FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	CHI/24UH/LSC/2020/0036,0047 & 0062
Property	:	Ward Court, 65 Seafront, Hayling Island PO11 0AL
Applicant	:	Simon Natelson-Carter (23) Penelope Donohue (19 & 41) Alwyn Allen (Flat 21) Evelyn Lesley Statham as Power of Attorney for Vera Croucher (Flat 37) Hannah Newbury (Flat 42) Perri Fox (Flats 44 & 49) David Day (Flat 45) John Cooper (Flat 50) Cathy Kennealy (Flat 53)
Representative	:	
Respondent	:	Ward Court Flats Management Company Limited
Representative	:	
Type of Application	:	Determination of liability to pay and reasonableness of service charges
Tribunal Member(s)	:	Judge D. R. Whitney Mrs J Coupe FRICS
Date of Hearing Held by CVP	:	23rd October 2020
Date of Determination	:	24th November 2020

DETERMINATION

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Background

1. This is the determination of three claims made by leaseholders of Ward Court, 65 Seafront, Hayling Island PO11 0AL ("the Property"). The Applicants are all leaseholders of the Property and the Respondent is the owner of the freehold being a company in which the leaseholders are also shareholders.

2. The applications are:

    - 0036 Applicants, Flats 21, 37, 42, 44, 45, 49, 50, 53: challenge as to liability and service charges for the years 2017 to 2020 inclusive;
    - 0047 Applicants, Flats 42, 50 and 53: challenge as to the basis of apportionment of the service charges levied by the Respondent;
    - 0062 Applicant Flat 23: adopted the cases made in 0036 and 0047;

3. Various sets of directions were issued by the Tribunal. These provided that all three applications were to be heard at the same hearing. The directions were substantially complied with and the Tribunal was supplied with three bundles. Within this decision pages referred to will be identified as 0036: A[], 0047 B[] and 0062C[].

4. The dispute appears to have arisen in that the Respondent believes significant expenditure is required to the Property. The Respondent has investigated whether or not further development of the Property could be undertaken including obtaining planning permission for the construction of additional flats upon the roof. It proposes that monies raised could then be used to off set costs of the works required. The Respondent has used service charge funds to fund the costs of investigating and obtaining planning permission. The Applicants challenge this use of funds and the dispute has broadened to cover certain other matters.

Hearing

5. The hearing took place remotely via CVP video hearing. All parties were able to attend and whilst on occasion certain parties connections were lost they were able to reconnect. At the conclusion of the hearing each and every party confirmed they had been afforded opportunity to

present their respective case and make all representations to the Tribunal.

6. The Tribunal was attended by:

Applicants: Mr Perri Fox
Ms Hannah Newbury
Mr John Cooper
Mr Natelson-Carter
Mr and Mrs Statham

Respondents: Mrs Pauline Jones
Mr Tony Jones
Mr Brad Roynon
Mr Mark Jarvis

7. Neither party was represented but a skeleton argument had been prepared by Mr Jonathan Upton of counsel on behalf of Mr Perri Fox in respect of application 0036.

8. The Tribunal at the outset confirmed with the parties the issues to be resolved within all three applications were:

- Has the Respondent properly demanded amounts under the terms of the lease?
- Has the Respondent properly apportioned service charges?
- Was the Respondent entitled to recover costs of potential redevelopment of the Property as a service charge item?
- Were the managing agents costs reasonable?
- Were the costs paid to Mr Ramsey reasonable?
- Should any orders pursuant to section 20C and paragraph 5A be made?

9. The parties agreed the above encompassed the issues to be addressed. It was agreed the Applicants would put forward their respective cases, followed then by the Respondent in reply. Regular breaks were taken including for lunch throughout the hearing.

10. The below is a summary, only, of the relevant points made by the parties.

11. Mr Fox began to present the case for the Applicants. He explained that Ms Newbury wrote to the Respondents A[115-117] suggesting that it should not be using service charge funds to pay for potential redevelopment of the Property which the Respondent was exploring. This letter referred to advice issued by ARMA as to what actions the company should follow.

12. Mr Fox suggested that the company was not demanding money in accordance with the lease. He referred to a demand A[89-92]. He

suggested that the demands were not in accordance with the lease A[34-47]. Mr Fox stated that it was the Fifth Schedule A[43] which sets out how service charges may be demanded. He suggested this did not allow an interim service charge to be demanded. He relied upon advice from Johnathan Upton A[55-69] within the bundle and the interpretation of the lease he suggests.

13. Mr Cooper then spoke and explained he also relied upon the skeleton argument of Mr Upton. He took the view that the costs which the Company estimated would need to be spent to bring the Property back to repair would not cost as much as £1,000,000. His view was that matters had been exacerbated as the Company had spent 4 years concentrating on obtaining planning permission rather than carrying out works to the Property.

14. Ms Newbury then spoke and adopted the arguments over service charge. Ms Newbury also challenged the method of apportionment adopted by the Respondent. She believed that the apportionment should be by reference to the rateable values of the flats. She had spoken with Portsmouth Water who advised her that the rateable value for all the flats within the Property was the same being £187. She referred to a letter from the solicitor for Mrs Kennealy B[35-36]. This suggested that the service charge should be apportioned by the reference to rateable value and that the Respondent knew this was the case and it was not properly following this arrangement. The solicitor in 1991 seemed to suggest the Company knew it could be challenged over this.

15. Ms Newbury confirmed that in respect of the issue of the apportionment the Applicants accepted that they were only seeking to challenge apportionment from July 2018 being the point she first raised this issue with the Respondent.

16. Mr Cooper adopted the arguments of Ms Newbury and also added that he could not understand how the Respondent had reached the apportionments which it applied B[130].

17. Mr Natelson-Carter also adopted the arguments made so far. He also explained that he expected the accounts to be certified by a third party who would have ensured that the amounts were properly apportioned. He suggested the amounts and proportions charged have changed over time.

18. As to the development costs he was not challenging the reasonableness of those costs. Simply put he did not accept that they were recoverable as a service charge item.

19. Ms Newbury accepted she had seen a copy of the contract appointing the managing agent although it was not in any bundle. She was satisfied that the contract was not a Qualifying Long Term Agreement and she personally was not pursuing that argument. Other Applicants

were. Her objection to the managing agents fee was that if they had been doing their job properly service charges would have been appropriately apportioned and money correctly spent when it has not been.

20. Ms Newbury explained that she objected to the charges of Mr Ramsey. He lived in the Property and his wife was a director of the Respondent. She felt he was paid substantial sums similar to amounts paid to the previous caretaker. She felt there was no transparency as to what tasks he undertakes and the documents provided do not properly identify what works he undertakes A[96-100].

21. Mr Cooper could not understand why an agent was required. All previous boards of directors had managed the Property without an agent. He felt they should have consulted. As for Mr Ramsey he also stated there was no explanation or breakdown and he and others remained in the dark.

22. Upon questioning by the Tribunal Mr Cooper and Ms Newbury both explained they had wished to become directors of the Respondent.

23. Mrs Jones asked various questions of the Applicants.

24. Mr Natelson-Carter acknowledged that he believed the managing agents could certify the accounts. He felt there should be some independent verification.

25. Ms Newbury accepted she received details of the EGM pack covering the proposed development.

26. Mr Cooper accepted he had seen invoices for the 2018 including what were called job cards for Mr Ramsey but he was appalled at the sums paid to him.

27. Mr Statham accepted Mr Ramsey had been to the flat to look at a leak.

28. Mrs Jones presented the case for the Respondent. She explained that there were 54 flats and she believed everyone was a member of the company. She described this as a “closed community”. The Respondent followed custom and practices developed over years. It had no income save for via the service charges. All funds were held in a designated client account.

29. She explained that she joined the committee in 2016. The Respondent had been reactive to maintenance and had no reserve funds. In her opinion various inappropriate and ineffective repairs had been undertaken. She was appointed as the Chair and advised all members that they needed to think more long term and arranged for the first survey to be undertaken.

30. She stated that weatherproofing of the Property had been an issue dating back to the 1970s. She looked at the various options. Currently the board was required to update the insurers on a monthly basis as to progress on potential repairs. The insurers require the current situation to be remedied if they are to continue providing cover.

31. She was aware that some residents were on a fixed income and so looked at how the company could fund the works. The boards report was in the bundle A[230].

32. Mrs Jones called Mr Roynon. He confirmed the contents of his witness statement A[214-216] were true and accurate. He explained he doesn't live permanently in his flat but uses it to visit family. He is a retired CEO of a local authority and is used to dealing with projects involving housing stock and repairs.

33. He believed the current proposed solution of development to fund repairs whilst perhaps not perfect was as good as it could be in the circumstances.

34. In his opinion the money needs to have been spent so that the Property can be returned to good order without large service charge costs. The Building Committee, of which he is a member, of the Respondent looked at the works required. He believed that there was a massive deficiency built up over many years as to works required to be undertaken. The Building Committee had 8 to 10 members including 3 directors of the Respondent.

35. Upon cross examination by the Applicants he confirmed the committee was chaired by Mrs Jones.

36. Mr Roynon explained he was not an expert but water ingress has occurred through the roof for a number of years and the advice was that replacement was required. His view was that the sale of the airspace would provide funds which the Respondent could then apply to the necessary works reducing the costs for all the leaseholders. Planning permission was obtained in December 2019 and whilst still more work needed to be done, they can now move forward. Mr Roynon believed that all that was being undertaken by the Respondent had been communicated to members via newsletters and meetings.

37. Mrs Jones stated that the leases required the service charge to be calculated as a rateable proportion and not Rateable Value. The proportions adopted B[130] had been used for many years. Some flats changed as it depended whether or not they had use of a garage. She understood this was the method used since 1975. Effectively the smallest flat on the ground floor paid less than a top floor flat. She believed this was in line with the lease terms.

38. Mrs Jones stated that an interim charge needed to be raised otherwise the Respondent would have no working capital. In her view the lease

does allow half yearly interim payments under clause 1 of the lease and she suggests this is common sense. The leaseholders are however allowed if they wish to pay monthly.

39. Mrs Jones explained she prepares the certificates although she is not an accountant. She stated that A[280] was an example. Supposedly the accountants will not certify the service charge accounts but provide Companies House accounts.

40. Mrs Jones went through the Scott Schedule of items in dispute A[227-229]. In her opinion all of the costs were directly related to maintenance of the Property. Hence service charge funds were used. The Respondent was exploring all options and has now served Section 5 notices with a view to then finding a developer.

41. As for the managing agent Mrs Jones agreed the invoice was not within the bundle. She had not realised all these documents would be required to be within the bundle. She explained the company had approached three agents before appointing KTS. KTS subsequently resigned and only charged for 8 months. Since then there has been no managing agent in place.

42. In respect of documents Mrs Jones suggested she had disclosed all of these to the Applicant in accordance with Tribunal directions but did not realise she would need to include these as part of her submissions. She suggested the Applicants had copies of all including "job cards" for Mr Ramsey.

43. Mrs Jones states that Mr Ramsey undertakes work in accordance with job cards and his hourly rate was originally £12.50 per hour but was now £15. She stated that he has insurance and he is a qualified builder. She accepted that Mr Ramsey will often identify jobs and she will then sign these off. Mrs Jones believes he charges for a fraction of the work he undertakes. He does essentially fulfil a caretaker role.

44. Mrs Jones explained the board of directors some years ago had decided to levy penalty charges for non-payment of service charges. She believed the amounts were reasonable and based upon what managing agents typically charge.

45. On questioning by the Applicants Mrs Jones explained the Respondent had prepared a budget potentially including the cost of the major works and had begun a section 20 consultation. She had forecast the leaseholders share but matters had not progressed as hoped due to Covid. She was expecting quotes at the end of the month with a view to works taking place in Spring 2021.

46. Mrs Jones was referred to B[87] which appeared to be accounts certified by the accountants in 1991. She stated she understood the accountants would not certify due to changes in the law. Hence she

does the exercise which is, she stated, a simple reconciliation of the budget against the actual costs.

47. In answer to questions by the Tribunal about reference to the Company not collecting in sums it was entitled totalling in excess of £800,000 Mrs Jones stated that the Company had not collected in monies such as Ground rents or Premiums as it believed the Company was for the benefit of the closed community. It is a single income company and without service charges would be insolvent.

48. Mrs Jones urged the Tribunal to reject the applications.

49. Mr Fox relied upon the skeleton argument of Mr Upton. Mr Cooper stated in closing that he did not believe £1,000,000 was required to be spent on the Property and the sums are excessive.

Determination

50. The Tribunal thanks all of the parties who attended the hearing and spoke. All who took part conducted themselves in a measured and appropriate manner.

51. It is unfortunate that the Tribunal is required to adjudicate upon a matter such as this when the Respondent is a company in which all of the leaseholders are members. That being said the legal authorities are clear that such companies are required to follow the terms of the leases and the statutory requirements for service charges.

52. The Tribunal in reaching its determination has had regard to all three bundles, the skeleton arguments and the oral submissions made by all parties.

Apportionment

53. At B[9-22] is an example lease. All appeared to accept that the leases are in similar form. Many leases have been extended by way of a document which extends the terms by reference to the original leases granted in or about 1970.

54. The Fifth Schedule B[18] defines the maintenance charge as:

1(5) "The Maintenance Charge" means the amount payable to the Company by the Lessee and certified by the Accountants as being a rateable proportion of the aggregate maintenance expenditure.

55. It is suggested that rateable proportion means Rateable Value. We are not satisfied that this is the correct interpretation. We accept Rateable Values would be a rateable proportion but that is perhaps only one

method. The draftsman in drawing up the lease could have, as often was the case, specify Rateable Values which were at the time of the granting of the lease notional figures fixed for various purposes including raising local property taxes and water rates and the like. The draftsmen did not do so nor further define what was meant by rateable proportion. We are satisfied that rateable proportion does not mean that the Rateable Values attributed to the flats when last assessed must be used as the method for calculating the apportionment.

56. The Respondent explains that the percentages applied vary according to the type of flat as per the matrix at B[130]. We would suggest that this methodology is not unlike that used for determining Rateable Values, in that it took account of factors which may affect the value of the flat in question.

57. This Tribunal is satisfied that this methodology is a rateable proportion and so is a methodology which is compliant with the lease terms. Further given its long usage it would be wrong, in our opinion, to suggest that an alternative method should now be adopted.

Service Charge Demands

58. Again, we must look at the lease. The relevant part of clause 1 states:

"AND ALSO CONTRIBUTING AND PAYING half yearly for all expenses set out in the Fourth Schedule hereto during the said term by way of additional rent an amount to be calculated in the manner set out in the Fifth Schedule hereto (and therein referred to as "the Maintenance Charge") and falling due for payment at the time and in the manner therein specified."

59. We do not set out in full the wording of the Fifth Schedule but examples are included in all the various bundles but particularly B[18]. The Fifth Schedule makes no reference to any interim or advance payment save that a Reserve Fund for future anticipated expenditure may be collected. It does provide for accounts to be prepared and requires the leaseholder to pay any amount due within one week of compliance with the terms as set out in the Fifth Schedule.

60. The Fifth Schedule requires the service charge to be certified by the "Accountants" who are defined as the accountant of the Company although the managing agents may be so employed.

61. The Respondent suggests that relying on clause 1 they must be entitled to recover amounts in advance so that the Company has funds. Further given, as they effectively are their own managing agent, they do not need any certificate and in any event their accountants say they cannot do this.

62. The Applicants say that the requirements of the Fifth Schedule are clear. This does not allow any interim charges to be levied but the Company should produce accounts, which should be certified by the accountant and then the leaseholder should pay their proportion of the total sum.

63. This Tribunal prefers the Applicants interpretation.

64. The Fifth Schedule is clear as to the method to be adopted. At the end of the accounting year an account is taken. Included within this may be an amount for reserves including any and all anticipated future expenditure. Subject then to certification, the relevant proportion may be demanded of each leaseholder and would be payable within 7 days of a proper demand.

65. As for certification we are not satisfied that a director of the Respondent can self certify. We see no reason why, as appears to have happened in the past, the Respondent's accountants cannot certify the accounts. We have also considered Tech Release 3/11 ICAEW which specifically advises accountants on the form of a certificate for such circumstances.

66. We find that no valid demands which comply with the lease have been served on the Applicants for any of the years in dispute. As a result, no monies can be said to be due and owing from any of the Applicants currently.

Managing Agents fees

67. It appeared to be accepted by all that in principle managing agents' fees may be charged under the lease terms. For the sake of clarity we confirm that managing agents fees are recoverable as a service charge cost pursuant to clause 7 of the Fourth Schedule B[18].

68. Turning to the question of whether or not a consultation should have been undertaken we note the concession by Ms Newbury. This was not binding on the other Applicants but given this and the fact we are told the agents were only employed and charged for some 8 months we are satisfied on balance that this was not an agreement for which a consultation exercise was required.

69. The management fee claimed (see A[280]) equates to £200 plus vat per unit per annum being budgeted for the whole year at £12,870. The actual cost billed we are told was £8580. We have not seen the contract or the invoice. It is accepted that KTS were employed as agents and the challenge, in short, is that the sum claimed is unreasonable or that the service was not necessary.

70. We find that the sum of £8580 for the managing agents, KTS in the service charge year 2019 was a reasonable fee. We find that the Respondent was entitled to employ a managing agent and recover the

cost as part of the service charge. No evidence was positively adduced to suggest why the sum itself was unreasonable and we are satisfied as a Tribunal that the cost charged in all the circumstances of managing the Property was reasonable.

Mr Ramsey's costs

71. We are not satisfied that these costs have been reasonably incurred and are payable.

72. These costs have been at issue from the commencement of these applications. The Respondent adduced no real evidence in support. The sample invoices produced for Mr Ramsey provide no detail for what work he has undertaken. We would have expected Mr Ramsey to have produced some form of witness evidence and to have attended the hearing. There was no evidence to show what works he undertook for which it was reasonable for him to receive a fee. We find on a balance of probabilities that the costs are not reasonable and have not been reasonably incurred.

Development costs

73. The sums in dispute are set out in the Scott Schedule. A version with all parties comments is at A[302-304]. Certain sums are conceded by the Applicants and we accept those concessions.

74. Turning to the lease it is the Fourth Schedule which sets out what sums are recoverable as service charges.

75. As a general point we are not satisfied that costs associated with obtaining planning permission or investigating generally the development options for the site are a service charge item. It seemed to be suggested by the Respondent that these were effectively works which would lead to maintenance and repair. We do not accept this argument. The wording of the Fourth Schedule is clear and unambiguous. The reasonable man would not consider these types of works to fall within any category of the Fourth Schedule.

76. Turning to the individual items we note we have not seen all of the invoices but heard much by way of explanation at the hearing. We are not satisfied that any of the sums within the Scott Schedule, beyond those conceded, are amounts which should have been properly charged to the service charges. All appear to relate to matters relating to the development of the Property. Whilst we accept that this may raise funds for the company to utilise towards complying with its repairing obligations this does not make these service charge items in our opinion.

77. As an aside we comment that the Respondent made reference to having forgone substantial income it could have claimed. Plainly if this income

for the company had been raised then the Respondent would have had funds and would not solely be reliant upon the service charges.

General

78. Given we have found that no valid demands have been issued this means that none of the supposed “penalty charges” and other administration charges levied against some of the Applicants are payable. In any event we make the point the Respondent is not entitled to charge “penalty charges”. Whether or not administration charges may be levied is a matter upon which the Respondent must take its own advice but will depend upon the particular circumstances. Currently no such sums or interest are payable by any of the Applicants.

79. For the avoidance of any doubt we exercise our discretion to make an order pursuant to Paragraph 5A of Schedule 11 of the Commonhold and Leasehold Reform Act 2002 to prevent any administration charges in relation to these proceedings being charged to the Applicants.

80. We are required to also consider whether an order pursuant to Section 20C of the Landlord and Tenant Act 1985 should be made. This is a discretionary remedy for the Tribunal to make.

81. We have considered all the circumstances. We are conscious that the Respondent is a company in which the leaseholders of this application and the rest of the Property are members. Mrs Jones told us the Company had not taken advice on the application but it is clear that the Respondent was taking legal advice upon other matters. We also accept that the Respondent was pursuing a course of conduct it thought would benefit the block as a whole. Plainly if the Company can raise funds from a redevelopment then this may assist everyone in reducing the amounts of future service charges. Looking at all the documents within the bundles it is plain that major works are required and we would expect that the costs of these will be very considerable.

82. However, it is plain the Respondent has failed to follow the terms of the leases even when matters have been raised with them. Whether the Directors of the Respondent agree with these challenges they are required to comply and follow the lease terms. We do therefore make an order pursuant to Section 20C that none of the costs of this application incurred by the Respondent may be levied upon the Applicants as a service charge.

83. We would suggest that potentially this decision will benefit none of the parties. We would urge all sides to work together to bury any differences and to move forward in a sprit of co-operation to ensure the good running of the Property. If the parties do not the results could be to the detriment of all leaseholders at the Property.

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 rpsouthern@justice.gov.uk being 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