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FIRST-TIER TRIBUNAL PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference :	CHI/00HN/LSC/2013/0036
Property :	Flat 4(D), 16 Sea Road, Boscombe, Bournemouth, Dorset BH5 1DB
Applicant :	Mr Jose-Vicente Vivo (the Landlord)
Representative :	Mr C Gair of counsel
Respondent :	Mr T C Gurban (the Tenant)
Representative :	---
Type of Application:	Transfer from the County Court for determination of service charges
Tribunal Members :	Judge P J Barber — Chairman Mr T E Dickinson BSc FRICS — Valuer Member Mr J Mills — Lay Member
Date and venue of Hearing :	4th September 2013, Court No. 8 Bournemouth County Court, Deansleigh Road, Bournemouth, Dorset BH7 7DS
Date of Decision:	11th September 2013

DECISION

Decision

1. (a) The Tribunal determines that the reasonable service charges payable by the Respondent in respect of the Flat for each of the following service charge years is as follows :-

March 2010 – September 2010

£ 74.02

September 2010 – March 2011

£310.80

March 2011 – September 2011

£310.80

Excess

£396.25

September 2011 – March 2012

£476.20

March 2012 – September 2012

£476.20

1. (b) The Tribunal determines in regard to the application under Section 20C of the 1985 Act that no order shall be made.

Reasons

INTRODUCTION

2. This application was issued in Northampton County Court (Case No. 2YN27042) by the Applicant on or about 29th November 2012, transferred to Bournemouth and Poole County Court and then transferred to the Tribunal by order of District Judge Willis on 25th March 2013 for determination of the balance of the claim for service charges. The total amount claimed in the County Court was £4,937.62 including the following elements of service charge :-

	£
Service Charge	
March 2010 – September 2010	292.77
Service Charge	
September 2010 – March 2011	529.55
Service Charge	
March 2011 – September 2011	529.55
Service Charge	
Excess	683.25

Service Charge

September 2011 – March 2012 682.45

Service Charge

March 2012 – September 2012 682.45

The Respondent Mr Gurban is the leaseholder of Flat 4, 16 Sea Road, Boscombe, Bournemouth, Dorset BH5 1DB ("the Flat"), being part of a building collectively comprising six flats in total, at 16 Sea Road, Boscombe aforesaid ("the Block"). The Tribunal is required to determine reasonableness of the service charges only, for the periods referred to in the above claim. The managing agent for the Block throughout the relevant period during which the disputed service charges arose was Guthrie Hills Marchant ("GHM") of Lymington, Hampshire.

3. Directions were issued in this matter on 9th April 2013 and further directions given on 2nd July 2013, inter alia requiring the parties to file their respective statements of case, replies and bundles of documents in the matter. The further directions issued, required the Applicant to file and serve a copy of the management agreement with GHM and allowed an extended period for the Respondent to file his statement of case, until 30th July 2013. In the absence of any reply by the Respondent, the Tribunal office wrote again to the Respondent on 1st August 2013 pointing out the need for the Respondent to provide his statement of case as a matter of urgency, but despite this no statement or any other papers or response had been filed by Mr Gurban.

THE LEASE

4. The Lease of the Flat is dated 11th December 1996 and is for a term of 99 years from 29th September 1996. The obligation to pay service charges is at Clause 4(1) and as set out in the Fifth Schedule to the Lease :-

"4.1 The Lessee hereby covenants with the Lessor to contribute and pay a quarter part of the costs expenses outgoings and matters set out in the Fifth Schedule hereto"

The Fifth Schedule to the Lease sets out in detail the costs, expenses and matters in respect of which the Lessee is to contribute in relation to service charges for the Flat. Clause 4(4) of the Lease further provides that the accounting year shall commence on the 29th September in each year.

THE LAW

5. Section 19(1) of the Landlord and Tenant Act 1985 ("the 1985 Act") provides that :

"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 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."

