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FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/00AU/LSC/2013/0527**
Property	:	**Unit 3.2 York Central, 70 York Way, London N1 9AG**
Applicant	:	**Keith de Souza**
Respondent	:	**York Central Residents Association**
Representative	:	**HML Hawksworth**
Type of Application	:	**For the determination of the reasonableness of and the liability to pay service charges and administration charges**
Tribunal Members	:	**Judge Nicol** **Mr TW Sennett MA FCIEH**
Date and venue of Hearing	:	**16th October 2013** **10 Alfred Place, London WC1E 7LR**
Date of Decision	:	**25th October 2013**

DECISION

Decisions of the tribunal

(1) The Tribunal determines that the reserve fund contribution and estimated service charges for 2013 are reasonable and payable.

(2) The Tribunal further determines that the legal fees of £1,392 and £570 are reasonable and payable.

(3) The Tribunal does not make an order under section 20C of the Landlord and Tenant Act 1985.

(4) The Tribunal determines that the Respondent need not reimburse the Applicant the Tribunal fees paid by him.

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 payable in respect of service charges and reserve fund contributions for 2013 and of legal fees in relation to previous Tribunal proceedings and in addressing his non-payment of previous charges.

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

The hearing

3. The Applicant appeared in person and was assisted by his wife. The Respondent was represented by Mr Robert Brown of counsel and Ms Rita Nalliah, Senior Property Manager at the Respondent's agents, HML Hawksworth, gave evidence.

The background

4. The Applicant challenges four discrete charges which the Respondent has sought to impose and they are dealt with in turn below. Firstly, though, the Tribunal would like to make a couple of general points.

5. The Applicant's oral presentation at the hearing was clear and well-structured. Neither the Tribunal nor the Respondent had any difficulty understanding the points he wanted to make. Unfortunately, this stands in contrast to his correspondence and to the organisation of his documents. He split issues between different e-mails or letters in his correspondence and into differently numbered and lettered sections in his hearing bundle in an attempt to provide clarity on each. Instead,

this made his position more difficult to identify. Further, he claimed that the Respondent had failed to answer questions or respond to certain points but when his correspondence was examined more closely, the questions were not there or the points were not expressed in a way which was either clear or which invited any response.

6. The Respondent refused the Applicant's invitation for a face-to-face meeting unless and until he made the agenda clear. While this is not an unreasonable request in normal circumstances, in this Applicant's case a meeting appears likely to be far more productive than trying to define issues in correspondence. If the Applicant has any queries on his service or administration charges in future, the likelihood of ending up in front of a court or tribunal is likely to be significantly reduced by having face-to-face meetings.

7. Having said that, the Applicant's response to the Respondent's failure to address his concerns or meet him was to withhold payment of the amount the validity of which he felt to be in doubt. This was not the appropriate way to deal with his concerns in these circumstances and is unlikely ever to be so. Following the decision of a previous Tribunal on 20th June 2013, this is the second application the Applicant has made unsuccessfully. By withholding payment until a Tribunal has ruled against him, he has to pay the Respondent's legal costs (see further below). If he had paid what was demanded, he would still have been able to challenge his charges but he would have incurred fewer legal costs, if any.

Reserve Fund

8. The Respondent is a lessee-owned company. It held its AGM on 20th November 2012 to which all lessees, including the Applicant, were invited. The Applicant did not attend. Those who did were presented with a 10-year plan for major works which it was felt required an increase in the annual Reserve Fund collection from £20,000 to £30,000.

9. The Applicant carried out his own calculation on the papers he had available and reckoned that the annual Reserve Fund collection did not need to be raised at all:-

   (a) The Applicant noted that the AGM had been informed that there was £80,700 in the existing Reserve Fund whereas the accounts to the year end of 31st December 2012 recorded it as £98,484. He asserted that the AGM had been deliberately misinformed.

   (b) Further, works had been carried out to the value of £20,000 in 2012 but the Respondent's calculations for the 10-year plan assumed that money had yet to be spent. The Applicant asserted that this was double-counting.

(c) In an e-mail dated 25th June 2013 Ms Nalliah informed the Applicant that the Reserve Fund contained £121,540. The Applicant deducted all Reserve Fund contributions to that date and reached a figure of £107,000, higher than the amount in the accounts.

10. In fact, Ms Nalliah was able to explain these apparent discrepancies. The Respondent held two funds of money, one in relation to ground rents amounting to around £16,500 and one for payments for various items such as photo shoots and storage amounting to around £9,000. The Respondent, as a lessee-owned company, had decided not to collect any more ground rents after 31st December 2012 but was not sure what to do with the collected funds. Their preference was to transfer both funds into the Reserve Fund but the money had been given to them for particular purposes. It was only after the AGM that, on legal advice, it was determined the funds could be put into the Reserve Fund.

11. Further, although works had been carried out in 2012, the Reserve Fund contribution of £20,000 had yet to be taken out by the time any of the figures the Applicant relied on had been compiled.

12. When these figures are into account, there is no evidence of any inaccuracies or discrepancies in the Respondent's figures for their Reserve Fund. Having said that, even the Applicant's calculations left the Reserve Fund in deficit after a few years. The Applicant asserted that the Respondent could not reasonably collect for the Reserve Fund on any basis other than a nil balance over a regular cycle of 5-6 years and any excess should not be payable. However, the calculation of a Reserve Fund is an estimate of future liabilities, some so far into the future that the amounts are closer to guesswork than scientific precision. The Respondent is required to act no more than reasonably. If the position changes during the period of the 10-year plan so that it appears more than was required had been collected, then of course the Respondent would and should reduce lessees' further contributions accordingly. In the meantime, the contributions demanded in 2013 to the Reserve Fund are reasonable and payable.

Estimated Service Charges

13. The Respondent demands advance service charges from the lessees each year based on an estimate of what the actual expenditure might be over the coming year. For 2013 the Respondent's estimate was £91,575. The Applicant carried out his own calculations and reached a figure of £81,831. In particular, he produced carefully-compiled spreadsheets which appeared to show significant over-estimates in relation to a few items such as insurance and utilities.

14. Unfortunately, the Applicant's approach confuses the method of calculation with the desired outcome. The only viable method of calculation is to try to estimate each category of charge separately.

However, the objective is not to come up with a figure in each category which matches or comes close to the final expenditure in that category. Such accuracy would, of course, be evidence of a good estimate while large discrepancies might call the estimate into question.

15. The true objective of the process of estimating the service charges is to come up with a total figure which is reasonably close to the eventual total figure for actual expenditure. The fact is that many years will contain some unanticipated expenditure. Some categories may underspend, some overspend and there may even be expenditure outside the categories used for the estimate. There needs to be a tolerance in the budget because the Respondent has no funds other than those provided by its members through the service charges and unanticipated expenditure must be covered.

16. The fact is that, for the last two years this objective has been achieved. For one year, the estimate was a little too low and for the other it was a little too high compared to actual expenditure. Known expenditure in the 9½ months of the current year, if continued at the same rate, would result in a total figure of a little less than the Respondent's estimate but significantly more than the Applicant's estimate.

17. It is possible that the Applicant's figures are better estimates for at least some of the categories he identified. However, in the circumstances, the Tribunal is satisfied that the total estimate is reasonable and the resulting service charges are payable.

Legal Fees

18. The previous Tribunal refused to make an order under section 20C of the 1985 Act so that the Respondent retained the power to add their costs of the proceedings to the service charge. In accordance with the power to do so under clause 10 of the lease, the Respondent sought to apportion the whole of the sum of £1,392, inclusive of VAT, in respect of such costs to the Applicant.

19. The Applicant did not seek to challenge the power of the Respondent to collect legal costs but asserted that a reasonable fee would have been no more than £225 inclusive of VAT:-

(a) He asserted that the costs were not proportionate to the sums of money involved, namely a few hundred pounds. If his application had only related to money, the Tribunal might have been inclined to agree. However, he also sought a variation of his lease. Understandably, the Respondent asserted that this was an important issue to them.

(b) Alternatively, the Applicant argued that the proposed variation was an issue relevant to all the lessees and so they should share the cost. In the Tribunal's opinion, this misunderstands the situation. The Applicant was not representing any other lessees. The variation was sought,

unsuccessfully, by him alone. He cannot incur costs on behalf of others just because the issues he raises may have implications for them.

(c) The Respondent's solicitors instructed Mr Brown to draft their Statement of Case. The Applicant queried the use of two lawyers and suggested the whole of counsel's fee should be discounted. This fails to take into account the fact that someone would have had to draft the Statement of Case so there would have been a cost in any event. The Tribunal is satisfied that counsel's fee was reasonable given the aforementioned importance of the case.

(d) The Applicant asserted that the Respondent's solicitor, Mr Tigwell of Guillaumes LLP, spent too long on the case and should have only spent around 1½ hours at a rate of £125 per hour. The Applicant is not a lawyer and is clearly inexperienced at how long it would take a lawyer properly to review the application and respond to it. His calculation of time and fee are unrealistic. The Tribunal has seen Guillaumes's invoices and timesheets and is satisfied that the resulting fees are reasonable.

(e) The Applicant asserted that the costs could have been avoided if the Respondent had accepted his reasonable invitation to meet him. The Tribunal has already commented on this above. In relation to the legal costs, this is an issue already encompassed in the previous Tribunal's refusal to make a section 20C order and this Tribunal has no power to alter that decision.

20. In the circumstances, the Tribunal is satisfied that the legal fees of £1,392 are payable by the Applicant.

Administration Charges

21. The previous Tribunal determined that the Respondent had the power to charge legal fees as administration charges under clause 13 of Schedule 4 to the lease which refers to costs incurred in contemplation of forfeiture proceedings. Under this provision, the Respondent claims £570 as set out again in Guillaumes's invoices and timesheets.

22. The Applicant asserted that he had intended to challenge all extant fees in his previous application and so these fees could and should have been raised then. However, the Respondent had not yet demanded these sums at the time of the previous application and they are not required to anticipate that the Applicant will challenge them.

23. Again, the Applicant challenged the amount of time spent in incurring these costs but the Tribunal's comments in relation to the costs of the previous proceedings above apply equally here.

24. As already commented on above, if the Applicant chooses not to pay his service charges pending determination of any dispute about them, he

runs the risk of having to pay at least some of the Respondent's costs of dealing with that dispute. The Respondent is entitled to enforce their right to the money and to charge the Applicant the cost of doing so. The Tribunal is satisfied that the charges of £570 are reasonable and payable.

Application under s.20C and refund of fees

25. At the end of the hearing, the Applicant made an application for a refund of the fees that he had paid in respect of the application and hearing[1]. Having heard the submissions from the parties and taking into account the determinations above, the Tribunal has decided not to order reimbursement.

26. The Applicant also applied for an order under section 20C of the 1985 Act. Taking into account the determinations above, the Tribunal determines that it would not be just or equitable in the circumstances for an order to be made.

Name: NK Nicol **Date:** 25th October 2013

[1] The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 SI 2013 No 1169

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 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 property tribunal, to the tribunal before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to any residential property tribunal;
(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.

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.

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 appropriate 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).