-First-tier Tribunal
Property Chamber
(Residential Property)

Case reference	**:**	**CHI/45UH/LSC/2022/0007**
Property	**:**	**184 Heene Road,** **Worthing,** **West Sussex BN11 4NX**
Applicant	**:**	**Richard Terrey**
Respondent **Represented by**	**:**	**Heene Road Property Management Ltd.** **Jorge de Silva (lay)**
Date of Application	**:**	**24th December 2021**
Type of Application	**:**	**to determine reasonableness and payability of service charges**
The Tribunal	**:**	**Bruce Edgington (Lawyer Chair)** **Michael Ayres FRICS**
Date & place of hearing:		**7th July 2022 as a video hearing from Havant Justice Centre, Elmleigh Road, Havant PO9 2AL**

DECISION

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1. The Tribunal determines, upon the evidence before it, that of the disputed service charges of £39,884.74, the sum of £5,024.12 should be refunded to the tenants of the 4 flats together with the Respondent's agreed credit of £200.64 referred to in item 5 of the Scott Schedule for 2017.

2. The Applicant has asked for an order that he should not have to pay any of the Respondent's costs of representation in connection with these proceedings either as a service charge or an administration charge. The Tribunal's decision in that regard is to make the orders requested i.e. the Respondent cannot recover costs of representation in these proceedings from the Applicant.

Reasons

Introduction

3. The property is a semi-detached house in a residential area containing 4 self contained flats. This application relates to service charges claimed from 2016-2021 inclusive. The application has been made by the leaseholder of flat 4 but

it clearly sets out disputes about charges applying to the whole building i.e. the 'property' for the purpose of this decision.

4. Some or all of those disputed service charges have been paid by the leaseholders. Subsection 27A(2) of the **Landlord and Tenant Act 1985** ("the 1985 Act") makes it clear that mere payment does not amount to an admission and that any paid service charges can still be challenged.

5. The application makes several requests for the Tribunal to, for example, investigate matters or obtain full supporting documents for some claims. The Applicant should understand that this is not a public enquiry. If it were then the person conducting the enquiry would be provided with resources to locate evidence. This is an application by a leaseholder for a determination that certain service charges are not payable. It is up to the Applicant to provide evidence or submissions of law to persuade the Tribunal, on the balance of probabilities, that such service charges are not payable. A Tribunal cannot obtain its own evidence although its members can use their knowledge and experience.

6. Directions orders were made by the Tribunal on the 18th March 2022 and 27th April 2022 timetabling the case to this hearing and a bundle of documents was duly lodged. However, important documents were not included and a letter was therefore written to the parties by the Tribunal on the 29th June 2022 informing them that a determination would be made on the basis of the information in the Scott Schedules filed for the years in question plus any supporting documents in the bundle.

7. Another bundle was then provided which changed all the page numbers. As the Tribunal members had already considered the original bundle, it would have been disproportionate to re-visit such page numbers. Any reference to page numbers in this decision are references to the page numbers in that original bundle. The new bundle did not really provide any further information although the parties did then provide up to date position statements. In fact the position of neither party had changed since the Scott Schedules in the original bundle had been prepared.

The Lease

8. The Tribunal has been provided with a copy of the lease for flat 4. The term is 99 years from the 24th June 2004 with increasing ground rent. As to service charges, there are references to them in various parts of the lease. In essence the landlord has to insure and maintain the property and the obligation on the leaseholders is to pay service charges as set out in clause 4(4) and the Fifth Schedule. This includes payments on account of anticipated service charges for the following year. The landlord's obligations are set out in clause 5 of the Fifth Schedule.

9. 'As soon as practicable' after the end of the accounting periods the landlord shall serve a signed certificate on the tenants setting out the total expenditure for that accounting period, the amount paid on account including any surplus carried forward. In other words, a reconciliation account.

10. The accounting period in the lease is said to be 12 months commencing on the 1st January in each year although it seems from the accounts supplied that the accounting period has changed so that it ends on the 31st July each year. There seems to be no dispute about this.

