FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**CHI/00HX/LSC/2019/0073**
Property	**:**	**Flat 3, 59 North Street, Swindon, Wilts SN1 3JY**
Applicant	**:**	**Dawn Hamblin and James Hamblin**
Representative	**:**	**-**
Respondent	**:**	**UK Property Trust Limited**
Representative	**:**	**Blue Property Management Limited**
Type of Application	**:**	**Determination of service charges and administration charges**
Tribunal Members	**:**	**Judge E Morrison**
Date of decision	**:**	**22 November 2019**

DECISION

The applications

1. Under the application dated 21 July 2019 the applicant lessees applied under section 27A of the Landlord and Tenant Act 1985 ("the Act") for a determination of their liability to pay service charges for service charge years 2015-2018, and future years. The respondent is the freeholder of the block. The applicant also disputes certain administration charges, pursuant to Schedule 11 to the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act").

2. The Tribunal also has before it applications under section 20C of the Act and paragraph 5A of Schedule 11 to the 2002 Act for orders that the Respondent's costs of these proceedings should not be recoverable through future service or administration charges.

Summary of decision

3. The service charges recoverable by the Respondent are as follows:

Year	**£**
2015	71.25
2016	142.20
2017	225.30
2018	225.30
2019	Nil until incurred and demanded

4. Orders are made under section 20C of the Act and paragraph 5A of Schedule 11 to the 2002 Act.

The lease

5. The lease for Flat 3 is dated 14 February 2006 and is for a term of 150 years from 1 January 2006.

6. The relevant provisions in the lease may be summarised as follows:

   (a) The lessee must pay one half of the premium paid by the lessor to insure the building;
   (b) In addition, as provided in clause 3.3, the lessee must pay on demand "one half of the amount spent in carrying out the obligations in this Lease to provide the services listed in the Fourth Schedule";
   (c) The Fourth Schedule deals with "Rights reserved" and makes no mention of any services to be provided by the lessor;
   (d) The lessor covenants to provide the services listed in the Fifth Schedule and in doing so "may engage the services of whatever employees agents contractors and consultants and advisors" considered necessary (clause 4.6);

(e) The Fifth Schedule is as follows:

Services to be provided

1. *Repairing the roof foundations external and load bearing walls joists beams and common parts of the Building including all paths and hallways*
2. *Decorating the outside of the Building every five years*
3. *Repairing and maintaining those sewers drains pipes wires and cables in the Building and its grounds which serve both the Property and other parts of the Building*.

7. There is no provision in the lease for any service charges to be paid on account, or for a reserve fund to be accumulated.

The building

8. The Tribunal has not inspected the property but the following description supplied by the applicant has not been challenged and appears to be borne out by the respondent's documentation. Flat 2A is a duplex flat occupying the first and second floors of a converted corner building. There are two other flats, at ground and basement level. Each flat has its own entrance and there are no internal common parts.

Procedural background

9. Following a case management hearing, directions were issued and later amended. These provided, in part, for the application to be determined on the papers without an oral hearing, as agreed by the parties. A bundle of documents was subsequently provided to the Tribunal and the contents of that bundle, supplemented by a copy of the lease obtained from Land Registry, comprise the evidence and submissions.

The law

10. The tribunal has power under section 27A of the Act to decide about all aspects of liability to pay service charges and can interpret the lease where necessary to resolve disputes or uncertainties. The tribunal can decide by whom, to whom, how much and when a service charge is payable.

11. By section 19 of the Act a service charge is only payable to the extent that it has been reasonably incurred and if the services or works for which the service charge is claimed are of a reasonable standard. When service

charges are payable in advance, no more than a reasonable amount is payable.

12. Under section 20C of the Act a tenant may apply for an order that all or any of the costs incurred by a landlord in connection with proceedings before a tribunal 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.

13. Under paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 a tenant may apply to the Tribunal for an order which reduces or extinguishes the tenant's liability to pay an "administration charge in respect of litigation costs".

The issues

14. In its statement of case the respondent has accepted that the lease does not provide for the lessee to make payment in advance of service charges being incurred, and accordingly administration charges arising out of the applicant's failure to satisfy on account demands for 2018 and 2019 will be "waived". The Tribunal therefore need not consider this issue any further.

