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FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/00AU/LSC/2013/0010**
Property	:	**46 Thornhill Houses Thornhill Road London N1 1PA**
Applicant	:	**The Mayor and Burgesses of the London Borough of Islington**
Representative	:	**Ms N. Karmel – Legal services**
Respondent	:	**Mr P Cain**
Representative	:	**In person**
Type of Application	:	**For the determination of the reasonableness of and the liability to pay a service charge**
Tribunal Members	:	**Judge: Ms N. Haria LLB(Hons)** **Valuer: Mr A. Manson** **Lay: Ms S. Wilby**
Date and venue of Hearing	:	**10 Alfred Place, London WC1E 7LR**
Date of Decision	:	**2 October 2013**

DECISION

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Decisions of the tribunal

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

(2) Since the Tribunal has no jurisdiction over county court costs and fees, this matter should now be referred back to the Lambeth County Court.

The application

1. The Applicant seeks a determination pursuant to s.27A of the Landlord and Tenant Act 1985 ("the 1985 Act") as to the amount of service charges payable by the Respondent in respect of Major Works to the block for a new door entry.

2. Proceedings were originally issued in the Lambeth County Court under claim no. 2YM66985. The claim was transferred to this tribunal, by order of District Judge on 3rd January 2013.

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

The hearing

4. The Applicant was represented at the hearing by Ms Karmel from the Applicant's Legal Services department and also in attendance on behalf of the Applicant were Mr Richard Powell the Special projects officer from the Applicant's Home Ownership Services and Mr Selwyn Forte a Senior Electrical Engineer employed by the Applicant. The Respondent appeared in person.

5. Immediately prior to the hearing the parties handed in further documents, namely a Skeleton Argument on behalf of the Applicant and the Respondent's statement of case. The start of the hearing was delayed while the tribunal considered these new documents.

The background

6. The property which is the subject of this application is a one bedroom flat within a purpose built block built at the turn of the last century. There are 18 units in the sub block and 83 units in the block/estate. There are 9 leasehold units in the sub block and 36 leasehold units on the estate.

7. Photographs of the relevant parts of the building were provided in the hearing bundle. Neither party requested an inspection and the tribunal did not consider that one was necessary, nor would it have been proportionate to the issues in dispute.

8. The Respondent holds a long lease of the property which requires the Applicant as landlord to provide services and the Respondent as 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.

9. The Lease is dated 30th September 1985 and is made between the Applicant(1) and John James Shortt Lazenblatt (2) ("the Lease"). The Lease was assigned to the Respondent on 25 July 2002.

The issues

10. At the start of the hearing the parties identified the relevant issues for determination were as agreed at the pre hearing review and were as follows:

    (i) whether the charges claimed in respect of the replacement of the door entry system were recoverable under the Respondent's lease,

    (ii) whether the Applicant had correctly apportioned the costs under the provisions of the lease to the Respondent,

    (iii) whether the Applicant had correctly consulted the Respondent in relation to the works relating to the replacement of the door entry system,

    (iv) whether the cost of the works were reasonable, and

    (v) whether the administration charge of £20 was payable by the Respondent to the Applicant.

11. The Tribunal heard evidence from the parties on the various issues and during the course of the hearing it became apparent that the parties would benefit from a short recess in order to try to reach an agreement on the issues. The parties returned and confirmed that the Respondent had agreed to pay 50% of the service charge amount in issue (50% of £1,060.54) and so all the issues apart from the issue as to the method of apportionment had fallen away.

12. The written submissions and oral evidence is not repeated here except where specifically relevant.

Method of apportionment of Service charge under the Lease

13. Ms Karmel relies on the Applicant's statement of case and her Skeleton Argument as well as the witness statement of Richard Powell.

14. It is submitted that the Applicant's method of apportionment across its housing stock in the borough is to divide the costs by the number of units in the block or "sub" block. This unitary cost is applied to two and three bedroom flats. If a leaseholder occupies a one bed flat there is a 10% reduction and a leaseholder who occupies a four bed flat is charged an extra 10%. It is submitted that this is the most cost and time effective way of allocating the charges. The Applicant has substituted this method of apportionment of service charge for that prescribed under the Lease pursuant to the proviso set out under Clause 5(3)(A) of the Lease which provides as follows:

"...the Council shall have the right at any time to fairly and reasonably substitute a more detailed method of calculating the service charge attributable to the dwellings in the Building and ...".

15. Ms Karmel referred the Tribunal to recent decisions of the LVT on the issue of apportionment of service charge, under case reference LON/00AU/LSC/2012/0783 and LON/00AU/LSC/2011/0562 where the method of apportionment had been challenged and upheld. It is accepted that these decisions are not binding on this Tribunal but may be persuasive.

16. The Applicant claims that the method of apportionment used by the Applicant resulted in an under recovery in the sum of £119.84 from the Respondent.

17. Mr Powell explained the background to the choice of method used to apportion the service charge. He stated that the Applicant has a leasehold housing stock of around 9000 units and it manages over 7000 of those units. He stated that there are a variety of methods of apportionment and the method used by the Applicant is commonplace. He stated that in view of the Applicant's leasehold stock this method of apportionment is deemed to be a reasonable approach to service charge apportionment. He stated that in the past the Applicant used borough wide costs and apportioned them to the buildings and dwellings without reference to specific costs and buildings. However now the system of apportionment is much more complex than it had been in the 1980's. He stated that the Applicant has over 1,700 block definitions used in the calculation of the service charge and some 7,000 leaseholders.

18. He stated that the feedback received from the Leasehold Management Benchmarking Club was that the apportionment method used is commonplace and is viewed by leasehold management practitioners to be preferable, reasonable and the most commonly used approach.

19. The Respondent confirmed that he did not dispute the Applicant is entitled to recover service charges under the Lease. He relied on his statement of case and written submissions. He described the building as a 1902 tenement whose flats were designed with different dwelling areas even for the same number of nominal bedrooms.

20. The Respondent referred to the provisions of Clause 5 of the Lease and stated that the Lease provides for service charges to be apportioned by area, the first part of the clause sets out the basis on which the service charge is to be calculated and the second part the basis on which the service charge is to be apportioned. He submitted that the draftsman would not have included conflicting provisions as to the method of apportionment within the Lease.

21. The Respondent stated that he believed that apportionment by reference to floor area is a standard method and he did not see why the Applicant should be given the right to vary the terms of the Lease that they drafted to the detriment of Leaseholders. He stated he had offered to work with the Applicant to measure the floor area of the units within the building. He stated that when a flat is sold it is sold by reference to the floor area and an additional bedroom may or may not add value. The Respondent stated that from the information disclosed in the freedom of information request 373010 he believes that the sole reason that the Applicant has used the "bedroom" method of apportionment was because this enabled them to recover nearly 100% of the service charge. In his written submission he stated that the sum recovered for some service charge items is marginally over 90%, in other places recovery is over 100%.

22. Mr Powell stated that previously flats were not sold on the basis of floor area but by reference to the number of bedrooms, now the law requires that the floor area of a property is specified on the sale information. He referred to paragraph 8 of his witness statement and explained that the London and South East Leasehold Management Benchmarking group which comprises all London Councils and also some London arms length management organisations gave feedback that only one council did not use number of bedrooms as a method of apportionment.

23. Mr Powell referred to paragraph 9 of his witness statement and reiterated that the Applicant has over 1700 block definitions used to apportion service charge and some 7000 leaseholders, he stated that a change to the current method of apportionment would be complex, time consuming and expensive. He stated that if the Applicant were to change the current method of apportionment he can envisage being at

another Tribunal hearing having to justify why they undertook the task and passed on the cost of the exercise to leaseholders. He stated that the Freedom of Information Request is useful in that it shows that in some areas the Applicant is under recovering the service charge and in others there is an over recovery. He stated that they had not identified the blocks where there had been an under recovery as they considered that any benefit that would be gained by changing the method of apportionment to ensure a 100% recovery would be out weighed by the sheer cost of the exercise of having all the units measured, he estimated the cost of the exercise would run in to tens of thousands of pounds for 1,700 units.