11. As to the payment of service charges, the lease provides that flat 4 only pays 20 per cent (page A76) whereas there are only 4 flats. This seems odd as the ground rent commences at £75 per annum in the lease (page A76) and the demands show a total ground rent of £300 per annum for the building (e.g. page B185) i.e. what would appear to be 25% for each flat. However there appears to be no dispute about the percentage of service charges payable by the Applicant for flat 4.

12. There is a dispute about whether the Respondent can charge a management fee if no managing agents are involved. The relevant clause dealing with this is clause 5(5)(f) which is part of the powers of the landlord to recover expenses as part of the service charge and says:-

> "*5(5)(f)(i) To employ at the Lessor's discretion a firm of Managing Agents to manage the Building and discharge all proper fees salaries charges and expenses payable to such agents or such other person who may be managing the Building including the cost of computing and collecting the rents in respect of the Building or any parts thereof*
>
> *5(5)(f)(ii) To employ all such surveyors builders architects engineers tradesmen accountants or other professional persons as may be necessary or desirable for the proper maintenance safety and administration of the Building*"

13. There is a further dispute about whether charges incurred because one leaseholder is in dispute with the landlord can be recovered as service charges or whether they have to be recovered from the leaseholder in question. The recitals to the lease are set out on page A77 onwards and include the statement that "*It is the intention of the Lessors that all Leases of other flats in the Building are in or will be granted in substantially similar form to this Lease*".

14. Clause 3(6) then sets out what happens if a leaseholder does not comply with the terms of the lease:-

> "*If at any time during the said term the Tenant shall make default in the performance of any of the covenants herein contained for or relating to the repair decoration or maintenance of the Demised Premises then to permit the Lessors at all reasonable times during the said term with or without workmen and others to enter upon the Demised Premises and repair decorate maintain or reinstate the same at the expense of the Tenant.....and to repay to the Lessors on demand the cost of such repair decoration maintenance or reinstatement (including any Solicitors' Counsels' and Surveyors' cost and fees reasonably incurred by the Lessors in respect thereof) such cost to be recoverable by the Lessors as if the same were rent in arrear*".

15. Sub-clause 5(5)(j) on page A90 allows the landlord to set up a "*Reserve Fund*" or, as is sometimes referred to, a 'sinking fund' of "*such sums of money as the Lessors shall reasonably require to meet such future costs as the Lessors shall reasonably expect to incur of* (sic) *replacing maintaining and renewing those items which the Lessors have hereby covenanted to replace maintain or renew*". The sinking fund in this case seems to suggest that it is only for the roof. However, the lease provides, as stated, that such a fund can cover all items of expenditure reasonably expected by the landlord.

The Law

16. Section 18 of the 1985 Act defines service charges as being an amount payable by a tenant to a landlord as part of or in addition to rent for services, insurance or the landlord's costs of management which varies 'according to the relevant costs'. Under section 27A, this Tribunal has the jurisdiction to determine whether service charges are reasonable or payable including service charges claimed for services not yet provided. Schedule 11 of the **Commonhold and Leasehold Reform Act 2002** ("the 2002 Act") makes similar provisions with regard to administration charges.

17. Section 22 of the 1985 Act says that a leaseholder may, by notice in writing, require a landlord to afford him reasonable facilities for inspecting accounts, receipts or other documents relevant to the service charge accounts. The landlord must also permit facilities for copying them at the leaseholder's expense.

18. Section 20C of the 1985 Act gives the Tribunal the power to order that any costs incurred by a landlord in presenting a case before the Tribunal can be excluded from any service charge. Paragraph 5A of Schedule 11 of the 2002 Act allows a Tribunal to make orders preventing a landlord from recovering costs of litigation from a tenant.

19. There is a dispute about whether cleaners and managing agents should have been employed without a consultation with the leaseholders. Section 20 of the 1985 Act says:

> "*20(1) Where this section applies to any qualifying works or qualifying long term agreement, the relevant contributions of tenants are limited in accordance with subsection (6) or (7) (or both) unless the consultation requirements have been either---*
> *(a) Complied with in relation to the works or agreement, or*
> *(b) Dispensed with in relation to the works or agreement by (or on appeal from) the appropriate tribunal"*

20. The relevant contributions have been set out in statutory instruments as being £250 per tenant for qualifying works and £100 per tenant for long term agreements i.e. for more than twelve months.

