

10383



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

Case reference : LON/00AW/LSC/2014/0258

Properties : 9 Westgate Terrace, London, SW10
9BT.

Applicant : 9 Westgate Terrace Limited

Representative : Ms. S. Pinsent (Freeholder)
Mr. M. Bannister (Managing Agent)

Respondents : Ms. O. Mordvinova (Flat 1)
Mr. M. Travia (Flat 2)
Mr. J. Kern (Flat 3)
Ms. E. Ducker (Flat 4)
Ms. S. Pinsent (Flat 5)

Representatives : Mr. M. Bannister (Applicant)

Type of application : Mr. Travia, Ms. Atholl Taylor
Hudson (For Mr. Kern); Mrs. E.
Ducker (Respondents)
For the determination of the
reasonableness of and the liability
to pay a service charge

Tribunal members : Aileen Hamilton-Farey
Mr. C. Piarroux

**Date and venue of
hearing** : 25 September 2014
10 Alfred Place, London WC1E 7LR

Date of decision : 24 October 2014

DECISION

Decisions of the tribunal

- (1) The tribunal disallows the applicant's management fees of 10% of costs of works under the insurance claim.
- (2) The tribunal determines that the maintenance charges payable by the leaseholders is not 'rent' within the definition contained in (x) of the First Schedule.
- (3) That in accordance with Clause 1 of the Seventh Schedule following the damage incurred to the building, no rent would be payable until the demised premises to the individual lessees had been restored.
- (4) That in respect to the maintenance charges for the period when the demised premises' were uninhabitable, no service charges are due or payable, in relation to services that were not provided. That is in this instance, the majority of services were not supplied to the building cleaning, television aerial, entryphone after the fire in May 2013, up until the building is reinstated and the services are recommenced...

The application

1. The applicant seeks a determination pursuant to s.27A of the Landlord and Tenant Act 1985 ("the 1985 Act") as to the amount of service payable by the respondents as set out below.
2. In respect of the works carried out following the fire at the premises, a supervisory fee of 10% of the insurance claim, amounting to some £25,828.30 exclusive of VAT and any addition to the insurance costs by way of fees and VAT to the supervising surveyor.
3. In addition, the applicant seeks a determination of whether, following on from the fire and when the building was uninhabitable, the leaseholders were liable to pay the usual ground rent and service charge.

The history of the application

4. On 2 May 2013 a fire occurred at the property, which effectively rendered the building uninhabitable.
5. The landlord's insurers LV were duly informed and appointed a loss adjuster, Mr. Coonan, of Woodgate & Clarke Limited to agree the extent of the claim.

6. Mr. Peck of Colin White Associates was appointed as Contract Administrator ("CA") produced a specification of works. PJM Refurbishment was the contractor appointed to carry out the works.
7. As CA Mr. Peck was required to inspect the works as they progressed, issue variations to the specification and agree instructions for payment to the Contractor, and finally agree the final account.
8. It does not appear that the final account has been agreed as, at the date of the hearing, it appeared that the common parts works had not been fully completed, and some work was still required to at least Ms.

The Leases:

9. It is understood that each of the leases is in the same form, and provides for each of the leaseholders to be liable for 20% of the Maintenance Fund as defined in Part I of the Fifth Schedule and relates to the expenditure identified in the Eighth Schedule.
10. The lease provided that the maintenance year commences on 29 September in each year, expiring on the 28 September the following year, and requires the payment of an advance 'on account charge' half-yearly on 25 March and 29 September in each year.
11. It is not denied between the parties that Clause 9 of the Eighth Schedule to the lease enables the landlord to employ a Managing Agent or Surveyor to manage *'The Property and to collect the rents and maintenance charges... and to carry out such other duties as may from time to time be assigned to him by The Lessor or are otherwise imposed on him by the provisions of this Lease'*.
12. The Eighth Schedule proceeds to detail those items of expenditure that fall within the Maintenance Fund.
13. The Seventh Schedule provides that if the Demised Premises are destroyed by a risk which is covered by the Landlord's insurance, then Rent will cease to be payable until the Demised Premises are rendered fit for occupation. It appears to this Tribunal that that is a clear and unequivocal clause, and that Rent does not include the Maintenance Charges. It therefore appears to this Tribunal that from 2 May 2013 no rent was payable by any of the leaseholder's until their flat became habitable.

