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FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**: CHI/29UL/LSC/2014/0047**
Property	**: Flat 3** **56 Bouverie Road West** **Folkestone** **Kent** **CT20 2RL**
Applicants	**:The Personal Representatives of** **Mr. J. Godden (deceased)**
Representative	**: PDC Legal Solicitors**
Respondents	**: Mr. M. Bereza and** **Miss K.L. Wellington**
Representative	**: Unrepresented**
Type of Application	**: Service charges claim referred from the County Court**
Tribunal Members	**: Judge R. Norman (Chairman)** **Mr. R. Athow FRICS MIRPM** **Ms L. Farrier**
Date and venue of Hearing	**: 24th September 2014** **Folkestone**
Date of Decision	**: 30th September 2014**

DECISION

Decision

1. (a) A service charge is payable

(b) The service charges disputed were reasonably incurred

(c) No amount is payable in respect of service charges by Mr. M. Bereza or Miss K.L. Wellington ("the Respondents") in respect of the period the subject of the claim in the County Court.

Background

2. Proceedings were commenced in the County Court in the name of Mr. J. Godden (Claim No. A11YJ998) claiming arrears of ground rent and service charges, costs and court fees. The claim is being pursued by the Personal Representatives of Mr. J. Godden (deceased) ("the Applicants"). They were represented at the hearing by Mr. Mertens of counsel instructed by the Applicants' Solicitors PDC Legal Solicitors.

3. The Applicants are the landlords of 56 Bouverie Road West, Folkestone, Kent CT20 2RL ("the building") of which Flat 3 ("the subject property") forms part. The Respondents were the lessees of the subject property at the time the proceedings were commenced in the County Court but have since sold their interest in the subject property.

4. By an Order dated 6th May 2014, the issues as to:
(a) Whether a service charge is payable, and
(b) Whether the service charge is reasonable, and
(c) The amount to be paid, the date and manner of payment and by whom to whom it is to be paid
were referred to the Leasehold Valuation Tribunal (now the First-tier Tribunal Property Chamber (Residential Property)).

Inspection

5. On 24th September 2014, the Tribunal inspected the exterior of the building and parts of the interior of Flats 1 and 2 at that address. Present were Mr. Donovan of Fell Reynolds, the managing agents on behalf of the Applicants, and the Respondents. For part of the inspection the lessees of Flats 1 and 2 were also present. The lessee of Flat 1 allowed us to have access through his flat to inspect the rear of the building.

6. Flat 1 is on the ground floor and basement, Flat 2 is on the first floor and the subject property is on the second floor.

7. It could be seen that the exterior of the building was in need of repair and decoration and we were told that such work was intended to be carried out in the near future.

8. We could see that there was vegetation growing in guttering, chimney stack, an area of wall abutting the gutter at the East side of the building and a roof valley.

9. We could not obtain access to the balcony to the front of the subject property but we were told that when surface water collects on the balcony it drains through a small hole in the base of the balcony to a small drain pipe which we could see leading from the underside of that balcony to a down-pipe.

10. We saw the garden gate and were told that it had recently been repaired by the provision of a new hinge. We were told that the front steps had been painted by the lessee of Flat 1. We were also told that the lock on the front door had been repaired on the day before our inspection.

11. Inside the hallway the fire alarm was pointed out and we could see that the carpet in the hall and on the stairs was dirty. The decoration to the walls of the internal common parts was worn.

12. In Flat 2 we were shown where the lounge ceiling had been repaired and we were told that the ceiling had come down twice. We could see damp patches on the ceiling and to the right of the window. In the back bedroom and in the bathroom there was black mould; particularly over the shower, and we were told that the lessee of Flat 2 had recently installed extractor fans in those two rooms.

Hearing

13. The hearing was attended by Mr. Mertens of Counsel, Mr. Donovan and the Respondents.

14. The Respondents had raised, in papers sent to the County Court and which now formed part of the hearing bundle for the Tribunal hearing, the existence of a surplus of £11,545.92. Mr. Athow, on behalf of the Tribunal, drew attention to p 315 of the hearing bundle where that surplus was shown as a carried forward figure in the service charge accounts for the year 1st January 2012 to 31st December 2012. At p 319 it was shown as a brought forward figure in the service charge accounts for the year 1st January 2013 to 31st December 2013. At p 319 there is also shown a surplus of £1,905.09 for the year ending 31st December 2013 and a surplus carried forward of £13,451.01.

