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FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case Reference	:	**LON/00BG/LSC/2013/0464**
Property	:	**Flat 301, Wharfside Point South, 4 Prestons Road, London E14 9EL**
Applicant	:	**Khilesh Vicky Luchman (the "Tenant")**
Representative	:	**N/A**
Respondents	:	**Boatport Limited (the "Landlord")**
Representative	:	**N/A**
Type of Application	:	**Determination of an application under s.27A Landlord and Tenant Act 1985**
Tribunal	:	**1. Mr A Vance, LLB (Hons)** **2. Mr M Taylor, FRICS**
Date of Decision	:	**03.09.13**

DECISION

Decision

1. The Applicant is not liable to pay the sum of £422.58 demanded from him by the Applicant in respect of the service charge year ending 31.12.09.

2. The Applicant is liable to pay the sum of £38.57 demanded from him in respect of the service charge year ending 31.12.10.

3. The tribunal makes an order under section 20C of the Landlord and Tenant Act 1985 so that none of the landlord's costs of the tribunal proceedings may be passed to the lessees through any service charge.

Introduction

4. This is an application made under section 27A of the Landlord and Tenant Act 1985 ("The Act") for a determination relating to the Applicant's liability to pay service charge to the Respondent for the service charge years ending 31.12.09 and 31.12.10.

5. The Applicant is the leasehold owner of Flat 301, Wharfside Point South, 4 Prestons Road, London E14 9EL ("the Property") a two-bedroom flat in a purpose build block of flats. The Respondent is his landlord and is the freehold owner of Wharfside Point South ("the Building"). Kinleigh, Folkard and Hayward ("KFH") are the Respondent's managing agents.

6. The relevant lease is dated 21.07.09 and was made between the Applicant and the Respondent for a term of 999 years from 01.01.08. It contains an obligation to pay service charges towards the landlords' costs, charges and expenses incurred in respect of matters set out in Part I of the Sixth Schedule to the lease. These are broken down into (a) Residential Service Charge items; (b) Estate Service Charge items; and (c) Building Service Charge items.

7. Directions were issued by the Tribunal on 09.07.13 that included a direction that the Application was to be dealt with on paper unless any of the parties requested an oral hearing. No hearing was requested and the matter has therefore been determined on the papers.

The Application

8. The Applicant contends that he is not liable to pay the sum of £422.58 in respect of the service charge year ending 31.12.09 nor the sum of £38.57 for the service charge year ending 31.12.10.

9. Both parties agree that service charge accounts for the two years in question were first sent to the Applicant on 14.06.12. The Respondent states that these were accompanied by invoices for both years setting out the final sums due from the Tenant for both years. This is not disputed by the Applicant.

10. It is the Respondent's case that both sets of service charge accounts contained an error in the way that void properties were treated. This was a new build development and most of the flats were not occupied until 01.06.09 with service charge expenditure being incurred only from 01.07.09. However, when preparing the accounts, the auditors had treated expenditure as having occurred from 01.01.09 meaning that the sums due from tenants had been incorrectly calculated.

11. The Respondents state that the accounts were returned to the auditors for correction that they also asked the auditors to further amend the accounts to take into consideration revised information that had been received in respect of insurance premiums for both years.

12. It appears that the buildings insurance policy provided cover for both the Building and also for Wharfside Point North. The insurance premium due therefore had to be apportioned between the two buildings. The Respondents state that information concerning the breakdown of the premium was only received from the insurers *after* the accounts were first sent out on 14.06.12.

13. The final charges were recalculated for both years and revised sets of accounts together with invoices were sent to tenants on 12.10.12.

14. The net effect for the year ending 31.12.09 was as follows:

14.1. Estate Service Charge - £1.83 increase;

14.2. Building Service Charge – £162.10 increase; and

14.3. Residential Service Charge - £258.65 increase.

15. The net effect for 31.12.10 was as follows:

15.1. Estate Service Charge – no difference;

15.2. Building Service Charge – £38.57 increase; and

15.3. Residential Service Charge – no difference

16. The sole issue between the parties is whether or not the Respondent is able to recover the costs referred to in the preceding two paragraphs

given the limitations imposed by section 20B of the 1985 Act on the time limit for making service charge demands.

The Law

17. S.20B of the 1985 Act states as follows:

Limitation of service charges: time limit on making demands

(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.

18. "Relevant Costs" are defined in s.18(2) of the 1985 Act as 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.

The Respondent's Case

19. The Respondent contends that a letter sent to the Applicant on 28.06.10 relating to the 2009 accounts was a valid notice in accordance with s.20B(2) that had the effect of stopping time running against it as far as s.20B(1) was concerned. They contend that a letter with the same effect was sent to the Applicant on 28.06.11 in respect of the 2010 service charge year.

20. Copies of both letters were provided by the Respondent to the Tribunal. However, whilst the second letter had attached to it a detailed summary of costs for the year ending 31.12.10 no summary at all is attached to the letter dated 28.06.10 in respect of the year ending 31.12.09.

21. In its Statement of Case the Respondent states that "we don't have a copy of the calculations referred to in the Notice" and that this is "regrettable". It points out that the total according to the revised accounts for the year is an overall surplus.

