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FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	:	**LON/OOAP/LSC/2013/0529**
Property	:	**84D Stapleton Hall Road, London N4 4QA**
Applicant	:	**Gareth Lloyd Jones**
Respondent	:	**Denetower Limited**
Representative	:	**Estates & Management Ltd**
Type of application	:	**Liability to pay service charges**
Tribunal Judge	:	**Angus Andrew**
Date and venue of hearing	:	**8 January 2014** **10 Alfred Place, London WC1E 7LR**
Date of decision	:	**17 January 2014**

DECISION

Decision

1. Mr Jones is not liable to pay any service charges in respect of the management fees and reserve fund contributions included in the service charge accounts for the years 2009/10, 2010/11 and 2011/12.

2. Denetower Limited may not recover any of its costs incurred in these proceedings from Mr Jones through the service charge.

3. Denetower Limited must by 14 February 2014 pay £315 to Mr Jones being the fees incurred by him in these proceedings.

The application and hearing

4. By his application received on 5 August 2013 Mr Jones sought a determination pursuant to section 27A of the Landlord and Tenant Act 1985 ("the 1985 Act") of his liability to pay service charges in respect of the service charge years 2009/10, 2010/11, 2011/12 and 2012/13. He also sought an order under section 20C of the Act preventing Denetower Ltd from recovering their costs incurred in these proceedings through the service charge. Finally he sought an order that Denetower Limited reimburse him with the fees that he has paid to the tribunal in connection with these proceedings.

5. At the hearing Mr Jones appeared in person whilst Denetower Ltd was represented by Ms E Fingleton, an in-house solicitor with Estate and Management Ltd.

Background

6. 84 Stapleton Hall Road ("the property") was originally a semi detached house that was subsequently converted into five flats. All the flats were sold on long leases. The lease of Mr Jones' flat ("the flat") is dated 3 June 1987 and is for a term of 99 years. Denetower Limited acquired the freehold reversion on 19 July 1993 after the five residential leases had been granted. I do not know when Mr Jones purchased the flat but certainly for the purpose of this decision he has been the lessee at all material times.

7. Ms Fingleton told me that Denetower Limited appointed Estate and Management Ltd as its agent for the purpose of (a) collecting the ground rent (b) placing the buildings insurance and collecting the premium contributions from the lessees and (c) serving statutory notices and conducting proceedings. However, as Ms Fingleton explained in her witness statement the Estate and Management Ltd do not manage the property on behalf of Denetower Limited.

8. Since the beginning of 2009 Denetower Limited have appointed four managing agents. County Estate Management Ltd managed the property until about September 2009. Ms Fingleton told me that Marlborough House Management Limited was then appointed as managing agent. Mr Jones' evidence was that nothing was heard from Marlborough House Management Ltd until 20 August 2010 when the lessees received a service charge demand from that company and that during the interregnum there were no managing agents. For reasons that will become apparent nothing hangs on this point and it is unnecessary for me to decide the exact date upon which Marlborough House assumed responsibility for managing the property. Dillons Management Limited was however appointed managing agents on 1 November 2010 and they managed the property until 1 April 2013 when Ariston Property Management Limited were appointed in their place.

9. The service charge year commences on 1 October. Included in the two hearing bundles where accounts for the years ending 30 September 2010, 2011 and 2012. The published accounts that were all certified by chartered accountants can be represented by the following table:

Expenditure	**2009/10**	**2010/11**	**2011/12**
Management fees	900.00	1,320.00	1,800.00
Professional fees	-	81.00	-
Accountancy fees	300.00	300.00	300.00
Bank charges	2.48	166.00	173.00
Reserve fund contribution	1,800.00	1,800.00	1,800.00
Insurance	1,153.30	1,339.00	1,099.00
Insurance excess	(100.00)	-	-
Total expenditure	**£4,055.78**	**£5,006**	**£5,172**

The flat lease

10. As observed the lease was granted on 3 June 1987. It is a creature of its time and by modern standards it would regarded as inadequate certainly

from a landlord's perspective. The lease reserves an annual ground rent and also *"by way of further rent a proportion representing 20 per centum of the sum or sums which the Landlord shall from time to time pay by way of premium ... for keeping the building insured ..."*.

