FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00BK/LSC/2018/0260**
Property	**:**	**60A Hanover Gate Mansions, Park Road, London NW1 4SN**
Applicant	**:**	**Mr. A. Ghosh (Leaseholder)**
Representative	**:**	**None**
Respondents	**:**	**1: Hanover Gate Mansions Ltd. (Landlord)** **2: Hanover Gate Mansions (Park Road) Ltd. (Management Company)**
Representative	**:**	**Mr. P. Brown of Counsel**
Type of application	**:**	**Application for determination of the reasonableness and payability of the service charge**
Tribunal members	**:**	**Mr. N. Martindale FRICS** **Mr. S. Mason BSc FRICS FCIArb**
Venue	**:**	**10 Alfred Place, London WC1E 7LR**
Date of decision	**:**	**29 December 2018**

DECISION

Decisions of the Tribunal

(1) **The management agency contract between the respondent and the managing agent Faraday Property Management Limited is not a qualifying long term agreement for the purposes of S.20 of the Landlord and Tenant Act 1985.**

(2) **The consultation requirements at regulation 5 of the Service Charges (Consultation Requirements) (England) Regulations 2003, prior to the letting of the managing agency contract, do not apply therefore.**

(3) **The statutory cap of £100 on the management fee element of the advance service charges for the year ended 30 June 2018, does not apply therefore.**

(4) **The applicant withdrew their claim that there had been breach by the first respondent of S.47 and S.48 of the Landlord and Tenant Act 1987.**

(5) **No order to prevent the landlord seeking to recoup their costs of responding to this application (should the lease allow it, through future service charges), is made under S.20C of the Landlord and Tenant Act 1985.**

(6) **No order is made to require the respondents to refund to the applicant the application and hearing fees of the Tribunal.**

Application

1. The Applicant seeks a determination pursuant to s.27A of the Landlord and Tenant Act 1985 ("the 1985 Act"), as to the amount of the estimated service charge payable by the Applicant leaseholder for the service charge year of 2017/18, in respect of the costs to the respondent of the appointment of a managing agent.

2. Tribunal Directions were issued on 7 August 2018 and were amended in respect of its paragraph 3 by further directions dated 21 August 2018 by Tribunal Judge Donegan. The effect of the further directions was to narrow the issues and sums at challenge in the initial application dated 10 July 2018, down to one particular item of cost and for one year only.

Hearing

3. The Directions provided for a one day hearing on 10 December 2018. Both parties substantially complied with the Directions. Each party provided their own bundle. While there was some overlap between them, taken together by the Tribunal the two documents provided sufficient evidence on which decisions could be made. The Tribunal considered the six questions raised in the further directions.

4. Though some additional papers were referred to including case law and in others submitted by the parties on the day, it was without objection of the other. These were received by the Tribunal where it was helpful to do so, but at no disadvantage to the other party.

5. Mr A. Ghosh appeared in person as applicant leaseholder. Mr P. Brown of Counsel appeared for the freeholder and its wholly owned management company. Mr H.N. Patel director of the management company appeared as a witness for the respondents.

Background

6. Neither party requested an inspection and the Tribunal did not consider that one was necessary, nor would it have been proportionate to the issues in dispute.

Applicant's case

7. Mr Ghosh confirmed that his lease ran for 120 years from July 1973. The Property is small one bedroom flat, converted from part of a large, former nineteenth century terraced family house, itself part of a long terrace of such houses and now former houses, overlooking Regents Park. Apparently this particular former house had been converted into flats ranging from 1 to 4 bedrooms in size.

8. The freehold of the building of which the Property formed part, was owned by the first respondent. The second respondent was the management company owned by the first and responsible for the effective running of the building. While most of the leaseholders in the terrace were also shareholders of the freeholder, the applicant was not.

9. The tenant has a long lease of the Property which requires the landlord to provide services and the tenant to contribute towards their costs by way of a variable service charge. There is provision for an estimated service charge to be levied at the start of the accounting year and a final or actual service charge after the end of the accounting year, resulting in a balancing credit or charge around that time. The lease provisions were not contested.

