



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

Case Reference : **CHI/00HP/LSC/2014/0014**

Property : **Flat 5 The Pines 38/40 The Avenue,
Branscombe Park, Poole, BH13
6HJ**

Applicant : **Mrs Veronica Smith**

Representative : **Mr Anthony Smith**

Respondent : **The Pines Management Company
Limited**

Representative : **Mr John Ellis, Chairman of the
Board of Directors**

Type of Application : **For the determination of the
reasonableness of and the liability
to pay a service charge**

Tribunal Members : **Judge Tildesley OBE**

**Date and venue of
Hearing** : **Determination on the Papers
without an oral hearing**

Date of Decision : **11 June 2014**

DECISION

Decisions of the tribunal

- (1) The Tribunal determines that the sum of £5,077.00 for legal fees is not payable by the Applicant in respect of the service charges for the years 2013 and 2014.
- (2) The Tribunal makes an order under section 20C of the Landlord and Tenant Act 1985 so that none of the Respondent's costs of the Tribunal proceedings may be passed to the Applicant through any service charge.

The Application

1. The Applicant seeks a determination pursuant to s.27A of the Landlord and Tenant Act 1985 ("the 1985 Act") on whether solicitors' fees in the sum of £5,077.00 (VAT inclusive) incurred by the Respondent in connection with advice on rights of way were payable as service charges for the years 2013 and 2014.
2. A case management hearing was held on 27 February 2014 with the purposes of identifying the issues in dispute and whether a settlement could be reached by the parties. The Applicant attended but the Respondent did not. The Tribunal was satisfied that the Respondent had been notified of the hearing, and that it was in the interests of justice to proceed in the Respondent's absence. Mr Ellis apologised subsequently for the non-attendance of the Respondent which was due to circumstances beyond the Respondent's control.
3. The Tribunal directed the parties to exchange their statements of case, and that the application would be determined without an oral hearing unless a party objected in writing to the Tribunal by no later than on 13 March 2014. The parties did not object.
4. The Tribunal indicated that it would notify the parties of its determination within 4 weeks from 21 May 2014.
5. The Tribunal agreed to the following leaseholders being joined to the application as parties:
 - Ms Barbara Moulder (Applicant) 6 The Pines 38 The Avenue.
 - Mrs Sylvia Williams (Applicant) 11 The Pines 38 The Avenue.
 - Mrs Terri Oates (Respondent) 27 The Pines 40 The Avenue.
 - Mr Arthur Nash (Respondent) 14 The Pines 38 The Avenue.

- Mr Christopher C Moorelvin Elliott (Respondent) 10 The Pines The Avenue.
- Mr Colin and Mrs Florence Chorley (Respondent) 15 The Pines 38 The Avenue.
- Mrs B I Burns (Respondent) 12 The Pines 38 The Avenue.
- Mr Robert and Mrs Barbara Burns (Respondent) 30 The Pines 40 The Avenue.
- Mrs Olga Ferreira Macinty re Brittain (Respondent) 18 The Pines 40 The Avenue.
- Mr Noel Sheath and Mr Brian Austin (Respondent) 23 The Pines 40 The Avenue.
- Mr Martin Easterbrook (Respondent) 4 The Pines 38 The Avenue.
- Mr Tim Knott and Mrs Jennifer Knott (Respondent) 24 The Pines 40 The Avenue.
- Mrs Fay Garner (Respondent) 22 The Pines 38 The Avenue.
- Mr and Mrs George Bates (Respondent) 8 The Pines 38 The Avenue.
- Mr and Mrs John Ellis (Respondent) 26 The Pines 38 The Avenue.
- Mrs Sandra Burgess (Respondent) 1 The Pines 38 The Avenue.
- Mr Trevor Hicks (Respondent) 25 The Pines 40 The Avenue.
- Mrs Beryl Todd (Respondent) 2 The Pines 38 The Avenue.
- Mr Ronald Belcher and Mrs Meretta Belcher 2 The Pines 38 The Avenue.
- Mr Paul Long and Mrs Rita Long 20 The Pines 38 The Avenue.

