10422

FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**CHI/29UG/LSC/2012/0071**
Property	:	**Flat 1, 75 Parrock Street, Gravesend, Kent DA12 1HF**
Applicant	:	**G & O Investments Limited**
Representative	:	**Mr James Davies, Counsel**
Respondent	:	**Ms N Khan**
Representative	:	**Miss Emma Harris, Counsel**
Type of Application	:	**Determination of service charges under section 27A Landlord and Tenant Act 1985**
Tribunal Members	:	**Judge E Morrison (Chair)** **Mr N I Robinson FRICS (Surveyor Member)**
Date and venue of Hearing	:	**19 September 2014 at Medway Magistrates Court**
Date of decision	:	**29 September 2014**

DECISION

The Applications

1. In March 2011 the Applicant landlord commenced proceedings in the Dartford County Court against the Respondent tenant, claiming the principal sum of £6,192,25, described as service charges, ground rent and other administration fees, and including interest. On 4 May 2012 the court ordered that the matter "be referred to the Leasehold Valuation Tribunal for determination of the issue of the reasonableness of the service charges and the construction of the lease and/or liability to pay the charges". The Tribunal has no jurisdiction to deal with claims for ground rent or interest, and at the outset of the hearing Mr Davies stated that the Applicant's claims for administration charges were not being pursued. This left only the service charges for determination.

2. In addition, the Applicant sought a costs order against the Respondent, and the Respondent sought an order under section 20C of the Act that the Applicant's costs of these proceedings should not be recoverable through future service charges.

Summary of Decision

3. The service charges recoverable by the Respondent are as follows:

Year	£
2006-7	639.69
2007-8	473.69
2008-9	731.46
2009-10	478.39

4. No order is made under section 20C of the Act.

5. The Respondent is to pay to the Applicant the sum of £500.00 towards the costs of the hearing on 30 August 2012.

The Lease

6. The lease of Flat 1 is dated 16 April 1987 and is for a term of 99 years from 29 September 1986 at a yearly ground rent of £100.00 for the first 25 years and rising thereafter.

7. The First Schedule to the lease describes the demised premises as follows:

"ALL THAT the flat situate on the Ground Floor of the Building and known as Number 75 Parrock Street Gravesend Kent as the same is for the purpose of identification only and not of limitation delineated on the Plan Numbered 2 annexed hereto and thereon edged red TOGETHER ALSO WITH:-

(a) Half part in depth of the structure between the floor or the ceiling of the flat and the ceiling or floor of the other flats as the case may be and
(b) Half part in width of all the internal walls of the flat (if any) and
(c) The internal walls and including all windows and the glass herein of those parts of the walls of the flat which at the date hereof do not join any other flat Building or premises and
(d) The staircases, hallways and landings leading to the flat from the ground floor and TOGETHER WITH the use in common with the occupiers of the other flats in the building of the garden paths tool shed drying areas and dustbin store situate to the rear of the building shown edged green on the Plan Numbered 1 annexed hereto (all which said premises are herein called "the demised premises").

8. On 29 September in each year the lessee is required to pay ¼ of the costs and expenses mentioned in the Sixth Schedule (Cl 2(e)). The Sixth Schedule refers back to the lessor's obligation to insure the building (Cl. 4(b)) and to the lessor's obligations as set out in the Fifth Schedule which, in summary, require the lessor to maintain, repair, redecorate and renew the external walls and structure and all shared conduits, to paint the exterior, and to comply with notices, regulations etc. affecting the building. Provision is made for the employment of such agents or professional adviser as the lessor may reasonably require.

9. By Paragraph 4 of the Third Schedule the lessee is granted the right (with others) to pass and repass over and through the common entrance hall and the steps leading from Parrock Street to the Building and to the garden at the rear "subject to the payment of one third of the expense of keeping the same in good repair and condition". Paragraph 9 of the Second Schedule requires the lessee "Not to use or permit the garden of the flat otherwise than as garden land and not to allow such garden to become overgrown or untidy but to keep the same in a good and husbandlike manner properly cultivated and free from weeds".

