FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**CAM/33UH/LSC/2019/0059 A**
Property	:	Flat 6, St Mary's Court, Church Street, Diss IP22 4DR
Applicant	:	Michael Norman (in person)
Respondent	:	FirstPort Retirement Property Services Ltd
Representative	:	Paul Sweeney (counsel), instructed by JB Leitch Ltd
Type of Application	**1**	for determination of reasonableness and payability of service charges for the years 2017, 2018 & 2019 [LTA 1985, s.27A]
	2	an order that the landlord's costs are not to be included in the amount of any service charge payable by the applicant and those other lessees identified by property number in the application [*op cit*, s.20C]
Tribunal members	:	Judge G K Sinclair & G F Smith MRICS FAAV REV
Hearing date	:	Monday 14th September 2020, by BTMeetMe
Date of this decision	:	15th September 2020

DECISION

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1. In this application, originally brought on 5th November 2019, the applicant lessee was required by the tribunal to file and serve a succinct list or schedule that

identifies by reference to each separate accounting year in question :

a. each specific item on the annual service charge account or statement that he disputes, and why
b. The amount claimed by the landlord for that item
c. The alternative amount that the applicant contends is payable
d. In respect of any major works to which section 20 applies, the contract concerned, the alleged failure to comply with the consultation regulations, and the prejudice suffered by the applicant resulting from such breach.

2. In response, in a document erroneously dated 5th November but received in the tribunal office on 24th December 2019, the applicant listed four items :

a. That the service charges levied include management fees that are defined in the lease by nature not quantity
b. That the service charges include the costs of surveyor fees for professional services in the window and door replacement programme, after failing to include the initial estimated cost of such involvement as stipulated in section 20
c. That the service charge apportionment is not yet as defined in the lease as 1/29th. This applies to 2018 and 2019 but also to previous years
d. Having advised the respondent that he would be withholding payment of the service charge for 2019 until the service charge apportionment was resolved he received a threatening letter to pay the charge if he wished to avoid an initial charge of £60. He was in hospital at the time.

3. For the reasons which follow the application is dismissed, and no order is made under section 20C.

Background

4. By its decision dated 30th August 2019 this tribunal rejected an application by the landlord, Proxima GR Properties Ltd, to vary 28 long leases at this development by altering their service charge contributions from 1/29th to 1/28th of the global annual service charge account.

5. That decision was not appealed, but in this application the applicant lessee seeks *inter alia* to resurrect that issue, having sought an assurance that the landlord would pay the missing 1/29th share itself.

6. Originally listed for an inspection and hearing on 9th April 2020, the case became yet another victim of the coronavirus pandemic, being first adjourned until this month and then, after consultation with the parties and the tribunal forming the view that an oral hearing rather than a paper determination was essential in order to achieve clarity, it was listed for a telephone hearing on 14th September 2020 by means of BTMeetMe conference call.

The lease

7. The applicant's lease, dated 8th January 1986, was granted by Spaulding and Holmes Ltd as landlord and Stephen William Brindley as leaseholder. The property, a ground floor flat, was demised for a term of 99 years from 24th June 1985 and has just under 64 years unexpired. In addition to the annual rent the leaseholder must pay an "additional rent" comprising (a) the insurance premium payable on the property, (b) 1/28th of the total annual cost of maintenance of the

television aerial system installed in the block by the landlord, and (c) other service charges set out in Part I of the Third Schedule.

8. Clause 4 concerns insurance of the flat and the block and, by clause 4.1, the lessee shall pay to the landlord 1/29th part of the aggregate insurance premium.

9. The lessee's obligations are set out in clause 5, and by 5.1 this includes payment of the rents (including the additional rent) reserved by the lease without deduction.

10. Paragraph 1 of Part I of the Third Schedule (which concerns the mechanism for calculating and payment of the service charge) provides that the lessee will pay by way of additional rent 1/29th part of the expenses and outgoings properly incurred by the landlord in respect of the heads of expenditure specified in Part II of the same Schedule. Part II, paragraph 10, refers to "the proper fees charges and expenses and commissions payable to any solicitor accountant surveyor valuer architect engineer and managing agent who the landlord may from time to time employ in connection with the management repair and maintenanc eof the property (but without prejudice to the generality of the foregoing) the cost of causing to be prepared the certificate referred to in Part I of the Third Schedule to this lease and the cost of causing to be calculated the service charge"

11. The references in :
    a. Clause 5.2.1.1 to keeping the internal surfaces of the windows in a clean and tidy condition
    b. Clause 5.2.2.1 to maintaining the interior of the flat in good decorative order
    c. Clause 6.6.2 [subject to the leaseholder paying the service charge on demand, to use its reasonable endeavours] as often as the landlord shall deem necessary to clean paint redecorate repaint and other wise treat to protect all the outside wood metal brick and cement work and other external surfaces
    d. Second Schedule, Part II, paragraph 5 [reserving to the landlord] the right to clean the external windows of the flat
    e. Fourth Schedule [leaseholder's obligations], paragraph 18 to keep clean the interior of the windows in the flat; and
    f. Fourth Schedule, paragraph 23 not to make any new structure nor make any external alterations or additions to any part of the flat and not to cut maim or remove any structural parts of the flat (whether internal or external)...

    very strongly suggest that the leaseholder has no right to alter or replace any of the windows to the flat.