11. Ms Fingleton accepted that the only other obligation to pay a service charge is that contained in clause 2(xii) by which the tenant covenants with the landlord:

> *"To pay to the Landlord on demand a contribution of 20 per centum of the costs and expenses (and reasonable accountancy and management fees) incurred by the Landlord in carrying out such work as may be reasonable and necessary for the proper maintenance repair and decoration of the exterior of the building and of the roof and structure and foundations thereof and of any building erected in connection therewith and the common paths and the dustbin areas and the sewers drains watercourses cables pipes wires or other services and things the use of which is common to the flats in the building and of keeping the entrance hall and common stair case of the building properly lit and cleaned and decorated and if applicable carpeted and in default of such payment the same shall be a debt due to the Landlord and be forthwith recoverable by action as rent in arrears PROVIED ALWAYS that the Landlord may prior to carrying out any such works or any of them require the Tenant to provide sufficient security to cover his share of the estimated costs and expenses therefore".*

Issues in dispute

12. At the hearing Mr Jones said that he no longer objected to the service charges for 2012/13 having recently received the accounts from Ariston. However he objected to the management fees and reserve fund contributions for 2009/10, 2010/11 and 2011/12 that are referred to in the above table, of which 20% had been demanded from him.

13. In his statement of case Mr Jones had asserted that the lease did not permit Denetower Ltd to appoint managing agents and that consequently it could not recover their fees. At the hearing he abandoned that argument and relied on his alternative argument which was that as no services had been provided by the managing agents no service charges could be payable in respect of their fees.

14. As far as the reserve fund contributions was concerned Mr Jones argument was quite simple: Denetower Ltd was not entitled under the terms of his lease to maintain a reserve fund and consequently no service charges could be payable in respect of the reserve fund contributions included in the annual service charge accounts.

Reasons for my decisions

Management fees

15. The insurance had been placed not by the managing agents but by Estate and Management Ltd who had received a commission, as Ms Fingleton conceded. Consequently the management fees charged by the various agents could not have included the cost of placing the building insurance.

16. Insurance apart Ms Fingleton asserted that the management fees must have included the cost of cleaning and providing electricity to the common parts and also the cost of responsive repairs. Mr Jones who lives at the property told me that the electricity to the common parts is "run off" one of the flat meters and is paid for by that flat owner. He also told me that the common parts have never been cleaned by or on behalf of landlord and that the lessees have always accepted responsibility for that task. Finally he said that no repairs had been carried out to the property during the three years under consideration.

17. I prefer the evidence of Mr Jones to Mr Fingleton's assertions for each of three reasons. Firstly because he lives at the property and is in a position to know if any works or services were provided during the three disputed years. Secondly because Ms Fingleton was unable to substantiate her assertions by producing copies of any invoices even though Mr Jones had in correspondence requested their production. Thirdly because Ms Fingleton's assertions were inherently improbable: if those costs had been incurred they would have been included under separate headings in the service charge accounts.

18. Ms Fingleton also relied on a budget for 2010/11 prepared by Dillons Management Ltd that included sums for a fire risk assessment and asbestos survey. She concluded that those costs must have been incurred and would have been included in Dillons' management fee. That reasoning is fallacious: the inclusion of a cost in a budget is not evidence that the work was completed. If an asbestos survey or fire risk assessment had been completed the cost would have been included in the audited accounts for 2010/11 but they were not. In any event the budget that Ms Fingleton relied on included also a management fee of £1,320 indicating that the cost of the asbestos survey and fire risk assessment would be charged in addition to and not as part of that fee. Finally Mr Jones said that during the disputed years neither the survey nor the assessment had been undertaken. Consequently and for each of these reasons I reject Ms Singleton's assertion that the management fees for 2010/11 included the cost of either a fire risk assessment or an asbestos survey.

