FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**CAM/11UB/LSC/2020/0026**
Property	**:**	60 Brooks Mews, Aylesbury, Bucks HP19 8FU
Applicant	**:**	Charles Ghunney [in person]
Respondent	**:**	Catalyst Housing Ltd
Representative	**:**	Byroni Kleopa, counsel instructed by Penningtons Manches Cooper
Type of Application	**1**	for determination of reasonableness and payability of service charges for the years 2015/16 to 2020/21 [LTA 1985, s.27A]
	2	for limitation of the respondent's ability to include its costs of these proceedings when calculating the service charge due from the applicant for this or any other year [LTA 1985, s.20C]
Tribunal	**:**	Judge G K Sinclair
Date of Hearing	**:**	Monday 16th November 2020, by BTMeetMe telephone conference call
Date of this decision	**:**	20th November 2020

DECISION

- Determination ..... paras 1–3
- Background ..... paras 4–8
- The lease. ..... paras 9–14
- Material statutory provisions ..... paras 15–18
- The hearing ..... paras 19–29
- Discussion and findings ..... paras 30–39

1. In this application the applicant leaseholder raises certain issues such as :
   a. A request that the tribunal direct that he be sent two separate service charge demands : one by Catalyst and the other by its managing agent FirstPort Property Services Ltd ("FirstPort") so that he knows precisely where he stands
   b. A query why the section 106 agreement between developer and Aylesbury Vale District Council (concerning the transfer of ownership of the play area) has not been implemented yet.

   These are outwith the tribunal's jurisdiction, and so cannot be determined.

2. He also questioned the cost of buildings insurance arranged by his landlord, Catalyst, for his house. At the outset of the hearing, however, he disavowed any such challenge. The matter proceeded solely on the question whether the fees charged by both Catalyst and FirstPort for the work actually done by them were reasonable.

3. For the reasons which follow the tribunal determines :
   a. That the application under section 27A concerning management fees be dismissed
   b. That the respondent landlord, responsible for the confused management which provoked the application, shall not be entitled to include the costs of defending this application when calculating the service charge payable by the applicant for this or any future year [section 20C]
   c. No order is made under rule 13(2) for the reimbursement of tribunal fees paid by the applicant.

Background

4. The applicant lives on a very recent development of houses and flats, a number being affordable homes, at Aylesbury in Buckinghamshire. The estate as a whole, comprising 75 units, is owned freehold by the respondent housing association, but many of the houses are themselves owned freehold, subject to a rent charge to secure payment for the maintenance and lighting of communal areas such as car parks and soft landscaped areas which occupiers are entitled to use but which are still owned by the respondent. It is unclear whether the estate roads have been adopted by the local highways authority.

5. The applicant occupies a house, but under a shared ownership lease granted by the respondent. His beneficial interest is currently 35%, and his annual rent is calculated accordingly. His other financial obligations under his lease are treated as service charges, governed by specific provisions in the lease and the legislation discussed below.

6. Rather than undertake direct responsibility for all the maintenance work on the common parts the respondent appointed FirstPort to act as its managing agent. Very confusingly :
   a. Catalyst refers in its service charge accounts to "superior landlord costs", when it means estate costs incurred by FirstPort as its managing agent
   b. Catalyst gets involved in part of the management, namely to the blocks where it has granted leases of flats or shared ownership houses, but leaves FirstPort to deal directly with the owners of freehold houses
   c. The service charge is calculated by reference to the 31st March year end

mentioned in the lease, whereas FirstPort produces its estimates and accounts (including both its S1 estate and Catalyst's S2 block expenses) on a calendar year basis with a 31st December year end. For leaseholders such as the applicant this causes delay and confusion in working out what balancing payment or credit is due

d. The service charge accounts exhibited to the respondent's statement of case include an S2 account referring to expenditure on a different block entirely. From the references to window cleaning and cleaning of internal common parts, landlord's electricity, etc the block concerned comprises flats.

7. Mr Ghunney's application to the tribunal was received on 30th January 2020. In it he sought to challenge "the management fee Catalyst Housing Association charges even though they have outsourced the management of the development." He went on to state that Catalyst had "recently lowered this charge admitting they had been overcharging."