Relevant statutory provisions

12. 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...

13. 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.

14. 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 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.

15. 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.

16. Insofar as major works are concerned, ie those in respect of which the contribution of any tenant liable to pay towards the service charge will exceed £250, then section 20 provides that the relevant contributions of tenants are limited to that amount unless the consultation requirements have been either complied with in relation to the works or dispensed with by (or on appeal from) the appropriate tribunal. The consultation requirements, in the instant case, are those appearing in Part 2 of Schedule 4 to the Service Charges (Consultation Requirements) (England) Regulations 2003[1] (as amended).

17. Section 20ZA(1) provides that :

> Where an application is made to the appropriate tribunal for a determination to dispense with all or any of the consultation requirements in relation to any qualifying works or qualifying long term agreement, the tribunal may make the determination if satisfied that it is reasonable to dispense with the requirements.

18. By section 20ZA(2) :

> In section 20 and this section –
> "qualifying works" means works on a building or any other premises,...

19. The Act does not define precisely what is meant by the term "works", and the leading textbook on this subject[2] comments :

> It is thought that "qualifying works" will generally be limited to the contractor's costs and will not include related professional fees (e.g. surveyors, structural engineers, the managing agent's tenant liaison fees etc), save, possibly, where the professional services constitute an integral part of the actual physical works.[3] However, in the absence of an authoritative decision on point, the position

1 SI 2003/1987

2 Tanfield Chambers : Service Charges and Management (S&M, 4th ed - 2018), at 13–05

3 *Marionette Ltd v Visible Information Packaged Systems Ltd* [2002] All ER (D) 377 (July) (Ch), at [90–100]

cannot be regarded as certain and the prudent approach is to ensure that consultation is carried out for both professional fees as well as the contractor's fees.

20. When determining whether it is satisfied that it is reasonable to dispense with the requirements the Supreme Court stated in *Daejan Investments Ltd v Benson & others*[4] that the emphasis should be on any prejudice suffered by the tenants, and that the following points should be borne in mind :

a. The purpose of the requirements is to ensure that tenants are protected from paying for inappropriate works, or paying more than would be appropriate. In considering dispensation requests, the tribunal should focus on whether the tenants were prejudiced in either respect by the failure of the landlord to comply with the requirements

b. As regards compliance with the requirements, it is neither convenient nor sensible to distinguish between a serious failing, and a minor oversight, save in relation to the prejudice it causes. Such a distinction could lead to uncertainty, and to inappropriate and unpredictable outcomes

c. The tribunal has power to grant dispensation on appropriate terms, and can impose conditions on the grant of dispensation, including a condition as to costs that the landlord pays the tenants' reasonable costs incurred in connection with the dispensation application

d. Where a landlord has failed to comply with the requirements, there may often be a dispute as to whether the tenants would relevantly suffer if an unconditional dispensation was granted

e. While the legal burden is on the landlord throughout, the factual burden of identifying some relevant prejudice is on the tenants. They have an obligation to identify what they would have said, given that their complaint is that they have been deprived of the opportunity to say it

f. Once the tenants have shown a credible case for prejudice, the tribunal should look to the landlord to rebut it and should be sympathetic to the tenants' case

g. Insofar as the tenants will suffer relevant prejudice, the tribunal should, in the absence of some good reason to the contrary, effectively require the landlord to reduce the amount claimed to compensate the tenants fully for that prejudice. This is a fair outcome, as the tenants will be in the same position as if the requirements have been satisfied.

The hearing

21. At the hearing the applicant, Mr Norman, represented himself and Mr Sweeney, counsel, represented the respondent. As directed, the respondent had produced a hearing bundle comprising 464 pages. However, as indicated in its statement of case, the applicant had never served upon it a copy of his more particularised claim and so it had to obtain a copy from the tribunal office. All that had been received was a single page to which were attached a number of exhibited documents, but the tone of the submission suggested that there ought to have been more. Mr Norman confirmed that there should have been several more pages, but as the bundle had been served as long ago as 28th February 2020 and this had not been spotted by him before now the tribunal had to proceed with what it had, plus what he wanted to say on each of his points orally.