6. Section 20 of the 1985 Act provides that :

(1) Where this section applies to any qualifying works or qualifying long term agreement, the relevant contributions of tenants are limited in accordance with subsection (6) or (7) (or both) unless the consultation requirements have been either –

(a) complied with in relation to the works or agreement, or

(b) dispensed with in relation to the works or agreement by (or on appeal from) a leasehold valuation tribunal.

.....

(5) An appropriate amount is an amount set by regulations made by the Secretary of State; and the regulations may make provision for either or both of the following to be an appropriate amount-

(a) an amount prescribed by, or determined in accordance with, the regulations, and

(b) an amount which results in the relevant contribution of any one or more tenants being an amount prescribed by, or determined in accordance with, the regulations.

(6) where an appropriate amount is set by virtue of paragraph (a) of subsection (5), the amount of the relevant costs incurred on carrying out the works or under the agreement which may be taken into account in determining the relevant contributions of tenants is limited to the appropriate amount.

The "appropriate amount" prescribed by Regulation 6 of The Service Charges (Consultation Requirements) (England) Regulations No. 1987 of 2003, ("the 2003 Regulations") is £250.00.

Regulation 4(1) of the 2003 Regulations provides that Section 20 of the 1985 Act shall apply to a qualifying long term agreement if relevant costs incurred under the agreement in any accounting period exceed an amount which results in the relevant contribution of any tenant, in respect of that period, being more than £100.

7. Sub-Sections 27A (1), (2) and (3) of the 1985 Act provide that :

"(1) An application may be made to a leasehold valuation 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 a leasehold valuation 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 cost, 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.

8. "Service Charges" are defined in Section 18 of the 1985 Act as follows

(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, 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

18(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.

INSPECTION

9. The Tribunal`s inspection took place in the presence of Mr Nathan Gooch of GHM and the Respondent Mr Gurban.

10. The Flat is a first floor flat in the Block, constructed in the late Victorian or early Edwardian period, on the corner of Sea Road and Hawkwood Road. The main side flank wall of the Block fronts on to Hawkwood Road. There is a café at ground floor level fronting Sea Road, with a basement underneath. The entrance door to the flats is directly off the pavement on Hawkwood Road; the Block is arranged

over three floors under a pitched and slate covered roof; the external elevations of the Block were not in the best decorative order. There is a small single storey extension at the rear, including a bin store, as well as the entrance door to Flat 1a. Inside the main entrance door, a door leads to the basement and also the utility meters. The floor, stairs and landing beyond the main entrance door are laid to carpet and the walls are emulsion painted. The Tribunal noted peeling of paint adjacent to external areas where either downpipes were missing or guttering was poorly detailed. The bin store doors fronting on to the pavement on Hawkwood Road, were unlocked. Access to Flat 2 is obtained from the ground floor communal entrance hall; entrance to Flats 3 & 4 is from the first floor landing and entrance to Flats 5 & 6 is from the second floor landing. The Tribunal was not requested to inspect the interior of the Flat and accordingly did not do so.