6. Judge Tildesley decided to determine the matter on his own because there was no dispute on the facts¹. Mr Mellery-Pratt who was originally

¹ Practice Direction: Composition of Tribunals Senior President of Tribunals November 2013

allocated to the case had to stand down because of a potential conflict of interest.

7. The issue for determination is whether the legal costs incurred by the Respondent in connection with a right of way over the property, known as The Pines were service charges which were recoverable under the terms of lease from the Applicant.
8. The relevant legal provisions are set out in the Appendix to this decision.

The Background

9. The Respondent was a company limited by shares. The share capital of the company was £300 divided into 30 shares of £10 each. Each lessee was allotted one £10 share. The Respondent was incorporated on 1 May 1969. The Respondent was originally set up under the control of the lessees to manage and maintain The Pines. On 3 May 1988 the Respondent acquired the freehold of The Pines. The Respondent was run by a board of directors who were all lessees
10. In 1969 the subject property originally known as Malcolm Court House was converted into 30 flats and renamed The Pines. The gardener's cottage (the Cottage) which was within the curtilage of Malcolm Court House was separated from the plot but retained a right of way over the land on which The Pines was sited, and had a new address of 38A The Avenue.
11. Around June 2013 the Respondent learnt that the Cottage had been put on the market and that a developer had plans to demolish it and erect townhouses and apartments on the site. The Respondent was concerned about the implications of this potential development for the right of way over its property, and the adverse effects of increased traffic flow to the leaseholders' enjoyment of their flats. This concern was prompted by correspondence from the Executor to the Cottage estate who complained about vehicles blocking access to the Cottage.
12. The Respondent decided to take legal advice on the right of way and the size and location of the entrance to the Cottage. In 2013 the Respondent incurred solicitors' fees totalling £1,350 (VAT inclusive)². In 2014 the fees were £3,900 (VAT inclusive) which included advice from Counsel of £1,500 (VAT inclusive). The cost of the legal advice was charged to the service charge account.

² The charges in 2013 were reduced to £1,177.20 (see letter dated 15 January 2014 from Mr Ellis to Laing Law) giving a grand total of £5,077.20.

13. Following receipt of the application the Respondent decided not to allocate further expenditure on legal costs to the service charge account until the outcome of the dispute was known.
14. The Applicant held a lease of flat 5 and garage 5 dated 11 June 1970 made between Whiteberry Properties Limited of the one part, the Respondent of the second part and Patrick William Lowe-Holmes and Greta Lowe Holmes of the third part. The original lease was for a term of 99 years from 29 September 1969.
15. On 20 January 2000 a new lease was granted to the Applicant which was supplemental and collateral to the one dated 11 June 1970. Under the new lease the term was for 999 years from 1 January 1999 with a new rent of a peppercorn per annum throughout the term.
16. The new lease arose from the acquisition of the freehold by the Respondent on 3 May 1988. Under the original lease dated 11 June 1970 the Respondent covenanted with the landlord and separately with the tenant to perform a range of services. The tenant in return covenanted with the Respondent and separately with the landlord to pay a charge for the services.
17. Under the new lease the covenants of the landlord and tenant under the original lease remained on the whole the same subject to certain alterations. The arrangements for insuring the property and slight changes to the contributions of individual lessees to the service charge were the principal alterations.
18. Clause 3 of the original lease as varied set out the tenant's covenants which included in clause 3(14) the covenant to pay the service charge. Clause 3(14) states so far as is relevant to this application:

“If at any time or times during the subsistence of the said term any sum or sums shall be expended by the Landlord and shall be due and unpaid to the Landlord under or by virtue of sub clause 4(2) of this lease the Tenant will on demand pay to the Landlord a proportion of the aggregate sum due and owing by the aggregate number of flats on the Estate save that flats 15 and 30 should be each treated as 1.5 flats giving an aggregate number of thirty one flats to the Landlord such proportion to be calculated by dividing the said aggregate sum by the aggregate number of flats on the estate
19. Under Clause 4(1) of the original lease as varied the Respondent covenanted with the Landlord and the Tenant to perform a range of responsibilities in connection with The Pines. These responsibilities were described in more detail in 10 separate sub-paragraphs and included:

- Keep the structure of the building and outbuildings in good and substantial repair. Keep the common parts in good order including cleaning the exterior of the windows once a month.
 - Keep all fixtures and fittings in the common parts in good order.
 - Paint the outside wood and ironwork once every three years.
 - Paint the common parts every five years.
 - Maintain the grounds of the estate.
 - To employ such staff as may reasonably be necessary to carry out any duties which the Respondent may require.
 - To insure the property.
20. Clause 4(2) enabled the landlord to step in to perform the various responsibilities in the event of the Respondent defaulting in its covenant.
21. Clause 5 of the original lease as varied required the tenant to pay the Respondent the service charge calculated in accordance with clause 3(14). Clause provides as follows so far as is relevant to this application:

“The Tenant hereby covenants with the Company (*Respondent*) that (i) during the subsistence of the said term the Tenant will pay to the Company an annual subscription of a proportion calculated as provided in sub-clause 3 (14) hereof or such other annual sum as may be determined by the Landlord as being necessary to ensure that each tenant of a flat on the Estate paying a like amount save that flats 15 and 30 should be each treated as 1.5 flats giving an aggregate number of thirty one flats..... shall equal the aggregate amount properly and reasonably required to be expended by the Company and the amount of any reserves properly and reasonably required by the Company in connection with the performance and observance during the whole of the term hereby granted of the covenants on the part of the Company hereinbefore contained the wages of all the Company’s employees and servants and administrative and office and other incidental expenses of the Company (including Accountants fees and Managing agents charges) in initiating and running its business such annual payments to be made in advance by four instalments on the usual quarter days or at such longer intervals and at such other times as the Company shall in writing notify the landlord”

The Parties' Representations

22. The Applicant argued that the expenditure on legal advice relating to the right of way enjoyed by the Cottage over The Pines had nothing to do with the Respondent's responsibilities as Landlord under the terms of the lease. The dispute with The Cottage affected the freehold of the property, and as such was between the Respondent in its capacity of freeholder and the owners of the Cottage.
23. According to the Applicant, the fact that the Respondent's board of directors had consulted with the lessees and received their approval to treat the costs as service charges was irrelevant. The Applicant pointed out the Respondent was responsible for both the management of the lease, and the ownership of the freehold, which were distinct legal responsibilities and had to be treated as such. The Respondent, therefore, was required to wear two hats: the landlord's hat when dealing with the management of the lease, and the freeholder's hat when handling matters associated with the ownership of the property.
24. The Applicant contended that the lease which governed the legal relationship between the Respondent and the lessees did not authorise the recovery of the legal expenses from the lessees through the service charge. The Applicant stated that the Respondent's reliance on part of Clause 5 of the lease was selective, and taken out of context.
25. The Respondent believed that the wording of Clause 5 of the lease which referred to *the wages of all the Company's employees and servants and administrative and office and other incidental expenses of the Company (including Accountants fees and Managing agents charges) in initiating and running its business* was the authority for incurring the legal fees and pay for these from the service charge in this instance.
26. The Respondent considered that it was part of its business to ensure that the easements and rights granted to leaseholders in part 2 of the lease were maintained and that legal advice was required to support this.
27. The Respondent stated that the use of service charge funds to finance the legal costs was consistent with the Respondent's mode of operation, which charged all expenditure to the service charge account. The Respondent pointed out the leaseholders were also the shareholders of the company. The Respondent had no separate funds in its capacity as a freeholder, and had no means with which to pay the legal expenses other than asking for voluntary contributions from the shareholders. Mr Ellis asserted that the board of directors had acted in good faith and transparent in its dealings with the Cottage.