15. In answer to our question of whether the copy lease provided in the hearing bundle was the current lease of the subject property and whether any variations had been made to it, Mr. Mertens and Mr. Donovan confirmed that as far as they were aware that was the current lease and that there had been no variations to it.

16. It was accepted by Mr. Mertens that the lease did not contain an express provision for a sinking fund or a reserve. However, he referred to the budget at p 213 as an example where there was a £1,000 reserve and the covenants in the lease requiring the lessor to maintain the structure and every fourth year to redecorate the exterior of the building and to carry out other

tasks which would require funds. In order to be able to redecorate, the lessor could either demand a very high service charge every fourth year or, as had been done, make provision by spreading that cost over four years. Taking the latter course was generally considered to be the preferred option. Mr. Mertens then referred to paragraph 1. (1)(b) of the Fifth Schedule to the lease (p 37) "In this Schedule the following expressions have the following meaning respectively:- (1) "Total Expenditure" means the total expenditure incurred by the Lessor in any Accounting Period ..... (b) all other expenses (if any) incurred by the Lessor in or about the maintenance and proper and convenient management and running of the Building". He submitted that a prudent management system for dealing with high value repairs and decorations was to levy annual charges towards a reserve fund to meet those costs and that the collection of a reserve is a prudent, reasonable and proper means of running the building encompassed within paragraph 1. (1)(b) of the Fifth Schedule.

17. However, whether or not the collection of a reserve could come within that provision, there remained the difficulty for the Applicants that paragraph 3 of the Fifth Schedule (p 38) provides that: "If the Interim Charge paid by the Lessee in respect of any Accounting Period exceeds the Service Charge for that period the surplus of the Interim Charge so paid over and above the Service Charge shall be carried forward by the Lessor and credited to the account of the Lessee in computing the Service Charge in succeeding Accounting Periods as hereinafter provided."

18. Mr. Bereza stated that in 2007 each lessee received an additional bill over and above the interim service charge for £780 for decorations. Apparently there was insufficient in any reserve at that time and since then the Respondents had contributed to the reserve shown in the accounts at the end of years 2012 and 2013.

19. Understandably, Mr. Mertens needed time to take instructions and to allow him to do this the Tribunal adjourned for 35 minutes.

20. When the hearing resumed, Mr. Mertens informed the Tribunal that calculations had been made to ascertain the position and that there seemed to be two points:
(a) Whether within the lease it is permissible to allocate to a reserve?
(b) The provision that deals with any surplus at the end of each financial year.

21. He accepted that the lease provides that if there is an excess beyond the actual costs it should be credited back to the account of the lessee for the next year. Looking at the accounts back to 2006 it could be seen that there was a surplus in each year. Dividing that between the three flats it could be ascertained that a figure should have been credited back each year. In six of the seven years there should have been a credit and in one a small charge. The net effect of that is that the Respondents should have been in credit in the sum of £4,482.81 as at 31st December 2013 and as a consequence the amount which should have been credited exceeds the amount claimed. There is nothing the Applicants can do about that but the knock on effect is not as straightforward. The subject property was sold by the Respondents in May

2014 and, as happens, enquiries were made by the purchasers as to state of the service charge accounts. Mr. Mertens had tried to confirm to whom the credit which has been identified will be attributable but had not been able to do so. The current owners bought on the understanding that there was a surplus of £13,000. He submitted that it runs with the property, subject to contract and conveyance and may be for the benefit of the current owners. As to the building itself, the effect of this interpretation is that no surplus will be gathered across the years and as a result every fourth year there will be a significant spike in the service charge. A large amount will have to be collected. It is an undesirable situation and has a bearing on whether it would be proper to collect a reserve. It would have an effect on saleability. The flats would be most saleable only just after repairs.

22. It was pointed out that a reserve could be collected on a voluntary basis but Mr. Mertens confirmed that there was nothing in writing to agree to that. He considered that it may be necessary to seek a variation of the leases. He suggested that not all the figures shown on pp 45 and 188 had been taken into account but agreed that all the costs claimed against the Respondents in the County Court proceedings were not due.

23. It was accepted by Mr. Mertens that no amount in respect of service charges is payable by the Respondents in respect of the period the subject of the claim. The claim for ground rent is not within the jurisdiction of the Tribunal but the evidence provided shows that at the time of issue of the proceedings in the County Court no amount in respect of ground rent was payable by the Respondents in respect of the period the subject of the claim.