HEARING & REPRESENTATIONS

11. The hearing was attended by Mr Gair of counsel for the Applicant, together also with Mr Chris Hill of GHM. Mr Rob Harding attended as an observer. The Respondent Mr Gurban also attended. Mr Gurban requested an adjournment on the grounds that he had not had enough time to file a statement of case or any bundle of documents. Mr Gurban said that he had been working on production of the required papers, but towards the end of July 2013, his young child had knocked into his computer and all his work had been lost. Mr Gurban said he had family problems and was a diabetic and suffering from stress. After a short adjournment to allow Mr Gair to take instructions, Mr Gair opposed the application for an adjournment on the basis that Mr Gair had had since March 2013 to put his statement of case together, that he had been granted an extension of time as a result of the further directions and also reminded of the urgency, as a result of the letter sent to him by the Tribunal dated 1st August 2013. Mr Gair submitted that Mr Gurban could have sought an adjournment much earlier; he said the Applicant had already incurred the cost of preparing for the hearing and was faced with financial difficulty in regard to the Block since a sum in the region of £13,000 is now owing in service charge arrears by all lessees. After a further short adjournment the Tribunal indicated that an adjournment would not be allowed since Mr Gurban had had ample time to file his statement of case and, despite written and telephone reminders from the Tribunal office, had failed to do so and accordingly in the interest of justice and fairness, taking account of the financial deficit for the Block, the matter should go ahead today.
12. Mr Gair advised the Tribunal that the Applicant wished to withdraw two elements of the claim being those relating to insurance and electricity charges; Mr Gair said that having looked further into the accounts and invoices, it had become clear that the insurance includes cover for both the residential and commercial parts of the Block and accordingly some apportionment and adjustment is necessary. Similarly in regard to electricity, Mr Gair advised that until recently a single meter had served both the residential and commercial areas and again, some further apportionment and adjustment would be needed. Mr Gurban said that if he had known that these elements were to be withdrawn, he would have offered a settlement for the remainder of the claim.

The Tribunal formally consented to the withdrawal of the elements of the service charges relating to electricity and insurance, on the basis that the figures currently available are plainly incorrect and do need adjustment which it will take some time for the Applicant to calculate properly. Adjusted demands will follow and Mr Gurban will still have the right to challenge those himself if he remains of the view that the adjusted charges are unreasonable.

13. Mr Gair submitted that it had been made more difficult for the Applicant to prepare for the hearing, as a result of the Respondent not having submitted a statement of case, resulting in the Applicant being unclear as to precisely which elements of the service charges were actually disputed by Mr Gurban. Mr Gurban clarified by advising that the elements of service charges which he disputes are as follows :

    2009/10

    Cleaning / Bin Store Door / Mortar Joints / Property Certification / Repairs to pipes

    2010/11

    Cleaning / Property Certification / Major Works / Repairs to Rain & Soil Pipes / Repair to Hopper / Fixing bolt to bin store / Leak damage / leak repairs

    2011/12

    Cleaning / Dock Lock

    At this point Mr Gair requested an early lunch adjournment so that, in the light of the information just provided by Mr Gurban, he could seek some urgent instructions from Mr Hill.

14. Following an early lunch adjournment, the Tribunal reminded the parties that they should include in their respective closing statements, any submissions in regard to the Respondent`s claim for an order in relation to the Applicant`s costs in these proceedings pursuant to Section 20C of the 1985 Act.

15. Mr Gair submitted in regard to cleaning costs for each of the three years in question, that the charges averaged £52 per month and that they were reasonable. Mr Gurban said the position was totally opposite and that the cleaning had been sub-standard ever since he purchased the Flat in early 2010 and that he could have done each cycle of cleaning himself in only about an hour. Mr Gair handed to the Respondent and to the Tribunal a copy of a decision in the case of *Bluestorm Ltd –v- Portvale Holdings Ltd [2004] EWCA Civ 289*; Mr Gair submitted that the decision showed that a tenant remained liable for service charges since they could not be set-off against any loss claimed by a tenant for alleged failure to repair, where it was the tenant`s failure to pay the charges that had caused the landlord`s inability to do work.

16. 2009/10 – In regard to the work to the bin store door costing £895.00, Mr Gair submitted that no evidence had been submitted that the work was not required; it was necessary owing to issues with vandalism and trespass by drug takers in the locality. Mr Gurban said his concern was not that the cost was too high, but that the old metal shutter could have been repaired much more cheaply.

17. In regard to the work to the mortar joints at a cost of £255.00, Mr Gair submitted that the work had been done and the cost was reasonable; Mr Gurban said the repair was predominantly for the benefit of the café / commercial premises. Discussion took place in regard to the definition of "the Building" in the Lease which excluded the café. Mr Gair accepted it was not entirely clear from the invoice where the mortar joints which had been repaired were. In regard to the repairs to pipes at a cost of £752.58, Mr Gurban again suggested that the pipes in question were common to both residential and commercial parts. Mr Gair accepted that this may be the case and mentioned that Mr Gurban had suggested a possible apportionment of 70:30 which might apply in regard to division of the costs as between the residential and commercial parts. Mr Gurban had made no submissions or produced any evidence to support this apportionment of costs. Neither party was prepared or in a position to make a case for the correct interpretation of the lease on this point. Mr Gair said he would leave it to the Tribunal to decide whether the invoice was applicable and if so what apportionment or division should be applied.

18. 2010/11 – In regard to Property Certification (an accountants' report) at a cost of £245.00 & VAT, Mr Gurban said the document had not been "produced" to him as required by Clause 4(3) of the Lease and that it was not sufficient for the Applicant to say he could visit GHM`s offices in Lymington to inspect it. In regard to the major works, Mr Gair said that the total cost was £2,580.00, but the Applicant accepted that no more than £250 would be levied within the service charges for the Flat, to reflect the fact that there had been no advance consultation or dispensation obtained, as would have been required under Section 20 of the 1985 Act. However Mr Gair accepted that the amount claimed for the "Service Charge Excess" of £683.25 needed to be adjusted to allow for the above. In regard to the Repairs to Rain & Soil Pipes at £752.58, and the Hopper at £57.22, Mr Gair submitted that the same argument in relation to the work affecting both residential and commercial elements was applicable and that again he would leave it to the Tribunal to decide whether and how to apportion the costs arising. In regard to fixing the bin store bolt at a cost of £20.00, Mr Gair said the lock had previously been vandalised and on the face of it, required repair. Mr Gurban submitted that the lock had not been vandalised and the problem was owing to the key pads on the old lock sticking in cold weather; he said the new bolt was not an effective solution. In regard to the leak damage at a cost of £168.00, Mr Gurban said this related to Flat 5 and that an insurance claim should have been made to cover the £168.00 cost, Mr Gair initially said the insurance excess was £250.00 but later checked and confirmed it had actually only been £100.00 at this time. In regard to £25.00 spent on leak repairs, Mr Gurban complained that this was a high charge for someone merely looking at the problem, rather than dealing with it. Mr Gair submitted that it had been necessary to ascertain the nature of the problem and the charge was reasonable and not disproportionate.

19. 2011-12 – In regard to the £154.51 locksmiths charge, Mr Gurban said that locks should not constantly need changing. Mr Gair said that the work related to a lock having been "ripped off" the bin store door and was again necessary and reasonable, on the face of it.

20. The Tribunal requested the Applicant to provide calculations regarding the adjustments to the service charges in question, to take account of the withdrawal of the elements relating to insurance and electricity. After a further short adjournment Mr Gair advised that the amounts of the claim relating to service charges as transferred for determination by the County Court as referred to in paragraph 2 above, are now adjusted as follows :-

Original Claim	Adjusted Claim
292.77	74.02
529.55	310.80
529.55	310.80
683.25	396.25
682.45	476.20
682.45	476.20

£ 2044.27 = Adjusted Total Claim

The adjusted total claim takes account of the withdrawal for further review by the Applicant of the elements of service charge relating to insurance and electricity, as well as the capping of the contribution by the lessee for major works at £250.00 in 2010/11 and allowance for the fact that an insurance claim could have been made in respect of the water leak, also in 2010/11.

21. In closing, Mr Gurban submitted that the proceedings had been unnecessary and that he had had little information from the Applicant to enable him to calculate what was properly due. In regard to section 20C costs, Mr Gurban said that even today the Applicant had had to withdraw part of his claim and that he, the Tenant, should not be punished for the Applicant`s failings. Mr Gair submitted that Mr Gurban had failed to comply with both sets of directions in the case and had provided no statement of case which would have enabled the Applicant to deal with some of the issues beforehand. Mr Gair said that Mr Gurban had simply not paid any of his service charges since 2010 although he must have known that moneys would be due. Mr Gair said costs could have been saved if only Mr Gurban had assisted in narrowing the issues and setting his points of dispute in context, prior to the hearing itself.

