10414

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/00BJ/LSC/2014/0293**
Property	:	**52 Queenstown Road, London SW8 3RY**
Applicant	:	**Peter Sykes and Aisling Sykes, Trustees of Hugh Sykes Settlement**
Representative	:	**In person**
Respondent	:	**Mrs M French**
Representative	:	**Rayners, Managing Agent**
Type of Application	:	**For the determination of the reasonableness of and the liability to pay a service charge**
Tribunal Members	:	**Judge Dickie** **Mr T Sennett MA, FCIEH** **Mr L Packer**
Date and venue of Hearing	:	**9 October 2014, 10 Alfred Place, London WC1E 7LR**
Date of Decision	:	**10 November 2014**

DECISION

Decisions of the tribunal

(1) The tribunal determines that the disputed service charges for buildings insurance and for accountancy are payable in full. Management fees are reduced to £100 plus VAT for each of the years in dispute. All other disputed items had been the subject of agreement between the parties.

(2) The tribunal makes an order under section 20C of the Landlord and Tenant Act 1985 so that none of the landlord's costs of the tribunal proceedings may be passed to the lessees through any service charge.

(3) The tribunal determines that the Respondent shall pay the Applicants £200 within 28 days of this Decision, in respect of the reimbursement of the tribunal fees paid by the Applicants.

The application

1. The Applicants seek a determination pursuant to s.27A of the Landlord and Tenant Act 1985 ("the 1985 Act") as to the amount of service charges payable by the Applicant in respect of the service charge years ending 25 March 2008 to 25 March 2014.

2. The relevant legal provisions are set out in the Appendix to this decision.

The hearing

3. The Applicant Mr Sykes appeared in person at the hearing and the Respondent was represented by Mr C Battersby of Rayners, the managing agent.

4. In the Applicants' statement of case Mr Sykes had asked the tribunal to make an order varying the terms of the lease under section 35 of the Landlord and Tenant Act 1987 on the ground in section 35(2)(f) of that Act - that the lease failed to make adequate provision for the calculation of service charges, since the proportions had remained the same in spite of the other flats in the building having been extended. However, whilst the tribunal expressed doubts that these circumstances could fall within the asserted ground, it had in any case no jurisdiction to make a determination on the matter since there was no application under s.35 of the 1987 Act before it.

5. Mr Sykes also sought a set off against the service charges said to be owing to the landlord due to an alleged breach of covenant by the landlord to repair the roof, which was said to have caused loss to the Applicants including loss of rental income. However, the tribunal provided the parties with an opportunity to consider and make submissions upon the decision of the Lands Tribunal in *Continental Property Ventures Inc v White* [2007] L.&T.R. 4, LT, in which HHJ Rich QC held that the tenants had an equitable set-off in damages for the landlord's breach of repairing covenant which was a defence which meant that those costs were not "payable". The tribunal considers that the jurisdiction to determine a set off as a defence to a landlord's claim for damages does not extend to determining a free standing claim for damages for breach of covenant brought by the tenant. The tribunal

would not in any event exercise its discretion in this case to determine claim for breach of covenant, which was not quantifiable on the evidence before it.

The background

6. The property which is the subject of this application is a two bedroom flat in a converted Victorian terraced house arranged over three storeys and comprising three flats in total. Photographs of the building were provided in the hearing bundle. 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 Applicants hold a long lease of the property which requires the landlord to provide services and the tenant to contribute one third of the costs by way of a variable service charge. There was no dispute as to the recoverability of any of the disputed items under the lease terms, which are accordingly not reproduced in this decision.

The issues

8. Within the application the Applicants had challenged a large number of individual service charge items across the years in dispute. However, prior to and on the day of the hearing the parties reached agreement as to a substantial number of those items, some of which were conceded by each party, such that the only disputed service charges for the determination of the tribunal were those for management, accountancy and buildings insurance.

9. Having heard evidence and submissions from the parties and considered all of the documents provided, the tribunal has made determinations on the various issues as follows.

Management Fees

10. The disputed management fees, including VAT, for the building (i.e. the three flats) were as follows:

2008	£599.25
2009	£603.75
2010	£616.88
2011	£630.00
2012	£630.00
2013	£630.00

11. The principal origin of Mr Sykes' current dissatisfaction with the management of the building carried out by Rayners related to its handling of an insurance payout resulting from storm damage that

occurred in March 2007. Mr Sykes said that the roof of the building had already been in a bad condition and had suffered serious damage and water ingress. He said that he had himself liaised with the insurance broker directly, with the managing agent's consent, and paid for repairs at a cost of approximately £2,900.

12. Mr Battersby said that the managing agent would have handled the repairs differently, had it had the opportunity, by replacing the whole roof and putting the insurance money towards the cost. However, in spite of his non admission that Rayners had authorised Mr Sykes to deal with the insurance claim directly, the tribunal considers it is not likely that the broker would have allowed this without the insured landlord's consent. It was not in dispute that the insurance company had paid the corresponding amount in respect of this claim (minus the excess) to the managing agent in 2007 or 2008. However, in spite of Mr Sykes's repeated requests, this amount plus excess was not paid to the Applicants until August of 2012, when it was applied as a credit to their service charge account. The tribunal could find no rational explanation for this.

13. Mr Battersby said that the managing agent had been holding onto the insurance payout deliberately because the Applicants were in service charge arrears. However, the insurance moneys would have more than extinguished any arrears at the close of the service charge year ending March 2008, and they were not applied against service charge arrears in any event until August 2012. Mr Battersby could not explain this delay.

14. Mr Sykes had other complaints concerning the quality of management, including the failure to inspect and maintain the building. He said that in 2012 the same roof suffered further disrepair and, in spite of complaints, including correspondence directly to the freeholder, repairs are still outstanding. The Applicants claimed to have suffered loss of rent because tenants had moved out owing to the conditions.

15. Mr Battersby observed that the management fees had only been increased by £15 since 2008, and that at a unit cost of about £170 plus VAT the management fees could not be described as excessive. He confirmed that the managing agents and/or their builders do make visits to inspect the building as necessary.

16. The tribunal considers that Rayners' management fees are within the range of reasonable charges for a professional service of a good standard. They fall to be reduced however in the present case because of shortcomings in the service offered. In particular, the deliberate and unjustified failure to account for the insurance payout for more than four years has understandably caused Mr Sykes significant frustration. There are corresponding errors in the accounts, as discussed below, presumably at the managing agents' instruction to the accountants.

The tribunal saw evidence of communication failures by the managing agents over a number of years, and of a failure pro actively to manage the building and its maintenance (though the tribunal's determination cannot bind any future court determining a claim for breach of covenant to repair and the tribunal is not exercising any such jurisdiction). In the circumstances, the tribunal considers that a reduction in management fees to £100 plus VAT for each year in dispute is justified to reflect reasonable management fees recoverable.

Insurance

17. The disputed insurance premiums for the building including tax were as follows:

2008 £760.00
2009 £790.00
2010 £813.00
2011 £821.00
2012 £870.00

18. Mr Sykes said he had complained as far back as 2003 about excessive insurance premiums. He himself owned or managed properties including four freeholds each containing three flats, and said he was able to obtain more competitive insurance of those buildings. His practice was to send a schedule to half a dozen insurance brokers for quotes. He produced two quotations dated 24 July 2014 he had obtained for the subject building, having acquired details for the quotes from the landlord's disclosure in these proceedings. These quotations had been:

Lansdown Insurance Brokers - £581.95
Flats Direct - £684.08

19. Mr Sykes contended that his quotations were like for like, though acknowledged that there was a difference on flood excess. He did not consider that such large differences in the premiums could be explained by such marginal differences in the policy terms. He argued that, the lower quotation being 58% lower than the landlord's premium for the year 2012, the tribunal could conclude that such a percentage of the premium for that and each preceding year had been unreasonable and should be discounted. After enquiries, it was established that the landlord's cover, in common with the Applicants' quotations, did not include terrorism.

20. There had been two claims on the buildings insurance during the relevant period – that for the storm damage to the Applicants' flat in 2007 and one for further water damage on 25 March 2011, settled in the sum of £1,256.00. Mr Sykes said he had notified the insurers of this claims history in obtaining his comparative quotes. Whilst it was not

clear from the evidence that the 2011 claim had been disclosed (Mr Sykes said he had the proof on his laptop), the landlord's broker observed in an email dated 18 September 2014 that the July 2014 comparative quotes were obtained just over three years from the date of the later claim, and that many insurance companies would therefore not require their disclosure. Mr Battersby emphasised that the new insurance quotation obtained for the renewal date on 19 October 2014 in the sum of £689 clearly reflected the fact that the 2011 claim was now more than three years old and no longer affected the premium.

