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FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	:	**LON/00AL/LSC/2015/0199**
Property	:	**138 Griffin Road, London SE18 7QA**
Applicant	:	**CAT Investments Limited**
Representative	:	**Mr Martin Paine from Circle Residential Management Ltd**
Respondent	:	**Miss Sherine Brown**
Representative	:	**No appearance**
Type of application	:	**Liability to pay service charges**
Tribunal member	:	**Judge Robert Latham** **Mr Ian Holdsworth FRICS**
Date and venue of hearing	:	**2 September 2015 at 10 Alfred Place, London WC1E 7LR**
Date of decision	:	**4 September 2015**

DECISION

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(1) The Tribunal determines that the sum of £4,245.32 is payable by the Respondent in respect service charges for the years 2009 to 2014.

(2) The Tribunal determines that the Respondent shall pay the Applicant £190 within 28 days of this Decision, in respect of the reimbursement of tribunal fees.

(3) The Tribunal further determines that the Respondent shall pay the Applicant £763.13 within 28 days of this Decision pursuant to Rule

13(1)(b) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013.

(4) Since the Tribunal has no jurisdiction over county court costs, fees and interest pursuant to Section 69 of the County Court Act 1984, this matter should now be referred back to the Woolwich County Court.

The Application

1. The Applicant landlord 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 tenant in respect of the service charge years 2000 to 2014.

2. On 17 December 2014, District Judge Thomas, sitting at Woolwich County Court set aside a default judgment which had been obtained in respect of 12 County Court actions. A number of issues were settled. However, the District Judge transferred the service charge issues to the Tribunal to determine the reasonableness of the service charges.

3. On 28 May 2015, the Tribunal gave Directions. The Respondent did not attend as she lives abroad in the UAE. On 8 May, the managing agents, Circle Residential Management Limited ("Circle Management") had written to the Respondent summarising the service charges that were claimed and inviting her to complete a schedule identifying the sums in dispute. She failed to respond to this letter.

4. The Tribunal directed the Respondent to provide a Statement of Case by 15 June setting out which of the service charges were in dispute and why. The Respondent failed to comply with this direction.

5. The Tribunal directed the Applicant by 10 July to make its responses to the schedule, or if one was not supplied, in a Statement of Case. On 15 July, the Applicant filed a detailed Statement of Case. At paragraph 7, the Applicant describes how the sum of £5,411.74 which is claimed is computed.

6. The Tribunal directed the Respondent to file a Reply by 24 July. On 16 July, the Respondent filed a Reply. She asserts that the Applicant committed fraudulent activities whilst acquiring the property. There seems to be no basis for this contention. She provided a Schedule setting out the service charges that are disputed. She does not dispute the excess service charge of £422.20 payable for 2009. She disputes all the interim service charges claimed for the years 2010 to 2014. She does not set out her grounds for disputing these.

7. The Tribunal considered that the matter could be fairly determined without a hearing. However, either party was permitted to make a written request for an oral determination. On 21 July, the Respondent requested an oral hearing.

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

The Hearing

9. The Applicant was represented by Mr Martin Paine, who is a Director of Circle Management. The Respondent has not appeared, despite having requested an oral hearing.

10. The Applicant has produced a Bundle of Documents which extends to 216 pages. We have the service charge accounts for the relevant years, namely 2009, 2010, 2011, 2012 and 2013. The service charge accounts for 2014 are not available. Whilst for the years 2009 to 2013, there has been a reconciliation between the budgeted and the actual expenditure, there is no such reconciliation for 2014.

The Background

11. The Respondent acquired her leasehold interest on 30 January 2009 (see p.24). The Applicant acquired the freehold interest on 18 June 2009 (see p.18). The Respondent has not paid any sums by way of service charges to the Applicant. There are three flats in the property. The Respondent's flat is at the rear of the ground floor and the basement. There are flats at the front of the grounds floor and on the first floor.

12. The lease is at p.24. The relevant provisions are summarised by the Applicant in its Statement of Case. The Respondent is obliged to pay 1/3 of the service charge (Clause 1.16). The accounting period is 1 January to 31 December (Clause 1.17). The tenant is required to pay an interim service charge. Where the interim service charge paid by the tenant exceeds the service charge for that period, the surplus is to be carried forward by the landlord and credited to the account of the tenant in computing the service charge in succeeding accounting periods (Clause 9.4).

13. The Applicant has not operated the service charge account in accordance with the lease. Where the interim service charge has exceeded the service charge for an accounting period, this has not been credited to the account for the subsequent period. It has rather been added to the reserves (see p.75). Ms Walpole explains how "it is the practice of the managing agent to use such service charge surpluses to offset future large service charge costs or future service charge contributions" (see [36.1] at p.13).

