FIRST-TIER TRIBUNAL

PROPERTY CHAMBER

(RESIDENTIAL PROPERTY)

Case reference	:	**CAM/12UE/LSC/2021/0012**
HMCTS code (paper, video, audio)	:	**V: CVPREMOTE**
Property	:	**Various properties at Lavenham Court, Botolph Green, Peterborough PE2 7ZF**
Applicant	:	**Various leaseholders as listed in the application**
Representative	:	**Mr T Palmer, leaseholder of 24 and 28 Lavenham Court**
Respondent	:	**Holdings & Management (Solitaire) Ltd**
Representative	:	**Mr R Alford of counsel**
Type of application	:	**For the determination of the liability to pay service charges under section 27A of the Landlord and Tenant Act 1985**
Tribunal members	:	**Judge S Brilliant** **Mr R Thomas MRICS**
Date of hearing	:	**05 August 2021**
Venue	:	**Cambridge County Court,197 East Road, Cambridge CB1 1BA**
Date of decision	:	**13 December 2021**

DECISION

Covid-19 pandemic: description of hearing

This has been a remote video hearing which has been not objected to by the parties. The form of remote hearing was by video V: CVPREMOTE. A face-to-face hearing was not held because it was not practicable and no-one requested the same. The documents that we were referred to are in a bundle totalling 409 pages.

The determination

1. The Tribunal determines that the amounts payable for the service charge years 2014 - 2020 inclusive and the estimated service charges for the service charge year 2021 should be reduced in part in accordance with the findings recorded below.

The application

2. 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 charges for the service charge years 2014 - 2020 inclusive and the estimated service charges for the service charge year 2021. The service charge years have been taken as calendar years by both sides. The applicants also make an application under s.20C of the 1985 Act. The application was received on 22 February 2021.

The hearing

3. The applicants were represented by the Mr T Palmer, one of the applicants. The respondent was represented by Mr R Alford of counsel.

The background

4. Lavenham Court consists of a mixed development of leasehold flats and houses, some with garages. None of the parties requested an inspection and the Tribunal did not consider that one was necessary, nor would it have been proportionate to the issues in dispute.

5. The applicants hold long leases of their respective flats which require the landlord to provide services and the tenants to contribute towards their costs by way of a variable service charge. We were shown a sample lease. The specific provisions of the lease will be referred to below, where appropriate.

The earlier determination

6. In 2018, Mr and Mrs Mathieson, the lessees of 17 Lavenham Court, made an application to the Tribunal for a determination of the reasonableness and payability of service charges for the years 2014 – 2018 ("the earlier

determination”). The Tribunal only made decisions in respect of the years 2014 – 2017.

7. In summary, the earlier determination decided that:

(a) The costs of an asbestos survey in 2014 were disallowed in that there had been two previous surveys carried out and the building had not been altered in any material way since.

(b) A late payment electricity charge by EDF in 2014 should not be charged to the lessees as they had paid in advance. It is not known how much this was.

(c) A handling charge by the managing agents in respect of accountancy charges was disallowed. We were told that this amounted to £150.33.

(d) The cost of a general risk assessment in 2015, 2016, and 2017 was disallowed. It was not reasonable to incur these costs in addition to the managing agents’ fees.

The present proceedings

8. In these proceedings a large number of lessees make similar and other challenges in respect of the years 2014 – 2020, and the estimates for 2021.

9. As stated in the directions given on 12 April 2021, the prompt for the present application was a claim for legal costs incurred by the respondent as part of the service charge year 2019. These were the costs incurred by the respondent in the earlier determination. Whether or not these costs can be recovered by the respondent under the respective leases is dealt with below.

10. We now turn to the challenged service charges in each of the respective years.

2014

11. The challenges are:

(a) The asbestos survey.

(b) The late payment electricity charge.

(c) The accountancy handling charge.

(d) Commission paid to the respondent when taking out building insurance.

The asbestos survey

12. There is no evidence that there was any significant change in circumstances which required a new inspection this year. We propose to follow the earlier determination.

The late payment electricity charge

13. It was rightly accepted by the respondent that this charge was not payable. It was not known what the exact figure was. If it has not already been credited to the lessees then it will now have to be. The Tribunal explained that it was not concerned with the state of accounts between the parties, as that is outside its jurisdiction.

The account handling charge

14. Again, it was rightly accepted by the respondent that this charge was not payable. We were told that such charges are throughout £150.33. Again, if it has not already been credited to the lessees then it will now have to be.

