



**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)**

- Case Reference** : CHI/29UH/LSC/2021/0105
- Property** : 2,4,6,7,8,12 Sandlewood Court
Tarragon Road
Maidstone
Kent
ME16 0ZG
- Applicant** : Lorraine Wright and others
- Representative** : In person
- Respondent** : Hyde Housing Association Ltd
- Representative** : Stephanie Lovegrove - Counsel
- Type of Application** : Section 27A Landlord and Tenant Act 1985 –
determination of service charges
Section 2C of the Landlord and Tenant Act
1985
Paragraph 5A of Schedule 11 of the
commonhold and Leasehold Reform Act 2002
- Tribunal Member(s)** : Judge T Clark
Mr M J F Donaldson FRICS
- Date and Venue of
Hearing** : 14th November 2022 and 7th February 2023
- Date of Decision** : 22nd February 2023

DECISION

Representatives:

1. The Applicants initially had Ms Probert acting as their spokesperson on 14th November 2022. On 7th February 2023 this had changed to Ms Wise.
2. The Respondents were at all times represented by counsel, Ms Lovegrove.

The Background:

3. The Applicants are the leaseholders of flats within a purpose- built block. The Respondents are their immediate landlords. The application is dated 11th November 2021 and concerns service charges in respect of flats 2,4,6,7,8,12 in the building at Sandewood Court for the years 2019 -2020 and 2020 - 2021.
4. The Applicants seek a determination in respect of service charges pursuant to section 27A of the Landlord and Tenant act 1985 and for orders pursuant to section 20C of that Act and Paragraph 5A of Schedule 11 of the Commonhold and Leasehold Reform Act 2002.

Directions:

5. Directions were given on the 13th of January 2022 for mediation, and if unsuccessful, for initial disclosure by the Respondent, and a case management hearing thereafter. The directions were within the bundle at pages 1013 – 1016.
6. A mediation took place on 22nd April 2022, however the parties were unable to agree a resolution to this application.
7. On 29th April 2022, following that failed mediation, further directions were given for disclosure, statements of case and witness statements. Although the directions provided for a paper determination the Tribunal was notified that a hearing attended by the parties was required.
8. The Respondent then made a case management application to join additional parties as further Respondents, namely HB Capital Investments limited, the current freeholder and their agents, Glenly LLP. and for consequential amendments to the directions.

9. The basis of the application is in relation to some parts/a proportion of the service charges which are in dispute in respect of services provided by HB Capital Investments Ltd (the Head Lessors) through its managing agent, Glenny LLP and then recharged by the Respondents to the Applicant(s). Notably the head lease is not tripartite but rather relates to HB and Hyde Housing Association Ltd. It was said in the application for joinder that the Respondent was unable to respond to any matters raised by the Applicants in respect of these service charges that are passed on.
10. It was accepted there is no contractual relationship between the Applicant and HB and/or Glenny LLP.
11. The matter was considered by Judge Dobson on the 28th May 2022 and a determination was made which is set out and contained in the bundle at 1023-1025. He found that it was very likely that the Respondent had the right to relevant documentation from HB, that the Respondent had not sought information from HB as yet and that there was an opportunity for it to do so. He concluded that if the relevant information sought by the Respondent was not provided an application for provision of documents would be appropriate and a suitable order could be made. He said that he did not know what documentation had been sought from HB or whether there was anything that HB had refused to provide and, if so, for what reason and that he did not consider it appropriate to make any order at this stage and could not identify what documentation any order should encompass. He further determined that he could not consider that it had been demonstrated by the Respondent that there is sufficient reason for HB to be made a party to the case and the application therefore failed, although the possibility of the addition of HB after provision of documents which may be sought was a possibility if there was some specific and compelling reason for HB to become a party. He did not seek to encourage such an application unless such specific and compelling reason could be provided.

Inspection

12. The Tribunal did not carry out an inspection prior or subsequent to these hearing dates.

The Law:

13. **Section 27A** An application may also be made for a determination, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description as to whether a service charge would be payable and if so by virtue of Section 27(A)(2)

- 1) *by whom payable*
- 2) *to whom payable*

- 3) the date payable on which**
- 4) the manner in which payable.**

14. Section 18 of the Act defines service charges and “**relevant costs**” and section 19 provides as follows;

“Relevant costs shall be taken into account in determining the amount of service charge payable for a period –
(a) Only to the extent that they are reasonably incurred, and
(b) (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.

15. Section 20 ZA (2) of the Act defines “**qualifying works**” for the purposes of consultation as “**works on a building or any other premises**”.

The hearing on 14th November 2022

16. The hearing before this Tribunal took place as a hybrid hearing with Ms Carly Probert, Ms Laura Wise and Mr Craig Gasson attending remotely. The Respondents and their witnesses attended in person, represented by Ms Stephanie Lovegrove of counsel.

17. Prior to the hearing the Tribunal were given a schedule of matters to be determined by the Tribunal (Agreed List of Issues).

18. The Tribunal read the bundle and the Agreed List of Issues. They also read the skeleton argument and authorities provided on behalf of the Respondents.

19. The matters listed in the schedule of agreed matters were as follows:

- a) The Respondents failure to “audit” the service charge/estate management accounts/costs.
- b) The Respondents allocation of some costs from bulk invoices.
- c) The Respondents failure to properly accumulate and or utilise a reserve fund for the major works in 2019.
- d) Communal water charges.
- e) Communal cleaning charges.
- f) Fire safety charges.
- g) The Management Company Costs (Homeowners), it having been accepted that The Respondents have a right to call for the payment of such costs as are called upon and as set out in the Headlease with HB.
- h) Estimates which appear to be based on previous year actuals without accounting for the fact that there were no major works in the following year
- i) Capping the service charge to 1% of value of a property. The service charge is currently running at 2.1% over the property value.

- j) Should the Tribunal make a section 20C order.
- k) Should the Tribunal make a Schedule 11 para 5A order.

20. The schedule should thereafter form part of the bundle.

21. In addition to the bundle and Agreed List of Issues Agreed the Tribunal also heard from the following witnesses on 14th November 2022:

Ms Carly Probert for the Applicants

Ms Jane Cox, Head of Housing Estate Services for the Respondent

Mr Andrew Clorley, Head of Commercial Transactions for the Respondent

Mr Scott Lawrence for the Respondent. He confirmed the Statements of case and that he had been involved in the current issues since around November 2021. The Tribunal was told that Mr Barnard no longer works for the Respondent so was not available and we were asked on behalf of the Respondent to give such weight to that written statement as we think fit.

22. It quickly became apparent that the use of the word “audit” by the Applicants was intended to mean that their case is that there is an obligation upon the Respondents to **scrutinise** the service charges passed down to them from HB rather than simply passing them on without further enquiry.

23. The Tribunal heard evidence that major works had been carried out by HB to the building, pursuant to their obligations under the lease. This included scaffolding being erected and the exterior of the building being cleaned.

24. Ms Probert gave evidence that she had not received her letter concerning consultation about this but she did not take issue with this, on the basis that she accepted that all other occupants, so far as she was aware, had been properly consulted and in accordance and in compliance with all legal requirements.

25. Ms Probert also gave evidence, and the Tribunal were taken to a letter in the bundle that referred to the scaffolding being erected to clean the windows. Clearly this was inaccurate.

26. The Tribunal were satisfied, having considered all the evidence that they are able to make a determination about the matters contained in the agreed issues for determination, apart from one which was the issue of the extent of scrutiny by the Respondents of the charges passed on by HB to them and in turn apportioned to the homeowners. The evidence of Mr Lawrence was that he could not comment on the scrutiny that had/has been adopted by the Respondents as to this.

27. On behalf of the Respondents Ms Lovegrove made two particular submissions, i) that the Respondent, as a social landlord, also bear the cost of these service charges in respect of non-home owners and so, on the face of it, would be astute

to whether those costs are reasonable, and ii) that the term “audit” had become rather one of “scrutiny” and that if the Tribunal is concerned about the scrutiny by the Respondents of those charges then the Respondents should be given an opportunity to respond in a further witness statement.

28. Therefore, on 14th November 2022 the Tribunal concluded that in respect of the HB service charges passed onto the Applicants it was not satisfied due to the lack of evidence at that time, as conceded by Mr Lawrence, of the extent of any scrutiny by the Respondents of these charges. The Tribunal is not concerned with any years other than those within the application, namely 2019 – 2020 and 2020 -2021.

29. The Tribunal therefore concluded that in these circumstances the Respondents should file and serve a further detailed witness statement(s) outlining what scrutiny/enquiries have been made in relation to the 2 years that are before the Tribunal, also what element refers to the major works and identifying in which year(s) these charges were passed on and how they were quantified.

30. The Tribunal therefore directed that the Respondent shall file and serve a further detailed witness statement within 28 days of the date of this consideration detailing the scrutiny undertaken by them of these service charges and providing a detailed explanation of how the service charges have been calculated. The Applicants were given 14 days to respond.

Subsequent matters

31. Application was then made by the Respondents for an extension of time to file and serve any statements upon which it wished to rely by 9th January 2023. That application was granted.

32. The Tribunal also listed this matter for a further day and in the event that the Applicants did not wish to challenge the evidence contained within the updating statement they should notify the Tribunal of this in writing and the listing would be reduced to a half day for the Tribunal to consider the further written evidence and make their decision based on the papers.

33. The Respondents filed and served 3 witness statements by the following people:

Scott Lawrence, Head of Property Charges
Katerina Birkeland, Home Ownership Manager, and
Olushola Alao, Property Team Manager (Kent)

34. In the event the Applicants did not file and serve any evidence in response and it was only the day before the Hearing that they confirmed they were content for the matter to proceed without challenge as to the fresh witness statements of the Respondents.

35. The adjourned hearing took place on 7th February 2023. The Applicants were asked if they wished to challenge anything in the Respondents statements and Ms Alao and Mr Lawrence were called and gave brief evidence on points of clarification.
36. Submissions were made on the outstanding issue of proper scrutiny by the Respondents and whether the Respondents had behaved reasonably in such scrutiny.

Determinations

37. The Tribunal referred to the Agreed List of Issues, and have found the following:

a) **The Respondents alleged failure to audit the service charge accounts.**

The Tribunal find that there is no obligation to formally audit the service charges passed on from the Head Landlord to the Respondents and in turn to the Homeowners. There is an obligation to scrutinise these to ensure that the charges being passed on are validly claimed and reasonable in amount.

The Tribunal is satisfied that the correct consultation procedures were carried out pursuant to section 20 Landlord and Tenant Act 1985 in relation to the major works which were carried out in cleaning the external façade of the building. Nor did the Applicants raise this as an issue to be determined.

The Applicants indicated that they did not challenge the updating evidence filed by the Respondents in accordance with the directions given on the first day of the hearing. The Tribunal nevertheless carefully considered all the evidence and is satisfied that the Respondents had in place at the relevant time procedures to scrutinise the particular service charges in question in 2019/2020 and 2020/2021 and further that they did in fact carry out such scrutiny. The Tribunal is also satisfied that the method of scrutiny is sufficient. The Tribunal were told that these procedures have been further improved since then.

In particular, the Tribunal accepted the evidence of Mr Lawrence that he had carried out a further review of not only the process of scrutiny itself but also the invoices and charges passed on between the first and second hearing and was satisfied that there was nothing that required further investigation.