Our Determination

14. Mr Paine argued that the Tribunal should only have regard to the interim service charges that were demanded. We do not accept this. Given that the actual expenditure in the years 2009 to 2013 has now been determined, it would be wholly artificial to have regard to the interim service charge that was demanded, rather than the service charges that were actually expended. Were we merely to have regard to the interim service charges based on anticipated expenditure, it would still be open to the tenant to challenge that payability and reasonableness of the sums actually expended.

15. In an e-mail dated 27 May, Circle Management invited the Respondent to admit the interim service charges adding that this "does not prejudice your rights to challenge the actual expenditure at a later date". It would seem from an e-mail from the Respondent, dated 8 June 2015, that she was willing to compromise on this basis.

16. This approach does not commend itself to us. We rather have regard to the actual expenditure and the reconciliations that the landlord was required to make at the end of each accounting period pursuant to the terms of the lease.

17. We find that the following sums are payable:

(i): 2009: Excess service charge of £422.20 (p.74). This is not disputed by the Respondent (see p.217).

(ii) 2010: The Applicant claims two interim services charges of £450, a total of £900. The accounts are at p.76. The Applicant does not pursue the sum of £92.86 claimed for interest. Mr Paine was unable to assist the Tribunal when asked how the sum was computed and the basis upon which it had been contended that it was payable. Nothing was spent on repairing the demised premises. We were told that the insurance premium was somewhat lower than normal this year as there had been a partial refund of the premium paid by the previous freeholder. We find that the following sums are payable: insurance - £155.93; accounting - £62.00; management fee - £206.81. Total: £414.74.

(iii) 2011: The Applicant claims two interim services charges of £450, a total of £900. The accounts are at p.78. The Applicant does not pursue the sum of £217.92 claimed for interest. Nothing was spent on repairing the demised premises. We find that the following sums are payable: insurance - £389.53; accounting - £62.00; management fee - £240.00. Total: £691.53.

(iv) 2012: The Applicant claims two interim services charges of £450, a total of £900. The accounts are at p.81. The Applicant does not pursue the sum of £284.74 claimed for interest. We find that the following sums are payable: building repairs - £220; insurance - £287.38; accounting - £62.00; management fee - £240.00. Total: £809.38.

(iv) 2013: The Applicant claims two interim services charges of £450, a total of £900. The accounts are at p.85. The Applicant does not pursue the sum of £598.11 claimed for interest. We find that the following sums are payable: building repairs - £98.40; health & safety: £180.80; insurance - £300.74; accounting - £100.00; management fee - £270.00. Total: £949.94.

(v) 2014: The Applicant claims interim services charges of £1,377.54. The Applicant contends that this became payable on 25 December 2013. The budget for 2014 is at p.72. The total budget for the three flats is £8,265.20. The Applicant deals with this aspect of its claim at [34] of its Statement of case at p.11. The budget includes £1,200 for building

repairs and £2,099.20 for internal decorations and re-carpeting. It also includes two sums which the Applicant states it is withdrawing, namely £180 for electricity and £2,400 for "sundry/maintenance". This reduces the budget to £5,685.20. The interim service charge that is payable is 1/6 of this, namely £947.53.

We therefore find that a total of £4,245.32.

Refund of Fees and Application for Costs

18. The Applicant made an application two applications for costs pursuant to Rule 13 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013:

    (i) Under Rule 13(2) for the reimbursement of the hearing fee of £190 which it has paid. The Tribunal is satisfied that the Applicant had no option but to bring these proceedings to compel the Respondent to pay the service charges that are due under her lease. The Applicant has been largely successful. the Tribunal orders the Respondent to refund the hearing fee of £190 paid by the Applicant within 28 days of the date of this decision.

    (ii) Under Rule (1)(b), a penal costs order is sought in the sum of £2,353.10. Mr Paine contends that the Respondent has acting unreasonably in the conduct of these proceedings. The Tribunal had been satisfied that this application should be determined without a hearing. On 21 July, the Respondent had requested an oral hearing. However, having requested such a hearing, she had failed to attend or to notify the Applicant that she no longer required an oral hearing.