[4] [2013] UKSC 14; [2013] 2 All ER 375

22. On his first point, quantification of the managing agents' fees, Mr Norman asked what that is supposed to be : 2%, as it was originally, 15% or 18%? It had varied over the years.

23. For the respondent Mr Dale said that his company now charges 18% (plus VAT) on sums expended (save for sums set aside each year for the redecoration and contingency funds, usually £5 000 and £10 000). Compared with its normal unit charge, which can fluctuate, of around £410 including VAT, the figures here were £298.99 for 2017, £320.42 for 2018 and £352.21 for 2019.

24. Asked by the tribunal what the local rate was in South Norfolk, Mr Dale said that he did not know, and of course Mr Norman had not investigated that either. It was also put to him that both the RICS Blue Book and the ARMA Code of Practice suggest that agents should not charge a percentage for standard work but a fixed fee, with unusual or other work such as supervision of major works, etc being charged on a different basis.

25. Concerning the windows project, Mr Dale said that his company had actually agreed with residents to waive the management fees on that project, so £2 970 is the fee claimed only for the other items listed on the 2017 accounts.

26. Mr Norman was unable to explain why the amount charged was unreasonable, nor to propose any alternative figure.

27. On his second point, the major works, Mr Norman focussed exclusively on the choice of surveyor, AHR, and a discrepancy between its fee of £5 424.14 inc VAT, as cited on a revised consultation statement and notice [339], and the larger sum of £7 626.99 actually charged. He said that he was later told that fees for earlier work had been omitted; hence the increase.

28. In response, Mr Dale said that the surveyors appointed had approached the local authority to enquire whether planning permission was required, as the property lay in a conservation area. The conservation officer was insistent upon the use of a particular type of window, a "Residents 9" window, so the respondent went out to tender accordingly. The responses produced an overall figure in excess of £133 000, which the respondent regarded as too high for a development intended for occupation by the elderly retired. A meeting was held at the property and the respondent approached the local authority again, seeking a change of mind. As the property is on the very edge of the conservation area, there had been a change in personnel in the planning department, and the authority were sympathetic to the leaseholders' predicament, it was agreed that standard PVCu windows could be used. On a re-tender the prices came in much lower, with a saving in the order of 40% : see [339]. The history is explained in an email from Paul Dale to First Response (an internal complaints department) dated 31st July 2019 [387]. In consequence the surveyors' fees, based on a percentage of the contract sum, were also reduced. This is the figure shown on that page, but it ignored the work done by the surveyors on the first, entirely proper, tender.

29. The larger figure was invoiced but later, as a concession, the respondent decided to refund it. At [245], on a page entitled "Breakdown of Reserve Movements" in the 2018 accounts, under the heading "Contingency", can be seen a "refund of

incorrect management fee calculation" (in fact referring to the surveyor's fees charged in the previous year) of £1 647.43, thus bringing the surveyor's fee back down to the £5 424.14 originally mentioned.

30. On the question whether consultation was required for the employment of the surveyors Mr Sweeney referred to section 27A(2) and the fact that a surveyor is not "works" to a building. In any case, even if the respondent should have carried out a consultation exercise when choosing AHR as surveyor, and if a section 20ZA application were needed and (through him) made, the applicant had failed to comply with the tribunal's directions by identifying any prejudice suffered.

31. On the applicant's third point, whether a proper adjustment had been made from demanding a 1/28th share to a 1/29th, as an earlier tribunal had upheld, the tribunal's attention was drawn by Mr Sweeney to the statement of account for 6 St Mary's Court at [428–429]. This showed that on 5th June 2018 there was a reimbursement of £151.26 to correct the lease fraction error. The figure comprised £72.86 for 2017 and £78.70 for 2018. Over the page, on [429], there was a further entry on 27th November 2019 showing "Reimburse L/F Correction 2019" in the sum of £84.18.

32. That resolved the matter, but Mr Norman still wanted confirmation that the landlord would meet the missing 1/29th share. It was explained to him by the tribunal that, so long as the accounts showed no deficit due to non-receipt, and a demand that the leaseholders meet the shortfall, then he had no cause for complaint.

33. As to his final point, of a threatening letter received after he informed the respondent of his intention to withhold payment of his service charge pending resolution of the above, the tribunal had to explain to him that the letter was only warning him of the potential consequences of his actions, as he would be putting himself in breach of covenant; thus entitling the landlord to recover all of its legal costs in enforcing the covenant against him. On the other hand, section 27A(5) of the 1985 Act protected him by confirming that a tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment. He could therefore pay up, ensuring that he was not in breach of his lease, and then argue about it later.

