10470

First-tier Tribunal
Property Chamber
(Residential Property)

Case reference	:	**CAM/00KF/LSC/2014/0095**
Property	:	**Flat 14, Estuary Lodge, Eastern Esplanade, Southend-on-Sea, Essex SS1 3AE**
Applicant	:	**Estuary Lodge Southend RTM Co. Ltd**
Respondent	:	**James Pearson**
Date of Transfer from Southend County Court	:	**1st August 2014**
Type of Application	:	**to determine reasonableness and payability of service charges and administration charges**
The Tribunal	:	**Bruce Edgington (Lawyer Chair)** **Stephen Moll FRICS** **John Francis QPM**
Date and place of Hearing	:	**8th December 2014 at Southend Magistrates' Court, Victoria Avenue, Southend-on-Sea SS2 6EU**

DECISION

1. The Tribunal determines that of the claim of £1,217.06, the following amounts are reasonable and payable:-

Item	Date	Claim(£)	Decision
Insurance	13.10.11	166.56	payable
Administration fee	14.10.11	60.00	£25 reasonable
Administration fee	20.03.12	60.00	£25 reasonable
Paid	17.05.12	-282.00	
Service charge in advance	25.12.12	337.50	not payable
Service charge in advance	25.06.13	400.00	not payable
Ground rent	25.06.13	12.50	no jurisdiction
Service charge in advance	25.12.13	400.00	not payable
Ground rent	25.12.13	12.50	no jurisdiction
Administration charge	13.02.14	50.00	reasonable
		1,217.06	

Therefore, of the claims for service charges and administration charges within the jurisdiction of the Tribunal (£1,192.06), the decision is that none is reasonable and payable as the amount paid is more than that owed.

2. The claim is transferred back to the Southend County Court under claim no. A3QZ5601 for determination of any outstanding issues. The parties should note that it will be up to them to make any application to the court in relation to those matters. In particular the Order of the court dated 1st August 2014 requires any such party to ask the court to lift the court's 'stay' of those proceedings.

Reasons

Introduction

3. Court proceedings were issued by the Applicant for the sum stated above plus interest and court fee in March 2014. It is an unusual case in the sense that the claimant is not the landlord to whom the Respondent is contractually liable, but a right to manage company which has, apparently, issued the proceedings with the support and consent of the landlord. It matters not as the Respondent has not raised any issue about this.

4. The Respondent filed a part admission in the sum of £432.94 without identifying which part of the claim this related to. He also filed a generally worded defence which did not deal with any of the particular parts of the claim. This may have been partially due to the fact that claim itself is just a total without any details. However, the Respondent says "*This matter concerns complex service charges and management fees and I ask that these be dealt with by the Leasehold Valuation Tribunal. Our defence relates to both miss and False accounting by the Landlords agents. The landlords agents have also Failed to produce appropriate accounts for monies spent*".

5. The matter was then 'transferred' to this Tribunal as it has taken over the jurisdiction of the Leasehold Valuation Tribunal. Strictly speaking the court can only transfer a 'question' for determination and, as was stated in the directions order, the question for determination is the payability and reasonableness of the service charges and administration charges claimed. The Tribunal has no jurisdiction to deal with ground rent.

6. Following the directions order made by the Tribunal, further details were given by the parties and, on the papers, their positions are:-

Respondent's case	**Applicant's position**
Insurance – disputed as it was claimed by previous managing agent and the figures do not add up	This cost is correct and is in the year end accounts for 2012
Administration charges – they are unreasonable because at the time reasonable disputes were being raised	These costs were charged by the previous managing agents

Service charges in advance – it is said that these are 'partially' disputed without saying which part. Window cleaning is not in the leases and money has been spent on a service road instead of the fabric of the building	No reason has been given for non payment save for the window cleaning and these charges have been included for many years as leaseholders cannot clean the upper floors
Administration fee £50 – it is an unreasonable amount as a Land Registry search is only £3	This is a fee to include the Land Registry charge and is reasonable
Credits – there are year end credits for 2012, 2013 and 2014 which have not been taken into account	These have been retained as a sinking fund
Service road improvements – the lease does not provide for these works to be undertaken as part of the service charge	At a meeting of leaseholders to which the Respondent was invited, all agreed to incur this expenditure
Management fee for 2013 - £67.50 of this is disputed for reasons which are not clear	These are expenses incurred in management

The Lease

7. The bundle produced for the hearing included a copy of the lease which is dated for the 11th February 1969 and is for a term of 199 years from 29th September 1967 with a ground rent of £25 per annum payable half yearly in arrears.

8. Of relevance to this case, the glass to the windows forms part of each demise and the contractual position under the leases would therefore be that it is up to the leaseholders individually to keep the outsides of the windows clean. However, this does not, of course, stop the landlord and the leaseholders coming to a separate agreement that there should be one contractor to clean the outsides of the windows with the cost to come out of the service charge account. Evidence has been produced by the Applicant at page 65 in the bundle that for the years 2006 to 2011, the service charges included amounts for external window cleaning ranging from £1,142.12 to £1,925.00 per annum.

9. The service charge regime includes the cost of maintaining and repairing the service road. The Respondent does not seem to deny this. His case is that recent work undertaken to the service road is an improvement and the lease does not allow for the cost of improvements as part of the service charges.

10. As to administration fees, the Respondent does not deny that such fees can be incurred but, for the avoidance of doubt, the Sixth Schedule also includes provision for the "*cost to the landlord of enforcement of any or all of the covenants herein contained other than for the payment of rent hereby reserved in so far as the same relate to the Estate or parts thereof and not solely to the demised premises*". This would include recovery of unpaid service charges.

11. There is no requirement under the lease for the service charge accounts to be audited or certified by a chartered accountant and there is no provision for the landlord to recover service charges in advance by way of a sinking fund or by any other means.

The Law

12. Section 18 of the **Landlord and Tenant Act 1985** ("the 1985 Act") defines service charges as being an amount payable by a tenant to a landlord as part of or in addition to rent for services, insurance or the landlord's costs of management which varies 'according to the relevant costs'.

13. Section 19 of the 1985 Act states that 'relevant costs', i.e. service charges, are payable 'only to the extent that they are reasonably incurred'. This Tribunal has jurisdiction to make a determination as to whether such a charge is reasonable and, if so, whether it is payable.

14. Paragraph 1 of Schedule 11 of the **Commonhold and Leasehold Reform Act 2002** ("the 2002 Act") ("the Schedule") defines an administration charge as being:-

> *"an amount payable by a tenant of a dwelling as part of or in addition to the rent which is payable... directly or indirectly in respect of a failure by the tenant to make a payment by the due date to the landlord."*

15. Paragraph 2 of the Schedule, which applies to amounts payable after 30th September 2003, then says:-

> *"a variable administration charge is payable only to the extent that the amount of the charge is reasonable"*

16. The Respondent has suggested that he is entitled to service charge accounts which have been audited or certified by an accountant. He is presumably referring to the new section 21 of the 1985 Act as set out in section 152 of the 2002 Act which does contain this provision i.e. that accounts will have to be accompanied by a certificate from a 'qualified' accountant. In fact this statutory provision has not yet been brought into effect and there is no proposed date for this so far as the Tribunal is aware.

The Inspection

17. The members of the Tribunal inspected the outside of Estuary Lodge on a bright winter's morning immediately before the hearing. It is a typical block of flats built in the 1960's of brick under a flat roof. Many of the flats have balconies made of reinforced concrete with metal railings set into them. The building is on the Esplanade which faces the Thames estuary and is therefore subject to direct impact from salt water in the off shore wind.

18. Some of the metal railings and reinforcing to the balconies are showing some signs of typical corrosion. Brickwork to the south facing

elevation appears to have been recently re-pointed and whilst some areas of re-pointing are required elsewhere, the building appears to have been maintained to a generally good order.

19. To the eastern side of the building facing Warwick Road, there is service road and it was evident to the Tribunal that this had been made wider by something under a metre for virtually its whole length. It is this work which the Respondent is denying responsibility for as it is an improvement.

The Hearing

20. The hearing was attended by Mr. Frank Rush from the Applicant company and the Respondent. There was a short adjournment to start with as the Respondent did not have a bundle. He had evidently moved house the week before. Mr. Rush had attempted to deliver the bundle to Mr. Pearson's home but had found it empty. Mr. Pearson had thought that the bundle was in the post and would come to him as he had a contract with Royal Mail to divert his post. Mr. Pearson was good enough to say that he would look at the bundle there and then and continue which is what happened.

21. He had found that there was one document not in the bundle which was a summary of the financial position from his point of view. This had been attached to his statement. He gave a copy to the Tribunal. It showed the whole financial position including claims for a refund of credits and for the service road. He was made aware that the Tribunal was limited in its considerations to the county court claim. He had not filed a counterclaim.

22. The Tribunal chair went through the various items of claim as set out above and asked for the evidence to support the positions of the parties. As to the insurance premium, Mr. Pearson simply said that the full premium had been in the budget supplied by the previous managing agent and he therefore thought that he had been double charged. When asked for the evidence of this, he seemed to be in difficulty. Equally, Mr. Rush seemed to be unable to provided evidence to the contrary.

23. There is a statement at page 168 in the bundle showing an insurance premium of £4,796.23 for the building for the service charge period commencing 25th June 2011. It is understood that the property pays 5% of the total which would mean a premium of £239.81 for the property. However, the premium seems to run for the year commencing 15th November and is stated to be £166.56 from a demand 'on account' at page 169.

24. As far as the administration charges are concerned, the parties could really add nothing to the written position as outlined above. As will be seen, the position regarding the service road, is somewhat irrelevant but evidence was given that the lease plan accurately reflected the position before the works. There had been a small stretch of garden boarder running the length of the service road between it and the pavement. There was a dispute as to whether the service road had

then been wide enough for 2 cars to pass side by side but it was agreed (a) that, in any event, anything wider than a car could not pass another and (b) that part of the paving had become damaged by vehicles running onto it. Mr. Rush said that the leaseholders had agreed that it would be much more practical and save possible further damage to get rid of the garden area and widen the service road.

Discussion

25. This is a case which highlights one of the shortcomings of the right to manage regime i.e. where one leaseholder falls out with his fellow leaseholders which is most unfortunate because the Respondent, as a chartered accountant, clearly has skills which may be of use to the Applicant. He says that he was not aware of the right to manage process but that would not have stopped him attending meetings of leaseholders or seeking to resolve the difficulties which have arisen rather than just refusing to pay.

26. This shortcoming was clearly anticipated by the 2002 Act relating to right to manage because such companies are often formed because a previous managing agent has not done its job properly. In this case, for example, the previous managing agents have already charged administration fees because the Respondent failed to make payments. He says that he was raising valid complaints at the time and everyone seems to accept that such managing agents were not doing a good job. Thus, to determine that such charges were unreasonably incurred will leave the landlord or, probably, the leaseholder members of the Applicant having to pay these amounts. Suing the managing agents involved to recover about £200.00 would clearly be disproportionate.

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

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

28. This means, in effect, that if there are disputed facts, then it is up to the person challenging the facts to prove, in the balance of probabilities, that his or her case is arguable before the Tribunal has to consider the other side's position.

Conclusions

29. As to the specific areas of dispute, on the matter of the **insurance premium**, the Tribunal listened carefully to the case put forward by Mr. Pearson but just could not see where his evidence was of double charging. He is a chartered accountant and should know full well that if figures are being challenged then there has to be an audit trail so that a determination can be made. He was unable to show this by evidence produced before or at the hearing and the challenge therefore fails.

30. As far as the **administration charges** before the Applicant took over are concerned, the Tribunal notes from the correspondence that these just seem to have been Countrywide's 'standard' charges for non payment. The exact circumstances as to how they arose is not clear save to say that Mr. Pearson accepted that he was retaining monies for what he said were good reasons. In the Tribunal's view, Mr. Pearson knew or ought to have known that non payment was likely to produce an administration charge but a charge of £50 plus VAT to write an additional letter is not, in this Tribunal's view, reasonable. A charge of £25 including VAT would be reasonable. That is the sum allowed for the 2 earlier claims of £60 each.

31. Mr. Rush said that the subsequent charge of £50 reflected a fee of £17 paid to the Land Registry, not the £3 stated by Mr. Pearson. Both that and the **management fee** of £67.50 appeared to the Tribunal to be reasonable and payable.

32. This just leaves the **service charges claimed on account and the sinking fund contribution.** Unfortunately, neither of these are payable according to the lease.

The Future

33. The leases on this estate are clearly outdated. Most of the leaseholders seem to have understood that and have agreed, voluntarily, to 'modernise' the regime by agreeing to pay service charges on account, by creating a sinking fund, by arranging for the outside windows to be cleaned etc. although Mr. Pearson said that his windows were not cleaned.

34. Mr. Pearson also made the point that when the RTM company was formed, he had approaches from 2 separate sets of people who were wanting to form such companies relating to this building which is why he decided not to get involved in either.

35. During the hearing, the Tribunal considered that there was at least some indication that goodwill might prevail as Mr. Pearson had obviously understood that payments on account of service charges were sensible as they allowed for some degree of budgeting. As to a sinking fund, it is all very well for someone just to sit back and let the landlord pay out and then consider whether the service charge was reasonable.

36. However, there are several points against that stance:-

- The landlord may not be able to afford to pay for decent repairs or, indeed, any repairs and would have to be sued for breach of contract if repair work was not done or not done properly
- An RTM company operating a sinking fund means that the lessees are in control rather than the landlord which is often a source of complaint
- With this building, the flat roofs of the garages will need replacing in the not too distant future. If the main roof is in the same condition, there is a very large cost on the horizon and a sinking fund would be a very important safeguard for the lessees

37. As far as the service road is concerned, the Tribunal considered that the work undertaken was not an improvement. It was certainly something different but it will save the cost of maintaining that strip in the future as part of the gardening budget and it reduces what was a risk of damage to other parts of the frontage and the frustration of having vans parking there without other vehicles being able to pass. It has long been held by the Upper Tribunal that changes which include long term cost savings and other advantages are not necessarily 'improvements' in the technical legal sense.

38. Any person selling their lease to a buyer who obtains proper legal advice may have problems selling in the future in view of the shortcomings of the leases mentioned above. Lessees could start to refuse to pay on account for service charges or towards a sinking fund.

39. Whatever Mr. Pearson may say about this building, the Tribunal formed the view that it was being reasonably well maintained and he is urged to try to seek a sensible solution to this dispute by accepting that payments on account and a good sized sinking fund are very much in the interests of the lessees. There are sizable items of expenditure due in the not too distant future. He knows or should be aware of a lessee's right to inspect books and supporting documents. If he really feels that either the previous managing agents or the Applicant have not undertaken the bookkeeping properly, his professional skills should enable him to trace any problem and assist rather than hinder.

40. Part of any agreement reached should include a voluntary deed of variation to the leases or an application to this Tribunal for the leases to be varied. The former will be cheaper than the latter. Problems building up for the future are never a good idea as has been amply demonstrated by this case.

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Bruce Edgington
Regional Judge
11th December 2014