FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**MAN/00FB/LSC/2017/0051 and MAN/00FB/LSC/2018/0069**
Property	**:**	**Betterton Court, Pocklington, YO42 2ET**
Applicants	**:**	**Mr L Waby and 29 other Lessees (see Annex 1)**
Respondents	**:**	**Anchor Trust**
Type of Application		**Commonhold and Leasehold Reform Act 2002 Schedule 11(5)(a)** **Landlord & Tenant Act 1985 – S27A(1) and (3) and s20C**
Tribunal Members	**:**	**K M Southby (Judge)** **J Jacobs (Expert Valuer Member)**
Date of Decision	**:**	**26 June 2019**

ORDER

BACKGROUND

1. The first of these two matters (**MAN/00FB/LSC/2017/0051)** originated through an application by Mr Waby and the other tenants of Betterton Court ('the Property') dated 1st June 2017. The Applicant sought a determination in relation to the reasonableness of costs allocated to the service charge account during the financial years 2013, 2014/15, 2015/16, 2016/17 and 2017/18 under section 27A (1) of the Landlord and Tenant Act 1985. In addition the Applicant sought a determination in respect of the reasonableness of the management fee and management of maintenance contracts fee charged between the years of 2005 and 2017/2018 under s27A (3) of the Landlord and Tenant Act 1985.

2. The matter was the subject of an inspection and hearing in October 2017 and the final decision of the Tribunal was appealed to the Upper Tribunal. The Upper Tribunal determined at paragraphs 71 and 72 of its decision that the leaseholders had applied to the FTT for a determination under s27A of the 1985 Act of the reasonableness of the contributions they had been required to make in the years 2014 to 2108 towards the property repairs fund in anticipation of major works, and that the FTT had made no such determination. Accordingly the matter was remitted to the FTT for a determination on this point.

3. The second matter (**MAN/00FB/LSC/2018/0069)** is a new claim brought by the same Applicant against the same Respondent who seeks a determination in relation to the reasonableness of costs allocated to the service charge account during the financial years 2013, 2015/16, 2016/17 and 2017/18 and 2019 under section 27A (1) of the Landlord and Tenant Act 1985. The Applicant also seeks a determination in respect of the reasonableness of the management fee and management of maintenance contracts fee under s27A (3) of the Landlord and Tenant Act 1985.

4. The Tribunal has received an application from the Respondent to strike out the Applicant's claim as being vexatious

5. The Tribunal has also received an application from the Applicant to bar the Respondent from further participation for being vexatious.

6. The Tribunal held a case management hearing on 21 May 2019 at which it became apparent that not all parties had been served with the relevant strike out applications. The hearing was accordingly adjourned and relisted as a telephone case management hearing on 26 June 2019. Ms Nieuwland attended on behalf of the Applicants, with Mr Waby also in attendance. Mrs Matusevicius attended on behalf of the Respondents.

PRELIMINARY ISSUES

7. The Tribunal heard oral representations and received written representations from the parties on the applications to strike out and bar the other party. Mrs Matusevicius confirmed to the Tribunal that she had not provided a written response to the barring application but resisted the application and disagreed with its substance.

8. The Tribunal has considered the Respondent's application to strike out the entirety of the matter as frivolous and vexatious, and concerning matters previously determined by the Tribunal. In order to consider this application we first considered the substance of the application **MAN/00FB/LSC/2018/0069**.

9. The new application in respect of 2013 and 2015/16 concerns contract management fees. Ms Nieuwland states that she accepts that this duplicates a matter before the Tribunal in the first application, but brings the claim because she claims the Respondents have refused to implement the findings in the previous judgment. The Applicant's position is that the 10% contract management fee imposed by the Tribunal in the first application is a global figure to be applied to all contracts.

10. Mrs Matusevicius' written application for strike out dated 3 May 2019 states '*Ms Nieuwland now seeks to bring a new application to raise additional challenges to those brought in the previous case, which is not considered appropriate. In addition it appears that Ms Nieuwland seeks to raise a new challenge in relation to the management fee which has been confirmed as falling outside the jurisdiction of the FTT and is currently the subject of Arbitration. It is respectfully submitted that the only determination now remaining to be made by the Tribunal is in respect of the reasonableness of service charges challenged in the previous case, based on the equalisation clause in the lease. It is Anchor Hanover's position that the other facts of this case are similar to those previously decided by the Tribunal and Ms Nieuwland had the opportunity to include these within the previous application. It is also contended that the purpose of this application is to seek to create an ongoing situation of discord and as such is vexatious in nature.*'

11. Ms Nieuwland's response to the strike out application on behalf of the Applicants states '*While the issues are similar to those raised in the previous case, the facts are quite different because we refer to charges demanded in different years. We have been obliged to bring these further matters before the FTT because the Respondent has ignored the decisions of both FTT and the UT, and has made it clear that they intend to disregard also the decision of the arbitrator in calculating management fees for the present and future years.*'

10. The Tribunal heard from Mrs Matusevicius on behalf of the Respondent that she did not accept the interpretation of the previous decision put forward by Ms Nieuwland and stated that the 10% was only in relation to the lift contract and that the Tribunal did not have the jurisdiction in the first matter to make a global decision affecting all contract management fees. Accordingly the Respondent has continued to apply a sliding scale of contract management fees since the date of the first decision.

11. The Tribunal considered the wording of the first application and the corresponding decision. The Applicant's Statement of Case includes management of maintenance contracts in general under the heading Management Fees at page 28 of the original bundle. The decision states '*the Tribunal heard representations about contract management fees which the Applicants argued were excessive.'* The Applicant specifically argued that the contract management fees in respect of the Lift were excessive being approximately 13% of the contract value and the Tribunal agreed, considering 10% to be a reasonable figure.

12. The Tribunal received the Respondent's sliding scale of management fees subsequent to the hearing at the Tribunal's request, in order for the Tribunal to consider the issue of contract management fees generally, rather than being limited to the lift contract alone. This was provided by the Respondent. The Tribunal's decision in paragraph 3 was that "the contract management fee percentage charged **under the lease** (*emphasis added*) is to be limited to 10%", this being a figure taken by the Tribunal as representing a reasonable figure for contract management in general. The Tribunal is of the view that its decision was clear at the time as applying to all contract management fees under the lease, and was not appealed by the Respondent.

13. Even if the Respondent were correct in its analysis of the Tribunal's original decision, and it had only applied to the lift contract, it may assist the Respondent to receive the indication that the Tribunal's view continues to be that a percentage above 10% for contract management fees is likely to be unreasonable based upon the Tribunal's knowledge and expertise in this area.

14. Accordingly the matters relating to contract management fees for 2013 and 2015/16 are struck out as having already been decided by the Tribunal under case number **MAN/00FB/LSC/2017/0051** and not appealed at the time.

15. The claim in respect of 2016/17 is in respect of a sum charged to the sinking fund. The year 2016/17 was considered by the Tribunal in the first matter only in so far as it was a budget. This does not preclude the Tribunal looking at the actual figures and considering the reasonableness

and payability of sums charged to the service charge account. Accordingly the Respondent is requested to provide an explanation of the charge of £2839.24

16. The claim in respect of 2017/18 is in respect of sums charged to the service charge account for door entry and warden call. The year 2017/18 was considered by the Tribunal in the first matter only in so far as it was a budget, and as above this does not preclude the Tribunal looking at the actual figures and considering the reasonableness and payability of the sums charged to the service charge account. Accordingly the Respondent is requested to provide documentary evidence to support the charges referred to in the application.

17. The remainder of the claim for 2017/18 in so far as it concerns contract management fees is struck out for the reasons set out above, having previously been determined by the Tribunal.

18. The Tribunal is asked to determine the management fee for 2019. The Respondent argues that this has already been determined by the Upper Tribunal as being outside the jurisdiction of the FTT, being a fixed charge. Ms Nieuwland argues on behalf of the Applicant that whilst the management fee was previously a fixed charge, the sum charged now fluctuates according to the level of service delivered. She therefore maintains that this new method of calculating the management fee distinguishes it from the type previously determined by the Upper Tribunal as being outside the jurisdiction of this Tribunal.

19. If Ms Nieuwland is correct then this is a new matter which has not previously been determined by the Tribunal. Clearly if she is incorrect then the Tribunal will be unable to make a determination, as it will not have jurisdiction. The Tribunal considers that it does not at this stage have sufficient information to be confident that this issue has already been determined, and will therefore hear evidence on the issue at the final hearing.