34. In his closing submissions Mr Sweeney reminded the tribunal that the burden of proof was on the applicant challenging service charges to show unreasonableness, and that Mr Norman had simply failed to do so. No competitive management fees were produced, nor any prejudice caused by the choice of AHR as surveyor.

35. Rather deflated, Mr Norman informed the tribunal that he felt a little out of his depth. So far as supervision of the window contract was concerned, that was water under the bridge, most residents were content with the result, but he felt that the respondent had not briefed AHR properly. He had had enough, and called it quits.

Discussion and findings

36. The tribunal is surprised to see that a member company of ARMA appears to levy management fees based on a percentage of expenditure rather than on a fixed

unit fee for standard works, in accordance with the RICS Blue Book. Inclusion of the insurance premium within that calculation is problematic, as it raises the possibility of the managing agents claiming a commission on the insurance deal. On page 5 of the *ARMA Advice Note : Management Fees* (June 2014 edition), under the heading "Good Practice", the second bullet point states this :

> Your charges should be appropriate to the task involved and be pre-agreed with the client whenever possible. Where there is a service charge, standard annual fees are usually quoted as a fixed fee rather than as a percentage of outgoings or income. This method is considered to be preferable so that tenants can budget for their annual expenditure. However, where the lease specifies a different form of charging, the method in the lease will be used by managing agents.

On page 6, under the heading "Fees as a percentage", the document goes on :

> Both ARMA and RICS believe it's poor practice to use percentages as a basis for management fees because it establishes an immediate conflict of interest between the client and the agent. However, some leases do require the landlord to use percentages to work out fees and so agents may have to follow that precedent.

37. This lease is silent on the matter, so the tribunal is disappointed that the ARMA and RICS preferred approach has not been followed to date.

38. Nevertheless, in the absence of any evidence from the applicant demonstrating what the local rate for managing agents' fees might be, there is no basis for the tribunal determining that the amounts actually charged by the respondent (especially after concessions concerning the major works) are unreasonable.

39. The tribunal sees no merit in the applicant's second point either. Although it was almost certainly entitled to charge for its abortive work on the first tender for the specialist windows, a counter-charge has been made so that residents only had to pay the sum originally specified in the revised statement and notice [339]. No evidence has been adduced to show that an alternative surveyor would have been better and cheaper (and the landlord is not obliged to choose the cheapest). The respondent also failed to show how, if at all, the leaseholders were prejudiced by any non-consultation about choice of surveyor.

40. The third point, concerning ensuring that leaseholders have been charged the correct 1/29th proportion, was satisfactorily cleared up by the corrections shown on the statement of account for the applicant's flat, at [428–429].

41. His fourth point is a non-point.

42. The application therefore fails. In the circumstances the tribunal sees no grounds for making an order under section 20C, whether in favour of the applicant or any of the other leaseholders. As the Upper Tribunal explained in *Plantation Wharf Management Ltd v Blain Alden Fairman & ors*[5], caution should be exercised when considering a section 20C application because it interferes with the parties' contractual rights. The jurisdiction of the tribunal is based on the application itself, so the identity of the applicant is therefore crucial to considering the power of the tribunal to make orders under section 20C of the Act. Such an order can

[5] [2019] UKUT 236 (LC)

only bind the applicant and/or those persons specified in the application, and for an individual to be "specified" that person must have given the applicant their express authority.

43. One other issue troubled the tribunal during the hearing, and Mr Dale was questioned about it. This concerned the very unclear service charge accounts and the way in which major works and the manner of paying for them were hidden from the income and expenditure accounts for 2017 and 2019. In each case the works and movements in the redecoration and contingency funds are noted only on the balance sheet and as notes to the accounts.

44. In 2017 the repairs and maintenance, as shown on the income and expenditure account, are modest : just over £4 000. The management fees are shown in the sum of £6 976.33 plus £1 395.27 VAT. On the balance sheet a one-line entry shows expenditure under each of the headings redecoration and contingency. It is only under notes 4 and 5, on the following page, that one sees the detail of what was incurred. Each entry also includes management fees, but these are on top of those shown on the income and expenditure account.

45. In the 2019 accounts something similar happened, save that when the tribunal asked the reason why the actual management fees exceeded the budget figure Mr Sweeney directed its attention to the management fees shown in notes 4 and 5, concerning external redecoration and roof repairs. These entries explained the difference between budget and actual on the income and expenditure account.

46. The treatment adopted in the 2017 and 2019 accounts was therefore different, and something that should have been made clearer by including all expenditure, and movement of funds, on the first page of the accounts so leaseholders could properly understand what was going on. Mentioning to elderly residents only at a meeting how to interpret the accounts is unlikely to be effective. The tribunal urges the respondent to be much, much clearer in future.

Dated 15th September 2020

Graham K Sinclair
First-tier Tribunal Judge