21. As far as the reserve or 'sinking fund' is concerned, sections 42 and 42A of the **Landlord and Tenant Act 1987** ("the 1987 Act") state that such a fund is held on trust for the tenants who have contributed to it and should be held by,

in this case, the landlord in a designated account. The tenants should benefit from any interest earned on that account.

The Inspection

22. With the present pandemic, Tribunals do not usually inspect properties and it was not felt that an inspection would have really assisted the members in making this determination. Mr. de Silva said at the hearing that an inspection would have helped with the drainage problems but it was rather late to organise that.

The Hearing

23. Those attending the hearing were the Applicant whose partner was also in the same room but took no part in the hearing. Mr. Jorge de Silva was also present.

24. The Tribunal chair introduced himself and the other Tribunal member. He then said that he had some questions to raise on the papers filed. He would do that and then go through the Scott Schedules. He would ask the other Tribunal member to ask any questions he had. That is in fact how the hearing was dealt with. Before bringing the hearing to a close, the Tribunal chair asked both parties whether they wanted to add anything and they both said 'no'.

25. The relevant questions raised and answered so far as they could be were as follows:

    (a) Mr. de Silva was asked about the service charges relating to problems with the tenants of flats 1 and 2. The problem with the drains was caused by a tenant building an extension and creating a new drain which blocked and affected other flats.
    (b) Mr. de Silva was asked about the roof contingency fund of £5,181.38 recorded at page B120 as at the 30th June 2017 when the service charge account for the period up to the 31st July 2017 said that the reserve was £600.48 (page B121). He said that the sum of £5,181.38 included company assets not held on behalf of the leaseholders. In other words this was just what the Respondent was holding as its own money to cover future service charges. The monies held on behalf of the leaseholders were those sums in the service charge accounts.
    (c) Mr. de Silva was asked what the terms of the original contract with Castor Consulting were They had been used at least since 2016 according to the Scott Schedule at page A117. He said that it was the same as the contract in the papers at page G246 i.e. for 2 years fixed plus additional time.
    (d) Mr. de Silva was asked what he did and what was his experience. He owns Castor Consulting which is an international consultancy organisation. Neither he nor they have much experience in residential property management.
    (e) The parties were asked about the management fee of £512.48 which was paid to the HML Group as management fees in 2020 (page E224) when Castor Consulting were paid management fees of £1,980.00 for the period November 2019 to July 2021 (page G241). No-one could explain this.

26. The Tribunal then took then parties through the Scott Schedules and asked questions of both parties on individual issues. Mr. Terrey conceded that some of the points he had made were about very small amounts of money and it was disproportionate to go into much detailed investigation as he was only liable to 20% of the amounts anyway. He just wanted to make the point that the management of the finances left much to be desired.

Discussion

27. Save for issues relating to the reserve fund and management fees, the Applicant challenges the payability of some services charges rather than suggesting that the cost or standard of a particular service was unreasonable save for some decorating where paint had been dripped and there were loose tiles. Even then, however, the Applicant is only challenging the supervision cost. There are some challenges to the accounting accuracy and some challenges which are matters of law i.e. has the landlord Respondent complied with both the terms of the lease and the law itself?

28. The Respondent's answer to this is in the Scott Schedules but, in effect, it simply says that the service charges have been incurred and correctly accounted for. Save for a repayment of £200.64 (page B179), no other repayments are agreed.

Reserve Fund

29. This issue was extremely concerning to the Tribunal. Whilst Mr. de Costa confirmed that he did say that such fund was £5,181.38 in credit in June 2017, his evidence was that this was a reserve held by the Respondent from its own funds to cover future repairs and maintenance. The monies contributed by the leaseholders were not as much as that i.e. it was what was in the service charge accounts.

30. He accepted that the leaseholders' reserve fund should have been held in a separate account and it now is. However, the money held in that account is the money reflected in the service charge accounts. In the 2021 service charge account, the figure is £2,403.28.