CONSIDERATION

22. We, the Tribunal, have taken into account all the oral evidence and the case papers, including those particularly brought to our attention, and the submissions of the parties.

23. The Tribunal noted that despite directions having initially been issued in March 2013 requiring Mr Gurban to file a statement of case and the time being subsequently extended following his request and reminder telephone calls and the letter dated 1st August 2013, Mr Gurban had failed to provide any bundle or statement of his case.

24. Cleaning 2009/12 – the Tribunal is of the view that the amounts in the estimates are not unreasonable; although Mr Gurban said he could have done the work himself much cheaper, that did not allow for the cost of necessary

insurances and equipment which any contractor should have. Accordingly the cleaning costs throughout the period are considered reasonable.

25. 2009/10 – in regard to the bin store door issue, no coherent evidence had been filed by Mr Gurban to support any view that the work and cost involved were not reasonable and accordingly the Tribunal concludes that the sum is reasonable. In regard to the mortar joints and repairs to pipes, the Tribunal notes that some of the cost may relate to both the residential and café premises but in the absence of clear evidence and explanation as to exactly which areas the work related to, the Tribunal is simply not in a position to make any determination.

26. 2010/11 – the Tribunal considers in the absence of any clear evidence to the contrary, that the cost of Property Certification is on the face of it, reasonable. The Tribunal notes the adjustment for the major works costs offered by the Applicant, reducing the relevant Service Charge Excess from £683.25 to £396.25.

27. In regard to the repairs to rain & soil pipes and the hopper, given that these relate but in an unclear way to both residential and commercial premises, the Tribunal was left by the parties in a difficult position. There was a potential difference of opinion between them about whether costs of repairs to the structure and exterior of the Block should be apportioned between the residential and commercial premises, or whether there should a horizontal separation of repairing responsibilities. Neither party had submitted any evidence or statement of case on this point. Counsel for the Landlord said that he left this for the Tribunal to decide but the Tribunal has no submissions and no coloured plans attached a lease.

28. In the absence of proper evidence the Tribunal finds the costs are reasonable. However we encourage the parties to meet and make a considered decision on this point. It may also be a matter that the parties wish to make submissions about when and if the case returns to the County Court.

29. The cost for fixing the bolt at £20.00 is reasonable on the face of it and in the absence of clear evidence to the contrary. The Tribunal notes the adjustment for the insurance claim which should have been made, offered by the Applicant being a £17.00 reduction reflecting a 25% share of the £168.00 cost (less the £100.00 excess). The exploratory cost of £25.00 in regard to the leak is considered reasonable in the absence of clear evidence to the contrary.

30. 2011/12 – there were differences between the parties in regard to the necessity for the locksmiths work; the Tribunal took account of references made by both parties to drug dealing activity in the vicinity of the Block and in all the circumstances it seems plausible, that the work was required and as such the Tribunal deems the cost reasonable.

31. In regard to the application for an order by Mr Gurban in relation to the Applicant`s costs pursuant to Section 20C of the 1985 Act, the Tribunal notes that the Respondent had wholly failed despite extended opportunities, to comply with directions in the case, and had failed to pay any service charges at all since 2010. Costs could have been saved by the Applicant if the Respondent had replied to directions and acted properly so as to narrow the issues in advance of the hearing. Accordingly no order is made under Section 20C.

32. We made our decisions accordingly.

Judge P J Barber (Chairman)

A member of the Tribunal
appointed by the Lord Chancellor

Appeals :

1. 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.

2. 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.

3. 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.

4. 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.