FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case Reference		**CAM/22UN/LSC/2020/0022**
Property	**:**	**6-10 Granville Road Clacton-on-Sea Essex CO15 6BX**
Applicant	**:**	**The various leaseholders named in the application**
Representatives	**:**	**Philip Scordis (Flat 6d)**
Respondent	**:**	**Powell & Co Property Limited**
Representative	**:**	**Sean Powell**
Type of Application	**:**	**For the determination of the liability to pay and reasonableness of service charges (s.27A Landlord and Tenant Act 1985)**
Tribunal Members :		**Judge Professor R. Abbey** **Mr D. Barnden MRICS**
Date and venue of Hearing	**:**	**29 October 2020 by a telephone hearing**
Date of Decision	**:**	**05 November 2020**

DECISION

Decisions of the tribunal

(1) The tribunal determines that: -

(2) The disputed service charges are reasonable and the applicants are liable under the terms of the lease of the property to pay the service charges as demanded other than as are disallowed or are varied by this decision with regard to the following specific items: -

a. Concreting work in 2012 within the s.20 works that year amounting in total to £7873 (at 2012 figures) and at 10% the sum of £787.30 and if appropriate plus VAT per lessee is to be allowed from the service charges for that service charge year.

(3) The tribunal further determines that it is just and equitable in the circumstances for an order to be made under section 20C of the Landlord and Tenant Act 1985 that 100% of the costs incurred by the respondent in connection with these proceedings should not be taken into account in determining the amount of any service charge payable by the tenant.

The application

1. The applicants seek a determination pursuant to s.27A of the Landlord and Tenant Act 1985 ("the 1985 Act") as to the amount of service charge payable to the respondent in respect of service charges payable for services provided for **6-10 Granville Road Clacton-on-Sea Essex CO15 6BX**, (the property) and the liability to pay such service charge.

2. The applicants are the lessee of the property pursuant to various long leases. The Disputed Charges are as set out in the schedule provided by the Tribunal and utilised by the parties for the service charge years from 2011 through to 2020. They concentrated mostly upon insurance, general service charge expenditure and specific works covered by s.20 notices in the early years.

3. In addition to the specific service charges in dispute, the applicant had general issues regarding the lease percentages for the service charges as well as specific concerns regarding section 20 notices.

4. The relevant legal provisions are set out in the Appendix to this decision. Additionally, rights of appeal are set out below in an annex to this decision

The hearing

5. The applicants were in person acting through Mr Scordis, one of the tenants, and the respondents were represented by Mr S Powell of the lessor company.

6. The tribunal had before it an electronic/digital trial bundle of documents prepared by the parties, in accordance with previous directions.

7. This has been a remote telephone hearing which has been consented to by the parties. A face to face hearing was not held because it was not possible due to the Covid 19 pandemic restrictions and regulations and because all issues could be determined in a remote telephone hearing. The documents that were referred to are in a bundle of many pages, the contents of which the Tribunal has recorded and which were accessible by all the parties.

8. In the context of the Covid 19 pandemic and the social distancing requirements the Tribunal did not consider that an inspection was possible. However, the Tribunal was able to access the detailed and extensive paperwork in the trial bundle that informed their determination. In these circumstances it would not have been proportionate to make an inspection given the current circumstances and the quite specific issues in dispute.

The background and the issues

9. The property is a block of flats in Clacton-on-Sea. There are 11 flats in the block of various sizes. They range from studio flats to a large three-bedroom maisonette, being flat 10d. One element of this dispute revolves around the service charge contributions of flats 6b and 8a, being 5% each flat of the total service charge for the block. The other nine flats each is responsible for 10% of the total service charge.

10. The lessees of the flats at the property hold long leases which require the lessor to provide services and the lessees to contribute towards their cost by way of a service charge. The lessees must pay a percentage described in his lease for the services provided. The liability for a share of the total service charge cost is expressed in the leases and as described above will be either 10% or 5%.

11. Mr Sean Powell is a director of the respondent company. Mr Powell is also a director of Powell & Co Management Limited who managed the block until a Right to Manage arrangement was put in place by order of the Tribunal with effect from 25th August 2020. Mr Powell is also the leaseholder of flat 6b. At one point the leaseholder of flat 6b paid no service charge as the other 10 flats each paid 10%. Subsequently the freeholder granted a deed by way of a form of lease variation for flats 6b and 8a amending the service charge contributions from 10% to 5% each

thereby making the total service charge contributions 100% across the eleven flats.

12. Mr Scordis and the other lessees in the block took the view that it was unfair and unreasonable that Mr Powell paid no service charges prior to the variation. Mr Powell relies upon the express lease terms. It was apparent to the Tribunal that Mr Powell was involved in the block in three different capacities as set out in the paragraph above and that this might lead to conflicts of interest.

