9132

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/00AJ/LSC/2013/0238 & LON/00AJ/LAC/2013/0012**
Property	:	**106 Ealing Village, Hangar Lane, W5 2EB**
Applicant	:	**Ealing Village Freehold Limited**
Representative	:	**Mr J Naylor (Solicitor)**
Respondent	:	**Ms P.C. Mason**
Representative	:	**None**
Type of Application	:	**For the determination of the reasonableness of and the liability to pay a Service Charge and Administration Charge**
Tribunal Members	:	**Mr M Martynski (Tribunal Chairman)** **Mr D Banfield** **S**
Date and venue of Hearing	:	**10 July 2013** **10 Alfred Place, London WC1E 7LR**
Date of Decision	:	**23 July 2013**

DECISION

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Decisions of the Tribunal

1. The Tribunal records the fact that the Applicant, at the hearing before the Tribunal, conceded that the Respondent had made payments to her Service Charge account totalling £1,470.00 which had not been accounted for on her account.

2. The Tribunal finds that the Administration Charge of £240.00 demanded on 31 May 2012 is not payable by the Respondent.

3. The Tribunal finds that the demands for payments on account of Service Charges in the total sum of £2134.74 dated 23 May 2012 are payable by the Respondent.

4. At the date of the proceedings the sum due from the Respondent was £1,669.28.

5. The Tribunal makes an order pursuant to section 20C Landlord and Tenant Act 1985 that none of the Applicant's costs of the Tribunal proceedings may be passed to the Respondent via the Service Charge.

The applications

6. Proceedings were originally issued in the Barnet County Court under claim no. 2YL21511. The claim was in turn transferred to this Tribunal, by order of District Judge Nisa dated 27 December 2012.

7. The Respondent made a counter-application directly to the Tribunal to challenge the reasonableness and payability of an Administration Charge in the sum of £240. That Administration Charge was in fact included in the sums claimed by the Applicant in the County Court proceedings.

8. The County Court proceedings and the Respondent's application were considered together by the Tribunal.

The background

9. The claim in the County Court was for the sum of £3379.28 that being the balance on the Respondent's Service Charge account as at 9 July 2012. The County Court proceedings were issued in or about early August 2012.

10. The make up of the alleged arrears on the Respondent's Service Charge account could be firstly broken down between Service Charges and an Administration Charge. The Administration Charge was demanded on 31 May 2012 and was for a sum of £240.00 in respect of an additional management fee.

11. It had long been the Respondent's case that she had made payments to a former managing agent, Gross Fine, in respect of her Service Charges and that those sums had never been credited to her account. A few days prior to the final hearing, the Respondent provided proof by way of bank statements of these payments.

The hearing

12. The Applicant, which had provided a bundle of documents for the final hearing as directed by the Tribunal, was represented by Mr Naylor, a Solicitor. Also present for the Applicant was a Mr Lloyd, a property manager.

13. At the hearing, Mr Naylor for the Applicant conceded that the Respondent had indeed made payments totalling £1,470 to her Service Charge account which had not been credited to that account.

The issues

14. The concession made by the Applicant reduced the amount in dispute so far as Service Charges were concerned to £1669.28.

15. The sum of £1669.28 was wholly accounted for by the non-payment of Service Charges on account demanded by the Applicant on 23 May 2012 in the sum of £2134.74. The Respondent had no dispute regarding her responsibility to pay these charges and had in fact paid these by the time of the hearing before the Tribunal.

16. The only issues regarding this part of the claim raised by the Respondent were that firstly, the Applicant was premature in suing for them. The sums were due (in accordance with the lease) on 25 June and the proceedings were issued in early August. Second, the Respondent pointed to the fact that she had in the past had an agreement to pay the Service Charges by instalments and she produced evidence to the Tribunal to support this. Given that there was no dispute that these sums were payable, the only relevance of these points is as to the costs of the proceedings both before the Tribunal and in the County Court.

17. This only substantive issue before the Tribunal was therefore the Administration Charge of £240.00.

The Administration Charge

18. The Applicant relied on the standard forfeiture clause in the lease as the ground on which the Administration Charge was levied. The relevant parts of that clause [clause 3.(9) of the lease] is as follows:-

> *To pay to the Lessors.....all costs charges and expenses.....incurred by the Lessors in or in contemplation of any proceedings in respect of this Lease under sections 146 & 147 Law of Property Act 1925.....including in particular all such costs charges and expenses of and incidental to the preparation and service of a notice under the said Sections* .....

19. The fee of £240 was charged in respect of various standard arrears letters sent to the Respondent. Mr Naylor stated that the Applicant had, via its managing agents, contemplated forfeiture and the service of a section 146 Law of Property Act Notice.

20. The Service Charge in the lease is recoverable as rent. Usually therefore, in respect of rent, there is no requirement on a landlord to serve a section 146 Notice. If there was no requirement to serve a Section 146 notice, then obviously no charge could be levied for the contemplation of such a notice and proceedings in respect of it.

21. However the Applicant relied upon the Court of Appeal authority of *Freeholders of 69 Marina v Oram* [2011] EWCA Civ 1258. That case is authority for the proposition that the section 146 procedure is applicable in cases of non-payment of a Service Charge even when such a charge is recoverable as part of the rent.

22. The Tribunal also had regard to the decision of a Leasehold Valuation Tribunal (as it was then) in the matter of *10 Lennox Gardens Limited and Masri*, LON/00AW/LAC/2013/0002, 22 May 2013. The parties were referred to this case during the hearing.

23. The Applicant faces three major problems in establishing that there is any justification for the management charge.

24. First, the directions given in this application, made on 2 May 2013, provided that the parties should exchange copies of signed witness statements of those witnesses of fact upon which they wished to rely. The witness statement served by the Applicant was the statement of Mr Pryke, the managing agent for the property. Mr Pryke was not at the hearing, his witness statement however specifically set out what work was done in respect of the management fee of £240.00 as follows:-

To clarify, the additional management fee accounts for the work undertaken by Crabtree's credit control department. I am aware that this includes considering the documentation and then writing a series of three debt recovery letters. Upon such letters not resulting in payment, this also includes the time involved in the instruction of debt recovery solicitors. Accordingly, in my view, this is an eminently reasonable sum.

25. At no point in his witness statement does Mr Pryke mention anything about the contemplation of any proceedings in respect of this lease pursuant to Sections 146 and 147 Law of Property Act 1925 or the preparation and service of a notice pursuant to those sections.

26. In the hearing Mr Naylor made the assertion that proceedings and a notice under section 146 had been contemplated. He stated that he had with him Mr Lloyd the property manager to confirm this. However Mr Lloyd had not made a witness statement in accordance with directions and no application was made for Mr Lloyd to give evidence without having made a statement. The mere assertion therefore by a legal representative that proceedings or a notice have been contemplated is not evidence of that fact.

27. There was therefore no evidence that any actual work had been done in the contemplation of proceedings or the service of a notice pursuant to section 146.

28. The second problem is that the invoice itself dated 31 May 2012 for the management fee makes no reference to the work done in respect of that fee. The invoice simply says '*Additional Management fee*'.

29. The third problem is of course that, given the concession made by Mr Naylor at the outset of hearing that payments made by Ms Mason had not been credited to her account, it would appear that she was not in fact in arrears when the arrears letters were being sent to her. Therefore even if there had been some genuine contemplation of proceedings or drafting of a notice pursuant to section 146, such work (and the charge for it) must have been unreasonable if there were in fact no arrears in respect of which action could be taken.

Application under s.20C

30. At the end of the hearing, the Respondent made an application for an order under section 20C of the Landlord and Tenant Act 1985. The Tribunal considers that it is just and equitable in the circumstances for such an order to be made.

31. The two substantive issues before the Tribunal were the payments made by Mrs Mason to the service charge accounts which have not been credited to her account and the management fee. The Applicant has not

been successful on either of these issues. It is correct that over the course of a number of years the Applicant's managing agents have sent letters to the Respondent asking her to provide evidence of the disputed payments to the Service charge account and that she only finally produced that evidence a short time before the final hearing before the Tribunal. However the fact is that the Respondent has been right all along on this issue, the reason why it had dragged on for so many years was the Applicant's previous managing agent's failure to do the basic accounting. It would not be fair for the Respondent now to have to pay for that failure by having the costs of these proceedings added to her service charge. As to the third issue, that being the failure to pay Service Charges on account demanded in May 2012 and due in June 2012, the Tribunal has no doubt that the Applicant would not have sued in respect of these Service Charges had it not also been pursuing the first and second issues. The Service Charges on account were only a little overdue when the County Court proceedings were issued. Further and in any event there was clear evidence by way of a letter from the Applicant's Managing Agent that the Applicant was willing to allow the Respondent to pay a Service Charges in instalments.

Other costs

32. After the hearing the Respondent wrote to the Tribunal making a claim for various other costs that she had incurred. The Tribunal declines to make any award of costs in this application. The Tribunal can only make an award of costs where it is of the opinion that a party has acted unreasonably in bringing or conducting proceedings. The Tribunal does not consider that there has been any unreasonable conduct on the part of the Applicant in these proceedings to warrant a costs penalty.

Mark Martynski 23 July 2013

Tribunal Judge

Appendix of relevant legislation

Landlord and Tenant Act 1985

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 a leasehold valuation 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 a leasehold valuation 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 propertyTribunal, to the Tribunal before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to any residential propertyTribunal;

(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.

Commonhold and Leasehold Reform Act 2002

Schedule 11, paragraph 1

(1) In this Part of this Schedule "administration charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent which is payable, directly or indirectly—
(a) for or in connection with the grant of approvals under his lease, or applications for such approvals,
(b) for or in connection with the provision of information or documents by or on behalf of the landlord or a person who is party to his lease otherwise than as landlord or tenant,
(c) in respect of a failure by the tenant to make a payment by the due date to the landlord or a person who is party to his lease otherwise than as landlord or tenant, or
(d) in connection with a breach (or alleged breach) of a covenant or condition in his lease.

(2) But an amount payable by the tenant of a dwelling the rent of which is registered under Part 4 of the Rent Act 1977 (c. 42) is not an administration charge, unless the amount registered is entered as a variable amount in pursuance of section 71(4) of that Act.

(3) In this Part of this Schedule "variable administration charge" means an administration charge payable by a tenant which is neither—
(a) specified in his lease, nor
(b) calculated in accordance with a formula specified in his lease.

(4) An order amending sub-paragraph (1) may be made by the appropriate national authority.

Schedule 11, paragraph 2

A variable administration charge is payable only to the extent that the amount of the charge is reasonable.

Schedule 11, paragraph 5

(1) An application may be made to the appropriate Tribunal for a determination whether an administration 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) Sub-paragraph (1) applies whether or not any payment has been made.

(3) The jurisdiction conferred on the appropriateTribunal in respect of any matter by virtue of sub-paragraph (1) is in addition to any jurisdiction of a court in respect of the matter.

(4) No application under sub-paragraph (1) 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.

(6) An agreement by the tenant of a dwelling (other than a post-dispute arbitration agreement) is void in so far as it purports to provide for a determination—
  (a) in a particular manner, or
  (b) on particular evidence,
  of any question which may be the subject matter of an application under sub-paragraph (1).