

10479



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

Case Reference : **BIR/41UG/LIS/2014/0007**

Property : **2 Burton Court, Burton Square, Rising Brook, Stafford, ST17 9LU**

Applicants : **The Executor of Rory James McCormick
Mr B J Simpson (Joined)**

Representation : **Mrs Gillian Mary Shardlow**

Respondent : **G and O Investments Limited**

Representation : **Mr Newman of counsel**

Type of Case : **Under Sections 27A and 20C Landlord and Tenant Act 1985 ('the Act')**

Date and Venue of Hearing : **18th November 2014 at Stafford Magistrates Court**

Tribunal : **Judge W J Martin
Mrs A J Rawlence M.R.I.C.S**

Date : **18th December 2015**

DECISION

Preliminary

- 1 On 14th March 2014 Gillian Mary Shardlow, as executor of Rory James McCormick deceased ('the Applicant') applied to the Tribunal ('the Application') under section 27A of the Act for a determination as to whether service charges were payable and if so as to their reasonableness in respect of 2 Burton Court, Burton Square, Rising Brook, Stafford, ST17 9LU ('the Property'). The Respondent is G and O Investments Limited. The Application also requested (a) an order under section 20C of the Act (b) an order reimbursing the Application Fee, under Rule 13 of the Tribunal Procedure (First-tier Tribunal) Property Chamber Rules 2013 ('the Procedure Rules') and (c) a determination that administration charges levied by the Respondent are not payable. The period in respect of which a determination is required is stated in the Application to be the years 2007 to 2012, the Property having been sold by Mr McCormick in April 2012.

- 2 A Case Management Conference ('CMC') was held at Stafford Magistrates Court on 19th June 2014. This was attended by Mrs Shardlow and her daughter, Miss K L S Shardlow, for the Applicant, and by Mr Peter Luke on behalf of Urban Point Management Limited for the Respondent. At the CMC, Mr Luke conceded that the administration charges were not payable. Arising from the CMC the Tribunal issued Directions for the determination of the remainder of Application following an inspection and oral Hearing.

Inspection

- 3 The Tribunal inspected Burton Court on 18th November 2014 in the presence of Mrs Shardlow, Mr Simpson (joined Applicant), Mr Luke and Mr Newman, counsel for the Respondent.

- 4 The premises including the residential properties known as Burton Court comprises a building partly of one storey, for the most part comprising a retail store operated by the Co-operative Society Limited. The first and second floors (at the perimeter on three sides of the building) comprise twelve first and second floor maisonettes. These are accessed via two enclosed staircases leading via doors from the pavement to a first floor pavement area also forming the roof to the store. The individual properties are accessed from this pavement area.

- 5 It was clear at the inspection that the pavement area had fairly recently been the subject of repairs. The Tribunal noted that there was pooling of water on the pavement area despite this.

The Leases

- 6 The Applicant's title derives from an underlease ('the Underlease') dated 9th October 1987 and made between Jack Wilson (1) and Rory James McCormick and Mary Torrance McCormick (2) whereby the Property was demised to Mr and Mrs McCormick for the term of 150 years from 25th December 1983 (less the last 10 days). The Underlease is subject to the provisions of a head lease ('the Head Lease') dated 13th January 1984 and made between Stafford and Stone Co-operative Society Limited (1) and Farm Fresh Eggs limited (2).

- 7 The provisions of the Underlease with regard to the provision and payment for services are very unusual. There are no conventional service charge clauses involving the collection of an interim estimated sum for a service charge year

with a balancing exercise being conducted at the end of the year. Instead, the only provisions obliging the lessee to pay to the lessor towards the upkeep of the structure and common parts is the obligation contained in Clause 1.3 to 'at all times to pay and contribute':

'(a) one twelfth contribution towards the cost and expenses of maintaining repairing and rebuilding the Common Parts

(b) a rateable or due proportion of the expense of making repairing maintaining supporting rebuilding and cleaning all ways passageways pathways sewers drains pipes watercourses water pipes cisterns gutters party walls party structures fences easements and appurtenances belonging to or used or capable of being used by the Lessee in common with the Lessor or the Lessees or occupiers of the Building near to or adjoining the Demised Premises of which the Demised premises form part

such contributions to be assessed by the Lessor's Surveyor whose decision shall be final and binding on all parties and in default of payment on demand shall be recoverable as rent in arrear'

