9244

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/OOAM/LSC/2013/0432**
Property	:	**Flat 3, 149 Amhurst Road, London, E8 2AW**
Applicant	:	**Quadron Investments Ltd.**
Representative	:	**Salter Rex, Managing Agents**
Respondent	:	**Questor Properties Ltd.**
Representative	:	**Mr Richard J Sandler, Solicitor**
Type of Application	:	**For the determination of the reasonableness of and the liability to pay a service charge, administration charges and limitation of costs of proceedings before the Tribunal**
Tribunal	:	**Judge Goulden** **Mr H Geddes JP RIBA MRTPI**
Date and venue of Hearing	:	**Wednesday 28 August 2013 at 10 Alfred Place, London WC1E 7LR**
Date of Decision	:	**16 September 2013**

DECISION

Decisions of the Tribunal

(1) The Tribunal determines that the sum of £1,312,78 in respect of the estimated service charges for the years which were the subject of the County Court Proceedings (Claim No:) to include £60 administration charges if incurred, would be reasonable and payable by the Respondent.

(2) The Tribunal makes the determinations as set out under the various headings in this Decision

(3) The Tribunal does not make an order under section 20C of the Landlord and Tenant Act 1985 so that the landlord's costs of the Tribunal proceedings may be passed to the lessees through any service charge.

The application

1. The Applicant seeks a determination pursuant to s.27A of the Landlord and Tenant Act 1985 ("the 1985 Act") and Schedule 11 to the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act") as to the amount of service charges and (where applicable) administration charges payable by the Applicant in respect of the service charge years 2010/2011 and 2011/2012. The service charge ends 31 December in each year.

2. Proceedings were originally before the Barnet County Court under claim No. 3YK15070. The claim was transferred to the Tribunal on the Court's own motion, by order of Deputy District Judge Hughes on 5 June 2013.

3. A copy of the Respondent's lease dated 15 July 1994 was provided to the Tribunal.

4. The relevant legal provisions are set out in the Appendix to this decision.

The hearing

5. The hearing took place on Wednesday 28 August 2013.

6. The Applicant was represented by Mr P O'Reilly AIRPM, Property Manager, Salter Rex, the Applicant's managing agents. There were no appearances for or on behalf of the Respondent.

7. Immediately prior to the hearing Mr O' Reilly handed in further documents, namely a breakdown of communal electricity bills,

payments, bank statements and correspondence with the electricity company.

8. At the end of the hearing, and with the permission of the Tribunal, Mr O'Reilly produced a copy of the ARMA guidance on accountancy fees, a copy of the invoice in respect of the administration charge of £60, a copy of the communications with the solicitor acting for the Respondent and a copy of an appeal against a decision of the Tribunal in the case of **Ralph Rettke-Grover v John Ellott Needleman and Ann-Marie Wolfryd UT Neutral citation number:[2010] UKUT 283 (LC),** all of which had been referred to during the hearing but which had not been included in the hearing bundle.

The background

9. The property which is the subject of this application was described by Mr O'Reilly as a flat in a converted terraced house comprising a ground and two upper floors. There were three flats in total, with the garden flat contributing 50% towards the services and the two upper flats contributing 25% each towards the services. All the flats had been sub let.

10. Photographs of the building had been provided within the hearing bundle. Neither side had requested an inspection and the Tribunal did not consider that one was necessary, nor would it have been proportionate in respect of the issues in dispute.

11. The Respondent holds a long lease of the property which requires the landlord to provide services and the tenant to contribute towards their costs by way of a variable service charge. The specific provisions of the lease will be referred to below, where appropriate. With no further information to the contrary, it is assumed that all the residential leases are in essentially the same form.

12. There had been a previous application before the Tribunal relating to another flat in the building (Flat 1) in which the present Respondent had requested to be joined as an Applicant. The Tribunal was advised that first Applicant had withdrawn the earlier application leaving the present Respondent as the sole Applicant. The present Respondent's case within the earlier application had been dismissed by the Tribunal on 1 October 2012 *"on the basis that the applicant* (ie the present Respondent) *has failed to comply with any directions, and has not paid the hearing fee as required".*

The issues

13. Mr O'Reilly said that Salter Rex had been appointed managing agents for the building in November 2010 and the Respondent had paid nothing by way of service charges since that appointment.

14. Since there had been no appearances at the hearing for or on behalf of the Respondent, the Tribunal relied on the Respondent's defence at the County Court which was dated 3 April 2013 and the Respondent's reply to the Applicant's statement of case, which was dated 24 July 2013. Both documents had been signed by Richard J Sandler, as solicitor on behalf of the Respondent.

15. From the defence, and from the amounts referred to by Mr O'Reilly (having stripped out those sums over which the Tribunal has no jurisdiction – see paragraph 16 below), it would appear that the relevant issues for determination by the Tribunal were as follows:

    (i) The payability and/or reasonableness of estimated service charges in the sum of £1,312.78 (the relevant deductions having been made in respect of insurance payments – see paragraphs 18, 19 and 20 below)

    (ii) Insurance payments.

    (iii) Electricity charges.

    (iv) Accountancy charges

    (v) Management fees.

    (vi) Insurance premiums.

    (vii) Health and Safety.

    (viii) Administration charges.

16. The Tribunal's jurisdiction is limited to the service charge and administration charge issues only. It should be noted that the Tribunal has no jurisdiction in respect of (where applicable) any issues relating to rent, interest, county court fees or solicitors' or managing agents' costs in respect of matters before the County Court.

17. Having heard evidence from Mr O'Reilly and considered all of the documents provided, the Tribunal has made determinations on the various issues as follows:

Insurance payments

18. The amounts challenged by the Respondent were £211.68 for the years 2009/2010 and £218.30 (for the year 2010/2011). It was stated that these sums had been claimed in previous court proceedings and paid by the Defendant on 14 February 2012.

19. In the Applicant's response dated 11 July 2013, it was stated *"we can confirm that both recently invoiced sums of £211.68 and £218.30 respectively have now been reversed from your account and therefore no longer form part of this claim. This is because we have had confirmation from the Landlord that payment has been made directly to them".*

The Tribunal's decision

20. Although the Applicant's response was sent to the Respondent's solicitor on 11 July 2012, the challenge was not formally withdrawn. The Tribunal does not consider that, in view of the Applicant's response, any determination of the Tribunal is required.

Electricity charges

21. The amounts before the County Court were estimates only

22. The challenge was in respect of the sum of £411 for communal electricity on the basis that it was excessive *"and not substantiated by accounts and correct charges should be substituted for them".*

23. The Applicant's response stated that all EDF energy electricity bills in connection with the communal electricity supply had been enclosed and that the actual sum paid to EDF energy for the year ending 24 December 2011, was £441.08. It was stated *"you will note from EDF Energy invoices for the period 2012 and 2013 that a substantial amount of this expenditure has been credited back and offset against the last two years invoices".*

The Tribunal's Decision

24. Mr O'Reilly said that the electricity provider, EDF, had overcharged and Salter Rex were in the process of recovering £182.78 up to November 2010. He said *"we have substituted correct charges at 25%".*

25. The Tribunal is dealing with the estimate only, and determines that the estimate in the sum of £411 if incurred would be reasonable.

Accountancy charges

26. The amounts before the County Court were estimates only.

27. The Respondent's challenge in its defence to the County Court action was that there was no provision in the lease for such charges to be included within the service charge. The case of Grover v Needleman and Wolfryd was cited. In addition, in the Respondent's reply, it was stated *"in any event the number of entries going through the books in any one year is so small as not to justify an independent accountant"*

28. The Applicant's case acknowledged that there was no specific reference to accountancy fees but it was considered good practice to prepare service charge accounts and was recommended by ARMA. It was contended that Clause 6 of the Fourth Schedule was wide enough to include accountancy fees.

The Tribunal's Decision

29. The Fourth Schedule of the lease sets out those costs, expenses, outgoings and matters in respect of which the tenant must contribute, Clause 6 of which states **"All other expenses (if any) incurred by the Lessor in and about the maintenance and proper and convenient management and running of the Building".**

30. The wording is sparse, but this Tribunal considers that it differs from the clause in the Grover v Needleman and Wolfryd case in that the wording in that case related to "any other services...of whatever nature as the Lessor may from time to time deem necessary or expedient for the efficient management of the Building and the garden areas, forecourts and footpaths belonging thereto". The Learned Judge considered that the wording in that clause *"is in my judgment directed towards services which are actually enjoyed by the lessees as the fruits of "the efficient management of the Building and the garden areas, forecourts and footpaths belonging thereto. The lessees would consider that, for instance, the sweeping up of fallen leaves in the garden to be such a service....."*

31. The Tribunal considers that the wording in the Respondent's lease is wide enough to encompass accountancy charges. Further, under the ARMA guidance note provided to the Tribunal, which had been revised in October 2011 under the heading *"Summary of Best Practice"*, it was stated, inter alia, *"all annual statements of account should be subject to an examination by an independent accountant before issuing to lessees"*.

32. No specific challenge was made as to quantum. The Tribunal considers the fees are modest.

33. The Tribunal determines that accountancy fees are payable within the service charge and the estimates of £140 (year ending 2010/2011) and £147.50 (2011/2012) referred to, if incurred, would be reasonable

Management fees

34. The amounts before the County Court were estimates only.

35. The Respondent's challenge was that the management fees of £265 plus VAT per unit per annum were excessive, there had been no effective management and management fees should be disallowed or reduced to a nominal figure. In correspondence with the Applicant's agents, it was stated *"in view of the minimal management required.....a management fee of £150 per unit is more than generous..."*

36. The Applicants case was that the management fees were based on £265 plus VAT per leaseholder which equates to £954 per annum and *"we can also confirm that our management fees have always been considered reasonable and very competitive"*. Mr O'Reilly said the portfolio had been handed over on his firm's appointment in November 2010, but that he had not received keys to the building from the previous managing agents and had had great difficulty in gaining access to the building. He said *"I had three leaseholders who didn't want managing agents. They paid the ground rent and insurance only"*.

37. Mr O'Reilly explained his duties as a managing agent and said *"most agents wouldn't do management for this type of property- normally £3,000 minimum management fee would be charged.,...we've done our utmost"*.

The Tribunal's Decision

38. The Tribunal considers that the management fee charged of £265 plus VAT per unit is within an acceptable band, and acknowledges that many, if not most, managing agents would not wish to carry out management duties for such a small number of units. The Respondent has not persuaded the Tribunal that the management fees should be disallowed or reduced to a nominal figure. No alternative quotations have been provided.

39. The Tribunal determines that the amounts estimated, if incurred, would be reasonable.

Insurance premiums

40. The amounts before the County Court were estimates only.

41. The Respondent's challenge was that these had been included in the service charges and claimed separately by the Applicant and therefore had been duplicated.

42. The Applicant's case was that the Respondent was confused. Whereas the service charge year runs from December to December, the insurance year starts from the middle of the year, ie from August to the end of July the following year. Therefore, there had not been any duplication.

The Tribunal's Decision.

43. The Applicant's explanation is accepted. The insurance premiums do not appear to have been duplicated and the amounts estimated, if incurred would be reasonable. No specific challenge had been made as to quantum.

Health and Safety

44. The amounts before the County Court were estimates only.

45. The Respondent's challenge was that the cost of reports had been included in service charge accounts but no reports had been carried out.

46. In the Applicant's response, it was confirmed that Health and Safety Risk Assessments had been carried out on 28 January 2013 and copies of both the asbestos survey and a fire risk assessment had been sent to the Respondent. It was acknowledged that no actual expenditure had been incurred under this head for the service charge years 2011 and 2012 and it was stated *"I believe that you may be referring to the provision which was allowed in the budget for both 2011 and 2011. The actual expenditure will be included in the service charge accounts for 2013"*

The Tribunal's Decision

47. The provision for health and safety inspections is perfectly proper. The Applicant's explanation is accepted.

48. The Tribunal determines that the estimates under this head, if incurred, would be reasonable.

Administration charges

49. The amounts before the County Court were estimates only.

50. The Respondent's challenge was that administration charges of £60 and £949 had been made which were not payable under the lease terms and/or were unreasonably incurred. It was stated *"The Applicants have*

been fully aware of the disputes and as such we are nowhere near any section 146 notices being served and the claim together with the claims for legal fees in the original claim notice, which are totally unsubstantiated, should be disallowed.

51. The Applicant stated *"we would argue that clause 3(A)(v) of the lease to pay all costs charges and expenses (including solicitors costs and surveyors fees) incurred by the lessor, for the purposes of incidental to the preparation and service of a Notice of a Notice under Section 146 of the Law Property Act 1925* (sic). *I understand from our clients solicitors that a Statement of Rights was sent to the lessee attached to their letter of 18 February 2013.*

The Tribunal's Decision

52. The invoice dated 7 November 2012 from Salter Rex stated *"to our administrative fees in respect of arrears documentation for the submissions of the case to the freeholders solicitors"* and was in the sum of £60 (£50 plus VAT of £10).

53. By Clause 3(A)(v) of the lease the tenant covenants **"to pay all costs charges and expenses (including Solicitors' costs and Surveyors' fees) incurred by the Lessor for the purposes of or incidental to the preparation and service of a notice under Section 146 of the Law of Property Act notwithstanding forfeiture is avoided otherwise than by relief granted by the Court".**

54. Although the Respondent contends *"we are nowhere near any section 146 Notices being served..."* this is not accepted by the Tribunal. If, as the Tribunal was advised, no service charges have been paid by the Respondent since the Applicant's managing agents took over in 2010, the Tribunal considers that the charges fall fully within the terms of the lease.

55. The Tribunal determines that the administration fee of £60 (£50 plus VAT of £10) for collating arrears documentation for the submission to solicitors is reasonably incurred and properly payable by the Respondent.

56. In respect of the legal fees of £949, there appeared to be no specific reference to this within the hearing bundle and, after conclusion of the hearing, the Case Officer was requested by the Tribunal to ascertain where the relevant information could be found within the bundle. However, it appeared from the email paper trail in Mr O'Reilly's response, that he had requested the solicitors for this information and breakdown of their costs. Further, Mr Sandler enquired whether he could submit written representations on this point.

57. In the Tribunal's emailed response to the Applicant's managing agents dated 12 September 2013 (with a copy to the Respondent's solicitor) it was stated *"The question you were asked was where in the hearing bundle reference was made to the sum of £949. It appears clear from your response that enquiry had to be made of your solicitors and clear also that some of the sums making up that figure were county court costs (over which the Tribunal has no jurisdiction). The invoice for this sum was not provided within the hearing bundle. No new evidence can be provided by the Applicant after the close of the hearing and neither will the Tribunal entertain further written representations from the Respondent's solicitor, as has been requested".*

58. On the basis of the information provided to the Tribunal at the hearing, the Tribunal is unable to make a determination in respect of legal costs. As a matter of principle, the Tribunal's view is as set out in paragraph 54 above.

59. Since this matter will return to the county court in due course, no doubt the Applicant will consider whether this issue should be referred within the county court proceedings.

Insurance excess

60. Mr O'Reilly said that this was for insurance excess for an accidental leak from one flat into another and depending on the circumstances, the insurance excess was payable through the service charge unless it was considered negligent, which was not the case here.

61. This issue was not included in the Respondent's Defence at the County Court, but was raised at a later date, namely in the Respondent's reply to the Tribunal to the Applicant's statement of case dated 24 July 2013. Since it is not a matter which has been transferred from the County Court, this Tribunal cannot deal with this issue.

Application under s.20C.

62. In the Respondent's reply of 24 July 2013, the Respondent applied for an order under Section 20C of the 1985 Act. It was stated, inter alia, *"the Respondent has always expressed a willingness to pay reasonable service charges and realises that a building cannot be run without them. But this does not mean that demands can be made and payment expected where figures are wrong and no management services are being provided".*

63. Mr O'Reilly said that since his firm had been appointed in 2010, no payment for any of the services had been made by the Respondent. He estimated that the costs of proceedings before the Tribunal were £500 plus VAT

64. The Respondent has, in the main, been unsuccessful. The Tribunal does not feel that the Applicant should be burdened with the consequence of that lack of success. The Respondent clearly accepts that a landlord cannot run a building if starved of funds.

65. Taking into account the determinations above, the Tribunal declines to make an order under Section 20C of the 1985 Act. The Tribunal determines that it is just and equitable that the costs of £500 plus VAT incurred by the Applicant in connection with proceedings before this Tribunal are to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable and, in the circumstances, the Applicant may pass any of its costs incurred in connection with the proceedings before the Tribunal through the service charge.

Name: J Goulden **Date:** 16 September 2013

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 20

(1) Where this section applies to any qualifying works or qualifying long term agreement, the relevant contributions of tenants are limited in accordance with subsection (6) or (7) (or both) unless the consultation requirements have been either—
(a) complied with in relation to the works or agreement, or
(b) dispensed with in relation to the works or agreement by (or on appeal from) a leasehold valuation tribunal.

(2) In this section "relevant contribution", in relation to a tenant and any works or agreement, is the amount which he may be required under the terms of his lease to contribute (by the payment of service charges) to relevant costs incurred on carrying out the works or under the agreement.

(3) This section applies to qualifying works if relevant costs incurred on carrying out the works exceed an appropriate amount.

(4) The Secretary of State may by regulations provide that this section applies to a qualifying long term agreement—

(a) if relevant costs incurred under the agreement exceed an appropriate amount, or

(b) if relevant costs incurred under the agreement during a period prescribed by the regulations exceed an appropriate amount.

(5) An appropriate amount is an amount set by regulations made by the Secretary of State; and the regulations may make provision for either or both of the following to be an appropriate amount—

(a) an amount prescribed by, or determined in accordance with, the regulations, and

(b) an amount which results in the relevant contribution of any one or more tenants being an amount prescribed by, or determined in accordance with, the regulations.

(6) Where an appropriate amount is set by virtue of paragraph (a) of subsection (5), the amount of the relevant costs incurred on carrying out the works or under the agreement which may be taken into account in determining the relevant contributions of tenants is limited to the appropriate amount.

(7) Where an appropriate amount is set by virtue of paragraph (b) of that subsection, the amount of the relevant contribution of the tenant, or each of the tenants, whose relevant contribution would otherwise exceed the amount prescribed by, or determined in accordance with, the regulations is limited to the amount so prescribed or determined.]

Section 20B

(1) If any of the relevant costs taken into account in determining the amount of any service charge were incurred more than 18 months before a demand for payment of the service charge is served on the tenant, then (subject to subsection (2)), the tenant shall not be liable to pay so much of the service charge as reflects the costs so incurred.

(2) Subsection (1) shall not apply if, within the period of 18 months beginning with the date when the relevant costs in question were incurred, the tenant was notified in writing that those costs had been incurred and that he would subsequently be required under the terms of his lease to contribute to them by the payment of a service charge.

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

(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 a leasehold valuation 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 a leasehold valuation tribunal 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).

Schedule 12, paragraph 10

(1) A leasehold valuation tribunal may determine that a party to proceedings shall pay the costs incurred by another party in connection with the proceedings in any circumstances falling within sub-paragraph (2).

(2) The circumstances are where—
(a) he has made an application to the leasehold valuation tribunal which is dismissed in accordance with regulations made by virtue of paragraph 7, or
(b) he has, in the opinion of the leasehold valuation tribunal, acted frivolously, vexatiously, abusively, disruptively or otherwise unreasonably in connection with the proceedings.

(3) The amount which a party to proceedings may be ordered to pay in the proceedings by a determination under this paragraph shall not exceed—
(a) £500, or
(b) such other amount as may be specified in procedure regulations.

(4) A person shall not be required to pay costs incurred by another person in connection with proceedings before a leasehold valuation tribunal except by a determination under this paragraph or in accordance with provision made by any enactment other than this paragraph.