



**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)**

Case Reference : CAM/00KF/LSC/2017/0066

Property : 25 Lovelace Gardens, Southend on Sea SS2 4NT

Applicants : Howard Spencer Slowley & Mark Steven Bond

Representative : Mr Slowley in person

Respondent : Westleigh Properties Ltd

Representative : Carley Melling (Assoc Director, Gateway Property Management Ltd) & Luke Bloomfield

Type of Application : for determination of reasonability and payability of service charges [LTA 1985, s.27A]

Tribunal Members : G K Sinclair, G F Smith MRICS FAAV REV & J E Francis QPM

Date and venue of Hearing : Thursday 19th October 2017
at Southend Magistrates Court

Date of this decision : 18th December 2017

DECISION

- Decision paras 1–2
- Background paras 3–5
- Relevant lease provisions paras 6–10
- Material statutory provisions paras 11–15
- Inspection and hearing paras 16–30
- Discussion and findings paras 31–41

1. For the reasons which follow in this document the tribunal determines that the answers to the nine points in question are :

- a. S.146 notice fee (£240) not recoverable
- b. 2012 balancing charge (for this unit) £662
- c. 2013 balancing charge £684
- d. Interest on arrears, @ 8% conceded as not recoverable
- e. Legal expenses (£300) £300
- f. 2015 adjustment to 2009 charge (£1.80) conceded – nil
- g. 2014 balancing charge £359
- h. 2015 balancing charge £1 032
- i. 2016 balancing charge £634

2. The tribunal also makes an order pursuant to section 20C of the Landlord and Tenant Act 1985 to the effect that the landlord’s costs of and incidental to this application shall not be taken into account when calculating the service charge payable by the applicants during this or any future accounting period. However, as the applicants did not properly comply with the tribunal’s directions for the preparation of a bundle, etc no order is made under rule 13(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 (as amended) for the reimbursement of any tribunal fees paid by them.

Background

3. 25 Lovelace Gardens is typical of the Southend area, being a terraced house which was either constructed or at some stage long ago divided into two long leasehold flats – one on the ground floor and one above, each with its separate entrance from the lobby behind a shared front door. Westleigh Properties Ltd owns a large portfolio of such properties in Southend and Westcliff-on-Sea.

4. This dispute concerns amounts claimed by the landlord’s managing agent by way of service charge balancing charges for the years 2012 to 2016 inclusive, plus a fee in connection with a section 146 notice, interest on arrears, and legal expenses. The application form originally sought a determination of service charges dating back to 2008, but these had been the subject of earlier tribunal proceedings in 2012, as a result of which credits had been applied to the service charge account, as shown on the statement appearing at page 77 of the hearing bundle. While a copy of the 2012 decision¹ was not before the tribunal during the hearing it was later able to obtain a copy and consider what items that tribunal had refused to allow.

5. It is common ground that the bulk of the items claimed relate to management expenses, as little or nothing has been done by way of maintenance or decoration

¹ CAM/00KF/LSC/2011/0158 (upstairs flat) & CAM/00KF/LSC/2012/0013 (downstairs flat)

of the exterior for many years. While the applicant lessees wished to challenge the insurance premiums they had not provided any evidence of alternative costs for similar cover, so this was not pursued.

Relevant lease provisions

6. The lease in question is dated 28th October 1994 and was made between Anthony Robin Marcus and Alan John Bacon as lessor and Herbert Thomas Stenbridge as lessee. The lease granted a tenancy of the ground floor flat (excluding the external walls and structural elements within) plus one car parking space at the front. That in the bundle lacked page 2, so the precise extent of the demise and the term were unclear, but Mr Slowley said that he had a complete copy in his possession.
7. By clause 2(2) the lessee covenanted with the lessor to pay by way of service charge rent one half of the costs expenses and outgoings referred to in the third schedule incurred by the lessor in relation to the building. By clause 2(4) the lessee also covenanted to pay to the lessor all costs charges expenses which may be incurred by the lessor incidental to the preparation and service of a notice under sections 146 and 147 of the Law of Property Act 1925.
8. By clause 4(1) the lessor covenanted with the lessee to keep in good repair and decoration and to renew and improve as and when the lessor considered necessary the structure of the building, including roof, external walls, chimney stacks, gutters, etc. By clause 4(2) the lessor covenanted to decorate the exterior of the building as often as necessary, and by 4(3) to keep the building insured.
9. Clause 6(1) provides for forfeiture if the rent is unpaid for more than 21 days, etc. The lease appears to contain no provision for payment of interest on any arrears.
10. Amongst the various cost items listed in the third schedule the respondent relied in particular upon paragraph 7, which refers to all legal and other proper costs incurred in the running and management of the building and in the enforcement of covenants (other than the payment of the fixed annual rent) on the part of the lessee and of lessees of other parts of the building, insofar as they are not recovered from the lessee in breach.

Material statutory provisions

11. Section 18 of the Landlord and Tenant Act 1985 defines the expression "service charge", for the tribunal's purposes, as :
 - 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...
12. The overall amount payable as a service charge continues to be governed by section 19, which limits relevant costs :
 - a. only to the extent that they are reasonably incurred, and
 - b. where they are incurred on the provision of services or the carrying out of works, only if the services or works are of a reasonable standard.
13. The tribunal's powers to determine whether an amount by way of service charges

is payable and, if so, by whom, to whom, how much, when and the manner of payment are set out in section 27A of the Landlord and Tenant Act 1985. The first step in finding answers to these questions is for the tribunal to consider the exact wording of the relevant provisions in the lease. If the lease does not say that the cost of an item may be recovered then usually the tribunal need go no further. The statutory provisions in the 1985 Act, there to ameliorate the full rigour of the lease, need not then come into play.

14. Please also note sub-sections (5) & (6), which provide that a tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment, and that an agreement by the tenant of a dwelling (other than a post-dispute arbitration agreement)² is void in so far as it purports to provide for a determination in a particular manner or on particular evidence of any question which may be the subject of an application to the Tribunal under section 27A.
15. By section 168(1) of the Commonhold and Leasehold Reform Act 2002 a landlord under a long lease of a dwelling may not serve a notice under section 146(1) of the Law of Property Act 1925 in respect of a breach by a tenant of a covenant or condition in the lease until at least 14 days after it has been finally determined on an application to this tribunal that the breach has occurred, or the tenant has admitted the breach, or a court in any proceedings, or an arbitral tribunal in proceedings pursuant to a post-dispute arbitration agreement, has finally determined that the breach has occurred.

Inspection and hearing

16. The tribunal conducted a brief inspection of the outside front of the building on the morning of the hearing. A few slipped roof tiles were noted, but what was most apparent from the different colours of flaking paintwork to the external timbers was that no external redecoration had been carried out for decades. The paving slabs decking the car parking spaces were cracked but, as part of each flat's demise, are a matter for each lessee to repair. From the lease plan it is apparent that there are no internal communal areas save for a small lobby just inside the front door of the building. The tribunal was assured that the condition of the rear of the building was similar to that at the front.
17. At the hearing Mr Slowley acted on behalf of himself and his co-applicant and the lessor was represented by Ms Carley Melling (associate director of Gateway Property Management Ltd) and Mr Luke Bloomfield.
18. The tribunal was presented with a confusing bundle comprising just over 350 pages, without a list of contents, that had been prepared by the respondent's managing agent. However, the respondent's written statement of case identified nine principal issues raised by the applicants by letter to the tribunal dated 16th August 2017 (pages 43–44), including the various recurring elements that make up the balancing charge during the various years in dispute. These comprise management and accountancy fees, bank charges, postage, legal expenses, an out-of-hours emergency service, repairs and maintenance (2015 & 2016 only), and surveyors' fees (2015) in connection with major works that never took place.

