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First-tier Tribunal
Property Chamber
(Residential Property)

Case reference	:	**CAM/22UD/LSC/2013/0066**
Property	:	**Flat C Osprey Court, 10 London Road, Brentwood, Essex CM14 4QG**
Applicant	:	**Osprey Court Management Co. Ltd.**
Respondent	:	**Jacqueline Preece**
Date of Transfer from Basildon County Court	:	**26th April 2013**
Type of Application	:	**to determine reasonableness and payability of service charges**
The Tribunal	:	**Bruce Edgington (Lawyer Chair)** **Evelyn Flint DMS FRICS IRRV** **Peter Tunley**
Date and place of Hearing	:	**22nd July 2013 at Marygreen Manor Hotel, London Road, Brentwood, CM14 4NR**

DECISION

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1. The Tribunal determines that reasonable and payable amounts in respect of service charges as set out in the court proceedings are £393.81 less £321.99 paid leaving a balance of £71.82.

2. The Tribunal makes an order pursuant to Section 20C of the **Landlord and Tenant Act 1985** ("the 1985 Act") preventing the Applicant from recovering five sixths its costs of representation before this Tribunal as part of any future service charge demand addressed to the Respondent.

3. This case is now transferred back to the Basildon County Court under claim number 3QT13361 so that any matters of enforcement or claims for any costs, fees and interest incurred in those court proceedings can be determined. The parties should note that it will be up to them to make any application to the court in relation to those matters.

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Reasons

Introduction

4. The Applicant owns Osprey Court, 10 London Road, Brentwood, Essex which was erected as a purpose built block of 6 flats in 1983. The long leases of the building are in modern form with the landlord/lessor, a management company responsible for maintaining the property and collecting service charges and the tenant/lessee.

5. The Applicant had been just the management company but it acquired the freehold title in December 1984. The lessees are the shareholders. The Respondent was a director but resigned some time ago.

6. The reasonableness and payability of service charges for 2010 and 2011 were the subject of a previous tribunal decision which is under case number CAM/22UD/LSC/2011/0079. A copy of this decision ("the 2011 decision") was in the bundle prepared for the Tribunal in a subsequent case heard on the 11th September 2012 ("the 2012 decision"). The 2011 decision sets out, in detail, the history of the parties, a description of the property, the lease terms and the law relating to the reasonableness and payability of service charges.

7. This decision must be read in conjunction with the 2011 and 2012 decisions and the matters referred to in the previous paragraph will not be repeated here. The 2012 decision determined the amount of service charges payable on account for the year commencing 1st January 2012. The Tribunal noted in the 2012 decision that "*it considers that the application in respect of service charges was somewhat premature because it now leaves the door open for another challenge to the 2012 expenditure*". This is exactly what has now happened.

8. On or about the 30th January 2013 the Applicant issued court proceedings against the Respondent for recovery of £347.96, being the amount requested on account of service charges for 1st January – 31st March 2013 plus £45.85 which was her alleged unpaid share of the 2012 service charges.

9. The Respondent filed a defence to that claim stating that she was paying £321.99 towards her service charges and she did not think that the balance of the claim was reasonable. She requested transfer to the Leasehold Valuation Tribunal for determination. The balance which appeared to be disputed was therefore £347.96 + £45.85 - £321.99 = £71.82.

10. Despite the rules which regulate both the court and this Tribunal to consider proportionality, this dispute was in fact transferred to the Leasehold Valuation Tribunal by order of Deputy District Judge Oldham on the 26th April 2013. On the 1st July 2013, the Leasehold Valuation Tribunal became part of the First-tier Tribunal, Property Chamber. In relation to the determination of the reasonableness and payability of service charges, the First-tier Tribunal has exactly the same jurisdiction as the Leasehold Valuation Tribunal.

11. The defence goes on to say that the Respondent challenges 3 invoices. She then deals with only 2 and they both appear to be part of the 2012 service charges. The invoices she challenges are invoice 9249 dated 31st January 2012 from a cleaning and gardening company in the total sum of £177.67 and invoice 991 dated 5th April 2012 for applying some white paint to the steps at the rear of the property in the sum of £174.74. These invoices total £352.41 of which the Respondent's share was £58.74 i.e. one sixth.