Commission paid to the respondent when taking out building insurance

15. This was not a matter raised in the earlier determination. There is a distinction between the commission paid to the broker, and the commission paid to the respondent. Mr Palmer made it clear that for this year it was only the commission paid to the respondent which was being challenged.

16. This area of the law is discussed in Chapter 6 of Tanfield Chambers Service Charges and Management 4th edition. In view of the authorities cited in paragraph 6-06 and the observation that, once a commission is received, the burden lies on the landlord to satisfy the test that the gross premiums are reasonably incurred, we are not persuaded by the respondent that there is any evidence to justify the retention of £943.51.

<u>2015</u>

17. The challenges are:

(a) The accountancy handling charge.

(b) Commission paid to the respondent when taking out building insurance.

(c) A general risk assessment fee.

18. The challenges (a) and (b) have already been dealt with.

19. The general risk assessment fee is charged in addition to the managing agents' fees. We were told that the managing agents instructed an expert to do health and safety checks. Ms Poulter of the managing agents explained that the expert considered the Health and Safety at Work Act 1974 and regulations made thereunder, the Occupiers' Liability Act 1957 and other Codes of Practice needed to identify risks.

20. In our experience, it is unnecessary and unknown for such a charge to be made. The managing agents should be doing this work. The 1957 Act provides that, for example, paving stones should not be liable to subside thereby causing a visitor to the premises to suffer a broken ankle. The managing agents do not need to delegate to an expert to look out for such a danger.

21. We note that the management fee per unit is a modest £108. The respondent might be better advised to charge a somewhat fuller management fee, but to include within it the work at present being contracted out.

<u>2016</u>

22. The challenges are the same as in 2015, and have therefore already been dealt with.

<u>2017</u>

23. The challenges are the same as in 2015, and have therefore already been dealt with.

<u>2018</u>

24. The challenges are the same as in 2015, and have therefore already been dealt with.

<u>2019</u>

25. The challenges are:

(a) Commission paid to the respondent when taking out building insurance.

(b) A general risk assessment fee.

(c) £6,000 legal costs of the respondent in conducting the earlier determination.

26. The first two challenges are the same as in 2015, and have therefore already been dealt with.

27. As far as the legal costs are concerned, the first question raised by Mr Palmer is whether the lease allows such legal costs to be recovered.

28. In an email dated 19 April 2021 the respondent put forward five different clauses in the lease which it says justify the recovery of these legal costs.

29. Most of these proposed justifications were either hopeless or too ambitious. However, paragraph 5(a) of the fifth schedule ("para 5(a)") includes as payable under the service charge:

To make provision for the payment of all costs and expenses incurred by the Company in the running and management of the Block and the collection of the rents and service charges in respect of the flats and parking spaces therein and in the enforcement of the covenants and conditions and regulations contained in the leases granted of the flats and parking spaces in the Block.

30. It is be noted that para 5(a) has three limbs in respect of which *all costs and expenses incurred by the [respondent]* can be recovered:

(a) *in the running and management of the Block;*

(b) *and [in] the collection of the rents and service charges in respect of the flats and parking spaces therein;*

(c) *and in the enforcement of the covenants and conditions and regulations contained in the leases granted of the flats and parking spaces in the Block.*

31. At the date of the hearing, the most pertinent authority on the correct construction of the words in limb (a) was the Upper Tribunal decision in Kensquare Ltd v Boakye [2020] UKUT 359 (LC), where Judge Elizabeth Cooke decided that a provision in a lease that *The cost of employing such professional advisers and agents as shall be reasonably required in connection with the management of the building* entitled the landlord to recover its legal costs incurred in two sets of Tribunal proceedings.

32. We were informed that permission for a second appeal to the Court of Appeal had been given in the Kensquare case, and that the hearing was due to take place in October 2021.

33. Because of the proximity of the appeal we asked the parties to make written submissions on whether any of the limbs of paragraph 5(a) entitled the respondent to recover its legal costs in the earlier determination, and whether we should stay our decision until the Court of Appeal had given its judgment on limb (a). Following both parties' submissions we decided to stay the writing of this decision until the Court of Appeal handed down its judgment.

34. Kensquare at [45] – [54] establishes that limb (a) does not allow recovery. We also note that limb (a) does not refer to professional advisers, so it is a weaker case than Kensquare in any event.

35. Limb (b) focuses on the word "collection". In our judgment, collection is, on balance, a matter of management rather than a matter of litigation. Historically, in the case of periodic tenancies, a rent collector would attend the property, receive a cash payment and enter the amount paid in the tenant's rent book. Today, a large landlord will have an accounts department which will send out the necessary demands and administer the payments, chasing up any defaulters. This is all part of the collection process.

36. In particular, the accounts department will need to prepare and serve appropriate notices for the recovery of ground rents under s.166 Commonhold and Leasehold Reform Act 2002, and appropriate notices for the recovery of service charges under s.21B Landlord and Act 1985. It is these costs to which limb (b) is directed.

37. Moreover, it is difficult to see how costs incurred in determining the amount of service charges to be paid could correctly be described as "collection". Furthermore, the earlier determination was in respect of proceedings initiated by the then applicants, not by the respondent. It would be straining the language call those proceedings "collection". In our judgment, limb (c) envisages enforcement by the landlord, not an application by a tenant to the Tribunal to establish what is payable in the first place.

38. We do not consider that the addition of the word *all* in para 5(a) – which does not appear in the Kensquare charging provision – affects the conclusion we have reached.

39. Mr Palmer's second argument is that, given the success of the applicants in the earlier determination, it would not be reasonable for the respondent to be able to recover its costs if, contrary to his earlier submission, the lease allowed it.

40. We are unable to accept this submission. The mechanism enabling a lessee to prevent legal costs incurred by a landlord at Tribunal hearing being recovered through the service charge is to make a s.20C application. At that stage the Tribunal can decide that it would not be reasonable for the landlord to recover some or all of its costs.

41. In the earlier determination, the applicants did make such an application but regretfully this never seems to have been determined. At the very least, no such order was made in favour of the applicants.

42. It is now far too late for such an application to be made within the earlier determination. Moreover, none of the other lessees joined in the s.20C application so they have lost any rights to make such an application within the earlier determination.

43. Mr Palmer's third point was that the costs of £6,000 were excessive. We are also unable to accept this submission. Using our expertise and experience, £6,000 is a reasonable and proportionate figure for costs in a case of this nature.

44. Despite rejecting these latter arguments, we find for the reasons set out above that these costs are not recoverable through the service charge.

45. In his written submissions, Mr Alford also sought to rely upon paragraph 5(b) of the fifth schedule to the lease. This refers to the cost of making applications and representations in respect of notices served under any statute. We reject this submission. The applicants' application to determine the amount of service charges which are payable does not fall within this paragraph on a fair reading.

<u>2020</u>

46. The challenges are:

(a) A general risk assessment fee.

(b) Commission paid to the respondent when taking out building insurance.

(c) Commission paid to the broker when taking out building insurance.

47. The first two challenges are the same as in 2015, and have therefore already been dealt with.

48. As to the third challenge, we do not regard the commission paid to the broker as being comparable to commission paid to the respondent. Throughout the relevant period commission had always been paid to the broker as well as to the respondent. The broker's commission was not challenged in earlier years. It is now challenged because it has jumped by 300% from the year before.

49. We can understand the applicants' surprise and concern about this, and it was right to be drawn to our attention. However, we regard the two

commissions as being quite separate for the purposes of these proceedings. There is no evidence that the premium payable by the applicants is any higher because the commission to the broker had increased by such a large margin. We therefore do not propose to make any adjustment to what is payable by the applicants in this regard.

<u>2021</u>

50. The challenges are:

(a) A general risk assessment fee.

(b) Commission paid to the respondent when taking out building insurance.

(c) Commission paid to the broker when taking out building insurance.

(d) Legal costs for a review of the lease.

51. The first two challenges are the same as in 2015, and have therefore already been dealt with. The third challenge is the same as in 2020 and has therefore already been dealt with.

52. This year is in respect of estimates only. The applicants are entitled to make a fresh application to the Tribunal once the costs have been incurred.

53. In the earlier determination it was suggested by the Tribunal that the leases should be reviewed as they were not felt to be satisfactory. It is therefore entirely proper that the respondent should embark upon this exercise. It is within our knowledge and experience that trying to vary 42 leases is an extremely complex and time-consuming task. We regard the budget of £3,000 as a modest figure, and allow it.

<u>s.20C</u>

54. At the conclusion of the hearing we said that we would ask for written submissions as to whether the costs of these proceedings should be subject to a s.20C order. Will each party please provide to the Tribunal and the other party within 14 days any such submissions.

Name: Simon Brilliant **Date:** 13 December 2021

<u>Rights of appeal</u>

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).