8. Directions were issued on 24th August 2020, anticipating that the case be dealt with on paper, without a hearing. As applicant, Mr Ghunney was directed to set out in a schedule the specific items he was challenging, and why. The respondent housing association could then submit its replies to each point on the schedule. Whether accidentally or otherwise, Mr Ghunney never served his schedule on the respondent by the required date[1] but instead sent two emails raising other points (including insurance) and attaching documents, as a consequence of which the respondent did not know precisely what case it had to meet. Shortly before the intended determination date Mr Ghunney changed his mind and asked for an oral hearing. Due to current coronavirus restrictions the hearing was conducted remotely by telephone.

The lease

9. The material lease, granted by the respondent as landlord to the applicant as leaseholder for a term of 125 years, is dated 22nd September 2015. With certain terms being defined either in the Particulars or in Schedule 6, the service charge provisions largely appear in clause 6 of the lease. By clause 2 the leaseholder agrees to pay by way of consideration the specified rent, the service charge in accordance with clause 6, and the management charge. This is reinforced by a covenant to similar effect at clause 3.1.

10. Schedule 6 defines the account year as ending on 31st March, and "Management Charge" means the sum charged by the landlord for the administration of the service charge as may be varied from time to time by the landlord acting reasonably. "Service Charge" means the specified proportion of the service provision (the latter defined by reference to clause 6.3) but, unhelpfully, the Particulars only identify the specified proportion as being :

a. in respect of Service Provision relating to the Common Parts of the Estate – A fair and reasonable proportion
b. in respect of Service Provision relating to audit fees – Apportioned per unit
c. in respect of Buildings Insurance and Management – Apportioned per

[1] He finally did so as recently as 20th October 2020

unit

11. "Unit" is not defined, either by reference to dwellings on the estate or only those let by the respondent on long leases, but estate costs (car park and grounds maintenance, street lighting, and public liability insurance) managed by FirstPort as Catalyst's agent appear to be divided by it between 75 units. These would include the freehold houses. Catalyst would not be responsible for insuring the latter.

12. As the subject premises are a leasehold house it is important to note that among the leaseholder's many covenants are those requiring him to repair and keep the premises in good and substantial repair (clause 3.5) and to decorate (clause 3.6). There no internal common parts for the landlord to manage. It simply has the obligations of taking out buildings insurance for the premises (clause 4.2) and to maintain the common parts of the estate (clause 4.3). The leaseholder covenants to reimburse his appropriate share of the buildings insurance arranged by the landlord by clause 3.3, so this is treated as separate from the service charge.

13. By clause 6.1 the leaseholder covenants to pay the service charge by equal payments in advance and on the same dates as the rent, i.e. monthly, on the first of each month. Clause 6.3 deals with the calculation of the estimated annual expenditure, which forms the basis of the monthly payments, 6.4 sets out the items of expenditure to be included within the service provision[2], and 6.5 for the determination and certification by the landlord of the year's actual expenditure so that a balancing payment can be demanded and paid or credit allowed.

14. While clause 6.4.3 includes amongst the fees and expenses which the landlord may incur the cost of preparing the service charge account, and although the Particulars mention the cost of audit, clause 6.5 refers only to certification of the account. There is no specific requirement for an audit.

Material statutory provisions

15. Section 18 of the Landlord and Tenant Act 1985 defines the expression "service charge", for the tribunal's purposes, as :

> 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…

16. The overall amount payable as a service charge continues to be governed by section 19, which limits relevant costs :
    a. only to the extent that they are reasonably incurred, and
    b. where they are incurred on the provision of services or the carrying out of works, only if the services or works are of a reasonable standard.

17. The tribunal's powers to determine whether an amount by way of service charges is payable and, if so, by whom, to whom, how much, when and the manner of payment are set out in section 27A of the Landlord and Tenant Act 1985. The first step in finding answers to these questions is for the tribunal to consider the

[2] Including, at 6.4.6, an anomaly. The sub-clause refers to "any costs incurred by the Landlord under clause 5.8.5, including any contribution to the expert's costs"; but there is no clause 5.8.5

exact wording of the relevant provisions in the lease. If the lease does not say that the cost of an item may be recovered then usually the tribunal need go no further. The statutory provisions in the 1985 Act, there to ameliorate the full rigour of the lease, need not then come into play.

18. Please also note sub-sections (5) & (6), which provide that a tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment, and that 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 in a particular manner or on particular evidence of any question which may be the subject of an application to the tribunal under section 27A.