15. In respect of the service charges, the issues are:

- Whether the applicant has any liability to pay a service charge in respect of services provided under the Fifth Schedule
  If Yes:
- Whether the respondent is entitled to recover a management fee and, if so, are the sums claimed reasonably incurred
- Whether the respondent is entitled to recover accountancy fees and, if so, are the sums claimed reasonably incurred
- Whether the respondent is entitled to recover bank charges and, if so, are the sums claimed reasonably incurred
- Whether the respondent is entitled to recover "health and safety" charges and, if so, are the sums claimed reasonably incurred
- Whether the respondent is entitled to recover repairs and general maintenance charges and, if so, are the sums claimed reasonably incurred.

16. The applicant has also asked the Tribunal to order a refund of any service charges which have been overpaid, together with late payment charges. This is not a matter over which the Tribunal has jurisdiction. We are able to determine the amount of the service charge, but any claim for a repayment pursuant to a tribunal determination must be made in the county court.

Whether the applicant has any liability to pay a service charge in respect of services provided under the Fifth Schedule

17. The applicant's case is that the lease only requires them to pay towards the services in the Fourth Schedule, not the Fifth Schedule. Inexplicably the respondent has entirely failed to address this point, seemingly assuming that the Tribunal will treat the payment obligation in clause 3.3 as referring to the Fifth Schedule, even though that is not what it says.

18. The question for the Tribunal is whether the words "Fourth Schedule" in clause 3.3 should be read as if they said "Fifth Schedule". The starting point for the interpretation and construction of a document is the meaning of the actual words used. Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation they were in at the time of the contract (*Investors Compensation Scheme v West Bromwich Building Society No. 1* [1998] 1 WLR 896).

19. In this case there is no doubt what "Fourth Schedule" means in a literal sense, but would a reasonable person entering into this lease in 2006 have understood that in reality "Fifth Schedule" were the words actually intended? Although courts will be slow to accept that people have made linguistic mistakes, in some cases the literal interpretation of the words used leads to a result so absurd that the only conclusion is that there has been a mistake. In *Chartbrook Ltd v Persimmon Homes Ltd* [2009] 1 AC 1101, Lord Hoffman identified two conditions to be met before a court could "correct by construction": (i) there must be a clear mistake on the face of the instrument and (ii) it must be clear what correction ought to be made in order to correct the mistake.

20. In my view this is a case where those tests are met. The reference to Fourth Schedule instead of Fifth Schedule in clause 3.2 is a clear mistake, and it is also clear what correction should be made. The Tribunal therefore finds that clause 3.2 should be read as referring to the Fifth Schedule and the applicant is accordingly liable to pay a service charge in respect of services provided by the respondent pursuant to that schedule.

Management fees

21. The respondent has until now always sought payment in advance based on a budget for the forthcoming year. Save in 2016, the budgeted cost matched the actual cost as set out in the end of year Income and Expenditure account.

Year	Amount demanded (50%)	Cost incurred (50%)
2015 (half year only)	22.50	22.50
2016	75.00	45.00
2017	216.00	216.00
2018	216.00	216.00

22. The applicant disputes any liability to pay management fees for years 2015-2018 on the basis that no chargeable services under the Fifth Schedule were performed during those years, or alternatively submits that the charges are not at a fair level. The only service provided by the managing agents was a "Health and Safety Risk Assessment" charged for separately.

23. The respondent submits that "the fifth schedule … is very limited and not exhaustive to what is required to run a development". Obviously with any management agent there will be a management fee to be paid per development and for any services provided we would have to produce year end accounts …". Reliance is placed on *Norwich CC v Marshall* LRX/114/2007 Lands Tribunal. It is said that the fees are "market-tested and are reasonable for the management duties we have to complete for each of our developments". A list of "Management Duties" has been provided.

24. The Tribunal is satisfied that clause 4.6 of the lease (see paragraph 6(d)) above permits the respondent to employ managing agents in connection with the provision of the Fifth Schedule services. The cost of so doing is therefore properly regarded as a cost within the Fifth Schedule so long as the agents' work relates to Fifth Schedule services.

25. The difficulty for the respondent is that there is very little evidence of Fifth Schedule services being provided during the four year period, 2015- 2018. While it is accepted that an annual inspection of the exterior is reasonably required and can be regarded as within the scope of the Fifth Schedule (see below), this has been charged for separately in addition to the management fee. The only other service provided by the respondent was preparation of a budget (used as a basis for on account demands which were not authorised by the lease), simple bookkeeping, and (in 2017 and 2018) arranging for a firm of accountants to certify a very simple end of year income and expenditure account. Were it not for the annual "health and safety risk assessment", there would be no expenditure directly relating to the property at all, with the possible exception of one unspecified "out of hours" charge of £18.00 separately charged in 2018.

26. Although the respondent has supplied a list of "management duties" this is clearly generic, and most of the duties have no application to this very simple building which has no internal common parts. It is also noted that not a single item of repair, maintenance or decoration was carried out in these years. The managing agents did not even address the issue of a damaged meter box door mentioned in every annual inspection report from 2015-2018.

27. The Tribunal accepts that end of year accounts should be prepared and these should form the basis for the service charges demanded. It is also reasonable, and in accordance with good practice, to employ an independent firm of accountants to certify the accounts, and clearly there will be some associated correspondence. The managing agents' reasonable costs of dealing with these matters should be paid by the lessees pursuant to clause 4.6 of the lease. However, given the extremely limited scope of the work carried out, the Tribunal does not find that an overall charge of £432.00 p.a. in either 2017 or 2018 is reasonably incurred. No explanation whatsoever has been provided for the increase in cost of more than 450% over the fees charged in 2015 and 2016. While the previous fee of £90.00 p.a. appears very low, there is no evidence that £432.00 p.a. is an appropriate market rate for the very limited work carried out for this building of three flats with no internal common parts (it being noted that insurance is not part of the managing agents' duties), and it does not accord with the Tribunal's general knowledge and experience. The applicant has not provided any comparable quotes for the service provided, but adopting a robust, common-sense approach the Tribunal finds that a reasonable management fee for each of these years, given that there is a separate charge made for the annual inspection and for preparation of the year-end account, is £180.00 inc. VAT, with 50% of that sum payable by the applicant.

Accountancy fees

28. The amounts demanded and incurred are as follows:

Year	Amount demanded (50%)	Cost incurred (50%)
2015 (half year)	37.50	37.50
2016	87.50	87.50
2017	122.50	173.00
2018	160.00	160.50

29. Again the applicant disputes any liability to pay these fees for years 2015-2018 on the basis that no chargeable services under the Fifth Schedule were performed during those years, or alternatively submits that the charges are not at a fair level.

30. The Tribunal has found (paragraph 27 above) that the cost of having the end of year accounts certified by an independent accountant is reasonably incurred. The amount of work required from the accountant was, however, minimal, with a very limited number of invoices to consider. The documentation supplied by the respondent shows that an independent accountant only became involved in 2017 and 2018, charging £75.60 each year, an entirely reasonable amount. In 2015 and 2016 there is no evidence of any independent certification, and the remaining accountancy charges are in fact charges made by the managing agents themselves: £75.00 in 2015, £175.00 in 2016, £245.00 in 2017 and £245.00 in 2018. There is no evidence that the end of year accounts for 2015-2016 were even sent to the lessees; nor is there any explanation for the sharp increase in costs. In 2017 there is a discrepancy between the cost for accountancy fees as stated in the year end account (£346.00) and the total of the supporting invoices (£320.60). The list of "Management duties" supplied by respondent states that "The production of the Service Charge accounts will incur an additional accountancy fee". Doing the best it can on this limited evidence, the Tribunal allows an annual sum of £75.00 inc. VAT for the managing agents to produce the extremely simple and short accounts for the years in question, general bookkeeping being part and parcel of general duties encompassed within the general management fee.

Bank charges

31. In each year the service charge account includes an amount for bank charges. From the supporting documentation it appears that there is a monthly charge for holding the account, together with fees for posting a copy of the statement and processing electronic payments. The applicant disputes any liability under the lease to pay these costs, and submits that as service charges are only payable by lessees once the costs have been incurred, there is no need for the managing agents to maintain a separate account to hold client money. The respondent responds that holding a separate account is in line with the RICS Code of Practice.

32. The Tribunal finds that it is entirely proper for the managing agents to maintain a separate bank account for this building, whether or not it holds "client money". It promotes proper transparency and avoids difficult issues of data protection and confidentiality that are likely to arise if monies are held in a general account.

33. There is no specific clause in the lease permitting recovery of bank charges through the service charge. As it is a charge made by the bank direct to the managing agents, the question is whether the management agreement between the agents and the lessor provides for the lessor to

pay those bank charges in addition to a general management fee. This has not been addressed by the respondent. Without any evidence that the agents are entitled to be reimbursed the banking costs, rather than absorbing them as part of their overheads, the Tribunal cannot be satisfied that the respondent has incurred any expenditure on these bank charges, and so they are all disallowed.

Health and Safety Risk Assessments

34. Midway through each year a "Senior Risk Manager" employed by the managing agents has completed a short "Risk Assessment Audit and Report" on the building. The agents seek to recover £150.00 as their fee in 2015, and £240.00 p.a. as their fee in subsequent years; the increase is unexplained. The applicant states that the inspection covers only exterior decoration and the charge is unjustifiable. The respondent says it has a duty to carry out the assessment.

35. It is reasonable for the managing agents to carry out an annual inspection and risk assessment, and to be paid a reasonable fee for this. This service can properly be regarded as within the scope of the Fifth Schedule; the need for repairs etc. cannot be ascertained without inspection. In determining the general management fee above, the Tribunal took account of the fact that the risk assessment was charged separately.

36. However the Tribunal is not satisfied that the costs are reasonable. Each of the four annual reports is extremely brief and in absolutely identical terms. It is clear that the inspector, who has a Level 2 certificate in risk assessment, simply looked at the exterior of this small building and the boundaries from ground level. He did not go inside, and the majority of the items listed in the risk assessment checklist have no application. He made no recommendations. The time taken for the inspection and preparation of the report cannot possibly have exceeded 1 hour, and could have been carried out by someone in the local area. The Tribunal finds that a reasonable fee would be £120.00 p.a. inc. VAT and disallows any additional amount.

Repairs and general maintenance

37. Although in each of years 2016-2018 the applicant has been asked to make a payment on account of £250.00 for repairs and general maintenance, in fact no work has been carried out. Nothing is recoverable by the respondent.

Calculation of recoverable service charges 2015-2018

38. Applying the Tribunal's findings set out above the service charges recoverable from the applicant for each year are determined as follows:

2015

The respondent seeks to recover only 50% of the annual cost, for the period 1.7.15- 31.12.15)

Accountancy fee	18.75
Management fee	22.50
Health & Safety risk assessment	30.00
Total	**71.25**

2016

Accountancy fee	37.50
Management fee	45.00
Health & Safety risk assessment	60.00
Total	**142.20**

2017

Accountancy fee	75.30
Management fee	90.00
Health & Safety risk assessment	60.00
Total	**225.30**

2018

Accountancy fee	75.30
Management fee	90.00
Health & Safety risk assessment	60.00
Total	**225.30**

39. There is no authority under the lease for the respondent to retain sums paid in excess of the amount determined to be payable.

2019 onwards

40. As noted, the lease does not permit recovery of service charges before they have been incurred. Therefore there is nothing due until a proper demand has been made in accordance with the lease.

Application under section 20C

41. In deciding whether to make an order under section 20C a Tribunal must consider what is just and equitable in the circumstances. The circumstances include the conduct of the parties and the outcome of the proceedings. The Tribunal accepts that this application was necessitated by the refusal of the managing agents to engage in any way with the reasonable queries raised by the applicant about the lease, the service charges, and how they were being administered. The respondent has ignored the provisions of the lease by demanding monies in advance, and has wrongly retained monies belonging to the applicant, even on the basis of its own service charge calculations. The applicant has been substantially successful in reducing the service charges. The Tribunal therefore finds it is just and equitable for an order to be made that to such extent as they may otherwise be recoverable, the respondent's costs, if any, in connection with these proceedings are not to be regarded as relevant costs to be taken into account in determining the amount of any future service charge payable by the applicant.

Application under paragraph 5A

42. For the same reasons, the Tribunal orders that the applicant shall have no liability to pay an administration charge in respect of the respondent's costs, if any, of these proceedings.

Dated: 22 November 2019

Judge E Morrison

Appeals

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.