



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

Case Reference : **CHI/21UG/LSC/2022/0127**

Property : **17 Knole Court and 2 Newdigate
House, Knole Road,
Bexhill on Sea, East Sussex,
TN40 1LN**

Applicant : **Ian Solley**

Respondent : **Knole Road Flat Owners
(Bexhill) Limited**

Type of Application : **27A '85Act**

Tribunal Members : **Judge D Dovar**

Date of Decision : **7th July 2023**

DECISION

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1. This an application for the determination of payability of service charges for the years ending 2020 and 2021. The Applicant is the long leaseholder of two properties which are part of a block of 80 flats, the landlord is the Respondent; a tenant owned company.
2. The specific challenges raised in the application, dated 13th November 2022 are:
 - a. For the year end 2020:
 - i. Items totalling £1,894 which are not recoverable;
 - ii. Excessive charge for management, being 23% of expenditure rather than 10%;
 - b. For the year end 2021:
 - i. legal fees of £3,537.54; and
 - ii. the management fees of Southdown Estates;
 - iii. whether Southdown Estates were properly appointed as managing agents in accordance with the statutory consultation requirements.
3. In addition the application raises an issue which this Tribunal does not have jurisdiction to deal with, namely why no balancing statement has been issued. The Tribunal's jurisdiction under s.27A of the 1985 Act is to determine the payability of charges that have been made or will be made; the failure to provide a balancing statement is not within that rubric. Notwithstanding, it does appear that the challenges are to the actual

costs that have been incurred and then passed through the service charge.

4. Directions were given on 25th January 2023 which identified that this matter was suitable for determination without a hearing, neither party objected to that. On reviewing the papers, I considered that further information was needed from the Applicant and so further directions were given on 18th May which the parties have complied with.

The year end 2020

£1,894

5. The Applicant has identified £1,894 of costs that he says do not fall within the service charge, they are:
 - a. £784, for the construction of an archive store for the landlord's documents, the invoice is dated 9th March 2020;
 - b. £30, on 13th March 2020 for moving files to that store;
 - c. £1,080 in legal fees on 9th January 2020 for chasing a bad debt;
 - d. £60 on 28th August 2020 for the court fee for a dispute with a tenant.
6. In their response dated 27th June 2023, the Respondent concedes that these sums are not payable under the service charge and have credited them.

Management Fees

7. The next challenge for this year end relates to management fees. The Applicant contends that the management fees are 10% of the other service chargeable costs.

8. The lease for 17 Knole Court is dated 1st August 1972 and the Lessor is Matlodge Limited.

9. Clause 5 provides a covenant by the tenant

‘to pay the Lessor ... a proportionate part of the expenses and outgoings incurred by the Lessor in the repair maintenance renewal and insurance of the said Building and the provision of services therein and the other heads of expenditure as set out in the Third Schedule hereto ...

10. The Third Schedule sets out a number of cost headings. Paragraph 4 provides for the employing a porter. Paragraph 7 deals with the fees of the Lessor’s Agents or Surveyors for collecting service charges and general management. That is set at 10% of

‘the notional rentals equal to the total gross annual values for rating purposes’ of all the flats.

11. However, the Applicant relies on a Deed of Variation dated 30th June 1983 granted by Matlodge in which he contends that the provision has been changed to

“ten per cent of the total annual outgoings in respect of the items of repair maintenance service...”

12. Identical provisions apply (including the deed of variation) for no 2 Newdigate House.
13. The Respondent first queries the validity of the variations on the basis that neither deed is registered on title.
14. If it is valid, the Respondent contends that that is unreasonable and would not be reflective of the work undertaken and could encourage unnecessary works in order to inflate the management fees. They also consider that the deed, if valid, would operate to their disadvantage as it would only allow payment of management fees after costs had been incurred and not on account as the 10% was related to '*the total annual outgoing*'. They also consider that the deed is out of date given that it refers to the costs of accommodation a porter and the provision of uniforms. They point to the fact that whilst there is no resident porter, demands on management have increased, in particular due to administrative burdens from GDPR and the building being listed.
15. I have no reason to doubt the authenticity of the deeds. Both are expressed to be variations to the lease, the implication being that they are to enure for the successors in title of the parties. The lack of registration does not undermine their effectiveness, nor that the Respondent was not aware of their existence. In *System Floors Ltd v Ruralpride Ltd* [1995] 1 EGLR 48, the Court of Appeal determined that a variation to a lease contained in a side letter, that was only expressed to be personal to the lessee, bound an assignee of the reversion, notwithstanding that the assignee was unaware of the variation. It

follows in this case that neither the lack of registration nor the lack of knowledge impedes the effectiveness of the Deeds against the Respondent.

16. As a result, the service charge provision for management fees is clear, it is 10% of expenditure. Whilst the Respondent may make many valid points as to the practical effect of that provision, that is the clear meaning of the term and applies notwithstanding any commercial difficulties that may follow. As Neuberger JSC said in *Arnold v Britton* [2015] AC 1619 ‘... while commercial common sense is a very important factor to take into account when interpreting a contract, a court should be very slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed ...’. Indeed some of the Respondent’s points rely on a change in circumstances since the lease was granted as support for rejecting a 10% of costs. Such an argument cannot succeed as the lease is not an organic document that changes with time, it must be interpreted as at the time it was executed (or varied in this instance).

17. The Applicant has identified the following as management costs for this year end:
 - a. £19,346 for the wages of Geoff Howard, Managing Agent;
 - b. £17,352 for the wages of Tim Quinn, Maintenance Manager;
 - c. £3,706.58 for office expenses and Telephone; and

- d. £3,093.09, being a 10% deduction from the insurance premium, which he suggests represents hidden broker's commission.
18. As for these costs, the Respondent contends that:
 - a. Mr Quinn is the Porter and as such that does not form part of a management fee. It is confirmed that he does not have any say in management decisions;
 - b. The use of an insurance broker is justified to ensure that the right insurance is taken out and that comparison quotes have been obtained;
19. I agree with the Respondent's view on what falls within management fees. The cost of the porter does not, that falls under paragraph 4. Neither does the cost of insurance, however that cost is arrived at.
20. There is a suggestion that arises from the figures presented by the Respondent that the management fees are not included in their total expenditure calculations. I do not think that this is the case, the accounts, which provide the yearly total expenditure, include the figures for both wages and management costs.
21. Accordingly, the only costs that are subject to the variations are the costs of Mr Howard and the office expenses; i.e. 23,052.58. That figure should be first be deducted and substituted with a figure, being 10% of the total expenditure for that year (not including the management costs).
22. The total expenditure for the year end 2020 was certified as £215,493.68. From that £1,894 must be deducted first. Then

£23,052.58, arriving at a total expenditure of £190,547.10. Then 10% is added for the management fee, being £19,054.71, with the result that the total payable for the year end 2020 is £209,601.81.

The Year end 2021

Legal Fees

23. In their recent submissions, the Respondent concedes that £3,437.34 in respect of legal fees and £3,486.47 of office expenses are not recoverable and has credited those items.

Management Fees

24. Management fees are challenged for this year are partially challenged on the same basis as the previous year. That is with respect to the period for which Mr Howard was managing, for the remaining period professional managing agents, Southdown Estates were appointed. The Deeds have an exception, that is if 'no suitably qualified agent can be found', then on three months notice to the tenants, the lessor can 'agree to pay their managing agent a commercially negotiated fee'. There is no evidence of either of those pre-conditions being engaged; i.e. no evidence that no suitably qualified agent could be found to work for remuneration based on 10% of expenditure, nor that notice was given. The Respondent has provided information on the background to the appointment of Southdown, but it does not entail an inability to find an agent who was willing to be remunerated at 10%.

25. Therefore the same considerations apply as with the previous year, with the result that the sums for the porter and insurance are allowed, but the sums for Mr Howard of £12,293.25 for management fees, £12,000 for Southdown Estates and £4,000 for company secretarial fees are not allowed. It has been suggested that £800 of this was not in fact paid to Mr Howard, but these are the figures currently in the accounts and no credit note has been applied and so for present purposes I will include the £800.
26. The total expenditure for the year end 2021 was certified as £215,918.78. From that £7,384.01 must be deducted first. Then £28,293.25 , arriving at a total expenditure of £180,241.52. Then 10% is added for the management fee, being £18,024.15, with the result that the total payable for the year end 2020 is £198,265.67.

Consultation

27. The final challenge is to the appointment of Southdown Estates as managing agents, it being said that the Respondent has failed to adhere to the consultation requirements.
28. The first management agreement with Southdown Estates is for a term of 182 days from 1st March 2021, with a 90 day notice period to terminate. The second is for 211 days with 90 days notice. It follows that neither is an agreement for more than 12months, with the result that it is not a qualifying long term agreement for the purposes of the statutory consultation requirements under s.20 of the 1985 Act.

Conclusion

29. The Applicant's contributions to the total service charge are for no17 Knols Court, 10/900ths and for No2 Newdigate House, 20/900ths. However, I note that given the addition of more units, the Respondents have in practice applied a more generous apportionment to the flats (1.11% (then -2.23%) for no2 and 1.18% for no17 (then -2.23%)). I will leave it to the parties to seek to agree what the correct apportionment is, but if there is any issue, either party has permission to refer the matter to me within 28 days of receipt of this determination.
30. Finally, these figures are based on actual expenditure. It is not clear whether, and if not, why not, the Respondent has carried out any balancing calculation, but if sums have been demanded in advance, then they should be reconciled with the figures set out above in order to arrive at the proper statement of account for the Applicant.

Appeals

A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application by email to rpsouthern@justice.gov.uk .

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.

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.

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.