4) In regard to Paragraph 5A of Schedule 11 of the Commonhold and Leasehold Reform Act 2002 (“the 2002 Act”), the Tribunal orders that the liability (if any) of the Applicant underlessees to pay administration charges in respect of the Respondent intermediate landlord`s litigation costs relating to these Tribunal proceedings, is extinguished.

## **Reasons**

### **INTRODUCTION**

1. The application made by Mr Jenkins an underlessee, on behalf of himself and the six other underlessees, and dated 22<sup>nd</sup> June 2019, is for determination of service charges in the years 2017-2019, and for which the total value of dispute was stated to be £16,760.76. The Applicants also sought orders in respect of the Respondent landlord`s costs under Section 20C of the 1985 Act, and under Paragraph 5A of Schedule 11 of the 2002 Act.
2. Directions were issued on 6<sup>th</sup> August 2019 and, following a telephone case management hearing (“CMH”), further directions were issued on 22<sup>nd</sup> August 2019.
3. The evidential bundle includes statements by the parties, copy accounts, certain invoices, emails and service charge demands. The building at 417-431 Bitterne Road, Southampton, broadly consists of 7 residential flats at first and second floor levels, with retail below. A specimen copy Underlease for Flat 3 was included in the bundle, being an Underlease dated 17<sup>th</sup> February 2006 made between Russell Tom Clarke and Christopher Simon Grayston (1) Peter Jeremy Blewitt and Lyn Blewitt (2) (“the Underlease”)

### **INSPECTION**

4. The Tribunal inspected the Property in the presence of Mr White of Flat 6, and also Leila Manzi and Andy Rose, both of the intermediate landlords` agents RMG.

5. The building at 417-431 Bitterne Road, Southampton has a main frontage to Bitterne Shopping Precinct and there is a single unit arranged across the ground floor, formerly occupied by Gannaways Farm Shop, but now apparently vacant. The building is constructed under a pitched and tile hung roof, with a series of dormer windows at second storey level and tile hanging to the first floor elevation at the front. Access to the seven residential flats is obtained at the rear of the building, where there is a small rear yard enclosed by fencing, within which a small timber shed and refuse bins, are located; a rodent or pest control box type device was noted to be set adjacent to the side timber fence, and behind the shed, a covered staircase leads to the flat entrances, all of which are at first floor level. The Tribunal was advised by Mr White that the flats are of varying sizes, including, studio, one bedroom and two bedroom variants.

### **THE LAW**

6. Section 27A Landlord and Tenant Act 1985 provides that:-

- (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, the date at or by which it is payable, and*
  - (d) *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)-(7)....

## **REPRESENTATIONS**

7. The hearing was attended by Mr Jenkins and his partner, Ms Jo Douglas, and also by Mr Andy Rose and Ms Leila Manzi from RMG, and by Mr Charles Sinclair, Counsel from 4 Kings Bench Walk, for Fineage Limited, the Second Respondent. There was also an observer present. At the outset of the hearing, Judge Barber explained that the application is in regard to the seven underleases, of which Mr Clarke and Mr Grayston are the intermediate landlords, and that the respective underleasehold interests are distinct and separate from the headleasehold interest which is as between the intermediate landlords, and Fineage Limited. Judge Barber indicated that in the absence of directly enforceable covenants in the underleases, as between the underlessees and the freeholder or superior landlord, there appeared to be no contractual nexus between such parties or direct means of enforcement. Judge Barber went on to indicate that a further Section 27A application had been received in the previous week, by the Tribunal, from Mr Clarke and Mr Grayston, seeking to challenge the service charges in their Headlease, but asking to be joined in as applicants in the present proceedings. On the face of it, the Headlease and the Underlease are entirely separate leasehold interests and accordingly it would not be appropriate for the applicants, in the second and recent Section 27A application, to be joined in as Applicants in the current matter. Judge Barber invited any representations to the contrary, but none were received; accordingly he advised Mr Rose that his clients should contact the Tribunal office after the hearing today, to confirm if they still wish the most recent Section 27A application to proceed, given some apparent misunderstanding as to the position by the intermediate landlords. Mr Sinclair, counsel for the Second Respondent, indicated to the Tribunal that he did not envisage taking a fully active role or participation in the hearing today, but would nevertheless remain present.
8. Judge Barber then requested that the parties should confirm the extent of the issues in dispute, for the avoidance of any doubt. Mr Jenkins and Mr Rose confirmed that the only matters in dispute are as follows:

### 2017

Estate Contribution £4408.00

Reserve Fund Contribution £700.00

### 2018

Estate Contribution £5985.00

Reserve Fund Contribution £700.00

### 2019

Estate Contribution £5985.00

Reserve Fund Contribution £700.00

The parties also confirmed that all seven underleases are broadly in similar form to the specimen Underlease included in the bundle, being in respect of Flat 3. Estate.

9. Judge Barber referred to some of the relevant provisions in the Underlease, including the definition of the service charge at Clause 1.12:

*“1.12 The Service Charge: One-seventh of Expenditure on Services in respect of the Estate.”*

Also Paragraph 1.1 of the Fourth Schedule provides:

*“Expenditure on Services means what the Landlord spends in complying with his obligations set out in the Sixth Schedule including interest paid on any money borrowed for that purpose”*

Judge Barber referred also to what appeared to be certain relevant provisions in the Sixth Schedule of the Underlease, being paragraphs 3 and 15, and invited Mr Jenkins and Mr Rose to confirm that these are the relevant provisions relied upon; Mr Jenkins and Mr Rose so confirmed, although Mr Rose added that he also relies on paragraphs 7 and 8 in the Sixth Schedule. Judge Barber indicated that since it appeared to be the case that the principles at stake, for each of the three years 2017, 2018 and 2019, were broadly the same, it would be helpful if when making their submissions, the parties include reference to the provisions relied upon in the Underlease, starting with the Estate Contribution, and then in regard to the Reserve Fund. The parties then proceeded to make their submissions.

10. Mr Jenkins said that the Estate Contribution and Reserve Fund items within the service charges had come as a surprise; he referred to paragraph 3 in the Sixth Schedule and said the terminology in the Underlease referring to the “Estate” meant, in his view, the whole building structure and added that in view of the age of the building conversion, if things went wrong, he would have expected that insurance might have covered them. In regard to the “Estate Contribution” of £4408.00 for all seven flats in 2017, the Tribunal invited Mr Rose to refer in the bundle to the supporting invoices being relied upon. Mr Rose referred to an invoice for £711.93 and also to four separate invoices, each for £924.00, all being invoices to his clients, the intermediate landlords, from the Headlessor`s agent. The Tribunal then asked Mr Rose to explain which works were actually covered by these invoices; Mr Rose said they had had difficulty in obtaining a breakdown of these sums from Keygrove, being the superior lessor`s agents. However, after some delay, Mr Rose was eventually able to confirm that the items of expenditure for 2017, for which supporting invoices had been obtained, were only those in regard to Keygrove`s management fees, and the pest control invoices from Kestrel Pest Control Ltd, in each such case addressed to the superior lessor, Fineage Limited.
11. In regard to the position for the “Estate Contribution” in 2018, being £5,985.00, Mr Rose again took some time attempting to locate relevant invoices in the bundle and eventually confirmed that for this service charge year, the only supporting invoices available, are in respect of Keygrove`s management fees, addressed to the superior lessor. It appeared according to Mr Jenkins, that part of the Estate Contribution for 2018 had been refunded, although the position was not entirely clear. The Tribunal reminded the parties at this point, that it is not concerned with ordering payment or repayment of sums, rather with establishing reasonableness and/or payability.
12. In regard to the position for 2019, Mr Rose referred firstly to various different figures in the bundle and to the fact that Keygrove were, by June 2018, no longer the superior lessor`s managing agents. In due course, Mr Rose confirmed that the sum demanded for £5985.00 in this year had been an estimate, based on the

previous figure for 2018; he confirmed that accordingly, there are no supporting invoices available at all for 2019. The Tribunal asked Mr Sinclair at this point if he had any comments to make; Mr Sinclair advised that he would leave any remarks to the end.

13. In regard to the reserve fund of £100.00 per underlessee, in each of the three years, Mr Jenkins said that he had no objection as such to a reserve fund being levied; however, he was concerned about the administration of the reserve fund, and for example, the carrying forward, he said, in 2018 of £890.00 to off-set a deficit arising from the Estate Contribution in the previous year. Mr Rose explained that there is a £700.00 reserve fund charge each year in respect of all seven flats; he added that the reserve fund contributions are paid into a separate account. Mr Rose said that in regard to the remaining service charges, these are paid into either a current or savings account and, on a day to day basis, transfers are made as necessary from the savings account to the credit of the current account, as needed, including in this instance, the £890.00 “transfer”. On this basis Mr Jenkins said he accepted the position, such that Mr Rose had confirmed that the reserve fund was not being used to prop up deficits arising from the Estate Contribution.
14. In regard to costs, Mr Jenkins said he felt it inappropriate for all or part of the landlord’s costs for these proceedings to be included in future service or administration charges. Mr Rose said that generally the award should go with whoever comes out on top, adding that his clients have confirmed that they have no intention to include either his or Ms Manzi`s costs in these proceedings, in future recharges to the underlessees.
15. The Tribunal invited Mr Sinclair to make any submissions for the Second Respondent; Mr Sinclair said that the actual management costs and pest control costs are not the focus of this Tribunal; he added that the only question is as to whether the costs charged by Mr Clarke and Mr Grayston to the underlessees, are reasonable.
16. In closing, Mr Rose said he did not wish to repeat what has already been said, other than saying that Mr Clarke and Mr Grayston needed to pay invoices as they came in, and Fineage Limited had dragged their feet and sat on refunds. Mr Rose said that once the details are received, then Mr Clarke and Mr Grayston will make sure that they go in to the 2019 accounts.
17. In his closing, Mr Jenkins said that Brays solicitors had indicated that their client intends to carry on much as before.

### **CONSIDERATION**

18. The Tribunal, have taken into account all the case papers in the bundle and the oral evidence given at the hearing.
19. In regard to the Estate Contribution claimed by way of service charges from the seven underlessees, being £4408.00 in 2017, and £5985.00 in each of 2018 and 2019, the Tribunal noted that Mr Rose placed reliance, regarding the intermediate landlord’s ability to charge for these items, on paragraphs 3, 7 and/or 8 in the Sixth Schedule of the Underlease. Paragraph 3 is as set out below:

*“3. To repair or (as appropriate) to contribute to the cost of repair of party walls and other facilities used in common by the occupiers of the Estate and the owners or occupiers of neighbouring property.”*

The Tribunal further notes that the term “Estate” is defined at clause 1.6 in the Underlease as follows:

*“1.6 The Estate: 419-431 Bitterne Road Southampton shown edged green on plan 3.”*

It is thus apparent from the definition of “the Estate” that the whole of the property at 419-431 Bitterne Road, is included and not for example merely the upper residential floors. Accordingly, paragraph 3 in the Sixth Schedule allows the intermediate landlords to repair or contribute to the repair of party walls separating 419-431 Bitterne Road from adjoining or neighbouring property; similarly, to contribute to repair or cost of repair of other facilities used in common by the occupiers of the Estate (which in this context appears to include the ground floor retail unit) and the owners or occupiers of neighbouring property. Typically, such provision might for example entitle the intermediate landlords to include in the service charges to the underlessees, repair costs for the party walls separating 419 or 431 from any other buildings adjoining, or such facilities as common or shared drains serving 419-431, and other neighbouring property. However paragraph 3 does not provide a general or open-ended right for the intermediate landlords to pass on to the underlessees, carte blanche, the costs arising from service charge demands which they have themselves received from their own superior landlord under the Headlease, in regard as in this case, to the headlessor`s management fees and pest control fees, as incurred by the headlessor. The intermediate landlords may only rely on paragraph 3 for passing on, costs specifically within the paragraph 3 definition. Mr Rose was also, in any event, unable to provide any supporting invoices for the 2017 Estate Contribution of £4408.00, other than those raised by the headlessor`s managing agent Keygrove, of the intermediate landlords, for management fees, and similarly the pest control costs as incurred by Keygrove. Management fees and pest control fees charged or incurred, as in this instance, by a third party`s managing agent, do not constitute either, costs for the repair of party walls, or the repair of facilities used in common, as between 419-431 Bitterne Road, and neighbouring property. Mr Rose had also cited paragraphs 7 and 8 in the Sixth Schedule of the Underlease, as being authority for passing on such costs to the underlessees; these provisions are set out below:

*“7 To keep all parts of the Estate used in common by the tenant of more than one flat adequately cleaned and lighted.*

*8. To keep the gardens of the Estate neat and tidy.”*

However, the management fees of the third party headlessor`s managing agent do not fall within either of the above provisions; whilst an argument might conceivably be raised that pest control measures might fall within one or other or both of the above provisions, the costs were of-course incurred by Keygrove. Paragraph 1.1 of the Fourth Schedule of the Underlease defines Expenditure on Services, as being what the intermediate landlord spends in complying with its obligations in the Sixth Schedule. Accordingly, expenditure incurred by the third party headlessor`s managing agent, Keygrove, in regard to pest control, does not

fall within either of paragraphs 7 or 8. Accordingly, the Tribunal determines that none of the Estate Contribution of £4408.00 for 2017, is payable.

20. In regard to the Estate Contribution of £5985.00 for 2018, Mr Rose was able to produce invoices only for management fees charged to the intermediate landlords, by the third party headlessor`s managing agents Keygrove; these do not fall within any of the heads of service charge payable by the underlessees, within paragraphs 3, 7 or 8 of the Sixth Schedule of the Underlease. Mr Rose referred to two invoices in the bundle from Keygrove, each for £1488.00; there being a further amount, he said, arising as an “accrual” on account of anticipated further similar charges. Any balance of the sum of £5985.00 being unattributable to the cost of items other than to management fees, was however, unexplained, and unsupported by any invoices or clear details. Accordingly, the Tribunal determines that none of the Estate Contribution of £5985.00 for 2018 is payable.
21. In regard to the Estate Contribution of £5985.00 for 2019, Mr Rose said that this was simply an estimated amount based on the total Estate Contribution raised in the previous year. Accordingly, as there are no invoices at all, and given that the whole of the Estate Contribution for 2018 has in any event been disallowed, there is no clear or persuasively logical basis or rationale by which the 2019 Estate Contribution, even on an estimated basis, may be deemed as reasonable or supportable. The Tribunal therefore determines that none of the Estate Contribution of £5985.00 for 2019 is payable.
22. In addition, no detailed accounts, certified by a member of the Institute of Chartered Accountants, were produced to the Tribunal in regard to any of the payments due by the intermediate landlords to the headlessor, as are required by paragraph 2(b)(iv) of the Headlease dated 22<sup>nd</sup> April 2004.
23. In regard to the Reserve Fund, the Tribunal notes that whilst the provision at paragraph 15 of the Sixth Schedule of the Underlease as below, may not be of the clearest, it does nevertheless suffice to support the charging of reasonable provision for further expenditure; in any event, the Tribunal further notes that Mr Jenkins said in evidence that he does not object to the reserve fund, his concerns as to accounting practices having been addressed and resolved by Mr Rose. The Tribunal further considers in broad terms and in principle, that a reserve fund contribution equating to £100.00 per annum by each of the underlessees, in each of the years 2017, 2018 and 2019 is not wholly unreasonable or disproportionate.

*“15. To make reasonable provision for further expenditure in respect of periodically recurring items or the replacement or renewal of items which in both cases would fall within this Schedule.”*

24. In regard to the applications made by Mr Jenkins pursuant to Section 20C Landlord and Tenant Act 1985 and Paragraph 5A of Schedule 11 of the 2002 Act, the Applicants have substantially been successful. Accordingly, and exercising its discretion, the Tribunal orders that none of the costs incurred or to be incurred by the landlord in connection with these Tribunal proceedings, are to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the Applicant tenants. Similarly, the Tribunal exercising its discretion, orders that the liability (if any) of the Applicant tenants to pay an administration charge in respect of litigation costs in relation to these



Tribunal proceedings, is extinguished. For the avoidance of doubt, the Tribunal is not minded to exercise its discretion to make any order for costs against the Respondent in favour of the Applicant, pursuant to Rule 13 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013.

25. Finally, the Tribunal considers that the Respondent intermediate landlords may wish to seek independent legal advice regarding their entitlement or otherwise, to pass on to the underlessees, costs arising from their separate Headlease. Such step may be a prudent measure, so as hopefully to avoid any similar difficulties or challenges recurring in the future.

26. We made our decisions accordingly.

Judge P J Barber (Chairman)

A member of the Tribunal  
appointed by the Lord Chancellor

## 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.