12. She then puts a summary at the end which is set out in this way:-

> "£174.74 The Steps
> £205.48 Gardening
> £50.70 Door Handle
>
> Total in dispute £430.92 There are 6 flats at Osprey Court so divide the amount into 6 = £71.82
> £71.82 is the amount I dispute and would like determined by the LVT Tribunal is £71.82"

She does not explain the discrepancy in amounts for the gardening or the detail of the dispute over the door handle. For the 'gardening' invoice, she also appears to have missed off the VAT.

13. In a subsequent written message from the Respondent to the Applicant dated 17th June 2013 which is page 9A of the Respondent's added documents, she deals with the door handle issue by stating that she had not seen the detail of this until she received disclosure in this case and that if she had been provided with this information beforehand "*I might have been happy to pay this rather than waste the panel and Chairman of the Tribunals time*". Whether she does now accept this claim is not clear from the papers.

14. The invoice for the gardening is at page 53 in the bundle. It is from Enterprise Complete Services Ltd . and the relevant part says:-

		Price	VAT
1.0	To provide weekly communal cleaning services as instructed	57.42	11.48
1.0	To provide periodic grounds maintenance as instructed	148.06	29.61
	Visits on 6th, 13th, 20th & 27th January 2012		

The total invoice amount is £246.57 i.e. £205.48 plus VAT of £41.09. A handwritten note has been put on the invoice by someone which gives a total of £177.67. This appears to be the element relating to grounds maintenance i.e. £148.06 + £29.61 VAT.

15. The Respondent's case seems to be that there was no ground maintenance undertaken on the 4 dates stated in the invoice because she, Mrs. Preece, was there.

16. As far as the painting of the lines on the steps is concerned, the Respondent does not appear to dispute that this work was needed, only that the amount charged was excessive and that the description of the paint as being road lining paint was wrong. The invoice is from ECM Support Services Ltd. and provides for wire brushing the edges of 19 steps and applying 2 coats of road lining paint. The total of the invoice at page 102 in the bundle is the £174.74 referred to by the Respondent.

17. Directions were given by the Tribunal chair to timetable the applications to a final hearing. In particular, the Applicant was ordered to file hearing bundles and it complied with that. The bundle should have been agreed but does not appear to have been as the Respondent wishes to reply on half a dozen further documents. The Tribunal ordered the parties to include witness statements from all witnesses who were to give evidence to the Tribunal, including the parties. There are statements from Martin Pye and James Denis Nutman on behalf of the Applicants but nothing from the Respondent.

The Inspection

18. The members of the Tribunal inspected the steps referred to in the defence in the presence of Mr. Nutman and Mrs. Preece. They had relatively recently been repaired and repainted. However, from the Tribunal's point of view, this was unfortunate because they could not see the state of the paint applied by the original contractor.

19. Neither party wanted the Tribunal to inspect anything else at the property and no other aspect to the case demanded an inspection of anything else.

The Law

20. The 2011 decision sets out the law relating to service charges and is not repeated here.

21. Section 20C of the 1985 Act allows a Tribunal to make an order preventing a landlord from recovering all or part of its costs of representation before the Tribunal as part of any future service charge.

The Lease

22. Once again, the relevant terms of the lease are in the 2011 decision and will not be repeated here. All parties agree that the disputed service charges are covered by the lease in the event that they are reasonable.

The Hearing

23. The hearing was attended by those who had attended the inspection plus other lessees. Ian Daniels attended with Mrs. Preece. He does not live at the property but was appointed a director of the Applicant company. He spoke for Mrs. Preece and the Tribunal considered that his contribution was sensible and sensitive and assisted the Tribunal.

24. The Tribunal chair started by trying to clarify the issues. As to the cleaning and ground maintenance, it seemed to be accepted by everyone that the dates on the invoice related to cleaning, not ground

maintenance. It was certainly not very clearly worded and the written explanations given to Mrs. Preece by Ms. Jakes had not been very helpful, to say the least. The argument then pursued on behalf of the Respondent was that the contract for cleaning and garden maintenance was dated 1st December 2010 and had in fact been terminated in November 2011. This was a new argument to the Applicant but Mr. Nutman said that whilst this assertion was correct, the contractors had in fact continued and the Applicant just decided that it would continue to pay their accounts as they were in fact doing the cleaning and would be doing ground maintenance.

25. As far as the steps were concerned, Mr. Nutman agreed that the photographs at pages 106 and 107 in the bundle were an accurate reflection of the state of the paintwork before it was re-done by a different contractor. Mr. Daniels asserted that at the time everyone was disappointed at the way the white faded but by the time it became obvious, the original contractor had been paid. The inference drawn by the Tribunal from what was 'discussed' between the parties at the hearing was that a decision had been taken that suing the original contractor was just not cost effective in terms of the time and effort of the directors of the Applicant company.

26. As far as the repaired handle was concerned, it was explained that this was a fire exit and had to dealt with quickly as the defect could have meant that someone was locked in the building in the event of a fire. The case of the Respondent can perhaps be summarised by saying that whilst she had doubts about the amount charged just for labour, she would not now pursue that as an issue.

27. As far as costs are concerned the Applicant wanted to recover its costs to include the court fee of £35, the LVT fees of £165, photocopying costs of £208.80 and the cost of delivering the bundles to the Tribunal office in Cambridge of £40.50. This totalled £449.30.

Conclusions

28. In this case, the Tribunal noted in the 2011 and 2012 decisions that much of the hearing bundle on each occasion was irrelevant to the issues to be determined and the same thing has happened for this hearing. Both parties, and the Respondent in particular, must understand that arguments about who said what to whom, allegations, threats and statements as to what may or may not be the general law of the land (as opposed to Sections 18-27A of the 1985 Act) are sterile and irrelevant.

29. What <u>is</u> relevant is that the 3 members of this Tribunal have spent a great deal of time going through bundles of nearly 200 pages trying to find anything that may be of evidential value. They have then travelled from Gravesend, Chelmsford and Cambridgeshire to spend time at the hearing. The case worker has come from Cambridge and the cost of the hearing venue has been incurred. The Tribunal members have then had to take time setting out their determination. Taking the actual costs and the general overhead costs of the Tribunal into account, many hundreds of pounds of public money have been expended upon this

case over and above any fees paid. It involves a dispute over about £70.

30. In *Schilling v Canary Riverside Development PTD Ltd* LRX/26/2005; LRX/31/2005 & LRX/47/2005 (6th December 2005) His Honour Judge Rich QC had to consider upon whom lay the burden of proof. At paragraph 15 he stated :

> *"If the landlord is seeking a declaration that a service charge is payable he must show not only that the cost was incurred but also that it was reasonably incurred to provide services or works of a reasonable standard, and if the tenant seeks a declaration to the opposite effect, he must show that either the cost or the standard was unreasonable. In discharging that burden the observations of Wood J in the Yorkbrook4 case make clear the necessity for the LVT to ensure that the parties know the case which each has to meet and for the evidential burden to require the tenant to provide a prima facie case of unreasonable cost or standard."*

31. In this case, 5 out of the 6 lessees have agreed the service charges in dispute and appear to have paid them. With such a small amount involved, it therefore seems to this Tribunal that the Applicant has satisfied its burden of proof and this now shifts onto the Respondent to provide a *prima facie* case of unreasonable cost or standard.

32. As far as the **garden maintenance** is concerned, the Tribunal's decision is that the amount claimed is reasonable and payable. Whilst the 2010 contract may have come to an end, the services continued to be provided and the other 5 lessees had decided to continue paying as they had done before. They felt that it would be unfair to stop the ground maintenance part of the agreement and then start it up again in the summer because this was likely to have involved a large increase because the 'swings and roundabout' principle would not apply.

