



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

Case Reference : **BIR/OOCT/LIS/2014/0019**

Property : **1 Kensington Court, Foxwood Grove,
Birmingham, B37 6HP**

Applicant : **Kensington (Kingshurst)
Management Company Limited**

**Applicant's
Representative** : **SLC Solicitors**

Respondents : **Mr F Drozda and Mrs D Drozda**

Type of Application : **Application under Section 27A (and
19) of the Landlord & Tenant Act 1985
for determination of the liability and
reasonableness in respect of service
charges.**

Tribunal Members : **Mr G S Freckelton FRICS (Chairman)
Judge D R Salter**

Date and venue of : **25th November 2014. There was no
Hearing as the parties requested a
Paper Determination**

Date of Decision : **19th January 2015**

DECISION

1. BACKGROUND

- 1.1 The Application has been referred to the Tribunal by order of District Judge Bull sitting at Birmingham County Court on 2nd June 2014. The Order was made on the Judge's own motion and not as a result of an application by either party. The transfer of the relevant papers to the Tribunal took place on 17th June 2014.
- 1.2 The Applicant is Kensington (Kingshurst) Management Company Limited and the Respondent leaseholders are Mr F Drozda and Mrs D Drozda.
- 1.3 The Applicant is the Management Company administering the development. The Respondents are the leaseholders of Flat 1, Kensington Court, Foxwood Grove, Birmingham, B37 6HP.
- 1.4 The Applicant has issued proceedings in the County Court for recovery of unpaid service charges for the period 1st December 2012 to 30th November 2013. The Tribunal issued directions on 25th July 2014 following which various submissions were made by both the Applicant and the Respondent.

2. THE LEASE

- 2.1 The property is held under a lease dated 26th January 1987 between the Metropolitan Borough County Council of Solihull, Wimpey Homes Holdings Ltd, Kensington Court (Kingshurst) Management Company Limited and Louise Catherine Henry as the purchaser.
- 2.2 The freehold interest in the property was acquired by Kensington Court (Kingshurst) Management Company Limited on 8th March 1988 and the leasehold interest in Flat 1 was acquired by the Respondents on 2nd February 2000.
- 2.3 The lease is for a term of 999 years from 1st January 1984 at a Peppercorn rent.
- 2.4 Clause 2 of Part 1 of the Sixth Schedule provides for the purchaser (the Respondents in this case) to pay to the Management Company, within 14 days of receiving Notice, a sum equal to the total amount specified in such a Notice. Part 2 of the Sixth Schedule details the expenditure to be recovered by means of a maintenance charge. The Fifth and Sixth Schedules detail the covenants by the Management Company for which the service charge is recoverable. In outline, these comprise of repair, painting, cleaning, ground maintenance, lighting, insurance, sundry fees, employees, maintenance, administration and a reserve fund.

3. THE LEGAL FRAMEWORK

- 3.1 Under Section 27A of the Landlord & Tenant Act 1985, the Tribunal has jurisdiction to decide whether a service charge is payable and if it is, the Tribunal may also decide:-
- (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.

- 3.2 Section 19 the 1985 Act provides that service charges must be reasonable for them to be payable.

“Relevant costs shall be taken into account in determining the amount of the service charge payable for a period –

- (a) only to the extent that they are reasonably incurred, and*
- (b) where they are incurred on the provision of services and the carrying out of works, only if the services or works are of a reasonable standard;*

and the amount payable shall be limited accordingly.”

- 3.3 A charge is only payable by the Lessee if the terms of the lease permit the Lessor to charge for the specific service. The general rule is that service clauses in a lease are to be construed restrictively, and only those items clearly included in the Lease can be recovered as a charge (*Gilje v Charlgrove Securities* [2002] 1 EGLR 41). It was also stated in *Gilje* above that “The Lease moreover, was drafted or proffered by the Landlord. It falls to be construed contra proferentum”.
- 3.4 If the lease authorises the charges, they are only payable to the extent that they are reasonably incurred; and where they are incurred, only where the services for which they are incurred are of a reasonable standard.
- 3.5 The construction of the lease is a matter of law, whilst the reasonableness of the service charge is a matter of fact. On the question of burden of proof, there is no presumption either way in deciding the reasonableness of a service charge. Essentially, the Tribunal will decide reasonableness on the evidence presented to it (*Yorkbrook Investments Ltd v Batten* [1985] 2 EGLR 100).

4. THE PROPERTY INSPECTION

- 4.1 The Tribunal inspected the property on Tuesday 25th November 2014 in the presence of Mr F Drozda (one of the Respondents) and Miss H Silvester of Galbraith Properties who are the Managing Agents for the development.
- 4.2 The Tribunal found Kensington Court to be 4 storey block with facing brickwork and rendered panels to external elevations surmounted by a pitched tiled roof. It was noted that areas of brickwork required re-pointing.
- 4.3 The Tribunal carried out an inspection of the Respondents' flat and noted damage to the ceiling within the entrance porch as referred to in the Respondents' submissions.
- 4.4 The Tribunal also noted areas where leaking had been reported internally to the kitchen, hallway, bathroom and bedsitting room.
- 4.5 The Respondents confirmed that the repairs he had carried out to the balcony above the kitchen appear to have resolved the leaking problems to the kitchen. The damage noted to the hallway, bathroom and bedsitting room were caused by leaking from the flat above and the Tribunal determined that these were not the responsibility of the Applicant, although it was understood from the submissions that a claim had been submitted to the insurers of the property.
- 4.6 The Tribunal carried out an external inspection of the property and surrounding area and noted that there was still cracking visible to the bitumen of the balcony immediately above the kitchen of Flat 1 Kensington Court. It was also noted that upgrading had been carried out to the balconies above on the second and third floors. Miss Silvester confirmed that ongoing upgrading of the balconies was being undertaken.
- 4.7 The Tribunal noted that the fences needed repairing and Miss Silvester confirmed that these were to be upgraded during the forthcoming year. The Tribunal noted that the gardens and grounds were generally well-maintained. It was also noted that the pathway to the flat was uneven.
- 4.8 The Tribunal also inspected the garage blocks to the rear. The area was noted to be untidy and the Respondents pointed out the drain, which blocked and caused flooding during heavy rainfall.

5. THE PARTIES' EVIDENCE & SUBMISSIONS

- 5.1 The Applicant submitted that the development comprises of 23 units situated within Foxwood Grove and that the service charges were apportioned equally between the owners of the 23 apartments in accordance with the terms of the lease. As such, the Applicant has demanded from the Respondents a contribution to the service charges, which have not been paid. The Applicant attached copies of the service charge demands to its submissions and these were inspected by the Tribunal.
- 5.2 The Applicant further submitted that it served a budget on the Respondents in which they detailed anticipated expenditure, which included provisions for all the items mentioned in the Fifth and Sixth Schedules of the lease. It was therefore submitted that the Respondents had been notified of the expenditure that had been accrued during the period, which was the subject of the Application and had been notified of the amount that they were due to contribute towards that expenditure. The Applicant included a copy of the service charge budget in their submission, which was noted by the Tribunal. The Applicant also attached a copy of the service charge accounts for the years ending 31st December 2012 and 31st December 2013.
- 5.3 The Applicant submitted that all the heads of expenditure listed in the budgets were specifically provided for within the lease. Accountants had confirmed that actual expenditure had been incurred and, therefore, that services had been provided throughout the period in question.
- 5.4 The Applicant submitted, therefore, that the Respondents were liable to contribute towards anticipated expenditure in advance of the provision of services and had failed to do so, which constituted a breach of covenant. It was submitted that such breaches compromised the Applicant's ability to provide services, although the Applicant had continued to honour its obligations despite the non-payment by the Respondents of their contribution.
- 5.5 The Applicant attached a Scott Schedule to support the submission as to the reasonableness of the charges levied.
- 5.6 In response, the Respondents submitted that the ongoing dispute over non-payment of service charges was primarily due to unresolved issues with the previous and present property management companies not carrying out their duties in respect of property maintenance. In particular, the Respondents detailed the following matters: -

- (a) The property maintenance company had carried out some high level gutter and fascia repairs, which had caused damage to the Respondents' lower level porch roof, gutters and downpipes where scaffolding poles were located and where workmen had walked on the tiles. This had caused cracking and movement of several tiles, which allowed water ingress into the porch.
- (b) At the same time, damp patches appeared inside the kitchen and living room to the Respondents' flat. The Respondents submitted that in their opinion, this appeared to stem from the balcony from the flat above, which had a recessed bitumen membrane with drainage hole, which was also blocked. This had caused water to overflow from the membrane and seep down the wall into the Respondents' flat. As a temporary measure, the Respondents had placed bitumen backed tiles under the ceramic tiles, moved the existing ceramic roof tiles back into place and then contacted the Management Company with a view to getting the repairs carried out. The Respondents had subsequently unblocked the drain hole, which appeared to resolve the problem. The Respondents arranged a meeting at which these problems were outlined with the Applicant's representative and it was agreed that the Applicant would carry out the necessary repairs. However, the water ingress persisted. Subsequently, the Respondents arranged directly with the occupant of the flat above for access and spent time cleaning and sealing round the cracked areas of the bitumen membrane. At the same time, the ongoing internal leak from the flat above into the living room and bathroom of Flat 1 had not been resolved.
- (c) The Respondents submitted that externally there were uneven slabs, which caused a trip hazard on access pathways to the property as well as poorly maintained unsafe balconies above. It was also submitted that blocked drains had caused flooding to the garage areas. At the time of the Tribunal's inspection, it was noted that an area of the pathway leading to the Respondents' flat had been taped off and that several slabs were uneven.
- (d) The Respondents submitted that they did not benefit from any of the communal stairs, hallways, exterior and interior security lighting, interior cleaning, painting or other repairs associated with the main block.

5.7 The Respondents submitted that they had carried out works for which they estimated the cost as follows: -

To repairs to the porch roof and re-plastering and decorating within the flat	£2,000.00
To level uneven slabs	£500.00
Monthly loss of income based on the value of a flat to let from March 2014	£350.00

- 5.8 The Respondents submitted photographs of both internal and external areas around the flat for the Tribunal's consideration.
- 5.9 In response to the Respondents' submission, the Applicant further submitted that in its opinion, the Tribunal did not have jurisdiction to deal with items of an alleged counter-claim and that the issues transferred to the Tribunal by the Court for determination related only to whether the service charge demanded from the Respondent is (or would be) payable and the amounts, which are (or would be) reasonably payable. The Tribunal confirms it does not have jurisdiction to consider the counter-claim.
- 5.10 The Applicant submitted that the items for which it rendered a service charge as detailed in the lease included insurance, repair and maintenance.
- 5.11 The Applicant further submitted that the Respondents had failed to provide evidence for the items of expenditure with which they disagreed. Furthermore, they had failed to comment on the Applicant's evidence to substantiate their reasoning for this disagreement and had not provided any alternative figures for what they considered to be appropriate amounts for the items of expenditure, which are in dispute.
- 5.12 The Applicant submitted that it appeared that the Respondents were in agreement with some items of expenditure detailed in the Scott Schedule namely, landscaping, professional fees and the reserve fund.
- 5.13 The items of expenditure with which the Respondents disagreed could be summarised as follows: -

(a) Communal electricity

The Applicant submitted that such expenditure had been incurred as evidenced by the accounts.

(b) Cleaning

The Applicant submitted that the Respondents had failed to provide any evidence to support their contention that no cleaning had been carried out in the area of Flat 1.

(c) Repairs

In relation to the expense of repairing fences and gates, the Applicant confirmed it had obtained quotations with works to the same scheduled for the next service charge year.

(d) Health and Safety

The Applicant submitted that the Respondents had failed to notify the Applicant of any alleged issues in relation to the paving slabs. With regard to the balcony repairs, the Applicant submitted that a number of balconies had been repaired with works to other balconies being scheduled as soon as the Applicant had funds to do so.

(e) Insurance

The Applicant submitted that the Respondents had failed to provide any reasons why they considered this item of expenditure to be unreasonable, nor provided details of the amount they considered could be appropriate.

(f) Professional Fees

It was submitted that the Respondents had failed to provide any comment in respect of the company secretarial and annual return filing fee and had not commented on what they considered an appropriate management fee to be.

- 5.14 The Applicant submitted that the photographs exhibited by the Respondents were not dated so it was not possible to ascertain when they were taken. In conclusion, the Applicant submitted that as a result of the Respondents withholding payments of their service charge contribution, the Applicant had no alternative but to refer the matter to solicitors.
- 5.15 The Applicant further submitted that the heads of expenditure listed in the Scott Schedule are specifically provided for in the lease and that the accounts confirmed that actual expenditure had been incurred and therefore that service had been provided throughout the period in question.

6. THE SCOTT SCHEDULE AND THE TRIBUNAL'S DETERMINATION

- 6.1 The Tribunal accepts that Flat 1 has its own entrance door and does not benefit from all the services provided to the block. However, this situation also applies, in various degrees, to other ground floor flats and the lease clearly provides for the various expenses to be apportioned equally between all the flats in the block. Therefore, the Tribunal considered the Scott Schedule provided by the parties and appended to this Decision at Appendix 1, which related to the period 1 December 2012 to 30 November 2013. However the Tribunal noted that the figures given by the Applicant in respect of the various service charge expenses did not accord with the figures given in the submitted service charge accounts.
- 6.2 The Tribunal therefore directed the Applicant to clarify the position and it was subsequently confirmed that the figures provided in the Scott Schedule were taken from the service charge budget and did not, therefore, reflect actual expenditure during the relevant period. The Tribunal therefore determined that for practical purposes their Decision should reflect the service charge expenses incurred for the period 1st January 2013 – 31st December 2013.

- 6.3 It was also noted by the Tribunal that the submitted service charge accounts did not include any amount relating to the Reserve Fund. Consequently and notwithstanding the approach outlined in paragraph 6.2, the Tribunal determined that a payment towards the Reserve Fund was permitted under Clause 11, Part 2 of the Sixth Schedule and, in this respect, an amount of £1050.00, as stated by the Applicant in the Scott Schedule, was not unreasonable.
- 6.4 The Tribunal therefore made its determination accordingly in respect of the various items as set out below.
- 6.5 This Determination is in respect of Kensington Court. It is therefore determined that the Respondent's contribution being a 1/23rd share amounts to £512.60.
- 6.6 This Determination does not take account of any amounts, which may have been paid by the Respondents. The Tribunal has dealt only with the issues for which it has jurisdiction.

7. APPEAL

- 7.1 Any appeal against this Decision must be made to the Upper Tribunal (Lands Chambers). Prior to making such an appeal the party appealing must apply, in writing, to this Tribunal for permission to appeal within 28 days of the date of issue of this Decision, (or, if applicable, within 28 days of any decision on a review or application to set aside) identifying the decision to which the appeal relates, stating the grounds on which that party intends to rely in the appeal, and stating the result sought by the party making the application.

Graham Freckelton FRICS
Chairman
First-Tier Tribunal Property Chamber (Residential Property)

APPENDIX 1

ITEM	APPLICANT'S SUBMISSION	RESPONDENT'S SUBMISSION	TRIBUNAL DETERMINATION	AMOUNT DETERMINED BY THE TRIBUNAL
Communal electricity	£682.00	No community security lighting is fitted in the area of Flat 1 Amount due: Nil	The charge is recoverable under Clause 6, Part 2 of the Sixth Schedule and Clause 5 of the Fifth Schedule.	£894.00
Cleaning	£918.00	No cleaning is carried out in the area of Flat 1 Amount due: Nil	Recoverable under Clause 3 of the Fifth Schedule and Clause 6, Part 2 of the Sixth Schedule.	£704.00
Repairs	£997.00	No repairs have been carried out in the area of Flat 1. Amount due: Nil	Recoverable under Clause 1 of the Fifth Schedule and Clause 6, Part 2 of the Sixth Schedule.	£2,671.00
Health and Safety	£360.00	Health and safety risk to all areas of the pathway due to trip hazard caused by uneven slabs. Amount due: Nil	£300.00 paid in 2012. Further inspection not required in 2013.	Nil
Landscaping/ grounds/ gardening	£1,974.00	Excessive cost, although partially agreed that hedges have been trimmed by another tenant. Amount due: Nil	Recoverable under Clause 4 in the Fifth Schedule.	£324.00
Insurance	£3,760.00	Insurance claim submitted on this insurance and not Respondent's insurance as suggested by Applicant's solicitor. Amount due: Nil	Recoverable under Clause 7 of the Fifth Schedule and Clause 4, Part 2 of the Sixth Schedule.	£1,621.00
Professional Fees	£892.00	Agreed. £892.00	Recoverable under Clause 2 and 10, Part 2 of the Sixth Schedule.	£1,076.00
Management Fee	£2,898.00	Excessive annual increase. Amount due: Nil	Recoverable under Clause 2, Part 2 of the Sixth Schedule.	£3,450.00
Reserve Fund	£1,050.00	Agreed. £1,050.00	Recoverable under Clause 11, Part 2 of the Sixth Schedule.	£1,050.00
TOTAL DUE				£11,790.00