24. The Respondent confirmed that he had no dispute with the previous Tribunal decision in case number LON/00AU/LSC/2011/0562, "the Andover decision". He challenged whether the cost of measuring the units would be excessive on the basis that the cost of a revaluation of Thornhill Houses for Building Insurance purposes was £80.00. The Respondent referred to the sales particulars of one bedroom flats in Thornhill Houses. These showed the difference in floor area between one bedroom flats within the block, one being 46 sq. m. and the other 74 sq. m. In his written submissions the Respondent stated that the variation in size between flats number 9 and 68, each one bedroom flats is about 70% and it cannot be right that they are charged the same service charge. The Respondent claimed that there was a very strong correlation between rateable values of properties and floor areas, he stated that he had sent the Applicant the floor area measurements of units within the block but the Applicant chose not to use it.

25. Ms Karmel submitted that the Applicant had the right under the provisions of the Lease to substitute at any time a more detailed method of calculating the service charge. She stated that Rateable values have become obsolete and so the Applicant had not simply changed the method of apportionment of its own volition. She submitted that regard should be had to the cost of the exercise and the fact that the Applicant is a Local Authority landlord with a large housing stock.

26. The Respondent stated that it was anticipated that rateable values would be abolished and the Applicant has had over 30 years to correctly implement the costs. He stated that the Applicant makes a profit of £6 million.

27. Mr Powell denies the Applicant makes a profit and he stated that the service charges are based on costs incurred.

The Tribunal's decision

28. The Tribunal determines that the method of apportionment of service charge used by the Applicant is in accordance with the provisions of the Lease.

Reasons for the tribunal's decision

29. Having heard evidence and submissions from the parties and considered all of the documents provided, the Tribunal has made the determination on the issue of apportionment of service charge as detailed above.

30. Under Clause 1(2) and Clause 5 of Lease the Respondent agrees to pay the service charge.

31. By virtue of Clause 3(1) of the Lease the Respondent covenants to pay the service charge.

32. Clause 5 of the Lease defines the service charge and Clause 5(2) provides that the service charge are to consist of *inter alia* a proportionate part of the expenses and outgoings incurred by the Applicant of the items set out in the Third Schedule of the Lease which comprise of:

    (i) The repair maintenance and renewal of the Building

    (ii) The provision of services for the Building and Estate(if any)

    (iii) Other heads of expenditure

33. Clause 5(3)(f) of the Lease provides that the annual amount of the service charge payable by the Respondent shall be calculated by adding together the building element, the estate element and the management element calculated as follows:

    (i) *"by dividing the aggregate of the expenses and outgoings incurred by the Council in respect of the matter set out in Part 1 of the Third Schedule hereto in the year to which the Certificate relates by the aggregate of the rateable value (in force at the end of such year) of all the dwellings and other rateable parts in the Building the repair maintenance and renewal or servicing whereof is charged in such calculation ...and then multiplying the resultant amount by the rateable value (in force at the same date) of the demised premises (hereinafter called the "building element")*

(ii) *by dividing the aggregate of the expenses and outgoings incurred by the Council in respect of the matters set out in part 2 of the Third Schedule ...in the year to which the Certificate relates by the aggregate of the rateable value (in force at the end of such year) of all residential units on the Estate and then multiplying the resultant amount by the rateable value (in force at the same date) of the demised premises (hereinafter called "the estate element")"*

(iii) The management element is a fair and reasonable proportion of the expenses incurred by the Applicant in connection with the maters set out in Part 3 of the Third Schedule.

34. The method of calculation set out in Clause 5(3)(f) is subject to the proviso under Clause 5(3)(A) which allows the Applicant at any time to fairly and reasonably substitute a more detailed method of calculating the service charge. Clause 5(3)(B) provides that in the event of the abolition or disuse of rateable values for property the reference to rateable values in the Lease should substituted by a reference to the floor areas of all the dwellings in the Building and on the Estate and calculated accordingly.