21. Given the significance of this timing, which did indeed suggest to the tribunal that the claims history had had a significant effect on premiums (that for 2013/2014 had been for just over £1000), the tribunal was not persuaded that Mr Sykes's quotations, which were likely not have any relevant claims history, were genuinely comparable.

22. Mr Sykes's quotations both reflected that the occupiers of the flats would not be on benefits, and he confirmed this was the case for all of the current occupiers of the flats. However, he agreed that the leases do not restrict the letting of the flats in this way, and there is no such restriction on the landlord's buildings insurance. The current nature of the occupants is not an indication of tenants the leaseholders of the flats might be free to choose during the currency of the annual policy of insurance. It seems to the tribunal that in this way also the quotations were not like for like, and it was not unreasonable to expect that such a factor could have a significant effect on the cost of any quotation.

23. Mr Battersby said that Weald had been used as broker for seven or eight years, and that none of its commission was passed to the agent or landlord. Rayners was comfortable with Weald's service and made a business decision in retaining them as brokers rather than chopping and changing since Weald's claims management had been good. The tribunal found that Rayners' approach to obtaining insurance had not been unreasonable, and gave the parties an opportunity to consider the full judgment in *Berrycroft Management Ltd v Sinclair Gardens Investments Ltd.* [1997] 1EGLR, in which case the Court of Appeal held that there was no implied covenant that the landlord's insurance premium should be reasonable, or that a tenant should not be required to pay a sum substantially higher than he could arrange himself. The tribunal being satisfied that the landlord has obtained insurance in the ordinary course of business, and at a market rate, it finds no persuasive evidence on which it could determine the premiums are unreasonable.

Accountancy Charges

24. Mr Sykes maintained dissatisfaction with the charges payable for preparation of the service charge accounts for some years. The charges

made for the building were as follows:

2008 £99.88
2009 £97.75
2010 £99.88
2011 £102.00

25. On questioning, it was apparent that to a very large degree Mr Sykes's complaints about the accounts related to their failure properly to account for the insurance monies that had been due to him since about 2008. Indeed, incorrect statements were made in the accounts as to the insurance claim – indicating in 2010 that "The reserve fund brought forward comprising the insurance claim received has been used to reimburse expenditure incurred" and in 2009 "A reserve in hand of £2,530 remains unchanged, no claims for reimbursement received". Mr Sykes also complained that the lease terms did not permit the landlord to operate a reserve fund, yet it has carried forward service charge credits, and that there had been significant delays in crediting service charge adjustments for the year ending March 2011 to the leaseholders' account (credited on 27 March 2012).

26. The tribunal considers that the sums claimed for accountancy were small, and the accounts largely accurate, and that a reduction to reflect Mr Sykes's complaints is not justified. No service charge reduction to reflect the handling of the insurance moneys in the accounts is appropriate in addition to that made to the management charge, it being likely that the accountant would be acting on instructions from the agent. The reduction in the management charge is sufficient to compensate the Applicants' complaints on this score in all the circumstances.

Application under s.20C and refund of fees

27. At the end of the hearing, Mr Sykes made an application for a refund of the fees that he had paid in respect of the application and hearing, in the sum of £125 and £190 respectively. Having heard the submissions from the parties and taking into account the determinations above, the tribunal orders the Respondent within 28 days to refund £200 of the fees paid by the Applicants. The amount of the order reflects the whole of the application fee and a proportion of the hearing fee, and recognises the relative success of the Applicants in gaining a number of concessions from the landlord before and on the day of the hearing, and a reduction in management fees as ordered by the tribunal.

28. In the application form the Applicants applied for an order under section 20C of the 1985 Act. That application was conceded by the landlord, and the tribunal determines that it is just and equitable in the circumstances for an order to be made under section 20C of the 1985 Act, so that the Respondent may not pass to the Applicants any of its

costs incurred in connection with the proceedings before the tribunal through the service charge.

Name: F Dickie **Date:** 10 November 2014

Appendix of 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.

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.