31. The other difficulty is that there is no evidence that the reserve fund has any plan. Best practice dictates that such funds should have a plan over a number of years setting out the likely cost of and estimated timing of major repairs and replacements such as the roof. This enables calculations to be made as to what is required and how the fund can be built up to meet those costs.

32. There is no evidence to contradict Mr. de Costa and no suggestion that he or the Respondent have been referred to the police for fraud. The Tribunal therefore concludes, on balance, that his evidence and the service charge accounts are correct.

Management fees

33. This also covers a large part of the Applicant's complaints. The contract with Castor Consulting in the papers is dated 1st November 2020 on page G246. However, that organisation has been used since at least 2016 and Mr. de Costa confirmed that the terms were the same then i. e. it was for an initial period of 2 years. The charges in the 2020 contract are a fixed service charge figure of

£600 per annum plus hourly rates for work which most managing agents would include in their annual charge or would claim from individual leaseholders e.g. time spent on dealing with pre-contract enquiries from individual leaseholders.

34. There are 2 issues. Firstly, is Castor Consulting within the definition of "*surveyors builders architects engineers tradesmen accountants or other professional persons as may be necessary or desirable for the proper maintenance safety and administration of the building*" as in sub-clause 5(5)(f)(ii) in the lease. The answer to that is 'no'.

35. However, sub-clause 5(5)(f)i also applies to "*such other person who may be managing the building*". The Tribunal was just about satisfied that Castor Consulting come within that second category. They prepared service charge accounts even though they clearly did not know how a sinking fund should be kept, they did not realise that as their contract was for more than one year, the leaseholders must be consulted prior to the appointment and there was no evidence of a signed reconciliation account of service charges being served each year.

36. Mr. de Silva's evidence that professional managing agents could not be found to deal with the management of residential properties of this size, was simply not accepted by the Tribunal. Some would no doubt suggest that the reason for not employing managing agents was so that Mr. de Silva could earn some money from the property in addition to ground rent as his evidence was that he owned Castor Consulting or at least had an income from it.

37. The next question for the Tribunal to decide is the amount of any management fee to be allowed. That issue is simple to resolve. Section 20 of the 1985 Act and the subsequent Statutory Instruments limit, in effect, the charges to £100 per leaseholder per annum.

38. In fact the end result for the leaseholders has not been far from the amount they would have had to pay for a professional managing agent. In other words, such an agent would have charged in the region of £250 per flat per annum and the amount this Tribunal would have allowed for the standard of management actually provided would have probably been in the region of £100 per flat per annum. For this information, the Tribunal relies on its substantial knowledge and experience.

39. If, as is suggested in the evidence at pages G241 and E224, management fees have been paid to both Castor Consulting and HML Group for October and November 2020, then the charges of HML Group must also be refunded. However, looking at the service charge account for 2021, it appears that the HML Group charge has not been transferred to the leaseholders. No doubt the parties will consider this.

40. At the hearing, the Applicant also raised concerns about the appointment of managing agents in 2022 i.e. Southern Brook Estate Management. The evidence was that this agent had been appointed in June 2022 and the contract will be reviewed in May 2023. This is less than a year which means that

consultation with the leaseholders was not required and the Tribunal cannot interfere with that appointment. If the Respondent decides to re-appoint that agent for more than a year, then consultation will be required.

Conclusions

41. Taking all these matters into account and doing the best it can, the Tribunal's conclusions are that charges demanded for 2016, 2017, 2018, 2019, 2020 and 2021 are reasonable and payable as follows. As both parties have the Scott Schedules in the bundle, the Tribunal does not repeat the lengthy submissions made in respect of each item. The item numbers are taken from such Scott Schedules:

	Item no.	Disputed amount (£)	Tribunal's comments	To be refunded (£)
2016	1	23.78	the amounts involved are so small as to be disproportionate to argue about	nil
	2	282.80	some evidence provided to bring the dispute down to a small figure	nil
	3	658.63	this is said to be a refund of monies received on 12th November 2015. The Applicant denies this but there is no evidence to support his view	nil
	4	600.00	management fee – see above (£400 maximum for the year)	200.00
	5	160.00	management fee – see above	160.00
	6	3,349.00	reserve fund – see above	nil
2017	1	17.73	disproportionate – see above	nil
	2	152.00	Tribunal satisfied that the contract was not in excess of 1 year and charges are reasonable	nil
	3	600.00	management fee – see above	200.00
	4	80.00	management fee – see above. In addition, this is the liability of flat 1	80.00
	5	297.12	management fee – see above	297.12
	6	784.00	management fee – see above. Also a liability for flat 1	784.00
	7	1,761.00	reserve fund – see above	nil
	8	530.27	reserve fund – see above	nil
	9	5,181.38	reserve fund – see above	nil
	10	5,865.80	reserve fund – see above	nil
2018	1	570.00	legal costs relating to an alleged breach of the lease of flat 1 – payable by flat 1	570.00
	2	242.25	cleaning costs – see item 2 of 2017	nil
	3	600.00	management fee – see above	200.00
	4	400.00	management fee – see above. Also a liability for flat 2	400.00
	5	57.00	management fee – see above	57.00
	6	80.00	management fee – see above	80.00
	7	6,301.42	reserve fund – see above	nil
2019	1	16.00	liability of flat 2	16.00

	2	600.00	management fee – see above	200.00
	3	80.00	management fee – see above. It would have been a service charge if allowed	80.00
	4	40.00	management fee – see above. It would have been a service charge if allowed	40.00
	5	80.00	management fee – see above. It would have been a service charge if allowed	80.00
	6	7,426.24	reserve fund – see above	nil
<u>2020</u>	1	90.00	disproportionate – see above	nil
	2	978.32	reserve fund – see above	nil
<u>2021</u>	1	600.00	management fee – see above	200.00
	2	360.00	management fee – see above	360.00
	3	80.00	management fee – see above	80.00
	5	940.00	management fee – see above	940.00
		39,884.74		5,024.12

42. Assuming that the Applicant pays 20% of the service charges, his share of the refund should be £1,004.82 plus £40.13 under item 5 of the Scott Schedule for 2017.

Costs

43. The Tribunal has been asked to make orders to ensure that the Applicants do not have to pay for the landlord's costs of representation in this case.

44. The Respondent has not made any specific application for the assessment of costs. Clause 3(10) of the lease only allows costs to be claimed if they are "*in or in contemplation of any proceedings in respect of this Lease under sections 146 or 147 of the* ***Law of Property Act 1925***" i.e. forfeiture or a dispute over internal decorative repairs.

45. This Tribunal has the power to prevent a landlord from claiming costs of representation in proceedings either as a service charge under the 1985 Act or an administration charge under the 2002 Act. Such orders are only relevant to Tribunal proceedings if (a) the lease provides for such costs to be claimed or (b) a wasted costs order is claimed or (c) unreasonable behaviour on the part of the landlord in the defence of or conduct of these proceedings is established. No suggestion of wasted costs or unreasonable behaviour has been put forward by the Applicant.

46. Whether an application by the leaseholders could be included within that definition in clause 3(10) of the lease (see above) has to be considered. **Kensquare Ltd. v Boakye** [2021] EWCA Civ 1725 related to an application to a Tribunal by the landlord to recover service charges during which a section 146 notice was served. It was evidently clear that the proceedings both before the Tribunal and the court were incidental to the service of a section 146 notice. There was no suggestion within these proceedings that the Respondent has even considered such a proposition. There is no dispute about internal decorative repairs.

47. In any event, it seems to this Tribunal that the application has revealed serious deficiencies in the way the Respondent has conducted itself within the period

covered by this application. Also, the lease provisions do not appear to allow for such costs to be recovered in any event as there has been no suggestion of forfeiture or a dispute about internal decorative repairs. The orders have been made to avoid any doubt.

....
Judge Bruce Edgington
8th July 2022

ANNEX - RIGHTS OF APPEAL

i. 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 to the First-tier Tribunal at the Regional office which has been dealing with the case.

ii. 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.

iii. 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.

iv. 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.