19. Ms Fingleton also suggested that the management fees would have included the preparation of the service charge accounts. However the accounts had been prepared and certified by chartered accountants and their annual fee of £300 for the preparation of the very simple accounts more than covered the cost of that work and was not challenged by Mr Jones.

20. Finally Ms Fingleton suggested that the management fees would have included the cost of sending out service charge demands and in chasing Mr Jones for unpaid service charges. I am not persuaded that clause 2(xii) of the lease permits the recovery of such costs. The management fees contemplated by that clause are restricted to those incurred in managing the tasks listed in the clause and for the reasons set out above I am satisfied that during the three disputed years no such tasks were undertaken by or on behalf of Denetower Limited. Even if I am wrong about that I would nevertheless disallow the management fee for that work because it is apparent that the demands in so far as they included reserve fund contributions were flawed and it is not reasonable to make a charge for issuing or chasing flawed demands.

21. In summary and for each of the above reasons I am satisfied that no material services were provided by any of the managing agents during the three disputed years. Consequently their fees were not reasonably incurred and no service charges are payable in respect of them.

Reserve fund contributions

22. In asserting that Denetower Ltd was entitled to recover reserve fund contributions through the service charge Ms Fingleton relied upon clause 2(xii) recited above. I have difficulty in understanding how that clause assists Denetower Ltd. The tenant's obligation to contribute towards the landlord's costs and expenses is limited to cost and expenses *"incurred by the landlord"*. When the service charge accounts were published and the demands issued no cost had been incurred.

23. The proviso to clause 2(x11) permits Denetower Limited to obtain funds on account of estimated costs. It does not however permit Denetower Limited to set up a reserve fund to cover the cost of future unidentified work for which no estimates have been obtained and then recover contributions to that fund through the service charge.

24. Ms Fingleton's alternative argument was no more persuasive. She relied on the RICS Service Charge Residential Management Code 2nd edition and in particular on the observation that it is good and prudent management to maintain a reserve fund for future work. The code itself cannot override the parties' contractual obligations contained in the lease and indeed that is apparent from a full reading of part 9 of the RICS Code that relates to reserve funds. Part 9 commences with the words: *"Reserve funds are often permitted by the lease"*. It concludes with the words: *"Where the lease*

does not allow for the collections of reserves, consider seeking the agreement of the tenants to a variation of leases, or an application to a Leasehold Valuation Tribunal (LVT) (see Appendix 1)". Appendix 1 explains that party to a lease can apply to a Leasehold Valuation Tribunal (now this tribunal) to vary a defective lease under the section 35 of the Landlord and Tenant Act 1987. No such application has ever been made.

25. Consequently and for each of the above reasons I am satisfied that Mr Jones is not liable to pay a service charge in respect of the reserve fund contributions included in the service charge accounts for each of the three disputed years.

Sections 20C and reimbursement of fees

26. To the extent that the costs might be recovered through the service charge the right to recover them is a property right which should not be lightly disregarded. Section 20C however provides that a tribunal may *"make such order on the application as it considers just and equitable in the circumstances"*. Those words permit me to take into account the conduct of the parties in deciding whether to make an order.

27. Mr Jones has been wholly successful in these proceedings. Denetower Limited response to his application was wholly misconceived. Apart from the issues decided above it is apparent from the documents included in the hearing bundle that during the three disputed years there was an almost total management failure. For each and all of these reasons it is just and equitable to make the order sought by Mr Jones and for similar reasons I order Denetower Limited to repay to Mr Jones his fees of £315 incurred in making this application including the hearing fee, such fees to be paid within 28 days.

Name: Mr A Andrew **Date: 17 January 2014**

Appendix of relevant legislation

Landlord and Tenant Act 1985 (as amended)

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 the appropriate 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 the appropriate 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) the appropriate 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.