9133

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/00AH/LSC/2012/0839**
Property	:	**Flat B, 28 Harold Road, Upper Norwood, London SE19 3PL**
Applicant	:	**Ms W J Nunn and Mr S G Clacy (freeholders)**
Representative	:	**Not applicable**
Respondent	:	**Mrs Carole Rose-Marie Hylton (leaseholder)**
Representative	:	**Not applicable**
Type of Application	:	**For the determination of the reasonableness of and the liability to pay a service charge**
Tribunal Members	:	**F Dickie** **W R Shaw, FRICS**
Date and venue of Hearing	:	**19 June 2013** **10 Alfred Place, London WC1E 7LR**
Date of Decision	:	**26 July 2013**

DECISION

Decisions of the tribunal

(1) The tribunal determines that:

a. the sum of £ 1300.33 is payable by the Respondent in respect of service charges for the year 2010

b. The sum of £932.80 is payable by the Respondent in respect of service charges for the year 2011

c. The sum of £1361.68 is payable by the Respondent in respect of service charges for the year 2012

d. No administration charges for late payment are payable

(2) The tribunal makes no order for the reimbursement of the Applicants' fees.

(3) The matter is to be transferred back to the Croydon County Court.

The application and background

1. The Applicant seeks a determination pursuant to s.27A of the Landlord and Tenant Act 1985 ("the 1985 Act") and Schedule 11 to the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act") as to the amount of service charges and administration charges payable by the Respondent in respect of the service charge years 31 December 2010 – 2012.

2. The property which is the subject of this application is a period house comprising six residential flats. The tribunal did not consider that an inspection of the premises was necessary. The Applicants are the freeholders, having purchased the building from Capital Property Investments UK Limited in about February 2011. The Respondent holds a long lease of the premises.

3. Proceedings were originally issued in the Croydon County Court under claim no. 2YM04091. The claim was transferred to this tribunal by order of District Judge Cole on 18 December 2012. On 19 February 2013 the tribunal issued directions for the determination of the matter on the papers. However, upon receipt of the parties' cases and on consideration of the issues the tribunal considered the matter unsuitable for paper determination and on 22 April 2013 directed an oral hearing which took place on 19 June 2013.

4. The Respondent also holds the lease of flat A within the same building, and has knocked through the two flats to make a single residential unit. The freeholder had also brought a County Court claim for unpaid service charges in respect of flat A claim number 2YM04089. However, the tribunal could find no evidence that jurisdiction had been transferred to it by order of the County Court. The tribunal's decision therefore only relates to flat B.

5. The lease requires the landlord to provide services and the tenant to contribute towards their costs by way of a variable service charge. The tribunal was provided with a copy of the lease for flat A only, but understands that for flat B to be in the same form so far as is relevant. Clause 3(1) and (2) and by 5(3) and (5) the tenant covenants to pay one sixth of the landlord's expenditure on insurance and repairs (including the landlord's payment of 10% per annum for management expense on the building).

6. The claim for flat B was for £4190.92 plus costs, comprising £3447.06 in service charges, administration charges of £295 in pursuing payment and £180 in ground rent. The tribunal has no jurisdiction in respect of ground rent and statutory interest claimed in the County Court.

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

The hearing

8. The Applicant Mr Clacy appeared in person at the hearing and the Respondent appeared in person accompanied by her husband Mr Lassell Hylton.

9. The start of the hearing was delayed by Mr Clacy's late arrival and the need for him to paginate the hearing bundle.

Set Off

10. In the Defence filed in the County Court the Respondent referred to the following allegations:

    (i.) The property is in a serious stage of repair and the landlord has consistently failed to comply with its repairing obligations under the lease. For over 2 years, she had written numerous letters to Capital Property Investments UK Limited in relation to the matters which required urgent attention, but these had not been dealt with. The Respondent had more recently received correspondence from the Applicants in relation to defective guttering and not the other more pressing matters which require attention.

(ii.) The roof above the bathroom in flat A is in a serious state of disrepair making that room damp and uninhabitable. The Respondent is disabled and at times needs to use a wheelchair and her 12 year old son has asthma. There is now a large hole in the bathroom roof and the ceiling is ruined as water gushes through it every time it rains. The Respondent also referred to having written to Capital Property Investments UK Limited on numerous occasions regarding the re-emergence of subsidence at the property, but nothing had been done to date.

(iii.) The interior common parts of the property are also in poor condition – carpets are worn and dangerous, paint is stripping off, there is damage and cracking to the walls.

11. In accordance with the tribunal's further directions of 22 April 2013 the Respondent prepared and served a "Defence and Counterclaim" in relation to her claim for a set off for breach of covenant. She provided only her own estimates necessary repair costs. At the hearing the Respondent explained that the main problem was a defective soil pipe in flat A which had been going on for 3 years and caused foul water to leak through the roof at first floor level above the bathroom in that flat, causing substantial damage. There was an actual hole in the bathroom roof. She produced photographs. Neither party relied on expert evidence. The Respondent wanted a surveyor to be appointed to produce a detailed report with costings for work to be carried out but not at her expense.

