12479

FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	CHI/00ML/LSC/2017/0026
Premises:		1st and 2nd Floor Rear Flat, 5 Brunswick Road, Hove, BN13 1DG
Applicant	:	Nicolette Houghton
Representative	:	ODT Solicitors
Respondent	:	5 Brunswick Road Hove Limited
Representative	:	Frank Wiyanta, Haines & Co
Type of Application	:	Determination of liability to pay and reasonableness of service charges under Section 27A of the Landlord and Tenant Act 1985
Date of Application:		16th May 2017
Tribunal Members	:	Judge S. Lal LLM
Date of Decision	:	19th October 2017

APPLICATION DETERMINED ON WRITTEN SUBMISSIONS

RULE 31 TRIBUNAL PROCEDURE (FIRST TIER TRIBUNAL) (PROPERTY CHAMBER) RULES 201

DECISION

The Application

1.This is an application under Section 27A of the Landlord and Tenant Act 1985 (the 'Act") where the Applicant is seeking a determination by the Tribunal as to what extent she is obliged to pay service charge under the lease dated 1st July 1994 made between AIB Finance Limited (1) and Lucy Kennet (2) (the "Studio Lease"). The Applicant also seeks an order for the limitation of the landlord's costs in the proceedings under Section 20C of the Landlord and Tenant Act 1985.

2. The parties have indicated that they are content for the application to be dealt with without a hearing.

The Applicant's case

3. 5 Brunswick Road, Hove is a period property converted into six flats held on long leases. The Applicant is the tenant under the Studio Lease and also a tenant of flat 5 of the property. The five flats contain a provision at part VIII of the First Schedule to their leases requiring them to pay 20% of the excess service charge for the property (totalling 100%). As tenant under flat 5, the Applicant has paid 20% of the excess service charge. However, she claims that she is not obliged to pay any excess service charge under the Studio Lease.

4. The five leases were granted in 1988, whereas the Studio Lease was granted in 1994 by AIB Finance Limited (as the original freeholders had been subject to mortgage possession proceedings).

5. The provisions of Part VIII of the First Schedule to the Studio Lease, in respect of the Applicant's liability to pay excess service charge, requires the Applicant to pay "such percentage as the Lessor in its absolute discretion decides to be a fair proportion".

6. The Applicant claims that clause 3 (b)(iii) of the Studio Lease obliges her to pay the excess service charge only where the Respondent incurs expenditure on the property which exceeds the aggregate amount payable by the lessees of all the flats in the property. The Applicant claims that this obligation cannot arise as the aggregate of the amounts payable by the other flats in the block in respect of excess service charge totals 100%.

7. The Applicant claims that one of the reasons she acquired the Premises was the fact that it contained no obligation to contribute towards the excess service charge and so gave her a favourable yield in investment terms. The Applicant states that she acquired the Premises to enable the Respondent to acquire the rest of the freehold of the property. She claims that at the time, there was a mutual understanding that maintenance would not be payable in respect of the Premises.

8. At the time of the purchase of the Studio Lease, the Applicant claims that the responses to the management enquiries made it clear that there was no obligation to pay excess service charge as the other flats contributed 100%.

9. In addition, the Applicant claims that the Respondent has never demanded service charge from the Applicant and the remaining five flats have borne 100% of all expenditure.

The Respondent's Case

10. The Respondent argues that the service charge provisions within the Studio Lease are clear and unequivocal. The Respondent claims that there is a requirement in the Studio Lease for the Applicant to pay a fair proportion of the maintenance expenditure by way of service charge, with such fair sum being at the absolute discretion of the freeholder.

11. The Respondent rejects the Applicant's argument that if the Applicant is obliged to pay the same percentage as the other flats, this would constitute 120% of the excess service charge being collected. The Respondent states that "any anomaly caused by the drafting of the leases, should be read so that a fair contribution is recovered, in accordance with the Clause" and that "any other interpretation results in unfairness to all of the lessees".

12. The Respondent refutes the Applicant's assertion that "the lease left no residual liability upon the flat, contained within the freeholder title, that this is wholly unsurprising when put properly into context".

13. The Respondent concludes that Clause 3(b)(iii) of the Studio Lease requires the Applicant to contribute towards the service charge and that as a beneficiary of the maintenance budget, it is only fair that the Applicant contributes an equal amount to the excess service charge (i.e. 16.6%) and that all the other lessees should pay the same percentage.

Decision

14. The Tribunal has considered the bundle of documents, including the Applicant's and Respondent's statements and the witness statements and correspondence provided by both parties.

15. This is an unusual case where the lessee of the studio flat has not historically paid any service charge contributions and the lessees of the other five flats have contributed equally to the service charge, irrespective of the size of the individual flats. It also appears that the lessee of the studio flat has benefited from the maintenance provisions in the same way as the other flats.

16. The liability of a lessee to pay service charge is determined by the provisions of the relevant lease, in this case the Studio Lease.
Clause 3(b)(i) requires the lessee to pay the "Basic Service and Maintenance Charge" of £100 mentioned in Part VII of the First Schedule in two half yearly payments on 24th June and 25th December each year. The Tribunal assumes that this sum is not in dispute.

17. Clause 3(b)(iii) provides as follows:

"If the expenditure incurred by the Lessors in any accounting period(as hereinafter mentioned) of twelve months in respect of the matters set out in the Third Schedule hereto (hereinafter called "the annual cost") and after making suitable transfer to a Reserve Fund in respect of future anticipated expenditure exceeds the aggregate amount payable by the lessees of all the flats in the Building in the accounting period in question (hereinafter called "the annual contribution" together with any unexpended surplus as hereinafter mentioned the Lessee shall pay to the Lessors within twenty-one days of the service of the certificate (as hereinafter provided for) an amount equal to the percentage mentioned in Part VIII of the First Schedule hereto (hereinafter called the "excess contribution") of the amount of such excess shown thereon which shall be recoverable from the Lessee in case of default as if the same were rent in arrear PROVIDED THAT if in any accounting period as aforesaid the annual cost is less than the annual contribution the difference (being the unexpended surplus) shall be accumulated by the Lessors and shall be applied in or toward the annual cost in the next succeeding or future accounting periods as aforesaid."

18. The percentage mentioned in Part VIII of the First Schedule is *"such percentage as the Lessor in its absolute discretion decides to be a fair proportion".*

19. The Tribunal notes that the provisions of clause 3(b) (iii) of the Studio Lease are identical to the provisions of clause 3(b)(iii) of the other leases save for the fact that in the other leases a specific 20% percentage is provided in Part VIII of the First Schedule.

20. The Applicant wishes the Tribunal to interpret Clause 3(b)(iii) so that the excess service charge cannot ever apply to the Applicant as the other lessees will always cover 100% of the excess expenses.

21. The Tribunal, however, interprets Clause 3(b) (iii) as a follow on from Clause 3(b)(ii) so that the Applicant's liability to pay any excess service charge arises if the amounts recovered from all lessees under clause 3(b)(ii) are insufficient to cover the "annual costs". On this interpretation, it is at this point that the Lessor can ask for a fair proportion from the Applicant, regardless of the fact that the other lessees are required to pay 20% of the excess service costs. It is also noted that the Lessor is able to make "a suitable transfer to a Reserve Fund in respect of future anticipated expenditure".

22. The Tribunal considers that Clause 3(b)(iii) of the Studio Lease envisages that the lessee will make a contribution to the excess service charge in certain circumstances, although it is admitted that the wording of Part VIII of the First Schedule leaves it open to dispute. The Applicant has in the past offered 10% based on square footage. However, the Tribunal rejects the central argument that she pays nothing at all for the reasons above.

23. The Tribunal does not have jurisdiction to determine what a fair proportion should be because the lease of the five flats is clear in that it refers to 20%. A "fair proportion" between the 6 flats may arguably be construed as 16.6% and the Tribunal can see no basis to find that the proportion for the other flats has ever been determined by floor space. They all pay equally regardless of floor space. Ultimately and looking forward the Tribunal feels it would be advisable to amend the Studio Lease/ other leases to include a specific percentage if this can be agreed by the parties. It would be in the interests of the five flats to have such an agreement as any prospective purchaser may well query the position of the studio lease under the present arrangements and 16.6% may well be an equitable amount as between all the flats.

24. For the reasons above, the Tribunal finds in favour of the Respondent. If the parties cannot agree a variation, an application to vary the leases could be made under Section 27 of the Landlord & Tenant Act 1987.

25. The Tribunal makes no further order.

26. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application to the First-tier Tribunal at the Regional office, which has been dealing with the case. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.

27. If the person wishing to appeal does not comply with the 28-day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28-day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.

28. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking

Judge S. Lal