20. The Tribunal was requested to include the matter remitted back from the Upper Tribunal to be heard alongside the remaining matters in this case. The Tribunal considers it would be in the interests of justice and efficient case management to do so.

IT IS ORDERED

1. The matters relating to contract management fees for 2013, 2015/16 and 2017/18 are struck out as having already been decided by the Tribunal under case number **MAN/00FB/LSC/2017/0051**

2. The remaining matters before the Tribunal are:
    a) 2016/17 – sinking fund charge of £2839.24
    b) 2017/18 – charges in respect of door entry and warden call
    c) 2019 – argument to distinguish current method of calculating the management fee from previous method of calculation, and, if the Tribunal determines it has jurisdiction, the reasonable value of the management fee.
    d) The remitted matter from the Upper Tribunal - being the reasonableness of sinking fund contributions

3. Within 14 days from the date of these directions**,** the Applicant shall prepare and distribute a 'Scott Schedule' to the Respondent which covers the years 2016/17 to 2019 and covers the issues set out above. At the same time the Applicant must confirm in writing to the Tribunal that it has done so. The Schedule is to be tabulated with the following headings:

- Disputed Item
- Year
- Reason for dispute
- £ Amount the Leaseholders are willing to pay
- Bundle page no.
- Respondents answer.
- Applicants comment on answer.

4. Within 14 days of receipt of the response to Direction 3 the Respondent shall provide comments in response to the disputed items using the space provided within the Scott schedule under 'Respondent's answer' and send a copy of the same to both the Applicant and Tribunal. This, together with copies of all relevant service charge accounts, demands, budgets / estimates, statements, spreadsheets and associated correspondence for the relevant service charge year(s).

5. Within 14 days of receipt of Direction 4 the Applicant provide comments in response to the disputed items under 'Applicant's answer' and send a copy of the same to both the Applicant and Tribunal.

<u>Preparing for the hearing</u>

6. The parties must try to agree a single bundle of documents for use at the hearing (in a file, with numbered pages and a list of contents). The bundle must include a copy of every document sent in accordance with the Tribunal's directions and, in particular, it must include copies of:

    - the application with enclosed documents
    - the order of the county court and relevant court documents

- these directions and any subsequent directions
- the lease of the Property and any relevant lease variations
- service charge accounts and budgets for the years in dispute
- relevant notices, invoices and demands for payment
- statements of case
- signed statements of any witnesses of fact the parties intend to call to give evidence at the hearing
- any expert reports (if permission has been given to admit expert evidence)

7. If the parties are unable to agree a bundle, they must inform the Tribunal as soon as possible. Otherwise, the Respondent must send **four** copies of the agreed bundle of documents to the Tribunal **at least 14 days before the hearing date**. The Respondent must also send the Applicant one copy of the bundle.

The hearing

8. The hearing will be listed for half a day at a venue to be confirmed and will take place between 29 August and 5 September 2019. The parties are requested to provide any non-availability for this time period by **26 July 2019.**

General

9. Documents must be sent by post or by hand delivery only. Documents sent by fax or by email will not be accepted.

10. No documents, letters or emails may be sent to the Tribunal unless also sent to the other party(ies) to these proceedings. Confirmation that this has been done must be clearly marked on all correspondence.

11. A party may apply for another direction amending, suspending or setting aside these directions. Unless made orally during the course of a hearing, any such application must be made in writing and must state the reason for making it.

THESE DIRECTIONS ARE FORMAL ORDERS AND MUST BE COMPLIED WITH. FAILURE TO COMPLY WITH DIRECTIONS COULD RESULT IN SERIOUS DETRIMENT TO THE DEFAULTING PARTY, AND COULD RESULT IN THE TRIBUNAL REFUSING TO HEAR ALL OR PART OF THAT PARTY'S CASE AND ORDERS MAY BE MADE FOR THEM TO REIMBURSE COSTS OR FEES THROWN AWAY AS A RESULT OF THE DEFAULT.

IF ANY PARTY WANTS TO ALTER THESE DIRECTIONS IT MUST IMMEDIATELY APPLY IN WRITING TO THE TRIBUNAL OFFICE GIVING FULL REASONS.