² Eg. provisions in a lease stating that the landlord's accountant's certificate shall be conclusive, or that any dispute shall be referred to arbitration

19. The tribunal went through each of these points, and the service charge account and supporting documents for each year, in turn.
20. *Section 146 Notice – £240 fee* – the respondent relied upon clause 2(4) of the lease as justification for this expense. However, it was unable to identify the alleged breach of covenant by the lessee, whether it had been admitted, or whether a court or tribunal had determined that a breach had been proved. The lessor was therefore unable to satisfy the test in section 168 of the 2002 Act and the issue of such a notice was therefore premature.
21. *2012 end of year balancing charge* – A number of questions were raised here that would also apply to later years. The statement at page 135 showed the total costs for the building, of which the applicants are liable for half. While Mr Slowley wanted to dispute the cost of insurance he had done no research on this issue and was therefore unable to pursue it. By contrast the respondent had gone to the trouble of obtaining a statement, at page 295, from Nigel Amos of Lorica Insurance Brokers. This explained that the respondent had a large block policy placed by his company, and set out some of the benefits enjoyed by lessees from the cover provided.
22. On management fees and costs the respondent's case was that accountancy is undertaken for the whole portfolio by Vincent Accountancy, at a fixed rate of £20 plus VAT per unit. However, the accounts are extremely basic, with invoices to Westleigh being issued by Gateway itself. They had been disallowed by the 2012 tribunal. Bank charges are calculated at £6 per unit and postage at £5. The respondent sought to rely upon other decisions which purportedly allowed such costs but, when asked whether the RICS Blue Book³ (in its current or previous editions) said that postage should be accounted for separately and not subsumed within the management charge, Ms Melling said that she did not believe that it did.
23. *Interest on "arrears" of service charges* – These were claimed by the lessor by reference to the statement of account appearing at page 77, at an annual rate of 8% (which is what Gateway would apply) but in accordance with the lease. No such provision for charging interest (which is a common provision) could be found in the lease, so the point was conceded by the respondent.
24. *Legal expenses of £300* – While the applicants queried this briefly in the table at the bottom of their letter to the tribunal at page 43 an explanation by the lessor, at paragraphs 24 and 25 in its statement of case, was not challenged. The tribunal did ask, to which the response from Gateway was that the rate is £300 from its point of view. Standard procedure is that a chaser letter is sent, then a second. A report is run on who the debtor is, a Land Registry search undertaken to find out if there is a mortgage, then contact the lender and liaise with it about the arrears – usually involving several letters and calls. Before contacting the lender Gateway would telephone or e-mail the debtor to enquire. The tribunal

³ *Service charge residential management Code and additional advice to landlords, leaseholders and agents* (3rd ed, 2016), as approved by the Secretary of State under the Approval of Code of Management Practice (Residential Management) (Service Charges) (England) Order 2016 [SI 2016/518]

was told that it does not charge if there is no reply to just the 1st and 2nd letters.

25. *Adjustment made in 2015 to year 2009 – £1.80* – The tribunal made it clear that arguing about £1.80 was not a proportionate use of the tribunal's resources. It was dropped.
26. *2014 end of year balancing charge* – the statement for this year end includes a number of credits, which would appear to relate to the implementation of credits following the 2012 tribunal decision (which concerned earlier years in which the service charges had been paid). Again, the tribunal queried the separate charge for postage.
27. *2015 end of year balancing charge* – On the face of it this was another high charge, including some previously queried items. However, after the respondent received adverse comment about the size of its management fees in a tribunal decision dealing with another flat (at 59 Silverdale Avenue, Westcliff-on-Sea)⁴ owned by Mr Yuusif Shohet, the lessee of the upstairs flat in this building (25a), Mr Shohet asked it to take that into account when assessing an appropriate fee for this building. It therefore voluntarily applied credits for management and accountancy fees and bank charges in the 2016 statement.
28. Two new items appeared in this year's statement. First was a small charge of £9 per flat for an out-of-hours emergency service. This was queried by the tribunal, as the AXA policy, at page 346, covers an out-of-hours emergency service for the demised premises. The response was that the service that Gateway now contracted for is for the landlord's obligations, while AXA is only for the demised premises.
29. Secondly, a surveyor's fee was claimed for work undertaken by Hann Graham Ltd in preparing a specification of works for the repair and redecoration of the exterior and internal lobby at the building. The invoice, at page 168, is for £400 plus VAT. While Mr Slowley observed that no work was ever done (and the running statement of account at page 77 shows a charge for major works later being reversed) the fact remains that the external surveyor did prepare for the lessor a specification of works for the purpose of a section 20 consultation. Is it not entitled to be paid, and even if it later changed its mind about proceeding, is the lessor not entitled to be reimbursed?
30. *2016 end of year balancing charge* – In this year the management fee claimed was lower, at £360 for the building or £180 per flat. Substantial credits were also included, following the approach by Mr Shohet. For the first time a small sum (£90) is shown as expenditure on repairs and maintenance. This was probably a small repair to guttering observed by the tribunal on site. Again, postage was claimed.