33. As far as the **steps** are concerned, the only conclusion which the Tribunal can draw is that the original work was not undertaken satisfactorily. Even Mr. Nutman accepted that the state of the white paint in the photographs in the bundle really points to the fact that white line paint could not have been used. If a white line in a public road had faded that quickly, it would mean that all white lines would have to be re-painted at least once a year. The Tribunal concludes that the Applicant took a pragmatic view as some repair work was needed to the steps anyway and they might as well be re-painted at the same time. The original contractor had been paid and the commercial decision was that the time and expense needed to pursue that contractor were not cost effective.

34. As far as the **door handle** is concerned, this matter is not being pursued by the Respondent

35. As to the **costs of today's hearing**, the Tribunal was extremely concerned about the overall cost of this case not only to the parties but to the public. It was prompted because the Respondent did not pay her share of the monies needed on account for January 2013. Whilst there may have been an argument about the 2012 service charges, the Respondent clearly did not appear to have an issue over the payment of £321.99 which should have been made in January.

36. After that, there has been fault on both sides – as before. Mrs. Preece and her co-shareholders in the Applicant company have fallen out and there appears to be complete lack of trust. It seems that Mr. Daniels was made a director to try to bridge that gap and this appears to have worked for a time. The Tribunal was informed at the hearing that the other 5 shareholders were considering removing him as a director which, if true, is hardly designed to prevent this sort of thing happening again.

37. As far as the Applicant is concerned, the explanations given to the Respondent to questions she has raised not only as a lessee but also as a shareholder in the Applicant have been perfunctory and sometimes misleading, particularly after the defence was filed. Restricting Mr. Daniels' access to the hearing bundle by not allowing him just to take it away and consider it was unhelpful. He is a director of the company and should have had complete access to everything. If he had, it may have been that a hearing could have been avoided.

38. It also may be that the 5 lessees and shareholders apart from Mrs. Preece do not agree with Mr. Daniels on every issue but he did help the Tribunal and seemed to have a good common sense approach. The problem over the bundle was not helped because it was just far too large anyway.

39. The Tribunal has found that the decisions taken by the Applicant over the disputed points were, on reflection, pragmatic, understandable and reasonable. If the amounts had been larger, the same result may not have been the outcome. If Mrs. Preece had been given all the relevant information about the cleaning contract and the door handle replacement at the time, she may not have been so difficult. As far as the painting was concerned, she was right in her criticism of the contractor.

40. The Applicant's attitude appears to be continuing with the decision taken to remove the trees in the back garden. Mrs. Preece clearly appears to dispute that decision. The correspondence indicates that she has not been given all the information about costings and alternatives which were available to the other 5 lessees at the time decisions were taken. This is far from helpful and could even be said to encourage a dispute.

41. At the end of the day, the Tribunal can only try to resolve disputes. If the disputes are over relatively trivial amounts and the resolution thereof costs the taxpayer an inordinately large amount of money, both

sides have to be discouraged from getting into the same situation again. For that reason all 6 lessees will have to contribute to the costs incurred which is why the Section 20C Order is worded as it is i.e. to ensure that Mrs. Preece only has to pay one sixth of the costs of preparation and representation. There is certainly an argument for saying that those costs are excessive anyway. The copying costs seemed to be very high and one reason for this may have been the paper used which seemed to be very high quality copying paper or even photograph quality paper. However, there is insufficient information e.g. as to comparative costs of copying, for any decision to be made one way or the other.

42. The Tribunal has no jurisdiction to determine whether the Respondent should be responsible for the initial fee paid to the county court. As the Respondent admits that over £300 was due and owing when the county court proceedings were issued, the court may well take the view that she should pay the initial £35. As to the remainder i.e. the fees paid to the Tribunal, the copying costs and the travel costs to Cambridge, these should be split 6 ways and paid by the 6 lessees in equal shares. This is an admittedly 'broad brush' approach but it will help each person involved to understand that proportionality applies equally to everyone.

43. Mrs. Preece may feel that she has the 'right' to challenge service charges before this Tribunal but, as has been said in other situations, with rights also come responsibilities, particularly when public money is involved.

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Bruce Edgington
Regional Judge
25th July 2013