The hearing

19. Bearing in mind that the dispute ostensibly concerned less than £500 the bundle of documents put before the tribunal was inordinately large, at some 730 pages. Unhelpfully, the numbering of the paper bundles and the eBundle differed by between 2 and 7 pages. Fortunately counsel for the respondent and the judge used the eBundle only. Quite what the applicant used is unclear, as – having asked for an oral hearing – he needed to go to work and so attended the hearing while travelling on a train. This was less than satisfactory.

20. The bundle was larger than necessary due to some duplication (with 2 copies of each of the lease and the buildings insurance policy) and over 150 pages of unspecified "landlord's disclosure" which was not referred to in its statement of case. The applicant's late and unanswered 2 page schedule appeared right at the end of the bundle.

21. The respondent was represented by Ms Kleopa of counsel. Also present on the telephone, but not speaking, were Joanna Zlado and Reventi Jesandi. Both are service charge managers at Catalyst. Neither party filed any witness statements, but in its lengthy statement of case the respondent produced a number of figures for annual management costs and attempted to answer the points perceived to be raised by the applicant, including buildings insurance. The document failed to answer a number of points, however, so the tribunal appreciated the fact that a hearing enabled some further questions to be asked to elicit some clarification of, for example, the size of the estate, Catalyst's status, what was meant by "superior landlord", and why the supposed estimated service charge accounts at exhibit C were produced by FirstPort and calculated by calendar year instead of the period prescribed by the lease.

22. Paragraphs 18 to 20 of the respondent's statement of case refer to demands sent to leaseholders for the year ahead, annual service charge accounts, and demands for any balancing payments. These documents are exhibited as C, D and E, but in fact those at C and D are prepared by FirstPort and its accountants (BDO) and calculated on a calendar year basis; not the 31st March year end imposed by the lease. The documents at C are not demands, but estimates of that year's likely expenditure. During the hearing Ms Kleopa said, on instructions, that exhibit C comprised financial documents sent by FirstPort to Catalyst; not to individual leaseholders. No clear explanation was offered as to why the exhibits clearly referred to expenditure on an entirely different block (probably of flats) and not to the small block of shared ownership houses including the subject premises.

23. Paragraphs 47 onwards deal specifically with management charges sought by the respondent on its own behalf or on behalf of FirstPort. Paragraphs 49-53 concern Catalyst's fees (for the S2 block expenditure own on the estimates and accounts), while paragraphs 54-61 are for FirstPort only (for the S1 estate costs). Looking at the documents exhibited it appeared as if FirstPort was charging a fixed £70 per unit under S1 in 2016 while Catalyst was charging £100 per unit under S2.

24. The figures listed in the statement of case were larger, suggesting a combined total in recent years of more than £300 for the management of a leasehold house and communal grounds. No, No, said Ms Kleopa. The tribunal had ignored the "post reduction actual charge" shown against the figures in paragraph 51. This reduction was not fully explained, but appeared to be a recognition that Catalyst had been overcharging for services such as bulk refuse collection which simply did not apply to houses.

25. The truth was that Catalyst charged two rates : a higher rate of £160 per unit if it carried out all the management and a lower rate if there was another "superior landlord". This appeared to refer to blocks of flats owned by other freeholders such as other housing associations, but on this estate there are none. Again, what Catalyst really meant was that a lower rate was charged if FirstPort was also imposing a charge for work carried out by it. The combined total should only be around £160 per unit, £165 for 2019.

26. Although the applicant hinted that FirstPort had, after demands by residents, reduced its management fee from £6 973 to £4 500 for the year 2019 he thought that he had raised and explained this in an earlier email, but he had not. Very fairly, Ms Kleopa referred the tribunal to the income and expenditure account at page 286, showing actual management fees of £4 500.16 as against an estimate of £6 973.00.

27. The tribunal noted that with actual costs for maintenance work, etc on the estate totalling £2 532.41 FirstPort had added, in addition to the above management fees, a further £1 376.01 for an account preparation fee, £420.00 for audit fees, £16.96 for legal and professional fees, and £207.50 for company secretarial fees. Quite how these could be justified was apparently outwith the knowledge of the respondent, which was employing FirstPort as its agent and passing on its costs unquestioningly to leaseholders.

28. Overall, Ms Kleopa said that the sole issue was the reasonableness of the overall charge for management, and that Mr Ghunney had neither raised specific points nor attempted to produce any comparable evidence of management fees. A £95 management fee for the maintenance and repair of the estate and £75 to Catalyst are reasonable. The applicant may not feel that he benefits from all these services, but they are payable.

29. Mr Ghunney concluded by saying that no reduction was given for 2015 or 2016, and in this last year FirstPort had reduced its fee to £4 500. This was because the playground was not maintained and residents demanded a reduction in the fee of 50%. Although the estimate for the following year was higher this was because it had been issued before the reduction had been agreed. He also sought greater

clarification in the demands served upon him.

Discussion and findings

30. The respondent freeholder has largely brought this application upon itself by over-complicating the management of this part-freehold and part-leasehold estate. References to FirstPort as a "superior landlord" when it is managing agent only, a lack of knowledge of what it has been doing and charging (seemingly regarding it as an independent party managing the majority of the estate, but forgetting that Catalyst is its principal), and allowing FirstPort to use its own accounting period instead of that identified in the lease, have only added to the confusion.

31. Catalyst has already had to reduce its fees from 2016/17 onwards in recognition of the fact that it had been overcharging the applicant for costs not incurred by his property, and that it was passing on FirstPort's management fees as well. Paragraph 48 of its statement of case lists a number of items justifying its fee as well as for arranging the buildings insurance. Some of these, such as dealing with shared ownership leaseholders' queries about staircasing and dealing with FirstPort's managing agents (presumably its staff), are questionable. Others, such as preparing accounts and issuing demands are questionable because a lot of this work (to a different accounting period) seems to have been done by FirstPort : see exhibits C and D. Is it reasonable for the applicant to pay for the cost of unpicking the calendar year accounts and converting them to April to ones ending on 31st March?

32. It was put to Ms Kleopa that one does not buy a dog and bark oneself, yet here Catalyst did not just let FirstPort get on with management, keeping just a watchful eye over matters. The amount of work done on the estate was relatively modest, yet the inclusion of S2 works in the FirstPort accounts suggests that it was that company that was actually managing everything on the estate and the blocks. Catalyst appears only to have adopted an administrative role, but why?

33. The applicant appears to have been asking for documentary evidence of the work actually done on the estate and costs incurred by FirstPort, and how it could justify such a high management fee for doing very little. Unfortunately he did not particularise his complaints in a schedule as directed, and when (far too late) he did he focussed on the irrelevant point that he did not actually benefit from the supposed services. If the lease requires him to contribute to certain costs then the tribunal cannot interfere; the classic example being the leaseholder of a ground floor flat obliged to contribute to the cost of lift maintenance. This was explained to Mr Ghunney by the tribunal during the hearing.

34. The lease provides for the imposition and collection of a management charge – one; not two. How does one assess a proper fee overall for managing a limited amount of external common parts and the arranging of block insurance, but with no liability for maintenance, repair or redecoration of the building itself? In the absence of comparable evidence or a degree of particularity in the applicant's complaints (which did not include a number of the S1 items which perhaps ought properly to be struck through with a red pen) the tribunal is left only to its own knowledge and experience as an expert tribunal.

35. Managing agents tend to charge, as the Blue Book encourages them to do, a fixed fee for normal everyday items including periodic routine inspections and the sending out of service charge demands and receipts, adding separate charges for section 20 major works consultations, contract management, etc. The lower the number of units the higher the cost is likely to be, to make the task worthwhile.

36. While the tribunal notes the reductions in its share of the management fee conceded by Catalyst (although without any clear explanation for the figures used) and the 2019 reduction in its fee by FirstPort it cannot, on the case as put and the evidence before it, say with any confidence that a total of £165 per unit is unreasonable in the circumstances. The burden lies on the applicant to prove that it is too high. For that reason the application fails.

37. Further, more focussed exploration may justify a future tribunal in taking a very different approach. Catalyst should reflect on how it is managing this estate, and how the failure to give its managing agent – whether FirstPort or someone else – a firm steer and hold it to the exact provisions in the lease rather than its own accounting preferences may be unnecessarily inflating the cost of management. By carelessly creating confusion in the mind of the applicant, and perhaps in other leaseholders, it has only provoked this application.

38. For that reason the tribunal is prepared to make an order under section 20C.

39. As the applicant has lost, and failed to comply with the tribunal's directions by producing a detailed schedule listing his complaints within the required time, the tribunal is not prepared to order the reimbursement of either the issue or hearing fees paid by him. A hearing was not anticipated until the applicant requested one very late in the day.

Dated 20th November 2020

Judge G Sinclair
First-tier Tribunal Judge