13. However, as for the lease terms this Tribunal could not vary the lease terms as this present application was about reasonableness of service charges. The percentages are clearly express in the lease and are binding. It is open to any party to the leases to make an application to a Court or Tribunal to seek to make lease changes but this is not something that this Tribunal is entitled to consider in the circumstances of this application in front of it. Inevitably this has meant in many cases the objections made by the tenants will fall to the wayside. So, for example, issues regarding the split of annual insurance premium raised by the applicants and based upon the percentages will not succeed. (Indeed the Tribunal was not shown any alternative quotes from the applicant and was therefore of the view that the amounts charged for insurance across the years was reasonable).

14. Mr Scordis raised objections regarding service charges and s.20 works carried out as long ago as 2011. This is some nine years ago and many service charge payments have been made by the tenants since then. It might therefore be alleged that the tenants have agreed the service charge payment that they now contest. Section 27A of the Landlord and Tenant Act 1985 provides that:

> *"(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….*
> *(5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment."*

15. In this context the Tribunal toook note of *Shersby v Grenehurst Park Residents Co. Ltd* [2009] UKUT 241 (LC) Judge Huskinson. This case may be cited for the proposition that delay in applying to a Tribunal can mean that service charges are "deemed to be admitted" within s.27A(4)(a) of the Landlord and Tenant Act 1985.The major part of the decision in the *Shersby* case concerned a manager's power under a lease to vary service charge percentages. A subsidiary issue concerned insurance premiums as to which the relevant passage is (para.44):

> *"As regards the years 1997 to 2004 inclusive I accept [landlord's counsel's] argument that the Appellant is not entitled to make an application under section 27A in respect of*

these payments. I find that he has agreed or admitted these sums and that section 27A(4) prevents his application in respect of these years. As regards section 27A(5) this provides that the Appellant is not to be taken to have agreed or admitted any matter by reason only of having made any payment. However, the Appellant has done substantially more than merely make payments in respect of these years. He has not only made the payments but has waited a long time (namely until the 2007 application) before seeking to challenge them, and has in the meantime made a separate application to an LVT raising various matters regarding services charges but not raising any matter as regards these insurance premiums. The 2005 proceedings were then withdrawn without the insurance premiums ever being raised as an issue. The combination of these repeated payments, without any complaint or reservation, coupled with the lapse of time and with the express challenging in formal 2005 proceedings of certain matters (but not these insurance matters) leads me to conclude that the Appellant must be taken to have agreed or admitted these premiums."

16. The issue was also considered in *Cain v Islington* [2015] UKUT 0117 (LC) where HHJ Gerald commented that:

> *"Looking at the reasoning behind this provision, no doubt the reason why the making of a single payment on its own, or without more, would never suffice is that such will often be insufficiently clear but also, in the peculiar area of landlord and tenant, it is common enough for tenants to pay (even expressly disputed) service charges so as to avoid the risk of forfeiture and preserve their home and the value of their lease. But the reason why a series of unqualified payments may, depending on the circumstances, suffice is because the natural implication or inference from a series of unqualified payments of demanded service charges is that the tenant agrees or admits that which is being demanded. Putting it another way, it would offend common sense for a tenant who without qualification or protest has been paying a series of demanded service charges over a period of time to be able to turn around and deny that he has ever agreed or admitted to that which he has previously paid without qualification or protest."*

17. Accordingly, the Tribunal took the view that much of these early service charges come within this area of concern and are affected by these issues. The Tribunal noted that this was the first of any application with regard to the service charges and as such would seem to indicate that there had been unqualified payments that satisfied the circumnutates set out in the *Cain* decision. For this reason, many of the disputed items will not succeed.

18. However, in one regard there is a matter that the Tribunal found it could consider. One section 20 set of works relating to concreting in 2012 were at issue. In his evidence the respondent conceded that this work had not in fact been carried out. (It may be the case that other works were completed but this is immaterial in the context of the s20 process and the specifically agreed works.). This work amounted in total to £10440 plus vat in 2019 terms and figures. As to index linking back to 2012 values, The Tribunal has used the costmodelling.com tender prices index. This index is compiled by Costmodelling Limited from information published by the Office of National Statistics, the RICS and several leading UK construction cost consultancies. For Quarter 1 of 2012 the index is 138. For Quarter 2 of 2019, 183. So, £10,440 times (138/183) is £7,873 to the nearest pound. Therefore, this amount is the amount that the respondent should in total reasonably refund to the tenants and if appropriate plus VAT.

19. Accordingly, the issues arise for determination are with regard to the charges and issues listed in the schedule mentioned above and will be considered item by item by the Tribunal following the same list. The Tribunal will consider whether the sums claimed for the service charge year are reasonable within section 19 of the Landlord and Tenant Act 1985, (were the services reasonably incurred and were they of a reasonable standard).