10. The applicant described to the Tribunal that he felt he was badly treated by the freeholder. He was excluded from shareholder meetings and not kept properly informed by either respondent, of decisions concerning the running of the building. He had experienced difficulties eliciting information from the respondents. In particular he had not been consulted on the issue of a qualifying long term agreement (QLTA), as was his entitlement under the S.20ZA consultation regulations, in the appointment of the existing managing agents Faraday Property Management Limited.

11. The applicant took the Tribunal through the various 'open' letter and email based correspondence between himself and Faraday, particularly their email of 31 May 2018: Then between himself and the respondent's solicitors Friday Legal, particularly their letter of 1 June 2018. In neither case did Faraday Management or Friday Legal deny that there was a contract in place, which he considered was conclusive that there was and that it had been acknowledged as a QLTA.

12. While he accepted that no formal written contract had been completed with Faraday, there had been open correspondence with sufficient terms to define their duties and it was accepted by all that they had taken over active management of the block and begun to provide services. Though there had been some subsequent correspondence about the responsibility for arrangement of building insurance, he did not accept that these indicated that no contract had been entered into. The applicant added that the fact that directors of the company, their solicitors and the agent themselves did not deny the existence of a contract was further evidence in support of his case.

13. The applicant argued that whilst the contract that had been completed with Faraday for 12 months contained at clause 7, a 3 month break clause which could be exercised after the end of month 9, it would mean that any notice would only be effective, at best, at least 1 day over the one year period. This therefore made it a QLTA, and hence subject to a requirement for prior consultation. In the absence of the proper prior consultation he was therefore only bound to pay £100 and no more, rather than the £218.73 which had been the anticipated contribution he would have been liable for under the QLTA., an overpayment by him of £118.73.

14. The applicant carefully pointed out to the Tribunal that neither Faraday nor the respondent's solicitors had disputed the duration of the contract, but that the respondents' position had changed and a new argument developed in preparation for defence at this hearing.

15. The applicant drew the Tribunal's attention to the decision in Corvan (Properties) Limited v Maha Ahmed Abdel-Mahmoud [2017] UKUT 228 (LC), upheld at the Court of Appeal [2018] EWCA Civ 1102. He drew the Tribunal's attention in particular to paragraphs 37, 38 and 40 of the appeal decision where a contract was found to a qualifying one for the purposes of consultation. Thus even if a contract was one day in excess of a year, this, he said made the contract a QLTA at the subject Property.

16. The applicant drew the Tribunal's attention to the decision in Brogden and Others and The Metropolitan Railway Company [1877] H.L.(E). Here there was no concluded written contract but the parties were held to be bound to a contract by virtue of their actions: The supply of coal to the railway and the subsequent payment for same, by the railway. The Tribunal noted that although there was held to be a contract by the actions of the parties in that case, importantly the effective start date of the contract was not that of the supply of coal, but that of the date of payment for same.

17. The applicant sought a limitation on his service charge in respect of the managing agent, to £100 for 2017/18 for the reasons above. He also sought repayment of his application and hearing fees (£300) and issue of a S.20C order preventing the landlord seeking to recover its costs of the case through the service charges in future years because the respondent should have accepted this argument months ago without him having to refer it to the Tribunal.

18. The applicant commented on the respondents' case. The respondents claimed to be not for profit companies. Whilst technically correct it was not right to conclude that they were run as some sort of charity without funds. Their operating costs were covered by the service charge and the first respondent received not only ground rents but also occasional lease extension premiums from leaseholders. He confirmed that about 10% of leaseholders in the terrace were not shareholders of the freehold company.

19. Although the applicant acknowledged that the respondent could have and might still apply separately to the Tribunal for dispensation from some or all of the requirements for consultation, such grant would be a distinct prejudice to him as a leaseholder. He was not satisfied with Faradays as managers, and he would in any case expect compensation and costs as part of the 'terms' of any grant of dispensation.

20. He considered that the respondents had not acted reasonably in defending a position at considerable expense to them, where in any case the effects of a cap on this cost would have resulted in such a small loss, a little over £100, to them, in respect of his service charge. He saw it as symptomatic of the over-bearing approach taken by the freeholder to non-shareholding leaseholders.