8 'Common Parts' is defined in Recital (1) 1.5 as:

'..those parts of the Building used in common by the tenants or occupiers of all the maisonettes comprised in the Building and being the forecourt stairways and passageways (including the doors and walls thereof) all which said common parts are hatched green on the plan annexed hereto and also the security inter-communicating system operating within the Building'

9 There is no direct covenant by the Respondent's predecessor with the underlessee to repair the structure or to maintain the common parts. However, by Clause 2.3 of the Underlease there is a covenant by the Lessor to:

'.. perform (so far as the Lessee is not liable for such performance under the terms hereof) the covenants and conditions on the part of the Lessee contained in the Head Lease and to indemnify and keep indemnified the Lessee against all actions claims proceedings costs expenses and demands in any way relating to the Head Lease'.

10 Clause 1.19 of the Underlease contains the following covenant by the underlessee:

'To observe and perform the several covenants and conditions contained mentioned or referred to in the Head Lease insofar as they may be applicable to the Demised Premises and to keep the Lessor indemnified against any breach non-observance or non-performance thereof.'

11 The Head Lease describes the 'Premises' by reference to the 12 maisonettes and the two staircases, but also specifically includes the forecourt to the maisonettes including the *'walls roofs windows window frames doors and doorframes the reinforced concrete floor slabs and the steel and concrete joists upon which the premises are supported and all plastered surfaces of such floor slabs and*

joists'. By Clause 1 (3) the Head Lessee is to keep 'the whole of the Premises and all additions thereto and the fixtures thereon including the boundary walls thereof and the drain soil and other pipes sanitary and water apparatus thereof in good tenantable repair and condition.'

Hearing and Submissions

- 12 In accordance with the Tribunal's Directions the parties prepared a Scott Schedule in which their respective submissions regarding the disputed service charge items were recorded. However, most of the items in dispute were repeated in each year, and for convenience the Tribunal records the submissions of the parties and its decisions on a subject by subject basis in the paragraphs following.
- 13 Insurance
The amount of the insurance premiums for each year was not challenged by the Applicant insofar as the amounts shown in the accounts represented the actual sums paid to the insurance company. However, the Respondent disclosed during the Hearing that the Respondent, or its Agent, retains 20% of the gross insurance premium as commission. The Respondent said that this was to cover the cost of collection and other tasks relating to the management of the insurance. The Applicant submitted that the Respondent ought to account for this commission and should not make a secret profit from the leaseholders in this way.
- 14 It was further argued by Mr Newman in closing that the provisions relating to insurance are separate in the Lease from the general service charge provisions, in that the obligation to pay arises from paragraph 2 of the Second Schedule to the Underlease under which there is reserved as rent one twelfth of the Lessor's cost of insurance.
- 15 The Tribunal does not agree with Mr Newman's thesis. Even though the collection mechanism is different to that in respect of the general services, the insurance premiums are nevertheless a service charge within the definition contained in section 18 to the Act. By virtue of section 42 of the Landlord and Tenant Act 1987 all service charges received by a landlord under a residential lease are held on trust. At common law a trustee may not make a secret profit from his trust and must account to the beneficiaries for any such profit. There was no evidence put forward that the retained commission was in any way a remuneration for services and in the absence of any such evidence the Tribunal finds that the Respondent's claimed expenses in collecting and managing the insurance are not reasonable incurred. The Tribunal therefore agrees with the Applicant that the Respondent should only pass on to the leaseholders through the service charge the amount of the insurance premium actually paid to the insurance company. The Respondent must therefore repay to the Applicants one twelfth each of the commissions retained or received by the Respondent in respect of each service charge year commencing with year end 31st March 2007 up to and including the year ending 31st March 2012.
- 16 Management Fee
By a Decision under reference BIR/41UG/LSC/2006/0006 ('the LVT Decision') which determined the service charges at Burton Court for the years prior to 2007 the Leasehold Valuation Tribunal had determined that the Underlease did not permit the Respondent to charge a management fee through the service charge. The Applicant submitted that despite the LVT Decision the Respondent

nevertheless continued to charge for management during the current disputed period. The Respondent conceded that all of the management fees had been incorrectly charged, and therefore the Tribunal determines that no management fees are payable by the Applicants during any of the service charge years in dispute.

17 Audit and Accountancy fees

The Respondent similarly conceded that the LVT Decision found that there was no clear entitlement to accountancy fees in the Underlease and disallowed them. It appears that these were charged initially in some of the years in dispute. The Tribunal determines that no audit and accountancy fees are payable by the Applicants during any of the service charge years in dispute.

18 Entry Phone Repairs and Maintenance

The Applicants accepted the charge for annual maintenance of the system carried out by Cirrus in each year, after the invoices were produced with the Scott Schedule. Mrs Shardlow did query a repair charge of £208.68 in 2011. She said that she did not query the amount of this invoice if the Tribunal found it to be payable.

19 The Tribunal finds that this repair and the charges for it are reasonable. Accordingly, the determination of the Tribunal is that all charges for Entry Phone repairs and maintenance as shown in the accounts are reasonable and payable by the Applicants. For the avoidance of doubt, the Tribunal's decision extends to invoice 53 in the Respondent's bundle, which is shown on the Scott Schedule under the Heading 'Repairs and Maintenance' for the year ending 31 March 2007 but which is in fact a Cirrus account for the annual maintenance of the entry phone system.

20 Professional Fees

In most of the years in dispute there are entries on the Scott Schedule relating to professional fees. In the main these are surveying fees. The following table contains details of all of the charges made through the service charge under this heading. The Tribunal's determination appears in the right hand column with the Tribunal's reasons following in the succeeding paragraphs.

Year End 31 st March 2007	Amount	Number in Respondent's bundle	Tribunal
M S Consultants Asbestos Survey and Report	£528.75	50	Allowed in full
M S Consultants Condition Survey and Report	£675.63	51	Allowed in full
A L Surveying Services Fee account relating to proposed major works	£1,480.50	52	Disallowed
Year End 31 st March 2008			
A L Surveying Services Account relating to Schedule of Dilapidations served by	£464.36	92	Allowed in full

Head Lessor.			
Year End 31 st March 2009			
Hubbard Pegman Whitney solicitors costs regarding Schedule of Dilapidations	£320.78	97	Allowed in full
A L Surveying Services Account relating to Schedule of Dilapidations	£520.17	98	Allowed in full
A L Surveying Services Fee Account relating to proposed major works	£3,478.68	99	Disallowed
Year End 31 st March 2010			
Management Services (HR) Ltd. Health and Safety Report	£440.63	107	Allowed in full
Management Services (HR) Ltd. Fire Risk Assessment	£393.63	108	Allowed in full
Year End 31 st March 2011			
Alderman Stone (formerly A and L Surveying Services) Fee Account Major Works	£671.31	114	Disallowed

- 21 The Applicants submission is that the LVT Decision found that legal professional and survey fees were not allowable. There is no clear entitlement in the Underlease to any of these charges. The Applicants also complained that amounts in respect of the surveyor's fees were charged through interim demands which were found to be not payable by the LVT Decision. The Applicant does not challenge the amounts, if the Tribunal find that these invoices are payable in principal.
- 22 The Respondent argued that the two accounts from M S Consultants in 2007 (Bundle Numbers 50 and 51) and the two accounts from Management Services (HR) Ltd (107 and 108) are in respect of statutory requirements and despite the shortcomings of the Underlease ought to be payable. As regards the asbestos report, for instance, it would not be lawful to employ contractors on site unless it was known that there was no dangerous asbestos present. It would be wholly unreasonable for the Respondent to be unable to recover costs in respect of health and safety and fire risks which it is legally required to provide. Similarly, the condition report (51) is something which every landlord should obtain from time to time, even if it is not an absolute legal requirement.
- 23 The Tribunal agrees with the Respondent regarding the four invoices referred to above. It is a necessary part of the Respondent's responsibilities under the Headlease regarding the repair of the premises comprised within it that it has in place the necessary statutory reports, and the Tribunal agrees that the commissioning of a condition report (at relatively modest cost) is also

commensurate with its responsibilities. Accordingly, the Tribunal finds that all of the four invoices 50, 51, 107 and 108 are reasonably incurred and payable by the Applicants.

