9989

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/00AT/LSC/2013/0834**
Properties	:	**Flats 2 (26B) and 3 (26C), Chiswick High Road, Chiswick, London W4 1TE**
Applicants	:	**Mr M. Perez (Flat 2)** **Mr and Mrs.T. Sampson (Flat3)**
Respondent	:	**Northern Trading Limited**
Representative	:	**Harrington Property Management Limited**
Type of Application	:	**For the determination of the reasonableness of and the liability to pay service charges**
Tribunal Members	:	**A.ENGEL – Judge** **S.MASON BSc FRICS FCIArb**
Date and venue of Hearing	:	**22nd April 2014** **10 Alfred Place, London WC1E 7LR**
Date of Decisions	:	**5th June 2014**

DECISIONS

A. The service charges for 2009 are £3,611-04 for Flats 1,2 and 3 = £1,203-68 per flat.

The service charges for 2010 are £3,015-18 for Flats 1,2 and 3 = £1,005-06 per flat.

The service charges for 2011 are £4,077-08 for Flats 1,2 and 3 = £1,359-03 per flat.

The estimated service charges for 2012 are £3,600 for Flats 1,2 and 3 = £1,200 per flat.

The estimated service charges for 2013 are £3,780 for Flats 1,2 and 3 = £1,260 per flat.

B. All of the costs incurred or to be incurred by the Respondent in connection with these 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 Applicants (Section 20Cof the Landlord and Tenant Act 1985).

C. The Respondent is required to reimburse to the Applicants, forthwith, the whole of the fees paid by the Applicants in respect of these proceedings (Rule 13(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013).

REASONS

The Respondent

1. The Respondent is the Freeholder of 26,Chiswick High Road, London W4 1TE.

The Respondent's Agent

2. The Respondent's Agent is Harrington Property Management Limited.

26, Chiswick High Street

3. The ground floor of 26 Chiswick High Street is a restaurant, which is let by the Respondent on a (long) lease.

4. Above the Restaurant are 3 flats (Nos. 1, 2 and 3), which are accessed from the rear of 26, Chiswick High Street The access is shared with 28, Chiswick High Street, which adjoins 26, Chiswick High Street. The Respondent is also the Freeholder of 28, Chiswick High Street.

The Applicants

5. Mr M.Perez is the (long) Lessee of Flat2. Mr and Mrs T. Sampson are the (long) Lesees of Flat 3.

The Application

6. By written application, dated 12th December 2013, Mr M.Perez applied to the Tribunal for a determination of the amount of service charges payable in respect of Flat 2 for the years 2009 to 2013.

Joinder

7. Mr and Mrs Sampson were joined as Applicants on 14th February 2014.

Directions

8. Written Directions were given by Judge Bowers (Tribunal Chairman) on 30th January 2014.

Hearing

9. An oral hearing took place before this Tribunal on 22nd April 2014 at the Tribunal's Hearing Centre at 10, Alfred Place, London WC1E 7LR.

10. At the hearing, Mr Sampson appeared on behalf of all 3 Applicants. Mr N.Siddiqui (the Respondent's Company Secretary) appeared on behalf of the Respondent and Mr Aslam from the Respondent's Agent also attended the hearing.

Evidence

11. Oral evidence was given by Mr Sampson and Mr Siddiqui and a large number of documents were adduced in evidence. These documents had been collated into a Bundle (by Mr Perez) and the Page and Tab references (below) refer to pages and tabs in the Bundle.

The Dispute

12. The Bundle includes (at Tab 5) a Schedule which had been completed by Mr Perez and on behalf of the Respondent, which set out the submissions of the parties in respect of each disputed item.

The Service Charge Year

13. The service charge year equates with the calendar year.

The Leases

14. The Leases contain the usual provisions for payment of estimated service charges in advance with the balance to be paid or credited when final accounts have been drawn up after the end of the year.

The Service Charge Proportion

15. It is agreed that each flat is liable to pay one third of the total service charges for the 3 flats.

2009

16. The service charge account for 2009 is at Page 4a.5.

17. Cleaning

£626-39 is the charge made.

There are invoices at 4a.12 to 23 – but they lack detail, containing references to Cleaning of Communal Area at £50 each month = £600 + 2 invoices for materials (£26-39).

The Applicants complain about the frequency and standard of the cleaning and there is no contrary evidence. The Applicants suggest £52-20 per unit = £156-60.

Doing our best on the scant evidence presented to us, we consider that we should allow one hour per week @ £7-50 per hour = £390 plus £26-39 for materials (as per the invoices at Pages 4a.24 and 4a.25) = **£416-39**.

18. £7-50 an hour is based on the more detailed invoices for 2010 – where cleaning is charged at £ 7-50 per hour.

£600 at £7-50 per hour = 80 hours. £156-60 per at £7-50 per hour = 20.8 hours.

The Tribunal has determined 52 hours.

Mr Mason agrees with this determination. What follows (in No.18) are my views and they are not to be attributed to Mr Mason.

I have set out this calculation in view of criticism – including observations (and decisions) in the Upper Tribunal and the High Court - that some decisions of the Property Chamber of the First-tier Tribunal are not based on evidence and/or have not been notified to the parties to be dealt with by the parties in advance of the decision(s).

In my view, this criticism has been misguided and I strongly suspect that some of it emanates from Judges whose legal careers have taken place in a atmosphere which is much more rarefied than that encountered on a day-to-day basis in the First-tier Tribunal (Property Chamber) where evidence is often scant and many litigants are unrepresented.

What were the Tribunal's options?

(a) The Tribunal could have plumped for either 80 hours or 20.8 hours - but neither is supported by evidence.

(b) The Tribunal could have said that evidence is lacking and allow nothing but this would have been unjust as it is conceded that some cleaning (to a reasonable standard) was done.

(c) The Tribunal could have reconvened the hearing to allow the parties to comment on the opinion of the Tribunal that 52 hours was appropriate. However, this would clearly have been disproportionate having regard to the amount at stake. Further, such exercise would have been pointless; in deciding on 52 hours, the Tribunal is not using its expertise, it is doing its best to reach a fair decision on scant evidence, as Property Chamber First-tier Tribunals have to do on many occasions.

19. <u>Lighting</u>

£125 is the charge made. Again, the evidence is scant and the Tribunal must do its best to reach a fair decision on such information as is available.

The Applicants submit that nothing should be allowed but, in the opinion of the Tribunal, this would be unfair as it is clear that some lighting was provided to communal areas.

We have concluded , on the balance of probabilities, that **£125** is a fair cost, taking into account:-

(a) No complaint is made about the charge of £355 for 2010;

(b) The size of the area to be lit. We do not have the exact dimensions thereof and we did not consider it necessary to inspect the Properties, but we have a general idea of the extent of the lighting required from the description of the Properties (see No.4 above).

(c) Our experience and expertise.

20. *This section (No.20) sets out my views, which are not to be attributed to Mr Mason.*

With regard to 19(c), our experience is above average in view of our professional experience. Further, we (in particular, Mr Mason) have expertise by reason of our qualifications and professional experience – including sitting in the Property Chamber of the First-tier Tribunal.

It is clear that we should use our expertise (Rule 3(d) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013. However, it has been suggested that before doing so, a Tribunal must indicate to the parties the basis of its claim to expertise and give the parties an opportunity of dealing with it.

There may be an exceptional case where this would be appropriate but, in my view, this is not necessary (and is, indeed, undesirable) in most cases and certainly it would have been a wholly disproportionate exercise in respect of this dispute over the sum of £125.

It should be borne in mind that I have been in legal practice for over 45 years and that to trawl through all my cases (even if this was now possible – which it is not) and pick out those relevant to this disputed item would be a Herculian task . Further, even if this task was completed and the results notified to the parties – how would that assist? Is it suggested that a party might challenge the information I provided or submit that my expertise was imagined rather than real and if so, who will judge these issues?

In my view, it should be borne in mind that this Tribunal has a body of knowledge which is built up over time and is available to be shared.

If a Tribunal member has to deal with a problem which arises in a particular case that might benefit from discussion with other members, there are other Tribunal members who can be consulted – although the final decision is, of course, a matter for the particular Tribunal member. This is the same process that has taken place for centuries in the Courts.

Further, in recent times, conferences for Tribunal members are held where issues which have arisen in cases are discussed.

No-one would suggest that a Judge should set out his/her experience in the field of personal injury before making an award of damages for personal injury.

Further, no-one would suggest that a Judge should set out his/her experience of criminal law before passing sentence in a criminal case, although it is well-known (within legal circles at least) that some Judges tasked with the most difficult and complex sentencing decisions are inexperienced in the field of criminal law.

Clearly, Judges consult colleagues, precedents and (nowadays) guidelines but there would be an uproar (and the likelihood of an increased sentence for contempt) if a criminal demanded to be informed of the basis for a Judge's expertise in criminal law, prior to sentence being passed. This observation also applies to the Judges who sit in the Court of Appeal and decide whether other Judges have made correct sentencing decisions.

Likewise, the "experts" on the Antiques Roadshow do not explain the sources of their knowledge . They are recognised as experts with a wealth of experience and access to relevant sources and that is the reason their valuations are broadcast.

Those who sit in the First-tier Tribunal (Property Chamber) are members of an "expert" Tribunal and should be respected as such. Tribunal members are appointed to make decisions – not to give evidence.

21. Maintenance

The charge is £1,498 (£500 each flat approx..)

Relevant invoices are at Pages 4a.26 to 32.

The Schedule (at 5a.3) sets out the cases of the parties.

The Applicants refer to:-

(i) The lack of detail on the invoices (which meant that there was the possibility of double charging and/or charging the Applicants a greater percentage of the cost than was appropriate).

(ii) That the Agreement for Sale of Flat 2 (Page 3a.1 - 4), dated 15th April 2008 , provides (on Page 3a.3) for the Respondent to make good certain defects within 6 months of completion, whereas some of the invoices refer to work during this 6 months period.

(Note that there was no agreement for sale in respect of Flat 3 adduced in evidence before us.)

The Respondent's case consists of assertions and a demand for justice (we have paid these invoices and should be reimbursed).

22. *This section (No.22) sets out my views, which are not to be attributed to Mr Mason. However, Mr Mason agrees that £750 should be allowed for Maintenance.*

The Tribunal's options were to:-

(a) Allow nothing as the Respondent had failed to justify any of the invoices – but this would have been unjust as the overwhelming probability was that the Applicants had benefitted to some extent.

(b) Issue summonses for witnesses to attend and/or documents to be produced by the contractors . This would have been unprecedented for disputes of this magnitude and may well not have produced any further relevant evidence. This option was clearly inappropriate.

(c) Conduct a detailed legal and factual investigation as to whether:-

(i) the defects were within the terms of the agreement for sale (Note that only certain defects were covered and we had only one agreement for sale in evidence);

(ii) the late invoices fell foul of Section 20B of the Landlord and Tenant Act 1985 – which is far from clear legal ground (see the discussion of Section 20 B in the Meadowbrook case BIR/00GG/LIS/2012/0073c at paragraphs 72 to 83 and in the Weekday Cross case BIR/00FY/LSC/ 2009/0020 at paragraphs 50 -79) and which had not been raised by the parties.

In my view, this would have been a disproportionate use of the Tribunal's resources and those of the parties and may well have led to criticism on the grounds that the Tribunal had raised a point which had not been raised by a party - see Triplerose v Grantglen [2012] UKUT 0204, where at Paragraph 14 of the Judgement, Judge Walden-Smith stated:-

"I echo the sentiments expressed by George Bartlett QC, as President, in *Beitov Properties Limited v Elliston Bentley Martin* that it is generally inappropriate for a tribunal to take a purely technical point (namely one that does not go to the merits or justice of the case) on the part of one side, when the issue has not been raised by a party in a party and party dispute."

Again this option was inappropriate –particularly in this case where - as in many service charge cases before the First –tier Tribunal (Property Chamber) - neither party was legally (or otherwise) represented.

(d) Allowing 50% (approx.) – which is what this Tribunal considered appropriate = **£750**. This was the fairest way in which this Tribunal could deal with this issue on the information before it and is the way such issues (of similar magnitude) have always been dealt with in the First-tier Tribunal (Property Chamber) and its predecessor.

23. *This section (No.23) sets out my views, which are not to be attributed to Mr Mason.*

There was no point in notifying this determination to the parties in advance of the decisions.

24. Management

The Respondent claims a management fee of 20% of the other charges (Page 4a.5). The Applicants contend for £88-16 for each flat (= £264 for the 3 flats), being 1/3 of the charge made (£793-44) – Page 5a.4.

The Respondent is entitled to reasonable fees for work reasonably done. Clearly, some management was done to a reasonable standard but the Applicants make generalised criticism of the work done. The evidence on this aspect of the matter is scant. No expert evidence was adduced. Scant evidence not an unusual occurrence in respect of disputed management charges.

The Tribunal, of course, has relevant expertise but it is only of limited use in this situation. The best this Tribunal can do, in the circumstances, is to determine that a 20% management fee is reasonable having regard to our decisions reducing the costs to which this 20% is to be applied.

25. Thus the liability for service charges for the 3 flats for 2009 is:-

Insurance (undisputed)	£1,717-81
Cleaning	£ 416-39
Lighting	£ 125-00
Maintenance	£ 750-00
	£3,009-20
Plus 20% Management	£ 601-84
	£3,611-04

I shall not repeat the observations I have made above in respect of 2009 - although those observations apply with equal force to the years dealt with below. Again, I emphasise that the observations are mine alone and that whereas Mr Mason agrees with all the determinations set out herein, the observations are mine alone and should not be attributed to Mr Mason.

2010

26. The Service charge account is at Page 4b.10.

27. Cleaning

The Respondent has charged £645-26. The Applicants contend that 25% (£161-32) should be allowed.

We allow 52 x £8 = **£416** – being one hour a week at £8 per hour.

28. Maintenance

The Respondent has charged £260-70 and has produced 3 invoices 4b.20 to 22 which amount to that sum.

The Respondent's justification for this charge is set out on Page 5b.3. We accept this evidence and we allow **£260-70.**

29. Management Fee

We allow 20% as in 2009.

30. Thus the service charge allowed for 2010 is:-

Insurance (undisputed)	£ 1,480-95
Cleaning	£ 416-00
Lighting (undisputed)	£ 355-00
Maintenance	£ 260-70
	£2,512-65
Management – 20%	£ 502-53
	£3,015-18

(Note that it is agreed that £47-01 will be deducted from the 2013 service charges – Page 5b.5 and 9.1).

2011

31. The Respondent charged £4,854-86 (Page 4c.5).

32. Cleaning

The Respondent charged £644-95. We allow **£416-00** – as per 2010 (No.27 above).

33. Lighting

We accept the Respondent's evidence on Pages 5c2 -3. It is common knowledge that variations in charges occur depending (partly) on the period covered by particular invoices. Our expertise informs us that overall, the amounts charged are within the parameters we would expect.

34. Maintenance

The Respondent has charged £1,579-10. There is a breakdown on Page 9.1 and the invoices are at Pages 11.2 to 11.7. The Respondent's case is on Page 9.2.

35. We accept the Respondent's evidence save that we consider it likely that the majority of the maintenance work also benefitted the ground-floor restaurant and we so find as a fact. The Tribunal has, therefore deducted 25% from the maintenance invoices – except for £11-34 (part of Invoice on Page 11.2) and £8-99 (Invoice on Page 11.3) which the Tribunal determines benefitted the flats and not

the restaurant. Thus, we allow:-

Page 11.2	£ 11-34
Page 11.3	£ 8-99
Page 11.4 (75% of £259-80)	£194-85
Page 11.5 (75% of £235-00)	£176-25
Page 11.6 (75% of £109-97)	£ 82-48
Page 11.7 (75% of £954-00)	£715-50
	£1,189-41

36. Management Fee
Our expertise leads us to the conclusion that there should be a cap of £650 bearing in mind the complaints of the Applicants and that the services provided to these flats were not as many as are provided to other flats (which have lifts, concierges, etc.). Thus, we allow £650 (which is less than 20% of the other charges).

37. Thus, the service charges for 2011 are:-

Insurance	£1,433-95
Cleaning	£ 416-00
Lighting	£ 387-72
Maintenance	£1,189-41
Management	£ 650-00
Total	**£4,077-98**

2012

38. As at the date of the hearing (22nd April 2014), the 2012 accounts had not been finalised.

39. The estimated service charge is £3,600 –and the calculation is on Page 4d.5.

40. The Tribunal considers it appropriate to allow the estimated service charge for 2012 in the sum invoiced (£3,600) as this is a lesser figure than that which we have allowed for 2011.

2013

41. At the date of the hearing (22nd April 2014), the 2013 accounts had not been finalised.

42. The estimated service charge is £3,988-80 – and the calculation is on Page 4e.5.. This figure is some 10% above the 2012 figure. We consider that a 5% increase only is appropriate at this (estimated) stage. We, therefore allow £3,780.

(Note that in respect of both 2012 and 2013, we are determining only the **estimated** service charges; the final charges can be challenged, if the Applicants consider it appropriate to do so, once the final accounts have been drawn up and the final service charges demanded.)

Section 20C and Reimbursement of Fees

43 . The Applicants have had to take proceedings before the Tribunal in order to obtain the reductions in the service charges demanded which we have found to be appropriate. Accordingly, the Orders set out at B and C above are just and equitable.

SIGNED: **A.J.ENGEL (Judge)**

A person may appeal to the Upper Tribunal – with permission of this Tribunal. Written application for permission to appeal must be made in writing to this Tribunal so that it is received by this Tribunal within 28 days of this document being sent to the person making the application.

An application for permission to appeal must identify the decision to which it relates, state the grounds of appeal and the result sought – see Part 6 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013