The Maintenance Charges:

14. These are contained within the Sixth Schedule (Lessors' Covenants) and the Eighth Schedule.

15. The Sixth Schedule provides that usual covenants on the part of a Lessor to maintain the external structure and internal common parts of the building. It appears that the Applicant considers that this clause places a liability on her to redecorate the outside of the building on a 7-yearly cycle, this is not the case, and it is the Lessee's covenant to decorate the Demised Premises on a 7-yearly cycle. The Lessor's covenant requires redecoration of the exterior 'as often as may be necessary'.
16. The Eighth Schedule then requires the cost incurred by the Lessor in complying with the Sixth Schedule to form part of the Maintenance Fund, together with those items already referred to.
17. It is this Tribunal's view therefore for the maintenance charges to be payable, they must be actually incurred by the Lessor. In a situation such as this where the building is uninhabitable, regular services would normally be suspended, and in all likelihood only insurance and accountancy fees would be payable. The Tribunal cannot see how any charges in respect of cleaning/ professional fees; TV aerial/entryphone or any repairs and maintenance would occur whilst the insurance works were being undertaken, and as such finds that no maintenance costs would be payable by the leaseholders in respect of those services not provided by the freeholder during the works.
18. The Tribunal was provided with Draft Accounts that showed a financial year end on 31 March, and on enquiry was informed that this was considered to be the financial year for the Maintenance Fund, however the Tribunal has already drawn attention to the Maintenance Year contained within the lease, and the draft accounts do not therefore accord with the lease. It may well be that these are 'draft' account and were awaiting the end of the financial year audit. However on the basis of the information before it, the Tribunal therefore finds that the Lessor should apportion those costs incurred from 29 September 2012 until 2 May 2013 to the service charge accounts and those from 3 May 2013 until practical completion of the works to be irrecoverable.

The hearing

19. The parties were represented by those noted on the front of this decision.
20. It was Mr. Bannister's case that the freeholder had always charged a flat rate management fee, plus 10% of expenditure on the service charge. This was not denied by the Respondents.
21. The Respondents' case was that the 10% claimed in respect of the insurance settlement was not a service charge and was not considered in any event to be reasonable, given that the insurers had instructed

loss adjusters and a contract administrator and a contractor had also been appointed. The Respondents' view was that the reinstatement works did not progress as quickly as they might, because Mr. Bannister, in their view, 'hindered them'. It is not necessary for the Tribunal to go into detail in this regard, however we do note that the letters from the contractors and surveyor regarding their roles in this contract.

22. The Tribunal does not consider that the additional 10% of the insurance premium can be properly recovered by the managing agents, for the reason that this was not a 'cost' incurred and was not a service charge.
23. It is clear that Mr. Bannister has spent a great deal of time on this matter and in the ordinary course of events, had this been a major works project for example, would have been able to charge the 10%; but in this instance the insurance company were basically the employer, they employed the loss adjuster, surveyor and contractor and have paid the fees/costs to each of those individuals. There is nothing in the lease that enables the managing agent to recover an additional sum, and in this Tribunal's experience the processing of insurance claims is a usual function of a manager and included within the standard fee.
24. It may well be that the fee charged by Mr. Bannister has not covered the significant amount of time spent by him on this matter, but the Tribunal is not in a position to change the standard rate charged. In addition, the Tribunal had not seen a copy of any management contract with Mr. Bannister and therefore could not ascertain whether or not the processing of insurance claims was covered in his fees.
25. In the circumstances, the Tribunal does not find that 10% of the insurance claim is a reasonable cost and the leaseholders are not liable to pay it under their leases.

Costs

26. Mr. Travia sought to claim the legal fees he had incurred in opposing this application. The Tribunal does not consider that the Applicant should pay these because the application was a prospective one, that is, if the Tribunal considered the charge to be reasonable then the landlord would claim it within the service charge. It was entirely reasonable for the freeholder to make the application in these unusual circumstances to be sure of the ability to recover. We therefore dismiss this application.
27. In addition the leaseholders sought a decision under S.20C of the Landlord & Tenant Act 1985 to prevent the landlord from recovering her fees as a service charge. Mr. Bannister informed us that the freeholder would not be charging any of its costs to the service charge

and on this basis we make an Order that none of the costs of these proceedings are to be considered to be service charges under the lease.

Name: Aileen Hamilton-Farey

Date: 24 October 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 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.