19. In considering the application for penal costs under Rule 13(1)(b), the Tribunal has regard to the guidance provided by HHJ Huckinson in *Halliard Property Co Ltd v Belmont Hall and Elm Court RTM Company Limited* LRX/130/2007; LRA/85/2008 in respect of the 2002 Act at [36]:

    "So far as concerns the meaning of the words "otherwise unreasonably", I conclude that they should be construed *ejustem generis* with the words that have gone before. The words are "frivolously, vexatiously, abusively, disruptively or otherwise unreasonably". The word "otherwise" confirms that for the purposes of paragraph 10 behaviour which was frivolous or vexatious or abusive or disruptive would properly be described as unreasonable behaviour. The words "or otherwise unreasonably" are intended to cover behaviour which merits criticism at a similar level albeit that the behaviour may not fit within the words frivolously, vexatiously, abusively or disruptively. I respectfully adopt the analysis of Sir Thomas Bingham MR (as he then was) in *Ridehalgh v Horsefield [1994] 3 All ER 848* as to the meaning of "unreasonable" (see paragraph 13 above) which I consider equally applicable to the expression "otherwise unreasonably" in paragraph 10 of schedule 12 to the 2002 Act. Thus the acid test is whether the behaviour permits of a reasonable explanation."

20. In *Ridehalgh v Horsefield,* Sir Thomas Bingham dealt with the word "unreasonable" in the context of a wasted costs order in the following terms:

> "'Unreasonable' also means what it has been understood to mean in this context for at least half a century. The expression aptly describes conduct which is vexatious, designed to harass the other side rather than advance the resolution of the case, and it makes no difference that the conduct is the product of excessive zeal and not improper motive. But conduct cannot be described as unreasonable simple because it leads in the event to an unsuccessful result or because other more cautious legal representatives would have acted differently. The acid test is whether the conduct permits of a reasonable explanation. If so, the course adopted may be regarded as optimistic and as reflecting on a practitioner's judgment, but it is not unreasonable."

21. The Tribunal is satisfied that an order for costs should only be made under Rule 13(1)(b) if on an objective assessment a party has behaved so unreasonably that it is only fair and reasonable that the other party is compensated by having their legal costs paid. This tribunal remains essentially a costs-free jurisdiction where an applicant should not be deterred from using the jurisdiction for fear of having to pay the other party's costs should she or he fail in their application. Were the tribunal to adopt an unduly punitive approach to any breach, it could have a chilling effect upon access to justice. Parties with good claims could be deterred from bringing them before this tribunal.

22. However, the Tribunal accepts that this is an exceptional case where it is appropriate to make such an order. Any party must have regard to the overriding objective in Rule 3 of the Tribunal Rules which is to deal with cases fairly and justly. This includes dealing with case in ways which are proportionate and in a cost effective manner. It is always open to a party to request an oral determination of a dispute. However, what is not acceptable is for an party to request an oral hearing and then fail to attend. This merely increases the costs incurred by the landlord. These may be passed on to the other tenants through the service charge. It also makes undue demands on the resources of the Tribunal. This is a case in which the tenant has failed to pay any service charges over many years. She has failed to advance any adequate case to justify her failure to do so.

23. Mr Paine seeks a penal costs order in the sum of £2,353.10. He claims 7.5 hours in preparing and attending the oral hearing (£1,875 + VAT of £375). He charges out his time at £250 per hour. Mr Paine is a director of Circle Management. He is a Fellow of Property Consultants Society. He is also a Member of the Institute of Residential Property Managers. He claims £250 per hour for the hearing (2.5 hrs); preparation (1 hr) and travel from Kingham in Gloucestershire (4 hrs). He further claims travel costs of £100.30 and copying charges of £2.80.

24. Having decided to make a penal costs order, the tribunal has a discretion in determining what sum to order. This should not exceed the costs reasonably occasioned by the unreasonable conduct of the opposing party.

However, it may be that an award in a lower sum is sufficient to reflect the Tribunal's disapproval of the party's unreasonable conduct.

25. We are satisfied that the sums claimed by Mr Paine are excessive. We accept the time claimed as being occasioned by the need to attend an oral hearing. This time would not have been expended had the tribunal determined the case on the papers. However, we would have considered £100 per hour for preparation and attending the hearing to have been reasonable, and £50 per hour for the travel time. This would have reduced the sum claimed to £763.10.

26. We have also asked ourselves what we consider to be an appropriate sum to mark our disapproval of the Respondent's conduct. This is a modest claim for service charges which does not raise any complex issues. We would have considered a sum of in the order of £750 to be an appropriate sum to mark our disapproval of the Respondent's conduct. This confirms our view that it is appropriate to make an award in the sum of £763.10.

Judge Robert Latham

4 September 2015

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.

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.

The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013

13. (1) The Tribunal may make an order in respect of costs only—

(a) under section 29(4) of the 2007 Act (wasted costs) and the costs incurred in applying for such costs;

(b)if a person has acted unreasonably in bringing, defending or conducting proceedings in ... a residential property case.....

(2) The Tribunal may make an order requiring a party to reimburse to any other party the whole or part of the amount of any fee paid by the other party which has not been remitted by the Lord Chancellor.