35. The Tribunal considered the decision of the LVT in the "Andover case" reference LON/00AU/LSC/2011/0562 to be persuasive. Although the provision in the lease considered in that case was similar to the provision in the Lease in this case, there is a difference in that in this case the Lease permits the Landlord to substitute a more detailed method of calculating the service charge whereas in the "Andover case" the Lease permitted the Landlord to substitute a different method of calculating the service charge.

36. The Tribunal had regard to guidance as to the principles of construction of Leases given in London Borough of Brent v Mrs Nellie Hamilton LRX/51/2005 and Gilje v Charlegrove Securities Ltd [2001] EWCA Civ 1777 that if a landlord seeks to recover money from a tenant there must be clear contractual provisions entitling him to do so. In the case of any ambiguity the contra proferentem rule of construction applies and so the lease having been drafted by the landlord falls to be construed against the landlord.

37. In Embassy Court Residents' Association v Lipman [1984]2 EGLR Cumming Bruce LJ stated that "No doubt in the case of leases entered into between a landlord and a tenant it is necessary for the landlord to spell out specifically in the terms of the lease, and in some detail, a sufficient description of every financial obligation imposed upon the tenant in addition to the tenant's obligation for rent ...." . However

having stated the basic principles of lease construction Cumming Bruce LJ accepted that under certain circumstances a term may be implied into a lease enabling a landlord to recover costs. The landlord in that case was a resident's association with no funds of its own and in order to give business efficacy to the transaction it was held that a term should be implied into the leases to the effect that the resident's association could incur expenditure to carry out the functions imposed on it and could recover the costs (including the cost of employing a managing agent) and to recover these from service charge. The case also supports the view that for a proper understanding and construction of a lease account should be taken of the background and factual matrix surrounding the grant of a lease. The Tribunal appreciates that the Embassy Court case is not on all fours with the facts before the Tribunal but nevertheless it provides useful guidance as to the approach to be taken in the interpretation of leases.

38. The issue therefore is whether the method currently used by the Applicant is in fact a more detailed method of calculating the service charge when compared to a service charge calculated by reference to rateable values or floor areas.

39. The Tribunal accepts that apportioning the service charge on the basis of the specific floor area of each unit and the specific floor area of the Estate would provide a more precise apportionment of the service charge.

40. There is however a subtle difference between a more detailed calculation and a more precise calculation. A more precise calculation will necessarily include more detail but it is possible to have a more detailed calculation without it resulting in a more precise calculation.

41. The Lease permits the Landlord to substitute rateable values or floor areas for a more detailed method of calculating the service charge. The Tribunal finds that the fact that there are now 1,700 different block definitions used to calculate the service charge inevitably means the calculation is more detailed.

42. Mr Powell stated that the Applicant has over 1,700 block definitions and some 7,000 leaseholders and a change to the current method of apportioning service charge would be time consuming and costly exercise. The cost of undertaking such an exercise would be borne by the leaseholders.

43. The Tribunal from its own knowledge and experience is aware that the method of apportionment of the service charge used by the Applicant is widely used by local authority landlords with large housing stock. This is supported by the feedback received by Mr Powell from the London and South East Leasehold Management Benchmarking group.

44. The Tribunal took into account the fact that the method of apportionment used by the Applicant is widely used by other local authority landlords. In addition the Tribunal was persuaded that the use of 1,700 block definitions provides a better and more accurate system for capturing more of the costs incurred than was previously the case. The Tribunal accepted that a change to the system currently used by the Applicant would be a costly and onerous exercise and Tribunal is not satisfied that it would be reasonable for the Applicant to undertake such an exercise. Accordingly the Tribunal finds the method of apportionment to be reasonable and fair.

The next steps

45. The Tribunal has no jurisdiction over county court costs. This matter should now be returned to the Lambeth County Court.

Name: N Haria **Date:** 2 October 2013

Appendix of relevant legislation

Landlord and Tenant Act 1985 (as amended)

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 the appropriate 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 the appropriate 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.