Reasons for the Tribunal's decision

28. The Tribunal's starting point is to determine the correct characterisation of what the Respondent received for its payment to the solicitors. The Respondent accepted that the charge for legal services was for advice on the right of way to the Cottage across the land belonging to The Pines. The purpose of this advice was to ensure any potential developer of the Cottage did not abuse the right of way, and to provide the Respondent with a bargaining position in the event of negotiations with the developer.
29. The right of way in question did not belong to the leaseholders of the property but by a third party, the owner of the Cottage. The owner was entitled to enforce the right of way against the grantor of that right and successors in title. The right of way was granted in a conveyance dated 31 October 1960, and recorded in the Property Register of the freehold title to The Pines of which the Respondent was the registered proprietor with absolute title. Thus any issue with the right of way concerned the Respondent in its capacity as freeholder of The Pines, and the owner of the Cottage. The relationship of the Respondent with the lessees of The Pines had no bearing upon the exercise of the right of way by the owner of The Cottage.
30. Given the above findings the Tribunal considers the charges for legal advice on the right of way does not meet the definition of service charge in section 18 of the Landlord and Tenant Act 1985, namely, *an amount payable by a tenant of a dwelling as part of or in addition to the rent which is payable, directly or indirectly, for services, repairs, maintenance, improvements or insurance or the landlord's costs of management.*
31. The premise behind section 18 is that the landlord can recover from the tenant costs for services provided to the tenant in connection with the building. The costs incurred by the Respondent on legal advice on the right of way had no nexus with any service supplied to the lessees by the Respondent in its capacity as landlord.
32. The Respondent argued that the lessees derived a benefit from the legal advice, the costs of which were authorised under the lease, and, therefore, recoverable from the lessees through the service charge. The purported benefit related to the lessees' quiet enjoyment of their leasehold property, and the protection of their right of way over The Pines.
33. The Tribunal is satisfied that the Respondent's arguments were flawed in two respects. First the purported benefit was, in the Tribunal's opinion, too remote to qualify the legal costs incurred as a service charge. Second, the Respondent's construction of the service charge

clause in the lease was perfunctory and disregarded the overall import of Clause 5 in the context of the lease.

34. The Respondent relied on the words in Clause 5 of *other incidental expenses of the Company (including Accountants fees and Managing agents charges) in initiating and running its business* for justifying the recovery of legal costs through the service charge.
35. The overall import of Clause 5 was to enable the Respondent to recover its costs and incidental expenses in the performance of its responsibilities under Clause 4. The responsibilities which were set out in paragraph 19 above related to the insurance, repair, maintenance and upkeep of the building, common parts and grounds. These responsibilities also defined the extent of the word *business* in Clause 5. The Respondent assumed that it could adopt a freestanding definition of *business* to incorporate all the Respondent's activities, which was not the case, and overlooked the important principle of construing the service charge clause in the context of the lease as a whole. The word *business* in Clause 5 was limited to the carrying out the Respondent's responsibilities under Clause 4.
36. The costs incurred on legal advice on the right of way has no connection with the Respondent's responsibilities under Clause 4, and was, therefore, not recoverable as a service charge under the lease.
37. There was also one further obstacle in relation to the recovery of the legal costs through the service charge, which was that there was no provision in the lease enabling the Respondent to charge the lessees for legal advice. The general rule is that legal costs can only be recovered if there is clear wording to that effect in the lease. It is significant that Clause 5 specified the charges of accountants and managing agents but was silent on the issue of legal fees. In the Tribunal's view, the phrase *other incidental expenses* was not sufficiently explicit to permit the charging of legal costs.
38. Mr Ellis on behalf of the Respondent has gone into a great detail of the steps taken by the board of directors in keeping lessees informed of developments, and seeking their views on the emerging situation with the Cottage. Mr Ellis has also explained the realities of a resident's management company and the particular issues that it faced in keeping the corporate affairs separate from its responsibilities under the lease.
39. The Tribunal accepts that Mr Ellis and the board of directors have acted in good faith and transparent in their dealings with the Executor and interested persons in the Cottage. It is also clear to the Tribunal that a good majority of the lessees supported the actions taken by the board of directors.