21. Lastly Mr Ghosh confirmed that he now withdrew his challenge under item 4 above.

22. In follow up questions to the applicant from Mr Brown for the respondent, it was accepted that any possible dispensation was a matter for another application, not for this hearing. It was also clarified as accepted between the parties that there was no additional written correspondence between the respondents' director Mr Sultan and Faradays which might elaborate on or explain the terms of appointment reached.

23. The applicant also expressed disappointment that Mr Sultan had not attended the hearing to give evidence since he was one of the key players in the whole matter.

Respondents' case

24. The respondents produced as witness of fact, Mr H.N. Patel, another director of the companies, one of five such. Other directors included Mr G. Franks as chairman and in particular Mr M. Sultan who was primarily in charge of this arrangement. However neither were available for this hearing.

25. As with Mr Sultan, no-one from Fridays solicitors had been produced to elaborate on the correspondence with Faradays, nor was there a witness from the agent. Whilst Mr Patel's presence as a witness was better than none, it became apparent to the Tribunal that he was not directly involved in the appointment of the agents and much of his evidence was second hand, gleaned from calls with fellow directors and from reading the written evidence that had been produced to the Tribunal.

26. Mr Patel confirmed that he was a solicitor but that he operated in a different area of the law from property. Mr Patel explained that he relied on the advice to the directors given by their retained lawyers Fridays and claimed no specialist expertise on QLTAs.

27. Mr Patel explained that the management company now organised its own insurance for buildings and that this arrangement rendered the draft written management contract received from Faradays as requiring a variation prior to its acceptance and signature. He confirmed that there was no other correspondence other than that produced for the hearing.

28. Mr Patel spoke about the company and leaseholder AGMs, but denied that leaseholders were excluded from any of these meetings. He stated that they even allowed sub-tenants to attend, as the business of the meetings very much focussed on the practical running of the building and all residents were therefore welcome.

29. Mr Patel explained that shortly after the applicant had questioned Faradays, the freeholder and management companies and Fridays about the basis of the appointment of the managing agents, and well before expiry of 9 months, Faradays had, for the avoidance of doubt, unilaterally given notice to the freeholder to terminate their appointment. Though the draft contract terms did not provide for this, the freeholder had chosen to accept this and such contract as was said to have existed no longer did so from that point onwards. Faradays were the current agent but had been and continued to operate on an informal trial basis still.

30. Mr Brown concluded the case with legal submissions for the respondent: He noted the earlier correspondence between the parties which acknowledged

that some form of contract was in place and which accepted that if a contract had indeed been entered into on or before 12 June 2017 then it would have been a QLTA. He accepted that in this case prior leaseholder consultation would have been needed, but which had not been undertaken and therefore the applicants contribution would have been limited to £100.

31. Mr Brown however, went on to deny that a contract on the draft terms had been entered into on or before 12 June 2017. He drew attention to the fact that neither side had signed off the draft and that there had been subsequent correspondence between the parties as to the final but significant terms dealing with the arrangement of buildings insurance. Mr Brown noted that the draft written contract was stated to run from 12 June 2017 to 11 June 2017 and that termination notice under clause 7 would be possible at a date only at least 9 months after 12 June 2017.

32. Mr Brown now accepted that a contract for property management services though on terms not wholly defined either by the draft or on some other oral terms, had been entered into, but that had occurred only after 12 June 2017. He acknowledged that services had been rendered as evidenced by the correspondence and that this had also been billed and paid for albeit significantly later. The key difference was that any start date after 12 June 2017 would have rendered the draft contract if it had weight, to be a period shorter than 12 months as it would be capable of being terminated in accord with clause 7 of the draft wording, meaning that it would not be a QLTA.

33. Mr Brown referred back to the Brogden case drawing the Tribunal's attention to the fact that in this case the unsigned draft contract for supply had only started when, the service having already been supplied, was finally paid for by the recipient. Thus at the subject property even if the services had started immediately on 12 June 2017, payment would not have been made until some days, perhaps weeks after for that service. Mr Brown suggested that the earliest start date of an oral contract based on the draft contract terms and on the subsequent actions of the parties in the evidence, would have been on or around 24 June 2017.