Decision

20. The tribunal is required to consider whether the services were reasonably incurred and were they of a reasonable standard. To do this the Tribunal will consider each item in dispute, taking into account the written and oral representation made on behalf of the parties before and during the hearing.

2011

21. Dealing first with the insurance. This is the first example where an objection must fail for the reasons set out above based upon the percentage issue. The second item is the management fee. This was set ot £250 and at the hearing the applicant conceded that this was a reasonable level of charge. Therefore, the Tribunal did not demur from this assessment. Of the remaining two items regarding the service charge fee of £547 and the s.20 charge these are both caught by the *Cain* approach and are therefore unaltered by the Tribunal.

2012

22. Again, dealing first with the insurance. This is the next example where an objection must fail for the reasons set out above based upon the percentage issue. Of the remaining items regarding the service charge

fee of £600 and the s.20 charges these are both caught by the *Cain* approach and are therefore unaltered by the Tribunal. This is of course other than the issue regarding the concreting that has been considered above.

2013

23. The disputed charges in this year are the same, insurance, s.20 and service charge fee and as such remain unaltered by the Tribunal for the same reasons outlined above.

2014

24. The disputed charges in this year are the same, insurance and service charge fee and as such remain unaltered by the Tribunal for the same reasons outlined above.

2015

25. The disputed charges in this year are the same, insurance at £156 and service charge fee of £650. The Tribunal considered these and in the absence of any evidence to the contrary decided that the charges were reasonable.

2016

26. The disputed charges in this year are the same and indeed are at the same levels, insurance at £156 and service charge fee of £650. The Tribunal considered these and in the absence of any evidence to the contrary decided that the charges were reasonable.

2017

27. The disputed charges in this year are the same, insurance at £162 and service charge fee of £700. The Tribunal considered these and in the absence of any evidence to the contrary decided that the charges were reasonable.

2018

28. The disputed charges in this year are the same, insurance at £206 and service charge fee of £700. The Tribunal considered these and in the absence of any evidence to the contrary decided that the charges were reasonable.

2019

29. The disputed charges in this year are the same, insurance at £170 and service charge fee of £700. The Tribunal considered these and in the absence of any evidence to the contrary decided that the charges were reasonable.

2020

30. The disputed charges in this year are the same, insurance at £82 and service charge fee of £750. The Tribunal considered these and in the absence of any evidence to the contrary decided that the charges were reasonable.

31. For all the reasons set out above the tribunal is of the view that the service charges for the various items listed above are reasonable and payable by the applicant save as otherwise varied by this decision.

Application for a S.20C order

32. It is the tribunal's view that it is both just and equitable to make an order pursuant to S. 20C of the Landlord and Tenant Act 1985. Having considered the conduct of the parties, their written submissions and taking into account the determination set out in the decision set out above, the tribunal determines that it is just and equitable in the circumstances for an order to be made under section 20C of the 1985 Act that 100% of the costs incurred by the respondent in connection with these proceedings should not be taken into account in determining the amount of any service charge payable by the tenant.

33. With regard to the decision relating to s.20C, the Tribunal relied upon the guidance made by HHJ Rich in *Tenants of Langford Court v Doren Limited* (LRX/37/2000) in that it was decided that the decision to be taken was to be just and equitable in all the circumstances. The tribunal thought it would not be just to allow the right to claim all the costs as part of the service charge. The s.20C decision in this dispute gave the tribunal an opportunity to ensure fair treatment as between landlord and tenant in circumstances where costs have been incurred by the landlord and that it would be just that the tenant should not have to pay them.

34. As was clarified in *The Church Commissioners v Derdabi* LRX/29/2011 the tribunal took a robust, broad-brush approach based upon the material before it. The tribunal took into account all relevant factors and circumstances including the complexity of the matters in issue and all the evidence presented. The Tribunal also took into account all oral and written submissions before it at the time of the hearing.

35. It was apparent to the tribunal that there were significant potential conflict issues that were highlighted in this decision and which related

specifically to the landlord, managing agent and lessee of one of the flats. The percentage charges were a significant element of the original charge dispute and were only removed by the respondent at quite a late stage in these proceedings once the variation had been effected. Accordingly, it can be seen that the tribunal did take issue with elements of the conduct of the respondents and could see where the applicant was able to take issue with the conduct of the service charge accounting process. For all these reasons the tribunal has made this decision in regard to the 20C application.

Name: Judge Professor R. Abbey **Date:** 05 November 2020

Appendix of relevant legislation and rules

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.

ANNEX - RIGHTS OF APPEAL

1. 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.

2. 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.

3. 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.

4. 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.