- 24 Invoices 52, 99 and 114 are all in respect of the same matter. The Respondent explained that these invoices in respect of A L Surveying Services (later Alderman Stone) arose as a result of the condition report which identified a number of works required to be carried out. The Respondent decided to commence a tender process and carry out consultation with the Leaseholders. This necessitated the employment of A L Surveying Services to prepare the tender documents and deal with all of the necessary formalities. The way the contract with A L surveying works is that different percentages of the estimated total costs are payable at different stages of the project. This is summarised as follows:

Invoice 52: Estimated tender sum £24,000. The gross fees were to be 15% of this sum, payable at that stage of the contract as to 35%, i.e. £1,260 plus VAT (£1,480.50).

Invoice 99: Tender sum now £45,706. The gross fee is now 12.5% (because it is based on a higher sum) and at the stage now being billed 75% of this sum is due, i.e. £4,284.94, less paid in invoice 52 £1,260, £3,024.94 plus VAT (£3,478.68).

Invoice 114: 85% now payable at this stage - £4,856.26, less billed £4,284.94 leaving £571.33 plus VAT (£671.31).

- 25 Mr Luke explained at the Hearing that the Respondent had never intended to carry out the major works unless the leaseholders agreed to the total amount and paid in advance. For this reason invoices were sent out requesting the sum of £5,103.01 as an 'additional interim service charge' on 24th March 2009. The Leaseholders were, to use Mr Luke's expression, aghast at the proposed cost, and the situation is that the work has still not been commissioned. However, it is argued by Mr Luke that it was necessary to engage A L Surveying Services to prepare the tender documents and take the project to a point where the leaseholders could be invoiced, and that therefore the Tribunal was urged to find the three invoices as reasonably incurred.
- 26 The LVT Decision found at paragraph 33 that *'it must be obvious to a reasonable tenant that the extent and nature of the roof works required a surveyor.'* The LVT Decision then made a determination as to the reasonableness of the actual invoice for the roof works which included the surveyor's costs. The Tribunal in the present case agrees with the principal enunciated in the LVT Decision. However, in the present case the evidence is that the Respondent embarked upon an expensive consultancy service with regard to the proposed major work, in the knowledge that the work could not be paid for unless the leaseholders' agreed to pay the cost in advance. Had the works actually been carried out, the Tribunal, in line with the LVT Decision, would have considered the invoices for the surveyors' fees alongside the invoices for the work itself. However, there is clearly no provision in the Underlease which permits speculative costs of this kind to be recovered and accordingly the finding of the Tribunal is that none of the three invoices 52, 99 and 114 are payable by the Applicants as service charges within the years in dispute.
- 27 The remaining three invoices, 92, 97 and 98, all relate to a quite separate problem, although this did not become clear until part way through the Hearing. In 2007, the Co-operative Society started to experience a problem with regard to

water dripping from the roof on to its 'Deli Counter'. It was assumed that this arose from a failure by the Respondent to maintain and repair the roof of the store, which also, of course, forms the forecourt to the 12 maisonettes. Accordingly a Schedule of Dilapidations was prepared. The Respondent did not provide a copy of the Schedule. However, it is clear from the evidence that was supplied that what concerned the Co-operative Society was the alleged ingress of water.