Discussion and findings

31. This has not been a well-managed building. Apart from one very recent, modest repair the exterior of this building has been untouched by the lessor or its managing agents for many years. At the inspection a number of different layers

⁴ CAM/00KF/LSC/2011/0064

of peeling paint could be seen from ground level, with some of the fascia stripped to bare wood. Nothing has been done by the managing agent other than insure the building, generate a few very basic pages of accounts from its management software each year, and charge both a management fee and a separate one for the "accounts". It then charges bank charges (with no specific provision for that in the third schedule to the lease) and for postage. Each of these are notional rather than actual costs. The Blue Book does not support such charging for items that are considered part of a managing agent's general overheads that are included in its unit charge for normal or basic management tasks.

32. The tribunal therefore disallows all bank and postage charges.
33. As management remained consistently poor, save for a late attempt to prepare for a section 20 consultation – which was later abandoned – the tribunal considers that until the recent voluntary reduction the management fees are too high.
34. For 2012 the tribunal allows the insurance premium and the management fee of £200 plus VAT only. Contrary to the lessor's assertion, the 2012 LVT decision did not allow recovery of legal costs, so these are disallowed now.
35. For 2013 the management fee of £528 overall is reduced to £480, or £200 per flat plus VAT. The insurance premium is allowed. All other charges, including accountancy – which appears to be internal rather than contracted out (as no invoices from a third party have been produced), are disallowed.
36. In 2014 the insurance premium is allowed in full. Legal expenses of £300 incurred in debt collection, which were never properly challenged, are allowed. A number of credits were applied to claimed management expenses, producing negative amounts. Deducting postage, that yields a total of £718, or £359 per flat.
37. In 2015 the insurance premium, surveyor's fees and out-of-hours fee are allowed in full. As for the other items, the tribunal would reduce the management fee to £200, but credits given in the following year it does not wish to due to double count. Deducting the "cost" of postage the overall sum for this year is therefore approved in the sum of £2 064, or £1 032 per flat on the basis that adjustments have been made in 2016.
38. For 2016 the lower management fee of £150 plus VAT per flat is allowed, as are the other sums save for postage.
39. The tribunal considers that neither party has really covered itself in glory, with the applicants failing to produce a hearing bundle and the respondent's agent not quite complying with the tribunal's directions either. Gateway also failed to produce a copy of the 2012 tribunal decision, which would have given a more accurate account of how its charging structure had been considered previously. More generally, Gateway has seemed unable to manage the property effectively over the years.
40. It was therefore reasonable for the applicants to challenge the service charges

imposed for the years in question, and that they have achieved a partial victory. In the circumstances the tribunal determines, under section 20C, that the lessor's legal costs of and incidental to this application shall not be taken into account in calculating the service charge due from the applicants in this or any future year.

41. However, in the above circumstances the tribunal considers it inappropriate to make an order under rule 13(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 for the reimbursement of the applicants' issue or hearing fees.

Dated 18th December 2017

Graham Sinclair

Graham Sinclair
Tribunal Judge