12. The Respondent did not recall being notified that Capital Property Investments UK Ltd. had sold the freehold and was not aware that it now owned a lease of the basement area (in respect of which there was planning permission to convert it into a further flat). The Respondent had no evidence of the date when she first made contact with LMD, the Applicant's managing agent, but said it was about 9 months ago. About 4 months ago they sent a representative who was shown the internal damage to the flat.

13. The Respondent wanted compensation for personal injury for the pain and suffering caused by the damage and disrepair. She believed the health of each member of the family had been affected.

14. Mr Clacy said the leaseholder had been notified in a letter dated 31 May 2012 of LMD's management of the building. He had not received any correspondence said by the Respondent to have been sent to the former freeholder. Mr Clacy said that upon being notified of the defective guttering and tree works required both were carried out immediately (on 12 June 2012 and 1 August 2012 respectively). He had been trying to contact the Respondent to arrange for the urgent works to be done and wanted to deal with the repairs immediately. He said he had

written to the leaseholder to chase the arrears and also to another leaseholder (Ms Mason) to try to get her help in contacting the Respondent as he had received no response. He intended to carry out a program of major works next year after statutory consultation.

15. The tribunal has the discretion to exercise jurisdiction to determine a set off for a landlord's breach of covenant against service charges owed (see Continental Property –v- White [2006] 1 EGLR 85). However, in the present case it is inappropriate that it do so. The set off claimed is for breach of covenants in the lease for flat A, and the service charge claim in respect of those premises is not before this tribunal. In any event, the disrepair is ongoing and this tribunal has no jurisdiction to make an order for specific performance to require the landlord to carry out works. Furthermore, the matter involves a potential claim for personal injury, in respect of which there is a pre action protocol to be observed in the County Court, that court being a much more suitable place for such matters to be tried. Accordingly the tribunal declines to determine the set off for breach of covenant and the Respondent has the option to pursue appropriate remedies in the proceedings still before the County Court in respect of flat A.

Service Charges Claimed

16. The following service charges were the subject of the County Court claim:

Year to 31 December 2010

17. Claim for £1300.33 comprising:

(i) Buildings insurance £1290.33 for year to 1 April 2010 plus 8 months to the end of the calendar year 2010.

(ii) £10 (1/6 share of £60) estimated electricity charges for communal lighting and standing charge. Mr Clacy could not say what the actual charges were. He believed that there was no landlord's meter, and that the supply ran off the meter of one of the lessees in the building.

Year to 31 December 2011

18. Claim for £946.73 comprising:

(i) Buildings insurance £836.73 for year to 31 December 2011.

(ii) £10 (1/6 share of £60) estimated electricity charges for communal lighting and standing charge.

(iii) £100 management charge per flat. Mr Clacy considered that the lease at Clause 5(5) permitted the recovery of a management charge of 10% of expenditure.

Year to 31 December 2012

19. Estimated costs of £1200 were claimed. Actual costs £1385.71 were now available, both parties had prepared their submissions on the basis of these, and the tribunal agreed to determine what actual expenditure was payable in respect of the following:

(i) Buildings insurance £883.79 for year to 31 December 2012.

(ii) £10 (1/6 share of £60) estimated electricity charges for communal lighting and standing charge.

(iii) Management charge of £150 per flat

20. By the time of the hearing, estimated charges for the year 2013 had been demanded, but these did not form part of the County Court claim.

Service Charges - Evidence and tribunal's determination.

21. Mr Clacy said the Applicant had purchased the freehold in about February 2011 and LMD had been instructed to manage later that year. The first service charge demand thereafter was 2 February 2013 for the years 2011 and 2013 but Mr Clacy observed that no sums were irrecoverable under section 20B of the 1985 Act (which imposed an 18 month time limit on demands from the date of expenditure) because the previous landlord had sent a demand for the buildings insurance for 2010.

22. The Respondent disputed the insurance claimed, including terrorism cover, and though she said she had asked for proof of payment there was no evidence that it had. Mr Clacy produced insurance certificates for each year. He said the premium had been high because of the history of subsidence. The Respondent failed to produce any evidence that the premiums were unreasonable. A landlord is not obliged to obtain the cheapest possible quote, but merely to act reasonably in obtaining insurance. Terrorism cover is a normal risk which some landlords reasonably opt to cover, particularly in London. The tribunal allows the insurance premiums in full.

23. Though the landlord could not prove actual expenditure on electricity, the amounts charges equated to £10 per flat per year, and in the circumstances the tenant confirmed at the hearing that she did not dispute this sum.

24. The Respondent did not dispute the landlord's entitlement to charge a management fee of 10% under the lease, but wondered what was actually done for that charge. Mr Clacy conceded that charges in excess of 10% had been made and that they should have been £755.84 for the building for 2012 (instead of £900) and £516.40 for 2011 (instead of £600). This represented a discount to the Respondent of £24.03 and £13.93 respectively for those years. The management charge is payable for the landlord's work in managing the building including the placing of insurance by the landlord, organising repairs, preparation of service charge accounts and service of demands. The tribunal finds that the management charges are payable subject to the amounts conceded.