The Applicant's Case

22. The Applicant's position is that the letter of 28.06.10 is not a valid notice for the purposes of s.20B(2). He relied on the decision in *London Borough of Brent v Shulem B Association Ltd* [2011] EWHC 1663 (Ch) (*"Shulem"*) and contended that as no figure for costs or service charges had been specified the notice was defective.

23. The Applicant also argues in respect of both letters that errors in calculation do not fall within the ambit of section 18 of the 1985 Act

The Tribunal's Decision and Reasons

24. It appears that the sums demanded from the Applicant on 01.10.12 relate to shortfalls in the sums previously demanded from him on account of service charge for the two years in question. It appears from the Respondent's Statement of Case that these shortfalls relate entirely to a re-apportionment of the buildings insurance premium.

25. As such, they clearly relate to costs incurred by the landlord in connection with matters for which service charge is payable under the terms of the lease and they therefore amount to *relevant costs* for the purposes of s.18(2) of the 1985 Act.

26. There is no evidence to indicate that these demands were the result of a re-calculation of the insurance premium or that the Respondent became liable to pay any additional premium which it then sought to recover from the Applicant.

27. It appears to us, on consideration of the cases of *Gilje v Charlegrove Securities* [2003] EWHC 1284 (Ch), [2004] and *Holding & Management (Solitaire) Limited v Sherwin* that s.20B has no application where payments on account are made to a lessor in respect of service charges but the actual expenditure by the lessor does not exceed the payments on account and no request for further payment needs to be made or is in fact made.

28. However, that is to be contrasted with the situation in this Application where subsequent demands for the balance of the actual costs incurred is made which exceeds the sums previously demanded and paid on account. As such, we consider that the provisions of s.20B *are* relevant to this Application.

29. That requires us first to ascertain whether or not the costs demanded by the lessor were incurred within 18 months before a demand for payment. The first demands for payment were served on 14.06.12. The revised demands for payment were served on 12.10.12. It seems to us that the earlier date is the relevant date for the purposes of s.20B(1). 18 months prior to that date was 14.10.10.

30. We do not have any information to assist in clarifying when the Respondent actually incurred the cost of the insurance premium but it seems reasonable to us to infer that it must have been prior to 14.12.10 given that the Applicant paid £1,000 on account of service charges to the Respondent on 22.08.09.

31. We therefore conclude that the costs of the insurance premium were incurred more than 18 months before demand for payment of the service charge was served on the Applicant.

32. The next question is whether or not the Respondent can avail itself of the 'escape route' offered by s.20B(2).

33. As far as the year ending 31.12.09 is concerned we do not accept that the letter of 28.06.10 is a valid notice for the purposes of s.20B(2). We accept and adopt the reasoning in *Shulem* that in order to be able to rely on the subsection a lessor is required to state a figure for the costs incurred. If it has incurred costs but is unable to state with precision what the amount of those costs are it can, as suggested by the court in *Shulem* err on the side of caution and set a figure that it feels is sufficient to enable it in due course to recover its actual costs.

34. In this case, whilst the letter of 28.06.10 states *"Please find enclosed a standard notice we are required to serve under the Landlord and Tenant Act 1985"* the Respondent has not advanced a positive case that a summary of costs or any other form of notice was, in fact, enclosed with the letter. Nor is there any evidence to indicate that one was.

35. In the absence of evidence to the contrary we conclude that no figure for the costs incurred was included with the letter of 28.06.10 and that the is not a sufficient notice under s.20B(2) to stop time running for the purposes of s.20B(1). We determine that the sum of £422.58 is not payable by the Applicant.

36. However, for the year ending 31.12.10, the letter dated 28.06.11 attached a summary of costs that gave a specific figure for buildings insurance.

37. Again, we presume that the cost of insurance was incurred prior to 14.12.10 and therefore more than 18 months before the demand on 14.06.12. However, in this instance we accept that the letter of 28.06.11 with the attached summary of costs *is* sufficient notice for the purpose of s.20B(2) to stop time running. This time, a specific figure was identified in respect of the costs of the insurance premium, namely £86,915.00. This was then adjusted to £58,228.00 in the accounts sent on 14.06.12 and then to £65,662.00. It follows that the amount of costs actually incurred was less than the amount stated in the summary accompanying the letter of 28.06.11.

38. We therefore determine that the full amount of £38.57 is payable by the Applicant to the Respondent for the service charge year ending 31.12.10.

Application under s.20C and refund of fees

39. The Applicant seeks an order under section 20C of the Landlord & Tenant Act 1985 Act that none of the costs of the Respondent incurred in connection with these proceedings should be regarded as relevant costs in determining the amount of service charge payable by the Applicant.

40. The Tribunal considers it just and equitable to make the order sought given that the Applicant has, to a significant degree, been successfully in pursuing this application that relates to errors of apportionment for which he was not responsible. Given that this application has been dealt with on the paper track it is, in any event, likely that very limited costs have incurred by the Respondent. We do not, however, considers it just and equitable to order that the Respondent refund any fees paid by the Applicant in respect of this Application.

Amran Vance

Judge of the First-Tier Tribunal

Date: 09.09.13