24. The Respondents did not challenge the submission that a service charge is payable.

25. The question as to the reasonableness of service charges demanded, was raised in the respondents' defence and counterclaim. When directions were issued the requirements included that the Respondents set out in a schedule the items and amount in dispute, the reason(s) why the amount was disputed and the amount, if any, the Respondents would pay for the item (p 183).

26. The schedule supplied by the Respondents (p 252) sets out three items:
(a) The fire alarm
(b) Fire alarm testing
(c) Maintenance work.

27. **The Fire Alarm.**

(a) The Respondents submitted that the cost of the installation and maintenance of the fire alarm was high and that the lessees should have been consulted about it.

(b) Mr. Donovan stated that the lessees had been consulted and that the system was a radio system rather than a hard wired system.

28. **Fire Alarm Testing**

(a) The Respondents submitted that the charge made for weekly testing of the fire alarm was unnecessary because they understood that weekly testing was required only in commercial properties. Also, they were not satisfied that the testing had been carried out every week. They stated that none of the occupiers of the building had ever seen anybody testing the fire alarm and submitted that if testing had been carried out every week then surely somebody would have witnessed it.

(b) Mr. Donovan stated that the system was checked weekly and maintained by Metroline Security and invoices and record sheets which were in the hearing bundle had been produced to support that.

29. **Maintenance Work**

(a) Mr. Bereza stated that damp had appeared in the subject property and that Mr. Donovan had said it was old damp and suggested Mr. Bereza paint over it. This he had done and had been paid for it.

(b) Mr. Donovan stated that he had looked through the loft with a contractor. No evidence of damp had been found so it was considered to be old damp and meter readings showed it as condensation. Mr. Bereza had offered to do the painting and had been paid for it. The ground rent and service charge statement at p 301 shows a service charge of £113.24 brought forward and then credited back. Mr. Donovan stated that it was likely that that sum was in payment for the painting.

(c) At the inspection, Mr. Donovan had explained that gutter clearing was carried out by a man from London using a large cherry picker but there was not one invoice in the documents produced which mentioned such equipment. Reference was made to pp 372, 374 and 366 concerning gutter clearing. The invoice dated 10th January 2012 (p 372) referred to ladder access to clean out gutters and gulleys to the front and rear of the building and to other works at a cost of £328.80. The invoice dated 27th November 2012 (p 374) referred to cleaning out gutters to the rear extension, refitting a down pipe and clearing out the back gutter to the chimney at a cost of £72. The invoice dated 18th December 2012 (p 366) refers to ladder access to clean out gutters, valleys and down pipes at a cost of £211.20. The Respondents asked why there had been two gutter clearings so close together on the 27th November and 18th December 2012.

(d) Mr. Donovan stated that usually the gutters were cleaned using a cherry picker but that if work was needed in between the usual cleaning other methods were used. Sometimes there are access problems. The work is on the list to be done today but the man with the cherry picker was not sure if he could get access because of the trees. Mr. Donovan explained that the 27th November 2012 invoice concerned the refitting of a downpipe so it made sense to have the gutters cleaned out at the same time but it was only the gutters to the rear of the building. The 18th December 2012 invoice was in

respect of the rest of the building. Mr. Mertens submitted that although there were two invoices close together in time (pp 366 and 374) the combined amount was £283.20 and the invoice (p 372) for £328.80 was almost a year earlier. In assessing whether the figure spent is reasonable, having been two in close succession affects that, but that total was less than was spent in the eleven months before an annual service and even though there were two invoices close together in time that does not necessarily make the charge unreasonable.

(e) The Respondents were concerned that a yearly fee is paid to Fell Reynolds and yet the work to the gate, the damp and the door lock was left , which led to bigger problems and it was the lessees' money that was paying for it. Also it took time to get things done. As an example, it was only when the ceiling in the lounge of Flat 2 came down that the problem was addressed and by that time the work cost more. The door lock had been repaired only the day before the hearing and if the door lock is faulty then the insurance could be invalid and there was no intercom system working for nearly nine months. It had been fixed in time for the start of the court proceedings.

(f) Mr. Donovan stated that the front gate had been dealt with as part of the major works in 2007, but he had no records from his predecessor. However, the contractor put the gate back but it had broken off and the contractor put it back at no cost. The main entrance door lock had been repaired twice in 2014. The problem is that the back plate lets the lock spin round. A new lock with new keys will be fitted in the next couple of weeks. He realised the importance of the building being secure.