25. The landlord's actual expenditure for 2012 had included charges for repairs. The Respondent considered the £840 cost of tree reduction work was high, that the guttering repair for £365 was only party done, gutter clearance charged at £181.50 and drain jetting at £165 had not been done. Mr Clacy said the cost of the guttering repair had included the erection of a tower because access over the flat roof was not considered safe. The Respondent produced no documentary evidence that expenditure was unreasonably high. Invoices were produced in respect of all work and on the balance of probabilities the tribunal is satisfied it was carried out. In the absence of persuasive evidence to the contrary the tribunal finds that all expenditure is reasonable and payable.

Administration Charges

26. The Applicant claimed a late payment fee of £15 for each of the years 2009 – 2011 for non payment of ground rent and debt recover costs of £295. However, the Applicant did not direct the tribunal to any clause in the lease which permitted for the recovery of such costs as administration charges. The tribunal finds they are not payable.

Application under s.20C and refund of fees

27. At the end of the hearing, the Applicant made an application for a refund of the fees that he had paid in respect of the hearing[1]. The Respondent opposed this given her confusion at the correspondence and that the landlord had failed to attend the pre trial review. The tribunal takes the view that the Respondent's primary motivation in resisting these proceedings was to ensure that the works of repair are

[1] The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 SI 2013 No 1169

carried out to her flat. It is reasonable to suppose that the hearing might not have been necessary if the landlord had attended the pre trial review and taken the opportunity that would thereby have arisen to seek to settle the proceedings. The fact that proceedings for flat A had not been transferred from the County Court would also have been likely to have been identified. Having heard the submissions from the parties and taking into account the determinations above, the tribunal does not order the Respondent to refund any fees paid by the Applicant.

28. At the pre trial review, the Respondent applied for an order under section 20C of the 1985 Act. Although the landlord indicated that no costs would be passed through the service charge since the lease did not permit it, for the avoidance of doubt the tribunal nonetheless determines that it is just and equitable in the circumstances for an order to be made under section 20C of the 1985 Act, so that the Applicants may not pass any of its costs incurred in connection with the proceedings before the tribunal through the service charge.

The next steps

29. Since the tribunal has no jurisdiction over ground rent and statutory interest, this matter is now transferred back to the Croydon County Court for the determination of all outstanding matters in the claim.

Name: F Dickie **Date:** 26 July 2013

Appendix of relevant legislation

Landlord and Tenant Act 1985

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 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 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 20

(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.

(2) In this section "relevant contribution", in relation to a tenant and any works or agreement, is the amount which he may be required under the terms of his lease to contribute (by the payment of service charges) to relevant costs incurred on carrying out the works or under the agreement.

(3) This section applies to qualifying works if relevant costs incurred on carrying out the works exceed an appropriate amount.

(4) The Secretary of State may by regulations provide that this section applies to a qualifying long term agreement—

(a) if relevant costs incurred under the agreement exceed an appropriate amount, or
(b) if relevant costs incurred under the agreement during a period prescribed by the regulations exceed an appropriate amount.

(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.

(7) Where an appropriate amount is set by virtue of paragraph (b) of that subsection, the amount of the relevant contribution of the tenant, or each of the tenants, whose relevant contribution would otherwise exceed the amount prescribed by, or determined in accordance with, the regulations is limited to the amount so prescribed or determined.]

Section 20B

(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 the 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.

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.

Leasehold Valuation Tribunals (Fees)(England) Regulations 2003

Regulation 9

(1) Subject to paragraph (2), in relation to any proceedings in respect of which a fee is payable under these Regulations a tribunal may require any party to the proceedings to reimburse any other party to the proceedings for the whole or part of any fees paid by him in respect of the proceedings.

(2) A tribunal shall not require a party to make such reimbursement if, at the time the tribunal is considering whether or not to do so, the tribunal is satisfied that the party is in receipt of any of the benefits, the allowance or a certificate mentioned in regulation 8(1).

Commonhold and Leasehold Reform Act 2002

Schedule 11, paragraph 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.

Schedule 11, paragraph 2

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

Schedule 11, paragraph 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 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.

(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).

Schedule 12, paragraph 10

(1) A leasehold valuation tribunal may determine that a party to proceedings shall pay the costs incurred by another party in connection with the proceedings in any circumstances falling within sub-paragraph (2).

(2) The circumstances are where—
(a) he has made an application to the leasehold valuation tribunal which is dismissed in accordance with regulations made by virtue of paragraph 7, or
(b) he has, in the opinion of the leasehold valuation tribunal, acted frivolously, vexatiously, abusively, disruptively or otherwise unreasonably in connection with the proceedings.

(3) The amount which a party to proceedings may be ordered to pay in the proceedings by a determination under this paragraph shall not exceed—
(a) £500, or
(b) such other amount as may be specified in procedure regulations.

(4) A person shall not be required to pay costs incurred by another person in connection with proceedings before a leasehold valuation tribunal except by a determination under this paragraph or in accordance with provision made by any enactment other than this paragraph.