

9025



**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)**

Case Reference : **LON/00AH/LSC/2013/0086**

Property : **FLAT 3, WRENWOOD COURT, 38
HERMITAGE COURT, KENLEY,
SURREY CR8 5EB**

Applicant : **SILVERLEAF LAND &
DEVELOPMENT LLP**

Representative : **PDC LEGAL SOLICITORS
HML ANDERTONS (MANAGING
AGENTS)**

Respondent : **(1) WILLIAM HAROLD
PAYNE
(2) JACQUELINE GAIL
NELSON**

Representative : **NONE**

Type of Application : **SECTION 27A LANDLORD AND
TENANT ACT 1985 AND SCHEDULE 11
TO THE COMMONHOLD AND
LEASEHOLD REFORM ACT 2002**

Tribunal Members : **MS L SMITH (LEGAL CHAIR)
MR N MALONEY FRICS
MR L G PACKER**

**Date and venue of
Hearing** : **26 June 2013
10 Alfred Place, London WC1E 7LR**

Date of Decision : **29 July 2013**

DECISION

Decisions of the Tribunal

- (1) The Tribunal determines that the sum of £1186.88 is reasonable and payable by the Respondents in respect of the service charges for the year ending 31 December 2012. The figure which the Respondents owe to the Applicant will however need to be adjusted to take account of the actual figures following receipt of the certified account for that service charge year, which has recently become available.
- (2) The Tribunal determines that the sum of £403.01 is reasonable and payable by the Respondents in respect of the administration charges claimed in the County Court proceedings in the sum of £583.01
- (3) The Tribunal makes the determinations as set out under the various headings in this Decision
- (4) The Tribunal determines that the Respondents shall reimburse the Applicant within 28 days of this Decision, the Tribunal fees paid by the Applicant, such fees to be confirmed by the Tribunal.
- (5) Since the Tribunal has no jurisdiction over county court costs and fees, this matter should now be referred back to the Aldershot and Farnham County Court.

The application

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 Respondents in respect of the service charge year ending 2011 and estimated charges for the year ending 2012.
2. Proceedings were originally issued in the Northampton County Court under claim no. 2YM23028. The claim was transferred to the Aldershot and Farnham County Court and then in turn transferred to this Tribunal, by order of Deputy District Judge Haig-Haddow on 30 November 2012.
3. The relevant legal provisions are set out in Appendix A to this decision.

The hearing

4. The Applicant appeared by Counsel (Mr Mertens) at the hearing. The Respondents did not attend, nor were they represented. The Tribunal is nonetheless satisfied that it gained a full understanding of the issues, from the information provided by the parties, and presented in the hearing.

The background

5. The property which is the subject of this application is an upper ground floor flat ("the Property") located within a block of 8 recently-constructed flats.
6. Neither party requested an inspection and the Tribunal did not consider that one was necessary, nor would it have been proportionate to the issues in dispute.
7. The Respondents holds a long lease of the Property dated 28 September 2007 ("the Lease") which requires the landlord to provide services and the tenant to contribute

towards their costs by way of a variable service charge. The relevant provisions of the Lease are set out in Appendix B to this decision.

The issues

8. At the start of the hearing Mr Mertens for the Applicant identified the relevant issues for determination as follows:
 - (i) The payability and/or reasonableness of service charges for the year ending December 2012 amounting to £1532.38 and contributions to the reserve fund of £312.50 (of which payment of £658 has been made by the Respondents). The amounts charged for services in the year ending December 2011 were relevant to the extent that they were the basis for the estimates of the amounts claimed for the year ending December 2012.
 - (ii) The payability and/or reasonableness of administration charges amounting to £583.01
9. Having heard evidence from the Applicant and read submissions from both parties and considered all of the documents provided, the Tribunal has made determinations on the various issues as follows.

Service charge items and amounts claimed

10. The Applicant claims the sum of £1186.88 for service charges for the year ending December 2012. This is made up of 2 payments of service charge in advance of £766.19 (due 1 January and 1 July 2012) together with contributions to the reserve fund due on the same dates of £156.25 each. From that figure of £1844.88 the Applicant has deducted the figure of £658 paid by the Respondents.

The Tribunal's decision

11. The Tribunal determines that the amount payable in respect of the service charge year ending December 2012 is £1186.88 (to be adjusted in the light of the final account for that year, now available)

Reasons for the Tribunal's decision

12. The Respondents disputed the service charge for the year ending December 2012 on the basis that they had not been provided with actual figures and that the amounts claimed in particular for cleaning, gardening, general repairs and insurance had risen significantly after the Applicant had taken over the Property in May 2011.
13. Mr Mertens drew the Tribunal's attention to paragraph 2 of Schedule 6 to the Lease which provides for payment of the service charge in advance by 2 equal instalments on 1 January and 1 July of each year. This paragraph and paragraph 12 of Schedule 4 of the Lease provides for accounts to be certified and the Landlord then balances any surplus or deficit by crediting any overpayment to future years or demanding any balancing charge. The Respondents' percentage contribution to the service charge is 12.5% (see clause 1.19 of the Lease).
14. Mr Mertens then drew attention to schedule 4 to the Lease and particularly paragraphs 3, 5, 7 and 8 which permit the Landlord to employ contractors and require the Landlord to carry out gardening and cleaning of the common parts and to insure the building. Mr Mertens also referred to paragraph 13 of schedule 4 which permits the Landlord to engage managing agents to manage the building.

15. Mr Mertens referred to the service charge accounts for the year ending 2011. The managing agents had taken over the building in May 2011 so the accounts for that year covered 7 months. Those accounts showed an actual charge for cleaning of £510, for gardening of £672 (plus additional work of £3078), for general repairs of £1523 and for insurance of £635. Those figures were lower than the budgeted figures with the exception of the insurance figure which was based on an actual figure in any event.
16. In relation to the service charge year ending 2012, Mr Mertens was able to give the Tribunal the certified accounts for that year which had just become available. The budgeted figures for the matters in dispute were £843 for cleaning, £2700 for gardening, £3000 for general repairs and £1671 for insurance. Although the County Court claim was based on estimated figures, the Tribunal had regard to the actual figures in the accounts as a guide to whether those estimates had been reasonable. The actual figures were £986 for cleaning, £2748 for gardening, £1217 for general repairs and £1035 for insurance.
17. In relation to gardening, Ms Villaincourt from Andertons who gave evidence to the Tribunal explained that the managing agent had carried out a tender process for the gardening and cleaning contract and accepted a tender from Evergreens in the amount of £702 per annum for cleaning, £1300 per annum for gardening and £280 for an initial one off tidy of the grounds. That was the cheapest quotation. When Andertons had taken over maintenance, extensive work had been needed to overhaul the gardens around the building. Those gardens are substantial. Work had been done to cut down trees and tidy the gardens up with a view to keeping maintenance charges down for the future. There had therefore been a one off cost of £3078. In future, the one off charges of this nature should be less (as had in fact been the case for the year ending 2012). Evergreens had not in fact been reappointed after the initial 3 month period. Another gardener had at that point been appointed directly by the freeholder for the gardening and cleaning. A tendering process had been carried out for this work and the appointed contractor, ACT, was the most competitive. Those tenders were £1790 + VAT for gardening and £936 + VAT for cleaning. The amount claimed for the year ending 2012 was approximately £1000 less than the amount certified for gardening for the year ending 2011. The cost of cleaning had increased slightly from approximately £73 per month to £82 per month.
18. In relation to general repairs, in 2011, the actual costs were £1523. A budgeted figure had been put forward for year ending 2012 of £3000. The actual figure for 2012 was £1217.
19. In relation to insurance, the figure for 2012 was £1046 and not £1913 as the Respondents asserted. The statement of income and expenditure which showed the £1913 figure was due to an incorrect item being posted to this account but the certified accounts for the year ending 2012 confirmed that the figure was £1035. The budgeted figure for year ending 2012 included a figure of £600 for a valuation survey which was not in fact carried out. The insurance figure in the accounts for year ending 2011 of £635 was due to this being for part of the year (7 months). The Respondents had commended the level of costs for 2009/10, (before Andertons had taken over) which included insurance at £1171.80 – ie higher than the final cost for 2012.
20. In relation to contributions to the reserve, Mr Mertens drew attention to clauses 1.22 and 5.2 of the Lease which made provision for a reserve fund and for the Tenant to contribute to this. Ms Villaincourt explained that it was difficult to calculate the reserve fund contribution at this stage as the previous freeholder had made no provision. Major works had recently been undertaken as none had been undertaken

by the previous freeholder (the building was a new build in 2008). Andertons was sympathetic to concerns about service charges and having to contribute large sums to major works which had not yet been billed. In future, reserve fund contributions would be calculated according to the probability of the need for internal and external works in accordance with the Lease and condition of the building.

21. Ms Villaincourt also explained that now that the accounts had been certified for 2012, there had been a surplus for 2012 which had covered the deficit for year ending 2011 and had enabled the Applicant to re-credit £91.50 to the Respondents' service charge account.

Administration charge items and amounts claimed

22. The Applicant claims the sums of £108 for "instruction fee", £168 for "debt collection fee", £180 for "solicitor's letter", £24 for "legal charges", £60 for the claim fee and a total of £43.01 for interest. A fee initially included in the account of £70 for a court fee is not claimed as part of the County Court proceedings.

The Tribunal's decision

23. The Tribunal determines that the amount payable in respect of administration charges is £403.01. The Tribunal does not consider that the amount of £180 is reasonably incurred and is not therefore payable.

Reasons for the Tribunal's decision

24. Mr Mertens drew the Tribunal's attention to clause 8.1 in relation to the recovery of interest. The Interest Rate is specified at clause 1.16 to be 5% over the base rate of National Westminster Bank plc or 10% whichever is the greater. Mr Mertens also drew the Tribunal's attention to paragraph 21 of Schedule 6 which permitted the Landlord to recover charges relating to any breach of covenant by the Tenant.
25. Ms Villaincourt gave evidence as to the process adopted by Andertons for credit control. Andertons has its own credit control team of 3 people headed by a senior person. All are full time workers and are an overhead which Andertons has to recover. Their initial work is covered by what is described as the "instruction fee" and would involve notifying the tenant that they would be referring the matter if payment were not made and then sending the matter to the debt collection agency.
26. Thereafter, the debt collection agency would charge their fee for taking on the case of £140 + VAT. They would send an initial letter and correspond with the tenant and mortgagee as necessary. This is a fixed fee. The debt collection agency also charges £24 for taking a legal charge. If payment were not then made, the debt collection agency would refer the matter to their solicitors who then send another letter.
27. Mr Mertens who was instructed by the debt collection agency's solicitors submitted that it was appropriate for the Applicant and Andertons to use a debt collection agency because this saved Andertons costs at the stage when solicitors became involved and proceedings were issued. Otherwise he estimated that the costs might be higher – in the region of £1000.
28. Ms Villaincourt explained though that the "solicitor's letter" claimed of £180 was not in fact anything to do with this process but was rather a letter from IBB who were the Applicant's own solicitors who had also written to the Respondents in relation to the debt. A copy of this letter was provided to the Tribunal after the hearing (in relation to Flat 6 which is the conjoined case). Having read this letter, the Tribunal does not

consider this part of the administration charges to be reasonable as there appears to be no reason why the Applicant's own solicitors should have become involved in the case, it having been referred to the debt collection agency and thereafter to the debt collection agency's own solicitor who had instituted the proceedings which were the subject of this transfer.

Application for refund of fees

29. At the end of the hearing, the Applicant made an application under Regulation 9 of the Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003 for a refund of the fees that it had paid in respect of the hearing. Having heard the submissions from Mr Mertens on behalf of the Applicant to the effect that the Respondents should have to pay for the costs incurred by their failure to pay and that this should not be passed on to the other leaseholders by way of the service charge and taking into account the determinations above, the Tribunal orders the Respondents to refund any fees paid by the Applicant within 28 days of the date of this decision.

The next steps

30. The Tribunal has no jurisdiction over county court costs. This matter should now be returned to the Aldershot and Farnham County Court.

Chairman:


Ms L Smith

Date:

29 July 2013

Appendix A: 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.

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).

APPENDIX B

RELEVANT CLAUSES OF THE LEASE

PARTICULARS

- 1.16 Interest Rate 5% above the base rate of National Westminster Bank plc from time to time or 10% whichever is the greater
- 1.11 The Service charge Money:
 (i) actually expended by or on behalf of the Landlord
 (ii) required for any Reserve for the Property Services; and
 (iii) (if the Landlord decides not to employ a firm of managing agents) equal to a managing fee of 15 per cent of the annual Property Expenses
- 1.19 The Tenant's Service Charge Percentage
 12.5 per cent [12.5%] subject to those matters specified in Schedule 5 of this lease
- 1.22 Reserve The sum or sums (to be fixed annually) which the Landlord (whose decision is final) considers necessary in the general interest of tenants of the Property to provide a reserve fund for items of anticipated future expenditure

Clause 5.2

The tenant is to pay:

- 5.2.1 The Rent during the Term by yearly payments in advance on 30 March in each year free of all deductions whatsoever the first payment thereof being a proportionate part of the Rent calculated from today to be made on today's date
- 5.2.2 On demand:
- 5.2.2.1 The Tenant's Service Charge Percentage
- 5.2.2.2 all other money payable or repayable by the Tenant to the Landlord under the Lease and
- 5.2.2.3 all costs charges and expenses which the Landlord may from time to time incur as a result of any breach by the Tenant of its obligations

Clause 8 Provisos

Clause 8.1 Interest

If any rent reserved by this lease or any other payment due to the Landlord under this lease remains unpaid 10 working days after the due date (whether formally demanded or not) then:

- 8.1.1 the Tenant is to pay interest on the unpaid amount at the Interest Rate calculated on a day to day basis from the due date for payment until actual payment;
- 8.1.2 the Landlord has the right to recover the interest as rent; and
- 8.1.3 the right to interest does not affect the Landlord's other rights under this lease.

Schedule 4

Property Services

3. To keep the Common Areas suitably furnished lighted cleaned and supplied with electricity
5. To provide any staff which the Landlord considers necessary in connection with the provision of the services referred to in this part of this Schedule
7. To keep the water features landscaped areas and gardens forming part of the Common Areas cultivated and in a neat and tidy condition and renew all plants shrubs and trees when necessary.

8.1 To keep the Property ...insured with an insurance office or underwriters and through any agency as decided from time to time by the Landlord....against loss or damage by fire storm tempest explosion and other risks...as the Landlord thinks fit for amounts which the Landlord thinks expedient being not less than the full reinstatement value from time to time

....

12. To employ a qualified accountant to audit the accounts for the Service Charges and certify the total amount of the Service Charges for the period to which the accounts relate and supply copies to the tenants of the Property

13. Generally to manage administer and protect the amenities of the Property and for that purpose if it sees fit to employ a firm of managing agents.

SCHEDULE 6

Part 1

Tenant's Covenants with the Landlord

2. To pay the Tenant's Service Charge Percentage to the Landlord:

2.1 by equal instalments in advance on 1 January and 1 July in every year the amount estimated by the Landlord as the Tenant's Service Charge Percentage for each year.....

2.2 within 15 Working Days after the Landlord serves on the Tenant a certificate prepared under paragraph 12 of Schedule 4 for the period in question the amount by which the estimated Tenant's Service Charge Percentage is less than the actual Tenant's Service Charge Percentage. Any overpayment by the Tenant is to be credited against future payments due from the Tenant of the Tenant's Service Charge Percentage.

21. To pay all costs incurred by the Landlord for:

21.1 any notice or proceedings under sections 146 or 147 of the Law of Property Act 1925 (even if forfeiture of this lease is avoided by means other than relief granted by the court);

21.2...

21.3 the breach of any of the Tenant's Covenants or obligations contained in this lease; and

21.4...