- 28 Following receipt of the Schedule of Dilapidations, the Respondent instructed A L Surveying Services to prepare an item by item response to the Schedule. This is the subject of invoice 92, which is dated 31st August 2007. It also instructed solicitors to advise (invoice 97) and there is a further invoice (98) from A L Surveying Services relating to a meeting with the surveyors for the Co-operative Society (Calfordseaden) and Central Midlands Estates to witness a dye test and agree a schedule of work.
- 29 It transpired that the re-asphalting of the roof area, which formed the subject of the roof works referred to in the LVT Decision had been successful, and that only minor works to the roof were required. However, the CO-operative Society agreed to provide an additional resurface to the roof and carry out the minor works at its own cost, subject to a contribution of £5,000 from the Respondent. This sum is not charged to the leaseholders in any of the years in dispute, and so the Tribunal does not need to concern itself with the issue of its payability or reasonableness.
- 30 However, the Tribunal does find that the three invoices relating to the Schedule of Dilapidations were reasonably incurred and payable by the Applicants. The service of the Schedule of Dilapidations is a first stage towards possible forfeiture of the Head Lease, and the Tribunal finds that it was entirely proper to take the reasonable steps it did to obtain advice and enter into negotiations to preserve the security of the Head Lease, which of course is also vital to the security of the Underleases of the maisonettes.

31 Repairs and Maintenance

The following invoices were included within the Scott Schedule under this Heading. The Tribunal's determination appears in the right hand column with the Tribunal's reasons following in the succeeding paragraphs.

Year End 31 st March 2007	Amount	Number in Respondent's bundle	Tribunal
Turrall Contracting Services cleaning gutters and channels etc	£360	54	Allowed in full
Turrall Contracting Services repair leak and re-tile	£165	55	Allowed in full
Year End 31 st March 2009			
Chase Contractors Roof repair	£180	100	Allowed in full

- 32 The Applicants' only objection to the above invoices for repairs is that the amounts were demanded in advance. The Tribunal finds that all of the three invoices are reasonable as to amount and payable by the Applicants.

Section 20 C Application and the Fees Application

- 33 The Applicants had requested that the Tribunal make an Order under section 20C of the Act that the costs of the Respondent in connection with the Tribunal proceedings are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the Applicants. The Applicants also requested that the Tribunal orders a return of the Application fee of £125 and the Hearing fee of £190 in accordance with the powers contained in Rule 13 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013.
- 34 Mrs Shardlow was clearly upset that the continuing failure of the Respondent to honour the terms of the LVT Decision, with particular reference to the demand for interim service charge contributions, caused her late father great distress. She produced in her bundle copies of the 20 plus letters her father wrote, and which she said were not replied to by Urbanpoint Property Management Limited. Another matter of concern was the fact that when her late father's property was sold, the sum of £600 was retained from the purchase price by the purchaser because the service charge accounts were not certified as fully paid by the Respondent.
- 35 Mr Newman made the point that, as regards the proceedings, there was in fact a measure of agreement between the parties and that they had been conducted in a low key manner. The largest issue between the parties remained the survey fee in respect of the major works. The Tribunal was urged not to make the section 20C Order and not to order a re-imbusement of the fees.
- 36 As to the section 20C Order, the Tribunal does not consider that there are any provisions in the Lease whereby the Respondent could charge back its costs in connection with the Tribunal proceedings. However, in the event that this were found not to be so, the Tribunal considers it proper to make a decision with regard to the application before it in any case.
- 37 The Tribunal is satisfied that Mrs Shardlow was quite justified in making the Application. The Respondent had attempted to collect the services charges in advance and had imposed management and other charges upon the leaseholders that were not authorised by the Underlease or the LVT Decision. Clearly that decision did not continue with legal effect in respect of the years following its determination, but the Tribunal considers that the Applicants were justified in expecting the Respondent to apply its findings into the future. The Respondent conceded it had been wrong and did not dispute the Applicant's contentions with regard to the management charges, or that there is no power to make interim charges.
- 38 The Tribunal is satisfied that ample grounds exist for the making of an order under section 20C of the Act and accordingly grant the Order as requested. The Tribunal finds that the same considerations apply to the application for the return of the fees paid by the Applicant and accordingly, in accordance with the powers contained in Rule 13 of the Procedure Rules, orders that the Respondent reimburses the Application fee and the Hearing fee to Mrs Shardlow.

39 If either party is dissatisfied with this decision they may apply for permission to appeal to the Upper Tribunal (Lands Chamber). Any such application must be made to the First-tier Tribunal within 28 days of this decision (Rule 52 (2)) of The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013.

Judge W.J. Martin - Chairman