40. Mr Ellis' representations, however, highlight the inherent weakness with residents' management companies which is one of finance. As a rule their only source of income is the ground rent which in this case is a peppercorn. This weakness is not a reason for confusing the separate liabilities of the lessees as tenants under the terms of lease and as shareholders of the residents' management company. The lessee's separate responsibilities are governed by different contracts, the lease and the articles of association. Equally it not permissible to regard service charge funds as part of the company's income. Service charge funds are held on trust and should only be applied for those purposes as specified in the lease..

The Tribunal's Decision

41. The Tribunal, therefore, determines the legal fees in the sum of £5,077.00 incurred by the Respondent do not meet the definition of a service charge, and even if they did, the fees are not recoverable under the terms of the lease. The Applicant is not liable to contribute to the legal fees as a lessee.

Application under s.20C and refund of fees

42. In the application form the Applicant applied for an order under section 20C of the 1985 Act. The Tribunal is of the view that there was no authority under the lease to recover the legal costs in connection with these proceedings. For the avoidance of doubt, the Tribunal nonetheless determines that it is just and equitable in the circumstances for an order to be made under section 20C of the 1985. The Applicant was wholly successful with her application. The effect of a section 20C order is that the Respondent cannot recover from the Applicant a contribution to its costs through the service charge.

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

Appendix of relevant legislation

Landlord and Tenant Act 1985 (as amended)

Section 18

- (1) In the following provisions of this Act "service charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent -
 - (a) which is payable, directly or indirectly, for services, repairs, maintenance, improvements or insurance or the landlord's costs of management, and
 - (b) the whole or part of which varies or may vary according to the relevant costs.
- (2) The relevant costs are the costs or estimated costs incurred or to be incurred by or on behalf of the landlord, or a superior landlord, in connection with the matters for which the service charge is payable.
- (3) For this purpose -
 - (a) "costs" includes overheads, and
 - (b) costs are relevant costs in relation to a service charge whether they are incurred, or to be incurred, in the period for which the service charge is payable or in an earlier or later period.

Section 19

- (1) Relevant costs shall be taken into account in determining the amount of a service charge payable for a period -
 - (a) only to the extent that they are reasonably incurred, and
 - (b) where they are incurred on the provisions of services or the carrying out of works, only if the services or works are of a reasonable standard;and the amount payable shall be limited accordingly.
- (2) Where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable, and after the relevant costs have been incurred any necessary adjustment shall be made by repayment, reduction or subsequent charges or otherwise.

Section 27A

- (1) An application may be made to the appropriate tribunal for a determination whether a service charge is payable and, if it is, as to -
 - (a) the person by whom it is payable,

- (b) the person to whom it is payable,
 - (c) the amount which is payable,
 - (d) the date at or by which it is payable, and
 - (e) the manner in which it is payable.
- (2) Subsection (1) applies whether or not any payment has been made.
- (3) An application may also be made to the appropriate tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs and, if it would, as to -
- (a) the person by whom it would be payable,
 - (b) the person to whom it would be payable,
 - (c) the amount which would be payable,
 - (d) the date at or by which it would be payable, and
 - (e) the manner in which it would be payable.
- (4) No application under subsection (1) or (3) may be made in respect of a matter which -
- (a) has been agreed or admitted by the tenant,
 - (b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,
 - (c) has been the subject of determination by a court, or
 - (d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.
- (5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.

Section 20C

- (1) A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a court, residential property tribunal or the Upper Tribunal, or in connection with arbitration 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 tenant or any other person or persons specified in the application.
- (2) The application shall be made—
- (a) in the case of court proceedings, to the court before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to a county court;
 - (aa) in the case of proceedings before a residential property tribunal, to that tribunal;
 - (b) in the case of proceedings before a residential property tribunal, to the tribunal before which the proceedings are taking place or, if the application is made after the

- proceedings are concluded, to any residential property tribunal;
- (c) in the case of proceedings before the Upper Tribunal, to the tribunal;
 - (d) in the case of arbitration proceedings, to the arbitral tribunal or, if the application is made after the proceedings are concluded, to a county court.
- (3) The court or tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances.