11631

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**MAN/OOBN/LSC/2016/0011**
Property	:	**2 Alexandra Apartments, 36-38 Alexandra Road South, Whalley Range, Manchester M16 8LW**
Applicants	:	**Alexandra Apartments Management Company Ltd**
Represented by	:	**Fords Residential Management**
Respondent	:	**Ms J Baig**
Type of Application	:	**Landlord and Tenant Act 1985 – s27A Commonhold and Leasehold Reform Act 2002 Schedule 11**
Tribunal Members	:	**Mr J. Platt FRICS, FIRPM (Chairman) Mr J Faulkner FRICS**
Date	:	**20 January 2017**

DECISION

© CROWN COPYRIGHT 2017

DETERMINATION

1. The total amount of service charges currently recoverable by the Applicant from the Respondent for the years 2013, 2014 and 2015 is **£3,078.10.** An additional sum of **£25.98** will be recoverable by the Applicant from the Respondent upon demand.

2. No administration charges are recoverable by the Applicant from the Respondent

3. The Tribunal has no jurisdiction to award interest pursuant to Section 69 of the County Courts Act 1984. That is a matter for the County Court

4. The Tribunal makes no determination regarding costs

APPLICATION

5. This matter was transferred to the Tribunal by order of DJ Swan sitting at Wandsworth County Court on 6th January 2016.

6. The order of DJ Swan made no specific reference to the issues being transferred to the Tribunal. The Tribunal, therefore, interpreted the order by reference to the details of the claim submitted to Northampton County Court on 1st October 2015. Namely, unpaid service charges, land registry fees, interest and costs.

7. More detailed analysis of the statement of case and supporting evidence identified that the total sums shown as service charge arrears included some administration charges.

8. The Tribunal, therefore, interpreted the order of DJ Swan as requiring a determination as to the payability and reasonableness of service charges and administration charges.

9. Directions were issued by the Tribunal on 9th March 2016 with further directions being issued on 3rd June 2016 and (following a Case Management Conference) on 28th November 2016.

10. The Applicant has complied with those Directions to a substantial degree.

11. The Respondent has complied with the Directions to a limited degree.

THE ISSUES

12. The Applicant's claim was for outstanding service charges at 1st October 2015 amounting to £3,321.55 plus interest and costs.

13. Analysis of the Statement of Account for the Respondent identified that this sum included interest charges and administration charges.

14. The Tribunal, therefore, determined the issues to be payability and reasonableness of:

    - service charges
    - administration charges
    - interest on unpaid charges

THE LAW

15. The full text of s18, s19 and s27A of Landlord and Tenant Act 1985 and Schedule 11 Commonhold and Leasehold Reform Act 2002 is appended at appendix 1.

WRITTEN EVIDENCE ON BEHALF OF THE APPLICANT

16. The Applicant submitted the original Statement of Case prepared for the court, service charge accounts y/e 31st October 2013 and 2014, service charge draft budgets for y/e/ 31st October 2015 and 2016, schedule of service charge apportionments, a copy of the lease, various service charge demands, statement of account and correspondence between the parties.

17. In response to the Respondent's Statement of Case, the Applicant submitted a further statement of case together with supporting documents including, office copy entries, a.g.m. minutes and emails 2013-2015, copies of service charge demands and summary of tenant's rights and obligation.

18. Following further directions and a Case Management Conference, the Applicant submitted service charge accounts for years ending 31st December 2013, 2014 and 2015 together with further supporting evidence.

WRITTEN EVIDENCE ON BEHALF OF THE RESPONDENT

19. The Respondent submitted a brief statement of case asserting that the Applicant had used the wrong service charge apportionment. The correct apportionment as per the lease being 2.97% not 3.24%.

20. The Respondent asserted that service charges had not been reasonably incurred, that services were not provided to a reasonable standard and that she had not been provided with any service charge bills or notified of the actual costs for periods in excess of 18 months.

21. Despite being directed by the Tribunal, the Respondent provided no detail as to which service charges or administration charges she disputed, nor any detail of how or why she considered any of the services had not been provided to a reasonable standard. The Respondent also provided no details of which service charge demands or accounts she asserts were not received within 18 months of costs being incurred.

THE LEASE

22. The lease of Apartment 2, made 6th April 2004, defines the parties as: Ballforth Ltd "Lessor", Alexandra Apartments Management Company Ltd "Residents Company" and Dermot Craven Developments Ltd "Lessee".

23. Service charge is defined at 1.15 as:

means a sum being 2.97% of the costs expenses and outgoings from time to time incurred or to be incurred by the Residents Company in complying with its obligations specified in the Fifth Schedule or such other fair and proper percentage as the Lessor or the Residents Company may in its absolute discretion determine. '

24. The 5th Schedule contains the obligations of the Residents Company to the Lessor and the Lessee. This includes the usual provisions to keep the main structure and exterior of the building, the common parts, lifts landings and staircases in good and substantial repair. To maintain all landscaping and car parking areas and keep common parts clean and tidy. To decorate the external and internal common parts. To keep the building insured on behalf of the lessor against usual perils. To set aside such sums as the Residents Company shall require to meet future costs.

25. The Respondent's obligation to pay service charges is detailed at 2 and within Schedule 4 Part 1 para 4: *"To pay to the Residents Company by way of additional rent the Service Charge by equal quarterly payments in advance on 25 March 24 June 29 September and 25 December in every year".*

26. Schedule 5 requires the Residents Company to *"estimate ... in advance of the said Service Charge and shall deliver such estimate to the Lessee by way of demand for payment by the Lessee on the 30 June or 31 December in each calendar year"* and to deliver to the Lessee a certified summary of the service charge after the end of each calendar year. *"If the said certificate and summary show that interim payments ... exceed the*

Lessee's liability in respect of the year in question the balance shall be set off against the interim payment due on 30 June (and if necessary that due on 31 December) the following year".

27. Schedule 5 also provides for the Residents' Company *"to set aside such sums of money as the Residents Company shall in its absolute discretion require to meet such future costs which the Residents Company expects or anticipates to incur ....."*

28. The Applicant also relies on para 3.5 to assert it's right to recover administration charges:

    "To pay all costs charges and expenses (including solicitors' costs and surveyors' fees) incurred by the Lessor for the purposes of or incidental to the preparation and service of any notice under Section 146 of the Law of Property Act 1925 arising out of any breach or non-observance of any of the covenants on the part of the Lessee herein contained notwithstanding that forfeiture may be avoided otherwise than by relief granted by the Court. "

THE DELIBERATIONS AND DETERMINATIONS

29. Lease terms: There is an ambiguity as to whether advance service charges are payable on the usual quarter days or on 30 June and 31 December. Having regard to the rent payment dates in para 2 and the summary and certification requirements detailed in Schedule 5, the Tribunal interpreted the lease "as a whole" to require advance payments on 30 June and 31 December.

30. When the Tribunal convened to consider the evidence on 2nd June 2016 it was evident that the Applicant had only ever demanded on account service charges and had never provided the Respondent with a certified summary showing a balance at 31st December, as required by Schedule 5 of the lease. The Applicants have in fact been running a company financial year to 31st October and have provided summaries of service charge expenditure for that period in each year.

31. The Tribunal considered that it was in neither parties interests to make a determination in respect of 'on account' service charge demands, where the final sums due relating to actual expenditure had never been crystallised; especially as the Tribunal had been requested by Wandsworth County Court to determine the Respondent's liability. The Tribunal, therefore, directed the Applicant to provide the said summaries and certificates for each of the years in question.

32. After two sets of further directions and a Case Management Conference, the Applicant eventually provided certified accounts for years ending 31st December 2013, 2014 and 2015. They have not provided any certified statements reconciling the Respondents actual liability for each year, giving due credit for sums demanded on account. Notwithstanding this fact, the Tribunal considered that it had sufficient information to make a determination of the Respondent's liabilities.

33. The Applicant also failed to provide a statement detailing a summary of what sums were claimed under each heading for each of the years being claimed.

34. Using the information supplied, the Tribunal determined that it had no jurisdiction relating to any sums incurred or claimed prior to 1st January 2013 as liability for those sums had already been determined by the Courts.

35. The Tribunal concluded that the sums at issue were:

    a. service charges for the years 2013, 2014 and 2015
    b. administration charges and
    c. interest

36. The income and expenditure accounts provided on 9th December 2016 show the following total service charge expenditure for each of the relevant years:

2013	2014	2015
£31,176	£41,829	£ 29,821

37. The Applicant initially pleaded that the Respondent was responsible for 3.24% of relevant costs. The Respondent pleaded she was only responsible for 2.97%. The Applicant responded that their initial pleading was in error and agreed that the correct apportionment, in accordance with the lease, is 2.97%.

38. The Applicant's evidence includes a running statement of sums demanded from the Respondent. This includes sums demanded as 'on account' service charges (including contributions to reserves) of:

2013	2014	2015
£513.02	£513.02	£513.01
£513.02	£513.02	£513.01
£1,026.04	£1,026.04	£1,026.02

39. The Applicant's evidence also shows that the on account demands for each of the years in question included reserve fund contributions totalling £5,600. This equates to reserve fund contributions being demanded from the Respondent (at 2.97%) of £166.32 for each year.

40. The amounts demanded on account towards actual expenditure were therefore?

2013	2014	2015
£859.72	£859.72	£859.70

41. In the absence of any end of year certificate reconciling the actual sums due from the Respondent, the Tribunal made their own calculations in respect of each year:

	2013	2014	2015
Total Expenditure	£31,176.00	£41,829.00	£29,821.00
Apportioned at 2.97%	£925.93	£1,242.32	£885.68

42. The Respondent's statement of case asserts that no service charge demands were received within 18 months of expenditure being incurred and therefore, all sums are time barred in accordance with Section 20B Landlord and Tenant Act 1985. The Applicant has provided evidence of 'on account' demands being made for each of the relevant years.

43. When the Tribunal Directed the Applicant to provide the service charge summaries and certificates for each relevant year, it also directed that; *the Applicant shall advise why it considers recovery of the sums detailed within the said summaries and certificates is not time barred in accordance with Section 20B Landlord and Tenant Act 1985.*

44. The Applicant addressed this issue in the third witness statement of Lucy Ford which states:

The Applicant has provided the Respondent with Service Charge Demands consistently as shown in the Applicant's original evidence ....

In relation to 'relevant costs' they are all accounted for on an annual basis as per the accounts submitted. Therefore, the Applicant is not seeking to recover any costs "more than 18 months before a demand for service charges has been served"

45. For the years 2013 and 2014, the Tribunal disagrees.

46. Section 20(B) of the Act states:

(1) If any of the relevant costs taken into account in determining the amount of any service charge were incurred more than 18 months before a demand for payment of the service charge is served on the tenant, then (subject to subsection 2), the tenant shall not be liable to pay so much of the service charge as reflects the costs so incurred.

(2)Subsection (1) shall not apply if, within a period of 18 months beginning with the date when the relevant costs in question were incurred, the tenant was notified in writing that those costs had been incurred, and that he would subsequently be required under the terms of his lease to contribute to them by the payment of a service charge.

47. In *London Borough of Brent v Shulem B Association Limited* [2011] EWHC1663 Ch, Morgan J stated (at para 55) that any notification under the section must say "that those costs had been incurred" He interpreted this to mean "the relevant costs which were incurred more than 18 months before the relevant demand for payment of the service charge had been incurred" He further decided [at para 65] that the landlord must tell the tenant that he or she will be required under the terms of the lease to contribute to those costs.

48. The apportioned sums expended in each year exceeded the sums demanded on account:

	2013	2014	2015
Apportioned Actual Expenditure	£925.93	£1,242.32	£885.68
Amount demanded on account	£859.72	£859.72	£859.70
Deficit not demanded	-£66.21	-£382.60	-£25.98

49. The deficits incurred in 2013 and 2014 have not been demanded within 18 months and have, in fact, only been calculated in December 2016.

50. The Tribunal has not been provided with any evidence of notices having been served under Section 20B(2). The Tribunal does not consider the company accounts previously supplied for y/e 31st October 2013 and 2014 satisfy those requirements, as detailed by Morgan J (above). The recovery of these sums is hence time barred.

51. The maximum liability of the Respondent towards relevant costs in each of those two years is therefore, limited to the sums demanded on account, as detailed in para 40 above.

52. The Applicant has also demanded reserve fund contributions of £166.32 for each year. The lease (at 1.15 and Schedule 5) entitles the Applicant to demand contributions to be held on trust to meet future costs. The maximum sums recoverable from the Respondent for 2013 and 2014 are therefore, the total sums demanded on account as detailed in para 38 above but the Applicant will need to recalculate the level of sums currently held on trust in reserves.

53. The Applicants have fallen foul of the circumstances outlined in 7.16 of the RICS Service Charge Residential Management Code 3rd Edition which states:

    Unless the lease states otherwise, you should not use any reserve fund as a float for the credit of surpluses and the debit of any deficits. This practice can lead to costs being irrecoverable, by virtue of section 20B of the Landlord and Tenant Act 1985. Instead, you should advise your client of the consequences of not demanding any underpayments in accordance with the lease.

54. The Tribunal then moved on to consider whether those sums had all been reasonably incurred and were therefore, recoverable from the Respondent as relevant costs.

55. The Respondent was directed on 9th March 2016 to provide a statement detailing which items of service charges and administration charges are disputed and the reasons why the charges, or any part of the charges are disputed. The Respondent has failed to provide any detail of the charges disputed nor the reasons why. She has simply made statements to the effect that she does not believe that service charges have been reasonably incurred and that services are not provided to a reasonable standard. She has not particularised any of the services she believes to fall within either category nor provided any evidence of the reasons why.

56. The Tribunal had regard to all the evidence, including income and expenditure statements for each year and determines that all costs detailed within the service charge accounts are relevant costs reasonably incurred. From the Tribunal's experience the sums appear to be relatively modest.

57. The deficit of £25.98 for 2015 will only become due when demanded in accordance with the lease (within 18 months of all costs being incurred).

58. The Tribunal also considered the amount of money being demanded as reserves contributions. The Tribunal determines the sums demanded of £166.32 per annum to be a reasonable contribution and to be payable by the Respondent for each of the years 2013, 2014 and 2015.

59. The certified accounts to 31st December 2015 show an amount of £41,642 held in reserve. It will be evident from this determination that figure does not accurately reflect the level of uncommitted service charges demanded as reserves at a level of £5,600 per annum. For the avoidance of doubt however, the Tribunal determines that the total sums held in reserve of £41,642 to be reasonable and if anything, rather modest for a development of this age and size.

60. The Tribunal determines the total service charges currently recoverable by the Applicant from the Respondent for the years in question to be £3,078.10 made up of:

	2013	2014	2015
Contribution towards relevant costs	859.72	859.72	859.7
Reserve Fund contributions	166.32	166.32	166.32
	1026.04	1026.04	1026.02

61. The Tribunal also determines that the additional sum of £25.98 in respect of actual expenditure incurred during 2015, will be recoverable by the Applicant from the Respondent upon demand.

62. The Applicant also seeks recovery of Administration Charges related to debt recovery.

63. The Applicant relies on clause 3.5 of the lease as a contractual right to recover Administration Charges. The clause is reproduced in detail at para 27 above. It is the usual provision for the Lessor to recover costs incurred for the purposes of or incidental to the service of a notice under Section 146 of the Law of Property Act 1925 i.e. forfeiture.

64. The Respondent contends that this clause does not permit the Applicant to recover Administration Charges as claimed, but fails to particularise why.

65. The particulars of the lease detail the parties as:

   a. Ballforth Limited (hereinafter called the "Lessor" which expression shall where the context so admits include the successors in title of the Lessor)
   b. Alexandra Apartments Management Company Limited (hereinafter called the "Residents Company)

66. The Applicant has provided evidence to show that the Freehold Proprietor, i.e. the Lessor, is Fairhold Holdings (2005) Limited as successors in title of Ballforth Limited.

67. The costs the Applicant is seeking to recover as Administration Charges by virtue of Clause 3.5 have not been incurred by the Lessor. They have been incurred by the Residents Company. There is no provision within Clause 3.5 for the Residents Company to recover any costs incurred in debt recovery. The Applicant did not contend that any other clauses within the lease provide for recovery of these costs nor has the Tribunal received any application to vary the lease.

68. The Tribunal, therefore, determines that the Administration Charges claimed are not recoverable under the lease.

69. The Applicant also seeks recovery of interest charges levied on unpaid 'on account' service charges. The Respondent contends that there is no provision within the lease for recovery of interest on unpaid service charges. This is agreed by the Applicant who has sought to recover interest pursuant to Section 69 of the County Courts Act 1984 at a rate of 8%.

70. The Tribunal has no jurisdiction to award interest pursuant to Section 69 of the County Courts Act 1984. That is a matter for the County Court.

71. Within its final submission, the Applicant has requested recovery of the additional accountancy costs in preparing statements to 31st December each year, from the Respondent. This request has been interpreted by the Tribunal as a request for the award of costs against the Respondent pursuant to Rule 13 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013.

72. The Applicant advised why the company's financial year end is 31st October and contends that it has only been necessary to redraft accounts to 31st December because of the Respondent's wilful failure to pay service charges.

73. The Tribunal does not condone the non-payment of on account service charges. The Tribunal also does not condone the behaviour of the Respondent in seeking to challenge the reasonableness of costs incurred and the reasonable standard of services, whilst failing to comply with directions to particularise those statements. The Tribunal also does not condone the delaying behaviour of the Respondent in seeking an adjournment of a Case Management Conference then failing to attend nor in making representations to the Tribunal that the Applicant should provide additional information then objecting to the Tribunal directing the requested information be provided.

74. With respect to the Applicant's request, its company accounts and the service charge requirements of the lease are totally separate, unconnected requirements. The Respondent cannot be held responsible for the Applicant's failure to comply with those terms. It is also evident from this

determination that the Respondent's liability could not be crystallised (by herself or the Tribunal) without the relevant statements.

75. The Tribunal, therefore, determines that no costs shall be awarded pursuant to Rule 13 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013.

-------- END -------

Appendix 1 – The Law

Section 18 of the Landlord and Tenant Act 1985 ("the 1985 Act") provides:

(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 –
which is payable directly or indirectly , for services, repairs, maintenance, improvements or insurance or the landlord's costs of management, and
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 provides that

relevant costs shall be taken into account in determining the amount of a service charge payable for a period –
only to the extent that they are reasonably incurred, and 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: and the amount payable shall be limited accordingly.

Section 27A provides that

(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 -
the person by whom it is payable
the person to whom it is payable
the date at or by which it is payable, and
the manner in which it is payable.

Subsection (1) applies whether or not any payment has been made.
....
No application under subsection (1)...may be made in respect of a matter which – has been agreed by the tenant........

(5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.

SCHEDULE 11ADMINISTRATION CHARGES
PART 1REASONABLENESS OF ADMINISTRATION CHARGES

Meaning of "administration charge"

1 (1)In this Part of this Schedule "administration charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent which is payable, directly or indirectly—

(a)for or in connection with the grant of approvals under his lease, or applications for such approvals,

(b)for or in connection with the provision of information or documents by or on behalf of the landlord or a person who is party to his lease otherwise than as landlord or tenant,

(c)in respect of a failure by the tenant to make a payment by the due date to the landlord or a person who is party to his lease otherwise than as landlord or tenant, or

(d)in connection with a breach (or alleged breach) of a covenant or condition in his lease.

(2)But an amount payable by the tenant of a dwelling the rent of which is registered under Part 4 of the Rent Act 1977 (c. 42) is not an administration charge, unless the amount registered is entered as a variable amount in pursuance of section 71(4) of that Act.

(3)In this Part of this Schedule "variable administration charge" means an administration charge payable by a tenant which is neither—

(a)specified in his lease, nor

(b)calculated in accordance with a formula specified in his lease.

(4)An order amending sub-paragraph (1) may be made by the appropriate national authority.

Reasonableness of administration charges

2 A variable administration charge is payable only to the extent that the amount of the charge is reasonable.

3 (1)Any party to a lease of a dwelling may apply to a leasehold valuation tribunal for an order varying the lease in such manner as is specified in the application on the grounds that—

(a)any administration charge specified in the lease is unreasonable, or

(b)any formula specified in the lease in accordance with which any administration charge is calculated is unreasonable.

(2)If the grounds on which the application was made are established to the satisfaction of the tribunal, it may make an order varying the lease in such manner as is specified in the order.

(3)The variation specified in the order may be—

(a)the variation specified in the application, or

(b)such other variation as the tribunal thinks fit.

(4)The tribunal may, instead of making an order varying the lease in such manner as is specified in the order, make an order directing the parties to the lease to vary it in such manner as is so specified.

(5)The tribunal may by order direct that a memorandum of any variation of a lease effected by virtue of this paragraph be endorsed on such documents as are specified in the order.

(6)Any such variation of a lease shall be binding not only on the parties to the lease for the time being but also on other persons (including any predecessors in title), whether or not they were parties to the proceedings in which the order was made.

Notice in connection with demands for administration charges

4 (1)A demand for the payment of an administration charge must be accompanied by a summary of the rights and obligations of tenants of dwellings in relation to administration charges.

(2)The appropriate national authority may make regulations prescribing requirements as to the form and content of such summaries of rights and obligations.

(3)A tenant may withhold payment of an administration charge which has been demanded from him if sub-paragraph (1) is not complied with in relation to the demand.

(4)Where a tenant withholds an administration charge under this paragraph, any provisions of the lease relating to non-payment or late payment of administration charges do not have effect in relation to the period for which he so withholds it.

Liability to pay administration charges

5 (1)An application may be made to a leasehold valuation tribunal for a determination whether an administration 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)Sub-paragraph (1) applies whether or not any payment has been made.

(3)The jurisdiction conferred on a leasehold valuation tribunal in respect of any matter by virtue of sub-paragraph (1) is in addition to any jurisdiction of a court in respect of the matter.

(4)No application under sub-paragraph (1) may be made in respect of a matter —

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.

(6)An agreement by the tenant of a dwelling (other than a post-dispute arbitration agreement) is void in so far as it purports to provide for a determination—

(a)in a particular manner, or

(b)on particular evidence,

of any question which may be the subject matter of an application under sub-paragraph (1).

Interpretation

6 (1)This paragraph applies for the purposes of this Part of this Schedule.

2)"Tenant" includes a statutory tenant.

3)"Dwelling" and "statutory tenant" (and "landlord" in relation to a statutory tenant) have the same meanings as in the 1985 Act.

4)"Post-dispute arbitration agreement", in relation to any matter, means an arbitration agreement made after a dispute about the matter has arisen.

5)"Arbitration agreement" and "arbitral tribunal" have the same meanings as in Part 1 of the Arbitration Act 1996 (c. 23).