34. Mr Brown mentioned the possibility of a grant of dispensation of consultation requirements, but acknowledged that it would be a matter for a separate application which was not before this Tribunal. Mr Brown also responded to the applicants concern about the expense of the application, the preparation and the hearing of the case; sums, the Tribunal noted, which were likely to be far in excess of the money at risk. No settlement proposals in correspondence had been offered by the applicant.

Decision with reasons

35. On the balance of probabilities based on the evidence and arguments presented, the Tribunal accepts that no formal written contract with Faradays for property management services was entered into on or before 12 June 2017. Instead the Tribunal determines that an oral contract evidenced by the actions

of supply and a subsequent payment, was entered into on some date after 12 June 2017. That contract if it incorporated the terms of the draft would have contained its provision for either party to serve 3 months prior notice of termination on any date after 9 months after 12 June 2017. Even if the start date had been 13 June 2017 and to the Tribunal 24 June 2017 appeared much more likely, then it would not have been a QLTA. It follows that no consultation was required and no service charge cap on this item for 2017/18 estimated service charge, applies.

36. The Tribunal saw no evidence of attempts at settlement prior, by either party, but the respondent being successful in the matter and the sums at stake being relatively small in comparison to the significant costs for either side, of the application, the Tribunal makes no order under S.20C and no order requiring the respondents to refund the application and hearing fees to the applicant.

Name: Neil Martindale Date: 29 December 2018

Rights of appeal

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the Tribunal is required to notify the parties about any right of appeal they may have.

If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber), then a written application for permission must be made to the First-tier Tribunal at the regional office which has been dealing with the case.

The application for permission to appeal must arrive at the regional office within 28 days after the Tribunal sends written reasons for the decision to the person making the application.

If the application is not made within the 28 day time limit, such application must include a request for an extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed, despite not being within the time limit.

The application for permission to appeal must identify the decision of the Tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal and state the result the party making the application is seeking.

If the Tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).

Appendix of relevant legislation

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.

Commonhold and Leasehold Reform Act 2002

Schedule 11, paragraph 1

(1) In this Part of this Schedule "administration charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent which is payable, directly or indirectly—
(a) for or in connection with the grant of approvals under his lease, or applications for such approvals,
(b) for or in connection with the provision of information or documents by or on behalf of the landlord or a person who is party to his lease otherwise than as landlord or tenant,
(c) in respect of a failure by the tenant to make a payment by the due date to the landlord or a person who is party to his lease otherwise than as landlord or tenant, or
(d) in connection with a breach (or alleged breach) of a covenant or condition in his lease.

(2) But an amount payable by the tenant of a dwelling the rent of which is registered under Part 4 of the Rent Act 1977 (c. 42) is not an administration charge, unless the amount registered is entered as a variable amount in pursuance of section 71(4) of that Act.

(3) In this Part of this Schedule "variable administration charge" means an administration charge payable by a tenant which is neither—
(a) specified in his lease, nor
(b) calculated in accordance with a formula specified in his lease.

(4) An order amending sub-paragraph (1) may be made by the appropriate national authority.

Schedule 11, paragraph 2

A variable administration charge is payable only to the extent that the amount of the charge is reasonable.

Schedule 11, paragraph 5

(1) An application may be made to the appropriate Tribunal for a determination whether an administration 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) Sub-paragraph (1) applies whether or not any payment has been made.

(3) The jurisdiction conferred on the appropriate Tribunal in respect of any matter by virtue of sub-paragraph (1) is in addition to any jurisdiction of a court in respect of the matter.

(4) No application under sub-paragraph (1) 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.

(6) An agreement by the tenant of a dwelling (other than a post-dispute arbitration agreement) is void in so far as it purports to provide for a determination—
(a) in a particular manner, or
(b) on particular evidence,
of any question which may be the subject matter of an application under sub-paragraph (1).