The Inspection

10. The Tribunal inspected the subject property immediately before the hearing, accompanied by the parties and their representatives. 75 Parrock Street is a mid terrace four storey house which has been converted into four self-contained flats, one per floor. The Lower Ground Floor Flat (which is at ground level at the front and basement level at the rear) has its own entrance from the front garden. Flat 1 is effectively a raised ground floor flat at the front but at garden level at the rear and shares its access to the building with the upper two flats via external front path and steps, main entrance door and shared hallway. It also shares usage of the rear garden accessed through a door at the rear of the ground floor hallway.

11. The front elevation is brick with rendered bands including parapet wall shielding view of the roof and generally appeared in fair condition

although the render was generally in need of redecoration and possibly other repairs, particularly at parapet level.

12. The tribunal inspected the shared hallway and stairs. There appeared to be two separate lighting systems. A fire alarm system with panel was noted but this appeared to be switched off. There was also emergency lighting but again this appeared not to be operational. It was understood that there is no communal electrical supply and so any communal electrical services must therefore be supplied by one or more of the flats. The hallway and stairs were considered to be in basic condition with Artex or similar coated walls and ceilings.

13. Access was also obtained to the rear garden area. The rear elevation of the property was rendered, in need of some repair, partly where boiler flues had been installed/changed. Taking the front elevation of the property as facing approximately east, the tribunal was shown the northern boundary fence, with a damaged panel, where there was previously a brick wall that had been replaced and noted that the south boundary fence was leaning. The rear west boundary comprised a brick wall with opening to a pathway.

Procedural Background

14. This application was originally listed for hearing on 30 August 2012. The hearing did not proceed on that date because the Respondent's statement of case and supporting bundle was produced only at the hearing, instead of by 20 July 2012 as had been directed. This resulted in an adjournment, and following the adjourned hearing on 19 October 2012, the Tribunal issued a decision dated 10 November 2012. This decision was to the effect that no service charges were payable, because the Applicant had failed to serve demands in the manner required by the lease. The Applicant obtained permission to appeal, and on 26 February 2014 the Upper Tribunal allowed the appeal. The application has now been listed for a further hearing to re-determine the matter.

15. The earlier decision addressed only the issue of service of the demands, and did not consider the payability or reasonableness of the demands under section 19 of the Act.

Representation and Evidence at the Hearing

16. The Applicant served a Statement of Case dated 5 July 2012, with supporting documents. The Respondent's statement of case in response included a draft Defence and Counterclaim prepared in connection with the county court proceedings, which exhibited a condition report prepared by a chartered surveyor dated September 2011. Both sides had then made further written submissions.

17. At the hearing, the Applicant was represented by Mr Davies of counsel. Mr I Capjohn and Mr N Adnan of the managing agents, Urbanpoint,

also attended. The Respondent was present and represented by Miss Harris of Counsel. Matters were dealt with very largely by way of submissions, although Mr Capjohn, Mr Adnan and Ms Khan gave some brief oral evidence.

The Law and Jurisdiction

18. The tribunal has power under section 27A of the Act to decide about all aspects of liability to pay service charges and can interpret the lease where necessary to resolve disputes or uncertainties. The tribunal can decide by whom, to whom, how much and when a service charge is payable.

19. By section 19 of the Act a service charge is only payable to the extent that it has been reasonably incurred and if the services or works for which the service charge is claimed are of a reasonable standard.

20. Under section 20C a tenant may apply for an order that all or any of the costs incurred by a landlord in connection with proceedings before a tribunal 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.

21. By virtue of para. 10 of Schedule 12 to the Commonhold and Leasehold Reform Act 2002 (which continues to apply to applications issued prior to 1 July 2013) the tribunal may order a party to pay a sum in costs not exceeding £500.00 if that party has, in the opinion of the Tribunal, "acted frivolously, vexatiously, abusively, disruptively, or otherwise unreasonably in connection with the proceedings".

Scope of the Demise and Extent of Lessor's Obligations

22. Having regard to the parties' written submissions, and in particular to the Respondent's proposed claim of set-off, based on the alleged failure of the lessor to comply with its repairing obligations, the Tribunal was initially concerned to try to resolve apparent ambiguities in the lease as to the scope of the Respondent's demise.

23. It was the Applicant's position that, by virtue of the First Schedule to the Lease, the demise included not only the ground floor flat itself, but also the outside steps leading up to the front door, the ground floor hallways, and the rear garden. The Respondent has no explicit repairing obligations in these areas, the lease simply providing for the Applicant to pay one-third of the cost of upkeep.

24. Miss Harris for the Respondent contended that the position was unclear, and that the lessee's own repairing obligations as set out in

clause 2 (c) only extended to the "interior" of the flat proper. There was nothing in the wording of First Sch. para. (d) to suggest the hallways referred to would extend to those leading to the flat itself from the back door, as opposed to from the front door, and in practice no-one had been maintaining any of the common areas. In the Third Schedule rights were granted over the "common entrance hall". Similarly, the words "use in common" in First Sch. para. (d) were not apt to demise the rear garden.

25. In an attempt to clarify matters, the Applicant was asked to obtain copies of the leases for remaining flats in the building (the Basement, First Floor and Second Floor flats), and, helpfully, these were provided in the course of the hearing. Having regard to the provisions of these leases, the Tribunal concluded that the rear garden could not possibly have been intended to be included in the Respondent's demise, because all the leases contain identical provision with respect to it in their respective First Schedules and in para. 9 of the Second Schedules. Mr Davies for the Applicant then conceded this point.

26. The question of whether all or some of the ground floor hallways are demised to the Respondent is not so easily answered. The lease of Flat 2 contains identical provisions in First Sch. para. (d). The result of applying the natural and ordinary meaning of the words used is that the area of the ground floor hallway which is used to access both flats is demised to each flat, but each by means of a separate lease, which is not legally feasible. Mr Davies argued that although the same words are used in each lease, they might mean something different in the case of Flat 2, i.e. only the area starting at the bottom of the stairs, so there was no overlap with the demise to Flat 1. However, the obvious objection to this argument is that it is simply not what the lease says. Miss Harris for the Respondent also pointed out that if the ground floor hallway was demised to Flat 1, there would be no need for the grant of rights over the "common entrance hall" as referred to in para 4 of the Third Schedule. Other provisions in the leases, e.g. as to contributions to upkeep of areas not covered by the landlord's obligations in the Fifth Schedule, are also problematical in this context. The point is certainly not free from doubt, but taking everything into account the Tribunal concluded that the hallways at ground floor level are not demised to any lessee, but neither are they subject to specific repairing obligations on the part of the lessor in the lease.

The Disputed Service Charges

27. The Applicant sought a determination of the service charges payable for years ending 29.9.07, 29.09.08, 29.09.09 and 29.09.10. The parties agree that service charges are collected only in arrears, but the Respondent has paid nothing towards any of these service charges, and at the hearing Miss Harris confirmed that they were all in dispute.

28. For each year the Applicant had provided a statement of account, certified by an accountant, together with supporting invoices. In every year there was a charge for accountancy fees, insurance and a management fee. In 2007 there was a charge of £793.13 for condition and asbestos reports. In 2009 and 2010 there were charges for repairs and maintenance.

Accountancy charges

29. In 2007 and 2008 the annual charge was £120.00 + VAT, with an increase to £130.00 + VAT in the latter two years. The Respondent accepted that the Fifth Schedule permitted employment of an accountant and recovery of the cost through the service charge but queried whether it was reasonable or necessary in a small building such as 75 Parrock St. The Applicant said that it was good practice to use an accountant to prepare the service charge accounts even if the lease did not require this. The Tribunal agrees with the Applicant. The cost is reasonable and is allowed in full for all years.

Insurance

30. The amount charged for insurance was £1037.11, £1113.35, £1144.80 and £1144.80 in years 2007-10 respectively. The Respondent produced no alternative quotes but simply suggested the amount was excessive. It was also argued that if the lessor was failing to comply with its repairing obligations in the building, the insurance would be "null and void" and therefore it was unreasonable to expect the Respondent to pay for it. The Applicant said that Lloyds brokers test the market each year and obtain cover to meet the lessor's requirements, in these years with AXA. As the flats are all sub-let and the managing agents have no information as to the identity of the occupiers, this increases risk and the premium. Without any evidence that the premium charged is unreasonably high, or that insurance cover has ever been jeopardised by any acts or omissions of the lessor, the Tribunal accepts the Applicant's case and all the charges are allowed.

Management fee

31. The fee charged was £587.50 (2007), £640.38 (2008), £701.50 (2009) and £733.20 (2010). This equates to £125.00 + Vat per flat in 2007, rising to £156.00 + Vat per flat in 2010. The Respondent argued that the Applicant had not done sufficient to justify these charges. There were no repairs in the first two years. There was no maintenance of the hallways. Mr Adnan for the Applicant said the rate charged was the minimum and would have been more like £190.00 + Vat per flat if there was responsibility for the common parts, which was the amount charged by Urbanpoint for similar flats in the same area. There was a list of duties carried out for this fee, which included arranging insurance, processing all bills, preparing information for the accountants, collecting ground rent, distributing service charge demands, accounting for lessee payments and administering insurance

claims. As the lessor had to fund all costs initially, arranging funds took a lot of time. There was an inspection twice a year. The fee had gone up by more than inflation as a lot of time had been spent on the building due to difficulties in contacting the lessees and collecting payments.

32. Again, in the absence of any evidence of alternative quotes or fees charged for comparable properties, and given the narrative of work done by the Applicant, the Tribunal allows all management fees. They are well within the bracket of fees normally encountered and there is no evidence that they are unreasonable.

Fees for Reports in 2007

33. The Respondent challenged the cost of a fee of £350.00 + Vat for an asbestos survey and report, and a fee of £325.00 + Vat for a condition survey and report, both obtained in 2007. It was contended that if the Applicant's position was that the lessees were responsible for the interior common parts, then logically the Applicant should not have undertaken the asbestos survey. The same point might apply to the condition report if it was concerned only with the interior. In response the Applicant said that the cost was recoverable under the Fifth Schedule, which allowed employment of agents etc. "in the management of the building". There was a statutory duty to contractors so far as asbestos was concerned. Copies of the reports were then made available to the Respondent. Having considered these, Miss Harris withdrew her objection. The charges are allowed in full.

Repairs and Maintenance

34. In 2009 £930.00 was charged for repairs and maintenance. In 2010 the figure was £362.80. The 2009 work was for various external repairs. One of the invoices included an item of work described as "Renew and repair all roof tiles". Six months later another invoice referred to repairing a downpipe and "put back roof tiles above gutter". Based on this evidence alone the Respondent queried whether repair and renewal of the roof tiles had been done to a reasonable standard. Why had more work been required just a few months later? Reliance was also placed on emails of unknown date from the lessee of Flat 3 complaining about the roof leaking. In response Mr Adnan said the first invoice could not possibly have been for a full roof replacement. The second invoice was primarily for gutterwork.

35. The Respondent made no submissions with regard to the 2010 invoices.

36. A common-sense reading of the first 2009 invoice shows that the roof work was just one component of a bill for £650.00. Clearly only a small area of roof tiles can have been renewed or repaired at that time, and there is no evidence that this area failed or that the work was defective or that it has any connection with complaints about roof made at other times. There is no evidence that any of the cost was unreasonably incurred or was too high. All charges are allowed.

37. The Tribunal therefore allows all service charges claimed by the Applicant, which are ¼ of the total costs incurred (less an unrelated credit given in 2010):

y/e 29.9.07	£639.69
y/e 29.09.08	£473.69
y/e 29.09.09	£731.46
y/e 29.09.10	£478.39

The Set-off

38. The draft Defence and Counterclaim alleged that the Applicant had failed to keep the building in repair and relied on an expert report of Mr Palmer MRICS which identified a number of defects. It was contended that these had caused the Respondent loss and damage, namely reduction in value of her flat and the expenditure of her own money on repairs costing £4135.00. She sought an order of specific performance requiring the Applicant to comply with its repairing obligations, and damages, in effect as a set-off.

39. The Tribunal explained to Miss Harris that it had no jurisdiction to make an order of specific performance; this was a remedy that could be pursued only in the courts. It could however consider a set-off based on monies expended by Respondent. The Respondent's bundle contained copies of a number of invoices, all apparently emanating from Imperial Building Contractors of Ilford, totalling £4135.00. However Miss Harris then told the Tribunal that the set-off would not be pursued. It was now accepted that the windows of the flat were the Respondent's responsibility and thus the invoice for £2100.00, described as the cost of supplying and fitting two new windows, was not a cost recoverable from the Applicant. The remaining invoices related to garden work or clearing rubbish from common areas. The Respondent now accepted these could not be pursued as the Applicant had no responsibility for these areas under the lease.

40. There was however one more recent invoice dated 1 August 2014 part of which the Respondent sought to set off. This recorded receipt of £195.00 cash from the Respondent for "steam clean carpet, clear rubbish, clear garden, change lock". Ms Khan wished to recover the cost of changing the lock on the front door of the building, which she had found broken when visiting, and had got it changed the same day. She had not informed the managing agents or given them a new key.

41. Even if the front door lock can be considered within the lessor's repairing obligations (which is far from clear) the Tribunal cannot allow any set-off. There is no evidence of how much the lock cost, and a lessee cannot simply take on jobs which are the lessor's responsibility without at the very least liaising with them in advance.

42. For the sake of completeness it is noted that the Respondent adduced no evidence of diminution of value of her flat.

Applicant's application for costs

43. This application was based on the costs thrown away by the adjournment of the hearing on 30 August 2012. Mr Adnan and Mr Capjohn had both attended that hearing representing the Applicant and the Tribunal was told that their fees for the day, billed to the Applicant, were about £950.00. It was said they both had to attend as they had each managed the property at different times. They had travelled from New Malden in Surrey. The last minute production of the Respondent's statement of case had been unreasonable conduct within the meaning of para.10 of Sch. 12 to the 2002 Act. In reply, Miss Harris said her client didn't understand why her solicitors had been so late in handing over the documents, and queried whether a full day's fees should have been charged.

44. The Tribunal relies on the matters set out by the Tribunal in its decision of 30 August 2012. It is clear that the Tribunal placed the blame for the abortive hearing on Ms Khan and/or her solicitors. Late production of the Respondent's written case meant the hearing was completely ineffective and costs were undoubtedly wasted. The Tribunal considers it would be just to require the Respondent to pay those costs, limited to £500.00. This sum must be paid by 19 October 2014.

Respondent's section 20C application

45. In deciding whether to make an order under section 20C a Tribunal must consider what is just and equitable in the circumstances. The circumstances include the conduct of the parties and the outcome of the proceedings. The outcome of these proceedings has been wholly favourable to the Applicant; the Respondent has not succeeded on any issue, although it is fair to say that the Applicant abandoned the claim for administration charges. As the Respondent had paid nothing at all towards the service charges, it was reasonable for the Applicant to institute proceedings. For these reasons, the Tribunal determines it would not be just and equitable to make an order under section 20C limiting recovery of the Applicant's costs through future service charges. In so deciding we are not making any determination as to the reasonableness of such charges, nor is the Tribunal making any finding as to whether the lease permits recovery.

Concluding Remarks

46. There are a significant number of problems with the leases at 75 Parrock Street, some but not all of which have been mentioned in this decision. In view of the Respondent's abandonment of her set-off claim,

the Tribunal's conclusions as to the extent of the demise are not strictly necessary to the determination of this case. Whether the conclusions are right or wrong, the lack of clarity in the leases increases the risk of future disputes over repairing obligations and the collection of service charges. The attention of the parties is therefore drawn to the provisions of Part IV of the Landlord and Tenant Act 1987, which make provision for the variation of leases in certain circumstances.

47. This matter is now remitted back to the county court.

Dated: 29 September 2014

Judge E Morrison (Chairman)

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.