(g) Referring to the invoice at p 371 the Respondents queried why there was a separate invoice for emergency lighting.

(h) Mr. Donovan stated that he was told the emergency lighting was working but then it was found not to be and so it was made to work. Sometimes he finds that employing a separate contractor to deal with the emergency lighting is cheaper than employing an alarm company to do the work because an alarm company is not needed to fit the lighting. However, in this case the same company was employed as they provided the cheapest price.

(i) The Respondents referred to the invoice (p 373) concerning repairs to the leaking balcony. The lessees paid for the repair and then two years later the same thing happened again.

(j) Mr. Donovan stated that the initial repair was carried out rather than completely stripping off the balcony, which would have cost £1,000. The repair option was taken so that Flat 2 did not have water coming in for longer than necessary but unfortunately the water started coming in again and the balcony had to be stripped back and new boarding installed. The problem may have been caused by the Respondents' tenants of the subject property because the contractor found that the drain hole in the balcony had been blocked by cigarette ends and Christmas tree needles. The tenants were told not to block the drain, the matter was resolved and so there was no need to tell the Respondents about it. At the request of the lessee of Flat 2, the stains on

the ceiling and wall have been seen by the builder who wants to leave them for a couple of weeks and then look at them again and deal with them.

(k) Mr. Mertens had the following submissions:
As to other invoices at p 366 onwards, the emergency lighting (p 371) and the balcony repairs (p 373), Mr. Mertens submitted that the actual figures in the accounts (pp 206 and 210) in 2012 for repairs £840.80 and the next year a similar figure against a budget for repairs of £1,000, showed that less than the budget was in fact spent. Mr. Mertens asked the Tribunal to bear in mind in considering reasonableness that there are only three flats in the building. Therefore there is no economy of scale and costs may seem to be higher. A contractor may have a minimum charge whether spread between three, ten or fifty flats. The questions about the door lock and intercom Mr. Donovan had addressed and answered. Mr. Mertens also submitted that the Tribunal would have experience of similar common entranceway problems where there is frequent use. Had other issues been included by the Respondents in the schedule at p 252, Mr. Donovan would have been in a better position to answer. Mr. Mertens also submitted that overall the service charges in the accounts for 2012 and 2013 equate to just about £1,000 and less in 2013 per flat per year and were not an unreasonable figure. The charges are chargeable under the lease and are payable by the lessees of the properties, albeit that they do not need to be paid by the Respondents because of the credit.

Reasons

30. The Tribunal considered all the submissions made and all the evidence provided and made findings of fact on a balance of probabilities.

31. There was no challenge by the Respondents to the submission that a service charge is payable.

32. As to whether the service charges which were challenged by the Respondents were reasonably incurred:

(a) No evidence was produced by the Respondents to support their submission that the cost of the fire alarm system was high; for example by the production of evidence of the cost and maintenance of other fire alarm systems. There was insufficient evidence before us to show that the cost was excessive and therefore we found that the cost was reasonably incurred.

(b) The Tribunal was satisfied that weekly testing of the fire alarm system was required and in the absence of evidence to contradict the documents produced on behalf of the Applicants, the Tribunal found that the testing had been carried out and that the charges were reasonably incurred.

(c) The Respondents considered that the damp in the subject property should have been dealt with in a different way but the Tribunal was satisfied that there was nothing charged to the service charge in respect of this work which could be challenged.

(d) The Tribunal was satisfied on the evidence given at the hearing supported by the documentary evidence in the hearing bundle that the charges for gutter clearing and related work were reasonably incurred.

(e) As to the front gate and the main entrance door lock, the Tribunal was satisfied on the evidence produced that there was nothing charged to the service charge in respect of this work which could be challenged.

(f) The Tribunal was satisfied on the evidence produced that the charges in respect of emergency lighting were reasonably incurred.

(g) As to the balcony drainage, on the evidence produced the Tribunal was satisfied that charges which had been made were reasonably incurred.

(h) Having taken instructions, it was accepted by Mr. Mertens on behalf of the Applicants that no amount in respect of service charges is payable by the Respondents in respect of the period the subject of the County Court claim.

Appeals

33. 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.

34. 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.

35. 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.

36. 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.

Judge R. Norman (Chairman)