The Tribunal heard evidence and accepted the evidence of the Applicants that they had made significant efforts to engage the Respondents in dialogue about the service charges but had not been provided with sufficient information pre proceedings to understand the extent to which Hyde had scrutinised the charges passed on by HB in relation to the major works. In fairness to the Respondents, this was complicated.

b) **The Applicants questioned use by the Applicants of allocation of some costs from bulk invoices and also allocation of invoices to individual home owners.**

The Tribunal heard evidence at the first hearing, and considerable time was taken looking at bulk invoices, the allocation of these and to individual invoices and cross referencing them to the block in question. The Tribunal were satisfied that this was appropriately carried out.

- c) **The Applicants complained that the Respondents had failed to accumulate a sufficient sinking fund to cover the major works for which they have now been charged and/or had failed to fully utilise the sinking fund that did exist.**

The Tribunal were taken to details of the sinking fund built up, and whilst it was insufficient in this case to cover the major works in question, the Tribunal was satisfied, and no submissions were made on this point on behalf of the Applicants, that there is no obligation to build up a sufficient fund to cover major works that might need to be undertaken. The Tribunal found that by its very nature this would prove difficult, if not impossible, to achieve and in fact would result in significant charges to Homeowners whilst such a fund, of indeterminate amount, was being accumulated.

- d) **The issue of communal water charges.**

It was accepted in the Agreed List of Issues that this has been resolved. The Respondents had made a small error and deducted this from the 2019/2020 accounts as it belonged in the 2020/2021 accounts in respect of charges levied.

- e) **Communal cleaning**

No issues were raised in the Agreed List of Issues, and it was given a nil value.

- f) **Fire safety including servicing and issues of apportionment.**

We heard evidence at the adjourned hearing in February that there had been a mistake made in calculating service charges, as to whether this should be calculated on the basis of units in the block or floor space. The Respondents conceded this point and told the Tribunal that where there was an error in an individual homeowner's favour they have not taken that credit away. Conversely any shortfall on service charge claimed has not been asked for. The Respondents were not challenged on this, and the Tribunal finds that this was an appropriate response by the Respondents to the discovery of the error.

- g) **Management Company Costs (Homeowners)**

In the List of Agreed Issues, it was accepted that the Respondents had the right to call for payment of the Management Company Homeowner costs passed on pursuant to the Headlease. The Tribunal heard no more about the issue and this part of the application was not pursued.

- h) **Estimates for following years based on previous years actual expenditure** This item arose from a concern about further service charges

levied in 2021/2022. However, the Tribunal is clear that this does not form part of the application. The Tribunal noted the apparently high ongoing levels of service charges which may require explanation if the Respondent is asked to do so. However, this does not form part of the Tribunal's determination today.

- i) **The Applicants asserted that there should be an overall limit of 1% of value of a property in relation to service charges.**

The Tribunal does not accept that this has any basis in statute or case law and finds that there is no such "cap" on service charges.

- j) and k) **Schedule 11 para 5A order and/or section 20C order**

The Tribunal considered whether to make an order pursuant to the Commonhold and Leasehold Reform Act 2002 Schedule 11 para 5A order as requested by the Applicants, limiting the Respondents ability to pass on their costs of this litigation to the tenants as an administration charge and/or whether to make an order determining that the legal costs are not to be regarded as relevant costs to be taken into account when determining the service charge payable pursuant to the Landlord and Tenant Act 1985 S20C.

The Tribunal took into account that the Respondents had been unable to provide satisfactory, or indeed any, substantive answers to the main issue in this application, namely scrutiny of the service charges passed on under the head lease for major works. The Tribunal considered the use of the word "audit" and its meaning and also considered the events prior to the issue of the application when the Applicants sought clarity on the service charges in a number of respects.

In the circumstances the Tribunal makes an order pursuant to the Commonhold and Leasehold Reform Act 2002 Schedule 11 para 5A and the Landlord and Tenant Act 1985 S20C preventing such charges being passed on through service and/or administration charges, determining that this is just and equitable in all the circumstances.

RIGHTS OF APPEAL

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application to the First-tier Tribunal at the Regional office which has been dealing with the case.
2. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.
3. If the person wishing to appeal does not comply with the 28- day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28- day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.
4. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking